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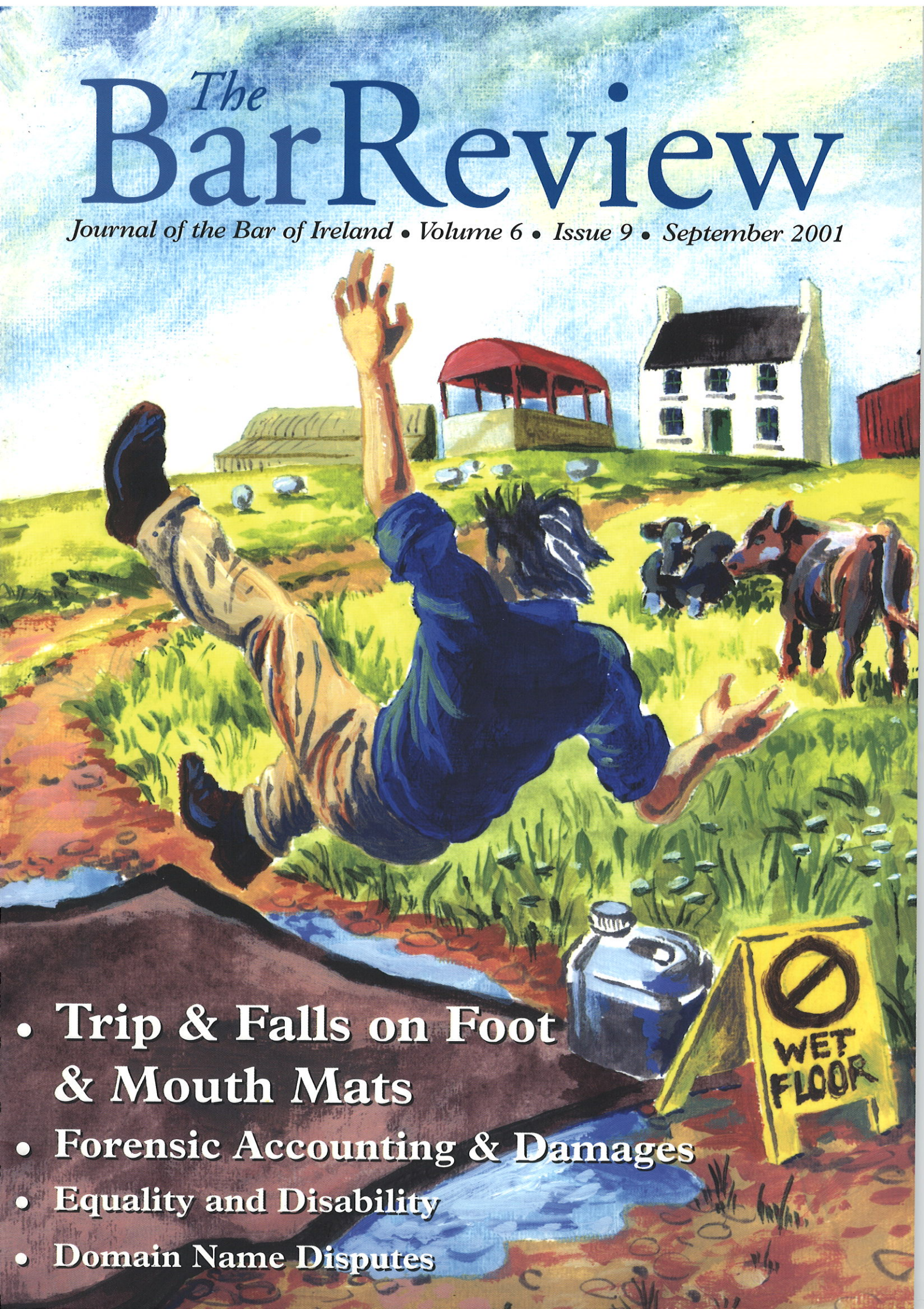

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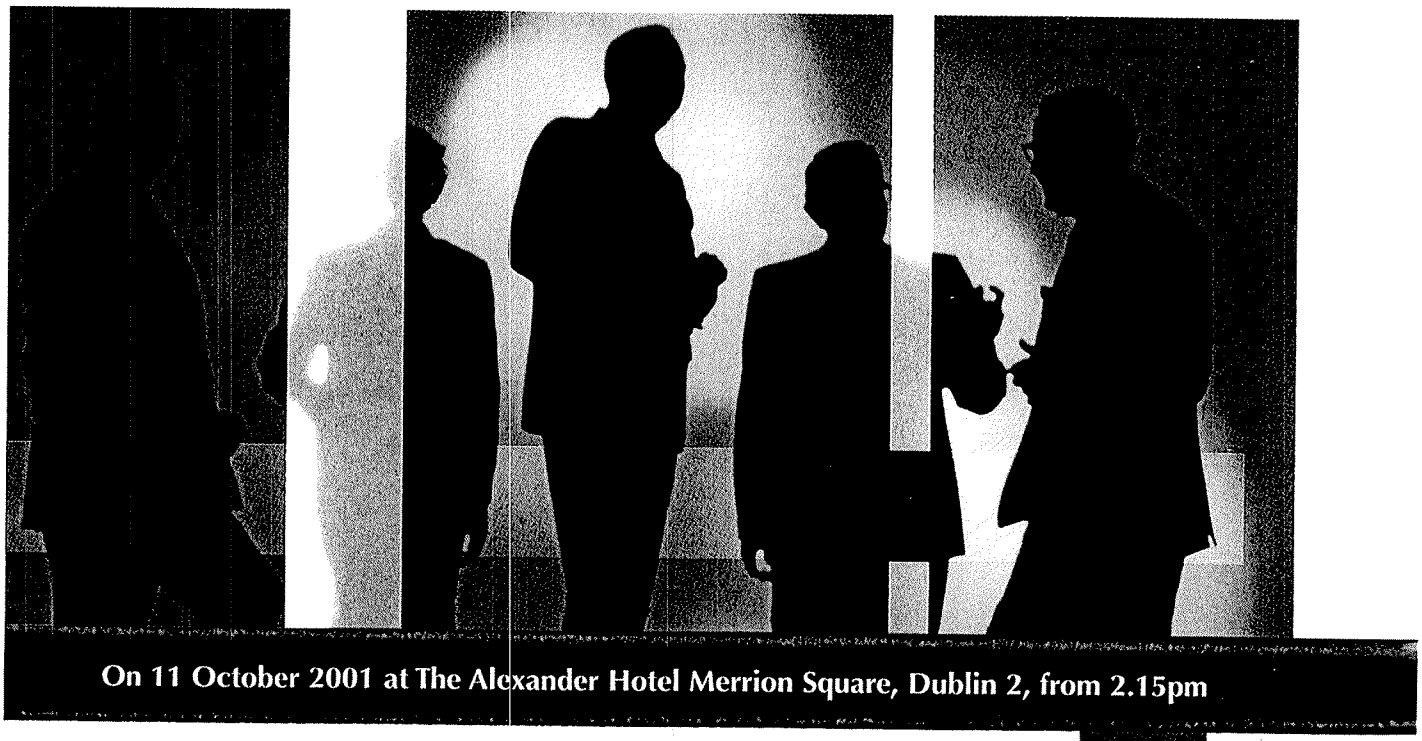

On 11 October 2001 at The Alexander Hotel Merrion Square, Dublin 2, from 2.15pm

Chaired by:

The Attorney General, Mr Michael McDowell SC
Chairman of the Company Law Compliance And Enforcement Group

Speakers:

Thomas B. Courtney
Solicitor, Head of Legal ICS Building Society
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Subscription and advertising queries should be directed to :

Noted Marketing and Design Limited,
The Mews,
26A Mount Eden Road,
Donnybrook, Dublin 4.

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Fax 01 283 0955

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Editorial Correspondence to:

The Editor,
Bar Review,
Law Library Building,
158 Church Street,
Dublin 7

Telephone: 353-1-817 5198
Fax: 353-1-817 5150
e-mail: pdm@lawlibrary.ie

THE BAR SOCCER TRIP TO SORRENTO

(OR, SUN SEA SAND AND SILK)

Conor Bowman BL

It was a humid mosquito-ridden journey. The Bougainvillea dripped in the heat and the stain across the beleaguered second year devil's cheap nylon shirt clutched his back in the shape of the former Soviet Union. He carried in the last of the bags to the Hotel Michelangelo and glanced around the tiny reception area as if he expected that at any moment he might be paged, even here at this remote outpost of Italian tourism, by his only instructing solicitor Mr. Pratt (one of the Dun Laoghaire Pratts). Upstairs his colleagues were taking up to eight seconds apiece to familiarise themselves with their respective suites. It was an atmosphere of relative calm and composure, and the happy snap of second-world-war type suitcases opening filled the corridors of the hotel. One of the party, an ageing corporate lawyer who prepared for bankruptcy cases through personal experience, stepped out onto the balcony of his third-floor room and surprised a flock of vultures in the alley below. They wheeled upwards and soared away over the wheelie bins and lice-infested matresses into the Sorrento dusk and then on out over the bay of Naples. The merrymakers and footballers unpacked and changed their socks. The rattle of padlocks heralded the opening of the one-metre-square bar and the scent of drink wafted up the elevator shaft. The hotel room doors slammed as one, and the patter of feet clunked through the old building in a manner which sent shudders down the spine of the original architect's professional indemnity certificate. "Thirty four beers please !" someone ordered. We are a simple people.

Less than a decent wrong turn away, down the apparently charming side streets, and just past the jewellers quarter of old Sorrento, lay the modest repository of the remainder of the travelling party. The Hotel Excelsior Palace was the legacy bequeathed by the fourteenth century to the elite of the Bar Soccer Club. Imagine the foresight involved! In the same way in which the framers of our Constitution cleverly built in a provision for the determination of milk quotas in the age of the mechanical milk machine, the edge of Italy guarded by the isle of Capri had longed to be graced by the elite of the Club that a few chosen people are proud to call amateur. It had hoped that one day it could repay all it owed to Ireland as a country through these valiant few who were of course agents for a disclosed set of three and a half principals.

Here the concierge preened his eyelashes in his compact emblazoned with the AC Milan logo. Cartier, Gucci, Versace, McCoy – these were the names of former guests who had ordered lobster in its dining hall. The palm trees swayed gently as the AG breezed by on his way back from an official visit to somewhere fabulous. The Nice Treaty was in the bag, and all was well with the world (Ireland and the Attorney General do not always holiday together but when they do the forty thousand lawsuits are forgotten). In a bar which housed more pianos than you culd shake a sword at, the elite of the club hatched a plan which in its simplicity would seal the defeat of the lawmen from Potenza and simultaneously secure the future of the 2-hotel rule. The cornerstone of this great scheme : Always pick the hotel where the Germans stayed during the war.

A few days later the caravan was on the move again. The case of Tweety & Bonjourno v The Crown had ben adjourned generally with liberty to re-enter, and the entire contingent were buoyed by this obvious success. The mood of the camp was positive – two nights out being ripped off had had the effect of causing a casual but well-suppored review of the existing fee structure. Contact with Dublin confirmed our position as at the apppendix of Europe (annoying and expendable) as we launched ourselves into middle Italy ready for battle. In a display of both pride and prejudice one of our crew broke under the strain, and was detained overnight in a kick-boxing amphitheatre. Someone else was touched by the muse and penned an extraordinary song about cats. Others slept on the bus, some read trashy novels, one man even thought about taking silk, but common to each man and woman as we journeyed on was a clear determination that this trip should yield more answers than questions. Even if that meant taking risks with our personal hygiene.

"See Naples and die but I say, see Potenza and live !" Our hosts were sickened that they'd never thought of the phrase themselves. They brought us gifts ; we accused them of bribery. They entertained us with dinner two nights running ; we accused them of bribery. They complemented us on our hospitality when they'd visited Dublin; we accused them of bribery. The last straw was when they suggested that our own referee in Dublin had been biased. A female colleague wearing a gownless evening strap summed it up poignantly when she said, "A blind man in a dark room looking for a black cat which isn't even there."

The two on the balcony symbolised what the trip was all about. It was about getting high, getting out and getting close. What will our legacy to Italy be ? A three all draw we should have won ? A bomb alert somewhere in Pompeii ? An elbow in the face of an opponent ? The retirement that never was ? Some ageing junior seeing the silk gown hanging tantalizingly out of reach until Masseys got their hands on both of them ? Falling down drunk in a cheap bar with a crap band who cannot pronounce the words of Hey Jude ? Miscalculating the result of the referendum ? Pretending to have been on a war crimes tribunal in Algeria to a stranger in an airport whose husband is from Algeria ? (I confess).

No, I think not, I do not even think that the monkfish near Sorrento will dry in the heat this July to the faint echo of the lawyers of Marseille, "Le Pen is mightier than the sword." I think that the imaginary secnd year devil will wash the stain of the Soviet Union out of his shirt and sometime ("maybe not today, or tomorrow, but someday and for the rest of his life") in Dolphin House, on a wet November afternoon in the middle of cross-examination, he will stop and say to the witness, "The Bougainvillea on Capro how it drips, oh how it drips in the heat."●

Conor Bowman (Hotel Michelangelo)

TRIP AND FALLS ON FOOT & MOUTH MATS: PUBLIC POLICY AND THE REASONABLE MAN

XY BL *explores the public policy issues arising in relation to claims of negligence associated with measures taken by landowners to prevent foot and mouth disease in Ireland.*

Introduction

In Spring 2001 there was a threat that foot and mouth disease, a highly contagious disease of cattle, would reach the Republic of Ireland from Northern Ireland. Occupiers of land were encouraged by the Government to take measures to prevent the spread of the disease. The most common precaution involved the placing of what were euphemistically called "mats" at the entrances to properties. These mats were usually pieces of carpet, although blankets and rugs (in various states of decomposition), straw ropes, and what appear to have once been foam mattresses were also used. The mats were supposed to have been soaked in disinfectant. It was intended that persons passing in or out of the property in question would wipe their feet on the mats in order to kill any traces of the disease existing on their footwear.

Few of these foot and mouth mats would meet the normal standard of care imposed upon persons putting out mats. The most common type, the piece of carpet, would often be frayed at the edges. Some of them could be seen with an edge folded up over the body of the carpet. More would be laid overlapping each other. The more imaginative species of mat presented their own difficulties, e.g. the foam mattress, into which one's foot sinks, quickly becomes discoloured by persons walking on it, thereby blending in with the surrounding surface and so becoming difficult to see. By May 2001 it was noted that persons were incurring serious injuries from tripping over these mats.[1]

At the level of first impressions it would appear churlish to allow a person injured in such a manner to succeed in a negligence claim given that the act giving rise to the injury was voluntarily done in the public interest. On the other hand, general negligence principles ordain that liability attaches to persons who place dangerous objects in the path of other persons.

This article discusses the role of the public interest in determining liability for injuries caused by the laying of disinfectant mats. The public interest comes into the analysis of liability at two points: whether a duty of care exists in these circumstances; and whether the standard of care is lowered by public interest considerations. It should nonetheless be remembered that the issue of liability in negligence is ultimately one of reasonableness in all of the circumstances of the case, and it would be misleading to suggest that certain aspects of public policy are relevant only to the duty of care and that others are relevant only to the standard of care. Therefore, the division of the main body of this article into two parts, each dealing with one of these aspects, should not be taken to suggest that the arguments used in one part are in no way relevant to the other.

The Duty of Care

Where the mat is placed on the land of the person placing it, the normal duty of care that attaches to occupiers applies. However the mat can also be placed on someone else's land e.g., on a road or footpath at the entrance to but outside premises occupied by the person placing the mat. In some such instances, the occupier of the land on which the mat was placed will not be negligent, e.g., if it were laid on local authority land in circumstances where the local authority could not reasonably have discovered it before the accident occurred. Under normal conditions it is clear that a duty of care is owed by persons who put dangerous items in the path of others. The issue in this regard is whether the public policy of helping to prevent the spread of foot and mouth disease negates the existence of a duty of care.

The leading Irish statement on the law on the existence of the duty of care is McCarthy J.'s judgment in *Ward v. McMaster,*[2] where he stated:

> "I prefer to express the duty as arising from the proximity of the parties, the foreseeability of the damage, and the absence of any compelling exemption based upon public policy. I do not, in any fashion, seek to exclude the latter consideration, although I confess that such a consideration must be a very powerful one if it is to be used to deny an injured party his right to redress at the expense of the person or body that injured him."

The issue becomes one of whether an economic risk (the chance of human beings catching foot and mouth disease is negligible: the danger was to Ireland's agricultural exports) is sufficient to lower a standard of care to guard against personal

injuries. Our society claims to value human beings more highly than favourable trade statistics and it could appear excessively utilitarian for the law to assert that a plaintiff's broken neck is an acceptable price to pay for a risk of a reduction in the sales of bullocks to Bahrain.

The prohibition at common law of recovery for pure economic loss was based, *inter alia*, on such a principle.[3] The distinction between economic loss and other types of loss has been collapsed in Ireland, as can be seen from a line of cases commencing with *Ward v McMaster*[4] and culminating in *McShane Wholesale Fruit and Vegetables Ltd. v. Johnston Haulage Co. Ltd.*[5] It can be argued that if in Ireland today pure economic loss is treated for the recovery of damages by plaintiffs in the same way as other types of loss, then it is merely the converse of that principle that a risk of damage to the national economy is a sufficient risk to invoke the application of the "public interest" doctrine. It follows that the fact that the risk is to the national economy rather than to life and limb is irrelevant.

"Our society claims to value human beings more highly than favourable trade statistics and it could appear excessively utilitarian for the law to assert that a plaintiff's broken neck is an acceptable price to pay for a risk of a reduction in the sales of bullocks to Bahrain."

This last analysis assumes that the law of negligence is based upon utilitarian principles of efficiency maximisation, and that the effect of cases like *McShane* is to allow purely economic factors to be factored into the utilitarian calculus. This is not the case. The passage in *Ward v. McMaster* [6] set out above presupposes an anti-utilitarian approach that focuses on the interests of the individual (plaintiff) as an end in itself.[7] The decision in *Ward* proceeds from the principle that there is no prohibition on recovery for pure economic loss and emphasises the ordinary rule that a plaintiff should be compensated for all losses caused to him. Applied to any particular fact situation, it has the effect of making public policy irrelevant to the question of liability unless it can be shown to be sufficiently powerful. It is very possible that a court would require some countervailing threat to life and limb, and not to trade in cattle, to constitute a sufficiently powerful consideration of public policy to defeat an otherwise good negligence claim.

The Standard of Care

Assuming that a duty of care exists in respect of a particular case the next issue is to determine whether the standard of care can be lowered on grounds of public policy. The locus classicus of this aspect of the standard of care is *Daborn v. Bath Tramways Motor Co. Ltd. and Smithey.*[8] In that case a bus driven by the defendant collided with a left hand drive ambulance driven by the plaintiff. This happened during World War 2 when there was a shortage of motor vehicles in England and left hand drive vehicles were pressed into service. The ambulance was not being used for emergency purposes at the time. The issue on appeal was the degree, if any, of contributory negligence on the part of the plaintiff. Asquith L.J. stated:

> "In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to be taken into account is the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of 5 miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk. . . In considering whether reasonable care has been observed, one must balance the risk against the consequences of not assuming that risk."

In applying that general principle to the facts Asquith L.J. expressly took into consideration (1) the necessity in time of national emergency of employing all transport resources which were available, and (2) the inherent limitations and incapacities of that type of transport. He dismissed as unreasonable the contention that it is preferable not to drive than to drive such a dangerous vehicle. He also held that it was not necessary for the driver to move into the right hand seat and check for vehicles attempting to overtake the vehicle in question before executing a turn. This is because such a procedure would involve "possible delay" and might be wholly ineffective.

The next important case on this point is *Watt v. Hertfordshire County Council* [9] in which the fire brigade received a call stating that there was a person trapped under a heavy vehicle. The fire engine specially fitted to carry the heavy jack used in these cases was on another call and so the jack was placed on a lorry which was not specially fitted to carry it. The lorry braked suddenly causing the jack to move inside the lorry, thereby injuring the plaintiff fireman. The court was unanimous in holding that where the purpose of the action was to save life, it was justifiable to take a far higher risk than would be justified in other circumstances. Denning L.J. stated:

> "One must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency, there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies the taking of considerable risk. . ."

Denning L.J. went on to state that each case must be decided on an analysis of the risk and the end involved.

The reasoning in those cases has been applied in Ireland to cases of occupier's liability. In *Whooley v. Dublin Corporation*[10] and *Kavanagh v. Cork Corporation*[11] the respective local authorities were held not to be negligent in using fire hydrant

boxes of a type that were easily interfered with. In both cases the High Court held that to use a less accessible type would be inconsistent with the purpose of a fire hydrant box, which must allow for the fire brigade to gain access to the hydrant with as few time consuming restrictions as possible.

An issue which immediately arises in relation to foot and mouth mats is whether the nexus between the placing of mats and the prevention of the spread of foot and mouth disease is too remote. Each of the cases discussed contains a fact situation of "But for the taking of the risk the public interest would have been adversely affected." On such a 'but for' analysis, the question is whether the use of foot and mouth mats prevented contamination in Ireland, i.e., if the defendant had not placed the mat would the national herd have become infected with foot and mouth disease? The answer has to be in the negative, as is shown by the fact that some people did not place mats during the scare and there was no widespread outbreak of the disease.

However, if the defendant had not placed the mat, the risk of the spread of foot and mouth disease would have increased, albeit slightly. On the authority of *Watt, Whooley* and *Kavanagh* this is sufficient to bring the foot and mouth situation within the scope of the doctrine because the public interest in question is in reality nothing more than a *risk* of damage to some interest. In *Watt* the crash victim might have extricated herself from the wreck, or lived long enough for the specially fitted fire engine to be recalled and have the jack properly installed. The end to be achieved was not the saving of life and limb, it was the reduction of the risk to life and limb. In *Whooley* and *Kavanagh* the delay in accessing the hydrant might have no material effect on the ability of the fire services to fight a fire. The end to be achieved, rather, is the reduction of the risk that in some future case the delay would have such an effect. On the authority of these cases, the fact that there was no widespread outbreak of foot and mouth disease is no answer to this defence.

Daborn approaches this issue from another angle. Notwithstanding Asquith L.J.'s assertion that one must balance the risk against the consequences of not assuming the risk, in that case there was no specific countervailing risk. At one level the case appears to be Asquith L.J.'s vicarious contribution to the war effort in that he applied a lower standard of care because there was a war on and because the plaintiff worked for the military. If *Daborn* can be interpreted in that manner, by analogy the scale and gravity of the foot and mouth disease scare might be enough to successfully invoke the doctrine in respect of a very wide range of actions connected with fighting the disease, subject to a requirement of proportionality.[12]

Conclusion

With regard to the duty of care, *Ward v McMaster*[13] militates in favour of a plaintiff-centred approach of excluding public policy from the analysis. It would be disproportionate in those circumstances to defeat a personal injuries claim with an economic-based public policy. That is not because economic loss is of a different order to personal injury, but because plaintiffs should be able to recover all of their foreseeable losses (economic or otherwise) without the intrusion of public policy, except in exceptional cases. Such an argument is also relevant to the height of the standard of care, although the case-law on that issue shows that in the past a less plaintiff-centred approach has been taken.●

1. Letter from Dr L.C. Luke, Consultant in Accident and Emergency Medicine, Cork Affiliated Hospitals, Southern Health Board, Cork. (Irish Times 1st May 2001) who wrote "There is mounting concern - in Britain at least - over the hazards to human beings of the foot-and-mouth epidemic. There is much talk, for instance, of the first suspected human case in Cumbria and alarm about the threat of dioxins released into the atmosphere from the burning pyres in Devon. However, there is a more significant and neglected human hazard. This has been tentatively dubbed "foot and mat disease" in Cork, and involves a wide variety of serious injuries resulting from tripping over crumpled and poorly placed disinfectant mats. We are seeing a growing number of such cases in the three emergency departments in this city and would urge those laying down the mats to do so with care and to warn those using them of the real (not remote) risks of tripping on them." This was followed up by a letter from Andrew Curtain, Consultant Obstetrician, and Gynaecologist, Cork University Hospital, (Irish Times 7th May, 2001) who wrote "No doubt the injuries [Dr. Luke] reports are genuine and no doubt the disinfectant mats pose a threat to life, limb and shoe; but he of all people will be aware that if anything is placed on the ground in these parts, one's passage will be hindered by a queue of entrepreneurs lined up to trip over it."
2. [1988] IR 337. Mc Mahon & Binchy, *Law of Torts* (3rd ed) para. [6.28] describes it as the definitive expression of how the courts should approach the duty of care.
3. Mc Mahon & Binchy, *Law of Torts* (3rd ed) p 203.
4. [1988] IR 337
5. [1997] 1 ILRM 86. See generally McMahon & Binchy, *op cit.*, Chapter 10
6. [1988] IR 337
7. See R.W. Wright, "The Standards of Care in Negligence Law", in Owen, D.G. (ed) *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995)
8. [1946] 2 All E.R. 333
9. [1954] 2 All E.R. 368
10. [1961] IR 60
11. Unreported, High Court (Keane J), 1994
12. Another interpretation of Asquith L.J.'s judgment is that it is unreasonable to expect people to live without the benefit of certain technological deveopments, i.e., that certain things are necessary for the normal functioning of daily life. The end to be achieved in taking the risk is the normal functioning of daily life. There is a direct nexus between the risk taken and the end to be achieved. However, as foot and mouth mats are of a different order to the normal functioning of daily life than motor vehicles, it appears that this aspect of the judgment is not relevant to the present issue.
13. [1988] IR 337

EQUALITY & DISABILITY

(PART I)

In the first of a two-part article on disability discrimination law in Ireland following the Supreme Court decision in Sinnott v Minister for Education and Others, ***Cliona Kimber BL*** *considers the statutory protections introduced by the Employment Equality Act 1998 as they apply to persons with disabilities.*

Introduction

There are an estimated 360,000 Irish people with disabilities, approximately ten per cent of the population. Only about 20% of these are employed.[1] Irish people with disabilities experience many problems and restrictions in areas which other Irish people do not, such as housing, transport, education, the provision of goods and services as well as entertainment and leisure activities. Many of these problems stem from the historical exclusion of persons with disabilities from the public sphere and mainstream Irish life as well as from the lack of suitable education and training and of employment opportunities. This exclusion of people with disabilities has its roots in the perception of people with disabilities as dependant and incapable of running their own lives, and moreover, in the belief that a disability renders one substantially incapable of enjoying life. Due to the fact that little is expected of people with disabilities, little is offered to them in the way of education, training and opportunities.[2] Such a lack of provision is demonstrated graphically by the Sinnott case.[3]

Many writers and studies have identified these prejudiced perceptions of the abilities of disabled people, rather than the actual disability, as creating most of the obstacles which limit the full participation of people with disabilities in society. These commentators point out that such barriers can be divided into four kinds, the first three being purely socially imposed.[4] The first type of barrier is a tangible structural barrier such as a staircase or revolving door which make' it difficult for a disabled person to enter or move around buildings whether for work or entertainment purposes. The second type of barrier is intangible, but also structural, such as the failure to provide written information in alternative formats, or the failure to provide sign language interpreters. A third type of barrier is an attitudinal one, such as the perception that because a person is an epileptic or in a wheelchair that she or he cannot have the necessary skills or qualifications to do a job. The fourth barrier, that is the barrier of the person's disability, is the only one which is not socially imposed. It is quite clear that someone who is blind cannot drive a car, nor can someone who is in a wheelchair become a manual labourer. However, the extent to which each person's particular disability affects their ability to do a job or take part in an activity is different for each person in each circumstance, and three of the barriers to their doing so can be overcome by thought, preparation or education.

Fortunately in recent times, as the result of changing political realities and strong lobbying on the part of people with disabilities, there has been a growing recognition of the fact that the exclusion and segregation of people with disabilities is not a consequence of their impairments, but results from political and social choices based on false assumptions about disability.[5] This recognition has led to legislative and policy changes at national and international level designed to assist in removing structural and attitudinal barriers to the inclusion of people with disabilities.[6] As a result people with disabilities have moved from being seen as objects of welfare, health or charity, to being recognised as the subject of legal rights.[7]

Ireland has also adopted legislation to provide for the equality rights of people with disabilities, although this has taken place more recently. In 1998, with the introduction of the Employment Equality Act, equal treatment in the area of employment for those with disabilities was provided for. Under the Equal Status Act 2000, which came into force in October 2000, equal treatment in the provision of goods and services to the public as well as in the provision education has been guaranteed. Additionally the Constitution is being used to challenge traditional practices in education or health care that discriminated against those with disabilities. Also at EU level, a Framework Directive has been adopted which will guarantee equal treatment in employment for the disabled in all EU member states when the timescale for its implementation into national legislation has expired.[8] This will require some changes to be made to Irish law.[9]

While these legislative developments are clearly welcome, the fact that disability discrimination legislation has been enacted so recently does, however, cause problems for lawyers working in this area. There is no body of Irish case law to guide practitioners on the interpretation of the law. The law that has built up on sex discrimination, which has been legally

"There is no body of Irish case law to guide practitioners on the interpretation of the law. The law that has built up on sex discrimination, which has been legally prohibited for over 20 years, is only of limited use, as disability discrimination has its own distinctive features. Irish lawyers must therefore look to a period of uncertainty while case law on disability discrimination is built up."

prohibited for over 20 years, is only of limited use, as disability discrimination has its own distinctive features. Irish lawyers must therefore look to a period of uncertainty while case law on disability discrimination is built up, and will also need to look to other jurisdictions to assist in interpreting and applying the new legislation.

The purpose of this article is to provide some guidance to practitioners in working with this new area of law. It will give a detailed overview of the Irish legislation and will consider how the law might be applied in the light of case law from other common law jurisdictions. It will also examine recent developments at constitutional level, in particular the *Sinnott* case and assess what part the Constitution plays in protecting the rights of those with disabilities. This Article will be divided into two parts. Part I will examine the Employment Equality Act 1998 and the rights of people with disabilities in the workplace. In Part II, the world outside the workplace will be considered in the light of the Equal Status Act 2000 and having regard to the constitutional protection of the rights of persons with disabilities.

The Employment Equality Act 1998

The Employment Equality Act 1998, as its name suggests, provides for equal treatment in the context of employment. It applies to a number of grounds of discrimination, of which disability is just one. Although disability discrimination is dealt with along with all of the other grounds of discrimination in a single piece of legislation, rather than in a 'disability discrimination' act,[10] it is clear that disability discrimination has its own distinctive features. Unlike sex discrimination, where those of a different sex are seeking to prove that their sex makes no difference to their ability to do a job, disabilities will often have an effect on someone's ability to perform the task required by an employer. A disability will make a person 'differently abled' to others, and thus a simple requirement of identical treatment of those with and without disabilities will not provide equality. A genuine guarantee of equality must go further than a mere prohibition of discrimination.

Thus disability discrimination legislation in the many countries which have enacted such laws often imposes requirements on employers to make some sort of reasonable accommodation of the needs of those with disabilities. Disability discrimination laws often also give employers permission to take positive measures to provide special treatment for employees with disabilities.

Also, unlike sex discrimination, where employers will wish to deny that sex played a role in a decision, employers in disability discrimination cases will frequently admit that the disability influenced their decision. The crucial issue will then be whether or not the decision can be justified and whether or not some form of reasonable accommodation would have been feasible. Disability discrimination laws thus seek to grapple with the difficult issue of when discrimination is justified. These considerations are important to remember when we turn to consider the legislation in more detail.

Prohibition of discrimination

Section 6(1) sets out the basic principle of the Act-

> "For the purposes of this Act, discrimination shall be taken to occur where, on any of the grounds in subsection (2) one person is treated less favourably than another is, has been or would be treated."

The Act therefore clearly defines discrimination as less favourable treatment. The emphasis is placed on ensuring that the employee is treated the same as other persons or classes of persons without a disability where their circumstances are "not materially different."[11] In order to prove discrimination in relation to employment, a person with a disability will have to show that she or he has been treated less favourably than some other comparable person who does not have a disability.

In the United Kingdom, whose Disability Discrimination Act 1995 is similar on this point, the Courts have had some difficulty in deciding what is the appropriate comparator for someone with a disability. This can be seen from the case of *Clarke v. TDG Ltd (trading as Novacold)*.[12] Mr. Clark had been employed in jobs that were both manually and physically demanding. He suffered a serious soft tissue back injury that resulted in his absence from work. In the light of his absence from work he was dismissed. Mr. Clarke brought an action to the EAT on the grounds that his dismissal constituted discrimination under the UK Act. The EAT rejected his claim on the basis that he was treated no differently than a person in similar circumstances, who was not disabled, would have been treated. The Tribunal held that the proper comparator where a person is dismissed for absence related to her or his disability is someone who is off work for the same amount of time but for a reason other than disability. Mr. Clarke appealed to the English Court of Appeal. In allowing his appeal, the Court ruled that the proper comparator was an employee who was not absent from work, on the grounds that it was a disability related absence which led to the dismissal, and that the true comparator was therefore an employee to whom the absenteeism reason did not or would not apply.[13]

Although there have been no equivalent Irish decisions on this point to date, this test is likely to be applied in Ireland as a logical extension of the way in which comparators are chosen in sex discrimination cases in Ireland.

Specific rights to equality

As well as the general right to equal treatment, the Employment Equality Act contains several specific guarantees of equality.

There is an entitlement to equal pay in section 29. This is subject to the proviso that employers can pay those with disabilities

different rates of pay if they are restricted in their capacity to do the same amount or the same hours as a person without a disability.[14] Section 30 provides that equal treatment is an implied clause of the employment contract.

Thus, even if the employment contract of a person with a disability does not have any written provisions mentioning or guaranteeing equal treatment, the Act ensures that a guarantee of equal treatment is read into the contract.

Under section 32 of the Act, harassment in the workplace on account of a person's disability is also prohibited. Thus an employee with a disability is entitled to have a workplace free from any disability-related harassment by other employees. An employer is liable to ensure that harassment does not take place in the same way that an employer is responsible for ensuring that employees are not sexually harassed. Interestingly, this responsibility of the employer extends to harassment by clients, customers or business contacts of the employer in circumstances where the employer ought reasonably to have taken steps to prevent it.

Direct and Indirect Discrimination

It is not only direct discrimination that is prohibited by the Act, but also indirect discrimination. Direct discrimination is quite straightforward and occurs where because of their disability a person is treated less favourably than another person who was not disabled would be. So, for example, an employer might advertise for 'able bodied candidates' or have a policy of not employing those in wheelchairs.

Indirect discrimination is less obvious on first glance, and covers treatment that is fair in form but discriminatory in operation. A standard definition is that indirect discrimination occurs where a provision or requirement is such that the proportion of persons who are disadvantaged by the provision is substantially higher in the case of persons of one group than of the other and the provision or requirement cannot be justified by objective factors. For example, not having lifts in a place or work might be fair in form, in that everyone is treated the same, but is discriminatory in practice in that it places those who cannot walk up stairs at a disadvantage.

It is also important to realise that there does not have to be an intention to discriminate. It is enough that a particular form of treatment does in fact discriminate against a person with a disability.

The above definition will more than likely have to be amended as part of the process of implementation of the EU Framework Directive. Under this Directive a complainant must show that she or he has suffered a 'particular disadvantage' as opposed to proving that a provision or requirement has disadvantaged a 'substantially higher' proportion of persons of the discriminated group. Thus, indirect discrimination should be easier to prove under this EU definition, as the requirement to provide statistical evidence, which has bedevilled equality legislation, will no longer be imposed.[15]

Although there is a basic requirement of equal treatment for those with disabilities, it is quite clear that people who have a disability may not in fact be able to perform a job because of that disability. In those circumstances an employer cannot simply treat such a person the same as an able bodied person. The law would be absurd if for example it prevented employers of airline pilots from requiring that pilots have excellent vision. What the law does require, however, is respect for the basic guarantee of equal treatment, subject always to allowing an employer to impose discriminatory conditions if such conditions can be justified as necessary for the performance of the job. These 'justifications' for discriminatory treatment will now be considered.

Justifications

Section 31 of the Act provides that indirect discrimination can be justified if it is reasonable in all the circumstances of the case. What might be reasonable is of course open to interpretation, but it is likely that certain governing principles will apply.

Stereotypes

It is clear that an employer cannot act upon generalised fears. These would be unlikely to be held to be reasonable. In the UK case of *Hammersmith and Fulham LBC v. Farnsworth*,[16] for example, an employee was found to have a history of mental illness and was considered on that basis not to pass a medical examination. The employer feared that she would have many absences from work. The Court found that the employee in fact had a reference from a previous employer showing that she had an excellent record of attendance and that the employer had not taken this into account.

Blanket Exclusions

A practice of excluding certain classes of people, for example diabetics or epileptics, from certain jobs would need to be altered and considered on a case by case basis. Blanket restrictions would be unlikely to be held to be reasonable where they did not affect a person's ability to do a job. An individual assessment of the abilities of an applicant would be necessary, especially where an impairment could take a variety of different forms from person to person. In the UK case of *Post Office v. Jones*,[17] for example, the Post Office imposed a blanket ban on driving for insulin dependant diabetics. Following a complaint by Jones, a diabetic delivery driver, the Post Office reconsidered its policy of automatically deeming such persons unfit to drive and admitted that its total ban on driving had been discriminatory.

Health and safety

The existence of health and safety concerns have long been used by employers to justify refusing employment to those with disabilities. Clearly, an employer has a duty to other employees so this is a delicate matter. It is likely, however, that an employer would now have to show that despite

"An employee with a disability is entitled to have a workplace free from any disability-related harassment by other employees... Interestingly, this responsibility of the employer extends to harassment by clients, customers or business contacts of the employer in circumstances where the employer ought reasonably to have taken steps to prevent it."

taking measures to reasonably accommodate the person with the disability, other employees would be put at risk by the employment of the person with a disability. In other words, an employer's reasoning and grounds for refusal to employ will now be likely to be subjected to greater scrutiny.

Areas of application of the Act

Section 8(1) provides that

" In relation to-

(a) access to employment
(b) conditions of employment
(c) training or experience for or in relation to employment
(d) promotion or re-grading, or
(e) classification of posts

an employer shall not discriminate against an employee or prospective employee and a provider of agency work shall not discriminate against an agency worker."

The Act therefore covers almost all employment situations. It also applies to advertising, to employment agencies, to persons or bodies offering vocational training, as well as to membership of trade unions or professional organisations that control entry to or the carrying on of a profession or occupation.

The definition of disability

One of the most important parts of the Employment Equality Act is the definition of disability. Section 2(1) of the Act provides that :

""disability" means -

(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person" body,
(b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
(c) the malfunction, malformation or disfigurement of a part of a person's body.
(d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
(e) a condition, illness or disease which affects a person's thought processes, perception or reality, emotions or judgement or which results in disturbed behaviour.

And shall be taken to include a disability which exists at present, or which previously existed but no longer exists, of which may exist in the future or which is imputed to a person."

It can be seen that this is an extremely wide definition of disability, based on medical characteristics rather than the functions a person can perform. In the only disability discrimination case to date to be brought in Ireland, *Ana Martinez v. Network Catering,*[18] the disability alleged was back pain. Very importantly, by including disabilities that are imputed to a person, it also includes people who are perceived to be disabled. This is necessary to ensure that a person is not discriminated against as a result of an incorrect perception that a person has a type or degree of disability that they do not in fact have. For example, intellectual disability is sometimes wrongly imputed to those who use wheelchairs, particularly those with cerebral palsy.[19] The definition also includes past and future disabilities.

"The UK definition is much more restrictive and will exclude many conditions that would be termed disabilities under Irish law. Nevertheless, in the UK, conditions such as clinical depression, chronic fatigue syndrome, gender identity dysphoria resulting from a gender reassignment, epilepsy, mental illness, diabetes, and dyslexia have all been held to be disabilities... Difficult questions will nonetheless remain."

The Irish definition contrasts with the UK definition in the Disability Discrimination Act 1995 which is functional in nature. The UK Act defines a disability as either a physical or mental impairment which has a substantial and adverse long term effect on a person's ability to carry out normal day-to-day activities.[20] The UK definition is therefore much more restrictive and will exclude many conditions that would be termed disabilities under Irish law. Nevertheless, in the UK, conditions such as clinical depression, chronic fatigue syndrome, gender identity dysphoria resulting from a gender reassignment, epilepsy, mental illness, diabetes, and dyslexia have all been held to be disabilities.

It may therefore be anticipated that the wider definition of disability under Irish law will be interpreted in Ireland to encompass a wide range of conditions. Difficult questions will nonetheless remain. Would factors such as left-handedness, educational deprivation, prison records, predisposition to illnesses, anorexia, bulimia or even obesity be considered as disabilities? Would conditions such as compulsive gambling or kleptomania be included in the concept of disability? The question of whether alcoholism and drug addiction will be defined as disabilities is also likely to give rise to problems. In the United States, in *Davis v. Boucher,*[21] a federal district court ruled that a municipality's policy of rejecting all job applicants with a history of drug abuse was contrary to the applicable disability legislation. This decision led to an amendment of the relevant law. Now, the Americans with Disabilities Act 1990, the principal US legislation, specifically excludes current drug abusers and alcoholics from the coverage of its provisions. Those with a history of substance or alcohol abuse are covered, however, if they have successfully completed a supervised drug rehabilitation programme.[22] It is uncertain how these problems will be dealt with in Irish law.

Reasonable accommodation and the nominal cost exception.

While the Act provides that those with disabilities must not be treated less favourably than those who do not have such a disability, the Act does not require employers to take on someone who is not fully competent and capable of doing the job.

Section 16(1) provides that :

"Nothing in this Act shall be construed as requiring any person to recruit or promote any individual to a position, or to provide training or experience to an individual in relation to a position, if the individual

(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be , performed."

The Act does go on to provide, however, in section 16(3)

"(a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties, if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and be fully capable of undertaking, those duties.

(b) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment r facilities to which paragraph (a) relates."

Taken together these provisions mean that an employer does not have to employ anyone who is not capable of doing the job, but that a person with a disability will be deemed capable of doing a job if they can do the job with some sort of special treatment or facilities. Furthermore, the provisions mean that an employer has a duty to reasonably accommodate the employee or potential employee and to provide such special facilities.

In relation to the particular question of what constitutes reasonable accommodation, it should be recalled that the Supreme Court in *Re the Employment Equality Bill 1996*[23] held that an unrestricted duty to accommodate amounted to an unconstitutional interference with the property right of employers. The Court ruled that the Act attempted to

> "transfer the cost of solving one of society's problems onto a particular group. The difficulty the Court finds with the section is not that it requires an employer to employ disabled people, but that it requires him to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work."[24]

As a result of this reference to the Supreme Court, an additional sub-paragraph was inserted into section 16(3) of the Act in the following terms:

> "(c) A refusal or failure to provide for special treatment or facilities ... shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer."

Thus, in Irish law, the employer only has a duty to reasonably accommodate the employee or potential employee in providing for their special needs if it does not go beyond a nominal cost. Commentators have argued that this qualification of the duty takes a lot of the teeth out of the legislation, and significantly weakens the impact of the requirement of reasonable accommodation.[25] On the other hand, a study carried out in the US in 1982 concluded that 51 per cent of 'reasonable accommodations' in the workplace cost nothing, and that a further 30 per cent cost between $100 -$380 per employee.[26] It is also unclear what is meant by a 'nominal cost'. Would the issue of nominal costs vary according to the nature of the employer and their circumstances? In other words would it be the case that what might be regarded as a nominal cost for an employer with a large turnover might not be a nominal cost for a small business? In the Seanad Debates relating to the Equal Status Bill, which contains a similar provision regarding nominal cost, the Minister seemed to suggest that it would be possible to interpret nominal cost according to the means of the business.

In any event, it is likely that this provision will have to be amended in the future to bring Ireland into line with the EU Framework Directive. This Directive, which is required to be implemented in Ireland by December 2003, also contains a definition of reasonable accommodation, but it is one which is very different from Irish law. Article 5 of the Framework Directive defines reasonable accommodation as:

> "appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a *disproportionate burden* on the employer."[27] (emphasis added)

Quite clearly, the concepts of 'nominal cost' and 'disproportionate burden' are very different, and it is likely that in applying the Framework Directive the ECJ would impose a greater financial obligation on employers to make reasonable accommodation than the 'nominal cost' allowed by Irish law. If and when this approach is taken by the ECJ, the doctrine of supremacy of EC law will mean that Ireland will be obliged, notwithstanding the Supreme Court judgment, to follow this approach.

The concept of reasonable accommodation

The concept of 'reasonable accommodation' is central to disability discrimination legislation in the US, Australia, Canada and the UK,[28] and a consideration of how the phrase has been interpreted in these jurisdictions should be of some guidance in detyermining what might be required of employers in Ireland. In these jurisdictions reasonable accommodation has been interpreted to mean not just the physical alteration of premises, but includes job restructuring, modified working hours, adjustments in working practices, and the provision of qualified readers or interpreters. The 1995 UK Disability Discrimination Act, for example, includes a list of steps that it may be reasonable for an employer to take. These include :

(a) making adjustments to premises
(b) allocating some of the employee's duties to another person
(c) transferring him or her to an existing vacancy
(d) altering his or her working hours
(e) assigning him or her to a different place of work
(f) allowing time off for rehabilitation, assessment or treatment
(g) arranging training
(h) acquiring or modifying equipment
(i) modifying instructions or reference manuals
(j) modifying procedures for testing or assessment
(k) providing a reader or interpreter, and
(l) providing supervision.

In the US it has been ruled that reasonable accommodation through any form of job-restructuring does not require an employer to change or reallocate the essential functions or nature of a job. What it does require an employer to do, however, is to rearrange the marginal functions of the job so that the essential functions can easily be handled by employees with disabilities.[29] Of course, in Ireland the requirement to make reasonable accommodation is limited by the fact that this accommodation does not have to exceed a nominal cost. Having said that, it is clear that there are very many accommodations which a Court may require an employer to make, which would not cost anything, or which would cost only very little.

For example, in the UK case of *Morse v. Wiltshire County Council*,[30] Mr. Morse was employed as a road worker. As the result of a road traffic accident he suffered injuries which led to some permanent disablement including limited movement and grip in his right hand, stiffness in his right leg and susceptibility to blackouts. On medical advice it was recommended that on return to work Mr. Morse should not work in certain areas or with certain equipment and that he should not drive vehicles. A need for redundancies arose in the County Council, and the Council decided to make those redundant who were the least flexible in terms of the range of work they could perform. On this criterion, Mr. Morse was made redundant, and he subsequently He claimed that the had been dismissed because of his disability. The Tribunal ruled that the employer had not fulfilled its requirement under the legislation to make reasonable adjustments in the method of operation to accommodate disabled persons, and that it had not taken steps to reasonably avoid dismissing a disabled employee. In another UK case, *Cook v. Thorne*,[31] the claimant successfully argued that an employer's failure to comply with a request for study leave which she needed to overcome her dyslexia problem constituted a failure to provide a reasonable adjustment.

In one of the leading cases in Canada, *Eldridge v. British Columbia (Attorney General)*,[32] the Canadian Supreme Court ruled that the health care system, which provided that deaf persons pay for the 'ancillary service' of sign language interpretation, was failing to make reasonable accommodation for such persons. In one of the most clearly expressed passage on the need for reasonable accommodation, Judge La Forest found that :

"Exclusion from the 'mainstream' of society results from the construction of a society based solely on mainstream attributes to which a disabled person will never be able to gain access ... it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled person from participation, which results in discrimination against them."

Job Application and Interview Process

The obligation to provide reasonable accommodation applies throughout the job application and interview process. For example, in *Ridout v. TC Group*,[33] an interview candidate who had photosensitive epilepsy was given an interview in a room without windows which was harshly lit with fluorescent lighting. Although she lost the case on the basis that she had not informed her prospective employers about her condition, it was implicit in the ruling of the UK Employment Appeals Tribunal that if the employer had been aware of her condition, it would have had a duty to accommodate her.

Employment qualifications/aptitude tests

Employers need to take particular care with employment qualifications/aptitude tests. Setting qualifications standards or devising aptitude tests that would screen out individuals with disabilities, where that level or type of aptitude or qualification is not needed for the job, would be discriminatory. It is important to ensure that persons with disabilities are not screened out unless they cannot do the job, and that there is a correlation between the job needs and the qualifications and aptitudes required. Thus, alternative tests might need to be devised, or a person might need to be given more time to complete a test, or be allowed to take more breaks. This would apply both to job applicants and employees seeking promotion. The US case of *Stutts v. Freeman*[34] illustrates this point. An employer refused to allow Stutts to enter a training programme to be a heavy equipment operator because of low scores on a written test. Stutts in fact had dyslexia, but otherwise was fully capable of doing the job. The Court ruled that the employer had failed to make reasonable accommodation by administering a non-written test.

"Quite clearly, the concepts of 'nominal cost' and 'disproportionate burden' are very different, and it is likely that in applying the Framework Directive the ECJ would impose a greater financial obligation on employers to make reasonable accommodation than the 'nominal cost' allowed by Irish law. If and when this approach is taken by the ECJ, the doctrine of supremacy of EC law will mean that Ireland will be obliged, notwithstanding the Supreme Court judgment, to follow this approach."

Employment Medicals

Special care must also be taken with pre-employment medicals and with application forms which ask questions about the health of the employee. It is better to ask neutral questions, such as 'will your health allow you to perform the essential requirements of the job?' rather than ask a candidate to list any illnesses or disabilities. If an employer requires disclosure of a disability prior to interview, it will be open to the allegation that the person was not hired because of their disability, and the question process itself would be likely to held to be discriminatory. It is only once an offer of employment has been made and before the commencement of employment that a medical examination would be appropriate. Even then, if a disability is disclosed, an employer would only be able to refuse employment on the basis of that disability if the disability affected the persons ability to do the job.

For example, in the UK case of *Hammersmith and Fulham LBC v. Farnsworth,*[35] Ms Farnsworth had been offered a job by Hammersmith and Fulham Council after interview. The Council's occupational health physician discovered that Ms Farnsworth has a history of mental illness and voiced concerns that a recurrence would affect her work attendance. The job offer was withdrawn on the grounds that satisfactory medical clearance had not been obtained. Ms Farnsworth brought a claim that she had been discriminated against on grounds of disability. The employment tribunal found that Ms Farnsworth had a reference from her previous employment showing that she had not lost any time through ill health but that the Council had not taken this into account. The tribunal found that the Council had simply assumed that Ms Farnsworth's attendance would be poor because of her mental health and thus she had been discriminated against because of her disability.

Exceptions

The Act in sections 34, 36 and 37 contains other exceptions to the equal treatment principle. In the circumstances listed below, a treatment which would otherwise be discriminatory under the terms of the legislation is deemed not to be discriminatory. These include:

(a) Discrimination on grounds of age or disability where equal treatment would lead to significantly increased costs;

(b) Age, race, or disability as an occupational qualification;

(c) Employment in a private household;

(d) Disability restrictions in the Defence Forces, Gardaí, or Prison Service.

Positive measures

Irish law allows employers to take positive measures if they wish, but it does not force them to do so. The Employment Act 1998 expressly permits positive action with regard to those with a disability, in section 33 as follows :

" Nothing in this Part or in Part II shall prevent the taking of such measures as are specified in subsection (2) in order to facilitate the integration into employment, either generally or in particular areas or a particular workplace, of-

(b) persons with a disability or any class or description of such persons

(2) The measures mentioned in subsection (1) are those intended to reduce or eliminate the effects of discrimination against any of those persons referred to in paragraphs (a) to (c) of that subsection."

Therefore, if an employer gives special treatment to an employee with a disability, such as longer breaks, other workers cannot complain that this difference of treatment infringes their right to equal treatment.

Under section 35(2), the Act also expressly allows employers to provide special treatment or facilities to those with disabilities.

Conclusions

Following this consideration of the Employment Equality Act, it is clear that there will be three crucial stages at which discrimination in employment may be found. Firstly, it may be found in the failure to admit that someone has a disability and thus to discriminate against him or her. Second, discrimination may take place as the result of having requirements or conditions for employment which exclude those with disabilities and which are not relevant or necessary for the job. Thirdly, it may be discriminatory to fail to reasonably accommodate the needs of an employee or potential employee who has a disability.

As with sex discrimination, an employer's actions may be challenged if they are based upon unfounded assumptions about the abilties or lack of ability of present or potential employees. Any sort of knee-jerk or blanket response will be likely to be found to be discriminatory. Practitioners advising employers will be careful to emphasise that each situation must be assessed on a case by case basis. Employers will also be best advised to ensure that they are clear about the requirements of a job, and to make sure that the conditions they impose on potential applicants, or the qualifications they require, do not screen out those with disabilities who would otherwise be capable of doing the job. If they fail to do so, complaints of discrimination on grounds of disability may be brought against them.●

ERRATUM

An error appeared in the first sentence of the article by Garrett Simons BL in the last issue of the Bar Review, *Judicial Review of Planning Decisions - Section 50 Practice and Procedure* (2001) 6 Bar Review 449, which mistakenly indicated that section 50 of the Planning & Development Act 2000 already applied to most planning cases.

This was an editorial error, and the editor is grateful to the author for pointing out that, in fact, the provisions of section 50 have not fully commenced, although regulations are expected shortly.

1. *A Strategy for Equality - Report of the Commission on the Status of People with Disabilities* (1996)
2. For a discussion of these perceptions, see Pothier, *Miles to Go: Some Personal Reflections on the Social Construction of Disability* (1992) 14 Dalhousie Law Journal 526.
3. *Sinnot v. Minister for Education, Ireland and the Attorney General,* Supreme Court, unreported, 12th July 2001
4. This method of analysis is used by the Canadian writers, Lepofsky and Bickenback, *Equality Rights and the Physically Handicapped,* in Equality Rights and the Charter (1985), and in the Canadian report, *Willing to Work,* Final Report of the Study Group on Employment and Disability (1991).
5. Degener and Quinn, *A Survey of International, Comparative and Regional Disability Law Reform,* Paper delivered to *From Principle to Practice Symposium,* Washington D.C., 22-26 October, 2000, at 10.
6. Canada and the United States were among the first countries to adopt anti-discrimination laws for persons with disabilities. The Canadian Charter of Rights and Freedoms 1982 and the Canadian Human Rights Act 1985 contain a guarantee of equality without discrimination on grounds of *inter alia* mental or physical disability. The United States adopted the Americans with Disabilites Act 1990, a detailed and landmark piece of legislation which prohibits *disability discrimination* across a wide spectrum. For a discussion of the law in the US, Canada and Australia, see Quinn, McDonagh and Kimber, Disability Discrimination *Law in the US, Australia and Canada* (1992). The UK adopted the *Disability Discrimination Act in 1995.* For a discussion of this Act, see Gooding, Disability Discrimination Act 1995 (1996). Important documents at the international level are the United Nations General Assembly 1982 *World Programme of Action Concerning Disabled Persons,* G.A. Res 37/52, U.N. GAOR, 37th Session ; and the *U.N. Standard Rules on the Equalisation of Opportunities for Persons with Disabilities,* G.A. Res. 48/96, U.N. GAOR, 48th Session.
7. This shift in the perception of people with disabilities from objects to subjects is discussed by Degener and Quinn, *op cit.*
8. Directive 2000/78/EC establishing a general framework for Equal Treatment in employment and occupation, [2000] O.J. L303/16. The Directive must be implemented into Irish law by 2 December 2003. For a consideration of the Directive, see Waddington and Bell, *More Equal than Others: Distinguishing European Equality Directives,* CMLRev. Forthcoming
9. For a detailed consideration of the changes which will be required in Irish law see Quinn and Quinlivan, *Disability Discrimination: The Need to Amend the Employment Equality Act 1998 in Light of the EU Framework Directive on Employment*", Paper given to the Equality Law Conference, Dublin Castle 2001 (to be published by the ICEL/ Equality Authority).
10. In the UK and the US, separate legislation was enacted to guarantee equality rights for those with disabilities. See Americans with Disabilities Act 1990 and the UK Disability Discrimination Act 1995.
11. Section 8, subsections 5, 6 and 7.
12. [1999] 2 All ER 977
13. A similar UK case is *British Gas v. McCaull* [2001] IRLR 60. McCaull had been employed by British Gas as a service engineer but had been injured in a road accident following epileptic seizure. He was absent form work for a long period of time. His driving licence was withdrawn and his medical advisors recommended that he could no longer perform the duties of service engineer. British Gas terminated his employment. An employment tribunal found that there had been disability discrimination partly because British Gas had treated Mr McCaull less favourably than an employee on long term sick leave who was not disabled. British Gas appealed on a number of grounds, including that the correct comparator had not been used. The Employment Appeals Tribunal stated that the lower tribunal had in fact used the wrong comparator. The correct test was to compare Mr. McCaull to other non-disabled employees, not those who were also on long term sick leave.
14. (section 35(1))
15. In *Employment Equality Agency v. Packard Electric Limited,* for example, the claimant argued that her ineligibility for participation in the Department of Social Welfare's social employment scheme due to her not being on the Live Register was indirect discrimination. Due to discrepancies between the various sets of figures cited and the absence of reliable statistical evidence, the Equality Officer ruled that the evidence could not sustain a finding of indirect discrimination. For a discussion of the difficulties this test has caused in Ireland, see Bolger and Kimber, *op cit,* at 12-13
16. [2000] IRLR 691
17. [2000] ICR 388
18. [2001] E.L.R. As the alleged incidents of discrimination took place prior to the operation of the 1998 Act, the Equality Officer was in fact precluded from investigating the complaint.
19. The Irish definition is very similar to the definition of disability in the Australian Disability Discrimination Act (Cmwth) 1992. For a more detailed discussion of this Act see McDonagh, *Disability Discrimination Law in Australia, in Quinn,* McDonagh and Kimber, *op cit.*
20. Section 1(1)
21. 451 F Supp 791 (E.D. Pa 1978).
22. See Quinn, *Disability Discrimination Law in the United States,* in Quinn, McDonagh and Kimber, *op cit.*

23 [1997] 2 I.R. 321

24. Hamilton J, at 367.
25. See Power, *The Equal Status Bill 1999 - Equal to the Task,* (2000) Bar Review 267 and Dowling, *Disability Discrimination,* (1999) Bar Review 121.
26. Discussed in Quinn, *op cit,* at p. 63.
27. The Directive also makes it clear that it is the net cost to the employer, after all state subsidies and grants have been taken into account, which is the cost to be assessed to the employer. On this point see the discussion in Quinn and Quinlivan, *op cit.*
28. See Dowling, op cit, and also Quinn, McDonagh, Kimber, op cit.
29. See Quinn, *op cit,* at p. 61.
30. [1998] IRLR 352
31. [1999] Discrim L. R. 100
32. [1997] 3 SCR 624. For a discussion of the law in Canada, see Kimber, *Disability Discrimination Law in Canada,* in Quinn, McDonagh and Kimber, *op cit.*
33. [1998] IRLR 628
34. 694 F 2d 666 (11th Cir. 1983)
35. [2000] IRLR 691

DOMAIN NAME DISPUTES: A REVIEW OF THE CASE LAW

Eleanor Keogan* *reviews the comparative decisions of panels recently established under UN-approved uniform dispute resolution procedures to adjudicate on claims of abusive domain name registration.*

Introduction

Domain names were originally intended to perform only the function of facilitating connectivity between computers through the Internet. Now they have metamorphosed into a form of business identifier. While trademark law seems to play a major role in the development of domain name law, it is important to note the borderless nature of the Internet. Trademark law is applied in the physical world of legal boundaries and, therefore, trademarks may legitimately be used by multiple owners with no risk of confusion to the public. Consequently, the question arises as to whether the UDRP's confusion standard is an appropriate and equitable one to apply to the Internet.

ICANN

In 1998 the US Government set up as a branch of the UN the Internet Corporation for assigned names and numbers (ICANN) to specifically deal with the issue of cyber-squatting. The term 'cybersquatting' refers to the trafficking or registration of well-known trademark names with the intention of using the trademark owner's need for the name to extort a financial profit. The Uniform Dispute Resolution Policy (UDRP) was formulated by ICANN for enforcement by mandatory arbitration in 1999. To date, ICANN has approved four dispute resolution providers to implement the UDRP. They include the World Intellectual Property Organisation (WIPO), the National Arbitration Forum (NAF), eResolution, and most recently, the CPR Institute.[1] The UDRP gives these approved dispute resolution providers limited jurisdiction to hear and decide cases involving 'abusive registrations' which are only supposed to apply to clear-cut cases of cybersquatting.

The UDRP

Pursuant to the UDRP, which are the terms of reference for the panelists, a Complainant must prove each of the following elements of the three-part test provided for under paragraph 4(a) UDRP:

- The Respondent's domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights; and
- The Respondent has no rights or legitimate interests in respect of the domain name; and
- The Respondent's domain name has been registered and is being used in bad faith.

It is essential that the complainant must prove all three elements before the name can be transferred or cancelled. For example, under a strict interpretation of the policy a registrant may have no demonstrable rights or interest in the name, and the name may have been registered and used in bad faith, but if it is not "identical or confusingly similar" to a trademark it should not be transferred. However, many opinions have held that proof of one element may also establish proof of another.[2]

Confusingly Similar

The 'confusingly similar' provision seems to be the one that is the easiest to satisfy. Despite fairly uniform application its scope has been stretched to its limits in a few cases. For example, in *Diageo plc v. John Zuccarini* (guinness-beer-really-sucks.com) it was held that the domain name was "confusingly similar" to the trademark 'Guinness'.[3]

Bad Faith

Most ICANN decisions turn on whether the complainant has shown that the respondent has acted in bad faith. This particular concept is unique to domain name disputes and has no real parallel in conventional trademark law. Under paragraph 4(b) UDRP the following factors are considered demonstrative of bad faith:

- Circumstances indicating that the respondent has acquired the domain name primarily for the purpose of selling, renting or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to the competitor of that complainant, for valuable consideration in excess of out-of-pocket costs directly related to the domain name; or
- Registration of the domain name in order to prevent the owner of the trademark or servicemark from reflecting the mark in a corresponding domain name, provided that the respondent has engaged in a pattern of such conduct; or
- Registration of the domain name primarily for the purpose of disrupting the business of a competitor; or
- by using the domain name, the Respondent has intentionally attempted to attract, for commercial gain, Internet users to its web site or other on-line location by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the respondent's web site or location or of a product or service on the respondent's web site or location.

These factors were specified to be 'without limitation', however, leaving panelists with a large scope to hold that different forms of behaviour they disapprove of may constitute 'bad faith'.

One unresolved issue is the scope of application of the term "use" within the context of "bad faith". The term "use" promoted initial concern in the U.S. because "use" meant that the domain name had to be "used in commerce". Similarly, from an Irish perspective, the interpretation of "use" in Section 14 (4) of the Trademarks Act 1996 and the requirement of 'a misrepresentation made by a trader in the course of trade...' in a passing off action would be likely to cause a similar predicament. The hope was that the UDRP would fill this existing gap by giving trademark holders a claim against a domain name holder even if the domain name wasn't being used commercially.

The UDRP would have been unable to fill this void if the policy's language were interpreted to require actual bad faith use of the domain name in a manner consistent with the common understanding of "use". However, there need not have been such initial concern when three out of the four factors outlining 'bad faith' do not require any 'use' *per se*, combined with the fact that these factors are non-exclusive. Also, many of the early decisions under the UDRP have found 'bad faith' in the absence of any traditional use of the domain, indeed even in the absence of an active website.

For example, in the first case decided under the UDRP by WIPO, *World Wrestling Federation, Inc. v. Bosman* (worldwrestlingfoundation.com),[4] the panel resolved that an offer to sell constituted a 'use' of the domain name even if the offer was the respondent's sole use of the domain name. Thus, an offer to sell alone may constitute 'use' sufficient to merit a finding of 'bad faith'.

"Most ICANN decisions turn on whether the complainant has shown that the respondent has acted in bad faith. This particular concept is unique to domain name disputes and has no real parallel in conventional trademark law... There appears to be significant scope for a complainant to succeed on the basis of evidence of more subtle types of underhanded or dishonest conduct than those enumerated in paragraph 4 (b) of the policy as examples of bad faith."

The issue of the scope of "use" interpreted within the context of "bad faith" is still to be finally resolved. The panel in *Telestra Corporation Limited v. Nuclear Marshmallows* (telestra.org)[5] construed "use" so broadly as to determine that registration alone may be sufficient to establish bad faith, in particular circumstances, despite the lack of any other overt action. Although the panel held that bad faith registration is insufficient to succeed under the UDRP and that the complainant must also establish that the domain name has been used in bad faith, nevertheless, according to the panel:

"(T)he relevant issue is not whether the Respondent is undertaking a positive action in bad faith in relation to the domain name, but instead whether, in all the circumstances of the case, it could be said that the Respondent is acting in bad faith....the significance of the distinction is that the concept of a domain name being used in bad faith is not limited to positive action; inaction is within the concept. That is to say, it is possible, in certain circumstances, for inactivity by the Respondent to amount to the domain name being used in bad faith."

The panel concluded that the passive holding of the domain name amounted to bad faith in light of the following circumstances:

- The Complainant's trademark has a strong reputation and is widely known
- The Respondent provided no evidence of any actual or contemplated bona fide use by it of the domain name
- The respondent took active steps to conceal its true identity by operating under a name that is not a registered business name
- The Respondent actively provided and failed to correct false contact details, in breach of its registration agreement

Taking into account all of the above, it was not possible to conceive of any plausible active use of the domain name that would not be illegitimate, such as by being a passing off, an infringement of consumer protection legislation or an infringement of the complainant's rights under trade mark law.

This case is significant in that it provides a broad interpretation of the "use in bad faith" requirement of the UDRP. There appears to be significant scope for a complainant to succeed on the basis of evidence of more subtle types of underhanded or dishonest conduct than those enumerated in paragraph 4 (b) of the policy as examples of bad faith. However, it could be argued that finding bad faith because there are no plausible active uses that would be legitimate is quite different from deciding that the Respondent actually engaged in a particular illegitimate active use. The panel gives no direction on this point.

Rights and Legitimate Interests

On the other hand, a respondent is entitled under paragraph 4(c) UDRP to demonstrate by way of defence to claims of bad faith and confusing similarity that it has a right or legitimate interest in a name by showing that:

- Before any notice of the dispute, there was use of, or demonstrable preparations to use the domain name in connection with *a bona fide* offering of goods or services; or
- The individual, business, or other organisation registering the name has been commonly known by the domain name, even if there are no trademark or service rights; or
- The registrant is making a legitimate non-commercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue for commercial gain.

There are essentially two bases on which respondents can be favoured under paragraph 4 (c)(i). The first is the where the respondent is selling goods and services and the second is when the respondent is selling the domain name itself. To date, however, there has been no consistent interpretation of exactly what constitutes "demonstrable preparations". The requirements of proof can vary from evidence of capital expenditure on marketing strategies, for example, to other cases setting only a minimal threshold of a "perfunctory" preparation for generic domain names which 'comprise of no more than a single, short, common word'.7

The defence of demonstrable preparations to offer and sell goods was utilised in *Rockport Boat Line (1994) Ltd. v. Gananoque Boat Line* (Rockportboatline.com) where the Rockport Boatline lost its complaint against its passenger boat competitor, the Ganonoque Boat Line, who operated its business two-miles west of the complainant, near Rockport, Ontario.[6] The panelist held that the respondent's acquisition of the domain name was in accordance with its expansion plans which included utilising a federally owned wharf in the city of Rockport should a wharf become available. In this case, bad faith was too difficult to prove, as demonstrable preparations were quite easy to establish.

A typical example of a case decided in favour of a respondent on the basis of sales and preparations to sell goods and services is *Eauto,L.L.C v. Triple S.Auto Parts* (eutolamps.com).[8] In that case, the respondent operator of a long-standing business that sold autolamps decided to sell the same on-line. The complaint related to the registered trademark 'Eauto' and the domain name 'Eauto.com'. The panelist held that the letter 'e' preceding a product had come to be understood as an electronic, Internet-based form of the same product. Therefore, "eautolamps" is an example of an Internet-based description of a generic product and on that basis the panelist ruled in favour of the Respondent.[9] It seems from the overall case-law in this area that the generic nature of a domain stands in the respondent's favour in assessing the legitimacy of the use in question.

The second prong to the offering of goods and services provision involves the passive holding of domain names for the purpose of selling them. It seems that the passive holding for the primary purpose of selling them to an individual trademark owner may be evidence of 'bad faith'. However, the marketing of generic domain names has been deemed to be 'legitimate use' by a number of panelists.[10] In such cases, however, the marketing must occur prior to the registrant's knowledge that the trademark existed. Otherwise, it will be deemed to have been registered in bad faith. The evidentiary requirements in this area are often very tenuous, as it is quite difficult to prove bad faith registration in itself particularly if it is a generic mark.

Fair Use

The defence of "fair use" right or legitimate interest has been received apprehensively in UDRP proceedings. This may be because "free speech" is not a concept that is as willingly embraced by countries outside the U.S. where the First Amendment is so cherished. Some panelists seem to give greater weight to the 'free' element of 'free speech' and will suspend such claims where there is any attempt to achieve a commercial gain.10

One such case arose in WIPO, *Wal-Mart Stores, Inc. v. Walsucks and Walmarket Puerto Rico.*[11] The Respondent argued that his sites were "freedom of expression forums of complaint against Wal-Mart". However, the Panel rejected his contention, noting that the respondent had offered his domain names to the company for sale. The Panel found the domain names to be confusingly similar to the 'Walmart' trademark, despite the extraneous "sucks" appendage, on the basis that confusion could arise if a Web surfer were to type the company's name into an Internet search engine. It is also notable that at the time of writing, nine completed UDRP proceedings have concerned the registrants incorporation of "sucks", and all nine disputes have resulted in the transfer of the domain name.[12]

However, a land-mark decision in this area was *Bridgestone Firestone, Inc. v. Jack Myers* (bridgestone-firestone.net).[13] This decision resulted in the earlier case of *Compagnie de Saint Gobain v. Dot-com Union Corp.* being wisely rejected as a precedent.[14] In that case, a shareholders' site used inter alia for commenting and criticising company management was

"It seems that the passive holding of domain names for the primary purpose of selling them to an individual trademark owner may be evidence of 'bad faith'... However, the evidentiary requirements in this area are often very tenuous, as it is quite difficult to prove bad faith registration in itself particularly if it is a generic mark."

disallowed on the basis that its name was identical to the company. In the later case, Bridgestone-firestone.net was registered by a former employee who was in a dispute over pension payments with the corporation and, therefore, wished to use the site as a forum for criticism and commentary about the company. The decision dismissing the complaint is of some interest in that it carefully distinguishes between legitimate fair use of domain names for purposes of criticism, and illegitimate uses tainted by bad faith.[15]

It would be interesting to see the application of Irish law to a case involving 'freedom of expression'. Although Article 40 of the Irish Constitution provides that it is the right of all citizens to express freely their convictions and opinions, it may be doubted whether a case of this type would be construed so as to fall within the scope of Article 40 of the Irish Constitution.

Generic Names

Generic words generally are not protected under trademark law due to the commonness of the word and the interest in preserving the word's utility in multiple contexts. Although the word may be incorporated into a trademark with another word or phrase, the generic word itself is normally considered to be within the public domain. This principle was reiterated in *CRS Technology Corporation v. Condenet, Inc.* (concierge.com)[16] in which the Panel stated:

"Even though the trademark and the name are all but identical, the first person or entity to register the domain name should prevail in circumstances such as these where the domain name is a generic word."

The panel therefore refused to transfer the domain name even though the complainant had a registered Canadian trademark for 'Concierge'.

The above case was a reasonable and fair decision. However, administrative panels have not demonstrated consistency, and there have been quite a few controversial decisions in this area which, in the author's view, have lacked any real feasibility. Among these is the controversial case of *J. Crew International, Inc. v. Telepathy, Inc.* (crew.com)[17] in which the application of the UDRP was expanded well beyond its scope and authority to essentially transfer the name to the trademark owner. This is a phenomenon known as 'reverse domain name hijacking', a doctrine which has been coined as an option in the UDRP to be used as a defence for respondents who claim to be victims of complainants acting in bad faith.[18]

The *Crew* case was interesting as the panel split in a decision over rights to the generic word "crew" in response to a complaint by J. Crew, a well-known and leading clothes retailer. The Respondent had registered or acquired more than fifty domain names including trademarks or other generic words. This was done primarily for the purpose of selling, renting or otherwise transferring the names. The majority of the panel held:

> " (T)he registration of domain names for speculative purposes constitutes an 'abusive registration' when (1) the Respondent has no demonstrable plan to use the domain name for a *bona fide* purpose prior to registration or acquisition of the domain name; (2) the Respondent had constructive or actual notice of another's rights in a trademark corresponding to the domain name prior to registration or acquisition of the domain name;[19] (3) the Respondent engages in a pattern of conduct involving speculative registration of domain names; and (4) the domain name registration prevents the trademark holder from having a domain name that corresponds to its registered trademark."

The dissenting panelist was quick to demonstrate the inaccuracies of this test when he said:

"(T)he biased test the panel has used here automatically creates a situation, in every case, where there is only one element left to test if the Complainant has a registered trademark and the domain registered by the Respondent is similar to the Complainant's registered trademark. Since every ICANN case ....has to have these two other elements the decision obviates two thirds of the tests set up under the ICANN Policy. The Majority view boils each case down to the single question, 'Did the Respondent have a specific bona fide purpose or use in mind prior to the acquisition of the domain name?' It rejects the idea that someone might not know exactly how he or she intends to use the domain name, and makes such uncertainty bad faith registration."

The dissenting panelist also pointed out that the automatic 'constructive' notice criteria is always satisfied *per se* by the simple fact of registration under the Majority's logic. Similarly, so is the third criterion when the domain name and the registered trademark are similar or identical. He finally contended that:

> "(T)he Majority seems to assume that a trademark owner has some God-given right to use the trademark to the exclusion of others....[and warned that the Majority's decision] creates a dangerous and unauthorised situation whereby the registration and use of generic words as domains can be prevented by trademark owners wishing to own their generic trademarks in gross."

A similar case arose when Esquire Magazine sought the transfer of the *esquire*.com domain name from the Respondent who was in the business of buying and selling domain names.[20] Esquire Magazine was the registrant of several U.S trademarks and had a website called esquiremag.com. The Respondent owned numerous domain names that incorporated famous trademarks, such as porschesource.com, mazdasource.com, gmcsource.com etc.

The Majority found bad faith on the basis of the Respondent having registered the name intending to sell it to the Complainant. This was upheld despite the absence of any real evidence of an offer and despite the fact that the domain name was sold in 1997 to Mail.com, which had a bona fide business plan to use the name in vanity e-mails. In a strongly worded dissenting opinion, decrying the "insupportable" decision of the Majority, Judge Milton Mueller held that while recognising that 'Esquire Magazine' is well-known, the word 'esquire' by itself is too generic and widely used to be exclusively associated with the magazine. He then said:

> "(T)he term [esquire] has common meaning as a descriptor for lawyers, or more broadly for gentlemen. The unadorned term 'esquire' is also a registered trademark for well-known shoe care products and for a variety of other products and services. The character string 'esquire' appears in over 280 domain names in the dot com space. It follows inexorably, then, that the domain name 'esquire.com' can be used legitimately as a domain name by a large number of people and in a variety of ways, without infringing the rights of the

Complainant. The UDRP is intended to prevent trademark owners from being extorted by cybersquatters, but it is also intended to protect legitimate registrations from being threatened by overreaching trademark owners."

This dissenting opinion illustrates that quite a strong argument exists for the need for panelists to differentiate between cybersquatters and mere domain name speculators.

One commentator, N.J. Wilkof, argues that the registration of generic domain names 'has the potential to reconfigure the balance between the private and public interests with respect to generic marks by conferring market-valuable rights in words that would not be protected under the classic principles of trademark law'.[21] Wilkof denounces the emergence of the Internet domain name registration system, the current technological requirements of the Internet itself (search engines) and the present preoccupation with the elimination of 'cybersquatting', rather than with the public interest, as the threats to this equilibrium.

Indeed, it could be said that decisions such as the decision in *Esquire.com* do not help to reconfigure this balance.

Celebrity Domain Names

Not surprisingly, the UDRP procedure has come under more scrutiny by the public eye when high profile individuals seek to claim back their domain name. Many of these famous individuals do not have trademark rights to their name and claim on the basis of acquiring common law rights to their name under Paragraph 4 (c) (ii) of the UDRP. The press has suggested that the ICANN procedure is being used to create a new personality right and in the U.K and Ireland it has been argued that that this process is a radical step forward in the area of 'passing off' and 'character merchandising.'[22]

The precedent was set in the *Julia Roberts v. Russell Boyd* (juliaroberts.com) case where Ms Roberts successfully claimed back her name from an owner of fifty other domain names including many other famous names such as 'alpacino.com'.[23] While the Respondent acknowledged that he selected the name because of the well-known nature of the actress, he contested whether she had common law rights in her name. He contended that he had legitimate rights because of his registration and use of the domain name and due to his genuine interest in the actress. However, before notice of the dispute was given to the Respondent the web-site featured a picture of another woman and did not have any content relevant to Ms Roberts. Also, the domain name had been put up for auction on Ebay.

The panel had no problem deciding that a trademark was not necessary and that the name 'Julia Roberts' had sufficient secondary association with the actress to constitute common law trademark rights under U.S. trademark law. It was held that the respondent had not demonstrated sufficient legitimate interest in the name and, in addition, that his registration of other domain names of famous movie and sports stars showed a pattern of conduct indicative of cybersquatting. The auctioning of the name was considered to be additional evidence of bad faith, and accordingly the domain name was transferred.

An interesting case arose in the UK involving the well-known novelist *Jeanette Winterson*,[24] who succeeded in claiming back her name which was registered as a .com, a .org and a .net domain. The respondent registered the names of thirty other authors. He said his intention was to develop web sites devoted to the authors with reviews, biographies etc. and that it would be clear that these sites were unofficial. He admitted that he had written to about ten authors trying to sell names, but said that this was in order to raise capital to get his venture off the ground. The Respondent telephoned Jeannette Winterson and allegedly said that he registered the names for profit. He offered to return the .net and .org for cost price but not the .com.

The panel referred to the present cases in English law with regard to passing off and individual names. Reference was made to the '*One in a Million*' case where it was held that it could be passing off if members of the public would be confused when consulting the 'Whois' Register[25]. The panel did not attempt to criticise the reasoning in the cited UK authorities which have been criticised by others for their failure to recognise the realities of character merchandising.[26] Instead the panel pointed out that the real issue in an ICANN dispute was not whether passing off had occurred, but rather whether or not the novelist owned unregistered trademarks in her name in her field of activity.

The issue of generics arose once more in this area when respondents made arguments as to the ordinary dictionary meanings that could be ascribed to the disputed domain names *Madonna*.com and Sting.com. However, merely attributing ordinary meaning to these domain names was not enough - bad faith registration and 'use' had also to be proven. In Madonna.com, registering the domain name in Tunisia to avoid US laws was deemed bad faith registration.[27] The Respondent argued that his offer to donate the domain name to the 'Madonna Hospital' in Nebraska, on condition that it would not transfer it to the complainant, demonstrated legitimate non-commercial use. This argument was also rejected as weak. Accordingly, the domain name was transferred to Madonna.

In contrast, Sting was not able to prove illegitimate use of the disputed domain name Sting.com.[28] It was undisputed that the domain name was identical to the complainant's name. However, the respondent evidently had been using the nickname 'Sting' on the Internet for the previous eight years for the purposes of anonymity. The fact that the Respondent offered to sell the domain name to the complainant upon the complainant's solicitation was not proof that the domain name was acquired solely for this purpose. It was notable that the panel was inclined to the view that the complainant's name 'Sting' was not a trademark or service mark within the UDRP but found it unnecessary to make a formal decision on this issue, as no bad faith use was found.[29]

The reasoning in these cases was also applied in a non-entertainment context in the case of 'philipberber.com' who is a well known Irish businessman.[30] He succeeded in the retrieval of his unregistered name from a registrant who had registered domain names containing the names of other well-known Irish businessmen. The site, in the guise of a fan site, contained a press report and a photograph of the complainant. The fact that his photograph etc. was on the site favoured the 'bad faith' contention. However, there is as yet no satisfactory case on fan sites. It is not at all clear whether the owner of a *bona fide* fan-site with no bad faith motives could succeed in retaining the domain name.

"The 'One in a Million' test is simply based on the proposition that "A name which will, by reason of its similarity to another, inherently lead to passing off is an instrument of fraud." This test has been commended by many critics and, while some believe that passing off may have been expanded beyond its intended scope, most accept that it as the only effective way to prevent cybersquatting."

Ireland and WIPO

Recently, two Irish cases arose in WIPO proceedings - *Esat Digifone Ltd. v. Michael Fitzgerald Trading as TELCO-Resource* (digifone.net)[31] and *Esat Digifone Ltd. v. Colin Hayes* (digifonewap.com).[32] In the latter case, the respondent, in an attempt to defend the complainant's contention of lack of legitimate interest in the domain name, argued that he intended to establish an e-commerce venture over the Internet aimed at the U.S. market. However, the complainant successfully argued that the distinct likelihood that this venture would be in the same field of activity as the complainant's business would mean that the respondent's business would inevitably be accessible from Ireland. Unfortunately, the respondent in this case defaulted on the claim and as such his arguments in response to the 'Cease and Desist' letters sent by the complainant were not explored or validated in full. However, the Panel made some interesting applications of Irish law to the case. On the issue of " bad faith" registration, the complainant pointed out that there are no reported decisions of Irish superior courts but submitted that it was likely that an Irish Court would follow the principles laid down by the English Court of Appeal in '*British Telecom & Others v. One in a Million*' in determining a dispute on the facts of this case.'[33] The Panel discussed the '*One in a Million*' case within the context of the complainant's submission but declied to refer to it in its decision. Instead, it applied only the criteria of the UDRP to the facts as the basis for its decision to transfer the domain name to the complainant.

However, naturally, the '*One in a Million*' test is commonly applied to British WIPO cases. As expressed by Aldous J, the test is simply based on the proposition that "A name which will, by reason of its similarity to another, inherently lead to passing off is an instrument of fraud."[34] This test has been commended by many critics and, while some believe that passing off may have been expanded beyond its intended scope, most accept that it as the only effective way to prevent cybersquatting. If intending to apply this case, Irish Courts should however also be aware of its limitations. There was in fact no evidence that the defendant intended to make use of the registered domain names in a way that could constitute passing off.[35] For example, if 'Marks & Spencer' had not agreed to purchase the domain name it was highly unlikely any other company would procure it. The Court found that there was an implicit threat to sell the domain name to another company who would use it to deceive the public but a company such as this would surely be hard to find. Unfortunately, the judgment also failed to comment on the applicability of passing off to a cyber-squatter who does not threaten to sell the domain name.

The only case which has been heard by the High Court in Ireland involving domain names is *Local Ireland Ltd and Nua Ltd v. Local Ireland-Online Ltd. and Con Daly Trading as Daly Financial*.[36] However, regrettably, this was only a motion for an application for an interlocutory injunction against the use by the defendants of the business names 'Locally Irish' and 'Local Ireland-Online' and the domain names 'localireland-online.com' and 'locallyirish.com', and not an actual trial for passing-off or trademark infringement. Therefore, the merits of the case were not fully explored. However, in granting the injunction Mr Justice Herbert pointed out that the domain names and business names in question would result in a very 'high probability of deception amounting to a misrepresentation' taking into account the similarity of the names, get-up, logo and services offered by the site.[37] This may indicate an inclination for Irish courts to favour trademark law and passing off as a basis for the resolution of domain disputes in the future.

It is also notable that in *Esat Digifone v. Colin Hayes* (Digifonewap.com), concerning the complainant's trademark rights in the mark 'Digifone', the Panel applied Irish case law to the question of similarity of the trademarks.[38] In particular, the Panely applied the test in *Coca-Cola v. F. Cade & Sons Ltd*, as follows:

"You must take the two words. You must judge them, both by their look and by their sound. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trademarks is used in a normal way as a trademark for goods of the respective owners of the marks."[39]

Notwithstanding this reliance, the Irish Trademarks Act 1996 was consciously avoided in this decision.[40] This leaves the law in this area more obscure in nature than the requisite three degrees of similarity in the Act. This was probably the intention of the Panel who under WIPO policy are reluctant to adopt the role of an international judicial body, and thus tend to implement the most minimalist of approaches possible.

Conclusion

In this article I have reviewed the various case law as guided by the UDRP since its inception in January 2000. As appears from this analysis, it may be concluded that the UDRP policy and its application by the arbitration forums constitutes, overall, a very effective mechanism for resolving domain name disputes. Certain questionable decisions, such as those outlined above in the area of generic names, have been made as a result of incorrect interpretations of the policy rather than a weak formulation of the policy itself. Some critics feel that this policy promotes a 'David versus Goliath' scenario in which powerful multinationals and celebrities unfairly challenge ordinary individuals. However, the teetering scales of justice seem to be in the process of stabilising as the case law develops. This is due to a greater emphasis on rights, legitimate interests and fair use as well as to recognition of the concept of 'reverse domain name hijacking'. It will be interesting to see how domain name disputes will be dealt with in Ireland. It seems that we may follow our British counterparts in applying passing off and trademark law as a means of resolution. However, it appears that arbitration forums such as WIPO are a more expeditious and a less expensive option than the slow process of court litigation. ●

* Bachelor of Business and Legal Studies, UCD

1. CPR established May 2000
2. *ABF Freight System Inc. v. American Legal* (timekeeper.com) WIPO D2000-0185. The Panel found that registration alone was sufficient to find bad faith.
3. WIPO D2000-0996
4. WIPO D99-0001
5. WIPO D2000-0003
7. *Shirmax Retail Ltd. v. CES Marketing Group Inc.* (thyme.com) AF-0104
6. FA 0094653 (Decision 30th May,2000)
8. WIPO D2000-0047
9. See *Continental Airlines Inc. v. United airlines Inc.*, US Patent and Trademark Office: Trial and Appeal Brd., 29 Dec. 1999 ("e-Ticket" held to be un-registerable due to its generic nature as booking within the airline industry to the public--element following the 'e' prefix must be distinctive and not so well known as to overcome this).
10. See *Planned Parenthood v. Bucci*, 1997 WL 133313
11. walmartcanadasucks.com,wal-martcanadasucks.com, walmartsucks.com,walmartpuertorico.com and walmartpeurtoricosucks.com (WIPO D2000-0477)
12. See WIPO D2000-0477, D2000-0583, D2000-0584, D2000-0636, D2000-0681, D2000-0662 and D2000-0996.
13. WIPO D2000-0190
14. Saint-gobain.net, D2000-0020.
15. See also Skipkendall.com, D2000-0868 and Csa-canada.com, D2000-0071.
16. NAF, Case No. FA0093547 (Commenced Feb., 2000)
17. WIPO D2000-0054
18. RDNH claim upheld in K2R.com, WIPO D2000-0622 and Smartdesign.com, WIPO D2000-0993. However, panelists are extremely reluctant to make this finding.
19. Both domiciled in U.S, therefore the Panel determined that constructive notice provisions of US trademark would apply pursuant to 17 U.S.C 1072.
20. *Hearst Communications Inc. vs. David Spencer and Mail.com*, NAF-93763. See also *Sud-Chemie AG v. tonsil.com*, WIPO D2000-0376, 'tonsil' trademarked by German company and a country-code version of same. Took 4 (b)(i) to new heights by holding that failure to respond to offer greater than out of pocket costs ($100) proved that a higher price was demanded ('bad faith').
21. Wilkof, *Trade Marks and the Public Domain: Generic Marks and Generic Domain Names* (2000) E.I.P.R 571
22. *Osborne, Don't take my Name in Vain! ICANN Dispute Resolution Policy and Names of Individuals* (2000) 5 Communications Law 128
23. WIPO D2000-0210
24. jeanettewinterson.com/.org/.net; WIPO D2000-0235
25. *British Telecom & Others v. One in a Million* (1998) 4 All ER 476
26. Uncle Mac, Kojak, Wombles and Abba cases. For discussion see n.23
27. *Madonna Ciccone, p/k/a Madonna v. Don Parisi and Madonna.com*; WIPO D 2000-0847
28. *Gordon Sumner p/k/a Sting v. Michael Urvan*; WIPO D2000-0596
29. See also jimihendrix.com, WIPO D2000-0634 which was a fan site but commercial use was found as basis for bad faith when the owner offered to sell it for $1 million and had a pattern of registering celebrity names.
30. *Philip Berber v. Karl Flanagan and KP Enterprises*, WIPO D2000-0661
31. WIPO D2000-0602
32. WIPO D2000-0600
33. (1998) 4 All ER 476
34. n.33, p.493
35. Meyer-Rochow, *The Application of Passing Off as a Remedy Against Domain Name Piracy* (1998) 20 (11) E.I.P.R. 408
36. Unreported, High Court (Herbert J), 2 October 2000
37. Refers to *Reckitt and Coleman Products v. Borden* (1990) 1 AER 873 at 880
38. n.33 above
39. (1957) IR 196
40. The rules of ICANN relating to the choice of law to be applied are quite vague, leaving panelists to apply the law they feel is most appropriate. However, most choose either the place of the registrar or the place of the registrant as the applicable law.

NOTIFICATION OF CHANGES TO DISTRICT COURT SITTINGS IN CORK CITY AND COUNTY

The Court Service wishes to inform practitioners that with effect from the **1st of September 2001,** the following changes have been made to District Court Areas and District Court sittings in Cork City and County.

(1) Amalgamations of District Court Areas.

The District Court Areas of **Blarney, Carrigaline and the old District Court Area of Riverstown,** have been amalgamated with the District Court Area of **Cork City.** From September, 2001 all district court sittings in the enlarged district court area of Cork City will take place in the District Courts situated in Angelesa Street, Cork.

(2) Revised Schedule of District Court Sittings in Cork County.

As result of the above changes, court sittings and days in Cork County (District No.20) have also changed and the new schedule of court sittings is set out below.

NEW DISTRICT COURT SITTINGS IN CORK COUNTY
District Number 20
With Effect from 1st of September, 2001
All courts will commence at 10.30a.m.

Day, of week on which court will sit	Tuesday	Wednesday	Thursday	Friday
1st in each month	Mallow	Kanturk	Midleton	Mitchelstown
2nd in each month	Mallow	Cobh	Midleton	Fermoy
3rd in each month	Mallow	Cobh	Midleton	Mitchelstown
4th in each month	Mallow	Cobh	Fermoy	Fermoy

NOTIFICATION OF CHANGES TO DISTRICT COURT SITTINGS IN COUNTIES LONGFORD, OFFALY AND WESTMEATH (DISTRICT NUMBER 9)

The Court Services wishes to inform practitioners that with effect from the **1st of September 2001,** the following changes have been made to District Court Areas and District Court sittings in counties Longford, Offaly and Westmeath.

(1) Amalgamations of District Court Areas.

(a) The District Court Area of **Edgeworthstown** has been amalgamated with the District Court Area of **Longford.** From September 2001, all District Court sittings in the enlarged District Court Area of Longford will take place in **Longford District Court.**

(b) The District Court Areas of **Kilbeggan, Daingean** have been amalgamated with the District Court Area of **Tullamore.** From September 2001, all District Court sittings in the enlarged District Court Area of Tullamore will take place in **Tullamore District Court.**

(c) The District Court Area of **Delvin** has been amalgamated with the District Court Area of **Castlepollard.** From September 2001, all District Court sittings in the enlarged District Court Area of Castlepollard will take place in **Castlepollard District Court.**

(d) The District Court Area of **Ballinacargy** has been amalgamated with the District Court Area of **Mullingar.** From September 2001, all District Court sittings in the enlarged District Court Area of Mullingar will take place in **Mullingar District Court.**

(2) Revised Schedule of District Court Sittings from 1st September, 2001.

As result of the above changes, court sitting days have also changed and the new schedule of courts sittings is set out below.

NEW DISTRICT COURT SITTINGS IN LONGFORD, OFFALY AND WESTMEATH
District Number 9
With Effect from 1st of September, 2001
All courts will commence at 10.30a.m.

Day, of week on which court will sit	Tuesday	Wednesday	Thursday	Friday
1st in each month	Longford	Tullamore	Mullingar	Edenderry
2nd in each month	Longford	Tullamore Family Law Day	Mullingar	Killucan
3rd in each month	Longford	Tullamore	Mullingar	Granard
4th in each month	Longford	Tullamore	Mullingar Family Law Day	Castlepollard

Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 6, Issue 9

A directory of legislation, articles and written judgments received in the Law Library from the 11th June 2001 to the 16th July 2001.
Judgment Information compiled by the Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Senior Judicial Researcher: Shane Dwyer, LL.B (Ling. Germ), LL.M
Judicial Researchers: Aine Clancy, LL.B (Ling. Germ), Alison de Bruir, LL.B/Maria Teresa Kelly-Oroz, B.C.L., LL.M/Anthony Moore, LL.B (Ling. Germ) LL.M (Cantab.), Joelle O'Loughlin, B.C.L, LL.M (N.U.I) Jason Stewart, LL.B, B.C.L (Oxon.)/Rory White, BCL (N.U.I), B.C.L. (Oxon.)

Administrative Law

Curtis v. Judge Kenny
High Court: **Kelly J.**
09/03/2001

Administrative; judicial review; contempt of court; applicant imprisoned by respondent for alleged and unspecified contempt of court; applicant seeking, *inter alia, certiorari* of order committing him to prison and costs; whether applicant was in contempt of court; whether there was any evidence to support or legal basis for applicant's committal to prison; whether orders of respondent finding applicant in contempt of court and committing him to prison had been *ultra vires* and in breach of natural and constitutional justice; whether respondent's conduct of the Circuit Court proceedings disclosed such impropriety as to justify an order of costs being made against him; whether Court entitled to infer from the evidence that respondent was guilty of such impropriety as to justify an order of costs being made against him, even though leave had not been granted in this regard.
Held: Certiorari granted; costs awarded against first and second named notice parties; Court not entitled to infer from evidence that respondent had been guilty of such wrongdoing as to justify order of costs being made against him, in the absence of leave in this regard; respondent, on evidence adduced, not in fact guilty of wrongdoing of type that would justify award of costs against him.

Rooney v. Minister for Agriculture
Supreme Court: **Keane C.J.**, Denham J., **Murphy J.**, Murray J., McGuinness J.
23/10/2000

Administrative; bias; proceedings initiated seeking compensation for the slaughter of animals; proceedings had been initiated against a number of defendants; plaintiff's claim was refused; on appeal the Supreme Court upheld the decision; plaintiff claims that a Supreme Court judge had acted on behalf of one of the defendants before being elevated to the bench; judge had given advice on the right to compensation; whether there was a reasonable apprehension of bias by a reasonable person that the existence of some particular relationship, factor, condition or circumstance would prevent a completely fair and independent hearing.
Held: Appeal dismissed; matter on which the judge advised was not material to the decision of the court; no cogent and rational link.

Statutory Instruments

Decommissioning act, 1997 (decommissioning) (amendment) regulations, 2001
SI 211/2001

Referendum (ballot paper) order, 2001
SI 203/2001

Referendum (ballot paper) (no. 3) order, 2001
SI 204/2001

Referendum (ballot paper) (no. 4) order, 2001
SI 205/2001

Referendum (special difficulty) order, 2001
SI 206/2001

Referendum commission (establishment) order, 2001
SI 155/2001

Referendum commission (establishment) (no. 2) order, 2001
SI 156/2001

Referendum commission (establishment) (no. 3) order, 2001
SI 157/2001

Referendum commission (establishment) (no. 4) order, 2001
SI 158/2001

Agency

Library Acquisition

Commercial agency and distribution agreements law and practice in the member states of the European Union
Bogaert, Geert
Lohmann, Ulrich
3rd edition
The Hague Kluwer Law International 2000
W118

Agriculture

Statutory Instruments

Diseases of animals act, 1966 (foot-and-mouth disease)(export and import of horses) order, 2001
SI 105/2001

Diseases of animals act, 1966 (foot-and-mouth)(import restrictions)(no. 2)(amendment) order, 2001
SI 107/2001

Diseases of animals act, 1966 (restriction on movement of certain animals) order, 2001
SI 121/2001

Diseases of animals act, 1966 (section 29A(4)) order, 2001
SI 80/2001

Diseases of animals act, 1966 (prohibition in respect of certain imported horses, greyhounds, machinery, vehicles and equipment) order, 2001
SI 81/2001

Diseases of animals act, 1966 (foot and mouth disease) (restriction on artificial insemination)
SI 144/2001

Foot-and mouth-disease (restriction of import of horses and greyhounds) (no.2) order, 2001
SI 85/2001

Foot and mouth (restriction on movement)(no. 3)(amendment) order, 2001
SI 90/2001

Foot and mouth (restriction on movement)(no. 4)(amendment) order, 2001
SI 91/2001

Foot and mouth disease (restriction of import of vehicles, machinery and other equipment)(amendment) (no. 3) order, 2001
SI 106/2001

Foot and mouth disease (restriction of import of vehicles, machinery and other equipment) (amendment) (no. 2) order, 2001
SI 84/2001

Foot-and-mouth disease (hay, straw and peat moss litter) (amendment) order, 2001
SI 86/2001

Foot-and-mouth-disease (restriction of import of horses and greyhounds) (no. 2) (amendment) order, 2001
SI 109/2001

Aliens

Camara v. Minister for Justice, Equality and Law Reform
High Court: **Kelly J.**
26/07/2000

Refugee status; judicial review; interviewing officer recommended that application for refugee status be refused; recommendation accepted by Minister; applicant appealed to Refugee Appeals Authority (the Authority) but the Authority recommended that his appeal should not be allowed; Minister wrote to applicant informing him that his appeal for refugee status had been refused; applicant granted leave to seek judicial review of the refusal of the Minister and the recommendation of the Authority; whether decision of Authority was unreasonable and/or irrational; whether the Authority acted *ultra vires* by misinterpreting and misapplying the definition of refugee; "curial deference" for decisions of specialist administrative bodies; s.2, Refugee Act, 1996; Geneva Convention, 1951.
Held: Application dismissed; material before Authority upon which it could come to the conclusion that the applicant had not made out a sufficient case to warrant him being granted refugee status.

Statutory Instrument

Aliens (visas) (no.2) order, 2001
SI 248/2001

Animals

Statutory Instruments

Diseases of animals act, 1966 (foot-and-mouth disease)(export and import of horses) order, 2001
SI 105/2001

Diseases of animals act, 1966 (foot-and-mouth)(import restrictions)(no. 2)(amendment) order, 2001
SI 107/2001

Diseases of animals act, 1966 (restriction on movement of certain animals) order, 2001
SI 121/2001

Diseases of animals act, 1966 (section 29A(4)) order, 2001
SI 80/2001

Diseases of animals act, 1966 (prohibition in respect of certain imported horses, greyhounds, machinery, vehicles and equipment) order, 2001
SI 81/2001

Diseases of animals act, 1966 (foot and mouth disease) (restriction on artificial insemination)
SI 144/2001

Foot-and mouth-disease (restriction of import of horses and greyhounds) (no.2) order, 2001
SI 85/2001

Foot and mouth (restriction on movement)(no. 3)(amendment) order, 2001
SI 90/2001

Foot and mouth (restriction on movement)(no. 4)(amendment) order, 2001
SI 91/2001

Foot and mouth disease (restriction of import of vehicles, machinery and other equipment)(amendment) (no. 3) order, 2001
SI 106/2001

Foot and mouth disease (restriction of import of vehicles, machinery and other equipment) (amendment) (no. 2) order, 2001
SI 84/2001

Foot-and-mouth disease (hay, straw and peat moss litter) (amendment) order, 2001
SI 86/2001

Foot-and-mouth-disease (restriction of import of horses and greyhounds) (no. 2) (amendment) order, 2001
SI 109/2001

Arbitration

Library Acquisition

Fouchard Gaillard Goldman on international arbitration
Gaillard, Emmanuel
Savage, John
The Hague Kluwer Law International 1999
C1250

Bankruptcy

Library Acquisition

Bankruptcy and debtor-creditor law: cases and materials
Eisenberg, Theodore
2nd edition
Westbury The Foundation Press, Inc. 1988
N310.U48

Corporate insolvency law and practice
Bailey, Edward
Groves, Hugo
Smith, Cormac
2nd edition
London Butterworths 2001
N310

Commercial Law

Library Acquisition

Uniform commercial code
White, James J
Summers, Robert S
5th edition
St. Paul, Minn. West Group 2000
N250.U48

Company Law

Bula Ltd. v. Crowley
High Court: **Carroll J.**
15/12/2000

Company; proceedings initiated against receiver for breach of duty; motion issued by the receiver claiming that the proceedings should be struck out as not disclosing any reasonable cause of action and/or being frivolous or vexations; proceedings arise out of long series of litigation between the parties; judgment in the main action was given in 1986 and the Supreme Court gave judgment on appeal in 1999; in the interim period a second action against the receiver and banks was commenced and heard in 1997; plaintiffs conceded that the claims made in the bank action could not succeed unless Bula was successful in its appeal to the Supreme Court; an application was therefore made to adjourn the action until the Supreme Court gave its ruling; adjournment was granted and the plaintiffs gave an undertaking that if the appeal was dismissed without overturning any material findings of fact the plaintiffs' primary claims in the bank action should stand dismissed with costs and that they will mount no further proceedings against the defendants for any alleged wrongdoing of which they were presently aware or ought to have been aware; receiver sought to sell certain of plaintiffs' assets to discharge its debt against some of the creditors; plaintiffs claimed that this debt had already been discharged; whether the plaintiffs were aware of the wrongdoing alleged in June 1997 when the undertaking was given; whether the application by the receiver to uphold the undertaking should be enforced.
Held: Breach of undertaking; permanent stay placed on the action.

WMG (Toughening) Ltd., In re
High Court: **Murphy J.**
06/04/2001
Company law; winding-up petition; petitioner claiming he is owed sum of money from company; petitioner claiming company is insolvent and unable to pay its debts; company instituted proceedings against, *inter alia*, the

petitioner; petitioner is chairman of another company, one of whose subsidiaries had been sole customer of company; company contending that existence of *bona fide* dispute in respect of amount to be collected renders it improper to allow winding-up; shareholder in company had sold controlling interest in company to petitioner on certain date; letter of that date from managing director and petitioner to controlling shareholder of company in which they undertook to establish a sinking fund in company to ensure redemption of certain investors in company and to leave existing financial parameters of company in place; company alleging breach thereof; whether statutory letter of demand pursuant to s.214, Companies Act, 1963 was delivered to the company's registered office by leaving it at the registered office within the meaning of section; whether letter signed by managing director binding on company; whether undertakings therein adhered to; whether court should endeavour to give effect to intention of parties at time letter was written; whether company had grounds of substance to dispute its liability; whether petition was being presented for the benefit of all the members and creditors.
Held: Petition dismissed.

Competition

Library Acquisition

Butterworths competition law handbook
Lindrup, Garth
7th edition
London Butterworths 2001
N266

Constitutional Law

Library Acquisition

American constitutional law
Tribe, Laurence H
3rd edition
New York Foundation Press 2000
M31.U48

Statutory Instruments

Referendum (ballot paper) order, 2001
SI 203/2001
Referendum (ballot paper) (no. 3) order, 2001
SI 204/2001

Referendum (ballot paper) (no. 4) order, 2001
SI 205/2001

Referendum (special difficulty) order, 2001
SI 206/2001

Contract

Whelan v. Kavanagh
High Court: **Herbert J.**
29/01/2001

Contract; specific performance; defendant vendor had not completed sale of house; plaintiff at all material times willing to pay balance of purchase price; vendor pleaded illegality as defence to claim for specific performance; claimed purchase price in original endorsement of claim fraudulent; claimed that prescribed drug had affected his judgment in colluding in fraudulent contract; whether purchase price set out in memorandum of agreement correct.
Held: Onus of proof not discharged by defendant; order allowing defendant to amend defence confirmed; damages and costs awarded in favour of plaintiff.

Library Acquisition

Law Reform Commission
Report on the statutes of limitations: claims in contract and tort in respect of latent damage (other than personal injury)
Dublin The Law Reform Commission 2001
N355.C5

Statutory Instrument

European communities (protection of consumers in respect of contracts made by means of distance communication) regulations, 2001
SI 207/2001

Copyright, Patents & Designs

Library Acquisition

European patent system: the law and practice of the European patent convention
Paterson, Gerald
2nd edition
London Sweet & Maxwell 2001
W142.1

Coroner

A.G. v. Lee
Supreme Court: **Keane C.J.**, Murray J., McGuinness J., Hardiman J., Geoghegan J.
23/10/2000

Coroner; hearing in Coroner's Court; witness summons issued; failure by witness to attend; sanction contained within the legislation to compel witness attendance clearly inadequate; proceedings instituted by plaintiff seeking interlocutory relief to direct the witness to attend; whether there is a general jurisdiction of the High Court to enforce the law on application from the Attorney General where it just and convenient to do so; whether exceptional circumstances exist to exercise this function.
Held: Appeal allowed; criminal sanction provided not appropriate method of enforcing the law; Attorney General as guardian of the rights of the public has jurisdiction to bring such action; not exceptional case for court to exercise its residual jurisdiction to secure compliance with the law.

Costs

Statutory Instruments

Circuit court (fees) order, 2001
SI 252/2001

District court (fees) order, 2001
SI 253/2001

Supreme court and high court (fees) order, 2001
SI 251/2001

Criminal Law

D.P.P. v. Crimmins
High Court: _ **Caoimh J.**
08/06/2000

Criminal; consultative case stated; formal identification; summary trial in District Court; evidence given by injured party and other witness that accused committed the offence but there was no formal identification of accused; whether there must be physical or formal identification of the accused in court.
Held: Before being entitled to enter a conviction against the accused person for any alleged criminal offence, the District Court, hearing the accusation must be satisfied that there is evidence identifying the accused as the perpetrator but such evidence need not necessarily consist of a physical identification in court.

People (D.P.P.) v. McDonagh
Court of Criminal Appeal: Barron J., **Laffoy J.**, Quirke J.
22/05/2000

Criminal; fresh evidence; applicant convicted of murder in Central Criminal Court; during hearing of application for leave to appeal against conviction applicant sought leave to adduce new and additional affidavit evidence at hearing of appeal in order to prove his innocence; whether availability of evidence contained in certain affidavits which tended to lend independent credibility to applicant's alibi defence constituted a special circumstance which justified the admission of the evidence contained in those affidavits alone or in conjunction with the other affidavits.
Held: Availability of evidence did not constitute a special circumstance.

People (D.P.P.) v. Davis
Court of Criminal Appeal: **Hardiman J.**, O'Higgins J., Kearns J.
23/10/2000

Criminal; appeal against conviction; appellant claimed that there had been insufficient evidence that the death of the deceased was caused by his actions, that the defence of provocation had not been properly put to the jury and that the jury should have been discharged at the request of the defence after a number of photographs showing him heavily

chained were published in the newspapers; whether jury's finding of guilt was supported by the evidence; whether repeated publication of photographs of the appellant in restraints prejudiced the defence; whether defence of provocation properly left to the jury.
Held: Appeal dismissed.

People (DPP). v. Higginbotham
Court of Criminal Appeal: **Keane C.J.,** Kelly J., O'Higgins J.
17/11/2000

Criminal; practice and procedure; applicant had been convicted on a majority verdict of dangerous driving causing death; applicant had sought to appeal against refusal of leave to appeal; Court agreed to treat application as hearing of appeal; whether failure to comply with statutory requirement whereby jury foreman is obliged to state in open court whether guilty verdict is unanimous or not and, in the latter instance, the number of jurors who agreed thereto, renders verdict unsafe; whether, on the evidence before it, a conclusion by the jury that the prosecution had established beyond any reasonable doubt that the defendant's van was being driven at time of accident in a manner which, in all the circumstances then prevailing, was dangerous to the public could be regarded as a safe or satisfactory verdict; s.25(2), Criminal Justice Act, 1984.
Held: Appeal allowed; order granted quashing conviction without ordering a retrial.

D.P.P. v. Edgeworth
Supreme Court: Keane C.J., Denham J., Murphy J., Murray J., **Hardiman J.**
29/03/2001

Criminal; validity of search warrant; whether search warrant issued by Peace Commissioner, under which evidence had been obtained in furtherance of prosecution of defendant, invalidated by failure to specify that such issuing officer had held this position for County of Dublin; whether such omission is a breach of any condition laid down by law for issue of such warrants; whether warrant invalidated by fact that it had been entitled "The District Court"; whether such misdescription had breached any condition or criterion imposed by legislature or had been simply an error; s.26, Misuse of Drugs Act, 1977; Art. 40.5 of the Constitution.
Held: Neither the omission nor the misdescription invalidated warrant.

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Butterworths police law
English, Jack
Card, Richard
7th edition
London Butterworths 2001
M615

Civil liability for sexual abuse and violence in Canada
Grace, Elizabeth K P
Vella, Susan M
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M544.C16

Criminal Law
Boyce and Perkins' criminal law
Perkins, Rollin M
Boyce, Ronald N
3rd edition
Mineola The Foundation Press, Inc. 1982
M500.U48

Expert evidence and criminal justice
Redmayne, Mike
Oxford Oxford University Press 2001
M604.9

Prison law
Livingstone, Stephen
Owen, Tim
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Oxford Oxford Univeristy Press 1999
M650

Statutory Instrument

Criminal Justice (Legal Aid) (Amendment Act) Regulations, 2001
SI 124/2001

Criminal justice act, 1999 (part III) (commencement) order, 2001
SI 193/2001

District court (criminal justice) rules, 2001
SI 194/2001

Damages

O'Brien v. Mirror Group Newspaper Ltd.
Supreme Court: **Keane C.J., Denham J.,** Murphy J., **Geoghegan J.***, O'Higgins J. (*dissenting)
25/10/2000

Damages; libel; newspaper article published by the defendants; jury found article libelous and assessed damages at ú250,000; appeal seeking to set aside damages as excessive; whether court could depart from its earlier decision; whether guidelines should be given to juries when assessing damages for libel; whether damages were excessive.
Held: Appeal allowed; award of damages excessive and set aside; new trial ordered on the issue of damages only.

Moffitt v. Bank of Ireland
High Court: **Finnegan J.**
17/11/2000

Damages; plaintiffs seek damages for conversion; plaintiffs had been indebted to defendant; plaintiffs' property had been destroyed by fire in 1983; defendant received cheque from insurers payable to first-named plaintiff and defendant jointly; defendant lodged cheque to account of first-named plaintiff in reduction of his liabilities without cheque being endorsed by latter; first-named plaintiff made no protest at the time; second-named plaintiff owner of greater part of contents of house; cheque payable to first-named plaintiff in trust for her, the policy having been effected by first-named plaintiff to that effect; defendant contends that claim is statute-barred, as proceedings had been issued more than fourteen years after receipt of notification of defendant's conduct with regard to cheque by first-named plaintiff; whether plaintiffs had established any basis for plea that action was based on fraud, that right of action had been fraudulently concealed or that action was for relief from the consequences of mistake; whether defendant could reasonably have been expected to avert to the possibility that second-named plaintiff might have an interest in proceeds of insurance settlement; whether a claim for knowing assistance of first-named plaintiff's breach of trust and knowing receipt of second-named plaintiff's share of cheque in breach of trust could lie; whether Family Home Protection Act, 1976, applied to proceeds of a fire insurance policy; whether plaintiffs' rights under Article 40.3.1 & 2 of the Constitution had been infringed; ss.71 & 72, Statute of Limitations, 1957.
Held: Claims dismissed.

Education

Statutory Instrument

Education act, 1998 (commencement) (no. 2) order, 1999
SI 470/1999

Employment

Carr v. Minister for Education and Science
Supreme Court: Keane C.J., McGuinness J., Hardiman J., **Geoghegan J.**, Fennelly J.
23/11/2000

Employment; judicial review; applicant is secondary school principal; attempted termination of applicant's employment by respondent; applicant refused to accept respondent's correspondence in this regard; respondent informed applicant in writing that refusal to enter into discussion constituted misconduct; whether respondent entitled to suspend payment of applicant's salary pursuant to s.7, Vocational Education (Amendment) Act, 1944, where no enquiry being held into breach of discipline; whether discretion to be exercised against making orders sought; whether term should be implied into applicant's employment contract requiring reasonable openness to negotiation.
Held: Appeal dismissed.

Carey v. Penn Racquet Sports Ltd.
High Court: **Carroll J.**
24/01/2001

Employment; force majeure leave; plaintiff had not attended work owing to sickness of her child and had subsequently applied for paid leave; such leave was refused by employer on basis that child's ailment was minor in nature; this decision was upheld by Employment Appeals Tribunal; whether in determining whether plaintiff's presence with her child was

indispensable, so as to avail her of entitlement to paid leave, matter should have been looked at from plaintiff's point of view at the time the decision was made not to go to work; s.13, Parental Leave Act, 1998.
Held: Appeal allowed.

Coonan v. Attorney General
High Court: **Carroll J.**
31/01/2001

Employment; renewal of contracts for State Solicitors; customary to grant extensions of one year period year by year from age 65; policy decision had been made that extensions to contracts of State Solicitors after the age of 65 would not be granted henceforth; plaintiff had been refused grant of an extension pursuant to policy decision; plaintiff seeks equitable remedy on foot of legitimate expectation that contract would be renewed; whether any notice had been given of new policy; whether sufficient to grant very short extensions in exceptional cases until new policy became generally known; whether there was a legitimate expectation that contract would be renewed.
Held: Damages awarded; conscious decision not to publicize new policy; extra months given as conciliatory gesture wholly inadequate.

Rooney v. Kilkenny
High Court: **Kinlen J.**
09/03/2001

Employment; injunctions; contract; plaintiff had taken certified sick leave and seeks an injunction requiring the defendants, her employers, to maintain her sick pay pending trial of action in which she alleges conduct of first named defendant resulted in a severe stress reaction on her part; defendants seek to terminate her employment contract; whether plaintiff entitled to sick leave; whether there is a fair issue to be tried between parties; whether damages would be an adequate remedy; whether balance of convenience favours granting of injunctive relief sought.
Held: Injunction granted; sick pay and pension installments to be maintained by defendants; plaintiff obliged to furnish defendants with evidence of her unfitness to work on weekly basis and to allow herself be examined by medical practitioner nominated by defendants.

Library Acquisitions

European labour law
Blanpain, Roger
7th edition
The Hague Kluwer Law International 2000
W131.5

Maternity and parental rights: a guide to parents' legal rights at work
Palmer, Camilla
2nd edition
London Legal Action Group 2001
N193.25

Statutory Instruments

Employment regulation order (hairdressing joint labour committee), 2001
SI 96/2001

Safety, health and welfare at work (confined spaces) regulations, 2001
SI 218/2001

Safety, health and welfare at work (general application) (amendment) regulations, 2001
SI 188/2001

Environmental Law

Library Acquisition

Environmental law in property transactions
Waite, Andrew
Jewell, Tim
2nd edition
London Butterworths 2000
N94

European Law

Whelan Group (Ennis) Ltd. v. Clare County Council
High Court: **Kelly J.**
09/03/2001

European communities; award of public contracts; equality of treatment; defendant had adopted a restrictive procedure for award of road construction project, which involved making the invitation to tender subject to a qualification questionnaire; questionnaire had required all interested contractors to have, *inter alia*, completed at least one individual project to the value of £10 million between 1995 and 1999; applicant seeks an order from Court removing this requirement; whether requirement complies with principle of equality underlying Council Directive dealing with award of such contracts; whether requirement objective, rational and capable of objective assessment and application; whether requirement relates to economic and technical conditions necessary to ascertain capabilities of potential tenderers; whether requirement proportionate; whether Council Directive permits the imposition of legitimate conditions precedent to the consideration of tenders for public contracts; Council Directive 93/37/EEC.
Held: Application refused.

Library Acquisition

European labour law
Blanpain, Roger
7th edition
The Hague Kluwer Law International 2000
W131.5

Statutory Instrument

European communities (protection of consumers in respect of contracts made by means of distance communication) regulations, 2001
SI 207/2001

Evidence

O'Keeffe v. Kilcullen
High Court: **O'Sullivan J.**
01/02/2001

Evidence; witness immunity; plaintiff's marriage had been declared null and void due to personality disorder resulting in incapacity to form and sustain normal marital relationship; third defendant had been appointed to carry out psychiatric assessment of plaintiff and to report to court; plaintiff claimed damages for negligence from third defendant; whether third defendant as a witness enjoyed an absolute immunity from suit in negligence in giving evidence in court.
Held: Evidence of third defendant is protected by absolute privilege; plaintiff's case dismissed.

Library Acquisitions

Expert evidence and criminal justice
Redmayne, Mike
Oxford Oxford University Press 2001
M604.9

Forensic evidence in Canada
Chayko, Gary
Gulliver, Edward
2nd edition
Canada Canada Law Book 1999
M608.C16

Science of fingerprints: classification and uses
United States Department of Justice: Federal Bureau of Investigation
Rev 12-84
Washington United States Government Printing Office 2000
M604.32

Fisheries

Beara In-Shore Fisherman's Co-op Ltd. v. Minister for Marine
High Court: **Finnegan J.**
28/02/2001

Fisheries; trial licences; applicant seeks leave to challenge decision of first named respondent to grant trial licence to second named respondent; whether there are substantial grounds for contending that decision is invalid or ought to be quashed; whether such grounds are reasonable, arguable and weighty and not trivial or tenuous; whether administrative error which had occurred resulting in grant of trial licence to third named respondent rather than to second named respondent who had applied for same renders such licence void; whether a mere technical error on foot of which applicant had been neither misled nor prejudiced amounts to a substantial ground to challenge grant of licence; whether decision to grant said licence had been irrational, wholly unreasonable and unsupported by evidence;

whether first named respondent should have considered written submissions by notice party (D£chas) to its notification of application for said licence, even though they had fallen outside of statutory period for receipt of such submissions; whether area in respect of which licence had been issued part of a site included in a candidate list for special conservation compiled by notice party (Minister for Arts, Heritage, the Gaeltacht and the Islands) at date of issue of said licence; s.73, Fisheries (Amendment) Act, 1997; r.10, Aquaculture (Licence Application) Regulations, 1998; ss.3 & 4, European Communities (Natural Habitats) Regulations, 1997.
Held: Application refused.

Statutory Instruments

Cod (fisheries management and conservation) order, 2001
SI 114/2001

Hake (fisheries management and conservation) order, 2001
SI 115/2001

Monk (fisheries management and conservation) order, 2001
SI 116/2001

Freedom of Information

Statutory Instruments

Freedom of information act, 1997 (prescribed bodies) regulations, 2001
SI 126/2001

Freedom of information act, 1997 (prescribed bodies)(no. 2) regulations, 2001
SI 127/2001

Freedom of information act, 1997 (prescribed bodies) (no. 3) regulations, 2001
SI 128/2001

Gaming & Lotteries

Library Acquisition

Law of Betting, Gaming and Lotteries
Smith & Monkcom the law of betting, gaming and lotteries
2nd edition
London Butterworths 2001
N186.C5

Garda Síochána

Shiels v. Minister for Finance
High Court: **Murphy J.**
25/03/2001

Garda Síochána; personal injury; damages; plaintiff Garda sustained personal injury while on duty; plaintiff was stabbed with a syringe needle while escorting prisoners; whether plaintiff suffered damage; whether plaintiff suffered post traumatic stress.
Held: Compensation awarded in the sum of £25,000.00 together with agreed special damages of ú380.00.

Human Rights

Library Acquisition

Bar Council Conference
The European convention on human rights bill,
2001
Bar Council of Ireland
McDowell SC, Attorney General, Michael
Feeney, Kevin
CLE
Bar Council Conference - 12th May 2001
Dublin Bar Council of Ireland 2001
C200

Information Technology

Statutory Instrument

Taxes (electronic transmission of certain revenue returns)(specified provision and appointed day) order, 2001
SI 112/2001

Insurance

Statutory Instruments

Long-term care insurance (relief at source) regulations, 2001
SI 130/2001

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SI 154/2001

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SI 129/2001

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Statutory nuisance
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London Butterworths 2001
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Planning

Kenny v. An Bórd Pleanála
High Court: **McKechnie J.**
15/12/2000

Planning; challenge to grant of planning permission; applicant seeks leave to apply by way of an application for judicial review for certain reliefs; whether there are substantial grounds for contending that planning decision is invalid or ought to be quashed; whether the question of reasonableness of defendant's decision is material; whether condition imposed by defendant allowing for agreement in writing between developer and planning authority on modifications to approved development plan is too wide and, as a result, *ultra vires*; whether development for which planning permission has been obtained is unknown or cannot in all material respects be identified; whether, in deciding whether or not to regulate an aspect of a proposed development, defendant is entitled to afford a developer, subject to consent of planning authority, a degree of flexibility, particularly if intended scheme involves complex enterprise; whether, once procedural statutory requirements have been satisfied, the Court should concern itself with qualitative nature of Environmental Impact Statement or debate on it before Inspector; whether, when under a statutory scheme a process has been commenced, those involved or affected thereby have a right to see process through to a conclusion under the law as it was at date of its commencement; whether statutory scheme introduced subsequent to issue of Notice of Intention to grant Planning Permission, but prior to appeal hearing, which would give special protection to structure it is proposed to demolish as part of the development, should be interpreted so as to have retrospective force; s.82(3A), Local Government (Planning and Development) Act, 1963, (as inserted by s.19(3), Local Government (Planning and Development) Act, 1992); Art. 15.5 of the Constitution.
Held: Leave refused.

Kenny v. An Bórd Pleanála
High Court: **McKechnie J.**
02/03/2001

Planning; judicial review; planning permission was granted to third-named notice party; application for leave to seek judicial review of decision granting same was refused as applicant had failed to show substantial grounds; applicant seeks certificate to enable him to appeal refusal of leave decision to Supreme Court; whether applicant had established that High Court decision refusing leave involved a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to Supreme Court; whether point of law at issue is of such gravity and importance that it transcends the interest and considerations of parties actually before the Court; whether assessment, evaluation and views expressed by judge at leave stage, both on factual and legal aspects of case, constituted approach required on an application for judicial review itself, so as to raise a point of law of exceptional public importance; whether aspect of leave decision dealing with role of Court once procedural statutory requirements with regard to Environmental Impact Statement have been complied with gives rise to point of law of exceptional public importance; s. 82(3B)(b)(i), Local Government (Planning and Development) Act, 1963.
Held: Certification denied.

Irish Hardware Association v. South Dublin County Council
Supreme Court: **Keane C.J.**, Denham J., Murphy J., Murray J., McGuinness J.
23/01/2001
Planning; development plan; original application altered; planning permission granted by respondent; no appeal lodged within the prescribed time; applicant unaware of the alteration in the plans; leave to apply for judicial review granted; applicant's claim for *certiorari* dismissed; applicant applied for certificate that his decision involved a point of law of exceptional public importance; application for certificate refused; refusal to grant certificate appealed; whether appeal lies to the Supreme Court on refusal to grant certificate; s.19, Local Government (Planning and Development) Act, 1992.
Held: Relief refused.

Statutory Instruments

Planning and development act, 2000 (commencement) order, 2001
SI 153/2001

Planning and development (licensing of outdoor events) regulations, 2001
SI 154/2001

Practice & Procedure

D.C. v. W.O.C.
High Court: **Finnegan J.**
05/07/2000

Forum conveniens; Brussels Convention, 1968; contesting jurisdiction; plaintiff claiming damages for rape and sexual assault; alleged incident took place in Sweden; both plaintiff and defendant domiciled in Ireland; defendant sought to have the proceedings stayed under the common law jurisdiction of the Court on the ground of forum conveniens and to have the matter litigated in Sweden; whether doctrine of forum conveniens has survived the incorporation of the Brussels Convention into Irish law; Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988.
Held: Application for stay refused.

Sean Quinn Group Ltd. v. An Bórd Pleanála
High Court: **Quirke J.**
04/10/2000

Practice and procedure; plaintiff seeks declaratory and other reliefs against defendants arising out of order of planning authority granting planning permission to sixth-named defendant, a business competitor of plaintiff, for development of cement manufacturing installation; concurrent application of sixth-named defendant seeks order dismissing plaintiff's proceedings on grounds that they comprise an abuse of process of the courts and are vexatious; whether plaintiff in commencing these proceedings has an ulterior motive and seeks a collateral advantage for itself beyond what the law offers; whether plaintiff has instituted proceedings for purpose which the law does not recognise as a legitimate use of remedy which has been sought; whether plaintiff abusing process of court to achieve improper objective.
Held: Plaintiff's claim dismissed.

Murphy v. M.C.
High Court: **O'Sullivan J.**
13/03/2001

Practice and procedure; application to dismiss plaintiff's claim for failure to furnish statement of claim; whether court may order plaintiff to deliver statement of claim; O.19, r.20, Rules of Superior Courts.
Held: Order granted directing the plaintiff to deliver statement of claim.

O'Connell v. Governor of Mountjoy Prison
Supreme Court: **McGuinness J.**, Hardiman J., Fennelly J. *(ex tempore)*
25/04/2001

Practice and procedure; warrant remanding child applicant; applicant had been charged with offence and had appeared before Metropolitan Children's Court; case having been adjourned, applicant had been remanded to Mountjoy Prison rather than a place of detention for young offenders following a certification of unruliness in accordance with relevant statutory provision; applicant challenges remand on basis that neither relevant statutory provision nor his date of birth appear on warrant remanding him to prison; whether it was necessary to state on the face of the warrant statutory provision under which applicant was remanded and applicant's date of birth. s.97, Children Act, 1908.
Held: Appeal dismissed.

PCO Manufacturing Ltd. v. Irish Medicines Board
Supreme Court: **Murphy J.**, Murray J., McGuinness J.
22/05/2001

Practice and procedure; judicial review; jurisdiction of court to order plenary hearing; function of respondent to determine applications for import, placing on the market or sale of medicinal products; applicant had a number of outstanding applications before the respondent and alleged delay by respondent in dealing with same; applicant granted leave to apply for certain reliefs by way of judicial review; statement grounding application for judicial review also included claim for damages for loss of profits caused by alleged delay; by notice of motion applicant had sought High Court order directing that application for judicial review insofar as it related to reliefs sought should be heard and determined prior to claim for damages; respondent sought order directing a plenary hearing of the proceedings; High Court declined to order a "split trial" in relation to the reliefs sought and the claim for damages and ordered that proceedings should stand adjourned to plenary hearing; whether Court should order separate hearings of the issues; whether splitting issues would offer any significant advantages to either party or reduce demands on judicial time; whether trial judge had jurisdiction to direct that the matter should stand adjourned to plenary hearing.
Held: Appeal dismissed.

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SI 168/2001
DIR 91/439

Road traffic (licensing of drivers) (amendment) regulations, 2001
SI 169/2001

Road traffic act, 1994, (part III) (amendment) regulations, 2001
SI 173/2001

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Statutory Instrument

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SI 172/2001

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Statutory Instruments

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SI 99/2001

Social welfare (occupational injuries) (amendment) regulations, 2001
SI 102/2001

Social welfare (rent allowance) (amendment) regulations, 2001
SI 100/2001

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Income tax (relevant contracts) regulations, 2001
SI 131/2001

Taxes (electronic transmission of certain revenue returns) (specified provision and appointed day) order, 2001
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Dublin The Law Reform Commission 2001
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Statutory nuisance
McCracken, Robert
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Payne, Simon
London Butterworths 2001
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Tribunals of Inquiry

Flood v. Lawlor
High Court: **Smyth J.**
24/10/2000

Tribunals of inquiry; discovery; plaintiff seeking reliefs pursuant to s.4, Tribunals of Inquiry (Evidence) (Amendment) Act, 1997; defendant had been ordered by High Court to make discovery to the Tribunal of certain documents; Tribunal subsequently received a "statement" of discovery from the defendant; by letter the Tribunal indicated deficiencies in the documentation already furnished by the defendant and detailed matters to which it required the defendant to attend; defendant failed to comply therewith; plaintiff then made order for discovery; defendant failed to comply therewith; plaintiff issued two summonses pursuant to Tribunals of Inquiry (Evidence) Act 1921-1998 requiring defendant to attend before Tribunal to furnish certain documents and to give evidence thereto; whether order for discovery was within the jurisdiction and discretion of the sole member; whether order for discovery was sufficiently clear on its face; whether order for discovery both as to its scope and time was too wide; whether a reasonable time had been given for compliance with said order; whether plaintiff had jurisdiction to issue the summonses; whether it was unreasonable to issue same.
Held: Reliefs sought by plaintiff granted.

Wills

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Bridge, Stuart
Oldham, Mika
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C-204/97 Portuguese Republic & Spain v Commission
Court of Justice of the European Communities
Judgment delivered 3/5/2001
(State aid-Aid for producers of liqueur wines and eaux-de-vie-Aid granted by the French Republic in the context of an increase in internal taxation)

C-152/98 Commission v Netherlands
Court of Justice of the European Communities
Judgment delivered 10/5/2001
(Failure of a Member State to fulfill its obligations-Directive 76/464/EEC -Water pollution-Failure to transpose)

C-192/98 Azienda Nazionale Autonoma delle Strade (ANAS)
Court of Justice of the European Communities
Judgment delivered: 26/11/1999
Article 177 of the EC Treaty (now Article 234 EC) - 'Court or tribunal of a Member State' - Directive 92/50/EEC - Procedures for the award of public service contracts

C-347/98 Commission v Belgium Court of Justice of the European Communities
Judgment delivered 3/5/2001
(Failure by a State to fulfill its obligations-Social security-Regulation (EEC) No 1408/71-Article 13(2)(f)-Legislation of a Member State providing for social security contributions to be levied on occupational disease benefits payable to persons who do not reside in that State and are no longer subject to its social security scheme)

C-119/99 Hewlett Packard BV v Directeur General des Douanes et Droits Indirects
Court of Justice of the European Communities
Judgment delivered: 17/5/2001
Common Customs Tariff-Combined nomenclature-Classification of a multi-function machine combining the functions of printer, photocopier, facsimile machine and computer scanner-Principal function-Validity of Regulation (EC) No 2184/97

C-159/99 Commission v Italian Republic
Court of Justice of the European Communities
Judgment delivered 17/5/2001
(Failure by a Member State to fulfill its obligations-Directive 79/409/EEC -Conservation of wild birds-Admissibility)

C-203/99 Henning Veedfald v Arhus Amtskommune
Court of Justice of the European Communities
Judgment delivered: 10/5/2001
Approximation of laws - Directive 85/374/EEC - Liability for defective products- Exemption form liability - Conditions

C-223/99 & C-260/99 Agora Srl v Ente Autonomo Fiera Internazionale di Milano
Court of Justice of the European Communities
Public service contracts - Definition of contraction authorities - Body governed by public law
Judgment delivered: 10/5/2001

C-288/99 VauDe Sport GmbH & Co. KG V Oberfinanzdirektion Koblenz
Court of Justice of the European Communities
Judgment delivered 10/5/2001
(Common customs tariffs-Tariff headings-Classification in the Combined Nomenclature-Child carrier)

C-340/99 TNT Traco SpA v Poste Italiane SpA & Ors
Court of Justice of the European Communities
Judgment delivered: 17/5/2001
Articles 86 & 90 of the EC Treaty (now Articles 82 EC & 86 EC)-Postal services-National legislation making the supply of express mail services by undertakings other than the one responsible for operating the universal service subject to payment of the postal dues normally applicable to the universal service-Allocation of the proceeds of those dues to the undertaking with the exclusive right to operate the universal service

C-389/99 Rundgren
Court of Justice of the European Communities
Judgment delivered 10/5/2001
(Social Security-Insurance contributions payable by pensioners who settle d in a Member State before the entry into force in that State of Regulations (EEC) Nos 1408/71 and 1612/68-Right of the State of residence to charge contributions on old-age and invalidity benefits paid by another Member State-Effect of an agreement by virtue of which the Nordic countries reciprocally waive all reimbursement of sickness and maternity benefits)

C-444/99 Commission v Italian Republic
Court of Justice of the European Communities
Judgment delivered 10/5/2001
(Failure by a Member State to fulfill its obligations-Directive 92/106/EEC -Failure to transpose within the prescribed period)

C-190/00 Balguerie & Ors v Societe Balguerie & Ors
Court of Justice of the European Communities
Judgment delivered: 3/5/2001
Regulation (EEC) No 4142/87 - Conditions under which certain goods are eligible on import for a favourable tariff arrangement by reason of their end use - Regulations (EEC) Nos 1517/91, 1431/92 & 1421/93 - Suspension of autonomous Common Customs Tariffs duties - Dates

C-285/00 Commission v French Republic
Court of Justice of the European Communities
Judgment delivered: 10/5/2001
Failure by a Member State to fulfill its obligations - Failure to transpose Directive 89/48/EEC within the prescribed period - Recognition of diplomas giving access to the profession of psychologist

C-345/00 P Federation nationale d'agriculture biologique des regions de France (FNAB) & Ors v Council of the European Union
Court of Justice of the European Communities
Judgment delivered: 10/5/2001
Appeal-Regulation (EEC) No 1804/1999-Prohibition of use of indications suggesting an organic method of production in the labeling and advertising of products not obtained by that production method - Temporary derogation for existing trademarks - Application for annulment - Inadmissible - Appeal manifestly unfounded

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European communities (pesticide residues) (fruit and vegetables) (amendment) regulations, 2001
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DIR 76/895,DIR 97/41,DIR 2000/24,DIR 2000/57

European communities (pesticide residues) (foodstuffs of animal origin) regulations, 1999
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European communities (pesticide residues) (products of plant origin, including fruit and vegetables) (amendment) regulations, 2001
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DIR 90/642, DIR 93/58, DIR 94/30, DIR 95/38, DIR 95/61, DIR 96/32, DIR 97/41, DIR 97/71, DIR 98/82, DIR 99/65, DIR 99/71, DIR 2000/24, DIR 2000/48, DIR 2000/58

European communities (classification, packaging and labelling of pesticides) (amendment) regulations, 2001
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European communities (authorization, placing on the market, use and control of plant protection products) (amendment) (no. 2) regulations, 2001
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DIR 91/414

European communities (protection of consumers in respect of contracts made by means of distance communication) regulations, 2001
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Safety, health and welfare at work (general application) (amendment) regulations, 2001
SI 188/2001
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European communities (licensing of drivers) regulations, 2001
SI 168/2001
DIR 91/439

European communities merchant shipping (port state control) (amendment) regulations, 2001
SI 213/2001
[DIR 1999/97]

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SI 226/2001
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2nd stage - Dail **[p.m.b.]**

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2nd stage - Seanad *(initiated in Dai)*

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

Central bank (amendment) bill, 2000
2nd stage - Seanad *(Initiated in Seanad)*

Children bill, 1999
Committee - Seanad *(Initiated in Dail)*

Children bill, 1996
Committee - Dail

Companies (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

Companies (amendment) (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Company law enforcement bill, 2000
Committee - Seanad *(Initiated in Dail)*

Containment of nuclear weapons bill, 2000
Committee - Dail *(Initiated in Seanad)*

Control of wildlife hunting & shooting (non-residents
firearm certificates) bill, 1998

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

Corporate manslaughter bill, 2001
2nd stage - Dail **[p.m.b.]**

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2nd stage - Dail

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1st stage - Dail

Criminal justice (illicit traffic by sea) bill, 2000
1st stage - Dail

Criminal justice (temporary release of prisoners) bill, 2001
1st stage -Dail

Criminal justice (theft and fraud offences) bill, 2000
Committee -Dail

Criminal law (rape)(sexual experience of complainant) bill, 1998
2nd stage - Dail **[p.m.b.]**

Dormant accounts bill, 2001
2nd stage - Seanad *(Initiated in Dail)*

Dumping at sea (amendment) bill, 2000
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Eighteenth amendment of the Constitution bill, 1997
2nd stage - Dail **[p.m.b.]**

Electoral (amendment) bill, 2000
Committee- Seanad *(initiated in Seanad)*

Electoral (amendment) (donations to parties and candidates) bill, 2000
Committee - Dail **[p.m.b.]**

Electoral (control of donations) bill, 2001
2nd stage - Dail **[p.m.b.]**

Employment rights protection bill, 1997
2nd stage - Dail **[p.m.b.]**

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

Equal status bill, 1998
2nd stage - Dail **[p.m.b]**

Euro changeover (amounts) bill, 2000
1st stage - Dail

European convention on human rights bill, 2001
1st stage - Dail

European union bill, 2001
Committee - Dail

Family law bill, 1998
2nd stage - Seanad

Fisheries (amendment) bill, 2000
Committee - Dail *(Initiated in Seanad)*

Fisheries (amendment) (no.2) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Freedom of information (amendment) bill, 2000
2nd stage - Dail **[p.m.b.]**

Harbours (amendment) bill, 2000
Committee - Seanad

Health (miscellaneous provisions) bill, 2000
1st stage - Dail

Health (miscellaneous provisions) (no.2) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Health insurance (amendment) bill, 2000
Committee - Dail

Heritage fund bill, 2001
1st stage - Dail

Home purchasers (anti-gazumping) bill, 1999
1st stage - Seanad

Horse and Greyhound racing bill, 2001
1st stage - Dail

Human rights bill, 1998
2nd stage - Dail **[p.m.b.]**

Human rights commission (amendment) bill, 2001
1st stage - Dail

Industrial designs bill, 2000
Committee - Dail

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1st stage - Dail

Irish nationality and citizenship bill, 1999
Report - Dail *(Initiated in Seanad)*

Irish national petroleum corporation limited bill, 2001
2nd stage - Seanad *(Initiated in Dail)*

Landlord and tenant (ground rent abolition) bill, 2000
2nd stage - Dail **[p.m.b.]**

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

Licensing of indoor events bill, 2001
1st stage - Dail

Local government bill, 2000
Committee -Dail

Local government (no.2) bill, 2000
2nd stage - Seanad *(Initiated in Dail)*

Local Government (planning and development) (amendment) bill, 1999
Committee - Dail

Local Government (planning and development) (amendment) (No.2) bill, 1999
2nd stage - Seanad

Local government (Sligo) bill, 2000
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Mental health bill, 1999
Report - Seanad *(Initiated in Dail)*

Ministerial, parliamentary and judicial offices and oireachtas members (miscellaneous provisions) bill, 2001

Motor vehicle (duties and licences) bill, 2001
2nd stage - Seanad *(Initiated in Dail)*

National stud (amendment) bill, 2000
Committee - Dail

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

Official secrets reform bill, 2000
2nd stage - Dail **[p.m.b.]**

Oireachtas (Ministerial and Parliamentary Offices) (Amendment) bill, 2001
1st stage - Dail

Ordnance survey Ireland bill, 2001
2nd stage - Dail *(Initiated in Seanad)*

Organic food and farming targets bill, 2000
2nd stage - Dail **[p.m.b]**

Partnership for peace (consultative plebiscite) bill, 1999
2nd stage - Dail **[p.m.b.]**

Patents (amendment) bill, 1999
Committee - Dail

Postal (miscellaneous provisions) bill, 2001
1st stage -Dail

Prevention of corruption (amendment) bill, 1999
1st stage - Dail **[p.m.b.]**

Prevention of corruption (amendment) bill, 2000
Committee - Dail

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

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

Private security services bill, 2001
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Proceeds of crime (amendment) bill, 1999
Committee - Dail

Prohibition of ticket touts bill, 1998
Committee - Dail **[p.m.b.]**

Prohibition of female genital mutilation bill, 2001
2nd stage - Dail **[p.m.b.]**

Protection of employees (part-time work) bill, 2000
Committee - Dail

Protection of patients and doctors in training bill, 1999

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

Protection of workers (shops) (no.2) bill, 1997
2nd stage - Seanad

Public representatives (provision of tax clearance certificates) bill, 2000
2nd stage - Dail **[p.m.b.]**

Radiological protection (amendment) bill, 1998
Committee- Dail *(Initiated in Seanad)*

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

Registration of births bill, 2000
2nd stage - Dail

Registration of lobbyists bill, 1999
1st stage - Seanad

Registration of lobbyists (no.2) bill 1999
2nd stage - Dail **[p.m.b.]**

Regulation of assisted human reproduction bill, 1999
1st stage - Seanad **[p.m.b.]**

Residential institutions redress bill, 2001
1st stage - Dail

Road traffic (Joyriding) bill, 2000
2nd stage - Dail **[p.m.b.]**

Road traffic bill, 2001
1st stage -Dail

Road traffic reduction bill, 1998
2nd stage - Dail **[p.m.b.]**

Safety health and welfare at work (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Safety of United Nations personnel & punishment of offenders bill, 1999
2nd stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1997
1st stage - Dail **[p.m.b.]**

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

Sea pollution (amendment) bill, 1998
Committee - Dail.

Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000
2nd stage - Dail

Sex offenders bill, 2000
Report - Dail

Shannon river council bill, 1998
Committee - Seanad

Solicitors (amendment) bill, 1998
Committee - Dail **[p.m.b.]**
(Initiated in Seanad)

Standards in public office bill, 2000
2nd stage - Seanad *(Initiated in Dail)*

State authorities (public private partnership arrangements) bill, 2001
1st stage - Dail

Statute law (restatement) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Statute of limitations (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

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

Sustainable energy bill, 2001
2nd stage -Dail *(Initiated in Seanad)*

Telecommunications (infrastructure) bill, 1999
1st stage - Seanad

Tobacco (health promotion and protection) (amendment) bill, 1999
Committee -Dail **[p.m.b.]**

Trade union recognition bill, 1999
1st stage - Seanad

Transport (railway infrastructure) bill, 2001
2nd stage - Dail *(Initiated in Seanad)*

Tribunals of inquiry (evidence) (amendment) (no.2) bill, 1998
2nd stage - Dail **[p.m.b.]**

Tribunals of inquiry (amendment) bill, 2001
2nd stage - **[p.m.b.]**

Twentieth amendment of the Constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

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

Twenty- first amendment of the constitution (no.3) bill, 1999
2nd stage - Dail **[p.m.b.]**

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

Twenty- first amendment of the constitution (no.5) bill, 1999
2nd stage - Dail **[p.m.b]**

Twenty-first amendment of the constitution bill, 2001
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.2) bill, 2001
2nd stage - Seanad

Twenty-second amendment of the constitution bill, 2001
Committee - Dail

Twenty-third amendment of the constitution bill, 2001
Committee - Seanad

Twenty- fourth amendment of the constitution bill, 2001
2nd stage -Dail

Twenty- fifth amendment of the constitution bill, 2001
2nd stage - Dail **[p.m.b.]**

Udaras na gaeltachta (amendment)(no.3) bill, 1999
Report - Dail

UNESCO national commission bill, 1999
2nd stage - Dail **[p.m.b.]**

Valuation bill, 2000
Committee - Dail

Vocational education (amendment) bill, 2000
2nd stage - Seanad (Initiated in Dail)

Waste management (amendment) bill, 2001
Committee - Dail

Waste management (amendment) (no.2) bill, 2001
2nd stage - Dail *(Initiated in Seanad)*

Whistleblowers protection bill, 1999
Committee - Dail

Youth work bill, 2000
Committee - Dail

Abbreviations

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

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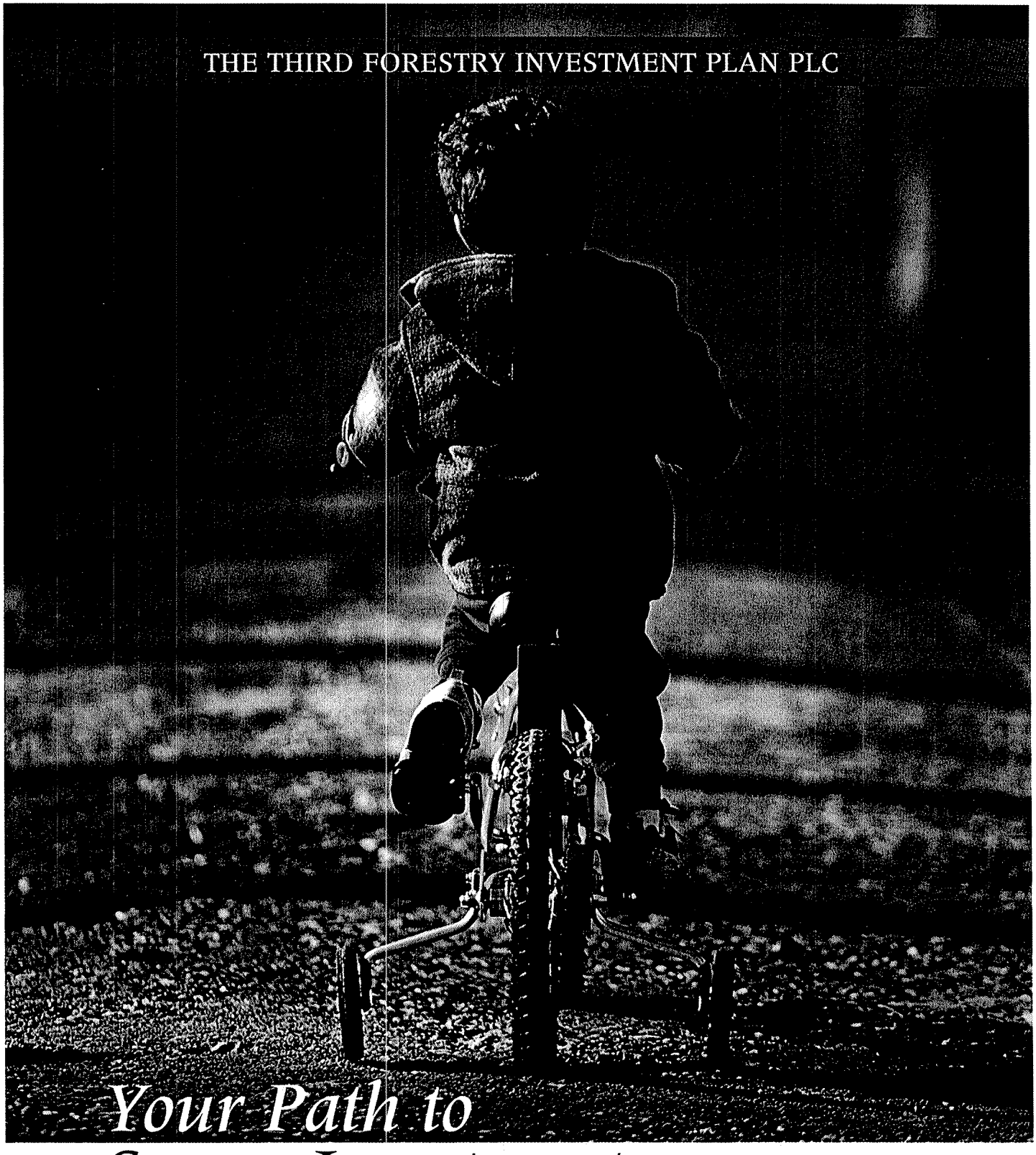

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IRELAND AND EUROPE'S FUTURE INTEGRATION: A RESPONSE TO THE ATTORNEY GENERAL

Eugene Regan BL* *responds to the speech delivered by* ***Michael McDowell SC*** *in June 2001 to the Lawyers' Group of the Irish Institute of European Affairs on the subject of European Integration and Enlargement.*

Introduction

Michael McDowell SC, speaking in a personal capacity to the Lawyers Group of the Institute of European Affairs on 18 June 2001, outlined his views on European Integration and Ireland's participation in that process. Notwithstanding the critical tone and the widespread publicity surrounding his presentation it has perhaps been overlooked that Mr. McDowell gave a strong endorsement, on that occasion as on previous occasions,[1] to the Treaty of Nice.[2] Mr. McDowell opened his speech as follows: "Can I say at the outset that I was personally in favour of ratification of Nice because I believe that it is necessary to separate the issues of enlargement and integration" and that "the Nice outcome was largely successful in doing so."

While the presentation of Mr. McDowell consists essentially of an airing of his own personal political views on European integration and Ireland's participation in that process, the views expressed primarily relate to the legal and constitutional implications for Ireland of that integration process and are thus amenable to critical analysis from a legal perspective. The underlying premise of the views expressed by Mr. McDowell is that there is a federalist agenda being pursued vigorously and relentlessly by the larger Member States of the Union designed ultimately to create a European State. He states that "there is a general perception that the European project is being energetically driven towards the creation of a 'European State' with a much greater pooling of political sovereignty and with major implications for the independence of member states - particularly smaller nations states such as Ireland." .

As this proposition underlines the entire approach of Mr. McDowell in his presentation, a first question which may be asked is whether such an inference is supported by or follows from the views expressed by European political figures who have outlined their opinion on the future shape of the European Union?

The Nation State within the European Union

Heads of State and Governments and other political figures such as the President of the Commission have expressed views on the role of the individual Member State within the European Union structure, as follows:

"Neither you nor we are envisaging the creation of a super European State which would supplant our national states and mark the end of their existence as players in international life...for the peoples who come after us, the nations will remain the first reference points." (Jacques Chirac, President of France)[3]

"A successful Union consists of free, independent sovereign nations who choose to pool their sovereignty in pursuit of their own interests and the common good...Such a Europe can, in its economic and political strength, be a superpower; a superpower but not a superstate." (Tony Blair, Prime Minister of the UK)[4]

"..In Europe no one wants to abolish the nation-state, no one wants to create a European Superstate." (Joschka Fisher, German Minister for Foreign Affairs)[5]

"If the statements of European leaders can be taken be taken at face value, and it seems entirely reasonable that they should be, there does not appear to be any proponent for the creation of a European State ... These statements rather point to a different conclusion, that the threat of the imposition of a superstate is not at present a real or likely threat."

"I support the excellent idea of a 'Federation of Nation States'...the gradual controlled process of sharing competences or transferring competences to the Union level ....an indissoluble mixture of two different elements: the federalist ideal and the reality of European nation states." (Lionel Jospin, Prime Minister of France)[6]

"...it is important to dispel once and for all the idea that our ultimate goal is a single state based on the dilution of our national identities and even of the leading roles of the nation states." (Antonio Vitorino, Commissioner for Justice and Home Affairs, European Commission)[7]

If Europe is to speak with one voice in world affairs, integration is essential "but I do not want integration to make Europe a ' Superstate'. Let me say this quite clearly. The purpose of integration is not to abolish nationhood or to make countries give up any part of their national identity." (Romano Prodi, President of the European Commission)[8]

If these statements can be taken be taken at face value, and it seems entirely reasonable that they should be, there does not appear to be any proponent for the creation of a European State, as suggested by Mr. McDowell. These statements rather point to a different conclusion, that the threat of the imposition of a superstate is not at present a real or likely threat.

Declaration on the Future of the Union

In the course of his presentation Mr. McDowell suggests that the 2004 Inter-Governmental Conference (IGC) constitutes a project which could significantly alter the nature of the relationship between the European Union and its Member States and, in effect, that this 'project' is about the creation of a 'European State'. He suggests that the leaders of Europe are 'dressing up' the creation of a Constitution of a European State in a harmless sounding veil as a Treaty of competences which, he says, 'won't wash'. Furthermore, he states that "the concept of the European statehood lies at the centre of much of the reforms being canvassed in the context of the intergovernmental council being planned for 2004."

I would disagree fundamentally with this analysis and suggest that an examination of the Declaration of the Heads of State and Government at Nice establishing the 2004 IGC Agenda does not bear out this conclusion. In a formal declaration in the final act of the Intergovernmental Conference in Nice, the Heads of State and Government of the 15 Member States issued a declaration on the future of Europe which called for a deeper and wider debate about the future of the European Union. It envisaged a process which will "encourage wide ranging discussions with all interested parties" including "representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc."

Mr. McDowell suggests that proposals for the establishment of a "European State are being devised by a narrow class of activist office holders, elected and unelected." Even if such a description is fitting to the Heads of State and Government of the 15 Member States of the EU, the fact is that the Declaration in question calls effectively for the establishment of an open Europe-wide forum on the future of Europe which will involve both politicians and civil society. Furthermore, the principal issues which are to be addressed in the debate on the future of Europe are set out in the Declaration at Nice in an open, frank and transparent manner and include:-

- The delimitation of powers or competences between the Union and the Member States.
- The status of the charter of fundamental rights (that is whether the charter, already proclaimed at Nice as a political declaration, should be now given binding legal status).
- The simplification of the Treaties.
- The role of national parliaments in relation to European Union institutional structures.

In addition the Heads of State and Government recognise the need to improve the democratic legitimacy and transparency of the Union and its institutions.

The 2004 IGC debate on the future of Europe, contrary to what is suggested by Mr. McDowell, does not represent a High Noon between the proponents of a European State and those who wish to preserve the pivotal role of the Member States. It is rather an effort to clarify the role of the Union vis-a-vis Member States and to improve the democratic nature of the Union. Each of these agenda items will now be considered in turn.

Member States and Union Powers

Mr. McDowell suggests that one of the primary indiciae of a European State in substance is a constitution. The reality is, however, that the Treaty of Rome as amended over the years is a form of constitution of the EU but that it does not provide for a European State. Mr. McDowell describes the treaties as "more akin to a lengthy legal contract than to a constitution." However, before Ireland joined the European Community in 1973 the Treaty of Rome was known to have direct

applicability and direct effect in the member state's domestic legal systems. It created rights and obligations for citizens which could be invoked before national courts. The European Court of Justice held that "the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also nationals. Independently of the legislation of member states community law, therefore, not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage."[9]

Accordingly, the Treaty of Rome is not a mere contract between the member states. It is a "constitutional charter of a community based on the rule of law."[10] That constitutional charter has been progressively built upon by the addition of the Single European Act, the Maastricht Treaty and the Amsterdam Treaty, and thus the building of a constitution of the European Union is to all intents and purposes complete. To describe the Treaties in question as a mere contract between Member States is to ignore 40 years of history of cooperation among the Member States as well as the jurisprudence of the European Court of Justice which has been endorsed in Treaty amendments from to time and given recognition by the national Courts of member states over the same period.

Furthermore, the Treaty of the European Communities provides that "the Community shall act within the limits of the powers conferred upon it by this treaty and of the objectives assigned to it therein."[11] In adopting measures at the level of the Community or Union this principle of limited attribution of powers must be balanced against a competing principle that Community powers must be effective to ensure that the objectives of the Community are achieved. Member States decide which powers are transferred to the Community but once transferred it is the European Court of Justice which has competence to decide the scope of the powers transferred. In this respect the European Court of Justice has often been accused of being too activist in assuming a policy making role in determining the powers of the community institutions.

In the Maastricht and Amsterdam Treaties Member States have sought to define more clearly the scope of Community competences by introducing the principles of subsidiarty, proportionality and transparency. Accordingly, Article 5 of the EC Treaty was amended by the Maastricht Treaty as follows:-

> "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the community shall take action, in accordance with the principle of subsidarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the community...."

In addition, a protocol was annexed to the Amsterdam Treaty which elaborated on the implementation of the principles of subsidiarty and proportionality. In particular it provides that when a proposal is made for community legislation, the reasons for it must be stated "with a view to justifying its compliance with the principles of subsidiarity and proportionality."

The United Kingdom and Germany have been the main proponents of the principles of subsidiarity. Both governments have been concerned to limit the competences of the community institutions for different reasons. While the question is on the agenda of the 2004 IGC debate on the future of Europe at the request of Germany, this is due to the fact that the Länder in Germany are concerned by the usurpation of their powers by the federal government, a process which they consider is facilitated by the increasing transfer of power to the European institutions. Accordingly, from a German perspective, this agenda item concerns very much a delimitation of the powers of the European institutions.

As Noel Dorr, the Irish Government's Special Representative on the preparatory group at the Nice IGC, has stated,[12] this issue "will be a matter of working through the treaties to set down fenceposts, demarcating those areas in which the community - or the Union - may exercise a competence or responsibility and those which must remain matters for the member state's governments and in which the Union can have no role." Mr. Dorr states that, "to adopt a phrase from Parnell, it could be an effort, once and for all, to set bounds to the march of the union."'

"As Noel Dorr, the Irish Government's Special Representative on the preparatory group at the Nice IGC, has stated, 'to adopt a phrase from Parnell, [The issue of subsidiarity] could be an effort, once and for all, to set bounds to the march of the union.' "

Accordingly, if this is the true nature and purpose of this discussion, there does not appear to be any grounds for the suggestion, as Mr. McDowell appears to suggest, that this agenda item is in effect a Trojan horse for the establishment of a European State.

The Charter of Fundamental Rights

The second element in the 2004 debate, referred to in the Declaration at Nice, concerns the Charter of fundamental rights. From Mr. McDowell's perspective " a justiciable bill of rights" constitutes one of the "indiciae of a European State in substance." Accordingly, he supported the position of the Irish Government in the Nice negotiations

which "strongly resisted the proposal made at Nice to give the charter treaty status and the subsequent proposal to incorporate it by reference to article 6 of the Treaty."

The Charter of Fundamental Rights adopted at the Nice European Council provides inter alia that: "The Charter does not establish any new power or task for the Community or the Union or modify powers and tasks defined by the treaties."[13] Furthermore, while the status of the charter has to be determined in the context of the 2004 IGC I would also submit that the inclusion of the Charter as part of the Treaties of the European Union would strengthen respect for fundamental rights in subjecting Community and Union decisions and legislation to the full rigours of the fundamental rights tests laid down in the Charter through the process of judicial review in the Courts. Making the Charter justiciable would complement rather than supplant the rights enjoyed by Irish citizens under the Irish Constitution and the idea is therefore to be welcomed.

To understand the motivation of European leaders in calling for its establishment of the Charter of Fundamental Rights it is essential to examine the manner which the issue of fundamental rights has been dealt with in EU law and decision-making. The European Court of Justice as early as 1970 held that "respect for fundamental rights forms an integral part of the general principles of community law protected the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structures and objectives of the community."[14] The Court has since emphasised the importance of fundamental rights in the activities of the Community in a long line of landmark judgments on this subject.[15]

In 1977 a joint declaration on human rights was adopted which provided:-

1. The European Parliament, the Council and the Commission stressed the prime important they attached to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention on Human Rights and fundamental freedoms.

2. In the exercise of their powers and in pursuance of the aims of the European Communities, they respect and will continue to respect these rights.

The Single European Act 1987 in its preamble refers to the determination of the Member States "to work together to promote democracy on the basis of the fundamental rights recognised in the Constitutions and laws of the member states, in the convention for the protection of human rights and fundamental freedoms and the European social charter, notably freedom, equality and social justice."

The Community Charter of the fundamental social rights of workers was adopted in 1989, and a protocol to the Maastricht Treaty provided for the adoption of this Social Charter. The Maastricht Treaty 1993[16] provided in Article F2 that the Union must respect, as general principles of community law, fundamental rights guaranteed by the ECHR and by constitutional traditions common to the member states. Respect for human rights and fundamental freedoms was stated to be one of the objectives of the Union's common, foreign and security policy.[17] Furthermore, European Union activity in the field of justice and home affairs has to comply with the European Convention on Human Rights and the Convention on the Status of Refugees 1951.[18] None of these provisions however was directly judiciable before the Court of Justice.[19] The jurisdiction of the Court was effectively limited to areas in which the community had competence to act.

The Treaty of Amsterdam 1997 at Article 6(1) provides that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states." Article 6(2) provides that the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of community law. Article 7 provides for the determination of the "existence of a serious and persistent breach by member states" of the Article 6 principles and for sanctions to be imposed on that member state.

Thus, while the European Court of Justice and the Treaties acknowledge the importance of fundamental rights in the work of the Union, these rights have not been spelt out either by the European Court of Justice or in the Treaties. Paul Gallagher S.C., writing on the Treaty of Amsterdam and fundamental rights, states that "it cannot be denied that the Amsterdam Treaty represents some major improvements on the Maastricht Treaty in a human rights context. However, it fails to address the fundamental issues caused by a lack of a comprehensive bill of rights..... Any system of judicial review in a human rights context must involve a comprehensive and codified bill of rights. I think we are entitled to ask why a Union with hundreds of millions of citizens must rely on a piecemeal development of human rights, rather than a clear definition of those rights which would at least enable those citizens to make a judgment on the extent of adulteration of the justice that is being sold to them by the Union."[20]

The Introduction of a Charter of Fundamental Rights represents a response to criticism of this nature bearing on the absence of any clear elaboration of the fundamental rights which European citizens enjoy and which they may seek to enforce before domestic courts or the Community Courts. It is also because of such criticism that many Member States and non-governmental bodies are anxious to ensure that the rights enunciated in this Charter ultimately become justiciable by the incorporation of the Charter into the Treaties.

Professor Boyle of the University of Edinburgh, in evidence to the Select Committee of the House of Lords on the EU Charter of Fundamental Rights, put the matter succinctly in stating that the adoption of the Charter would help to remedy "the obvious defect that although the European Union Treaties make greater reference to respect for fundamental human rights, they nowhere set out these rights in detail."[21] Furthermore, the individual citizen's ability to challenge a measure on fundamental rights grounds is more restricted

when the measure is adopted by an EU institution than if it were adopted by a national authority. It is this lacuna in the existing legal process which the Charter of Fundamental rights endeavours to fill. However, that lacuna in the law can only be filled if the Charter is made justiciable.

It is evident from an examination of the evolution of the case law of the European Court of Justice and of the political debate in Europe over the years that the Charter was neither conceived nor drawn up by a narrow band of federalists. It is an attempt to respond to criticism of the preoccupation of the Community and Union with economic issues without due regard to the importance of fundamental rights. The idea of a Charter was put forward by the European Parliament at various times and in particular in 1989. The notion of a Charter was the subject of discussion at the 1996 Intergovernmental Conference which led to the adoption of the Treaty of Amsterdam. It was drawn up following the decision of the Heads of State and Government at the European Council in Cologne in June 1999, that a European Union Charter of fundamental rights should be established to consolidate fundamental rights applicable at Union level and to make "their overriding importance and relevance more visible to the Union citizens."[22]

Furthermore, the Charter was drafted by a 'Convention' which consulted widely in drawing up the Charter and which consisted of representatives of the Heads of States or Governments, a representative of the President of the European Commission, members of the European Parliament and representatives from national parliaments.

Mr. McDowell in his article states that, since the status of the charter is not to be treaty based, he is "a little troubled now to see the charter filtering into European law as though it has been formally ratified by the member states to become a judicial component of the acquis communautaire." He adds that "[i]t is disturbing to see indications that enthusiasts for a federal European Convention are already developing the beginnings of a jurisprudence based on the charter." I would venture to suggest that it would be more surprising still if the policy makers in Brussels and Strasbourg ignored the Charter and failed to give due recognition to the fundamental principles enunciated in the charter in the formulation of decisions or legislation adopted at European level: the entire object of the exercise is that the Union will have greater regard to the issue of fundamental rights in all of its activities and in particular in those areas where the Union has new competences following the Treaty of Amsterdam, in particular in the area of police and judicial cooperation in criminal matters.

Simplification of the Treaties

The third element contained in the Declaration of the future of Europe which will be the subject of the 2004 IGC is the issue of the simplification of the treaties. While acknowledging that the treaties are "complex" and indeed "impenetrable to the citizen", Mr. McDowell seems to suggest that the placing of the item of simplification of the Treaties on the agenda of the 2004 IGC is not in fact a *bona fide* item for discourse and debate but is another ruse of the federalists to establish a Constitution for a European State. Such a suggestion in another forum might be described as flying in the face of reason and common sense. If the Treaties are "impenetrable to the citizen", the question of how the Treaties can be made more comprehensible to the individual citizen seems to be a perfectly legitimate item for public and political debate.

This not a unique situation. Making our own domestic legislation more understandable to the non-legal person has been the subject of research and debate in Ireland as evidenced by a recent Report of the Law Reform Commission on the use of plain language in drafting legislation.[23] It does of course remain to be seen what positions Member States and non-governmental bodies will adopt in relation to the simplification of the Treaties. It is, however, self evident that the Treaties have become more complex with the amendments of the original Treaty of Rome introduced by the single European Act and by the Maastricht and Amsterdam Treaties. It is also recognised that the Treaties contain provisions of a constitutional nature and other provisions which reflect mere policy orientations which the Member States may to change from time to time.

However, the issue of simplification of the Treaties is not new and has been a source of criticism for some time. To meet in part such criticisms the Amsterdam Treaty introduced a new numbering of the provisions of the Treaties. Furthermore, work has taken place in different fora on a consolidation or simplification of the treaty texts, the most notable being that carried out by the University Institute in Florence. Accordingly, the placing of this item on the 2004 IGC Agenda represents simply a response of European leaders to the real need and persistent demands that the workings of the European Union institutions and in particular its basic Treaties be rendered more comprehensible to the individual citizen.

Role of National Parliaments

The role of national parliaments in relation to European Union institutional structures was discussed during the negotiations of the Amsterdam Treaty. National parliaments have no direct role in the institutional structure of the Union but they do have an indirect role because each Minister in the Council is

"In relation to the procedures in Ireland for democratic control of the decisions adopted and endorsed by Irish Ministers at European level, this is a matter to be decided by the Irish authorities and not one to be imposed by the European authorities. The inadequate vetting of European legislation by the Oireachtas has been a source of comment since Ireland joined the European Community."

answerable to a greater or lesser extent to his or her own national parliament within the context of the procedures adopted at national level for monitoring and debating issues which arise at the meetings of the Council of Ministers.

Noel Dorr has pointed out that "France, responding to strong pressures in the National Assembly, took the lead on this issue when the topic was discussed during the negotiation of the Amsterdam Treaty. However, while they recognised the importance of the democratic role of national parliaments, most member states were reluctant to create a new institution to give that role collective expression within the union. To do so, it was felt, could well be a step towards greater "inter-governmentalism..." [24] However, a protocol was annexed to the Treaty of Amsterdam on this subject which provided *inter alia* for a better flow of information to national parliaments.

This debate on the role of national Parliaments is again on the agenda because of the fundamental concern about the perceived democratic deficit in the Union's decision- making processes and institutional structures. This is a legitimate concern and one which will no doubt give rise to many proposals for change. One such proposal is for the introduction of a second chamber in the European Parliament, drawn directly from national parliaments. However, it is not clear at this early stage what the outcome of such a debate will be, nor what alternative proposals will be forthcoming from member states.

In relation to the procedures in Ireland for democratic control of the decisions adopted and endorsed by Irish Ministers at European level, this is a matter to be decided by the Irish authorities and not one to be imposed by the European authorities. The inadequate vetting of European legislation by the Oireachtas has been a source of comment since Ireland joined the European Community. Mr. McDowell rightly questions as a striking proposition the notion that an Irish Minister should be technically at large free to negotiate a regulation or directive which as a matter or European and Irish law the Oireachtas is absolutely bound to accept..."This may be a striking proposition, but it is not new, and it is a position which has prevailed since Ireland joined the community in 1973.

In this regard I would agree entirely with Mr. McDowell when he states "that there is a strong case, in terms of democracy, constitutionalism and autonomy for a far reaching reform of the interaction of the Oireachtas with European policy and legislation affairs." It is clearly necessary to ensure that there are appropriate procedures put in place for examining, vetting and debating decisions and legislation adopted at a European level. However, it is fair to say that the failure in this regard is a failure of democratic accountability in Ireland, not in the Union. Nor is it for the Union to prescribe or suggest the process by which Irish ministers are mandated to endorse or adopt decisions in the context of the Council of Ministers. To do so would be a gross interference in the democratic process in Ireland. Accordingly, in looking to the issue of democratic legitimacy and transparency in relation to European Union activities, it is well to bear in mind that this is a job of work to be done domestically.

Perspective, proportionality and objectivity

Mr. McDowell's analysis can be faulted on the grounds of perspective, proportionality and objectivity.

In his perspective of the European Union Mr. McDowell speaks of an " inner circle of federalism", "whether in the corridors of the Commission or the European Parliament or the wings of the Council meetings" who are intent on creating a European State. It is a black and white, them or us, either/or perspective. The reality is quite different.

Following a long but now largely resolved debate on whether the most effective manner of doing business in the European Union is one based on the inter-governmental or a supra-national system, ultimately the Member States have adopted the so-called "Community Method" as the most effective way of reaching decisions and responding to the political needs of Member States and citizens. This method is based on the Commission initiating legislation and the Council of Ministers together with the European Parliament taking the ultimate decision. The system is subject also to the role of the Commission as guardian of the Treaties and of the European Court of Justice as the ultimate arbiter and guarantor of the rule of law. It is a system which worked effectively for 40 years. However, member states are now reluctant to apply this method to such areas as Common Foreign and Security policy or Police and Judicial Cooperation in criminal matters because of concern with national sovereignty.

The debate on the system of decision-making in the EU is not new but rather dates back to the post war years when the countries of Europe were endeavouring to provide for the economic restructuring of the European economy. It is a theme which has been played out in the day to day business of the European Community/Union since the establishment of the Treaty of Rome and has been the subject of debate in negotiations on all subsequent amendments to that Treaty. The Single European Act, the Maastricht and Amsterdam Treaties and now the draft Nice Treaty have not been the result of a move to create a European state but rather constitute the end product of the cooperative efforts of the Member States of the Union in dealing with the pressing political, economic and social problems confronting Europe and its citizens over the years.

The Treaty of Rome in 1957 was conceived as a means of furthering the economic prosperity of Europe by the creation of inter alia an internal EC market or common market by means of a customs union, a common agricultural policy and a competition policy. The Single European Act in 1986 was designed essentially to complete the process of creating an internal market in Europe, complemented by an economic and social cohesion policy. The Maastricht Treaty in 1992 aimed to further strengthen the economic well-being of Member States and their citizens by the creation of a European monetary union and a single currency and to deal with other issues of common concern such as asylum, border control, immigration, drug addiction, fraud, and judicial cooperation in civil and criminal matters. The Amsterdam Treaty of 1997 endeavoured to deal with the Union's commitment to promote democracy and economic prosperity in Eastern Europe through Enlargement of the Union and in this regard to set down the

fundamental rights and democratic principles upon which the Union is based and which constitute pre-conditions of entry of new member states joining the Union. While it was initially envisaged that the Amsterdam Treaty would deal with the institutional issues involved in a near doubling of the number of member states with the enlargement of the Union, such institutional issues had to be dealt with in the draft Treaty of Nice.

Accordingly, the end result is an institutional structure which reflects the "Partnership of Member States" model referred to and approved of by Mr. McDowell in his speech, nothing more nothing less. This structure has evolved not from any pre-conceived plan, but from the experience of Member States working together and adopting decision-making procedures and institutional structures necessary to deal effectively with the political problems of the day.The constitutional and legal nature of that structure has been described by the German Constitutional Court as follows: "The Member States have established the European Union in order to exercise a part of their functions in common and to that extent to exercise their sovereignty in common. ... The Union Treaty takes account of the independence and sovereignty of Member States ..., it equips the Union and European Communities only with specific competences and powers in accordance with the principle of limited individual competences ... and then establishes the principle of subsidiarity for the Union ... and for the European Community ... as a binding principle of law."[25]

The institutional structure of the Union as it exists today does not fit neatly into the traditional classifications of political scientists for the simple reason that it represents a unique form of political cooperation among independent nation states.

Security, Police and Judicial Cooperation

Mr. McDowell suggests that "the emergence since Maastricht of a competence for the European Union to create an area of freedom, security and justice and the provisions in the Treaty of Amsterdam concerning police and judicial cooperation have been seen by some as the opportunity to create a uniform or at least harmonised system of criminal law for the member states."

I would say that the Treaty provisions on police and judicial cooperation in criminal matters[26] represent an agreement between Member States designed primarily to confront a common problem of organised crime throughout the European Union rather than a hidden agenda of "a narrowly based hot-house federalist view of the needs and future of the European Union", as described by Mr. McDowell.

The proposition that the provisions on police and judicial cooperation have been seen by some as an opportunity to create a uniform or harmonised system of criminal law is not self evident in that developments in this area are entirely based on principles of cooperation between the police and judicial authorities in the different member states. Furthermore, there is no provision in the Amsterdam Treaty for harmonisation of criminal law, and in adopting this approach Member States have been particularly conscious of the principle of subsidiarity. However, they are also conscious of the need for greater cooperation in policing in the European Union in a situation where there are different criminal jurisdictions in an open market without internal border controls and increasing evidence of cross border crime.

Mr. McDowell calls in question the creation of an area of freedom, security and justice and indeed the concept of "police and judicial cooperation" in the European Union on the grounds that it may some way tarnish the common law heritage of this country. He states that "this common law heritage is something of great value and of constitutional status. It is, and has been, tried and tested not only here but throughout the common law world - a region where tyranny has never held sway, a region that has, on more than one occasion, formed the last bastion against tyranny and the moral arsenal from which tyranny was vanquished."

Applying the legal principle of proportionality one might suggest that this particular statement is lacking in proportionality or, in lay man's terms, that it is over the top. To denigrate the civil law legal systems of other Member States in this fashion is unreasonable particularly if one bears in mind the many similarities between the civil law and common law systems both of which derive many of their legal principles and concepts from Roman law. Furthermore, when we speak about tyranny and the common law world I seem to recall from the history books a reference to 700 years of tyranny in this country, a tyranny which many would say was sustained very effectively by a common law legal system.

"Developments in the area of police and judicial cooperation are entirely based on principles of cooperation between the police and judicial authorities in the different member states. Furthermore, there is no provision in the Amsterdam Treaty for harmonisation of criminal law, and in adopting this approach Member States have been particularly conscious of the principle of subsidiarity."

Furthermore, Mr. McDowell refers to the Corpus Juris project as if this was the sum total and the centerpiece of the efforts of the Union to cooperate in the area of policing and criminal law matters. Without providing any objective justification, he asserts that "this project remains on the federalist agenda." The Corpus Juris, which has been explained in detail by Mr. Justice Carney in a recent publication,[27] constitutes a response from the European Commission to the continuing demands for greater action in confronting fraud against the budget of the European Communities. However, it is a project which has been rejected by the Heads of State

and Government at the conclusions of the IGC at Nice on 11 December 2000. It is thus no longer on the current agenda, federalist or otherwise.

Mr. McDowell broadens the argument from the Corpus Juris to suggest that "the agenda for third pillar measures is driven from outside this country with little or no domestic public debate." As stated above, the agenda for the Third Pillar, which concerns police and judicial cooperation on criminal matters, is driven by the need to confront organised crime, drug trafficking and fraud and other forms of serious cross border crime within the European Union. These issues were marked down as issues of Common Concern of Member States in the Maastricht Treaty 1993. The Irish presidency of 1996 placed the issue of crime as a priority item on the agenda of the Heads of State and Government. This ultimately led to the police and judicial cooperation provisions of the Amsterdam Treaty,[28] the Vienna Action Plan of the European Commission on the best way to implement those provisions, and to a special European Council on the subject in Tampere in Finland in October 1999. This is a European Council at which the Taoiseach of this country participated.

Mr. McDowell concludes on this issue that "Ireland has a particular interest that third pillar measures are not imposed on us by stealth or inadvertence." The reality is that Ireland participates in all actions, decisions and measures adopted under the Third Pillar and therefore has it within its control whether to be an active of passive participant in that process.

Conclusion

The European Community was in existence for a mere 16 years when Ireland joined and in 1973 it entered a very different Community to that which exists today. It was a Community in the making. Ireland has now been a member for almost[29] years. Many of the great advances in the integration process took place after Ireland's entry to the European Economic Community - the completion of the internal market, a comprehensive structural and cohesion policy, economic and monetary union. Ireland participated actively in that process over this period, understood the purpose and value of policy measures adopted, and had time to adapt to the many changes introduced. Having participated in that process for almost 28 years and having played our part in shaping the nature of the Community or Union in which we now belong, it is surely not credible to suggest that we have been or are in effect bystanders rather than active participants. It is equally implausible to suggest that Irish Ministers, civil servants, representative organisations and other parties representing Irish interests who participate at all levels of EU decision-making do not share in the ownership of the EU agenda and the decisions made under that agenda. If this is the case, however, we only have ourselves to blame.

In this regard I would wholeheartedly support the point of view expressed by Mr. McDowell when he states that: "Our priority must be to take an active role in developing and articulating a model of Europe which we want to see." ●

* **The author is Chairman of the Lawyers' Group in the Institute of European Affairs. The views expressed in this article represent the author's personal views.**

1. This is consistent with earlier statements of Michael McDowell such as those made on 7 February 2001 when speaking on Irish Constitutionalism and the Development of the European State, Speech by Attorney General, Michael McDowell S.C. at Cearrbhall O'Dhalaigh memorial dinner, in which he stated inter alia that "The Irish Government regards the negotiations at Nice with evident and justified satisfaction because they lay the necessary basis for the ambitious programme of EU Enlargement which we strongly support without at the same time asking the Irish State to make dramatic and unnecessary concessions on issues adverse to our national interests."
2. Adopted by the Heads of State and Government in Nice on 11 December 2000
3. "Our Europe", Speech to the Bundestag Berlin 27 June 2000.
4. "Superpower - not Superstate", Speech to the Polish Stock Exchange, Warsaw, 6 October 2000.
5. Speech at the Institute of European Affairs, Dublin, 30 April 2001.
6. Speech on "The Future of an Enlarged Europe" to the International Press Centre, Paris, 28 May 2001.
7. Speech on "The Convention as a Model for European Constitutionalisaton" to the Humboldt University, Berlin, 14 June 2001.
8. Speech on "Our Common Future" to University College Cork, 22 June 2001.
9. *Van Gend en Loos*, Case C-26/62 [1963] ECR 1
10. *Opinion on draft agreement between EEC and EFTA* of 12/12/91
11. Article 5, Treaty of the European Communities
12. The Treaty of Nice means report, edited by Jim Dooge and Patrick Keatinge, Institute of European Affairs, April 2001, Chapter 12, Proposals and Process, Noel Dorr, page 199.
13. Charter of Fundamental Rights, Article 51.
14. Case C-11/70 [197] ECR 1125
15. Case C-4/73 *Nold v Commission* [1974] ECR 941, Joined cases 201 and 201/85 *Klench v Secretaire d'Etat* [1986] ECR 3477, Case C-5/88 *Wachauf v Bundesamt fur Ernahrung and Forstwirtschaft* [1989] ECR 2609 to mention just a few.
16. Also known as the Treaty of the European Union.
17. Article J12
18. Article K21
19. Article 11 of the Maastricht Treaty
20. Irish Journal of European Law, 1998
21. Select committee on the European Union, House of Lords Session 1999 - 2000, Eighth report EU Charter of Fundamental Rights, 16 May 2000
22. Conclusions of the European Council, Cologne, June 1999.
23. Report on Statutory Drafting and Interpretation: plain language and the law - Law Reform Commission 2000.
24. "What the Treaty of Nice Means", Edited by Jim Dooge and Patrick Keatinge (April 2001), Institute of European Affairs, Chapter 12, 119
25. Manfred Brunner & Ors v The European Union Treaty (CMLR) 1994 (1) 57, at paragraph 52.
25. For a detailed analysis of the Treaty of Amsterdam provisions on Police and Judicial cooperation in Criminal matters, see Regan (Ed), "The New Third Pillar - Cooperation against Crime in the European Union" published by the Institute of European Affairs.
26. Ibid.
27. Articles 29-42.

orensic Accounting and the Calculation of Personal Injury Damages

In the first of two articles dealing with forensic accounting calculations, ***Prof Niamh Brennan of UCD*** *and* ***John Hennessy BL*** *examine the approach to calculating damages in personal injury cases.*

Heads of special damage in personal injury cases

Damages in personal injury cases use a more or less standard methodology which does not differ significantly between cases.[1] Where a plaintiff is asserting that the injuries have affected the capacity for work, the methodology usually includes projecting lost earnings and related fringe benefits over the period the plaintiff would reasonably have been expected to work had the accident not occurred. An accident victim may suffer a reduction in life expectancy, which may in turn reduce working life. Future costs (such as medical or nursing care) also need to be projected in many cases. Information on life expectancy and working life expectancy can be obtained from statistical data. Actuarial assistance is usually needed in sourcing and analysing this information and in calculating the present value of the future cash effects of the plaintiff's injuries. Forensic accountants can provide valuable assistance in the calculation of special damages which may include lost earnings (both past and future), additional healthcare, rehabilitation and medical expenses (both past and future), special education or retraining costs, and household services lost. Table 1 lists special damages commonly arising from personal injuries. Table 2 lists items sometimes forgotten in formulating claims for damages

Table 1: Damages in personal injury cases

Special damages

- Lost earnings (including other compensation, fringe benefits, etc)
  - During injury period (past and future)
  - Consequent on potential for higher periods of unemployment
  - Consequent on limitations in earning capacity due to injuries
  - Reduced life expectancy
- Pension rights lost
- Additional health care and living expenses
- Other actual costs (past and future) arising from the injury

Mitigating (reduction in) damages

- Earnings post injury (past and future)
- Income tax savings
- Certain social welfare benefits received

The calculation of lost earnings is based initially on historical data. Those earnings are projected using assumed growth rates. The projected earnings (lost because of the accident) are then discounted to their present value using an appropriate discount rate.

In assessing loss of future earnings, loss of earning capacity (rather than loss of earnings per se) is the object of the calculations. The loss of earnings capacity assessed in the Irish courts is based on what the plaintiff would have earned rather than what he could have earned. This is clear from a large number of decisions of the courts over the years. Barron J. put it simply and clearly in *Doran v. Dublin Plant Hire Ltd* when he said:

> "Although it may be difficult to determine the facts which give rise to future loss of earnings, it still must be done. The fundamental matter is to determine the natural and probable financial loss to the plaintiff. There are two parts to the equation:
> (1) What would the plaintiff have earned throughout his working life, if he had not met with the accident; and
> (2) What will he now earn over the same period." [2]

Table 3 shows the various elements comprising the estimate of pecuniary loss

Difficulty in Quantifying Awards

The difficulty in assessing damages is not a basis for a refusal to make an award in the plaintiff's favour. In fact, the courts have stated that it is not appropriate to substitute an increase in general damages for an item of special damage on the grounds that the latter is difficult to quantify.[3]

Difficulties in estimation are common in cases concerning the loss of an opportunity for the plaintiff arising from the accident. In the nature of things, these damages are speculative and much depends on the evidence in a particular case. An obvious and frequent example is damages for lost profits in the case of a self-employed plaintiff. If absolute certainty were required as to the precise amount of the loss that the plaintiff had suffered, no damages

would be recovered at all in a majority of cases. In awarding damages, courts take account of uncertainties such as lost earnings capacity, loss of profits and future damages, with a view to arriving at a best estimate.

Assumptions

Many questions concerning personal injuries calculations cannot be answered with precision, even with the benefit of expert evidence, because they relate to the future. Accordingly the experts, and ultimately the court, must make certain assumptions about the future in order to arrive at an estimate of the present value of future losses. In making such assumptions the court must consider the probability of occurrence of possible future events (*e.g.* promotion, change of job, redundancy, death, further disabling accident, etc.) and the relative probabilities of these events must be factored into the award for future loss of earnings. It is accepted in the courts that these calculations of damages will be based on assumption and estimation.[4]

Probability versus possibility

The courts distinguish between probability and possibility.[5] *Reddy v. Bates*[6] is regularly referred to in personal injuries cases to this day as it is regarded as having established as a matter of law that the present value of future loss of earnings, as calculated using actuarial techniques and the best estimate of probable actual losses in the future, should be reduced to take account of a degree of uncertainty as to whether a plaintiff would be employed continuously for the period assumed by the calculations.

Loss of Earnings

Lost earnings comprise the monetary loss, expressed in present values, arising from the individual's inability or reduced ability to provide certain services. Lost earnings damages comprise the present value of the difference between the plaintiff's projected 'but for' earnings and the projected actual earnings. The calculations include both actual or estimated lost past earnings and projected lost future earnings.

This can be summarised in the following equation:

Lost earnings =
('But for' - actual past earnings) + Present value ('But for' - projected future earnings)

The legal principles for calculating damages for lost earnings were set out for the purposes of English law in *Cookson v. Knowles*[7] as follows:

- Past lost earnings can include expected increases in income (*e.g.* wage increases that have been granted to employees performing similar tasks as the plaintiff);
- Future loss is based on earnings at the date of the trial, i.e. no allowance for inflation. However, account may be taken of expected increases in earnings (*e.g.* arising from promotion);
- Future loss is usually calculated by applying a multiplier (derived from annuity tables) to the multiplicand (*i.e.* the estimate of the annual loss).

Calculation of past earnings loss

Past losses may be calculated by applying to a periodic (*i.e.* weekly, monthly, annual) amount (called the multiplicand) a multiple for the period of loss. Adverse contingencies must be taken into account (such as ill-health, strikes, unemployment) which would have reduced the plaintiff's earnings in the pre-trial period had there been no injury. This adjustment is similar to that in calculating future losses, except that a deduction for life expectancy is not appropriate.

Estimate of annual earnings

Earnings will include basic earnings, overtime, shift premium, bonuses, commissions, fringe benefits and deferred benefits. Finding appropriate base earnings requires the accountant to calculate or estimate the amount of earnings of the injured party prior to the accident. The plaintiff's earnings history prior to the incident is a good source for understanding the base-year earnings. Earnings should be reduced by taxation and certain social welfare payments[8] and by any costs incurred by the plaintiff in making those earnings such as travel costs and clothing costs.[9] In the case of foreign currency earnings lost, the court will award damages in the foreign currency[10] or convert the foreign currency amount at an appropriate rate.[11]

Fringe benefits

Lost earnings may include lost fringe benefits. If the earnings are lost, the benefits that accompany them are generally also lost and should therefore be included in lost earnings calculations. Fringe benefits are compensable damages[12] because their absence is an economic loss to the plaintiff which must be replaced and they are part of the payment for the injured person's services. Details of the benefits the plaintiff was receiving before the accident, and was likely to receive in the future, should be obtained. Lost fringe benefits then need to be estimated. Courts have, for instance, compensated plaintiffs for loss of board and lodging,[13] and loss of the opportunity to buy duty free goods.[14] In cases where the employer and employee share the cost of the fringe benefit, the calculation should only include the employer's contribution towards the fringe benefit.

In Ireland, the inclusion of fringe benefits and the deduction of expenses directly attributable to employment are generally accepted practices and these adjustments to the basic earnings figures tend to be made in the actuary's report and to form part of the actuary's calculations. The general principle that the amount

Table 2: Top ten list of losses plaintiffs often overlook

1. Loss of household services such as cooking, cleaning and transporting children
2. Loss of future social security or pension benefits
3. Loss of holiday pay
4. Loss of future health insurance and life insurance benefits
5. Loss of deferred compensation from a lost job
6. Loss of long-term or short-term disability insurance
7. Loss of benefits from promotions that were expected or likely
8. Loss of personal possessions damaged in an accident
9. Loss of estate accumulation, including contributions to retirement plans
10. Cost of mileage to and from medical treatment

Source: Adapted from Long, S. "Top ten things plaintiffs forget in personal injury cases" *Frankenfeld Report Newsletter*, Vol. 1, No. 1, November 1998, www.frankenfeld.com.

recoverable by a plaintiff is limited to the difference between losses resulting from the damage and any gains arising as a consequence of the accident was clearly stated by Walsh J. in the Supreme Court in *O'Looney v. Minister for the Public Service.*[15]

Projection of future earnings

In an award where a plaintiff is compensated for the loss of earning capacity, the court compares the plaintiff's pre-accident earning capacity with his post-accident earning capacity, and awards damages to represent the difference. In theory, compensation under this head is for the loss of a capital asset (*i.e.* the ability to earn) rather than for loss of income in the form of earnings. (*e.g.* see the judgment of Barr J. in the High Court in *Phelan v. Coillte Teoranta*[16]).

In order to calculate a lump sum to compensate for loss of future earnings, a projection of future earnings will be required. A growth rate must be determined to project future earnings over the expected working life of the injured person. This is the percentage rate that earnings would be expected to increase during the damage period. The growth rate must accurately reflect the expected increases in the plaintiff's earnings. A variety of sources are used to estimate this rate including industry standards, historical data and government statistics. A plaintiff's historical earnings are frequently used as a predictor of future earnings growth rates. If a solid historical record is available, it may be used to calculate a growth rate directly. Alternatively, it may be necessary to resort to average earnings statistics for the relevant occupation. The accountant may project 'but for' earnings based on the past trend in the plaintiff's earnings, provided these follow a consistent pattern and are a reliable indicator of the future. Earnings may also increase because of the plaintiff's prospects of promotion,[17] even where the prospects of promotion are not certain[18] (see also *State (Thornhill) v. Minister for Defence*[19]).

Projecting income streams for self-employed persons is likely to be more difficult than for employees. For self-employed persons a distinction must be made between their income from equity in the business (which should not be affected by the injury) and income in compensation for their work in the business. One approach is to calculate what it would cost to pay a manager to do the work of the owner.

As stated earlier, the measure of damage is not loss of earnings *per se* but loss of earnings capacity. The effect of loss of earnings capacity is that the plaintiff is disadvantaged in competing with others for work in the labour market. Thus, damages may also be awarded in respect of 'disadvantage in the labour market' where the plaintiff's employment prospects are adversely affected by the injury.[20] The quantum of damage depends on the present value of the risk that the plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market.

Calculating the lost earnings of children involves greater estimation and subjective judgement than for adults.[21] Two approaches have been used, the latter being less likely in practice:

- The use of government statistics of average earnings (possibly subject to adjustment for the particular circumstances of the individual child);[22] and
- Based on the earnings and employment history of the child's father.[23]

Table 3: Estimate of pecuniary loss

Total estimated pecuniary loss includes present value of:

- Lost net earnings
  - Reduction in gross earnings
  - (Unemployment probability)
  - (Income taxes)
  - Fringe benefits
  - (Work-related expenses)
- Lost household services
- Costs of lifetime health care and living expenses
- Other recurring future costs (e.g. equipment)
- Funeral and burial costs (fatal accident cases)
- Other out of pocket costs

Multiplier reflecting duration of losses and time effects of payments in the future applied to the sum of these amounts

Lost social welfare benefits

In some cases, the plaintiff's earning capacity is so reduced that he will not be able to make social welfare contributions resulting in lower social welfare entitlements than before the accident. In such cases, the claim for damages should include the lost social welfare benefits.

Valuation of Pension Benefits / Loss

In some personal injury cases, the lost compensation includes lost pension rights or benefits which would have been earned during the projected working life of the plaintiff and received following retirement . These projected lost pension benefits must be added to lost earnings in calculating damages. There are two ways of calculating the present value of the loss. The open market approach involves obtaining quotations on the insurance market for the amount of lost pension for the plaintiff. Alternatively, an actuary can be asked to assess the present value of payment for life of the amount of the loss of pension commencing at the date of retirement of the plaintiff. The method used in *Auty v. National Coal Board* [24] for calculating pension loss in personal injury claims has been accepted in England as the primary way for computing losses of pension in lump sum calculations. The open market approach was followed, together with the application of a 5% discount rate.

"The effect of loss of earnings capacity is that the plaintiff is disadvantaged in competing with others for work in the labour market. Thus, damages may also be awarded in respect of 'disadvantage in the labour market' where the plaintiff's employment prospects are adversely affected by the injury. The quantum of damage depends on the present value of the risk that the plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market."

Mitigating Lost Earnings

Plaintiffs have a duty to take reasonable steps to minimise the damages they incur, for example by finding alternative employment after an accident. Actual earnings after the injury may not be the best measure of damage mitigation - the plaintiff may not have made a sufficient effort to mitigate damages.

The basic rule is that damages are based on the net consequential loss. Receipts arising from the accident must therefore be deducted from the plaintiff's losses. However, the general rule in Irish law (subject to specific exceptions) is that compensating benefits are not taken into account in reducing the plaintiff's damages for loss of earnings in a personal injury action.[25]

Other items to be considered include the following:

- Statutory sick pay should be deducted;[26]
- Redundancy payments should not be taken into account in assessment of damages;[27]
- Savings on living expenses (e.g. travel costs to/from work) should be deducted as an expense to earn lost earnings;[28] and
- Any tax rebate must be deducted from lost earnings.[29]

Although defendants have attempted to have entitlements to pension rights or accelerated payment of pensions taken into account in assessing compensation for loss of earnings by plaintiffs, the courts have resisted this. For such benefits to be taken into account in assessing loss of earnings claims would be to allow the wrongdoer to benefit from his wrong.

Lost Years Deduction

Irish law allows plaintiffs whose life expectancy has been shortened to recover loss of earnings and other pecuniary benefits in respect of his 'lost years', i.e., years in which the plaintiff would have been alive and earning but for the accident.[30] Lost years are calculated by reference to the likely life expectancy of the plaintiff, were it not for the accident, compared with his life expectancy after the accident. A plaintiff's injuries often result in a reduced life expectancy such that he is expected to die before the "normal" retirement age. In such cases, the court will determine compensation for the income which the individual would have earned between the (expected) age of death and the (previously expected) age of retirement. In principle, the pleasure which consumption of this residual income would have provided during the years which have been lost can be replaced by consumption during the plaintiff's now-shortened lifetime.

Calculation of 'lost years' damages

A plaintiff whose life expectancy has been shortened will not need to be compensated for the full value of the income lost during the years which he/she will not now live. Numerous theories have been put forward for the determination of the amount of compensation to be made for lost years. These range from:

- Reducing full income for those components of income absolutely necessary to the maintenance of life; to
- Reducing full income for the entire value of the plaintiff's projected expenditure on consumption (i.e. deduction of the entire value of income except savings).

A calculation based on reasonable assumptions as to likely future patterns of spending on essential living expenses will usually be sufficient.

Calculation of living expenses

Pecuniary benefits which form the subject of a 'lost years' claim are not confined to, but mainly relate to, lost earnings. The size of the claim depends on the age of the plaintiff and his life expectancy at the date of trial.

The primary difficulty here concerns the measurement of the value of living expenses. One method is to approximate this figure using the average family's expenditures on such categories as food, clothing, shelter and transportation. If the plaintiff were a member of a family, not all income would have been spent on that person alone. Indeed, fatal accident litigation in the U.S. suggests that the total amount which most individuals spend on goods and services which benefit them alone is approximately 30 percent of after-tax income. As only some portion of that percentage is spent on necessities, the deduction for personal necessities may be as little as 10 - 15 percent. Although most of the reported cases assume that all expenditures on food, shelter, clothing, transportation, and health care are necessary, two alternative views have been proposed concerning the proportion of the income on which to base the calculations:

- Only that portion of family income which would have been spent on the plaintiff should be deducted. On that basis, the plaintiff was awarded 67 percent of the income which would have been earned during the lost years;
- Courts have based their awards on the percentage of personal income which would have been devoted to necessities. This has led to awards lying between 50 and 60 percent of the lost years' income.

A number of approaches to calculating the deduction have been applied in the UK:

- Deduction has been calculated in a manner similar to the value of dependants' dependency in fatal accident cases;[31]
- Damages have been limited to the sums which the victim would have saved during the lost years;[32] and
- Damages have been calculated by reference to the available surplus remaining, after deducting from the net earnings the cost of maintaining the victim in his station of life.[33]

"A plaintiff's injuries often result in a reduced life expectancy such that he is expected to die before the 'normal' retirement age. In such cases, the court will determine compensation for the income which the individual would have earned between the (expected) age of death and the (previously expected) age of retirement. In principle, the pleasure which consumption of this residual income would have provided during the years which have been lost can be replaced by consumption during the plaintiff's now-shortened lifetime."

Given these different approaches to the calculation of the deduction of living expenses, the English Court of Appeal in the combined appeals, *Harris v. Empress Motors Ltd and Cole v. Crown Poultry Packers Ltd*[34] provided some general guidance as to the principles to be applied. In both cases, the judge at first instance had adopted the Fatal Accidents Act dependency approach and had deducted 25 per cent from the net earnings in assessing damages for the lost earnings during the lost years. Three principles were set out:

1. The elements comprising living expenses should be the same regardless of the age of the injured party;
2. The sum to be deducted as living expenses should be the proportion of the victim's net earnings spent on maintaining himself at the standard of living appropriate to his case; and
3. Sums expended to maintain others should not form part of the victim's living expenses and should not be deducted from net earnings.

Expenses

For expenses to be recovered, it must be demonstrated that the expenses are necessary because of the defendant's wrong.[35] Only reasonable expenses may be recovered.[36] In cases of severe injury, additional expenses may have to be considered such as additional healthcare, rehabilitation and medical expenses (both present and future), and special education or retraining costs.[37] In the case of severe injuries, calculation of the annual loss often includes annual nursing/medical costs to be incurred by the plaintiff. Where healthcare costs include a stay in a medical or paramedical institution, the element of that cost relating to the value of board and lodgings must be deducted, as the plaintiff would have had to maintain himself had he not been injured.[38] The courts have also allowed expenses of special accommodation and adaptations to existing accommodation in the case of severe injuries.[39]

Three criteria are generally relevant in evaluating future medical costs. They must be (i) directly related to the wrong of which the plaintiff complains, (ii) generally acceptable by the medical profession and (iii) reasonable in amount.[40]

Multipliers in relation to future expenses should not be set so as to allow recovery for lost years (relating to reduced expectation of life) in a manner similar to future earnings. Furthermore, compensation for the cost of future care of an individual whose life expectancy is demonstrably impaired need obviously be less than that required for someone whose anticipation of a future lifetime is normal.

Personal / Household Services

Since individuals make valid contributions through their efforts at both paid and unpaid work, the courts have concluded that they should be compensated when they are unable to pursue either type of employment. In the field of personal injury litigation this has implied that calculation of a plaintiff's damages should include the loss (or impairment) of the individual's ability to perform household services. Controversy remains, however, concerning the method which should be used to establish the economic value of that loss. There are two components of the loss of household services: direct labour, including most general housekeeping duties; and management or indirect labour.[41]

"The multiplier is designed to reflect many factors, in particular the plaintiff's life expectancy and the time value of money. In personal injury cases, courts have traditionally relied on doctors for opinions on plaintiffs' remaining life expectancy. As the money intended to compensate the future loss is being received at the time the calculation is made rather than when the loss or expense is actually incurred, the multiplier is adjusted downwards to take into account the time value of money."

Daly v. General Steam Navigation Co[42] involved a claim for household services. Two main principles set out in *Daly* deal with the pre-trial and future loss of household services. First, a future loss of household services was allowed, regardless of the intent, or lack of it, on the part of the plaintiff to hire replacement household labour to compensate for the lost capacity to undertake household work. The second aspect related to loss of ability to perform household duties in the pre-trial period as a result of the accident. The notional value of those replacement services was not considered an appropriate measure of the loss of housekeeping ability. The loss, rather, should have been assessed as a part of the plaintiff's general damages, and the additional pain, suffering and loss of amenity experienced by the plaintiff should be the measure of that loss. This approach to the impairment of housekeeping ability which awards the plaintiff for the loss of ability rather than relying on the prior "antiquated if not sexist" approach (which sought to calculate the value of the services lost by measuring the loss from the point of view of a third party who had previously benefited from the services provided by the victim) has been supported in the Canadian courts.[43] In addition, in some instances, the household services which were performed by a plaintiff or the deceased cannot be replicated by replacement labour.[44]

Multipliers

Given that damages are awarded in the form of a lump sum rather than in the form of an income stream, the assessment of damages requires the conversion of future cash flows into a capital sum. Actuaries generally advise, and the courts generally apply, a multiplier approach. A multiplier based on the expected duration of the loss is applied to an amount representing the annual losses and expenses (called the multiplicand) producing a capital figure. In personal injury actions, the multiplier is determined at the date of trial. Invariably an actuary advises on the appropriate multiplier.[45]

The multiplier is the number of weeks or years of loss of earnings, discounted to account for the early receipt of a lump sum. The multiplier is designed to reflect many factors, in particular the plaintiff's life expectancy and the time value of money. In personal injury cases, courts have traditionally relied on doctors for opinions on plaintiffs' remaining life expectancy where it has been shortened by the effects of the injuries.

As the money intended to compensate the future loss is being received at the time the calculation is made (i.e., at the time of the judgment or settlement of the action) rather than when the loss or expense is actually incurred, the multiplier is adjusted downwards to take into account the time value of money. If the loss is not

"The question of the appropriate differential to be assumed between investment returns and wage inflation for the purpose of calculating the present value of future losses is controversial... The economic environment in Ireland in recent years has given rise to differentials between inflation rates and returns available on secure investments that are much less than 4%. Indeed such differentials have on occasion been negative (i.e. inflation rates have exceeded relevant interest rates). The size of the differential is, of course, affected by the interest rate chosen which, in turn, is affected by the risk profile of the investment and the period for which the investment is to be made."

expected to begin until some time in the future, there must be an additional adjustment of the discount for accelerated receipt. A further and separate downward adjustment will be made to the multiplier to reflect the contingencies of life. The multiplier should also take into account the rate of return on investment of the lump sum in the future. These principles apply to both future expense and loss of future earnings. In order to effect the discount of accelerated receipt, it is necessary to apply a notional rate of interest which the plaintiff is assumed to obtain by investing the 'accelerated' lump sum. There are therefore two main factors that determine the multiplier - the period of loss and the discount rate.

The multiplier is often provided to the court when the facts concerning rate of growth of earnings, discount rate, and age of retirement are not in dispute, but there is some disagreement concerning the plaintiff's starting salary. The determination and agreement of multipliers is usually less difficult than might be expected, for two reasons. First, experts rarely differ significantly with respect to the discount rate or the plaintiff's retirement age. Thus, multipliers would have to be provided only for a selection of growth rates of earnings. Second, growth rates of earnings tend to be associated very closely to education level. Simply by calculating a multiplier for each of four education levels can provide a comprehensive range of multipliers: primary school, secondary school, university, and post-graduate.

Kemp sets out two approaches to calculating damages using multipliers. The single multiplier method is based on average net annual earnings and one multiplier.[46] The split multiplier approach caters for changing earning capacity of the injured party and applies an increasing amount of earnings (multiplicand) to the multiplier.[47]

Assumptions underlying the multiplier

When arriving at an appropriate multiplier to apply to loss of earnings, an actuary will make an assumption as to the extent to which investment returns will exceed wage inflation over the period of the losses. In doing so, the actuary is building into his calculation of the present value of future lost earnings an assumption in relation to increases in income. He is simultaneously applying a discount to arrive at the capital value today of the future income stream that the plaintiff has lost. If it is accepted that, over the long term, wage inflation and investment returns move approximately in tandem with a relatively constant differential between them, this approach has the effect of making it unnecessary to project specific inflation-related pay rises into the future. However, such a calculation ignores any pay adjustments arising from factors other than inflation (*e.g.* by virtue of promotion, productivity changes, etc.) that the plaintiff might enjoy, and these therefore need to be factored into the calculation separately.

The question of the appropriate differential to be assumed between investment returns and wage inflation for the purpose of calculating the present value of future loss earnings is controversial. The controversy has arisen because the formerly widely accepted differential of 4%, arrived at based on historical investment performance in times of medium to high inflation, is regarded by many commentators as excessive when inflation and interest rates are low. The economic environment in Ireland in recent years has given rise to differentials between inflation rates and returns available on secure investments that are much less than 4%. Indeed such differentials have on occasion been negative (i.e. inflation rates have exceeded relevant interest rates). The size of the differential is, of course, affected by the interest rate chosen which, in turn, is affected by the risk profile of the investment and the period for which the investment is to be made. It is important to note that a reduction of even 1% (from 4% to 3%) in the discount rate can increase significantly the present value of a series of future cash flows.

This issue has not been determined on a definitive basis in the Irish courts to date. In England, however, the House of Lords addressed the question in *Wells v. Wells.*[48] Their Lordships focused their attention on whether investment returns assumed in such calculations should be the returns on equities (which involve significant investment risk) or on Index Linked Government Securities (ILGS) (which are a much safer form of investment the effect of which is to protect the capital sum from the effects of inflation and provide a return to the investor). All five law lords held that the latter approach was the appropriate one. Lord Lloyd of Berwick said:

> "Investment in ILGS is the most accurate way of calculating the present value of the loss which the plaintiffs will actually suffer in real terms.
> Although this will result in a heavier burden on these defendants, and, if the principle is applied across the board, on the insurance industry in general, I can see nothing unjust. It is true that insurance premiums may have been fixed on the basis of the 4 to 5% discount rate indicated in *Cookson v Knowles* [1978] 2 All E.R. 604, [1979] A.C. 556 and the earlier authorities. But this was only because there was then no better way of allowing for future inflation. The objective was always the same."[49]

"It is important to note that a reduction of even 1% (from 4% to 3%) in the discount rate can increase significantly the present value of a series of future cash flows... It is submitted that 3% is likely to be much closer to an appropriate differential in Ireland today than figures of 4% and higher that are commonly used."

Lord Steyn said:

> "...the Court of Appeal have assumed that the same investment policy would be suitable for all investors, regardless of special needs. The premise that the plaintiffs, who have perhaps been very seriously injured, are in the same position as ordinary investors is not one that I can accept. Such plaintiffs have not chosen to invest: the tort and its consequences compel them to do so. ...Typically, by investing in equities an ordinary investor takes a calculated risk which he can bear in order to improve his financial position. On the other hand, the typical plaintiff requires the return from an award of damages to provide the necessities of life. For such a plaintiff it is not possible to cut back on medical and nursing care as well as other essential services. His objective must be to ensure that the damages awarded do not run out. It is money that he cannot afford to lose."[50]

Although these judgments would appear to rely heavily on the availability of ILGS, of which there is no equivalent in the Irish financial markets, it is noteworthy that the court did not stop at approving the use of such investments to calculate the appropriate differential. Their Lordships went on to extract from the evidence presented to them the appropriate percentage, and all agreed that, instead of the figures of 4% to 5% commonly used, the correct differential for the cases before them was 3%, reflecting the altered investment environment and the availability of a suitable benchmark. It is submitted that 3% is likely to be much closer to an appropriate differential in Ireland today than figures of 4% and higher that are commonly used.

Accounting Data

Accounting numbers are essential in computing and supporting financial calculations. The foundation of the calculation must be built securely on all available data. Forensic accountants can assist in the early stages of a case in the acquisition of information by formulating interrogatories and requests for discovery of relevant financial documents. Forensic accountants may also assist in evaluating the quality, integrity and sufficiency of the data available in respect of the case. All accounting information must be evaluated for its relevance, reliability, comprehensiveness and accuracy. Inadequate information will lead to flawed calculations.

Forensic accountants need to double-check the foundations and assumptions on which their calculations are based. Instructing solicitors should:

- Make sure they have supplied the forensic accountant with all available financial information. Forensic accountants are limited by the information provided to them. The failure to use all available data or to have knowledge of what is available can lead to seriously flawed calculations; and

- As far as possible, double check the accountant's stated assumptions and calculations to make sure all relevant information is included therein and has not been misunderstood.

The use of third party endorsements for assumptions in forensic accounting reports will add to the credibility of the calculations. For example, central statistics office data[51] or data from industry associations can assist in confirming the accounting data (e.g., average industrial wage, wages in a specific industry) used in the report. Newspaper appointments pages can also provide a useful source of salary ranges for a particular job.

There are occasions, particularly in relation to self-employed persons, where the accounts and the returns to the revenue do not reveal the true financial performance of the business. In the UK, the courts have found that a plaintiff may be compensated for lost earnings even where these were not disclosed to the revenue.[52]

Concluding Comment

There are several aspects of the way in which the law compensates the victims of personal injuries arising from legal wrongs that merit clarification or review. These include:

(1) The arbitrary limit placed on general damages payable for pain and suffering in the most tragic and extreme cases;

(2) The somewhat unclear and imprecise deduction made by courts from calculated special damages to take account of future uncertainties - the so-called 'Reddy v. Bates deduction';

(3) The effective subsidisation of the insurance industry by the State that results from the calculation of damages on a 'net of tax' basis; and

(4) The assumptions made routinely in actuarial calculations regarding the long-term differential between wage inflation and investment returns - a small change in this assumption can have a very significant effect on the calculation of damages.

A clear indication of current judicial and/or legislative thinking in these areas would assist legal practitioners, and forensic accountants, in achieving greater precision in the calculation of damages for personal injuries.●

1. Many aspects of personal injury calculations cannot be covered in this short article, including fatal accident cases, payment of awards, taxation of personal injury damages etc. Further information on these topics are to be found in Brennan and Hennessy, *Forensic Accounting* (Round Hall Sweet & Maxwell, Dublin, due for publication October 2001).
2. [1990] 1 I.R. 488 at 497 - 498.
3. *Ibid.*
4. *Mallett v. McMonagle* [1970] A.C. 166.
5. *Kennedy v. East Cork Foods* [1973] I.R. 244 at 252-253.
6. [1983] I.R. 141.
7. [1979] A.C. 556.
8. *Cooke v. Walsh* [1984] I.L.R.M. 208, 217.
9. *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174, 191.
10. *Peter Paul Hoffman v. Dr. David Sofaer* [1982] 1 W.L.R. 1350.
11. See, for example, *Conley v. Strain* [1988] 1 I.R. 628.
12. *Glover v. BLN Ltd* (No. 2) [1973] I.R. 432.
13. *Liffen v. Watson* [1940] 1 K.B. 556.
14. *Ashley v. Esso Transportation Co. Ltd* [1956] *The Times* 8 February.
15. [1986] 1 I.R. 543 at 547.
16. [1993] 1 I.R. 18.
17. *Mitchell v. Mulholland (No. 2)* [1972] 1 Q.B. 65, 83-84 (C.A.).
18. *Ratnasingam v. Kow Ah Dek* [1983] 1 W.L.R. 1235.
19. [1986] 1 I.R. 1.
20. In the UK *Smith v. Manchester Corporation* [1974] 17 K.I.R. 1 C.A.; in Ireland *Kennedy v. East Cork Foods Ltd* [1973] I.R. 244 (S.C.).
21. See, for example, *McNamara v. Electricity Supply Board* [1975] I.R. 1 (S.C.); *Cooke v. Walsh* [1984] I.L.R.M. 208, 217 (S.C.); [1983] I.L.R.M. 429, 435; *Lindsay v. Mid-Western Health Board* [1993] 2 I.R. 147 at 177.
22. A wealth of interesting statistics can be found in the annual publication: Central Statistic Office Ireland *Statistical Abstract* (Government Publications, Dublin, Annual).
23. *Cassel v. Hammersmith and Fulham Health Authority* [1992] P.I.Q.R. Q168.
24. [1985] 1 All E.R. 930 (C.A.).
25. See Section 2 of the Civil Liability (Amendment) Act 1964 and the modifications to the general rule, contained in that section, made in sections 75 (as amended by section 20 of the Social Welfare Act 1994) and 237 (as amended by section 17 of the Social Welfare Act 1997) of the Social Welfare (Consolidation) Act 1993. See also *Woodman Matheson & Co. Ltd v. Brennan* [1941] 75 I.L.T.R. 34.
26. *Palfrey v. GLC* [1985] I.C.R. 437.
27. *Mills v. Hassal* [1983] I.L.R. 330; see also *O'Loughlin v. Teeling* [1988] I.L.R.M. 617.
28. Discussed in *Dews v. National Coal Board* [1988] 1 A.C. 1.
29. *Hartley v. Sandholme Iron Co. Ltd* [1975] Q.B. 600.
30. The leading case on this in the UK is *Pickett v. British Rail Engineering* [1980] A.C. 136. However the matter was addressed in an earlier Irish case *Doherty v. Bowaters Irish Wallboard Mills Ltd* [1968] I.R. 277 (S.C.).
31. *Benson v. Biggs Wall & Co. Ltd* [1983] 1 W.L.R. 72; *Harris v. Empress Motors Ltd* [1983] 3 All E. R. 561; [1984] 1 W.L.R. 212.
32. *Sullivan v. West Yorkshire Passenger Transport Executive* 17 December 1980 (unreported), as cited in *Harris v. Empress Motors Ltd* [1983] 3 All E. R. 561; [1984] 1 W.L.R. 212.
33. *White v. London Transport Executive* [1982] 1 Q.B. 489; *Clark v. Sugrue Brothers Ltd* 28 January 1983 (unreported).
34. [1983] 3 All E. R. 561; [1984] 1 W.L.R. 212.
35. White, J. P. M. *Irish Law of Damages for Personal Injury and Death* (Butterworths, Dublin, 1989) p. 230.
36. *Cunningham v. Harrision* [1973] Q.B. 942; *Cassel v. Riverside Health Authority* [1995] P.I.Q.R. Q. 168.
37. See, for example, *Conley v. Strain* [1988] 1 I.R. 628.
38. *Shearman v. Folland* [1950] 2 K.B. 43 (CA); *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174.
39. *Doherty v. Bowaters Irish Wallboard Mills Ltd* [1968] I.R. 227 (S.C.); *Fitzgerald v. Lane* [1987] 2 All E.R. 455 (C.A.).
40. Slesnick, "Forecasting medical costs in tort cases", in *Litigation Economics* (Gaughan, P. A. and Thornton, R. J. (eds), JAI Press, Greenwich, Connecticut, 1993).
41. *Brouwer v. Grewal and Edmonton (City)* [1995] 168 A.R. 342, at 353-4.
42. [1980] 3 All E.R. 696.
43. *Fobel v. Dean* [1991] 6 W.W.R. 408, at p. 423 (Saskatchewan Court of Appeal).
44. *Taguchi v. Stuparyk* [1994] 16 Alta L.R. 3d 72, at 84-5.
45. This is in contrast to the practice in the UK where multipliers are based on actuarial tables called Ogden tables.
46. Examples of where this method has been applied include *Brightman v. Johnston* [1985] The Times 17 December; *Housecroft v. Burnett* [1986] 1 All E.R. 332 (CA).
47. Examples of where this method has been applied include *Brittain v. Gardner; Burke v. Tower Hamlets HA* [1989] *The Times* 10 August.
48. [1998] 3 All E.R. 481.
49. *ibid.*, at page 493.
50. *ibid.*, at page 504.
51. Central Statistics Office Ireland *Statistical Abstract,* (Government Publications, Dublin, Annual).
52. *Duller v. South East Lincs Engineers* [1981] C.L.Y. 585.

HE EUROPEAN CONVENTION ON HUMAN RIGHTS AND IRISH INCORPORATION - ADOPTING A MINIMALIST APPROACH

In the first of a two-part article on the European Convention on Human Rights Bill 2001 , ***Ray Murphy*** *and* ***Siobhán Wills,*** *Irish Centre for Human Rights, Faculty of Law, NUI Galway, consider the background and context of the incorporation debate in Irish law.*

Introduction

Ireland and the United Kingdom have long been signatories to the the European Convention on Human Rights ("ECHR") and their citizens have had the right to appeal to the European Court of Human Rights for a decision on those rights, provided that they have exhausted local remedies. After some delay, Ireland has now begun the process of incorporating the ECHR into domestic law.[1] Some commentators dispute as to how much substantive difference this will make, and argue that human rights in Ireland are protected by the laws already in place. Others argue that whilst the Irish Constitution of 1937 provides superior protection in some areas, in others it is much weaker than the ECHR. However, the Convention does provide a politically neutral template for fundamental rights protection in both jurisdictions.[2] In this way the ECHR is a crucial building block in creating a new European public order based not on a common market but on shared beliefs about what fundamental values are important in a civilised society.[3]

The question of incorporation of the ECHR into Irish domestic law has been considered for some time, and academic and other commentators have discussed the issue of the domestic status of the ECHR.[4] While it is generally accepted that the fundamental rights articles in the Irish Constitution contain elaborate provisions for the protection of human rights that have been developed and expanded by the jurisprudence of the Irish courts, some significant gaps remained. This is not surprising as most of the major international human rights documents such as the Universal Declaration on Human Rights and later Conventions, including the ECHR, were drafted well after the 1937 Constitution came into effect. The conclusion of the Belfast Agreement in 1998 added urgency to the question of incorporation. It committed the Irish Government to "ensure at least an equivalent level of protection of human rights" in the Republic of Ireland as will pertain in Northern Ireland.[5]

Ireland is the last of the member states in the Council of Europe to incorporate the ECHR into domestic law. One reason for this reticence may be that, in the minds of many, incorporation is perceived as encroaching upon national sovereignty. Ireland has a Constitution that guarantees popular sovereignty, an independent state and an impressive array of individual rights. However, most European states now have written constitutions many of which guarantee fundamental rights and all have found a way to accommodate the ECHR in their domestic law.

Symbolism and National Constitutions

Constitutions have enormous symbolic power, coming as they usually do at decisive and formative points in a nations' history (often following a war against oppression or a revolution).[6] At the heart of most national constitutions is a belief that the protection of fundamental rights and popular sovereignty are linked concepts. The existence of fundamental rights protects democracy and democracy protects fundamental rights - with some assistance from the watchful eye of the courts, the guardians of constitutional rights. As Chief Justice Barak of the Supreme Court of Israel said:

> 'Remove majority rule from constitutional democracy and its essence is harmed. Remove the sovereignty of fundamental values from constitutional democracy and its very existence is called into question. Judicial review of constitutionality enables the society to be true to itself and to honor its basic conceptions. This is the basis for the substantive legitimacy of judicial review. This is also the true basis for the principle of constitutionality itself.' [7]

The Irish Constitution, like most other national constitutions, is the text that defines the Irish nation-state.[8] The ECHR is similar to a constitutional document but it differs from national

constitutions in it that transcends state boundaries. It is based on the consent of states - but it is part of a new and developing international legal order that has been described as "an empire of rights".[9] Until recently international law was firmly premised on shared ideas of state sovereignty and mutual consent. But with the technological, economic and social changes wrought by globalisation that era is ending. The driving force behind this change in perception is "the emergence of international human rights as the paradigm through which all of international law is viewed".[10] This new paradigm is in conflict with the principles of popular sovereignty and state sovereignty on which the Constitution is based.

The tension between the concept of a global order based on human rights law and the concept of popular sovereignty is also evident in Ireland. Ireland has ratified both the ECHR and the International Covenant on Civil and Political Rights ("ICCPR") - but until recently it has been reluctant to incorporate either of them into domestic law, citing the Constitution as the primary reason for not doing so.[11] The government took the view that incorporation was unnecessary because the Constitution provides superior protection, and that it is impractical to have two fundamental rights instruments.[12] In addition, Irish judges prefer to base their human rights rulings in laws that are "guaranteed Irish"[13]rather than looking to Europe or elsewhere - partly perhaps because Ireland has had a Constitution guaranteeing fundamental rights longer than most other states except the United States, but partly perhaps because the conception of the "common good" is different. When Irish judges do refer to the ECHR it is almost always as one of a number of international documents on human rights: citing the ECHR or the ICCPR seems to be "intended simply as evidence of the high level of protection of rights afforded by the Irish Constitution".[14]

The Irish Constitution and Incorporation

In Ireland, all governmental powers, legislative, executive and judicial derive, as the Constitution acknowledges, from the people of Ireland and the holders of these powers are, in the end, answerable to them. This concept of popular sovereignty includes the power of referendum to alter rights created or recognised by the Constitution.[15] The terms of the Constitution acknowledge that it is the Irish people and no other international body, court or agreement that establishes the fundamental rights and freedoms.[16] In such matters, Ireland cannot abdicate the constitutional right and duty of citizens to determine the content of Irish law. To do so would be seen as a surrender of independence.[17]

Ironically, it was the strength of the existing fundamental rights provisions in the Constitution and the dualist nature of the Irish legal system that presented the biggest obstacles to incorporation. The matter of incorporation was examined by the Report of the Constitution Review Group ("Review Group"), which concluded that the experience of the last fifty years indicated that the fundamental rights provisions in the Constitution contained flaws and were in need of revision.[18] In addition, the presumption of constitutionality has given rise to the development of a "double construction" test to determine the constitutionality of a statute.[19] This has resulted in courts attributing strained interpretations to statutes in order to save them from a finding of invalidity.[20]

The Review Group did not recommend direct incorporation of the ECHR into domestic law - in fact it expressly rejected this option - but rather opted for a form of *a la carte* incorporation whereby certain provisions of the ECHR could be reflected in laws where the Convention standard was higher than that already contained in domestic law. Although the Review acknowledged that the most effective form of incorporation would be by means of constitutional amendment conferring supremacy on ECHR standards, it did not accept the principled arguments in favour of such an approach.[21] However, the analysis was somewhat incomplete as the Review Group did not examine the option of legislative incorporation, nor did it give adequate consideration to the Swedish model of incorporating at constitutional level but recognising the supremacy of the ECHR jurisprudence.[22] This would have had the advantage of retaining the existing fundamental rights provisions of the Constitution, while having the ECHR as a constitutional add on.[23]

The Impact of European Union Law[24]

Membership of the European Union has indirectly meant that certain rights protected under the ECHR are already binding in Ireland. The fact that human rights constrain the member states and Community institutions has long been apparent from the case law of the European Court of Justice.[25] In addition to highlighting the ECHR as a source of principles to which it will have recourse, the European Court of Justice judgement in the *Rutili* case[26] implied that provisions of Community law must be construed and applied by member states with reference to the rights enshrined in the ECHR. In this way, rights protected under the ECHR that have been recognised as binding under European Union law are also binding in Ireland and are justiciable in the domestic courts (provided the case concerns an issue that has a Community dimension). Furthermore, the Maastricht Treaty included provisions on human rights in the European Union, provisions that have been strengthened by the 1997 Amsterdam Treaty[27], and the question of the adoption of a European Union Charter of Fundamental Rights is also being considered.[28]

The Belfast Agreement

Human rights formed a key part of the Belfast Agreement and this was a feature that distinguished it from earlier settlement proposals for Northern Ireland.[29] The articulation of rights protection as flowing from international law commitments rather than just the history of the conflict opened up arguments for Irish government reciprocity, which were difficult to resist.[30] While the Agreement contained a number of express commitments by the Irish Government with regard to human rights, the actual commitment to examine the question of incorporation of the ECHR was couched in language falling short of creating a clear legal obligation to do anything more than examine the issue.[31] After the passing of the Human Rights Act, 1998 in the United Kingdom[32], Ireland found itself in the embarrassing position of being the only state in the Council of Europe not to have incorporated the ECHR into its domestic law.

The delay in incorporation can be partly attributed to dispute as to exactly what is "the highest possible standard" of human rights protection attainable in Ireland.[33] Several competing and deeply held beliefs have contributed to the lack of action on the part of the government during the past two years. The first is the belief that the Constitution already embodies a much higher standard of human rights protection than that available

under the ECHR; also by implication that human rights protection in Ireland, by virtue of the Constitution, is of a much higher standard than that pertaining in Northern Ireland both prior and subsequent to the passing of Human Rights Act, 1998. Others argue that whilst the Constitution is strong in some areas of human rights protection, it is much weaker in others; they point to weaknesses in the criminal law procedure, inadequate access to legal aid[34] and the long struggle it took to decriminalize consensual homosexual acts of intimacy as areas in which human rights are better protected under the ECHR than the Constitution. Correlative to this point of view, is the belief that the Constitution reflects particular cultural convictions that are not shared by the majority of the Northern Ireland's inhabitants - and that failure to incorporate the text of the ECHR into Irish domestic law will suggest that in Ireland Convention rights are likely to be given an Irish "gloss". There is little in Irish jurisprudence to date to suggest that such fears are groundless.

The Constitution asserts unequivocally the independence of an Irish polity premised on popular sovereignty.[35] It was drawn up in the context of establishing independence, was adopted by popular referendum and can only be amended by referendum. Underlying reservations remain that to cede the pre-eminence of ECHR law and jurisprudence within the domestic law of the State would result in a diminution of sovereignty similar to that consequent to the European Court of Justice rulings in *Internationale Handesgesellschaft GmbH*[36], *Van Gend en Loos*[37] *and Costa v Enel*.[38] Any form of incorporation that did not confirm the pre-eminence of the Constitution would have required a referendum. Governments are nervous of referendums on politically sensitive issues - the history of referendums on divorce, abortion and the Nice Treaty would make any government hesitate. ●

1 The proposed European Convention on Human Rights Bill, 2001, was initiated in April 2001.

2 G. Hogan, "The Belfast Agreement and Future Incorporation of the ECHR in the Republic if Ireland", *The Bar Review*, (January/February 1999), pp. 205-211.

3 In Ireland v. United Kingdom No 5310/71, 15 YB 76 (1972), the Commission declared that signatories to the ECHR had committed themselves not only to ensuring that the Convention is respected within the states own legal system but also to ensuring respect for "ties of solidarity which the States Parties intended to create between themselves with a view to establishing a European public order", (Application 5310/71, report of Commission, 25 Jan. 1976; separate opinion on the interpretation of art. 1 of the Convention, 497-9).

4 See for example: A. Drzemczewski, *The European Human Rights Convention in Domestic Law - A Comparative Study*, (Oxford: 1983), pp. 170-175; G. Whyte, "The Application of the European Convention on Human Rights Before the Irish Courts", 31 *International and Comparative Law Quarterly*, (October 1982), pp. 856-861; Jaconelli, "The European Convention on Human Rights as Irish Municipal Law *Irish Jurist* (new series), (1987), pp. 13-27; Gleeson, "The European Convention on Human Rights: Its Practical Relevance", 2 IJEL (1993), pp. 248-265; A. Connelly, "Ireland and the European Convention on Human Rights: An Overview", in L. Heffernan and J. Kingston (eds), *Human Rights - A European Perspective*, (Dublin: Round Hall Press, 1994), pp. 34-47; P. Dillon-Malone, "Individual Remedies and the Strasbourg System in an Irish Context", *Ibid*, pp. 48-66; L. Flynn, "The Significance of the European Convention on Human Rights in the Irish Legal Order", 1 IJEL, (1994), pp. 4-29; D. O'Connell, "Review of the Cases from the Republic of Ireland in Strasbourg Over the Last Decade", *Irish Human Rights Yearbook*, (1995), pp. 1-14; A. Connelly, "Ireland and the European Convention", in B. Dickson (ed.), *Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland*, (London: Sweet & Maxwell, 1997), pp. 185-209; L. Flynn, "Chapter 5 - Ireland", in C. Gearty (ed.), European Civil Liberties and the European Convention on Human Rights, (Kluwer, 1997), pp. 177-215.

5 Belfast Agreement, Rights, Safeguards and Equality of Opportunity, para. 1.

6 In the U.S. the American revolution, in Ireland independence, in Germany "Stulle Nunde" (Zero Hour), in India independence, in South Africa the ending of apartheid.

7 C.A. 6821/93 *United Mizrahi Bank Ltd. v. Migdal Village*, Piskey Din 49(4) 221 (Isr.). at p.340, Opinion of Chief Justice Barak at para. 80

8 Attorney General Michael McDowell, Opening Address, Law Society of Ireland Conference on *The Incorporation of the European Convention on Human Rights into Irish Law*, 14 October 2000.

9 P. Kahn, "American Hegemony And International Law Speaking Law To Power: Popular Sovereignty, Human Rights and the New International Order", *1 CHIJIL 1*, (Spring 2000), p. 5

10 *Ibid.*

11 For background and general discussion of the issue see *First Report by Ireland in Compliance with Article 40 of the International Covenant on Civil and Political Rights*, Government Publications, 1992. See also *Second Periodic Report of Ireland*, UN Doc. CCPR/C/IRL/98/2 and UN Doc. HRI/CORE/1/Add. 15/Rev. 1 and D. Fottrell, "Reporting to the UN Human Rights Committee - A ruse by any other name? Lessons for the International Human Rights Supervision from Recent Irish Experience", *Irish Law Times*, 2001, pp. 61-68.

12 In 1993, in answer to questions in the Dáil about incorporating both the ECHR and the ICCPR into Irish law, the Minister for Justice stated that "It would be difficult to incorporate into our laws, whether by means of a constitutional amendment or legislation, new provisions which duplicate many of those already in the Constitution", Dáil Debates, Vol. 434, 14 October 1993, Col. 1233. See also C. Lysaght, *The Status of International Agreements in Irish Domestic Law*, 12 ILT, (1994), pp. 171 - 173, at p. 172.

13 D. O' Connell, "The Constitution and the ECHR: Belts and Braces or Blinkers", *Irish Human Rights Yearbook*, (2000), pp. 90-109 at 97.

14 L. Flynn, "The significance of the European Convention on Human Rights in the Irish Legal Order", 1 *IJEL* (1994).

15 Address by Mr. Justice A. Hardiman, Supreme Court, at the to Law Society Conference on *Effective Remedies under the European Convention in Human Rights*, Dublin, 10 February 2001. Article 5 of the Irish Constitution of 1937 states that Ireland is a sovereign, independent, democratic state; and Article 1 affirms, *inter alia*, the right of the Irish nation "to develop its life, political, economic, and cultural, in accordance with its own genius and traditions."

16 McDowell, *supra.*, n 8, pp. 2 and 4.

17 *Ibid.* p. 4.

18 *Report of the Constitution Review Group*, Dublin, May 1996, p. 214.

19 East Donegal Co-operative Ltd v Attorney General [1970] IR 317 and G. Hogan, "The Incorporation of the ECHR into Irish Domestic Law", Law Society Conference, 14 October 2000, esp. pp. 12-17.

20 *See Loftus v. Attorney General* [1979] I.R. 211; *Doyle v. An Taoiseach* [1986] I.L.R.M. 693; *Hegarty v. o'Loughran* [1990] 1 I.R. 148; *Re National Irish Bank Ltd.*, [1999] I.L.R.M. 321; and J. M. Kelly, *The Irish Constitution*, (3rd. ed., G. Hogan and G. White, eds.), Dublin, (1994), pp. 458-459.

21 Its position, which was to be applied on a section by section analysis of the fundamental rights provisions of the Constitution was stated as follows:
"... it would be preferable to draw on the ECHR (and other international human rights conventions) where:
i) the right is not expressly protected by the Constitution
ii) the standard of protection of such rights is superior to those guaranteed by the Constitution; or
iii) the wording of a clause of the Constitution protecting such right might be improved". *Report of the Review Group*, supra., n 18, p. 219.

22 The Swedish Constitution was amended in 1995, and Chapter 2, section 23 now provides that:
"No law or other regulation may be enacted contrary to Sweden's obligations as follow form the European Convention on Human Rights".

23 See G. Hogan, "The Incorporation of the ECHR into Irish Domestic Law", supra., n. 19, p.6.

24 See M. Finlay, "Implementation of EU law in Ireland - Remedies for Breach of Human Rights", paper delivered at the Law Society Conference, Dublin, 10 February 2001.

25 *Internationale Handesgesellschaft GmbH* Case 11/70, [1970] ECR 1125 and Case 26/62, *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR1; [1963] CMLR 105

26 Case 36/75 [1975] ECR 1219.

27 See generally P. Alston, *The EU and Human Rights*, (Oxford University Press, 1999); and L. Betten and N. Grief, EU Law and Human Rights, (Longmans, 1998).

28 This question, along with other constitutional reforms, has been deferred until 2004.

29 C. Bell, *Peace Agreements and Human Rights*, (Oxford, 2001), p. 213.

30 Ibid., p. 175

31 See Opening Address McDowell, *supra.*, n. 8.

32 See Lord Lester of Herne Hill and D. Pannick (eds.), *The Human Rights Act, 1998; An Introduction*, Butterworths, 1999; and Lord Lester, "Challenges and Enigmas: The Human Rights Act 1998", [1999] JR 170-176.

33 See *Constitutional Considerations*, Address by Attorney General, Michael McDowell to the Law Society Conference on "Effective Remedies under the ECHR", 10 February 2001, p. 1.

34 D. Robinson, "Improved remedies in Irish Law under the ECHR", paper delivered at the Law Society Conference, Dublin, 10 February 2001.

35 Articles 1, 5, 6, 27, 29, 46 of the Constitution.

36 Case 11/70, *Internationale handesgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel* [1970] ECR 1125

37 Case 26/62, N.V. *Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR1; [1963] CMLR 105

38 Case 6/64, *Flaminio Costa v. Enel* [1964] ECR 585, [1964] CMLR 425, 593

CRIMINAL LIABILITY

Finbarr McAuley** and **J Paul McCutcheon
Round Hall Sweet & Maxwell
(2000, pp.950)

Reviewed by ***Michael McDowell SC***

Barry McAuley and Paul McCutcheon have planned and accomplished what no other Irish legal academic, with the exception of the late J M Kelly, has essayed – namely authorship of a major book which is avowedly intellectual and thematic as distinct from being a practitioner or student text book. *Criminal Liability* is a triumph in terms of its scope, its depth, and its intellectual coherence and analysis. We have several excellent text books on Criminal Law. But until now we have had no book of this type – thematic criminal jurisprudence.

Criminal Liability is at once rational and passionate. The authors in their preface decry the rather un-intellectual approach of Irish jurists to the issue of *criminal liability*. This is unashamedly an historical and a comparative treatise. If justification is sought or needed for this approach, some is offered on the basis that our criminal law is not a codified, self-explaining and self justifying system.

The preface also points to the very limited reportage of criminal case-law, most especially in the Court of Criminal Appeal. That Court, some argue, leaves disappointingly little discernible trace of much of the significant volume of cases that it handles. Especially in a time when practice directions demand the preparation of written submissions by appellants and respondents, there appears, on a superficial glance at any rate, to be comparatively little by way of written judgments in response. That deficit, the authors argue in criticism of modern practitioners, stems in part from the quality and nature of the submissions made to the Court. The blame, they contend, may also attach to an "over-constitutionalisation" of Irish criminal law.

Whatever the cause, *Criminal Liability* is arguably part of the remedy. The historical, comparative and philosophical approach challenges the reader to intellectual reflection and deeper analysis of what is the very heart of our concept of criminality. But lest I give the impression that this is a purely intellectual work, I would hasten to affirm the very opposite. This is a work which promises to elevate the level of debate and disputation in criminal law in court as assuredly as in the lecture theatre. It also demands to be read by those who initiate and draft our criminal legislation.

Rather than attempt a Cook's Tour of the contents, I prefer to make short references to some of the topics given masterly treatment in this work. *Criminal liability* topics such as Mens Rea and Strict Liability are analysed by reference to their philosophical and social rationale and by reference to historical and comparative perspectives. Issues such as Insanity, Diminished Responsibility are treated with consummate skill and grasp. Attributed Liability is given a satisfactory intellectual analysis and underpinning. Provocation and self defence are analysed as concepts as well as doctrines.

To the case-hardened practitioner or judge, the "Archbold" approach to such fundamental concepts as an accumulation of case-law may be practical; but if law is seen as a developing, living thing, the intellectual insights offered by *Criminal Liability* offer a satisfying rationale and a platform for change rather than purely casuist, exegetical legal thinking.

Whether many would read *Criminal Liability* straight from cover to cover is doubtful; I certainly feel that it will prove to be a work that jurists will consult more by topic. But it is undoubtedly a work which is constructed as a consistent whole. The authors will be justly proud of this their shared masterpiece. They have written other works of great merit but it is hard to see either of them deriving greater satisfaction from any other book or project. *Valeant*!●

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