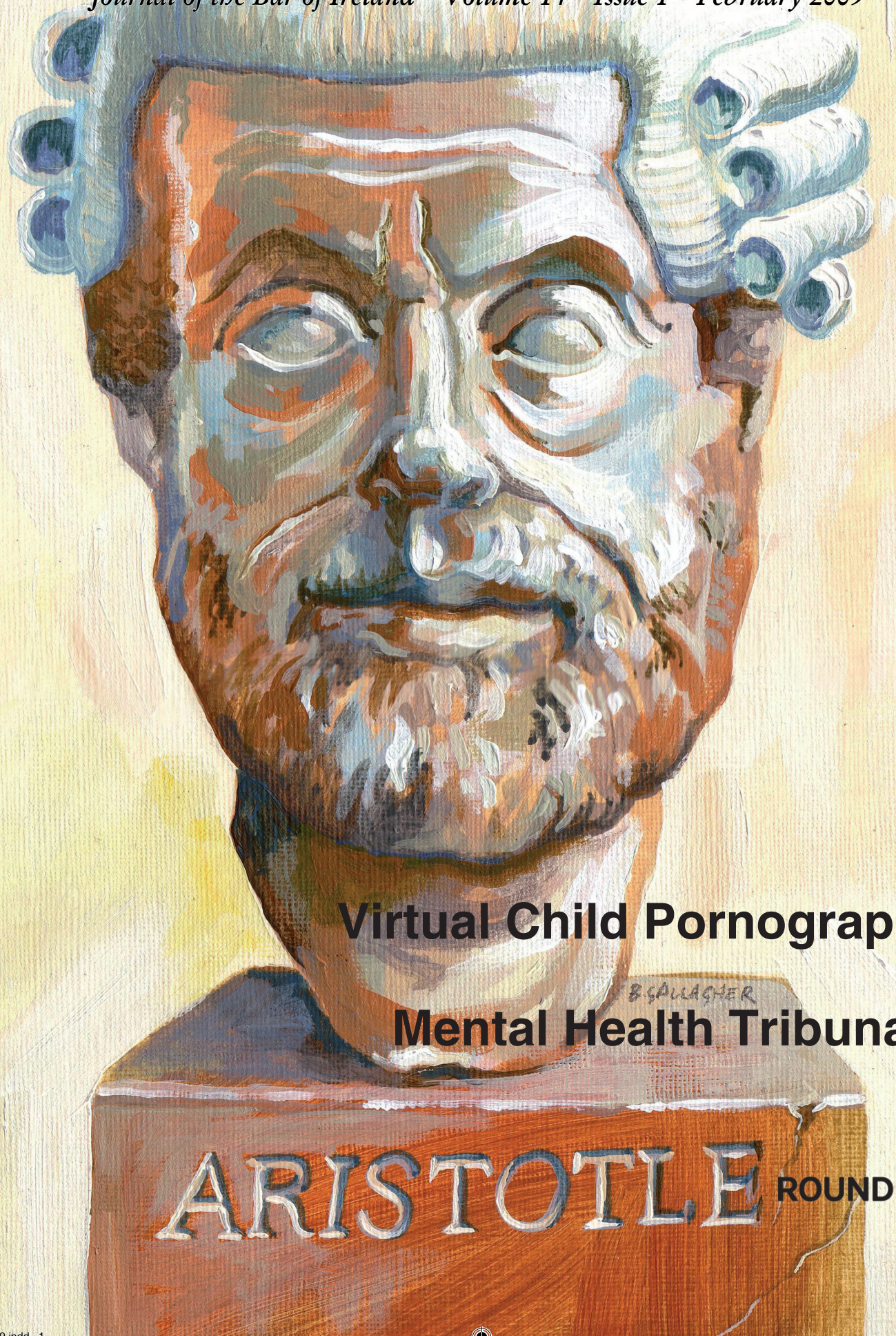




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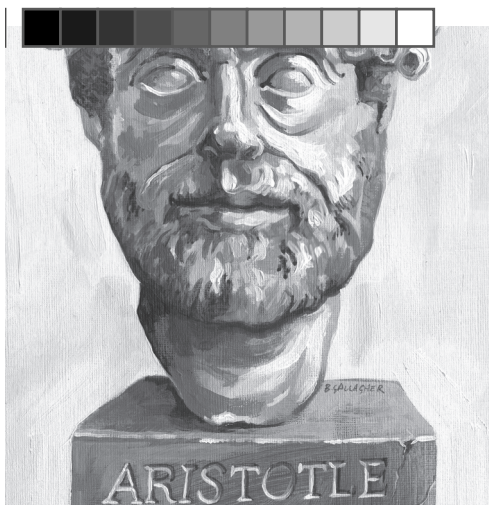
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Virtual Child Pornography

Mental Health Tribunals

ARISTOTLE ROUND HALL



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The Bar Review February 2009

An Introduction to the CCBE

DAVID CONLAN SMYTH BL AND JEANNE McDONAGH

Background

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of more than 700,000 European lawyers through its member bars and law societies from 31 full member countries, 2 associate countries and 6 observer countries. The CCBE was founded in 1960, as the ramifications of the European Economic Community on the legal profession began to be seriously considered. It is an international non-profit-making association incorporated in Belgium.

The CCBE acts as the liaison between the EU and Europe's national bars and law societies. The CCBE has regular institutional contacts with those European Commission officials, and MEPS and staff in the European Parliament, who deal with issues affecting the legal profession. In addition, the CCBE works closely with legal organisations outside Europe such as the International Bar Association (IBA) and the Union International des Avocats (UIA).

Structure

The CCBE is administered by a President and two Vice Presidents who are elected for one-year terms. The current President is Peter Koves (Hungary) and the incoming President for 2009 is Anne Birgitte Gammeljord from Denmark. There is a full-time Secretary-General (Jonathan Goldsmith), who manages the day-to-day affairs of the organisation through a permanent Secretariat based in Brussels where he is assisted by a number of legal assistants, trainees and a stagiaire.

There are three categories of CCBE members: full members, associate members and observer members. All the national bars and law societies of the twenty-seven members of the European Union and of the three members of the European Economic Area (Norway, Liechtenstein and Iceland) are full members of the CCBE, together with Switzerland. In addition, the bars of Croatia and Turkey are associate members (Council of Europe countries in official negotiations for accession to the European Union). There are 8 observer members (other Council of Europe countries): Albania, Armenia, FYROM, Georgia, Moldova, Montenegro, Serbia and Ukraine. The associate and observer members must also adhere to the Statutes of the CCBE and adopt the CCBE's Code of Conduct (full text available at www.ccbe.org).

Each national delegation consists of up to six individuals, depending on the size of the country and the organisation of its legal profession. This is a matter left to the individual members. The United Kingdom Delegation is comprised of the Bar of England and Wales, the Law Society of England and Wales, the Faculty of Advocates, the Scottish Law Society, the Bar of Northern Ireland and the Law Society of Northern Ireland. The German, Greek and Spanish delegations have representatives from the individual member bars as well

as from the national bar council. The CCBE's funding is provided through annual dues paid by all members, whether full, associate or observer.

Work

Most of the work is carried out by Specialist Committees and Working Groups made up of nominees and experts from the national delegations who research and report on a wide range of areas affecting the European legal profession. The Committees and Working Groups cover matters such as lawyers' ethics, the effects of competition law and policy on the legal profession, the free movement of lawyers, training of lawyers, international trade in legal services, and human rights. In recent years, working groups have focused on such subjects as money laundering, legal aid, family law, European contract law and corporate social responsibility.

Through its close relationships with the European Commission and European Parliament, the CCBE may be able to influence legislation in a number of areas of substantive law, too, such as criminal law and company law. Through its long dealings with the European Court of Justice, and European Court of Human Rights, it is regularly consulted about procedural changes in those courts. Anthony Collins SC is the Irish member of the CCBE's Permanent Delegation to the Court of Justice.

The Standing Committee is the executive body of the CCBE, composed of heads of national delegations, and presided over by the President. It makes policy decisions, and meets approximately five times a year.

The CCBE organises or takes part in a variety of conferences addressing current legal issues, such as professional indemnity insurance, social security for lawyers, and IT law developments.

Irish Representation

Ireland joined the CCBE as an observer member in 1972, obtaining full membership in 1973. The Irish Delegation has an allocation of 6 votes out of a total of 235. Mr Justice John Cooke was the first Irish President of the CCBE. The current Irish Delegation is comprised of representatives of the Bar Council and of the Law Society of Ireland, as follows:

Head of Delegation	Mr. Michael G. Irvine	
Second Head of Delegation	Mr. David Conlan-Smyth	
Information Officer	Ms. Eva Massa (<i>Law Society</i>) Ms. Jeanne McDonagh (<i>Bar Council</i>)	e.massa@lawsociety.ie jmcdonagh@lawlibrary.ie

There are a number of Irish representatives on individual committees, which meet during the year to discuss relevant issues and make recommendations. For further information please contact either Ms McDonagh (for barristers) or Ms Massa (for solicitors).

CCBE HUMAN RIGHTS AWARD

The Council of the Bars and Law Societies of the European Union (CCBE) has just presented its second Human Rights Award jointly to Heping Li, Advocate in Beijing and to the joint group of Legal Aid Lawyers in Spain who represented the persons accused of the terrorist attacks on the 11th March 2004 at Atocha Station in Madrid.

The prize was established in 2007 by the CCBE to highlight the work of a lawyer (or lawyers' organisation) who has brought distinction to the legal profession by demonstrating an outstanding commitment and sacrifice in upholding the fundamental values of the profession. The first award was presented to Avocats San Frontières ("ASF") in November 2007. ASF is an independent international non-governmental organisation whose mandate is to contribute to the creation of fair and equitable societies in which law and legal institutions serve society's most vulnerable groups. ASF's primary strategic objective is to promote efficient and effective access to justice. ASF runs projects on a worldwide basis and in recent years has provided legal assistance in the Democratic Republic of Congo, Burundi, Rwanda, East Timor and South Sudan.

This year, the CCBE decided to award its prize to individual lawyers. The award was conferred on the Spanish lawyers at the CCBE's plenary session held in Brussels on the 29th November 2008. Mr Heping Li was unable to attend as he was detained upon his departure for Brussels at Beijing Airport by the Chinese authorities and was not permitted to travel to Belgium. It is unclear as to whether Mr Heping Li is currently in detention or not. Mr Heping Li is a partner in the Beijing Globe Law Firm which has provided legal services to Falun-Gong practitioners. In September 2007 whilst representing one practitioner, Mr Dong Cao, who was charged with the crime of "using a cult organisation to violate the law" and "accepting an illegal interview" (for simply meeting with Mr Edward McMillan-Scott, Vice President of the European Parliament), Mr Heping Li was assaulted and his brief and materials in respect of that case and others were stolen. Mr Dong Cao was later sentenced to five years imprisonment. Mr Heping Li has also defended clients involved in seeking to close down pollutant factories, leaders of local churches and persons charged with criminal offences in respect of whom confessions had been obtained through torture. Many of his cases have been widely reported by the media in China.

The bombings in Madrid on 11th March 2004 led to 191 people losing their lives and around 1,800 people were injured. In 2007, the trial of the persons accused of engaging in or abetting terrorist offences in respect of the bombings commenced in the Audiencia Nacional and lasted eighteen months. The Madrid Bar appointed through its legal aid scheme twenty three lawyers for the accused and three lawyers to represent the interests of the victims and their families.

The evidence was phenomenally complex with some 90,000 documents, 650 witnesses as to fact and 98 expert witnesses giving evidence. 50,000 phone tracks had also been obtained by the police. The trial received unprecedented public attention in Spain with nearly 400 journalists being assigned to the case. The oral proceedings were also broadcast live on-line during the trial. Most of the accused did not speak Spanish and many professed a complete lack of interest in the proceedings. The lawyers worked to tight deadlines for insignificant remuneration with some required to close their law firms for over one year and in the process, losing income and clients. These difficulties were compounded by a lack of sufficient independent Arabic translators as well as the dispersal of the accused throughout Spain and the very short deadlines imposed in the oral phase of the proceedings. It was only with the assistance of the Consejo General de la Abogacia Espanola (Spanish Bar Council) that the Ministry for Justice agreed to provide better conditions to enable the lawyers involved to properly defend their clients at trial. This included overcoming basic obstacles like an initial denial by the State of the right of the accused's lawyers to have access to many of the documents in the possession of the prosecution, a denial of an adequate number of professional translators and interpreters and a wholly inadequate remuneration under the legal aid scheme. Of the 28 accused, 21 were found guilty on a number of counts ranging from forgery to murder, 7 were acquitted. Of those found guilty, 3 were sentenced to as much as 43,000 years in prison but under Spanish law will serve no more than 40 years.

One exceptional story deserves mention. The lawyer who represented the man who was accused of being the chief protagonist in the plot did so in circumstances where a partner in his firm (as well as the partner's wife) had been killed in the attacks. The accused man was later acquitted of the charges.

In early 2009, the CCBE will begin to compile a list of individuals and organisations to be awarded the Human Rights prize in November 2009. The CCBE Human Rights Award is the only award which is designed to recognise the work of European lawyers in the field of human rights (although this can be extended to cover non-European lawyers where exceptional circumstances exist). Candidates for the award can only be nominated through the CCBE's member or observer Bars and Law Societies. The CCBE Human Rights Committee is responsible for considering the submissions and for submitting a proposal in respect of the winner to the Standing Committee held in September of each year which is responsible for making the decision to give the award to a particular candidate. The prize is then officially presented to the winner by the President of the CCBE at the Plenary Session held in November each year. Any nominations by the Irish Bar should be submitted in early course to the authors of this article.

Further Information on the CCBE

CCBE issues a quarterly newsletter which can be downloaded from the website <http://www.ccbe.org>. ■

Virtual Child Pornography: A Victimless Crime?

OISÍN CLARKE B.L.

Introduction

The Internet and the World Wide Web have had a huge influence on modern society and, according to the latest figures released in December 2007, there are now almost 1.32 billion people online worldwide.¹ The technology has clearly enhanced our lives but the virtually limitless access to any kind of information has its price. Part of this price is the ease of access to child pornography.

According to Ladle, there are four different forms of child pornography. First, there is “Real” or “Actual” child pornography which involves and depicts images of real children engaged in sexual activity. Second, there is “Virtual Child Pornography”. This involves realistic images of children engaged in sexual activity, but the images are 100% computer-generated and there are no actual children involved. Third, there is “Morphed” or “Computer Altered” child pornography. These images start with a real child, or adult, in an innocent or not so innocent pose, but is then altered to create a different computer generated image of a child engaging in an activity far removed from that contained in the initial image. Finally, there is child pornography where youthful actors, over the age of consent, are used to portray children engaging in sexual activity.² This article is concerned with the second type of child pornography – virtual child pornography.

The article will discuss the American case law on the area and the rationale for the decisions reached by the U.S. courts. It will then look at European initiatives to combat child pornography and at how Ireland has dealt with the problem. Finally, it will analyse the arguments on each side to see if virtual child pornography could be seen as a victimless crime.

The Law in the United States

(a) The approach of the US Courts to Child Pornography

Pivotal to the idea of pornography is its relationship with obscenity and the First Amendment to the U.S. Constitution, which states: “Congress shall make no law ... abridging the freedom of speech”.³ Watanabe argues that obscenity has always been denied First Amendment protection as it serves

no essential part of any exposition of ideas and is of such slight social value that any benefit in allowing it is outweighed by the social interest in order and morality.⁴ Despite this, it was not until 1973 in *Miller v California*⁵ that the U.S. Supreme Court actually proposed an obscenity test. Works were considered obscene if the “average person applying contemporary community standards”⁶ found that the work, taken as a whole, appeals to the prurient interest. The Court stated that in so far as material is “not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person- or indeed, a totally insensitive one”.⁷ The Court gave examples of what a state statute could constitutionally define for regulation. This included “patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated” and “patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals”.⁸ This test did not overrule an earlier decision in *Stanley v Georgia*⁹, where the Supreme Court found it unconstitutional to criminalise possession of obscene material in a person’s home.

In 1982, the U.S. Supreme Court specifically held in *New York v Ferber*¹⁰ that child pornography, along with obscenity, was a category of speech not sheltered by the First Amendment. The Court justified its ruling on four grounds. First, the Court found that the State’s interest in “safeguarding the physical and psychological well-being”¹¹ of children surpassed any First Amendment rights. Second, the distribution of such material is “intrinsically related to the sexual abuse of children”.¹² Third, the advertising and selling of child pornography provides an economic incentive for its continued production. Finally, the value of such images is exceptionally low.¹³ The Court relied on the rationale that continued circulation of the images would compound the harm, forcing victims to relive the abuse. This, along with the difficulty faced in infiltrating the clandestine child pornography industry, left the Court no recourse but to “dry

1 www.internetworldstats.com.

2 Ladle, “Protecting Pedophiles and Valuing Virtual Child Pornography: A Critique of Ashcroft v. Free Speech Coalition” (2004), 40 Idaho L. Rev. 457 at 26.

3 U.S. Constitution. Amendment 1.

4 Watanabe, “Real Problems, Virtual Solutions: The (Still) Uncertain Future of Virtual Child Pornography Legislation” (2005), 10 J. Tech L. & Pol’y 195 at 1-2.

5 *Miller v California*, 413 U.S. 15, 20 (1973).

6 *Ibid.* at 24.

7 *Ibid.* at 33.

8 *Ibid.* at 25.

9 *Stanley v Georgia*, 394 U.S. 557 (1969).

10 *New York v Ferber*, 458 U.S. 747 (1982).

11 *Ibid.* at 756-57.

12 *Ibid.*

13 *Ibid.* at 762.

up the market” by punishing the speech that resulted from the underlying crime.¹⁴

Ferber dealt with production and distribution of child pornography but not possession. In *Osborne v Ohio*,¹⁵ the U.S. Supreme Court extended *Ferber* and criminalised possession and viewing of child pornography within the privacy of one’s home. Adler offers an explanation for this. She feels that the crux of this reasoning is that, unlike obscenity, child pornography requires an act of child abuse. It is this urgent need to protect children from abuse that has marked this dramatic difference in the Court’s reasoning between obscenity and child pornography.¹⁶

After *Ferber* and *Osborne*, the child pornography industry went underground. Despite this, the rise of the Internet and the availability and anonymity of the online world has increased profit-motivated child pornography distribution. This, combined with huge advances in computer technology, has resulted in an increase in the use of virtual child pornography.

(b) Virtual Child Pornography and the Child Pornography Prevention Act 1996

Virtual child pornography is one hundred percent computer generated and does not depict actual children. An investigation by U.S. Congress into the issue found that new photographic and computer imaging technologies made it almost impossible to tell the difference between real and virtual images.¹⁷ Watanabe maintains that these images could still cause sufficient harm to warrant them being proscribed in the same way as actual child pornography.¹⁸ Congress wanted a similar proscription but it had a problem. The standard in *Ferber* only addressed “live performances” and the recording of such performances. As virtual child pornography did not exist in 1982, a loophole existed in *Ferber* which the Courts could not have envisioned. Technology was making existing laws obsolete and virtual child pornography was beyond the scope of existing statutory prohibitions. However, Congress believed it still posed a very real and dangerous threat to children.¹⁹ Senator Hatch seemed to encapsulate the general feeling in Congress when he stated that:

“computer-generated child pornography has many of the same harmful effects, and thus poses the same threat to the physical and mental health, safety and well-being of our children and of our society as pornographic material produced using actual children”.²⁰

To highlight the problem, Congress convened various experts and committees who reached the following conclusions. These conclusions provide valuable insight into the question

of virtual child pornography as a victimless crime. The report found that virtual child pornography:

- (1) Was used as a method of seducing children to participate in sexual activity.
- (2) Was used by paedophiles to “whet their own sexual appetites”.
- (3) Was virtually indistinguishable from actual child pornography as a result of new technologies.
- (4) Would have as much of a negative effect on the community as actual child pornography, which created a danger for children.
- (5) Encourages the perception of children as sexual objects “leading to further sexual abuse and exploitation...”²¹

Congress attempted to address this new threat with the Child Pornography Prevention Act 1996 (CPPA)²². Under the auspices of the CPPA, the definition of child pornography was stretched even further than in *Ferber* and *Osborne*. Now it covered “any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture that appear[ed] to be of a minor engaging in sexually explicit conduct.”²³ This new definition closed the loophole available in *Ferber* as the law now criminalised images made without the use of actual children. However, Congress, bolstered by successes in *Miller*, *Ferber* and *Osborne* received a set-back in 2002 with the Supreme Court decision in *Ashcroft v Free Speech Coalition*.²⁴

(c) The Decision in Ashcroft v Free Speech Coalition

The Free Speech Coalition was a trade association involved in the adult entertainment industry. The Coalition, along with other parties, challenged the CPPA on the grounds that it was “vague, overbroad, and constitut[ed] impermissible content-specific regulations and prior restraints on free speech.”²⁵ Four Federal Courts rejected Constitutional challenges to the CPPA before the Supreme Court eventually struck down §2256 (8)B and §2256 (8)D as constitutionally overbroad and in violation of the First Amendment. §2256 (8)B defined child pornography as any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture that is, or appears to be, of a minor engaged in sexually explicit conduct. §2256 (8) D banned any sexually explicit image that was advertised, promoted, presented, described or distributed in such a manner that conveys the impression that it depicted a minor engaging in sexually explicit conduct. This would cover, for example, images of particularly youthful looking adults pretending to be children. The Supreme Court was split over the decision with Justices Kennedy, Thomas and O’Connor concurring and Justices Rehnquist and Scalia dissenting. There was an

14 Adler, “Inverting the First Amendment” (2001), 149 U. Pa. L. Rev. 921 at 4.

15 *Osborne v Ohio*, 495 U.S. 103, 109 (1989).

16 Adler, *op. cit.* at 6.

17 [1996] S. Rep. No. 104-358, at 2.

18 Watanabe, *op. cit.* at 3.

19 Ladle, *op. cit.* at 3.

20 142 Cong. Rec. S11840 (daily ed. Sep 30, 1996).

21 S. Rep. No. 104-358, at 2 (1996).

22 Child Pornography Prevention Act of 1996, 18 U.S.C. § 2252A (Supp. IV 1998). (CPPA Act).

23 *Ibid* § 2256(8)(B).

24 *Ashcroft*, 535 US 234 (2002).

25 Free Speech Coalition, U.S. Dist LEXIS 12212, at *2.

immediate public outcry, with some commentators going so far as to say that the decision elevated the protection of child pornographers and paedophiles above that of children.

Upon analysing the elements of virtual child pornography, the Court rejected the notion that it meets either the *Miller* or *Ferber* standards. Firstly, it regulated materials that are outside the categories of free speech protected by the First Amendment. Secondly, it was not aimed at the “obscene” material defined in *Miller* and went beyond the real child pornography identified in *Ferber*. The Court went on to hold that, while virtual child pornography may be “virtually indistinguishable” from actual child pornography, its images are not the “product of child sexual abuse” as was the case in *Ferber* and *Osborne*. Ladle feels that this interpretation means that the pornography prohibited by the CPPA is not “intrinsically related” to the sexual abuse of children and lacks the necessary proximate link.²⁶

The Court found the Government’s argument that virtual child pornography whets the appetites of paedophiles and aids their seduction of children was too tenuous a link to uphold the legislation. The Court held that without “a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct”.²⁷ The Court also felt these virtual images were a viable alternative if such images were a necessary component of a literary or artistic work.²⁸ The Court rejected the idea that the existence of virtual child pornography would hamper convictions in the area of actual child pornography. Congress argued the virtual images were so close, visually, to real images that accused paedophiles could argue that real images found in their possession were merely virtual. The Supreme Court emphatically rejected this stating it “turns the First Amendment upside down”²⁹ as the “government may not suppress lawful speech as [a] means to suppress unlawful speech”.³⁰

Justice O’ Connor concurred and dissented in part. She agreed that the ban on youthful looking adults contained in §2256(8)D was overbroad and unconstitutional. However, she disagreed with the Court in relation to its findings on virtual child pornography.³¹ Basically she was stating that, as long as the prohibitions were limited to virtual child pornography, the Act was constitutionally sound. She felt that even if this virtual pornography defence had not yet been raised, governmental concern was valid and Congress should not be required to “wait for harm to occur before it can legislate against it”.³² The two dissenting judges, Chief Justice Rehnquist and Justice Scalia, agreed with this view. Justice Thomas made the point that, if technological advances make it impossible to distinguish between virtual and actual children, a “narrowly drawn restriction”³³ on virtual child pornography may be constitutional.

(d) From Ashcroft to PROTECT

Congress did not take this lying down and had alternative legislation drawn up almost immediately. The resulting legislation had the unfortunate title of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT)³⁴ and was signed into law one year after the Court struck down the CPPA. This Act made a number of important amendments to the CPPA. First, the phrase “indistinguishable from ... that of a minor”³⁵ replaced “appears to be of a minor”³⁶ when the images in question were digital images, computer images or computer-generated images. The former phrase applies if an ordinary person viewing the image would conclude that it is an image of an actual minor engaged in sexual conduct.³⁷ This provision ensured only convincing virtual child pornography would be criminalised while still allowing virtual images to be used for literary/artistic purposes. Congress also narrowed the scope of virtual child pornography to “digital images”, “computer images” and “computer-generated images”.³⁸ Items of artistic merit such as cartoons, drawings, paintings or sculptures remained outside the legislative provisions. The main thrust of the new Act was to proscribe virtual child pornography only to the extent necessary to protect the government’s ability to effectively combat the trade of actual child pornography.³⁹ PROTECT also requires the showing of obscenity as defined in the *Miller* test, an element not included in the CPPA. PROTECT appeared to address and rectify the constitutional concerns the Supreme Court had in *Ashcroft* regarding the CPPA.

Congress was also forced to retract a number of statements issued by it prior to the enactment of the CPPA. Seven years earlier, Congress had stated that virtual child pornography was widely available and easily made. It now had to concede, “[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children”.⁴⁰ Congress were also forced to concede, on expert advice, that to create virtual child pornography “the cost in terms of time, money and expertise is – and for the foreseeable future will remain – prohibitively expensive”⁴¹.

On April 6, 2006, in *United States v. Williams*,⁴² the Eleventh Circuit Court of Appeals ruled that one component of PROTECT, the “pandering provision” violated the First Amendment. The “pandering provision” conferred criminal liability on anyone who knowingly:

advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer,

26 Ladle, *op cit* at 4.

27 *Ashcroft*, 535 US 234 at 251-253.

28 *Ibid*.

29 *Ibid* at 255.

30 *Ibid*.

31 *Ibid* at 262-7.

32 *Ibid*.

33 *Ibid* at 259.

34 PROTECT Act 18 U.S.C. §2252A(c) (2003).

35 *Ibid* § 2256(8)(B).

36 CPPA § 2256(8)(B) (2000).

37 PROTECT Act § 2256 (11).

38 *Ibid* § 2256(8)B.

39 Slocum, “Virtual Child Pornography: Does it Mean the End of the Child Pornography Exception to the First Amendment?” (2004), 14 Alb. L.J. Sci & Tech. 637 at 3.

40 PROTECT Act § 501(7).

41 *Ibid*.

42 *United States v Williams* D. C. Docket No. 04-20299-CR-DMM

any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct

It was held that, although the content described in subsections (i) and (ii) is not constitutionally protected, speech that advertises or promotes such content does have the protection of the First Amendment. Accordingly, § 2252A(a)(3)(B) was held to be unconstitutionally overbroad. The Eleventh Circuit further held that the law was unconstitutionally vague, in that it did not adequately and specifically describe what sort of speech was criminally actionable.

The Department of Justice appealed the Eleventh Circuit's ruling to the U.S. Supreme Court where an oral hearing was held on 30th October 2007.⁴³

On Monday 19th May, 2008, the Supreme Court overturned the decision of the Appellate Court and upheld the provision by a 7-2 majority. Justice Scalia, writing for the court majority, rejected the argument that the law was too broad under the First Amendment and said it was not impermissibly vague. He noted specifically that offers to engage in illegal transactions are categorically excluded from First Amendment protection, and he characterized the speech of an individual claiming to be in possession of child pornography in this category of unprotected speech. He also stated that the law did not violate due process because its requirements were clear and could be understood by courts, juries and potential violators. Justices Souter and Bader Ginsburg dissented. Justice Souter wrote that the court majority allows the new prohibition to suppress free speech that would otherwise be protected by the First Amendment.⁴⁴

Ireland: The Constitution and Legislative Action

(a) The Extent of Child Pornography in Ireland

There would appear to be no Irish cases on virtual child pornography.⁴⁵ However, the data available on child pornography seems to indicate that Ireland has a real problem in this area. A Report compiled for the Dept. of Justice in 2006⁴⁶ showed that between 2000 and 2004, 204 possible crimes involving child pornography were investigated. Out of these 204 investigations, 138 were followed up and a crime was detected in 120 of them. A file was sent to the DPP in 106

cases and 2 prosecutions were initiated. Professor O'Donnell, co-author of the Report, claims the stock of images involving minors is increasing, but prosecutions are decreasing due to offenders becoming more sophisticated at covering their tracks.⁴⁷ Despite this, a number of Irish people were arrested during Operation Flo,⁴⁸ an Austrian led investigation into a global child pornography ring.

In their third annual report (July '03 – Dec '05), Hotline⁴⁹ stated it received more than double the reports of child pornography/abuse than for the same period in their second report, with the average number of reports increasing from 75 to 170 per month. The report also concluded that the severity of the material found has significantly increased from its last report.⁵⁰ In their fifth annual report (1st Jan '07 – 31st Dec '07), released on the 21st July, 2008, Hotline stated that this increased to an average of 223 reports per month in 2006 but fell slightly to 216 per month in 2007. However, the report also states that in 2007, "not a single report that was confirmed as being illegal child pornography was found to be either hosted in, or distributed from, Ireland. This has been the case since the establishment of the Hotline and is a record of which this country should be very proud".⁵¹

While this may be so, Paul Durrant, ISPAI Hotline General Manager, has repeatedly stated that this is no reason to become complacent in relation to any form of child pornography.⁵² Each report has also noted that the severity of the material found has increased significantly, which means that a continuously vigilant attitude is needed if Ireland is to keep her doorstep clean, especially with the rapid technological advances in computing every year.⁵³ The low crime rate in this area at the moment, does not mean the crime does not exist here. As Professor O'Donnell stated, the people accessing these images are getting more sophisticated at covering their tracks, so a constant level of awareness is necessary to ensure these tracks can be followed.

(b) Constitutional Background

The Irish Constitution affords a lesser protection to freedom of speech than its U.S. counterpart. Article 40.6.1 allows freedom of expression "subject to public order and morality".⁵⁴ The Irish Supreme Court considered this provision in *The State (Lynch) v. Cooney*⁵⁵ and concluded:

"This provision enables the State in certain instances to control these rights and freedoms. The basis for any attempt at control must be, according to the

43 The full text of the oral hearing can be found on www.supremecourt.us.gov

44 For the full judgment, go to <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=06-694>

45 Only one Irish case appears to relate to virtual child pornography, but on closer examination this is merely a result of confusion of terminology, as the case in question involved images on temporary Internet files rather than computer-generated images. See : <http://www.ireland.com/newspaper/ireland/2004/1210/309375559HM4CTPORN.html> (Friday December 10, 2004).

46 O'Donnell and Milner, "Child Pornography and the Criminal Justice System: A Report to the Dept. Of Justice, Equality and Law Reform" (2006) at 43. (Received courtesy of Prof. O'Donnell).

47 *Ibid* at 43.

48 <http://www.ireland.com/newspaper/frontpage/2007/0208/1170363891244.html> (8/2/07)

49 Hotline is a service run by the Internet Service Providers Association of Ireland (ISPAI) to combat illegal content, particularly child pornography, on the Internet. Its operation relies on the public to submit reports about content they have encountered on the Internet which they suspect may be illegal.

50 www.hotline.ie/thirdreport/analysis/index.html

51 http://www.hotline.ie/5threport/executive_summary/index.html

52 *Ibid*.

53 Reports available on www.hotline.ie

54 Bunreacht na hEireann, Article 40.6.1.

55 [1982] IR 337.

Constitution, the overriding considerations of public order and public morality”.⁵⁶

This gives the Irish legislators and judiciary a wider scope to prohibit and control areas such as child pornography and virtual child pornography. Even so, Walsh has criticised Article 40.6.1 and Irish obscenity law. She claims Irish law in this area may actually contravene Article 10 of the European Convention on Human Rights. She argues that: “the application of censorship law is placed in the hands of a conservative elite ...whose task is to advance the presumed moral welfare of the individual and society and that ambiguities in the definitions of obscenity and indecency leave the legislation open to abuse.”⁵⁷ However, Article 10 of the Convention allows for a restriction on freedom of expression in order to preserve the health and morals of a particular State. It may well be argued that the definition of “health and morals” is in the hands of a “conservative elite” but, as a result of the double restriction imposed by both the Constitution and the Convention, it is hard to see how anyone could succeed in claiming their right to freedom of expression would be restricted unnecessarily by a prohibition of any form of child pornography in this State.

(c) Irish Legislation dealing with Child Pornography.

In Ireland, child pornography is controlled by the Child Trafficking and Pornography Act 1998. As this is criminal legislation, the courts will construe these provisions strictly so the legislation needs to be examined to see if its provisions specifically deal with virtual child pornography.

Under section 2 of the Act, any audio or visual representation that implies, advocates, encourages or counsels any sexual activity with children is prohibited “irrespective of how or through what medium the representation...has been produced, transmitted or conveyed”⁵⁸. This includes “any representation, description or information produced by or from computer graphics or by any other electronic or mechanical means”.⁵⁹ Section 2(1) makes it an offence for a child or depiction of a child to be engaged in, or witness to, or depicted as being engaged in or witness to, sexual activity. There is no requirement that an adult be involved in any way. Section 2(2) states that the definition of a child shall be construed as including a reference to a figure resembling a person that has been generated or modified by computer-graphics.⁶⁰ This would seem to be a clear provision prohibiting on virtual child pornography. Section 2(3) bolsters this provision by stating that a person will be deemed to be, or have been a child, if the person appears to the court to be or have been a child “unless the contrary is proven”.⁶¹ This proviso seems to offer a defence for pornography

involving youthful looking actors, who may appear child-like. That defence will be quite limited in scope as section 2(3) includes images depicting or representing children. Even if the actors are over 17, if they are depicting or representing a child, they fall foul of the legislation. Sections five and six of the Act make production, distribution and possession of child pornography illegal.

(d) Ireland and The Cybercrime Convention

The European Council Convention on Cybercrime was a European led initiative, signed by Japan, Canada, the U.S. and the Republic of South Africa, which advocated a complete ban on virtual child pornography in 2001. It is worth noting that out of the 44 signatories to the Convention, only 22 have ratified it so far, the last being Slovakia where the Convention came into force on the 1st May 2008.⁶² The Convention came into force in the U.S. on the 1st January 2007.⁶³ Both Ireland and the U.K. are signatories to the Convention but neither has ratified its proposals.

Article 9(1) of the Convention requires that all signatories make it an offence to produce, make, distribute, procure or possess child pornography through any form of computer system.⁶⁴ Article 9(2) defines child pornography as a minor, a person appearing to be a minor, or realistic images representing a minor engaged in sexually explicit conduct.⁶⁵ Flanagan has stated that these provisions would encompass computer-generated images of children.⁶⁶ McIntyre suggests that as Irish law already addresses the bulk of the issues contained in the Convention, there will be a legislative temptation to adopt a minimalist approach to full compliance. He feels that the legislature may simply tinker around the edges of the existing laws, making only the changes necessary for compliance. He believes such an attitude would result in a missed opportunity to comprehensively reform the law in this area.⁶⁷

Victimless Crime or Not?

Perhaps the most important argument as to whether or not Virtual Child Pornography is victimless is the fact that paedophiles may be able to raise virtual child pornography as a defence to excuse actual child pornography. This point concerned all the judges in *Ashcroft*, with even the concurring judges giving it special consideration. During hearings on the PROTECT Act, the National Center for Missing and Exploited Children (NCMEC) produced some alarming findings. Firstly, they submitted a series of pictures containing both real and virtual images of children to show the difficulty an ordinary person would have distinguishing them. Secondly, and far more worrying, the NCMEC testified

56 [1982] IR 337 at 361.

57 Walsh, “Gender, the Law and the Legal System, Background note on Censorship”, (2002) UCD. (Walsh’s views were referenced in a paper on Pornography in “The Second National Report of the Irish Observatory on Violence against Women”, October 2006, by Monica O’ Connor.)

58 *Ibid* s. 2(1).

59 *Ibid*.

60 *Ibid* s.2(2).

61 *Ibid* s.2(3).

62 <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=8&DF=&CL=ENG>

63 *Ibid*

64 European Council Convention on Cybercrime 2001, Art. 9(1).

65 *Ibid*. Art 9(2).

66 Flanagan, “The Law and Computer Crime: Reading the Script of Reform”(2005), 13 Int’l J.L. & Info. Tech. 98 at 11.

67 McIntyre, “Computer Crime in Ireland: A Critical Assessment of the Substantive Law” (2005), 15 ICLJ 1 at 20.

that prosecutors have begun to dismiss cases if the NCMEC could not identify the children appearing in the images.⁶⁸ Even more disturbing were Congress's findings that the virtual child pornography defence was largely illusory. Industry experts still maintained that, as of yet, virtual child pornography was too time consuming and expensive to be a truly viable option for most paedophiles. This indicates that most of the child pornography claiming to be virtual was still being made with actual children.⁶⁹ According to Watanabe, even at this, the very existence of a virtual child pornography defence gave paedophiles a double escape clause: (1) It provided a ready-made defence against prosecution for using actual minors. (2) It encouraged child pornographers to alter images of children slightly to give the appearance they were computer-generated.⁷⁰

The Supreme Court in *Ashcroft* acknowledged that no actual children were used or harmed in the production of virtual child pornography. However, experts have concluded that child pornography, either real or virtual, enflames the desires of paedophiles, increases the creation and distribution of child pornography and leaves the viewer less sensitive to images of exploitation or abuse of children.⁷¹ Although the Supreme Court stated that this link was too tenuous without a "significantly stronger, more direct connection",⁷² Congress raised legitimate concerns. Experts in the area warned that viewing any form of child pornography, even virtual, can result in a need for "more and increasingly explicit child pornography to satisfy his cravings. When mere visual stimulation no longer satisfies him, he will often progress to sexually molesting live children".⁷³

If the chance of this happening is more than *de minimis*, there is sufficient reason for its complete prohibition (consistent with the artistic/literary exceptions). In some countries, such as the U.S., this may involve a delicate balancing act between competing fundamental rights but this is not a novel concept as courts worldwide have a hierarchical view of fundamental rights. Surely, if one right was to lead to potential harm to children, a competing duty to protect those children could supersede it?

It also seems a legitimate point that, if virtual child pornography increases production or distribution of child pornography, it causes harm. Paedophiles may be encouraged to keep images on the chance they are virtual as "the government has the burden of proving the pornography is real".⁷⁴ Criminalising virtual child pornography would contribute to individuals destroying such images, therefore cutting a vital link in the distribution chain.

Another issue of concern for Congress was the fact that paedophiles may use virtual images to entice other children into sexual activity. Ladle states the Court accepted in *Osbourne* that actual child pornography could be used as enticement.⁷⁵ If

new technology blurs the distinction between real and virtual images how can anyone, with complete certainty, claim that virtual child pornography cannot be used for the same ends? Accordingly, the legislative response should be as stringent as it is when dealing with actual child pornography.

These findings should provide the impetus any country needs to prohibit virtual child pornography, except in cases of serious literary/artistic endeavour. Slocum states that if the technology becomes as widespread as the U.S. Congress fears, prosecutions under traditional child pornography provisions may become difficult unless there is additional legislation to prohibit virtual child pornography.⁷⁶ The weight of this argument is given more force when you consider some recent comments by Prof. Max Taylor of the UCC COPINE⁷⁷ project. At a seminar entitled "Understanding Child Pornography", he stated that the average age of children appearing in abusive images is between 6 and 12 years old. He claimed that recent trends have seen this becoming lower with more babies and toddlers being used. Combined with this, he feels the levels of abuse are becoming worse. He also states that demand for these images is increasing rapidly and, on average, twenty new children a month are appearing on the Internet in abusive or highly graphic sex poses.⁷⁸

These are disturbing statistics. Virtual child pornography cannot be seen as victimless if it in any way contributes to these images becoming more prevalent on the net and the response, from both legislators and ISP, has been largely uncompromising. In 2004, BT the U.K.'s largest ISP blocked all illegal child pornography websites and the other major providers are likely to follow suit.⁷⁹ Virtual child pornography has been illegal in Holland since 2002, and in February of this year, the State prosecutor stated it is considering taking a test case against an online virtual game, Second Life, where adults can pretend to be children and engage in virtual sex with other adults.⁸⁰ In Canada, child pornography includes any photographic, film, video or other visual representations, whether made by electronic or other mechanical means. It is also an offence to make, distribute, possess or access this material.⁸¹ Amendments to the Criminal Code Act 1995 in Australia have targeted ISP or web-hosts. Providers are now liable for fines ranging between \$11-55,000 if they are aware their services are being used to access child pornography and do not alert the Federal Police within a reasonable time. It is also a federal offence, with a penalty of up to ten years imprisonment, for a person to use a carriage service, such as the Internet, to access, transmit or make available child pornography or child abuse material.⁸² ISPs in Ireland have adopted a similar tactic through Hotline. These responses

68 S. Rep. No. 108-2, at 5 (2003).

69 *Ibid.*

70 Watanabe, *op. cit.* at 7.

71 Senate Report No.104 – 358, at 2. (1996).

72 *Ashcroft*, 535 US 234 at 251-253.

73 Extract from Brief of the National Center for Missing and Exploited Children as Amicus Curiae in Support of Petitioners at 6, *Ashcroft v Free Speech Coalition*, 535 US, 234. (2002).

74 S. Rep. No. 104-358 at 91 (1996).

75 Ladle, *op. cit.* at 7.

76 Slocum, *op. cit.* at 3.

77 The COPINE (Combating Paedophile Information Networks in Europe) Project was founded in 1997, and is based in the Department of Applied Psychology, University College Cork, Ireland.

78 <http://archives.tcm.ie/irishexaminer/2003/03/03/story437563346.asp>

79 http://technology.guardian.co.uk/online/news/0,12597,1232506,00.html#article_continue

80 www.theregister.co.uk/2007/02/21/dutch_demand_ban_on_virtual_child_porn/

81 Canadian Criminal Code, Pt. 5, Sexual Offences, Public Morality and Disorderly 1985, s.163 (1).

82 Australian Criminal Code Act 1995, Pt. 10.6.

show that legislators take the problem very seriously and in no way see it as victimless.

Conclusion

The issue is highly controversial and can be, according to former Solicitor General Drew Days, “almost impossible to discuss in a reasoned way”.⁸³ The tide of public opinion is almost exclusively one-sided and a recent survey in the U.K has shown that 89% of a 1,000-person survey would support ISP tracking visitors to child porn websites.⁸⁴ Simon Gauen, who conducted the survey, stated, “the freedoms offered by the Internet should never extend to protecting those who derive pleasure from harming the most innocent section of our society”.⁸⁵ With legislative and public opinion so vocal on the subject, it is very hard to categorise virtual child pornography as victimless.

Despite this, at the 5th National Prosecutor’s Conference in 2004, Tom O’Malley, one of the country’s leading authorities on sentencing, stressed that only in the most extreme circumstances should a custodial sentence be imposed on a paedophile when all, or most of the images were computer generated, unless there is an element of distribution involved.⁸⁶ This seems to lend credence to the idea that when no actual children are involved, the crime is reduced. From a clinical sentencing perspective, the idea that no actual children used equals a lesser sentence, makes sense. However, this attitude could reflect the lack of knowledge of and research into the problem in Ireland. As I stated earlier, the problem of virtual child pornography has not arisen so far in Ireland. As such, I feel the true extent of the damage it can cause has not been fully realised here and this may account for a lenient attitude towards virtual rather than actual

images. The American research has shown how dangerous virtual images can be.

Even when real children are not involved, there is sufficient evidence to suggest that the existence of such images causes harm by perpetuating the cycles of distribution and actual abuse. Michael Heimbach, Chief of the FBI’s Crimes Against Children Unit, stated that through “practical experience”, there is “no doubt that child pornography fuels some child pornographers to live out their fantasies on real children”.⁸⁷ The NCMEC findings that most of these “virtual children” are in fact, real, make it tantamount to a criminal act for any country to leave an avenue of escape for perpetrators. Even if it were a case, as in the U.S., where such legislation interfered with other fundamental rights, an important point must be remembered, succinctly expressed by Judge Ferguson in *Ashcroft*:

[C]hild pornography, real or virtual, has little or no social value [therefore]... [w]hy should virtual child pornography be treated differently than real child pornography?The only difference is that real child pornography uses actual children in its production whereas virtual child pornography does not. While this distinction is noteworthy, it does not somehow transfer virtual child pornography into meaningful speech.⁸⁸

Anything which in any way promotes an activity that has potential to harm the most vulnerable members of society cannot be seen as victimless. The victims here are children and it is the duty of any State to offer them the highest protection possible. ■

83 John Heilemann, Big Brother Bill, *Wired* Oct. [1996] at 53,54.

84 www.news.bbc.co.uk/2/hi/uk-news/politics/6175441.stm

85 *Ibid.*

86 <http://www.ireland.com/newspaper/ireland/2004/0524/3448591984HM5DPP3.html>

87 Hearings on Free Speech Decision, *supra* note 1, at 10.

88 *Free Speech Coalition v Reno*, 198 F.3d 1083, 1100-01 (1999, 9th Cir).

2009 ICMA CONFERENCE

The Irish Commercial Mediation Association will hold its 2009 conference “Mediation saves: time, money and business relationships” on Friday 6 March 2009, at 8.00 am (Registration) to 2.30pm at Croke Park (The Ash Conference Room, Cusack Stand, St Joseph’s Ave, off the Clonliffe Road)

Speakers and participants include Mark Appel, Senior Vice President of the Centre for International Dispute Resolution, Mr Justice Peter Kelly of the Commercial Court, Terence O’Keeffe, Law Agent Dublin City Council, Turlough O’Donnell SC, counsel and mediator, Martin Lang, Head of Contracts & Dispute Resolution Construction Industry Federation, John Madden, Madden Mediation & Arbitration Limited and Visiting Professor of Law TCD and Brian Speers, CMG Solicitors and mediator.

The Conference will include Lunch with a key note address from Lawrence Kershen QC. The cost is:

ICMA members: € 100.00 and Non-members: € 175.00

Booking and payment can be made online at www.icma.ie.

For further information please contact: cathychamberlaine@eircom.net

Round Hall Judicial Review Conference 2008

NIAMH CLEARY* AND RACHAEL WALSH**

The Round Hall Judicial Review Conference took place in The Distillery Building on November 22nd. It was attended by members of the judiciary, legal practitioners, and representatives of government and regulatory bodies. The conference was chaired by The Hon Mr Justice Adrian Hardiman of The Supreme Court, whose concluding comments provided an interesting perspective from the other side of the bench to that of the speakers at the conference; Gerard Hogan SC, Anthony M. Collins SC, James O'Reilly SC and Michael Lynn BL. This article provides a brief overview of the main points covered by the speakers.

Gerard Hogan SC: Delay and Order 84

Gerard Hogan SC highlighted an important change in judicial attitudes relating to delay in seeking judicial review. Order 84, rule 24 sets out time limits within which judicial review must be sought. Mr Hogan observed that the common law imposed an obligation on parties to move promptly, independently of the time limits imposed by Order 84. A party who has instituted proceedings within the time limits prescribed in Order 84 may still fall foul of this obligation. Mr Hogan pointed to *O'Connell v Environmental Protection Agency*,¹ which held that the time limits imposed on applicants under s. 85(8) of the Environmental Protection Agency Act 1992 did not lessen the requirement for an application to be made promptly.

Mr Hogan noted that the substance and context of an application will be relevant in this context. A more restrictive judicial attitude is taken in commercial² or public procurement cases, where the stricter time limits in Order 84A apply. Similarly, a strict approach will also be taken to last minute applications to restrain an administrative³ or criminal hearing. The courts are also strict where a case raises major issues of public importance that cannot be fully addressed in the short timeframe in which the decision must be made, and the applicant's delay in seeking judicial review caused the restrictive timeframe. Conversely, despite evidence of more stringent judicial attitudes following the Supreme

Court decision in *De Róiste v Minister for Defence*⁴, the power to extend time is still liberally employed where the delay can be explained and there is no evidence of prejudice to third parties, particularly where there is evidence that the applicant tried to resolve the issue through political or other means.⁵ Mr Hogan observed that, although Order 84 is not to be construed as a statute of limitations,⁶ the courts' attitude to delay had become more robust in recent years. This was partly due to the courts' increasing sensitivity to the statutory imperatives underlying schemes subject to judicial review and to the significance that the courts attributed to matters such as administrative inconvenience deciding whether or not to extend time.

Mr. Hogan also reviewed some recent developments in judicial review. In *Bupa v. Health Insurance Authority*⁷ the Supreme Court held that legislative provision affecting individual rights must be expressed in clear and explicit statutory language. He also discussed *Blehein v. Minister for Health and Children*,⁸ in which statutory attempts to remove a right of judicial review were held to be unconstitutional.

Anthony M Collins SC: Procedural Exclusivity

Mr Anthony M. Collins SC sought to distinguish between cases in which the litigants may only proceed by way of judicial review and those for which judicial review was inappropriate. He argued that the judicial review procedure is the only appropriate route where a litigant seeks what is in effect an order of *certiorari*, prohibition or mandamus.

*O'Donnell v. Corporation of Dun Laoghaire*⁹ provides that litigants are not precluded from seeking a declaratory order by way of plenary action. Mr Collins agreed that, although Costello J's observation that the "significant safeguards" available to public authorities in judicial review proceedings were also available in plenary hearings was technically correct, it was not clear that these protections were comparable to those available under Order 84 in practice.

Mr Collins pointed to areas of law in which statute provides that judicial review is the exclusive route of appeal against administrative decisions. Although the Supreme Court has repeatedly affirmed that judicial review is an inappropriate means of challenging the constitutional validity

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1 [2002] 1 ILRM 1.

2 See *Dekra Eireann Teo. v. Minister for the Environment and Local Government* [2003] 2 IR 270, where a short delay in a commercial case was held to be fatal.

3 *O'Flynn v Mid-Western Health Board* [1991] 2 IR 223.

4 [2001] 1 IR 190.

5 *McDonnell v Dún Laoghaire Corporation (No. 2)* [1991] ILRM 301, *State (Furey) v Minister for Defence* [1988] ILRM 89.

6 See *O'Driscoll v. Law Society of Ireland* [2007] IEHC 352.

7 *Bupa Ireland Ltd. v. Health Insurance Authority* [2008] IESC 42.

8 *Blehein v. Minister for Health and Children* [2008] IESC 40.

9 [1991] ILRM 301.

of legislation,¹⁰ Mr Collins noted that it was not uncommon to find leave orders granting leave to advance constitutional arguments or to seek declarations that legislative provisions were unconstitutional. He observes that such issues should be dealt with at the *ex parte* leave stage. James O'Reilly SC returned to this issue in his paper.

Mr Collins concluded by addressing the recent High Court decision; *Ryanair v Commission for Aviation Regulation*.¹¹ Ryanair sought, by Special Summons, to challenge a decision of the respondent to allow the Dublin Airport Authority to charge certain fees in respect of check-in desks at Dublin Airport. The Commission moved to dismiss the proceedings, contending that Ryanair's sole remedy was by way of judicial review. Kelly J held that, where an a party seeks to have a decision made pursuant to the European Communities (Access to the Ground Handling Market at Community Airports) Regulations quashed, such an order should sought by way of judicial review unless there is a clear statutory remit to make an order of the type sought by way of plenary proceedings. Mr Collins concluded that the time was ripe to revisit the permissive approach adopted by the courts in *O'Donnell*, as it was desirable that litigants should have recourse to a procedure designed to address challenges of a public power in a single procedure.

James O'Reilly SC: Varying Standards of Review

Mr. James O'Reilly S.C. discussed "Varying Standards of Judicial Review". Mr. O'Reilly first turned his attention to conventional judicial review. He stressed that judicial review is inappropriate in situations involving a conflict of facts, referring to two recent High Court decisions; *Donegan v. Dublin City Council*¹² and *Dublin City Council v. Gallagher*¹³. Both involved factual disputes brought by way of judicial review and in both instances the judges emphasised that judicial review was not appropriate. According to Mr. O'Reilly, it is understood that most judicial review actions fail, and he called for research to gather conclusive statistics on this point. At the *ex parte* leave stage in conventional judicial review, the standard of review is the relatively low threshold set out by Finlay CJ in *G v. Director of Public Prosecutions*¹⁴, which essentially requires that an applicant establish an arguable case. Mr. O'Reilly argued against a general move to *inter partes* leave hearings because it might create a risk of exclusion of meritorious cases from judicial review.

On the question of applications for stays of proceedings or interlocutory injunctions, Mr. O'Reilly stressed that normal injunction standards apply in judicial review, therefore an undertaking as to damages is always required. At the substantive hearing, no uniform standard of review exists. The grounds of legal challenge, varying standards of review such as *Wednesbury*¹⁵ and *O'Keefe*¹⁶ unreasonableness, and

curial deference to expert statutory bodies and tribunals, may all influence the standard of review applied at the substantive hearing. Mr. O'Reilly also noted that a higher threshold, such as substantial grounds, often applies in statutory contexts. He criticised the length and complexity of proceedings at the leave stage in the statutory scheme for planning cases and noted that there may be duplication between the leave and substantive hearing stages. Finally, Mr. O'Reilly argued that constitutional challenges should, as a general rule, be brought by way of plenary proceedings, in order to ensure appropriate findings of fact in the High Court. He favoured the "ripeness" doctrine in U.S. constitutional law.

Michael Lynn BL: Proportionality and the ECHR

Mr. Michael Lynn BL addressed "Proportionality, the ECHR and Judicial Review", developing further the theme of varying standards of review. The UK courts have referred to the need for anxious scrutiny in cases where fundamental rights such as life and liberty are affected. Having reviewed the Irish case-law, Mr Lynn suggested that anxious scrutiny is in practice applied in the asylum and immigration context, but an express judicial pronouncement endorsing this approach would be welcome.

Taking Article 3 of the European Convention on Human Rights, the prohibition on torture and degrading treatment, as an example of an absolute, non-derogable right, Mr. Lynn explored the duty of a reviewing court to undertake steps of its own to obtain relevant material. He noted that the European Court of Human Rights does take such steps, but that the Irish courts have resisted adopting an inquisitorial stance.¹⁷ Mr. Lynn stressed the importance of the proportionality principle as the litmus test of interferences with qualified rights. In *Smith and Grady v. UK*¹⁸, the ECtHR held that *Wednesbury*-style rationality review does not provide a sufficient remedy to satisfy Article 13 of the Convention's guarantee of a right to an effective remedy. Moreover, even where judicial review scrutiny is heightened, it may fall short of the requirements of Article 13.

Turning to the Irish jurisprudence, Mr. Lynn noted the trend in the Irish citizen child cases away from a traditional requirement that decisions be manifestly contrary to reason and common sense, evident in cases such as *A.O. & D.L. v. Minister for Justice, Equality and Law Reform*¹⁹. More recently, the Supreme Court has required that a decision-maker consider whether an interference with individual rights is proportionate and that he/she makes a reasoned decision.²⁰ However, High Court judges have generally taken a restrictive view of the kinds of circumstances in the immigration context that will amount to a disproportionate interference with the right to family life guaranteed by Article 8 of the ECHR.²¹ ■

10 See *Riordan v An Taoiseach* [1999] 4 IR 343 at 350-351, *Gilligan v Ireland* [2001] ILRM 473 at 479.

11 [2008] IEHC 278.

12 *Donegan v. Dublin City Council* [2008] IEHC 288.

13 *Dublin City Council v. Gallagher*, O'Neill J., 11 November 2008.

14 *G v. Director of Public Prosecutions* [1994] 1 IR 374.

15 *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

16 *O'Keefe v. An Bord Pleanála* [1993] 1 IR 39.

17 See *I v. Minister for Justice, Equality and Law Reform* [2008] IEHC 23.

18 *Smith and Grady v. United Kingdom* (2000) 29 EHRR 493.

19 *A.O. & D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1.

20 See *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] IESC 25 and *Dimbo v. Minister for Justice, Equality and Law Reform* [2008] IESC 26.

21 See e.g. *Aghonlabor v. Minister for Justice, Equality and Law Reform* [2007] IEHC 166 and *G.O. v. Minister for Justice, Equality and Law Reform*, (High Court, 19th June 2008, Birmingham J.).

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IMMIGRATION

Asylum

Applicant Irish born minor - Female genital mutilation - Country of origin material - State protection - Whether internal relocation available to applicant - Whether internal relocation viable means of avoiding risk - Whether respondent had selectively chosen country of origin material - Whether all material put to applicant - Whether necessary for respondent to produce country of origin documentation or whether questioning of applicant on issues arising sufficient - Whether State protection available or sufficient - *Stefan v Minister for Justice, Equality and Law Reform* [2001] 4 IR 203 applied; *K v Secretary of State for the Home Department* [2007] 1 AC 412 and *Idiakbena v Minister for Justice, Equality and Law*

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Asylum

Assessment of claim - Fair procedures - Duty to give reasons - Refugee Applications Commissioner - Whether failure to give adequate reasons for refusal of claim - Whether substantial grounds for contending that decision invalid - *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 considered - Relief refused (2006/187JR - Herbert J - 8/5/2008) [2008] IEHC 137
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Asylum

Country of origin material - Leave to apply for judicial review - Fair procedures - Evidence - Inferences drawn from documentary evidence - Application of independent country of origin information to objective assessment of whether well founded fear of persecution exists - Whether correct and fair approach adopted - Whether material error of fact in decision - Whether decision unfair - Whether substantial grounds for contending that decision invalid and ought to be quashed - *Rostas v Refugee Appeals Tribunal* (Unrep, Gilligan J, 31/7/2003) considered; *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436 (Unrep, Peart J, 9/7/2004) distinguished - Leave to seek judicial review refused (2006/1107JR - Birmingham J - 25/6/2008) [2008] IEHC 193
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Credibility - Country of origin information - Whether respondent improperly made adverse finding of credibility - Whether respondent took into account inappropriate matters in reaching findings - Judicial review - *Ojelabi v Refugee Appeals Tribunal* [2005] IEHC 42 (Unrep, Peart J, 28/02/2005) applied; *Sango v Minister for Justice* [2005] IEHC 395 (Unrep, Peart J, 24/11/2005) and *P v Refugee Appeals Tribunal* [2007] IEHC 415 (Unrep, Feeney J, 07/12/2007) considered - Refugee Act 1996 (No 17), ss 2, 11 and 16 - Immigration Act 2003 (No 26) s 7 - Relief refused (2006/563JR - Gilligan J - 3/7/2008) [2008] IEHC 254
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Credibility - Leave to apply for judicial review - Fair procedures - *Audi alteram partem* - Country of origin information - Whether duty upon decision maker to afford opportunity of responding to country of origin information adverse to applicant for asylum - Whether existence of alternative remedy adequate to cure defects in decision making process - Whether substantial grounds for contending that decision invalid and ought to be quashed - *Stefan v Minister for Justice* [2001] 4 IR 203 considered - Application for leave to seek judicial review granted (2006/875JR - Herbert J - 8/5/2008) [2008] IEHC 133
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Asylum

Credibility - Leave to apply for judicial review - Fair procedures - Description of travel to State - Whether findings on credibility rationally made - Whether decision *ultra vires* - Whether substantial grounds for contending that decision invalid - Refugee Act 1996 (No 17), s 11B - Leave to seek judicial review refused (2006/1063JR - Herbert J - 8/5/2008) [2008] IEHC 135
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Asylum

Credibility - Leave to apply for judicial review - Whether error on face of decision material - Internal relocation - Whether decision rational and reasonable on issues of credibility and internal relocation - Whether substantial grounds for contending that decision invalid and ought to be quashed - *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 considered - Relief refused (2006/1034JR - Birmingham J - 26/6/2008) [2008] IEHC 219
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A (S) v Refugee Applications Commissioner

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Information compiled by Clare O'Dwyer, Law Library, Four Courts.

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European communities (avian influenza) (control on imports from Croatia and Switzerland) regulations 2008
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2/2008 Social Welfare and Pensions Act 2008
Signed 07/03/2008

3/2008 Finance Act 2008

Signed 13/03/2008

4/2008 Passports Act 2008
Signed 26/03/2008

5/2008 Motor Vehicles (Duties and Licences) Act 2008
Signed 26/03/2008

6/2008 Voluntary Health Insurance (Amendment) Act 2008
Signed 15/04/2008

7/2008 Criminal Justice (Mutual Assistance) Act 2008
Signed 28/4/2008

8/2008 Criminal Law (Human Trafficking) Act 2008
Signed 07/05/2008

9/2008 Local Government Services (Corporate Bodies) (Confirmation of Orders) Act 2008
Signed 20/05/2008

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Signed 02/07/2008

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Signed 08/07/2008

12/2008 Legal Practitioners (Irish Language) Act 2008
Signed 09/07/2008

13/2008 Chemicals Act 2008
Signed 09/07/2008

14/2008 Civil Law (Miscellaneous Provisions) Act 2008
Signed 14/07/2008

15/2008 Dublin Transport Authority Act 2008
Signed 16/07/2008

16/2008 Nuclear Test Ban Act 2008
Signed 16/07/2008

17/2008 Intoxicating Liquor Act 2008
Signed 21/07/2008

18/2008 Credit Institutions (Financial Support) Act 2008
Signed 02/10/2008

19/2008 Mental Health Act 2008
Signed 30/10/2008

20/2008 Cluster Munitions and Anti-Personnel Mines Act 2008
Signed 02/12/2008

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

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2nd Stage – Dáil **[pmb]** *Deputy Michael D. Higgins*

Anglo Irish Bank Corporation Bill 2009

Bill 1/2009

2nd Stage - Seanad

Appropriation Bill 2008

Bill 64/2008

2nd Stage - Seanad

Arbitration Bill 2008

Bill 33/2008

Committee Stage - Dáil

Broadband Infrastructure Bill 2008

Bill 8/2008

2nd Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Broadcasting Bill 2008

Bill 29/2008

Committee Stage – Dáil (*Initiated in Seanad*)

Charities Bill 2007

Bill 31/2007

Report and Final Stages – Dáil

Civil Liability (Amendment) Bill 2008

Bill 46/2008

2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Civil Liability (Amendment) (No. 2) Bill 2008

Bill 50/2008

2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Civil Partnership Bill 2004

Bill 54/2004

2nd Stage – Seanad **[pmb]** *Senator David Norris*

Civil Unions Bill 2006

Bill 68/2006

Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Climate Protection Bill 2007

Bill 42/2007

2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Cluster Munitions Bill 2008

Bill 19/2008

2nd Stage – Dáil **[pmb]** *Deputy Billy Timmins*

Consumer Protection (Amendment) Bill 2008

Bill 22/2008

2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

Coroners Bill 2007

Bill 33/2007

Committee Stage – Seanad (*Initiated in Seanad*)

Credit Union Savings Protection Bill 2008

Bill 12/2008

2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Feargal Quinn, Shane Ross and Ivana Bacik*

Criminal Justice (Violent Crime Prevention) Bill 2008

Bill 58/2008

2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Criminal Law (Admissibility of Evidence) Bill 2008

Bill 39/2008

Order for 2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Criminal Law (Home Defence) Bill 2008

Bill

2nd Stage – Dáil **[pmb]** *Deputies Charles Flanagan and Michael Ring*

Data Protection (Disclosure) (Amendment) Bill 2008

Bill 47/2008

2nd Stage - Dáil **[pmb]** *Deputy Simon Coveney*

Defamation Bill 2006

Bill 43/2006

2nd Stage – Dáil (*Initiated in Seanad*)

Defence of Life and Property Bill 2006

Bill 30/2006

2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Electoral (Amendment) Bill 2008

Bill 38/2008

Report and Final Stage - Dáil

Electoral Commission Bill 2008

Bill 26/2008

2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Employment Law Compliance Bill 2008

Bill 18/2008

Order for 2nd Stage – Dáil

Ethics in Public Office Bill 2008

Bill 10/2008

2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Ethics in Public Office (Amendment) Bill

2007

Bill 27/2007

2nd Stage – Dáil (*Initiated in Seanad*)

Finance (No. 2) Bill 2008

Bill 56/2008

Committee Stage - Seanad

Fines Bill 2007

Bill 4/2007

Order for 2nd Stage – Dáil

Freedom of Information (Amendment) Bill 2008

Bill 24/2008

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Freedom of Information (Amendment) (No.2) Bill 2008

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Freedom of Information (Amendment) (No. 2) Bill 2003

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Bill 30/2008

2nd Stage – Dáil **[pmb]** *Deputy Liz McManus*

Garda Síochána (Powers of Surveillance) Bill 2007

Bill 53/2007

2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

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Report and Final Stage – Dáil

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Harbours (Amendment) Bill 2008

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Health Insurance (Miscellaneous Provisions) Bill

Bill 67/2008

1st Stage - Dáil

Housing (Miscellaneous Provisions) Bill 2008

Bill 41/2008

Report Stage – Seanad (*Initiated in Seanad*)

Housing (Stage Payments) Bill 2006

Bill 16/2006

2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan*

Human Body Organs and Human Tissue Bill 2008

Bill 43/2008

2nd Stage – Seanad **[pmb]** *Senator Feargal Quinn*



Human Rights Commission (Amendment)
Bill 2008
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2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Immigration, Residence and Protection
Bill 2008
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Committee Stage – Dáil

Industrial Development Bill 2008
Bill 65/2008
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2006
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Juries (Amendment) Bill 2008
Bill 25/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

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2006
Bill 31/2006
Committee Stage – Dáil (*Initiated in Seanad*)

Legal Practitioners (Qualification)
(Amendment) Bill 2007
Bill 46/2007
2nd Stage – Dáil **[pmb]** *Deputy Brian O'Shea*

Legal Services Ombudsman Bill 2008
Bill 20/2008
2nd Stage – Dáil

Local Elections Bill 2008
Bill 11/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Mental Capacity and Guardianship Bill
2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik*

Mental Health (Involuntary Procedures)
(Amendment) Bill 2008
Bill 36/2008
2nd Stage – Seanad **[pmb]** *Senators Déirdre de Búrca, David Norris and Dan Boyle*

Motor Vehicle (Duties and Licences) (No.
2) Bill 2008
Bill 57/2008
Committee Stage – Seanad

National Cultural Institutions (Amendment)
Bill 2008
Bill 66/2008
1st Stage – Seanad **[pmb]** *Senator Alex White*

National Pensions Reserve Fund (Ethical
Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Nursing Homes Support Scheme Bill 2008
Bill 48/2008
2nd Stage – Dáil

Offences Against the State Acts Repeal
Bill 2008
Bill 37/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

Offences Against the State (Amendment)
Bill 2006
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1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn*

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Paul Coughlan and David Norris*

Ombudsman (Amendment) Bill 2008
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Order for 2nd Stage – Dáil

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2nd Stage – Dáil **[pmb]** *Deputy Joe Costello*

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2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

Prevention of Corruption (Amendment)
Bill 2008
Bill 34/2008
Committee Stage – Dáil

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Order for Second Stage
– Seanad (*Initiated in Seanad*)
Protection of Employees (Agency Workers)
Bill 2008
Bill 15/2008
2nd Stage – Dáil **[pmb]** *Deputy Willie Penrose*

Public Appointments Transparency Bill
2008
Bill 44/2008
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Registration of Lobbyists Bill 2008
Bill 28/2008
2nd Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Seanad Electoral (Panel Members)
(Amendment) Bill 2008
Bill 7/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Spent Convictions Bill 2007
Bill 48/2007
2nd Stage – Dáil **[pmb]** *Deputy Barry Andrews*

Stem-Cell Research (Protection of Human
Embryos) Bill 2008
Bill

2nd Stage – Seanad **[pmb]** *Senators Rónán Mullen, Jim Walsh and John Hanafin*

Student Support Bill 2008
Bill 6/2008
2nd Stage – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
2nd Stage – Dáil

Twenty-ninth Amendment of the
Constitution Bill 2008
Bill 31/2008
2nd Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

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Bill 14/2008
Report and Final Stages – Dáil

Twenty-eighth Amendment of the
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Bill 14/2007
Order for 2nd Stage – Dáil

Victims' Rights Bill 2008
Bill 1/2008
2nd Stage – Dáil **[pmb]** *Deputies Alan Shatter and Charles Flanagan*

Vocational Education (Primary Education)
Bill 2008
Bill 51/2008
2nd Stage – Dáil **[pmb]** *Deputy Ruairi Quinn*

Witness Protection Programme (No. 2)
Bill 2007
Bill 52/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

ABBREVIATIONS

BR = Bar Review

CIILP = Contemporary Issues in Irish
Politics

CLP = Commercial Law Practitioner

DULJ = Dublin University Law Journal

GLSI = Gazette Law Society of Ireland

IBLQ = Irish Business Law Quarterly

ICLJ = Irish Criminal Law Journal

ICPLJ = Irish Conveyancing & Property
Law Journal

IELJ = Irish Employment Law Journal

IJEL = Irish Journal of European Law

IJFL = Irish Journal of Family Law

ILR = Independent Law Review

ILTR = Irish Law Times Reports

IPELJ = Irish Planning & Environmental
Law Journal

ISLR = Irish Student Law Review

ITR = Irish Tax Review

JCP & P = Journal of Civil Practice and
Procedure

JSIJ = Judicial Studies Institute Journal

MLJI = Medico Legal Journal of Ireland

QRTL = Quarterly Review of Tort Law

The references at the foot of entries
for Library acquisitions are to the shelf
mark for the book.

Case Law on the Mental Health Act 2001: Part 1

NIALL NOLAN B.L.

The Constitutional and Legal context – Procedure and Principles

Part 2 of the Mental Health Act 2001 (hereafter “the 2001 Act”) was commenced on the 1st of November 2006 thereby introducing a quasi-judicial process for the review by Mental Health Tribunals of involuntary admissions to and detentions in psychiatric hospitals. Referring to its recent review and report (April 2008, hereafter “the review report”) on the operation of the Act since commencement, Dr. Edmond O’Dea, Chairman of the Mental Health Commission stated in his introduction, “The 2001 Act has undoubtedly introduced radical reform within Irish Mental Health Services. It has introduced comprehensive human rights protections for those admitted involuntarily, thereby leading to a high level of accountability and external scrutiny”. This article examines some general principles applied by the Irish courts in the context of the Act. A subsequent article to be published in the *Bar Review* will focus on more specific provisions in the Act.

Since the commencement of the Act, there have been a number of cases brought to the High Court challenging, on various grounds, the bases for such admissions and detentions. The majority of these proceedings have been instituted as habeas corpus proceedings examining the validity of the detention pursuant to Article 40.4 of The Constitution of Ireland 1937. A more limited number of cases, involving generally persons no longer detained, have been commenced by way of applications for orders of Judicial Review and have proceeded pursuant to the terms of Order 84 of the Rules of the Superior Courts 1986 (as amended).

Judicial review incorporates for example, consideration of whether or not a decision was arrived at within the statutory framework provided, in our case, the Mental Health Act and relevant statutory instruments. This analysis is underpinned and robustly supported by the Constitutional rules of fair procedures. These legal concepts also play a vital role in the resolution of applications for habeas corpus enquiries. Specifically in the area of detentions on grounds of mental ill-health, and in endorsing the patient’s right to seek enquiries into the legality of same under Article 40 of the Constitution, the Superior Courts have pronounced in the following terms in the relatively recent past: -

In *R. T. v. Director of the Central Mental Hospital* [1995] 2 I.R. 65, which dealt with a detention pursuant to S.207 of the Mental Treatment Act of 1945, Costello P. stated:

“The reasons why the Act of 1945 deprives persons suffering from mental disorder of their liberty are perfectly clear. It does so for a number of different

and perhaps overlapping reasons — in order to provide for their care and treatment, for their own safety, and for the safety of others. Its object is essentially benign. But this objective does not justify any restriction designed to further it. On the contrary, the State’s duty to protect the citizens rights becomes more exacting in the case of weak and vulnerable citizens, such as those suffering from mental disorder. So, it seems to me that the constitutional imperative to which I have referred requires the Oireachtas to be particularly astute when depriving persons suffering from mental disorder of their liberty and that it should ensure that such legislation should contain adequate safeguards against abuse and error in the interests of those whose welfare the legislation is designed to support.”

Such statements of fundamental principle have also found expression and echo in the context of applications for inquiries pursuant to Article 40 of the Constitution arising from matters concerning the implementation of the Mental Health Act 2001. For example, in the *ex tempore* decision of Sheehan J. in the case of *J.B. v. The Central Mental Hospital & Ors*, the learned judge noted:

“While it is common case that the applicant is seriously ill, needs treatment, and is presently a potential danger to others, the Court is forced back to a consideration that this is an Article 40 application and the Constitution obliges it to consider whether or not the applicant is detained in accordance with law.”

Early cases – emerging themes

One of the first, if not the first application pursuant to Article 40 following the commencement of the Act was moved in the case of *Q. v. St. Patrick’s Hospital & Ors* (*Ex-tempore* Judgment of Mr. Justice O’Higgins, 21st of December 2006). Although no reported copy of this judgment is to hand, it appears that it involved a circumstance where a detainee, found by the High Court judge not, as a matter of fact, to have been detained pursuant to Section 23 of the 2001 Act, was nevertheless made the subject of an admission order pursuant to the terms of Section 24. It was uncontroversial that the patient was very unwell and that the psychiatrist who signed the admission order was acting out of the best of therapeutic motives in his consideration that the Applicant required continued involuntary detention and treatment.



Nevertheless, Mr. Justice O'Higgins is reported to have held, referring to the underlying factual situation "*it seems to me that that is not merely a procedural defect*" and thereafter, referring to what ultimately presented as the insurmountable obstacle to the making of a detention order under Section 24, he is reported to have commented, "*for the exercise of the jurisdiction in Section 24 ... it says 'where a person is detained pursuant to Section 23' and that did not apply.*"

This case's significance also lies in its early indication that, as far as the High Court was concerned, there were definite limitations to be placed on any purposive or paternalistic or *best interests* approach to the interpretation of the Act. In fact a mental health tribunal sat in relation to this detention and attempted to apply the provisions of Section 18(1) of the Act to "cure" any defects it observed. Again however, while expressing sympathy for the dilemma which faced this tribunal, the High Court could not condone its approach. In a strong dictum, the Court is recorded as stating:

"just because a result would maybe be desirable and maybe the right outcome, the law cannot be bent so far by virtue of purposive interpretation as to do violence to the words of the Act itself."

The Court's approach in this case, repeated in a number of other cases which we shall come to, is one entirely in keeping with the importance our superior courts have placed upon the *rule of law*, particularly from a constitutional perspective. In this regard, Mr. Kris Gledhill, Barrister and Lecturer in Law with the University of Auckland, commented on the importance of the rule of law in a presentation to a Mental Health Commission conference in the following terms:

"This has a number of features, but one essential part of the concept is the reduction of discretion by the formulation of clear legal rules and the requirement that interventions in people's lives have a basis in law: the judiciary is the body whose function is to guarantee the observance of the rule of law."

Less generally, the aforementioned approach is also consistent with the long standing canon of interpretation to the effect that a strict construction attaches to legislation affecting personal liberty.

On the 6th of February 2007, Mr. Justice Clarke delivered what has proved to be a quite influential decision in the context of litigation under the Act, although some of the main issues addressed in the judgment should not surface again. A significant feature of this decision, *J.H. v. Vincent Russel, Clinical Director of Cavan General Hospital* (Unreported High Court, 6th of February 2007) certainly as regards current litigation and for practical purposes, is what Mr. Justice Clarke had to say, having determined that a detention under the scheme for involuntary detention under the Mental Health Acts was unlawful on two grounds, regarding what *form* the order for release should take.

In this respect, it remained unchallenged that the Applicant Mr. H was still suffering from a mental disorder at the time of the application for release. Any other form of treatment does not appear to have been canvassed in the case. Therefore, in order to protect the Applicant's welfare

and applying recent Supreme Court authority in analogous circumstances, the High Court ordered that the Applicant be released 7 hours after the order was made. The release was "scheduled" in this way in order to facilitate a re-admission under the Act. This form of order has become a central feature of this litigation.

Best interests and Purposive/Paternalistic Interpretation

Section 4(1) of the Mental Health Act 2001 provides as follows:

"in making a decision under this Act concerning the care or treatment of a person (including a decision to make an Admission Order in relation to a person), the best interests of the person shall be their principle consideration with due regard been given to the interests of other persons who may be at risk of serious harm if the decision is not made..."

This express imperative harks back in substance to the paternalistic canon of interpretation that had been deployed by our Superior Courts in cases disposed of under the old mental health detention regimes.

Considerable insight as to the meaning of the *best interests* principle as well as to how the paternalistic approach to statutory interpretation is currently being applied has been provided by a number of applications under Article 40 which have challenged decisions made under the 2001 Act.

In *MR v. Byrne & Ors* (Unreported High Court, 2nd of March 2007), Mr. Justice O'Neill commented:

"In my opinion having regard to the nature and purpose of the Act of 2001 as expressed in its preamble and indeed throughout its provisions, it is appropriate that it is regarded in the same way as the Mental Treatment Act of 1945, as of a paternal character, clearly intended for the care and custody of persons suffering from mental disorder."

This dictum appears to speak to a traditional understanding and approach in the area but as is invariably the case, it took several cases before a clearer picture began to emerge, in particular as regards the limitations of the best interests principle and any paternalistic interpretation.

In this regard, I would first mention the decision of Mr. Justice Peart in *A.M. v. Kennedy & Ors* (Unreported High Court, 24th April, 2007). In this case there was some doubt and confusion as to when an extension order under Section 184 of the Mental Treatment Act 1945 ended (the period straddled the commencement of the Mental Health Act on the 1st of November 2006) which led to consequent uncertainty as to when a renewal order commenced and the appropriate timing of a Mental Health Tribunal. In this context, Mr. Justice Peart said the following:

"In matters involving the deprivation of liberty, and I place persons such as the applicant who are ill in no lesser a position than other persons whose liberty

is in other circumstances curtailed or removed, the greatest care must be taken to ensure that procedures are properly followed, and it ill-serves those whose liberty is involved to say that the formalities laid down by statute do not matter and need not be scrupulously observed. That is not to say that where the meaning of a statutory provision is unclear or open to different interpretations the meaning which is consistent with a purposive interpretation of the legislature's intention is not the one which should be adopted. That is a different question altogether."

Returning to *W.Q.*, one of the issues Mr. Justice O'Neill had to consider was what failures of compliance could be excused by Mental Health Tribunals pursuant to Section 18(1)(a)(ii) of the 2001 Act. This provision is in the following terms:

"18 – (1) Where an Admission Order or a Renewal Order has been referred to a tribunal under s. 17, the tribunal shall review the detention of the patient concerned and shall either –

- (a) If satisfied that the patient is suffering from a mental disorder, and
 - (i) that the provisions of sections 9, 10, 12, 14, 15 and 16 where applicable have been complied with, or
 - (ii) if there has been a failure to comply with any such provision, that the failure does not affect the substance of the order and does not cause an injustice, affirm the order, or
- (b) If not so satisfied, revoke the order and direct the patient to be discharged from the approved centre concerned..."

On this occasion, Mr. Justice O'Neill put his view of paternalism and "best interests" in the context of these concepts as tools of statutory construction. He stressed that the best interest of the person is to be the principle consideration under Section 4 of the Act and added:

"In my opinion, the best interests of a person suffering from a mental disorder are secured by a faithful observance of and compliance with the statutory safeguards put into the 2001 Act, by the Oireachtas. That together with the restriction in s. 18(1)(a)(ii) mean that only those failures of compliance which are of an insubstantial nature and do not cause injustice can be excused by a Mental Health Tribunal. Therefore it necessarily follows that there must be in existence either an Admission Order or Renewal Order, where appropriate, which in substance is valid. An order which contains a flaw which undermines, or disregards the statutory basis for lawful detention as provided for in this Act, could not be excused under s. 18. Therefore the absence of the necessary valid preceding order or the making of an order by the wrong person are in my opinion defects which take the purported order outside or beyond the statutory scheme provided and cannot be cured under s. 18."

Mr. Justice Peart in giving judgment in the case of *P McG v. The Medical Director of the Mater Misericordia Hospital & Ors* (Unreported High Court, 29th of November 2007) stated:

"In the circumstances of this case it was in my view appropriate for the Applicant's solicitor to form the view that as the provisions of Section 22 of the Act had clearly not been complied with, the High Court should be asked to enquire into the legality of the Applicant's detention. It is not for the solicitor appointed to represent the interests of the patient to ignore the failure to observe the provisions of s.22 on the basis that she may not have believed that this Court was likely to order his release. That is a matter for this Court to decide. To fail to bring the matter to Court for such an enquiry on such a basis would lead to a risk that in some case or cases a patient might remain in unlawful detention without redress, given in particular the vulnerability of many such patients who may not be in a position to themselves instruct their appointed legal representative to apply for an order releasing him or her from detention. Such a situation would tend also to encourage a slack approach to the observance of the requirements of this legislation whose very purpose is to put in place a regime of statutory procedures for the protection of vulnerable persons against involuntary unlawful detention. The protections put in place are detailed and specific and it is of the utmost importance that they be observed to the letter, and that no unnecessary shortcuts creep into the way in which the Act is operated."

In the case of *M.D. v. Clinical Director of St. Brendans Hospital & Ors* (Unreported Supreme Court, 27th of July 2007), Mr. Justice Hardiman speaking for a unanimous Supreme Court said the following:

"Mr. McDonagh is in my view correct in his submission that the Act, and in particular Sections 9 - 18 thereof, is intended to constitute a regime of protection for persons who are involuntarily detained because they are suffering from a mental disorder. That purpose will not, in my view, be achieved unless the Act is complied with."

Flowing from these cases I believe is an evolving jurisprudence which, while still recognising the appropriate canon of construction as a paternal one, has necessarily highlighted that there are limits on how far it can be taken. It should not be used to re-write the legislation. The Superior Courts are necessarily vigilant to ensure that the separation of powers, which lies at the core of this State's democratic model, is not in any way imperiled. No amount of well-intentioned action, it has been determined, can make lawful what is patently, on the face the Act, unlawful. Underwriting therefore the term *best interests* is the fact that respect for the rule of law, as well as a patients' best *legal* interests, must form part of any assessment of best practice in relation to a particular issue arising on the operation of the Act.

“Voluntary” detention

The question of whether or not a patient can be properly considered as being voluntarily present in an “approved centre” is of crucial importance to the operation of the regime under the new Act. The issue has given rise to litigation, in particular in relation to the purported application of the provisions of Sections 23 and 24 of the 2001 Act. Guidance on this topic has been provided by Strasbourg as well as a piece of recent domestic jurisprudence.

In the former regard, the case of *H.L. v. United Kingdom*¹ is instructive. It is firstly necessary to outline the facts of the case. The Applicant was an adult male diagnosed as autistic. He was unable to speak and had a limited level of understanding. He lived with paid carers, and attended a day centre. It was agreed by all parties that he lacked the capacity to consent or object to institutional admission. In 1997, whilst in the day centre, he became agitated and engaged in self-harm. On the recommendation of his social worker he was transferred to an Intensive Behavioural Unit of a psychiatric hospital as an informal patient. There he was compliant and did not try to run away. Had he attempted to do so, formal confinement proceedings pursuant to the Mental Health Act, 1983 would have been commenced and the Applicant would not have been allowed off the premises. However, such formal proceedings had not been necessary. Notwithstanding repeated requests by his family for the Applicant’s return, the hospital refused to discharge him into their care. At issue in the domestic litigation was whether individuals such as the Applicant who acquiesce rather than assent to their admission and who lack the capacity to make a decision as to where they will reside in any event, can be admitted informally and remain in hospital under these circumstances or whether they must be ‘sectioned’ under the formal involuntary detention powers in U.K legislation. The High Court (in this case the court of first instance) in the U.K. held that he had not been detained and that the English common law allowed the admission of people lacking the capacity to make decisions in these circumstances. When the Court of Appeal reversed the decision, his compulsory detention was initiated under the Act, but the House of Lords restored the High Court’s decision.

An application was then lodged on the Applicant’s behalf with the European Court of Human Rights, the issue being whether the Applicant’s original “informal” admission breached his right to liberty under Article 5 of the European Convention on Human Rights. The Court found that the Applicant’s right to liberty under Article 5 of the Convention was engaged. Further, Article 5 rights were not specifically dependent on whether the individual expressed a wish to leave the facility. Instead, the key fact was that the staff of the hospital exercised “complete and effective control over his care and movements”². Had he attempted to leave, he would have been prevented from doing so, and visits from his carers were restricted by the hospital staff.

Significantly the European Court went on to state:

“In this latter respect, the Court finds striking the lack

of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted. The contrast between this dearth of regulation and the extensive network of safeguards applicable to psychiatric committals covered by the 1983 Act ... is, in the Court’s view, significant. In particular and most obviously, the Court notes the lack of any formalised admission procedures which indicate who can propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There is no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attach to that admission. Nor is there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention. The nomination of a representative of a patient who could make certain objections and applications on his or her behalf is a procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for patients who are legally incapacitated and have, as in the present case, extremely limited communication abilities.”

As a result of the lack of procedural regulation and limits, the Court observes that the hospital’s health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed, as and when they considered fit ... this left “effective and unqualified control” in their hands. While the Court does not question the good faith of those professionals or that they acted in what they considered to be the applicant’s best interests, the very purpose of procedural safeguards is to protect individuals against any “misjudgments and professional lapses” ...³

Accordingly, the Court found a violation of Article 5.

Further, in the English High Court decision of *J.E. v. D.E. (by his litigation friend, the Official Solicitor). Surrey County Council and EW*⁴ Munby J, in approving the rationale underpinning the aforementioned *HL* judgment of the European Court of Human Rights and affirming a previous dissenting opinion of Judge Loucaides of the European Court of Human Rights in *H.M. v. Switzerland*⁵, held that:

“A person can be “deprived of his liberty”, indeed detained in the fullest and most complete sense of the word, even though his departure from the place of detention is not prevented by a locked door or by any other physical barrier.”⁶

Indeed he concluded at paragraph 125 with the following view:

“A person can be as effectively “deprived of his liberty” by the misuse or misrepresentation of even

1 (2005) 40 EHRR 32

2 *Ibid*, para. 91

3 *Ibid*, paras. 120 -121 (Emphasis added)

4 [2007] 1 MHLR 39

5 (2004) 38 EHRR 17

6 *Ibid*, para. 118

non-existent authority as by locked doors and physical barriers.”

A patient’s own capacity to remain as a voluntary patient is also of significance. The European Court of Human Rights addressed the issue of capacity, consent and deprivation of liberty in *Stork v. Germany*⁷ where the Court held that in addition to the objective fact of a physical deprivation of liberty, there also existed a subjective element as to whether that person had validly consented to the confinement in question. In this case, the Applicant had been placed in a locked psychiatric unit at the request of her father. The Court stated:

“Having regard to the national courts’ related findings of fact and to the factors that are undisputed between the parties, the Court observes that the applicant had attained the age of majority at the time of her admission to the clinic and had not been placed under guardianship. Therefore, she was considered to have the capacity to consent or object to her admission and treatment in hospital. ... Having regard to the continuation of the applicant’s stay in the clinic, the Court considers the key factor in the present case to be that – as is uncontested – the applicant tried on several occasions to escape. ... Under these circumstances, the Court is unable to discern any factual basis for the assumption that the applicant – presuming that she had the capacity to consent – agreed to her continued stay in the clinic. In the alternative, assuming that the applicant was no longer capable of consenting ..., she cannot in any event be considered to have validly agreed.”⁸

Returning to our own shores, reference should be made in the first instance to the aforementioned decision of Mr. Justice Clarke in *J.H.*. Although voluntariness as an issue has formed the basis of a number of challenges, to my knowledge the issue remains to be considered either as expressly or as concisely as it was in this case. The following passage of the judgment is particularly instructive:

“... it is also suggested that the period of apparent voluntary detention (as referred to above) was not genuine in that Mr. H. was subjected to an identical regime concerning control (some of it not, apparently, in accordance with his wishes) when he was formally detained under detention orders and when he was, apparently, a voluntary patient. It is also questioned as to whether Mr. H. was truly a consensual patient during the relevant period. Indeed it is worthy of note that some of those in whose charge Mr. H. was placed, questioned, at that time, the validity of his detention on that very basis. I was again satisfied that Mr. H’s detention was invalid on this ground. The legislation is clear. A person could only be detained under s. 184 for a maximum of twenty four months. I was satisfied that at the expiry of that period there either

had to be a finding that Mr. H. was being a person of unsound mind (*which, for the reasons which I have indicated earlier, may not have been considered a practical proposition or, indeed, desirable*), a release, or a genuine transfer into voluntary detention. While I was satisfied that what occurred was done with the best of intentions, I was not satisfied that Mr. H. went into a period of genuine voluntary treatment at that stage. I appreciate that it would appear that part of his own motivation in signing the relevant documentation related to a desire to stay in Cavan. However I was not satisfied that the relevant period during which Mr. H. was, apparently, a voluntary patient, was in substance properly voluntary and I am therefore satisfied that he was inappropriately detained for in excess of the maximum period of twenty four months.

6.5 While I fully understand the pressures which may have led to those in charge of Mr. H. to attempt to devise means of ensuring his continued treatment, (which they clearly considered desirable) notwithstanding the defective legislation within which they were operating, I was nonetheless satisfied that his detention was unlawful on that ground as well.”

Finally reference should be made to the recommendation contained in the Mental Health Commission’s review report that the issues arising here be addressed through capacity assessment legislation, “It is recommended that the introduction of capacity legislation be prioritized by legislators to address these difficulties and empower and protect vulnerable people who are not able to make their own decisions.....The status of patients should not be lightly changed from voluntary to involuntary, and the rights of patients in this regard must be fully safeguarded”. Elsewhere in it’s report the Commission stated that “Legislation is needed to make clear who can take decisions, in which situations, and how this should be done”

Appropriateness of the treatment afforded

Considerable guidance for doctors and lawyers on this issue, and more particularly what form a challenge under this heading might take, was also provided by the above-mentioned judgement delivered by Mr. Justice Clarke in *J.H.*. In this regard and essentially drawing an analogy with the position of those detained within the criminal process, Mr. Justice Clarke stated :

“7.5 However by a parity of reasoning with the jurisprudence of the courts in respect of persons who are detained within the criminal justice process, it does not seem to me that anything other than a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful.”

Access to medical records

Basic fairness of procedures as well as the imperatives of constitutional and natural justice require that access to a

7 [2005] MHLR 211

8 *Ibid*, paras. 74-76



patient's medical records be provided to a patient's legal representatives. Indeed how else could a mental health legal representative discharge his or her statutory function?

The 2001 Act somewhat surprisingly is silent on issues relating to such, access but guidance on the matter is provided by the decision in *LK v. Clinical Director, Lakeview Unit* [2007 2 ILRM 69].

As Clarke J's judgment makes clear, a substantial reason the proceedings were commenced in the first place was an apparent *impasse* concerning access to the Applicant's medical records. In this regard, Mr. Justice Clarke said the following, once again in highly instructive terms:

"I am fully understanding of the difficult position in which those charged with the management of the Lakeview unit were placed. On the one hand they were faced with a request from a solicitor (having apparent instructions on behalf of a person apparently lawfully detained by them) seeking medical records. On the other hand, the very reason for the detention of the applicant led to a legitimate questioning (confirmed by her own nominated psychiatrist in due course) of her capacity to consent. It would appear that those circumstances led, not unreasonably, to an application to the court.

However it is also clear from the jurisprudence of the European Court of Human Rights that it is necessary to put in place appropriate measures to enable such review mechanisms in respect of detained persons as the courts provide to be available to persons who may not be fully able to deal with their own affairs. In those circumstances it seems to that an institution, such as the Lakeview unit, in which persons are detained under the provisions of the Acts, must make facilities available to ensure that persons are not deprived of a reasonable opportunity to bring a challenge to the lawfulness of their detention. While it may well be the case that objection could

legitimately be taken to a request for the release to a lawyer, apparently acting on behalf of a person so detained, of that person's entire medical records, nonetheless it seems to me that there is an implied constitutional obligation on any institution to afford the utmost facility to a person who wishes to mount a challenge to their detention.

Therefore in my view, in the absence of special or unusual circumstances, a person acting on behalf of someone detained is entitled to be facilitated with reasonable access both to that person and to that person's medical records for the purposes of facilitating a review by the Court of the lawfulness or otherwise of the detention of the person concerned."

On this point, the Mental Health Commission has recently recommended in its review report, "that the 2001 Act be amended to allow a patient's legal representative to review the records relating to the patient at the approved centre, as is the case for the consultant psychiatrists who carry out the independent medical examinations under Section 17. As matters transpired, this recommendation foreshadowed a decision reached in *EJW* (judgment delivered in November 2008, approved version awaited) wherein *inter alia*, Mr. Justice Peart in robust terms disapproved of practices whereby a Responsible Consultant Psychiatrist refused a patient's legal representative, appointed under the Mental Health Act 2001 to represent the patient at a mental health review tribunal, from having access to the patient's medical files when such a patient was so unwell that a view was taken that such a patient lacked capacity to consent to the release of the records. The learned judge also deprecated, as offensive to basic fairness of procedures, the practice whereby such access could consequently only be obtained on the actual date of the mental health tribunal, following a direction by the tribunal. ■

Colmcille and the Irish Copyright Tradition*

RONAN SHEEHAN, SOLICITOR

Peter Sutherland was appointed Director General of the General Agreement on Tariffs and Trade in 1993. His task was to conduct the Uruguay Round of negotiations in which copyright issues played an important part. At World Intellectual Property Organization headquarters in Geneva, he discovered, among the agency's disparate iconography, an image of the sixth-century Irish saint, Colmcille, which included the words "To every cow it's calf, to every book it's copy"¹.

That pithy, poetic expression is forever associated with Colmcille, although no-one claims that he said it. And, while the date upon which it was said, or if it was said at all, may be a matter of conjecture and dispute, Europe has no copyright expression of older vintage. It articulates the fundamental concern of copyright law. Who is entitled to make a copy? It offers the answer to that question which western traditions of copyright law give: the person who is entitled to the original work is entitled to the copy of that work. It is ironic that this principle, which the record avers he disputed, should be associated with his name. But that is why Colmcille features in WIPO headquarters in the role of father-figure to the legal tradition which the organization espouses.

Colmcille, Brigid and Patrick are the three patron saints of Ireland. In 563, Colmcille left Derry for Scotland. He founded a monastery upon the island of Iona. From this foundation, Christianity reached Scotland and the north of England, specifically Northumbria. In Ireland, Scotland and England, a confederation of Columban monasteries developed. (Columba is the Latin name for the Irish Colum, meaning dove).

Literature about him begins with a life, *Vita Columbae*, by Adomnan (628-704). The Venerable Bede records his deeds in *Historia Ecclesiasticae*. An anonymous Derry scribe wrote a life in the 12th century. Manus O'Donnell's classic Irish language work, *Beatha Colaím Cille*, Life Of Colum Cille, appeared in the 17th century. Geoffrey Keating's 17th century history of Ireland, *Foras Feasa Ar Eirinn* offers an account of the saint and the copyright dispute. Ian Finlay's *Colmcille* (1979) and Brian Lacey's *ColumCille And The Columban Tradition* (1996) are critically acclaimed contemporary works.

The copyright dispute is described by Manus O'Donnell. What follows is a summary.

Colmcille visited the monastery at Dromyn, near Ardee, County Louth, where Finnian was abbot. He asked to borrow a book and it was given to him. He would stay behind to copy the book after mass, without Finnian's knowledge. When

Finnian heard about this, he protested to Colmcille. This should not have happened without his agreement.

"I will need the ruling of the King Of Ireland about this," said Colmcille.

"That is the judgement of Diarmaid MacCerbail".

"I'll accept that," said Finnian.

After that they both went to Tara of the Kings, to Diarmaid. Finnian told his version of events to the King first.

"Colmcille copied my book unknown to me and I say that the "son" (copy) of my book is mine".

Colmcille replied.

"I say that Finnian's book that I copied from is none the worse for it. And it is not right that the divine words in that book should perish. Or that I, or anyone else, should be hindered from copying or reading them or spreading them among the people. Moreover, I claim that I was entitled to copy it. Because if I gained any benefit through the copying, I would give that to the people. There would be no loss to Finnian, or damage to his book."

Then Diarmaid gave his famous judgement:

"To every cow, its little cow, that is its calf, and to every book its little book (copy). Because of that, Colmcille, the book you copied is Finnian's".

"That is a bad judgement," said Colmcille. "And you will be punished for it."

For this judgement and for the reason that the king executed a hostage who was under Colmcille's protection, Colmcille called his kinsmen, the Cenel Conaill and Cenel nEogain, to arms. The Battle Of Cul Dreimne (in Sligo) ensued. Colmcille triumphed, but declined to assume the role of High-King as he might have done. Instead, he was obliged to leave Ireland as an exile to do penance for the numbers slain in the battle.

Manus O'Donnell underlines what was the cause of the strife.

The *Cathach* (the battler, the Battle Book) is the name of that book through which the battle was fought. It is the greatest treasure of Colmcille in the territory of the Cenel Conaill. It is covered with silver under gold. It is not lawful to

* This article is dedicated to James Joshua Virgil Sheehan

1 Peter Sutherland in conversation with Ronan Sheehan circa 1996.



open it and if it is taken three-times right-handwise around the host of the Cenel Conaill when they are going into battle, they will come back safe and triumphant. And it is on the chest of the abbot or cleric who is, so far as possible, without mortal sin, that the Cathach should be carried around the host.²

Robert Clark and Shane Smyth's textbook³ devotes half of one of 837 pages to this subject.

"Scholars dispute the true outcome of this copyright litigation; under some traditions, it is said to have led to the battle of Cuil Dreimne. One scholar at least is of the view that the entire "decision" is probably fictitious and Phillips is unable to identify any convincing proof that the trial of Colmcille was actually about unauthorized copying."

Thus the dispute between Colmcille and Finnian is dismissed for uncertainty. The authors suggest that it may at best be regarded as a story, "a tale which resonates down the ages". But it is not law.

The issue was reviewed recently by Liam Breathnach, Dublin Institute of Advanced Studies, author of, *inter alia*, A Companion To Corpus Iuris Hibernicum by Daniel Binchy, the ur-text of Brehon Law scholarship.⁴

What is the expression of a legal principle doing in the life of a saint? The question must be considered in the context of Irish law as a whole.

The large body of legal writing from Mediaeval Ireland reveals a tradition which extends from the 7th to the 17th century. The jurisdiction of the Brehons encompassed the whole island from earliest times until the Norman invasion of the twelfth century. From then until the seventeenth century, it was used in a significant portion of the country.

Many of the legal texts we have comprise compilations specially put together for lawyers. Law and literature were not exclusive categories. No lawyer's book consists solely of law texts. They include sagas and the lives of saints. The professions of poetry and law were affiliated to one another. Some legal texts are in verse, for example, a 13th century work on distraint. A 16th century compilation from County Clare contains numerous sagas.

Some sagas are set in a legal context, for example that involving the ill-fated king, Fergus MacLeti. Cormac Mac Art features in both legal and literary contexts. The enunciation of legal principles by the illustrious dead is a feature of the texts. The false judgement is a common theme.

"One day Cormac Mac Art set out for Tara. He met a woman who was weeping. The reason was that her sheep had broken into the queen's woad garden and eaten the leaves off the plants. The King MacCon had ordered that the sheep be forfeit for their offence. Cormac immediately pointed out that the judgement

should have been "one shearing for another". In other words, the woman should only have been obliged to hand over the shearing of her sheep in recompense for the shearing of the woad plants. When MacCon was informed of Cormac's judgement, he realized that he had been guilty of an injustice and that Cormac was the rightful king".

The famous story of how Cuchullin got his name is also structured to make a legal point about compensation. On a journey north, Setanta encounters a guard-dog. It belongs to Cullin. Thus cu (dog) Chullin (of Cullin). He kills the dog. Now he is obliged to supply a substitute dog. Until the appropriate mastiff is found, that substitute must be Setanta himself who accordingly changes his name to Cuchullin.

The relationship between law and literature in this context is considered by Katherine Simms⁵.

Poems such as Muirghuis O'Davoren's *Einecland na tri sechtgrad* served as mnemonics which would fix in the law student's mind the varying amount of the honour prices, or the procedures to be followed when distraining the property of an accused person. It advertised the skill and status of the man who wrote them. For someone who was both judge and poet, the honour price of both was combined.

Lawyers were learned in the literary, historical and mythological traditions of their country, because these were sources of law. *Uraicecht Becc* (Little Primer c 900 ad), a primer for law students, begins in a manner similar to the Institutes Of Gaius, or of Justinian, by defining the bases of law as being founded upon "roscadaib & Fasaigib & teistemnaib fraib" which means upon "maxims and precedents and true scriptural testimonies"

Old Irish law tracts cite the opinion of ancient judges on past disputes generally drawn from mythology. Doubtful cases and disputes are drawn from literary myths and sagas, a practice not unlike that employed in the ancient Roman schools of rhetoric

The relationship between law and poetry had its roots in pre-Christian Irish culture. The poet was a seer, a sacred seer, like the sacra vates of Virgil, whose inspired words represented a moment of intersection between the divine and the human. The judge's verdict was also such a moment.

The pagan belief that the moment when a judge issued his verdict was an encounter between the human and the divine and that the will of the Gods was outraged by an unjust judgement, while just judgements drew down divine blessings, is already testified among the Celts of Gaul in the first century BC, where Strabo remarks that the druids were chiefly trusted to try cases of homicide. And that "when there is an abundance of these, they consider that there is also an abundance of the land", presumably because their many just judgements drew down the gods' blessing on the crops. In mediaeval Ireland, the judge who gave false judgements also brought a curse on the surrounding population: seol n-etha blechta& mesa ... gallra&amcesa – a failure of grain and of milk and of mast ... diseases and difficulties.

The age of the copyright affair is a material point. Manus O'Donnell's is the oldest version we have. The ancient lives

2 Translation of Manus O'Donnell from Brian Lacey "Life Of Colmcille"

3 Robert Clark and Shane Smyth Intellectual Property Law In Ireland, Butterworth 1997

4 John Philpot Curran Foundation. Seminar, The Colmcille Irish Copyright Tradition, National Museum Of Ireland, November 2006)

5 Brehon Lawyers in the 16th century, Katherine Simms. Eriu 2007



do not mention it. That factor is not decisive. It may be that it is a survival. Manus O'Donnell states that his work is based on a comprehensive review of older books. Keating also mentions the dispute between Colmcille and Finnian. His work is based on the lost Book Of Malecca. His version has the gospel, not the psalms, as the subject matter of the dispute. It may therefore be assumed to derive from a different tradition to that adopted by his predecessor Manus O'Donnell. Both however focus upon the unjust judgement – “there is no harm in copying”.

Colmcille, not Manus O'Donnell, says this. In the lives of saints, when a saint makes a statement of this nature, it is conclusive. That is the truth of the matter.

Both the O'Donnell and Keating versions concur in rejecting the claim to copyright. On this basis, Liam Breathnach affirmed that the right we call copyright did not exist in the law of Ireland under the system known to the Irish people as the Brehon Laws.

So Liam Breathnach expresses a different view to that of Clark and Smyth in the *opus citatus*. There was a law. It was expressed in a way which nowadays might be thought literary rather than legal, but that was a mode in which the Brehon system expressed laws.

Point of contact with the Statute Of Anne (1709)

A detailed account of the *Cathach* was recently commissioned by the Royal Irish Academy⁶. This shows that the right to keepership of the relic has been a crucial issue since earliest times.

The O'Donnells claimed Colmcille as their ancestor. Deriving from the ninth century Domhnall, they were a branch of the Ui Neill. Tir Chonaill, their territory and indeed principality, takes its name from Conal, son of Niall Noigialach, “Niall of the Nine Hostages”. Manus O'Donnell, author of the 16th century, *Life Of Colmcille*, was grandfather of Aodh Rua O'Donaill, the dauntless Red Hugh of Elizabethan times.

After the Treaty Of Limerick (1691), the catholic Jacobite army retreated to France. Colonel Daniel O'Donnell of Ramelton (1666-1735), like Aeneas, leaving the ruins of Troy with his household Gods, brought the Cathach to the continent. He fought in the Irish Brigade in the service of France. He campaigned in France, Germany, Italy and the Low Countries. He fought Marlborough, Churchill's ancestor, at Oudenarde in 1708. He commanded the regiment of O'Donnell of The Irish Brigade in the campaigns of 1709-1712. These actions included the Battle Of Malplaquet and the defence of the lines of Arleux, Denain, Douai, Bouchain and Quesney. He served under Marshall Villars in Germany at the sieges of Loudun and Freiburg and at the forcing of General Vaubonnes entrenchments. This led in March 1714, to the peace of Rastadt between Germany and France.

It is ironic that, at the time the English parliament was enacting the first copyright statute, the Statute Of Anne 1709, which afforded the owner of a book the right to copy it, Daniel O'Donnell sustained upon the battlefield his allegiance

to a far older law. He was made a Brigadier-General on 1st February 1719. He died in his bed at St.Germain-en-Laye, having deposited the *Cathach* with the convent of the Irish Benedictine nuns at Ypres in Flanders upon the stipulation that it should be given up to the chef of the clan when applied for. Connel O'Donnell brought it back to Ireland in 1813.

It was found to contain the pages of a psalter written in Irish majuscule script. It may date from the sixth century and appears to have been written by one hand. The number of errors and corrections in the text suggest that it may have been written in some haste. It may have been written by Colmcille.

The manuscript may be seen in The Royal Irish Academy. The casket in which it was contained is in the National Museum Of Ireland. The *Cathach* may be cited in support of the view that the tradition is based upon actual historical events. It is not material to the argument that the tradition expresses a law.

Point of Contact with Irish Folklore

The archives of the Department Of Irish Folklore in UCD reveal a long tradition of the copyright dispute. Bairbre Ni Fhloinn of that department gave an account of this tradition to the seminar already cited.

Two years ago, an old man living at Altagowlan, Arigna, Co Roscommon, was asked to say what he knew of Colmcille. To which he replied “Every cow is calved. And every book is copied”⁷

Point of Contact with the Public Interest Defence

In an essay entitled *The Public Interest Defence in Copyright Law, Myth or Reality?* (European Intellectual Property Review 2006), Alexandra Sims cites an observation of Lord Jauncey in *Attorney General v Guardian Newspapers Limited* (No.2).

“The courts of The United Kingdom will not enforce copyright claims in relation to every literary work. Therefore, the courts do play an active role in copyrights operation and will intervene to deny protection when the public interest would be harmed. The public interest defence differs from the public interest in the broad sense. The public interest defence does not deny copyright protection to a work, it merely prevents the claimant from enforcing copyright against the defendant.”

Martin MacNamara's *The Psalms In The Early Irish Church* argues that the psalter was “very much at the centre of Christian life, indeed of the life of the literate community. The earliest specimens of writing in Ireland are the so-called Springmount Bog tablets (Co.Antrim, early 7th century). They are wax tablets bearing psalms 30 to 32, used, it would appear, to initiate pupils into the art of reading and writing.

⁶ *The Cathach Of Colmcille, An Introduction*..Michael Herity and Aidan Breen, Royal Irish Academy 2002

⁷ John James Mulhern in conversation with Wendy Elliot, Department Of Education, UCD, August 2006



The psalter as a book in Ireland was loved and venerated. It was at the very centre of monastic literature and learning.”

This observation suggests that Colmcille’s dispute was upon a matter of public interest.

Point of Contact with Muslim Law

It is not right that the divine words in that book should perish.

“Intellectual property law did not play an important role in the Indonesian economy until the 1980’s⁸. The Live Aid Concert organized in 1985 by the Irish rock-singer, Bob Geldof, became the starting point for discussion about intellectual property law in that country. Soon after the release of the Live Aid record, 1.5 million tapes with a market value of 3 million US dollars were produced in Indonesia. Due to poor copyright protection, the Live Aid organization did not get a single cent of this money and the rock singer called for a boycott of Indonesia as a holiday destination.

In a recent newspaper article⁹, the Indonesian lawyer, Mohamed Mova Al’Afghani criticizes fatwas issued by the Indonesian Ulemmas Council because they contained the judgement that intellectual property violations are “haram”. In effect, that the unlawful use of intellectual property violates the law of God and is therefore sinful. The Council had argued that intellectual property is one of the types of property protected under Islamic law. Al’Afghani argued that the council should have investigated whether this was a *sui-generis* Islamic concept rooted in the primary sources of Islamic law, the Koran and hadith (oral tradition). They would have found that few verses supported their position. On the contrary, there is abundant authority for the proposition that all knowledge belongs to God and that knowledge-seeking and knowledge-sharing is an obligation for all Muslims.

There had been a system of knowledge acknowledgement known as “yaza” from the author. This system of a chain of authority was designed to ensure authenticity in the passing of knowledge from one person to another, and also as a form of respect for authors. This system was not created for financial benefit but rather for the sanctity of science. It only protects the moral right of an author to a certain degree. The knowledge itself belongs to God, not to any individual. The yaza system certainly is not a form of copyright.

In Mohamed Al’Afghani’s view, copyright is a response to the Gutenberg printing revolution of the European middle-ages. The concept of the patent – intellectual product – stemmed from that. Intellectual property is a concept developed in the West. It is not a *sui-generis* Islamic legal concept. Does intellectual property protection serve Indonesian society’s best interests? On the contrary, it has been the cause of much abuse. It would serve Islamic society to limit the concept of intellectual property, if not completely abolish it in the future. Extensive intellectual property protection is only in the interests of big corporations and advanced nations.

Islamic values favour the promotion, transfer and dissemination of knowledge rather than treating it as property. Islamic legal scholars should enlighten and liberate Muslim

8 *Intellectual Property Law In Asian Countries: A Survey*, Christopher Anton 1991 3 EIPR

9 The Jakarta Post (17/11/08)

society by limiting and reducing the protection granted under the concept of intellectual property. Imparting a capitalistic legal concept and stamping God’s word on it will not bring any benefits to society

Point of Contact with Chinese Law.

It is not right that I, or any other, should be hindered from copying or reading them or spreading them among the people. I claim that I was entitled to copy it, for if there was any profit for me in copying it, I would want to give that profit to the people.

In Colmcille’s view, the people are entitled to the value of the book; the copy grants them their entitlement.

The defence expresses a cultural, moral and philosophical attitude to knowledge, one we may assume was rooted in his society. The book, the psalms, should be freely available to everyone.

China once had a similar view. This is recorded by Li Xiang Sheng of the China Legal Affairs Centre, Beijing in an article¹⁰ which assesses the enactment of the New Copyright Law in that year by China’s Congress. The bill was designed to bring China into line with the West. It might be one thing, Li Xiang Sheng suggests, to change a law, but it is quite another thing to change the long established cultural attitudes of an ancient civilization.

“Before discussing the legal issues arising from the Copyright Law, it is of interest to consider the historical and political circumstances leading up to its introduction. Historically, the development of copyright law is recognized as a consequence of the invention of printing techniques and the development of book-publishing. However, although printing was first invented in China and publishing traditions date further back in China than in Europe, a comprehensive copyright system was never established in China.”¹¹

Among the reasons for this, Chinese cultural attitudes cannot be overemphasized. Morality concerning intellectual property differed from that concerning other types of property. It is a tradition in China that “in matters of calligraphy and printing, one is not to discuss price.”¹²

Chinese intellectuals, the authors of many copyright works, were not interested in the economic value of their works. By the same token, it is also necessary to highlight that the potential value of original works might not have been understood by the user of copyright works. Therefore, it remains to be seen if traditional Chinese attitudes towards copyright works may now affect the operation of the new western-style copyright law”¹³

If the shadow of Finnian and Colmcille is reflected here, shades of Cuil Dreimne too may be discerned in the course of China’s engagement with the concept of intellectual property. The British Navy was involved at the start.

10 *Observations On The Copyright Law of The People’s Republic Of China*, Li Xiang Cheng EIPR 1990

11 Ploughman and Hamilton, Copyright Routledge and Kegan Paul

12 Ploughman and Hamilton, op.cit.}

13 *Waiting For Supplements; Comments on China’s Copyright Law*, European Intellectual Property Review, Li Xiang Cheng, EIPR



“In fact the Copyright Law is not the first copyright law of China. The first such law can be traced back to 1910, one year before the last emperor was overthrown. The reason for its introduction was probably not changing Chinese attitudes towards the protection of original works, but more likely can be attributed to foreign influences, including the presence of the British Fleet”¹⁴.

Since there had been no copyright law in China for forty years prior to 1990, its introduction involved a new concept for most Chinese. Li Xiang Cheng warns that this fact should be born in mind by those who contemplate the exploitation and protection of their copyright in China.

“Foreign influences played a role in the discussions which preceded the Copyright Law. An important role was played by the US government, armed with GATT, section 301, and Super 301 of the US Trade Act 1974. Zheng Chengsi, the distinguished jurist, noted that there was a strong call for change in the law by domestic intellectuals. This situation reflected not only changing attitudes but also the serious extent of the infringements”¹⁵.

Point of Contact with Copyright and Related Acts Right (Ireland) 2000

Then Diarmaid gave the famous judgement: To every cow its little cow, that is, its calf, and to every book its little book (copy); and because of that, Colmcille, the book you copied is Finnian's.

Diarmaid's judgement and order prefigure our contemporary legislation.

S.102 enacts that the author of a work shall be identified as the author and that right shall also apply in relation to an adaptation of the work. The right conferred by this section shall be known as the Paternity Right.

S.126 enacts that when a person has in his possession an infringing copy of a work or an article designed for making copies of a copyright work, the owner of the copyright of the work may apply to the appropriate court for an order that the infringing copy or article may be delivered up to him or such other person as the court may direct.

Point of Contact with the Book of Kells

“Why should the Irish people pay to see pictures they already own”¹⁶?

It is not right that that the divine words in that book should perish or that I, or any other, should be hindered from copying or recording them or spreading them among the people.

Iona (I Colum Cille) or the monastery at Kells, County Meath, produced the eponymous book in the 8th or 9th century. Some hold that the work started on Iona and

transferred to Kells to escape the attention of Viking marauders. An illuminated manuscript of the four gospels, it is on display in the library of Trinity College, Dublin. While the books awe-inspiring visual dimension have made it a wonder of the world for over a thousand years, it is essentially a Latin gospel and may be regarded as the cornerstone of Ireland's Latin heritage. In Irish it is Leabhar Colum Cille, the Book Of Columcille. Upon postcards, facsimiles and in other places, the trustees of the library of TCD assert a copyright interest in the book, an interest which is emphatically exercised through the entrance fee charged to visitors to the library, which has over many years earned the college an enormous income and continues to do so.

The New York Times in May 2007 printed an article by Eamonn Quinn which heralded a two year laser analysis programme of the book, “by ramon spectroscopy, which will study the chemicals and composition of the treasure, its pigments, inks and pages of fine vellum.” Robin Adams, the librarian of Trinity College, hoped the exacting dot-by-dot analysis by laser would unlock secrets and help his staff preserve the book which attracts over half-a-million visitors.

Whose book is it? Whose copyright, if anyone's? These secrets were not the target of Robin Adam's laser analysis.

The first reference to it we know is in *The Annals Of Ulster* (1007) when the theft of the “most precious object” in the western world is described. Giraldus Cambrensis thought it, the great Gospel Of Colmcille, the work of an angel, not a man.

Michael Slavin outlines the book's history¹⁷. A land grant at the back of the book places it in Kells c. 1140. In 1260 or thereabouts, the monastery transfers from Columban to Augustinian hands. At the suppression of the monasteries in 1539, things become unclear.” The best guess is that the book passed into the care of the family of the last Abbot, Richard Plunket. From 1158 to 1604, someone uses the book to record annals. In 1621, James Usher, Church of Ireland, Bishop of Meath, makes an entry in the book. Sometime between 1663 and 1681, Usher's successor in the See, Henry Jones, made the book the subject of a donation to Trinity College, along with the Book Of Durrow. According to Michael Slavin, this might have been done for the protection of the books.

“It is quite possible that both volumes were in any case housed at Trinity for safe-keeping. In the mid-seventeenth century, Kells is known to have been a hot-bed of Puritan extremism - these individuals, who had an abhorrence of graven images, would surely have loved to get their hands on either book with a view to destroying them”

Trinity College has retained the book, and the benefits of possession, for three hundred years. The people of Kells want to bring it home.

Henry Jones (1605-1682) sounds an unlikely refuge from Puritan or indeed any brand of extremist. Scoutmaster General in Cromwell's army, he attended meetings of the army council, an institution responsible for ordering the

14 Li Xiang Sheng *op.cit*

15 *Chinese Intellectual Property And Technology Transfer Law*, Zheng Chengsi, Sweet and Maxwell 1987

16 Charles Haughey, Taoiseach, declining a proposal that the National Gallery of Ireland charge the public an entrance fee.

17 *The Ancient Books Of Ireland*, Michael Slavin, Wolfhound Press

massacres of Irish Catholics at Drogheda and elsewhere and for rounding-up and transporting tens of thousands of Irish people as slaves to the Barbadoes. He established and served upon a special court which tried people for their alleged involvement in atrocities. He administered the transplantation of Catholics to Connacht. Aidan Clarke offers the view¹⁸ that Jones' presentation of the Book Of Kells and that of Durrow was in fulfilment, "indeed more than fulfilment, of the tacit obligations he assumed upon his appointment as vice-chancellor of Dublin University in 1646 in place of his uncle, Archbishop Usher." Under Cromwell, he acquired forfeited estates in Summerhill, County Meath, together with the wardship of the heir of a wealthy landowner within the pale and grants of the tithes of nine abbeys and rectories (these last directly ordered by Cromwell). He was complicit in the persecution of Archbishop Saint Oliver Plunkett.

It is difficult to see what valid title, in real property, in personal property, in intellectual property, could pass through the hands of Henry Jones.

Point of Contact with the Video Recordings Act 1989 (Ireland)

I say that Finnian's book that I copied from is none the worse for it.

The passage of this act had perhaps as much to do with foreign influence, specifically that exercised by the Motion Picture Association of America which represents large corporations like Disney, Warner Brothers, Dreamworks, Columbia Pictures, Miramax, people like Michael Eisner, Jeffrey Katzenberg, Rupert Murdoch, Harvey Weinstein *et al.* as it had to do with a change of cultural attitudes on the part of the Irish people. The Act purported to criminalize matters of copyright infringement in the context of the cinema. In imitation of the British FACT or Fight Against Copyright Theft (established 1983), INFACT, Irish National Fight Against Copyright Theft was established at the time of the Act.

Of this development, Clark and Smyth make the following observation: In the area of film rights, which are normally held by film corporations, the statutory copyright, at least in relation to reproduction and adaptation, are administered by the rights-holder directly. Public performance in the form of film distribution are also administered by the film company while private rental in the form of video is administered by specialist branches of these corporate bodies. In Ireland, many of these rights are protected in the form of the Industry organization, INFACT which is active in the area of counteracting video piracy in the form of importation and distribution of pirated copies as well as domestic pirating of video products. INFACT also operates in the rental sector against those who distribute illegal products to the public. The policing role, carried out with the assistance of the Gardai and the Revenue Commissioners by using a number of legislative supports, is generally regarded as being an area where new legislative measures are urgently required to strengthen the effectiveness of the law in relation to piracy.

18 Jones, Henry, Dictionary Of National Biography, Aidan Clarke, Oxford University Press

It has recently been observed¹⁹ that FACT's name is a mis-nomer since there is no such offence within the United Kingdom as "Copyright Theft" under the Theft Act 1968. When copyrighted material is copied, this act is not removing the material permanently from its owner. Copyright infringement is not theft, stealing or "twokking" (taking without consent) as it is possession of a copy or copies of copyrighted material without a suitable license from the owner.

Denise Fitzpatrick (with Terry Prone) recently published a book²⁰ which detailed her struggle to assert her intellectual property rights against Disney Corporation. A native of Skryne, County Meath, she conceived of a character called Piggley Pooh and set out, with her husband, to transform the idea into a TV series. She claimed throughout that the idea was born of the Irish rural culture of her childhood. The Disney Corporation did not agree.

"Winnie The Pooh", a children's story by A.A. Milne, was published in 1926 and was followed two years later by "*The House at Pooh Corner*". Milne's son Christopher Robin is credited as the inspiration and catalyst for the stories and his is the name of the child who plays with the animal characters in the books: Winnie The Pooh (a toy bear), Rabbit, Piglet, Eeyore, Kanga, Roo and Tigger. Disney acquired intellectual property rights to the A.A. Milne characters and made considerably more money from them than A.A. Milne or his publishers did.

Disney said that Denise's pig represented an infringement of their "rights" in A.A. Milne's bear. They issued a "Cease and desist" letter, a threat to sue her unless she stopped trying to turn her pig into a TV series. The book records the sheer misery and virtual ruin to which Denise and her whole family were made subject by Disney corporation whose vast resources were deployed against her for many years in a myriad of legal procedures. Denise never relinquished her right to her intellectual property, her characters. After many years of a soul-destroying survival-struggle, the European Court, at Alicante, upheld that right. The victory was soured by an unforeseen realpolitik aspect of the children's entertainment business. Were Denise to use the word "Pooh" in her title, Disney might boycott - and ruin - everyone who dealt with them. From the jaws of victory, a character named "Piggley Winks" was born.

In this contest for the intellectual property rights of an Irish citizen, the Irish citizen was not assisted by the organization styling itself the Protector of Irish intellectual property interests, which had usurped that name and that role before the contest began. To this legislatively-assisted act of piracy, our representatives should return, perhaps by the Sligo road. ■

19 Entry under "Fight Against Copyright Theft" in Wikipedia

20 *Cease And Desist*, Mercier Press, 2005