

# The Bar Review

*Journal of the Bar of Ireland • Volume 12 • Issue 3 • June 2007*



- **The European Arrest Warrant**
- **“Loss of Chance” In Medical Negligence**
- **Creating a competition culture**

# The BarReview

Volume 12, Issue 3, June 2007, ISSN 1339 - 3426

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The Bar Review is published by Thomson Round Hall in association with The Bar Council of Ireland.

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43 Fitzwilliam Place, Dublin 2  
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Subscriptions: January 2007 to December 2007 - 6 issues  
Annual Subscription: €195.00  
Annual Subscription + Bound Volume Service €300.00

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The Bar Review June 2007



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# Causation and the "Loss of Chance" Doctrine In Medical Negligence Cases

Eilin O'Dea BL

## Introduction

Causation is generally the most difficult hurdle for the plaintiff to overcome in medical negligence cases. Traditionally, a plaintiff must prove, on the balance of probabilities, that "but for" the doctors negligence he would not have suffered the injury. In many situations, the plaintiff has little difficulty establishing negligence on the part of the doctor and furthermore that the negligence materially contributed to his suffering the injury, but because the plaintiff has more than a 50% risk of suffering the injury even in the absence of the doctors negligence he can recover nothing. This state of affairs leads inevitably to the conclusion that in certain cases a doctor can be negligent with impunity even where such negligence had a material effect on the injury ultimately suffered by the plaintiff.

This situation has led to dissatisfaction amongst the judiciary in many jurisdictions. Courts have been forced to re-examine the appropriateness of the "but for" test in medical negligence actions. Many common law jurisdictions such as States in the US, Canada and New South Wales have cast aside the "but for" test in favor of a more pragmatic approach to the issue of causation. Courts have examined the direct impact of the doctor's negligence on the plaintiffs ultimate injury. Where a doctor's negligence has materially increased the risk of injury or conversely has deprived the plaintiff of a material chance of avoiding the injury, the Court will award the plaintiff proportionate damages accordingly.

In a recent UK decision<sup>1</sup>, a much divided House of Lords in a majority decision favoured the traditional "but for" test when dealing with causation in medical negligence cases. The situation in Ireland is far from clear, however a recent Supreme Court decision<sup>2</sup> would seem to indicate a similar reluctance to that of our UK neighbours in departing from the traditional "but for" test. The following comparative analyses of the law in this area examines the arguments in favour of judicial recognition of the Doctrine of "loss of chance" in situations where a doctors negligence has had a material affect on the plaintiffs ultimate injury albeit that the plaintiff had a greater than even chance of suffering the injury even in the absence of the doctor's negligence. Where a doctor owes a duty of care to his patient and as a direct result of his negligence in the care of his patient he increases that risk of injury that it was his very duty to protect against and the patient ultimately suffers the injury are the Courts not obliged to ensure justice is done between the parties? Where a doctor can negligently treat his patient with impunity in all circumstances where

the patient has a greater than even chance of suffering a particular injury at the outset, is his duty of care not hollow and meaningless?

## Causation

Prior to embarking upon an analysis of relevant jurisprudence it is necessary to examine the concept of causation in medical negligence. Where a plaintiff brings an action against a defendant there are a number of necessary preconditions to a successful claim. The plaintiff must prove, on the balance of probabilities, that the defendant owed them a duty of care. In medical negligence cases this duty of care is based on ordinary negligence principles arising from the doctor/patient relationship and generally should not create any major difficulty for the plaintiff. The next issue for the plaintiff is the need to demonstrate, on the balance of probabilities, that the doctor breached this duty of care. The plaintiff must prove negligence on the part of the doctor whereby the doctor is guilty of such failure as no medical practitioner of equal specialist or general status or skill would be guilty of if exercising ordinary care. Once the plaintiff has established negligence he must take the next step of proving, on the balance of probabilities, that he suffered an injury. This leads directly to the issue of causation, whereby, the plaintiff must demonstrate that the injury he suffered was caused by the doctors negligence on the balance of probabilities. In many cases the causal nexus as between the negligence and the resultant injury is relatively straight forward. However this is not always the case.

If we take as our starting premise the fact that most of us visit our doctor only at a time when we are already suffering from an illness, it is possible to anticipate the problems that may arise where a doctors negligent acts may have contributed to the overall outcome of our injury/illness but did not, on the balance of probabilities, cause us to suffer the eventual outcome as that was more likely than not to have occurred even in the absence of negligence.

If I may demonstrate this by giving a simple example as follows: A goes to his general practitioner complaining of chest pain, His GP negligently diagnoses his condition as a chest infection whereas in fact A is suffering from acute angina and goes on to suffer a myocardial infarction (Heart Attack) the following morning. The issues before the court are the following:

The GP owed A a duty of care.

The GP breached that duty of care. (The court accept that the GP negligently misdiagnosed under the circumstances)

1. *Gregg v Scott* (2005) UKHL2

2. *Quinn (a minor) v Mid Western Health Authority* (2005) IR VOL 4

A suffered an injury.

The crucial element, however, is whether the GP's negligence caused, on the balance of probabilities, the injury or was A more likely than not to suffer the heart attack in any event, even where the GP had made a correct and timely diagnosis?

Say, for arguments sake, the court accepts the medical experts opinion, that had A been treated in a timely and proper manner, there was a 30% chance that the heart attack would have been prevented. The issue in this regard is what did A suffer as a result of the GP's negligence or did he suffer anything at all? From a matter of pure common sense and logic one would imagine that he suffered the loss of a 30% chance of avoiding a heart attack or alternatively his risk of suffering a heart attack was increased by 30% as a direct result of the GPs failure to exercise ordinary care. When one examines the duty of care owed by the GP to A, matters become clearer. The GP owed A a duty to reduce the foreseeable risk of a heart attack by offering immediate and appropriate treatment which was reasonable under the circumstances. The Court has accepted that the GP wholly failed in this duty. The central issue therefore is whether the loss of this 30% chance of avoiding the injury is in and of itself a compensable injury that must necessarily give rise to proportionate damages or are the Courts entitled under the "but for" test to equate this loss as nil on the grounds that it was less than 50%?

### Recognition Of The Loss Of Chance As A Compensatable Injury

It must be noted at this juncture that the courts frequently award compensation to plaintiffs for the loss of a realistic chance of a commercial opportunity in contract contexts whereas they have demonstrated marked reluctance to recognise this doctrine in medical negligence actions. The courts recognise the value of the potential commercial benefit and compensate accordingly.

Thus in *Chaplin v Hicks*<sup>3</sup> the plaintiff succeeded in her claim whereby the defendant had failed to notify her of the date of a beauty contest. The court did not examine the hypothetical possibility of her success at the contest but rather recognised the loss of opportunity as of itself amounting to an injury. Similarly, where a defendant solicitor negligently allows a plaintiff's claim to become statute barred, the court will not assess on the balance of probability the potential outcome of the claim, had it not been barred, but will rather compensate for the loss of opportunity.

This distinction as between Tort actions and Contract actions is of vital importance in this area. To take the situation whereby a plaintiff has seen a doctor on a private as opposed to public basis, does this plaintiff have a cause of action in loss of chance as against the doctor arising from their contract? What is the justification for recognising loss of chance in contract but not in tort actions? One argument may concern the inherent uncertainties within medicine. Who should bear the burden of any medical uncertainties and complexities in a situation where a plaintiff has established a duty of care and breach of that duty of care by the doctor as well as the fact of the injury on the balance of probabilities? This statement of course begs the question as to what is the injury and who caused it?

### Proximate Cause Of Injury

Frequently, in medical negligence actions the Courts make the finding that the plaintiff's injury is multi-factorial in origin (one of those factors being the doctors negligence) and thus the plaintiff ultimately fails on the basis that he cannot establish the defendant doctor's negligence as being the proximate cause of injury as there is medically no proximate cause of injury. Where the Courts use the traditional "but for" test in these situations, thereby requiring the plaintiff to prove, on the balance of probabilities, that it was the doctor's negligence that was the proximate cause of the injury, the plaintiff cannot possibly succeed. Is it just and fair to place a burden of proof on the plaintiff which he simply cannot overcome as a result of circumstances out of his control? Oftentimes the difficulties in establishing any one factor as being the proximate cause of injury arise due to inherent medical uncertainties. In other circumstances it is the failure of the doctor to conduct an appropriate examination that gives rise to the inherent medical uncertainties and yet the plaintiff will fail on the grounds of inability to demonstrate the doctor's negligence as the proximate cause of injury. In the recent House of Lords decision *Gregg v Scott*<sup>4</sup> which I shall return to momentarily, Lord Hoffmann noted the following when dealing with the issue of proximate cause in medical negligence cases:

"Everything has a determinate cause, even if we do not know what it is. The blood starved hip joint in *Hotson's case*, the blindness in *Wilsher's case*, the mesothelioma in *Fairchild's case*; each had its own cause and it was for the plaintiff to prove that it was an act or omission for which the defendant was responsible...*The fact that proof is rendered difficult or impossible because no examination was made at the time, as in Hotson's case, or because medical science cannot provide the answer as in Wilsher's case, makes no difference, There is no inherent uncertainty about what caused something to happen in the past or about whether something which happened in the past will cause something to happen in the future. Everything is determined by causality. What we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof*".

It is worth taking a close look at Lord Hoffmann's comments. The first issue that arises is the assertion that everything has a determinate cause even if we do not know what it is. In medical terms, this statement is simply incorrect. A disease may be caused by several factors each playing an equal role. In that event there is, medically, no proximate cause. Take as an example the blindness in the *Wilsher's case* as is referred to by His Lordship. The Court was unable to determine a proximate cause of the baby's blindness. The court had to accept the medical evidence that there were several factors that probably played a part in the eventual unfortunate outcome, including the doctor's negligence, but there was no proof of proximate cause.

His Lordship then goes on to state that; "it is the obligation of the plaintiff to prove that it was the negligent act or omission that was the proximate cause of the injury even where proof of proximate cause is rendered impossible as a result of no timely medical examination" (which was the fault of the defendant doctor) "or because medical science cannot provide the answer". His Lordship then goes on to conclude that; "there are no inherent uncertainties about what

3. [1911] 2KB 786

4. *Supra*

caused something to happen in the past as the law compensates for lack of knowledge by the concept of the burden of proof". This reasoning, with respect to His Lordship, advocates the application of legal rigidity which in certain circumstances flies in the face of justice and fairness. His Lordship would appear to state, on the one hand, that inherent uncertainties exist in the field of medicine but as a result of the legal concept of the burden of proof, these uncertainties are obliterated or simply ignored. Even in circumstances where it is the doctor's negligence that creates the medical uncertainties, as in the example *supra*, given that no timely examination was made, it matters not, according to His Lordship, the plaintiff must fail. In other words a doctor may rely on his own negligent failure to conduct a timely examination which prevents the Court from determining proximate cause of injury so as to defeat the plaintiff's claim.

This often imposes an impossible task on the plaintiff i.e. to prove, on the balance of probabilities, that the doctor's negligence was the proximate cause in circumstances where there was no proximate cause but several contributing factors including the defendant's negligence.

## The Case Law

The first case of relevance is the English decision *McGhee v National Coal Board*<sup>5</sup>.

In this case the plaintiff suffered a dermatological condition which he alleged was caused by the negligent breach of duty by his employer in failing to provide the plaintiff with adequate shower and washing facilities at the place of work. The plaintiff had been exposed to brick dust over a four day period and developed dermatitis. The plaintiff was unable to establish, on the balance of probabilities, that it was the negligent failure to provide shower facilities that caused the dermatitis. It should be noted that the only evidence of negligence accepted by the court as against the defendants was the non provision of showers. Therefore the plaintiffs task was not a straightforward one. The court accepted that any number of factors may have given rise to the dermatitis but accepted that the disease was caused by exposure to brick dust. However, as pointed out *supra*, there was no issue as to negligence regarding this exposure. Therefore, the only matter before the court was whether they could award the plaintiff damages even where he clearly failed to prove on the balance of probabilities that the failure to provide shower facilities caused his injury.

The House of Lords held as follows;

" though the medical evidence for the workman could not establish that, had he been able to wash immediately in showers provided by his employers, he would not have contracted the disease, yet, in the absence of complete medical knowledge of all the material factors relating to the disease, there was no substantial difference between materially increasing the risk of injury and making a material contribution to the injury and accordingly, the workman was entitled to recover damages from his employers in respect of their admitted breach of duty for an injury within the risk which they created".

This case appears to be clear authority for the proposition that the "but for" test or "all or nothing" approach will be modified in

circumstances where the courts believe its rigid application will result in injustice. The court did award damages even though the plaintiff failed to satisfy the burden of proof.

Recent cases however have refused to adopt the reasoning of the court. It has now become an "exceptional case" limited to its own particular facts and not to be considered of general application. It is said that the fact that there was only one possible agent that could have caused the disease i.e. the brick dust which he was exposed to at his place of work makes the facts of the case unique. But how can this argument succeed? It is certainly the case that the brick dust caused the dermatitis but bear in mind the exposure to this was not negligent, it was only the failure to provide shower facilities that was held to be negligent and this latter negligence did not cause injury on the balance of probabilities.

Take as an example a situation whereby a patient has primary cancer when he first visits his doctor which as a result of a misdiagnosis and failure to treat has become secondary cancer at the date of trial. In this situation, there is only one agent involved, namely, cancer. The reality of the situation is that there was no negligence on the part of the doctor as far as the primary cancer is concerned. He did not cause the cancer. However, the court accept that the failure to diagnose and delay in treatment materially contributed to the risk of the plaintiff developing secondary cancer and indeed that very risk has been realised at the date of trial. In these circumstances also, there is only one agent involved but no negligence is at issue regarding the development of the primary cancer anymore than there was in the exposure to brick dust.

In this writers view, the House of Lords did not intend to make an exception based on the particular facts of the case. There is no distinguishing feature that warrants such a view.

The next case of significance is the English case of *Hotson v East Berkshire Health Authority*<sup>6</sup>.

In this case a young boy fell from a tree and fractured his hip. As a result of medical negligence there was a five day delay in diagnosing a fracture to the boy's hip, immediately whereby he was seen and an x-ray of his knee was obtained. He was discharged home on analgesia. He suffered excruciating pain on discharge and some five days later after numerous visits to his GP, he was once more seen in the hospital wherein this time a hip x-ray was performed. He was found to have suffered a fracture to the neck of his femur and had at that stage gone on to develop a condition of a-vascular necrosis which he had developed secondary to the fracture. The first issue was that the defendants were held to be guilty of negligence in their failure to perform a hip x-ray on the occasion of his first visit to the hospital on the day of the accident. The court accepted medical evidence to the effect that the five day delay cost him a 25% chance of recovery. To put it another way, had the plaintiff been diagnosed and treated on the day of the accident, he would still have had a 75% chance of developing the a-vascular necrosis. The Court of Appeal held that the plaintiff had been deprived of a 25% chance of full recovery, that this was a compensatable loss caused directly as a result of the defendants negligence and awarded the plaintiff damages to the extent of 25% of total damages.

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5. [1973] 1 WLR

6. [1987] AC 750

This would appear a just result in the circumstances, however it was unanimously overruled by the House of Lords. The Lords held that as the plaintiff only had a 25% chance of recovery even in the absence of medical negligence this "chance" in legal terms equated with "no chance" as it fell short of the balance of probabilities.

The next English decision of great significance with regard to the "loss of chance" doctrine is the recent House of Lords decision *Gregg v Scott*, *supra*:

In this case, the plaintiff had visited his local GP complaining of a lump under his arm. The GP negligently misdiagnosed the lump as a benign collection of fatty tissue. Some nine months later the plaintiff moved home and upon registering with his new GP mentioned the lump. The second GP sent the plaintiff for investigations whereby the plaintiff was diagnosed with Non Hodgkin's Lymphoma which had by then developed into secondary cancer (metastases).

The court accepted that had the plaintiff been diagnosed when he first visited the defendant, he would have had a 42% chance of survival. However, as a result of the defendant's negligence and delay in treatment, this chance had dropped to approximately 25% at the date of trial. Thus the plaintiff had been deprived of a 20% chance of recovery as accepted by the court. The difficulty for the court was the fact that on the medical expert evidence, the plaintiff, while having a good statistical chance of recovery at the outset, fell short of the 50%. Therefore on the ratio of *Hotson*, he should recover nothing. In a majority decision, the plaintiff lost his claim. As I have already dealt with Lord Hoffmann's reasoning above, I will now examine the strong dissenting judgment of Lord Nicholls. His Lordship adopted a pragmatic approach to the facts before him. He notes the fact that the plaintiff was deprived of a 20% chance of recovery as a direct result of the defendant's negligence. He further points out that the plaintiff could have recovered damages if his initial prospects of recovery had been more than 50% but because they were less he can recover nothing. He goes on to state the following

"This surely cannot be the state of the law today. It would be irrational and indefensible. The loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery. In both cases the doctor was in breach of his duty to his patient. In both cases the patient was worse off. He lost something of importance and value. But, it is said, in one case the patient has a remedy, in the other he does not. This would make no sort of sense. It would mean that in the 45% case the doctor's duty would be hollow. The duty would be empty of content".

When dealing with the fact that "loss of chance" is a recognised and compensatable loss under contract law, Lord Nicholls has the following to say;

"The law would rightly be open to reproach were it to provide a remedy if what is lost by a professional adviser's negligence is a financial opportunity or chance but refuse a remedy where what is lost by a doctor's negligence is the chance of health or even life itself".

Finally, His Lordship noted; "It cannot be right to adopt a procedure having the effect that, in law, a patient's prospects of recovery are treated as non-existent whenever they exist but fall short of 50%. If the law were to proceed in this way it would deserve to be likened to the proverbial ass".

The next case of significance is the New South Wales decision of *Rufo v Hosking*<sup>7</sup>. In this case the facts were as follows;

The plaintiff came under the care of the defendant pediatrician as she was diagnosed to be suffering from systemic lupus erythematosus (Lupus) in 1992. The plaintiff's claim was that the defendant had negligently continued her on high doses of corticosteroids which were a proven cause of the development of osteoporosis and this had given rise to her suffering vertebral micro fractures. The plaintiff also claimed that the failure by the defendant to introduce a steroid sparer also contributed to her injury. The court did not accept the latter argument, however, they did accept that the defendant had behaved negligently in the continuation of high dose steroid therapy and this had contributed to the plaintiff's injuries. The court did not find that the defendant's negligence caused the plaintiff's injuries, on the balance of probabilities; however, they had no difficulty in awarding the plaintiff damages on the grounds of "loss of chance". The court held as follows when discussing the "loss of chance" doctrine.

"In my opinion, the evidence in this case strongly supports the view that medical science can do no more than assert that there was a very substantial risk of the adverse result, that the risk was materially increased by the negligence, and that the adverse result was the realisation of the totality of the risk; and provide some basis for quantifying the chance that the adverse result would have been avoided if the negligence had not occurred". The following extracts are of particular pertinence;

"The question, why should there be recovery for loss of a chance when less than even, turns on the nature of the duty of care imposed on the medical practitioner. It is a continuum, starting with diagnosis and the duty to advise the patient as to his or her treatment and then embracing the mode of treatment itself...All these matters go to bringing to bear reasonable care and skill, here that of an ordinary skilled specialist pediatrician, to the task of achieving the best chance of a successful medical outcome. Given that is the purpose of medical treatment, why should not loss of achieving that end be recoverable, where treatment falls short of that standard of reasonable care and skill? It is simply the analogue of advising earlier about the prospect of risk in achieving such an outcome...Recovery for loss of a chance can be seen therefore as the corollary of a medical duty of care directed to achieving the best chance of a successful outcome though it call for no more than reasonable care and skill in that endeavor".

Finally, it is necessary to examine this area of the law as interpreted by the Irish courts. In the decision of *Philp v Peter Ryan and the Bons Secours Health System*<sup>8</sup>. His Honourable Judge Peart would appear to have accepted the doctrine of "loss of chance" by making an award in damages on this basis.

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7. [2004] NSWCA 391

8. [2004] IEHC 77

The plaintiff in this case had been negligently diagnosed as suffering from acute prostatitis whereby in fact he had a particularly aggressive form of prostatic cancer. The court readily accepted that the care given by the defendant was sub standard in the circumstances. The issue before the court was that, while there was an undoubted breach of duty and subsequent injury suffered, the plaintiff, on the balance of probabilities, would have gone on to suffer the injury even in the absence of negligence. Peart J adopted a pragmatic approach to the issues before him;

"On the balance of probabilities, I am of the view that having been deprived of an opportunity of considering having immediate or fairly immediate hormone treatment in the summer of 2001, a reasonable consequence of that is that the plaintiff has suffered distress by having a reasonable belief that his life has been shortened by anything from 8 months to two years, and that on the evidence before me there is a reasonable basis for that belief. I cannot make a definitive conclusion in relation to whether his life has been shortened, or by how long, simply because the whole question is the subject of such debate, as I have shown, but I can conclude on the balance of probabilities, the fear that his life has been shortened is a reasonable fear, and the distress caused to the plaintiff in that regard is reasonable, and for which he is entitled to be compensated".

Peart J appears to acknowledge the fact that the plaintiff was deprived of the opportunities of alternative treatments which may have been of benefit, as a result of the defendant's negligence. He then goes on to award the plaintiff damages to the extent of his reasonably held belief that his life was shortened and the resultant stress this belief would cause the plaintiff. While the result of the decision appears just under the circumstances it is unfortunate that His Honour did not discuss the doctrine of "loss of chance" or conduct a comparative analysis.

A recent Supreme Court decision throws some doubt as to the future recognition of the "loss of chance" doctrine in the Irish Courts.

In *Quinn (a minor) v Mid Western Health Board, supra*, the infant plaintiff was born with severe brain damage attributable to a condition subsequently diagnosed as Periventricular Leukomalacia. The plaintiff sued the defendant on the grounds that their negligent mismanagement of the pregnancy caused her injury on the balance of probabilities. The remarkable feature of this case was the fact that neither "the loss of chance" doctrine or "material increase of foreseeable risk" were pleaded. This was all the more unfortunate given the nature of the complex medical issues involved whereby His Honourable Justice Kearns remarked the following;

"In resolving that conflict, it was clear that the trial judge had to deal with conflicting evidence from both sides with regard to a medical condition, i.e. P.V.L., which is multi factorial, poorly understood and the subject matter of widely diverging scientific and medical understanding, notably in terms of its precipitating cause".

Thus while the court acknowledged the existence of inherent medical uncertainties and complexities, the fact that the defendant admitted to negligent mismanagement of the pregnancy, the fact that the plaintiff suffered catastrophic injuries, they were in a situation where they had to choose all or nothing! As a result of the medical uncertainties, the plaintiff was unable to prove that the defendant's negligence was the proximate cause of the injury, simply because there was no proximate cause of injury, rather the disease is multi-factorial in its precipitating cause. Was this not an example of a case whereby "... the evidence in this case strongly supports the view that medical science can do no more than assert that there was a very substantial risk of the adverse result, that that risk was materially increased by the negligence and that the adverse result was the realisation of the totality of the risk; and provide some basis for quantifying the chance that the adverse result would have been avoided if the negligence had not occurred", as per *Rufo v Hosking, supra*.

As neither "loss of chance" or material increase of risk were in fact pleaded, the situation is far from clear, particularly bearing in mind the decision of *Philp v Ryan, supra*. However, the tenor of the judgment is to the effect that the court would be extremely reluctant to interfere with the normal standard of proof and "but for" test in medical negligence cases.

## Conclusion

This is a complex area of Law that has given rise to much judicial discord. From first principles, in this writer's view, to deprive a plaintiff of a remedy on the grounds that he cannot prove the defendant's negligence was the proximate cause of injury, in circumstances where there was, medically, no proximate cause of injury, but rather, a number of contributing factors, including the defendant's negligence, is inherently unjust.

Doctors owe their Patient a duty to act with ordinary care, when this duty can be breached with impunity, as occurs under the "all or nothing" doctrine, this duty becomes hollow and empty.

Finally, there is an obligation on our Courts to give priority to the attainment of justice as between parties which must override other considerations. Where the rigid application of legal formulas and principles gives rise to inherently unjust results, our Courts must re-examine this area of the law and make the necessary modifications. ●

# Pink Underwear, the European Arrest Warrant and the Law of Extradition

Micheál P. O'Higgins BL

## Introduction

As students and practitioners of extradition law, we often approach cases from a fundamental rights perspective, searching for ways in which extradition might be blocked or the process somehow tripped up. Traditionally, the Irish focus has been to treat with scepticism invitations by requesting states to assume that everything is perfectly in order with their legal system. Our post-colonial heritage, our traditional fondness for the underdog, our *anti-polis* forebears, our position as a small island state on the edge of Europe, the emphasis in our written Constitution on fundamental human rights, misgivings about abuses of those rights here and across the water, all of these factors, philosophical and psychological, legal and non-legal, in different ways led to the Irish courts adopting a strict and sometimes sceptical attitude to extradition applications during the 1980's and 1990's.<sup>1</sup>

The Northern Ireland troubles in particular threw up issues of concern and caused our courts to approach extradition applications from a rights-based perspective. For instance, the issue of ill-treatment was relied upon by the Supreme Court in *Finucane v. McMahon*<sup>2</sup> where the appellant claimed that there was a real risk that he would be ill-treated if he were extradited to Northern Ireland. The appellant had been involved with other prisoners in a break out from the Maze Prison, during the course of which a prison officer died of a heart attack. Evidence was led that a great number of the remaining IRA prisoners were assaulted by officers in revenge for the death of their colleague. The prison officers declined to co-operate with an enquiry into the allegations of assault and effectively colluded to defeat any disciplinary enquiries taken place. In the unanimous judgement, the Supreme Court held that the appellant had shown there was a probable risk of ill-treatment were he to be returned to the Maze Prison in Northern Ireland. As a result, the court held that it was required to order the release of the applicant in order to ensure that his constitutional rights were not so violated.

An oft quoted statement of Irish law on extradition from this period is the dictum of Walsh J. in *Ellis v. O'Dea*<sup>3</sup>:

"There is nothing in the (Extradition) Act of 1965 which could be construed as purporting to permit to be exposed any person, the subject of extradition proceedings, to procedures which the Constitution

would not tolerate. In other words there must be not only a correspondence of offences but also a correspondence of fair procedures. No procedure to which the extradited person could be exposed may be one which, if followed in this State, would be condemned as being unconstitutional."

The following cases from the 1990s give an idea of the type of points advanced by persons seeking to resist surrender. In *Larkin v. O'Dea*<sup>4</sup> the Supreme Court upheld the High Court's decision not to order extradition in circumstances in which evidence obtained in breach of the applicant's constitutional rights might be admitted at his trial for murder.

The likelihood that an accused will not get a fair trial was relied upon as a ground in the three cases of *Clarke v. McMahon*<sup>5</sup>, *Ellis v. O'Dea (Number 2)*<sup>6</sup> and *McGee v. O'Dea*.<sup>7</sup> In the first two cases, the Court refused to accept that the likelihood of an unfair trial existed. In *Clark*, the applicant lost on the fair trial ground (he argued his conviction at Belfast Crown Court was flawed) but won on the basis of a finding that there was a real risk that he would be subjected to ill-treatment were he now to be returned to the Maze Prison.

As an interesting barometer of the public and official mood at the time, when the UK sought the extradition of one Fr. Patrick Ryan<sup>8</sup>, the Attorney General exercised his power to veto the extradition on the ground that the accused could not receive a fair trial in the United Kingdom. In a departure from the usual practice, the then Attorney General, Mr. John Murray S.C. issued a public statement giving his reasons for the decision, including the concern that Fr. Ryan's right to a fair trial had been irredeemably prejudiced by media coverage of the case and statements made in the House of Commons. Interestingly, the Attorney General had regard to factors above and beyond those set out in the Extradition (Amendment) Act, 1987, taking the view that his role as AG required him to be satisfied that the extradition proceedings did not infringe the Constitution or involve an abuse of the legal process. The decision caused outcry in the UK and was criticised in the House of Commons by the then Attorney General Sir Patrick Mayhew.<sup>9</sup>

1 This Article is an edited version of a paper delivered at a Bar Council Conference on Extradition Law and the European Arrest Warrant, entitled *Comity –v- Liberty, Protecting Human Rights in Extradition and EAW cases.*

2 (1990) 1 IR 165, (1990) IILRM 505

3 (1989) IR 530

4 (1995) 2 IR 485, (1995) 2 IILRM 1

5 (1990) IR 228, (1990) IILRM 648

6 (1991) 1 IR 251

7 (1994) 1 IR 500, (1994) 1 IILRM 540

8 Represented by Barry White S.C. (now High Court Judge), Rory Brady B.L. (now Attorney General) and Elvio Malocco (now film director).

9 Irish Times, 14th and 15th December, 1988, as noted in *The Irish Law Officers by Professor James Casey (Second Ed.)* at pg.182 and in *JM Kelly: The Irish Constitution (fourth Ed)* by Hogan & White pg. 1650 fn 511

In *McGee v. O'Dea*<sup>10</sup>, Flood J. refused extradition where the applicant argued adverse publicity made a fair trial impossible. The applicant was able to demonstrate that the newspaper coverage of the case was sensationalist, including a photograph of the applicant which purported to identify him as the murderer of the victim.

An interesting contrast (for the purpose of the themes developed later in this article) is the decision of Kelly J. in *Quinlivan v. Conroy* (no. 2).<sup>11</sup> In that case the applicant contended once again that adverse publicity was an exceptional circumstance which rendered his proposed extradition "unjust, oppressive or invidious" for the purposes of s. 50 (2) (bbb) of the Extradition Act, 1965 as amended. Kelly J. distinguished Flood J's decision in *McGee* on the basis of the evidence in the case before him, but also on the basis of the safeguards which the State had shown to exist in English Law to ensure the right to a fair trial. The approach of Kelly J. – of examining whether there was legal infrastructure in place in the requesting state to enable an accused canvass fair trial rights at his trial – is an approach which has found favour in more recent English cases on the European Arrest Warrant and also in some ECHR decisions on the same theme.

Without really stepping back to analyse whether such an approach was permissible, let alone warranted, the Courts here operated on a presumption that extradition applications fell to be dealt with by reference to Irish norms and procedures, so that where foreign procedures didn't come up to the mark, extradition would be refused. This interventionist approach by the Irish Courts, where the procedures of the requesting state are subjected to a rigorous and sometimes critical assessment led unconsciously to the view that what was required was for the state to show an equivalence of approach in the requesting state.

### Pink Underwear

Hence, we have for instance the notorious pink underwear case, *Attorney General v. POC*<sup>12</sup> which involved an application under the Extradition Act, 1965. The respondent was a Roman Catholic Priest who was accused of three incidents of sexual abuse with a minor which were said to have occurred in 1978 at a time when the minor was an altar boy. In opposing extradition, the respondent made a full blooded attack on the fairness of the procedures operated by the requesting State of Arizona in the United States of America. Apart from the delay issue, the respondent argued that the bail regime in Arizona offended the applicant's fundamental rights as guaranteed by the Irish Constitution. It was argued that if extradition was ordered he would effectively not get bail and would remain incarcerated for up to a year before his trial.

The respondent also criticised what was said to be the inhuman and unacceptable prison conditions in the State of Arizona operated by one Sheriff Arpaio and the continuing humiliation of inmates by the Sheriff's insistence that they wear pink underwear.

On the delay issue, O'Sullivan J. stated that if the respondent were being prosecuted in this jurisdiction, he as a High Court Judge would conclude that there was a real and serious risk of an unfair trial by reason of the delay which had occurred since the commission of the alleged offences, and that

therefore the respondent's trial should be stopped.

On the morning judgement was intended to be delivered, O'Sullivan J. was approached by counsel for the State who wished to bring to his attention an article in that morning's Sun newspaper. The story depicted a chain gang of the inmates of Maricopa County Jail being paraded in a very public way, wearing nothing but pink underwear and being linked together with pink handcuffs all under the supervision of Sheriff Arpaio. In a refreshingly candid conclusion, this according to Judge O'Sullivan "clearly gave the lie to the case, theretofore made by the US authorities, that not only were the practices in Maricopa County Jail reformed but so was Sheriff Arpaio himself. It further gave the lie to the case made that the wearing of pink underwear could never be seen by the public because they were always worn under outer garments."

The postscript judgement also refers to transcripts of interviews with Sheriff Arpaio in the Irish media which were put before the Court. In one, the Sheriff indicated that the applicant could be in his jail for 2 or 3 years before he ever gets a trial. The reason he insists on inmates wearing pink underwear was "because they don't like it". The Sheriff stated "I have got the only female chain gang in the history of the world...I started that one eight and a half years ago. I am an equal opportunity incarcerator."

Elsewhere the Sheriff was reported as boasting

*"we have a restraint chair, when people come in the jail drunk or they are high on drugs or hitting everybody, slashing themselves, we put them in the restraint chair to protect them, ....one person did die in the chair many, many years ago that you keep talking about, not you but the press keeps talking about, probably that is the only thing they can zero in on other than the pink underwear and the hot tent, it is 130° in the tent that I put the inmates in...the tents are Korean war tents, they are free, .... we have a jail overcrowding problem and we put the convicted people in the tents and if our men and women are in tents now fighting for their country in Iraq, I am not concerned about convicted criminals living in tents."*

The pink underwear case must plainly be viewed in the context of its own special facts. Judge O'Sullivan found that there was a chillingly sadistic tone to the Sheriff's comments and he felt that it was the duty of any Irish Court to ensure that there could be no possible risk of an extraditee finding himself in a regime governed by the Sheriff. Extradition was refused.

### Is it time for a Change in Approach?

As we have seen, the approach adopted by our courts in extradition cases up until recently has been interventionist, requiring an in depth examination of the requesting State's practices and procedures. The focus of this paper is to consider whether that approach represents current Irish law, and if so, whether it should be departed from. By way of contrast with the Irish position, we will look at the UK approach and the ECHR position. We will conclude by examining critically the state's case for a softening of the line to bring us more in line with our European partners.

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10. (1994) 1 IR 500, (1994) 1 ILRM 540

11. (2000) 3 IR 154, (2000) ILRM 515

12. Unreported, High Court (O'Sullivan J.) 27th July, 2005

## EAW Process

Undoubtedly, the growing sophistication and mobility of criminals throughout Europe has necessitated a greater level of co-operation between member states to ensure that fugitives do not escape justice merely by crossing at a geographical border. By agreeing to make it easier for member states to “process” the return of wanted persons to requesting states, countries within the Union agreed on a common platform of mutual trust to give effect to judicial arrest warrants from those other countries. Hence, the birth of the Framework Decision which forms the basis of the new surrender regime. Most controversially, the principle of dual criminality, for centuries the cornerstone of international extradition law, has been substantially modified. In relation to the 32 offences set out in Article 2 of the Framework Decision, the requirement of dual criminality has been removed altogether. That is worth repeating. A country can demand the surrender of a person from another country even if the charge against the person does not constitute an offence under the laws of the latter country. Sniffiness by Irish lawyers towards this development might perhaps be misplaced, in the light of the Supreme Court’s recent finding that it is alright to continue detaining a prisoner for an offence which no longer exists.<sup>13</sup>

On the other side of the scales, the new procedure retains many important safeguards, and in one or two cases introduces new protective elements. The offences must be punishable by a custodial sentence of at least 12 months (4 months in the case of a sentenced prisoner). The subject cannot be surrendered if he is below the age of criminal responsibility for the same offence in the executing state. The double jeopardy principle has been retained and, of course, the Framework Decision expressly retains the obligation to respect fundamental human rights. A cornerstone of the new arrangements is that it lifts surrender procedures out of the executive arm of government into the domain of the judicial authorities within each member state. Whilst that is nothing new in an Irish context, it represents a major change in outlook for many of our European neighbours, including the United Kingdom.

From the point of view of *efficiency*, the macro achievements of the EAW procedure are significant. The procedure is now simpler and faster. Supporters of the process point to the figures available for 2005: more than 6800 EAW’s were issued, 1706 persons were arrested, 1485 persons were effectively surrendered, yielding a surrender rate of 87%. The average time from arrest until decision was approximately 40 days in opposed applications and approximately 14 days in cases dealt with on consent. 5% of the cases took longer than 90 days.<sup>14</sup> The figures on the Irish turnaround rate are awaited. The anecdotal impression is that the Irish courts are somewhat more exacting.

## Recent Irish Cases on EAW and Fundamental Rights

At the time of writing, the Supreme Court has yet to adjudicate substantively upon a case involving the tension between the international comity of the EAW and the protection of fundamental rights of the citizen. The High Court, however, in a number of recent cases have applied an *Ellis v. O’Dea* type approach in an EAW context.

In *Minister for Justice, Equality and Law Reform v. Stapleton*<sup>15</sup>, the respondent was wanted in the United Kingdom to stand trial on various fraud type offences which were said to have been committed between May of 1978 and July of 1982. The respondent was an Irish citizen aged about 62 years who had lived continuously in Ireland with his wife and family since December of 1994. The respondent opposed surrender on a number of grounds including the risk that he would not get a fair trial and the risk that he would be subjected to inhuman and degrading treatment. Peart J. disposed of these two suggestions without much difficulty, indicating that it would require very clear, uncontroverted and cogent evidence of this probability before the High Court could contemplate refusing surrender on that basis.

The respondent was however successful on the delay issue. Peart J. noted the respondent had given evidence of actual prejudice in that certain witnesses were deceased or their whereabouts were unknown to him and that files had been destroyed. Even if actual prejudice had not been established to the required degree, Peart J. was satisfied that the lapse of time since 1978/1982 to the present time went well beyond the bounds of acceptability.

The *Stapleton* decision is very significant. It appears to be the first meaty EAW case in which the High Court confronted head on the tension between the comity of courts/mutual respect principle and an assertion by a respondent that his rights were under threat. However, it is appropriate to point out at this juncture that since *Stapleton*, the law on delay has undergone something of a transformation. In two landmark cases, the Supreme Court has narrowed the basis upon which a person seeking to restrain his trial can rely upon either complainant or prosecutorial delay. Those cases are *PM v. DPP*<sup>16</sup> and *H v. DPP*<sup>17</sup> and they essentially state that an applicant must show prejudice before a trial will be prohibited on grounds of delay. Thus, the delay beast which once roamed wild across our juristic plains, moving in herds to Court 14 and beyond, now lies disfigured, almost to the point of extinction. Quite why this sad cull occurred is not altogether clear, but it has diminished considerably the significance of the issue.

That development aside, the importance of Peart J’s judgement in *Stapleton* remains: the Judge rejected the view that where the criminal justice system of the requested State meets accepted norms and standards, the question of whether a trial should be stopped should be left to the neighbouring jurisdiction and should not be decided upon by the Irish courts.

## Peart J’s Analysis in Stapleton

The meat of Peart J’s analysis is contained in the following passage: -

“...if the applicant enjoys a convention and a constitutional right to a trial of offences with which he is charged within a reasonable time, that is a right which he is entitled to invoke and have protected on the first occasion on which it becomes relevant for argument, and that is not a matter to be postponed so that it can be ventilated at some date in the future in another Country, and after the respondent has been returned from custody to that place. S. 37 of the 2003 Act mandates

13. See the judgement of the Supreme Court in the “Mr. A” Article 40 case, *A v. Governor of Arbourhill Prison* 2nd June, 2006, 10th July, 2006

14. These figures were provided by Angelika Mohlig, Legal Officer in the Legal Service of Eurojust in a conference paper to the Irish Centre for European Law, 16th November, 2006.

15. Unreported, High Court (Peart J.) 21st February, 2006

16. Unreported, Supreme Court, 5th April, 2006

17. Unreported, Supreme Court, 31st July, 2006

that this court shall not order the surrender of a requested person if to do so would not be compatible with this State's obligations under the Convention or its protocols, or would constitute a breach of any provision of the Constitution."<sup>18</sup>

The Judge reiterated the view earlier stated by him in the case of *Minister for Justice, Equality and Law Reform v. SR*<sup>19</sup> (now under appeal) that the approach of the Courts under the 2003 Act should be carried out on broad constitutional principles and not confined to whether it has been shown that to order surrender would be "unjust, invidious or oppressive" which was the threshold in s. 50 (2) (bbb) of the Extradition Act, 1965, although of course some of that earlier jurisprudence might be helpful in considering the issues arising under the EAW process.

In *SR*, surrender was refused on the basis of a finding by the High Court that the respondent was at a real risk of dying if placed in any situation of severe stress. Peart J. held that on the basis of the evidence which had been adduced before him it was reasonable to assume not only that any trial would constitute such a severely stressful situation, but so also would the whole pre-trial period, including his surrender to the UK, where he would be involved in instructing solicitor and counsel in preparation for this trial. Interwoven with the dangers to the respondent's health point was an abuse of process point and the related delay point.

The Court found that the crown prosecution service in England had been aware of an intention on the part of the government here to bring in legislation to amend the 2003 Act. The CPS in England had decided to bide their time to await the introduction of that amending legislation rather than proceed under the then existing arrangements. The Court was critical of the fact that the decision took no account of any circumstances which might have affected any one of the persons in the 20 cases referred to as being affected by that policy. No consideration was given to the individual respondent's circumstances, even though he was a very sick man according to his doctors. Moreover, the decision ignored the requirement under the Framework Decision that extradition matters be dealt with on an urgent basis. Peart J. stated that there is something fundamentally unattractive, and in the Judge's view unacceptable about a requesting authority depriving a person of the opportunity of having matters proceed under existing arrangements, so that it might in due course become more difficult for that person to successfully challenge the application for this surrender. For all of these reasons, the Court felt that the respondent was treated unfairly and that he had been the victim of unfair procedures.

In the later case of *Minister for Justice, Equality and Law Reform v. Corrigan*<sup>20</sup>, Finnegan P. relied in part on Judge Peart's analysis in *SR*. In *Corrigan*, the respondent was wanted to stand trial on seven counts of indecent assault which were said to have occurred between 1967 and 1972 in England. The first the respondent became aware of the allegations of the first complainant was in 1988. Subsequently in 2002 and 2003, other complainants made statements to the English police. It was not until July of 2005 that the police in England made their application for the issuance of the European Arrest Warrant. Finnegan P. held that the period of two years and two months in between the date of the last complainant's complaint and the application for the warrant was excessive and not justified on the evidence. The Judge held s. 40 of

the 2003 Act preserves the position under Irish law of a person whose surrender is sought where there is prosecutorial delay. This section does not enhance such a person's position. As the Judge was satisfied that the respondent could not by reason of prosecutorial delay in this jurisdiction be tried, the Judge felt that the respondent could not, having regard to s. 40 of the Act of 2003, be surrendered.

Surrender was also refused on the basis of the delay which had occurred since the commission of the alleged offences. In other words, on the basis of complainant delay. Again, that aspect of the court's finding may have to be reviewed in the light of the Supreme Court's recent jurisprudence on delay, particularly *H* and *PM*.

## The United Kingdom Approach

Judges in the United Kingdom adopt a much less interventionist approach when faced with subjects opposing surrender on human rights grounds. The United Kingdom approach is instructive not only because of our common legal heritage, but also because of the prominent role played in UK extradition and surrender law by the European Convention of Human Rights, the provisions of which are applicable under UK law by virtue of the UK Human Rights Act, 1998. Until the advent of the UK Extradition Act, 2003, it was the Home Secretary who decided if extradition was barred because of concerns about the subject's fundamental rights. That position has now changed so that it is the extradition judge who decides whether to refuse surrender if it would not be compatible with the subject's rights under the European Convention on Human Rights.

As a comparator to show the less interventionist approach of the English courts, the case of the so called "Natwest Three" is of interest. In *R (Birmingham) v. Government of the United States*<sup>21</sup>, three employees of the Nat West Bank were sought by the United States authorities to stand trial on fraud charges relating to the infamous Enron Company, a company which collapsed in controversial circumstances in 2001. Each of the three wanted persons could have been prosecuted in the UK but the authorities there had decided not to prosecute them.

If extradited, the subjects would face trial in Houston, Texas, where Enron had been based and where, according to the evidence offered, they would not get a fair trial. The requested persons argued that the purpose of the prosecution was to obtain evidence from them for use against Enron personnel who were "bigger fish to fry" in the Enron scandal. They argued they would almost certainly be denied bail. There would be a long delay before trial. They would have to pay for legal representation at a cost of between \$1,000,000 and \$2,000,000 per defendant and there would be no possibility of recovering costs in the event of an acquittal. The Houston jury would be prejudiced against them and an application for a change of venue would be unlikely to succeed.

As every case is governed by its facts, it is worth noting that the extradition trial judge was plainly sceptical as to the quality of the evidence offered by the defendants' expert witness. That consideration may well have affected the outcome of the entire case.

18. Pg. 12 of the Judgement

19. Unreported, High Court (Peart J.) 15th November, 2005

20. Unreported, High Court (Finnegan P.) 22nd March, 2006

21. (2006) EWHC 200 (admin) 21st February, 2006

Of more interest however is the approach adopted by the English High Court. In upholding the extradition trial Judge's decision to order extradition, the English High Court adopted the approach of examining what fair trial infrastructure was in place in the United States that could be availed of by the subjects in the event of their surrender. Laws LJ. commenced by considering the sixth amendment to the US Constitution which is that country's guarantee of a fair trial. He noted its similarity in content to that of ECHR Article 6. He noted that in America there is a right to legal representation, to apply for bail, and to seek a change of venue. Jurors are vetted for bias in a *voir dire* process. There was no suggestion the Judge would be other than impartial. He noted also that the extradition trial judge (the Magistrate's Court) had applied what Laws LJ. thought was the correct test, namely whether the Defendants faced "a clear risk of suffering a flagrant denial of a fair trial" in Texas. That formulation of the applicable test was taken from the leading ECHR case of *Soering v. United Kingdom*.<sup>22</sup> Laws LJ. in Birmingham concluded that, on the evidence, the requested persons had fallen a distance short of meeting the test set out in *Soering*. Accordingly, extradition was granted.

Interestingly, the threshold set by the Strasbourg Court for persons opposing extradition on article 6 (fair trial) grounds seems more onerous than the standard to be met when opposing extradition on article 3 grounds, which deal with torture, inhuman or degrading treatment. The article 6 threshold is the requirement to show a "flagrant denial of a fair trial" whereas the hurdle in an article 3 objection is to show there are "substantial grounds of a real risk of ill-treatment" if extradition proceeds.<sup>23</sup>

Both *Soering* and *Mamatkulov* display the European Court's reluctance to prevent extradition if the criminal justice system of the requesting state does not accord in all respects with that of the executing state. Some members of the Strasbourg Court felt that extradition should not be prevented merely because the procedures in the requesting state are not in full accord with those of the extraditing Country.<sup>24</sup>

## Two Views

Advocates of a less interventionist role by Irish Judges suggest that in this country we are out of step with most of Europe and also to an extent, with the Strasbourg Court on this issue. In relation to the delay ground for imposing extradition, it seems the Irish experience differs markedly from the Dutch. *Keijzer*<sup>25</sup> indicates that delay has hardly ever been successful as a defence against extradition. This can be explained in the first place by the fact that delay is rarely considered to amount to a *flagrant* violation of article 6 and, secondly, by the fact that in the domestic Dutch context, the courts, since 1987, normally compensate such violations by sentencing the accused to a lesser penalty than would have been imposed had the undue delay not taken place, rather than declaring the case inadmissible; in extradition cases, the courts of the requesting states are apparently expected to do the same.

A State barrister might usefully argue that the test in a prohibition action to stop a trial is: Has the accused demonstrated a real risk he will not get a trial in accordance with article 38.1 of the Constitution. A person who is sought for a trial in another state is not entitled to a trial in accordance with article 38.1. He is entitled to a trial conducted in accordance with the fair procedures requirements of that country's legal system, which may not be the same thing.

On the other side of the house, defenders of the rigorous approach will argue that fundamental rights have always been at the core of Bunreacht na hEireann and they should remain so. Where it has been demonstrated that to surrender a respondent will result in a violation of one of his constitutional rights, that should be the end of the matter; the court should have no truck with cuddly talk about the European project, it should simply decline to participate in a breach of a person's rights. An enquiry centred on the constitutional entitlements of the individual is the correct approach, irrespective of the standards adopted in other countries. The High Court should not delegate the protection of fundamental rights to the requesting state. Human rights should be canvasable at the first port, not the last. To argue s.37 of the Act excludes the delay issue because that is separately covered by s.40 is nonsense. S.37 embraces all constitutional rights, including the right to an expeditious trial.

## Some Crystal Ball Gazing

As stated, a number of EAW cases in which surrender was refused will shortly be coming before the Supreme Court on appeal. In at least one of those cases it is likely that the court will have to confront head on the *comity versus liberty* dilemma.

One or two pointers to the Supreme Court's likely approach in upcoming appeals can be found tucked away in some of the recent cases coming before that court. In *Minister for Justice, Equality and Law Reform v. Altaravicius*,<sup>26</sup> the Chief Justice carried out an in-depth analysis into the genesis of the European Arrest Warrant Act, 2003. The Chief Justice indicated that the Act ought be interpreted in the light of the terms of the Framework Decision with particular regard to the objectives of that document. He quoted from the preamble to the Framework Decision and the references to a new simplified system of surrender and the objective of removing the complexity and potential for delay inherent in pre-existing extradition procedures.

Most tellingly, the Chief Justice emphasised repeatedly that the entire process was based upon a high level of confidence between member states. Having reviewed a number of the earlier cases on extradition, the Chief Justice commented as follows on the hurdle facing a person opposing surrender on the ground of a breach of rights: -

"That is not to say, as the judgements which I have cited, and others, have made clear, that the Courts are prevented from examining applications for surrender with a view to being satisfied that relevant legislation has been complied with and personal rights which are guaranteed are not infringed. But they do so with a benefit of a presumption that the issuing State complies with its obligations."

In *Minister for Justice, Equality and Law Reform v. McArdle*<sup>27</sup>, the respondent opposed his surrender on a number of grounds, including the contention that he had been subjected to an abuse of process. He relied upon a range of matters including an alleged close friendship which had developed between a member of An Garda Siochana, who had some responsibility for liaising with the Spanish police and assisting them with their enquiries and a Spanish police man involved in the case, that garda member's prior acquaintance with the deceased and her family and the failure of the Spanish authorities to inform the respondent that his refusal

22. (1989) 11 EHRR 439

23. See also *Mamatkulov v. Turkey* (2005) 41 ECHR 25.

24. I am grateful to Tony McGillicuddy B.L for his insights into the ECHR and UK position on the applicable tests.

25. "Handbook on the European Arrest Warrant", Judge Rob Blektoon, editor in Chief, TMC Asser Press, 2005, pg. 189

26. Unreported, Supreme Court (Murray CJ, Denham and Hardiman JJ.) 5th April, 2006.

27. (2005) 4 IR 260

to meet with members of the Spanish police in Ireland and answer their questions could result in adverse inferences being drawn from that refusal. The Supreme Court dismissed those concerns summarily, taking the view that they were all matters that were relevant only to the criminal trial and the weight to be attached to evidence tendered at that trial.

In *Minister for Justice, Equality and Law Reform v. Dundon*,<sup>28</sup> the Supreme Court made clear that the adequacy of evidence against a person whose surrender is sought is not a matter for consideration under the Act of 2003 as there is no requirement that the requesting state establish a *prima facie* case.

As to what the Supreme Court might do in a more finely balanced case, remains to be seen. It is clear from virtually all of the authorities<sup>29</sup> that human rights objections will only be entertained where they are supported by strong and cogent evidence. Mere assertions as to prejudice or mistreatment will not suffice. Much will depend upon the nature of the breach alleged. So for instance the likelihood of a person being subjected to torture or inhuman treatment will obviously be treated in a different category to a person complaining about delay or perhaps concerns about access to bail or prejudicial media coverage in the requesting state.

## The Fair Trial Right

The issue most likely to trouble our courts may well turn out to be the fair trial issue. The first question to be asked is what standard will be applied? Will it be the *Z v. DPP*<sup>30</sup> threshold of a "real risk of an unfair trial" or will it be the more exacting ECHR standard as laid down in *Mamatkulov*<sup>31</sup> of showing "a flagrant denial of a fair trial". Will it be sufficient for the state to point to the existence of fair trial infrastructure in the requesting state, such as access to bail, legal representation and an impartial Judge? Or will the court demand close to an equivalence of fair procedure safe guards before extraditing a person? Will it be enough for the subject to show, under Irish law, his trial would be stopped, or will the *mutual recognition* principle dislodge that as the applicable threshold? And will the practice of construing extradition statutes, and hearings held under them, in a penal fashion be revived? <sup>32</sup>

## Section 37 of the 2003 Act

Perhaps the strongest argument of all in favour of maintaining a strict and interventionist style approach is the 2003 Act itself, and in particular s. 37 thereof. Section 37, which commences Part III of the Act, provides (in summary form) that a person shall not be surrendered under this Act if:-

- (a) his or her surrender would be incompatible with the State's obligations under the ECHR;
- (b) his or her surrender would constitute a contravention of any provision of the Constitution.

The view that the key to unlocking this whole question lies in a proper construction of s. 37 is re-enforced by the following passage from Fennelly J. who, speaking in soothsayer-like tones in *Dundon v. Governor of Cloverhill Prison*<sup>33</sup> stated:

"This Court is required to interpret and apply the Act of the Oireachtas which implements the Framework Decision. It is notable, in this respect, that section 16(1) (e) envisages that a person will be surrendered provided that *inter alia* "the surrender of the person is not prohibited by Part 3 or the Framework Decision (including the recitals thereto) ." (Emphasis added). Section 37, which is in Part 3 of the Act, prohibits any surrender which would be incompatible with rights variously based on the European Convention on Human Rights or its Protocols and, most importantly, that it would "constitute a contravention of the Constitution".

It seems that s. 37 was something of a solo run by Ireland, going beyond the human rights guarantees embodied within the Framework Decision. An examination of the Dáil Debates for the relevant period shows that the Minister introducing the Act was particularly keen to emphasise to the Dáil the strong additional protections which s.37 brought. Below are some extracts from the the Dáil debates on the report and final stages of the European Arrest Warrant Bill, 2003.<sup>34</sup> After some goading from Deputy Aengus Ó'Snodaigh of Sinn Fein, Minister McDowell quoted in full s. 37 of the Bill and then stated as follows: -

"I do not know what greater protection of human rights could have been put into this legislation. The Parliamentary Counsel in my Department and in the Attorney General's office and I have made sure that every possible defence for human rights and civil liberties, and every possible defence based on discrimination or threat to human rights, would be included in this legislation."

Elsewhere in the same speech Minister McDowell states: -

"...section 37 to which I referred, goes as far as any member state of the European Union, and further than most, in protecting the freedoms and rights of people in respect of whom arrest warrants are issued."

For all these reasons, while the UK and ECHR law on the EAW might be of assistance, the Irish courts are likely to focus on the true construction of s. 37, and in particular on the issue whether the respondent has made out a clear case that granting surrender will result in one of his constitutional rights being breached. At the end of the day, the answer is likely be an Irish answer to an Irish question. ●

28. (2005) 1 IR 261

29. Including for instance *Minister for Justice, Equality and Law Reform v. Skripicova* Unreported Supreme Court 24th April, 2006

30. (1994) 2 IR 476

31. According to the majority judgement, whilst there are doubts the subject would not receive a fair trial in Uzbekistan, there is insufficient evidence to show that any irregularities in the trial process amount to a flagrant denial of the subject's article 6 right.

32. In *Attorney General v. Parke*, Unreported, the Supreme Court, 9th December, 2004, the Court held that extradition proceedings were inquisitorial and not adversarial, and therefore a failure by the State to come up to full proof on the evidence could be overlooked in some circumstances.

33. (2006) 1 ILRM 321 at pg. 348

34. Dáil Eireann Debates – Volume 577- 17

## Legal

The  
BarReview

Journal of the Bar of Ireland, Volume 12, Issue 3 June 2007

## Update

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Cross-examination on affidavit – Company law – Directors – Disqualification – Whether material conflicts of fact between parties – Whether cross-examination on affidavits appropriate – Examination of commercial probity of respondent – Whether plenary hearing of issues more appropriate – *Holland v Information Commissioner* (Unrep, SC, 15/12/2003) and *Re NIB Ltd; Director of Corporate Enforcement v. D'Arcy* [2005] IEHC 333 [2006] 2 IR 163 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 40 r 1 and O 75B rr 7 and 9 - Companies Act 1990 (No 33), ss 8, 22(b) and 160(2) – Order that respondent attend court to be cross-examined on his affidavits (2005/271COS – O'Donovan J – 16/6/2006) [2006] IEHC 369 *Re NIB Ltd; Director of Corporate Enforcement v Seymour*

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Moot – Whether appeal moot in sense of being purely hypothetical or academic – Whether issues pending on appeal affected respondent in exercise of its statutory powers – Where party had *bona fide* interest in appealing against declaratory order not confined to past events peculiar to particular case which have been resolved court should be reluctant to deprive it of its constitutional right to appeal – Personal Injuries Assessment Board Act 2003 (No 46), ss 7 and 17 – Application to strike out appeal refused (169/2005 – SC – 16/11/2006) [2006] IESC 62  
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Enforcement - Employment law – Settlement negotiations – Terms - Proceedings struck out on basis case settled - Whether concluded agreement negotiated between parties – Whether agreement binding – Held that settlement was binding (2002/24874P and 2003/1427S – Dunne J – 24/11/2005) [2005] IEHC 401  
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Concurrent wrongdoer – Claim for contribution in prior proceedings – Joinder of third party – Whether done as soon as reasonably possible – Whether claim for contribution barred by non-joinder of third party in prior proceedings – Whether third party notice served as soon as reasonably possible - Whether issue of service of third party notice as soon as reasonably possible *res judicata* – Whether plaintiff disentitled to maintain proceedings – Preliminary issue – *McElwaine v Hughes* (Unrep, Barron J, 30/4/1997) followed - Civil Liability Act 1961 (No 41), s 27 – Appeal allowed (285/2005 – SC – 14/3/2006) [2006] IESC 16  
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			Ethics in public office (amendment) bill 2007 1st stage- Seanad [pmb] <i>Mary O'Rourke</i>

European parliament and local elections (voting at 16) bill 2007 1st stage- Dail [pmb] <i>Eamon Gilmore and Joe Costello</i>	Mercantile marine (avoidance of flags of convenience) bill 2005 2nd stage- Dail [pmb] <i>Thomas P. Broughan</i>	Road traffic (amendment) bill 2006 1st stage- Dail
Fines bill 2004 2nd stage- Dail [pmb] <i>Jim O'Keefe</i>	Money advice and budgeting service bill 2002 1st stage – Dail	Road traffic (miscellaneous provisions) bill 2006 2nd stage- Dail
Fines bill 2007 1st stage- Dail	National pensions reserve fund (ethical investment) (amendment) bill 2006 2nd stage- Seanad	Road traffic (mobile telephony) bill 2006 Committee- Dail [pmb] <i>Olivia Mitchell</i>
Fluoride (repeal of enactments) bill 2005 2nd stage – Dail [pmb] <i>John Gormley</i>	Noise bill 2006 1st stage- Dail [pmb] <i>Ciaran Cuffe</i>	Sexual offences (age of consent) (temporary provisions) bill 2006 2nd stage – Dail [pmb] <i>Brendan Howlin</i>
Freedom of information (amendment) (no.2) bill 2003 1st stage – Seanad [pmb] <i>Brendan Ryan</i>	Nuclear test ban bill 2006 Committee stage – Dail	Tribunals of inquiry bill 2005 1st stage- Dail
Freedom of information (amendment) bill 2006 1st stage-Dail [pmb] <i>Joan Burton</i>	Offences against the state acts (1939 to 1998) repeal bill 2004 1st stage-Dail [pmb] <i>Aengus Ó Snodaigh</i>	Twenty-eighth amendment of the constitution bill 2005 1st stage- Dail
Genealogy and heraldry bill 2006 1st stage- Seanad [pmb] <i>Senator Brian Hayes</i>	Offences against the state (amendment) bill 2006 1st stage- Seanad [pmb] <i>Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn.</i>	Twenty-eighth amendment of the constitution bill 2006 2nd stage- Dail [pmb] <i>Michael D. Higgins</i>
Good samaritan bill 2005 2nd stage – Dail [pmb] <i>Billy Timmins</i>	Official languages (amendment) bill 2005 2nd stage –Seanad [pmb] <i>Senators Joe O'Toole, Michael Brennan and John Minihan.</i>	Twenty-eighth amendment of the constitution bill 2007 1st stage- Dail
Greyhound industry (doping regulation) bill 2006 2nd stage – Dail [pmb] <i>Jimmy Deenihan</i>	Passports bill 2007 1st stage- Dail	Twenty-eighth amendment of the constitution (No.2) bill 2006 2nd stage- Dail [pmb] <i>Dan Boyle</i>
Health (hospitals inspectorate) bill 2006 2nd stage – Dail [pmb] <i>Liz McManus</i>	Personal injuries assessment board (amendment) bill 2007 1st stage- Seanad	Twenty-eighth amendment of the constitution (No.3) bill 2006 2nd stage- Dail [pmb] <i>Dan Boyle</i>
Housing (stage payments) bill 2006 1st stage- Seanad [pmb] <i>Senator Paul Coughlan</i>	Planning and development (amendment) bill 2005 2nd stage – Dail [pmb] <i>Eamon Gilmore</i>	Voluntary health insurance (amendment) bill 2007 1st stage- Seanad [pmb] <i>Mary O'Rourke</i>
Human reproduction bill 2003 2nd stage – Dail [pmb] <i>Mary Upton</i>	Planning and development (amendment) bill 2006 1st stage – Dail [pmb]	Waste management (amendment) bill 2003 2nd stage – Dail [pmb] <i>Arthur Morgan</i>
Immigration, residence and protection bill 2007 1st stage- Seanad	Planning and development (amendment) (no.3) bill 2004 2nd stage- Dail [pmb] <i>Eamon Gilmore</i>	Water services bill 2003 Committee - Dail (Initiated in Seanad)
Independent monitoring commission (repeal) bill 2006 2nd stage – Dail [pmb] <i>Martin Ferris, Arthur Morgan, Caoimhghín Ó Caoláin, Aengus Ó Snodaigh and Seán Crowe.</i>	Privacy bill 2006 1st stage- Seanad	Whistleblowers protection bill 1999 Committee - Dail [pmb] <i>Pat Rabbitte</i> leave to withdraw 4/4/2006
Irish nationality and citizenship (amendment) (an Garda Síochána) bill 2006 1st stage – Seanad [pmb] <i>Senators Brian Hayes, Maurice Cummins and Ulick Burke.</i>	Prohibition of ticket touts bill 2005 2nd stage – Dail [pmb] <i>Jimmy Deenihan</i>	<b>BR = Bar Review</b> <b>CILIP = Contemporary Issues in Irish Politics</b> <b>CLP = Commercial Law Practitioner</b> <b>DULJ = Dublin University Law Journal</b> <b>GLSI = Gazette Society of Ireland</b> <b>IBLQ = Irish Business Law Quarterly</b> <b>ICLJ = Irish Criminal Law Journal</b> <b>ICPLJ = Irish Conveyancing &amp; Property Law Journal</b> <b>IELJ = Irish Employment Law Journal</b> <b>IJEL = Irish Journal of European Law</b> <b>IJFL = Irish Journal of Family Law</b> <b>ILR = Independent Law Review</b> <b>ILTR = Irish Law Times Reports</b> <b>IPELJ = Irish Planning &amp; Environmental Law Journal</b> <b>ISLR = Irish Student Law Review</b> <b>ITR = Irish Tax Review</b> <b>JCP &amp; P = Journal of Civil Practice and Procedure</b> <b>JSIJ = Judicial Studies Institute Journal</b> <b>MLJI = Medico Legal Journal of Ireland</b> <b>QRTL = Quarterly Review of Tort Law</b> The references at the foot of entries for Library acquisitions are to the shelf mark for the book.
Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003 Report – Seanad [pmb] <i>Feargal Quinn</i>	Pyramid schemes bill 2006 2nd stage- Dail [pmb] <i>Kathleen Lynch</i>	
Land and conveyancing law reform bill 2006 2nd stage- Dail	Registration of wills bill 2005 2nd stage – Dail (Initiated in Seanad) [pmb] <i>Senator Terry Leyden</i>	
Law of the sea (repression of piracy) bill 2001 2nd stage – Dail [pmb] (Initiated in Seanad) leave to withdraw 8/3/2005.	Registration of lobbyists bill 2003 1st stage- Dail [pmb] <i>Pat Rabbitte</i>	
Local elections bill 2003 2nd stage –Dail [pmb] <i>Eamon Gilmore</i>	Rehabilitation of offenders bill 2007 1st stage-Dail [pmb] <i>Barry Andrews</i>	
Markets in financial instruments and miscellaneous provisions bill 2007 1st stage- Dail	Residential tenancies (amendment) bill 2006 1st stage – Dail [pmb] <i>Deputy Fergus O'Dowd</i>	
Mental capacity and guardianship bill 2007 1st stage- Seanad	Restriction on animal testing bill 2007 1st stage-Dail [pmb] <i>Deputies Dan Boyle and Eamonn Ryan</i>	
	Roads bill 2007 1st stage- Seanad [pmb] <i>Senator Mary O'Rourke</i>	

# Two Official Languages - The Canadian Experience

The Honourable Mr Justice Michel Bastarache, Supreme Court of Canada



Both the Republic of Ireland and Canada are (predominately) common law jurisdictions with written constitutions and two official languages. Our Official Languages Act of 2003 owes much to the Canadian federal Acts of 1969 and 1988 of the same name, especially in relation to the enactment of legislation and the administration of justice.

It is to be expected, therefore, that when issues relating to the status or use of an official language or languages arise, either pursuant to the constitution or to legislation, that Canadian jurisprudence, experience and practice will be cited before the Irish courts and most likely prove persuasive in the development of Irish jurisprudence and practice in this developing area of legislative and judicial official bilingualism.

The following lecture was given by Mr Justice Michel Bastarache of the Supreme Court of Canada to members of the Bar in April. The issues addressed such as the provision of bilingual legislation and delegated legislation, the right to be tried by French speaking judge and jury in places where francophones are very much in the minority, and the right to interpretation and translation services before the courts for speakers of official and non official language alike all find resonance here.

## Introduction

Before describing the federal regime regarding language rights in the areas of legislation and administration of justice in Canada, it may be useful to recall that jurisdiction over languages was not included in the sections of the Canadian constitution dealing with the distribution of powers between the federal government and the provinces. The power to adopt language legislation is ancillary to the power to adopt laws in other legislative fields. There are now language laws in many provinces, but a comprehensive language regime can be found only in Québec, New Brunswick and to a lesser extent Ontario. New Brunswick is the only officially bilingual province. It adopted the first *Official Languages Act* in Canada, in the year 1969. The federal government adopted its first *Official Languages Act* in the same year. The federal government later imposed language acts in the federal territories. The jurisdiction over languages is therefore restricted to matters over which the province or federal government respectively have jurisdiction. It is also restricted by the necessity to give precedence to constitutional guarantees. The right to adopt language laws was contested in the Jones case; the Supreme Court held that the Constitution provided minimum protections that could be improved by legislation. S.16 of the *Canadian Charter of Rights and*

*Freedoms* consolidated that ruling by providing specifically for the expansion of language rights, avoiding a clash with the right to non discrimination.

The particular context of language rights in Canada is defined principally by history and political compromise. A few basic language rights were constitutionalized in 1867; additions were made when Manitoba became a province in 1870 and again when the constitution was patriated in 1982. Although language rights are different from the legal rights that are recognized in the *Canadian Charter of Rights and Freedoms*, and in various international instruments, the Supreme Court of Canada has recognized in the *Secession Reference* in particular that they nevertheless constitute fundamental rights. They are evidence of the intention of the framers of the constitution to protect official minority language groups and assure their full participation in society without sacrificing their cultural and linguistic identity. This, the Supreme Court has held, is a foundational principle of the constitution that has normative effect. I mention this because, as I will explain later, it has an important impact on the interpretation of language legislation, whether it be constitutional or not.

Another preliminary issue is that Canada has not adopted a language regime entirely based on personality or on territoriality. In Canada, territoriality is reflected in the basic constitutional provisions dealing with languages, s.133 of the *Constitution Act* of 1867 and ss.16 to 19 of the *Canadian Charter of Rights and Freedoms*, which is part of the *Constitution Act* of 1982. These provisions establish rights applicable at the federal level, in Québec and New Brunswick. But these rights are available to any person whatever his or her origin, or mother tongue. For instance, s.19(2) guarantees the right to a trial in French to an Anglophone as well as a Francophone in New Brunswick, s. 20 to receive federal services in either language as a simple matter of choice. At the federal level, services are available according to specific criteria based, to a point, on evidence of sufficient demand. The system is therefore both personal and territorial.

## The enactment of legislation

The *Act of Union* of 1840 had made English the language of legislation, debates and proceedings in the Province of Canada. This proved to be unworkable. During the constitutional debates leading to the adoption of the constitution of 1867, a compromise on languages was negotiated. It took the form of s 133 which provides that English and French shall be the official languages of Parliament and the federal courts, as well as those of the Legislature of Québec and courts of that province. Language rights did not extend to the executive or the administration. Identical obligations were imposed on Manitoba when it was created in 1870. Twenty years later, the

Legislature of Manitoba unilaterally abolished these rights; this measure was deemed unconstitutional in the lower courts early in the century, but these decisions were ignored.

The Supreme Court ruled on the issue in *Forest v. Manitoba*, in 1979. Six years later, in the important *Reference on Language Rights in Manitoba*, the Supreme Court held that all statutes adopted in English only were unconstitutional; to preserve the rule of law and constitutional order, the Court suspended the declaration of invalidity for the period necessary for Manitoba to re-enact its laws in both languages. That same year, in *Blaikie v. Québec*, the Supreme Court declared part of the *Charter of the French Language*, adopted by the Québec legislature, unconstitutional. The *Charter* had made French the language of legislation in Québec, although it provided for the later translation and publication of laws in English. The Supreme Court held that the constitution required that the legislation be adopted, printed and published simultaneously in both official languages. It further held that the obligation extended to secondary or delegated legislation. In another language case dealing with language rights in the courts in that same year, *MacDonald v. Montreal*, Beetz J said, *obiter*, that the requirement of bilingualism in the adoption of laws did not mean that simultaneous translation was required in Parliament or in the Legislature of Québec. Parliament instituted simultaneous translation in 1959 and there has been no decision regarding its constitutional status. Translation is now a requirement under Part I of the *Official Languages Act* 1988, but there is no simultaneous translation in the Québec Assembly. It is provided in New Brunswick.

There has been much controversy regarding the nature of the documents that must be adopted or adopted and published in both official languages. In *Québec v. Collier*, in 1985, the Québec Court of Appeal held that, to be effective, the right to participate in the debates of the Québec Assembly required that sessional papers be available in both official languages. The Supreme Court confirmed that decision in 1990. But there was still disagreement over the scope of the words "records and journals" used in s.133 of the constitution.

"Journals" refers to the order paper, notices and minutes. "Records" are the analytical record of the daily votes and proceedings of the House. The entries are prepared using the clerk's minutes. "Journals" also includes the official and permanent record of proceedings, petitions, readings of bills, references to committees, resolutions, votes, debates adjourned. Proceedings of the Senate are reported in similar fashion. Hansard is the official report of the debates, the verbatim transcription of what was said. At the federal level and in New Brunswick, Hansard is translated. In Québec it is not. There is still some uncertainty regarding obligations regarding Hansard because it is not a required archival document on one hand, but it has an official character and must be referred to in the House if a member wants to have it corrected. The debate is somewhat related to the philosophy reflected in the constitution: does it provide for minimum guarantees reflecting a simple political compromise (pre-confederation practice would then be relevant), or does it constitute one of the elements of the guarantee of equal participation in the parliamentary process? This of course has serious implications regarding the work of Parliamentary committees. Is there an obligation to provide bilingual minutes of their deliberations?

As earlier mentioned, the obligation to adopt laws in both languages

was extended by the Supreme Court to printing and publication; the requirement of simultaneity was added, as was the rule that both versions were of equal value. The obligations were considered implicit by the Supreme Court in *Blaikie* (1970). It would seem obvious that all bills must be presented in both official languages at first reading; in the *Manitoba Language Reference*, the Supreme court said that simultaneity is required "throughout the process of enacting bills into law" (p775). Nonetheless, the Standing orders of the House of Commons provides for bilingualism only on second reading. This was not challenged because in fact bills are presented in bilingual form at first reading. In Québec however, the Standing orders provide for minimum constitutional requirements to be met, which is interpreted to mean bilingualism at the final stage. The government of Québec considers that even if its procedure were found to be invalid, there is no judicial review of the legislative process so that its laws could not be declared unconstitutional for that reason alone.

## Delegated Legislation

What of the obligations regarding delegated legislation? There are two major inquiries here: First, what is the scope of the guarantee? Second, what are the requirements regarding enactment?

This is a complex issue which was dealt with in three cases: *Blaikie II*, the *Manitoba Language Reference* rehearing, and *Sinclair*. One problem of course is terminology. It is very inconsistent. There are however some statutory definitions that provide a little guidance. "Regulation" means, under the *Statutory Instruments Act*, for instance, a statutory enactment being a rule, order or regulation governing the practice or procedure in any proceeding before a judicial or quasi-judicial body established under any act; "statutory instrument" includes any order, rule, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established under certain kinds of authority. Other laws define "regulation" differently; the Act respecting the consolidation of the statutes and regulations of Québec simply defines regulation as an order, decree or rule.

In *Blaikie II*, the Supreme Court identified four types of delegated legislation. First, regulations enacted by the government, a minister or a group of ministers. All of these are formally issued by the Governor or Lieutenant Governor in Council. They therefore pose no problem. Directives and guidelines are excluded. The difference is in substance, not form. Directives provide no legal sanction for non performance, though they may give rise to administrative sanctions. But rules of practice of courts and quasi-judicial tribunals are included; this results not from their legislative but from their judicial character.

One problem we have today is that the quasi-judicial characterization has disappeared from our law. Some authors suggest that the duty applies to all tribunals required to provide procedural fairness; but I think all tribunals would then be covered unless we established categories according to the importance of that duty. The bilingualism requirement does not apply to school boards or municipal governments in Québec according to *Blaikie II*. The reason for this is historical; these boards pre-existed confederation and were not compelled to provide bilingual services. The Supreme Court held that s.133 was a political compromise and that its scope should not be artificially enlarged. The same is true of Indian band councils. The

New Brunswick Court of Appeal has however held in *Charlebois v. Moncton*, in 2005, that municipal by-laws must be translated in New Brunswick because the rationale for excluding the same in *Blaikie* is inapplicable in the context of the *Charter* extension of language guarantees to New Brunswick in 1982. Another important category comprises rules of professional associations; here the obligation depends on the relationship between the association and government. If the regulation is approved by government in any way, the obligation arises. Approval by a board is not sufficient, nor is publication in the Official Gazette. Sub-delegation is therefore not covered.

The Rehearing in the *Manitoba language Reference* was meant to elucidate further regarding orders in council and documents incorporated by reference to primary and secondary legislation. The answer was not very satisfactory. The Supreme Court ruled that orders in council were included if they were of a legislative nature either because of their form, content (does it initiate norms or determine how rights can be exercised) or effect (does it create a legally binding rule applicable to an undetermined number of persons). In fact, its decision in the main reference did not find form sufficient, undermining the test. This deficiency appeared in the Sinclair decision a month after the *Manitoba Reference* where the Court decided that the Québec Assembly could not adopt a shell law and incorporate by reference unilingual documents to achieve its purpose. A legislative act could not be disingenuously divided into discreet parts. Here, bilingualism applied to all instruments though many would not have been found to satisfy the test in the Reference on their own. But incorporation by reference is not so simple to resolve; Sinclair referred to procedural acts having to do with the adoption process, but some incorporated documents will have the effect of imposing norms. The test adopted with regard to them requires that one first determine if the incorporated instrument is itself of a legislative nature; if not, it is excluded. The second question is whether the incorporated instrument is an integral part of the primary instrument. The Ontario Court of Appeal was divided on the issue of the incorporation of traffic laws in *Massia*! It held that if the body creating the incorporated document was not one to which s.133 applied, the document need not be translated. The Supreme Court disagreed in giving its answer to the third question, i.e. whether there is a *bona fide* reason for incorporation without translation. It cited as reasons government cooperation, practicability, the technical nature of documents. This open ended test is much criticized as a clear departure from the focus in *Blaikie* on equal access.

As mentioned earlier, ss.17 and 18 of the Charter have been said to have the same effect as s.133 of the Constitution Act of 1867. They are however a little more precise. For instance, s.17 confirms the right to use the two official languages in any debates "or other proceedings" of Parliament. Committees are therefore specifically included. S.18 does not use the word "acts" but refers to "statutes"; it would therefore be necessary to conclude that statutes includes regulations. The above conclusion would seem to be inapplicable to ss.17(2) and 18(2) which extended the constitutional rights to New Brunswick. As earlier mentioned, the New Brunswick Court of Appeal set aside the purposes of s.133 in its interpretation of the 1982 provisions and preferred to draw on the legislative and political evolution of the Province. Another strange distinction to be made is that rights under s.133 are absolute while *Charter* rights like those found in ss.17 and 18 are subject to s.1 limitations of the Charter.

The *Official Languages Act* has reaffirmed the constitutional rights

and expanded them. For instance, s.7 captures instruments not caught by the interpretation of s.133: anything published in the Gazette for instance must be bilingual.

## Bilingualism in the judicial system

The constitutional provisions entrenching minority language rights in the judicial system include s.133 of the *Constitution Act 1867*, s.19 of the *Canadian Charter of Rights and Freedoms*, and s.23 of the *Manitoba Act 1870*. These rights represent a minimum that has been completed by a number of legislative provisions. At the federal level, those provisions are found principally in the *Official Languages Act* and the *Criminal Code*.

A few preliminary remarks are necessary at this point. First, I will observe that contrary to other constitutionally protected language rights, those pertaining to the legal system received a narrow interpretation in the Supreme Court of Canada, creating the need for progressive legislation, this until the Supreme Court reversed itself in the *Beaulac* decision of 1999. Second, it is important to underscore the important difference between language rights and legal rights in the constitution. Language rights are about the protection of culture; legal rights are about due process and fair trials. This means that the right to an interpreter under s.14 of the *Charter* is not a language right. It has a distinct origin and role. Language rights are substantive, not procedural. This will have implications: the right to language of choice is not constrained by maternal language or the fact that the accused or witness is knowledgeable of the language of the majority. Third, a word about the division of powers in this area. The legislative authority to regulate languages depends on the nature of the court and the matter before it. At the federal level, language use in the administration of justice is provided for in three respects. The *Official Languages Act* is ancillary to the power to make laws for peace order and good government. The power to determine the use of languages in federal courts is authorized under s.101 of the *Constitution Act* of 1867. The power to determine the use of languages in criminal proceedings is ancillary to the power to legislate in respect of criminal procedure under s.91(27) of the *Constitution Act* of 1867, even though criminal law is applied in provincial courts. Provincial legislatures can regulate the use of languages under the power to administer justice coming under s.92(14) of the Constitution Act of 1867. It is clear then that the language of prosecution of provincial offences and civil proceedings is determined by the provinces. Because federal courts rarely have exclusive jurisdiction, many cases can proceed either in those courts or in provincial courts; language rights will not be the same in many cases. If there is conflicting legislation, the federal act will apply. If the federal government delegates the prosecution of federal offences, it cannot thereby eliminate language protections.

The general constitutional right is to use one's language in the protected courts. Unfortunately, in the 1986 decision of *Société des Acadiens v. Association of Parents for Fairness in Education*, the Supreme Court of Canada decided that this right does not impose a corresponding obligation on the State or any other individual to use the language so chosen, or to be required to understand that language. This meant that judges, lawyers, court staff all had the right to use their language of choice and were not required to provide access to justice in the language of the accused or party having the right to make a choice. Beetz J. advocated restraint in the application of language rights because they were based on political compromise and not on fundamental principles like legal rights. This analysis was inconsistent with the evolution of Canada and based blindly on

continuity of the pre-confederation regime, forgetting that under that regime all judges and court officials were bilingual and that there was no need to provide for translation and special rules. In 1999, in the case of *R v. Beaulac*, that decision was reversed. The Court decided that all language rights had to be interpreted in accord with their object which was to guarantee equal access to the courts to members of the two official language communities and that equality of service meant substantive equality; regarding the Criminal code provisions, this meant that the State had the obligation to provide an institutional framework to accommodate the choice of language.

One initial problem was to define the word "court". Did this apply to administrative tribunals? The Court decided it applied to all courts created by the federal government or the Province of Québec and to quasi-judicial tribunals. These tribunals were defined as adjudicative bodies applying legal principles to the assertion of claims under their constituent legislation. As earlier mentioned, this categorization has been abandoned; nevertheless, no problem has surfaced since the *Official Languages Act* has imposed bilingualism on all adjudicative bodies. The right is awarded to "any person"; this has been interpreted to include corporations as well as individuals, including not only litigants but also judges and judicial officers. There is no constitutional right to be understood without translation, and the right to a translation would not be a language right but the right to be heard, a legal right. The right is exercised in "pleadings" and "process".

Pleadings are the oral and written arguments, not the evidence. There is no right to a translation of evidence in the form of affidavit or otherwise. Process refers to procedural documents emanating from the court. In *MacDonald*, the Supreme Court said a summons was a process and therefore subject to s.133, which meant that it could be issued in the language of choice of the person issuing it. The choice is not that of the litigant, but that of the issuer. This would seem inconsistent with the decision to impose bilingualism regarding rules of procedure on the basis that the rules are necessary to a meaningful access to the judicial system. Nevertheless, that is the state of the law when constitutional norms are considered in isolation. The approach of the Supreme Court in the 1986 decisions was much criticised. The *Beaulac* decision addressed these criticisms and overturned the 1986 decisions with regard to the rules of constitutional interpretation. The new interpretative framework could however only be applied to the criminal code provisions in the context of that case. The problem now is that there is some conflation of language rights and fair trial rights: for example, can a court find that a breathalyser certificate must be in the language of the accused without considering the language competency of the accused?

It is necessary to say something of s.20 of the *Charter* because it outlines the right to receive services from the administrative component of the judicial system as part of the government. Several litigants have tried to enlarge language guarantees by arguing that issuing a ticket or laying an information is a government service. This was caused by the restrictive position taken in the 1986 trilogy. The arguments did not succeed. An information is judicial in nature and s.20 does not apply. To the extent the courts as institutions communicate with the public to offer services (notices of practice, hearing dates...), s.20 applies. In fact federal institutions must make an active offer of service in both languages.

The federal regime has been completed by the *Official Languages Act* and amendments to the *Criminal Code*. The first *Official Languages Act* was adopted in 1969; the new act was adopted in

1988. It expands the rights conferred on parties in proceedings before federal judicial or adjudicative bodies. It has been interpreted purposefully. The most important expansion is in the affirmation of the right of a party to speak and be understood without the assistance of an interpreter by the court in the official language of choice. The right applies to all judges and officers hearing a case except for the judges of the Supreme Court of Canada. The duty to provide court officers that speak the language of the litigant applies in the case of bilingual proceedings as well as unilingual proceedings. Witnesses can give evidence in the language of their choice, but they can be examined through an interpreter. Evidence taken can be obtained in the language of choice upon request at no cost to the requesting party. Federal courts all have rules respecting notice requirements regarding the choice of language.

The second most important expansion is in the obligation for the Crown, where it is a party to a civil proceeding, to use in its oral and written pleadings the language chosen by the other party. Evidence is given by the witness in the language of his choice; no translation can be obtained unless there is a ruling that it is necessary in a specific case in order to provide the right to a fair trial. Regarding process, the law provides that the pre-printed portion of any form shall be in both official languages; details are in the language of choice but their translation can be obtained on request. Every final decision, order and judgment must be in both official languages where the issue is of general interest and also in cases where proceedings were conducted in both official languages in whole or in part. Simultaneity is not required, although it is in fact observed at the Supreme Court of Canada.

Even though criminal proceedings occur in provincial courts, the federal government has the authority to legislate with respect to criminal procedure, and therefore, the use of official languages in criminal procedure. Part XVII of the Code applies to criminal offences; it also applies to many non-criminal offences because its terms were incorporated in provincial legislation dealing with provincial offences. The main rights are found in ss.530 and 530.1. As earlier mentioned, s.530 was interpreted in *Beaulac* to require positive measures by the Crown to accommodate the choice of language of the accused. There is a substantive right to be tried in one's language without translation by judge or judge and jury. One's language is that language with which the accused has a sufficient connection; the accused can decide this subjectively but must demonstrate that he or she has sufficient command of the language to instruct counsel. Knowledge of the other official language is irrelevant. The accused has the right to proceedings in the language of choice, or to bilingual proceedings in some circumstances. The accused has the right to be informed of the right to choose the language of proceedings. Under s.530.1, the judge, prosecutor and other court staff are viewed as an institution and required to function in the language of the accused. The obligations of the Crown extend to preliminary inquiries. If the accused cannot understand a witness, he can obtain the services of an interpreter. If pre-printed forms are used, the printed portions must be bilingual.

## Conclusion

In Canada, the development and interpretation of language rights have been difficult issues to deal with; the political ramifications of the long debate have been profound. I believe we have now reached a national consensus on constitutional and legislative protections. Implementation in concrete situations will occasionally raise problems, but courts are now usually diligent in their task and no surprises are expected after the decision in *Beaulac*. ●

# Creating a competition culture in Ireland – private actions for damages

Imogen McGrath BL

## Introduction

This article assesses the right of private individuals to sue for damages in the Irish courts for breaches of competition law. Private enforcement of competition law is a vital limb of an effective competition law regime. It is current European Commission policy to promote private competition law litigation to assist in the enforcement of the competition rules under the European Treaty.<sup>1</sup> As of yet, however, private antitrust action in this jurisdiction has been very rare. Private actions for damages for breach of competition law may arise where: 1) proceedings are issued by an aggrieved individual for an infringement of competition rules; and 2) as a “follow-on” action on foot of a decision of the European Commission that there has been a breach of Articles 81 or 82 EC. A party aggrieved by breaches in a “follow-on” action may bring a private action for damages in the Irish courts relying on the findings of fact in a Commission decision. The question arises as to what is the level of the burden of proof on the aggrieved party in those circumstances and how difficult it will be to prove that the anti-competitive acts caused the losses claimed.

At present, although Community law establishes the principle that competition rules give rise to private rights, it is for each Member State to determine how those rights may be exercised. In short, it is national procedural and evidential law which determines the manner in which Community rights may be enforced. In the majority of Member States, actions for damages for the infringement of EC and national competition laws have been extremely limited. Awards for damages by national courts at the initiative of private parties are uncommon. The conditions for bringing such claims are diverse and underdeveloped. In contrast, in the United States, 90% of antitrust enforcement is achieved through private actions.

It could be said that, as the Irish Competition Authority (hereafter the ‘Authority’) becomes more active in its investigation and enforcement of competition law, there will be more opportunities for businesses who suffer loss due to the anti-competitive behaviour of others to sue for damages with respect thereto. This article investigates

whether a heightened awareness of competition rules will promote private actions for damages, thereby creating a competition culture in Ireland. Or, will our national procedural rules on issues such as costs and the burden of proof discourage the private litigant, thus leaving enforcement in the hands of the Authority.

## Developing a policy for private enforcement of competition rules

Private actions for damages for breach of competition law are the cornerstone of the European Commission’s policy of enhancing the level of private enforcement of competition law at national level in the Member States. The European Competition Commissioner, Nellie Kroes, has acknowledged the importance of encouraging private enforcement of competition law and, in particular, the right to damages arising there from:

“The EC Treaty gives the victims of anti-competitive behaviour a basic right to reparation for the damage caused. We have to find a way to make that tight a reality for more people and more businesses. Private enforcement of competition law has an important role to play in building the competition culture that we need to stimulate in order to fulfil our ambitions for economic growth in Europe...If we can help citizens and businesses to enforce their rights – then potential offenders will be more likely to think twice before breaking EC competition rules”<sup>2</sup>

It is widely accepted that facilitating damages claims for breaches of the antitrust rules will not only strengthen the enforcement of competition law, but will also make it easier for consumers and firms who have suffered damage from an infringement of competition law rules to recover their losses from the infringer. Having acknowledged the difficulties arising from the wide variation of the nature of the laws governing damages in the different Member States, on 19th December 2006 the Commission published a Green Paper setting out options for improving the current system of damage actions related to the infringement of EC competition law. The aim of the Green Paper and the accompanying Commission Staff Working Paper

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1. See the Commission’s Green Paper on damages actions for breach of the EC antitrust rules, Brussels 19.12.2005, [COM (2005) 672]

2. Commissioner Nellie Kroes, opening speech at the European Parliament

workshop on damages actions for breach of EC antitrust rules, Brussels June 6 2006.

is to look at ways in which damages actions for breach of Articles 81 and 82 of the EC Treaty before national courts may be facilitated so as to better compensate victims and complement the enforcement activities of public enforcement authorities.

As the Commission develops its policy on private actions for damages it must be mindful of the pitfalls which have arisen in the United States. Undoubtedly, the United States has achieved a competition culture. Under the US system, class actions can facilitate the bringing of expensive litigation. Further, treble damages are available for the successful plaintiff. The successful defendant still has to pay its own costs and jury trials on damages are guaranteed to antitrust plaintiffs under the US Constitution.

However, the US culture of damages for antitrust action is not without its flaws. Firstly, consumers priced out of the market who do not buy the product are not identified or compensated, and at Federal level, indirect purchasers cannot sue for damages. The original view of the purpose of treble damages in the United States was that it was compensatory in light of the difficulties of measurement and proof of damages, not punitive.<sup>3</sup> The US system is often criticised as encouraging unmeritorious or vexatious legislation with class actions, treble damages and cost shifting providing strong incentives for claimants. The passing on defence is not accepted in the US.<sup>4</sup> This means that, for the purpose of calculating the amount of damages, a defendant cannot argue that the losses suffered by a claimant are reduced if the claimant would have been able to pass on those losses to its customers. The US system is a warning of the hazards of multiple private actions for damages for breaches of competition law. One commentator has said that "the fear of treble damage actions is one of the most potent influences in securing compliance with antitrust."<sup>5</sup>

## Principles of European law governing private actions for damages

The obligation for national courts to provide a remedy in damages for breach of competition rules was established by the European Court of Justice ("ECJ") in *Courage v Crehan*.<sup>6</sup> The ECJ held therein that national law could not place an absolute bar to the recovery of damages on a party who was in *pari delicto* as this would frustrate the purpose of Article 81. The ECJ further stated that:

"26 The full effectiveness of article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

29 However, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state

to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).

...

33 In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him." <sup>7</sup>

The *Courage v Crehan* case establishes that while private litigants are entitled to claim damages for infringements of the competition rules, it is left to the Member States to determine a significant number of issues according to national laws. Such issues include: locus standi; cause of action (breach of statutory duty, tort, unlawful interference causing damage etc.); rules of causation; rules of evidence (including the weight to be given to any prior finding by the European Commission; remedies (injunction or damages); the bases on which any damages might be awarded; and methods of calculation of damages including whether damages can be reduced to the extent that any overcharges were passed on to customers.<sup>8</sup>

In *Manfredi*, a preliminary ruling reference also threw up the question of private actions for damages for breaches of competition law. The aggrieved parties sought an order for damages against insurance companies for repayment of the increase in the cost of premiums for compulsory civil liability insurance relating to accidents caused by motor vehicles, vessels and mopeds paid due to the increases implemented by those companies under an agreement declared unlawful by the Italian national competition authority.<sup>9</sup> The insurance companies argued that the action for damages was outside the limitation period and the preliminary reference arose *inter alia* from the national court's uncertainty as to whether the limitation period for bringing actions for damages, and the amount of damages to be paid, both of which are fixed by national law, were compatible with Article 81 EC. The ECJ held that:

"82 In that regard, it is for the national court to determine whether a national rule which provides that the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC begins to run from the day on which that prohibited agreement or practice was adopted, particularly where it also imposes a short limitation

3. C.A. Jones "Private Enforcement of Antitrust Law in the EU, UK and USA" Oxford University Press, 1999, pp. 80-81.

4. The passing on defence was rejected in *Hanover Shoe v United Shoe Machinery* 392 us 481 (1968) and the right of an indirect purchaser to claim was rejected in *Illinois Brick v Illinois* (1977). However, many States have introduced statutes to repeal the *Illinois Brick* case.

5. Neale & Goyder "The Antitrust Law in the USA: A Study of Competition Enforced by Law" 3rd ed Cambridge University Press 1987.

6. Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage*

Ltd and Others, [2001] ECR I-6297.

7. *Ibid.* at p. 522.

8. See Holmes, "Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK" [2004] ECLR 25 at p 26.

9. The Italian Competition Authority's decision was challenged by the insurance companies but ultimately upheld by Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Latium) and by the Consiglio di Stato (Council of State).

period that cannot be suspended, renders it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.

Interestingly, on the matter as to the type and quantum of damages available, the ECJ commented:

"95 Secondly, it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.

96 Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible (see *Brasserie du pêcheur* and *Factortame*, cited above, paragraph 87, and *Joined Cases C-397/98 and C-410/98 Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 91)."

The Commission has acknowledged in the Green Paper that perhaps the greatest hurdle facing the private antitrust litigant is proving that his loss is caused by the illicit actions of his competitor:

"274...Proof of causation can be highly complex in antitrust cases. The financial loss suffered by the victims of anticompetitive behaviour will often consist in the paying of a supra-competitive price. The claimant will therefore often have to show that a rise in price was the consequence of the actions of the defendant. The defendant might in turn argue that any rise in prices was in fact caused by something different, such as the normal functioning of the market or by the actions of third parties. Proving a causal link might require complex economic analysis based on a large number of facts and economic data..."

Similar conclusions as reached in the Green Paper are echoed in academic commentary on private actions for damages for breach of EC Competition rules. Whish has identified that important issues relating to causes of action for damages in Member States remain unresolved. Such issues include causation, remoteness, quantum, punitive damages and the division of responsibility for determining these issues between the Community and the national laws of the Member States. Whish states that "...it can be anticipated that, over the next few years, courts in the EU will be called upon to refine the law on damage actions."<sup>10</sup>

### Private actions for damages in the member states: lessons from the UK and France

The law in the UK now provides that if a regulator has made a decision finding a breach of competition law, the civil courts and the

UK's specialist tribunal, the Competition Appeal Tribunal ("CAT") are bound by that decision. In other words, armed with an OFT or European Commission decision against the defendant, a claimant does not have to prove there was an infringement. Actions in the ordinary courts remain an alternative whether or not the claimant has an infringement decision.<sup>11</sup>

In *Courage v Crehan*, the defendant was the tenant of two public houses and required to purchase a fixed minimum quantity of beer from the brewer Courage Limited. The plaintiff sued the defendant for £15,266 for unpaid deliveries of beer. The defendant complained that the plaintiff sold beer to other public houses at lower prices which reduced his profitability so much that his business failed. The defendant also counterclaimed that the terms of the leases, and in particular the beer tie, were in breach of Article 81 EC. As discussed above, the English High Court referred several questions to the ECJ which included whether a party claiming relief is entitled to damages alleged to arise as a result of his adherence to a clause in the agreement which is prohibited by Article 81 EC<sup>12</sup>.

When *Courage v Crehan* returned to the English High Court following the ECJ decision, among the matters considered were: whether the damages claimed by Mr. Crehan were in respect of a type of loss against which he is protected by Art. 81; whether the beer ties caused Mr. Crehan's business failure at the two public houses; what was the appropriate quantum of damages, and at what date should the damages be measured. The High Court held that, on the balance of probabilities, based on the evidence before the court, if Mr Crehan had been free of tie throughout and had been paying a market rent for free-of-tie pubs, not an inflated rent for free-of-tie pubs, his business would have survived the first three critical years, and had it been concluded that the beer ties infringed Article 81 EC, it would therefore have followed that the infringement of Article 81 EC caused the failure of the business and thus caused loss to Mr Crehan. The Court of Appeal recognised that "*The broad question of fact which he [the High Court Judge] had to decide was whether it had been established that Mr. Crehan bore significant responsibility for the distortion of competition.*"<sup>13</sup> The Court of Appeal reversed the High Court decision that beer ties imposed on a pub tenant had not infringed Article 81 and held that the High Court judge should have followed the European Commission's findings in a similar case. The Court of Appeal thus reversed this decision in 2004 and awarded damages of £131,336 (plus interest) to Mr Crehan. It was the first time that the Court of Appeal had awarded damages for breach of competition law.

In its judgment on 19 July 2006, the House of Lords overturned this decision finding that the High Court judge's decision should be restored.<sup>14</sup> Whilst damages are still in principle awardable for infringing restrictions of competition law, the overall result is that the judge is entitled to conduct the full assessment of the facts in the absence of an EU decision on the same facts.

Another English case, *Arkin v Borchard Lines Ltd* ("*Arkin*"), concerned a claim for damages for breach of Articles 81 and 82 EC, including for predatory pricing, between two companies carrying containerised

10. Whish, *Competition Law*, 5th Ed, p. 300, Chapter 8 "Articles 81 and 82: enforcement in the courts of Member States".

11. Competition Act 1998, sections 47A and 58 A

inserted by the Enterprise Act 2002, sections 18 and 20.

12. *Courage v Crehan* [1999] EuLR 834 at p. 853.

13. *Crehan v Inntrepreneur Pub Company* [2004]

EWCA Civ 637

14. See House of Lords Judgment in *Inntrepreneur Pub Company and others v. Crehan* at: <http://www.bailii.org/uk/cases/UKHL/2006/38.html>

cargo between the UK and Israel.<sup>15</sup> The plaintiff claimed that members of the defendant conference liners engaged in predatory pricing which he alleged drove him out of the market. Colman J dismissed the plaintiff's claim and found that the defendant's pricing strategy was not to eliminate its competitors. However, the Judge went on to state that, even if the plaintiff had established an infringement, his claim would have failed for lack of causation:

"(a) the predominant cause of the claimant's losses were its failure to withdraw from the market; (b) the continued participation in the market, such loss it suffered later, and its decision to leave the relevant market a little later were predominantly caused by its remaining in the market and cutting its rates to unsustainably low levels; (c) there was no proof that the losses incurred were caused by the Conferences' breaches of Article 81 or 82; and (d) there was no proof that the predominant cause of its ceasing of trading was the conferences breaches of Art 81 and 82."

Essentially, the Court held in *Arkin* that the Plaintiff's own actions had broken the chain of causation. The Judge considered that no reasonable liner or operator in the same financial position as the plaintiff's company would in those circumstances have remained in the relevant market at that time. Further, in that case the issue of the Statute of Limitations was also considered.

In France, although there have not been many private actions for damages, there is an increase in this type of litigation. It is not inconceivable that in Ireland, a similar action for damages as against France Telecom could be initiated. In 2003, Neuf Telecom was awarded €7 million damages from France Telecom as a result of France Telecom's anti-competitive win-back practices in the fixed telephony sector.<sup>16</sup> Following the liberalisation of the local telephony market in 2002, France Telecom, who rents the use of its fixed line network to alternative fixed line operators such as Neuf Telecom, used information concerning its former clients that it was able to access from these alternative fixed line operators to tailor its sales pitches in an attempt to win back these former clients. The commercial court found that such practices amounted to the tort of "unfair competition" and awarded damages accordingly. However, this can be contrasted with another recent case in France which exemplifies the need for some reform of national procedural rules to achieve private enforcement of antitrust law. The Conseil de la Concurrence held on 30 November 2005 that the three largest wireless telephony companies had reached a "Yalta of market shares" from 2000 to 2002.<sup>17</sup> It was estimated that each consumer had lost at most a few hundred euro in damages, and, absent any form of class action mechanism, there exists no relief for the victims of the anti-competitive behaviour. The companies in question were ordered to pay the state a considerable fine but this will not compensate the consumers.

## Status of private actions for damages for breach of competition law in Ireland

Private enforcement of competition law in Ireland involves aggrieved persons instituting proceedings against undertakings for allegedly breaching the Competition Act 2002 or EC competition rules. The RSC Competition Proceedings SI 130/2005 provides the necessary rules of court to deal with some aspects of competition litigation and inserts Order 63B into the Rules of the Superior Courts. Section 14(1) of the Competition Act 2002 provides that any person who is aggrieved in consequence of an anti-competitive arrangement or an abuse of a dominant position which is prohibited by sections 4 and 5 of the Competition Act respectively has a right of action for relief. Section 14(1) establishes the test for standing for private antitrust litigants in that they must be an "aggrieved person". Although this term is not defined in the act, it appears in other statutes and has been widely interpreted as:

"..a term to be generously interpreted – which is generally understood to include any person who has reasonable grounds to bring the proceedings [...] the question of whether a person has sufficient interest must depend on the circumstances of each particular case..."<sup>18</sup>

In *Donovan v ESB*, damages were awarded to the plaintiff for breach of Irish competition law.<sup>19</sup> The High Court held that the plaintiff should recover such damages as it had suffered in respect of its losses arising from the said abuse. The Supreme Court held that damages should be awarded on the same basis as any other tort or civil wrong. In the judgment of the Court, Barrington J observed the differences between a decision on infringement by the Commission and a private action before the Irish Courts:

"The European Commission is the policeman of the competition law of the Community. It may, in certain circumstances, impose penal sanctions on undertakings which violate competition law. In deciding what fine to impose the Commission will naturally look to the intentions or motivations of the undertakings in question.

But we are here dealing with litigation inter partes. The court has jurisdiction to award damages in an action properly brought under s.6 of the Act of 1991. This means it must award damages in an appropriate case. Its function is to compensate injured parties for damage suffered as a result of the abuse complained of. It is not concerned with the motives or the intention of the party in default unless the question of exemplary damages arises. It awards damages on the same basis as it would award them in the case of any tort or civil wrong."<sup>20</sup>

It is predicted that the biggest hurdle facing a private litigant in the Irish courts will be proving that the losses incurred were caused by the anti-competitive behaviour of the defendant. Proving this causal link will necessitate complex and expensive economic and

15. [2003] EWHC 687.

16. Tribunal de Commerce de Paris, 18 June 2003, Neuf Telecom / France Telecom.

17. Conseil de la Concurrence, Case No. 05-D-65 November 30 2005.

18. *The State (Lynch) v Cooney* [1982] IR 337.

19. [1997] 3 IR 573.

20. *Ibid.* p. 585

econometric evidence. As demonstrated by the UK cases discussed above, it will be possible for defendants to argue that the claimants were victims of harsh market conditions or indeed that they should have mitigated their loss by exiting the industry.

In addition, it has yet to be determined in Ireland whether the so called passing-on defence will be available. On the basis of general principles, it may be possible, in theory, for a defendant to argue the passing on defence. If an award of damages for a breach of competition law is to be compensatory only, then logically a victim should not be compensated for losses incurred which were in fact passed on to the consumer. The passing-on defence does not take into account any losses in the volume of sales which may have been incurred by the increase in price that was passed on to consumers. Further, allowing the passing-on defence permits a level of unjust enrichment to the offending party. However, an outright ban on recovery of such losses would act as a disincentive for indirect purchasers from taking private antitrust actions. It would appear that under Irish law at present, such indirect purchasers would be considered to be aggrieved parties. Section 14(5) of the Competition Act gives the possibility of awarding exemplary damages to victims of anti-competitive behaviour. Traditionally, under Irish law such damages are awarded rarely and this should remain so in antitrust actions. An award of exemplary damages to complainants, over and above any compensation for actual loss, would create a kind of bounty system for bringing competition complaints.

Further, there are some procedural obstacles in Ireland which may discourage litigants from bringing private antitrust actions, such as the absence of a class action system and the unlikelihood of ever fully recovering the costs incurred in litigation. Indeed, the Authority believes that the lack of private antitrust litigation in Ireland is attributable to the cost of litigation.<sup>21</sup>

## Conclusions

It is clear that European competition policy is moving towards a more litigation based approach to compensate for a lack of resources in national competition agencies and generally stimulate awareness of the importance of competition to the European economies. In the present absence of a harmonised European policy, it appears that it is national procedural laws which govern the determination of issues such as causation, proximity and any defences which the defendants may wish to raise. To encourage the development of a healthy competition culture in Ireland, some review of national rules on class actions and the award of costs may be necessary. While the emergence of a High Court competition list paves the way for increased private actions for damages, perhaps the development of a practice of awarding costs on a solicitor-client basis in competition law actions may reduce the anxiety of plaintiffs in embarking on such types of expensive actions for damages. In any event, as adherence to competition law becomes a daily consideration in the activities of most professions and industries in Ireland, the spectrum of increased private actions for damages becomes a reality. ●

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21 Irish Competition Authority Submission, "European Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules", 20th April 2006, para. 1.5.

# Recent developments in construction law: the newly published contracts for publicly funded construction works.

Micheál Munnelly BL

The National Development Plan 2007-2012 was launched with much fanfare in January of this year. It announced that €184 billion would be spent over the lifetime of the plan. Much of this money will be spent on building and infrastructural projects. With this background the Department of Finance has also introduced a new suite of construction contracts which will govern the administration of much of the largest spend the state has ever undertaken. Those involved will have to become familiar with these new contractual arrangements and so will their lawyers.

The much anticipated new arrangements for the engagement and payment of construction consultants and the procurement of public works came into force at the beginning of this year.<sup>1</sup> The Government decided in May 2004 to reform the approach to both the procurement of public works projects and the engagement of construction consultants. The reforms were identified as a key "value for money" initiative to help address overruns (i.e. the increase in project cost between the tender price accepted and the final outturn cost) on public works contracts, and also to develop more client-focused and standardised conditions for the employment of construction consultants.

A suite of five new Forms of Construction Contracts for Public Works have been developed.<sup>2</sup> The five contracts deal with the traditional Employer/Contractor relationship in both construction and engineering projects. The new contracts have met with much criticism from the bodies that were represented on the Government Contracts Committee for Construction and given the changes that have been made by the new contracts, it is expected that there will be a steep learning curve for Employers, Contractors and their lawyers.

In this paper I intend to identify some of the main differences between the new form of contract for employer designed building works and its predecessor, the Government Departments and Local Authorities Contract (GDLA). The existing GDLA form, with which the

industry had become very familiar, is published by the Royal Institute of Architects of Ireland (RIAI) in agreement with the Construction Industry Federation (CIF), the Society of Chartered Surveyors (SCS) and the Department of Finance.

## Consultation Process

The new contracts have been developed with the stated intention of introducing lump sum fixed price contracts in order to bring greater certainty and value for money to procurement and management of public works contracts. Throughout the development process, the various drafts of the new forms of contract were examined and debated by the main construction related government departments and the various bodies represented on the Government Contracts Committee for Construction. There was a year-long consultation process with the CIF, the RIAI, the Institute of Engineers of Ireland (IEI), the SCS and trade union bodies. It is fair to say that the consultation process appears to have been fraught, with the IEI, the CIF and the SCS all publicly expressing their dissatisfaction with various elements of the new contracts. In any event the process is finally complete and the new contracts are on their way.

## New Contract for Building Works (Designed by the Employer) v. GDLA Contract

The drafters of the new contract have attempted to identify as many of the possible events that may occur during the course of a construction project and to set out who will be responsible for the cost and delay that may be associated with the event. The drafters have shifted some of the risks associated with unforeseen occurrences from the Employer and on to the Contractor. The Contractor in turn is invited to price for the additional risk within his tender for the works. In this way the Employer is better positioned to be aware of the likely final cost of the project. The possible disadvantage to the Employer is that the risks are often ones which the Employer has traditionally borne and a Contractor will be weary of taking on this risk and will presumably price accordingly.

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1. Circular 33/06 issued by the Department of Finance stated that the revised arrangements for the engagement and payment of construction consultants would take effect on 1st of January, 2007, and new provisions for the procurement of public works projects would take effect on the 19th of February, 2007.

2. The contracts comprise traditional (employer designed) contracts for civil engineering and building works, and "design and build" contracts

## The Schedules

The new forms of contract contain two schedules, the first of which is to be completed by the Employer before the tender stage, and the second of which is to be completed by the tendering contractor and submitted with his tender. The schedule performs a similar role to the Appendix in the existing RIAI and GDLA forms of contract. However, the schedules are significantly more extensive and require much more careful scrutiny and care in their completion by the parties. The schedules must be examined very carefully by a tendering contractor, as an error in the completion of the schedule could potentially have very costly consequences.

## Performance Bonds

In this context, a performance bond is an undertaking by a financial institution (the bondsman) to reimburse any party to a contract for the loss or damage which a court would award for breach of contract. A bond is not required under the existing GDLA form of contract although there is a reference to the possible existence of one in Clause 28(a). Clause 1.5 of the new contract sets out the default position by obliging the Contractor to provide a bond of 25% of the accepted contract sum up to the period of Substantial Completion and 12.5% of the accepted contract sum thereafter. It is very important that the Contractor is aware of this aspect when he is tendering for the works, as if the matter is not addressed in Schedule 1E and he does not include for the cost of these bonds in his tender price, he will not be able to recover this cost from the Employer.

## Insurance of Existing Structures

Under Clause 26 of the GDLA, conditions it is the Employer's responsibility to insure existing structures. Under Clause 3.8 of the new contract the default position is that if the matter is not addressed in the Schedule, it will be the Contractor who carries the risk of loss or damage to existing facilities.

## Delay and Compensation Events

Under the GDLA conditions the methods of determining whether an unforeseen event or occurrence entitles the Contractor to additional time to complete or additional money can be relatively complex. An analysis of the event under a number of the clauses of the contract will often be required in order to establish whether or not a Contractor's claim for time or money is meritorious. The new contracts attempt to refine this process, and one of the tools used in this regard is the introduction of the concepts of Delay Events and Compensation Events.

At its most fundamental level, the Contractor owns the risk associated with providing the Works, by the date for Substantial Completion and for the Contract Sum. However, certain events may arise that give the Contractor an entitlement to an extension to the Date for Substantial Completion and/or an alteration to the Contract Sum.

Clause 10.1, by reference to Schedule 1(Section K), identifies a list of 21 possible events or occurrences which might regularly occur during the course of a construction contract, such as an instruction to carry out additional works or a delay in allowing the Contractor access to the site and so on. Included in this list of 21 events however, are four items which have a default position of entitling the Contractor to an extension of time only, namely:

(18) *"An item of value of archaeological or geographical interest or human remains is found on the Site, and it was unforeseeable"*

(19) *"The Contractor encounters on the Site unforeseeable ground conditions or man-made obstructions in the ground, other than Utilities"*

(20) *"The Contractor encounters unforeseen Utilities in the ground on the Site"*

(21) *"Owners of Utilities on the Site do not relocate or disconnect Utilities as stated in with the Works Requirements, when the Contractor has complied with their procedures and the procedures in the Contract, and the failure is unforeseeable"*

If a "Yes" is not inserted by the Employer beside the above mentioned items (indicating that the items are Compensation Events) pursuant to Clause 1.2(18), the Contractor will only be entitled to an extension of time in relation to these events, but will not be able to recover any associated costs. It is clear that the occurrence of any one of these events could have potentially disastrous consequences for a Contractor if he has to carry the cost associated with the delay. Because of this, considerable consideration will have to be given to the pricing of works where a "No" has been inserted in the schedule in relation to these items.

## Conciliation and Arbitration

As is the position with the existing GDLA Contract, the new contract contains provisions for mandatory conciliation and arbitration procedures in the event of a dispute arising between the parties. Unlike the RIAI and the GDLA Contracts however, there is no default appointing body named in the new contract that shall be responsible for the appointment of a Conciliator or Arbitrator to the dispute in the event that the parties cannot agree upon a person. Schedule 1N requires the Employer to insert the name of a default appointing body, but if this is not done when the contracts are being executed, it is likely that the conciliation and/or the arbitration procedure would fail in circumstances where the parties could not agree on a person to act as conciliator or arbitrator.

However, the new contract does allow more latitude to an Employer in choosing the default appointing body that it will insert into the first schedule. For example, the existing GDLA states that if a dispute occurs and the parties can not agree on a person to act as conciliator or arbitrator then the RIAI shall appoint a person from their panel of experts to the dispute. With the new contract an Employer is free to choose what body shall appoint a conciliator or arbitrator to the dispute. This could be, for example, The Institute of Chartered Arbitrators, The Law Society or The Bar Council.

Interestingly and usefully, Clause 13.1.10 of the new contract states that *"If a conciliator has recommended the payment of money, even if a notice of dissatisfaction is given, the party concerned shall make the payment recommended by the conciliator, provided that the other party first provided to the paying party a bond executed by a surety...."* This addition is to be welcomed and should provide some much needed teeth to the conciliation process which is otherwise a non binding forum.

## Calculation of Adjustments to Contract Price

Another area where care is required by a Contractor is in the completion of Schedule 2, Section E. As variations and alterations inevitably arise in even minor construction projects the method used to value additional works or variations can be of enormous importance to Employers and Contractors. In Section E the Contractor is required to insert his hourly labour rates for different categories of workers as well as a percentage of margins required on materials and plant items. These rates are to be used in the calculation of labour and plant or materials margins in the event of the occurrence of a Compensation Event. Perhaps unfairly and unnecessarily the new contract states that if these fields are left blank they shall read as zero and the Contractor will effectively be prevented from recovering any additional costs for labour, plant and materials where a Compensation Event occurs.

## Sub-Contractors

The Nominated Subcontractor and associated Prime Cost Sum has very much been part and parcel of the administration of the RIAI and GDLA forms of contract. The Nominated Subcontractor is a specialist subcontractor who is chosen by the Employer who issues an instruction to the Main Contractor to enter into a subcontract with that subcontractor. The new forms still allow an Employer to direct a Contractor to engage a subcontractor or specialist, but the difficulty would seem to be that the new forms do not afford the same protection to the Contractor in relation to these subcontractors as was given by the RIAI and GDLA forms of contract. Under the GDLA form of contract, the Contractor was entitled to make reasonable objection to any proposed nominee but this provision has been removed from the new contract.

It does seem to be a glaring omission that a proposed form of subcontract document for use in conjunction with the main contract has not been developed and released simultaneously with the new contracts. The existing form of sub-contract for use with the GDLA contract will not be suitable for use with the new contract. It is understood that new subcontract forms are being drafted, but in the meantime it is to be assumed that some subcontractors will understandably be very reluctant to enter into bespoke conditions in an untried and untested environment.

## Time Bars and Contractors' Claims

Under Clauses 9 and 10 of the new contracts, time bars have been introduced to limit the time within which a Contractor must inform the Employer's Representative of the occurrence of a Delay and/or Compensation Event. The provisions are detailed, but in summary, the Contractor must notify the Employer's Representative of such an occurrence within 20 days. This is no different from the GDLA requirements. However, there is a new requirement that the notice must prominently state that it is being given under sub-clause 10.3 of the Contract. If the notice does not state that it is being given pursuant to clause 10.3 the Contractor will not be entitled to additional time or money. This will limit a Contractor's ability to avoid the consequences of a time barring provision by arguing that a reference to an event in the Contractor's correspondence is sufficient notice to the Employer of the occurrence of a Delay and/or Compensation Event.

This is a very harsh provision and is likely to result in a Contractor implementing a policy of issuing Clause 10.3.2 notices at the slightest possibility of a delay and/or compensation event occurring, and this in turn will inevitably lead to a strain in relations between the Contractor and the Employer/Employer's Representative.

## Omissions and Reduction of Time

One of the most unusual provisions, and indeed one of the few that seem to be slanted in the Contractor's favour, is Clause 9.5 of the new contract. In effect, the clause states that if a 'Change Order' (a variation instruction) results in an omission from the works, a revised date for completion of the contract shall be agreed between the Employer's Representative and the Contractor. However, the clause goes on to state *...[if there is no agreement, there shall be no reduction]*. Thus on its face, it would seem that if the extent of the works are reduced, and the Contractor refuses to agree to a reduction in the contract period, then there shall be no reduction.

## Employer's Representative

The new contracts introduce the title of 'Employer's Representative'. In reality, the Employer's Representative will be the equivalent of the Architect in the RIAI and GDLA contracts. The new contract continues the position that an Employer may make a unilateral appointment and a reappointment of the Employer's Representative "at any time" and without reference to the Contractor. Under the standard RIAI contract form the Contractor is entitled to object to any proposed Architect for "sufficient" reasons.

On first appearance, this may not seem to be a great worry to a Contractor, but it should be understood that the role of the Employer's Representative is at the heart of the administration of the contract. The Employer's Representative/Architect is responsible for certifying or valuing Contractors' claims for interim payment, variations and extensions of time. The right to object to a proposed Employer's Representative can be very important for a Contractor, particularly in a situation where there may be a perception of bias. In traditional contracting arrangements, the Contractor will be aware at an early stage (usually when invited to tender) of the identity of the Employer's Representative, however, under the new contract he may not know the identity of the Employer's Representative until after the Contract Date. In a small construction community such as exists here, the identity of the Employer's Representative may very well be considered vitally important to a tendering Contractor.

Schedule 1 of the new contract introduces limitations on the Employer's Representative's authority. The Employer is invited to set out in the Schedule the maximum value of a Change Order which the Employer's Representative may instruct. This will go to focus the mind of the Employer's Representatives and should make them more cost conscious than they may have been under the existing contracts.

## Conclusion

The above are just a few examples of the many issues raised by the introduction of the Government's Construction Contracts for Public Works. It is clear from this brief analysis that the contracts represent a major shift from the tried and tested arrangements, with which the Irish construction industry had become familiar. The transfer to the Contractor of many of the risks traditionally borne by the Employer will undoubtedly lead to greater certainty in relation to final costs at an earlier stage in the project. However, it is argued by many that the existing contracts are now performing adequately, and as the parties become more expert in the provision of major infrastructural projects that there is no need to change the current system. The Department of Finance disagrees and the new contracts are now on their way. The new contracts are likely to result in the Employer being in a better position to know the likely final cost of a project when they receive their tenders from Contractors. On the other hand, it seems that Contractors will be so dubious of the new provisions that works will be priced accordingly. The Department of Finance may get their lump sum contracts but it remains to be seen if any savings will be achieved.●