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The Irish Criminal Bar Association

MARY ROSE GEARTY BL

Hundreds of barristers qualify every year, and most of them come to the Bar to practise (even if only for their first year of devilling). It has become more and more difficult to maintain links with all of those practising in the same field, let alone with all of our colleagues now in practice. As the volume of legislation and case law continue to increase in the area of criminal law, the task of assimilating the knowledge and information necessary to ensure that one is aware of all developments has become daunting indeed, particularly for those who must glean this information outside of court hours. Against this background, it became clear that the criminal bar would benefit from a representative body which would facilitate communication within the bar itself and promote our interests, particularly in terms of continuing education.

There was one further catalyst to the formation of the ICBA. Some members of the Irish Bar, and many of those practising in the criminal bar in particular, had been critical of legislation in this area (notably the Criminal Justice Bill of 2006) and wanted a group within which concerns like this could be raised and, if necessary, statements produced on behalf of a group rather than one or two individuals.

In July of 2006, a number of barristers practising at the criminal bar met and discussed plans to form a new association. Their aims were to foster more discussion on matters of interest, to maintain and promote high standards of practice and to make representations on behalf of all practitioners at the criminal bar.

Within months of an ad hoc meeting in the Distillery Building, a temporary committee had been elected and hundreds of barristers had attended a preliminary meeting to discuss the planned association and at the first two seminars organised by ICBA.

The Association now has a draft constitution and a membership of around 220. Membership of the Association is open to any practising barrister, the fee is €20 for a devil and €50 for other members. The stated aims of ICBA are:

1. To promote the highest standards in the practice of criminal law.
2. To seek improvements in the area of criminal law, both in legislative provisions and administrative procedures.
3. To operate as a forum for barristers who practice in the area of criminal law.
4. To provide information and education in regard to criminal law.
5. To make representations on behalf of members’ interests to the judiciary, the Courts Service of Ireland and any other body as appropriate.

The draft constitution contains provisions for 6 committees, as follows;

The Finance Committee

The Communications Committee — responsible for internal communication with members and external communication with other persons and bodies

The Law Reform Committee — responsible for the preparation and presentation of submissions and commentaries in areas where change or reform of criminal law is anticipated or required

The Education Committee — responsible for the preparation and provision of continuing education for members

The Circuit Committee — responsible for liaison between the Association and members who practice in different court areas throughout the country.

The Liaison Committee — responsible for liaison with the members, the judiciary and the solicitors’ profession. It will also organise social events within the Association and assist with the social aspects of conferences, whether national or international.

The New Members’ Committee — responsible for liaison, support and education for members in their first few years of practice.

In its short life, the Association has already arranged and hosted a number of successful seminars and a reception for new members of the Library. It has plans for a number of conferences in the near future, a general reception for members before Christmas and a week-end conference at a Circuit venue, with a view to travelling to each Circuit in turn in order to maximize the involvement of members throughout the country.

We strongly encourage all members to join this Association and to avail of the increased links and information it offers to us all, both as colleagues and as professionals in a highly competitive field. ■
The cities of Dublin and Belfast are to host the World Bar Conference 2008 which will take place from the 27th June to 30th June next year.

Top international human rights experts will address delegates travelling from referral bars around the globe. Attending are acclaimed international speakers including human rights defender Beatrice Mtetwa, Middle East Correspondent Robert Fisk and Shami Chakrabati, Director of civil rights organisation, Liberty.

In previous years the international conference was held in Cape Town, Hong Kong and Shanghai. The Cross border conference is widely viewed as a coup for Ireland.

According to Mr Hugh Mohan, joint chair of the Conference, “This four day event has proven to be very successful in attracting legal experts from around the globe. Delegates will have the opportunity to partake in legal discussions with leaders in their fields. It is also an opportunity to meet other likeminded barristers. In addition, delegates will have the opportunity to enjoy pre-arranged activities and entertainment in the cities of Belfast and Dublin.”

The conference is being held by the International Council of Advocates and Barristers, an organisation formed by the Bar Association in jurisdictions where there is a separate profession of an independent referral Bar. Its members are currently the Bar Associations of Australia, England and Wales, Hong Kong, the Republic of Ireland, New Zealand, Northern Ireland, Scotland, South Africa, Namibia and Zimbabwe.

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Pictured at the launch of the World Bar Conference, were Hugh Mohan SC, Co-Chair of The International Council of Advocates and Barristers, Turlough O’Donnell SC, Chair of the Bar of Ireland and Noelle McGrenera QC, Chair of the Bar of Northern Ireland and Co-Chair of The International Council of Advocates and Barristers.
Bioethics and The Middle of Life

ANN POWER SC

This is the second in a three part series of articles dealing with bioethics and the law. The first article featured in the November edition of the Bar Review and the third and final article will be contained in the February edition.

Body Parts as Medicine

Margot Brazier, Professor of Law at the University of Manchester, has analysed how medicine has changed from being something that was given to us to something that we ourselves are. Increasingly, as we enhance our understanding of the human body, we are aware that the human body itself is a source of medicine or that humans are medicine.

Biological materials harvested from human sources offer a promise of “cure” for many diseases. Blood and blood products have been used now for nearly a century both in transfusion and as treatment for conditions like Haemophilia. In vitro fertilisation (IVF) and an array of reproductive technologies which IVF gave birth to, brought hope to the infertile. Pre-implantation genetic diagnosis (PGD) allows parents to avoid the birth of a child with some devastating genetic disease. PGD when linked with Human Leukocyte Antigen Tissue Typing (HLA) allows for the creation of so-called “saviour siblings”—allowing one child to be created to become a source of survival for another. Organ transplants save lives. Stem cell therapies may one day enable us to manufacture new tissue and organs in the laboratory. Organ retention enables scientists to increase their understanding of disease and thereby save more lives. So the blood, cells, sperm, eggs, tissue and organs of the human body are in themselves “cures” for many debilitating and even life-threatening conditions. Nevertheless, each one of these life-saving therapies has caused controversy and at times public outrage.

To get a flavour for the ethical and legal issues raised by the use of “body parts” Brazier invites us to engage in a thought experiment. Imagine in 2010 a baby boy is born in Manchester. His parents name him Sam. He grows and thrives until the age of 3 when he contracts meningitis. However, his recovery is swift and so remarkable that he needed no antibiotics. Tests reveal an amazing result. Sam carries within him cells that can fight off most diseases and his organs and tissue have a capacity for regeneration unless catastrophically injured. Scientists believe that Sam could be used to understand and cure most human diseases that are unrelated to the ageing process. The question Brazier asks is: How far can they go?

- Few would object if Sam’s doctors (with his parents’ consent) took blood samples and tissue samples from the child.
- Could they take stem cells from his bone marrow to manufacture cell lines?
- If the risk or distress to Sam was minimal, moral objection to minor intrusive procedures would be subdued. Legally, the position is more dubious. Are any of those interventions in Sam’s interest? And there are limits to parental powers to authorise procedures relating to their children.
- What if Sam’s parents say “No—you may not so much as touch the child.” Should the State have the power to restrict their freedom of choice in order to confer a benefit on others?
- What if his parents offer a conditional consent? You may “experiment” on Sam’s tissue and cells but first you must pay us €50,000 plus a 20% royalty on therapies developed from his cells.

These different scenarios introduce some of the underlying themes of real debate. Must an absolute veto on a procedure which will do untold good and little, if any harm, be respected? And given the benefits that would flow from such research, why should Sam’s parents not be paid? It may be bad taste but parents make money out of their gifted children in other ways, such as, for example, through advertising. Why should Sam’s parents not profit from their “gifted” son?

- What if the scenario darkens? What if, in order to profit fully from our miracle boy, doctors need access to every organ in his body, to every speck of his tissue? What if, in order for society to benefit from his amazing biological secrets, we need to kill Sam?

Would even the most committed utilitarian consider Sam’s murder justified despite the far greater good that would accrue to the far greater number? The instinctive reply might be that even the most extreme utilitarian could not justify human sacrifice in order to bring about this greater good. Yet through conscription to military service, we sacrifice young lives by sending them to near certain death. What is the difference?

- And what if Sam were killed in a road accident? His

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1 The inspiration for much of this part of the paper is taken from Margot Brazier’s article, “Human(s) as Medicine(s)” in First Do No Harm, Sheila McLean (ed.), Ashgate, 2006 187.
own miraculous properties cannot save him but his dead body contains the secrets of his miracle medicine. His parents refuse to consent to any form of intrusion on their dead son's body beyond what is required for the coroner's autopsy.

Some would argue that parental objections should carry much less weight than the imperatives of science and the potential good to humanity.²

At the centre of the complexity about proper uses of bodies and bodily material lies a fundamental discomfort about what makes human beings special.

Organ Retention

Arguably, a fundamental cause of the recent controversies surrounding organ retention was the chasm of misunderstanding between families and clinicians. The clinicians perceived the body of the deceased as biological material, potentially useful in the advancement of medicine. The person whose body it was, no longer existed. It would be wasteful not to make use of what was left behind. The parents of a dead child still perceived the body as their child. Some claimed compensation for having suffered traumatic injury upon learning about the retention of bodily parts. While the Courts had much sympathy for such claimants, their claims were dismissed.³

Interestingly, many of those who attended meetings of the Retained Organs Commission (which was established to oversee the return of identifiable body parts in the wake of the organ retention scandals in England) said that had they been asked to consent to the retention and ensured that the parts would be beneficially and respectfully used, they would have agreed.⁴ Is willingness to donate organs reconcilable with fury when they are retained without permission? What is at issue here? Is it the perceived insult to the living (in not being asked for consent) or the insult to the dead in what may be perceived as a dehumanised approach to the remains? According to the Bristol Inquiry Report, a lack of understanding about organ retention undoubtedly played a part. It stated:

The fact that parents and the public were unaware that human material was routinely taken and used for a variety of purposes and large collections existed around the country was unacknowledged or ignored.⁵

Organ Donation

Cadaveric organ donation is another area of public policy where autonomy or "consent" is an issue. A grieving parent asked to donate a child's heart may have an immediate empathy between his pain and the pain of other parents whose child is dying. Perhaps there is a sense in which the dead child will "live on".

Coming as it did in the wake of the organ retention scandal in Britain it was perhaps not too surprising that the Human Tissue Act 2004 in that jurisdiction focused heavily upon consent. Out of respect for "autonomy", the Act and its codes or practices strongly emphasised the need to comply with the former wishes of the individual where these are known. But "autonomy" or self determination in the context of the dead is somewhat anomalous. The Act seeks to respect autonomy by emphasising the prior wishes of the dead. Its credentials fall in respect of those who have expressed no choice. It not only fails those who would have been willing to donate (and most population surveys show significant support for cadaveric donation—up to 90% in some cases⁶) but also fails to reflect any notion of the wider public good with the result that the needs of patients desperately awaiting a transplant are unnecessarily sacrificed. Should legislation here be premised upon a rebuttable presumption in favour of donation?

Living Donation

One might imagine that the use of bodily materials taken from the living would be less complex given that the scene is not coloured by emotional loss or bereavement. No so. Transfusions are routine but have given rise to controversy within some religious communities.

What about the use of other bodily materials? What about donating a kidney or a lobe of your lung, or a segment of your liver? Arguably, these demand courage and a higher pain threshold but for the most part, such altruistic donations are applauded and are not prohibited by law. But unfettered live donations still remain problematic and may have to surmount legal obstacles. Brazier writes:

Should I propose to donate my kidney to my dying brother, my wish will be likely to be granted and applauded. Should I offer my kidney to a stranger, my altruism may be regarded with suspicion. Should I advertise my kidney for sale, I will fall foul of UK law.⁷

In Britain, the sale of organs for transplantation was first criminalised by the Human Organs Transplant Act, 1989. That prohibition is continued by section 32 of the Human Tissue Act, 2004. But is a total ban on the sale of organs necessary and, if so, why? Is it a legitimate restriction on a person's freedom to do what he desires with his own body? What if we were to have a regulated market instead, one which

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³ See Declin v National Maternity Hospital [Unreported, High Court, O’Donovan J., 1 July 2004] and O’Connor & Another v Lenihan [Unreported, High Court, Pearl J., 9 June 2005]
⁵ At para 32
⁶ UK Transplant, Barriers to Joining the NHS Organ Donor Register. Qualitative and Quantitative Research Carried out on Behalf of UK Transplant 2002/03, Bristol, UK Transplant, 2005
⁷ Margot Brazier, op cit., at n. 1.
ensures adequate protection to vendors and purchasers? Is it not the case that society has a legitimate interest in restricting autonomy on the grounds of prevention of harm to the vulnerable?

**Refusal of Medical Treatment**

In September 2006, the High Court ordered that a competent woman (Ms K) who had refused a blood transfusion should be given the transfusion against her will in order to save her life. The 23-year-old Congolese woman suffered massive blood loss following the birth of her child at the Coombe Hospital. Speaking in French and through an interpreter, she told hospital staff she did not want a blood transfusion as she was a Jehovah's Witness.

The Master of the Coombe applied to the High Court for directions and the Court directed the hospital to do everything in its power to save the life of the woman including, if necessary, restraining her if she physically attempted to stop doctors administering to her the transfusion.

The judgment generated heated debate for a number of reasons. Firstly, the Court applied the “best interests” test often used in medical law. However, it was not the best interests of the woman but rather those of her child that were considered. The Court regarded the interests of the woman’s newborn child as paramount and held that if her mother died, he could be left with no one to look after his welfare. Secondly, some have argued that in authorizing and directing non-consensual medical treatment, the Court failed to have regard to the patient’s natural right to self-determination and to her Constitutional rights to bodily integrity and to practice of religious freedom. In addition, it is questionable whether any regard was had to sections 4 (2) of the *Health Act, 1953* which expressly provides that:

(2) Any person who avails himself of any service provided under this Act shall not be under any obligation to submit himself … to a health examination or treatment which is contrary to the teaching of his religion.

The judgment of the Court in Ms K’s case is something of a new departure in the jurisprudence of the Courts in the area of non-consensual medical treatment. In earlier cases of this nature, the High Court had ordered transfusions to be carried out in circumstances where either there was a doubt as to the competence or capacity of the patient to refuse or where the decision to refuse treatment was being made by a parent on behalf of a child. Those cases are readily distinguishable from the K case.

In Ms K’s case, the evidence was that she was neither a minor nor incapacitated. In such circumstances, was it legitimate for the Court to by-pass her refusal to have such treatment and to direct that it be administered, forcibly, if necessary? Perhaps the Court took the view that in circumstances of urgency, it would find in favour of saving life and allow the legality of the decision to be argued afterwards. Well motivated as such an approach undoubtedly is, one must however ask wherein lies the difference between requiring Ms K (against her wishes and, if necessary, by force) to have a blood transfusion in order to save her life and ordering her to have urgent chemotherapy (if necessary by force) in order to save her life? Is it legitimate for the Court to enforce its view of what ought to be done for the view of person who has decided against treatment?

Whilst one sympathizes with any Court obliged to decide upon matters of life and death in urgent circumstances, questions about the legal ratio of the decision arise. Had the Court, for example, found that the circumstances of Ms K’s condition (post delivery, post medication, stressful environment) were such that there was at least a doubt as to her actual capacity to make a fully informed choice and that in such circumstances it would err on the side of caution, then, arguably, the legal principles governing consent to and refusal of medical treatment may have been regarded as less compromised. Indeed, Professor Mason argues that because the implications of refusal of treatment are more serious than the implications of accepting treatment, the bar might justifiably be raised before the Court is satisfied that a patient’s refusal should be respected.

**The English Authorities**

The cases in England on refusal of treatment have, generally, arisen where the life of a patient is threatened by the refusal and where doctors and hospitals, fearing liability in battery or negligence, have sought declarations of lawfulness prior to treating patients against their expressly stated wishes. The right to refuse medical treatment, as a corollary of the requirement of consent to treatment, has been articulated and repeated in a number of leading English decisions in recent years. In the case of *Re T (An Adult: Refusal of Treatment)*, Lord Donaldson MR stated that:

An adult patient who ... suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered. [This right exists] notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent.\(^8\)

The right to refuse is predicated upon the patient having sufficient capacity to enable him to exercise that right. The cases demonstrate that the right to refuse, while conceded in strong terms as a matter of first principle, is frequently undermined by the courts as they look for "some way out" whereby refusal is by-passed and treatment given without offending the integrity of legal principles involved.

The decision of the Court of Appeal in *Re T (An Adult: Refusal of Treatment)* is the leading English case in this area. Ms T, in her 34th week of pregnancy was involved in a road traffic accident. She refused a blood transfusion after the visit of her mother, who was a Jehovah’s Witness and with whom the patient had lived until the age of 17. Her condition deteriorated and the attending doctors decided that a Caesarean section was necessary. The Consultant

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Anaesthetist would have administered a blood transfusion, given the patient's critical condition, but felt inhibited from doing so by reason of the patient's refusal. Her father and boyfriend sought a declaration of lawfulness to cover the proposed transfusion. The Order was granted and upheld by the Court of Appeal.

It was held that the scope of the right to refusal was not such as to cover the particular situation which arose. Reference was made to Miss T's diminishing allegiance to the Jehovah's Witnesses since leaving her mother and that her decision had been announced “out of the blue”. Additionally, the Court heard that medical staff had failed to inform her, fully, of the risk attendant upon refusal. Thus, there was held to be a situation of emergency and in those circumstances the clinicians were free and in fact were obliged to act in Ms T's best interests by performing the transfusion. Lord Donaldson, MR found that the patient lacked the capacity necessary for a valid decision. The accident, the medication, the advanced stage of pregnancy and her severe pneumonia all constituted, in his opinion, abundant evidence of the patient's incapacity at the time of her purported refusal and, consequently, her consent was impaired.

By way of contrast, in the subsequent case of Re C (Adult: Refusal of Treatment) the patient's refusal of treatment was upheld by the High Court. C was suffering from schizophrenia and was confined to Broadmoor Prison. Having developed gangrene in one of his feet, he was advised by doctors of a significant risk of death if his leg was not amputated below the knee. The patient not only refused to consent to the operation but also sought an injunction preventing doctors from carrying it out in the future. It was held that such a patient was competent to refuse the treatment and the injunction was granted. It was held that to be competent, a patient had to understand or at least be capable of understanding the nature and effects of the proposed treatment in broad terms, to believe the

information concerning this and to weigh the information so as to make a choice. In this case the medical witnesses were divided on the question of C's competence and the Judge chose between them and found in favour of C's competence to exercise his right to refuse treatment.

An exception to the right of the competent patient to refuse treatment was found in Re S (Adult: Refusal of Medical Treatment). In this case, doctors at a London hospital sought an order, effectively compelling Mrs S to undergo an emergency Caesarean section against her express wishes. In a judgment which had to be delivered as quickly as possible if the life of the baby and the mother were, on the medical evidence, to be saved, Sir Stephen Brown granted the declaration. In doing so he relied on dicta in Re T to the effect that a compulsory operation of this sort might be permissible if the patient's refusal of treatment could lead to the death of a viable foetus. In reaching his decision under pressure of time, Sir Stephen Brown left open the question of Mrs S's competence although, such evidence as there was cast doubt on her capacity to refuse.

This decision was strongly condemned by exponents of the liberal pro-autonomy persuasion. The Court, clearly, had chosen one norm (the sanctity of life) over another (respecting the patient's right to self-determination) to the point where it was prepared to allow the forced subjection of the patient to invasive treatment.

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10 [1994] 1 AER 819

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Deference and Redefining Reasonableness

PAUL DALY*

Introduction

While judicial review principles in England continue developing in the wake of the Human Rights Act 1998,\(^1\) review of the merits of Irish administrative decisions remains comparatively underdeveloped. The current law, as set out in O’Keeffe v An Bord Pleanála and State (Keegan) v Stardust Victims’ Compensation Tribunal, allows only minimal substantive review of decisions taken by expert agencies. There has been some academic and judicial disquiet about the continued invocation of these rigid principles, but precious little commentary as to what might replace O’Keeffe and Keegan. Though the present author is a proponent of a more nuanced approach to substantive review, judges are correct to proceed with caution: the path to more intrusive review of the merits of administrative decisions is rutted with pitfalls. At the same time, the path ought to be negotiated, by academics, practitioners and, above all, judges. If a debate can be sustained, we should arrive at our ultimate destination with the legal and political realities of the modern administrative state, allows the various branches of government to engage in constructive dialogue and furnishes principles of good administration which can improve the lot of the Irish citizenry. The purpose of this article is to identify some of the pitfalls and turn attention to key questions that need to be answered before the courts can feel comfortable about redefining reasonableness.

The Existing Doctrine

The modern Irish formulation of the doctrine that all administrative decisions must be reasonable came in O’Keeffe v An Bord Pleanála.\(^2\) There, the Supreme Court held that decisions of the planning authorities can only be displaced of expert decision-makers, now apparently extends to all administrative agency decisions.

Deference and Redefining

4 [1986] IR 642, 658, Henchy J held, inter alia, that to justify correction by the superior courts, a decision would have to be “fundamentally at variance with reason and common sense…indeffensible for being in the teeth of plain reason and common sense…plainly and unambiguously in the face of fundamental reason and common sense” or “flagrantly reject or disregard fundamental reason or common sense.”

5 Judicial Review (Dublin, 2002) at p.493. (Emphasis in original.) Though Bradley later notes, at p.497, how “[t]he courts often invoke the seminal decision in Keegan rather than the O’Keeffe interpretation and on other occasions both decisions are cited together.” See Lobe v Minister for Justice [2003] 1 IR 1, 61 (SC per Denham J).

6 In both of these cases, Dikilu v Minister for Justice, [2003] IEHC 40; and T v Refugee Appeal Tribunal [2004] IEHC 606, it is debatable that O’Keeffe was applied correctly but that is an argument for another day. It may be three if one can count I v Minister for Justice [2007] IEHC 180, but McGovern J appeared to base his decision on a number of grounds other than a failure to meet the O’Keeffe test. See also Fitzpatrick v Minister for Justice [2005] IEHC 9, where Ryan J held that the respondant’s failure to utilise his power to revoke a deportation order failed the Keegan test; specifically, a “failure to take into account the period during which the applicants lived together as a married couple in the State.” One might argue that this was more a breach of the duty to take into account all relevant factors, though the same substantive outcome would have been reached.

7 Aer Rianta v Aviation Commissioner, [2003] IEHC 707/01.

Secondly, one judge has, albeit obliquely, noted the logical deficiencies present in O’Keeffe. Though speaking in the context of an appeal on a point of law, Kearns J suggested “the greater the level of expertise and specialised knowledge which a particular tribunal has, the greater the reluctance there should be on the part of the court to substitute its own view for that of the authority.” To risk putting words in the judge’s mouth, a blunt instrument like O’Keeffe is inappropriate in the era of hundreds of various statutory agencies. Indeed, inapposite may be too mild: the Oireachtas has not used uniform statutory language or structure in setting up the battery of state agencies that advise government, promulgate rules and regulations and prosecute individuals. It has, as we shall see later, treated the agencies differently. If the Oireachtas has employed its exclusive law-making power to differentiate between agencies, the courts ought not to use one overarching principle when it reviews the decisions of those agencies.

Thirdly, from a procedural point of view, it puts the onus firmly on individual litigants to establish that a decision taken by a public body was irrational. This may not be novel, but, especially given the high threshold that must be scaled, it poses some troubling questions about the relationship between the citizen and the state.

A related point is that O’Keeffe carries all the disadvantages of a ‘rule-based’ approach — the risk of substantive injustice — but none of the advantages — generally, the benefit of a ‘rule-based’ approach is that matters can be disposed of quickly: this is hardly the case with O’Keeffe, which in practice necessitates a lengthy review of the record to ensure that relevant evidence exists.

Finally, and perhaps most importantly, it may not take account of important human rights questions. Is the same standard of review appropriate for refugee decisions, where constitutional rights are at stake, where the ‘anxious scrutiny’ test also applies. See also his decision in [2004] IEHC 176, on the merits: “The respondent argues that the Minister’s decision to refuse his consent must be decided on the basis of the established test...” See also his decision in [2005] IEHC 470 (McMenamin J); and [2007] IEHC 176, on the merits: “The respondent argues that the Minister’s decision to refuse his consent must be decided on the basis of the established test...” See also his decision in [2004] 3 IR 296.


McGuinness J in Z v Minister for Justice, Equality and Law Reform [2002] IESC 14, indicated a wish for full argument on the question, at [59] of her judgment. There have been varying statements from the Irish judiciary on the desirability of change. Some High Court judges have seemed happy with the current state of affairs. See Mohsen v Refugee Appeals Tribunal [2003] IEHC 65 (Pearl J); Mohsen v Minister for Justice, Unreported, High Court, Smyth J, 12 March 2002; Cusma v Minister for Justice [2006] IEHC 36 (Hanna J). Recently, in TG v Refugee Appeals Tribunal [2007] IEHC 174, Charleton J hedged, on the basis that the anxious scrutiny question is the subject of a number of reserved judgments. A desire for change has been evident from some quarters, however. McGovern J has gone furthest, actively applying the test in KCC v Minister for Justice [2007] IEHC 176, on the merits: “The respondent argues that the Minister’s decision to refuse his consent must be decided on the basis of the established test...” See also his decision in [2007] IEHC 180. Strikingly, in a dissenting judgment, Kenny J., in Ospandek and Luke v Minister for Justice, [2003] 1 IR 1, stated at p.201: “It seems to me that where as in this case, constitutional rights are at stake, [the O’Keeffe and Keegan] standard of judicial scrutiny must necessarily fall well short of what is likely to be required for their protection...” In a case such as the present, the routine application of the unmodified test...makes decisions of the Minister virtually immune from review.” See also O(II) v Refugee Appeals Tribunal [2005] IEHC 470 (McMenamin J); and Critto v Refugee Appeals Tribunal [2004] IEHC 119 (Laffoy J) although the last two were applications for leave to apply for judicial review, rather than substantive decisions on the merits, the comments do not seem confined to the leave stage).
exercised in judicial adventurism which would set aside decades of caselaw in this area. To adopt such a course might quickly bring in its wake an endless stream of judicial review applications in cases where human rights might to any degree be said to be affected by some ministerial or administrative decision."

Kearns J’s caution is typically wise, even if it may be at odds with his earlier suggestion about the logic of a blunt rule. As I hope to sketch now, redefining reasonableness and building an appropriate framework of judicial review for the modern administrative state will be a difficult process.19

**Redefining Reasonableness**

Perhaps the most intuitively attractive solution to the deference problem is suggested by Imelda Higgins: that “anxious scrutiny” ought to be applied in – at the very least – asylum cases.20 This approach has the virtue of being supported by substantial English case law and commentary.21 However, it is at once both too much and too little.

While the Irish jurisprudential tradition has long relied on borrowing from other common law jurisdictions, the justification for borrowing from England at the present time, in the present field, may not be as strong. The advent of the Human Rights Act in England has rendered a drastic effect on judicial decision-making there; it is far from clear that the European Convention on Human Rights has an analogous status in Irish law.22 This is quite apart from any differences in legislative structure. In a thoughtful judgment, Clarke J recognised this latter problem. In *EMS v Minister for Justice*, he noted the “potential difficulty in applying the jurisprudence of the courts of the United Kingdom in refugee matters to the Irish situation having regard to the difference in the manner in which the respective jurisdictions have legislated for the protection of those seeking refugee status.” Though Clarke J borrowed from the English case law in this instance, his restrained approach seems correct. If “anxious scrutiny” is to be imported into Ireland, it should be accompanied by a careful appraisal of the comparisons and contrasts between the Irish and English systems.

Standing alone, the plea for “anxious scrutiny” also says too little. If it is to be applied to decisions in the area of refugee law, it is not easily cabin ed there. The justification for extending “anxious scrutiny” to certain administrative decisions is that key human rights are implicated, such as the rights to life, bodily integrity and family life. But whether one looks at the European Convention on Human Rights, or the Irish Constitution, there are other rights which arguably deserve the same, if not higher, levels of judicial protection.

The right to private property, after all, is guaranteed twice by the Irish Constitution and again, albeit weakly, in the Convention. In short, if asylum decisions are to be subject to a higher standard of scrutiny, then the case is a fortiori for planning decisions.

Such a contention recently arose, somewhat obliquely, before the House of Lords. First, in *Kay v Lambeth Borough Council*, the House had held that a local authority’s housing policy was presumptively compliant with the property rights protection in the European Convention. Later, in *Huang v Home Secretary*, the respondent argued that sauce for the housing goose should be sauce for the immigration gander: that if housing policies were presumptively compliant with the Convention, then so were immigration regulations. The House was unimpressed:

“Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented.”23

This response gives the lie to any suggestion that “anxious scrutiny” can simply be employed in the immigration field. There must be some deeper justification for refusing to extend it to other areas, a justification which, unfortunately, must rely on abstract concepts such as the nature of democracy and the legitimacy of delegated powers.

There are further problems. The statutory schemes setting up Ireland’s plethora of administrative and advisory agencies employ a bewildering array of legislative formulations to delegate authority. If jurists and judges are to be serious about giving effect to the intentions of the Oireachtas, sustained focus on the different policy choices made by elected representatives will be necessary. A blunt instrument of unreasonableness may not accord with parliamentary intention, but an insufficiently rigorous set of principles would have just the same shortcoming.


20 Higgins, op. cit. Dr Gerard Hogan, op. cit., argues in a similar vein.

21 See Higgins, op. cit.


23 [2004] IEHC 396. However, after quoting this passage, McGovern J held in *KCC v Minister for Justice* [2007] IEHC 176: “while there are some differences of approach in the legislation in the United Kingdom and in Ireland the cases here and the United Kingdom have adopted a broadly similar approach to matters of Asylum Law.”

24 [2006] UKHL 10; [2006] 2 AC 465. See especially Lord Bingham at [39], holding, “It is not necessary for a local authority to plead or prove in every case that domestic law complies with article 8. Courts should proceed on the assumption that domestic law strikes a fair balance and is compatible with article 8.” See also Lord Nicholls, at [54-55] also raising the possibility of a landslide of litigation.

25 [2007] UKHL 11, [17].
Consider the webs of statutory provisions governing the relationship between agencies and the executive and legislature. Some, such as the Competition Authority, Office of Director of Corporate Enforcement and the Financial Services Regulatory Authority,\textsuperscript{26} are not subject to policy directions from the government; many others are.\textsuperscript{27} There are also differences in the mechanisms for accountability depending on the agency in question: usually, as with the Road Safety Authority, the chief executive officer must appear before Oireachtas committees when summoned;\textsuperscript{28} however, on occasion, there is a prohibition on expressing a view on the merits and demerits of government policy, as with the Health Service Executive.\textsuperscript{29}

What of the difference between the different types of decision that agencies make, and how they make them? Is a unilateral, politically-motivated decision by a Minister to be accorded the same level of respect as a regulation which is promulgated by an expert agency after members of the public and interested persons have been given the chance to comment on the record? On a less politically-fraught level, is an individual decision as to entitlement to benefits, which only directly affects one person, more or less deserving of curial deference than a decision taken at a higher level to exclude certain classes of individual from entitlement to benefits?

Finally, a question which has not been addressed in any systemic fashion – perhaps because the answer seems intuitively obvious\textsuperscript{30} – is the justification for curial deference and why a reasonableness doctrine is needed in the first place. Is deference based on the nature of judicial review and the rule of law? Is it based on the separation of powers? Is it derived from the intentions of the Oireachtas? Or is it simply dictated by expediency: that the courts have less expertise than agencies in their specialist areas and do not have the time to run through administrative records with a fine toothcomb? It should be noted that some critics doubt that there is any rationale at all for the existence of a principle of curial deference.\textsuperscript{31}

Addressing the justifications for administrative review alone would require a lengthy review of jurisprudence and commentary from Ireland and elsewhere. These are difficult questions, which will need sustained attention if they are to be answered properly.


\textsuperscript{27} E.g. the Health Service Executive, Commission for Energy Regulation, and the Commission for Communications Regulation: Health Act 2004, s.10; Electricity Regulation Act 1999, ss. 10, 38; and Communications Regulation Act 2002, s.13, respectively.

\textsuperscript{28} Road Safety Authority Act 2006, s.17(16).

\textsuperscript{29} Health Act 2004, s.21(9).

\textsuperscript{30} See the comments of O’Flaherty J (“We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis.” Faulkner v Minister for Industry and Commerce, Unreported, Supreme Court, 10 December 1996); and more recently, Denham J (“The courts approach with caution the review of a specialist body. Such a body has particular expertise to apply to decision-making in their arena. That specialist knowledge is not held by the courts. The process of review by way of judicial review is not a full appeal, but rather a review of the process and fair procedures.” Scrollside Ltd. v. Broadcasting Commission of Ireland [2006] IESC 24.)

News

CD for Bar Benevolent.

If you missed the fabulous launch of “Christmas in the Library”, a CD of Christmas Songs in aid of the Bar Benevolent Fund, you can still buy a copy by contacting Conor Bowman at 01 817 4414 (Cost €20).

Artists include Maddie Grant, Mary Rose Gearty, Chris Meehan, The Bar Choir, Adrian Mannering, Declan Doyle, Cormac MacNamara, Michele Rayfus, Michael O’Donoghue, Jacinta Heslin, Mellissa English, Seamus Noonan, Mastaise Leddy, Conor Bowman and Maurice P. Gaffney

First Non Jury High Court trials in County Mayo

Pictured at the first Non Jury High Court trials in County Mayo were, Henry O’Bourke S.C., Fintan Murphy, County Registrar for County Mayo, Judge John MacMennamin, Judge Paul Gilligan, Judge George Birmingham, Pat O’Connor, President of the Mayo Solicitors’ Bar Association
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Justice, equality and law reform (delegation of ministerial functions) (no. 20) order, 2007
SI 555/2007

Justice, equality and law reform (delegation of ministerial functions) (no. 21) order, 2007
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Justice, equality and law reform (delegation of ministerial functions) (no. 22) order, 2007
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Recent developments in Adverse Possession

Nicholas McNicholas BL

Introduction

There have been a number of recent developments in the law of adverse possession. Firstly, the House of Lords overruled the Court of Appeal in the much celebrated Pye case back in July 2002. Secondly, since October 2003 the Land Registration Act 2002 in the UK has brought sweeping changes to the procedure on adverse possession as it relates to registered land. Thirdly, the Grand Chamber overruled the first Chamber of the European Court of Human Rights, again in the Pye case, as recently as 30 August 2007. Then on 7th September, 2007, Mr. Justice Clarke handed down his judgment in Dunne v Iarnrod Eireann and CIE:1 which on the one hand, is a welcome distillation of the law, but on the other, creates (it is suggested) a novel and hitherto unexplored test for stopping adverse possession, which is very favourable to the paper owner.

Part I of this Article is a comparative discussion of the law in England and Ireland. It looks at the decision in Pye (now that the dust has settled and the Grand Chamber has given adverse possession the all-clear) and compares it to Irish jurisprudence, and in particular, the very recent High Court decision of Dunne v CIE. Part II looks at the test for “ceasing” adverse possession as enunciated in Dunne and suggests that it, wrongly or rightly, breaks new ground. Part III looks briefly at the decision of the Grand Chamber in Pye.

Part I: A Comparative Analysis.

Pye and the Story of The Grahams

The Grahams occupied 23 hectares in Berkshire under a grazing agreement.2 Pye (a large development company) did not renew the agreement when it expired at the end of 1983, nevertheless the Grahams continued in occupation.3 They in fact tried to contact Pye to obtain a further grazing agreement. Importantly, they were allowed to buy the standing crop of grass on the land for £1,100 and this cut was complete on 31 August 1984. From 1 September 1984 on, it was held by the House of Lords that the Grahams no longer had permission to be on the land and thus their possession became “adverse”.4 From September 1984 until 1999, they continued to use the lands without permission.

The Grahams farmed the land to its utmost use. The chartered surveyor who gave evidence stated that he could not think of anything else that they could do with the land. On the other hand, nothing was done by Pye in relation to the land during this time and they showed no interest in it. In 1993, a representative of Pye visited the disputed land to inspect it but even then he only viewed it from the road and from the drive. He did not actually go on to the land. Pye showed no interest in the agricultural management of the land.

The House of Lords held for the Grahams, whom they said had acted honourably throughout though the windfall afforded them sat uncomfortably with Lord Bingham who agreed with Neuberger J when he had said in the High Court5 that it was a conclusion which he reached “with no enthusiasm”. Nevertheless, it was a five Law Lord unanimous decision and the Court of Appeal was overruled without apology.

The House of Lords overruled the Court of Appeal on their application of the law to the facts. Lord Browne-Wilkinson questioned the Court’s conclusion that the initial 11 month agreement for occupation “plainly” did not give exclusive possession to the Grahams. Whilst questioning it, he accepted that there was substantial evidence to hold that it constituted only a licence (particularly that it was actually called and referred to as a “grazing licence”) and did not upset their finding.

It was the “intention to possess” that caused the most trouble. The House overruled the Court of Appeal when they held that a willingness to take a licence or pay rent was not incompatible with an intention to possess. The House concluded that the Grahams did have the necessary intention to possess on their application of the law to the facts. Lord Browne-Wilkinson questioned the Court’s conclusion that the initial 11 month agreement for occupation “plainly” did not give exclusive possession to the Grahams. Whilst questioning it, he accepted that there was substantial evidence to hold that it constituted only a licence (particularly that it was actually called and referred to as a “grazing licence”) and did not upset their finding.

1 Unreported, High Court, 7th September 2007
2 The Court of Appeal held that it was occupied under a licence and the House of Lords although it expressed doubt as to whether it was “possession” or “licence” but accorded with the Court of Appeal on this point. J.A. Pye (Oxford) Ltd. v. Graham [Court of Appeal] [2001] Ch 804 and J A Pye (Oxford) Ltd v Graham [House of Lords] 418.
3 On this point, crucially in the House of Lords the Court of Appeal was overruled in holding that the Grahams merely continued under a licence, and that they in fact went beyond the terms of any licence and into possession, whether or not they were in possession or not under the actual terms of the licence.
4 The Court of Appeal had said that the Grahams were not in possession at all as it had been under a “licence”.
5 Neuberger J [2000] Ch 676
6 Witness statements as under the Civil Procedure Rules, 1998
The 4 Principles in Pye

Lord Browne-Wilkinson put to rest many notions which he referred to as “heresies” that had grown up out of jurisprudence in adverse possession cases. He set out the law as he saw it, firmly and without ambiguity. I have taken 4 key principles from his speech and tested them against the law in Ireland. The principles are as follows:

(1) That the word “adverse” in the Limitation Acts of 1939 and 1980 was an unfortunate addition and that contrary to what had been thought, possession for time to run does not have to be “adverse” at all. All the possessor has to do is enter into ordinary possession without permission, with the requisite intention to possess;

(2) That possession in the context of a claim for land being statute barred involved ordinary possession which was made up of two elements namely (i) factual possession and (ii) an intention to possess. That factual possession denotes a degree of adequate control or sufficiency and varied according to the circumstances particularly the nature of the lands and the use to which they were normally put to or that the possessor was doing as much on the land as the owner would be expected to do;

(3) That an intention to possess was an “intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow” and that it does not mean an intention to own or acquire title. Furthermore, that there is no incompatibility between a squatter being willing to pay the paper owner if asked and his being in the meantime in possession. It was on this point, predominantly, that the Court of Appeal had erred, according to the House.

(4) That the idea that possession depends on the intention of the paper owner is heretical and wrong and that at the very most, only an inference that can be drawn from the actions or inactions of the possessor in view of the expressed intentions or interests of the paper owner if appropriate.

The 4 Principles tested against the law in Ireland

The judgment of Clarke J in the recent case of Dunne is a good place to start. Curiously, Clarke J did not refer at all to the decision of the House of Lords in Pye but did refer to the celebrated judgment of Slade J (as he then was) in the High Court in Powell v. McFarlane upon which the House of Lords heavily relied. This case was heard before the Pye case had been approved on human rights grounds and this may have a bearing on its absence from mention.

Clarke J set out the test as he saw it at page 12 of his judgment and formulated it as follows:

1. Is there a continuous period of twelve years during which Mr Dunne was in exclusive possession of the lands in question to an extent sufficient to establish an intention to possess the land itself, rather than to exercise grazing rights or the like over it.

2. Is any contended period of possession broken by an act of possession by CIE. If so, time will only commence to run when that act of CIE terminates.10

He qualified the second part of the test by holding that the sufficiency of the act of possession required for CIE to break possession and wind the clock back to zero, was a very low threshold. This would be satisfied by even the slightest of acts of possession on the part of the paper owner.

Principle No. 1

In formulating the test to be applied, Clarke J avoided getting bogged down by the niceties of words like “adverse” or “inconsistent” and his judgment in the author’s view benefits as a result. This very much accords with what Lord Browne-Wilkinson was at pains to point out in Pye, namely that the word “adverse” causes more confusion than anything and adds nothing to the test for the limitation defence. Thus, it would appear Clarke J. was ad idem with Principle No. 1 above.

Principle No. 2

In relation to Principle No. 2 above, Clarke J at page 8 of his judgment agreed that factual possession and intention to possess was necessary to amount to ordinary possession and that factual possession meant “single and exclusive possession”11 which entailed a “sufficient degree of exclusive physical control”. He stated that the possession must be “objectively viewed by reference to the lands concerned and the type of use which one might reasonably expect a typical owner to put those lands to.”12

7 “An admission of title by the squatter is not inconsistent with the squatter being in possession in the meantime.”
8 [1977] 38 P&CR 452
9 Lord Browne-Wilkinson stated “Although there are one or two
10 It is also abundantly clear by now that the possession has to be without the consent, permission or licence of the paper owner. This is the essence of “dispossession” cf. Powell’s case (1977) 38 P&CR 452 Slade J at page 459.
11 Citing Slade J. in the High Court of England and Wales, In Powell v McFarlane (He became Slade L.J. by the time he delivered his judgment in the Court of Appeal in Buckinghamshire County Council v Moran [1990] 1 Ch. 623.
12 Para. 4.5, page 9, unreported judgment
The “sufficiency” of possession was described in the often cited passage in *Lord Advocate v. Lord Lovat* as follows:

“The question whether a defendant who relies on the Statute of Limitations was and is in adverse possession must be considered in every case with reference to the particular circumstances …., the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with due regard for his own interest.... all these things greatly bearing as they must under various conditions, are to be taken into account in determining the sufficiency of a possession.”

This has been followed in many of the Irish authorities on the topic.  

It is also said that possession in Ireland needs to be “obvious” or of a “definite character”. This requirement is really one of “sufficiency” of possession any by definition therefore relevant to whether or not there is an intention to possess. Either way, it can be squared with *Pye*.

**Principle No. 3**

In relation to Principle 3, it seems clear that Clarke J. did not suggest that the intention to possess was an “intention to own or acquire title”. Paragraph 1 of his test refers to an “intention to possess the land itself”. He did not go so far as to say that it was an “intention to possess so far as is reasonably practicable”. In *Pye*, the Court held that an intention to possess was there if it was an intention to possess so far as reasonably practicable. Lord Hutton quoted and endorsed Slade J in *Powell* who explained what is meant by “an intention on his part to .... exclude the true owner”:

“What is really meant, in my judgment, is that the *animus possidenti* involves the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.”

It is now well established that *Powell v McFarlane* is good law in Ireland and in the UK as it has been approved and cited on numerous occasions. Slade J’s rider of “so far as is reasonably practicable” has not received the express approval of the Irish Courts but it should certainly be argued by a squatter if helpful to his case.

Clarke J in his judgment made reference to the fact that the plaintiff, Mr Dunne, had not excluded local children who used the lands under question frequently. This (although it was not expressed in this way) may have indicated that he did not intend “to exclude the world at large”. Clarke J stated that accordingly, Mr Dunne was not the “exclusive user”. There is no indication that Mr Dunne had excluded the children “as far as reasonably practicable” or whether if he did, that would have been enough to maintain an intention to possess. Therefore it is not yet clear whether Irish Law accords with Principle No. 3 above.

In order to determine what is meant by “exclusive possession” one can look at the now favoured decision in *Powell’s case* (1977) 38 P&CR 452 at 470–471 Slade J said:

“Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so”.

In *Pye*, the House of Lords endorsed this view. The last sentence indicates that the test might be: was the possessor acting as you would expect the occupying owner to act?

There is a good argument therefore that if a possessor has done no more or less than what the occupying owner would have been expected to do, given the nature of the land, the way it was commonly used or enjoyed etc, then he is in exclusive possession, even if others used it from time to time. This, it could be argued, can only ever be to do “what is reasonably practicable”.

Secondly there was no indication in *Dunne* whether the Plaintiff would have, if asked, being willing to pay for the use of the land or whether this would have effected the outcome. In *Pye*, the Court had approved what was said in *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, 24 by Lord Diplock that an admission by the squatter to that effect “which any candid squatter hoping in due course to acquire a possessory title would be almost bound to make” did not indicate an absence of an intention to possess. It remains to be seen whether the Irish courts will follow this.

**Principle No. 4**

In relation to Principle No. 4, Clarke J again clarified the law in this regard and affirmed that Irish law accords with *Pye* in this regard. Clarke J approved the judgment of Barron J. in *Seamus Durack Manufacturing Limited v. Considine*, (1987) I.R. 677 whereby he accepted that the future intended use of the property by the paper owner could not be relevant except

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13 (1880) 2 App. Cas. 173.  
16 In his judgment at pp 471-472
Perhaps as one of the indicators relevant to a bona fide held intention to possess, or lack thereof.

Part II: A critique of the new test.

Clarke J. cited with approval Slade J. (as he then was) in Powell v. McFarlane when he stated:

“...an owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest of acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession.”

Slade J. was however talking about what acts were necessary to negative the initial discontinuance of possession by the paper owner, such that the squatter can move into ordinary exclusive possession. He was not talking about the paper owner re-establishing possession after dispossession or discontinuance of possession had occurred.

Clarke J. put the test another was as follows:

“The real question which I need to ask, therefore, is as to whether Mr. Dunne can establish a single continuous twelve year period during the last 30 years in which he was in exclusive possession of the lands in question to such a degree as would be reasonable having regard to the standard of an owner making normal and usual use of lands of the type in question and during which twelve year period no act of possession, however slight, occurred by or on behalf of CIE.”

The author can find no other application of a similar test in the jurisprudence of Ireland or the UK. Neither is there an indication in the words of the Statute that this is the test to be applied and as such, it represents new territory. It is well known that adverse possession is a limitation defence and during which twelve year period no act of possession, however slight occurred by or on behalf of CIE.

The phrase “slightest of acts” used by Slade J. does crop up in earlier and later cases. These cases are Ocean Estates Ltd v Pinder, Portland Managements Ltd v. Harte and Others, and in Mount Carmel Investments Ltd v Peter Yablow Ltd and Another.

However, the phrase “slightest of acts” was only used and approved in relation to a paper-owner who had been out of possession re-establishing a possession in order to take and maintain an action for trespass (either for damages or possession).

In Ocean Estates Ltd v Pinder [1969] 2 AC 19, can be found the first mention of the phrase “slightest of acts” by Lord Diplock used by Slade J in Powell:

“This contention is based upon a relic of the ancient law of seisin under which actual entry upon land was required to perfect title and to enable the owner to bring a personal action founded on possession such as ejectment or trespass. In Bristow v. Cormican (1878) 3 App.Cas. 641, Lord Blackburn, at p. 661, explains how in the development of the action of ejectment the entry ceased to be actual and became a mere legal fiction. It is in their Lordships’ view unnecessary to consider to what extent at the present day, more than a century after the abolition of forms of action, actual entry by the person having title to the land is necessary to found a cause of action in trespass as distinct from ejectment or recovery of possession. Put at its highest against the plaintiffs it is clear law that the slightest acts by the person having title to the land or by his predecessors in title, indicating his intention to take possession, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title unless there can be shown a subsequent intention on the part of the person having the title to abandon the constructive possession so acquired: see Bristow v. Cormican (1878) 3 App.Cas. 641, Lord Hatherley at p. 657, and Wuta-Ofei v. Danquah [1961] 1 W.L.R. 1238.

In the present case, the plaintiffs can rely upon the entry on the land by Mr. Chipman on behalf of the Chipper Orange Co. Ltd. from 1941 to 1946 and his use of it for growing fruit trees, and upon their own entries by their architect in 1957 and by their surveyor in 1959-60. In addition to being enough in themselves to establish sufficient possession to bring an action for trespass these later entries negative any intention on the part of the plaintiffs to abandon possession, having regard to the purpose, viz that of eventual building development, for which the plaintiffs held the land.”

These dicta were upheld by the Court of Appeal in Portland Managements Ltd v. Harte and Others. Scarman L.J. stated at page 182:

“I cite those cases in support of the proposition, which appears to me to be clear law, that when an owner of land is making a case of trespass against a person alleged to be in possession, all that the owner

17 Para. 4.6, page 9 of the unreported judgment.
18 Para. 4.9, page 10 of the unreported judgment
19 Not any more in the UK, since the Land Registration Act 2002.
20 [1969] 2 AC 19,
21 [1976] 2 W.L.R. 174, Court of Appeal, Scarman L.J
22 [1988] 3 All ER 129, Court of Appeal
23 [1976] 2 W.L.R 174
The Court of Appeal in *Mount Carmel Investments Ltd v Peter Thurlow Ltd and Another*24 limited the operation of the dicta, stating that the mere assertion by the paper owner of his title through a letter to the squatter is not enough to stop time running.

The law in the UK stipulates that only certain acts will break the adverse possession in the UK. For example, in *Markfield Investments Ltd v Evans*, Simon Browne L.J. stated the law as follows:

> “Essentially, therefore, the true owners’ cause of action accrues once his land is in adverse possession, and continues to be treated as accrued unless and until the land ceases to be in adverse possession. Adverse possession may cease (a) by the occupier vacating the premises, (b) by the occupier giving a written acknowledgment of the true owner’s title (see sections 29 and 30 of the 1980 Act), (c) by the true owner’s grant of a tenancy or licence to the occupier (even a unilateral licence: see *BP Properties Ltd v Buckler* (1987) 55 P & CR 337), or (d) by the true owner physically re-entering upon the land. Once, however, the land has been in continuous adverse possession for 12 years, the occupier is barred by section 15 from bringing an action to recover it and, indeed, his title to the land (assuming, as here, that it is registered) becomes held in trust for the adverse possessor who may himself apply to have the title registered in his own name.”

Finnegan J had stated in *Feehan v Leamy* in relation to dispossession:

> “The plaintiff here at no time had any cattle or other animals on the land and did not require the same for grazing. The only use to which he put the land was to visit it on a number of occasions each year when he would park his car and standing on the road or in the gateway look over the hedge or the gate into the same. He was never prevented from doing this by the second named defendant. Insofar as the plaintiff’s title is concerned the presumption is that it extends to the centre of the road and so when standing at the gate looking into the lands the plaintiff was in fact standing on his own lands. This he did from the evidence several times a year throughout the period in which the second named defendant claiming to have been in adverse possession. As I understand his evidence, the plaintiff was exercising all the rights of ownership which he wished to exercise in respect of the lands pending the determination of litigators. I find as a matter of fact that he was not dispossessed.”

In *Dunne*, the “acts of possession” were in fact potentially much greater than the acts in *Feehan*. However, Clarke J seemed to implicitly accept that they were still “minimal” but enough in all the circumstances to wind the clock back. The defendant had carried out renovation works over a period of one year and a half to a station which was at one end of the land. The defendant had also (pursuant to a complaint by a neighbour) sent out a contractor to re-establish the fences between the neighbour’s land and the disputed lands. Either of these acts it would seem would have been enough to wind the clock back.

Clarke J seemed to state that these acts were still “minimal” when he stated:

> “I am mindful, of course, that the acts concerned did not involve the entirety of the lands. The station works were at one end of the lands, the fencing to Mr. Kavanagh’s property on the other. However the lands were not divided in any way so that one could meaningfully state that a party was in possession of some but not all of them. Therefore, it seems to me that, though minimal, the acts of possession by CIE must be taken to relate to all of the lands at the relevant times.”

In conclusion, Clarke J’s judgment represents on the one hand a most welcome clarification of the law on establishing adverse possession. On the other hand, the test for “ceasing adverse possession”, if the author’s view is correct, would appear to be a novel formulation and hitherto unexplored. There is a strong legal foundation for the approach, because of the presumption that the paper owner intends to take possession. However, should the same test be applied for re-possess, once possession has been lost or abandoned? Or, is it right that minimal or co-incidental acts that look like possession or an intention to possess are enough to stop time running, even though an intention to re-possess might not exist?

With the threshold for re-possess so low, and the test so favourable to paper-owners, it is difficult to see how a possessor can win, short of the paper-owner being unaware of his title, or being abroad, or having absolutely no interest over the land. Perhaps, however, this is the correct scope for the doctrine. Perhaps if this had been the law in the UK, the human rights dimension would never have been in question.

### Part III: The Effect of the Grand Chamber Decision

The Grand Chamber of the ECHR handed down their decision on 30 August 2007 at a public hearing in Strasbourg. The judges were by no means in agreement. They voted 10:7 to keep the doctrine as it exists.

Article 1 of Protocol No. 1 provides:

> “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in

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24  [1988] 3 All ER 129
25  [2001] 1 WLR, Simon Browne L.J. at page 1324
any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The Grand Chamber held that in order to be compatible with the general rule set forth in Article 1, an interference with the right to the peaceful enjoyment of possessions must “strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.

The Grand Chamber held that a “fair balance” was achieved and that although it was not disputed that the land lost by them was worth a substantial sum of money and that the Grahams had fallen into a substantial windfall, limitation periods, if they are to fulfil their purpose at all must apply regardless of the size of the claim. Therefore, the value of the land was of no consequence.

The Grand Chamber held that the law as it exists is used as a “control of use” of land by the State and not a “deprivation of possessions” which might have warranted a compensatory regime. It was on this point that Mr Palmer had failed in the case of Beaulane Properties Ltd v Palmer. He had successfully established adverse possession, but the law was held incompatible with Article 1.

The Irish government very much supported, echoed and added to the submissions made by UK government. They had a similar vested interest to avoid a system of compulsory compensation for those dispossessed by the operation of the doctrine. They put forward several areas of public interest which are served by the law. They cited the quieting titles and clarification of title where land, whether registered or unregistered, had remained abandoned and was occupied by another person; the failure to administer estates on intestacy; the desirability of using land to advance economic development; the perfection of title in cases of unregistered title, and in dealing with boundary disputes.

The Irish Government also submitted that ownership of land brings duties as well as rights, and the duty to take some action to maintain possession was not unreasonable. It submitted that the Chamber should not be influenced by post hoc legislative changes which provided a higher standard of human rights protection. By this, they were referring to the limitation periods.

They referred to the antiquity of the doctrine and the familiarity of purchasers and owners of land with it, and submitted that the doctrine did not upset “the fair balance between the public interest and the right to peaceful enjoyment of possessions”.

The ECHR has no Irish judges and only one British judge out of a total of some 46 judges. The British judge, Sir Nicholas Bratza dissented along with a Greek, Macedonian, Slovakian and Armenian Judge. A separate dissenting opinion was delivered by one Russian and one Cypriot judge. The dissenting opinions are of more interest.

The 5-judge dissenting opinion stated that whilst they could accept that where land is abandoned, it may be in the general interest that it should be acquired by someone who would put it to effective use, they could not accept that this general interest would extend to depriving a registered landowner of his beneficial title to the land except by a proper process of compulsory acquisition for fair compensation. The 5-judge opinion also stated that the general interest served by the law of adverse possession in the case of registered land was of limited weight and the impact of the law on the registered landowner was exceptionally serious. They accordingly felt that a fair balance had not been struck and that there were no adequate safeguards to protect the registered owner’s legitimate title. Interestingly, they agreed that a system of compensation was not the answer either, as this did not sit well with the operation of limitation periods. However the lack of compensation was relevant to the overall proportionality of the control of use of land by the State.

The Russo-Cypriot opinion was even more forthright dismissing the notion of there being any legitimate aim with regard to registered land and holding that the affect of the doctrine was entirely disproportionate and that no fair balance was struck. They stated: “I do not see how illegal possession can prevail over legitimate ownership (de facto v. de jure).”

**Part IV: Conclusion**

The sustainability of such an antiquated doctrine in an era of registered land hangs very much in the balance. However, for the time being, it has survived a Grand Chamber of 17 judges from countries with very different legal systems from our own common law system (or that of the UK). As it turns out, the UK took a more Article 1-compliant stance than the Grand Chamber itself by its pre-emptive amendment of the law in England and Wales on adverse possession in the Land Registration Act 2002.

Sections 15-17 of the Limitation Act 1980 no longer apply to registered land and a new “early warning” system after 10 years has been introduced. The changes mean that after 10 years, a possessor may apply to register his title but he must first give notice to the Registrar who, in turn, gives notice to the legal owner. The legal owner must oppose the registration and then a two-year clock starts to run within which time the owner must take steps to regularise his title, namely by taking eviction proceedings and also, importantly, enforcing any order for possession within that time. The Act also gives a statutory recognition to any equity the possessor may have and allows registration where he can show that equity.

The Act only applies in the jurisdiction of England and Wales. Adverse Possession in the context of registered land is now to be considered in applications for registration by the Chief Land Registrar or by an Adjudicator to whom appeals can be made. Therefore the Courts’ workload is eased. Hearings are in public. The meaning of adverse possession is unchanged and the definition as it stands in Pye therefore continues unchanged. The Land Registry gives guidance on
Conveyancing Law Reform Bill 2006, which has been passed by the Senate and is entering its second stage. It can only be assumed therefore that the legislature have no desire at this stage to amend the law.

The definition of the concept of adverse possession has remained the same and has been clarified by the House of Lords in Pye as well as Dunne. Also, the pre-October 2003 system has been held to be human rights compliant by virtue of the Grand Chamber decision on 30 August 2007. There is now a distinct difference between the two jurisdictions in terms of (a) the definition of an intention to possess and (b) the test to be applied in ceasing adverse possession. On both counts, the paper owner comes out more favourably in Ireland as the law stands. Therefore although the fairness of the system in an era of registered land, still hangs in the balance, there is no obligation on Ireland to follow the suit of the UK.

In Schedule 6, adverse possession is defined simply as follows: “A person is in adverse possession of an estate in land for the purposes of this Schedule if, but for section 96, a period of limitation under section 15 of the Limitation Act 1980 (c 58) would run in his favour in relation to the estate.”

The Law Reform Commission has recommended amending the law on adverse possession in a consultation paper in 2002 and in a further paper in 2005. The recommendations were put forward in a section of that paper entitled “The Limitation of Actions”. However it looks like the proposed amendments were left out of the Law and

28 http://www.landreg.gov.uk/info/noticeboard/item/?article_id=12487
29 LRC 67 of 2002
30 LRC 74 of 2005

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Diminished Responsibility and the Insanity Defence

Diane Duggan BL

Introduction

The development of the concept of criminal responsibility reached a watershed last year with section 2 (1) of the Criminal Law (Insanity) Act 2006 which introduced Diminished Responsibility into Irish Law:

(1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person:
(a) did the act alleged,
(b) was at the time suffering from a mental disorder, and
(c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,
the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.

From the outset it must be noted that this article is not a commentary on the legislation, as this has been done when the Act was introduced as a bill in 2002. Rather, this is an examination of how diminished responsibility came about within the context of the development of the insanity defence and the legal environment within which it will feature.

The extent to which an accused can be held responsible for their actions has been debated and argued in courts for centuries. In the past 150 years, legal systems have slowly come to acknowledge advancements in medical and behavioural sciences, in tandem with recognition of the fact that certain circumstances reduce the culpability of the accused. The onset of diminished responsibility is the latest development in this regard, and will arguably become quite a prominent feature of criminal law in time to come.

The defence can only be used on a charge of murder and in recent months, it has had its first foray in Central Criminal Court murder trials, essentially as a partial defence to the charge. To examine its implications in full, it is necessary to develop in order to properly view the circumstances in which diminished responsibility has emerged, and for this, insanity law is a useful frame of reference.

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Background to Criminal Responsibility

The law in this area has been set out extensively in Irish caselaw and older law was succinctly analysed by O’Hanlon J. in his 1967 article. It is necessary to have regard to early developments in order to properly view the circumstances in which diminished responsibility has emerged, and for this, insanity law is a useful frame of reference.

It is necessary to state at this point that diminished responsibility does not naturally stem from the insanity defence. They are quite different concepts, which is not alone reflected in their conviction implications, but also in the statement their findings make about the human mind. The insanity defence prescribes a particular label on the accused, whereas diminished responsibility claims that the accused was suffering from a mental disorder at the time of the offence. They are connected however by the manner in which they both require expert testimony. When questions are raised about the state of the mind of an accused, inevitably, either defence will be employed. This close relationship is also demonstrated in the wording of the 2006 Act, whereby when an accused is found to be suffering from a mental disorder, it is open for the jury to decide whether or not it amounts to insanity or diminished responsibility.

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1 Criminal Justice (Insanity) Act 2006 s.6(1)
2 Section 2(1)
4 Not Guilty because of Insanity, Ir. Jur 1967 Vol 3
5 The insanity defence denotes a conviction of ‘Not Guilty by Reason of Insanity’, while the diminished responsibility defence results in a finding of not guilty of murder, but guilty of manslaughter by reason of diminished responsibility.
6 Section 6 (1) (c) “the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act”
The English Precedent

As far back as the 17th century, there was a certain level of intolerance towards any measures that were seen to excuse an individual from the responsibility of having committed a crime. The level of proof required was extremely high and somewhat unrealistic. Coke's “wild beast” definition persisted for quite some time, most notably in the 1724 trial of Arnold wherein the jury were told that a man must be “totally deprived of understanding and must not know what he is doing no more than an infant, a brute or a wild beast” to avail of an insanity defence.

A more enlightened era was heralded in the Hadfield case in 1800 where it was agreed that previous insanity definitions were never truly met in reality and the jury were told that “if a man was in a deranged state of mind at the time, he is not criminally answerable for his acts.” This era of enlightenment did not prevail however, particularly because the message Hadfield’s acquittal sent out was that it was possible for someone to attempt to kill the King and be acquitted.

The seminal case of M’Naghten in which the accused was acquitted on the basis of the insanity defence led to such controversy, that Judges were summoned by the House of Lords to make judicial pronouncements about the state of the insanity defence. This was an extremely unusual move and the judiciary objected to being asked to make law without reference to a specific case. From this quagmire, the M’Naghten Rules emerged. This aspect of the history of the insanity defence is probably the most cited and most criticised. Even those defending the rules stated that “although the present law lays down such a definition of madness that nobody is hardly ever really mad enough to be within it, yet it is a logical and good definition.”

This demonstrates quite clearly the conflict that always existed in attempting to cater for the fact that in certain cases, the accused was not in a position to be held fully responsible, if at all for his actions. There were always competing interests at play even before advancements in medicine and psychiatry entered the field. While there were attempts to exhibit that mens rea was lacking due to mental conditions, this was often overridden by the security interests of the Crown. Deliberations at defining flawed mental capacity were so problematic that they were overridden by the need to make concise and applicable law. The fact that the M’Naghten Rules were not borne out of specific circumstances (albeit instigated by a specific case) has been heavily criticised. Questions surrounding a state of mind are so complex in any individual case, that providing answers for one case alone would have been difficult. Having to enforce blanket rules was wholly problematic, particularly in an era where there was little sympathy for mental deficiencies.

It must also be noted that the decision to raise such a defence as insanity came about in an environment where the death penalty was a potential outcome. This affected the nature of its development. The confines of the era from which the M’Naghten Rules were born are in stark contrast to the contemporary legal climate which has provided us with diminished responsibility.

Development in the United States

As the M’Naghten Rules were held as the authority for the insanity defence across common law jurisdictions, reaction to them and development from them varied outside of England. US law was the first to show signs of moving away from M’Naghten as behavioural sciences began to emerge. This was manifest in the Durham Rule and Model Penal Code. The Durham Rule was set out by Judge Bazelon in which he stated that an accused is not criminally responsible if his act was the result of a mental disease or defect. This was not universally applied however, but was closely followed by the rule from the Model Penal Code wherein it was decided that the M’Naghten Rules should be abandoned and replaced by this code which accounted for the possibility of a mental disease or defect which would lead to the accused lacking capacity to appreciate the wrongfulness of his conduct. Judge Irving R. Kaufman stated that:

“the rule, moreover, reflects awareness that in the perspectives of psychiatry absolutes are ephemeral and gradations inevitable. By employing the telling word ‘substantial’ to modify ‘incapacity’ the rule emphasises that any incapacity is not sufficient to justify avoidance of criminal responsibility, but that total incapacity is also unnecessary.”

Here it was clear that law was beginning to recognise in a positive manner, the complexities that arise when questioning the state of the human mind and that there were varying degrees of conditions within such.

The Irish Position

Change was not quite so clearcut in Ireland. There appeared to be a certain will to move away from M’Naghten in the early twentieth century, as attempts were made to advocate for certain categories of insanity. This was demonstrated in arguments for irresistible impulse as opposed to full insanity. In AG v O’Connor, it was held that uncontrollable impulse was not allowed as a defence and soon after, in AG v O’Brien, it was stated that there was no evidence to substantiate the defence of irresistible impulse. However, it was stated in O’Brien that the M’Naghten Rules were not comprehensive.

References:

1 R v Hadfield (1800) 27 St. Tr. 1281, per Lord Kenyon CJ
2 R v M’Naghten (1843) 4 St. Tr. M’Naghten was accused of murdering Edward Drumond, in the mistaken belief it was the Prime Minister, Robert Peel. He claimed the insanity defence in that he was being persecuted by the Tory party and that his life was in danger.
3 For a full reproduction of the rules see O’Hanlon, Not Guilty because of Insanity (see 4).
4 Baron Bramwell commenting on the rules before the select committee on Sir James Stephens Homicide Law Amendment Bill in 1874. See 4, p. 67
5 Durham v United States, 214 F. 2d 862 (1954)
6 Subsequent to United States v Freeman 357 F. 2d 606 (1966)
7 1933 I.J. Ir. 130
8 [1936] IR 263
and that in the correct circumstances, a case for irresistible impulse may be possible:

“No doubt substantial grounds of objection in practice may be raised against admitting the defence of irresistible impulse…but the English Court of Appeal notwithstanding, that is not sufficient to rule it out of consideration if it be shown to rest on any established principle of criminal law.”

This indicated a tentative acknowledgement by the courts, as early as 1936, that M’Naghten was not the definitive statement on mental conditions. However, it would be some time before the courts took positive action in this direction and make a ruling contrary to M’Naghten, and it is only when this would happen that conditions would be right for diminished responsibility to emerge. The length of time was illustrative of the slow and sometimes hesitant pace of change in Ireland as opposed to Britain where the M’Naghten rules were robustly defended until the introduction of the Homicide Act 1957 which altered English insanity law with the provision for diminished responsibility. The requisite test was where the accused was suffering from an abnormality of the mind, his mental responsibility for his acts was substantially impaired. Despite the fact that the M’Naghten rules still applied for the insanity defence, diminished responsibility introduced a certain vernacular into English law which paved the way for medicine and psychiatry playing a role in cases where the mental culpability of the accused was questioned and recognized the degrees to which mental impairment and deficiencies could occur.

This contrasted with the pace of change in Ireland. While inclinations to move away from M’Naghten rules were intimated by the courts here, no such moves were manifest until perhaps the case of *People (Attorney General) v Hayes* which O’Hanlon commented upon as follows:

“The charge of the trial judge appears from the newspaper reports to have contained a radical restatement of the law as to insanity which – if followed – will have brought the law in this country very much into line with modern law in the US and will have carried it well beyond the stage which has hitherto been reached in England.”

*Doyle v Wicklow County Council* was a vital case in Ireland in that it acknowledged the restrictive approach the M’Naghten rules set forth for the insanity defence, noting that there was little or no input from behavioural sciences into their inception. It illustrated that a greater psychiatric contribution was required to better define legal insanity. Griffin J made reference to Henchy J’s ruling in *Hayes* where he outlined:

“[The M’Naghten Rules] do not take into account the capacity of a man on the basis of his knowledge to act or to refrain from acting, and I believe it to be correct psychiatric science to accept that certain serious mental diseases, such as paranoia or schizophrenia, in certain cases enable a man to understand the morality or immorality of his act or the legality or illegality of it, or the nature and quality of it, but nevertheless prevent him from exercising a free volition as to whether he should or should not do that act.”

The cases of *Doyle* and *Hayes* both widened the scope of issues to be considered in criminal responsibility, particularly by raising the notion of volitional insanity and the flaws of M’Naghten, given that it was purely a knowledge based test. This signalled that there were many perspectives in how the insanity issue should be approached and was a further example of gradual moves in Irish law away from M’Naghten.

Despite this mood for progressive change in the area of criminal responsibility, there was no conclusive statement in legislation or otherwise to bring Irish law up to speed with other jurisdictions. Thus when the defence of diminished responsibility was raised in *DPP v O’Malley* in 1985, it was wholly rejected on the grounds that there was no basis for such a defence in Irish law. Finlay CJ commented as follows:

“It seems to me impossible that, having regard to these considerations, there could exist side by side with what is now the law in this country concerning a defence of insanity a defence of diminished responsibility such as has been contended for in this case which would, in effect, leave to an accused person and his advisers the choice as to whether to seek to have him branded as a criminal or whether to seek on the same facts the more humane and, in a sense, lenient decision, that he was not guilty of a crime by reason of insanity.”

This comprehensive statement made it clear that the only defence available when an accused’s mental capacity was in question in this jurisdiction was the insanity defence. The authority for the insanity defence by this point was *Doyle* however, it was becoming evident that in certain circumstances a number of cases would fall short of reaching the requirements of an insanity defence while the mental capacity in question in these cases was still flawed to a certain extent. The changes brought about by the Criminal Law (Insanity) Act 2006 were therefore much welcomed.

**Diminished Responsibility – the Irish Definition**

The wording of the 2006 Act differs from its much older English counterpart. The 2006 Act describes a situation where the accused may be suffering from a ‘mental disorder’, whereas in England the test requires ‘an abnormality of the

9 ibid at 271
10 Unreported, CCC, 30th November 1967, Henchy J.
11 ibid n4 at 61
12 [1974] IR 55
13 ibid n16
14 ibid n18 at 71
15 [1985] IR 517
16 ibid at p.523
17 ibid n18
18 Criminal Justice (Insanity) Act 2006, s. 6(1)
mind. The 2006 Act defines a ‘mental disorder’ as including ‘mental illness, mental disability, dementia or any disease of the mind but does not include intoxication.

English law was not so express in its preclusion of intoxication and there have been grounds for it to be included in certain circumstances such as if alcoholism gave rise to an abnormality of the mind. This is an interesting point because in the first case to go to a jury in this State since the enactment of the 2006 Act, DPP v John Collins where diminished responsibility was raised as a defence, the accused’s alcoholism was a crucial factor in determining the extent of his responsibility. The accused was ultimately unsuccessful in pleading diminished responsibility on the basis of the fact that his Alcohol Dependency Syndrome and resulting organic brain damage was found not to amount to a mental disorder within the meaning of the Act.

It is of note that the Act sets out how the mental disorder in question must “diminish substantially his or her responsibility for the act.” The use of the word ‘substantially’ echoes deliberations decades previously that degrees and gradations of mental deficiency are possible and should be recognised by law. It also assists in ascertaining the extent to which a mental disorder should feature for the defence to be availed of.

The Act also provides that the onus of proof of establishing the defence of diminished responsibility rests on the defence. This is in keeping with traditional practises in insanity law, and the prosecution are afforded the opportunity to rebut evidence adduced by the defence in support of their assertions. This evidence is put forward in the form of expert testimony.

The English term, ‘abnormality of the mind’ has lent itself more to legal definition than medical definition and has been interpreted extensively in the courts. By contrast, the use of the term ‘mental disorder’ in the 2006 Act very much so lends itself to expert testimony as it is a common term for medical and psychiatric professionals. The role of such testimony is worth exploring to some extent.

Role of Expert Testimony in determining Diminished Responsibility

Psychiatrists or other medical practitioners are frequently called upon to give evidence when the insanity defence is pleaded, and will continue to be necessary in determining diminished responsibility. Their role however can sometimes be controversial. Ultimately, the question to be decided in any case will be left to the jury and the expert witnesses merely assist the court in providing information. Nonetheless, interaction between law and the input of medicine or psychiatry or behavioural sciences is fraught with difficulties.

Conflicting Disciplines

Law and psychiatry have contrasting conceptual frameworks. While there have been moves throughout the twentieth century across common law jurisdictions for the two to interact, there has never been a definitive approach to how they should collaborate. Psychiatry is subject to constant research and is constantly updated in endeavours to make true findings about mental capacity. In this manner it is almost a fluid doctrine which is not well met by the adversarial system of law. Concepts within criminal law such as irresistible impulse, voluntary and involuntary acts, volitional and cognitive insanity do not feature in psychiatric language and make the task of the expert witness quite problematic, to the extent where neither discipline understands the other at times.

“…lawyers, with their conceptions of psychiatric disability largely it seems fashioned by the case law on “insanity” may regard legal definitions as synonymous with clinical problems such that neither group can necessarily see the conceptual (and practical) problems encountered by the other.”

The extent to which such a contribution should occur is carefully considered. If expert testimony is to be awarded too much authority in the courtroom, the role of the jurors will be diminished which may affect the adversarial process. However, disallowing expert testimony has proven to render judgements somewhat uninformed. Of this question of balance, McAuley writes:

“The point is that neither [criminal courts or juries] should be compelled to disregard the additional evidence regarding the springs of human action provided by the behavioural sciences.”

The prescribed course of action is for non-experts to continue to use their own judgement, but to take notice of what behavioural science can provide.

Conflict within Psychiatry

It is perhaps a minor issue, but it is worth noting that conflicts can occur within psychiatry itself. The two main tools of diagnosis are the ICD and the DSM. It is within such classifications that psychiatric standards are set in order to comment upon the mental health of individuals. It is worth noting that different editions of the DSM have varied significantly in what constitutes a major mental illness and what criteria is required. As new research and findings are ongoing, the last editions of such diagnostic manuals as

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19 Homicide Act 1957 s.2(1)
20 Criminal Justice (Insanity) Act 2006, s.1
21 R v Tandy [1987] Cr.App.R. 45, CA
22 CCC, March 26th 2007
23 Criminal Justice Act 2006, s.6(2)
24 R v Byrne [1960] 2 QB 396
25 Patricia Casey and Giaran Craven, Psychiatry and the Law (Dublin: Oak Tree Press, 1999) 385
26 Finbarr McAuley, Insanity, psychiatry and criminal responsibility (Dublin: Round Hall Press, 1993) 108
27 International Classification of Diseases, Vol 10 – World Health Organisation
28 Diagnostic and Statistical Manual of Mental Disorders, Vol IV – American Psychiatric Association
the DSM or ICD can quickly become outdated, and prove to be an extra obstacle for psychiatry and law to co-operate. In fact, in the recent case of *DPP v John Collins*, the two expert witnesses clashed on the issue of whether the ICD 10 or DSM IV was the foremost authority in Ireland in an effort to determine which of alternative definitions took precedence.

**How Psychiatry and Law Co-operate**

The problems for expert witnesses were highlighted in research regarding attempts by psychiatric and legal authorities to work together in Oregon, United States. A Psychiatric Security Review Board (PSRB) was established to set the psychiatric standard for determination of ‘mental disease or defect’ (term used in US at the time) in a court of law. However, it proved to be a difficult task as it was not easy for the two disciplines to create a lexicon that worked for both. In this, the relevant legal sources set the legal standard for insanity and the relevant psychiatric sources (PSRB) set the relevant psychiatric standard for determination of mental disease or defect. Inconsistency occurred when psychiatrists using the psychiatric standard were called upon to satisfy the legal standard.

“The problem is that “mental disease or defect” … is not part of psychiatric or psychological nomenclature; thus, experts are free to interpret these legal terms in light of their professional beliefs. Without guidance…there is a lack of uniformity and predictability in the application of these terms…This encourages unseemly battles of experts in court, [and] inconsistency of findings between judges.”

Thus expert testimony can be a minefield for potential experts who seek to reconcile their knowledge with the outcome that the defence or prosecution is looking for. With psychology laying much of its foundations in theory, it is very difficult for experts to provide a concise and definite opinion that meets the requirements of legal insanity.

“Lawyers are rightly skeptical of psychological agonizing over notions of responsibility, they look for practical guidance, rather than expressions of doubt and concerns.”

It may be the case that law does not wish to reconcile itself to behavioural sciences’ efforts to explain human behaviour, rather law seeks an expert who will support legally created concepts. The answers to legal questions are not easily arrived at among expert witnesses, however, the fact that the wording of the 2006 Act is ‘mental disorder’ eases the procedure to some extent.

**Conclusion**

It is contended that in the midst of all these challenges, in terms of how psychiatry and law interact, and conflicts within psychiatry, that it may be less daunting a task to find that an accused fits the criteria for diminished responsibility, by use of the easily transferable term ‘mental disorder’, than it is to find an accused fitting the insanity defence. ‘Insanity’ is a term which is not recognized in psychiatry, and requires a higher level of mental deficiency to be proven in a way that complies with the insanity defence. The 2006 Act states that as well as suffering from a mental disorder, the accused must either:

- not know the nature and quality of the act or
- not know that what they were doing was wrong or
- were unable to refrain from committing the act.

It is also possible that the conviction implications may influence which defence appears more attractive. Persons found not guilty by reason of insanity are committed to a “designated centre” subject to the Mental Health Review Board established under the 2006 Act. Those successfully availing of the defence of diminished responsibility are found not guilty of murder but guilty of manslaughter on the grounds of diminished responsibility. This may be the preferred outcome if a manslaughter verdict is more appealing to an accused than an indefinite period of detention being declared insane.

It could tentatively be stated that because the threshold for a successful plea is slightly lower for diminished responsibility, it will be employed to a far greater extent than the insanity defence in future. It is perhaps an easier task to present a situation to a jury where the accused momentarily lost all reason which caused him to commit the act, than the task of fixing the accused with the label of insanity. Diminished responsibility is the product of a long and controversial path paved by insanity law, but rather than being an ultimately positive concept, some practitioners argue that it is merely medical diagnosis eroding personal responsibility, and to some extent this could be true.

Nonetheless, there are undoubtedly large numbers of convictions in the past where the circumstances dictated that the insanity defence was unsuccessful, but diminished responsibility may well have been pleaded successfully. There has only been one successful plea of diminished responsibility so far since the Act was introduced, with one trial ongoing at the time of writing, but we can be certain that many more will follow.

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29 ibid n28
31 ibid
33 Criminal Justice (Insanity) Act 2006, s.5(1)(b)
34 Criminal Justice (Insanity) Act 2006, s.12
35 *DPP v Patrick O’Brien*, CCC, April 23rd 2007
36 *DPP v Brendan McGaborn*, CCC, November 12th 2007