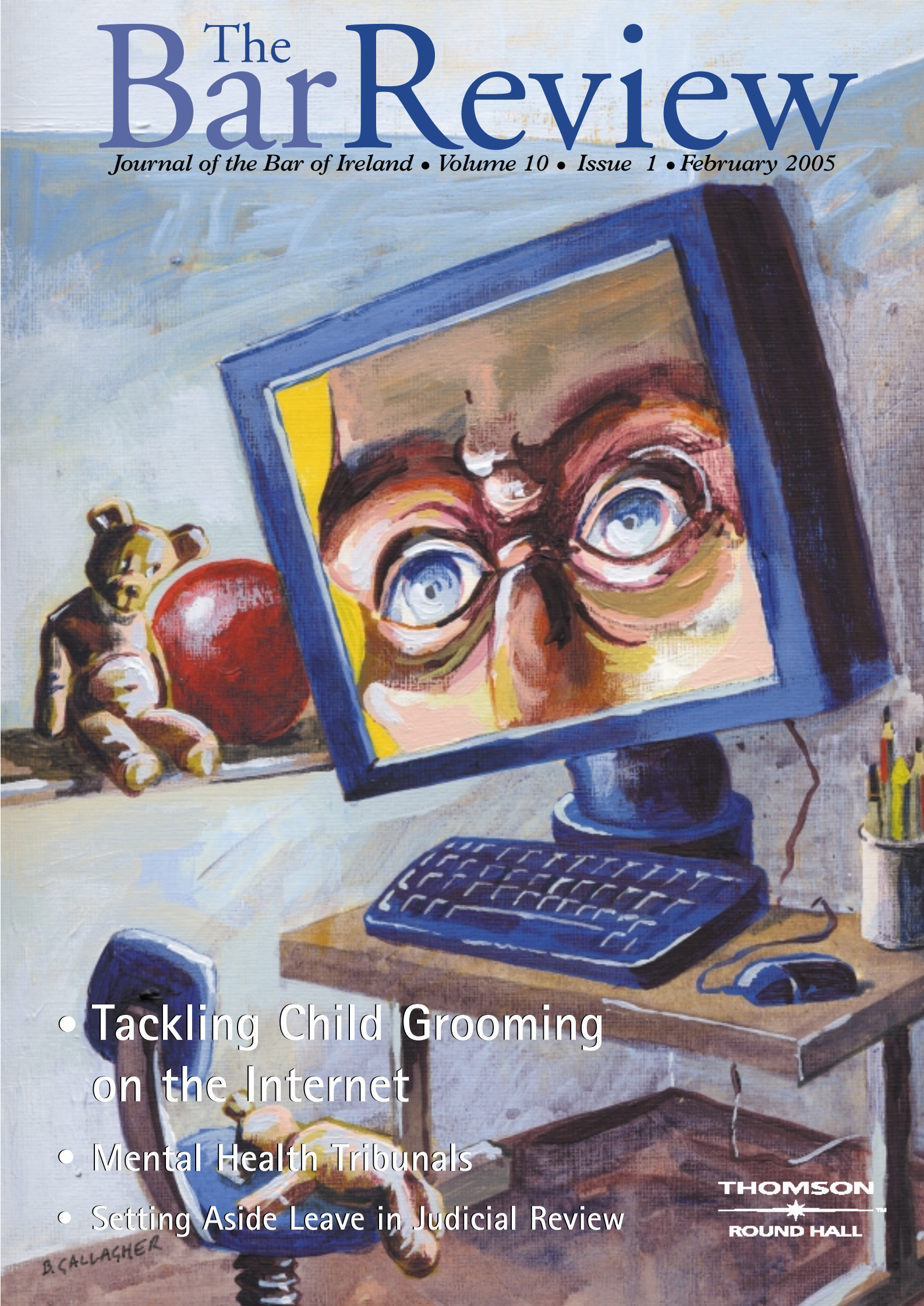
The Bar Review

Journal of the Bar of Ireland • Volume 10 • Issue 1 • February 2005



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THOMSON
ROUND HALL

The Bar Review

Volume 10, Issue 1, February 2005, ISSN 1339 - 3426

THOMSON ROUND HALL

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

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Email: info@roundhall.ie web: www.roundhall.ie

Subscriptions: January 2005 to December 2005 - 6 issues
Annual Subscription: €175.00
Annual Subscription + Bound Volume Service €265.00

For all advertising queries contact:
Directories Unit. Sweet & Maxwell
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The Bar Review Febuary 2005

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It's Not About the Lawyers!

At last, those who may be genuinely prejudiced by the operation of the Personal Injuries Assessment Board are beginning to make themselves heard. At least one union, the Technical Engineering and Electrical Union, has nailed its colours to the mast and stated emphatically that the new system puts injured employees at a very serious disadvantage.

The union represents 40,000 workers, mainly in manufacturing and construction, where workplace safety is a huge problem. The union indicates that it has already direct experience of the defects in the PIAB system in processing employee claims.

Firstly, it decries the "Do it Yourself" approach that is foisted on claimants, who do not have the technical knowledge and expertise to prepare documents that may ultimately be used as evidence in court, if PIAB does not ultimately resolve the claim. Secondly, it points out that there is no provision in the PIAB system to make employers eliminate workplace hazards or unsafe practices uncovered by the investigation of claims. And, finally, the union feels it is obvious that the primary purpose of the legislation is to reduce insurance costs by making it harder for employees to bring claims.

Unfortunately, there is no umbrella group to give a voice to the victims of personal injuries. When the Bar Council or the Law Society venture to express the views of potential plaintiffs, that view is inevitably drowned and derided by the accusation that lawyers are only protecting their already well-feathered nests. The truth is that the insurance industry and employers have successfully pushed through an anti-plaintiff, anti-victim PIAB system. And they have done this, with little opposition from either politicians or the media, because they have very cleverly ridden the anti-lawyer train.

But as the TEEU is trying to point out. It's not about the lawyers! Or at least, the rights of victims should not be drowned out by vested groups who can launch into lawyer-bashing as a means of diverting attention from the real issues.

Mr Justice McMenamin in the High Court has ruled that the PIAB cannot refuse to deal directly with lawyers acting for claimants before the PIAB. He noted that the PIAB procedures, because of their complexity, importance and potential impact on a person's rights, justified the right to legal representation. It is a logical and fair judgment.

Yet, representatives of PIAB have insisted they will appeal. One representative was quoted in the *Irish Times* as saying "that the balance between strong and weak does not arise because no litigation is involved." With all due respect, this is a gross mis-reading of the true effect of PIAB.

A claimant in a personal injuries case cannot institute litigation without first bringing the claim to the PIAB. Indeed, Mr Justice McMenamin noted that the procedures for bringing a claim before PIAB were analogous to the steps necessary to the initiation of legal proceedings. Once the claim is brought to PIAB, the claimant has set out his stall and if he has not followed the correct procedures, or has not set out his case adequately, he may be irrevocably prejudiced. The system is new and untested. Despite protestations to the contrary, it is complex, even for experienced lawyers. One has only to look at the plethora of articles in this journal alone written by legal experts debating the complexities of the PIAB system.

If a claimant is nervous about squaring up against the might of an insurer (with its battery of legal expertise), he ought to be entitled to hire a lawyer to communicate with PIAB and to ensure his rights are safe-guarded. This is perfectly reasonable and fair, particularly when that claimant will have to foot the bill for that lawyer out of his own pocket. Those who run PIAB are so intent on making it a lawyer-free zone that they are missing this key point.

It's not about the lawyers!

It's about victims' rights. It's about fairness.

St. Audeon's Perform Macbeth

Sunniva McDonagh BL

On the 14th of December, the children from St. Audeon's National School in Cook Street performed Macbeth in the Distillery Building. The play was a great success and a fitting tribute was paid to the young actors by Rory Brady SC, Attorney General, who introduced the play.

The Law Library's association with St. Audeon's dates back to September 1999. As well as putting on a play, the children have also performed an annual mock trial in one of the Round Hall Courts. The children play the witnesses and the jury (and sit in a real jury box). Real barristers and a real judge make up the picture. A very popular trial is that involving the theft of a large box of chocolates, the defence to which is one of alibi. The script written by the late Brendan Grogan is still in operation. A different exhibit of chocolates has to be found for each play. When Hardiman J. presided, the exhibit was partially eaten prior to the conclusion of the prosecution case. In the last couple of years, this trial has been kindly co-ordinated by Siún Leonowicz.

Perhaps the highlight of the association with St. Audeon's is the annual play, produced by our former colleague, Nastaise Leddy, which has been put on in the Distillery Building. Most of the pupils from St. Audeon's come from Oliver Bond flats, where there is a strong sense of community that spills over into the school and is kindled by the dedicated staff. The teachers are fully committed to the education of the children and it is an honour that the school widens its curriculum to include annual drama.

In 1999, the association of barristers with the local community was formalised into a Community Liaison Committee. Its projects are funded by kind donations of individual barristers who recognise the importance and value of being neighbours to those who live in and around the Four Courts. Individual barristers currently operate a meals on wheels service and a Christmas party for local primary schools has become an annual event. John Keogh has kindly organised the event. New volunteers and new ideas in relation to furthering these links with the community would be most welcome. The Community Liaison Committee can be contacted care of the Bar Council office.

Banquo (Warren Flood) appears at Macbeth's feast

Lady Macbeth (Daryl Keogh); Macbeth (Stephen Rooney) 'Girl you gotta love your man'
(Riders on the Storm – The Doors)

Witches (Kelvin Caffrey and Natasha Ryan); Rory Brady AG; Macbeth (Stephen Rooney); King Duncan (Martin Sands).

Lady Macbeth (Daryl Keogh); Macbeth (Stephen Rooney)
'Husband don't brood, what's done is done'
'Ah wife, a lot done; a lot more to be done'

Photographs were taken by the Sunday Business Post at the performance of Macbeth.

Tackling Child Grooming on the Internet: The UK Approach

Alisdair A. Gillespie

Introduction

In 2003, the government of the United Kingdom passed a new statute, the Sex Offences Act 2003, which was intended to consolidate and update the law relating to sexual offences and offending. The basis for the law prior to this Act was to be found in the Sexual Offences Act 1956 and successive cases demonstrated that the original law was not fit for the purpose of safeguarding vulnerable members of society from harm.

One of the changes introduced by this legislation was the introduction of a specific offence to tackle the threat of child grooming, particularly in respect of those who use the Internet to solicit children for abuse. This new law had been proposed by a multi-disciplinary and apolitical advisory body known as the Home Secretary's Internet Task Force on Child Protection which had been in existence since 2001[1] which brings together politicians, child protection charities, the industry and other experts with the task of advising the government, through the Home Secretary, on the safety of the Internet for young people. It is chaired by a minister[2] and meets as a full body approximately four-times a year but also as a series of sub-groups.

The Internet Task Force had been established because of concern that some sex offenders were using the Internet to befriend children through this medium, and related technologies, eventually allowing them to meet with the child offline and abuse them. In this article I seek to demonstrate what the Task Force and government did in order to safeguard children from abuse.

Grooming

Before examining the legislative response it is, however, first necessary to try to identify what grooming is. Grooming is neither new nor particularly hi-tech. The grooming of children has taken place over many years as it enabled people to get children to acquiesce to sexual abuse. A very rudimentary example of why this is necessary can be provided by Bob McLachlan, the former head of the Metropolitan Police's Paedophile Unit, who says that monsters do not get children, nice people do. By this he means that children will normally run away from those who seek to do them harm, but the paedophile will work on the premise of befriending the child or gaining some sort of emotional control over the child to enable them to be placed in a position whereby they can abuse a child and not be discovered.

Many do not like the term 'grooming' because it is very difficult to identify what precisely grooming is. To a significant extent it can be purely innocent activities (such as communication or gifts) that are used to befriend a child. Thus an offender may groom a child for a considerable period of time before he undertakes an act that the law would deem sufficient to attract liability. Howitt (1995) argues that the grooming process is cyclic and that it is, in essence, related to Wolf's Offending Cycle.[3] The cycle includes stages that cover issues such as fantasy[4] eventually leading to the offender identifying a child.[5] The next stage will involve the offender summing up the courage to act on his impulses, and this can be a lengthy stage whereby the offender must overcome a number of intrinsic barriers through cognitive distortion. However eventually the offender will reach the point where he has sufficiently befriended a child where the child will allow the abuse to occur.[6] The grooming process continues after the abuse, as an offender will not wish to be caught and thus an offender must continue to remain in some sort of contact to ensure that there is no disclosure. Howitt (1995) notes that whilst it is common to hear of stories where offenders say to a child, "don't say anything, you won't be believed" or, "if you say anything, you will be taken into care" these are almost certainly powerful examples of methods of ensuring a child's silence.[7]

Whilst the original cycle was not designed with technology specifically in mind, it is unlikely that online grooming represents a significant departure from traditional grooming practices but, rather, permits the cycle to be speeded up. Quayle and Taylor provide the classic example of how this can occur when they note an offender is able to move to the more explicit stages because there is the perceived idea of anonymity on the Internet:

> You can't go up to a boy in the street and say... do you fancy having sex... whereas you could online.[8]

Whilst this may be somewhat simplified in terms of it being presented as being a non-targeted solicitation, it is almost certainly accurate in terms of being able to undertake sexualised conversation and solicitation in a way that is simply not possible in an offline situation.

1 *See Improving Child Protection on the Internet: A Partnership for Action* (Home Office Press Release 092/2001).
2 Currently Paul Goggins M.P., Parliamentary Under-Secretary of State.
3 Howitt, D. (1995) *Paedophiles and Sexual Offences Against Children.* John Wiley & Sons. London. p.84.
4 Terry and Tallon (2004) argue that deviant fantasy is an important part of the grooming process and is, in essence, when the victim is grooming him or herself in preparation to seek out a child and groom themselves (see (2004) *Child Sexual Abuse: A Review of the Literature.* http://www.nccbuscc.org/nrb/johnjaystudy/litreview.pdf p.21).
5 Howitt (1995), op.cit., p.84.
6 Howitt argues that this phase will include a number of experimentation stages where conversations and contacts will become increasingly sexualised (Ibid.). Quayle and Taylor have noted that child pornography will often be used in this stage in order to try to persuade the child that sexual contact is neither uncommon nor wrong.
7 Howitt (1995), op.cit., p.92.
8 Quayle and Taylor (2001) *Child Seduction and Self Representation on the Internet* 32 British Jouranl of Social Work 602.

Legislative Responses

Before the United Kingdom introduced its provision, the country that had previously recognised the need to tackle such behaviour was, perhaps unsurprisingly, the United States of America. As a Federal system, America had adopted both Federal and State responses to such crimes. The simplest law is the Federal law, which does not require any abuse of technology but, rather, simply requires the offender to cross state boundaries with the intention of committing a sexual act against a child.[9] This is a simple law that is designed to cover all situations but which was successfully used to prosecute the first reported case of child grooming within the USA.[10]

State law differs with some providing for technology-specific crimes. Examples of this would include Maine, which provides the offence of "soliciting a child by a computer to commit a prohibited act."[11] Other States, on the other hand, prefer to take a wider approach, for example the State of Georgia, which has a crime of child enticement:

> A person commits the offense [SIC] of enticing a child for indecent purposes when he or she solicits, entices or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts.[12]

This type of offence concentrates more on the behaviour of the offender rather than the use of technology and thus arguably has a wider remit. When the *Task Force* examined the current legal position of grooming under the law in England and Wales, it was concerned that it was not adequately covered. Whilst the offence of child abduction[13] could have been used, this was not a sexual offence and thus did not trigger ancillary issues[14] and there were also doubts as to whether the law was being bent too far in order to accommodate a problem that had not been foreseen at the time the legislation had been drafted.[15]

A New Offence

The Task Force decided that a new sexual offence needed to be created in order to tackle grooming behaviour. It was decided at the outset that this would, unlike the crime in Maine, not be technology-specific. The reasons for this were principally twofold. First, it has been noted already that grooming is not restricted to an online context and whilst the Task Force itself was concentrating on the online threats, we did not want to restrict ourselves to these mediums. Second, as we all know, technology is developing at an impressive pace. There were concerns that if we made the offence technology-specific, that it could become out of date. An example of our concerns could be seen from the Maine criminal code. That section expressly uses the term 'computer'. Is a mobile telephone a 'computer'? What about a 3G (third-generation) telephone that allows broadband-equivalent connection to the Internet? So that we did not create questions such as this, it was decided that the law would be more general.

The principal provision is contained within s.15, Sexual Offences Act 2003, which provides:

> (1) A person aged 18 or over (A) commits an offence if-
>
> (a) having met or communicated with another person (B) on at least two earlier occasions, he-
>
> (i) intentionally meets B, or
>
> (ii) travels with the intention of meeting B in any part of the world,
>
> (b) at the time, he intends to do anything to or in respect of B, during or after the meeting and in any part of the world, which if done will involve the commission by A of a relevant offence,
>
> (c) B is under 16, and
>
> (d) A does not reasonably believe that B is 16 or over.

The offence is punishable by a maximum sentence of ten years imprisonment[16] and it is considered to be a sexual offence for the purposes of ancillary sentencing matters.[17] It can be seen immediately that the provision can be considered extremely wide and some concerns have been raised as to whether the provision creates a thought-crime, something that will be discussed, albeit briefly, below.

Actus Reus

The requirement for two or more communications is analogous to the provisions under the Protection From Harassment Act 1997 and is designed to stop the law being applied to single acts. What constitutes two communications will be a matter for the courts but it would seem likely that individual emails and text-messages will count, whereas a single transaction in a chatroom, even though it involves the sending and receiving of many messages in real-time may not because this position is, in essence, the same as a telephone call. There is no requirement for the communications to be sexual, something that was the cause of a significant amount of debate.

The government rejected requirements that at least one communication must be sexual because, they argued, grooming frequently does not involve sexual conversations and accordingly it may have been possible for someone to escape liability on that basis. The counter argument, however, is that realistically the type of persons that this provision is designed to tackle would normally involve sexual remarks at some point in the grooming process and so it would have not made the job of law enforcement any more difficult. Indeed because the mens rea requirement is one of intent, it is very difficult to see how this section could be prosecuted without some sexual reference. In hindsight it may be regrettable that the requirement did not remain because it could have helped defeat the allegation that the crime is a thought-crime.

The crux of this section is the meeting. Grooming, as noted above, is very transient behaviour and it is virtually impossible to define precisely what behaviour amounts to grooming or, indeed, when it starts or finishes. It is important to note, therefore, that although this provision is frequently referred to as the 'grooming offence' its actual description is 'Meeting a child following grooming etc'. Whilst the inclusion of the word 'etc.' is somewhat unhelpful, it does reinforce the fact that this offence is dealing with the *effects* of grooming and not the grooming itself. The Task Force decided that the mischief we were trying to prevent was those people meeting children they have groomed over the Internet so that they can abuse them. The meeting became the step at which we believed criminal liability could accrue although through the use of the Criminal Attempts Act 1981, it would also be possible for someone who attempted to meet with a child in these circumstances

9. US Penal Code, Title 18, section 2241(c).
10. See Tarbox, K. (2000) *Katie.com: One Girl's Loss of Innocence*. Orion. London. This book is written by the first victim of child grooming in the USA and is an interesting account of the grooming process and the reaction of society to such acts. Whilst it is now old, and Katie was perhaps somewhat naive, it remains a compelling account and serves as a good introduction to this area for those interested.
11. See Maine Penal Code, Chapter 11, p.259.
12. See Georgia Penal Code, section 16-6-5.
13. Contrary to s.2, Child Abduction Act 1984.
14. For example, sex offender notification schemes (aka the "sex offenders register"), sex offender orders etc.
15. For more on this see Gillespie, A.A. *Children, Chatrooms and the Law* [2001] Criminal Law Review 435 and Gillespie, A.A. *Child Protection on the Internet: Challenges for Criminal Law* [2002] Child and Family Law Quarterly 411.
16. s.15(4).
17. For example, the sex offenders "register" (see Part 2 of the 2003 Act) and extended sentences (see s.161, Powers of the Criminal Courts (Sentencing) Act 2000 as amended).

to be culpable too.[18] The addition of the alternative *actus reus* of travelling to meet the child was added because it was felt that this was still proximate enough (with the requisite *mens rea*) but would also ensure that the police did not have to risk the safety of a child by, in effect, observing an actual meet, something that could not be justified as the risk to the child would be too great.

Mens Rea

The *mens rea* of this crime is perhaps more important than the *actus reus* in that this is where the main principal 'badness' is to be found. The *mens rea* is one of intent, and it can be required up to two times. The choice of intention was deliberate and although this is, arguably, the most difficult form of *mens rea* to prove, it was decided that it was also the most satisfactory in ensuring that innocent people would not come within this provision.

An intention to commit an illegal act is always required. The definition of an illegal act is one that comes within Part 1 of the Sexual Offences Act 2003 and it is, therefore, extremely wide. However it does not include all types of behaviour and, for example, the creation of abusive images of the child is arguably outside of this Act, although this is unlikely to be problematic as other criminal law provisions exist to tackle such behaviour.[19]

When it comes to proving intent, it is likely that there will be a considerable number of ways of proving intent. The content of the communications are likely to be of assistance, especially as noted above that in many situations the content of such material is likely to be sexual. The police are already used to the concept of forensically examining computers to recover emails and other computer data, and this is likely to find relevant material. It is important to note that in the grooming context, there will be at least two opportunities to gather such evidence, because not only will it be the offender's computer that could contain information but also the child's. Other computer data that might be of assistance is between the offenders and others. Quayle and Taylor note that many offenders will speak to others of a like-mind[20] and thus it is quite possible that the adult will discuss how the grooming has progressed with another offender, this will certainly be admissible, not least because the requirement of the section is that A has the intention, not that A has communicated that intention to B.

Offline evidence will also be useful in showing the intention of an offender. Childnet International maintains a list of cases which involve children being groomed[21] and existing cases have led to perpetrators being arrested in possession of PDAs or diaries, where they have booked a hotel where condoms were present, and in one incident, where the offender was arrested in possession of comics, toys, condoms and lubricant jelly. It would not, it is submitted, be too difficult to place such evidence before a jury and invite them to consider what the intention of the offender was.

Where the actus reus of the crime is travelling to meet the child, a second mens rea is required, that being travelling with the intention of meeting a child. In most situations, this will be uncomplicated as it will not be difficult, for example, for the police to demonstrate a nexus between the travel and the likely location of the child, and the evidence discussed above is likely to be as useful here.

Thought Crime?

Liberty argues that the new offence amounts to a 'thought crime'. Their argument is that the law means that people will be 'prosecut[ed] not for anything they've done but for things someone thinks they might do - because someone is second-guessing their thoughts'.[22] Baroness Blatch, speaking in the House of Lords during the passage of the Bill, noted that it was an offence not merely looking at thoughts but looking at someone who has 'embarked on a course of conduct designed to result in the commission of a child sex offence'.[23] This, it is submitted, is an important point and it is important to remember that there is an *actus reus* component, albeit one that is relatively easily satisfied. Earlier in the article, it was noted that there had been an argument that the communications should contain sexual references and if it did so, it would be more likely that the allegation of a thought-crime could be rebutted.

Gathering sufficient evidence to show an intention to commit a sexual offence against a child will, it is submitted, require identifying that an offender has targeted a child and begun to groom that child for abuse. To suggest that innocent communications will be captured by this offence is somewhat naïve in that it is difficult to see how the prosecuting authorities could demonstrate the requisite intent in those circumstances. That said, however, it is incumbent on the law enforcement and prosecuting authorities to ensure that this offence is not misused, bringing the provision into disrepute. Where a wide provision is created, the necessity for acting must be carefully contemplated by those who use it.

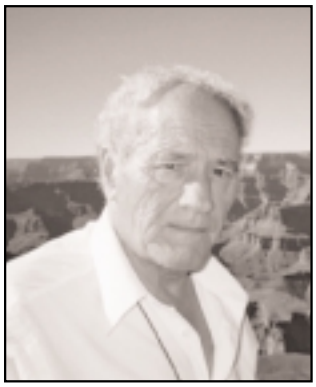
Conclusion

The technological revolution has been extremely useful to us in terms of bringing social and professional benefits to our lives. The Internet and related mediums have changed the way that we conduct ourselves and many of us use the Internet or email every day in our jobs and many use computers to facilitate their social interactions. However technology can also pose a threat to vulnerable members of society, and we know, for example, that the Internet has led to an exponential growth in abusive images of children. The technology also allows offenders to have direct access to children in ways that would previously not have been possible. The ability to maintain a degree of anonymity whilst on the Internet does allow some adults to befriend children and groom them for abuse.

The UK government has reacted to this threat by the creation of the Task Force and, in part, by the new offence contained in s.15 of the Sexual Offences Act 2003. Whilst the provision is somewhat controversial, it does, it is submitted, meet the needs of society. The offence has been carefully drafted, but it will also require law enforcement agencies and the courts to adopt a common-sense approach to its implementation. It will be interesting to see how this offence is used and, in particular, how the courts interpret its provisions. This is something that is being watched not only in the United Kingdom but in other countries too as governments consider whether there own laws are sufficient in tackling the misuse of technology by those who wish to sexually abuse children.●

Alisdair A. Gillespie is a Reader in Law at the University of Teesside and a member of the Home Secretary's Internet Task Force on Child Protection. The views in this article are purely his own and do not necessarily reflect the collective opinion of the Task Force.

18. The use of this Act is particularly important because s.1(2) states that it is possible to commit an attempt even if the act is impossible. Accordingly this could be used in proactive operations where the police, after identifying a sex offender, 'take over' the communication and turn up to the meeting. In these situations the person would still be liable. For more on this see Gillespie, A.A. *Tackling Grooming* (2004) 77 Police Journal 239 at 252-3.
19. See s.1, Protection of Children Act 1978 and also see ibid.
20. Quayle and Taylor (2001), op. cit., p.601.
21. See www.childnet-int.org
22. See Liberty (2003) *Sexual Offences Act 2003:* Liberty Response. Press Release, January 29.
23 see Hansard, HL Deb, col. 1258, 1 April 2003.



Albert McDonald

11 August 1938 - 28 December 2004

Having been born in their grandparents' house in Linenhall Street (off Green Street) weighing only 2lbs each, neither Albert nor his twin brother Pat was expected to live. Having proved he was a fighter from the start, Albert grew up in the area, going to school in Georges Hill Convent and the CBS in North Brunswick Street. During the hungry fifties, Albert worked as a waiter in Scotland for a while and then went to London to find work. While working in London, he bought his first set of drums and went to music school.

Returning to Dublin, he worked in a textile factory in Chapelizod before he followed his brother Pat and grandfather Patrick Geraghty into the library. As Pat's identical twin, Albert's arrival on the main floor of the library one Monday morning caused considerable confusion for members. They had to grapple with a very familiar face (with a big smile) telling them that, as it was his first day, he would have to go and find the answer for them from somebody else! That confusion of identities continued for many years even after Pat moved to the position of Crier.

Albert remained for many a symbol of the library service before the days of the issue desk and the catalogue, never mind the computer. One's trade in the library was painstakingly learned from others and everything had to be committed to memory. Albert's devotion to service to the members was legendary and was very much shaped by those early years. In addition to his familiar 'front of house' activities, as the library changed, Albert trained in bookbinding, the conservation and oiling of books and made repairs as required.

His interest in, and love of older things was also seen in the coins, stamps, medals and items that he collected. His research into the items and the areas where they were found brought him a very varied knowledge. Some of his finds were through his well-known passion for metal detecting. He used this hobby to practical effect in the Library, when he accurately pinpointed the position of the girder in the wall between the Front Gallery and the Blue Room before the door was cut. His other interests - fishing and bird watching - were a means to be out in the countryside that he loved. But drums and drumming were a lifelong passion, as anyone to whom he showed the picture of a youthful Albert with drums clearly understood.

The many tales that members and staff have to tell about Albert reflect the affection in which he was held by those who knew him well. His help and kindness, especially to pupils and the less experienced, was appreciated by many generations of barristers.

You could not help but be touched by Albert's warmth of character, his sense of fun (sometimes mischief) and his grin, in spite of his (at times) frustratingly individualistic streak. That streak would later contribute to his untimely death, as Albert found it hard to take advice and guidance, even from his medical advisers.

The library will be a quieter place once we accept that he is gone and it will also have a lot less smiles. Our sympathies go to his family, particularly to his only daughter Helena of whom he was so proud, and to Pat.

JA

The Mental Health Act 2001

Jenny Bulbulbia BL

The Mental Health Act 2001 ("The Act") will be commenced in its entirety over the coming months. The reform of mental health legislation in Ireland is long overdue. Prior to the Mental Health Act 2001, the legislative framework was outdated and lacking in focus on the rights of mental health service users. Further, it failed to comply with international obligations and standards provided for by the European Convention on Human Rights and the United Nations Principles for the Protection of Persons with a Mental Illness and for the Improvement of Mental Health Care (1991), as well as other international protocols.

The Mental Health Act 2001 replaces the majority of the provisions of the Mental Treatment Act 1945[1]. It also replaces the Mental Treatment Act 1953; the Mental Treatment Act (Detention in Approved Institutions) Act 1961; the Mental Treatment Act 1961[2] and the Health (Mental Services) Act 1981.

The Act addresses two main requirements in the provision of mental health care in a modern society. First, the establishment of a legislative framework within which persons with a "mental disorder" may be admitted, detained and treated involuntarily in approved mental health centres. Secondly, the promotion and maintenance of quality standards of care and treatment that are regularly inspected and properly regulated. For the first time in Irish mental health law, the term "mental disorder" is comprehensively defined.[3]

To date, only Part 3 of the Act has been commenced. Part 3 provides for the establishment of the Mental Health Commission and the Inspector of Mental Health Services. The Inspector of Mental Health Services replaces the Inspector of Mental Hospitals (provided for under the Mental Treatment Act 1945) and has a wider and more significant remit. The Mental Health Commission is an independent statutory body. It has a dual mandate to protect the interests of any person detained involuntarily in an approved centre, and to promote, encourage and foster the establishment and maintenance of high standards and good practices in the delivery of mental health services. The establishment and maintenance of Mental Health Tribunals is an integral part of this mandate and is specifically provided for under the Act.

Mental Health Tribunals

A Mental Health Tribunal is a tribunal established under the Mental Health Act 2001. Its primary function is to ensure the protection of the rights of patients detained involuntarily. Mental Health Tribunals will review every admission order, renewal order, and treatment order for psychosurgery and any order transferring a patient to the Central Mental Hospital made under the Act. Mental Health Tribunals will also be convened to review the cases of all patients currently detained involuntarily under the Mental Treatment Act 1945 within six months of the commencement of Part 2 of the Act.

Prior to the Mental Health Act 2001, there was no statutory provision for independent judicial or quasi-judicial review of a decision to admit a person involuntarily for treatment. The only manner in which such a person could seek to review the decision was by way of a *habeas corpus* application under Article 40 of the Constitution.

Article 5 of the European Convention on Human Rights states that any person who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his or her detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful. Accordingly the European Court of Human Rights has stated[4] that all detained patients must have a right of access to a judicial body independent of the executive and with the powers of a court including the power to order discharge. The Court stated that the judicial body does not have to be a traditional court so long as it is independent and the person has a right to be heard and a right to be legally represented.

The United Nations Principles for the Protection of Persons with a Mental Illness and for the Improvement of Mental Health Care (1991) states that any decision relating to a person with mental illness, who lacks legal capacity, shall only be made after a fair hearing by an independent and impartial tribunal before which such a person has been legally represented.

In fulfillment of these principles, the Mental Health Act 2001 provides for the establishment of Mental Health Tribunals. These are independent tribunals established by the Mental Health Commission to review and affirm or revoke decisions made under the Act. Any person affected by a decision

1. Part VIII (Superannuation of officers and servants of mental hospital authorities) and sections 241 and 276, 283 and 284 of the Mental Treatment Act 1945 are not replaced and are still in force.
2. Sections 39 and 41of the Mental Treatment Act 1961 are not replaced and are still in force
3. The term "mental disorder", as defined in the Mental Health Act 2001 S33 (1), means mental illness,severe dementia or significant intellectual disability where,
   - because of the mental illness, severe dementia or significant intellectual disability there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons,
     or
   - because of the severity of the illness, dementia or disability, the judgement of the person concerned is so impaired that failure to admit the person to an approved mental health centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such an admission and that the admission and treatment would be likely to benefit or alleviate the condition of the person to a material extent.
4. *X v United Kingdom* 919810 4 EHRR 188

under the Act is entitled to be informed of their rights before such a tribunal and to be heard and be legally represented. The important safeguards recognised and enshrined in international protocols are now provided for in Irish law.

The Mental Health Tribunals will be of considerable interest to lawyers. Initially there may be in excess of 2000 tribunal hearings per annum, as approximately 2000 involuntary admissions are made in Ireland each year. Where a renewal order is made in respect of any patient detained involuntarily, a further hearing will occur to test the lawfulness of the ongoing admission. Tribunals will also be convened to hear cases in relation to certain types of treatment.

Membership of the Mental Health Tribunals

Each tribunal is comprised of a panel of three members appointed by the Mental Health Commission. Each panel consists of:

- A practising barrister or solicitor who has been in practice for not less than seven years who will act as chairperson.
- A consultant psychiatrist (retired consultant psychiatrists are eligible for appointment within seven years of their retirement).
- A lay person, that is a person other than a barrister, solicitor, consultant psychiatrist, registered medical practitioner or registered nurse.

In addition to the tribunal panel, each Mental Health Tribunal shall have a Clerk attached to it.

Interviews have already been conducted for some of these positions with applicants required to complete a detailed application form and attend for interview. The Mental Health Commission, in the selection of panel members, appears to have been rigorous in its selection criteria and accountable in its selection procedures. All appointments are on a contract for service basis. Compulsory training courses will be provided by the Mental Health Commission for all members of Tribunals. Membership of a tribunal is for a maximum term of three years, on the expiration of which a member may be re-appointed. The Commission, for specified reasons, may remove members from a tribunal.

Legal Representation before a Mental Health Tribunal

Every patient is entitled to be assigned a lawyer to represent him or her before a tribunal, unless she or he proposes to engage one independently. While the Commission will administer a legal-aid scheme, the right to be assigned a lawyer under the Act is absolute and will not be means tested. The Commission will conduct interviews for a panel of lawyers to represent patients before tribunals and compulsory training will be given to all such lawyers.

Process of Review in Relation to Admission and Renewal Orders

The majority of Tribunals will be established to review the making of admission orders or a renewal order in respect of patients. Every such patient is entitled to certain information concerning an admission or renewal order[5]. Within 24 hours of the making of an admission order or a renewal order, the patient's treating consultant psychiatrist must:-

1. send a copy of the order to the Mental Health Commission

and

2 notify the patient in writing of the fact that such an order has been made. It is envisaged that this will be done by way of a written statement to the patient stating that:-

   i. he or she is being detained under an admission order or under a renewal order,
   ii. he or she is entitled to legal representation,
   iii. the general description of the proposed treatment to be administered during the period of detention,
   iv. he or she is entitled to communicate with the Inspector of Mental Health Services,
   v. he or she is entitled to have his or her detention reviewed by a Mental Health Tribunal,
   vi. there is a right of appeal to the Circuit Court against the decision of that Tribunal
   vii. he or she can be admitted in a voluntary capacity if he or she indicates such a wish.

On receipt of a copy of an admission order or a renewal order The Mental Health Commission must, as soon as possible, do the following[6]:-

1. Refer the matter to a Mental Health Tribunal.
2. Assign a legal representative to the person concerned unless he or she proposes to engage one.
3. Direct in writing that a consultant psychiatrist (chosen from a panel of consultant psychiatrists established by The Mental Health Commission for the purposes of carrying out the following independent medical examination[7]) determine whether the patient is a person with a mental disorder. Such a determination must be made in the interest of the patient. It shall be determined by:-
   i examining the patient,
   ii interviewing the consultant psychiatrist responsible for the care and treatment of the patient, and
   iii reviewing the records relating to the patient.

Within 14 days, a written report on the results of the examination, interview and review will be sent to the relevant Mental Health Tribunal and a copy provided to the legal representative of the patient.

5. The Mental Health Act 2001 S16
6. The Mental Health Act 2001 S17
7. The Mental Health Act 2001 S33 (3) (b) . If the consultant psychiatrist to whom a direction has been given is unable to examine the patient concerned another member of the panel will be so directed - The Mental Health Act 2001 S17 (3).

The approved centre concerned is obliged to facilitate this examination of the patient, interview of the treating psychiatrist and review of the records. Obstruction, interference or failure to co-operate is an offence[8].

A Mental Health Tribunal will be convened (usually in the approved centre where the patient is detained) and may either:-

- Affirm the admission or renewal order,

or

- Revoke the admission or renewal order and direct that the patient be discharged from the approved centre concerned.

Procedural aspects of a Mental Health Tribunal hearing[9]

In general, the tribunal is required to create its own procedures to ensure a just and fair review of orders made under the Act, such as an admission order or a renewal order. The principles of fair procedures and natural and constitutional justice must be adhered to at all times. The Mental Health Commission is empowered to furnish additional guidance on the procedural aspects of Tribunal hearings. It is envisaged that before any tribunals are commenced, such guidelines will be issued which will be of specific interest to parties appearing before a Tribunal or to persons representing parties before it.

However, certain procedural requirements are set out in the Mental Health Act 2001:

Prior to the tribunal hearing

- The tribunal must notify, in writing, the consultant psychiatrist responsible for the care and treatment of the patient concerned of the date, time and place of the relevant sitting of the tribunal.
- The tribunal must notify, in writing, the patient concerned or his or her legal representative of the date, time and place of the relevant sitting of the tribunal.
- The tribunal may direct that the consultant psychiatrist responsible for the care and treatment of the patient arrange for the attendance of the patient before the tribunal. However a patient is not required to attend if to do so would, in the opinion of the tribunal, prejudice his or her mental health, well being or emotional condition.
- The tribunal must give to the patient, or his or her legal representative, copies of any reports before the tribunal and an indication in writing of the nature and source of any information that has arisen during the review.
- A tribunal may direct in writing any person whose evidence is required to attend before the tribunal at a specified date, time and place to give evidence to the tribunal. Such person may also be directed to produce specified documents. The tribunal has the power to direct in writing any person to send to the tribunal any document or thing in his or her possession that the tribunal specifies as being relevant to the hearing.

At the Hearing

- Tribunal hearings are heard in private. They will be convened at the approved centre (psychiatric hospital or unit) concerned.
- Each member of the tribunal has a vote and decisions are determined by a majority of votes.
- In reaching its decision, the tribunal must have regard to the report prepared for it by the relevant consultant psychiatrist appointed by the Mental Health Commission to carry out an independent medical examination and any other reports, documents, statements and evidence that are deemed appropriate.
- The tribunal will hear submissions and any evidence it requires in order to make its decision.
- If the patient is in attendance at the tribunal, he or she must be afforded the right to present his or her case to the tribunal either in person or through the legal representative.
- Any witnesses called by either the patient or the tribunal may be cross-examined by the patient, or his or her legal representative as the case may be, and by the tribunal.
- Written statements may be admissible as evidence before the tribunal but only with the consent of the patient or the patient's legal representative.
- Failure to cooperate with any of the requirements of a tribunal is an offence.[10]
- Where false evidence is given before a tribunal, the person giving such false evidence shall be guilty of perjury as if the evidence were given before a court.
- All witnesses, and the patient's legal representative, shall have the same privileges and immunities as if they were appearing in a court.
- Reasonable witness expenses shall be paid for by the Mental Health Commission.
- Absolute privilege attaches to all tribunal documents, statements and reports made at sittings or meetings of the tribunal by tribunal officials or members, wherever published.

Decisions of the Mental Health Tribunals

To affirm an order, the Mental Health Tribunal must be satisfied that:-

The person concerned is a person with a mental disorder
and
The procedural requirements leading to the admission and detention of the patient have been complied with[11]. Such procedural requirements include:

- an application for involuntary admission in a form specified by the commission,
- a recommendation for involuntary admission in a form specified by the commission.
- the admission order,

8. A person guilty of such an offence shall be liable on summary conviction to a fine not exceeding €1500 or to imprisonment for up to 12 months or both - The Mental Health Act 2001 S30
9. The Mental Health Act 2001 S49
10. A person guilty of such an offence shall be liable on summary conviction to a fine not exceeding €1500 or to imprisonment for up to 12 months or both - The Mental Health Act 2001 S49 (4)
11. A Mental Health Tribunal may still affirm an order even if there has been a failure to comply with all the procedural requirements, provided such failure does not effect the substance of the order or give rise to an injustice. - The Mental Health Act 2001 S18 (1) (a) (ii)

- the renewal order (where applicable),
- the provision of information to the patient, and
- where applicable, the taking into custody of a person by a member of An Garda Siochana.

A Tribunal shall issue its decision in writing by way of a prescribed form.

A Mental Health Tribunal is obliged to make a decision as soon as possible after the date of the order under review, and in any event no later than 21 days from the date of that order. However, if the Mental Health Tribunal wishes, or if the patient requests, this time period may be extended for a further 14 days. The patient is entitled to apply for a further extension of 14 days for the making of the decision and such further extension will be granted by the Mental Health Tribunal if it is satisfied that it is in the best interest of the patient so to do. While an extension is granted the order under review will remain in force until the expiration of that time period.

As soon as the decision is made, the Mental Health Tribunal will write to the following persons stating its decision to affirm or revoke the order under review and stating the reasons for the decision:-

- The patient,
- The patient's legal representative,
- The consultant psychiatrist responsible for the care and treatment of the patient concerned,
- The Mental Health Commission, and
- Any other person who should, in the opinion of the Mental Health Tribunal, be notified.

Appeal Procedure

If a patient is not satisfied with a decision by a Mental Health Tribunal to affirm an order in respect of him or her, he or she may appeal to the Circuit Court on the grounds that he or she is not a person with a mental disorder as defined by the Act. The onus is on the patient to satisfy the Circuit Court that he or she is not such a person. Before making any order, the Circuit Court shall have regard to any submission made by or on behalf of the above persons. The Circuit Court may affirm or revoke the order and attach such consequential or supplementary provisions it considers appropriate.

The appeal may be heard by either the judge of the circuit in which the relevant approved centre is situated or, if the patient, so chooses, the judge of the circuit where the patient ordinarily resides. The appeal must be lodged within 14 days of the receipt by the patient, or by his or her legal representative, of the notification of the decision to affirm the order.

Notice of the appeal must be served on the following:-

- The consultant psychiatrist concerned
- The Mental Health Tribunal concerned
- The clinical director of the approved centre concerned
- Any other person specified by the Circuit Court

The appeal hearings shall be in *camera* and extensive restrictions placed on the reporting or publication of the proceedings, the breach of which constitutes an offence[12]. The only appeal that lies against an order of the Circuit Court is an appeal on a point of law to the High Court.

"Best Interest" Principle

Human and civil rights are a fundamental tenet of our society and are enshrined in the Irish Constitution and in the European Convention on Human Rights[13]. For mental health service users they are paramount. The Act states[14] that in making a decision under the Act concerning the care or treatment of a person, including a decision to make an admission order, "the best interests of the person shall be the principle consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made." The Act also states that in the making of such a decision "due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy." In *Re. a Ward* [1995] ILRM 401, the Supreme Court stated that "the loss by an individual of his or her mental capacity does not result in any diminution of his or her personal rights recognised by the Constitution ... including self-determination, and the right to refuse medical treatment." This case involved a request by the family that feeding by artificial means be discontinued even though the result could be that the person's life would be no longer sustainable.

The principle of "autonomy" has a particular resonance in the area of health care. It is synonymous with the principle of personal choice or self-determination more commonly referred to in the health care service as "consent". Though a person's mental capacity may be diminished because of a mental disorder, respect for their autonomy should not be. A person's right to information is vital; consent, in so far as is possible, should always be informed. It is only permissible to depart from these principles where, in the clinical judgment of a registered medical doctor, the withholding of information would be in the best interests of the patient[15]; professional discretion, guided by the principles of the Act, is the key. Where a patient is unable or unwilling to give consent, the Act provides for safeguards that will ensure that no treatment shall be given unless it is necessary[16] in the best interests of the patient. In the case of certain invasive treatments, such as psycho-surgery or electro-convulsive therapy or the administration of medicine, specific safeguards are provided.

The best interests of persons who may be subject to the making of a decision under this Act must involve a consideration of whether or not there is a less restrictive or alternative method of obtaining the desired result. Therefore, a provision exists whereby a person who is admitted involuntarily must be informed in writing that he or she may be admitted on a voluntary basis, if he or she indicates such a wish.[17]

Every decision contemplated, proposed and made under the Act is guided by these fundamental and important principles; the best interests of the person are paramount.

12. A person guilty of such an offence shall be liable on summary conviction to a fine not exceeding €1500 or to imprisonment for up to 12 months or both - The Mental Health Act 2001 S30
13. Incorporated into Irish law as of 1st January 2004
14. The Mental Health Act 2001 S4
15. The Mental Health Act 2001 S10 (2) and S57
16. The Mental Health Act 2001 S57
17. The Mental Health Act 2001 S16

Conclusion

The Irish Constitution provides that no person shall be deprived of his or her liberty, save in accordance with law. There is an onerous responsibility on those who frame the law to ensure that the deprivation of a person's liberty is necessary for that person and commensurate to the needs of society.

As with all new legislation, the Mental Health Act 2001 will be tested through the courts. Not every aspect will have been foreseen, despite the intentions of the framers of the legislation. Where the deprivation of liberty is provided for in legislation it is right that constitutional aspects, procedural aspects and natural law issues are rigorously tested. The body of medical knowledge that surrounds mental disorders is constantly being developed, and doctors will invariably differ. There may be dispute in relation to the evidential effect of the medical principles applied in difficult cases, where decisions are made at the margins.

Legal representation within the tribunal itself must be balanced and protecting of all interests. While the interests of the patient are rightly protected by the provision of free legal representation, what of the interests of the treating consultant psychiatrist whose initial decision to admit the patient is subject to a second opinion and then tested before the tribunal? He or she may be cross-examined by the patient's lawyer. Will the immunities and privileges contained in the Act be adequate protection for such a person, or should they also have legal representation? If they choose to be legally represented, will the tribunal degenerate into an adversarial forum (as some say the Employment Appeals Tribunal has become) and unnecessarily "lawyer heavy", as opposed to the inquisitorial forum that is envisaged by the Act?

Where the deprivation of liberty may result, is an adversarial forum appropriate to ensure that any infringement of a fundamental right is rigorously accounted for? In this context, it is important to note that the Act develops and extends the oldest protection of a person's liberty, being an application for *habeas corpus*, the hearing of which (even in the most stringent of times in Irish society) has always been honoured by a court. However, where the "best interest" of the patient is the primary consideration of the tribunal, and indeed the guiding principle of the Act, an inquisitorial approach may ultimately prove more effective.

It appears to the writer that a significant issue will turn on the patient's capacity to properly instruct his or her lawyer and whether there may be a need to appoint guardians ad *litem*. There is a significant responsibility thrust upon lawyers to make decisions as to their client's capacity to instruct them properly, which will have consequences in the running of applications or appeals. However, such a lawyer will have the benefit of all records pertaining to the patient, and, in particular, the report of the independent consultant psychiatrist (as noted earlier, on receipt of an admission or renewal order the Mental Health Commission will direct a consultant psychiatrist, chosen from a panel maintained by the Commission, to examine a patient to determine whether they are a person with a mental disorder). It will be interesting to see whether such consultant psychiatrists will be required to address the issue of the capacity of the patient to instruct a lawyer.

The Mental Health Act 2001 is a positive step forward in the provision of a mental health service that, for the first time, places the user at the centre of the process. The first 12 to 18 months of the work of the tribunals and the ensuing appeals will provide welcome judicial interpretation of the legislation. It will be interesting to return and assess the operation of the Act, in law and in practice, at that point. ●

Book Launch

L-R: Pictured at the launch of the newly published book on Evidence in Trinity College are L-R: the author Declan McGrath BL; Mr Justice Ronan Keane, former Chief Justice; Mr Justice Adrian Hardiman, The Supreme Court; and Catherine Dolan, Commercial Manager, Thomson Round Hall.

Community Scholarships

Chairman of the Bar Council Hugh Mohan SC awards a Bar Community Liaison Scholarship to Stephen McDonald. The scholarships are awarded to local students entering third level education.

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 10, Issue 1, February 2005

Edited by Desmond Mulhere, Law Library, Four Courts.

A directory of legislation, articles and written judgments received in the Law Library from the 25th November 2004 up to 7th February 2005

Judgment information supplied by First Law's legal current awareness service, which is updated every working day. (Contact: bartdaly@www.firstlaw.ie)

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Signed 27/02/2004
S.I. 84/2004 (S27 commencement)
S.I. 588/2004 (s65 commencement)

4/2004 Industrial Relations (Miscellaneous Provisions) Act 2004
Signed 09/03/2004
S.I. 138/2004 (commencement)

5/2004 Motor Vehicle (Duties and Licences) Act 2004
Signed 10/03/2004

6/2004 Public Health (Tobacco) (Amendment) Act 2004
Signed 11/03/2004
S.I. 251/2002 (part 2 commencement)
S.I. 480/2003 s's 2,3,4,5(1), 5(2), 5(5), 5(6), 6, 7 and s 47
S.I. 110/2004 s1(2)
S.I. 111/2004 s's 2,3, 15, 16, 17, 18, 19 and s20

7/2004 Public Service Superannuation (Miscellaneous Provisions) Act 2004
Signed 25/03/2004

8/2004 Finance Act 2004

9/2004 Social welfare (Miscellaneous Provisions) Act 2004
Signed 25/03/2004

10/2004 Aer Lingus Act 2004
Signed 07/04/2004

11/2004 Air Navigation and Transport (International Conventions) Act 2004
Signed 13/04/2004

12/2004 Private Security Services Act 2004
Signed 04/05/2004
S.I. 685/2004 (commenced in part)

13/2004 Tribunals of Inquiry (Evidence) (Amendment) Act 2004
Signed 05/05/2004

14/2004 An Bord Bia (Amendment) Act 2004
Signed 05/05/2004

15/2004 Electoral (Amendment) Act 2004
Signed 18/05/2004

16/2004 Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) (Amendment) Act 2004
Signed 02/06/2004

17/2004 Child Trafficking and Pornography (Amendment) Act 2004
Signed 02/06/2004

18/2004 Copyright and Related Rights (Amendment) Act 2004
Signed 03/06/2004

19/2004 Health (Amendment) Act 2004
Signed 08/06/2004
S.I. 378/2004 (commencement)

20/2004 Criminal Justice (Joint Investigation Teams) Act 2004
Signed 30/06/2004
S.I. 585/2004 (commencement)

21/2004 Central Bank and Financial Services Authority of Ireland Act 2004
Signed 05/07/2004
S.I. 454/2004 s28 and s33
S.I. 455/2004 (commencement)

22/2004 National Monuments (Amendment) Act 2004
Signed 18/07/2004

23/2004 Commissions of Investigation Act 2004
Signed 18/07/2004

24/2004 Equality Act 2004
Signed 18/07/2004

25/2004 Electricity (Supply) (Amendment) Act 2004
Signed 18/07/2004

26/2004 International Development Association (Amendment) Act 2004
Signed 19/07/2004

27/2004 Residential Tenancies Act 2004
Signed 19/07/2004
S.I. 505/2004 (commenced in part)
S.I. 525/2004 (establishment day)
S.I. 649/2004 (s202 regulations)
S.I. 750/2004 (commencement No.2 order)

28/2004 Maternity Protection (Amendment) Act 2004
Signed 17/08/2004
S.I. 652/2004 (commenced in part)

29/2004 Maritime Security Act 2004
Signed 19/07/2004

30/2004 Education for Persons With Special Educational Needs Act 2004
Signed 19/07/2004

31/2004 Civil Liability and Courts Act 2004
Signed 21/07/2004
SOME OF THE ACT CAME IN ON SIGNING S1 (3)
S.I. 544/2004 (commenced in part on 20/09/2004 and 31/03/2005)

32/2004 State Airports Act 2004
Signed 17/08/2004

33/2004 Public Service Management (Recruitment and Appointments) Act 2004
Signed 6/10/2004

34/2004 Intoxicating liquor Act 2004
Signed 15/10/2004

35/2004 Dumping at Sea (Amendment) Act 2004
Signed 3/11/2004

36/2004 Ombudsman (Defence Forces) Act 2004
Signed 10/11/2004

37/2004 Council of Europe Development Bank Act 2004

38/2004 Irish Nationality and Citizenship Act 2004
Signed 15/12/2004

39/2004 Tribunal of Inquiry into Certain Planning Matters and Payments Act 2004
Signed 15/12/2004

40/2004 Appropriation Act 2004
Signed 17/12/2004

41/2004 Social Welfare Act 2004
Signed 17/12/2004

42/2004 Health Act 2004
Signed 17/12/2004
S.I. 886/2004 (commenced in part)
S.I. 887/2004 (commenced (no.2) order)

43/2004 Housing (miscellaneous provisions) Act 2004
Signed 21/12/2004

44/2004 Road Traffic Act 2004
Signed 22/12/2004

Amendments of the Constitution

Twenty-seventh amendment of the Constitution Act, 2004

Bills of the Oireachtas up to 07//02/2005 Information compiled by Damien Grenham, Law Library, Four Courts.

Adoptive leave bill, 2004
Committee -Seanad

Broadcasting (amendment) bill, 2003
1st stage -Dail

Child trafficking and pornography (amendment) (no.2) bill, 2004
1st stage- Dail

Civil partnership bill, 2004
1st stage- Seanad

Comhairle (amendment) bill, 2004
1st stage - Dail

Consumer rights enforcer bill, 2004
1st stage -Dail

Criminal Justice bill, 2004
1st stage-Dail

Criminal justice (terrorist offences) bill, 2002
Committee -Dail

Criminal law (insanity) bill, 2002
Committee - Seanad

Disability bill, 2004
2nd stage - Dail

Dormant accounts (amendment) bill, 2004
Report- Seanad

Driver testing and standards authority bill, 2004
1st stage- Dail

Electricity regulation (amendment) bill, 2003
2nd stage - Seanad

Enforcement of court orders bill, 2004
2nd stage- Dail

Enforcement of court orders (no.2) bill, 2004
1st stage- Seanad

Finance bill, 2005
1st stage-Dail

Fines bill, 2004
1st stage- Dail

Freedom of information (amendment) (no.2) bill, 2003
1st stage - Seanad

Freedom of information (amendment) (no.3) bill, 2003
2nd stage - Dail
Fur farming (prohibition) bill, 2004
1st stage- Dail

Garda Siochana bill, 2004
Committee-Seanad

Grangegorman development agency bill, 2004
1st stage - Dail

Health (amendment) (no.2) bill, 2004
1stt stage- Dail

Health and social care professionals bill, 2004
Report stage- Seanad

Housing (state payments) bill, 2004
1st stage- Seanad

Human reproduction bill, 2003
2nd stage - Dail

International criminal court, 2003
1st stage - Dail

International peace missions deployment bill 2003
2nd stage - Dail

Interpretation bill, 2000
Committee- Dail

Irish nationality and citizenship and ministers and secretaries (amendment) bill, 2003
Report - Seanad

Land bill, 2004
2nd stage - Seanad

Law of the sea (repression of piracy) bill, 2001
2nd stage - Dail (*Initiated in Seanad*)

Local elections bill, 2003
1st stage -Dail

Maritime safety bill, 2004
1st stage-Seanad

Money advice and budgeting service bill, 2002
1st stage - Dail (*order for second stage*)

National economic and social development office bill, 2002
2nd stage - Dail (*order for second stage*)

National transport authority bill, 2003
1st stage - Dail
Offences against the state acts (1939 to 1998) repeal bill, 2004
1st stage-Dail

Parental leave (amendment) bill, 2004
1st stage - Seanad

Patents (amendment) bill, 1999
Committee - Dail

Planning and development (acquisition of development land) (assessment of compensation) bill 2003
1st stage - Dail

Planning and development (amendment) bill, 2003
1st stage - Dail

Planning and development (amendment) bill, 2004
1st stage - Dail

Planning and development (amendment) (no.2) bill, 2004
1st stage -Dail

Planning and development (amendment) (no.3) bill, 2004
1st stage- Dail

Postal (miscellaneous provisions) bill, 2001
1st stage -Dail (*order for second stage*)

Proceeds of crime (amendment) bill, 1999
Report - Dail

Proceeds of crime (amendment) bill, 2003
1st stage - Dail

Public service management (recruitment and appointments) bill, 2003
1st stage - Dail

Railway safety bill, 2001
Committee - Dail

Registration of deeds and title bill, 2004
1st stage - Seanad

Registration of lobbyists bill, 2003
1st stage- Dail

Residential tenancies bill, 2003
2nd stage - Dail

Safety, health and welfare at work bill, 2004
1st stage- Dail
Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000
Committee - Dail

Sea pollution (miscellaneous provisions) bill, 2003
1st stage - Seanad

Statute law revision (pre-1922) bill, 2004
1st stage - Seanad

Sustainable communities bill, 2004
1st stage - Dail

The Royal College of Surgeons in Ireland (Charter Amendment) bill, 2002
2nd stage - Seanad **[p.m.b.]**
Transfer of execution of sentences bill, 2003
Committee - Seanad

Twenty-fourth amendment of the Constitution bill, 2002
1st stage- Dail

Twenty-seventh amendment of the constitution bill 2003
2nd stage - Dail

Twenty-seventh amendment of the constitution (No.2) bill 2003
1st stage - Dail

Veterinary practice bill, 2004
1st stage- Seanad
Waste management (amendment) bill, 2002
2nd stage- Dail

Waste management (amendment) bill, 2003
1st stage - Dail

Water services bill, 2003
1st stage - Seanad

Whistleblowers protection bill, 1999
Committee - Dail Abbreviations

BR =Bar Review
CIILP =Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
FSLJ = Financial Services Law Journal
GLSI = Gazette Society of Ireland
IBL = Irish Business Law
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IFLR = Irish Family Law Reports
IILR = Irish Insurance Law Review
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

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

PIAB and MIBI claims - An Alternative View

by Stuart Gilhooly, Solicitor

Introduction

Ever since the Personal Injuries Assessment Board Act 2003 ("the Act") came into effect on 28 December 2003, personal injury practitioners in both branches of the profession have been looking critically at its provisions. An article in the November edition of this journal by Cathleen Noctor B.L. and Richard Lyons B.L. ("the authors") offered an interesting and somewhat controversial view on the relationship between Personal Injury Assessment Board (PIAB) and the Motor Insurers Bureau of Ireland (MIBI). In a nutshell, the authors suggested that a PIAB application was not necessary before issuing proceedings against the MIBI. At first glance, the argument is quite attractive. However, on closer examination, I would offer an alternative interpretation.

S.I 438 of 2004

The authors referred to S.I. 438 of 2004 but failed to point out that this commencement order not only brought into effect Section 3(b) of the Act but also, *inter alia*, Section 3(d) of the Act, which reads as follows:

> "a civil action not falling with any of the preceding paragraphs (other than one arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person)"

Therefore, the Act clearly applies to any action, which is defined as a civil action, unless the claim is one for medical negligence. I would submit therefore that Section 3(b) is irrelevant in those circumstances. The only reason for its inclusion and that of Sections 3(a) and 3(c) (ie employers liability and public liability claims) is so the legislature could have the option of staggering the introduction of any given category of claims, an option which it exercised in relation to section 3(a) but chose not to when introducing the remaining categories.

Section 4(1) of the Act

So, in my view, the Act applies to MIBI claims so long as they come within the definition of "civil action". This is defined in Section 4(1) of the Act as:-

> "an action intended to be pursued for the purposes of recovering damages, in respect of a wrong, for -
>
> (a) personal injuries, or
>
> (b) both such injuries and damage to property (but only if both have been caused by the same wrong)."

Clearly, a personal injuries claim against the MIBI falls within this very wide definition. The crux of the authors' argument, however, is the first exception to this rule under subsection (1) which reads as follows:-

> "an action intended to be pursued in which in addition to damages for the foregoing matters, it is *bona fide* intended, and not for the purpose of circumventing the operation of *section 3*, to claim damages or other relief in respect of any other cause of action"

The opinion of the authors is that this subsection applies to MIBI claims because of the practice in most such claims to seek a declaration to direct that the judgment is satisfied by the MIBI. This is a technical point, which requires closer scrutiny.

In the first instance, it is clear that this subsection was not intended to apply to MIBI claims. It is intended to deal with situations where there are two separate causes of action arising out of one incident. An instance would be where a claim for both defamation and personal injury arose out of an incident, for example, where a person was wrongly accused of shoplifting. It is arguable that the seeking of a declaration in an MIBI claim does not represent a separate cause of action at all. It must be borne in mind that the right to a declaration does not stand on its own. It cannot exist without an order for damages and, therefore, if the claim for damages fails, so necessarily must that part of the action seeking a declaration. I would argue that it does not represent a separate cause of action but rather a consequential relief arising from the same cause of action, which necessarily flows from the award for damages and only exists for the purpose of enforcing that award against the MIBI. A declaration would not be necessary in a PIAB claim as the MIBI would be the respondent and the order to pay would be directed against them.

I accept that my argument, in this respect, is just an argument, but I have little doubt that were a Court to have regard to the interpretation of this section, it would look closely at the intention of the legislature. What is interesting about this is that the Act expressly excludes three other types of claims, including Garda Compensation claims, but makes no reference whatsoever to MIBI claims. Surely if they had intended to exclude PIAB's jurisdiction to such actions, then they would have expressly said so.

Can the MIBI be a respondent?

A respondent is defined in Section 13(1) of the Act as:-

> "the person or each of the persons who the claimant alleges in the application is or are liable to him or her in respect of the relevant claim".

In an untraced motorist claim, the only person against whom a claim can be made is the MIBI, therefore it clearly falls within the definition of respondent. A claim must therefore be made in the normal way to the MIBI and assuming that compensation cannot be agreed, a PIAB application form is simply filled out citing the MIBI as the respondent and the claim is processed in the usual way. There is no reason why this claim should be treated any differently to any other personal injury claim and therefore why the legislature would need to bar PIAB's jurisdiction. It is also impossible to envisage any specific injustice to a claimant by having to apply to PIAB in an MIBI claim, as distinguished from any other personal injury claim.

Claims against uninsured motorists

This is an altogether more complex situation. For the same reasons as outlined above, I believe that a declaration to enforce a judgment against MIBI in an uninsured motorist claim does not constitute another cause of action as again, the relief claimed does not stand on its own and is consequential on an award for damages against the uninsured motorist.

Where it is complicated is where a claimant proceeds to PIAB against the uninsured motorist alone. While the authors are quite correct to say that MIBI would not necessarily be made aware of such an application, it is surely naive to believe that they will not adopt a mechanism for finding out. In the first instance, PIAB may tell them. While PIAB have no statutory basis for this, it must be borne in mind that they have no such basis for informing insurance companies of insured respondents, but still do so anyway. The MIBI will always nominate a member insurance company to protect their interests and usually quite quickly after receipt of all material information. PIAB would doubtless argue that MIBI are, therefore, *de facto* indemnifiers of the uninsured respondent as it is they who will eventually have to pick up the tab. Secondly, MIBI may simply ask the claimant to provide details of any PIAB application as a condition precedent. It clearly falls within the category of "material information" required under section 3.2 or "all relevant documentation" under section 3.5. Finally, the claimant is obliged to give twenty eight days notice to the MIBI before obtaining any judgment which gives rise to an obligation on MIBI as required under section 3.9. As an order to pay has the same effect as a judgment as defined in Section 40 of the Act, then the MIBI must be informed at least 28 days before the judgment is obtained, or in this case, before the assessment is accepted.

Another problem with proceeding to PIAB against the uninsured motorist alone is the dubious benefit of this. The only reason I can think of is if the claimant had a case with little chance of success and would then hope that the uninsured motorist did not respond to a request for consent. However, even this scenario does not allow for an inadequate award with which the claimant is not happy and indeed with which no costs are provided. If the claimant then rejected this award, he would only be able to proceed against the uninsured motorist, as the authorisation would not allow him to issue proceedings against MIBI in the absence of a rejected assessment by them.

It, therefore, seems sensible to identify both the uninsured motorist and MIBI as respondents on the PIAB form and this at least means that if the award is rejected by either party, then proceedings can be issued against both.

Section 17(1)(v) of the Act

Finally, the authors argue that Section 17(1)(v) of the Act should be invoked where MIBI claims are concerned. Much as this would be desirable, it is extremely unlikely. This section states that

> "...The Board shall not be required to arrange for the making of an assessment under *section 20* of the relevant claim concerned (or as appropriate, shall discontinue any such assessment the making of which it has arranged) if...
>
> (v) in its opinion the relevant claim falls within a class of relevant claims as respects which the Board has, with the consent of the Minister and the Minister for Justice, Equality and Reform, for the time being declared there to be good and substantial reasons for its not arranging the making of such an assessment in respect of them."

In the first instance, even if the Ministers and PIAB did invoke this section, it would only apply after an application had been made, thus meaning you would first have to collect an authorisation as confirmed by Section 17(4) of the Act. This, of course, would be much better than having to wait for a full assessment but it is not likely to happen. There is no logical reason for PIAB to deem an MIBI claim in such a category. It would appear that the purpose of Section 17(1)(v) is to rule out a class of new and currently unforeseen claims in such nature as, say, army deafness or asbestos claims. An MIBI claim is, in effect, no different to any other personal injury claim except insofar as there is an obligation to comply with conditions precedent, which does not seem to affect the making of a PIAB application.

Conclusion

It is with no pleasure that I have outlined my concerns about the authors' arguments: I have been a vocal critic of PIAB since the Board was first mooted. However, I feel that any attack on the Act should have a good chance of success.

The concern is that based on the authors' argument, solicitors would issue proceedings directly against the MIBI without first applying to PIAB. If the MIBI then raised a defence that these proceedings were in breach of Section 12 of the PIAB Act, then there is a danger, particularly with the impending two year statute of limitations, that the claim would be statute-barred, should the MIBI defence ultimately prove successful but after two years had passed.

I should point out that I am not saying that I am right and that the authors are wrong. Their argument is stateable but, in my opinion, nothing more. I would preach caution to any legal practitioner before embarking on the course of action suggested. It is of course likely that someone will take this on and then, we'll know for sure.

Time will tell. ●

Setting Aside Leave in Judicial Review Proceedings

Stephen Dodd BL

Introduction

The jurisdiction to set aside a grant of leave in judicial review proceedings has only recently been confirmed. It has emerged that leave may be set aside not only on grounds of lack of jurisdiction, mala fides or non-disclosure, but also more surprisingly, on the grounds of lack of merit, albeit in exceptional circumstances. An application to set aside leave takes the form of a motion before another High Court rather than an appeal to the Supreme Court. There are of course certain principled objections that can be made to the existence of such jurisdiction. These include that it runs the risk of undermining the filter mechanism of a leave application. It also potentially conflicts with the notion of judicial review as being a "speedy and expeditious" remedy by adding an unnecessary tier between the leave application and the substantive hearing. Furthermore, the grant of leave is discretionary and setting aside leave arguably fails to show due deference to the exercise of judicial discretion. This article will therefore examine the burgeoning case law on this area and explore where the parameters of such jurisdiction may be drawn.

Inherent Jurisdiction

There is nothing in the Order 84 of Rules of the Superior Court, concerning judicial review, regarding a jurisdiction to set aside the grant of leave. Although Order 52 Rule 3, allows *ex parte* orders to be set aside, this is only in respect of *ex parte* orders made on the basis that the delay of proceeding on notice would cause "irreparable or serious mischief". The case law, has however established that the power to set aside leave in judicial review is grounded upon the inherent jurisdiction of the courts. One of earliest examples of the recognition of such power arose in certain planning cases. In *Goonery v Meath County Council*[1], Kelly J set aside leave on the basis that leave should have been sought on notice[2] rather than in an *ex parte* application. Kelly J however refused to set aside leave on such grounds in *O'Connor v Dublin Corporation*[3]. While these cases were based on a lack of jurisdiction by failing to follow the procedure for leave, in *Adams v DPP*[4], Kelly J set aside leave based on the fact that the British Home Secretary was not a party subject to judicial review in Ireland. This was confirmed on appeal to the Supreme Court[5]. Kelly J rejected the contention that the proper procedure was an appeal to the Supreme Court as opposed to a motion to set aside before a High Court judge. He further rejected that the only judge who could hear the application was the judge who granted the *ex parte* order, stating that any judge of the High Court could entertain such motion. The jurisdiction to set aside leave was however confirmed and more precisely delineated by the Supreme Court in the case of *Adam & Iordache v The Minister for Justice, Equality and Law Reform*[6]. In this case, proceedings concerned a group of Romanian nationals challenging certain deportation orders. Leave having been granted, an application to set aside leave was successful in the High Court.

On appeal to the Supreme Court, McGuinness J noted the general jurisdiction to set aside an *ex parte* order, citing McCracken J. in *Voluntary Purchasing v. Insurco Limited*[7], who declared

> "..... Quite apart from the provisions of any rules or statute, there is an inherent jurisdiction of the Courts in the absence of an express statutory provision to the contrary, to set aside an order made ex parte on the application of any party affected by that order. An ex parte order is made by a judge who has only heard one part to the proceedings. He may not have had the full facts before him or he may even have been misled, although I should make it clear that that is not suggested in the present case. However, in the interest of justice, it is essential that an *ex parte* order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence or submissions before the Court. It would be quite unjust that an order could be made against a party in its

1. Unreported, High Court, Kelly J., July 15, 1999
2. On the basis that the matters were "decisions" within the meaning of Section 82 of the Local Government (Planning and Development) Act, 1963 as amended by Section 19(3) of the Local Government (Planning and Development) Act, 1992, which requires the application for leave to be made in an inter partes hearing. This has been expanded under section 50 of the Planning and Development Act 2000, as amended.
3. [2000] 3 IR 420
4. [2001] 2 ILRM 401
5. [2001] 1 IR 47
6. Unreported, Supreme Court, April 5, 2001
7. [1995] 2 ILRM 145

absence and without notice to it, which could not be reviewed on the application of the party affected".

McGuinness J therefore categorised the jurisdiction as part of a general power to set aside *ex parte* orders. McGuinness J., though recognising that jurisdiction, cautioned that such power should be used sparingly and in rare case. She declared

> "In my view the learned trial judges in the instant cases, O'Donovan J. and Morris P., were correct in deciding that this Court has a jurisdiction to set aside an order granting leave which has been made on the basis of an ex parte application. However, I would accept the submission of Mr. Shipsey, with which Mr. O'Donnell agrees, that this jurisdiction should only be exercised very sparingly and in a very plain case. The danger outlined by Bingham L.J. in the passage quoted above would be equally applicable in this jurisdiction. One could envisage the growth of a new list of applications to discharge leave to be added to the already lengthy list of applications for leave. Each application would probably require considerable argument - perhaps with further affidavits and/or discovery. Where leave was discharged, an appeal would lie to this Court. If that appeal succeeded, the matter would return to the High Court for full hearing followed, in all probability, by a further appeal to this Court. Such a procedure would result in a wasteful expenditure of Court time and an unnecessary expenditure in legal costs; it could be hardly said to serve the interests of justice. The exercise of the Court's inherent jurisdiction to discharge orders giving leave should, therefore, be used only in exceptional cases. "

On the facts, McGuinness J set aside the grant of leave. She considered that each applicant did not have sufficient interest in the matter (many had been permitted to remain in the country, others had not acquired an interest as their refugee application had not been decided on, while others were named simply because they were Romanian). McGuinness J also considered that the affidavit had not set out in sufficient detail the claim that the decision making process was flawed or in error. On the papers, she considered the Court could not assess whether the facts supported a stateable ground for the relief sought, opining; "....It is not so much that the applicants have not put forward a stateable case, as that they have not put forward any case at all within the confines of judicial review proceedings."

Hardiman J also recognised that the Court has jurisdiction to set aside the grant of leave in a judicial review case. He declared

> "In my view, any order made ex parte must be regarded as an order of a provisional nature only. In certain types of proceedings, either the apparent requirements of justice or the requirements of its administration mean that a person will be affected in one way or another by an order made without notice to him and therefore without his having been heard. This state of affairs may, depending on the facts, constitute a grave injustice to the defendant or respondent. In the context of an injunction, only a very short time will normally elapse before the defendant has some opportunity of putting his side of the case. In judicial review proceedings, the time before this can occur will normally be much longer. This clearly has the scope to work an injustice at least in some cases".

Hardiman J noted that the principle was applied by Kelly J in *Adams v DPP*, and had been recognised in England, at least prior to the change in the Rules. In this respect he cited an English Law Reform Commission paper in 1994 which at the time summarised the position that; "At present a respondent may apply to have the grant of leave to move for judicial review set aside. The grant of leave will only be set aside if the respondents can show that the judge's decision that the case was fit for further consideration and a substantive judicial review was plainly wrong".

On the facts, Hardiman J noted that the applicant's arguments based on the European Convention of Human Rights required overturning the Supreme Court in *Doyle v The Commissioner of An Garda Siochana*[8], though no argument was advanced to show that the case was wrongly decided. He therefore dismissed the claim declaring;

> "The applicants' proceedings are of the baldest kind, without any basis in law or fact, and, with the exception of Mr. Iordache's case, without any attempt to rely on proved individual circumstances either in relation to attacking the decisions taken in respect of the individual applicants or on the broader aspects of their claim. In my view they are all frivolous, vexatious and doomed to fail: indeed they are scarcely recognisable as legal proceedings at all."

It is submitted that the stated rationale in the case for permitting setting aside was not entirely coherent with grounds for setting aside on the facts. While the rationale is that leave is an *ex parte* application, and as such the judge has only heard one side of the case and so may not have the full facts or may have been misled, this did not appear to play any part in setting aside on the facts. Leave was set aside because the case was very weak and lacked a basis for challenging the decisions. However this would have been apparent to the judge who granted leave.

8. [1999] 1 IR 249.

Grounds for Setting Aside

In Adam, the Court viewed the ability to set aside the grant of leave as a species of the general jurisdiction to set aside *ex parte* orders. However there are certain differences between *ex parte* leave in judicial review and many other *ex parte* orders. Examples of the latter may include interim injunctions, an *ex parte* renewal of a summons[9], third party proceedings[10], the service of a summons[11] and the service of a summons outside the jurisdiction[12]. The *ex parte* leave application in judicial review is an essential part of the very nature of judicial review. The leave application performs the function of a filtering mechanism, which does not generally apply to other *ex parte* applications, which are generally based on either urgency or administrative convenience. Leave is a requirement for special permission to bring proceedings, not applicable to other types of proceedings, which may be commenced without such permission. The mere grant of leave does not have any direct legal consequences; it does not operate as an automatic stay on the challenged decision unless an express order is made. It is difficult to imagine how the grant of leave could therefore constitute "a grave injustice". Also unlike other *ex parte* applications, the full papers grounding the application for judicial review will generally be placed before the judge considering leave. Subject to the power to amend the papers and file supplemental affidavits, the full extent of an applicant's case will generally be evidenced by the papers that are presented at leave stage.

Whatever about setting aside leave on grounds of *mala fides*, the misleading of the leave judge or lack of jurisdiction, to permit leave to be set aside on grounds of being frivolous or vexatious, arguably duplicates and undermines the filtering function of the leave stage. The test for leave (an "arguable case") would appear to be a positive expression of the ground for setting aside leave on grounds that the case is frivolous or vexatious. Implicit in the rationale for allowing an *ex parte* order to be set aside, is that some factor may emerge from hearing the other side, which if known by the judge who granted the *ex parte* order, may have affected his consideration of the matter. This does not appear to be a requirement for setting aside leave in judicial review. Such a jurisdiction which allows one High Court judge to set aside the order of another High Court except where there was some fact not placed before the first judge, sits uneasily with such notions as judges having "seisin" of particular matters, the equality of status of judges of the same rank, the appellate structure of the courts system as described in the Constitution and the principle of *res judicata*. While it appears theoretically possible for an applicant refused leave from one High Court judge, to seek leave from another, this is largely unheard of. In practical terms therefore, an applicant who is refused leave merely has the remedy of appeal to the Supreme Court, while a respondent can bring an application to set aside leave before another High Court judge, and if this is refused, has a further appeal to the Supreme Court.

Lest there was any doubt, the jurisdiction to set aside leave was again confirmed by the Supreme Court in *Gordon v DPP & McGuinness*[13]. In this case, Butler J granted leave to apply for judicial review to challenge a District Court order which convicted the applicant of a road traffic offence, on the grounds that the conviction had been obtained by false evidence of the Gardai involved. The order of Butler J was set aside by Kearns J in the High Court on the basis that the case concerned disputed matters of fact, that there was no assertion that the District Judge acted other than within jurisdiction and that the matters in dispute were such as should be resolved on appeal and were not suitable for judicial review. On appeal to the Supreme Court, the decision of Kearns J to set aside, was unanimously reversed

Fennelly J, giving the judgment for the Supreme Court noted that the relevant principles had been recently examined in *Adam*, especially in the judgment of McGuinness J. Fennelly J summarised these principles as that;

- "leave to apply for judicial review can be obtained by demonstrating that, if the facts alleged are proved, the applicant has an arguable case in law to obtain the relief he seeks; this has been frequently described as a "low threshold" and by Denham J as a "light burden ; (see her judgment in *G v DPP*)"
- It is also necessary for the applicant to show that judicial review would be the only effective remedy and specifically that it would be more effective than any alternative remedy;
- once leave has been granted, the High Court has inherent jurisdiction to set aside the order granting it;
- this jurisdiction should be exercised sparingly and only in plain cases."

Fennelly J noted that the judgment of Hardiman J in *Adam*, confirmed the existence of the remedy to set aside leave, but did not express any view on the standard applicable on such applications. However, he considered it significant that in the part of Hardiman J's judgment, concerning the merits of the order setting aside leave, he characterised the applications as being "frivolous, vexatious and doomed to fail."

Fennelly J further emphasized that the power to put aside should only rarely be invoked. He declared;

> "It follows that the applicant for the order to set aside carries a heavier burden than the original applicant for leave. The latter has to show that he has an arguable case. The former has to establish that leave should not have been granted, a negative proposition. It is both logical and convenient to the administration of justice that this should be so. The leave procedure was intended to provide a filtering process, a protection against frivolous or vexatious applications. The judge at the *ex parte* case will scrutinise applications for leave. Obviously his decisions will not

9. Order 8 Rule 2
10. Order 16(8)(3)
11. Order 12 Rule 26
12. Order 11
13. Unreported, Supreme Court, June 7, 2002

always be right. Hence the need to permit applications to set aside, where clearly unmeritorious applications have slipped through the net. There is also a need to be able to set aside orders made where there has been a failure by the applicant to observe the principle of utmost good faith, of which the present case is not an example. On the other hand, to permit this option to operate as a pre-emptive hearing of the substantive trial would defeat the purpose of the judicial review machinery for all the reasons given by McGuinness J and Bingham L.J."

The above passage displays some curious balancing. The statement of "the need to permit applications to set aside, where clearly unmeritorious applications have slipped through the net", indicates a duplication of the leave stage. It effectively envisages erecting a second net to catch so-called unmeritorious claims. Considering that a judicial review hearing is generally based on *affidavit* evidence only, it is difficult to see that an application to set aside will be much different from the substantive hearing, albeit with a different burden of proof.

On the facts, Fennelly J in refusing to set aside the grant of leave, alluded to a Northern Ireland decision[14] to the effect that the superior courts will exercise their supervisory jurisdiction over lower courts with the aim of promoting the due administration of justice and that there may be cases where an order will be set aside where it has been obtained by false testimony. Fennelly J considered that while it was not yet clear that this was the case, it was the allegation of the appellant, and sufficient factual material has been furnished to establish a *prima facie* case. He also considered that it was not yet clear whether an appeal to the Circuit Court would be an adequate alternative remedy.

Fennelly J went on to conclude that;

"It is not desirable to comment any further on the merits of the appellant's case for judicial review or on the respondent's opposition to it. It suffices to say that it has not been shown that it is unarguable. Consequently, it has not been shown that the order of Butler J plainly should not have been made. "

Again the reference to the standard of showing that a case is not unarguable in a motion to set aside, illustrates that the same level of proof applies as at leave stage, where the test is that it is arguable. The existence of such a form of review in the motion to set aside, may at the election of a respondent effectively transform any ordinary judicial review where leave is of course *ex parte*, to the special form of judicial review, where leave is on notice (albeit the standard will still be an arguable case rather than substantial grounds). This transformation has been enabled by judge made rules rather than legislative change.

As can be seen above, Fennelly J in scrutinising the decision as to whether there were arguable grounds for granting leave, implicitly accepted that the merits of the case can be considered.

Certain subsequent applications of the setting aside motion have expanded the grounds and have further underlined that there is no need to show certain matters were not before the judge granting leave. Leave was set aside on grounds that the dispute did not properly come within the scope of judicial review in *Ainsworth v The Minister for Defence*[15]. The proceedings concerned a challenge to the recording of settlement terms of a personal injuries action on the applicant's personnel file, concerning his employment as a member of the Defence Forces. Kearns J, although recognizing there was a heavy burden to set aside leave, considered the dispute did not fall within the realms of judicial review and the case was plainly one where leave should not have been granted.

The jurisdiction to set aside was further extended to embrace whether there were sufficient grounds for the judge granting an extension of time to bring judicial review proceedings. This was in *MCD v Commission to Inquire Into Child Abuse*[16], where the respondent sought to set aside a grant of leave on the grounds that there was nothing advanced which could constitute "good reason for extending the period within which the application shall be made."[17] The proceedings concerned a refusal of the respondents to accept a late application to the Commission to Inquire into Child Abuse. An extension of time was necessary due to delay in instituting the judicial review proceedings. O'Caoimh J noted that delay in applying to the Court for leave can constitute a ground upon which leave will be refused. He considered none of the reasons advanced by the applicant constituted good and sufficient reason to justify the delay. He noted that the delay would result in prejudice to the respondent and to the persons against whom complaints would be made to the Commission.

However while there is an option to bring an application to set aside leave, no implications can be drawn regarding the strength of the case from a failure by a respondent to bring an application to set aside leave. This was so held by O'Sullivan J in *Martin v An Bord Pleanala*[18], in rejecting the argument that as there had been no application to set aside, it must be assumed that on an application for interlocutory relief, the applicant has a serious issue to be tried.

14. R (Burns) v County Court Judge of Tyrone {1960-1961] N.I. 167
15. Unreported, High Court, Kearns J. June 4, 2003.
16. [2003] 2 IR 348
17. Reliance was placed on the English decision in *R. v. H.M. Customs and Excise, ex p. Eurotunnel* (The Independent, 17 February, 1995, where the Queens bench division set aside the grant of leave on the grounds there was not sufficient grounds to justify the delay in bringing the proceedings.
18. Unreported, High Court, O'Sullivan J., July 24, 2002

Leave On Notice ?

The case law examined, cites as the rationale for the jurisdiction to set aside, the fact that leave is an *ex parte* application. It would appear to follow from this that the jurisdiction to set aside a grant of leave, would not exist in relation to forms of judicial review where legislation has prescribed that the leave application must be made on notice to the respondent, in such areas as planning, immigration and waste management law and other areas. However in a recent immigration case, it was suggested that the same principles for setting aside applied in relation to leave granted after an inter partes hearing. This was in the Supreme Court case of *CS v Minister for Justice , Equality and Law Reform*[19], which concerned an appeal against the grant of leave challenging a deportation order and the regulations upon which the order was based. McGuinness J giving judgment in the Supreme Court, largely dismissed the appeal, citing *Gordon* and *Adam* that the jurisdiction is to be exercised sparingly. On the facts of the case she noted that "the volume of litigation concerning asylum cases is already large; it is undesirable to add to it save for the most cogent reasons". McGuinness J nevertheless expressly stated that the principles for setting aside leave were not confined to where leave was granted *ex parte* but also *inter partes*. She declared;

> "very similar considerations, in my view, apply mutatis mutandi where the filtering mechanism provided under statute is an inter partes hearing and the standard is that of substantial grounds. In the present case, the learned High Court judge exercised his discretion within his jurisdiction and with considerable thought and care. In general, this court would be reluctant to interfere with that exercise of his discretion."

McGuinness J did however set aside one ground, where the order of the High Court gave leave to rely on the grounds set forth at numbers 1, 2, 5, 7 and 9 in the statement of grounds. However she considered that ground 7 did not appear to correspond to the conclusions of the learned High Court judge set forth in his judgment and this ground was set aside. This ground for setting aside appeared to be based on an administrative error in the drafting of the order.

Despite the reference to the case of setting aside, it is submitted that this case was not strictly an application to set aside the grant of leave but an appeal against the grant of leave. A certificate for leave to appeal was granted by the High Court judge after he granted leave. There was no application before another judge in the High Court to set aside the grant of leave in the High Court, as was the case in *Adams, Adam, Gordon, Ainsworth* and *MCD* but a direct appeal to the Supreme Court. The case may be more correctly characterised as an appeal against the grant of leave rather than an application to set aside, though it appears similar principles will be applied. If an application could be brought to set aside leave granted on notice before another High Court judge, not only would that be inconsistent with the rationale for such jurisdiction stated in the pre-existing case law, but would wholly undermine the other restriction in the special form of judicial review, whereby it is necessary to obtain a certificate for leave to appeal a decision of the High Court.

Conclusion

The jurisdiction to set aside a grant of leave in judicial review is now firmly established. It appears that leave can be set aside on grounds that there was no jurisdiction to grant leave on an *ex parte* basis, that the proceedings are frivolous or vexatious, that a matter does not come within the scope of judicial review and that an extension of time should not have been granted. It is clear there is no requirement to show the existence of some relevant fact not before the judge that granted leave. Despite the asserted heavy burden to be discharged before leave can be set aside, the scope of the jurisdiction is undesirably wide. The judge-made case law, runs the risk of undermining the leave stage. It also potentially transforms all judicial review where leave is *ex parte*, to the special judicial review procedure where leave is on notice, without any legislative intervention. Finally, the application of the test in subsequent High Court cases arguably indicates that the caution which attended the declaration of jurisdiction to set aside leave, is in danger of being discarded .●

19. Unreported, the Supreme Court, July 27,2004

Judicial Discretion and the Brussels I Regulation

Brian Conroy LLB, LLM[1]

Introduction

Ireland does not have a long tradition as a venue for major international commercial litigation. Yet more and more of these disputes are coming before our courts.[2] This development can be partly attributed to the continuing success of our open economy, as well as to our status as a neutral, English-speaking common law jurisdiction. The perceived reliability of our judicial system must also be a factor. No doubt the recent creation of the Commercial Court will further enhance Ireland's standing from the perspective of companies looking for an appropriate forum in which to litigate. Hence Irish jurisdiction clauses should appear more frequently in international commercial contracts. As regards cross-border disputes in respect of which a jurisdiction has not been chosen in advance, companies may well be increasingly inclined to seek to have their cases heard in Ireland on the basis of its suitability as a forum. Irish judges will need to be astute to ensure that cases are not heard in this jurisdiction in breach of the principle of comity.

The most significant example of an interference with comity occurs when the courts of two or more countries assume jurisdiction over substantially the same dispute. At common law, judges had a broad discretion as to how they dealt with a situation of this nature. The principal mechanism open to a judge who wished to have a case heard elsewhere was to decline jurisdiction on the basis of the doctrine of *forum non conveniens*. The other main means of preventing a "rush to judgment" in competition with another jurisdiction was to issue an anti-suit injunction restraining a litigant from pursuing proceedings in the foreign courts, although it has been argued that issuing an order of this kind comprises at least as much of an interference with comity as the situation which it seeks to remedy. The question of whether either or both of these two options remain open to the Irish and British courts in the context of the special jurisdictional rules on civil and commercial matters created by the Brussels I Regulation has been hotly debated. Three recent preliminary references to the European Court of Justice bring the issues of principle that are at stake here sharply into focus.
This article proposes first to examine the power of the Irish courts to stay proceedings in favour of a foreign forum under the traditional common law rules. I will then consider the courts' capacity to injunct foreign proceedings at common law. Having set out the major principles of the special rules regarding jurisdiction that have been created by the Brussels I Regulation, I will discuss the extent to which the courts' power to stay proceedings in favour of another jurisdiction is modified in cases falling within the scope of the Brussels regime. The preliminary reference by the British courts to the European Court of Justice in the case of *Owusu v. Jackso*n [2002] EWCA Civ 877 is especially relevant in this regard. Finally, the degree to which the power to issue anti-suit injunctions is preserved in the context of the Brussels I Regulation will be assessed. Of particular significance under this rubric are the very recent decisions of the European Court of Justice in the *Erich Gasser* and *Turner v. Grovit* references.

The traditional rules on staying proceedings

The fundamental difference between the traditional common law rules regarding jurisdiction and the Brussels regime is that the court's decision on whether or not to exercise jurisdiction under the traditional rules is discretionary. The court will stay proceedings that have been started as of right in Ireland under the doctrine of *forum non conveniens* where it is shown that there is a foreign jurisdiction which is clearly a more suitable venue for the proceedings. The speech of Lord Goff in the House of Lords in *Spiliada Maritime Corpn. v. Cansulex Ltd.* [1987] AC 460 (approved by the Supreme Court in *Intermetal Group Ltd. v. Worslade Trading Ltd.* [1998] 2 I.R. 34) is the cornerstone of the modern law on the doctrine of *forum non conveniens*. There the learned Law Lord stated as follows:

> "The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."[3]

Matters to be taken into account at the stage of determining whether a given foreign jurisdiction is clearly the more appropriate one will include, in particular, (1) factors connecting the proceedings with that jurisdiction which relate to convenience and expense for the litigants, e.g. the availability of witnesses, and (2) other factors connecting the proceedings with that jurisdiction, e.g. the law governing the relevant transaction. Once it has been decided that an alternative forum is clearly the more appropriate one, ordinarily a stay will be granted in relation to the proceedings here, unless it can be shown that there are special circumstances by reason of which justice requires that a stay should not be granted, e.g. the fact that the plaintiff cannot obtain

1. LL.B. (*ling. fr.)*, LL.M. (Cantab.), Senior Judicial Researcher.
2. See for example Re *Intercare Ltd.* [2004] 1 ILRM 351; *Analog Devices v. Zurich Insurance Co.* [2002] 1 I.R. 272; *Minister for Agriculture v. Alte Leipziger* [2001] 2 I.R. 82; *Bio-Medical Research Ltd. v. Delatex S.A.* [2000] 4 I.R. 307; *Intermetal Group Ltd. v. Worslade Trading Ltd.* [1998] 2 I.R. 34; *Holfeld Plastics Ltd. v. ISAP* OMV Group Spa, High Court, Unreported, Geoghegan J., 19th March 1999; Clare Taverns v. Gill, High Court, Unreported, McGuinness J., 16th November, 1999.
3. At p.476.

substantial justice in the foreign jurisdiction, as occurred in the *Intermetal Group* case, where a stay in favour of the Russian courts was refused on the basis of the delay that was likely to accrue if the case was to be heard in that jurisdiction, Murphy J. in the Supreme Court stating as follows:

> "Justice required that the action and in particular the interlocutory aspects thereof should be dealt with expeditiously. If the learned trial judge had granted a stay and refused to hear the interlocutory application such a refusal would have constituted the denial of justice not merely to the plaintiffs but also to the defendant. They shared a concern to have this extremely important commercial problem resolved at the earliest date even though their expectations as to the ultimate outcome necessarily differed. The trial of this action in a different forum would not serve the ends of justice."[4]

The Irish courts will be quicker to stay proceedings that are initiated as of right here in a case where the original contract included an exclusive jurisdiction clause in favour of a foreign forum. In the absence of recent domestic authority, the position here seems to be as enunciated by the Court of Appeal in *The Nile Rhapsody* [1994] 1 Lloyd's Rep. 382, where it was held that the defendant will normally be entitled to a stay under a modified version of the *Spiliada* test if there is a valid exclusive jurisdiction clause in favour of a foreign court. The Irish court may refuse a stay even where such a clause exists, however, if strong cause is shown by the plaintiff.[5]

Anti-suit injunctions at common law

A court here cannot stay proceedings which have been begun in a foreign court, but in certain circumstances, it will be able to grant an injunction restraining a party from instituting or pursuing proceedings abroad, i.e. an anti-suit injunction. An anti-suit injunction is most likely to be sought by a defendant in foreign proceedings who would prefer that the matter should be heard in the Irish courts rather than abroad. The injunction is directed at the litigant who is attempting to initiate or pursue proceedings abroad rather than the foreign court, although obviously it may affect the foreign court in practice. The common law justifies anti-suit injunctions on the basis that they are granted to protect domestic courts from abuses of their process and to prevent the oppressive treatment of litigants here rather than to interfere with the process of foreign courts. In *Murphy (Joseph) Structural Engineers v. Manitowoc (U.K.) Ltd.*, Supreme Court, Unreported, 30th July 1985, the Supreme Court held that the same rules applied to the granting of an anti-suit injunction in respect of foreign proceedings as to the granting of a stay in respect of domestic proceedings on the basis of *forum non conveniens*, i.e. once the Irish courts had assumed jurisdiction an injunction would be granted unless it could be shown that the foreign court was clearly the more appropriate forum and that the interests of justice did not demand that the case be heard here. Griffin J., giving the judgment of the Court, stated that it had "long been established that the Courts have an inherent jurisdiction to stay or strike out an action or to restrain by injunction the institution or continuance of proceedings in a foreign court whenever it is necessary to prevent an injustice." In adopting such an expansive approach to its power to issue anti-suit injunctions, the Supreme Court was following the earlier British decisions of *Castanho v. Brown & Root* [1981] AC 557 and *Smith Kline & French Laboratories Ltd. v. Bloch* [1983] 1 W.L.R. 730.

The modern position in Britain is significantly different to that set out above. The new approach there holds that, since an anti-suit injunction is an indirect interference with the administration of justice in a foreign jurisdiction, such an injunction will only be granted in strictly circumscribed circumstances. It is submitted that the Supreme Court would be likely to adopt this more restrained approach to the issue of anti-suit injunctions if and when the question arises before it. The modern British case law indicates that an injunction will not be granted unless the case fits into one of the following two categories of situation: (1) a litigant has behaved or threatens to behave in an unconscionable manner, or (2) a litigant has invaded or threatens to invade a legal or equitable right of another. Situation (1) will exist if the pursuit or initiation of proceedings in the foreign forum would be vexatious or oppressive. An example of such a situation arose in *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak* [1987] AC 871 where the Privy Council decided on appeal from the Court of Appeal of Brunei that an injunction should be granted to restrain the plaintiff from pursuing proceedings in Texas, since the defendant would be unable to avail of a third party indemnity which would have been available had the case been heard in Brunei if the litigation took place in Texas and hence, would suffer serious injustice rendering the pursuit of the Texan proceedings vexatious and/or oppressive. Perhaps the paradigm example of situation (2) occurs where the foreign proceedings involve the breach of an exclusive jurisdiction clause in favour of the domestic courts contained in the contract in respect of which the dispute has arisen. In *Continental Bank v. Aeakos* [1994] 1 WLR 588 Steyn LJ. in the Court of Appeal indicated that an anti-suit injunction will be issued where the foreign proceedings involve the breach of an exclusive jurisdiction clause unless there are "special countervailing factors" or some other good reason why the court should exercise its discretion against the applicant.

The better view may be that in general an anti-suit injunction can only be granted in respect of foreign proceedings where the Irish court has assumed jurisdiction over the substantive matter in dispute before the foreign court. It can be argued that if this were not the case, the courts here would no longer be protecting their own process by issuing an injunction but instead would be policing the manner in which foreign courts exercise their jurisdiction. However, the English courts have sometimes been willing to grant injunctions even where the foreign jurisdiction is the only forum in which the plaintiff would be able to pursue his claim. Thus in *Midland Bank v. Laker Airways* [1986] QB 689, an anti-suit injunction was granted in respect of American anti-trust proceedings on the ground that these proceedings were vexatious and oppressive because none of the material dealings between the parties had any association with the US, despite the fact that no such proceedings could have been taken in England. In contrast, the more recent House of Lords decision in *Airbus Industrie GIE v. Patel* [1999] 1 AC 119 indicates that a court will be reluctant to grant an injunction unless it is satisfied that the foreign proceedings have some real link

4. At p.38.
5. See *The Eleftheria* [1969] 2 All ER 641.

with the jurisdiction from which the injunction is sought. In that case an anti-suit injunction restraining the pursuit of proceedings in Texas in respect of an aircraft accident in India was refused, overturning the decision of the Court of Appeal, on the basis that the English forum did not have a sufficient interest in, or connection with, the matter to justify an interference with the foreign proceedings. Therefore it seems that in recent years the English courts have begun to subordinate their vigilance in policing abuses of process to the principle of comity.

The Brussels I Regulation

EC Regulation No. 44/2001 (known as the Brussels I Regulation), which came into force on 1st March, 2002, aims to create a unified system for the allocation of jurisdiction between the courts of signatory states and to harmonise the relevant jurisdictional rules of these states. Of the 25 Member States of the EU, all but Denmark have acceded to the Regulation. The Regulation essentially replaces the Brussels Convention (although that last instrument continues to apply to the relationship between Denmark and the rest of the signatory states). The Brussels I Regulation is now the most important instrument governing the allocation of jurisdiction between Ireland and other European states.
The Brussels I Regulation applies to civil and commercial disputes in general. It does not apply to revenue, customs or administrative matters, or to a public authority acting in the exercise of its public authority powers. Matters relating to the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, and wills or succession are also excluded. In addition, the Regulation does not apply to the winding up of insolvent companies or other legal persons, judicial arrangements, social security or arbitration. Once a matter does come within the material scope of the Regulation, the general rule under Article 2 is that the defendant should be sued in the courts of the Member State in which he is domiciled. There are further provisions which modify this principle's application in specific circumstances: under Article 5(3), for example, where a dispute concerns a tort committed in a Member State the claim may be taken either in that Member State or in the state in which the defendant is domiciled. However, a person domiciled in a Member State can be sued in the courts of another Member State only in accordance with the terms of the Regulation. Hence an Irish court would have no general discretion under the Regulation, for example, to exercise jurisdiction on the grounds that Ireland was a more appropriate forum in which to hear the matter than the jurisdiction in which the defendant was domiciled. Where proceedings are taken in Ireland against a defendant who is domiciled in a Member State and the Regulation does not confer jurisdiction on the Irish courts, the court here is obliged to decline jurisdiction of its own motion if the defendant does not submit to its jurisdiction.

Article 22 of the Regulation contains an exception to the general rules on jurisdiction in the Regulation. The provision allocates exclusive jurisdiction, regardless of the defendant's domicile, in five circumstances where the courts of a particular Member State are thought to be uniquely appropriate to adjudicate upon the subject-matter of the dispute. The five paragraphs of Article 22 concern: (1) certain proceedings relating to immoveable property; (2) certain proceedings regarding the formation and dissolution of companies; (3) certain proceedings concerning entries in public registers; (4) certain proceedings concerning intellectual property rights; and (5) proceedings concerning the enforcement of judgments.

Article 27 of the Regulation contains a provision designed to reinforce the principle of comity by ensuring that the courts of two Member States will not attempt to exercise jurisdiction in relation to the same dispute. According to the provision, where parallel proceedings involving the same parties and the same cause of action are brought in more than one Member State (*lis pendens*) any court other than the court "first seised" of a dispute must stay the proceedings or decline jurisdiction. One consequence of this rule is that, in a case where the courts of more than one jurisdiction are competent to hear the case under the Regulation, each party has an incentive to initiate proceedings as quickly as possible in the jurisdiction in which it wishes to have the case heard. Thus, for example, the natural defendant will often apply forthwith for a negative declaration in the courts of its preferred jurisdiction in order to ensure that they are first seised.

Article 23 of the Regulation deals with exclusive jurisdiction clauses. Under Article 23(1), if the parties, one or more of whom is domiciled in a Member State, have agreed that the courts of a particular Member State shall have jurisdiction, then these courts will have jurisdiction, provided that the agreement satisfies the formal requirements laid down in the provision. The question of whether a jurisdiction clause excludes the jurisdiction of the courts of other Member States is a matter of construction. If the clause is found to be exclusive, Article 23 requires that the courts of all other Member States must decline jurisdiction in favour of the courts of the chosen jurisdiction. Where the clause is construed non-exclusive, either party may elect as to whether to sue in the chosen jurisdiction or in another court that is competent to hear the case under the terms of the Regulation.

Staying proceedings and the Brussels 1 Regulation

The Regulation itself does not address the question of to what extent, if at all, the jurisdiction of a court to grant a stay in favour of a more appropriate jurisdiction on the basis of forum non conveniens survives its coming into force. This is probably because it was only in the UK and Ireland, as the two common law jurisdictions among the Member States, that the courts had possessed such a jurisdiction prior to the operation of the Brussels regime. It is clear that, where a case does not come within the terms of the Regulation at all, the traditional rules on *forum non conveniens* will continue to apply; see *Doe v. Armour Pharmaceutical Co. Inc.* [1994] 3 I.R. 78. Conversely, it seems quite well settled that the Irish courts should not be permitted to grant a stay in favour of another Member State where both Ireland and that state are entitled to assume jurisdiction under the terms of the Regulation. The real controversy arises when a non-Member State appears to be a more suitable forum for the dispute in question than Ireland, despite our courts' jurisdiction being triggered under the Regulation by, for example, the domicile of a defendant company being in Ireland.

In *Arkwright Mutual Insurance Co. v. Bryanston Insurance Co. Ltd.* [1990] 2 QB 649 the English courts had jurisdiction under the Convention, because the defendant company was domiciled there, but the contract around which the dispute revolved contained an exclusive jurisdiction clause in favour of the American courts. Potter J. in the English High Court granted a stay over the English proceedings despite the fact that the Regulation applied because the defendant was domiciled in the U.K, holding that a stay in favour of a non-Member State could be granted where the parties had agreed that the courts of that state were to have exclusive jurisdiction. In the later case of *Re Harrod's (Buenos Aires) Ltd.* [1992] Ch 72 the Court of Appeal went even further by deciding that, although the court had jurisdiction under the then equivalent of Article 2 of the Regulation, a stay could be granted in favour of the Argentinean courts if the defendant satisfied the court that Argentina was a more appropriate forum.

The above decision has been criticised on the basis that it undermines the aims of the Regulation by permitting the courts of a Member State to continue to use its own discretionary jurisdictional rules where the Regulation's mandatory provisions should apply. In defence of the decision it has been stated that, where jurisdiction is declined in favour of a non-Member State, the courts of a Member State will never exercise jurisdiction on the matter, meaning that the Regulation's chief goal of allocating jurisdiction between Member States does not apply. In support of the latter argument, in the course of his judgment in *Re Harrod's*, Bingham L.J. adopted the following extract from an article by Lawrence Collins:

> "Once a court in a contracting state has jurisdiction it is entitled, vis-à-vis other states, to exercise that jurisdiction and other courts cannot. But the states which were parties to the Convention [now the Regulation] had no interest in requiring a contracting state to exercise a jurisdiction where the competing jurisdiction was in a non-contracting state. The contracting states were setting up an intra-Convention mandatory system of jurisdiction. They were not regulating relations with non-contracting states."[6]

In *Intermetal Group Ltd. v. Worslade Trading Ltd.* the Supreme Court indicated obiter, per Murphy J., who referred to "the highly contentious nature of the debate", that the question as to the effect of the Brussels I Regulation on the doctrine of *forum non conveniens* would require a reference to the European Court of Justice. Then in *D.C. v. W.O'C.* [2001] 2IR 1 Finnegan J. (as he then was) indicated that the Irish courts' discretion to stay proceedings on this basis had not survived the incorporation of the Brussels Regulation into Irish law. However, in the very recent case of Re *Intercare Trading* [2004] 1 ILRM 351, Kelly J. appeared to envisage a greater role for the doctrine of forum non conveniens under the Regulation than may have been inferred from the D.C. case. The Court referred in particular to the Court of Appeal decision in *Re Harrod's*, holding that the decision in *D.C. v. W.O'C* was "limited to cases where the parties are both domiciled in a contracting state."

The question of whether a common law discretionary mechanism on jurisdiction can continue to be used where the Regulation applies but one party is resident in a non-Member State remains a controversial one. In *Owusu v Jackson* [2002] EWCA Civ 877 the plaintiff was seriously injured in an accident that occurred while he was on holiday in Jamaica. He chose to sue for damages in England, on the basis that one of the defendants was domiciled there, but the remainder of the defendants were domiciled in Jamaica and on the facts, Jamaica appeared the more appropriate venue for the proceedings. The Court of Appeal, instead of simply relying on *Re Harrod's* and staying the English proceedings in favour of the Jamaican courts, referred the following questions to the European Court of Justice:

> "1. Is it inconsistent with the Brussels Convention on Jurisdiction and the Enforcement of Judgments 1968, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:
>
> (a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;
> (b) if the proceedings have no connecting factors to any other Contracting State?
>
> 2. If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?"

This reference set two starkly contrasting attitudes to the scope of the Regulation into relief. On the one hand was the narrow "internalist" view of the Regulation that has tended to be favoured by the British courts and commentators, whereby the allocation of jurisdiction between a member state and a non-member state is a matter for the courts of the member state; on the other is the harmonising approach that has been championed on the Continent, whereby judges do not retain *any* discretion as to jurisdiction once the Regulation's application has been triggered.

Advocate-General Léger's opinion on the matter was issued on 14th December, 2004. His conclusions on the questions referred may be summarised as follows:

(1) The doctrine of *forum non conveniens* cannot be applied in a situation where both the plaintiff and the defendant are domiciled in a contracting State, even if both parties reside in the same State and hence the only choice of jurisdiction to be made is between that of a Member State and a non-Member State.

(2) Once the jurisdiction of a Member State is triggered under Article 2 of the Regulation by the defendant being domiciled there, the doctrine of *forum non conveniens* cannot be used by a judge in that State to decline jurisdiction in a favour of a non-Member State. The only exceptions to this general rule may be where the courts of the latter State have already been seised of *lis pendens* or related actions, or where there is an exclusive jurisdiction agreement in favour of that non-Member State, or if any of the specified special circumstances set out in Article 22 of the Regulation apply to the non-Member State, i.e. the dispute centres around immoveable property that is located in that non-Member State or around the dissolution of a company resident in that State, etc.

Hence the Advocate-General appears to have settled for a sensible compromise between the continental and common law views of the applicability of *forum non conveniens* in the context of the Regulation. Essentially the doctrine cannot apply at all where both parties are domiciled in the same Member State. In order for the doctrine to be invoked to decline jurisdiction where the defendant is domiciled in a Member State and Article 2 of the Regulation is triggered, it will have to be shown that one of the special factors set out above militating in favour of a non-Member State taking jurisdiction exists. Thus the Regulation's policy does not apply only to the allocation of jurisdiction as between Member States, but some room for the application of the doctrine of *forum non conveniens* remains, even within the context of the Regulation's rules.

6. At p. 103. See Collins (1990) 106 L.Q.R. 535.

The Brussels I Regulation and anti-suit injunctions

The anti-suit injunction appears to be a device that is peculiar to common law jurisdictions. Hence the Regulation is silent on whether a court would retain its jurisdiction to issue an anti-suit injunction in respect of proceedings being pursued in another Member State in a case falling within the scope of the Brussels regime. While this might seem to indicate that the Irish and British courts retain a discretion to issue such an injunction as part of their inherent jurisdiction to prevent abuses of their process, it may be suggested that such an interference with the process of justice in another Member State is hardly appropriate if, as many continental commentators would have it, the Brussels regime is supposed to harmonise the application of the rules on jurisdiction by national courts. Furthermore, since Article 27 requires a court to decline jurisdiction in favour of the court first seised where there is a *lis pendens* in another Member State, there is a good case to be made that the Irish courts should not assume jurisdiction to entertain an application for such an anti-suit injunction where proceedings have already been initiated elsewhere in the EU. On the other hand, it may be suggested that an Irish judge would be justified in issuing an anti-suit injunction where he considered that the courts of another Member State had assumed jurisdiction in spite of an exclusive jurisdiction clause in favour of the Irish courts, or where it appeared that the proceedings abroad were vexatious or oppressive.

In *Overseas Union Insurance v. New Hampshire Insurance* [1991] ECR-I-3317 the European Court of Justice indicated that the court second seised of a dispute to which the Regulation applies, will not generally be in a position to determine whether the court first seised was correct to assume jurisdiction. This conclusion would seem to indicate that an Irish court should not issue an anti-suit injunction in respect of proceedings in another Member State merely because it considers that the foreign court assumed jurisdiction despite an exclusive jurisdiction clause in breach of Article 23, or because it feels that the foreign proceedings are abusive. The question of the propriety or otherwise of a national court assuming jurisdiction should be one for that court alone. However, in *Continental Bank v. Aeakos*, the Court of Appeal did issue an anti-suit injunction in respect of proceedings already initiated in Greece (a Member State), stating that the Greek courts had assumed jurisdiction in breach of an exclusive jurisdiction clause in favour of England. The Court refused to stay the English proceedings under Article 27, concluding that Article 23's requirements in relation to exclusive jurisdiction clauses took precedence over Article 27 and thus that there was no requirement to decline jurisdiction on the basis of a *lis pendens*. The Court of Appeal in *Turner v. Grovit* [2000]1 QB 345 went even further, granting an anti-suit injunction in respect of Spanish proceedings on the ground that the foreign proceedings were brought for no other reason other than to oppress the defendant and hence were an abuse of the process of the English courts. The major argument against this approach would be that the courts of another Member State are in the best position to decide whether proceedings there are abusive, particularly since the Brussels regime does not seem to envisage the courts of one Member State policing the process of other national courts.

Hearing the appeal in *Turner v. Grovit* [2002] 1 WLR 107, the House of Lords sought a ruling from the Court of Justice on the compatibility of anti-suit injunctions with the Brussels regime. The question referred was framed as follows.

> "Is it inconsistent with the [Brussels Convention] for the courts of the United Kingdom to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?"

In answer to the question referred, on the 27th April, 2004, the Court of Justice seems to have heralded the demise of the anti-suit injunction in the context of the Brussels Regulation, stating that the Regulation "...is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings."

The conclusion arrived at by the Court of Justice focuses on oppression as a ground for granting an injunction and does not advert directly to the possibility of a national court injuncting proceedings in another Member State taken in breach of an exclusive jurisdiction clause in favour of that national court. However, in response to a reference from the Austrian courts in *Erich Gasser v. Misat* [Case C-116/02], the Court of Justice had already ruled on 9th December, 2003, that, "Article 21 of the Brussels Convention [now Article 27 of the Brussels I Regulation] must be interpreted as meaning that a court second seised, whose jurisdiction has been claimed under an agreement conferring jurisdiction, must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction." This conclusion essentially overrules the decision of the Court of Appeal in Continental *Bank v. Aeakos*, because it means that the Court in that case should have declined jurisdiction to entertain the application for an anti-suit injunction in the first place. Hence, once the requirements of Article 27 as to *lis pendens* are shown to have been met, a national court should simply decline jurisdiction without considering whether the terms of an exclusive jurisdiction clause have been breached.

Conclusion

It is clear that the anti-suit injunction is a weapon that remains available to the Irish courts in cases that fall within the traditional common law rules. Furthermore, there is no doubt that the doctrine of *forum non conveniens* retains its full vigour at common law. Both of these mechanisms value a judge's decision on the justice of a given case ahead of predictability and consistency. However, the rulings of the European Court of Justice in the *Erich Gasser* and *Turner v. Grovit* references clearly carry the consequence that there is now no possibility of issuing an anti-suit injunction in respect of proceedings in another Member State in a case falling within the terms of the Brussels regime. If it follows the opinion of Advocate-General Léger, the decision of the Court of Justice on the reference in *Owusu v. Jackson* may not sound the death knell for the use of discretionary mechanisms for the allocation of jurisdiction in the context of the Regulation, but those mechanisms will be confined to strictly delineated circumstances. Hence there is now limited room for the exercise of judicial discretion as regards the assumption of jurisdiction within the scheme of the Brussels I Regulation.●