The Bar Review

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- Calling time on Adverse Possession?
- Interference with Jurors
- Judicial Enforcement of Socio-Economic Rights

THOMSON
ROUND HALL

The Bar Review

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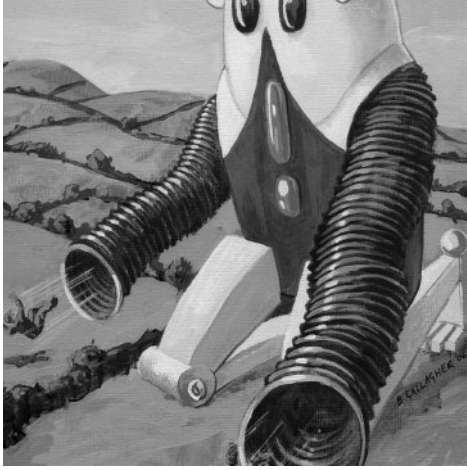

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The Regulation of the Legal Professions.

Address by Minister for Justice, Equality and Law Reform, Michael McDowell delivered at the Historical Society, Trinity College Dublin. "That regulation of the legal profession should be reformed"

With self-regulation, division into two branches and a clear demarcation of functions, the legal professions are always vulnerable to accusations of restrictive practices within each profession and between them. The legal professions are not unique in this regard. High cost is usually the underlying basis for claims of restrictive practices in any of the professional services, whether it is accountancy, medicine or the legal service. This frequently leads to calls for deregulation to remove all competitive restraints resulting, in theory at least, in lower consumer costs and higher quality service.

Two Professions Or One?

A fundamental issue for consideration is whether we should have separate professions of solicitor and barrister or whether we should have a single, fused profession of attorney.

The answer to that question, I think, has to be decided by reference to whether either system is likely to deliver a fairer, more accessible, more economic, higher quality service to the citizen and to society. In favour of a fused system are advanced the arguments of non-duplication, organic specialisation, and simplicity. Few have argued with conviction that a fused profession would work out cheaper to the client. And no international comparative evidence has ever suggested that fusion means cheaper law in any comparable state or system. It would appear that there simply is no evidence that amalgamating barristers and solicitors into commercial firms would, of itself, reduce costs to citizens and society.

On the contrary, basic economic theory would suggest that permitting the emergence of such fused firms would tend to increase, rather than diminish, the monopoly power of those firms which could fence in the best counsel as partners or as employees. One only has to look to the accountancy profession for evidence that the emergence of large, blue chip firms with international links is not always associated with cut-throat competition with smaller undertakings on fees. Which is not to say that there is no competition or tendering in the accountancy sector. There is. But big firm dominance in law and accountancy is simply not generally associated with low consumer cost. And there can be little doubt that giving the largest law firms an opportunity to fence off the commonage of the Bar would limit access for smaller law firms to talented barristers on terms of equality for most people in our society.

Apart from economic theory, there are other qualitative, social issues. Ending a situation in which smaller solicitors practices across the country would have equal access as of right to the best advocates in the system would have potentially serious implications for the tone and fairness of our adversarial system of justice. The model of access to an independent referral bar through small scale solicitors undertakings has significant social advantages which are not simply economic.

In our system, the courts operate on the basis of advocacy to a far greater extent than other systems, which are much more a paper process. Ensuring significant "equality of firepower" in terms of advocacy as a matter of course gives the lone citizen or the marginalized group a far better chance of being equal in the eyes of the law as a matter of fact as well as in constitutional theory.

The professional obligation of the Bar to be prepared to accept instructions on either side of an issue (the so-called "taxi-cab" principle) has meant that the under-dog has always had a good chance of proper representation, even for unpopular causes. That rule has enabled many solicitors to act as pioneers in ground-breaking litigation. It has also meant that "no foal, no fee" cases were taken. In the era of the time sheet, large firms with the best advocates would be under huge pressure to avoid that type of work.

Fusion would also probably end the practice of prosecutors and defenders being chosen as advocates from the same pool of advocates in the area of criminal law. That could have serious implications for the criminal justice system.

If I thought that a fused profession of attorneys would yield a better result in economic, social or equity terms, I would support fusion. But I have to say that I am not merely unconvinced by the argument for fusion; I am convinced that fusion would more likely lead to a worse result in economic, social and equity terms.

Reform of the Legal Professions

But the existence and maintenance of two professions does not mean that the separate professions are immune from reform. On the contrary, there are many aspects of the professions that should be reviewed - some which relate directly to the consequences of separation.

For instance, maintaining rules which keep the professions distinct does not justify rules and practices that are arbitrary and indefensible. Mobility between the two branches of the profession should be facilitated to the greatest extent compatible with the existence of the distinction between solicitor and barrister. Subject to the minimum safeguards, solicitors and barristers should be able to opt into the other profession with minimum formality.

Direct public access to the services of each branch of the profession should be maximised. Competent solicitors do not want or need to act as post boxes for barristers. Competent barristers do not want or need to handle clients' accounts and property Barristers who want to form partnerships with solicitors should simply become solicitors. Mixed partnerships between barristers and solicitors would simply end the taxi-cab rule. A barrister who was in partnership with a solicitor or who was employed by a solicitor would simply cease to be a barrister in the commonly understood meaning of the term. He or she would effectively be a solicitor who performed advocacy - something that the law already permits.

In that context, solicitors who undertake court-room advocacy work are entitled to total equality of esteem with barristers doing the same work. It is wrong and indefensible that they should ever feel any "cold breeze" from any quarter, still less a sense of being frozen out. It is important that the judiciary and the Courts Service at every level makes that entitlement to equality of esteem a day to day reality.

Partnerships among barristers, in my view, would not reduce the costs of barristers services to clients but would tend to increase the monopoly power of the partnerships. As things stand, a barrister has no separate financial stake in his or her practice that can be sold, shared or bequeathed, And that is how things should be, from the point of view of the economic interests of society. Barristers should remain independent individual undertakings as sole practitioners. Cost sharing and team work among barristers should, however, be encouraged and permitted.

The distinction between senior and junior counsel in relation to costs and fees should cease to exist as a matter of law and practice. If either rank is to remain, in my view, it should be advisory only as to competence and experience and not a matter of public law. In my personal view, the involvement of Government in admitting barristers to the "inner bar" is an anachronism.

In short, I strongly believe that further reforms of the legal professions are necessary and that a distinction between solicitors and barristers should not be used as a pretext for preserving practices that are indefensible or self-serving.

I also very much welcome the positive attitude to change lately adopted by the Bar Council and the Law Society. Knee-jerk defensive reaction in the past to preserve the status quo ill-became professions whose members well know that there must be change as part of a modern effective legal system. I know of no complex, economically successful society in which lawyers have failed to prosper. But there are many cases where legal conservatism and self-interest threatened the capacity of society to prosper and develop. Far reaching change is also needed in the management of court time and business. Justice delayed is justice denied. But that is for discussion on another occasion.

Legal Services Ombudsman

Self regulation is not now in vogue among the commentariat - except that is in the context of the press itself. I am someone who believes in self regulation wherever possible. I believe for instance that self-regulation in the case of solicitors has generally been very good. Of course, it is backed up by a statutory process. I have noted the views of lay people who serve in the Law Society's disciplinary system that the regime is, in their view, very strict and exacting and somewhat unforgiving. It is far from the "old boys club" that some would claim.

I believe that both barristers and solicitors should have disciplinary procedures that are open and transparent and in which the lay component is in the majority. I am glad that the professions have signalled that they will embrace this proposal for reform.

To further protect clients of the legal service, I am in the process of strengthening the mechanisms for dealing with complaints against both solicitors and barristers. Self-regulation must deliver the highest standards of professional integrity for the protection of clients. There is a public interest in ensuring a high level of confidence in the manner the professions regulate their affairs.

Just prior to Christmas the Government agreed my proposals to establish on a statutory basis a Legal Services Ombudsman. The Ombudsman will oversee the handling by the Law Society and Bar Council of three classes of complaint against solicitors and barristers, namely inadequate services, excessive fees and misconduct.

* The key function will be to provide a forum of appeal for clients of solicitors and barristers who are dissatisfied with the outcome of a complaint made to the Law Society or Bar Council.
* The Ombudsman will also conduct quality control checks on disciplinary cases that are not appealed.
* Entry to the professions will also be monitored by the Ombudsman who will report annually to me and the Oireachtas on the adequacy of numbers admitted to each profession. This will ensure that entry is not determined by the profession's financial interest but by society's needs.

Provision for the Legal Services Ombudsman will be included in a Civil Law (Miscellaneous Provisions) Bill currently being drafted and which I expect to publish this spring with a view to enactment before the end of this year.

Legal Costs – Value for Money

The issue of legal costs and fees is rarely out of the news. It's a subject upon which everyone has something to say. Recently, we have had controversies concerning legal costs which have undermined the confidence of many in the legal profession. These controversies give rise to public comment, which reflects unfairly on the vast majority of barristers and solicitors who endeavour to do their job fairly and provide their clients with the best service possible. However, it remains the case that there is a great deal of uncertainty about legal costs, especially where costs are visited upon the losing party in a civil action, a party who has had no input into how those costs arose. This isn't good for the legal profession or the general public.

Many people feel that access to the Courts has become prohibitively expensive. Many people feel that simple Circuit Court actions are now far beyond the capacity of many reasonably well off people to contemplate. In many family cases, the legal costs have become another catastrophe for families in crisis. Many people believe that there is little or no downward competitive pressure on many aspects of legal costs - even though conveyancing, for instance, is now becoming competitive.

The Haran Report

There is a widespread perception that the present system of deciding on legal costs is one in which lawyers, in the broadest sense of that term, determine their own incomes by rules which lawyers interpret and apply, and with little public interest input. There is a need to take steps to address the costs issue.

In 2004, I told an Oireachtas Committee that I intended to address these issues. In late 2004, I established the Legal Costs Working Group - chaired by Paul Haran, a former Secretary General of the Department of Enterprise, Trade and Employment - to examine the issue of the costs of civil litigation. With Government approval I asked the Group to examine the present level of legal fees and costs arising in civil litigation and the system and arrangements in place in the State relating to the taxation of costs. I also asked them to make recommendations for initiatives or changes in this area which would lead to, or assist in, a reduction of costs associated with civil litigation, would improve accessibility to justice and provide for greater transparency. The Group finalised their report late last year and, just before Christmas, I brought the report to Government to secure its endorsement of the Report's recommendations.

I am now going to take the necessary steps to implement the recommendations.I intend to empower the consumer of legal services - the client - and give him or her the information they need to make informed choices. I intend to transform the way in which legal costs are determined and, where legal costs are disputed, how costs are to be

assessed.

Implementation

I am pleased to announce that the noted accountant and businessman, Desmond Miller, FCA, has agreed to act as Chairman of an implementation advisory group which will oversee the steps necessary to complete the transformation towards the new system.

Substance of the Reform

There are three main strands to the Report.

Firstly, the Report recommends the replacement of the existing taxation of costs system (by the "taxing masters") with a new regime which would comprise the establishment of:

* a legal costs regulatory body to formulate recoverable cost guidelines based on an assessment of the amount of work reasonably required to be done in typical cases
* a written assessment process, based on the recoverable cost guidelines prescribed by the regulatory body, to be carried out by a Legal Costs Assessment Office where legal bills are disputed; and
* an oral appeals process conducted by an Appeals Adjudicator.

Put simply, it is recommended that costs guidelines should be based on an assessment of the amount and nature of work required to be done in a case. The "work done" principle is central to the Report's recommendations. Recovery of costs for "work agreed to be done but not done" will end. For instance, the Group recommends that the solicitor's instructions fee be broken down into its component parts. A similar approach should also be adopted in relation to the counsel's brief fee. All fees should be itemised and it must be clear to the client what they are being charged, why they are being charged and the basis upon which they are being charged.

Section 27 of the Court and Court Officers Act 1995 already permits the Taxing Master "to examine the nature and extent of any work done, or services rendered or provided". But it has not worked.

As the Report notes, notwithstanding the opportunity the provision presents to scrutinise legal fees by reference to work done, "rule of thumb" practices are still employed, for example, in the fixing of Junior Counsel's fees. Indeed, given the recommendation that costs should primarily be recoverable by reference to work done, the Group considered the almost universal practice whereby Junior Counsel is paid two thirds the rate of Senior Counsel as unacceptable and unfair given its arbitrary nature.

It is also my intention to radically strengthen the law in relation to the charging of percentage deductions from awards by solicitors and barristers.

Empowering the Client

Secondly, the report calls for significant improvements to be made in the quality and quantity of the information that a solicitor is required to provide to clients and the manner in which it is to be supplied. It is vital to ensure that clients get full and up to date information on the costs implications of their cases. This information should be provided at the critical stages of the process to aid the clients in making informed decisions. And it is important that clients should be given ample opportunity at all stages to terminate proceedings and prevent the further escalation in costs.

To this end the Report recommends that:

* the costs agreement letter issued by solicitors (as provided for by section 68 of the Solicitors (Amendment) Act 1994) be amended to provide the client with more detailed information
* unless the circumstances clearly preclude it, clients should be afforded a cooling-off period from receipt of their costs agreement letter before proceedings are commenced
* periodic updates be provided
* solicitors be obliged to notify clients of material developments in the conduct of litigation; and
* clients be given the opportunity to cease their action before any material increase in expenditure is incurred (subject to the knowledge that a litigant who abandons litigation may be liable to the costs of the opposing party).

Many civil actions are, of course, run on a "no foal, no fee" basis. It's important to note that the Group do not recommend that we depart from this arrangement which has long been a part of our system. The Report states that this system provides an opportunity for persons of modest means to engage a solicitor to vindicate their rights. This system has served us well and compares favourably, indeed, with the system in the neighbouring jurisdiction.

It is also my intention to put in place a clear statutory obligation on solicitors to negotiate and agree fees of barristers and experts in the interests of the client. The courts' jurisdiction to award costs will be required to be exercised in the context of a duty on lawyers to fully advise on the availability of alternative dispute resolution where that is appropriate.

Finally, the Report recommends a number of legislative and procedural changes to reduce delays in court hearings and generally designed to expedite the legal process. The intended effect of these recommendations is to introduce more certainty into the area of legal costs in civil litigation and to provide a simple and more transparent system for determining costs where disputes arise.

As will be seen from the Report, the Group's recommendations are wide-ranging and, when implemented, they will represent a very significant change in the manner in which legal costs are determined and assessed. The recommendations span the operational, policy and legislative areas and it is clear that a deal of preliminary work will be required before the new systems can be put in place. That is why Desmond Miller's Implementation Group is being established immediately.

I have no doubt that once the new costs arrangements have been put in place and have bedded into the legal system, the market for civil legal services will become more predictable, consistent and transparent to consumers. This transparency will also make it easier for consumers to recognise competitive prices for the services they require and facilitate access to the State's system of justice.

Conclusion

The new measures I am taking in the form of an Ombudsman and on legal costs will transform the provision of legal services. Taken with important initiatives already put in place to tackle the so-called compensation culture in the Civil Liability and Courts Act 2004 and the establishment of the Personal Injuries Assessment Board, the legal system is changing rapidly. This change is essential to ensure that the legal system and the legal professions continue to meet the requirements of our modern dynamic economy. A modern, dynamic economy is good for lawyers too. Ireland was recently rated the most open, enterprising state in the EU and the third most open, enterprising

state in the world.

Our society is becoming more complex in tandem with our increasing prosperity. The legal system has a key function in oiling the wheels of progress. We must ensure that the legal professions continue to adapt. I am sure that the package of measures taken already and those on the way will equip the legal system and the two legal professions to react to the changing needs of a mature and progressing modern economy.

I very much welcome the new realism of the legal professions about the need for modernisation and reform. My advice to the members of the profession is to take the lead in reform. Don't just be self regulating - become the engines for professional reform as well. I warmly acknowledge the huge changes that have already occurred - in education, professional development, and in increasing the size of intakes. I acknowledge and salute those changes. But on the very important issue of "value for money", an issue which is very often the most difficult for professional bodies to deal with because of the implications for the members' incomes, I say that far-reaching change is needed there too. I am inviting the members of the legal profession to accept that "value for money" reform is as inevitable as it is difficult. It won't go away as an issue. It will be on any Minister's agenda and will happen.

As a lawyer and as a person who has experience of the workings of both professions, I might be accused of being conflicted in this matter. I think, however, that the record shows that I have a grasp of the need for reform and of the means to bring it about. The measures taken by the Tanaiste and by me in relation to the compensation culture have been effective and fair. Lower insurance premia are the result., The legal profession has adapted to the new reality. Ireland has benefited.

On "value for money" reform, everyone stands to gain in the medium and long term. Now is the time to deliver that change. ●

Interference With Jurors and Attempting the Impossible

Frances Gardiner BL

Intimidation of witnesses in Irish criminal trials is increasingly noted in the media. Tampering with juries, by contrast, is rarely reported. Section 41 of the *Criminal Justice Act 1999* states that a person commits an offence who harms or threatens, menaces or in any other way intimidates or puts in fear another person, with the intention of causing the investigation of an offence or the course of justice to be obstructed, perverted or interfered with.[1] The person intimidated must be a person assisting the gardai in the investigation, a witness, a juror or potential juror, or a member of his family. Within the confines of the above wording, an act designed to interfere with a juror which falls short of harm, threat, menace or putting in fear, may slip through the net of legislation governing such offences. In such cases, the common law offence of embracery continues to offer protection against such 'interference' with a juror or jury.

Murdoch's *Dictionary of Irish Law* defines embracery as the common law offence of any improper endeavour or attempt corruptly to influence or instruct a jury by money, promises, threats, or by other persuasions or fraudulent devices, other than the strength of evidence and the arguments of counsel in open court.[2] Archbold states that the common law indictable offence of embracery, which is punishable by fine and imprisonment, consists of 'any attempt to corrupt or influence or instruct a jury, or any attempt to incline them to be more favourable to one side than to the other, by money, promises, letters, threats or persuasions, whether the jurors on whom such an attempt is made give any verdict or not, or whether verdict given be true or false'[3]. If a jury has already retired to consider a verdict when such an attempt is made, does this take away the grounds for a charge of attempted interference, since it would now amount to attempting the impossible? And in circumstances involving interference with a jury, what type of act constitutes an 'attempt' ?

In the recent Irish case of *DPP v Walsh* in July 2005, these issues were analysed in the Circuit Criminal Court by Judge McDonagh. The accused was charged with attempting to tamper with a jury by contacting a brother of the foreman of a jury in an earlier Circuit Court criminal trial[4] to ask if the foreman 'could be swung'. Defence counsel argued (i) that the charge itself was *res judicata* to a degree, (ii) that the offence of *embracery* is now obsolete, and (iii) that the law on *attempting the impossible* did not support a conviction on the facts of the case. Judge McDonagh, the trial judge in the case, gave a ruling on the law relating to these issues, relying on English and Irish sources for his judgment.

(i) *Res Judicata*

The charge of attempting to tamper with a jury arose from Walsh's behaviour during the trial of Black and Fitzgerald[5] when Walsh, a friend of one of the accused in that case, allegedly telephoned a brother of the foreman of the jury to ask 'if he could be swung'. Walsh was earlier observed in the back of the court making notes while the jury was being empanelled, allegedly noting the name of the foreman - Lagrue - because he had served in the Irish army in Lebanon with a soldier named Lagrue during the 1990s. The accused claimed he was simply noting the sex of the jurors because Fitzgerald had a reputation as a 'ladies man' and he, Walsh, hoped there would be more women than men on the jury.[6] Walsh said that Fitzgerald was a lifelong friend of his (Walsh's) girlfriend and was present in court to show support for him. Walsh was later seen in a nearby public house in the company of the two accused during the trial.

The defence argued that the matter was *res judicata* to an extent, since Judge O'Donnell had heard evidence and examined a witness regarding alleged jury interference at the time of the incident, and Judge White, the trial judge in the Black and Fitzgerald trial, had proceeded with that case on the grounds that no improper contact had been made with the jury. Judge O'Donnell, having heard evidence, did not cite Walsh for contempt, and defence counsel reminded the court that once one judge disposes of

1 Criminal Justice Act 1999, section 41.
2 2004, p. 390
3 Archbold. *Criminal Pleading Evidence and Practice* (2001) Section IV 28-151
4 *DPP -v- Black and Fitzgerald*
5 The charge in this case was larceny of a sportscar, selling off parts and burning the remains.
6 The jury in Walsh's own trial, to whom he addressed these remarks, comprised 8 women and 4 men.

a matter, a second judge cannot come along and revisit it. Once adjudicated upon, the matter is finished. Prosecuting counsel submitted that Walsh had involved himself in two ways in the Black and Fitzgerald trial: firstly by taking notes in court during the empanelment of the jury and secondly by telephoning the brother of the foreman of the jury. Judge O'Donnell's adjudication was solely for the purpose of ensuring the integrity of that trial rather than a procedure against Walsh himself. If the latter had been the case, Walsh should have sought an order of prohibition to prevent the trial, but had not done so.

Furthermore, if the allegation that the matter had been dealt with were to stand, then a Plea in Bar should have been entered at the commencement of Walsh's trial. This was not open to the accused because the trial judge had made no finding against him. No contempt inquiry had commenced or concluded, leading prosecuting counsel to contend that the argument that the matter had been heard and determined must fail. Judge McDonagh was satisfied that Judge O'Donnell's concern was for the integrity of the criminal trial then before Judge White, quoting the learned judge's final words '*as to what happens now, that is for others to decide*'. In other words, the court's quest was to test the legitimacy of the existing trial and uphold the validity of the jury verdict, rather than the potential indictment of Walsh for criminal behaviour. Therefore, since no plea in bar could possibly have been entered, and in the absence of grounds for seeking prohibition to prevent the trial of Walsh because the matter was *res judicata*, Judge McDonagh refused the first ground of the defence application.

(ii) Embracery is an obsolete offence?

Defence counsel referred to *R v. Owen*[7], where Lords Justices Lawton, Browne and Willis stated *per curiam* that the offence of embracery[8] is obsolescent and should be dealt with summarily as a contempt of court if only one person is involved, with an immediate custodial sentence by the trial judge as the only appropriate sentence. The reasoning behind this contention is that there are other means for dealing with circumstances which were formerly dealt with as embracery. If more than one person was involved, the likely charge is conspiracy to pervert the course of justice, while if only one person was involved, the charge was likely to be contempt of court. As this sort of incident arises during the progress of a trial, the contempt could be dealt with by the judge exercising his summary jurisdiction to deal with the contempt forthwith. However, it must be left to the common sense of judges to decide when they must resort to this power to deal with such contempt, that is, whether to proceed summarily rather than by reviving the obsolescent offence of embracery.

In the instant case the prosecution opened to the court an Irish Supreme Court judgment of Fitzgibbon, J., *In re M.M. and H.M.*,[9] dealing with the offence of embracery. Judge McDonagh emphasised the gravity of the offence, noting similarities between definitions of embracery contained in the Irish *M.M.* case, the *Owen* case and in *Archbold*. Fitzgibbon, J. referred to Kennedy, C.J.'s dictum in the *M.M.* trial, that any interference or attempt to interfere with a jury is, and has been treated from the earliest period of our jurisprudence, as a very grave criminal offence. Whether the jurors on whom such an embracery attempt is made give any verdict or not, or whether the verdict given be true or false is irrelevant to the offence of attempt or actual jury interference. In the *Owen* case, the Law Lords outlined what ought to be done by trial judges where an interference is perceived as a contempt. English courts have summary jurisdiction, power under RSC Order 52, and power to deal with the matter by indictment.

In Ireland, as Johnston, J. pointed out in *MM v. HM*, there is no doubt that the judge has jurisdiction to deal with interference with a juror in a summary way, but if the judge thought fit, he could have sent the papers to the Attorney-General with a request that the accused should be prosecuted on indictment for a misdemeanour. More importantly, as Judge McDonagh noted, in 1933, embracery was a crime recognised and defined by the Irish Supreme Court, subjecting the offender either to an indictment or an action. McDonagh, J., reiterated his earlier finding that the embracery offence had not been dealt with by the trial judge in Black and Fitzgerald. He concluded that what was once a crime in Irish law, unless altered by statute or court, ought still to be a crime. Since the crime of embracery had neither been challenged constitutionally in the Irish courts nor altered by statute, the learned Judge found that the second ground of the defence application must fail.

(iii) Desire, Intention, Proximity and Attempting the impossible

Charleton et al state that the gravamen of attempt cannot be the mere holding of an intent to commit a crime. If this were so, then a person could be found guilty of a crime simply on the basis of his thoughts[10]. A positive step or action is an essential component. Otherwise the intent does not go beyond mere preparation. The most satisfactory test to establish if an act constitutes an attempt is that it should not be too remote from the crime, or in other words, proximity must be established.

Counsel for the defence tabled a three-pronged challenge to defeat the proximity theory.[11] First, the step between intent and attempt had not been bridged by Walsh, because the steps he did take were merely preparatory to the intended act itself, which was to make contact with

7 Criminal Appeal Reports, 1976 p. 199
8 The Court of Appeal definition of embracery accorded with that of Archbold 1998.
9 [1933] I.R. 299
10 see *Charleton, McDermott & Bolger* (1999) 4.19

the foreman of the jury. Second, the act of attempt must be 'close to the commission of the crime', which was not the case here, since a brother of the juror was too remote a contact to fulfill the legal prerequisites for attempt. Relying on *Attorney General v. Richmond*[12] and *Attorney General v. Thornton*[13] to distinguish between desire and/or intention to commit an offence and actually attempting it, defence counsel argued that all that was done by Walsh was a preparatory act, and that intention alone is not sufficient for the commission of an offence. Judge McDonagh, quoting Haugh J's direction to the jury in *Thornton* that a mere desire to commit a crime, or a desire followed by an intention to do so, is not sufficient to prove attempt. An attempt consists of an act done by the accused with a specific intent to commit a particular crime. This must go beyond mere preparation, and must be a direct movement towards the commission after preparations have been made; that some such act is required and if it only remotely leads to the commission of the offence and is not immediately connected therewith, it cannot be considered as an attempt to commit an offence.

The defence argued that since no evidence had been adduced that an attempt was made to contact the juror directly, the proximity component was absent and thus the act fell short of attempt, even if desire and intention were present. Defence counsel distinguished the *Thornton* case where the accused had a direct conversation with the doctor who was asked to procure a drug to produce a miscarriage, while the instant case was equivalent to going to the doctor's nurse and speaking to her preparatory to going to the doctor. Here the great moment was to be the one when the jury foreman would be approached. The great plan in this instance never got off the ground and at its worst was merely preparatory. Countering this argument, the prosecution contended that all the accused had to do was to communicate with a member of the jury, whom he had identified, and Walsh had taken a positive step to interfere with the jury via the brother of the foreman by telephoning him.

The defence of impossibility is peculiar to the inchoate offences of attempt, conspiracy and incitement[14]. The defence submitted that where the commission of the offence proves impossible, any attempt to commit the offence does not exist. In the instant case this reasoning implies that since the jury had already been sequestered, contact with the foreman would have been impossible and thus the charge of attempt had no basis in law. *Charleton et al* allow it is possible to argue that where the objective of the accused is impossible, nothing he ever does can be proximate to the substantive crime but says this argument has never been accepted as the basis of the defence of impossibility as it applies to inchoate crimes.

Judge McDonagh then considered the prosecution distinction between legal impossibility and physical impossibility. In the case of a pickpocket, for example, the putting of his hand into an empty pocket in the hope of gain but finding it empty is targeting the person and not the pocket. Not knowing in advance the impossibility of the act, he nevertheless has performed an act that he thinks will lead to a successful conclusion.[15]The accused will be guilty where the object he is intent on achieving would be a crime if he was successful.[16] Applying this to the instant case, the learned judge said Lagrue (the jury foreman) was not open to contact and neither was his brother open to do a good turn for an old mate. The defence submitted that Walsh was in the same position as the pickpocket. Reiterating the words 'any attempt whatsoever' used in *MM v HM* by the Supreme Court, Judge McDonagh concluded that the actions taken by Walsh fell squarely within the definition 'any attempt whatsoever'. Furthermore, the phrase 'to swing' in the context of a jury and in the instant case 'could he be swung' implies persuasion by whatever means. Persuasion was clearly a word which was in the contemplation of the Supreme Court in 1933, according to the learned judge, who found that the actions brought him certainly within the definition of embracery, and also brought him firmly within any rational view of attempt.

Walsh was found guilty by the jury of embracery and sentenced to four years imprisonment. I understand the case in now being appealed. The proceedings here demonstrate that, while the 1999 Criminal Justice Act addresses overt intimidation or putting in fear of jurors, the acts identified in the instant case, falling short of overt threat or menace, yet deliberately aiming to tamper with a jury, can be dealt with under the common law offence of embracery. ●

Visit of President of the ECHR to King's Inns

President Luzius Wildhaber, President of the European Court of Human Rights addressed the students at King's Inns late last year. At the end of his address, he presented Karen Dowling with the Niall McCarthy Bursary for 2006 (awarded to a degree student following a rigorous interview and submission of an essay). Karen was joined by previous McCarthy scholars, Kate O'Toole and Oisín Crotty.

11 *Charleton et al* 4.34 and 4.35
12 1 *Frewen* 28 (1935)
13 [1952] IR 91
14 *Charleton,* 4.66
15 In *Detering* [1982] 2 SCR 583, the Supreme Court of Canada held that even though the victim of a fraud was not deceived by the accused's acts, the accused could be convicted of attempted fraud, quoted in *Charleton et al* 4.69.
16 Legal impossibility consists of acts done by an accused which are not characterised as an offence.

The Payment of Compensation to Victims of Rape

By Maire Reidy B.L.

In order to justify the imposition of a non-custodial sentence in rape cases, there must exist exceptional circumstances. In *DPP v. Tiernan*[1], the Supreme Court (Finlay C.J.) held that, notwithstanding the need to consider the particular circumstances of each case, "it is not easy to imagine the circumstances which would justify the departure from a substantial immediate custodial sentence for rape and I can only express the view that they would probably be wholly exceptional". It was held that the one sure mitigating factor was an admission of guilt, particularly if made at an early stage and resulting in a plea of guilty[2]. Such an early plea may result in a lesser sentence being imposed but would not result in a non-custodial sentence in the absence of exceptional circumstances.

In the wake of *Tiernan*, one of the changes relevant to the sentencing of sex offenders was the introduction in 1993 of compensation orders. Section 6 of the Criminal Justice Act 1993 gives the Court statutory authority to make such an order:-

> "Subject to the provisions of this section, on conviction of any person of an offence, the court, **instead of or in addition to dealing with him in any other way,** may, unless it sees reason to the contrary, make (on application or otherwise) an order (in this Act referred to as a 'compensation order') requiring him to pay compensation in respect of any personal injury or loss resulting from that offence (or any other offence that is taken into consideration by the court in determining sentence) to any person (in this Act referred to as the 'injured party') who has suffered injury of loss." *(Emphasis added)*

As regards the quantum, how much compensation should be paid to a victim of rape or aggravated sexual assault? It appears that this is a matter for the judge's discretion but it should not exceed the amount that would be payable in a civil action for the injury.

The section increased awareness of the payment of compensation as a sentencing option open to the court and it encouraged offenders to offer compensation in the hope that, if accepted by the victim, it would reduce the length of their sentence or result in the imposition of a non-custodial sentence. The practice was therefore sometimes referred to as "the chequebook defence" and the perception was that the payment of compensation facilitated offenders rich enough to pay compensation in escaping prison while those not in a position to make such payment were being imprisoned for the same or similar offences: as the saying goes, a person is entitled to the best defence that money can buy.

In *DPP v McLaughlin* (Court of Criminal Appeal, Kearns J., July 13, 2005), the DPP applied pursuant to s.2 of the Criminal Justice Act, 1993, for a review of the respondent's sentence on the ground of undue leniency. The respondent had pleaded guilty to rape and was sentenced to three years imprisonment suspended for five years upon the sentencing judge learning that the respondent had made the sum of €10,000 by way of compensation available to the victim and upon the respondent entering into a bond of good behaviour. The applicant argued that the sentencing judge erred in principle in giving disproportionate weight to the acceptance by the complainant of the sum of money offered by the respondent. It was further submitted that the judge erred in principle in failing to give adequate weight to the victim impact report which set out in detail the effects that the offence had had on the complainant and that the perpetrator had inflicted a sexually transmitted disease upon his victim. It was further submitted that there had been no early expression of remorse or honest acceptance of responsibility by the respondent in that the indication of the guilty plea was conveyed only in the week prior to trial. Counsel on behalf the applicant argued that there must be exceptional circumstances to justify the imposition of a non-custodial sentence in the case of rape and that the payment of money was not an exceptional circumstance.

The Court held, imposing a sentence of four years imprisonment and

1 [1988] I.R. 250, at p. 253.

2 See Thomas O'Malley (2000) Sentencing Law and Practice (Dublin: Round Hall Sweet & Maxwell) at p. 410.

suspending the last three years in recognition of the payment of compensation to the victim, that only special circumstances justify a sentencing judge in failing to impose a custodial sentence for a rape offence. Rape is an offence punishable by imprisonment for life and which ranks only second in the hierarchy of criminal offences known to the law. Whilst in every criminal case, a judge must impose a sentence which meets the particular circumstances of the case, it is not easy to imagine a circumstance which would justify departure from a substantial and immediate custodial sentence for rape *(DPP v Tiernan* [1988] I.R. 250 followed). The payment of money of itself cannot be described as an exceptional circumstance. There is no jurisprudence, principle or practice which renders the payment of compensation to a rape victim inconsistent with the imposition of a custodial sentence.

The issue of compensation arose again in *DPP v. McCabe(No. 2)* (Court of Criminal Appeal, July 13, 2005), where judgment was delivered on the same day as *McLaughlin*. As in *McLaughlin*, the DPP applied pursuant to s.2 of the Criminal Justice Act, 1993 for a review of the respondent's sentence on the ground of undue leniency. The respondent had pleaded guilty to aggravated sexual assault on a female foreign national. Taking into account that the respondent had offered and the victim had accepted compensation in the sum of €15,000, the learned trial judge imposed a term of 4 years imprisonment, but suspended same on condition that the respondent enter into a bond to keep the peace and be of good behaviour for a period of 3 years. He also ordered that the respondent's name be entered in the Sex Offender's Register. The facts of the offence were that the respondent had entered a 24-hour shop in Dundalk where the complainant was working and had forced her into an area at the back of the shop where he removed her shoes, trousers and underwear and his own clothing. He told her he had a knife. The scene was brought to an end when another person entered the shop and the respondent fled. Upon his arrest, he said that he had drunk a lot of alcohol. He also stated that he had attended a lap-dancing club earlier in the night and blamed his actions on the amount of alcohol in his system and the effect the lap dancing had had on him. The respondent, a farmer and married man, who had a 2-year-old child at the time, had no previous convictions. From the victim impact report, it appeared that the complainant had been diagnosed as suffering from post-traumatic stress disorder to a severe degree and had been prescribed medication by a psychiatrist. The applicant submitted that any practice whereby the payment of compensation would preclude the imposition of a custodial sentence would lead to a variety of highly unsatisfactory outcomes. It was further submitted that any form of 'cheque-book' defence culminating in an agreed payment was also highly objectionable in that it was capable of discriminating between rich and poor offenders in a totally arbitrary manner.

The Court held, refusing the application, that the payment of money cannot, of itself, be viewed as an exceptional circumstance justifying a non-custodial sentence in a rape case. In the instant case, however, the court was satisfied that the events of the night in question were quite exceptional and that the exposure of the respondent to large amounts of alcohol and displays of lap dancing in a nightclub in Dundalk triggered an episode which was quite out of keeping with his character. Since the time of the offence, the respondent had given up alcohol completely. Notwithstanding this, his marriage had collapsed because of the ramifications of the sexual assault. For the purpose of raising the necessary amount to pay compensation, he sold off his herd of cattle. In circumstances where the respondent had been led to believe that a non-custodial sentence would be imposed if the victim indicated a willingness to accept the sum offered, fairness would require that a custodial sentence only be imposed where there had been an actual rape or some other major aggravating factor.

In the *McLauglin* and *McCabe* cases, the Court of Criminal Appeal has reaffirmed the position outlined in the Criminal Justice Act 1993, which is that the payment of compensation by a sex offender to his victim is not necessarily incompatible with the imposition of additional sanctions for the same offence. According to O'Malley on *Sentencing Law and Practice,* the compensation order has much to commend it as a reparative measure, but it is of very limited value in advancing the welfare of the victim. The recent Court of Criminal Appeal decisions make it clear that there is no practice, principle or jurisprudence whereby paying money to a victim of rape results in or tends towards the imposition of a non-custodial sentence. The position remains that rape, being one of the most serious crimes in the hierarchy of offences, second only to murder, must, other than in the most exceptional circumstances, attract a substantial and immediate custodial sentence, regardless of the payment of compensation.

A final question on the issue of compensation is what significance, if any, ought to be attached by the court to the acceptance of compensation by victims of rape? As Counsel for the applicant, Patrick Gageby, SC pointed out in the *McLaughlin* case, in circumstances where a victim may be impecunious, he or she may feel obliged or may want to take the money offered. Furthermore, a complainant may decide to accept the money in order to donate it to a charitable cause so as to help other people. In a number of cases, sentencing judges have referred to victims who refused the offer of compensation and remarked that they respected that choice[3]. Does this imply that a decision by the victim to accept the money may not be worthy of respect? ●

3 See *DPP v. Padraig Finn* [2001] 2 I.R. 25. The Supreme Court mentions the offer of compensation by the offender's family to the victim and her rejection of same. The High Court judge, in sentencing the offender, said that he both understood and respected victim's rejection of the offer of compensation.

Legal Update

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A directory of legislation, articles and acquisitions received in the Law Library from the 23rd November 2005 up to February 7th 2006.
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Waste disposal without licence – Environmental pollution – Risk of pollution – Site investigation and report – Conditions necessary to making of order under s 57(1) – Whether conditions established – Whether evidence of on-going environmental damage at time of making of order necessary – Whether plea of guilty in prior criminal proceedings admissible – Prejudice – Whether respondent bound by plea – Discretion – Principles applicable to exercise of discretion – Whether order under s 57 available only as last resort – Whether appropriate to order respondents to commission site investigation and report – Whether s 57 applicable to first respondent personally – *Wicklow County Council v Fenton (No 2)* [2002] 4 IR 44 and Morris v Garvey [1983] IR 319 followed; *Director of Public Prosecutions (Ivers) v Murphy* [1999] 1 IR 98 considered - Waste Management Act 1996 (No 10), s 57 – Relief granted (2003/37MCA – Clarke J – 17/6/20050 [2005] IEHC 208
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Leave to amend plenary summons and statement of claim sought – Whether amendments necessary for purposes of determining controversy – Discovery – Documents - Plaintiff's motion for discovery - Whether plaintiff entitled to documentation - Rules of the Superior Courts 1986 (SI 15/1986), O 28, r 1 and O 31, r 12 – Liberty to amend plenary summons and statement of claim and discovery granted (2002/14536P – Budd J – 10/6/2005) [2005] IEHC 288
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Judicial review – Statutory interpretation – "Commercial proceedings" – Whether judicial review proceedings challenging grant of planning permission "commercial" – Whether proceedings capable of admission to commercial list – P.J. Carroll v. Minister for Health [2005] IESC 26 [2005] 1 IR 294 distinguished - Rules of the Superior Courts 1986 (SI 15/1986), O 63A, r 1(g) – Proceedings admitted to commercial list (2004/404JR – Kelly J – 14/6/2005) [2005] IEHC 188
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Delay
Dismissal of proceedings for want of prosecution – Inordinate and inexcusable delay – No step in proceedings for six years – Acceptance by plaintiff's solicitor that he was responsible for the delay – Whether delay of over six years during which no step was taken inordinate – Whether delay excusable - Balance of justice - Whether defendant prejudiced by plaintiff's delay – Whether where responsibility for delay rests upon professional advisor court should take into account that plaintiff may have alternative means of enforcing rights - Application granted in respect of second defendant - (1997/2633P – Clarke J – 28/6/2005) [2005] IEHC 294
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Whether information sought by interrogatory appropriate – Whether interrogatories probative of matters in issue – Whether special exigency established – *Woodfab Ltd v Coillte Teo* [2000] 1 IR 20, *McCole v Blood Transfusion Service Board* (Unrep, Laffoy J, 11/6/1996) ,Det Danske v KDM (1994) 2 Lloyd's Reports 534, Crofter Properties Ltd v *Genport Ltd* (Unrep, McCracken J, 23/4/2002) and Mercantile Credit Company Ltd v Heelan [1994] 2 IR 105 considered - Application refused - (1999/12463P – Master Honahan - 20/4/2005) [2005] IEHC 230
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Criminal summons – Summary offence – Act of 1986 incorporating time limit from Act of 1851 – Whether Interpretation Act 1937 applied – Whether summons obtained within six months – *Dodds v Walker* [1981] 1 WLR 027; Williams v Burgess (1840) 12 Ad&El 635; Young v Higgon (1840) 6 M&W 49; *Radcliffe v Bartholomew* (1892) 1 QB 161 and *Frew v Morri*s (1897) 34 ScLR 527 followed - Petty Sessions (Ireland) Act 1851 (14 & 15 Vict, c 93), s 10(4) – Interpretation Act 1937 (No 38), s 11(h) – Courts (No 3) Act 1986 (No 33), ss 1(4), 1(7) - Summons issued within time (2004/1997SS – Finlay Geoghegan J – 14/6/20050 [2005] IEHC 187
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3/2005 Health (Amendment) Act 2005
Signed 11/03/2005

4/2005 Social Welfare and Pensions Act 2005
Signed 14/03/2005
S.I.187/2005 commencement s's 38 & 39
S.I. 230/2005 commencement s7(1)

5/2005 Finance Act 2005
S.I.225/2005 commencement s's 100& 104(1)(b)

6/2005 British-Irish Agreement (Amendment) Act 2005
Signed 06/05/2005

7/2005 Landlord and Tenant (Ground Rents) Act 2005
Signed 19/05/2005

8/2005 Dormant Accounts (Amendment) Act 2005
Signed 25/05/2005

9/2005 Sea pollution (Hazardous Substances) (Compensation) Act 2005
Signed 30/05/2005

10/2005 Safety, Health and Welfare at Work Act 2005
Signed 22/06/200

11/2005 Maritime Safety Act 2005
Signed 29/06/2005

12/2005 Investment Funds, Companies and Miscellaneous Provisions Act 2005
Signed 29/06/2005

13/2005 Air Navigation and Transport (Indemnities) Act 2005
Signed 04/07/2005

14/2005 Disability Act 2005
Signed 08/07/2005
S.I. 474/2005 commenced in part.

15/2005 International Interests in Mobile Equipment (Cape Town Convention) Act 2005
Signed 09/07/2005

16/2005 Electoral (Amendment) Act 2005
Signed 09/07/2005

17/2005 Commission to Inquire into Child Abuse (Amendment) Act 2005
Signed 09/07/2005

18/2005 Civil Service Regulation (Amendment) Act 2005
Signed 09/07/2005

19/2005 Civil Registration (Amendment) Act 2005
Signed 09/07/2005

20/2005 Garda Siochana Act 2005
Signed 10/07/2005
S.I. 370/2005 commencement s2.

21/2005 Grangegorman Development Agency Act 2005
Signed 11/07/2005

22/2005 Veterinary Practice Act 2005
Signed 12/07/2005

23/2005 Interpretation Act 2005
Signed 17/10/2005

24/2005 Land Act 2005
Signed 26/10/2005
S.I. 689/2005 (commencement)

25/2005 Adoptive leave Act 2005
Signed 02/11/2005
S.I. 724/2005 (commencement)

26/2005 Social Welfare Consolidation Act 2005
Signed 27/11/2005

27/2005 Health and Social Care Professionals Act 2005
Signed 30/11/2005

28/2005 Transfer of Execution of Sentences Act 2005
Signed 13/12/2005

29/2005 Appropriation Act 2005
Signed 16/12/2005

30/2005 Social Welfare Act 2005
Signed 16/12/2005

31/2005 Railway Safety Act 2005
Signed 18/12/2005

32/2005 Statute Law Revision (Pre-1922) Act 2005
Signed 18/12/2005

33/2005 Coroners (Amendment) Act 2005
Signed 21/12/2005

34/2005 Development Banks Act 2005
Signed 21/12/2005

Abbreviations
BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Society of Ireland
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland

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Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement

Gerry Whyte BL*

Introduction

In a book[1] published in 2002, I defended the proposition that it is both constitutionally and politically legitimate for Irish courts to protect the implied socio-economic rights of marginalized individuals and groups when it is clear that such rights have been egregiously neglected by our political system. I also cautioned, however, that one should not overestimate the impact of judicial decisions on public policy and argued that the real value of litigation in this context is that it functions as a corrective mechanism for the political system, requiring that system to address issues of social exclusion that would otherwise be ignored.

Sadly, if predictably, the Irish Supreme Court took a very different view of the role of the courts in this area in two cases decided in 2001, *Sinnott v. Minister for Education*[2] and *T.D. v. Minister for Education*.[3] In both cases, several members of the Supreme Court signalled their opposition to the involvement of the courts in matters of distributive, as distinct from commutative, justice. This distinction was first introduced into Irish law by Costello J (as he then was) in *O'Reilly v. Limerick Corporation*[4]. In this case, he held that a claim for damages for alleged infringement of constitutional rights through a failure to provide the plaintiffs with access to halting sites raised issues of distributive justice that, under our doctrine of separation of powers, were entrusted to the political, rather than judicial, authorities. In T.D., a majority of the Supreme Court took the view that mandatory orders directing the executive to fulfil its constitutional obligations could only be granted where there had been a conscious and deliberate decision by the executive to act in breach of its constitutional obligations, accompanied by bad faith or recklessness.[5] Moreover senior members of the Court also signalled that the Constitution could not be relied upon to protect implied socio-economic rights. Thus Murphy J. said:

> 'With the exception of Article 42 of the Constitution, under the heading "Education", there are no express provisions therein cognisable by the courts which impose an express obligation on the State to provide accommodation, medical treatment, welfare or any other form of socio economic benefit for any of its citizens however needy or deserving'.[6]

Keane C.J. also expressed the

> 'gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as "socio-economic rights" to be unenumerated rights guaranteed by Article 40'.[7]

Given the central importance of remedies to public interest litigation, these two decisions clearly restrict the role and impact of litigation in protecting socio-economic interests.[8] Irish courts, it seems, could not be relied upon to protect socio-economic interests that are not explicitly referred to in the Constitution or legislation. Moreover, even in respect of express socio-economic rights, remedies for their infringement would, in the vast majority of cases, be restricted to declarations, prohibitory injunctions and damages. A judicial refusal to recognise implied socio-economic rights is particularly problematic, given that the demand for the recognition of such rights is invariably rooted in political neglect of the needs of marginalized groups, as can be seen most evidently in the recent campaign of the Disability Legislation Consultation Group. Recent judicial decisions, however, suggest that the Irish courts may not be completely irrelevant to the protection of socio-economic rights, even if the judicial role here is a limited one. Moreover, even where the

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1 Whyte, **Social Inclusion and the Legal System: Public Interest Law in Ireland** (IPA, 2002).
2 [2001] 2 IR 545.
3 [2001] 4 IR 259.
4 [1989] ILRM 181
5 See the judgment of Murray J (as he then was) in *T.D.* [2001] 4 IR 259 at p.372. Denham J. dissented on this point in *T.D.*, holding that in exceptional circumstances a court may grant a mandatory order in circumstances "where a constitutional right has not been protected by defendants and where there are no reasonable grounds to balance such a decision against the protection of constitutional rights." [2001] 4 IR 259 at p.306. Geoghegan J. had expressed a similar view, *obiter*, in *Sinnott*.
6 [2001] 4 IR 259 at p.316.
7 [2001] 4 IR 259 at p.282. Similar sentiments were expressed by Hardiman J at p. 361.
8 In other respects, however, recent judicial decisions are very accommodating of public interest litigation. See, e.g., *Mulcreevy v. Minister for the Environment, Heritage and Local Government* [2004] 1 ILRM 419 and *Irish Penal Reform Trust v. Government of Mountjoy Prison* (2 September 2005) on *locus standi; Iwuala v. Minister for Justice, Equality and Law Reform* [2004] 1 ILRM 27 on the use of the *amicus curiae* brief; and *McEvoy v. Meath Co. Co.*, [2003] IEHC 31; High Court, 24 January 2003 on the awarding of costs in public interest cases.

protection of socio-economic rights is entrusted to non-judicial bodies, the courts retain some residual supervisory role.

A focus on the role of the courts in the enforcement of socio-economic rights may obscure the fact that the issue here is, at root, a political one - does our version of democratic politics take seriously the concept of enabling every person to participate in society to the full extent of her abilities and potential? In this article, I offer some views on the relationship between the call for enforceable socio-economic rights and the nature of our politics. I then consider the implications of two recent judicial decisions on the role of the courts in the enforcement of socio-economic rights in Ireland before commenting on the supervisory role of the courts in relation to non-judicial bodies charged with such enforcement.

Socio-economic rights and distrust of democracy

Writing extra-judicially about the role of the courts, Hardiman J. argued that the views of supporters of judicial activism "are characterised by a deep distrust of the democratic political process, and by an authoritarian tinge."[9] In 1998, however, another Hardiman offered compelling evidence to justify a deep unease with the manner in which our political system largely ignores the needs of disadvantaged groups and individuals. According to Dr. Niamh Hardiman, there are many reasons why disadvantaged groups in Ireland are unable to influence political decision-making effectively.

> "It is difficult for people in disadvantaged situations to become organised: their circumstances make it hard to build up networks of involvement. There are many aspects of social disadvantage, making it difficult to establish common concerns between organisations. These organisations may themselves face challenges as to how representative they really are...
>
> Even where the disadvantaged acquire a voice with which to lobby government, they do not necessarily gain influence, at least not when their objectives are held to conflict with those of business. The Irish economy is small and very open, and is particularly dependent on retaining and expanding investment in the multinational sector. Business interests do not necessarily oppose government initiatives to reduce social inequalities. But they can bring a powerful influence to bear on the priority which governments accord to redistributive issues, both through direct lobbying, and through what we might think of as the particular structural advantage they enjoy in the Irish economy. The possibility also exists that business interests may influence government priorities indirectly, through the financial donations they make to political parties.
>
> Finally, the prevailing style of setting priorities and deciding upon the distribution of resources within the Irish political system tends to favour those best able to promote their group's interests and claims. Within the established way of doing things, radical policy innovations are not so much resisted as never seriously contemplated".[10]

Dealing specifically with disadvantage and electoral politics, Hardiman cited studies showing strong correlations at the aggregate level between low electoral participation and social deprivation in the Dublin area and indicating that long-term non-voters are far more likely to be socially disadvantaged that regular voters. In contrast, swing voters who "occupy far more of politicians' and party activists' attention ... are far more likely to be urban, middle-class, and articulate about their interests and preferences".[11]

In my opinion, the call for justiciable socio-economic rights arises directly from the failure of the political system to respond effectively to groups that are economically, socially and, therefore, politically marginalized. It does not follow, however, that a recognition of what I consider to be a serious flaw in our political system amounts to a "deep distrust of the democratic political process" that is characterised by an "authoritarian tinge". Quite the contrary, in fact, for I have defended judicial activism in relation to the protection of socio-economic rights on the ground that such activism is sometimes necessary to provoke or spur the political system into addressing questions of social exclusion. I do not argue - I cannot in the face of the facts on the ground - that judicial activism should pre-empt the political process. However I do believe that it can help to foster a particular type of democratic politics, described by Michael Perry as "deliberative, transformative politics".[12] This is a type of democratic politics in which each individual is recognised as an end in herself rather than as a person to be manipulated in the interests of securing another's selfish, sectional interests; a politics that believes it is possible, if sometimes difficult, to ascertain what the common good requires in a given situation and that encourages all participants in the political process to work towards the attainment of that common good. However there can be no doubt but that the promotion of this type of democratic politics will be impeded if the courts eschew any role in reviewing the failure of the other branches of government, especially the executive, to protect adequately the needs of groups traditionally ignored by the political process. Such judicial reticence gives free rein to what Perry calls "manipulative, self-serving" politics where citizens treat their personal preferences as a given and where politics consists largely of manipulating others in order to secure those preferences. Whether supporters of judicial activism may be regarded as distrustful of democracy depends, therefore, on what version of democracy one has in mind.

The views expressed by many senior members of the Supreme Court in

9 "The Role of the Supreme Court in our Democracy" in Mulholland (ed.), **Political Choice and Democratic Freedom in Ireland: Forty Leading Irish Thinkers** (2004) at p.42.

10 "Inequality and the representation of interests" in Crotty and Schmitt, (eds.) **Ireland and the Politics of Change** (Addison Wesley Longman Ltd., 1998) p.122 at p.134.

11 Hardiman (1998), at p.135.

12 See **Morality, Politics and Law** (Oxford University Press, 1988), ch.6.

Sinnott and *TD* are certainly inimical to an extensive judicial role in the protection of the interests of the disadvantaged of our society. However two recent decisions suggest that all is not quite lost and that, if only in exceptional cases, litigation may yet have something to offer.

In re Article 26 and the Health (Amendment) (No.2) Bill 2004

The approach adopted by the Supreme Court in *In re Article 26 and the Health (Amendment) (No.2) Bill 2004*[13] to arguments based on implied socio-economic rights holds out the prospect of some residual role for the courts in the enforcement of such rights.

The background to this case was the unlawful policy of the health authorities, over a period of almost thirty years, of charging medical card holders for the provision of in-patient services in public nursing homes. The 2004 Bill purported to provide a lawful basis for such charges in the future and also to validate retrospectively the charges imposed in the past. The Bill was referred by the President to the Supreme Court pursuant to Article 26 of the Constitution and its constitutionality was challenged on a number of grounds. The grounds that concern us here are the arguments directed against the prospective provisions of the Bill. Counsel challenging the Bill argued that citizens who could not look after themselves independently had an implied constitutional right to care and maintenance by the State, derived from the constitutional rights to life and bodily integrity protected by Article 40.3, and, accordingly, that they could not be charged for such care and maintenance. In the alternative, it was argued that the charges actually provided for by the Bill unduly restricted the constitutional right of access to the relevant services of persons of limited means.

While these arguments were eventually dismissed by the Supreme Court, the manner in which the Court reached its conclusions is of interest in relation to the judicial protection of socio-economic rights. In the light of the views expressed in *T.D.*, it was certainly open to the Supreme Court to dismiss this challenge to the constitutionality of the 2004 Bill on the ground that no implied constitutional right to care and maintenance by the State existed.[14] Significantly, however, the Court did not take this course of action. Instead it held open the possibility that citizens might enjoy such an implied socio-economic right, stating

> [i]n a discrete case in particular circumstances, an issue may well arise as to the extent to which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs.[15]

Noting that it was not necessary to resolve this issue in the instant case, the Court proceeded to decide whether the charges provided for in the Bill could be regarded as an impermissible restriction on a constitutional right to care and maintenance by the State, assuming such a right existed. The Court concluded that it could not be regarded as an inherent characteristic of any such right that the services provided by the State had to be provided free of charge, irrespective of the means of the holder of the right.

In response to the alternative challenge to this aspect of the Bill advanced by counsel, the Court held that the charges actually proposed would not restrict access to the relevant services by persons of limited means to such an extent as to amount to an infringement of their claimed right to care and maintenance by the State. In coming to this conclusion, the Court had regard to the facts that the potential beneficiaries of the services referred to in the Bill would have had to maintain themselves out of their own resources when living outside the care of the Health Board and that there was nothing before the Court from which it could conclude that the maximum charge fixed by the Oireachtas in the Bill would generally cause undue hardship or unduly deny access to the services in question. While there might be individual cases in which such a charge would involve undue hardship, the Bill made adequate provision for these by conferring on the Chief Executive Officer of each Health Board of a discretion to remit the charge, in whole or in part, in order to avoid undue hardship.

The fact that the Court upheld the proposed charge for in-patient services only after satisfying itself that the statutory regime would not unduly deny access to these services suggests, by implication, that legislation that did unduly deny access to such services might be regarded as unconstitutional. Coupled with the fact that the Court was prepared to assume that persons of limited means might enjoy a constitutional right to care and maintenance by the State, this suggests that the present Supreme Court may see some role for the courts in the protection of implied socio-economic rights. This marks some departure from the stance of Keane CJ and Murphy J in *T.D.*, if only because those judges appear to take a rather absolutist position in rejecting judicial recognition of implied socio-economic rights.[16]

At the same time, the *Health (Amendment) (No.2) Bill reference* does not herald a complete judicial *volte-face* from the views expressed in *Sinnott* and *T.D.* There is, after all, a very significant difference between asking a court to grant a mandatory injunction directing the State to protect a socio-economic interest in the absence of any legislation, as was the case in the two earlier cases, and inviting a court, as in the instant case, to review legislation that affects such an interest.[17] Moreover, the background to the instant case suggests that the Health Bill was designed to protect State action taken in bad faith (even if the Supreme

13 [2005] IESC 7; Supreme Court, 16 February 2005. See O'Dell and Whyte, "Is This a Country for Old Men and Women? - *In re Article 26 and the Health (Amendment) (No.2) Bill 2004"* (2005) 27 DULJ 368.

14 Indeed this course of action would appear to have been urged on the Court by the Attorney General - see the Court's summation of his argument on this point at pp.19-20 of the unreported judgment.

15 At p. 21 of the unreported judgment.

16 In the *Health (Amendment) (No.2) Bill reference*, the Court also passed comment on the relationship between the doctrine of separation of powers and the State's obligation to protect constitutional rights, saying, at p.23,
"[T]he doctrine of the separation of powers, involving as it does respect for the powers of the various organs of State and specifically the power of the Oireachtas to make decisions on the allocation of resources, cannot in itself be a justification for the failure of the State to protect or vindicate a constitutional right". However, as my colleague, Dr. Oran Doyle, argues, this merely means that the various organs of government cannot hide behind the doctrine of separation of powers in order to justify a failure to protect constitutional rights - it does not necessarily mean that the courts are given an extensive role, under that doctrine, to enforce such rights as against the legislature or executive and does not detract from anything said in either *Sinnott* or *T.D.* See Doyle and Whyte, "The Separation of Powers and Constitutional Egalitarianism after the Health (Amendment) (No.2) Bill Reference" in O'Dell, (ed.), *Older People in Modern Ireland: Essays on Law and Policy* (First Law, 2005), p.393.

Court declined to hold that the monies had been collected in bad faith[18]). This strikes a chord with the test enunciated by Murray J. (as he then was) in *T.D.* for the granting of a mandatory order directing the executive to fulfil a legal obligation, namely, that there must be a 'conscious and deliberate decision by the organ of State to act in breach of its constitutional obligations to other parties accompanied by bad faith or recklessness'.[19] Thus it is possible that what is emerging here are the inchoate elements of a judicial policy that would review legislative and executive decisions in relation to fiscal matters, including socio-economic rights, only where there was evidence of bad faith.

O'Donoghue v. Legal Aid Board

Whatever about a possible softening of judicial attitudes towards the recognition of implied socio-economic rights, there is nothing in the *Health Bill reference* to suggest any departure from the position of the Supreme Court majority in *T.D.* in relation to the granting of mandatory injunctions against the executive. Accordingly, in the vast majority of cases in which it is sought to protect a socio-economic right, the plaintiff will be limited to the remedies of a declaration, damages or a prohibitory injunction. Given that many complaints in relation to the State's approach to socio-economic rights is about a *failure* to act, as distinct from a positive act of interference with a socio-economic right, the virtual absence of the mandatory injunction from the remedies available to a successful plaintiff is, to say the least, unfortunate. Moreover, recent history in relation to the protection of children's rights justifies some scepticism about the power of judicial declarations to secure effective vindication of rights.[20] A recent decision of Kelly J., however, illustrates that an award of damages may, in appropriate circumstances, bring about improved protection for socio-economic rights.

In *O'Donoghue v. Legal Aid Board*,[21] the plaintiff successfully sued the State arising out of a delay of more than two years in providing her with legal aid in connection with her application for a divorce. Her claim was based on, inter alia, breach of constitutional duty and infringement of the European Convention on Human Rights by the State. In the High Court, Kelly J. held that the plaintiff had a constitutional right to civil legal aid derived from her constitutional right of access to the courts and her constitutional right to fair procedures.

> Applying the approach of Lardner J. [*in Stevenson v. Landy*[22] and *Kirwan v. Minister for Justice*[23]] it seems to me that the unfortunate circumstances of the plaintiff in the present case are such that access to the courts and fair procedures under the Constitution would require that she be provided with legal aid.

Moreover the delay in granting legal aid in the instant case amounted to a breach of this right for which the plaintiff was entitled to recover damages.

Kelly J. thus became only the second Irish judge to recognise that the Constitution provided for a right to civil legal aid in certain circumstances. In *Stevenson v. Landy*[24] and *Kirwan v. Minister for Justice*[25] Lardner J. had held that an impecunious litigant had a constitutional right to civil legal aid where s/he was contesting wardship proceedings taken by the State in respect of his/her child or seeking release from detention under the Trial of Lunatics Act 1883 respectively. In *O'Donoghue*, Kelly J. significantly broadened the extent of this constitutional right to cover impoverished litigants seeking a divorce[26] and maintenance for a dependant child. However his view of this constitutional right may be even more expansive still for he also referred to the 1995 Act as "[giving] substance, in many ways, to the constitutional entitlement to legal aid for appropriate persons."[27]

Kelly J. also rejected the argument advanced by counsel for the State that the courts were precluded from intervening in this area by virtue of the doctrine of separation of powers as explained by the Supreme Court decisions in *Sinnott v. Minister for Education*[28] and *T.D. v. Minister for Education*.[29] He distinguished both cases on the ground that the instant case was not concerned with a claim for mandatory relief against the State and did not involve any question of a future breach of constitutional rights.[30]

Damages were calculated by Kelly J. as the additional amount of maintenance the plaintiff would probably have received had her case come before the courts more swiftly, a sum of £2,080, together with a sum of £5,000 in respect of the stress and upset occasioned by the delay in providing her with legal aid. In deciding on how quickly the plaintiff

17 Though, on another view, the logic of protecting rights requires the courts to be as attentive to sins of omission as they are to sins of commission - see, e.g., Bandes "The Negative Constitution: A Critique" **88** *Mich L Rev* 2271 (1990); Whyte, (2002), pp.20-22; Hogan and Whyte, *Kelly's The Irish Constitution* (4th ed., 2003), paras.6.2.299-308.

18 See p.65 of the unreported judgment. At the same time, the Court noted, on p.64, that counsel for the Attorney General 'had frankly and rightly accepted ... that there was no conceivable basis upon which anybody could reasonably have thought the charges could lawfully be levied or collected from persons aged seventy or over after [2001]. He also accepted the possibility that some such fully eligible persons had made protests'. On that basis, the Court held that the State could not rely on the decision in *Murphy v. A.G.* [1982] IR 241 insofar as it sought to rely on equitable principles relieving a defendant from full restitution on the grounds of good faith.

19 [2001] 4 IR 259 at p.337.

20 The decision of Kelly J. in *D.B. v. Minister for Education* [1999] 1IR 29; [1999] 1 ILRM 93 to grant a mandatory injunction directing the executive to provide secure accommodation for certain teenagers came in the wake of five years of litigation highlighting the legal obligations of the authorities in this regard. See Whyte (2002), ch.5.

21 [2004] IEHC 413 (High Court, 21 December 2004).

22 High Court, 10 February 1993.

23 [1994] 2 IR 417; [1994] 1 ILRM 444.

24 High Court, 10 February 1993.

25 [1994] 2 IR 417; [1994] 1 ILRM 444.

26 It would seem to follow from the State's obligation to respect marital privacy and possibly also from its obligation to uphold the institution of Marriage that this right should also apply to impecunious litigants seeking a judicial separation.

27 In the immediately preceding paragraph, he also said: "The purpose of the 1995 Act is that persons who meet the necessary criteria shall receive legal aid. That carries the implication that the entitlement to legal aid will be effective and of meaning."

28 [2001] 2 IR 545.

29 [2001] 4 IR 259.

should have been provided with legal aid, the judge adopted the Board's own target of two to four months from receipt of the application as reasonable.

The State did not appeal against this decision, instead providing the Legal Aid Board with a significant increase in funding that enabled it to reduce the waiting list at most, if not all, centres to less than four months, the target set by Kelly J. in his judgment. On the face of it, therefore, *O'Donoghue* appears to be one of the more successful examples of litigation strategy, notwithstanding the non-availability of the mandatory injunction.

However it does not follow that, because this decision was the catalyst for the subsequent improvement in the civil legal aid scheme, *O'Donoghue* is an example of "a further very significant transfer of power to an unelected judiciary already very powerful by the standards of most European countries."[31] The decision not to annul the consequences of Kelly J.'s decision is, in essence, a political decision. Assuming for the sake of argument that the Supreme Court would have upheld the High Court decision, if the administration had wished to restore the status quo ante, it could have proposed an amendment to the Constitution withdrawing constitutional protection from the right to civil legal aid. That such an amendment was never really an option is due to the fact that, as a matter of political calculation, it was indefensible. However there are no legal impediments to such a proposal and there are a number of examples in our Constitution of amendments that were made in response to judicial dicta or to actual or anticipated judicial decisions. If no such proposal was advanced in the instant case that is because the political authorities made a political evaluation of the matter and decided to work with the principles enunciated by Kelly J. However, in the last analysis, the key decision here is made by the political authorities, not by the courts, and so it is an overstatement to say that entrusting the protection of implied socio-economic rights to Irish judges is to create an all-powerful, uncontrollable elite.

Non-judicial enforcement

Notwithstanding the decisions in the *Health (Amendment) (No.2) Bill* reference and in *O'Donoghue*, it remains the case that the role of the judiciary in protecting implied socio-economic rights in Ireland is likely to be a limited one for the foreseeable future. That being so, attention will have to be focused on the non-judicial alternatives that exist in this area. Recourse to the courts is not necessarily the only way in which to protect socio-economic rights. Such rights may be very effectively protected by independent, non-judicial bodies such as the Ombudsman whose office has a distinguished track record of holding various public bodies to account in relation to their treatment of members of the public.

However if politicians entertain the hope that reliance on administrative agencies will give them a free rein in relation to the vindication of socio-economic rights, then they are going to be disappointed, at least to some extent. In the first place, it is very unlikely that legislation could oust the High Court's traditional power of judicial review (permitting that Court to examine the decisions of inferior courts and tribunals on the grounds of whether such bodies had the lawful authority to act as they did and whether they followed fair procedures in their decision-making process) in the light of Article 34.3.1 of the Constitution which provides for, *inter alia*, a 'High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal'. This power enables the High Court to strike down an administrative decision that 'plainly and unambiguously flies in the face of fundamental reason and common sense' - The State *(Keegan) v. Stardust Victims' Compensation Tribunal*[32] - though the Court is likely to be cautious in the exercise of this jurisdiction. It is certainly the case that legislation could not preclude recourse to the courts where issues of constitutional rights were at stake. Thus the Constitution would seem to require some role for the courts, however limited.

Second, Ireland has a number of international obligations of which account must be taken when it comes to the matter of socio-economic rights. These are well documented by the Irish Human Rights Commission in its *Observations on the Disability Bill 2004*.[33] In particular, Ireland is obliged to ensure both the progressive realisation of certain socio-economic rights and that certain minimum standards of service are achieved. The Commission has also drawn attention to the obligation to ensure that the holders of socio-economic rights have access to remedies and sanctions that are accessible, affordable, timely and effective and to systems of adjudication about rights that are independent and impartial. Such of these international obligations as are derived from the European Convention on Human Rights are now cognisable by our domestic courts by virtue of the European Convention on Human Rights Act 2003.

In conclusion, one cannot create a 'lawyer-free' zone when it comes to the question of vindicating socio-economic rights. However it should be recognised that the call for lawyers and the courts to be involved in this area is a symptom of the failure of the political system to address in a meaningful way different aspects of social exclusion. Therefore, if the political system commits itself to the effective protection of socio-economic rights, this will obviate any need to have recourse to the courts. In the absence of such a commitment, however, those who feel ignored by the political system are likely to be tempted by the prospect of obtaining protection for their interests through the courts. Thus the debate on justiciable socio-economic rights is inextricably linked to the larger debate about the nature of Irish politics. ●

30 In the light of his conclusions on the Constitution, Kelly J. held that it was not necessary for him to rule on the plaintiff's entitlements under the European Convention on Human Rights. He did comment, however, that his conclusion as to the plaintiff's constitutional rights was completely consistent with the provisions of the Convention and that the reasoning in *Airey v. Ireland* (1980) 2 EHRR 305 in which the European Court of Human Rights held that the right of access to the courts protected by Article 6(1) of the Convention could, in some circumstances, oblige the State to provide civil legal aid, was applicable in the instant case. 31 Hardiman (2004), at p.39.

32 [1986] IR 642.

33 Available at http://www.ihrc.ie/_fileupload/publications/Disability_Bill_2004_Obs.doc, last consulted on 8 December 2005.

Calling Time on Adverse Possession ?

Niall Buckley BL

Introduction

Described in a 1985 article by Dockray as "a neglected backwater"[1] the law on adverse possession has been the source of some recent controversy. The judgment of the European Court of Human Rights in *J A Pye (Oxford) v United Kingdom*[2] casts its status into uncertainty. On 15 November, 2005, by a narrow majority of 4-3, the Strasbourg Court held that English law on adverse possession, as it applied to registered land, involved a violation of the right to peaceful enjoyment of possessions under Article 1 of the First Protocol to the Convention. Responding to recent judicial and legislative developments in England, and pre-empting a Strasbourg finding of inconsistency with the European Convention on Human Rights, the Law Reform Commission Report (LRC 74-2005) of July 2005 had already advocated certain legislative changes in Ireland regarding registered land. These are incorporated in the Commission's Draft Land and Conveyancing Bill 2005.

This article considers the *Pye* case and inquires whether the proposed changes to Irish adverse possession law are an appropriate response. Does a rapid response of legislative reform erode any argument that the prior-existing regime was/is in fact compatible with the Convention? If changes in the law are required, ought they be restricted to registered land? Are there compensatory implications for the government? Finally, it is proposed to explore the differing Irish experience of the doctrine in an attempt to examine to what extent it might withstand ECHR scrutiny.

The *Pye* and *Beaulane Properties* Cases

In *J A Pye (Oxford) Ltd v United Kingdom* the 'paper' owner claiming a violation of its human rights was a property development company. The company was the registered owners of 23 hectares of land in Berkshire, but had no immediate intention of developing it. Mr and Mrs Graham were owners of a farm adjacent to the applicant's land and occupied the disputed land under a grazing agreement until December 1983. In December 1983 the Grahams were written to by the applicant's surveyor, stating that the agreement was about to expire and requesting them to vacate the premises. A request for a renewed grazing agreement in January 1984 was refused. Nonetheless the Grahams remained on in occupation. In June 1984 they purchased the right to take the crop of grass from the land that season. From September 1984 until 1999, however, the Grahams continued to use all of the disputed land for farming purposes without the permission of the applicants. In 1997, the Grahams had registered cautions in the Land Registry on the ground that they had obtained title by adverse possession. The applicant companies issued proceedings seeking cancellation of the cautions and possession of the land.

In the High Court, Neuberger J granted judgment for the Grahams but expressed the view that the effect of depriving the owner of his land was "illogical and disproportionate."[3] He considered that the adverse possession doctrine had little apparent justification in the context of registered land. In 2001, the Court of Appeal reversed the High Court decision and held that the Grahams did not have the necessary intention to possess the land. Although this holding was dispositive of the appeal, Lord Justices Keene and Mummery went on to consider the Article 1 issue in obiter remarks. Mummery LJ considered that Article 1 did not impinge on the Limitation Act and viewed the extinction of title, not as a "deprivation of possessions or a confiscatory measure," but merely the "logical and pragmatic consequence of the barring of his right to bring an action."[4] Keene LJ opined that limitation periods were not incompatible with the Convention.

The House of Lords allowed the Graham's appeal and restored the High Court order holding that the Grahams did have possession of the land. There was no "inconsistency between a squatter being willing to pay the paper owner if asked and his being in the meantime in possession."[5] The human rights argument was not pursued before the House of Lords, it being conceded that the 1998 Human Rights Act did not have retrospective effect. Lord Bingham of Cornhill in *obiter* remarks endorsed Neuberger J's sentiments, commenting that where "the land is registered it is difficult to see any justification" for the adverse possession rule and "even harder to see why the party gaining title should not be required to pay some compensation."[6]

In the shadow of a pending Strasbourg appeal in *Pye*, the Convention

1 Dockray, "Why do we Need Adverse Possession?" (1985) Conv 272

2 15 Nov 2005, European Court of Human Rights, Application 44302/02

3 [2000] Ch 676 at 710

4 [2001] 2 WLR 1293 at 1309

5 [2003] 1 AC 419 at 438, per Lord Browne-Wilkinson

6 [2003] 1 AC 419 at 426

compatibility of adverse possession was revisited before the English High Court in Beaulane *Properties v Palmer.*[7] In a strong judgment, Nicholas Strauss QC traced the history of land registration and adverse possession in England. The Deputy Judge emphasised the differing nature of title to registered and unregistered land. Title to unregistered land is based on possession and title to registered land is based on the fact of registration, the registration system specifically being introduced to avoid the uncertainties of a possession-based system. Nicholas Strauss QC concluded that the:

> "pre-2003 state of the law, by which an owner of land can lose it inadvertently and even without fault, was not the result of any deliberate public policy, but rather of an accidental combination of a different public policy in 1925 and later case law."

The context of section 75 of the 1925 Real Property Limitation Act's introduction was closely examined. The provision allowed a possessory owner to apply for rectification of the Land Register after the expiry of the limitation period. Reviewing the Royal Commission Report and Cherry and Marigold, *The Land Transfer Acts 1875 and 1897*, the Deputy Judge perceived that at the time, the public interest sought to be served by the general extension of the limitation statute to registered land was to facilitate the resolution of boundary disputes. According to *Leigh v Jack*[8] - the then prevailing jurisprudential orthodoxy - he remarked, it would have been "virtually impossible for an owner of land who had not forgotten about it or abandoned it to lose title inadvertently."[9] Hence, he saw the current wider application of adverse possession to registered land as an accidental consequence rather than a carefully considered legislative response to further a public interest. The expropriation of registered land without compensation or notice under the doctrine was thus disproportionate and incompatible with Article 1 of the First Protocol. The judge applied section 3 of the Human Rights Act 1998, interpretation provision, to resolve the issue. Section 75 was to be construed as "applying to cases in which adverse possession was established in accordance"[10] with the case law prevailing at the time of its enactment in 1925.

The Strasbourg Ruling

Some months later, on 15 November 2005, the ECtHR handed down its judgment in *J. A. Pye (Oxford) Ltd v United Kingdom.*[11] In the Court's assessment, Article 1 of Protocol No.1 comprises three rules. The first rule enunciates the principle of the peaceful enjoyment of property. The second rule permits deprivation of possessions subject to certain conditions. The third rule recognises the right of Contracting States to "control the use of property in accordance with the general interest". The national authorities are afforded a wide margin of appreciation in determining what is in the 'public interest', which the court will respect unless it is "manifestly without foundation."[12] Citing *James v United Kingdom*[13], the court underlined that providing the legislature remains within this margin, "it is not for the Court to say whether the legislature's discretion should have been exercised in another way."[14] Nonetheless, a 'fair balance' must be struck between the general interest and the individual's rights:

> [T]here must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions or controlling their use. Compensation terms...are material to the assessment of whether the contested measure respects the requisite fair balance, and notably, whether it does not impose a disproportionate burden on the applicant."[15]

The Court states that "the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference" under Article 1. The Court endorsed its previous holding in *Stubbings v. United Kingdom*[16] that limitation periods are fully compatible with the Convention, but determined that the present case was not merely about the Limitation Act 1980 but also the provisions of the Land Registration Act 1925 which deprived the applicant of its "title to the land".

A key argument advanced was the appropriate characterisation of the doctrine, whether it qualifies or limits the property right at the moment of acquisition or has the effect of depriving the owner of an existing right as and when it operates. The United Kingdom government argued that property was acquired subject to the limitations which adverse possession imposed on it. The ECtHR rejected this and regarded the Statue of Limitations provision as 'biting' only at the completion of the adverse possession period and not delimiting the property right from acquisition. Thus, the applicants were deprived of their possessions and it fell to be examined whether it was justified under the criteria of legitimacy of aim, proportionality and the preservation of a fair balance.

In advocating the legitimacy of the aim, the government argued that the doctrine of adverse possession of land serves the goals of quieting of titles, and ensures the reality of unopposed occupation and its legal ownership coincide. While the Court accepted "the undoubted relevance and importance of [the aims governing adverse possession of land] in the case of unregistered land, their importance in the case of registered land is more questionable." The Court also took significant account of the passing of the Land Registration Act 2002 and the substantial changes it introduced to that area of law, including a requirement of notice from the squatter and a compensation mechanism.

The proportionality examination then pivoted on factors common to registered and unregistered land alike: (1) the non-payment of compensation reasonably related to the land's value, and (2) the lack of adequate procedural protection of the property rights, in the form of notification of the risk of losing title. Taking account of these facts, the Court ruled narrowly by 4-3 that the provisions of the acts imposed an excessive burden and failed to strike a fair balance. The issue of the appropriate quantum of compensation to be paid by the contracting state under Article 41 of the Convention was adjourned.

7 [2005] 3 WLR 555
8 (1879) 5 Ex D 264
9 [2005] 3 WLR 555 at 581
10 *Ibid* at 615
11 European Court of Human Rights (Application 44302/02, 15 Nov 2005)
12 at page 12 para 44
13 (1986) 8 EHRR 123
14 *Ibid* at 146, para 51
15 *J.A. Pye (Oxford) Ltd v United Kingdom* at para 46
16 (1996) 1 BHRC 316

The 3-judge dissenting opinion deemed that the applicant company was a specialised professional real estate developer and knew that their rights were subject to the restrictions and qualifications of the Limitation Act. They could not claim to be ignorant of the doctrine's application. Possession carried not only rights but duties, and the duty to begin an action for repossession within 12 years was not an excessive one. They emphasised the wider nature of the margin of appreciation under Article 1, and feared that the "majority have been swayed by the legislative changes and judicial comments, rather than trying to assess what would have been the position if...the 2002 Act had not been passed"

In the Strasbourg judgment, one witnesses a number of tensions in play: the wide margin of appreciation normally afforded to issues of property rights; the general requirement of compensation; the vindication of limitation periods; and the appropriate characterisation of the doctrine's effect. Interestingly, although the registered-unregistered land dichotomy is in play, the principal axis of the ruling turns on the absence of compensation and notice.

The Irish Impact

The historical context and application of the Irish provisions on adverse possession are quite distinct from their English equivalents, a point which will be returned to later in the article. Importantly, however, the Irish legislation also separates the barring of a right of action and the extinguishment of title - a key distinction drawn by the ECtHR. Section 13(2)(a) of the Statute of Limitations 1957 provides that "no [action to recover land] shall be brought after the expiration of twelve years from the date which the right of action accrued to the person bringing it." Section 24 provides that at the expiration of the limitation period "the title of that person shall be extinguished." Section 49 of the Registration of Title Act 1964 extends the application of the 1957 Statute to registered land, and provides that a person claiming title may apply to the Registrar of the Land Registry to be registered as owner of the land.

If one were to accept the applicability of the Strasbourg decision to Irish law, the ECtHR rationale would support returning the law to the pre-1833 position. The Court's endorsement of limitation periods but rejection of the extinction of title would mirror the pre-1833 status of the law under which the true owner's right of action is barred but his title remains extant. It was under section 34 of the Real Property Limitation Act 1833 that the owner's rights first became not only barred, but his title also extinguished. Even in the uncommon instance of contested title, the pre-1833 position involves an unsatisfactory deadlock of interests: The owner has no legal recourse against the squatter and no effective title; the squatter's title is not marketable.

As mentioned earlier, the Irish Law Reform Commission anticipated an unfavourable Convention ruling on adverse possession in England, and perceived a sufficient similarity between the Irish and English versions of the doctrine to include a number of recommendations for reform of the law in its Report on the Reform and Modernisation of Land Law and Conveyancing,[17] published in July 2005. In Chapter 2, the Commission remarks that "the operation of the doctrine has become the subject of increasing controversy"[18] and that in England "considerable doubts have been expressed by some judges as to whether the doctrine is consistent with the European Convention."[19] Furthermore they noted that the English legislation has been substantially amended in 2002, requiring the registered owner to be placed on notice and providing for compensation.

The Report concludes that the doctrine has long served "an extremely beneficial and useful purpose in land law" in quieting titles but that it must be recognised that that "on occasion the doctrine may operate unfairly."[20] The Commission cite the example of someone who deliberately seeks to acquire someone else's land without payment of compensation and the Commission's perception that the doctrine exacts "a very severe penalty on landowner (the loss of land) through a mere oversight or mistake."[21]

Under the proposed reforms in the Draft Land and Conveyancing Bill, the previous effect of extinguishing title after expiry of the limitation period would be abolished. Section 129 provides that any person claiming to recover the land under the Act of 1957 may apply to the court for a vesting order to acquire title to the land, which order must be registered in the Land Registry for the vesting to take effect. This will also apply to unregistered land. Section 130 provides that the court may require notices to be displayed or served; inquiries and searches to be made or statutory declarations to be furnished as to the ownership of the disputed land. Importantly, it also proposes that the Court be given the power to order payment of compensation by the applicant to the prior owner.

It is submitted that if this Law Reform Commission response is precipitated by the European Convention controversy, it may be premature. As a preliminary point, Article 43 of the ECHR provides that a party may refer a matter for consideration before the 17-judge Grand Chamber, within 3 months of the judgment. Given the narrow majority in this case, and the potential compensatory implications for the U.K. government, a Grand Chamber referral is quite possible. A second factor in assessing the appropriateness of a prompt response is borne out in the dissenting judgment. The minority feared that the majority, in concluding a violation occurred, had been swayed by the intervening legislative changes in the United Kingdom. An immediate legislative response in Ireland could be perceived as a concession that the pre-existing regime was incompatible with the Convention. This could have significant compensatory consequences. The prospect of the Irish government as respondent before the Strasbourg Court on this issue is a far from remote possibility with 1,400 applications annually before the Land Registry to register new owners through adverse possession. Much

17 LRC 74-2005
18 *Ibid* at 2.04
19 *Ibid*
20 *Ibid* at 2.06
21 *Ibid*

of the force of any argument that adverse possession had been justified would risk being undermined by events. Although as yet undecided, the amounts contemplated by the Court in *Pye* under the Article 41 "just satisfaction" provision were very substantial, ranging from £10 million to £380,725 sterling. With such a liability landmine at stake, it may well be worth standing fast on reform in this area and seeking to vindicate the current law.

Furthermore, the *Pye* ruling leaves matters in a certain flux. The orthodox interpretation in England is that it will only bear upon registered land. But the twin fulcrums of the judgment, compensation and notice, are of course not peculiar to the registration system. True, the Court averts to a less legitimate aim being served by adverse possession within the context of a land registration system, than as applies to unregistered land, but the reasons behind the Court finding of a want of proportionality could equally apply to unregistered land. One must also avoid too great a reliance on a simplified account of the differing bases for title - possession in respect of unregistered land; registration in the case of registered land - as a justification for fundamentally differing treatments vis-á-vis adverse possession.

If one perceives a need to legislate for notice and compensation for title acquired by adverse possession what are the implication for rights acquired by prescription generally? All of these bear upon the owner's property rights, registered or unregistered, and do not at present require notice or compensation. Does a perceived necessity to reform adverse possession undermine a philosophical buttress of these other doctrines' longstanding legitimacy?

Fundamentally and most forcefully, the proposed changes will render the process of acquiring land by adverse possession significantly more expensive. An application to Court is likely to incur considerably more administrative and legal costs than a section 49 application before the Registrar of Titles, and may even necessitate the payment of compensation to a party who has entirely neglected their interest for over twelve years. Besides the disadvantages for the applicant, it will also affect a considerable drain on court time and resources if the courts have to handle annually, not only the approximately 1400 registered land applications, but also the instances of unregistered land. It is noteworthy that despite the sweeping changes recently introduced to the English system, their Land Registration Act, 2002 did not introduce a comparable measure and retains the practice of making applications to the Registrar. It is submitted that if the consequence is to be a systematic increase in conveyancing costs, and a clogging up of the court system, a new regime should be pressingly required and not prematurely prescribed.

The Irish Justification Argument

The recent English climate for adverse possession has been one of hostility with the Law Commission describing it as legitimising "possession of wrong" and in some cases "tantamount to sanctioning a theft of land."[22] In this sense the issue was 'under fire' before it ever reached Strasbourg.

The Irish history is rather different and it will be argued that there are reasonable grounds to suggest that the ECtHR would uphold the Irish application of the adverse possession. Lyall advances a number of policy justifications for the doctrine: the quieting of titles; discouraging persons from sleeping upon their rights; favouring the productive use of land; and the phenomenon of unadministered estates.[23] This final reason is a characteristically Irish one. Frequently in respect of agricultural land, no letters of administration or probate are taken out in respect of the deceased owner. The offspring abandon the land, save for one child who remains in charge of the farm. After the expiry of the limitation period, an application is made so that the register will reflect this family member occupant as owner. Such situations account for a very substantial proportion of the section 49 applications annually. As Griffin J remarked in *Perry v Woodfarm Homes* "there must be very few agricultural holdings in this country in which at some time in the past 140 years a tenancy was not 'acquired' under the statute [of limitations]."[24]

The Law Reform Commission recognised that far from the 'land thief' conception, squatters claiming possessory title usually fall into the following categories:

(i) a family member holding adverse to the interests of other family members, often under an intestacy. Sometimes, though not always, the person in adverse possession is the person whom the testator and/or the next of kin tacitly regard as being morally entitled to the lands;

(ii) a person who has encroached on neighbouring land - which sometimes occurs inadvertently due to the inadequacy of maps, particularly in old deeds, although, of course, it may occur less accidentally and less justifiably;

(iii) a person who has a defective paper title (eg by virtue of a conveyance's failure to employ adequate words of limitation), and the defect is one which it is impossible or impracticable to rectify;

(iv) a person who has taken possession of land which has been effectively abandoned.[25]

The Law Reform Commission observes:

> Not only has the European Convention been given effect in Irish law by the *European Convention on Human Rights Act 2003*, but there is also the protection of private property rights enshrined in Article 40 and 43 of the Constitution.[26]

Far from buttressing any argument for reform, this suggests change is unnecessary. For forty years, a property rights guarantee and the adverse

22 "Land Registration for the Twenty-first Century: a Consultative Document" [Cm 4027] Law Commission at para 10.5

23 Lyall, *Land Law In Ireland* (Roundhall Sweet & Maxwell, 2000, 2nd ed.) at 831

24 1975] IR 104 at 129

25 LRC 67-2002 at 1.14

possession provisions of the 1957 and 1964 Acts have co-existed unchallenged. This point would seem to be strengthened by the structural similarities between the convention protection and Article 43 which justifies delimiting properties rights in accordance with the "exigencies of the common good". Interestingly, in *Perry v Woodfarm Homes*[27], the leading modern Irish case on adverse possession, no constitutional point was argued before the Supreme Court. The constitutionality of sections 13 or 24 of the Statute of Limitations Act 1957, and section 49 of the 1964 Act has never been challenged. Similarly no challenge has been brought against section 12 of the 1957 Act, which provides for the extinction of title of the owner of converted goods after 6 years. Moreover, *Tuohy v Courtney*[28] recognised the right to litigate as an unenumerated personal right but upheld the limitation period imposed upon it. In the circumstances, even where it a property right, it would have made no difference to the extent of constitutional protection afforded to it. The right against which this was balanced was the "constitutional right of the defendant in his property to be protected against unjust or burdensome claims."[29] The Court's role was to determine whether the balancing of rights in the legislation was "so contrary to reason and fairness as to constitute an unjust attack"[30] on an individual's rights. This approach is consistent with the rationality standard applied by the ECtHR in reviewing incursions on property rights in *James v United Kingdom.*

The English law's development is described in *Beaulane* as somewhat of a historical accident. In contrast, in Ireland the provision for registering the possessor as owner was first introduced in section 52 of the Registration of Title Act, 1891 at the same time as descent of land on intestacy to the heir-at-law was abolished by Part IV of the Registration of Title Act and replaced by descent to the next-of-kin, in line with the existing rules regarding personalty.[31] The modernisation of intestacy and registration of the possessory owner were consistent with an intention that the Register should reflect the long-time occupant of land as owner.

The issue was again consciously addressed by the legislature when the Registration of Title Act, 1964 expressly repealed section 52 of the 1891 Act, under which applications were made to the Circuit Court. During the passing of the Bill, the then Minister for Justice, Mr. Charles Haughey T.D. explained that there was:

> "no good reason why persons who have acquired a title to registered land by adverse possession should be forced to incur the trouble and expense of applying to the court for an order declaring their title "[32]

Section 49 of the 1964 Act provided for the Registrar to determine applications or refer them to the court under section 19, which also allowed for a right of appeal to the court against decisions of the Registrar. McAllister remarks that this was a response to the rarity of contested applications and an inconsistency with the position whereby Examiners in the Land Registry regularly dealt with title on first voluntary registration arising under the statute of limitations.[33]

So to marshal the arguments in support of the current Irish system: *James v United Kingdom*[34] makes clear that a wide margin of appreciation is accorded to member states in the regulation of property rights. The appropriate test is a looser rationality standard. The ECtHR recognises that the public interest can be served by their re-allotment between private individuals. Furthermore, adverse possession has co-existed non-contentiously with the Bunreacht na hêireann's property rights guarantee for over four decades. Given the acceptability of barring a right of action after twelve years, it is not manifestly irrational that the legislature should facilitate the marketability of a limited resource such as land, by recognising the title of the occupier as a corollary.

In Ireland, adverse possession serves the legitimate goals of quieting titles, favouring the productive use of land, and where estates are left unadministered, it allows the Register to be amended, after the expiry of the limitation period, to reflect the real ownership of the land. This latter purpose is primarily associated with registered land and serves a clear public interest. In the instance of unadministered estates, as the remaining next of kin have abandoned the land, there is no genuine "registered" owner whose title rights are prejudiced, as the ECtHR envisaged. There is no personal representative responsible for that estate. The register is redundant. As the vast majority of these claims under section 49 are uncontested, a requirement to apply directly to the court is unnecessary and costly. Even where contested, it is misleading to equate twelve years complete neglect of an interest with "mere inadvertence." There is an important social end served by the productive use of land. Notwithstanding this, the existing right of appeal to the court should safeguard any Article 6 concerns about the determination of civil rights and obligations before an independent tribunal, in the rare instances that acquisition of title by adverse possession is contested.

In conclusion, as the LRC observes, the Irish model has served "an extremely beneficial and useful purpose in land law" to date. Given the significant contextual differences, it does not necessarily follow from *Pye* that the Irish regime is incompatible with the Convention. The proposed sections in the Draft Bill would introduce significant additional expense for applicants as standard, notwithstanding that contested applications account for a small minority of cases. It seems unwise to impose an expensive pre-emptive remedy before an Irish-specific diagnosis on the doctrine has been delivered. ●

26 LRC 74-2005 at 2.05
27 [1975] IR 104
28 [1994] 3 IR 1
29 *Ibid* at 47 per Finlay C.J.
30 *Ibid* at 47
31 s.84 & 85 Registration of Title Act, 1891
32 Seanad êireann, Volume 57 at 1042 (11 June 1964)
33 Mc Allister, *Registration of Title in Ireland* (Dublin, 1973), at p.96
34 (1986) 8 EHRR 123