The Bar Review

Journal of the Bar of Ireland • Volume 12 • Issue 1 • February 2007

- Recent Developments in Electoral Law
- The European Communities Bill, 2006
- A Privilege for Psychotherapy?

THOMSON ROUND HALL

Oifig an Ard-Aighne

THE OFFICE OF THE ATTORNEY GENERAL

GOVERNMENT OF IRELAND

OFFICE OF THE ATTORNEY GENERAL REQUIRES BARRISTERS FOR POSITIONS AS

Advisory Counsel (Grade III)

The positions are for Barristers interested in developing their careers in a challenging and modern legal environment.

Role

The role of Advisory Counsel is to assist and advise the Attorney General in carrying out his or her functions. It involves advising in the fields of domestic, European and international law, participation in the formulation of legislation and legal policy at these levels, representing the State in international fora and advising on the conduct of litigation in which the State is involved. This comprises a very wide range of legal topics including Constitutional, administrative, European and Human Rights law. It involves giving legal advice to Government Departments and Offices in relation to all areas of public administration. The Office is unique amongst law practices due to the scope and variety of the work it undertakes. Advisory Counsel will be required to be available for secondment from time to time to other Government Departments or Offices and it is expected that such secondments will be for approximately 2 years.

Location

The Office which is located in Government Buildings, Merrion Street, Dublin 2, has not been listed by the Government as part of its decentralisation programme. Secondment to another Government Department or Office may be to a location outside Dublin.

Panel

A panel may be established from which future vacancies may be filled. All the posts are permanent and pensionable.

Qualification Experience

Applicants must, on 01 March 2007, have practised as a barrister in the State for at least four legal years (Experience in certain whole-time positions in the Civil Service may also be acceptable as practice as a barrister in the State).

Salary Scale

€71,395 - €91,747 (for those paying a personal pension contribution)
Entry at a point above the minimum may be possible for appointees with suitable experience.

Closing date

Monday 26th February 2007

For further information and how to apply log onto our website **www.publicjobs.ie**

If you would like additional information on these vacancies please visit the Office website www.attorneygeneral.ie or contact the Human Resources Manager at Tel. **01-6314000.**

Please note that the premises of the Office of the Attorney General have been adapted for accessibility by persons with disabilities.

The Public Appointments Service is committed to a policy of equal opportunity.

Cuirfear fáilte roimh chomhfhreagras I nGaeilge.

LoCall: 1890 449999 • International: +353 1 8587400

The Bar Review

Volume 12, Issue 1, February 2007, ISSN 1339 - 3426

Contents

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

For all subscription queries contact:
Thomson Round Hall
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301 Fax: + 353 1 662 5302
Email: info@roundhall.ie web: www.roundhall.ie

Subscriptions: January 2007 to December 2007 - 6 issues
Annual Subscription: €195.00
Annual Subscription + Bound Volume Service €300.00

For all advertising queries contact:
Tom Clark, Direct line: 44 20 7393 7835 E-Mail: Tom.Clark@thomson.com
Directories Unit. Sweet & Maxwell
Telephone: + 44 20 7393 7000

The Bar Review February 2007

Design: the Design Room T: 497 9022 Cover Illustration: Brian Gallagher T: 497 3389 E: bdgallagher@eircom.net W: www.bdgart.com

THOMSON ROUND HALL

Editorial Correspondence to:
Eilis Brennan BL,
The Editor,
Bar Review,
Law Library,
Four Courts,
Dublin 7
DX 813154
Telephone: 353-1-817 5505
Fax: 353-1-872 0455
e-mail: *eilisebrennan@eircom.net*

Continuing Professional Development

Inga Ryan
CPD Manager, The Bar Council

Continuing Professional Development was introduced to the Bar in October 2005. It was initiated as a means of ensuring the establishment and promotion of high standards of work within the profession and to enable barristers to develop their careers by acquiring new professional skills and areas of practice. The undertaking to continue legal education may be viewed as a statement to the public, to solicitors, to other professions and to the Competition Authority that barristers are committed to offering the best up to date service.

Each term, the Bar Council holds a programme of events open to members of the Bar. These have been very well attended and we are focused on ensuring consistent high quality of events and their relevance to members and the development of the Bar. Recently other bodies have followed our lead in offering courses that may qualify for CPD, The Honourable Kings Inns being one of these. The National Universities, the Law Society and various commercial bodies also hold courses that may qualify for CPD.

Frank Callanan SC and Mary Rose Gearty BL gave their thoughts on CPD at the Bar and below are their observations.

CPD: Continuing Or Compulsory Professional Development?

Frank Callanan SC

The provision of Continuing Professional Development seminars and lectures under the auspices of the Bar Council for those wishing to attend is commendable. Moreover, in making seminars in some degree reasonably accessible and affordable to people outside the law, the Bar Council is providing an important public service, at a time when access to seminars of legal topics seems increasingly restricted by exorbitant tariffs.

What is untenable is the requirement that members of the Bar attend a fixed quota of lectures or seminars in the course of a year, ultimately as a precondition of their being permitted to practise. This is objectionable philosophically, and in terms of how barristers have practised and continue to practise their profession. It is also surely obvious that dragooned attendance at lectures or seminars is of highly dubious educational benefit.

The compulsory basis for continuing practise development which is based on paragraph 9 ["Practising Certificates and Continuing Professional Development"] of the Code of Conduct for the Bar of Ireland adopted, at a general meeting of the Bar on 13 March 2006, raises significant issues for the Bar Council. Looking at the issue purely on its merits, there is no imperative in public or political terms, or arising from competition law as to how the profession chooses to provide, or not to provide, continuing legal education. It is an issue as to the internal governance of our profession – our liberal profession – that can be addressed without external constraint.

The responsorial refrain from the Bar Council will no doubt invoke the recent increasing and accelerating rate of legislative and procedural changes, and of specialisation of spheres of legal practice. These are however considerations that will continue to ensure that there is a high voluntary demand to sustain a scheme of continuing professional development.

It is apparent that the model through which the compulsory requirement is being introduced is that of the tightening noose. A potentially ugly situation will arise when the issue of imposing sanctions for a failure to comply with a compulsory requirement arises. If at that stage it is treated as a dead letter, or subject to highly selective (objectively discriminatory?) application, it is something that manifestly should not have been introduced in the first place.

Finally, I hope it will not appear too frivolous to suggest that it is objectionable on purely aesthetic grounds that anyone other than hardened aficionados of bar soccer or golf outings should on Saturday mornings be compulsorily exposed to large congregations of barristers sporting 'casual' attire.

CPD – The New Peig?

Mary Rose Gearty BL

Anyone who remembers the Falklands and Band Aid will not have to be reminded that one of the most daunting tasks of the teenager in the days before TY was to plough through the life of Peig Sayers, compulsory reading for the compulsory Irish language course. Fascinating though her life was (she married young and had a vast number of children, I seem to recall), in what way is this relevant to professional development at the Bar, one might ask.

The number of conferences and lectures spawned by the CPD wing of the Bar Council has risen noticeably in the last year, the topics have been varied and seem to have catered for all sections of the Bar (not to mention the solicitors' profession and the public). Also, and perhaps not surprisingly, the attendance record has been much higher than that at previous similar events. This is, of course, because each barrister must now attain a minimum number of CPD points every year, on pain of death (or worse, disbarment).

In assessing the impact of this programme, it seems to me that there is only one cause for complaint. The range and quality of the lectures is good, such an easy method of professional development is clearly beneficial to the profession, but does it have to be compulsory?

In the past year I have attended four conferences, read 82 articles (approximately) – many of them on legal topics – and have even delivered a lecture to a very small, but enthusiastic group of junior barristers who must have been coerced into attending. Many of the group had never devilled with me and most had never even dated me.

The compulsory element of the CPD regime may not suit all barristers, indeed many may object strongly to this aspect of the programme but it is arguable that this is the most effective feature of CPD at the Bar. My own experience in this regard can best be described by revealing that my previous record of attending lectures and conferences comprised the grand total of one conference per year until 2005.

Two questions arise: (a) whether the method adopted will achieve the aims of the programme and (b) whether, on balance, the benefits are such that they outweigh any objections.

(a) Does compulsory attendance improve professional standards?

I can only assess the effectiveness of compulsory attendance by citing my own horrendous pre-CPD record and asking you to draw your own conclusions as regards increased attendance at conferences and lectures. If one can rely on what is said in the tea-room (and some of it must be true, surely?), the level of attendance has risen dramatically. Whether those in attendance are actually listening, is, of course, another matter. It seems to me that one reaches a wider audience if 50 attend at a lecture, even reluctantly, than if one is limited to the 10 enthusiasts who would have attended anyway.

Linked with this attempt to improve our standards is the enhanced public confidence in a profession which attempts to ensure a minimum number of hours spent in attending such events and acquiring the latest information in our respective fields.

(b) Do the benefits of the programme outweigh the objections to compulsory attendance?

There is an unpleasant, paternalistic hue which colours any attempt to encourage behaviour by making it compulsory. There is a natural revolt against the very concept. Arguably, the reluctant participant (and everyone else) would be better off if he "developed professionally" in other ways. The antipathy I still feel towards poor innocent Peig speaks more eloquently than abstract language can.

On the other hand, I must admit that it was the compulsory nature of the programme that drove my increased attendance as noted above. I was pleasantly surprised at the relatively painless way in which my knowledge was increased and it was very convenient to have a package of lectures, neatly presented and handily summarising a particular area of law. I wish I could say that this will prompt my future attendance as much as any threat of sanction but I know myself better than that. I am exactly the kind of person who benefits most from a programme such as this: I think it laudable, I would encourage others to attend and would vote for its expansion. But I will not get out of bed to go to a lecture on any topic, unless I have to. Getting out of bed to go to work is difficult enough, but, unlike poor Peig, at least I'm paid for most of the work I do.

I concede that it is not ideal for such a scheme to be foisted onto a profession which is an independent body of self-employed specialists. The market should naturally weed out those who do not keep up their study of recent law. But the conceptual objections in this regard do not, for barristers such as me, outweigh the practical benefits of the compulsory programme.

I do not envy the Bar Council their tasks when it comes to enforcing this new regime: it may become the most objectionable part of the scheme if it is not sensibly and fairly enforced. So far, however, the CPD programme has been of great assistance to me. Though it is embarrassing to excite comment of this nature at any stage in one's professional development, it is gratifying to hear that twice recently I cited recognisable law in submissions to court. Or so I'm told. It was only recognisable, of course, because my opponents were forced out of bed to the same lecture series. Or aithníonn cíaróg cíaróg eile. As Peig would have told you.

You can check out what's planned for CPD at the Bar by looking at the Law Library website www.lawlibrary.ie UCC have a useful webpage with details of upcoming events around the country http://www.ucc.ie/law/irishlaw/events/ ●

Art exhibition raises money for Nepalese educational charity

A Special Christmas exhibition of paintings by the renowned Ukrainian artists, Andriy Ozermyy and Tetiana Tsaryk, was launched by Mr. Ercus Stewart S.C., on Wednesday 6th December 2006, at the Distillery Building, on Church Street. One third of the proceeds was donated to INET

INET is grateful to Ercus Stewart for his enthusiasm and support for this project and to the Bar Council and Harry McQuaid and staff, who gave so readily of their time and assistance. We also express our sincere thanks to the artists for their generosity. The successful exhibition raised over 2,000 euros for the Irish Nepalese Educational Trust [INET] an Irish Registered Charity which is building a school in the Solu Khumbu region of Nepal.

A sponsored trek to Nepal is planned for October/November this year with proceeds being split 50/50 for the Irish Nepalese Trust and the Nepal Cerebral Palsy School.

Enquiries to inet1@eircom.net

The European Communities Bill, 2006

Elaine Fahey BL

The Legislative Purpose

The express purpose of the recently enacted European Communities Bill, 2006[1] is to amend s. 3 of the European Communities Act, 1972[2] so as to permit the Ministerial creation of indictable offences by way of regulation, to give effect to European acts under statutes other than the Act of 1972 and to validate certain statutory instruments made before the passing of the Bill. However, the Bill has its real genesis in the Supreme Court decisions of *Browne v. Ireland*[3] and *Kennedy v. Attorney General*,[4] which it attempts to reverse in terms of result. There, the Supreme Court in both instances concluded that the Executive had acted *ultra vires* the provisions of s.3(3) of the European Communities Act 1972, where a Minister had created an indictable offence in the implementation of European law by way of regulation.

The net result of the content of the European Communities Bill 2006 is a dramatic enhancement of Ministerial powers to create indictable offences with swingeing penalties in the absence of debate or scrutiny by the Houses of the Oireachtas. It also retrospectively validates all previous statutory instruments made before the passing of the Act that purported to give effect to European acts and purports to constitutional proof their effects, giving them statutory force, even in the event of serious conflict with constitutional rights.

The *Browne* and *Kennedy* Decisions

In *Browne v. Ireland*, the applicant was a master of a fishing vessel that was charged for being in breach of drift net regulations. The applicant had challenged by way of judicial review the *vires* of the Sea Fisheries (Drift Nets) Order, 1998 made pursuant to s. 223A of the Fisheries (Consolidation) Act, 1959 as amended as being *ultra vires* the Minister for Fisheries and in violation of s. 3(1) of the European Communities Act, 1972 or if *intra vires*, that the delegation was in breach of Article 15.2.1 of the Constitution. The Order of 1998 was made pursuant to s. 223A of the Fisheries (Consolidation) Act, 1959 as amended, for the purpose of giving effect to Council Regulation EC No. 1239/98 and provided for criminal penalties in respect of an individual who failed to comply with provisions of the Regulation.

Keane CJ held that the Order was designed to give effect to a Council Regulation and not an Act of the Oireachtas. S.3(3) of the European Communities Act 1972 was unequivocal in its terms: a Minister could not create an indictable offence by way of regulation. Therefore, s. 223A of the Act of 1959 could not empower the Minister to make such an offence by regulation. S. 224B of the Act of 1959, on the other hand, had created an indictable offence by way of primary legislation and employing the maxim *expressio unius est exclusio alterius*, it was clear that s. 223A was not intended to empower the Minister so as to create an indictable offence.

In *Kennedy v. Attorney General*, the applicant fishermen had been prosecuted for violating terms of a license pursuant to the Mackerel (Licensing) Order, 1999. In the High Court, Ó Caoimh J. held that the impugned Order under the which the applicants had been prosecuted was *ultra vires* s.223A of the Fisheries (Consolidation) Act, 1959, as amended, the same section that the Order in *Browne* had been found to have offended against. On appeal to the Supreme Court, it was argued on behalf of the respondents that the measure was *intra vires* in that unlike in *Browne*, here the Order did not implement European Community law and the case did not involve a measure giving effect to Community law but rather a measure adopted by the State to control sea fishing. The applicant contended that the Minister had acted *ultra vires* s.3(3) of the Act of 1972 by using secondary legislation to create an indictable offence.

Denham J. held (Fennelly J. dissenting) that the:

> "European Communities Act, 1972, specifically states a principle and a policy that regulations made by a Minister enabling Community law shall not create an indictable offence: "Section 3(3): Regulations under this section shall not create an indictable offence". It is an important principle and policy of the legislation. It is a limitation on the power of a Minister…The Oireachtas did enact in express terms a provision in s.224B whereby the Minister may by regulations give effect to Community law and it was stated that a person who fishes or attempts to fish in contravention of regulations under this section shall be guilty of an offence and shall be liable on conviction on indictment to a fine not exceeding £100,000 and forfeiture…Section 224B on the other hand authorises the Minister to make Regulations…In the scheme of the Irish fisheries legislation it could not have been intended by the Oireachtas that s.223A would be used to implement Community law, in light of the clear words of s.224B."[5]

1 No. 61 of 2006.

2 S. 3 of the Act of 1972 provides that:
"(1) A Minister of State may make regulations for enabling section 2 of this Act to have full effect.
(2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act).
(3) Regulations under this section shall not create an indictable offence.
(4) Regulations under this section may be made before the 1st day of January, 1973, but regulations so made shall not come into operation before that day."

3 [2003] 3 IR 205. *Cf. Quinn v. Ireland* [2006] IESC 65.

4 [2005] 2 ILRM 401.

5 Fennelly J. held that the Order could not have been made pursuant to s.224B as its terms had to be specified in a Community act to comply with that section. Rather he held that *Browne* was distinguishable on the basis that the Order of 1998 there implemented a mandatory requirement, whilst here, there was no such mandatory requirement being implemented.

Thus the Supreme Court had established unambiguously that the spirit and form of s.3(3) of the Act of 1972 had to be adhered to by lawmakers and that important separation of powers concerns formed the legislative motivation behind the principle that a Minister could not create indictable offences by way of regulation, with all of their attendant seriousness for the liberty of the individual, notwithstanding the importance of the subject matter being legislated for.[6]

The Provisions of the European Communities Bill 2006

As to the substantive provisions of the Bill, s. 2 of the European Communities Bill 2006 provides that:

"(*a*) Section 3 of the Act of 1972 is amended by the substitution of the following subsection for subsection(3):

" (3) Regulations under this section may—
(*a*) make provision for offences under the regulations to be prosecuted on indictment where the Minister of the Government making the regulations considers it necessary for the purpose of giving full effect to a provision of the treaties governing the European Communities or an act adopted by an institution of those Communities,
and
(*b*) make such provision as that Minister of the Government considers necessary for the purpose of ensuring that penalties in respect of an offence prosecuted in that manner are effective and proportionate, and have a deterrent effect, having regard to the acts or omissions of which the offence consists, provided that the maximum fine (if any) shall not be greater than €500,000 and the maximum term of imprisonment (if any) shall not be greater than 3 years.",

and

(*b*) the insertion of the following subsection:

"(5) In this section— 'maximum fine' means the maximum fine to which a person shall be liable on conviction on indictment of an offence; 'maximum term of imprisonment' means the maximum term of imprisonment to which a person shall be liable on conviction on indictment of an offence."

Thus swingeing penalties for indictable criminal offences may be proscribed by Ministerial Order in the absence of any reasoned debate or scrutiny by the Houses of the Oireachtas. The Minister of State Mr. Noel Treacy TD introducing the Bill notably stated that:

> "The Sea Pollution (Amendment) Act 1999 provides for penalties of €10 million and-or five years' imprisonment. Under the Veterinary Practice Act 2005, penalties of €320,000 and-or ten years' imprisonment are provided for. Under the Animal Remedies Act, 1993, a person who has in his or her possession a prohibited remedy or an animal which as been administered such a remedy is liable on a first offence to a fine of €100,000 or ten years' imprisonment or both. The Oireachtas passed that legislation. We are capping penalties in European legislation at €500,000 and a maximum of three years' imprisonment. On the principle of subsidiarity and taking account of our responsibilities, therefore, we are capping the powers that Ministers have to make regulations on all those issues even though other legislation permits much greater penalties. The penalties in this Bill of a maximum of €500,000 fine and up to three years' imprisonment — and the courts will make the decision on the actual fine and the term of imprisonment within those limits — are not especially excessive when compared with other legislation"[7]

Clearly effectiveness, pragmatism and deterrence form the rationale behind s. 2(a) of the Bill of 2006, whereby a Minister may create by way of secondary legislation criminal offences to be prosecuted on indictment. While such values may be to the fore of the jurisprudence of the Luxembourg Court of Justice as to European law generally, it may not necessarily save s. 2(a) from falling foul of judicial scrutiny in this jurisdiction. It is worth recalling that the status quo in s.3(3) of the Act of 1972, expressly prohibiting such Ministerial action, had been approved of for its constitutional wisdom with respect to the separation of powers by Denham J. in *Kennedy v. Attorney General*:

> "The European Communities Act, 1972, specifically states a principle and a policy that regulations made by a Minister enabling Community law shall not create an indictable offence: "Section 3(3) Regulations under this section shall not create an indictable offence". *It is an important principle and policy of the legislation. It is a limitation on the power of a Minister*"[8] (Emphasis supplied)

Moreover, the general tenor of reforms of national legislative activity in the area of the implementation of European law has been towards increased scrutiny of European law measures, as witnessed in the European Union (Scrutiny) Act, 2002 and the important work of the Oireachtas Joint Committee on European Affairs and the Dáil sub-committee on European scrutiny, pursuant to the terms of the Act of 2002. In fact, one of the most overdue yet fundamental legislative measures ever introduced by the Irish Oireachtas is surely the Act of 2002, enacted to ensure greater scrutiny of EU legislation by the Houses of the Oireachtas, so as to scrutinise more rigorously proposed measures and to amend the European Communities Act, 1972. Whilst a modest form of parliamentary legislative scrutiny had originally been in place at the inception of Community membership, in the form of the European Communities Act, 1972, it in turn was to be amended on the grounds of its deficiencies. This resulted in the European Communities (Amendment) Act, 1973, nonetheless still constituting a framework to analyse EC legislation lacking rigour and resource commitment. However, the legislative history of the newer Act of 2002 has interesting origins, relating to redressing the anti-European electoral feeling after the first failed Nice referendum and not any benevolent pro-European governmental sentiments.[9] Perhaps this fact underscores the oddity of arming a Minister with the weaponry of penalties and powers that the European

6 And see also *Quinn v. Ireland* [2006] IESC 65 to similar effect, where the Supreme Court upheld the validity of secondary legislation providing for the creation of indictable offences pursuant to s. 20 of the Animal Remedies Act 1993 as being *intra vires inter alia* s. 3 of the Act of 1972. Denham J. held that:

> "The Minister is empowered by the Act of 1993 to make regulations, *inter alia,* for the purpose of giving effect to acts of the institutions of the European Union. A breach of these regulations is an offence under s. 20 of the Act of 1993. A person who commits such an offence may be tried summarily or by indictment and different penalties are set out for the differing proceedings. Thus the Oireachtas has decided that breach of the regulations made under s. 8 may be an offence to be tried on indictment. It was not a decision of the Minister. The regulations do not create an indictable offence, the Oireachtas created the offence."

7 Vol. 185 *Seanad Debates* 12th December, 2006, c. 1303.

8 [2005] 2 ILRM 401,412. See also *Quinn v. Ireland* [2006] IESC 65, noted above.

9 The Government adopted, with much modification, an opposition Bill, the European Union Bill, 2001, introduced by Mr. Ruari Quinn T.D.

Communities Bill 2006 now proposes.The Irish Act of 2002 is all the more notable in light of the new Protocols entitled "On the role of National Parliaments in the European Union" and as to the Application of the Principles of Subsidiarity and Proportionality" contained in the *Treaty Establishing A Constitution for Europe*,[10] not yet ratified, involving National Parliaments in the European legislative process in a most significant fashion.[11] Pursuant to the latter, all proposed legislation and documentation relating to the European legislative process is forwarded from each of the institutions respectively, particularly the Commission, to the national parliaments, the preamble of the Protocol providing that its objective purports to:

> "to encourage greater involvement of national Parliaments in the activities of the European Union and to enhance their ability to express their views on draft European legislative acts as well as on other matters which may be of particular interest to them".

Moreover, inter-parliamentary dialogue as to the legislative process, as between the national parliaments and the European Parliament is also provided for. For example, provision in made for the Commission to justify its legislative proposals with regard to the principles of subsidiarity and proportionality. The national parliaments may provide reasoned opinions in response, that shall be taken into account by the Commission.[12] The national parliament's opinion may entail that the Commission is forced to justify its refusal to adopt the opinion therein or that in fact it might accept the views therein. Thus, remarkable and far-reaching developments in the legislative process appear to be ongoing, both within the Irish legal order and at European level in the event of the ratification of the Draft Constitutional Treaty with respect to legislative scrutiny and parliamentary involvement in all matters relating to the implementation of European law. The thrust of s. 2 of the Bill goes entirely contrary these recent developments.[13]

Power to give effect to European acts under statutes other than the Act of 1972

S. 3 of the Bill states that:

> "(1) A power to make a statutory instrument conferred on a Minister of the Government by a provision of a statute may be exercised for the purpose of giving effect to a European act if the obligations imposed on the State under the European act concerned relate, in whole, to matters to which that provision relates.
> (2) A statutory instrument made for a purpose referred to in *subsection (1)* may contain such incidental, supplementary and consequential provisions as appear to the Minister of the Government making the statutory instrument to be necessary for the purposes of the statutory instrument (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act, the Act of 1972 and the provision of the statute under which the statutory instrument is made).
> (3) Where a statutory instrument is made for a purpose referred to in *subsection (1)*, the statutory instrument, or the preamble or recital to the statutory instrument, shall specify the European act to which the statutory instrument gives effect.
> (4) Section 2 of the Ministers and Secretaries (Amendment) (No.2) Act 1977 shall not apply to a power to make a statutory instrument for a purpose referred to in *subsection (1)*.
> (5) This section applies to a power that, but for this section, would not be exercisable for the purpose of giving effect to a European act."

S. 3(1) purports to allow statutory instrument making powers in *existing* legislation to be used to give effect to EC law, subject matter permitting, thereby circumventing the need to use the Act of 1972. However practical this might be, this seems to be a questionable statutory intervention in view of the fact that it renders the Act of 1972 seemingly redundant in a wide range of circumstances. The Minister of State introducing the Bill stated that:

> "What is being proposed is no more than what was already provided for in the 1972 Act, although its remit is more extensive on this occasion. It is worth noting that section 3(2) is limited in its scope. It cannot be used to amend this Bill, the 1972 Act or the relevant section of the primary legislation being used to create the statutory instrument. The constitutional validity of this approach was accepted by the Supreme Court in the *Meagher v. Minister for Agriculture* case…
>
> There are safeguards in place and a Minister can only use existing primary legislation to give effect to a European Community measure if the existing primary legislation relates in whole to the subject matter of the European Community measure. For example, a Minister cannot use the Institutes of Technology Act 2006 to give effect to a European Community measure on water quality, as it is not permissible to jump from one to the other.."[14]

However, the effects of s.3(1) are surely compounded by the extraordinary provisions of s.3(2) of the Bill that accord to the Minister sweeping powers where s.3(1) is employed. Thus in the event of the use of a statutory instrument to implement a Europe act pursuant to legislative powers other than those contained in the Act of 1972, s.3(2), using the same formula that exists as contained in s.3(2) of the European Communities Act 1972, permits the Minister to create statutory instruments that:"contain such incidental, supplementary and consequential provisions as appear to the Minister of the Government making the statutory instrument to be necessary for the purposes of the statutory instrument (including provisions repealing, amending or applying, with or without modification, other law.)"

10 OJ 2004 C310 p. 1.

11 See Cygan "The Role of National Parliaments in the EU's New Constitutional Order" in Tridimas & Nebbia eds. *European Union Law for the Twenty-First Century: Rethinking the New Legal Order Vol. 1* (Hart, 2004)

12 See Articles 4-6 thereof. The Court of Justice possess jurisdiction to hear actions on the basis of infringement of the principle of subsidiarity (see Article 7) and an annual report as to the operation of the schema is provided for in Article 8 of the Protocol.

13 See Fahey "Reflecting On The Scope Of The Irish European Union (Scrutiny) Act, 2002 and Parliamentary Scrutiny in the Draft Constitutional Treaty" (2007) 13 European Public Law (forthcoming).

14 2006 Vol. 185 c. 1310.

Although the subsection expressly excludes *inter alia* the power to alter the provision of the statute under which the statutory instrument is made itself, one wonders whether such a section could ever survive judicial consideration in light of the fact that the Minister is left truly at large in the operation of the section that permits a vast array of legislation to be modified with minimal democratic safeguards and a complete absence of Oireachtas scrutiny. The Minister pursuant to the section is given far-reaching law making powers that might be perceived as going well beyond those judicially approved of in the decision of the Supreme Court in *Meagher v. Minister for Agriculture*, the decision relied upon by the Minister when introducing the Bill as evidence of its stamp of constitutionality.[15] There, the Supreme Court held that Regulations under consideration made pursuant to s. 3 of the Act of 1972 amounted to a mere giving effect to the "principles and policies" of the Directive at issue, Council Directive 85/358/ EEC. Rather, Denham J. held that to require the Oireachtas to legislate would be *sterile and artificial* and to say that the Regulations breached Article 15.2.1 in fact was based on a false premise that the Minister was determining policy. Here, fundamentally, however, the express purpose of the authorised act of delegation as approved by the Oireachtas in a parent Act is being stretched and expanded to include European acts in addition to empowering the Minister to amend, repeal or modify legislation, as well as according him the power to create significant criminal offences by way of regulation. *Prima facie*, it remains questionable as to whether the *ratio* of *Meagher* may extend this far.[16]

Incorporation by reference: altering the constitutional status of a statutory instrument

S. 4 of the Bill provides that:

> "(1) Every statutory instrument made before the passing of this Act—
> (*a*) under a provision of a statute that did not provide for the exercise of the power conferred by that provision for the purpose of giving effect to a European act, and
> (*b*) that purported to give effect to a European act, shall, in so far as it purported to give such effect, have statutory effect as if it were an Act of the Oireachtas.
> (2) If *subsection (1)* would, but for this subsection, conflict with a constitutional right of any person, the operation of that subsection shall be subject to such limitation as is necessary to secure that it does not so conflict but shall otherwise be of full force and effect."

Thus, s. 4 operates to retrospectively validate all statutory instruments that might have been perceived to be constitutionally frail in the wake of the *Browne* and *Kennedy* decisions. The formula of s. 4 is significant in so far as it attempts to alter the constitutional status of a statutory instrument and represents a breathtaking act on the part of the Oireachtas to mend its own hand. It is arguable that, s. 4(1) could be contended to be both on its face, prospective and retrospective. Do the usual rules of statutory interpretation then apply, that is that statutory instruments only speak prospectively unless otherwise provided for, or does the purposive approach apply pursuant to the Interpretation Act, 2005? More controversially, s. 4(2) represents a rather botched attempt to guarantee the section constitutionality in the event of a challenge to its constitutionality with respect to proportionality. If in retrospectively validating a statutory instrument and giving it the status of primary legislation, a constitutional right is conflicted with, s. 4(2) provides that s. 4(1) shall be "subject to such limitation as is necessary to secure" the protection of constitutional rights, but rather clumsily s.4(1) "shall otherwise be of full force and effect". This is clearly a most far-reaching section, providing for haphazard reading down of legislation so as to save it in the event of challenge. Quite apart from the subjective and potentially inconsistent application of the section to legislation, one wonders whether the subsection *should* ever survive judicial challenge.

However, despite the obvious difficulties associated with this type of approach to legislating and to constitutionalism generally, as outlined here, ss.4(1) and (2) would appear to have already received judicial sanction in light of the decision of the Supreme Court in *Leontjava v. Minister for Justice*[17] that has failed as of yet to attract any subsequent judicial consideration, extra-curially or otherwise. In *Leontjava,* the Supreme Court considered *inter alia* the controversial s.2 of the Immigration Act, 1999, introduced in the wake of *Laurentieu v. Minister for Justice*[18] by the Oireachtas to cure any potential constitutional frailties attaching to secondary legislation made pursuant to the Aliens Act 1935. S.2 of the Act of 1999 provided that:

> "(1) Every order made before the passing of this Act under section 5 of the Act of 1935 other than the orders or provisions of orders specified in the Schedule to this Act shall have statutory effects as if it were an Act of the Oireachtas
> (2) If subsection (1) would, but for this subsection, conflict with a constitutional right of any person, the operation of that subsection shall be subject to such limitation as is necessary to secure that it does not so conflict but shall be otherwise of full force and effect."

15 [1994] 1 IR 329.

16 It is important to note, however, that *Meagher* is affected by the subsequent Supreme Court decision in *Maher v. Minister for Agriculture* [2001] 2 IR 139. In *Maher* the applicants sought to challenge the European Communities (Milk Quota) Regulations, 2000 enacted in Irish law pursuant to Council Regulation (EC) No. 1256/99 as being *ultra vires* Article 15.2.1 and not necessitated pursuant to Article 29.4.10 of the Constitution. It has been stated by Hogan & Whyte eds. *Kelly: The Irish Constitution* (4th ed., Lexis-Nexis, 2003) para 5.3.71, that as a result of *Maher v. Minister for Agriculture*:

> "it can never be said that the transposition of a Community legislation by means of a statutory instrument is itself 'necessitated' for the purposes of Article 29.4.10…[and that]…it is clear that the critical test in this area is whether the Directive which is sought to be transposed by way of primary legislation …would be superfluous [to transpose in such fashion]."

Thus *Maher* is perceived as constituting a less forgiving formula as to the Oireachtas actions in the implementation of European law and that such matters will be subject to rigorous scrutiny that *Meagher* might have suggested. *Cf.* the strict approach of the Supreme Court as to Ministerial powers of *inter alia* seizure and detention pursuant to secondary legislation purporting to implement Council Directive 95/53/EC, fixing the principles governing the organization of official inspections in the field of animal nutrition: see *Albatros Feeds v. Minister for Agriculture* [2006] IESC 52.

17 *Leontjava v. Director of Public Prosecutions* [2004] 1 IR 591.

18 [1999] 4 IR 26. This fact was adverted to by the Minister of State, Mr. Noel Treacy T.D., introducing the Bill in the Seanad, who noted that it was more efficient to "incorporate by reference" rather than repeat the contents of a statutory instrument in a statute and so the formula at issue in s. 2 in *Leontjava* was being adopted once more by the legislature here, having already been expressly approved by the Supreme Court.

In the High Court, Finlay Geoghegan J. had held the section to be unconstitutional, finding no authority for such legislative action to be contained in the Constitution for the Oireachtas to exercise.[19] On appeal, however, Keane CJ concluded that as there was no provision in the Constitution either permitting or prohibiting such action, in light of the wide legislative powers accorded to the Oireachtas generally, the choice of the Oireachtas to incorporate the instruments by reference rather than setting out their text was a choice that they were entitled to make. Moreover, the Court would not accept that the framers of the Constitution in 1937 intended to limit their legislative powers in this regard. Both the High Court and Supreme Court in *McDaid v. Sheehy*[20] had been satisfied as to the validity of this type of provision. Keane CJ held that the President had been able to refer s. 2 of the Immigration Bill, 1999 to the Court had she felt it necessary pursuant to Article 26 of the Constitution, which she had not, and therefore, the constitutionality of s. 2 of the Act of 1999 was upheld.

The decision of the Supreme Court in *Leontjava* has received trenchant criticism for its inconsistent approach to matters relating to the proper system of checks and balances inherent within the separation of powers. The Court on the one hand has mandated generally a strict constitutionalism with respect to Article 15.2.1 and the *ultra vires* doctrine[21] and on the other hand, has prescribed a carte blanche to the legislative branch in *Leontjava*.[22] Notably, three members of the *Leontjava* Court have retired, so perhaps reconsideration of the merits of the decision remains a possibility.[23] In the absence of such reconsideration, however, the decision stands and remains a forewarning as to the lawfulness of s. 4 of the Bill of 2006.

Conclusion

Senator Quinn at the Seanad Committee stage, where the Bill was passed on a narrow 21-17 vote, contended forcefully that:

> "[i]t [the legislation] abrogates to the Executive the power to create indictable offences by ministerial edict….We must increase rather than dilute the amount of EU business that is carried out in the full light of day. Ministerial orders, in practice, are invisible."[24]

The European Communities Bill, 2006 represents a striking approach on the part of the Oireachtas to European law matters, where the needs of democratic accountability are surely of major concern. The Bill runs contrary to the general trends in this area towards widespread reform of the Irish legislative process, that the Oireachtas had itself introduced approximately four years ago as to the implementation of European law. Unfortunately, pragmatism and efficiency prevail in this particular instance at the expense of principle and results in an extraordinary aggrandisement of unchecked Ministerial power ●

19 [2004] 1 IR 591, 613.

20 [1991] 1 IR 1. There however, merely 5 Orders made pursuant to *inter alia* s. 1 of the Imposition of Duties Act 1957 had been confirmed by s. 46 Finance Act 1976. However, the applicant had not challenged the validity of s. 46 of the Act of 1976 but rather had challenged the provisions of s. 1 and so any technical confirmation by the Supreme Court of the validity of this type of mechanism is surely *obiter*. Moreover, s. 46 had not sought to retrospectively validate a whole variety of secondary legislation, but merely a small numerical number of Orders.

21 As to which see Casey *Constitutional Law in Ireland* (3rd ed., Roundhall, 2000) p. 228.

22 See Binchy "Emerging Trends in Irish High Court and Supreme Court Jurisprudence" Fourth Annual Brian Walsh Memorial Lecture, ISEL, 9th November, 2005; Fanning "Reflections on the Legislative Process following *Leontjava v Director of Public Prosecutions*" (2004) 39 Ir. Jur. 286.

23 Keane CJ, McGuinness and McCracken JJ. being the three former members. (Fennelly J. and Murray J (as he then was) were the remaining members of the Court). Keane CJ delivered the decision of the Court as required pursuant to Article 34.4.5 of the Constitution.

24 Vol. 185 *Seanad Debates*, 12th December, 2006, c. 1299.

Recent Developments in Electoral Law

Liam Dockery BL

Later this year, the country will go to the polls to elect a new Dáil. This article outlines some recent developments in Electoral law under three headings: legislation, case-law and court rules. The first development concerns a legislative initiative which extends voting facilities to prisoners for the first time; the second relates to a recent Supreme Court decision which upheld a constitutional challenge by three individuals to certain provisions of the Electoral Act 1992 on the nomination of non-party candidates for election to Dail Eireann; and the third development concerns a change to the Superior Court Rules on the trial of election petitions.

Postal voting for Prisoners

As recently as 2001, the Supreme Court held that the failure of the State to provide voting facilities for prisoners was not a breach of the equality guarantee in Article 40 of the Constitution. In *Breathnach v Ireland & the Attorney General*,[1] the applicant prisoner sought a declaration by way of judicial review that the failure of the State to provide him as a citizen of the State amongst the prison population with the machinery to enable him to vote was discriminatory in failing to vindicate his right to be held equal before the law under Article 40 of the Constitution.

In the High Court, Quirke J held that the right to vote was a constitutionally protected right, the restriction of which was not at the time of his conviction a sanction permitted by law and that therefore the State had a duty to provide the applicant with a postal vote. The judge noted that this would not impose an unreasonable administrative demand on the State, nor did the exercise of that right depend on the continuance of the applicant's personal liberty.[2] Quirke J concluded that the failure of the State to provide for the applicant the necessary machinery to enable him to exercise his franchise comprised a failure by the State to vindicate a right conferred on the applicant by Article 40.1 of the Constitution to be held equal before the law.

On appeal, the Supreme Court disagreed, holding that the applicant was not deprived of his vote as he remained entitled to be on the register of voters and therefore, if released on temporary release, he would be entitled to exercise that franchise. It reasoned that the suspension of the right to vote following the deprivation of a person's liberty was a necessary consequence of the voluntary acts of the applicant which caused him to lose his liberty. The suspension of that right did not simply depend on practical considerations but was because of the nature of a constitutional right – that if a person is deprived of his liberty in accordance with law then he loses, temporarily, other express and unenumerated rights, like the right to travel and to earn a livelihood[3]. Furthermore, the Court declared there was no absolute right to vote under the Constitution and some of the applicant's rights were lawfully suspended as a result of his lawful detention and so the lack of facilities to vote was not arbitrary, unreasonable or unjust and was not in breach of the applicant's constitutional rights. Both Keane CJ and Denham J noted that it was for the Oireachtas to decide as a matter of policy whether to legislate and provide facilities for prisoners to vote.

Although the State had not disenfranchised the prison population, its reluctance to extend voting facilities to prisoners perhaps had its origins in the historical concept of civic death – that convicted prisoners had broken the social contract and so could be regarded as temporarily forfeiting the right to take part in the government of the country. Legislation based on that rationale exists in some European countries and prevailed in the United Kingdom up until recently when it was successfully challenged in *Hirst v the United Kingdom (No.2)*[4]. The concept has evolved elsewhere too. In the space of 10 years, Canada went from providing legislation barring all prisoners from voting to deciding in 2002[5], that to deny prisoners the right to vote was to lose an important means of teaching democratic values and social responsibility and ran counter to democratic principles of inclusiveness, equality and citizen participation and was inconsistent with the respect for the dignity of every person that lay at the heart of its democracy. The Canadian turnaround was noted by the ECHR in *Hirst*.

In *Hirst*, a prisoner serving a sentence for a manslaughter conviction claimed that as a convicted prisoner, he had been subject to a statutory blanket ban on voting in parliamentary elections. The legislative justification for the bar contained in s.3 of the Representation of the People Act, 1983 was, as outlined by the Secretary of State at the time, that "by committing offences which by themselves…require a custodial sentence, such prisoners have

1 [2001] 3 IR 230

2 This was the test applied by Costello J in *Murray v Ireland* [1985] IR 532 (HC) to determine those rights which a prisoner could exercise notwithstanding the deprivation of liberty to exercise many other constitutionally protected rights as a consequence of the loss of his constitutional right to liberty.

3 The Court reaffirmed the rationale of McCarthy J in *Murray v Ireland* [1991] ILRM 465 at 477 (SC).

4 ECHR [2005] Grand Chamber 6/10/2005

5 *Sauve v the Attorney General of Canada (No.2)* [2002] 2 CF. In 1992 in *Sauve v Canada (No.1)* [1992] 2 SCR 438, legislation banning all prisoners from voting was struck down. The legislative code was then modified to apply only to prisoners serving two years or more and these provisions were in turn struck down in *Sauve (No.2)*.

forfeited the right to have a say in the way the country is governed for that period…Removal from society means removal from the privileges of society, amongst which is the right to vote for one's representative." The ECHR held that while the statute pursued the legitimate aims of preventing crime by sanctioning the conduct of convicted prisoners and enhancing civic responsibility and respect for the rule of law, the measure lacked proportionality as it was an automatic blanket ban imposed on all convicted prisoners.

Unlike in the United Kingdom, Irish legislation had never provided that prisoners were legally incapable of voting. Nonetheless, an Irish prisoner had argued before the European Commission of Human Rights in 1998[6] that the absence of provisions permitting him to vote in prison in effect deprived him of his right to vote. The Commission disagreed and held that the suspension of the right to vote did not thwart the free expression of the people in the choice of the legislature and could not be considered arbitrary in the circumstances of the case. The following year, a case of particular interest to the Irish position was decided in South Africa. In *August and another v Electoral Commission*,[7] two prisoners applied to the Constitutional Court of South Africa for a declaration and orders that the Electoral Commission take measures enabling them and other prisoners to vote while in prison. The Constitution itself set out the right of every citizen to vote in unqualified terms. While the Constitutional Court recognized that limitations might be imposed on the exercise of fundamental rights, it held that in the absence of legislation barring them from voting, prisoners had the right to vote: therefore, the Electoral Commission was under an obligation to make reasonable arrangements for prisoners to vote.

It seems the ECHR's decision in *Hirst* and the evolving case-law in Canada and South Africa to which it alluded, may have prompted the Oireachtas to look at the issue of prisoners voting rights afresh. The State has now arguably acted on its 'obligation' by enacting the Electoral (Amendment) Act 2006 which enables prisoners to vote while they are in lawful custody.

The Act outlines a two-stage process: the prisoner/elector must firstly apply for a postal vote and then exercise that vote in the place of his detention. This first stage involves four steps which might loosely be summarized as notification, application, consideration and entry on the postal voters list; the second stage outlines how the elector casts his vote.

Application

(i) *Notification* – the registered authority gives public notice of the category of electors entitled to apply to be entered on the postal voters list, the manner in which and time before which applications must be submitted and the times and places at which application forms may be obtained. The registered authority will provide application forms to every prison situate in its area.[8]
(ii) *Application* – once the prisoner obtains the application form he must sign it or, if he is unable to write, mark it and complete the form in accordance with the instructions contained thereon.

He must then sign a certificate that the applicant is a person who is detained in prison pursuant to an order of a court and the circumstances of the electors detention are such as to render it likely that he will be unable to go in person on polling day to vote. The application form and certificate are handed to the relevant official[9] who sends it by post so that it will be received by the registration authority not later than the last date for making claims for corrections in the draft register.

(iii) *Consideration* – where the registered authority is satisfied that a person applying under section 2 is an elector to whom the section applies and that he was ordinarily resident in the jurisdiction prior to his detention in prison, and has completed the application form and certificate required by section 3, it will grant the application and notify the applicant. Where not so satisfied, the registration authority will refuse the application and the unsuccessful applicant will be notified. The Act provides for an appeal in writing to the County Registrar against the ruling of the registration authority refusing entry in the postal voters list.

(iv) *Entry* – the electors name is entered in the list of postal votes by the registration authority not later than the last date for making claims for correction in the draft register.

Voting

The provisions contained in Part XIII of the Electoral Act 1992 governing postal voting generally will apply to postal votes cast by prisoners with some modifications.

Part XIII provides that a returning officer for a constituency shall send to each Dail elector whose name is on the postal voters list, a ballot paper in an envelope addressed to the elector along with a small ballot paper envelope, a declaration of identity and a covering envelope. The declaration of identity must be completed and signed and handed to the relevant officer, who witnesses the signature and stamps the declaration of identity with the prison stamp and then destroys the envelope addressed to the elector. Next the prisoner marks the ballot paper in secret although the Act is silent about where in the prison this will occur. While this is an operational matter for the prison authorities, the Act ensures that the constitutional requirement of a secret ballot is observed whether the ballot paper is marked in the prisoners cell or elsewhere in the prison.

The marked ballot paper is placed in the ballot paper envelope which is sealed and the envelope and the completed declaration of identity are placed in the covering envelope and handed to the prison governor who in turn sends it by post to the returning officer. If the ballot paper, duly marked by the said elector, and accompanied by the said declaration of identity, duly signed by him, is received by the returning officer before the close of the poll, it shall be counted and treated in the same manner as a ballot paper placed in a ballot box in the ordinary way.[10]

6 *Patrick Holland v European Commission of Human Rights*, 14/3/1998, DR 93, p.15

7 *August v Electoral Commission* (CCT8/99: 1999 (3) SA 1)

8 Large notices were placed in several daily newspapers in January 2007 advising that application forms were to be made available in all prisons from the 19th January 2007.

9 Defined in section 1 as "the governor or other person in charge of the prison or any person employed in the prison who is authorized by the said governor or other person in charge to perform any function expressed to be performable by such an official."

10 s.64 Electoral Act 1992

The Oireachtas has followed its forebears by enabling a further category of persons to vote without having to attend personally at a polling station. Disabled voters have voted by post since 1986. Two years previously, the Supreme Court had held in *Draper v The Attorney General*[11] that the fact that the plaintiff was unable to attend at a polling station by reason of physical disability and that there were no facilities enabling her to vote otherwise or to vote by post did not render the law at that time unconstitutional. Postal voting facilities have also been extended to those voters who can satisfy the registration authority that the circumstances of their occupation, service or employment are such as to render it likely they will be unable to go in person on polling day to vote.[12] This includes students who are defined as those on a full time basis on an educational course of study in an educational institution in the State. A democracy which is constructed on the bedrock principle of universal suffrage should enable as many people as possible to vote in its elections. The acknowledgement by law-makers that prisoners should no longer have to rely on the unlikelihood of their temporary release coinciding with an election to exercise their right to vote, enhances Irish democracy.

The Nomination of Independent Candidates

The manner in which non-party candidates (or 'Independent' candidates as they are generally known) seek nominations for election to Dail Eireann will require legislative change following the recent decision of the Supreme Court in *King, Cooney and Riordan v The Minister for the Environment and Local Government, Ireland and the Attorney General*.[13] The three plaintiffs challenged the constitutionality of certain statutory provisions contained in the Electoral Act 1992 governing the nomination of candidates for election to Dail Eireann. Their challenge was based on three grounds: that the conditions and procedures were not permitted by Article 16; that the procedures were so onerous as to be an impermissible impediment to their constitutional rights to be nominated as candidates; and that the procedures constituted an invidious discrimination against non-party candidates as compared with candidates affiliated to a registered political party and nominated by that party.

Section 46(4A) of the 1992 Act[14] provides that a non-party candidate's nomination must be assented to by 30 persons who are registered as Dail electors in the relevant constituency. Subsection (4B) outlines the provisions which apply in respect of the required assents. In order to assent to the nomination, a person registered as a Dail elector in the constituency must sign the candidate's nomination paper and produce at the Local Authority Offices in the relevant constituency photographic identification to the local authority official to authenticate his assent. The locations of these offices for the 2002 Dail election were set out in the Electoral Regulations 2002 (SI No.144 of 2002).

Murray CJ, for the Court, observed that the plaintiffs had produced "significant" evidence of the burden and difficulty encountered by each of the 30 assentors in having to travel to the Local Authority Office designated for the particular constituency in which each of the plaintiffs had sought nomination. Each assentor had to attend at the designated office during normal office hours and in many instances, assentors would have to travel substantial distances often where there was no convenient public transport. Some assentors would have to arrange for childcare and in some situations give up a day's work and probably lose a day's pay as a result. While a significant number of candidates had no great difficulty in complying with the conditions, the Court noted that evidence had been given by a couple of witnesses that they were unable to obtain 30 assentors in time before the close of nominations due to the difficulties in complying with the provisions which were compounded in particular by the obligation to travel to the prescribed office.

The Court reaffirmed the legitimate interest of the State in regulating the conduct of elections by law in the interests of protecting and maintaining the integrity and efficacy of the electoral process for Dail Eireann and cited with approval "a cogent example and expression of that legitimate interest" in the United States Supreme Court decision in *Jennes v Forston 403 US 431*. This case held that "there is surely an important State interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organisation's candidate on the ballot – the interest, if no other, in avoiding confusion, deception and even frustration of the democratic process at the general election".[15] Murray CJ noted that a very large number of countries apply measures to ensure that the holding of orderly and democratic elections is not undermined by the unfettered participation of frivolous candidates or an excessive number of candidates. A filtering process for prospective candidates was therefore justified.

Since the foundation of the State, the Court continued, some such measures had existed which provided protection against abuse and underlined to potential candidates an important public policy that those seeking election should have some genuine commitment to the electoral process. Indeed, legislation had provided for a monetary deposit of £300 to be paid by non-party candidates but this requirement had been struck down by the High Court in *Redmond v the Minister for the Environment, Ireland and the Attorney General*[16] because it amounted to an impediment to participation, was not permitted by Article 16 of the Constitution and was therefore unconstitutional. In a surprisingly blunt criticism of that decision, the Court expressed its difficulty in comprehending "how a sum anywhere in the region of £300 or its equivalent in Euro (or more if inflation is allowed for in the meantime) could be considered a disproportionate measure in contemporary Ireland *(sic)* for such a legitimate purpose." Ironically, the 30 assentor requirement replaced the monetary deposit requirement for non-party candidates.

11 [1984] IR 277
12 s.63 Electoral Act 1997
13 Judgement delivered on the 13th November 2006
14 As inserted by the Electoral (Amendment) Act, 2002
15 ibid at 442
16 [2001] 4 IR 61

It was not unduly burdensome, the Court held, to require a candidate to obtain 30 assentors to ensure the proper regulation of elections; nor was the requirement that the assentors attend some designated place to authenticate their signature so disproportionate a burden on the prospective candidate as to be in some way unconstitutional. However, Murray CJ found substance in plaintiffs arguments concerning the requirement that all thirty assentors must attend at the office in the constituency as specified in the Regulations. The Court reasoned that while the requirement may not pose a problem in urban areas, assentors in some areas would have to travel long distances – for example, assentors living in West Wicklow would have to travel to Wicklow town in east Wicklow; those in far North Mayo would have to travel to Castlebar; and those on the boundaries of West Limerick to Limerick City. There was, accordingly, a real risk that a potential candidate would have to devote a disproportionate amount of time over a disproportionate period of the election campaign to arrange for 30 people individually or collectively, or in separate groups, to travel to and from the designated Local Authority Office.

The Court considered that this particular imposition was disproportionate to the particular objective to be achieved, namely the due authentication of the nomination papers. Despite the State's argument that the designation of the Local Authority headquarters as the office at which such nomination papers had to be authenticated was necessary in order to carry out such authentication in a secure manner because it is the location of the electoral register, the Court was not satisfied that there were no other administrative arrangements which would be significantly less onerous. Therefore, the entirety of sub-section 4(B) was unconstitutional.

The requirement that a non-party candidate's nomination paper be assented by 30 constituents remains and the public policy principle upon which the filtering process is based has been stoutly defended. The task for the Oireachtas and election authorities now is to provide a less onerous administrative arrangement by which assentors can authenticate the nomination of a non-party candidate.

Changes to the petition procedure

The final recent change to the Electoral law landscape concerns the trial of an election petition. The Electoral Acts 1992-1997 provide that a Dail election can only be questioned by a petition to the High Court. The statutory framework governing the petition procedure is set out in s.132 of the Electoral Act 1992, the Third Schedule thereto and s.44 of the Electoral Act 1997 while the relevant court rules are set out in Order 97 of the Rules of the Superior Courts.

In 2005, Order 97 was replaced by a new Order 97, the provisions of which are contained in SI 294 of 2005. The introduction of the new Order was prompted by judicial criticism of the absence of updated court rules when the petition procedure was last invoked in 2003 in *Sinnott v Martin*[17]. Kathleen Sinnott (now an MEP), challenged the Dail election result in the Cork South Central constituency in the 2002 Dail election on the grounds of an alleged overspend by Micheal Martin, T.D. After dismissing the petition[18], Mr. Justice Kelly, bemoaned the absence of updated rules stating that "unfortunately and despite the fact that the 1992 Act is on the statute book for the last 12 years, no rules of court have been made to regulate the way in which the court should deal with election petitions. Order 97 of the Rules of the Superior Courts, which deals with parliamentary election petitions, proceeds on the basis that the Parliamentary Elections Act 1868 is still the governing law on the topic".[19]

It was unsurprising that neither the 1992 Act nor the 1997 Act provided guidance on the court procedures concerning the application for leave to present a petition[20] and the trial of the petition itself.[21] What provoked the ire of the Court in *Sinnott* was that Order 97 remained unaltered for so long. Thus the Court stepped in and provided the necessary case management of the petition in the absence of any procedural guidance in the form of court rules.[22] Happily, this procedural anomaly in the rules has been rectified by the new Order 97, which largely follows the case management procedures adopted by the Court for the trial of the *Sinnott* petition.

This procedural tidy-up will not alter the future trial of any election petition in any significant way. Nonetheless, updated court rules are now in place which provide for an application for leave to present a petition grounded upon an *ex parte* docket, the presentation and contents of the petition and motion for directions, the maintenance of records, the hearing of the motion for directions and which supplement some of the statutory provisions of the Third Schedule to the 1992 Act concerning security for costs, applications for leave to withdraw a petition, substitution of petitioners and costs.

Practitioners and judges alike can confidently turn to the new rules for guidance on how to present and try any future Dail election petition. Naturally, this will benefit all the prospective participants. One of the arguments submitted by the parties seeking their costs against the Minister for Environment, Heritage and Local Government in *Sinnott* was that the failure to promulgate rules of court on election petitions created difficulties which should justify an order of costs in their favour. This argument was rejected by the Court – but the benefit of the new rules is that no party to a future petition will proceed on a false hope of recouping their costs on that basis and a potential costs exposure for the State has been removed. No doubt the new Order will enjoy its first outing later this year ●

17 [2004] 1 IR 121

18 Two judgments were delivered by Mr. Justice Kelly. The first judgment which refused the petition was delivered on the 30th January 2004; the second judgment dealing with the costs of the proceedings was delivered on 31

19 ibid. at 159

20 s.44(b) Electoral Act 1997

21 The Third Schedule to the 1992 Act Rule 6 entitled 'Trial of Petition' provides the statutory steps for the trial of a petition.

22 Mr. Justice Kelly remarked that a case management procedure "would have been desirable, or perhaps even necessary, even if rules of court existed having regard, *inter alia*, to the statutory obligation that the matter should be listed for trial as soon as was reasonably possible".

Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 12, Issue 1, February 2007

A directory of legislation, articles and acquisitions received in the Law Library from the 16th November 2006 up to 5th February 2007
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

ADMINISTRATIVE LAW

Article

Morgan, David Gwynn
Constitutional and administrative law framework of the Personal Injuries
Assessment Board
6 (1) 2006 JSIJ 33

Statutory Instruments

Appointment of special adviser (Minister for Justice, Equality and Law
Reform) order 2006
SI 635/2006

Commission for public service appointments (additional function) order
2006
SI 599/2006

Commission for public service appointments (additional function) (no.2) order 2006
SI 600/2006

Commission for public service appointments (additional function) (no.3) order 2006
SI 601/2006

Ethics in public office (designated positions in public bodies)(amendment) regulations 2006
SI 677/2006

Ethics in public office (prescribed public bodies, designated directorships of and positions in public bodies) (amendment) regulations
2006
SI 678/2006

Oireachtas (ministerial and parliamentary offices) (secretarial facilities) regulations 2006
SI 535/2006

Registration of electors (entry in postal voters list) order 2007
SI 1/2007

Library Acquisition

Harris, Brian
Disciplinary and regulatory proceedings
4th ed
Bristol: Jordan Publishing Limited, 2006
M303

AGRICULTURE

Statutory Instruments

Abattoirs (control of designated bovine offal) (revocation) regulations
2006
SI 565/2006

Agriculture appeals act 2001 (amendment of schedule) (no. 2) regulations
2006
SI 584/2006

Bovine diseases (levies) regulations 2006
SI 673/2006

Diseases of animals act 1966 (transmissible sponiform encephalopathies) (fertilisers and soil improvers) order 2006
SI 615/2006

European Communities (animal transport and control post) regulations 2006
SI 675/2006

European Communities (protection of animals kept for farming purposes) regulations 2006
SI 705/2006

National beef assurance scheme act 2000 (approval) order 2006
SI 676/2006

AIR LAW

Articles

Hinds, Anna-Louise
Airtours? A consolidation of existing law on collective dominance?
2006 IJEL 233

Leonowicz, Siun
The Warsaw Convention and deep vein thrombosis
2006 ILTR 294

McGrath, Imogen
Air wars
2006 (November) GLSI 24

Statutory Instrument

Aviation regulation act 2001 (levy no. 7) regulations 2006
SI 658/2006

ARBITRATION

Award

Fundamental error of law on face of award – Standard of review – Materials to be considered – Whether court entitled to review matters specifically referred to arbitrator for resolution – Jurisdiction to set aside or remit award under common law and statute – Whether such jurisdictions co-terminus – Misconduct – Whether arbitrator entitled to decide matters on point not put to parties – *McStay v Assicurazione Generali SPA* [1989] IR 248, *Keenan v Shield Insurance Co Ltd* [1988] IR 89, *In Re Strabane RDC* [1910] 1 IR 135, *Doyle v Kildare Co Co* [1996] 1 ILRM 252 applied; *Honorable Irish Society v Minister for Finance* [1958] NI 170, *Nils Heime Akt v G Merel & Co Ltd* (1959) 2 Lloyds Rep 292, *FR Absalom Ltd v Great Western (London) Garden Village Society* [1933] AC 592, *Société Franco – Tunisienne d'Armenmen-Tunis v Government of Ceylon* [1959] 3 All ER 25 and *Whitworth v Hulse* (1866) LR 1 Exch 251 followed; *DS Blaiber & Company Limited v. Leopold Newborne (London) Ltd* (1953) 2 Lloyds Rep 427, *McCarthy v Keane* [2004] 3 IR 617, *McCarrick v Gaiety (Sligo) Ltd* [2001] 2 IR 266, *Tobin & Toomey Services v Kerry Foods Ltd* [1996] 2 ILRM 1 and *Portsmouth Arms Hotel Ltd v Enniscorthy UDC* (Unrep, O'Hanlon J, 14/10/1994), *Stillorgan Orchard Ltd v McLoughlin* [1978] ILRM 128 considered - Arbitration Act 1954 (No 26), ss 36 and 38 – Order setting award aside refused – (2005/420SP & 445SP – Clarke J – 1/11/2005) [2005] IEHC 347
Limerick Co Co v Uniform Construction Ltd

Articles

Leonard, Patrick
ECO Swiss - weakening the UNCITRAL model law?
Daly, Sarah
2006 IJEL 259

O hOisin, Colm
ADR and arbitration opportunities for the Bar
12 (5) 2006 BR 144

Library Acquisition

Dickinson, Andrew
Butterworths international commercial litigation handbook
2nd ed
London: LexisNexis Butterworth, 2006
C1250

BANKING

Library Acquisitions

Breslin, John
Banking law
2nd ed
Dublin: Thomson Round Hall Ltd, 2007
N303.C5

Griffiths, Gwendoline
Bank confidentiality
4th ed
Haywards Heath: Tottel Publishing, 2006
C226

Moss, Gabriel
EU banking and insurance insolvency
Oxford: Oxford University Press, 2006
W107

Parsons, Timothy N
Lingard's bank security documents
4th ed
London: LexisNexis Butterworths, 2006
N303.2

Statutory Instruments

Central bank act 1971 (approval of scheme of AIB Finance Limited and
Allied Irish Bank, plc) order 2006
SI 557/2006

Central bank act 1942 (financial services ombudsman council) levies and fees regulations 2006
SI 556/2006

Central bank act 1942 (sections 33j and 33k) (amendment) regulations 2006
SI 528/2006

BETTING AND GAMING

Statutory Instrument

Horse racing on-course betting office (amendment) regulations 2006
SI 481/2006

BUILDING & CONSTRUCTION

Library Acquisitions

Bunni, Nael G
Risk and insurance in construction
2nd ed
London: Spon Press, 2003
N83.8

Glover, Jeremy
Understanding the new FIDIC red book: a clause-by-clause commentary
London: Sweet & Maxwell, 2006
N83.8

CHARITIES

Article

Lillis, Nora
Recent developments in charity law and the taxation of charities
2006 (July) ITR 82

Library Acquisition

Law Reform Commission
Law Reform Commission report on charitable trusts and legal structures for charities
Dublin: Law Reform Commission, 2006
L160.C5

CHILDREN

Articles

Coveney, Hilary
Child in time
2006 (December) GLSI 18

Kilkelly, Ursula
Reform of youth justice in Ireland: the "new" Children Act 2001
2006 (4) ICLJ 2

Twohig, Brendan
The childcare services relief
2006 (July) ITR 66

Library Acquisitions

Lewis, Penney
Delayed prosecution for childhood sexual abuse
Oxford: Oxford University Press, 2006
M544.7

Mahendra, B
Adult psychiatry in family and child law
Bristol: Jordan Publishing Limited, 2006
N155.3

Office of the Minister for Children
Giving children a voice: investigation of children's experiences of participation in consultation and decision-making in Irish hospitals
Dublin: Office of the Minister for Children, 2006
N185.122.Q11.C5

Statutory Instruments

Chid care (pre-school services) (no.2) regulations 2006
SI 604/2006

Child care (pre-school services) (no 2) (amendment) regulations 2006
SI 643/2006

Children act 2001 (amendments to part 11) (commencement) order 2006
SI 590/2006

CIVIL SERVICE

Statutory Instrument

Civil service regulation (amendment) act 2005 (section 8)(commencement) order 2005
SI 629/2005

COMMERCIAL LAW

Library Acquisition

Lawson, Richard
Commercial contracts: a practical guide to standard terms
2nd ed
Haywards Heath: Tottel Publishing, 2006
N254

COMMERCIAL AGENTS

Article

Carey, Gearoid
Commercial agents and compensation - recent developments
2006 CLP 224

COMPANY LAW

Corporate veil

Limitation of liability – Company responsible for environmental damage – Whether veil of incorporation can be lifted and orders made directly against company directors - *Wicklow County Council v Fenton* [2002] 4 IR 44 followed - Orders granted (2005/15MCA – Peart J – 18/1/2006) [2006] IEHC 2
Laois County Council v Scully

Directors

Disqualification – Conduct – Fitness to manage company – Mitigation – *Re NIB; Director of Corporate Enforcement v D'Arcy* [2005] IEHC 333 (Unrep, Kelly J, 26/10/2005) and *In re Westmid Packing Services Ltd* [1998] 2 All ER 124 followed – *In re Dunleckney Ltd* (Unrep, Carroll J, 18/2/1999) considered – Companies Act 1990 (No 33), s 160 – 9 year disqualification granted – (2006/27COS – Finlay Geoghegan J – 9/3/2006) [2006] IEHC 67
Re Ansbacher (Cayman) Ltd; Director of Corporate Enforcement v Collery

Directors

Disqualification – Necessary proofs – Criteria by which court should exercise discretion – Whether conduct of person such as to make him unfit to be concerned in management of company – Appropriate length of disqualification order – *Cahill v Grimes* [2002] 1 IR 372 applied; *Re Grayan Building Services Ltd* [1995] Ch 241; *Re Westmid Packing Ltd* [1998] 2 All ER 124 considered - Companies Act 1990 (No 33), s 160(2) – Disqualification order made (2005/270COS – Kelly J – 26/10/2005) [2005] IEHC 333
Re National Irish Bank Ltd; Director of Corporate Enforcement v D'arcy

Directors

Restriction – Costs of investigation – Whether court had discretion to award costs for legal fees incurred in investigating matter – Whether solicitor's fees sought came within definition of costs of investigation – Whether costs of investigation confined to legal costs incurred in connection with litigation – *In Re Mitek Holdings Ltd; Grace v Kachkar* [2005] 1EHC 160, (Unrep, Finlay Geoghegan J, 5/5/2005) considered - Companies Act 1990 (No33), s 150(4B) –

Companies Act 1961 (No 33), s 281 – Rules of the Superior Courts 1986, (SI 15/1986), O 99, r 10(2) – Liquidator's costs allowed against respondent (2005/121COS – Laffoy J – 15/5/2006) [2006] IEHC 149
Re Moypool Ltd; Gannon v O'Hora

Directors
Restriction –Whether directors acted responsibly – *In re First Class Toy Traders Ltd*; *Gray v McLoughlin* [2004] IEHC 289 (Unrep, Finlay Geoghegan J, 9/7/2004) distinguished – Companies Act 1990 (No 33), s 150 – Order granted – (2004/267COS – MacMenamin J – 21/12/2005) [2005] IEHC 468
In re Club Tivoli Ltd; Foster v Davis

Investigation
Final report – Documents – Disclosure – Access to documents – Whether inspectors under obligation to provide access or to make discovery of documents after delivery of final report – Whether order sought related to matters arising out of report prepared pursuant to s 11 – Whether the court should exercise its discretion under s 12(1) to make the order sought – Whether order sought would require inspectors to act outside lawful authority – Whether order sought would be consistent with scope and scheme of legislation – *Re Ansbacher (Cayman) Ltd* [2004] IEHC 222, [2004] 3 IR 193 approved - Companies Act 1990 (No 33), ss 11, 12 and 22 – Application refused (1998 89 & 132Cos – Kelly J 10/2/2006) [2006] IEHC 35
Re NIB Ltd

Liquidation
Petition – Insolvency – *Bona fide* dispute – *Re WMG (Toughening) Ltd* [2003] 1 IR 389 followed – Companies Act 1963 (No 33), s 214 – Petition dismissed – (2005/239COS – Laffoy J – 23/2/2006) [2006] IEHC 73
In re Mares Associates Ltd

Winding up
Costs – Pre-resolution expenses – Whether pre-resolution fees and expenses were expenses properly incurred within meaning of Act of 1963 – *Re Sorge &Co Ltd* [1986] BCLC 490 not followed; *Re Sandwell Copiers Ltd* [1988] BCLC 209 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 74, r 128 – Companies Act 1963 (No 33) s 281 – Interpretation Act 2005 (No 23) s 5 – Application for fees dismissed (2005/327COS – Laffoy J – 22/2/2006) [2006] IEHC 52
Re Compustore Ltd

Winding up
Insolvency – Presentation of petition during period of insurance policy – Making of winding up order after insurance policy expired – Whether liquidation occurred during period of insurance policy – Whether appointment of liquidator becomes effective at date of presentation of petition – *Re Eurofoods IFSC Ltd* [2004] 4 IR 370, *UPM Kymmene Corp v BMG Ltd* (Unrep, Laffoy J, 11/6/1999) and *Re Dynamics Corporation of America* [1973] 1 WLR 63 followed; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 distinguished - Companies Act 1963 (No 33), s 220(2) – Winding up within period of insurance (2003/5269P – Gilligan J – 25/11/2005) [2005] IEHC 474
Emo Oil Ltd v Sun Alliance and London Insurance plc

Articles

Buckley, Niall F.
Back to the boardroom - relief from directors' restriction orders
2006 CLP 258

Herlihy, Julie
Back to basics: corporation tax losses and charges
2006 (November) ITR 42

Kavanagh, James
The acquisition trail and due diligence for pension schemes
2006 (November) ITR 54

Maher, Bronagh
In whose interest?
2006 (December) GLSI 30

O'Flaherty, Gavin
A new dawn in Irish company law: the new company law reform and consolidation bill
2006 (November) ITR 58

Library Acquisitions

Bruce, Martha
Rights and duties of directors
8th ed
Haywards Heath: Tottel Publishing, 2006
N264

Fuller, Geoffrey
Corporate borrowing: law and practice
3rd ed
Bristol: Jordan Publishing Limited, 2006
N263

Picarda, Hubert A P
The law relating to receivers, managers and administrators
4th ed
Haywards Heath: Tottel Publishing, 2006
N396

Smith, Charles G S
Company procedures precedents
London: Thomson Sweet & Maxwell, 1987
N261.Z3

Statutory Instruments

Companies (auditing and accounting) act 2003 (prescribed bodies for disclosure of information) regulations 2006
SI 619/2006

COMPETITION LAW

Articles

Hinds, Anna-Louise
Airtours? A consolidation of existing law on collective dominance?
2006 IJEL 233

Leonard, Patrick
ECO Swiss - weakening the UNCITRAL model law?
Daly, Sarah
2006 IJEL 259

McGrath, Imogen
Air wars
2006 (November) GLSI 24

Library Acquisitions

Blanco, Luis Ortiz
European Community competition procedure
2nd ed
Oxford: Oxford University Press, 2006
W110

Competition Authority
Competition in professional services: solicitors and barristers
Dublin: Competition authority, 2006
N266.C5

CONFLICT OF LAWS

Jurisdiction
Administrative decision – Appropriate jurisdiction –Whether plaintiffs' case related to administrative matters falling outside parameters of jurisdiction of Irish courts – Whether plaintiff seeking to interfere with decision of foreign sovereign power – Whether court had jurisdiction to adjudicate on validity of foreign administrative decision – Whether practical considerations applied – *Adams v DPP* [2001] 1 IR 47 followed - Whether *res judicata* – Council Directive 80/336/Euratom – Council Directive 84/467/Euratom – Council Directive 85/337/EEC - Appeal dismissed (341/2004 - SC - 11/7/2006) [2006] IESC 46
Short v Ireland

Jurisdiction
Company law – Recognition and enforcement of judgments – Proceedings involving same cause of action in being in England – Whether Irish courts should decline jurisdiction - Whether stay pending proceedings before English courts appropriate – Conditional appearance entered in Irish proceedings – Whether proceedings in Ireland and England have "same cause of action" – Whether irreconcilable judgments might result - Whether cases are "related actions" - *Gubish Maschinenfabrik KG v P*alumbo (Case 144/86) [1987] ECR 486, *The Tatry* (Case C-406/92) [1994] ECR-I-5439 and *Ganner Electronic GmbH v Basch Expolitatie Maatschappij BV* (Case C-111/01) [2003] ECRI-4207 considered – Council Regulation (EC) 44/2001, articles 22, 24, 27 and 28 – Relief refused (2004/10397P – Finlay Geoghegan J – 5/5/2006) [2006] IEHC 134
Popely v Popely

Jurisdiction
Lugano Convention – Contract – Exclusive jurisdiction clause – Consensus between parties – Defendant domiciled abroad – Place of performance of obligation – Onus on plaintiff – Whether Ireland place of performance of obligation in question – Whether Irish courts had jurisdiction to determine proceedings – *Canada Trust Company v Stolzenberg (No 2)* [2002] 1 AC 1 distinguished; *Estasis Salotti di Colzani Aimo e Gianmario Colzani v Rüwa Polstereimaschinen GmbH (Case 24/76)* [1976] 3 ECR1831 approved; *Holfeld Plastics Ltd v ISAP OMV Group Spa* (Unrep, Geoghegan J, 19/3/1999), *Viskase Limited v Paul Kiefel GmbH* [1999] 1 WLR 1305 and *Handbridge Ltd v British Aerospace Communication Ltd* [1993] 3 IR 342 followed - Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988, articles 2, 5(1) and 17(1) -Rules of the Superior Courts 1986 (SI 15/1986), O 12, r 26 – Jurisdiction of Courts and Enforcement of Judgments Act 1998, (No 52), s

18 – Relief refused (2003/9072P – O'Neill J – 7/3/2006) [2006] IEHC 60
Stryker Corp v Sulzer Metco AG

CONSTITUTIONAL LAW

Fair procedures
Bias – Objective bias – Principles to be applied where application made to judge to disqualify himself on grounds of objective bias – Whether previous *ad interim* decision by judge in matter between parties can ground objective bias claim against judge - *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412, *Dublin Well Woman Centre Ltd v Ireland* [1995] 1 ILRM 408 and *O'Neill v Beaumont Hospital Board* [1990] ILRM 419 followed – Judicial review refused (2005/1299JR – Quirke J – 10/2/2006) [2006] IEHC 33
D (D) v Judge Gibbons

Foreign affairs
International law – War – Landing or overflying of foreign military aircraft – *Laches* – Acquiescence – *In re O Laighléis* [1960] IR 93, *Horgan v Ireland* [2003] 2 IR 468, *O'Malley v An Ceann Comhairle* [1997] 1 IR 427 and *Cassidy v Minister for Industry* [1978] IR 297 followed – Air Navigation (Foreign Military Aircraft) Order 1952 (SI 74/1952) – Air Navigation (Carriage of Munitions of War, Weapons and Dangerous Goods) Order 1973 (SI 224/1973) – Air Navigation (Carriage of Munitions of War, Weapons and Dangerous Goods) (Amendment) Order 1989 (SI 130/1989) – Air Navigation Act 1946 (No 23)– Constitution of Ireland 1937 – Reliefs refused – (2002/571JR – Macken J – 13/12/2005) [2005] IEHC 442
Dubsky v Ireland

Habeas corpus
Detention – Control – Persons subject of *habeas corpus* orders free from detention outside jurisdiction – Whether conditional orders of *habeas corpus* remain effective – Whether jurisdiction to make other orders restoring *status quo ante* – *In re D* [1987] IR 449 approved - Constitution of Ireland 1937, Article 40 – Order requiring return of applicants to State pending hearing vacated (70, 71, 72, 73, 227/2005 – SC – 2/3/2006) [2006] IEHC 8
Abebayo v Commissioner of An Garda Siochána

Judiciary
Removal from office – Resolution of Oireachtas – Judicial independence – Separation of powers – Deference by courts to another organ of State – Standard which court measured failure by organ of State to comply with constitutional obligations – Judge as witness to Oireachtas committee – Statutory power to call judge as witness to Oireachtas committee – Constitutional interpretation – Presumption of constitutionality – Parliamentary procedures – Whether statute unconstitutional – Whether parliamentary procedures presumed to be constitutional – Whether Oireachtas had power to call judge as witness – Whether power to call judge as witness constitutional – Whether resort may be had to principles derived from other parts of Constitution for constitutional interpretation – Resolution for removal of judge – Fair procedures – Form of report of committee – Direction from committee – Privilege against self incrimination – Possession – Whether Oireachtas could adopt standing orders to establish sub–committee to receive evidence – Whether committee could direct production of *prima facie* unlawful material – Whether direction constitutional – Whether direction violated privilege against self incrimination – Whether "thing" under privilege against self incrimination – *People v O'Shea* [1982] IR 384, *Sinnott v Minister for Education* [2001] 2 IR 545, *State (Healy) v Donoghue* [1976] IR 325, *Goodman International v Mr Justice Hamilton* [1992] 2 IR 542, *Buckley and others (Sinn Féin) v AG* [1950] IR 67, *TD v Minister for Education* [2001] 4 IR 259, *East Donegal Co-Operative Livestock Mart Ltd v AG* [1970] IR 317, *McDonald v Bord na gCon* [1965] IR 217 and *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] IR 413 considered; *Maguire v Ardagh* [2002] 1 IR 385 distinguished - Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) (Amendment) Act 2004 (No 16) – Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 (No 17), s 3A – Constitution of Ireland 1937 , Articles 15.10 and 35.4.1° - Relief refused (198 & 203/2005 – SC – 9/3/2006) [2006] IESC 14
Curtin v Clerk of Dáil Éireann

Statute
Validity – Retrospective effect– Prohibition against retrospective increase in penalty – Imposition of criminal penalty which did not exist at time offence was committed – Whether statutory burdens amounted to punishment or penalty – Whether sufficient reason to depart from earlier authority – *Locus standi* – Whether sufficient standing to challenge constitutionality of impugned provisions of enactment – Whether affected by enactment - *Cahill v Sutton* [1980] IR 269 considered; *Enright v Ireland* [2003] 2 IR 321 followed; *People (DPP) v D(G)* [2004] IECCA 17 (Unrep, CCA, 13/7/2004) and *People (DPP) v NY* [2002] 4 IR 309 considered - Sex Offenders Act 2001 (Commencement) Order 2001 (SI 426/2001), art 2 - Sex Offenders Act 2001 (No 18), pt 2 – Constitution of Ireland 1937, Articles 15.5 and 38.1 - European Convention on Human Rights, article 7.1 – Claim dismissed (2004/626JR – Clarke J – 16/2/2006) [2006] IEHC 40
H (P) v Ireland

Articles

Coveney, Hilary
Child in time
2006 (December) GLSI 18

Morgan, David Gwynn
Constitutional and administrative law framework of the Personal Injuries
Assessment Board
6 (1) 2006 JSIJ 33

Library Acquisiton

Lenaerts, Koen
Constitutional law of the European Union
2nd ed
London: Sweet & Maxwell, 2005
W84

CONTRACT LAW

Sale of land
Concluded contract – Mere negotiations - Legitimate expectations – Public body – Failure of public body to respect legitimate expectations – Good faith - *Glencar Exploration Plc v Mayo County Council (No. 2)* [2002] 1 IR 84, *Fluid Power Technology Co v Sperry (Ireland) Ltd* (Unrep, Costello J, 22/2/1985) and *Walford v Miles* [1992] 2 AC 128 followed – Claim dismissed – (1998/856P – Laffoy J – 31/3/2006) [2006] IEHC 111
Triatic Ltd v Cork County Council

Sale of land
Leasehold premises – Notice to complete – Misrepresentation – Abatement of purchase price – Whether the defendant had misrepresented quality of services available – Whether notice to complete effective – Whether the court has jurisdiction to determine validity of notice to complete on vendor and purchaser summons – *Re Terry and White"s Contract* (1886) 32 Ch D 14 and *Molphy v Coyne* (1919) 53 ILTR 177 mentioned - .Vendor and Purchaser Act 1874 (37 & 38 Vict, c 78), s 9 – Rules of Superior Courts 1986 (SI 15/1986), O 38, r 3 – Claim dismissed (2005/288SP – Laffoy J – 24/2/2006) [2006] IEHC 54
Hegarty v Fusano Properties Ltd

Library Acquisition

Lawson, Richard
Commercial contracts: a practical guide to standard terms
2nd ed
Haywards Heath: Tottel Publishing, 2006
N254

CONVEYANCING

Judgment mortgage
Registered land – Priority – Unregistered *lis pendens* – Judgment mortgagee – Status as volunteer – Whether judgment mortgagee entitled to rely on s.10 of Judgments (Ireland) Act to assert priority over unregistered *lis pendens* – AS *v GS* [1994] 1 IR 407, *Re Murphy and McCormack* [1930] IR 322, *Re Strong* [1940] IR 382 and *Giles v Brady* [1974] IR 462 followed; *Tempany v Hynes* [1976] IR 101 considered - Registration of Title Act 1964 (No 16), s 71(4)(c) – Judgments (Ireland) Act 1844 (7 & 8 Vict, c 90) s 10 - *Lis pendens* granted priority (2005/2SP – Clarke J – 12/12/2005) [2005] IEHC 437
ACC Bank plc v Markham

Articles

Brennan, Gabriel
Electric picnic
2006 (November) GLSI 38

Maddox, Neil
The Land and Conveyancing Law Reform Bill 2006: an overview
12 (5) 2006 BR 171

Library Acquisition

Linehan, Denis M
Irish conveyancing law and practice
Cork: Irish Legal Publications, 2006
N74.C5

Statutory Instruments

Land registration rules, 2006
SI 558/2006

COSTS

Library Acquisition

Cook, Michael J

Cook on costs 2007: a guide to legal remuneration in civil contentious and non-contentious business
2007 ed
London: LexisNexis Butterworths, 2006
L89

COURTS

Jurisdiction
Supreme Court – Appeal from judge alone – Conflict of evidence – Role of appellate court – Whether appellate court can interfere with findings of fact made by trial judge on oral evidence - *Hay v O'Grady* [1992] 1 IR 210 followed - Applicant's appeal allowed (62/1005 – SC – 23/3/2006) [2006] IESC 17
Advanced Totes Ltd v Bord na gCon

CREDIT UNION

Statutory Instrument

Credit union act 1997 (alteration of financial limits) regulations 2006
SI 546/2006

CRIMINAL LAW

Appeal
Jurisdiction of Supreme Court – Appeal from Court of Criminal Appeal – Scope of appeal from Court of Criminal Appeal to Supreme Court – Statute – Interpretation – Certificate on point of law of exceptional public importance that appeal be taken to Supreme Court – Whether Supreme Court having jurisdiction to intervene in sentence when questions certified for appeal relate to conviction – Sentence – Whether sentence disproportionate – Whether Supreme Court should intervene in sentencing decision of Court of Criminal Appeal – *People (AG) v Giles* [1974] IR 422 followed - Courts of Justice Act 1924 (No 10), s 29 – Constitution of Ireland 1937, Article 34.4.3° - Appeal dismissed (154/2004 – SC 10/7/2006) [2006] IESC 42
People (DPP) v Gilligan

Bail
Presumption of innocence – *Prima facie* entitlement to bail – *Quantum* of bail – Inquiry as to means of applicant and surety – Responsibility of applicant to provide accurate information as to means – Procedure for provision and verification of information as to means – Whether inquiry as to means adequate – Whether *quantum* amounted to denial of bail – *The People (AG) v O'Callaghan* [1966] IR 501 followed; *The State (AG) v Coleman* (1933) 67 ILTR 183 and *Hoffman v Judge Coughlan* [2005] IEHC 60 (Unrep, O'Neill J, 4/3/2005) approved - Criminal Procedure Act 1967 (No 12), s 27 – Misuse of Drugs Act 1977 (No 12), ss 15 and 27 – Misuse of Drugs Act 1984 (No 18), s 6 – Bail Act 1997 (No 16), ss 5 and 7 – Courts and Courts Officers Act 2002 (No 15), s 33 (127/2006 – SC – 26/5/2006) [2006] IESC 34
Broderick v DPP

Delay
Right to expeditious trial – Complainant delay – Right to fair trial - Sexual assault – Minors – Prejudice – Whether delay inordinate and excessive – Culpable delay – Dominion – *O'Flynn v Clifford* [1988] IR 740, *Blood v DPP* [2005] IESC 8 (Unrep, SC, 2/3/2005), *C(P) v DPP* [1999] 2 IR 25 and *F(T) v DPP* [2005] IEHC 31 (Unrep, Quirke J, 18/1/2005) followed – Order of prohibition granted in respect of one complainant and refused in respect of the other – (2005/292JR – Quirke J – 15/12/2005) [2005] IEHC 431
D (C) v DPP

Delay
Right to expeditious trial – Complainant delay – Right to fair trial - Prohibition – Rape – Indecent assault - Minors – Prejudice – Whether delay inordinate and excessive – Order of prohibition granted in respect of one complainant and refused in respect of two others – (2004/867JR – Clarke J – 16/12/2005) [2005] IEHC 436
C (T) v DPP

District Court
Warrant – Jurisdiction – Statute – Whether arrested persons could only lawfully be brought before court in District where warrant was obtained – Whether District Judge should have referred case back to court where warrant was obtained – *Coates v O'Donnell* [1997] 1 IR 417 distinguished - Petty Sessions (Ireland) Act 1851 (14 & 15 Vict, c 93), s 11(1)(i) – Criminal Justice Act 1951 (No 2), s 15(1) – Courts and Court Officers Act 1995 (No 31), s 41 – Criminal Justice (Miscellaneous Provisions) Act 1997 (No 4), s 18 – Relief refused (2004/678 & 679 – MacMenamin J – 17/2/2006) [2006] IEHC 165
Massoud v Judge Dunne

Evidence
Failure to preserve evidence – Forensic evidence – Delay – Risk of unfair trial – *Z v DPP* [1994] 2 IR 476 and *Scully v DPP* [2005] 1 IR 242 followed – Prohibition refused – (2004/568JR – Dunne J – 25/1/2006) [2006] IEHC 153
O'Driscoll v DPP

Evidence
Issue estoppel –*Res judicata* – Criminal proceedings – Whether finding of criminal court capable of giving rise to estoppel in subsequent criminal proceedings action – Whether discrete issue may be regarded as finally and validly determined by court, even though verdict on general issue set aside - *Corporation of Dublin v Flynn* [1980] IR 357, *R v Humphrys* [1977] AC 1, *Rogers v The Queen* [1994] 181 CLR 251 followed; *The People (DPP) v O'Callaghan* [2001] 1 IR 584 overruled; *Kelly v Ireland* [1986] ILRM 318, *Breathnach v Ireland* [1989] IR 489 distinguished; *R v Hogan* [1974] QB 398 not followed; *People (DPP) v Quilligan (No 3)* [1993] 2 IR 305, *Connelly v Director of Public Prosecutions* [1964] AC 1254, *Duhamel v The Queen* [1984] 2 SCR 555, *Mills v Cooper* [1967] 2 QB 459, *R v Blair* [1985] 1 NSWLR 584, *R v Maskell* [1970] 54 Cr App R 429 considered – *Certiorari* granted; no issue estoppel arising (417/2005 – SC – 23/5/2006) [2006] IESC 31
Lynch v Judge Moran

Extradition
European arrest warrant – Correspondence – Whether arrest warrant valid – Principle of mutual recognition – *AG v Parke* [2004] IESC 100 (Unrep, SC, 6/12/2004) followed – European Arrest Warrant Act 2003 (No. 45) – Surrender granted – (2005/7Ext – Peart J – 14/2/2006) [2006] IEHC 63
Minister for Justice, Equality and Law Reform v Stafford

Extradition
European arrest warrant – Domestic warrant – Production of domestic warrant underlying European arrest warrant – Whether respondent entitled to domestic warrant – Fair procedure – Presumption that issuing state complied with Framework Decision – Whether presumption entitled respondent to copy of domestic warrant – *Minister for Justice v Fallon* [2005] IEHC 321 (Unrep, Finlay Geoghegan J, 9/7/2005) distinguished; *Wyatt v McLoughlin* [*1974*] IR 378 and *Ellis v O'Dea* (No 2) [1991] IR 251 approved - European Arrest Warrant Act 2003 (No 45), ss 4A, 10, 11(1), 11(1A) and 20 – Framework Decision (2002/584/JHA), article 8 – Appeal allowed, matter remitted to HC (446/2005 – SC – 5/4/2006) [2006] IESC 23
Minister for Justice v Altaravicius

Extradition
European arrest warrant – Personal rights – Delay – Offences allegedly committed in 1978 to 1982 – Whether surrender prohibited as incompatible with state's obligations under European Convention on Human Rights – Whether surrender in breach of respondent's constitutional rights – Whether delay excessive unconscionable and inexcusable – Whether sufficiency of safeguards for fair trial in requesting state relevant – Whether respondent established on balance of probabilities that capacity to adequately defend himself hampered – Whether on balance of probabilities respondent would receive trial within reasonable time – Nature of alleged offences – *Woodcock v Government of New Zealand* [2002] EWHC 2668 (Admin), [2004] 1 WLR 1979 considered; *Minister for Justice v R(S)* [2005] IEHC 37, (Unrep, Peart J, 15/11/2005) and *F(J) v DPP* [2005] IEHC 382, (Unrep, Peart J, 16/11/2005) followed - European Arrest Warrant Act 2003 (No 45), s 4A, 16 and 37 – European Convention on Human Rights Fundamental Freedoms 1950, articles 3 and 6 – Council Framework Decision (2002/584/JHA), article 12 – Surrender refused (2005/39Ext – Peart J – 21/2/2006) [2006] IEHC 43
Minister for Justice v Stapleton

Extradition
European arrest warrant – Statutory interpretation – Words and phrases – "Judicial authority" – Principles to be applied – *Ejusdem generis* – Whether judicial authority stated on face of warrant being competent judicial authority – Whether prosecutor general judicial authority for purposes of European arrest warrant – *Criminal Pupino* (Case C-105/03) [2006] QB 83 and *Enander v Governor of Brixton Prison* [2005] EWHC 3036 (Admin) [2006] 1 CMLR 37 considered - Framework Decision (2005/584/JHA), article 6(1) – European Arrest Warrant Act 2003 (No 45), ss 2 and 4A – Surrender order (2005/8Ext – MacMenamin J – 31/7/2006) [2006] IEHC 270
Minister for Justice v Altaravicius

Extradition
Lapse of time – Correspondence of offence – Relevant date – Fraud – Whether extradition unjust, oppressive or invidious – Fraud – Obtaining of money by false pretences – Conspiracy to defraud – *Myles v Sreenan* [1999] 4 IR 294 followed –Extradition Act 1965 (No 17), ss 42(3), 47, 50 – Order of release refused – (2001/344SP – Peart J – 13/12/2005) [2005] IEHC 413
Egan v O'Toole

Jurisdiction
District Court – Summary offences – Preliminary hearing - Arrest warrant obtained - Whether accused properly before court – Whether complaints made within time limits – Defence – Whether defence may be adjudicated upon as preliminary issue - Whether jurisdiction to re-hear where issue has been ventilated and determined previously by another judge of District Court – *Res judicata* - Issue estoppel – Abuse of process - *Minister for Agriculture v Norego Ltd* [1980] IR 155 considered - Petty Sessions Ireland Act 1851 (14 & 15 Vict, c 93), s 10(9) – Question answered in negative (2005/1491SS – Dunne J – 15/5/2006) [2006] IEHC 155
DPP (Kenny) v Doyle

Road traffic offences
Drink driving – Alcohol test – Blood or urine specimen – Failure to provide urine specimen within time allowed – Whether reasonable time allowed to provide urine specimen – *DPP (Coughlan) v Swan* [1994] 1 ILRM 314 approved - Road Traffic Act 1994 (No 7), s 13 – Reasonable time allowed (159/2005 – SC – 28/6/2006) [2006] IESC 38
DPP v Malone

Road traffic offences
Drink driving – "Refusing or failing to comply" with requirement to give specimen of breath – Whether failure to supply specimen in manner indicated an offence – Statute – Interpretation – *DPP (O'Brien) v Cormack* [1999] 1 ILRM 398 approved - Road Traffic Act 1994 (No 7), s 13 – Accused failed to comply (213/2004 – SC – 28/7/2005) [2005] IESC 52
DPP v Moorehouse

Road traffic offences
Drink driving – Intoxilyser – Detention for observation for 20 minutes prior to taking sample – Whether breath specimens from defendant taken with reasonable expedition – Whether defendant had been lawfully detained – *DPP v Finn* [2003] 1 IR 372 and *DPP v McNiece* [2003] 2 IR 614 applied - Road Traffic Act 1961 (No 24), s 49(4) – Road Traffic Act 1994 (No 7) ss 10, 13(1)(1a) and 17 – Detention lawful (2005/560SS – Quirke J – 16/11/2005) [2005] IEHC 371
DPP (Mulqueen) v O'Connor

Road traffic offences
Drink driving - Intoxilyser – Order of District Court authorising presence of engineer on behalf of respondent at servicing and testing of intoxilyser breath testing machine – No objection raised initially to making of order – Objection subsequently on grounds of difficulty in obtaining compliance of third party servicing company - Whether District Judge correct in making order – Whether District Judge would be correct in proceeding to hear charge in circumstances where inspection sought but not carried out – Order correctly made (2004/1179SS –O'Neill J – 5/5/2006) [2006] IEHC 142
DPP v Moore

Summons
Defective summons – Fundamental defect – Defect going to jurisdiction of District Judge – Challenge to validity of summons – Inquiry as to nature of defect –Whether attendance of defendant or defendant's solicitor cured all defects – Whether necessary to hear evidence to determine nature of defect – *DPP v Clein* [1983] ILRM 76 distinguished; *DPP v Garbutt* [2004] IEHC 175 (Unrep, Murphy J, 4/5/2004) followed; *Duff v Mangan* [2003] ILRM 91 applied – Order granted, matter remitted to District Court (2004/369JR – Clarke J – 3/2/2006) [2006] IEHC 34
Payne v Brophy

Trial
Evidence – Failure to preserve evidence – Risk of unfair trial – Test to be applied – Duty and discretion of gardaì in seeking out and preserving evidence – Identification evidence by gardaí – Fingerprint evidence – Whether applicant wrongfully deprived of opportunity of examining car – Whether gardaì under obligation to carry out forensic examination of car – Whether real risk of unfair trial established – Delay in seeking evidence – Whether applicant guilty of delay in seeking inspection of car – Whether applicant disentitled to relief by reason of delay - *Dunne v DPP* [2002] 2 IR 305, *B v DPP* [1997] 3 IR 140, *Braddish v DPP* [2001] 3 IR 127 and *Scully v DPP* [2005] IESC 11, [2005] 1 IR 242 considered – Prohibition refused (2004/145JR – Dunne J – 13/1/2006) [2006] IEHC 1
Molloy v DPP

Trial
Jurisdiction – Central Criminal Court – Delay – Inherent power of trial court to protect its process from abuse – Whether trial court has jurisdiction to hear application to stay or quash indictment on grounds of delay – *R v Chairman, County of London Quarter Sessions, ex p Downes* [1954] 1 QB 1 considered; *People (DPP) v O'C(J)* (Unrep, Carney J, 3/4/2001) overruled; *R v Connelly* [1964] AC 1254 not followed; *BF v DPP* [2001] 1 IR 656, *G v DPP* [1994] 1 IR 374, *K(M) v Judge Groarke* (Unrep, SC, 25/7/2002) and *State (O'Connell) v Fawsitt* [1986] IR 362 considered - Courts of Justice Act 1924 (No 10), s 29 – Accused's appeal dismissed (17/2005 – SC – 27/7/2006) [2006] IESC 54
People (DPP) v O'C (P)

Trial
Jurisdiction – Plea – Change of plea – Discretion – Good and sufficient reason – Fair procedures – *Byrne v Judge McDonnell* [1997] 1 IR 392 and *People (DPP) v B* [2002] 2 IR 246 distinguished – *Certiorari* refused – (2004/819JR – Laffoy J – 27/2/2006) [2006] IEHC 72
Dunne v Judge McMahon

Warrant
Search warrant – Risk of unfair trial – Drugs offences – Trial – Whether judicial review correct remedy – *Blanchfield v Hartnett* [2002] 3 IR 207 and *McLoughlin v DPP* (Unrep, SC, 8/11/2001) followed – Criminal Justice (Miscellaneous Provisions) Act 1997 (No 4) – Prohibition refused – (2004/424JR – Murphy J – 15/3/2006) [2006] IEHC 74
McNulty v DPP

Articles

Campbell, Liz
The evidence of intimidated witnesses in criminal trials
2006 ILTR 246

Coffey, Gerard
Electronic monitoring of offenders in the administration of criminal justice
2006 ILTR 300

Kilkelly, Ursula
Reform of youth justice in Ireland: the "new" Children Act 2001
2006 (4) ICLJ 2

Murphy, Gerard
The admissibility of sexual experience evidence in Ireland
2006 (4) ICLJ 15

O'Donnell Thomas
Summary v indictable: choices in the disposal of criminal cases
6 (1) 2006 JSIJ 15

Robinson, Dara
Wiping the slate clean
2006 (October) GLSI 29

Ryan, Andrea
The European evidence warrant: the emergence of a European law of evidence?
2006 (4) ICLJ 8

Spencer, Keith
A Goodyear for auld habits - formalising the practices of plea bargaining
12 (5) 2006 BR 175

Library Acquisitions

Cape, Ed
Defending suspects at police stations: the practitioner's guide to advice and representation
5th ed
London: Legal Action Group, 2006
Luqmani, Jawaid
M570

Council of Europe
European prison rules
Strasbourg: Council of Europe Publishing, 2006
European Prison Rules
W133.6

Director of Public Prosecutions
Attending court as a witness
Dublin: Office of the Director of Public Prosecutions, 2006
M605.C5

Hanly, Conor
An introduction to Irish criminal law
2nd ed
Dublin: Gill & Macmillan, 2006
M500.C5

Lewis, Penney
Delayed prosecution for childhood sexual abuse
Oxford: Oxford University Press, 2006
M544.7

Murdoch, Jim
Treatment of prisoners: European standards
Strasbourg: Council of Europe Publishing, 2006
Human rights: Europe
C200.E95

Murphy, Peter
Blackstone's criminal practice 2007
2007 ed
Oxford: Oxford University Press, 2006
M500

Thomson Round Hall
Criminal law conference 2006: includes the implications of the new criminal justice act 2006 and the new guidelines for prosecutors
Dublin: Thomson Round Hall Ltd, 2006
M500.C5

Statutory Instruments

Criminal justice act 2006 (commencement) (no.3) order 2006
SI 586/2006

Criminal justice act 2006 (commencement) (no.4) order 2006
SI 622/2006

Criminal justice (illicit traffic by sea) act 2003 (commencement) order 2006
SI 539/2006

Criminal justice act 1984 (treatment of persons in custody in Garda
Siochana stations) (amendment) regulations 2006
SI 641/2006

Rules of the superior courts (evidence) 2007
SI 13/2007

Transfer of execution of sentences act 2005 (commencement) order 2006
SI 647/2006

DAMAGES

Personal injury
Road traffic accident – Assessment – Proportionality – Whether insurance monies to be considered in assessment – Book of *quantum* – *Greene v Hughes Haulage Ltd* [1997] 3 IR 109 and *Rossiter v Dun Laoghaire Rathdown Borough Council* [2001] 3 IR 578 followed – Civil Liability (Amendment) Act 1964 (No 17), s 2 – Damages of 1,246,233.00 awarded – (2001/7674P – Budd J – 16/12/2005) [2005] IEHC 473
McFadden v Weir

DEFAMATION

Articles

Carolan, Eoin
Defamation and privacy reform: a democratic model of media freedom?
12 (5) 2006 BR 147

McGonagle, Marie
Modernising defamation law
2006 (Summer) QRTL 19

Morris, Johanna
General damages and the Defamation bill 2006 - real reform?
2006 ILTR 283

DIRECTORS

Article

Buckley, Niall F.
Back to the boardroom - relief from directors' restriction orders
2006 CLP 258

Library Acquisition

Bruce, Martha
Rights and duties of directors
8th ed
Haywards Heath: Tottel Publishing, 2006
N264

DRAFTING

Library Acquisitions

Ramage, Roderick W
Kelly's draftsman
19th ed
London: LexisNexis Butterworths, 2006
L34

Waterworth, Michael
Parker's modern wills precedents
5th ed
Haywards Heath: Tottel Publishing, 2007
N125

EDUCATION

Library Acquisition

O'Mahony, Conor
Educational rights in Irish law
Dublin: Thomson Round Hall, 2006
N184.C5

Statutory Instrument

Education and science (delegation of ministerial functions) order 2006
SI 533/2006

ELECTRICITY

Statutory Instruments

Electricity regulation act 1999 and gas (interim) (regulation) act 2002 (gas) levy order 2006
SI 631/2006

Electricity regulation act 1999 (electricity) levy order 2006
SI 640/2006

EMPLOYMENT LAW

Contract
Injunction – Interlocutory injunction – Breach of contract – Duty of fidelity – Restraint of trade - Whether breach of fiduciary duty of director – Whether implied covenant preventing disclosure of confidential information short of trade secret after employment ceased – Whether breach of employment contract after contract ceased - Whether fair issue to be tried – Whether damages an adequate remedy - *Wallis Bogan & Co v Cove* (1997) IRLR 453 and *Faccenda Chickens Ltd v Fowler* [1987] 1 Ch 117 applied –Interlocutory relief refused; defendants directed to deliver up all materials relating to plaintiff's business (2006/497P – Clarke J – 17/2/2006) [2006] IEHC 50
The Pulse Group Ltd and Pulse Marketing Services Ltd v Ciaran O'Reilly and Eye Glen t/a Brando

Disciplinary inquiry
Natural justice – Fair procedures – Prison service – Criminal proceedings against employee – Employee acquitted on merits – Prison Governor seeking to hold disciplinary inquiry into breaches of discipline arising from same events – Whether disciplinary inquiry entitled to re-open matters decided by criminal courts – *McGrath v Commissioner of An Garda Síochána* [1991] 1 IR 69; *Mooney v An Post* [1998] 4 IR 288 followed - Garda Síochána (Discipline) Regulations 1989 (SI 94/1989), reg 38 – Prison (Disciplinary Code for Officers) Rules 1996 (SI 289/1996) – Applicant's appeal allowed (17/2004 – SC – 26/1/2006) [2006] IESC 3
Garvey v Minister for Justice

Wrongful dismissal
Interlocutory injunction – Contract of employment – Implied term – Whether employer deprived of right to give proper notice of termination – *Eastwood v Magnox Electric plc* [2004] UKHL 35, [2005] 1 AC 503, *Fennelly v Assicurazioni Generali SPA* (1985) 3 ILTR 73 and *Shortt v Data Packaging* [1994] ELR 251 considered - Unfair Dismissals Act 1977 (No 10) – Protection of Employees (Fixed-Term Work) Act 2003 (No 29) – Council Directive 1999/70/EC – Injunction refused (215/2005 – SC – 4/10/2005) [2005] IESC 89
Lingham v Health Service Executive

Articles

Byrne, Brian
Defrenne to Cadman. Female employees and length of service.
11 (6) 2006 BR 209

Grogan, Richard
Division of labour
2006 (November) GLSI 35

Library Acquisitions

Barrett, Gavin
Consolidated dismissal, redundancy and employee consultation legislation
Dublin: Clarus Press Ltd, 2006
N192.26.C5

Byrne, Raymond
Safety, health and welfare at work act 2005
Dublin: Thomson Round Hall, 2006
N198.C5.Z14

Donovan, Dorothy
Employment law
Dublin: Thomson Round Hall, 2006
N192.C5

Kerr, Anthony
Employment rights legislation
2nd ed
Dublin: Thomson Round Hall, 2006
N192.C5

Kerr, Anthony
Termination of employment statutes
3rd ed
Dublin: Thomson Round Hall, 2006
N192.2.C5.Z14

Middlemiss, Sam
Cyber liability of employers: balancing control of e-communication against employees' privacy
N192.C5

Thomson Round Hall
The Thomson Round Hall health and safety conference 2006
Dublin: Thomson Round Hall, 2006
N198.C5

Statutory Instruments

Circuit Court rules (industrial relations acts) 2007
SI 12/2007

Employment permits act 2006 (commencement) order 2006
SI 682/2006

Employment permits act 2006 (prescribed fees and miscellaneous procedures) regulations 2006
SI 683/2006

Employment regulation order (aerated waters and wholesale bottling joint labour committee), 2006
SI 559/2006

Employment regulation order (provender milling joint labour committee),
2006
SI 560/2006

Employment regulation order (retail grocery and allied trades joint labour committee) (no.2), 2006
SI 591/2006

National minimum wage act (national minimum hourly rate of pay) order 2006
SI 667/2006

EQUALITY

Article

Ni Longain, Michelle
The ABC of PQE
2006 (October) GLSI 22

EQUITY

Article

Buckley, Niall F
Expecting too much of legitimate expectation?
11 (6) 2006 BR 184

EUROPEAN UNION

Directives

Regulations – Delegation of power – Control of plant protection products – Withdrawal of authorisation for active substance – Whether respondent erred in requiring applicant to furnish certain data and information – Whether Minister capable of delegating power to withdraw authorisation to official – Whether respondent erred in refusal to accept ongoing studies – Whether decision to revoke authorisation arbitrary, irrational, unlawful or *ultra vires* – Whether respondent could revoke authorisation – *Fenchurch Properties Ltd v Wexford County Council* [1992] 2 IR 268 distinguished; *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 followed; *Tang v Minister for Justice* [1996] 2 ILRM 46 applied - European Communities (Authorisation, Placing on the Market, Use and Control of Plant Protection Products) Regulations 1994 (SI 139/1994), reg 10 – European Communities (Authorisation, Placing on the Market, Use of Plant Protection Products) Regulations 2003 (SI 83/2003) – Council Directive 91/414/EEC – Commission Directive 2002/37/EC – *Certiorari* granted (2003/842JR – Finnegan P – 23/3/2005) [2005] IEHC 99 *Agrichem BV v Minister for Agriculture and Food*

Articles

Beck, Gunnar
The English courts and the application of community law
2006 IJEL 184

Hayes, Maurice
The National forum on Europe: a model of democratic engagement
2006 IJEL 272

Hinds, Anna-Louise
Airtours? A consolidation of existing law on collective dominance?
2006 IJEL 233

Leonard, Patrick
ECO Swiss - weakening the UNCITRAL model law?
Daly, Sarah
2006 IJEL 259

Maguire, Tom
The Cadbury triangle - anti-avoidance and the ECJ
2006 (November) ITR 63

McCann, Patrick
The Brussels and Lugano regime - recent developments and emerging issues
2006 IJEL 304

Mullally, Siobhan
Asylum procedures: recent developments in EU law
11 (6) 2006 BR 212

Riley, Jilly
ECJ decision on intra-branch supplies: Ministero dell'Economia e delle
Finanze, Agenzia delle Entrate v FCE Bank plc.
2006 (July) ITR 107

Ryan, Andrea
The European evidence warrant: the emergence of a European law of evidence?
2006 (4) ICLJ 8

Tryfonidou, Alina
Redefining the notion of belonging in a citizens' Europe: The Queen (on the application of Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills
2006 IJEL 217

Library Acquisitions

Blanco, Luis Ortiz
European Community competition procedure
2nd ed
Oxford: Oxford University Press, 2006
W110

Farr, Sebastian
EU communications law
2nd ed
London: Sweet & Maxwell, 2006
W144.6

Foster, Nigel
Blackstone's statutes: EC legislation 2006-2007
17th ed
Oxford: Oxford University Press, 2006
W4

Hancher, Leigh
EC state aids
3rd ed
London: Sweet & Maxwell, 2006
W110.1

Lenaerts, Koen
Constitutional law of the European Union
2nd ed
London: Sweet & Maxwell, 2005
W84

Maniatis, Spyros
Trade marks in Europe: a practical jurisprudence
London: Sweet & Maxwell, 2006
W109.7

Moss, Gabriel
EU banking and insurance insolvency
Oxford: Oxford University Press, 2006
W107

Murdoch, Jim
Treatment of prisoners: European standards
Strasbourg: Council of Europe Publishing, 2006
C200.E95

EVIDENCE

Articles

Campbell, Liz
The evidence of intimidated witnesses in criminal trials
2006 ILTR 246

Heffernan, Liz
Gauging the reliability of scientific evidence in tort
6 (1) 2006 JSIJ 140

Kennedy, William
Expert view
2006 (October) GLSI 32

Murphy, Gerard
The admissibility of sexual experience evidence in Ireland
2006 (4) ICLJ 15

Ryan, Andrea
The European evidence warrant: the emergence of a European law of evidence?
2006 (4) ICLJ 8

Library Acquisitions

Heffernan, Liz
Scientific evidence: fingerprints and DNA
Dublin: First Law Limited, 2006
M604.32.C5

Hodgkinson, Tristram
Expert evidence: law and practice
2nd ed
London: Sweet & Maxwell, 2007
M604.9

Thomson Round Hall
The expert witness directory of Ireland 2007
2007 ed
Dublin: Thomson Round Hall, 2006
M604.9.C5

Statutory Instrument

Rules of the superior courts (evidence) 2007
SI 13/2007

FAMILY LAW

Child abduction
Costs – Application for return of children to habitual residence – Application refused – Discretion of court not to make any order as to costs notwithstanding failure of application pursuant to O 99, r 1(3) – Applicant denied access to children – Applicant succeeded in number of interim applications – Whether court obliged to make costs order - Relevant factors –Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 1 and 1(3) – Civil Legal Aid Act 1995 (No 32), s 33(2) - Court awarded costs to respondent up to date of legal aid; no order thereafter - (2005/19 HLC – Finlay Geoghegan J – 10/2/2006) [2006] IEHC 70
L (F) v L (C)

Child abduction
Hague Convention – Custody rights - Application for return of child to place of habitual residence – Whether breach of custody rights – Whether father's rights as exercised amounted to rights of custody – Whether father had right to object to change of residence of children – Whether courts of Michigan had rights of custody over children - Whether removal of children from US wrongful – Whether court can determine legal issues without further assistance as to law of State of Michigan – Findings of fact – *HI v MG (Child abduction: Wrongful removal)* [2000] 1 IR 110 followed – Application adjourned to permit further affidavit(s) of laws to be obtained (2005/21 HLC – Finlay Geoghegan J – 8/3/2006) [2006] IEHC 68
D (T) v P (A-M) and R (J)

Child abduction
Hague Convention - Custody rights – Retention - Application for return of child to jurisdiction of England and Wales – Whether retention of children in breach of custody rights – Whether retention of children wrongful – Whether children habitually resident in England – Whether applicant exercising custody rights – Whether applicant acquiesced in retention of children in Ireland - *CM v Delegation of Malaga* [1999] 2 I.R. 363 and *RK v JK (Child Abduction: Acquiesence)* [2000] 2 IR 416 applied – Order for return granted (2005/38 1A & 15 HCL –Finlay Geoghegan J – 25/1/2006) [2006] IEHC 69
G (V) v McD (P)

Child abduction
Hague Convention – Wrongful retention – Acquiescence – Grave risk – Mother taking children to Ireland for holiday and retaining after expiry of holiday period– Whether retention of children wrongful – Whether children acquired new habitual residence – Whether acquiescence by father in wrongful retention – Whether father actively or passively accepted changed circumstances – Whether acquiescence inconsistent with right to summary return – Whether grave risk that return would expose children to physical or psychological harm– Discretion whether child returned to country of habitual residence– Whether court should consider from welfare basis where interests of children lie – *B v B* [1998] 1 IR 299, *In Re K (Abduction: Consent)* [1997] 2 FLR 212, *RK v JK (Child Abduction: Acquiescence)* [2000] 2 IR 416 and *In Re H (Abduction: Acquiescence)* [1998] AC 72 followed; *Minister for Justice v C(V)* (Unrep, SC, 24/1/2002) and *CM v Delegación De Malaga* [1999] 2 IR 363 applied. *In Re A (Minors) (Abduction: Custody Rights)* [1992] 2 WLR 536 and *AS v PS (Child Abduction)* [1998] 2 IR 244 approved - Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – Hague Convention on the Civil Aspects of International Child Abduction 1980, articles 12 and 13 – Return of children ordered (2005/18HLC – Finlay Geoghegan J – 26/1/2006) [2006] IEHC 10
R (S) v R (MM)

Articles

Aylward, Ross
The problem with defining marriage
2006 (4) IJFL 21

Shannon, Geoffrey
Breaking up is hard to do
2006 (December) GLSI 26

Library Acquisitions

Aylward, Ross
Pre-nuptial agreements
Dublin: Thomson Round Hall, 2006
N172.C5

Mahendra, B
Adult psychiatry in family and child law
Bristol: Jordan Publishing Limited, 2006
N155.3

Statutory Instrument

Maintenance allowances (increased payment) regulations 2006
SI 598/2006

FISHERIES LAW

Statutory Instrument

Cockle (fisheries management and conservation) (no. 2) regulations 2007
SI 3/2007

Cockle (fisheries management and conservation) (regulations 2007)
SI 2/2007

Control of fishing for salmon (amendment) order 2006
SI 653/2006

Fisheries (commercial fishing licenses) (alteration of duties and fees) order 2006
SI 628/2006

Fishery harbour centres (fixed payment notice) bye-laws 2006
SI 607/2006

Mussel seed (conservation no 11) regulations 2006
SI 603/2006

Orange roughy (fisheries and conservation) (no. 13) regulations 2006
SI 666/2005

Regional fisheries boards (postponement of elections) order 2006
SI 629/2006

Salmon rod ordinary licenses (alteration of license duties) order 2006
SI 670/2006

Sea fisheries (weighing procedures for herring, mackerel and horse mackerel) (no. 2) regulations 2006
SI 575/2006

Wild salmon and sea trout tagging scheme (no. 2) regulations 2006
SI 672/2006

FREEDOM OF INFORMATION

Library Acquisitions

Feldman, Estelle
Freedom of information: law and the practice
Dublin: First Law Limited, 2006
M209.16.C5

McDonagh, Maeve
Freedom of information law
2nd ed
Dublin: Thomson Round Hall, 2006
M209.16.C5

GARDA SIOCHANA

Statutory Instruments

Garda Síochána act 2005 (section 19(5)) order 2006
SI 620/2006

Garda Síochána (retirement) (no. 2) regulations 2006
SI 686/2006

HEALTH LAW

Library Acquisition

Office of the Minister for Children
Giving children a voice: investigation of children's experiences of participation in consultation and decision-making in Irish hospitals
Dublin: Office of the Minister for Children, 2006
N185.122.Q11.C5

Statutory Instruments

Health act 2004 (commencement) order 2006
SI 651/2006

Health act 2004 (complaints) regulations 2006
SI 652/2006

Health (charges for in-patient services) (amendment) regulations 2006
SI 649/2006

National breast screening board (revocation and dissolution) order, 2006
SI 633/2006

National cancer screening service board (establishment) order, 2006
SI 632/2006

Tallaght hospital board (establishment) order 1980 (revocation) order 2006
SI 621/2006

HUMAN RIGHTS

Articles

Collard, Aideen
Public Interest law and beyond. An interview with Robert Garcia
12 (5) 2006 BR 167

Collins, Stephen
Heavy traffic
2006 (October) GLSI 36

The development of Public Interest Law in India
12 (5) 2006 BR 143

Library Acquisitions

Council of Europe
Manual on human rights and the environment - principles emerging from the case law of the European Court of human rights Strasbourg: Council of Europe Publishing, 2006
C200

Murdoch, Jim
Treatment of prisoners: European standards
Strasbourg: Council of Europe Publishing, 2006
Human rights: Europe
C200.E95

IMMIGRATION

Asylum

Application for asylum – Rejection of application for asylum in another member state – Member state responsible for examination of application for asylum – Criteria for establishing member state responsible for taking back applicant – Refugee Act 1996 (Section 22) Order 2003 (SI 423/2003), art 8(8) – Council Regulation (EC) 343/2003 – *Certiorari* granted (2004/740JR – Herbert J – 2/2/2006) [2006] IEHC 29
S (NA) v Refugee Appeals Tribunal

Asylum

Credibility – Fear of persecution – County of origin information – AMT *v Refugee Appeals Tribunal* [2004] IEHC 219 [2004] 2 IR 607 and *NK v Regugee Appeals Tribunal* [2004] IEHC 240 [2005] 4 IR 321 distinguished – *X (J) v Refugee Appeals Tribunal* [2005] IEHC 167 (Unrep, Dunne J, 2/6/2005) followed – *Certiorari* refused – (2004/1162JR – Peart J – 9/12/2005) [2005] IEHC 416
I (M) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Application for leave – Breach of natural and constitutional justice - Country of origin information – Whether failure to refer applicants to country of origin information – Whether substantial grounds - Relief refused (2005/903JR –O'Neill J – 12/5/2006) [2006] IEHC 154
M (L) v Refugee Appeals Tribunal

Asylum

Refugee status – Fresh information - Request for permission from Minister for further application for refugee status – Positive decision in respect of asylum application sister in law of applicant on similar grounds – Test applicable to fresh evidence claims - Whether appropriate test applied by Minister in considering request - Whether substantial grounds – Whether O'Keeffe test appropriate where protection of constitutional and human rights at issue - *R v Secretary of State for the Home Department ex p Onibiyo* [1996] 2 All ER 901 considered; *EMS v Minister for Justice* [2004] IEHC 398 (Unrep, Clarke J, 21/12/2004) and *Gashi v Minister for Justice* [2004] IEHC 394 (Unrep Clarke J, 3/12/ 2004) followed - Refugee Act 1996 (No 17), s 17(7) – Leave granted (2005/887JR – MacMenamin J – 5/5/2006) [2006] IEHC 136
I (CO) v Minister for Justice, Equality and Law Reform

Asylum

Refugee status - Refusal – Credibility of applicant – Fair procedures – Whether tribunal obliged to put matters likely to support adverse decision to applicant in order to enable applicant to comment - Disclosure of information to applicant by tribunal – Fair procedures – Whether disclosure obligation breached by tribunal – *I(V) v Minister for Justice, Equality and Law Reform* [2005] IEHC 150 (Unrep, Clarke J., 10/5/2005) followed - Whether previous tribunal decision in relation to asylum application of family member created presumption of refugee status in favour of applicant - Refugee Act 1996 (No 17), s 16(8) – *Certiorari* granted (2004/1187JR – Finlay Geoghegan J – 7/4/2006) [2006] IEHC 113
O (S) v Refugee Appeals Tribunal

Asylum

Refugee status – State protection – Presumption that state of origin willing and able to provide protection - Failure to request assistance from state authorities in home country – Whether failure to seek protection sufficient to defeat claim – *Canada (Attorney General) v Ward* (1993) 2 RCS 689 and *Skenderaj v Secretary of State for the Home Department* [2002] EWCA Civ 567 considered – *Certiorari* granted (2005/410 JR – Herbert J – 5/5/2006) [2006] IEHC 132
K (D) v Refugee Appeals Tribunal

Deportation

Decision not to revoke order – Judicial review – Leave – Test to be applied – Child suffering from attention deficit hyperactivity disorder – Planned removal to third country – Claimant asserting unavailability of necessary psychiatric treatment in third country – Right to private life – Whether exceptional circumstances category – Whether insufficient regard to right to private life under European Convention on Human Rights – Whether decision to proceed with deportation proportionate – Immigration Act 1999 (No 22), s 3(11) – European Convention on Human Rights Act 2003 (No 20), sch 1, article 8 – Leave to seek judicial review granted (2006/147JR – Herbert J – 3/3/2006) [2006] IEHC 56
A (O) v Minister for Justice

Deportation

Family rights – Legitimate expectation – Whether deportation order breached applicants' right to reside as family unit – Whether sufficient justification for interference with constitutional rights – Whether decision proportionate, necessary in free and democratic society – Legitimate expectation of applicant – Whether deportation order spent – Arguable grounds – Whether respondent considered and balanced interests of applicants' rights and upholding immigration laws – *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 followed; *Boultif v Switzerland* (2001) 33 EHRR 1179 and *Yildiz v Austria* (2002) 36 EHRR 553 considered - Dublin Convention (Implementation) Order 2000 (SI 343/2000) – Immigration Act 1999 (No 22) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on the Protection of Human Rights and Fundamental Freedoms 1950 –Dublin Convention 1990 (2004/351JR – Peart J – 7/4/2005) [2005] IEHC 104
S (CE)(Nee I) v Minister for Justice, Equality and Law Reform

Deportation

Refusal to revoke deportation order – Bail – Application for leave to seek judicial review of decision – Whether applicant has right to remain in jurisdiction pending application for leave – Standard of proof – Whether leave application and interlocutory injunction should be heard together – Detention for evasion – Whether court can admit detainee to bail – Whether abuse of power to detain where clear that deportation could not be carried out within statutory time period – *A(O) v Minister for Justice* [2006] IEHC 56 (Unrep, Herbert J, 3/3/2006); *G v DPP* [1994] 1 IR 374; *Margine v Minister for Justice* (Unrep, Finlay Geoghegan J, 14/2/2004) followed ; *People (AG) v O'Callaghan* [1966] IR 501; *R v Home Secretary, ex p Turkoglu* [1988] 1 QB 398; *R v Spilsbury* [1898] 2 QB 615; *Lane v Esdaile* [1891] AC 210; *Dougoz v Greece* [2001] ECHR 213; *Chahal vUnited Kingdom* (1996) 23 EHRR 413; *Amuur v France* (1992) 22 EHRR 533; *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360; *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317 and *R v Durham Prison Governor, ex p Hardial Singh* [1984] 1 WLR considered; *BFO v Governor of Dochas Centre* [2005] 2 IR 1 distinguished - Immigration Act 1999 (No 22), ss 3(11) and 5 – Illegal Immigrants (Trafficking) Act (No 29), s 5(1) – Deportation restrained and bail granted pending hearing (2006/423JR – Herbert J – 24/5/2006) [2006] IEHC 162
O (B) v Minister for Justice

Deportation

Revocation - Judicial review – Illegal re-entry into State following deportation – Application for revocation made following illegal re-entry - Scope of review - Immigration Act 1999 (No 22), s 3(11) – Relief refused (2003/442JR – O'Neill J – 3/5/2006) [2006] IEHC 140
D (OA) v Minister for Justice, Equality and Law Reform

Articles

Collins, Stephen
Heavy traffic
2006 (October) GLSI 36

Mullally, Siobhan
Asylum procedures: recent developments in EU law
11 (6) 2006 BR 212

Statutory Instrument

Immigration act 2004 (visas) (no. 2) order 2006
SI 657/2006

INFORMATION TECHNOLOGY

Article

Lambert, Paul
Search engines, metatags and keywords - new challenges in defending trade marks online
2006 CLP 216

Library Acquisition

Middlemiss, Sam
Cyber liability of employers: balancing control of e-communication against employees' privacy
N192.C5

INJUNCTIONS

Public procurement
Transparency – Whether commitments made between defendants afforded defence to application for injunction – Whether defendants could seek to deny plaintiff injunctive relief when course of action adopted by defendants later found to be illegal – Whether appropriate to grant mandatory injunction when substantive issue not heard – Whether duty to observe principle of equal treatment of tenderers - *Morris v Garvey* [1983] IR 319 applied; *Commission v Belgium (Case C-87/94)* [1996] ECR I-2043 and *Commission v Denmark (Case C-243/89)* [1993] ECR I-3353 followed – Injunction granted (2006/1602P – Smyth J – 23/5/2006) [2006] IEHC 161
Advanced Totes Ltd v Bord na g Con

Article

Ryan, Ray
Mareva injunctions, third parties and the law of negligence
2006 CLP 253

INSURANCE

Library Acquisitions

Bunni, Nael G
Risk and insurance in construction
2nd ed
London: Spon Press, 2003
N83.8

Moss, Gabriel
EU banking and insurance insolvency
Oxford: Oxford University Press, 2006
W107

Pether, Michael
Bingham and Berrymans' personal injury and motor claims cases
12th ed
London: LexisNexis Butterworth, 2006
N294.M6

INTELLECTUAL PROPERTY

Trade marks
Registration – Opposition – Test applicable in assessing whether entity is proprietor of trade mark – Use of ordinary English word – Whether necessarily follows that consumers believe every product bearing trade mark employing that word produced by the same entity – Brand extension – Whether use in promotional activity constitutes extension of brand to new product – Likelihood of confusion – Association between two businesses – Whether use of same or similar typeface leads to likelihood of confusion – *Re Nicholson & Sons Ltd's Application* (1931) 48 RPC 227 considered; *Eastman Photographic Materials Co Ltd v John Griffiths Cycle Corp Ltd* (1898) 15 RPC 105, *HJ Lees & Son (London) Ltd's Application* (1955) 72 RPC 75 and *Players Trade Mark* [1965] RPC 363 distinguished - Trade Marks Act 1963 (No 9), ss 19, 25, 52 and 57 – Appeal dismissed (2004/342SP – Clarke J – 24/3/2006) [2006] IEHC 103
Jaguar Cars Ltd v Controller of Patents

INTERNATIONAL LAW

Article

Binchy, William
International tort litigation: new European horizons
2006 (Summer) QRTL 24

Library Acquisition

Dickinson, Andrew
Butterworths international commercial litigation handbook
2nd ed
London: LexisNexis Butterworth, 2006
C1250

JUDICIAL REVIEW

Alternative remedy
Appeal as bar to judicial review – Appeal not commenced – Remittal to District Court – Whether appeal process adequate alternative remedy – Whether existence of appeal bar to judicial review – Whether issue raised more appropriate to judicial review than to appeal – *State (Roche) v Delap* [1980] IR 170 distinguished; *Stefan v Minister for Justice* [2001] 4 IR 203 applied - Whether matter should be remitted to District Court *Nevin v Crowley* [2001] 1 IR 113 considered – Order granted, matter remitted to Distrcit Court (2004/369JR – Clarke J – 3/2/2006) [2006] IEHC 34
Payne v Brophy

Locus standi
Contract of employment – Appeal of decision of board of management to independent arbitrator – Whether matter of public law – Whether breach of fair procedures and natural and constitutional justice – Whether obligation on arbitrator to give reasons – Whether injury to reputation of applicant – *Beirne v Commissioner of An Garda Síochána* [1993] ILRM 1; *Murphy v Turf Club* [1989] IR 171; *Rajah v Royal College of Surgeons* [1994] 1 IR 384; *Geoghegan v Institute of Chartered Accountants in Ireland* [1995] 3 IR 86; *Eoghan v University College Dublin* [1996] 1 IR 390 followed - Education Act 1998 (No 51), s 24(6) and (6) – *Certiorari* granted (2004/587JR – O'Neill J – 1/11/2005) [2005] IEHC 376
Becker v Duggan

Procedure
Leave to apply – Effect of application – Whether institution of judicial review proceedings challenging validity of deportation order acts as automatic stay on order pending outcome of proceedings – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(1) and (2) - Order requiring return of applicants to State pending hearing vacated (70, 71, 72, 73, 227/2005 – SC – 2/3/2006) [2006] IEHC 8
Abebayo v Commissioner of An Garda Siochána

JURISPRUDENCE

Article

Binchy, William
Fourth annual Brian Walsh memorial lecture: emerging trends in Irish High Court and Supreme Court jurisprudence
2006 IJEL 331

LANDLORD AND TENANT

Lease
Covenant as to payment of rent - Rent arrears – Summary summons for liquidated amount – Defence and counterclaim – Set-off of unliquidated amounts - Whether defence available under terms of lease – Whether *bona fide* defence – Whether case appropriate to summary judgment - *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607 applied – Order of Master set aside, leave to defend and adjournment for plenary hearing granted (2004/1082S - O'Sullivan J – 4/5/2006) [2006] IEHC 133
The Leopardstown Club Ltd v Templeville Developments Ltd

Article

Ryall, Aine
Residential Tenancies Act 2004: review and assessment
6 (1) 2006 JSIJ 60

Library Acquisition

Fancourt, T M
Enforceability of landlord and tenant covenants
2nd ed
London: Thomson Sweet & Maxwell, 2006
N92.4

LEGAL HISTORY

Library Acquisition

McCarthy, Patricia
'A favourite study' building the King's Inns
Dublin: Gill & Macmillan Ltd, 2006
L403

LEGAL PROFESSION

Articles

Coonan, Genevieve
The role of judicial research assistants in supporting the decision-making role of the Irish judiciary
6 (1) 2006 JSIJ 171

Denham, The Hon. Mrs Justice, Susan
Proposal for a court of appeal
2006 IJEL 1

O hOisin, Colm
ADR and arbitration opportunities for the Bar
12 (5) 2006 BR 144

Library Acquisition

Competition Authority
Competition in professional services: solicitors and barristers
Dublin: Competition authority, 2006
N266.C5

Statutory Instruments

European Communities (lawyers' establishment) regulations, 2003 (qualifying certificate 2007) regulations, 2006
SI 625/2006

Solicitors act, 1954 to 2002 (apprentices' fees) (no.2) regulations, 2006
SI 616/2006

The Solicitors acts, 1954 to 2002 solicitors (practising certificate 2007) regulations, 2006
SI 624/2006

LIMITATION OF ACTIONS

Library Acquisition

McGee, Andrew
Limitation periods
5th ed
London: Sweet & Maxwell, 2006
N355

LOCAL GOVERNMENT

Statutory Instruments

Local authority members (gratuity) (amendment) regulations, 2006
SI 674/2006

Local government (expenses of local authority members) regulations 2006
SI 668/2006

MEDIA LAW

Article

Duparc Portier, Pascale
Media reporting of trials in France and in Ireland
6 (1) 2006 JSIJ 197

MEDICAL LAW

Library Acquisition

Morrell, John
Emergency services: law and liability
Bristol: Jordan Publishing Limited, 2006
N33.5

Statutory Instruments

Health act 2004 (commencement) order 2006
SI 651/2006

Health act 2004 (complaints) regulations 2006
SI 652/2006

Health (charges for in-patient services) (amendment) regulations 2006
SI 649/2006

Irish medicines board (fees) regulations 2006
SI 617/2006

Tallaght hospital board (establishment) order 1980 (revocation) order 2006
SI 621/2006

MEDICAL NEGLIGENCE

Article

Craven, Ciaran
Medical negligence and the Dunne principles: what do the first and second principles mean?
2006 (Summer) QRTL 1

Library Acquisition

Khoury, Lara
Uncertain causation in medical liability
Oxford: Hart Publishing, 2006
M608

MENTAL HEALTH

Library Acquisition

Mahendra, B
Adult psychiatry in family and child law
Bristol: Jordan Publishing Limited, 2006
N155.3

Statutory Instruments

Circuit Court rules (mental health) 2007
SI 11/2007

Mental health act 2001 (approved centres) regulations 2006
SI 551/2006

Mental health act 2001 (authorised officer) regulations 2006
SI 550/2006

Rules of the superior courts (mental health act 2001) 2006
SI 597/2006

MISREPRESENTATION

Library Acquisition

Cartwright, John
Misrepresentation, mistake and non-disclosure
2nd ed
London: Sweet & Maxwell, 2007
M547

MORTGAGES

Article

Maddox, Neil
The law and practice of judgment mortgages
11 (6) 2006 BR 189

Library Acquisition

Clark, Wayne
Fisher and Lightwood's law of mortgage
12th ed
London: LexisNexis Butterworths, 2006
N56.5

NEGLIGENCE

Negligent misstatement
Duty of care – Scope of liability for negligent misstatement – Proximity – Life insurance policy – Whether special relationship creating duty of care – Whether plaintiffs sufficiently proximate so as to be persons reasonably within contemplation of defendant as being likely to be affected by its acts or omissions – Whether personal reliance on statement necessary for recovery of damages – Whether plaintiffs entitled to damages - *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 considered – Appeal allowed (177/2002 – SC – 22/3/2006) [2006] IESC 19
Wildgust v Bank of Ireland

Vicarious liability
Liability of State for diocesan owned and managed school – Sexual assault by principal on pupil at school – Whether vicariously liability arose where assailant's salary paid by Department of Education and teachers therein subject to departmental inspections – Whether State vicariously liable - *Delahunty v South Eastern Health Board* [2003] 4 IR 361 applied; *Lister v Hesley Hall Limited* [2001] UKHL 22 [2002] 1 AC 215 distinguished – Claim dismissed (1998/10555P - de Valera J – 20/1/2006) [2006] IEHC 13
O'K (L) v H (L)

Articles

Holland, David
Civil Liability and Courts Act 2004: some thoughts on practicalities
6 (1) 2006 JSIJ 43

Morgan, David Gwynn
Constitutional and administrative law framework of the Personal Injuries
Assessment Board
6 (1) 2006 JSIJ 33

Ryan, Ray
Liability for negligent misstatement: the Supreme Court decision in
Wildgust
Ryan, Des
2006 (Summer) QRTL 13

Library Acquisitions

Kevan, Tim
Fraudulent and exaggerated claims
St Albans: XPL Publishing, 2006
N38.1

Morrell, John
Emergency services: law and liability
Bristol: Jordan Publishing Limited, 2006
N33.5

Pether, Michael
Bingham and Berrymans' personal injury and motor claims cases
12th ed
London: LexisNexis Butterworth, 2006
N294.M6

Powell, John L
Jackson & Powell on professional liability
6th ed
London: Sweet & Maxwell, 2007
N33.3

PATENTS & TRADE MARKS

Article

Lambert, Paul
Search engines, metatags and keywords - new challenges in defending trade marks online
2006 CLP 216

Library Acquisition

Maniatis, Spyros
Trade marks in Europe: a practical jurisprudence
London: Sweet & Maxwell, 2006
W109.7

PENSIONS

Articles

Kavanagh, James
The acquisition trail and due diligence for pension schemes
2006 (November) ITR 54

Lynn, Theodore G.
Encouraging Irish pension funds to act as shareholders – suggested statutory reform
2006 CLP 240

Statutory Instrument

Personal retirement savings accounts (disclosure)(amendment) regulations, 2006
SI 567/2006

PERSONAL INJURIES

Article

Holland, David
Civil Liability and Courts Act 2004: some thoughts on practicalities
6 (1) 2006 JSIJ 43

Library Acquisition

Kevan, Tim
Fraudulent and exaggerated claims
St Albans: XPL Publishing, 2006
N38.1

PLANNING AND ENVIRONMENTAL LAW

Appeal
Point of law of exceptional public importance – Desirable in public interest – European Union – Directive – Whether points of law of exceptional public importance – Test to be applied in determining matters to be agreed between planning authority and developer – *Lancefort v An Bord Pleanála (No 1)* [1998] 2 IR 511, *Kenny v An Bord Pleanála (No 2)* [2001] 1 IR 704, *Arklow Holidays Ltd v Wicklow County* [2004] IEHC 75 (Unrep, Murphy J, 4/2/2004), *Ashbourne Holdings Ltd v An Bord Pleanála* (Unrep, Kearns J, 19/6/2001) and *Begley v An Bord Pleanála* (Unrep, Ó Caoimh J, 23/5/2003) followed; *Fallon v An Bord Pleanála* [1992] 2 IR 308 considered - Waste Management Act 1996 (No 10) – Planning and Development Act 2000 (No 30), s 50(4)(f)(i) – Council Directive 75/442/EEC – Council Directive 85/337/EEC – Council Directive 91/156/EEC – Council Directive 91/689/EEC – Leave to appeal refused (2005/291JR & 52COM – Clarke J – 29/3/2006) [2006] IEHC 102
Arklow Holidays Ltd v An Bord Pleanála

Appeal
Point of law of exceptional public importance – Desirable in public interest – Application for leave to apply for judicial review refused - Planning permission –Whether applicant improperly and invalidly required to provide additional information – Whether point of law to be certified by way of appeal – Standard required - *Kenny v An Bord Pleanála* [2001] 1 IR 704 considered – Planning and Development Act 2000 (No 30), s 50(2) - Planning and Development Regulations 2001 (SI 600/2001), reg 33(1) –Leave to appeal refused - (2004/241 JR – Murphy J – 5/5/2006) [2006] IEHC 139
Hodgers v Cork County Council

Permission
Conditions attached to grant of planning permission – Failure to implement conditions – Application for relief in respect thereof – Validity of planning permission - Interpretation of planning permission - Onus of proof – Discretion of the court – Whether applicant established contravention of conditions - *Lancefort Ltd v An Bord Pleanála* (Unrep, Morris J, 13/5/1997), *Readymix Eire Ltd v Dublin City Council* (Unrep, SC, 30/7/1974), *In re XJS Investments Ltd* [1986] IR 750, *Dublin City Council v Liffey Beat Ltd* [2005] IEHC 82 (Unrep, Quirke J, 10/3/2005), *Dublin Corporation v Sullivan* (Unrep, Finlay P, 21/12/1984) and *Morris v Garvey* [1983] IR 156 considered – Planning and Development Act 2000 (No 30), s 160 –Relief refused (2004/27 MCA – O'Donovan J – 6/3/2006) [2006] IEHC 53
Ryan v Roadstone Dublin Ltd

Waste management
Unauthorised waste disposal facility – Measures to be ordered to remediate land – Whether court can impose remedy which is unlikely to achieve objectives in legislation – Whether court can lift veil of incorporation and grant orders as against company directors – *Wicklow County Council v Fenton* [2002] 4 IR 44 followed - Waste Management Act 1996 (No 10), s 57 – Planning and Development Act 2000 (No 30), s 160 – Council Directive 74/442/EEC – Council Directive 91/156/EEC – Orders granted (2005/15MCA – Peart J – 18/1/2006) [2006] IEHC 2
Laois County Council v Scully

Articles

Galligan, Eamon
Onus of proof in section 160 applications
2006 IP & ELJ 104

Macken, James
The Planning and Development (Strategic Infrastructure) Act 2006
2006 IP & ELJ 139

O'Donovan, Erik
Further regulation in the waste sector - a private sector perspective
2006 IP & ELJ 145

Simons, Garrett
The Environmental Impact Assessment Directive, direct effect and private developers
2006 IP & ELJ 99

Library Acquisition

Council of Europe
Manual on human rights and the environment - principles emerging from the case law of the European Court of human rights Strasbourg: Council of Europe Publishing, 2006
C200

Statutory Instruments

European Communities (environmental impact assessment) (amendment) regulations 2006
DIR/2003-35, DIR/85-337
SI 659/2006

Planning and development regulations 2006
SI 685/2006

Planning and development (strategic infrastructure) act 2006 (commencement) (no.2) order 2006
SI 553/2006

PRACTICE AND PROCEDURE

Abuse of process
Injunction – Abuse of process – Final High Court order under appeal to Supreme Court – Further High Court orders sought - Order refused – (2002/10338P – Peart J – 14/12/2005) [2005] IEHC 419
Sheehy v Ryan

Abuse of process
Strike out – Planning law – Planning permission – Unauthorised development – *Locus standi* – Delay – *Frascati Estates v Walker* [1975] IR 177 and *Fay v Tegral Pipes Ltd* [2005] 2 IR 261 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28 – Planning and Development Act 2000 (No 30), s 50 – Claim struck out – (2005/569SP – Laffoy J – 3/4/2006) [2006] IEHC 112
Lennon v Limerick City Council

Appeal
Time limits – Hepatitis C Compensation Tribunal – Whether limitation period for appealing Tribunal decisions capable of enlargement – Hepatitis C Compensation Tribunal Act 1997 (No 34), ss 4(1) and 5(15) – Rules of the Superior Courts (No 7) (Appeals from Hepatitis C Compensation Tribunal) 1998 (SI 392/1998), O 105A, r 2(2) – Rules of the Superior Courts 1986 (SI 15/1986), O 107, r 7 – Time for appeal extended (2002/7Ct – O'Neill J – 6/4/2006) [2006] IEHC 115
F (D) v Minister for Health and Children

Contempt
Civil contempt – Refusal to purge contempt – Punitive powers – Double jeopardy – Breach of injunction – Whether court had power to punish refusal to purge contempt where injunction discharged – *Flood v Lawlor* [2002] 3 IR 67 followed – No further sanction imposed (2005/840P – Finnegan P – 7/4/2006) [2006] IEHC 108
Shell E&P Ireland Ltd v McGrath

Costs
Court's discretion – Costs follow event – Test to be applied in departing from rule that costs follow events - Burden of displacing rule that costs follow events – Whether court should have regard to facts of particular case – Whether court could have regard to fact that defendant who was successful overall was not successful on substantive issue raised and prosecuted in defence in application for costs – *Grimes v Punchestown Developments Co Ltd* [2002] 4 IR 515 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 1 – Partial order for costs made (2002/1183P – Laffoy J – 10/2/2006) [2006] IEHC 32
Fyffes plc v DCC plc

Discovery
Fair procedures – Prosecution – Public interest immunity – Whether requirement of fair procedures applied to DPP in exercise of statutory powers – Whether DPP required to list every document in affidavit of discovery – Whether discovery undermines special position of DPP in relation to reasons to prosecute – Whether delay in decision to prosecute applicant – Whether applicant entitled to discovery - *Dunphy v DPP* [2005] IESC 75, [2006] 1 ILRM 241; *H v DPP* [1994] 2 IR 589; *Nenea Karteria Maritime Company Ltd v Atlantic and Great Lakes Steamships Corporation (No 2)* [1981] Com LR 139 followed - (117/2006 – SC - 26/7/2006) [2006] IESC 51
Cunningham v President of the Circuit Court

Discovery
Legal professional privilege – Disclosure of privileged documents to third party – Whether waiver of privilege – Whether test of fairness applied – Non-confidential communications with third parties – Whether prerequisite of confidentiality to claim of privilege over such communications – Whether privilege on grounds that communications gathered as "materials for evidence" - *Fyffes plc v DCC plc* [2005] IESC 3 [2005] 1 IR 59; *Smurfit v Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 IR 469; *Telebooth Pty Ltd v Telstra Corporation Ltd* [1994] 1 VR 337; *MFM v PW (Legal professional privilege)* [2001] 3 IR 462 and *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 considered – Limited inspection ordered (2004/19386P – Finlay Geoghegan J – 21/12/2005) [1005] IEHC 451
Woori Bank v KDB Ireland Ltd

Discovery
Non–party discovery – Documents – Circumstances in which non–party discovery should be ordered – Whether court should exercise its discretion to make order for non–party discovery – Whether realistic alternative to the making of an order for non–party discovery existed – Whether particular oppression or prejudice would be caused to non–party called upon to discover documents –Whether inspectors appointed under Companies Act 1990 can be compelled to discover documentation – *Fusco v O'Dea* [1994] 2 IR 93, *Allied Irish Banks plc v Ernst & Whinney* [1993] 1 IR 375 and *Chambers v Times Newspapers Ltd* [1999] 2 IR 424 - Companies Act 1990 (No 33), ss 11 and 22 – Rules of the Superior Courts, 1986 (SI 15/1986), O 31, r 29 – Application refused (1998 89 & 132Cos – Kelly J 10/2/2006) [2006] IEHC 35
Re NIB Ltd

Judicial review
Public procurement – Contract – Tender – Preliminary issue – Delay – Whether good reason for extending time period – Relevant date – State of knowledge – European Union law – Rules of the Superior Courts 1986 (SI 15/1986), O84(A), r 4 – Extension of time granted – (2006/83JR – Clarke J – 2/5/2006) [2006] IEHC 137
Veolia Water Consortium v Fingal County Council

Limitation of actions
Negligence – Delay – Personal injury – Accrual of cause of action – Date of knowledge – Whether unfair on defendants to proceed with case – *W v Ireland (No 2)* [1997] 2 IR 141, *JO'C v Director of Public Prosecutions* [2000] 3 IR 478 and *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 applied - Statute of Limitations Act 1957 (No 6) – Statute of Limitations (Amendment) Act 1991 (No 18) – Statute of Limitations (Amendment) Act 2000 (No 13), s 3 – Claim dismissed (1998/10555P - de Valera J – 20/1/2006) [2006] IEHC 13
O'K(L) v H(L)

Limitation of actions
Personal injuries – Road traffic accident – Privilege – Equitable estoppel – Prejudice – *Ryan v Connolly* [2001] 2 ILRM 174 and *Doran v Thompson* [1978] IR 223 followed; *Sauria* [1957] Lloyds Reps distinguished – Statute of Limitations 1957 (No 6), s11(1)(2) – Order refused – (2003/7297P – MacMenamin J – 11/1/2006) [2006] IEHC 22
Murphy v Grealish

Particulars
Defamation – Libel – Innuendo – Fair procedures - *Mahon v Celbridge Spinning Co Ltd* [1967] IR 1 followed – Order refused (2003/11812P – MacMenamin J – 3/3/2006) [2006] IEHC 71
Byrne v Radio Telefís Éireann

Pleadings
Amendment of defence – Relevant considerations - Necessity for good reasons – Principle of ensuring real controversy litigated – Prejudice - *Croke v Waterford Crystal Ltd* [2005] 2 IR 383 and *O'Leary v Minister for Transport* [2001] 1 ILRM 132 followed - Petty Sessions Ireland Act 1851 (14 & 15 Vic, c 93), s 10(9) – Amendments allowed (2004/19386 P – Clarke J – 17/5/2006) [2006] IEHC 156
Woori Bank Ltd v KDB Ireland Ltd

Remedies
Declaration – Abuse of process – Delay – Estoppel - Whether claim for declaratory relief in plenary proceedings constitutes abuse of process – Whether proceedings should have been by way of application for judicial review – Whether O 84 provides exclusive procedure for persons seeking declaratory relief in matters of public law – *O'Reilly v Mackman* [1983] 2 AC 237 not followed - Whether time constraints under O 84 apply to plenary proceedings – Whether estoppel appropriate in matters of public law - Whether delay in seeking legal redress - *Finnerty v Western Health Board* (Unrep, Carroll J, 5/10/1998) distinguished; *De Róiste v Minister for Defence* [2001] 1 IR 190, *O'Callaghan v Mahon* [2005] IESC 9 (Unrep, SC, 9/3/2005) and *O'Brien v Moriarty* [2005] IESC 32 [2005] 2 ILRM 321 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 84 - Relief refused (2004/491P & 2005/100JR – Smyth J – 14/2/2006) [2006] IEHC 75
Murphy v Mr Justice Flood; Murphy v Judge Mahon

Security for costs
Taxation – Review of taxation – Plaintiffs insolvent – Defendants seeking security for costs – Whether defendants entitled to order for security for costs – Whether review of decision of Taxing Master constituted separate and distinct legal proceeding – Whether defendants entitled to set-off subsequent untaxed award of costs against award of costs – Whether defendants must proceed to taxation of costs before entitlement to set-off arises - *Gannon v Flynn* [2001] 3 IR 531 followed; *Inter Finance Group Ltd v KPMG Peat Marwick* (Unrep, Morris P, 29/6/1998) approved; *Tolstoy Miloslavsk v United Kingdom* (1995) 20 EHRR 432 considered - Companies Act 1963 (No 33), s 390 – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 38 – Security for costs order (1989/7315P – Quirke J – 26/4/2006) [2006] IEHC 123
Superwood Holdings plc v Sun Alliance Assurance Co Ltd

Service out of jurisdiction
Third party proceedings –– Application to set aside – Contract – Legitimate expectation – Abuse of discretion – Challenge to reasonableness of decision – Whether challenge to validity of decision of organ of company – Whether third party notice should be set aside – *Sanders v van der Putte (Case 73/77)* [1977] ECR 2383, *Newtherapeutics Ltd v Katz* [1991] Ch 226, *Grupo Torras v Al-Sabah* [1996] 1 Lloyd's Rep 7 and *Spielberg v. Rowley* [2004] IEHC 384 (Unrep, Finlay Geoghegan J, 26/11/2004) followed; *Speed Investments Ltd v Formula One Holdings Ltd* [2004] EWCA Civ 1512, [2005] 1 WLR 1936 distinguished - Council Regulation (E.C.) No. 44/2001, articles 2, 5(1), 5(3), 6(2), 22, 24, 47 and 48 – Rules of the Superior Courts 1986 (SI 15/1986), O 11, r (1)(f), O 12, r 26 and O 15, r 3 – Order setting aside service refused - (2002/16269P – Finnegan P – 5/4/2006) [2006] IEHC 105
Hassett v SEHB

Summons
Renewal – Failure to serve summons while it was in force – Order for renewal made by High Court – Application to set aside renewal – Whether plaintiff advanced "other good reason" to renew summons – Whether purpose of renewal to prevent defendant relying on Statute of Limitations – *Celtic Ceramics Ltd v IDA* [1993] ILRM 248 applied; *Martin v Moy Contractors Ltd* (Unrep, SC, 11/2/1999), *Gilroy v Flynn* [2005] 1 ILRM 290 and *Connolly v Casey* [2000] 1 IR 345 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 8, rr 1 and 2 – European Convention on Human Rights, article 6(1) – Renewal of summons set aside (2003/15970P – O'Sullivan J – 6/7/2006) [2006] IEHC 215
Allergan Pharmaceuticals (Ireland) Ltd v Noel Deane Roofing

Want of prosecution
Dismissal of action - Principles to be applied – Inordinate and inexcusable delay by plaintiff – Discretion as to whether balance of justice for or against matter proceeding – Test to be applied by the court in exercise of discretion – Whether matters relating to injuries are relevant factors where dismissal of appeal on liability sought – Admission of additional evidence on appeal - *Sweeney v Horan's (Tralee) Ltd* [1987] ILRM 240 and *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 followed; *O'Domhnaill v Merrick* [1984] IR 151, *Kobler v Austria (Case C-224/01)* [2003] ECR I-10239 and *Price and Lowe v The United*

Kingdom [2003] ECHR 409 considered – Action dismissed (339/1996 – SC – 10/7/2006) [2006] IESC 43
McGrath v Irish Isphat Ltd

Articles

Canny, Martin
Justice denied?
2006 (November) GLSI 32

Maddox, Neil
The law and practice of judgment mortgages
11 (6) 2006 BR 189

McCann, Patrick
The Brussels and Lugano regime - recent developments and emerging issues
2006 IJEL 304

Statutory Instruments

Circuit Court rules (industrial relations acts) 2007
SI 12/2007

Circuit Court rules (mental health) 2007
SI 11/2007

Circuit Court rules (social welfare appeals) 2007
SI 10/2007

Rules of the superior courts (evidence) 2007
SI 13/2007

Rules of the superior courts (mental health act 2001) 2006
SI 597/2006

Rules of the superior courts (statutory applications and appeals) 2007
SI 14/2007

PRISON LAW

Library Acquisitions

Council of Europe
European prison rules
Strasbourg: Council of Europe Publishing, 2006
European Prison Rules
W133.6

Murdoch, Jim
Treatment of prisoners: European standards
Strasbourg: Council of Europe Publishing, 2006
Human rights: Europe
C200.E95

PRIVACY

Article

O'Callaghan, Patrick
The Privacy bill 2006 - comparative observations on a "super tort"
2006 ILTR 251

Library Acquisitions

Griffiths, Gwendoline
Bank confidentiality
4th ed
Haywards Heath: Tottel Publishing, 2006
C226

Toulson, Roger G
Confidentiality
2nd ed
London: Sweet & Maxwell, 2006
M209.P7

PROBATE

Library Acquisition

Winegarten, J I
Tristram and Coote's probate practice
30th ed
London: LexisNexis Butterworths, 2006
N127

PROPERTY

Judgment mortgage
Registered land – Priority – Unregistered *lis pendens* – Judgment mortgagee – Status as volunteer – Whether judgment mortgagee entitled to rely on s.10 of Judgments (Ireland) Act to assert priority over unregistered *lis pendens* – AS *v GS* [1994] 1 IR 407, *Re Murphy and McCormack* [1930] IR 322, *Re Strong* [1940] IR 382 and *Giles v Brady* [1974] IR 462 followed; *Tempany v Hynes* [1976] IR 101 considered - Registration of Title Act 1964 (No 16), s 71(4)(c) – Judgments (Ireland) Act 1844 (7 & 8 Vict, c 90) s 10 - *Lis pendens* granted priority (2005/2SP – Clarke J – 12/12/2005) [2005] IEHC 437
ACC Bank plc v Markham

Property
Conveyancing - Agreement for sale of land – Error in map – Specific performance - Abatement – Compromise of proceedings – Failure to complete sale – Damages - Terms as to costs – Whether agreement as to costs reached – Subsequent order for costs granted – Whether settlement repudiated – Robbery at premises – Distribution of risk – Compensation for damage to property – Order to complete sale (2005/317P – Finnegan P – 17/5/2006) [2006] IEHC 157
O'Dwyer v Boyd

Articles

Brennan, Gabriel
Electric picnic
2006 (November) GLSI 38

Maddox, Neil
The Land and Conveyancing Law Reform Bill 2006: an overview
12 (5) 2006 BR 171

Rochford, Caroline
Review of property reliefs post Finance Act 2006
2006 (July) ITR 70

Ryall, Aine
Residential Tenancies Act 2004: review and assessment
6 (1) 2006 JSIJ 60

Library Acquisitions

Fancourt, T M
Enforceability of landlord and tenant covenants
2nd ed
London: Thomson Sweet & Maxwell, 2006
N92.4

Linehan, Denis M
Irish conveyancing law and practice
Cork: Irish Legal Publications, 2006
N74.C5

Statutory Instruments

Land registration rules, 2006
SI 558/2006

PUBLIC PROCUREMENT

Invitation to tender
Award criteria – Transparency – Whether mandatory requirement to set out award criteria in tender documentation – Whether necessary to set out all criteria upon which tenders will be assessed in award criteria – *SIAC Construction Ltd v County Council of the County of Mayo (Case C-19/00)* [2001] ECR I-7725 applied - European Communities (Award of Public Service Contracts) Regulations 1998 (SI 378/1998) – Directive 92/50/EEC, art 36 – Applicant's appeal allowed (62/1005 – SC – 23/3/2006) [2006] IESC 17
Advanced Totes Ltd v Bord Na gCon

RECEIVERS

Library Acquisition

Picarda, Hubert A P
The law relating to receivers, managers and administrators
4th ed
Haywards Heath: Tottel Publishing, 2006
N396

REFUGEES

Articles

Collins, Stephen
Heavy traffic
2006 (October) GLSI 36

Mullally, Siobhan
Asylum procedures: recent developments in EU law
11 (6) 2006 BR 212

ROAD TRAFFIC

Library Acquisition

Pether, Michael
Bingham and Berrymans' personal injury and motor claims cases
12th ed
London: LexisNexis Butterworth, 2006
N294.M6

Statutory Instruments

Road traffic act 1994 (control of traffic - exemption permits) regulations
2006
SI 639/2006

Road traffic (control of traffic) regulations 2006
SI 638/2006

Road traffic (licensing of drivers) regulations 2006
DIR/91-439, DIR/94-72, DIR/96-47, DIR/97-26
SI 537/2006

Road traffic (signs) regulations 2006
DIR/2004-54
SI 637/2006

SENTENCING

Article

Coffey, Gerard
Electronic monitoring of offenders in the administration of criminal justice
2006 ILTR 300

SHIPPING LAW

Library Acquisition

Symmons, Clive R
Irish maritime law statutes annotated 2000-2005
Dublin: Thomson Round Hall, 2006
N330.C5

Statutory Instrument

Merchant shipping (weighing of goods vehicles) regulations 2006
SI 510/2006

SOCIAL WELFARE

Statutory Instruments

Circuit Court rules (social welfare appeals) 2007
SI 10/2007

Social welfare (consolidated supplementary welfare allowance) (amendment) (No. 2) (miscellaneous provisions) regulations 2006
SI 572/2006

Social welfare (consolidation payments provisions) (amendment) (no. 13) (miscellaneous provisions) regulations 2006
SI 571/2006

Social welfare (consolidated payments provisions) (amendment) (no.14) (increase in rates) regulations 2006
SI 692/2006

Social welfare (consolidated payments provisions) (amendment) (no. 15)(absence from state and imprisonment) regulations 2006
SI 696/2006

Social welfare (consolidated payments provisions) (amendment) (no. 16) (early childcare supplement) regulations 2006
SI 681/2006

Social welfare (consolidated supplementary welfare allowance) (amendment)(no. 3) (rent supplement means disregard) regulations 2006
SI 697/2006

Social welfare (occupational injuries) (amendment) (no.1) (miscellaneous provisions) regulations 2006
SI 695/2006

Social welfare (occupational injuries) (amendment) regulations 2006
SI 694/2006

Social welfare (rent allowance) (amendment) regulations 2006
SI 693/2006

Social welfare (temporary provisions) regulations 2006
SI 580/2006

STATUTORY INTERPRETATION

Construction
Literal construction - Whether statutory language obscure or ambiguous – Companies Act 1963 (No 33), s 281 – Interpretation Act 2005 (No 23) s 5 - Application for fees dismissed (2005/327COS – Laffoy J – 22/2/2006) [2006] IEHC 52
Re Compustore Ltd

Article

Donlan, Sean Patrick
A flood of light? Comments on the Interpretation Act 2005
Kennedy, Ronan
6 (1) 2006 JSIJ 92

SUCCESSION

Will
Power of appointment – Construction – Donee – Whether donee of power identified – Whether valid exercise of power of appointment – Intention of testator – Whether intention ascertainable from words used in will – *In re Curtin (deceased); Curtin v O'Mahony* [1991] 2 IR 562 considered; *Heron v Ulster Bank Ltd* [1974] NI 44, *Howell v Howell* [1992] 1 IR 290 and *Bank of Ireland v Gaynor* (Unrep, Macken J, 29/6/1999) followed - Succession Act 1965 (No 27), ss 90 and 99 – Plaintiff's claim dismissed (2004/457SP – Smyth J 24/3/2006) [2006] IEHC 104
Butler v Butler

Article

Storan, Emma
Section 117 of the Succession Act 1965: another means for the courts to rewrite a will?
2006 C & PLJ 82

TAXATION

Articles

Bradley, John
Changes to the remittance basis of taxation and other foreign issues impacting on the PRSI/ health contribution
2006 (July) ITR 74

Byrne, Dermot
Artists' exemption guidelines challenged: Appeal Commissioners' decision of 25 July 2005 in Joe Tiernan v Revenue Commissioners
2006 (July) ITR 80
Considine, John
The importance of safeguards on revenue powers: another perspective
2006 (November) ITR 49

Donnelly, Dympna
Stamp duty on contracts for differences
2006 (November) ITR 77

Herlihy, Julie
Back to basics: corporation tax losses and charges
2006 (November) ITR 42

Kennon, Ethna
The EMAG case and cross-border supplies of goods
2006 (July) ITR 88

Lillis, Nora
Recent developments in charity law and the taxation of charities
2006 (July) ITR 82

Maguire, Tom
The Cadbury triangle - anti-avoidance and the ECJ
2006 (November) ITR 63

Mongan, Dearbhla
Double taxation credit relief for traders in the aftermath of Legal and General
2006 (November) ITR 46

O'Riordan, Breda
A bridge over troubled water: employer solutions in the 21st century
2006 (November) ITR 38

Power, Tom
A bird's-eye view of stamp duty
2006 (November) ITR 71

Ramsay, Ciaran
High Court decision in section 811 case: Revenue Commissioners v O'Flynn Construction Co. Ltd., John O'Flynn and Michael O'Flynn
2006 (July) ITR 91

Riley, Jilly
ECJ decision on intra-branch supplies: Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v FCE Bank plc.
2006 (July) ITR 107

Rochford, Caroline
Review of property reliefs post Finance Act 2006
2006 (July) ITR 70

Twohig, Brendan
The childcare services relief
2006 (July) ITR 66

Library Acquisitions

Clarke, Giles
Clarke: offshore tax planning
13th ed
London: LexisNexis Tolley, 2006
M336.76

Cordara, Roderick
Tolley's orange tax handbook 2006-07
33rd ed
London: Lexis Nexis Tolley, 2006
M335

Irish Taxation Institute
Code of professional conduct & recommended best practice guidelines and bye-law no. 1

Dublin: Irish Taxation Institute, 2006
M335.C5

Redston, Anne
Tolleys yellow tax handbook 2006-07
London: LexisNexis Tolley, 2006
M335

Statutory Instruments

Finance act 2006 (commencement of sections 93(1), 97(1)(b) and 99(1)(a)) order 2006
SI 549/2006

Finance act 1999 (commencement of substituted section 98a) order 2006
SI 581/2006

Taxes (electronic transmission of partnership tax returns) (specified provisions and appointed day) order 2006
SI 636/2006

Value-added tax regulations 2006
SI 548/2006

TELECOMMUNICATIONS

Library Acquisition

Farr, Sebastian
EU communications law
2nd ed
London: Sweet & Maxwell, 2006
W144.6

Statutory Instrument

International telecommunications satellite organisation (ITSO) (privileges and immunities) order 2006
SI 569/2006

TORT

Limitation of actions

Negligence – Personal injury – Date of knowledge – Proceedings not issued within three year limitation period – Whether claim statute barred – No consent given to post-mortem examination – Plaintiffs aware post–mortem carried out by defendant – Whether plaintiff induced into believing post-mortem examination was standard practice – Whether plaintiffs believed they had been wronged – Whether justification in not commencing proceedings within statutory period – Constructive knowledge – Whether facts reasonably ascertainable with help of medical advice – Whether clear from autopsy report that organs retained – Whether knowledge of pathologist could be imputed to plaintiff – Whether reasonable to seek expert medical advice - Statute of Limitations (Amendment) Act 1991 (No 18), s 2(2)(b) - Claim dismissed (2002/10299P – O'Donovan J – 1/7/2004) [2004] IEHC 437
Devlin v National Maternity Hospital

Negligence

Nervous shock – Conditions to be satisfied by plaintiff - Post-mortem examination carried out without consent – Organs removed and retained – Plaintiff becoming ill on hearing – Plaintiff developing post-traumatic stress disorder – Whether nervous shock sustained by reason of actual or apprehended physical injury to plaintiff – Whether evidence that plaintiff suffered physical injury - Duty of care – Whether defendant entitled to carry out post-mortem examination without consent – Whether duty owed not to interfere with remains of deceased – Whether foreseeable that plaintiff would suffer nervous shock as result – *Kelly v Hennessy* [1995] 3 IR 253; *Fletcher v Commissioner of Public Works* [2003] 1 IR 465 applied; *Philp v Ryan* [2004] IEHC 121 (Unrep, Peart J, 11/3/2004) not followed - Claim dismissed (2002/10299P – O'Donovan J – 1/7/2004) [2004] IEHC 437
Devlin v National Maternity Hospital

Articles

Binchy, William
International tort litigation: new European horizons
2006 (Summer) QRTL 24

Heffernan, Liz
Gauging the reliability of scientific evidence in tort
6 (1) 2006 JSIJ 140

Holland, David
Civil Liability and Courts Act 2004: some thoughts on practicalities
6 (1) 2006 JSIJ 43

Morgan, David Gwynn
Constitutional and administrative law framework of the Personal Injuries
Assessment Board
6 (1) 2006 JSIJ 33

Ryan, Ray
Liability for negligent misstatement: the Supreme Court decision in
Wildgust
Ryan, Des
2006 (Summer) QRTL 13

Library Acquisitions

Connolly, Ursula
Tort: cases and materials
Dublin: Thomson Round Hall, 2006
N30.C5

Kevan, Tim
Fraudulent and exaggerated claims
St Albans: XPL Publishing, 2006
N38.1

Khoury, Lara
Uncertain causation in medical liability
Oxford: Hart Publishing, 2006
M608

Morrell, John
Emergency services: law and liability
Bristol: Jordan Publishing Limited, 2006
N33.5

School of Law, Trinity College
Torts 2006: new developments in the law: papers from a conference held in
Trinity College on Saturday, 20th May 2006
Dublin: Trinity College, 2006
N30.C5

TRANSPORT

Statutory Instruments

Railway safety act 2005 (railway incidents) regulations 2006
EA DIR/2004-49
SI 585/2006

Railway (Dublin light rail line C1 - Connolly to The Point) order 2006
SI 648/2006

Transport (railway infrastructure) act 2001, (Kildare route project) order
2006
SI 596/2006

TRIBUNAL OF INQUIRY

Jurisdiction

Fair procedures – Obstruction and hindrance – Whether tribunal acting *ultra vires* in making findings of obstruction and hindrance against parties appearing before it – Whether tribunal obliged to notify parties in advance that it intended to make findings of obstruction and hindrance - *Gallagher v Corrigan* (Unrep, Blaney J, 1/2/1988) distinguished - Costs – Discretion - Whether parties entitled to costs before tribunal – Whether tribunal entitled to take into account earlier findings of obstruction and hindrance in refusing costs – Whether tribunal decision on costs constituting administration of justice – *Haughey v Moriarty* [1999] 3 IR 1 applied; *Goodman International v Hamilton (No 1)* [1992] 2 IR 542 distinguished - Tribunals of Inquiry (Evidence) Act 1921 (11 Geo 5, c 7) – Tribunals of Inquiry (Evidence) (Amendment) Act 1979 (No 3), ss 3(2) and 6 – Tribunals of Inquiry (Evidence) (Amendment) Act 1997 (No 42), s 3 – Tribunals of Inquiry (Evidence) (Amendment) Act 2004 (No 13), s 2(1) – Relief refused (2004/491P & 2005/100JR – Smyth J – 14/2/2006) [2006] IEHC 75
Murphy v Mr Justice Flood; Murphy v Judge Mahon

TRUSTS

Library Acquisitions

Hayton, David J
Underhill and Hayton: law relating to trusts and trustees
17th ed
London: LexisNexis Butterworths, 2006
N210

Kessler, James
Drafting trusts and will trusts: a modern approach
8th ed
London: Thomson Sweet and Maxwell, 2007
N210

Law Reform Commission
Law Reform Commission report on charitable trusts and legal structures for charities
Dublin: Law Reform Commission, 2006
L160.C5

WILLS

Library Acquisition

Waterworth, Michael
Parker's modern wills precedents
5th ed
Haywards Heath: Tottel Publishing, 2007
N125

At a glance

Rules of Court

Circuit Court rules (industrial relations acts) 2007
SI 12/2007

Circuit Court rules (mental health) 2007
SI 11/2007

Circuit Court rules (social welfare appeals) 2007
SI 10/2007

District Court districts and areas (amendment) and variation of days (District No. 1) order 2006
SI 609/2006

District Court districts and areas (amendment) and variation of days and hours (Ballyforan and Ballinasloe) order 2006
SI 626/2006

District Court districts and areas (amendment) (Ballyfarnon and Boyle) order, 2006
SI 608/2006

District Court districts and areas (amendment) (Dowra and Drumkeerin and Manorhamilton and Ballyconnell and Swanlinbar) order, 2006
SI 610/2006

District Court districts and areas (amendment) (Oldcastle and Kells) order, 2006
SI 536/2006

District Court districts and areas (amendment) (Skreen and Easky) order,
2006
SI 627/2006

Rules of the superior courts (evidence) 2007
SI 13/2007

Rules of the superior courts (mental health act 2001) 2006
SI 597/2006

Rules of the superior courts (statutory applications and appeals) 2007
SI 14/2007

European directives implemented into Irish Law up to 05/02/2007

Information compiled by Robert Carey, Law Library, Four Courts.

European Communities (aerial fertilisation) (forestry) regulations 2006
DIR/1976-464
SI 592/2006

European Communities (aquaculture animals and fish) (placing on the market and control of certain diseases) (amendment) regulations 2006
DIR/1991-67, DIR/1995-22
SI 614/2006

European Communities (avian influenza) (control on imports of avian products from South Africa) regulations 2006
DEC/2006-532
SI 498/2006

European Communities (capital adequacy of credit institutions) regulations
2006
DIR/2006-48
SI 661/2006

European Communities (capital adequacy of investment firms) regulations
2006
DIR/2006-49
SI 660/2006

European Communities (energy performance of buildings) regulations 2006
DIR/2002-91
SI 666/2006

European Communities (enforcement of community judgments on trade marks and designs) regulations 2006
REG/40-1994, REG/6-2002
SI 646/2006

European Communities (environmental impact assessment) (amendment) regulations 2006
DIR/2003-35, DIR/85-337
SI 659/2006

European Communities (European public limited-liability company) (employee involvement) regulations 2006
SI 623/2006

European Communities (financial transparency) (amendment) regulations 2006
DIR/2005-81
SI 613/2006

European Communities (foodstuffs intended for particular nutritional uses) regulations 2006
DIR/89-398, DIR/96-84, DIR/1999-41, DIR/2001-15, DIR/2004-5, DIR/2006-34
SI 579/2006

European Communities (free movement of persons) (no. 2) regulations 2006
DIR/2004-38
SI 656/2006

European Communities (human blood and blood components traceability requirements and notification of serious adverse reactions and events) regulations 2006
DIR/2005-61, DIR/2002-98
SI 547/2006

European Communities (internal market in electricity) regulations 2006
DIR/2003-54, DIR/96-92
SI 524/2006

European Communities (life assurance) framework (amendment) regulations
2006
DIR/2002-87, DIR/2002-83
SI 664/2006

European Communities (motor vehicles type approval) (amendment) (no.3) regulations 2006
DIR/2005-55, DIR/2005-78, DIR/2006-20, DIR/2006-27, DIR/2006-51, DIR/2006-72, DEC/2006-368)
SI 540/2006

European Communities (mechanically propelled vehicle entry into service)(amendment) (no. 2) regulations 2006
DIR/2005-55
SI 542/2006

European Communities (non-life insurance) framework (amendment) regulations 2006
DIR/2002-87, DIR/2002-13
SI 665/2006

European Communities (passenger care entry into service) (amendment) (no.2) regulations 2006
DIR/2005-55, DIR/2006-20
SI 541/2006

European Communities (quality system for blood establishments) regulations
2006
DIR/2005-62, DIR/2002-98
SI 552/2006

European Communities (quality system for blood establishments) regulations
2006
DIR/2005-62, DIR/2002-98
SI 562/2006

European Communities (restrictive measures) (Lebanon) regulations 2006
REG/1412-2006
SI 574/2006

European Communities (road transport) (amendment) regulations 2006
DIR/96-26, DIR/98-76
SI 561/2006

European Communities (value-added tax) regulations 2006
DIR/2006-112, DIR/2006-98
SI 663/2006

Railway safety act 2005 (railway incidents) regulations 2006
DIR/2004-49
SI 585/2006

Road traffic (licensing of drivers) regulations 2006
DIR/91-439, DIR/94-72, DIR/96-47, DIR/97-26
SI 537/2006

Road traffic (signs) regulations 2006
DIR/2004-54
SI 637/2006

Acts of the Oireachtas 2006

Information compiled by Damien Grenham, Law Library, Four Courts.

1/2006 University College Galway (Amendment) Act 2006
Signed 22/02/2006

2/2006 Teaching Council (Amendment) Act 2006
Signed 04/03/2006

3/2006 Irish Medicines Board (Miscellaneous Provisions) Act 2006
Signed 04/03/2006

4/2006 Competition (Amendment) Act 2006
Signed 11/03/2006

5/2006 Social Welfare Law Reform and Pensions Act 2006
Signed 24/03/2006

6/2006 Finance Act 2006
Signed 31/03/2006

7/2006 Aviation Act 2006
Signed 04/0/2006

8/2006 Sea-Fisheries and Maritime Jurisdiction Act 2006
Signed 04/04/2006

9/2006 Employees (Provision of Information and Consultation) Act 2006
Signed 09/04/2006

10/2006 Diplomatic Relations and Immunities (Amendment) Act 2006
Signed 12/04/2006

11/2006 Criminal Law (Insanity) Act 2006
Signed 12/04/2006

12/2006 Registration of Deeds and Title Act 2006
Signed 07/05/2006

13/2006 Parental Leave (Amendment) Act 2006
Signed 18/05/2006

14/2006 Road Safety Authority Act 2006
Signed 31/05/2006

15/2006 Criminal Law (Sexual Offences) Act 2006
Signed 02/06/2006

16/2006 Employment Permits Act 2006
Signed 23/06/2006

17/2006 Health (Repayment Scheme) Act 2006
Signed 23/06/2006

18/2006 European Communities (Amendment) Act 2006
Signed 28/06/2006

19/2006 National Sports Campus Development Authority Act 2006
Signed 5/7/2006

20/2006 Defence (Amendment) Act 2006
Signed 12/07/2006

21/2006 National Economic and Social Development Office Act 2006
Signed 12/07/2006

22/2006 Hepatitis C Compensation Tribunal (Amendment) Act 2006
Signed 16/07/2006

23/2006 Road Traffic Act 2006
Signed 16/07/2006

24/2006 Building Societies (Amendment) Act 2006
Signed 16/07/2006

25/2006 Institutes of Technology Act 2006
Signed 16/07/2006

26/2006 Criminal Justice Act 2006
Signed 16/07/2006

27/2006 Planning and Development (Strategic Infrastructure) Act 2006
Signed 16/07/2006

28/2006 Road Traffic and Transport Act 2006
Signed 04/10/2006

29/2006 Sea Pollution (Miscellaneous Provisions) Act 2006
Signed 31/10/2006

30/2006 International Criminal Court Act 2006
Signed 31/10/2006

31/2006 Patents (Amendment) Act 2006
Signed 11/12/2006

32/2006 British-Irish Agreement (Amendment) Act 2006
Signed 11/12/2006

33/2006 Electoral (Amendment) Act 2006
Signed 11/12/2006

34/2006 Industrial Development Act 2006
Signed 18/12/2006

35/2006 Appropriation Act 2006
Signed 19/12/2006

36/2006 Social Welfare Act 2006
Signed 19/12/2006

37/2006 Europol (Amendment) Act 2006
Signed 23/12/2006

38/2006 Irish Film Board (Amendment) Act 2006
Signed 23/12/2006

39/2006 Houses of the Oireachtas Commission (Amendment) Act 2006
Signed 23/12/2006

40/2006 Energy (Miscellaneous Provisions) act 2006
Signed 24/12/2006

41/2006 Investment Funds, Companies and Miscellaneous Provisions Act 2006
Signed 24/12/2006

42/2006 Local Government (Business Improvement Districts) Act 2006
Signed 24/12/2006

Bills in progress up to 05/02/2007

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

Information compiled by Damien Grenham, Law Library, Four Courts.

Air navigation and transport (indemnities) bill 2005
1st stage- Seanad

Broadcasting (amendment) bill 2006
1st stage- Seanad

Building control bill 2005
Committee – Dail

Carbon fund bill 2006
2nd stage - Dail
Child care (amendment) bill 2006
2nd stage- *(Initiated in Seanad)*

Child trafficking and pornography (amendment) (no.2) bill 2004
Committee stage- Dail **[pmb]** *Jim O'Keeffe*

Citizens information bill 2006
2nd stage - Dail

Civil law (miscellaneous provisions) bill 2006
Committee stage – Dail

Civil partnership bill 2004
2nd stage- Seanad **[pmb]** *David Norris*

Civil unions bill 2006
2nd stage- Dail **[pmb]** *Brendan Howlin*

Climate change targets bill 2005
2nd stage – Dail **[pmb]** *Eamon Ryan and Ciaran Cuffe*

Comhairle (amendment) bill 2004
2nd stage – Dail

Competition (trade union membership) bill 2006
2nd stage – Dail **[pmb]** *Michael D. Higgins*

Consumer protection bill 2007
1st stage- Seanad **[pmb]** Senator *Mary O'Rourke*

Consumer rights enforcer bill 2004
1st stage –Dail **[pmb]** *Phil Hogan*

Courts (register of sentences) bill 2006
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Criminal justice (mutual assistance) bill 2005
Committee stage – Seanad

Criminal Law (amendment) bill 2006
1st stage- Dail **[pmb]** *Jim O'Keeffe*

Criminal law (home defence) bill 2006
1ST stage- Dail **[pmb]** *Jim O'Keefe*

Defamation bill 2006
2nd stage – Seanad

Defence (amendment) bill 2005
2nd stage – Dail **[pmb]** *Billy Timmins*

Defence (amendment) (No.2) bill 2006
1st stage – Seanad

Defence of life and property bill 2006
2nd stage- Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Education (miscellaneous provisions) bill 2007
1st stage- Dail

Electricity regulation (amendment) bill 2003
2nd stage – Seanad

Electricity regulation (amendment) (single electricity market) bill 2006
1st stage- Dail

Electoral (amendment) (prisoners' franchise) bill 2005
2nd stage – Dail *(Initiated in Seanad)* **[pmb]** *Gay Mitchell*

Electoral (preparation of register of electors) (temporary provisions) bill 2006
1st stage- Dail **[pmb]** *Eamon Gilmore*
Electoral registration commissioner bill 2005
2nd stage- Dail **[pmb]** *Eamon Gilmore*

Enforcement of court orders bill 2007
1st stage- Dail

Enforcement of court orders (no.2) bill 2004
1st stage- Seanad **[pmb]** *Senator Brian Hayes*

Ethics in public office bill 2006
1st stage- Dail

European communities bill 2006
1st stage- Seanad

Fines bill 2004
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Fines bill 2007
1st stage- Dail

Fluoride (repeal of enactments) bill 2005
2nd stage – Dail **[pmb]** *John Gormley*

Foyle and Carlingford fisheries bill 2006
Committee stage- Dail

Freedom of information (amendment) (no.2) bill 2003
1st stage – Seanad **[pmb]** *Brendan Ryan*

Freedom of information (amendment) bill 2006
1st stage-Dail **[pmb]** *Joan Burton*

Genealogy and heraldry bill 2006
1st stage- Seanad **[pmb]** *Senator Brian Hayes*

Good samaritan bill 2005
2nd stage – Dail **[pmb]** *Billy Timmins*

Greyhound industry (doping regulation) bill 2006
2nd stage – Dail **[pmb]** *Jimmy Deenihan*

Health bill 2006
2nd stage- Dail

Health (hospitals inspectorate) bill 2006
2nd stage – Dail **[pmb]** *Liz McManus*

Health (nursing homes) (amendment) bill 2006
Report stage- Dail

Housing (stage payments) bill 2006
1st stage- Seanad **[pmb]** *Senator Paul Coughlan*

Human reproduction bill 2003
2nd stage – Dail **[pmb]** *Mary Upton*

Independent monitoring commission (repeal) bill 2006
2nd stage – Dail **[pmb]** *Martin Ferris, Arthur Morgan, Caoimhghín ó Caoláin, Aengus ó Snodaigh and Seán Crowe.*

International peace missions bill 2003
1st stage-Dail

Irish nationality and citizenship (amendment) (an Garda Siochana) bill 2006
1st stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke.*

Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003
Report – Seanad **[pmb]** *Feargal Quinn*

Land and conveyancing law reform bill 2006
2nd stage- Dail

Law of the sea (repression of piracy) bill 2001
2nd stage – Dail **[pmb]** *(Initiated in Seanad)*
leave to withdraw 8/3/2005.

Local elections bill 2003
2nd stage –Dail **[pmb]** *Eamon Gilmore*

Medical practitioners bill 2007
1st stage- Dail

Mercantile marine (avoidance of flags of convenience) bill 2005
2nd stage- Dail **[pmb]** *Thomas P. Broughan*

Money advice and budgeting service bill 2002
1st stage – Dail

National development finance agency (amendment) bill 2006
1st stage – Seanad

National oil reserves agency bill 2006
Report stage- Dail

National oil reserves agency bill 2006
Report stage - Dail

National pensions reserve fund (ethical investment) (amendment) bill 2006
2nd stage- Seanad

Noise bill 2006
1st stage- Dail **[pmb]** *Ciaran Cuffe*

Nuclear test ban bill 2006
Committee stage - Dail

Offences against the state acts (1939 to 1998) repeal bill 2004
1st stage-Dail **[pmb]** Aengus Ó Snodaigh

Offences against the state (amendment) bill 2006
1st stage- Seanad **[pmb]** *Senators Joe o'Toole, David Norris, Mary Henry and Feargal Quinn.*

Official languages (amendment) bill 2005
2nd stage –Seanad **[pmb]** Senators *Joe O'Toole, Michael Brennan and John Minihan.*

Planning and development (amendment) bill 2005
2nd stage – Dail **[pmb]** Eamon Gilmore

Planning and development (amendment) bill 2006
1st stage – Dail **[pmb]**

Planning and development (amendment) (no.3) bill 2004
2nd stage- Dail **[pmb]** *Eamon Gilmore*

Prisons bill 2005
Committee – Seanad

Prisons bill 2006
1st stage- Seanad

Privacy bill 2006
1st stage- Seanad

Prohibition of ticket touts bill 2005
2nd stage – Dail **[pmb]** *Jimmy Deenihan*

Pyramid schemes bill 2006
2nd stage- Dail **[pmb]** *Kathleen Lynch*

Registration of wills bill 2005
Committee – Seanad **[pmb]** *Senator Terry Leyden*
Registration of lobbyists bill 2003
1st stage- Dail **[pmb]** *Pat Rabbitte*

Residential tenancies (amendment) bill 2006
1st stage – Dail **[pmb]** *Deputy Fergus O'Dowd*

Road traffic (amendment) bill 2006
1st stage- Dail

Road traffic (miscellaneous provisions) bill 2006
2nd stage- Dail

Road traffic (mobile telephony) bill 2006
Committee- Dail **[pmb]** *Olivia Mitchell*

Sexual offences (age of consent) (temporary provisions) bill 2006
2nd stage – Dail **[pmb]** *Brendan Howlin*

Statute Law revision bill 2007
1st stage- Seanad **[pmb]** *Mary O'Rourke*

Tribunals of inquiry bill 2005
1st stage- Dail

Twenty-eighth amendment of the constitution bill 2005
1st stage- Dail

Twenty-eighth amendment of the constitution bill 2006
2nd stage- Dail **[pmb]** *Michael D. Higgins*

Twenty-eighth amendment of the constitution (No.2) bill 2006
2nd stage- Dail **[pmb]** *Dan Boyle*

Twenty-eighth amendment of the constitution (No.3) bill 2006
2nd stage- Dail **[pmb]** *Dan Boyle*

Waste management (amendment) bill 2003
2nd stage – Dail **[pmb]** *Arthur Morgan*

Water services bill 2003
Committee - Dail *(Initiated in Seanad)*

Whistleblowers protection bill 1999
Committee - Dail **[pmb]** Pat Rabbitte leave to withdraw 4/4/2006

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics

A Privilege for Psychotherapy?

Simon O'Leary, Barrister and Psychotherapist*

Part 1

Introduction

I served as a member of the Law Reform Commission from 1987 to 1997. In that capacity, I joined in a recommendation, in the Commission's Report on the Law relating to Child Sexual Abuse (LRC 32 of 1990) that a mandatory reporting requirement be placed on doctors and psychologists, notwithstanding any reservations of those professions.

The Commission had sought, in a Consultation paper published before the report, submissions from medical, psychological or psychoanalytic associations or bodies. We received no submission on mandatory reporting. At that time, we were reflecting in our recommendation the general view of society and I, for one, shut my eyes and ears to misgivings.

Having retired from the law and qualified as a psychoanalytical psychotherapist, I now regret having joined in the Commission's recommendation and this article is an attempt to explain why.

The article is drawn from a thesis I submitted in the course of my studies and as it is appearing in a legal journal, much of the psychoanalytic material has been omitted or abridged. In Part 1, I will try to locate the conduct of psychotherapy appropriately in the context of the existing, relevant law of privacy and privilege, with particular reference to sacerdotal privilege. In Part 2, which will be published in the next edition of the Bar Review, I will suggest that a distinct privilege should attach to matters disclosed in psychotherapy.

I start with The Legal Environment for Psychotherapy in Ireland.

Privacy and the therapeutic space

Privacy

There is little reported Irish law on privacy. An individual's right to privacy will not always take precedence over other considerations, such as the protection of life or health or public morality.[1]
There is much European law. The European Convention on Human Rights: Article 8 provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

The pursuit of private goals will often involve the formation of voluntary relations with others of varying degrees of intimacy. The European Commission on Human Rights has expressed the view that privacy and private life are of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfillment of his personality[2] and entail the right to establish and to develop relationships with other human beings, *especially in the emotional field* (my italics) for the development and fulfillment of his personality.[3]

The Convention has now, with certain strings attached, become part of Irish law since the European Convention on Human Rights Act 2003, was enacted.

In 1972, an interdepartmental task-force in Canada defined personal privacy as "spatial" in the sense that the physical person is deemed to be surrounded by a bubble or aura, a personal "space" not bounded by real walls and fences but by legal norms and social values.[4]

These considerations apply to the practice of and engagement in psychoanalytic psychotherapy.

Privacy in Psychoanalysis

Freud was always conscious of considerations of privacy and has written that the complete elucidation of a case is bound to involve the revelation of intimacies and the betrayal of secrets. It is certain that some of the patients about whom he wrote would never have spoken if it had occurred to them that their admissions might possibly be put to scientific uses.

Melanie Klein[5] has stressed the importance of privacy, even in the analysis of children.

When Jung was interviewed by John Freeman in 1959[6] and was asked what were the significant features of the dreams Freud recounted to him, he told Freeman he was "indiscreet" to ask this as

*Member of the Irish Forum for Psychoanalytic Psychotherapy

1 *McGee v Attorney General* (1974) I.R. 284, *Norris v Attorney General* (1984) I.R. 36, *Kennedy and Arnold v Ireland* (1987) I.R. 587.
2 *Bruggeman and Scheuten v Germany*, Report of the European Commission on Human Rights, 5DR, 100
3 *X v Iceland*, Decision of the European Commission on admissibility, 5 DR, 86
4 Department of Communications and Department of Justice, Canada, (1972) *Privacy and Computers.*
5 (1955) *The Psychoanalytic Play Technique: Its History and Significance.* In *Envy and Gratitude*; London: Vintage ; 1997, 126-7.
6 " Face to Face" B.B.C. television, 22nd October, 1959.

there was such a thing as "a professional secret": a consideration which, for him, lasted after Freud's death. In the last few years, Naomi Campbell, Michael Douglas and Catherine Zeta Jones, to the consternation of the tabloids, have maintained rights to privacy and confidentiality in the English Courts." Monica Lewinsky has described privacy as "something you don't think about until you lose it."

It is to be noted that journalists who are constantly trumpeting the public's "right to know" are zealous in seeking to protect the privacy of their own sources.

Privilege

When privilege is established, it is an expression of society's intention to permit an otherwise unacceptable restriction on judicial truth - seeking because a greater value is placed on the particular relationship to be protected. [7]

Examples of private privileges are the privilege against self-incrimination and solicitor-client privilege; each relating to confidential matters arising in the professional relationship. They flow, naturally, from the presumption of innocence and from the right to legal representation. The right not to incriminate oneself is also listed in Article 6 of the European Convention on Human Rights. The privilege is the client's privilege and can be waived by him.

The Wigmore Principles

It is to be noted that many of the leading cases on professional privilege in common law jurisdictions refer to the principles laid down in Wigmore, the respected American textbook on the law of Evidence.[8] These principles are elaborated as follows:-

> "Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice…four fundamental conditions may be predicated **as necessary to** the establishment of a privilege against the disclosure of communications between persons standing in a given relation:
>
> (1) The communications must originate in a confidence that they will not be disclosed;
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation;
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously *fostered*; and
>
> (4) The injury which would enure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
>
> These four conditions being present, a privilege should be recognized; and not otherwise."

Sacerdotal Privilege

In Ireland, a distinct type of private privilege survives, called sacerdotal privilege.

The leading Irish authority on the topic is the case of *Cook v. Carroll*[9]. The facts of this case are that a parish priest interviewed, together, in his house a girl parishioner who alleged that she had been seduced and the parishioner whom she held responsible for the seduction. Subsequently, an action for damages for seduction was brought by the girl's mother against this parishioner and the priest was called to give evidence of what passed at this interview. He refused to give evidence, claiming privilege.

It was held by Gavan Duffy J. that this refusal to give evidence was justified and was not a contempt of court, expressing the view that communications made in confidence to a parish priest, in a private consultation between him and certain of his parishioners, are privileged and that such privilege cannot be waived by a party thereto without the consent of the priest. Judge Gavan Duffy cited the Wigmore Principles with approval. He also referred to the special position of the Catholic Church in the Constitution and the utter futility of trying to invade the secrecy of the confessional.

He emphasized that whereas the client could waive privilege in the solicitor/ client situation, as it is the client's privilege, the parishioner could not do so in the case before him as the privilege was the priest's.

For the next 35 years, no decision of the High Court is on record on this matter. The matter was addressed again by Carroll J. in 1980 in the case of *ER v JR*[10]. In this case, a priest claimed privilege in respect of communications made to him as a marriage counsellor. Judge Carroll applied Wigmore's four principles to the priest as marriage counsellor rather than as parish priest. She considered confidentiality to be an essential element in that relationship. "*I can imagine nothing less conducive to frank and open discussion between the priest and the spouses, possibly leading to admissions of faults and failings on both sides, than the possibility that total confidentiality will not be observed*."[11] She went on to find that the State should foster such counselling as it gives protection to the family by helping it over difficulties She applies the privilege, described as a confidence-building measure, to ministers of religion in general. She held that the privilege is that of the people consulting and *not of the counsellor*. She reserved and did not deal with the question of whether privilege can arise where the counsellor is not a minister of religion.

Matters were refined further in *Johnston v. Church of Scientology*[12], a decision of Geoghegan J.. In this case, the plaintiff had joined the Church of Scientology and underwent what is described as a "spiritual practice" known in that organisation as "auditing", which involves "one-to-one counselling. In the course of this counselling, certain documents were produced which charted the plaintiff's "spiritual progress". Before the plaintiff's counselling began, she signed an agreement whereby these documents were subject to

7 Mosher, P. W. (1999) *Psychotherapist-Patient Privilege: The History and Significance of the U.S. Supreme Court's Decision in the case of Jaffee v. Redmond.* [Downloaded from the Internet, http://psa-uny.org/jr/articles/mosher.htm

8 Wigmore, J. H. (1961*) Evidence in Trials at Common Law.* (Mc Naughton rev.) Little, Brown: New York

9 1945 I.R. 515

10 1981 I.L.R.M. 125

11 p.126

12 eIWLR_1373, 30 April, 1999

"priest-penitent" privilege. She subsequently ended her involvement with the Church of Scientology and brought proceedings against it and some of its members claiming, *inter alia*, that she had been brain-washed. In the course of these proceedings, she sought discovery of all documents relating to her counselling but the defendants claimed that these documents were under sacerdotal privilege. They also claimed that the "auditing" process was analogous to confession in the Roman Catholic Church and that the seal of confession meant that the documents were privileged. Alternatively, the defendants claimed that the plaintiff was bound by the agreement she signed which rendered the documents privileged.

Geoghegan J. found in favour of the plaintiff, holding, *inter alia*:

(1) No evidence was adduced by the defendants to establish that "auditing" was analogous to Roman Catholic confession. Privilege arising from the priest-penitent relationship in the confessional is *sui juris* and was not capable of being extended in the manner suggested by the defendants.
(2) There are situations where privilege may arise from counselling which is given by a priest to a parishioner but this privilege can always be waived by the parishioner. *E.R. v J.R.* followed.
(3) A private contract cannot oust the jurisdiction of the court to order discovery. The agreement between the parties was a contract not to make voluntary disclosure; it did not create an obligation not to make compulsory disclosure.

The judge gave it as his opinion that Gavan Duffy J. had "muddied the waters" in *Cook v Carroll* by treating the, then, special position of the Roman Catholic Church in the Constitution as a relevant consideration in his judgment:

> "I do not accept that the Defendants can rely on an alleged analogy with the seal of confession. Neither in the Affidavits nor in Court and even though I requested it, was any evidence produced by way of theology manuals etc. that it was part of the doctrines of the Church of Scientology that any disclosure of what transpired in auditing or training sessions led to some kind of eternal punishment. Furthermore, the whole question as to whether the Church of Scientology is a religion or not remains controversial throughout the world…"

Having agreed with Carroll J. in *ER v JR*, he continues

> "…although Carroll J. left the question open, I would be inclined to think that in modern times, when all kinds of secular counselling is available, and in particular, marriage counselling, there may well be a privilege which the courts would uphold in some circumstances but it would always be capable of waiver unilaterally by the persons being counselled."[13]

Earlier that same year, in the case of *W.W. v P.B.*[14], it was held that in a civil action for damages occasioned by sexual assault, the plaintiff could not refuse to produce medical, psychiatric or counseling notes and records relating to the case. The basis for the decision was that a plaintiff could not make serious allegations against a person and then withhold material that might be relevant to the defendant's defence of the allegations. The court rejected an argument that to require production of such documents would be likely to deter complainants from reporting allegations of sexual abuse. It also held that a plaintiff who brought an action for damages arising out of an allegation of sexual abuse did not have a right of confidentiality vis-à-vis the defendant with respect to remedial treatment of harm allegedly suffered by him as a result of such abuse.

Medical Ethics

Codes of professional ethics in both Britain and Ireland regard confidentiality as fundamental to the doctor/patient relationship and as a time-honoured principle of medical ethics.[15] A duty of confidentiality is basic to the therapeutic relationship in that it facilitates proper management based on full disclosure, in a setting of confidence, without fear of unauthorised access to the information by a third party, to the patient's detriment. In the English courts, at any rate, confidentiality has been characterised as being in the public interest:

> In the long run, preservation of confidentiality is the only way of securing public health; otherwise, doctors will be discredited as a source of education, for future individual patients will not come forward if doctors are going to squeal on them. Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled and self-treatment does not provide the best care. [16]

In medical ethics, it is regarded as permissible to disclose confidential information without the patient's prior consent under two broad headings - in the private as well as in the public interest.

Private Interest

Disclosure in the private interest would usually arise where patients, especially in psychiatry, are usually under the care of a team. Although patients should be informed, where possible, that information concerning them is being shared among psychiatric or other medical carers, where this cannot be effected, consent can be implied when circumstances justify it.

Public Interest

There are four relevant circumstances when disclosure may be regarded as more important than confidence.

(a) Either during the course of litigation or during the course of a tribunal of inquiry, discovery of medical records may be ordered, either against an individual who is a proper party to the proceedings or against the institution or person who holds the patient's records, if the court is satisfied that the records are relevant to the proceedings.

(b) The law requires that public health authorities be notified of persons known or suspected to be suffering from certain infectious diseases.

(c) As to whether the law requires disclosure of confidential information, for example, relating to an abuser or a dangerous psychopath, without consent, to safeguard the life or safety of another is a question undecided in Ireland at the moment. Casey and Craven note the *Tarasoff*[17] decision in the United States and a later, English decision, in the case of *Edgell*[18], about release from psychiatric care, which

13 pps. 3,4.
14 Unreported, Barr J., 18 March, 1999
15 Casey, C. and Craven, C. (1999) *Psychiatry and the Law*. Dublin: Oaktree Press.
16 *Rose J. X v Y*, (1988) 2 All ER 648.
17 *Tarasoff v Regents of the University of California*, (1976) 131 Cal Rptr 14 (Supreme Court of California)
18 *W. v Edgell* [1990] 1 All ER 835 (CA)

concluded that where a consultant psychiatrist becomes aware, even in the course of a confidential relationship, of information which leads him in the exercise of what the court considers a sound professional judgment, to fear that such decisions may be made on the basis of inadequate information and with a real risk of consequent danger to the public, he is entitled to take such steps as are reasonable in all of the circumstances to communicate the grounds of his concern to the responsible authorities. In *Tarasoff*, damages were recovered after an assault where a psychiatrist failed to inform the plaintiff that a patient wanted to kill him.

(d) Confidential information may be collated for research purposes but, in those circumstances, patient anonymity must be protected.

Accordingly, although the law's protection of confidence is grounded on the premise that there is a public interest that confidences should be protected by the law, it is, perhaps, safest to assume that the public interest may be outweighed by some other countervailing public interest which favours disclosure[19] .

Constitutional Protection

Article 44. 2 (1) of the Constitution provides:

> Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

This article has been held by the Supreme Court to guarantee the right not to be compelled or coerced into living in a way which is contrary to one's conscience and, in the context of the Article, that means contrary to one's conscience so far as the exercise, practice or profession of religion is concerned.[20] In *Mulloy v Minster for Education*, the Court elaborated:

> "There may be many instances where, in order to implement or permit of the full and free exercise of the freedom of religion guaranteed by the Constitution, the law may find it necessary to distinguish between ministers of religion or other persons occupying a particular status in religion and the ordinary lay members of that religion or the rest of the population"[21]

The Supreme Court gave no guidance as to what kind of provision would fall within this principle but Professor James Casey[22] presumes they are referring to evidential privileges, specifically the sacerdotal privilege recognized in *Cook v Carroll* and *E.R. v J.R*. Thus, this constitutional protection for religion gives a distinct advantage to confession over psychotherapy when it comes to the provision or maintenance of privilege.

Mandatory Reporting

An unending war is being fought against privacy by the media under a banner which proclaims "the public has a right to know". A more cynical view would suggest that the war is fought so that as much newsprint and advertising space as possible can be sold. The media have been successful, and their battle honours to date include freedom of information legislation, inroads on Cabinet confidentiality and legislation on defamation, recently introduced. Whereas data protection legislation, ostensibly, protects the privacy of personal data, its effect is that a therapist, who keeps notes relating to a client, or a student therapist who, for example, writes up his training sessions or his infant observation records, on his computer, will have to hand them over to the client or family observed, if they are sought by them. Mandatory reporting guidelines have been circulated by health-boards relating to child abuse. Patients who seek therapy from health board counselling services have to sign a form consenting to breaches of confidentiality in certain circumstances.

The old offence of misprision of felony required any person to report any felony of the commission of which they had knowledge. Felonies and misprision of felony have been abolished and the offence of misprision replaced by s. 7 of the Criminal Law Act, 1997, which provides that where a person has committed an arrestable offence (i.e. one punishable by at least 5 years imprisonment), any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without reasonable excuse any act with intent to impede his or her apprehension or prosecution shall be guilty of an offence. A simple failure to report would not be captured by this offence.

In 1999, the Protection For Persons Reporting Child Abuse Act was enacted to provide protection from civil liability to persons who report child abuse to an appropriate person, for example, to a Garda or a designated health- board officer.

In 1999, the Government also published a document called *Children First - National Guidelines for the Protection and Welfare of Children* in the context of an on-going review of the child abuse guidelines. *Children First* recommends the introduction of mandatory reporting and suggests in guidelines that where an adult is attending a therapeutic service provided by a health board and there is deemed to be a current risk to a child, the counsellor or health professional should report the situation to the health board immediately. It is not unreasonable to assume that any legislation which flows from this publication will follow its recommendations.

Whereas I have not as yet had personal experience of the law invading any client's privacy, colleagues with experience of a mandatory reporting regime have informed me that an obligation to report :

(1) can lead to suicide attempts;
(2) can deter perpetrators from seeking help;
(3) can deter victims from seeking help;
(4) can lead to therapists avoiding patients whom they suspect have been sexually abused.

A review of child-care law by an English interdepartmental group in 1985 recommended against the introduction of mandatory reporting. The group felt that a mandatory reporting requirement might :

> Be counter-productive and increase the risk to children overall, first by weakening the individual's (professional's) sense of personal responsibility and secondly, in casting the shadow of near automatic reporting over their (professionals') work, by raising barriers between clients and professionals and also between professionals involved in the same case.[23]

19 *A.G. v Guardian Newspapers Ltd* (No. 2)(1988) 3 All ER 545
20 *McGee v Attorney General*; [1974] IR 284
21 [1975] I.R. 88 at 96.
22 Casey, J. (2000) *Constitutional Law in Ireland*, 3rd Ed.. Sweet and Maxwell: Dublin.
23 Interdepartmental Review of Child Care Law, 1985, H.M. Stationary Office, London.

The Aims of Psychotherapy

For Freud, the twin aims of an analysis were to help the analysand to work and to love. Much of the tension between psychoanalysis and society arises from the misleading premise that the unconscious is anti-social and that the psyche is inherently opposed to social discipline and practical reality.

The effect of psychoanalytic psychotherapy is not, as some may think, to release such anti-social drives in the patient, to the detriment of society but to release him from urgings, promptings and tendencies he does not understand which may give him anxiety, an unnecessarily harsh conscience and feelings of guilt. A successful analysis can, as it were, call off these dogs and help him live in harmony, in and with the society that had appeared to be enslaving him.

The Therapeutic Space

The liberating effect of psychoanalysis requires a particular social space, a space which is, in principle, free of the regulatory monitoring of social life. The patient must be allowed to act out any destructive aspects of his personality in a space where he is free and is received without prejudgement.

Jung[24] introduced the idea of an analytic frame which created a space inside it in which something vital, a relationship between two selves, patient and analyst, might evolve. The frame might seamlessly expand or contract or vary in its permeability at different times during analysis, with no adverse effects for patient or analyst or their relationship but when the analyst felt under pressure to reveal or report, knowing that this might have an adverse effect on the analytic relationship, the frame would become breakable.

The frame protects both the analyst and the patient from themselves and each other, lending the analyst enough support to furnish a holding environment in which the patient can regress at first and from which he may ultimately emerge with an assumption by him as far as he is able, of responsibility. The analyst is the custodian of this frame.

What occurs within the boundary does not and is not expected to "make sense" (in ordinary parlance) and cannot be communicated outside the boundary without loss or violation of its meaning. This psychoanalytic truth is not calculated to be received sympathetically by lawyers or legislators. This is unfortunate, because the principle of confidentiality, incorporating freedom of thought and expression, individuality, autonomy and privacy, serves to contain the frame and secure it with a kind of moral support, which, in turn, requires the formal backing of the law.

A reporting requirement or a subpoena from a court can operate as an impingement, a traumatic disruption of the sense of continuity occurring at a time when the patient is not ready to encompass it ●

In Part 2 of this article, which will be published in the next edition of the Bar Review, the author shall develop the argument that a distinct privilege should attach to matters disclosed in psychotherapy.

24 Jung, C.G. (1935) *The Tavistock Lectures*, C. W. 18.
- (1952) C. W. 12.

Conscripting Women into the Workforce:

Honouring the Lisbon Agenda by Violating the Constitution?[1]

John P. Byrne BL

On 1 December 1999, the Minister for Finance of the day, Mr. McCreevy moved towards the individualisation of the tax code. In doing so he 'contended that the change would encourage more married women to participate in the workforce'[2]. Despite climbing down on the original proposal a few weeks after the announcement, a type of stealth individualisation soon commenced as well as other fiscal measures that clearly benefit two-income married couples over one-income married couples. This article will consider whether those fiscal measures are compatible with the European Convention on Human Rights and Fundamental Freedoms insofar as they seek to encourage married women into the workforce; one opposition party described it as 'conscription'.[3] It will also consider whether that fiscal policy, insofar as it constitutes a tax-penalty against one-income married couples for choosing to leave one spouse in the home is compatible with the Constitution of Ireland.

Introduction to Individualisation

The concept of individualisation was first introduced to the State during the Budget 2000 speech of the Minister for Finance. One economist has described the move as 'one of the most controversial events in Ireland's fiscal history'.[4] In his Budget Speech, the Minister proposed three tax bands: £17,000 for single incomes, £28,000 for one-income married couples and £34,000 for two-income married couples. The exchequer cost for individualisation was £310 million.

The Minister also announced his intention to move in the following two budgets towards 'full-individualisation' of the bands in the sense that the one-income tax band and the one-income married tax band would weld at £28,000 and that the two-income married tax band would be twice that value by 2002. The voices of protest against that measure were so powerful that the Minister had to climb down and within a week, a package of countervailing measures were adopted including a £3,000 tax-free allowance for married couples where one spouse stayed at home to mind children or other dependants. The effect of the counter-veiling measures significantly diluted the original budget proposals.

The policy of individualisation was barely mentioned in the Budget of 2001 and the measure quietly disappeared from the political agenda. However, that was not the end of the matter for it has been argued that the move towards full individualisation has continued since that time by stealth.[5] The argument runs that the policy is ever-present today in a different form; instead of affecting the standard rate band, it now affects the Employee Tax Credit; what used to be called the PAYE allowance.

The Employee Tax Credit is individual to each earner and only applies to those within the PAYE system. In that way two-income married couples within the PAYE system are afforded two credits and one-income married couples within the PAYE system are afforded one credit. However couples outside the PAYE system are not afforded any credits - a system which creates a further layer of discrimination. The Government would contend that the credit is applied regardless of marital status. However, the application of the credit clearly benefits married couples, and particularly married two-income couples, within the PAYE system. Whilst the year-to-year increases in the Employee Tax Credit have been relatively small, 'the cumulative change over time has been substantial.'[6] The value of the credit was €660 in 2002 and has since increased to €1,760, a rate of increase far higher than the rate of inflation.

There are two other relevant fiscal matters: the advantage that two-income married couples enjoy on the tax bands; and the homecarers allowance. As regards the tax bands, in 2000 a two-income married couple was afforded a £6,000 advantage on the tax bands over a one-income married couple. This moved away from the old regime where all married couples were treated the same. From Budget 2007, the difference is far higher: a one-income married couple pays the lower rate of tax until they reach €43k, at which point they pay the higher rate of tax. At the same time, a two-income married couple pays the lower rate of tax until, potentially, they reach €68k at which point they pay the higher rate of tax.

In that way, a one-income married couple earning 68k gross are eligible to pay the lower rate of tax on the first €43k and the higher rate of tax on the remaining €25k. In contrast, a two-income married couple earning €68k gross are eligible to pay the lower rate of the taxation on the whole amount.

1 See also Byrne, John P., 'Constitutional Doubt on Fiscal Policy' *The Irish Times*, December 15, 2006.

2 See the 10th Progress Report of the All-Party Oireachtas Committee on the Constitution 'The Family'(2006) at p. 42.

3 Dáil Éireann - Volume 527 - 06 December, 2000 Financial Resolutions, 2000. - Budget Statement, 2000.

4 Jim O'Leary, Individualisation becoming reality by stealth' The Irish Times, Friday December 1, 2006.

5 Ibid.

6 Ibid.

The homecarers allowance was introduced in 2001 at a standard cash value of €660; now in 2007 the allowance is €770. The married person's tax-band and the rate of the homecarers allowance in each case interact with each other. The overall effect is that the fiscal system is undeniably weighted significantly in favour of two-income married couples since 2000. This is the case, whether through the differences in the taxation bands or the so-called stealth individualisation provisions contained in the increases in the Employee Tax Credit and even after taking into account the homecarers allowance where it applies.

E.U. Lisbon Agenda

The drive towards individualisation in Ireland appears to be the State's response to the Lisbon Agenda which was signed in March 2000. In Lisbon, the EU Heads of States and governments agreed to make the EU 'the most competitive and dynamic knowledge-driven economy in the world by 2010, capable of sustainable economic growth with more and better jobs and greater social cohesion'. In order to realize that Agenda, the EU focused on three particular issues including the achieving of an employment rate of 60 per cent for women.

In 2000, the European Commission publicly praised Ireland for its individualisation policy and encouraged the government to continue with it.[7] Recent statistics published by the Central Statistics Office (CSO) confirm that the policy has been effective: the percentage of women in employment has increased substantially in recent years: now 59 per cent, up from 43 per cent in 1996.

The Constitutional perspective

From a socio-economic perspective, the Government fiscal policy as it applies to married couples interferes with the personal choices which couples need to make within their own personal sphere. The fiscal incentives afforded to two-income married couple's lacks a level of fundamental fairness in that it interferes with a basic freedom of choice; whether one or both spouses should work outside of the home.

Mr. John Bruton, the leader of Fine Gael argued in the Dáil that the proposed individualisation of the tax code 'goes against the letter and the spirit of our Constitution'. In particular he said that:

> 'Article 41 does not look on Ireland as a nation solely of individuals. It looks on Ireland as a nation of families as well as a nation of individuals and the recognition is given in the Constitution to the authority and the separateness of each family in the way they decide to distribute their resources. There is no mandate in the Constitution for individualisation, for treating families differently depending on the choices they make within their family structure. Under the Constitution, the authority of the family to make decisions as to who should or should not go out to work is recognised.'

There are *obiter dicta* from the courts which support that view. In *PH v. Murphy and Sons*[8] Costello J. was of the view that Article 41.1.2° protected the family against legislation impairing 'its constitution and authority', or deliberate acts of State officials having the same effect.[9] In *L v L*, Finlay CJ referred to the 'protection of the family from external forces'.[10] The same judge delivering the judgment of the court *In re Article 26 and the Matrimonial Home Bill 1993*[11] stated:

> 'Having regard to the extreme importance of the family as acknowledged in Article 41 of the Constitution and to the acceptance in that Article of the fact that the rights which attach to the family including its right to make decisions within its authority are inalienable and imprescriptible and antecedent and superior to all positive law, the Court is satisfied that such provisions [i.e. those of the Bill] do not constitute reasonably proportionate intervention by the State with the rights of the family and constitute a failure by the State to protect the authority of the family.'[12]

At the time of the proposed individualisation policy, the number of stay-at-home spouses in the State was estimated at 30,000. For the most part, those represented in that figure became, in the words of Mr. Bruton, 'non-persons' in the eyes of the Government; trapped and undervalued. The government was accused of being 'blind to all work which is not paid work'; driven by monetary and business concerns and companies' ambitions to make profits. Mr. Bruton stated:

> 'Anyone who could introduce a tax penalty for unpaid work in the home is blind to all work other than work for which payment is made. This Government does not believe that unpaid work carried out by someone in the home counts. Because it does not figure in GDP figures or company balance sheets, it does not count in the eyes of the Minister for Finance.'[13]

However the Government saw benefits in the proposal. Mr. Cowen, the Minister for Health of the day said the government was recognising that the State needed a 'modern taxation system for a changed society' in that the proposed system 'treats taxpayers as individuals based on what they earn and not on their marital status' and 'rectifies the imbalance in the tax system against most taxpayers who are single or two-income earners'[14] Minister McCreevy said the effect of the measure would be to reduce the percentage of taxpayers on the top rate of income tax from 46 per cent to 17 per cent of taxpayers, or 12 per cent when exempt cases are included; which on the available estimates of the day would result in some 350k taxpayers being removed from the top rate of tax.[15] The Taoiseach argued that the ESRI had put forward the option of full individualisation of the tax bands in a booklet that had been published by that institute on 27 September 1999.[16] The ESRI subsequently denied this arguing that their proposal had been taken out of context by the Government.

7 http://www.rte.ie/news/2000/0707/budget.html
8 [1987] IR 621.
9 At p 626.
10 At p. 108.
11 [1994] 1 IR 305.
12 At p. 326.
13 Dail Debates Dáil Éireann - Volume 512 - 07 December, 1999 Financial Resolution No. 5: General (Resumed)
14 Dáil Éireann - Volume 512 - 08 December, 1999 Financial Resolution No. 5: General (Resumed).
15 Dáil Éireann - Volume 512 - 14 December, 1999 Priority Questions. - Income Tax Bands
16 Dáil Éireann - Volume 512 - 07 December, 1999 Financial Resolution No. 5: General (Resumed).

The core issue around the introduction of fiscal measures that benefit two-income married couples is not a question of economic priorities or the perceived 'modernisation' of the tax code; at heart this is a constitutional issue - a question about the limits to which a Government can go in interfering with the constitutionally protected rights of the family.

It might be thought that Article 41.2, versed as it is in such clear and unambiguous language, would protect a stay-at-home spouse from fiscal penalty:

> Article 41.2
>
> 1° In particular, the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
>
> 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home

However, it is far from certain that the provision could be invoked in that way. Casey points out that Article 41.2 is one of the Constitutions 'most controversial provisions'[17] and he considered as 'just' the finding of the Constitution Review Group that:

> 'Article 41.2 assigns to women a domestic role as wives and mothers. It is a dated provision much criticized in recent years. Notwithstanding its terms, it has not been of any particular assistance even to women working exclusively within the home.'[18]

It appears that the Article does impose some kind of obligation on the State. In *L v L*[19], the argument was made that a wife seeking a judicial separation was entitled to a 50 per cent share in the family property in circumstances where she had never worked outside of the home. The High Court upheld her claim but the Supreme Court rejected it, stating that 'it would be making a quantum leap in constitutional law to hold that by her life within the home, the mother acquired a beneficial interest in it'. When giving his judgment in that case, Finlay CJ, stated that the judiciary had no right to grant such an interest 'where that would be unrelated to the question of her being obliged by economic necessity to engage in labour to the neglect of her duties.'

Arguably, the current government policy is in fact related to such a question in that the current policy is one of active discrimination against the stay-at-home spouse. On that point, *L v L* could be distinguished. In any event, O'Flaherty J. in his judgment in that case stated that Article 41.2 requires the State to endeavour to ensure that mothers with children to rear or to be cared for are given economic aid by the State. He stated:

> 'If a mother in dire economic straits were to invoke this Article it would be no answer for the State to say that it did not have to make any effort in her regard at all, though it would be open for it to say that it was doing its best having regard to the State's overall budgetary situation.'[20]

In the same case, Egan J stated that whilst sub-s 1 of Article 41.2 does not impose a positive obligation, it does voice a 'recognition' which, in his opinion, is a prelude to explain 'the positive obligation in sub-s 2'.[21]

In *DT v CT*,[22] Murray J. stated that the work of a spouse in the home cannot be a basis for discriminating against her by reason only of the fact that the husband was the major earner or the breadwinner during the course of the marriage. The learned judge continued that:

> '[Article 41.2.1°] does, however, expressly recognise that work in the home by a parent is indispensable to the welfare of the State by virtue of the fact that it promotes the welfare of the family as a fundamental unit in society.'[23]

As regards matters of taxation, the Supreme Court has stated that when considering the constitutionality of taxation law, the court is solely concerned with the question whether the fiscal provisions adversely affect constitutional rights. In *Madigan v. The Attorney General*[24], O'Higgins C.J. in the course of giving the decision of the Supreme Court stated that:

> 'On such examination as to constitutionality of a taxation law, the court does not enter into the area of taxation policy, nor concern itself with the effectiveness of the choices made by the Government and the Oireacthas; all such matters relating to this object and rage of taxation are matters of national policy which cannot, as such, be considered by the courts. The courts' concern relates solely to the question whether what has been done affects, adversely, constitutional rights, obligations or guarantees.'[25]

However in *MacMathuna v. Attorney General*[26] the Supreme Court stated clearly that the courts could not adjudicate on the fairness of the manner in which the state administer public resources, Finlay C.J. stating: '..these are peculiarly matters within the field of national policy, to be decided by a combination of the executive and the legislature, that cannot be adjudicated upon by the courts.'[27] In *Brennan v. Attorney General*[28], the Supreme Court indicated that there had to be reasonable uniformity in the administration of taxation. The case concerned a taxation provision which constituted an attack on the property rights of the applicant.

The most significant decision for present purposes was the decision in *Murphy v. Attorney General.*[29] In *Murphy,* the plaintiffs successfully argued before Hamilton J. in the High Court that ss. 192, 193 and 197 of the Income Tax Act 1967, as amended, were invalid. In effect, the provisions provided for a joint tax-free personal allowance to a married couple smaller that that which was provided in respect of an identical combined income enjoyed by two single persons living together.

17 Casey, *Constitutional Law in Ireland* (3rd Ed.) at p. 625.
18 Stationary Office Dublin 1996.
19 [1992] 2 IR 77.
20 At p. 112.
21 At p. 115.
22 [2002] 3 I.R. 334.
23 At p. 407.
24 [1986] ILRM 136
25 At p. 159.
26 [1995] IR 484.
27 At p. 499.
28 [1984] ILRM 355.
29 [1982] IR 241.

On appeal, the Supreme Court struck down ss.192-197 as unconstitutional on the ground that those provisions provided for the aggregation of the earned incomes of married couples and in that way normally imposed tax at a higher rate. (It was estimated that for the tax year 1977-78, the plaintiffs would have to pay approximately £2,000 in income tax. Unmarried couples living together would pay approximately £1,700).

Hamilton J. in the High Court had found that the effect of s. 192 of the 1967 Act are 'contrary to the principles underlying the remainder of the Act, *viz*., the principle of individual taxation on an individual's income.'[30] Following the *Murphy* decision, the Minister for Finance of the day, Mr. George Colley, granted to all married couples double the personal allowance of a single person, whether or not both husband and wife were in paid employment. It appears that Minister McCreevy reinterpreted Colley's interpretation of *Murphy* when McCreevy moved towards individualisation of the tax code on 1 December 1999. It is likely that it was Hamilton J's reference to 'the principle of individual taxation' which gave McCreevy the legal impetus to make such a bold move.

That Article 41.2 creates positive rights and that those rights have been adversely affected by the fiscal regime introduced by the Government constitutes one argument for its unconstitutionality. There is another argument; based on the constitutions' equality provision at Article 40.1. In the High Court decision in *Murphy*, Hamilton J. upheld the plaintiffs' contention that the provisions of the Income Tax Act were unconstitutional on the basis that the provisions at issue constituted a violation of that equality guarantee. He considered that the provisions 'discriminated invidiously against married couples and the husband in particular, and cannot be justified on any ground'.[31]

The Supreme Court overturned that finding; Kenny J. giving the judgment of the court stated that Article 40.1 is not a guarantee of equality before the law in all matters or in all circumstances. He said it was a 'qualified guarantee to all citizens as human beings that they will be held equal before the law.' The second paragraph of Article 40.1 is 'a recognition that inequality may be recognized and provided for, but only if it flows from or is related to a difference of capacity, physical or moral, or a difference of social function.'[32] He found that whilst there was 'inequality' between, on the one hand, married couples living together, and, on the other hand, married couples who are separated or unmarried couples living together, that that inequality 'is justified by the particular social function under the Constitution of married couples living together.'

It should be pointed out that the facts of *Murphy* and the issue of the fiscal provisions that apply today to one-income married couples are distinguishable. *Murphy* concerned inequality between married couples on the one hand and separated or unmarried couples on the other. The present scenario concerns an argument of inequality between one-income married couples on the one hand and two-income married couples on the other. The 'particular social function' in this case is arguably identical.

However, that would not be the end of the matter, for Kenny J. had expressly stated that 'an inequality will not be set aside as being repugnant to the constitution if any state of facts exists which may reasonably justify it.' In that way, the government, if faced with a constitutional challenge to the relevant provisions in the Finance Acts as they apply to one-income married couples, would need to locate any state of facts which could justify that inequality. Arguably, the government argument here would be a mixture of the State's obligations under the Lisbon Agenda and the most cost effective way of taking a large percentage of tax-payers off the higher rate of taxation. Whether those arguments would stand up to scrutiny is debatable; though as the Bar is well aware, arguments under Article 40.1 are rarely successful in the Supreme Court.

Considering all of these matters, whether the Courts would be prepared to accept that the fiscal provisions as they apply to one-income married couples are unconstitutional, is a matter of interpretation. Quite arguably, the courts would vindicate the rights of those affected on the grounds that Article 41.2 does impose positive obligations on the State to protect women within the home, (or men in the home as the case might be),[33] as Egan J. has stated in *L v L,* and that the fiscal provisions patently counteract that positive right. Certainly it is interesting to note the view of Murray J., now the Chief Justice, that 'work in the home by a parent is indispensable to the welfare of the State'. The other principle argument, that which flows from Article 40.1, would necessitate the State locating a set of facts which reasonably justifies the patent inequality between one-income married couples and two-income married couples.

European Convention on Human Rights and Fundamental Freedoms

As regards the compatibility of the taxation of married persons in Ireland with the *European Convention on Human Rights and Fundamental Freedoms* ('The Convention'), it appears there are three relevant articles in that Convention: Article 8, Article 14, and Article 1 of Protocol No. 1.

There have been cases before the European Court of Human Rights (ECtHR) where differences in treatment between married and unmarried persons have been justified. In *Marckx v. Belgium*[34], it was ruled that a State may foster marriage by granting benefits to married couples which it denies to single cohabitants. In *Lindsay v. United Kingdom*,[35] married and unmarried couples who were taxed differently were not found to be in a comparable position and in *McMichael v. The United Kingdom*[36], legislation which did not grant automatic parental responsibility to unmarried fathers was justified on the basis that marital status constituted an objective and reasonable justification. However, individualisation raises a different issue entirely: whether one married person can be treated differently to another married person; and that argument appears entirely novel.

30 At p. 274.
31 At 274.
32 At p. 283.
33 The All-Party Committee report stated the courts showed signs of applying a gender-neutral application to Article 41.2.
34 A 31 (1979).
35 *Lindsay v. United Kingdom* (1987) 9 EHRR CD555.
36 judgment of 24 February 1995, Series A no. 307-B, § 98

In *PM v. United Kingdom*[37], the applicant, an unmarried father, could not qualify for tax deductions for maintenance payments made to his child in the UK. The applicant claimed a breach of Article 14 of the Convention in conjunction with Article 1 of Protocol 1, arguing that the UK could not provide any justification or explanation why the Qualifying Maintenance Payment Allowance in that jurisdiction (QMPA) was not provided in a non-discriminatory fashion. He also argued that the United Kingdom had not explained why the fact of marriage provided a justification for treating child maintenance payments differently. Interestingly, when the Strasbourg court considered the argument under Article 14 the court considered that the unmarried father should be considered in a relevantly similar position to a separated married father for the purpose of the Article. The court considered that it was the distinction between a separated married father and a separated unmarried father which the United Kingdom had to justify and not any general distinction between a married father and an unmarried father. The court concluded that:

> 'Given that he has financial obligations towards his daughter, which he has duly fulfilled, the Court perceives no reason for treating him differently from a married father, now divorced and separated from the mother, as regards the tax deductibility of those payments. The purpose of the tax deductions was purportedly to render it easier for married fathers to support a new family; it is not readily apparent why unmarried fathers, who undertook similar new relationships, would not have similar financial commitments equally requiring relief.'

Insofar as the United Kingdom sought to justify the tax relief on the grounds that it made it easier for a married father to support a new family, the UK government was unsuccessful. *PM* shows that the ECtHR is prepared to look beyond marital status in order to rule on whether there has been a violation of Article 14. In other words, the ECtHR when faced with a State justification on the grounds of marital status is prepared, in certain circumstances, to push the issue of marital status to one side and consider whether there is another justification.

Following that approach, the Irish Government, in theory, could justify the difference in the tax bands between two-income married couples and one-income married couples on the grounds that there is some other justification, aside from marriage, which justifies why a one-income married couple pays more income tax on the bands than a two-income married couple. On the other hand, as regards the application of the Employee Tax Credit, it is fairly clear that the ECtHR will require an explanation for the different treatment irrespective of the fact that the Employee Tax Credit is applied regardless of marital status. In that sense, it would be interesting to see how the Irish Government would argue the compatibility of these fiscal provisions with the Convention. The fact that one-income married couples are treated differently to two-income married couples within the Irish fiscal system is sure to raise eyebrows in Strasbourg.

When the Irish Government moved towards the individualisation of the tax code in 1999, the Minister for Finance contended that the change would encourage more married women to participate in the workforce[38]. This may well have been in line with the State's commitments under the Lisbon Agenda. However, it is submitted that this constitutes a clear *prima facie* violation of Article 8 of the Convention. The Irish Government could in turn seek to justify that violation under Article 8(2) but in order to do so would have to show, *inter alia*, that there was both a 'pressing social need' for the interference *and* that the means employed are proportionate to the legitimate aim(s) pursued by the State.

In that way, the Irish Government would have to show that the purpose of individualisation was itself a legitimate aim and that the means employed (a series of tax penalties) was proportionate to that aim, *and* that there was a pressing social need to encourage stay-at-home parents out of their homes. In that regard, two factors are in the State's favour. Firstly, that a Contracting State to the Convention enjoys a wide margin of appreciation in the area of taxation.[39] That position was reaffirmed in the 2006 decision in *Stere and Others v Romania*[40] though in that case, the ECtHR found against the State and ruled that a violation had occurred where income tax had been wrongfully deducted.

The second factor is that the list of legitimate aims in Article 8(2) permits interference 'in the interests…of the economic well-being of the country.'[41] In that way, the Irish Government could argue, *inter alia*, that the State needs more workers in order to fasten the growth in the Irish economy or that it has commitments to the EU to increase employment rates arising from the Lisbon Agenda.

If the Irish Government sought to justify its fiscal provisions on the grounds of its Lisbon Agenda commitments, the door would be open for the ECtHR to examine whether the means of implementing those EU commitments are compatible with the Convention or even, conceivably, whether the EU commitments themselves are compatible with the Convention.

On the negative side for the Government, the fact that the tax incentive for two-income married couples is so high increases the difficulty for the State in demonstrating that the means employed are proportionate to the aim. Even if the figure was significantly smaller, the State may not avoid a violation, for in *PM,* the figure at issue was accepted as being quite small though it constituted a significant amount of the applicant's weekly income. In *Logan v. UK*[42]*,* a taxation burden that the applicant argued was so high as to interfere with family life was carefully scrutinised though no violation was found in that case.

37 Application no. 6638/03, 19 July 2005

38 See the 10th Progress Report of the All-Party Oireachtas Committee on the Constitution 'The Family'(2006) at p. 42.

39 *Gasus Dosier-und Fördertechnik GmbH*

40 Application no. 25632/02.

41 See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* 1995 (Dublin)

42 App. No. 24875/94; (1996) 22 EHRR CD 178.

Conclusion

The government policy of individualisation, introduced for whatever reason, has proven one of the most controversial economic policies of recent years; almost certainly the most controversial policy of the current administration. The reasons for the introduction of the measure are removed from the effect of the measure in practice; and there is little doubt that in its application, the policy of individualisation (whether through stealth or otherwise) adversely affects one-income married couples and leaves them in a worse position than either single-income earners or married two-income couples. Nor are the figures insignificant: in the tax year 2007 alone, the differential between the income tax paid by married one-income couples and married two-income couples earning the same gross amount will reach several thousand Euro.

Whether the reason for the implementation of the policy back in December 1999 was directly related to the proposed Lisbon Agenda signed in March 2000 is unclear. The source of the policy of individualisation is unknown, as Deputy Michael Noonan put it aptly in the Dail: 'I do not know where it came from – it seems to have come out of a clear blue sky – but it was certainly a very bad idea.'[43]

A regards the legality of the policy, there are serious question marks over whether the policy is compatible with the European Convention and whether it is constitutional. For the sake of balance it should be noted that both the Strasbourg court and our own Supreme Court have been reluctant to interfere in matters of taxation; though both courts *have* interfered on various occasions in the past. Certainly the argument from the Convention is more straightforward: the government's rationale for introducing the policy is incompatible with Article 8 and would have to be justified.

As regards the constitutional argument; the greatest difficulty in a constitutional action against the State would be showing legislative intent: that the State intended to encourage married women out of their homes. The courts are not prepared to consider Dáil Debates when considering legislative intent (a state of affairs that is scarcely credible) and conceivably a constitutional challenge would founder over this very obstacle. However, the fact that the Supreme Court has hinted at the existence of a positive right contained in Article 41.2 and the fact that the policy clearly penalises a family who choose to leave one spouse at home should weigh on the Governments' collective minds. Certainly, the legality of this policy is far from certain ●

43 Dáil Éireann - Volume 512 - 08 December, 1999 Financial Resolution No. 5: General (Resumed).

The Hon. Mr. Justice O'Donovan

By

The Hon. Mr. Justice Geoghegan

It is approximately forty years since I drove home from Roscommon to Dublin, Diarmuid O'Donovan's car with his first wife Ann in the passenger seat. Diarmuid had encountered a minor heart problem while playing golf after court on circuit. We had left him behind in the County Hospital. That same heart finally, but prematurely, brought Diarmuid's life to a close after feeling unwell while watching with his wife Sara "the Munster match" on television a few weeks ago. Within that period, however, he lived life to the full. Diarmuid knew how to work and knew how to play, but playing never interfered with his work. Much has been said in recent days and weeks of his gregarious character, his ability to enjoy life to the full, while at the same time having a deep and conscientious sense of purpose and dedication to his work.

It is on this last element of his character that I would particularly like to concentrate. I had the experience and pleasure of being a barrister with him on the Midland Circuit. As other contemporary colleagues at the time such as Kevin Lynch, Garrett Cooney, Harry Whelehan and James Nugent would testify, Diarmuid's capacity for, and dedication to, his work at the Bar was quite astonishing. He was a fine advocate and every case was attended to with the utmost meticulousness, right down to the most minor item of special damage. He was beloved and trusted by his instructing solicitors and clients. He was utterly fearless and gave what was usually impeccable advice to the client as to whether to fight or settle. In his later years as a senior counsel, he concentrated almost exclusively on his extensive personal injury practice but as a junior he was the classic circuiteer who was willing to take on everything he was given. This did not exclude even conveyancing. I distinctly recall that he successfully sorted out a most troublesome title and drafted the conveyance relating to the purchase of a well known hotel in the Midlands.

Rather unusually for the time, he was prosecutor for three different counties and a highly competent and fair one at that.

When in July 1996, Diarmuid O'Donovan was appointed a High Court judge, he applied the same seriousness and conscientiousness to that task and brought to bear his wide knowledge of the law. Throughout his time on the bench, Diarmuid O'Donovan suffered from a chronic immune disease in addition to spasmodic heart problems but continually overcame them so that if at all possible, he would not miss a day in court. Whether as barrister, judge or as a human being, everybody liked him and he was particularly kind to staff who worked with him.

Outside of the law altogether, he had a wide circle of friends. He was a former captain of the Grange Golf Club and was about to be elected President when he died. He had great loyalty to his old school, St. Mary's College, Rathmines, and to the Rugby Club of the same name.

He was a person of quiet religious faith firmly rooted in his school days.

After a short period as a widower, he married Sara Moorhead now a Senior Counsel. He and Sara married in Rome some three and a half years ago. The wedding was a great occasion for all of us who attended it. Those last years brought Diarmuid untold happiness with Sara introducing him to new areas of interest.

Mr Justice Diarmuid O'Donovan was born on the 4th August 1937 and died on the 20th January 2007. He was the eldest child of Donough and Florence O'Donovan. His father was for many years the Chief State Solicitor.

Diarmuid was called to the outer bar in 1959 and the inner bar in 1974. Shortly after his call to the bar in 1959, he joined the Midland Circuit at the suggestion of his life long friend Peter Nugent (now Dom Andrew Nugent O.S.B., Prior of Glenstal Abbey) who had then started practice on that circuit. It was fitting that Dom Andrew was the principal celebrant at the funeral mass.

In addition to his wife Sara, Diarmuid is survived by three sons by his first marriage to Ann McMahon, Derry, a Senior Counsel, Donough and David, both medical consultants.

No obituary of Diarmuid O'Donovan would be complete without mention of his long association with the Bar Golfing Society of which he was in his time Captain and President respectively. When in the last two years or so, ill health prevented him from playing golf, he still kept the score cards as he had traditionally done. If there had been a score card for popularity amongst bar and bench, Mr Justice Diarmuid O'Donovan would have ranked high among the prize winners.

QUINN-life

- Low Charges 1% - 1.5%
- Total Return Equity Funds
- No Entry or Exit Fees
- No Bid/Offer Spread

Personal Pensions
Company & Executive Pensions
ARFs & AMRFs
PITC Provider
Lump Sum Investment
Regular Savings Plans
Child Savings Plans

1850 77 1851

www.quinn-life.com

Warning: The value of your investment may go down as well as up

QUINN-*life* direct Limited is regulated by the Financial Regulator. Terms & Conditions Apply

EBS Ad
Repeat