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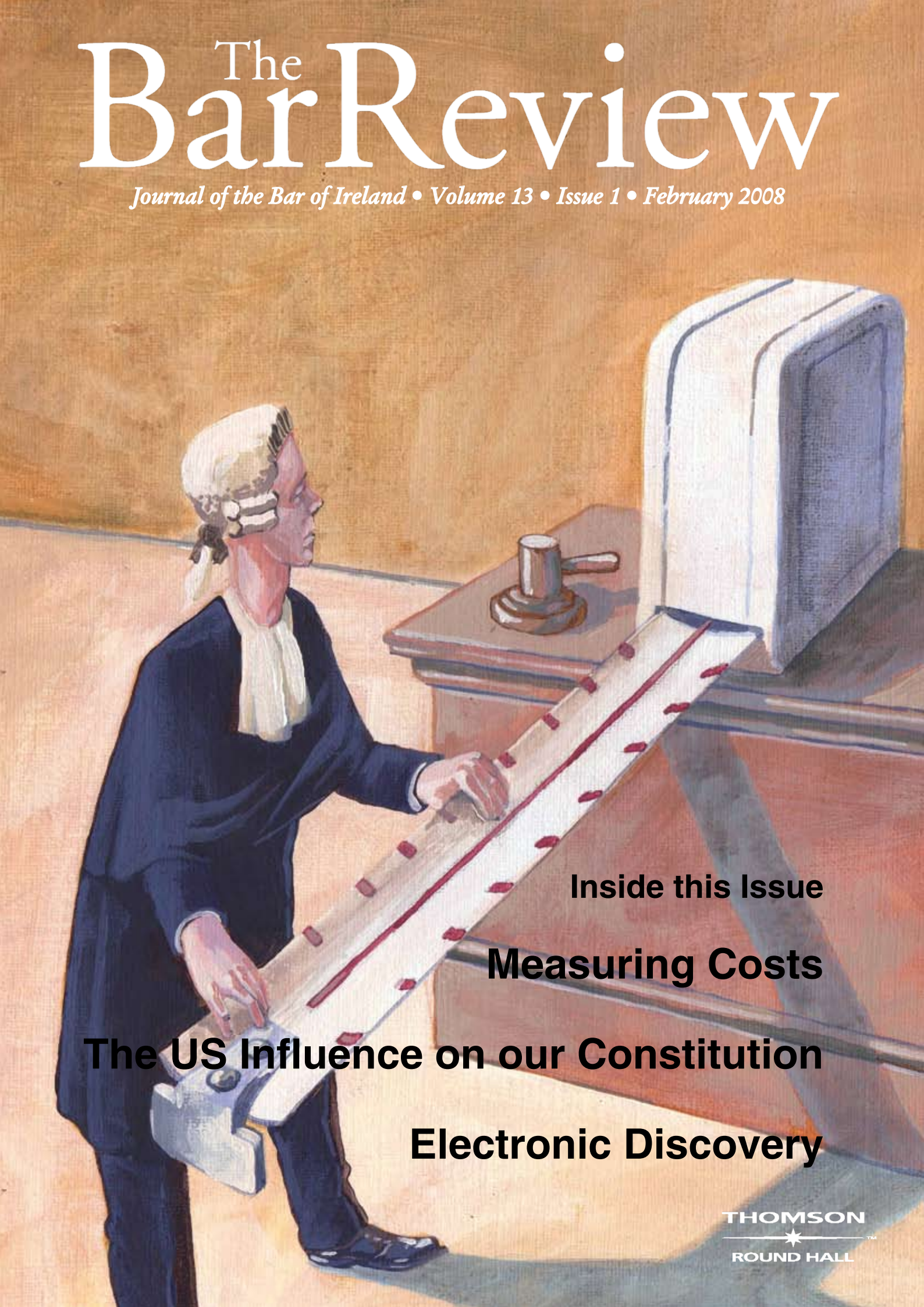

Inside this Issue

Measuring Costs

The US Influence on our Constitution

Electronic Discovery

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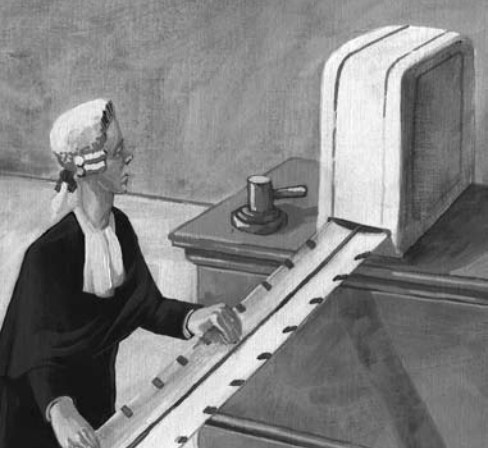

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Contents

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James Joyce, Boss Croker, Oliver Wendell Holmes and the Influence of America on Irish Constitutional Law

Donal O'Donnell SC

This paper was first delivered to a meeting of the American Bar Association International section in the Kings Inns, Dublin on 2nd October, 1997.

Introduction

In his fascinating study on judicial reputation Judge Richard Posner observed that legal reputations are surprisingly short-term.[1] Current and recent cases are much more readily cited than earlier decisions by even well regarded judges. When I began to study Constitutional Law, it was the orthodoxy that Irish Constitutional Law was heavily influenced by the development of the United States Constitution. It did not occur to me or to anyone else to question this or to seek its source. It had been repeated so often in the previous ten to fifteen years that it was accepted as a given.

Nor was it surprising that this was so. Ireland was the first common law country after the United States to have a full bodied Constitution protecting fundamental rights and permitting judicial review. There have always been close ties between Ireland and the United States. It seemed perfectly natural that US Constitutional law would be an obvious port of call when the new Irish state came to draft a Constitution. In fact, it turns out that this orthodox view is in relative terms quite recent, and that the story is more complicated and at least to me, more interesting than that.

Legal Links Between Ireland and the U.S.

That there were always close links between the United States and Ireland in legal issues is undoubtedly correct. There are any number of instances. I remember, as a young boy my father pointing out a small and unprepossessing shop in the town of Strabane, and telling me that the printer of the US Declaration of Independence had lived there. Later I discovered that John Dunlap had indeed left home at the age of ten and emigrated to Pennsylvania, and not only was the first printer of the Declaration of Independence but also produced the first printing of the US Constitution.[2] A second example is on view in the Kings Inns. I refer to the magnificent Sir John Lavery painting of the trial of Sir Roger Casement. In this painting, on one side of the court can be seen the Defendant's team which included, although not sitting in the lawyers' benches, an American lawyer Michael F. Doyle from Philadelphia, who was assisting the defence. *The New York Times* for June 1916 carried an extensive and sympathetic account of the trial.[3] On 27 June, 1916, it described Mr. Doyle as acting in the case but being "the only lawyer not wearing a gown and wig" – a fact faithfully recorded in the Lavery painting.

Doyle has another connection with Irish Constitutional Law. He was, apparently, responsible for saving the life of Eamon de Valera in 1916 by establishing that de Valera was a U.S. citizen and the British were persuaded that de Valera, a leader of the Rising, should not be executed for fear of inflaming U.S. opinion. As you may know, among his many other achievements, Eamon de Valera went on to be the principal drafter of the Irish Constitution of 1937.[4]

On the other side of the court in Lavery's painting can be seen the imposing and impressive features of F.E. Smith QC and the then Attorney General and later Lord Birkenhead who in due course negotiated the Anglo Irish Treaty. The night before the trial he invited his prosecution team to dinner in his house and after offered to read his opening speech. They listened respectfully (they probably had no choice) but eventually suggested that while the speech was undoubtedly impressive, it did seem to touch on matters which might not be capable of being proved in evidence. He replied that it was too late to change: the speech had already been telegraphed to New York for publication in that day's newspapers[5].

Another instance from early 20th Century was when the young James Joyce was seeking a publisher for *Ulysses,* he turned to an Irish American lawyer, John Quinn, who had promoted the famous Armory show which introduced Impressionist painting to the American public, and who agreed to have the book published in the United States. That in turn, provoked some work for lawyers since the book was

1 Richard A. Posner, *Cardozo: A Study In Judicial Reputation* (University of Chicago Press, 1990).

2 See Cohen: "Irish Influences on Early-American Law": Books (2001) XXXVI *Irish Jurist* 199.

3 Special Cable to *New York Times,* "Casement On Trial For High Treason", http://query.nytimes.com/gst/abstract.html?res=9A06E5D6113FE233A25754C2A9609C946796D6CF.

4 When Doyle returned to the US, he reported to President Wilson's Secretary Joesph Tumulty. Doyle also explained that he had discovered Casement could demand a firing squad instead of a hanging. Tumulty who was a lawyer as well as a politician replied, "And did you charge him a fee for that Michael?" *Time Magazine*, April 15, 1940, http://www.time.com/time/magazine/article/0,9171,789720-2,00.html.

5 Travers Humphreys, *Criminal Days: Recollections and Reflections of Travers Humphreys* (Hodder and Stoughton Limited, 1946).

initially banned after an obscenity trial in 1920. It was not until 1933 and Judge Woolsey's famous decision that it was lawful to sell Ulysses in the US.

Inspiration from the U.S. Constitution

It does seem absolutely natural therefore that when the new Irish Free State approached the task of drafting a new Constitution, that it would turn away from the British experience and seek inspiration from the obvious source of the United States Constitution. Thus, Akenson and Fallin who wrote the first study of the drafting of the Free State Constitution,[6] could state:

> The most familiar written Constitution was that of the United States of America. The Committee possessed an American lawyer, C.J. France, a guarantee that the American structure would be understood. Further Kevin O'Shiel had written a book on the framing of the American Constitution.

This statement seems to me to be a useful starting point. The Committee not only contained Mr. France and Mr. O'Shiel with their expertise but also a businessman, James Douglas, with close ties to the U.S. and a number of practising lawyers namely John O'Byrne (later Attorney General and judge of the Supreme Court), James Murnaghan (then Professor of Roman Law and Jurisprudence in University College Dublin and later a judge in the High Court and Supreme Court) and perhaps the most interesting member, Hugh Kennedy K.C., then the legal advisor to the Provisional Government.[7]

However, the American influence is by no means so simple as this might suggest. In the first place, Kevin O'Shiel did write a book entitled *The Making of a Republic* but the subject was not the framing of the US Constitution, but the United States War of Independence. In fact, there is no evidence that he had any interest in US Constitutional Law. At the time he was actively involved in the Boundary Commission and took little part in the deliberations of the Drafting Committee and in the end signed none of the drafts. The case of Clement J. France , a lawyer from Seattle, is even more interesting.[8] He had been involved in the White Cross, an organization which sought to provide relief to victims of the War of Independence in Ireland between 1919 and 1921. At the suggestion of one influential member of the Committee, James Douglas, a Quaker businessman who had also been on the White Cross Committee, Mr. France was added to the Committee and ultimately signed the draft of the Constitution along with Mr. Douglas and Hugh Kennedy which was accepted by the Government as the basis of the Constitution which was ultimately ratified. But there is no evidence that C.J. France was particularly familiar with or indeed enamoured of the United States Constitution or had any significant input into the drafting of the Free State Constitution.

Hugh Kennedy and the Constitution

In 1928 as it happens, Hugh Kennedy, by then the Chief Justice of the Irish Free State, addressed the semi-centennial meeting of the American Bar Association in Seattle on the "*Character and Sources of the Constitution of the Irish Free State*".[9] Hugh Kennedy is an interesting figure in Irish history. He was the first advisor to the Irish Free State government, and the first Attorney General and then the first Chief Justice of the Irish Free State. He also had a very distinctive and vigorous understanding of what the new Constitution might entail and was later to express his disappointment at the manner in which it had been treated by politicians. He also has another claim to fame. He was a direct contemporary at the University College Dublin of James Joyce who, as we have seen, had his own connections with American law. When in due course Kennedy became the auditor of the L & H debating society in U.C.D, the candidate who he defeated was James Joyce and as editor of a student magazine, he vetoed the publication of a piece by Joyce. Whatever his other merits, Joyce did not believe in being a good loser. Ellman describes Kennedy as Joyce's "*bete noir*" and Hugh Kennedy lives on in literary history as the inspiration for the name of the villain of Ulysses, 'Blazes' Boylan[10]. It was perhaps understandable in 1928 that the Chief Justice did not think it particularly politic to refer to the works of the then banned and obscene James Joyce when addressing the ABA.

Instead, he addressed the ABA in words, which you at least might think are equally applicable today[11]:

> There can hardly be a more overwhelming honour to fall to the lot of a humble practitioner of the law in any part of the world than to be presented to and invited to address a convention of the greatest organized body of lawyers that exists or indeed (I think I may safely say) has ever existed; and exists not merely for the promotion of selfish or personal interest or the vulgar getting of money, but for the advancement of study and research in all the fields of legal learning, for the improvement of the law and legislation and administration, and for the enhancement and dignity of our great profession and the public services which it renders.

6 "The Irish Civil War and the Drafting of the Free State Constitution" (1970) *Eire, Ireland* 10.

7 Harkness, *The Restless Dominion* (MacMillan, 1969) at p. 23 states that the "Constitution bore the imprint of Hugh Kennedy who was determined to exclude British impositions." C.P. Curran, *Under the Receding Wave* (Gill and MacMillan, 1970) described Kennedy as immersed in the Federalist papers and extremely familiar with the US and Swiss Constitutions.

8 He is identified as a member of the Committee in all the standard historical works: O'Sullivan, *The Irish Free State and its Senate* (Faber and Faber, 1940); McCracken, *Representative Government in Ireland* (Oxford University Press, 1958), Harkness, *The Restless Dominion* (Macmillan, 1969) and Mansergh, *The Irish Free State and its Government* (G. Allen and Unwin, 1934) but no further information is provided about him in any of these texts.

9 Hugh Kennedy, "Character and Sources of the Constitution of the Irish Free State", (1928) 14 *ABA J* 437.

10 'Blazes' Boylan's full name was Hugh Boylan and Kennedy's full name was Hugh Boyle Kennedy. The picture of the shallow, crude and promiscuous Boylan would have been particularly offensive to Kennedy.

11 Ibid., at p. 437.

When you read Chief Justice Kennedy's paper and appreciate its classic and ornate style, it is possible to get some sense of the shock that the modernity of a work such as *Ulysses* must have caused. Nevertheless Kennedy's closing passage is still inspirational: He described the then fledging Constitution as "a Constitution whose democratic character is manifest if Gettysburg still speaks." He continued:

> This boast at least may we make without fear of challenge, that under the institutions as we have made them, there is no reason for ascendancy of class or religion, and the upgrowing youth of our state will compete, with equality of opportunity in a free country to whose service they are now called to give of their best in conditions which realize what seemed the wild dreams of their fathers, conditions which end a feud of centuries and open up the economic and other possibilities which should flow from the reconcilement of historic enmity[12].

Looked at today, you might expect that when addressing American lawyers in Mr. France's hometown about the source of the drafting of the Free State Constitution, that one of its principal architects would have acknowledged the significant influence of the one American lawyer who had participated in the Committee's work and after all, had been one of the three signatories, along with Kennedy himself, of the most influential draft. But although Chief Justice Kennedy went on to give a detailed description of the members of the Committee[13], he made no reference at all to CJ France.

The reason for this omission may not be too difficult to find. Although James Douglas had recommended the addition of France to the Committee, he engaged in considerable correspondence with other influential Americans who started to warn him against Mr. France. One of them, a John D. Ryan wrote: [14]

> We have no knowledge of course of what Mr. Frances ideas or sentiments regarding the Constitutional provisions are. He may reflect our sentiments and he may correctly reflect predominant American sentiment, but we do not know and therefore our concern can be readily understood, especially as his brother came out of Russia recently with ideas and opinions regarding the establishment of a government there which shocked and astounded the great majority of thinking Americans.

Subsequently, Mr. Douglas came to view France as a pure adventurer and in the end Hugh Kennedy appears to have concluded that CJ France was a topic, like James Joyce, to be avoided.

James Douglas and the U.S.

There is one other interesting point of contact with the US. Mr Douglas, who was an influential member of the Committee, had travelled extensively in the United States in his dealings with the White Cross in 1920. He was undoubtedly an entirely admirable man although perhaps not the most lively of companions. He was brought to the Wills/Firpo Heavyweight Title Fight and to the Ziegfeld Follies to see Will Rogers. He was also informed that it had been arranged that the head waiter in Shanleys restaurant during that era of Prohibition would provide him with any alcohol he might require. The head waiter told him he did not want any payment and would do anything to help the Irish cause. Mr. Douglas was, unfortunately, a teetotaller and accordingly was not able to take his place at the bar of Shanleys in the fight for Irish freedom.

Mr. Douglas also had dinner with an Irish-American lawyer, Judge Morgan O'Brien who invited him to dinner along with Boss Croker who, as you may know, had been the leader of Tammany Hall.[15] After a lifetime of service to the people of New York in a humble capacity in local government, Boss Croker was able to retire in 1907 to Ireland and bought a stately home in Foxrock with large and extensive land holding known as the 'The Boss's Acres', upon which he trained race horses, one of which famously won the Derby in 1907.[16] Boss Croker lived in scandalous circumstances with his housekeeper, and when she died, he replaced her with a Native American Indian Princess. This larger than life character undoubtedly made an impression on a young neighbour, Samuel Beckett.[17] He did not however, make a particularly favourable impression on Mr. Douglas. He records in his memoirs:

> After dinner, Judge O'Brien took Croker and me around the apartment and told us where he had bought and the price he had paid for the furniture, carpets, ornaments and pictures. Mrs. O'Brien and Mrs. Croker discussed clothes and talked about the sales in certain New York shops. It was my first experience with millionaires and although it was an interesting experience, I cannot say that I enjoyed it.[18]

It does not appear that there was time between the clothes shops and money talk to discuss the Constitution.

12 Ibid., at p. 445.
13 Ibid at p. 442.
14 See: Brian Farrell, "The Drafting of the Irish Free State Constitution" (1970) Vol. V *Irish Jurist* 114, 351,352.
15 Boss Croker resigned after failing to deliver New York City for the Democratic candidate in the 1900 Presidential election. That candidate was William Jennings Bryan In another coincidence Michael Francis Doyle had acted as a secretary to Bryan.
16 The story of this triumph is irresistible. The English press were confident that no Irish trained horse could win. The turf in Ireland was not good enough, the racing poor and no Irish trainerwould dare enter a horse in the greatest race in the world. The response of the Irish people was predictable. Everybody backed Orby. Its odds tumbled from 100/1 to 100/9 and when in due course it won there were bonfires lit in Dublin and the bemused horse was triumphantly paraded throughout the streets of Dublin where one over excited observer shouted "*Thank God, at last a Catholic horse has won the Derby*."
17 See Eoin O'Brien, *The Beckett County* (Arcade Publishing, 1993) and Anthony Cronin, *Beckett: The Last Modernist* (DeCapo, 1999).
18 J. Anthony Gaughan, *Memoirs of Senator James Douglas: Concerned Citizen* (University College Dublin Press 1999).

U.S. Influence Not Direct

It appears, therefore, that the US influence on the Irish Free State Constitution was not by any means as direct and simple as that suggested by Akenson and Fallin. While contact with America was pervasive, and as Chief Justice Kennedy said, the United States was "*our greatest friend among the nations*", and while it appears that Irish lawyers were aware of the developments in the United States, there was no direct and ready reference to either the American Constitution, or American Constitutional law cases, in the development of Irish law in the early part of the 20th Century. On reflection, this is perhaps not surprising. While the US Constitution and US Constitutional Law, is for most of us the gold standard for Constitutional Law, the federal system established by the US Constitution was not particularly relevant to Ireland and in the area of personal rights, the Lochner era which was then dominant in the United States would not have been particularly congenial to even the relatively conservative lawyers who then practised in the Irish courts. If anything, the dissents of Holmes and Brandeis which argued for judicial restraint would probably have appeared more persuasive to the Irish lawyers' eyes.

In due course, the 1937 Constitution, principally authored by Eamon de Valera, built upon the foundations of the 1922 Constitution and expanded the fundamental rights provision, and retained Judicial Review. There is clear evidence that the drafters were aware of the developments in America and the risks inherent in the power of Judicial Review, but they appear to have considered that there was little risk of a conservative Lochner type line of authority in Ireland. What they could not have anticipated, was that the US Supreme Court, staffed with new Roosevelt appointees. would embark upon an extremely activist liberal phase, and that that would in turn influence the Irish courts.

Early Irish Constitutional law

For the first 50 years of the Irish State there was relatively little innovative Constitutional litigation. One landmark was *NUR v. Sullivan*[19] which was, I think, the first case in which the Supreme Court struck down a piece of legislation on the grounds that it infringed the Constitutional rights of the citizen. It is an interesting case in many respects, not least because the leading judgement in the Supreme Court was given by Mr. Justice Murnaghan who was one of the drafters of the 1922 Constitution. It is also interesting because it demonstrates one of the main influences of Constitutional litigation, which might be called the principle of necessity, the need for counsel to find some argument to present on behalf of their client. All counsel made extensive reference to the US law. This in one sense was curious since the fundamental issue in *NUR v. Sullivan* was the right of freedom of association, something that was expressly provided for under the Irish Constitution, and is not expressly provided for in the US Constitution.

The case is also notable because the case in the High Court was argued on behalf of the Attorney General by Cearbhall O'Dalaigh, soon himself to become Attorney General and later to become an influential Chief Justice. But what is most startling to modern eyes with any familiarity with any US Constitutional developments is that among the cases that were cited were two notorious cases in the line of authority which had then been over ruled by the United States Supreme Court, namely *Lochner v. New York* [20] and *Adkin v. Children's Hospital* [21]. Nevertheless, *NUR v. Sullivan* is highly significant as a way station in the development of Irish Constitutional Law. It showed first, that the courts were willing to exercise the power to strike down legislation on the grounds that it would infringe the Constitutional rights of the citizen. Second, it shows the significance of the contribution of individual lawyers and third, it demonstrates that when a clear issue arose, the lawyers in the first place, and the courts thereafter had immediate recourse to US decisions, albeit on a somewhat ad hoc basis. This illustrates something which will be recognised of practitioners in any jurisdiction. Lawyers do not choose the cases that come to them or the side of the cases that they have to argue. Arguments have to be sought out and pressed into service. The process of research can bring them very far a field. By contrast, the principal Universities where law was taught in Ireland were almost entirely silent on the US developments. While Constitutional issues were being discussed in UCD, and that became a fertile seed bed for ideas that subsequently came to prominence, there is no indication that the teachers or the students looked for inspiration to the U.S.

Another early landmark case in Irish Constitutional law was *Buckley v The Attorney General*[22], the Sinn Fein funds case. Once again, although that was a case which essentially involved an interpretation and application of the Irish Constitution, there were references made by counsel, on both sides, to the correct approach to the interpretation of the Constitution by reference to the US cases. These were two of the most dramatic cases of the period and while in neither case, could the Supreme Court be said to have relied particularly on US precedent, it is nevertheless significant, that at those moments of judicial innovation, the citation of American authority is to be found. There were clearly stirrings in the undergrowth. Over the next fifteen years or so there was no dramatic decision or any increased reliance on American authority. But there is nevertheless a sense of subterranean activity which might, if the circumstances were right, explode.

State (Quinn) v. Ryan

The Irish Reports for year 1965 has a good claim to be the volume which encapsulates the emergence of a distinctively modern Irish Constitutional jurisprudence. It contains *Conroy v. Attorney General* [23], a decision on the right to trial by jury for minor offences; *McDonald v. Bord Na gCon*[24], a leading Constitutional case on fair procedures; *The People v. O'Brien*[25]

19 [1947] IR 77.

20 198 U.S. 45 (1905).
21 261 US 525 (1923).
22 [1950] IR 67.
23 [1965] IR 411.
24 [1965] IR 217.
25 [1965] IR 142.

dealing with the question of the admissibility of illegally obtained evidence and/or unconstitutionally obtained evidence; *Attorney General v. Ryans Car Hire*[26], the case which decides that the principle of *stare decisis* does not mean that the Supreme Court is bound by its previous decisions (or those of its predecessor) and the landmark decision *Ryan v. Attorney General*[27] which established that there are Constitutional protected rights that are not expressly enumerated in the text and was the impetus for the modern development of Irish Constitutional law. But for present purpose, the volume is significant because it contains the case of *State (Quinn) v. Ryan*[28].

The case of *State (Quinn) v. Ryan* must surely be ranked as one of the foremost example of cases where dicta are regularly and reverently repeated but the decision itself is rarely, if ever, applied.[29] It introduced a concept of a Constitutional contempt of Court[30] and announced that the Courts could fashion any remedy for breach of a Constitutional right. In the famous phrase, ÓDálaigh C.J. stated:

> "… it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts powers in this regard are as ample as the defence of the Constitution requires".

There is no doubting the passion and even the fury that is discernible from the judgements in the Supreme Court and there is no more passionate and furious statement than that contained in the judgement of Mr. Justice Walsh[31].

> I reject the submissions that because upon the foundation of the State our courts took over an English system and a common law that the courts must be deemed to have adopted and should now adopt an approach to Constitutional questions conditioned by English traditional methods and English training, which despite their undoubted excellence were not fashioned for interpreting within Constitutions or reviewed in the Constitutionality of legislation. *In this State, one would have expected that if the approach of any court of final appeal of another State were to be held up as an example for this court to follow, it would be more appropriately have been the Supreme Court of the United States rather than the House of Lords.* In this context, it is not out of place to recall that in delivering the judgment of the Supreme Court in *Re: Tilson*, Mr. Justice Murnaghan stated "It is not a proper method of construing a new Constitution of a modern State to make an approach in the light of legal survivals of an earlier law.[32]

This was certainly a rebuke to counsel in the case and as we have seen, was not particularly fair, since up until that point the Supreme Court was not exactly awash with the citation of American authority. Furthermore, it seems particularly unjust in this specific context, since the principal authorities relied on by the State (and which the court wished to disregard) were decisions of the Supreme Court itself, or at least its predecessors.[33] But in many ways the unfairness of the criticism is the best illustration of the depth of feeling in the court that a decisive move was being made away from British precedent and the common law analysis, and to consciously look to American authorities to support the arguments on either side of the case.[34]

The other curiosity of the decision in *State (Quinn) v. Ryan* is that the implication that the Irish courts regularly looked to the U.S. Supreme Court for authority, while not perhaps true at the time, became true, almost of its own force. Thereafter, all the landmark cases contained explicit references to lines of US authority. Perhaps the most significant is the important case of *McGee v. Attorney General* [35] where the Supreme Court held that the ban on importation of contraception infringed on the right of privacy or marital privacy. Clearly, the reasoning was closely patterned on *Poe v. Ullman*[36] and *Griswold v. Connecticut* [37]but the court did not explicitly endorse or rely on those decisions because, it seems, of a fear of being accused of embarking on a line of authority which had as its natural conclusion the then very recent and (even then) controversial decision in *Roe v.Wade*[38]. But the very fact that this close comparison could be made sparked a line of first, academic and subsequently public discussion which led to the referendum on abortion, the debate over which has raged in our society and in courts here and in Europe, for many of the subsequent years. But once *McGee* had been absorbed into the national consciousness, the public perception of the Irish courts as activist like their American counterparts, and furthermore relying heavily on U.S. decisions, was firmly established.

Conclusion

The story, therefore, is less simple and straightforward than might first appear, but to my mind, more individualistic and more interesting. It is not a story of an unbroken history of reliance on American authority, or of conscious decisions on the part of either the drafters of a Constitution or academic writers or indeed a collective decision of the judiciary. Instead, it reflects something that this meeting in particular should celebrate: the curious routes that can be taken by individual

26 [1965] IR 642.
27 [1965] IR 294.
28 [1965] IR 70.
29 See the comments of Hardiman J. in *Sinnott v. Minister for Education* [2001] 2 IR 545.
30 And is itself to date the only example of such a contempt.
31 Ibid., at p.126. Emphasis Added.
32 In the foreword to O'Reilly and Redmond, *Cases and Materials on the Irish Constitution* (Incorporated Law Society of Ireland, 1980) Walsh J. states of this passage from Tilson "*The voice is that of Mr. Justice James Murnaghan. The words were those of my late and very distinguished colleague Mr. Justice Lavery.*"
33 *The State (Downing) v. Kingston* (No.2) [1930] [1937] IR 699, and *The State (Duggan) v. Tapely* [1952] IR 62.
34 Nor was the charge as unfair as it might have appeared from a reading of only the Reports. Mr. Justice Barrington who argued many of the Constitutional cases over a period of the early 60s until the late 70s, informed me that it was the habit of O Dalaigh CJ to ask counsel in most cases whether there were any American authorities on the point.
35 [1974] IR 284.
36 367 US 497 (1961).
37 381 US 479 (1965).
38 410 US 113 (1973).

lawyers, whether advocates or judges, faced with the demands of particular cases.

Finally, I would not like you to think that the traffic was all one-way. Ireland has made its own contribution to US jurisprudence. Oliver Wendell Holmes, perhaps the best known American jurist has his own and unlikely connection to Ireland. When he was not writing stinging dissents or magisterial judgments or erudite books, he liked to travel to England and socialize with members of the land gentry in London.[39] It appears he became infatuated with a member of the Irish ascendancy, Clare Castletown, a member of what may be described as the hunting, shooting and fishing aristocracy, and who was not only married and living in Doneraile, County Cork, but was also and at the same time conducting an affair with another gentleman. Oliver Wendell Holmes used to visit the Castletowns in County Cork and formed a friendship with the local parish priest Canon Sheehan, a successful popular author, whose works had never been the subject of an obscenity trial. America might have produced Oliver Wendell Holmes, the hero of the Civil War, the Harvard scholar and the dominant intellectual of the Supreme Court but it is Ireland which gives you Oliver Wendell Holmes as a hopeless romantic and shameless flirt. This may have been the inspiration for Isaac Asimov's story of Holmes walking in Washington and who on passing a pretty girl turned to his companion and said "George what I wouldn't give to be 75 again."

Whether you have come to Ireland to flirt with the aristocracy, speak to literary parish priests, attend heavyweight fights, or seek out the equivalent of the barman at Shanley's, or whether like Mrs. Croker it is a matter of shopping and clothes, I hope your stay is enjoyable and that this visit of the ABA will write one more line in the fascinating story of the interaction between Ireland and the United States in the field of Constitutional Law. ■

39 This episode is carefully and sensitively described in G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1993).

News

Santa Visit to Local Schools

Children from St Audeon's and George' s Hill School, Dublin enthusiastically greet Santa at his Christmas visit organised by the Bar Council.

Bar Council Scholarship

Pictured at the award of the Bar Council local schools' scholarship is Paddy Hunt, treasurer of the Bar Council, and scholarship winner, Nicola Fitzgerald. The scholarship provides a bursary for the first year of study in higher education and is in recognition of outstanding academic achievement and contribution to school life in the community.

Fitzpatrick Lecture in Legal Bibliography

On Thursday 28th February 2008 at 7.30. pm, former Chief Justice Ronan Keane will deliver the eighteenth lecture in the above free public series entitled "From Home Rule to Brussels: Irish Constitutions and their Commentators" at Dublin City Library and Archive, 138-144 Pearse Street, Dublin 2. Dr. Gerard Hogan, Senior Counsel, will chair the proceedings. As space is limited, those interested in attending should apply for tickets to: Hugh M. Fitzpatrick, Solicitor/Library and Information Consultant, 9 Upper Mount Street, Dublin 2. Phone: 01-2692202; Fax: 01-6619239; e-mail: hmfitzpa@tcd.ie

Electronic discovery – taming the beast

Roderick Bourke*

Introduction

In December 1882, Brett L.J. delivered his judgment in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company*[1] on a motion for further and better discovery in a breach of contract case, where the defendant sought discovery of a small number of documents referred to in the plaintiff's discovered minute book. Brett L.J. concluded that the obligation to discover documents included documents which, it is reasonable to suppose, contain information which *may*—not which *must*—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. The equivalent case today, almost 130 years later, would include discovery of many emails and other electronic documents and possibly a dispute about whether relevant records on the company's sales director's home computer had been disclosed.

Peruvian Guano is a powerful tool in civil litigation, particularly for plaintiffs and their advisors but in England Lord Woolf, in recommending its curtailment in 1995, said that the rule made

> "virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is."[2]

Under the Civil Procedure Rules ("CPR") in England, standard discovery excludes the train of inquiry limb of *Peruvian Guano* and furthermore limits searches for documents to "reasonable searches"[3].

In Ireland, even though Order 31 rule 12 RSC since 1999 has limited the impact of *Peruvian Guano*, because a party only has to give discovery of relevant documents within agreed (or ordered) categories of documents, the year by year growth in the volume of electronic data, and its prevalence in business, administration and social life, means that discovery of electronic data may be burdensome and difficult, particularly in larger cases. This article considers how the Irish courts have addressed these issues and what changes in the rules may be necessary in light of what Fennelly J. has described in *Dome Telecom Limited v Eircom PLC* as "the sheer volume of traffic generated by the new means of communications".[4] [5]

Proliferation of electronic information

Email and other electronic technologies have led to huge growth in stored information in organisations. If, for example, each person in a small company of 50 persons sends 10 emails per business day, the total of emails created and stored annually could exceed 120,000. The scale snowballs in bigger organisations. Email and other electronically stored information ("ESI")[6] may be created and held in many ways such as online, on a desktop or personal computer, databases, backup or archive systems, or indeed on voicemail, mobile phones or personal digital assistants.

"Metadata" is information embedded in electronic documents and thus may not ordinarily be viewable or printable on the computer application that created the document. However, such information usually can be retrieved without technical difficulty and can reveal evidence of who created the document, what changes were made to it, and when it was created. Data ostensibly deleted from computer systems may nonetheless continue to exist and thus may be retrievable (such "deleted" data are described colourfully in the USA as "vampire documents"). As a result, a client may have to review many sources of ESI, some not readily accessible, before responding to a request of order for discovery.

What documents are discoverable

The word "document" is not defined in the rules of the Superior Courts and relevant data may be held in a form that does not in any way correspond to documents in the traditional sense. However Delaney and McGrath[7] suggest that in light of the broad interpretation of the word "document" in *McCarthy v. Flynn*[8], where the Supreme Court held that an X-ray plate and photograph were documents, and in light of subsequent mainly English case law[9], it is likely that a flexible approach will be taken by the courts as to the types of documents that are discoverable. This

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1 (1882) 11 Q.B.D. 55, (1885) I.L.T.R. 188.
2 Access to Justice: Interim Report (June 1995) p 167, §17.
3 See part 31.7 CPR.
4 [2007] IESC 59 (5 December 2007).
5 The Law Society in October 2007 published a report on discovery in the electronic age which addresses many of the issues the subject of this article.
6 A description used in rule 34(a) in the Federal Rules of Civil Procedure in the United States of America.
7 Civil Procedure in the Superior Courts, second edition, at pages 299 and 300.
8 [1979] IR 127.
9 See for example judgment of Vinelott J in Derby v Weldon (no. 9) [1991]1 W.L.R. 652.

has been borne out in *Dome Telecom Limited v Eircom PLC*[10] where Geoghegan J referred to the "vast amount of stored information in the business world which formerly would have been in documentary form but which now is computerised". In that case, Geoghegan J. and Fennelly J. did not see a difficulty in principle in requiring a party to retrieve relevant ESI (telephone usage data) from a computer system and to discover it in a format in which it had not previously existed.[11] Despite such flexibility, it would be useful to include a definition of document in the rules of the Superior Courts to put beyond doubt or misunderstanding that discovery is not limited to documents as traditionally understood.

The English and US Federal Rules offer different approaches in this respect. The English CPR defines "document" (in the context of disclosure and inspection of documents) as meaning "anything in which information of any description is recorded"[12], and a practice direction of the Commercial Court in that jurisdiction observes that this broad definition extends to electronic documents, including email and other electronic communications, word processed documents and databases, stored and deleted information and meta data.[13] In the United States, Federal Rule 34(a) as amended in 2006, states that "electronically stored information - including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained" is discoverable. A broad definition of "document" similar to that in the CPR, but expressly including ESI may be a satisfactory definition for the Irish rules.

Scope of discovery

The prospect of finding useful evidence of damning electronic conversations or of altered electronic documents is a powerful incentive for parties to seek discovery of much ESI. Even though the proliferation of electronic data may make discovery more burdensome and costly, such discovery is usually more readily searchable than paper discovery. This may be an advantage to the receiving party, who through the careful use of electronic key word searches, may be able to identify relevant documents or data within minutes. However the costs and difficulties of searching for and reviewing such data may be very substantial for the producing party, particularly where data is not systematically stored or is otherwise difficult to retrieve.

The retention of the full *Peruvian Guano* test in Ireland[14] means that the population of ESI caught in a discovery agreement or order may be surprisingly wide or, at least, it may be very difficult for a producing party to ensure that all relevant data has been identified and discovered. Metadata usually will not be relevant unless it may throw light on issues such as of dishonesty, misrepresentation or bad faith. However, other forms of ESI, and in particular email, may each be relevant and abundant in quantity. Multiple copies of an email sent to different addressees may be discoverable and the task of conscientiously searching, say, six months email and other ESI and reviewing it for discovery may be substantial. These difficulties will be much greater in bigger cases involving large organisations, with many custodians of information and different computer systems, where allegations may range over years and concern numerous issues.

Order 31 rule 12 RSC as amended by SI No 233 of 1999 gives parties the means to argue for broader or narrower discovery, including discovery of ESI, and thus the party resisting a request may seek to argue under rule 12 (2) and (3) that even though the material sought may be relevant (under *Peruvian Guano*), it is not necessary for the purposes of disposing fairly of the litigation or for saving costs. In recent years the courts have looked on a number of occasions at the question of limiting relevant discovery on the grounds of necessity and the Supreme Court has done so most recently in *Dome Telecom,* where ESI was the subject of the discovery appeal. These cases suggest that there may be considerable scope to argue the necessity test in cases where there is potentially heavy discovery of ESI.

Necessity

In *Ryanair p.l.c. v. Aer Rianta c.p.t.* [15], Fennelly J. observed that although the onus was on an applicant for discovery to show necessity under the altered Order 31 rule 12, the applicant did not have to show an objective or absolute necessity for the documents. Fennelly J. made reference to the decision of Kelly J. in *Cooper Flynn v. Radio Teilifís Éireann and Others,*[16] where Kelly J. had applied a principle from earlier English cases[17] which defined "necessary" in the context of discovery as meaning more than documents without which the applicant could not possibly succeed, but rather included documents which improved the applicant's prospect of success. Kelly J. held in that case that to deprive applicant of such "litigious advantage" would not be conducive to the fair disposition of the action. Fennelly J. considered that the concept of "litigious advantage" gave guidance to the context within which the court has to reach a conclusion as to the likely effect of the grant or refusal of discovery on the fair disposal of the litigation but went on to say that the court must have regard

> "to all the relevant circumstances, including the burden, scale and costs of the discovery sought. The court should be willing to confine categories of discovery sought to what is genuinely necessary for the fairness of the litigation".

In *Framus Limited v CHR plc,*[18] Murray J., in adopting Fennelly

10 *Supra* note 4.
11 Geoghegan J.'s judgement outlined in some detail relevant English and other cases about the definition of a "document".
12 At part 31.4.
13 see paragraph E3.11 (a) – (e) of the Admiralty and Commercial Courts Guide, 7th Edition, 2006.
14 The test has been applied recently in cases such as *Schneider (Europe) GmbH v Conor Medsystems Ireland Limited* [2007] IEHC 63 and *Medtronic Inc & Ors v Guidant Corporation & Ors* [2007] IEHC 37.
15 [2003] 4 IR 264.
16 [2000] 3 IR 344, 355.
17 Including a speech of Lord Salmon in *Science Research Council v Nassé* [1980] A.C. 1028 at 1071.
18 [2004] 2 IR 20.

J.'s comments in *Ryanair*, suggested that although in most cases once a party establishes that documents are relevant, discovery of the documents will be necessary for the fair disposal of the litigation, there must be some proportionality between the extent or volume of documents to be discovered and the degree to which they are likely to advance the applicant's case or damage his opponent's case in addition to ensuring that no party is taken by surprise by the production of documents at a trial.

Dome Telecom

Electronic discovery was not a significant issue in the judgments in *Ryanair* or *Framus*. In the recent Supreme Court appeal in *Dome Telecom Limited v Eircom PLC* however, the volume and burden of discovering electronic data was the principal issue facing the court. *Dome Telecom*, like *Ryanair* and *Framus*, was a competition case. The plaintiff had obtained an order in the High Court for discovery of documents to be created from the defendant's raw computer data and databases relating to the volume of telecommunications minutes trafficked from 1 July 2000 to 7 April 2005 in respect of 1800 numbers by reference to access method by the defendant to competitors of the plaintiff. Kearns J. referred to "the gargantuan task" which the discovery would entail and he and Fennelly J. decided the appeal by postponing a decision on discovery until after a trial on liability issues in the High Court, which might make the discovery unnecessary.

In his judgment Kearns J. pointed out that it is not always the case that relevance creates necessity, because otherwise there would be no need to have two separate concepts of relevance and necessity. He described necessity as the true threshold where issues of proportionality must be assessed and that the more necessary the document is, the more proportionate it will be for the requesting party to obtain discovery.

Geoghegan J. distinguished between the concepts of discovery being "necessary" and discovery being "proportionate", and said that although the rules do not expressly provide that discovery sought must be proportionate or reasonable or that it must not be oppressive, discovery may nonetheless be "necessary" and yet be so disproportionate as to render it unreasonable for a court to benefit the party seeking such discovery by making the order. He could conceive of instances where the expense of what might otherwise be "necessary" discovery might put a party out of business. Geoghegan J. observed that although that might not necessarily prevent an order from being made, a court would have to weigh up that factor quite heavily in deciding whether it should make the order.

Fennelly J. accepted that only in unusual cases should a court decline to order discovery of relevant and necessary documents, but he considered that the unusual scale and extent of the burden placed on the appellant in the *Dome Telecom* case required the court to examine whether what is sought was likely to produce genuinely useful evidential material.

Cost benefit analysis

The Irish courts have been reluctant to go down the road of carrying out a cost benefit analysis where documents requested on discovery are relevant in the full *Peruvian Guano* sense and are likely to be necessary, taking into account legitimate litigious advantage. However in recent cases, the court has been willing to consider curtailing or postponing the discovery of relevant discovery where the burdens and costs would be disproportionate to the likely benefit.

The approach of the Irish courts contrasts to that of the CPR in England and Wales and, to a lesser extent, the US Federal Rules.

In standard disclosure in England and Wales, disclosing parties are only obliged to make reasonable searches, which take into account the overriding principle of proportionality[19]. The reasonableness of searches is judged by the following factors: the number of documents involved, the nature and the complexity of the proceedings, the ease and expense of retrieval of any particular document and the significance of any document that is likely to be located during the search. These factors reflect a key part of the overriding objective of the CPR, which is dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues, and to the financial position of each party.

A party is obliged to set out the extent of the searches carried out or not carried out in the disclosure document. Special reference must be made to the search for electronic documents (listing what was searched and the extent of search) and the party must list what searches for electronic documents it did not carry out.

In the United States, the Federal Rules take a different approach. Although the scope of discovery in the United States is quite similar to that of the full *Peruvian Guano* rule,[20] rule 26(b)(2)(B) of the Rules of Civil Procedure provides that a party need not provide discovery of electronically stored information from sources that the party identifies as not being reasonably accessible because of undue burden of costs. When this is challenged, the rules provide that the reasonableness of the party's stance will be judged on the specificity of the discovery request, the quantity of information from other and more easily accessed sources, the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources, the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources, predictions as to the importance and usefulness of the further information, the importance of the issues at stake in the litigation and the parties' resources. These criteria place more emphasis on the investigation of whether justice can be done if the limitation is allowed

19 Under CPR, the court may make an order for specific disclosure where justified and this may extend to full *Peruvian Guano* disclosure in respect of particular issues or classes of documents. (See *Documentary Evidence*, Hollander, 9th Edition, pp 8 – 26).

20 Discovery allowed in Rule 26 (b) (1) Federal Rules extends to "any matter, not privileged, that is relevant to the claim or defence… Relevant [discoverable] information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence".

than the English rules, which focus more on the size and complexity of the case and the amount at stake.

Cost benefit in Ireland?

By putting an emphasis on cost benefit analysis, the English rules, in particular, are clearly inspired by the object of avoiding unnecessary costly and protracted litigation and the burdens identified by Lord Woolf of excessive discovery. It is clear that the Irish courts are concerned with this issue too. The rule change in Ireland brought about by Statutory Instrument 233 of 1999 was inspired with the objective of seeking to curb the excesses of discovery caused by the proliferation of documents due to photocopiers, email and other technologies.[21] Since then, in considering any limitation of discovery in cases where there may be substantial volumes of relevant documents, Irish judges have made reference to factors such as proportionality and reasonableness. Fennelly J. in *Ryanair* pointed out that

> "the public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objective of expedition and economy".[22]

Should the Irish rules go further than at present and give more weight to cost benefit analysis, or go further by curtailing the *Peruvian Guano* test of relevance, particularly in light of the growing extent of discovery due to the relevant ESI? The following factors may be relevant to this question:

1. The large majority of cases in Ireland are not document (or ESI) heavy cases. In many cases, there may be little or no discovery and in others, the 1999 rules have served to curb the extent of discovery.
2. In recent years, many heavy cases have been judicially case managed. Case management gives a judge a good means to encourage the parties to be reasonable, or to direct sensible solutions to discovery and similar issues.
3. The 1999 rules offer parties scope to raise concerns that they may have about the volume of ESI that may be discoverable. Parties can seek to persuade their opponents or the court that limitations on searches by way of use of key word searches for ESI, or non-disclosure of duplicative documents would save costs and time and would not cause an injustice.
4. Introducing a standard limited obligation to search for relevant documents, similar to "reasonable searches" in England, with an obligation to disclose the extent of the searches, would lead to many disputes about whether the searches were reasonable.
5. Lightening in all or most cases the obligation to search for possibly relevant documents, including ESI, would make it easier for organisations with bad filing and poorly organised technology to avoid their responsibilities to give discovery. Organisations with proper systems for filing and retrieving ESI could be at a disadvantage because they can more easily retrieve material.
6. A dramatic change, such as a switch to the equivalent of the English rules, would upset the well established and understood system of discovery under the 1999 rules, and while it could mean cost saving and less difficulty in some larger cases, it probably would be at the cost of justice in a significant number of other cases.

On balance it is difficult to justify a radical departure from the current Irish rules. As seen above, it is likely that the courts will be increasingly willing to invoke the necessity test and other existing principles to curb discovery in cases where it concludes that to do so would not affect the interest of justice.

However, the word "document" for the purpose of discovery should be defined in the rules of the Superior Courts to take into account ESI. Consideration should also be given to amending the rules to provide for criteria, similar to those in the US Federal Rules, under which the court could evaluate any proposals for limiting discovery of relevant documents, including ESI, in exceptional circumstances. Such criteria should centre on whether it is likely that justice could still be done if the proposed limitation is allowed. ■

21 See the comments of Morris P in *Swords v. Western Proteins Limited* [2001] 1 I.R. 324 at p.328.

22 *Supra* note 15 at page 277.

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ADMINISTRATIVE LAW

Statutory Instruments

Appointment of special adviser (Minister for Defence) order 2007
SI 769/2007

Appointment of special adviser (Minister for Defence) (no. 2) order 2007
SI 770/2007

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SI 556/2007

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Review of adjudicative government decision – Standard of review – Manifest error – Decision on allocation of EU restructuring aid for sugar industry under EU regulation – Whether decision on allocation of aid based on calculation of losses to growers attributable to reform of EU sugar market as a whole or solely to closure of sugar processing plant – Whether decision on allocation reflects sound economic balance – Whether manifest error in decision – *SIAC v Mayo County Council* [2002] 2 IR 148 considered – Council Regulation EU/320/2006, arts 3 & 4 – Order quashing government decision (2006/933JR & 81COM – Clarke J – 14/6/2007) [2007] IEHC 211
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Disqualification – Past improper practices – Present clean bill of health – Consequences for respondent – Protection of public – Non-penal nature of order – Findings against respondent – Companies Act 1990 (No 33), s 160 – Order refused (2005/101Cos – Peart J – 23/1/2007) [2007] IEHC 1
Re Kentford Securties Ltd: Director of Corporate Enforcement v McCann

Directors

Appointment – Shareholding – Whether defendant director of plaintiff – Whether

defendant shareholder in plaintiff – Defendant granted declarations that plaintiff neither shareholder nor director (2004/18860P – McGovern J – 9/2/20070 [2007] IEHC 59
Linden Ltd v Glennon

Directors

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Walsh v NIB

CONSTITUTIONAL LAW

Child

Personal rights – Nature of child's constitutional rights –Duty to provide secure accommodation and treatment – Detention in secure unit –High Court – Jurisdiction – Inherent jurisdiction – Whether circumstances exist to invoke inherent jurisdiction of High Court – Whether High Court in exercise of inherent jurisdiction could make order for long term detention in secure care of minors – Whether long term detention in secure care was required in interests of education and welfare of minor – Whether procedural safeguards should be put in place for protection of rights of minors and parents and needs of family unit – Duration of detention – Whether any rationale for further detention of minor in secure care – Constitution of Ireland, 1937, Articles 40.3, 41 and 42 – European Convention on Human Rights Act 2003 (2005/90M – MacMenamin J – 15/6/2007) [2007] IEHC 189
S (S) v Heath Service Executive

Fair procedures

Obligation to give reasons – Costs – Whether reasons adequate or sufficient – Whether decision irrational or unreasonable – *O'Mahony v Ballagh* [2002] 2 IR 410 followed – Order quashed and matter remitted to Circuit Court (2005/845JR – McCarthy J – 2/7/2007) [2007] IEHC 232
F (S) v Judge Murphy

General election

Constituencies – Proportionality of ratio between population and seats – Consequences where new census shows constituencies to be disproportionate – Meaning of "census" – Meaning of phrase "so far as it is practicable" – Obligation on Oireachtas to review constituencies – *O'Donovan v Attorney General* [1961] IR 114, *The Electoral (Amendment) Bill 1961* [1961] IR 169 and *O'Malley v An Taoiseach* [1990] ILRM 461 considered – Electoral Act 1997 (No 25) – Electoral (Amendment) Act 2005 (No 16) – Constitution of Ireland 1937, Article 16.2.3° – Proceedings dismissed (2007/2819P & 3475P – Clarke J – 7/6/2007) [2007] IEHC 185
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Specific performance

Terms – Breach – Whether plaintiffs entitled to renewable licences – Damages for breach of contract – Assessment of *quantum* – Methods and principles – Held that plaintiffs entitled to specific performance and damages arising from breach (2002/15800P – Laffoy J – 18/7/2007) [2007] IEHC 251
Cummins v South Dublin County Council

Terms

Parties – Incorporation of terms by reference to collateral agreement – Construction – Declaration sought – Unilateral variation – Whether intended to create contractual relations – Whether enforceable contract subsisting – Whether government policy could affect variation – *Rothmans of Pall Mall (NZ) Ltd v Attorney General* [1991] 2 NZLR 323 considered – Plaintiff granted relief (2005/4573P – 29/6/2007) [2007] IEHC 222
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Southern Hotel Sligo Ltd v Iarnród Éireann

Jurisdiction

District Court – Criminal offence – Minor offence – Technical offence – Whether District Court having jurisdiction to try technical offence – Whether offence minor or fit to be tried summarily – *Clune v Clifford* [1981] ILRM 17 not followed – Refusal of jurisdiction quashed, matter remitted (2006/418JR – Charleton J – 12/3/2007) [2007] IEHC 161
McCormack v Judge McDonnell

CRIMINAL LAW

Delay

Prejudice – Whether prejudice established – Whether evidence available – Whether dismissal of charges without hearing evidence within jurisdiction – Order dismissing proceedings quashed, matter remitted (2006/808JR – Feeney J – 2/3/2007) [2007] IEHC 135
DPP v Judge Sheridan

Evidence

Admissibility – Constitutional rights – Privacy – Road traffic offence – Driving under influence of intoxicant – Opinion of arresting garda as to accused's intoxication – Opinion formed on curtilage of accused's dwelling – Whether implied authority to enter curtilage – Whether evidence unlawfully obtained – Whether evidence should be excluded – *People (DPP) v McCreesh* [1992] 2 IR 239 and *DPP (Dooley) v Lynch* [1998] 4 IR 437 distinguished – Held that evidence not unconstitutionally obtained (2007/128SS – Herbert J – 31/7/2007) [2007] IEHC 248
DPP v O'Sullivan

Evidence

Failure to seek out – CCTV – Fair trial – Whether technical evidence of utility of CCTV at night – *Braddish v DPP* [2002] 1 ILRM 151, *Dunne v DPP* [2002] 2 ILRM 241, *Scully v DPP* [2005] 1 IR 242, *O'Callaghan v Judges of the Dublin Metropolitan District Court* [2004] 2 IR 442 considered – Relief refused (2006/279JR & 244Jr & 290JR – Feeney J – 30/3/2007) [2007] IEHC 137
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Extradition

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Elements of offence – Misuse of drugs – Whether necessary to prove *mens rea* in respect of each element of offence – Possession of drugs of value in excess of statutory amount with intent to sell or supply – Whether necessary to prove *mens rea* as to value of drugs – *People (DPP) v Murray* [1977] IR 360, *CC v Ireland* [2005] IESC 48 [2006] 4 IR 1, *Sweet v Parsley* [1970] AC 132 & *People (DPP) v Byrne* [1998] 2 IR 417 followed – Courts of Justice Act 1924 (No 10), s 29 – Misuse of Drugs Act 1977 (No 12), ss 3, 15, 15A & 29 – Misuse of Drugs Act 1984 (No 18), s 16 – Criminal Justice Act 1994 (No 15), s 3 – Criminal Justice Act 1999 (No 10), s 4 – Criminal Justice Act 2006 (No 26), ss 22 & 81 – Appeal dismissed (459/2006 – SC – 26/7/2007) [2007] IESC 31
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P (PM) v P (KT)

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Detention

Lawfulness – Admission order – Renewal order – Review by mental health tribunal – Whether renewal order could take place prior to review of admission order by mental health tribunal – Plain intention of Oireachtas – Periods of detention – Duration of admission order – Notification of detention – Mental Health Act 2001 (No 25), ss 14, 15, 16, 17 and 18 – Interpretation Act 2005 (No 23), s 15 – Detention found to be lawful (2007/663SS – Peart J – 24/5/2007) [2007] IEHC 183
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Recoverability – Medical negligence – Failed sterilisation operation – Whether defendants liable in damages to plaintiff – Public policy – Whether plaintiff entitled to damages for costs of rearing children arising as result of failed sterilisation – *Fletcher v Commissioner of Public Works* [2003] 1 IR 465 and *McFarlane v Tayside Health Board* [2000] 2 AC 5 considered – Action dismissed (2003/14595P – Kelly J – 20/6/2007) [2007] IEHC 206
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Statutory duty

Fire Authority – Statutory immunity – Statutory interpretation – Extent of statutory immunity enjoyed by third defendant – Whether claim against third defendant relates to performance of its statutory functions – Whether claim incapable of success by reason of statutory immunity – *Fuller v Minister for Agriculture and Food* [2005] 1 IR 529 and *Howard v Commissioners of Public Works* [1994] 1 IR 101 followed – Fire Services Act 1981 (No 30), ss 10, 28 and 36 – Action against fire service dismissed (1998/9756P – Feeney J – 27/3/2007) [2007] IEHC 200
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Delay in seeking relief – Unauthorised development – Change of user – Proof that change occurred within limitation period – Whether use of structure commenced within limitation period – Whether applicant barred from obtaining relief due to expiration of statutory time limit within which to seek relief – Whether application should be dismissed – *Dublin Corporation v Sullivan* (Unrep, Finlay P, 21/12/1984) applied – Planning and Development Act 2000 (No 30), s 160(6)(a)(i) – Application dismissed (2005/402CA – de Valera J – 26/7/2007) [2007] IEHC 258
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Whether leave to discontinue should be granted – Whether terms should be imposed as condition to granting leave – Costs – Principles to be applied in determining costs where plaintiff seeks to discontinue – Whether different principles apply in circumstances where counterclaim has yet to be tried – Whether liability for costs should be on solicitor and client basis or on party and party basis – Effect of discontinuance on counterclaim – Effect on undertaking as to damages – *JT Stratford & Son Ltd v Lindley (No 2)* [1969] 1 WLR 1547; *Barretts & Baird (Wholesale) Ltd v IPCS* (1988) 138 NLJ 357; *RTZ Pension v ARC Ltd* [1999] 1 All ER 532; *Walker v Walker* [2005] EWCA Civ 247, [2006] 1 WLR 2194; *Australian Security Commission v Aust–Home Investments Limited* (1993) 44 FCR 194; *Covell Matthews & Partners v French Wools Ltd* [1978] 1 WLR 1477; *FSL Services Ltd v MacDonald* [2001] EWCA Civ 1008 (Unrep, CA, 21/6/2001) and *Geaney v Elan Corporation plc* [2005] IEHC 111, (Unrep, Kelly J, 13/4/2005) considered; *Newcomen v Coulson* (1877-78) LR 7 Ch D 764 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 26, r 1 – Leave to discontinue granted and costs awarded (2005/840P – Laffoy J – 18/4/2007) [2007] IEHC 144
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Discovery

Production – Possession or power – Implied undertaking not to use disclosed documents for purposes other than litigation in which disclosed – Foreign litigation – Documents disclosed in course of proceedings in United Kingdom – Whether disclosed documents had to be discovered in Irish proceedings – Whether obligation on party making discovery to seek release from disclosure obligations owed to courts in other jurisdiction – *Patrick v Capital Finance Pty Ltd (No 4)* (2003) FCA 436 followed – Second defendant ordered to take all necessary steps to produce documents (2001/7739P – Clarke J – 26/7/20070 [2007] IEHC 247
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Discovery

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Dismissal of action

Application to strike out proceedings – Inherent jurisdiction of court to strike out proceedings to prevent abuse of process – Contract – Sale of land – Action for specific performance – Whether concluded contract in existence – Whether proceedings unsustainable – Whether proceedings abuse of process – Whether pleadings disclosing no reasonable cause of action – *Barry v Buckley* [1981] IR 306 considered; *Supermacs Ireland Ltd v Katesan (Naas) Ltd* [2000] 4 IR 273 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28 – Order that proceedings be struck out and *lis pendens* vacated (2006/2149P – Clark J – 1/5/2007) [2007] IEHC 190
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Dismissal of action

Cause of action – Abuse of process – *Res judicata* – Issue estoppel – Whether dismissal of proceedings for want of prosecution bars future proceedings in relation to same cause of action – Plaintiff not legally represented in previous actions – Whether arguments could reasonably have been advanced in previous actions – Whether rule in *Henderson v Henderson* applying – Whether proceedings ought to be dismissed – *Barry v Buckley* [1981] I.R. 306, *Sun Fat Chan v Osseous Limited* [1992] 1 I.R. 425, *Pople v Evans* [1969] 2 Ch. 255 and *Henderson v Henderson* (1843) 3 Hare 100 considered; *AA v Medical Council* [2003] 4 IR 302 applied – Application dismissed (2001/5369P – Clarke J – 27/7/2007) [2007] IEHC 245
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Dismissal of action

Delay – Abuse of process – Proceedings

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Renewal – Set aside – Principles to be applied – Where onus of proof on application to set aside renewal of plenary summons resides – Extent to which complaints of defendant prejudice due to alleged delay in prosecution of claim admissible on application – Whether renewal of plenary summons should be set aside – Whether European Convention requires strict approach – Whether most appropriate stage in proceedings to consider issue – *Behan v Bank of Ireland* (Unrep, McGuinness J, 5/2/1997); *Baulk v Irish National Insurance Co Ltd* [1969] 1 IR 66; *McCooey v Minister for Finance* [1971] 1 IR 159; *Prior v Independent Television News Ltd* [1993] 1 IR 403; *McMullen v Ireland* (App 42297/98) (Unrep, ECHR, 29/7/2004) and *Barry v Ireland* (App 18273/04) (Unrep, ECHR, 15/12/2005) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 8, r 2 – Defendant's application refused (2002/1636P – Ó Néill J – 2/2/2007) [2007] IEHC 38
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Construction – Bequest – Condition – Condition that beneficiary return to live at house and farm subject of gift – Whether condition precedent or subsequent – Whether void for uncertainty – Whether beneficiary took gift free of condition – *Burke and O'Reilly v Burke and Quail* [1951] IR 216, *Mackessy v Fitzgibbon* [1993] 1 IR 520 and *In re Hennessy* (1963) 98 ILTR 39 followed – Condition found to be void (2006/197Sp – Laffoy J – 19/6/2007) [2007] IEHC 228
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European Communities (aerial fertilisation) (forestry) (amendment) regulations 2007
DIR/1976-464
SI 790/2007

European Communities (animal remedies) (no.2) regulations 2007
DIR/2001-82, REG/1990-2377, REG/2004-726
SI 786/2007

European communities (bluetongue) (restriction on import) (amendment) (no.5) regulations 2007
DEC/2007-688
SI 781/2007

European communities (control of organisms harmful to plants and plant products) (amendment) (no. 3) regulations 2007
DIR/2005-16, DIR/2007-41, DIR/2001-32, DEC/2006-133, DEC/2007-410, DEC/2007-433
SI 777/2007

European communities (foods intended for use in energy-restricted diets for weight reduction) regulations 2007
DIR/1996-8, DIR/2007-29
SI 784/2007

European Communities (foot and mouth disease) restriction on imports from the United Kingdom) (no.2) (third amendment) regulations 2007
DEC/2007-746
SI 787/2007

European communities (general food law) regulations 2007
REG/178-2002
SI 747/2007

European Communities (interoperability of the trans-European conventional and high speed rail systems) regulations 2007
DIR/2007-32)
SI 772/2007

European Communities (markets in financial instruments) (amendment) regulations (No.2) 2007
DIR/2004-39
SI 773/2007

European Communities (misleading and comparative marketing communications) regulations 2007
DIR/2006-114
SI 774/2007

European Communities (processed cereal-based foods and baby foods for infants and young children) regulations 2007
DIR/2006-125)
SI 776/2007

European communities (vehicle testing) (amendment) regulations 2007
DIR/96-96
SI 709/2007

Medicinal products (control of advertising) regulations 2007
DIR/2001-83, DIR/2004-27
SI 541/2007

Medicinal products (control of manufacture) regulations 2007
DIR/2001-83, DIR/2004-27, DIR/2001-20
SI 539/2007

Medicinal products (control of placing on the market) regulations 2007
DIR/2001-83, DIR/2004-27
SI 540/2007

Medicinal products (control of wholesale distribution) regulations 2007
DIR/2001-83, DIR/2004-27
SI 538/2007

ACTS OF THE OIREACHTAS 2007 (AS AT 31st JANUARY 2008)

Information compiled by Karen Kelly & Renate Ni Uigin, Law Library, Four Courts.

1/2007 Health (Nursing Homes) (Amendment) Act 2007
Signed 19/02/2007

2/2007 Citizens Information Act
Signed 22/02/2007

3/2007 Health Insurance (Amendment) Act 2007
Signed 22/02/2007

4/2007 Courts and Court Officers Act (Amendment) Act 2007
Signed 05/03/2007

5/2007 Electricity Regulation (Amendment) (Single Electricity Market) Act 2007
Signed 05/03/2007

6/2007 Criminal Law (Sexual Offences) (Amendment) Act 2007
Signed 07/03/2007

7/2007 National Oil Reserves Agency Act 2007
Signed 13/03/2007

8/2007 Social Welfare and Pensions Act 2007
Signed 30/03/2007

9/2007 Education (Miscellaneous Provisions) Act 2007
Signed 31/03/2007

10/2007 Prisons Act 2007
Signed 31/03/2007

11/2007 Finance Act 2007
Signed 02/04/2007

12/2007 Carbon Fund Act 2007
Signed 07/04/2007

13/2007 Asset Covered Securities (Amendment) Act 2007
Signed 09/04/2007

14/2007 Electoral (Amendment) Act 2007
Signed 10/04/2007

15/2007 Broadcasting (Amendment) Act 2007
Signed 10/04/2007

16/2007 National Development Finance Agency (Amendment) Act 2007
Signed 10/04/2007

17/2007 Foyle and Carlingford Fisheries Act 2007
Signed 10/04/2007

18/2007 European Communities Act 2007
Signed 21/04/2007

19/2007 Consumer Protection Act 2007
Signed 21/04/2007

20/2007 Pharmacy Act 2007
Signed 21/04/2007

21/2007 Building Control Act
Signed 21/04/2007

22/2007 Communications Regulation (Amendment) Act 2007
Signed 21/04/2007

23/2007 Health Act 2007
Signed 21/04/2007

24/2007 Defence (Amendment) Act 2007
Signed 21/04/2007

25/2007 Medical Practitioners Act 2007
Signed 07/05/2007

26/2007 Child Care (Amendment) Act 2007
Signed 08/05/2007

27/2007 Protection of Employment (Exceptional Collective Redundancies And Related Matters) Act 2007
Signed 08/05/2007

28/2007 Statute Law Revision Act 2007
Signed 08/05/2007

29/2007 Criminal Justice Act 2007
Signed 09/05/2007

30/2007 Water Services Act 2007
Signed 14/05/2007

31/2007 Finance (No.2) Act 2007
Signed 09/07/2007

32/2007 Community, Rural and Gaeltacht Affairs (Miscellaneous Provisions) Act 2007
Signed 09/07/2007

33/2007 Ministers and Secretaries (Ministers of State) Act 2007
Signed 09/07/2007

34/2007 Roads Act 2007
Signed 11/07/2007

35/2007 Personal Injuries Assessment Board (Amendment) Act 2007
Signed 11/07/2007

36/2007 Criminal Procedure (Amendment) Act 2007
Signed 25/10/2007

37/2007 Markets in Financial Instruments and Miscellaneous Provisions Act 2007
Signed 31/10/2007

38/2007 Local Government (Road Functions) Act 2007
Signed 26/11/2007

39/2007 Copyright and Related Rights (Amendment) Act 2007
Signed 04/12/2007

40/2007 Social Welfare Act 2007
Signed 20/12/2007

41/2007 Appropriation Act 2007
Signed 21/12/2007

42/2007 Health (Miscellaneous Provisions) Act 2007
Signed 21/12/2007

BILLS OF THE OIREACHTAS AS AT 31st JANUARY 2008

Information compiled by Karen Kelly & Renate Ni Uigin, Law Library, Four Courts.

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

Biofuels (Blended Motor Fuels) Bill 2007
2nd Stage – Dáil **[pmb]** *Deputies Denis Naughten, Richard Bruton, Fergus O'Dowd, Olivia Mitchell and Bernard J. Durkan*

Charities Bill 2007
Committee Stage -Dáil
Civil Law (Miscellaneous Provisions) Bill 2006
Committee Stage – Dáil

Civil Partnership Bill 2004
2nd Stage- Seanad **[pmb]** *Senator David Norris*

Civil Unions Bill 2006
Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Climate Protection Bill 2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Competition (Amendment) Bill 2007
2nd Stage – Dáil **[pmb]** *Deputies Michael D. Higgins and Emmet Stagg*

Control of Exports Bill 2007
Committee Stage-Dáil *(Initiated in Seanad)*

Coroners Bill 2007
Committee Stage- Seanad *(Initiated in Seanad)*

Criminal Justice (Mutual Assistance) Bill 2005
Committee Stage – Dáil *(Initiated in Seanad)*

Criminal Law (Human Trafficking) Bill 2007
Committee Stage – Dáil

Defamation Bill 2006
Report Stage – Seanad

Defence of Life and Property Bill 2006
2nd Stage- Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Enforcement of Court Orders (No.2) Bill 2004
1st Stage- Seanad **[pmb]** *Senator Brian Hayes*

Ethics in Public Office (Amendment) Bill 2007
2nd Stage- Dáil *(Initiated in Seanad)*

Finance Bill 2008
1st Stage – Dáil

Fines Bill 2007
1st Stage- Dáil

Freedom of Information (Amendment) (No.2) Bill 2003
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Garda Síochána (Powers of Surveillance) Bill 2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
1st Stage- Seanad **[pmb]** *Senator Brendan Ryan*

Housing (Stage Payments) Bill 2006
2nd Stage- Seanad **[pmb]** *Senator Paul Coughlan*

Immigration, Residence and Protection Bill 2007
1st Stage- Seanad *(Initiated in Seanad)*

Immigration, Residence and Protection Bill 2008
1st Stage – Dáil

Irish Nationality and Citizenship (Amendment) (An Garda Síochána) Bill 2006
1st Stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke*

Land and Conveyancing Law Reform Bill 2006
Committee Stage – Dáil *(Initiated in Seanad)*

Legal Practitioners (Irish Language) Bill 2007
Committee Stage – Dáil

Legal Practitioners (Qualification) (Amendment) Bill 2007
2nd Stage – Dáil **[pmb]** *Deputy Brian O'Shea*

Mental Capacity and Guardianship Bill 2007
Committee Stage- Seanad **[pmb]** *Senators Joe O'Toole and Mary Henry*

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
1st Stage- Dáil **[pmb]** *Deputy Dan Boyle*

Nuclear Test Ban Bill 2006
Committee Stage – Dáil

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, Paul Coghlan and David Norris*

Passports Bill 2007
Report and Final Stage- Dáil

Privacy Bill 2006
1st Stage- Seanad **[pmb]** *Senator Donie Cassidy*

Spent Convictions Bill 2007
2nd Stage – Dáil **[pmb]** *Deputy Barry Andrews*

Tribunals of Inquiry Bill 2005
2nd Stage- Dáil

Twenty-eighth Amendment of the Constitution Bill 2007
1st Stage- Dáil

Victims' Rights Bill 2008
1st Stage – Dáil

Voluntary Health Insurance (Amendment) Bill 2007
Committee Stage – Dáil *(Initiated in Seanad)*

Witness Protection Programme (No. 2) Bill 2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Abbreviations

BR = Bar Review

CIILP = Contemporary Issues in Irish Politics

CLP = Commercial Law Practitioner

DULJ = Dublin University Law Journal

GLSI = Gazette Law Society of Ireland

IBLQ = Irish Business Law Quarterly

ICLJ = Irish Criminal Law Journal

ICPLJ = Irish Conveyancing & Property Law Journal

IELJ = Irish Employment Law Journal

IJEL = Irish Journal of European Law

IJFL = Irish Journal of Family Law

ILR = Independent Law Review

ILTR = Irish Law Times Reports

IPELJ = Irish Planning & Environmental Law Journal

ISLR = Irish Student Law Review

ITR = Irish Tax Review

JCP & P = Journal of Civil Practice and Procedure

JSIJ = Judicial Studies Institute Journal

MLJI = Medico Legal Journal of Ireland

QRTL = Quarterly Review of Tort Law

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

Measure for measure: The Jurisdiction to Measure Costs

HUGH KENNEDY B.L. AND BRID O'FLAHERTY B.L.

"For in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you." Matthew 7:2

The High Court on occasion exercises its jurisdiction to "measure" on the spot the costs of applications determined before it. For example, the costs of an application to restrict a director of a company have commonly been measured, the usual order for costs being that the restricted director "do pay the sum of €X as a contribution toward the costs of the applicant liquidator". In family law proceedings, the Court has on occasion measured the entire costs of an action, in the interests of finality. In the Commercial Court, it is not uncommon for costs to be summarily determined and ordered to be payable immediately, particularly in interlocutory applications.

In addition, the Master of the High Court, in *Mitsubishi Electric Europe B.V. v Design Air Ltd,*[1] has engaged in a pilot exercise to measure the costs of "a random sample of applications of the sort which are made on a daily basis" before him. The Master has set out in considerable detail how he believes such regularly-occurring costs should be measured.

In this short article, we examine the basis of the High Court's jurisdiction to measure costs, and we explore the question of when measurement of costs may be more appropriate than taxation.

Measuring Jurisdiction

Order 99 of the Rules of the Superior Courts, 1986, deals with the jurisdiction of the High Court on the question of costs generally. Order 99, Rule 1 provides:

> Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules…[t]he costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."

Thus, the High Court enjoys a general discretion in the awarding of costs of proceedings that come before it, subject to law.

Furthermore, Order 99, Rule 4 provides that:

> "The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

The Court's jurisdiction to measure costs arises under Order 99, Rule 5, which reads:

> "Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and an order for the payment of costs may require the costs to be paid forthwith, notwithstanding that the proceedings have not been concluded. In awarding costs, the Court may direct (a) that a sum in gross be paid in lieu of taxed costs, or (b) that a specified proportion of the taxed costs be paid, or (c) that the taxed costs from or up to a specified stage of the proceedings be paid." *(Emphasis added)*

Thus, it is clear that the High Court has jurisdiction to measure the costs of any proceedings in a summary manner, rather than delegating the quantification of costs to the Taxing Master.

Master measurer

Under Order 63, Rule 6, the Master has jurisdiction to award costs at his discretion and "may direct payment of a sum in gross in lieu of payment of costs to be taxed". In the *Mitsubishi* case, the Master engaged in a pilot exercise to measure the costs of a random sample of applications.[2] The Master had already made rulings on different types of motions in sixteen separate cases and had made costs awards. He then invited the parties in all the motions to return and make submissions on quantum of costs of the motions; the parties did so in thirteen of the cases.[3] Three parties declined to participate in the Master's project: "[f]or

1 [2007] I.E.H.C. 203, unreported, May 22, 2007.

2 P.9 of the Master's judgment in *Mitsubishi*.

3 *Mitsubishi Electric Europe B.V. v Design Air Ltd* [2006 No. 1562 S] (Plaintiff's motion for liberty to enter final judgment).
A.C.C. Bank plc. v Crystal Tiles Wholesale Ltd [2006 No. 867 S] (Plaintiff's motion for liberty to enter final judgment).
Andrews v Eircom plc [2001 No.13393 P] (Motion to strike out Defence for failure to make discovery).
AXA Sunlife Services plc v Whitman [2006 No.22 FJ] (*Ex parte* application for leave to enforce a foreign judgment).
Breslin v Panorama Holiday Group Ltd [2004 No. 9751 P] (Motion

the record, it should be noted that three of the larger firms in Dublin…requested the Master not to measure costs in their particular cases. For whatever reason, these solicitors' firms, presumably on their client's instructions, opted to go the taxation route".[4]

By way of background to the *Mitsubishi* case, the Legal Costs Working Group[5] has recommended in its report[6] that legal fees should not include "all encompassing instruction fees"[7] but should only be for work done and this work should be based on a set of standardised figures. The Legal Costs Implementation Advisory Board[8] in its report[9] recommends the establishment of a Legal Costs Regulatory Body and a Legal Costs Assessment Office.[10] The Legal Costs Regulatory Body would be responsible for setting recoverable costs guidelines, while the Legal Costs Assessment Office would be responsible for the assessment process and would replace the Office of the Taxing Master.

The Master warns in *Mitsubishi* that such proposed changes should be monitored by the courts.

He expresses the view that although high costs are a concern with a citizen's access to the courts, there must also be enough solicitors and barristers to serve the public's needs. He states that "[f]ees will have to be profitable enough to sustain solicitor's offices in every town and although litigation fees are only a proportion of solicitor's total earnings, these fees often subsidise less profitable services and bad debt."[11] Similarly the Master explains how junior counsel often have to discount or write off fees and are often over-reliant on the brief fee at the end of a case. The Master is anxious that "Survival on merit alone is unusual: in time, the talent pool for judicial appointments might be a small group not reflective of society in general, unless juniors are now to be properly paid for their drafting and other preliminary work".[12]

The Master notes that in June 2004, the Committee on Court Practice and Procedure, chaired by Mrs. Justice Denham, observed that "there is merit in giving power to judges to determine the amount of costs in appropriate (usually less complicated) cases".[13]

In *Mitsubishi,* the Master states that it is for the courts to pursue the agenda of justice, even in the matter of litigation costs, and that this task cannot be subcontracted. The Master believes a new approach with documented bills and time recording will make it easier for the courts to engage with the process of costs measurement on an objective basis. It is for these reasons that the Master felt the Master's Court was a wholly appropriate forum for the pilot exercise in measuring costs. He expresses the hope that the Legal Costs Regulatory Body, when established, would pay particular attention to what he describes as "draft recovery guidelines published by the High Court (through its officer, the Master, pursuant to the Rules of Court)".[14]

The Master summarises the Irish and English jurisprudence available on measurement of costs. He explains in great detail how costs should be measured.

He concludes with a summary of how the cost assessment should be done, *inter alia:*[15]

The recoverable cost should be measured objectively. The costs will be determined by reference to the hourly rate of the lawyer of appropriate grade for the task and not by reference to the lawyer who actually performed it *i.e.* if Junior Counsel is sufficient, then a Senior Counsel may not recover his/her fees. The basic hourly rate for each grade lawyer should be the same. The rate of the lawyer who is the lead or responsible lawyer for the task is subject to an automatic uplift of the prescribed guideline. Any task requiring advocacy will normally be allowed as a team work item but the advocate will be allowed extra time (of no less that half of the hearing time) for preparation for court appearances. Time will be measured in real time but for no more that the prefixed time budgets for standard items. Circumstances involving sharing of time on more than one matter, or repetitive pro forma work will be allowed on a reduced basis. Full fees will sometimes be allowable for adjournments contested "on the day" with reduced fees as appropriate in other circumstances. A percentage uplift may be allowed for items which for litigation of that particular type involved unusual complexity, exceptional skill on the part of the lawyer, particular urgency and or patently exceptional value for the client.

The Master then applied these principles to the thirteen cases before him and measured costs accordingly. Since *Mitsubishi,* the Master has been applying the principles set out there, to measure and fix the costs of various types of interlocutory motions, when requested to do so.

Role of the Taxing Master

The Taxing Master's functions are detailed further on in Order 99, but it is important to realise that the jurisdiction of the Taxing Master to tax costs only arises (a) following an award of costs by the Court to a party, (b) if the Court itself does not measure costs, and (c) if the parties cannot subsequently agree on costs themselves, necessitating the

to strike out the proceedings for failure to deliver a statement of claim).

Galway v FAS [2004 No. 9033 P] (Motion to dismiss for want of prosecution).

Foley v Hamilton [2006 No.307 CA] (Motion to extend the time for appealing a Circuit Court order).

King v Brophy [2004 No. 18251 P] (Motion to dismiss for failure to deliver a Statement of Claim).

Monahan v McCafferty and Murray [2003 No.1715P] (Motion to strike out Defence).

Noonan v Ballyconway Transport Ltd and Peter Ward Ltd [2001 No. 12322 P] (Motion for discovery).

The Governor and Company of The Bank of Ireland v Gaynor [2006 No. 3855 S] (Motion for liberty to enter final judgment).

Unecol Company Ltd v James Healy T/a James Healy and Sons [2006 No. 1251 S] (Motion for liberty to enter final judgment).

Wright v Foley and Lenihan [2001 No. 10586 P] (Motion to strike out for breach of court order).

4 P.2 of the Master's judgment.

5 Established by the Minister for Justice, Equality and Law Reform in September 2004.

6 Legal Costs Working Group Report, November 7, 2005.

7 Para.5.24, Legal Costs Working Group Report.

8 The Legal Costs Implementation Board was established by the Minister for Justice Equality and Law Reform in early 2006.

9 Legal Costs Implementation Advisory Group report, November 2006.

10 Para.2.5, Legal Costs Implementation Advisory Group report.

11 P.4.

12 P.5.

13 Para.6.10 of its 29th Report.

14 P.9.

15 P.41.

intervention of the Taxing Master to determine the amount of costs allowable.

There are very detailed provisions contained in Order 99 as to the practice and procedure of taxation generally: the office of the Taxing Master is a specialist tribunal dealing with nothing but the taxation of legal costs, day in day out. There is even provision for the awarding of further costs by the Taxing Master for attendance by parties at taxation (Order 99, Rule 29 (12)). Finally, the Court exercises a supervisory role over the Taxing Master: parties unhappy with determinations of the Taxing Master can apply to the Court for a review of the determination. Thus, when it comes to the question of measuring costs, the Taxing Master is a subcontractor of the Court: the Court at first instance can measure the costs itself, or it can allow the Taxing Master to decide the question if there is no agreement between the parties; if a party is dissatisfied with the Taxing Master's findings, it can bring the matter back before the Court for a final determination or measurement.

Appropriate measures

Although it is not uncommon for the Court to exercise its discretion to measure costs, there is very little caselaw indeed (the Master of the High Court's *Mitsubishi* ruling aside) dealing with *when* the Court should exercise this discretion, and *how*. The provisions of Order 99 are in identical terms to the pre-1999 England and Wales equivalent rules, and over the years the Court of Appeal has provided some useful guidance on these questions. In addition, we provide some common-sense pointers for practitioners faced with the prospect of measured costs.

The seminal case on the exercise by the Court of its discretion to measure costs in lieu of taxation is *Leary v Leary*,[16] a decision of the Court of Appeal in matrimonial proceedings. There, when delivering judgment, the trial judge, without prior warning to the husband, had made an order under the equivalent of Order 99 Rule 5 directing him to pay to the wife a fixed amount of stg£31,000 costs, instead of having the costs of the proceedings taxed. The trial judge stated that the order for costs reflected the consequences of the husband's failure to disclose his financial position during the proceedings, and that the possibility of further litigation arising out of a taxation of costs should be forestalled for the benefit of the parties.

The Court of Appeal upheld the judge's summary measurement of costs in lieu of taxation, finding that the judge was entitled to exercise his discretion under the equivalent of Order 99, Rule 5 to award a fixed sum in lieu of taxed costs, if he considered such an award was required to reflect the failure of a party to disclose his or her financial situation. The court went on to say that generally, the power to measure costs was not confined to "modest and simple cases". Nor was the judge required, before making the award, to conduct an inquiry in the nature of a "preliminary taxation" in which there was a detailed investigation of the figures. The whole purpose of measuring costs was to avoid the expense, delay and aggravation involved in protracted litigation arising out of a taxation.

The discretion was, however, required to be exercised judicially and the judge was required to give proper consideration to all relevant factors when measuring costs, the Court of Appeal said. Furthermore, it depended on the circumstances of the case whether the rules of natural justice required the judge to warn of his intention to measure costs and to give the affected party the opportunity of making submissions before doing so. However, where the judge assessed a gross sum without warning, it was open to the parties to make submissions in case certain aspects had been overlooked.

The court found that the decision to award measured costs without prior warning was not open to challenge as an exercise of discretion, and that the husband had not shown prejudice by being deprived of the opportunity to contest the costs submitted by the wife's solicitors.

Leary v Leary is the leading case on the old England and Wales equivalent of the discretion to measure costs. Since the introduction of the new Civil Procedure Rules in 1999, a new regime as to the awarding of costs generally, and specifically the assessment of costs, has been in operation, leading to a large gap between the practice of the Irish courts and the courts across the water on such questions.

In brief, under the post-1999 CPR regime, the English and Welsh courts now deal with the quantification of costs awards either by way of detailed assessment by a costs officer (analogous to taxation) or by "summary assessment", akin to measurement.[17] Summary assessment involves the court determining the amount payable at the end of the hearing, usually on a relatively rough-and-ready basis.[18] Where hearings of either trials or interim applications are disposed of within a day, all courts are obliged to make a summary assessment of the costs of that day on that day, unless there is good reason not to do so. Two good reasons for not doing so are where (i) a party shows substantial grounds for disputing the costs claimed and so the costs cannot be dealt with summarily, or (ii) there is insufficient time to carry out a summary assessment properly. Summarily-assessed costs normally are payable within 14 days of the order.

To assist the judge, parties are required to file and serve not less than 24 hours before the hearing signed statements of their costs for the hearing detailing, *inter alia,* the number of hours claimed, the hourly rate, the grade of fee earner, the solicitor's costs for attending the hearing, counsel's fees and VAT. At the end of the hearing, the judge asks for the parties' statements of costs, and examines the detailed breakdown of costs actually incurred by the party to whom costs have been awarded. The court is permitted to draw on its general experience of costs in comparable cases, to decide if the figures in the statement of costs are reasonable and proportionate, although judicial tariffs for different types of cases are not allowed.[19] Neither is the fact that the amount

16 [1987] 1 All E.R. 261.

17 Under CPR, Pts. 43 and 44.

18 *Bryen & Langley v Boston* [2005] E.W.C.A. Civ. 973, at paragraph 43. The following account has been synopsised from S. Sime, *A Practical Approach to Civil Procedure* 7th ed. (Oxford: OUP, 2004).

19 *1-800 Flowers Inc. v Phonenames Ltd* (2001) T.L.R. July 9, 2001 (Court of Appeal).

claimed is very large reason for detailed rather than summary assessment.[20]

One of the leading post-1999 English and Welsh case on summary assessment of costs is *1-800 Flowers Inc. v Phonenames Ltd.*[21] There, the trial judge's summary assessment of costs of a trade mark action lasting a full day at stg£10,000, when the parties had submitted statements of costs of stg£38,842 and stg£65,009 respectively, was overturned by the Court of Appeal, which sent the question of costs off for detailed assessment. Jonathan Parker LJ stated that "it is in the nature of the jurisdiction to assess costs summarily that the ambit of the court's discretion when carrying out a summary assessment is very wide" but "it is of the essence of a summary assessment of costs that the court should focus on the detailed breakdown of costs actually incurred by the party in question, as shown in its statement of costs; and that it should carry out the assessment by reference to the items appearing in that statement."[22]

Measuring Up

The following are some pointers for practitioners on the measurement of costs:

- The Court may of its own motion decide to measure costs rather than have them taxed.
- The Court which hears the matter should be the one which measures, and not another Court, as it is only the Court which has actually heard the case and knows about it that is in a position to make a summary assessment of costs.[23]
- If the Court decides to measure, it need not ape or copy the practices and procedures of the Taxing Master, but can act in a summary manner.[24]
- Under Order 99, Rule 5, no provision is made for the parties to be heard before the Court measures costs, but it is clearly in the interests of justice that parties be afforded the opportunity to be heard before the Court measures.[25]
- It is open to one or both of the parties to ask the Court to measure instead of tax.
- Where a party seeks to have its costs measured on the spot by the Court, to aid the Court a bill or statement of the party's costs for the hearing can be presented for the Court's consideration, with a copy for the other side. To avoid accusations of ambush and to allow the other party to respond, it might be prudent to send a copy to the other side prior to the hearing.
- Parties may dispute items of costs presented to the Court by the other side.[26]
- Measurement rather than taxation may be more appropriate in:
  - short, self-contained and discrete matters that have reached a conclusion before the Court;
  - matters where finality is desirable and the delay, aggravation and expense of further taxation proceedings would best be avoided;[27]
  - standard or common applications which frequently come before the Court;[28]
  - matters where measurement and an order for immediate payment is requested because payment of costs by the losing party is in doubt;[29]
  - cases where the Court wishes to mark its displeasure with a party's conduct, or where some serious prejudice has been caused to the opposite party for which it is necessary immediately to compensate him.[30]
  - cases where "issue-based costs orders" are made by the Court.[31]
- On the other hand, taxation may be more appropriate than measurement in:
  - cases where there is likely to be an overall taxation of costs at their conclusion;
  - complex or non-standard matters, that are perhaps interlinked with or referable to other proceedings where costs will not be measured but will be taxed;
  - hearings that last longer than a day;
  - matters where one party is legally aided, a minor or under a disability, or an emanation of the State;
  - matters where an award of costs covers multiple plaintiffs or defendants.[32]
- Order 99, Rule 5 appears to exclude split measured/taxed costs awards by the Court.
- Measurement is not to be confined to "simple" or "small" cases only.[33]
- An award of measured costs has the same status as any other order of the Court, and is enforceable in like manner.

Finally, one possible variant on a measured costs order to note is Mrs. Justice Finlay Geoghegan's current order in many restriction applications against company directors: that the applicant liquidator's costs are to be taxed in default of agreement, with a stay, provided that the respondent director do pay to the applicant liquidator the sum of €X, as measured by the Court, within a certain time. ■

20 *Bryen & Langley v Boston* [2005] E.W.C.A. Civ. 973.
21 *1-800 Flowers Inc. v Phonenames Ltd* (2001) T.L.R. July 9, 2001 (Court of Appeal). The other leading case is *Lownds v Home Office* [2002] 1 W.L.R. 2450.
22 At paragraph 114.
23 *Mahmood v Penrose* [2002] E.W.C.A. Civ. 457.
24 *Leary v Leary* [1987] 1 All E.R. 261.
25 *Newton v Newton* [1990] 1 F.L.R. 33.
26 For possible arguments, see generally, K. Scott & J. Morgan, *Summary Assessment of Costs* (Oxford: OUP, 2006).
27 *Microsoft Corporation v. Backslash Distribution Ltd* [1999] T.L.R. March 15, 1999.
28 As is the practice in the Master's Court after *Mitsubishi.*
29 *Silva v C. Czarnikow Ltd* [1960] 1 Lloyd's Rep. 319 provides an entertaining account of a pre-emptive application by successful defendants for costs to be measured in lieu of taxation.
30 *IBM United Kingdom Ltd v Henry Boot Scotland Ltd*, Court of Appeal, unreported, February 23, 1990.
31 For example, *Veolia Water UK plc v Fingal County Council* [2006] I.E.H.C. 240, Clarke J., unreported, June 22, 2006. See generally, H. Delany, "The Costs of Interlocutory and Leave Applications" 25(17) *I.L.T.* 270 (2007).
32 Ibid.
33 *Leary v Leary* [1987] 1 All E.R. 261.

Bioethics and The End of Life

Ann Power SC*

This is the third and final article in a three part series dealing with bioethics and the law. The first and second articles featured in the November and December editions of *The Bar Review*.

Polarized Paradigms

The last two decades have been marked by two apparently contradictory developments. On the one hand, disabled people have organised themselves into a new social and political movement in order to challenge discriminations that have excluded them from contemporary society and in order to promote their civil rights. In many countries, including Ireland, anti-discrimination legislation has been passed and barriers to the participation of disabled people are beginning to be removed. Negative attitudes towards disability and impairment have been challenged.

On the other hand, advances in genetic knowledge acquired through pre-implantation genetic diagnosis (PGD) means that embryos can screened for genetic disease and eliminated from those selected for implantation. The development of pre-natal screening programmes promises improved health on the basis of selective termination of pregnancies affected by impairment or disability. Under the U.K. Abortion Act, 1967, abortions until birth are permitted in circumstances where there is a substantial risk that the child if born "would suffer from physical or mental abnormalities" as to be seriously handicapped—the foetal abnormality ground.[1] In addition, gene therapies hold out the possibility of curing genetic disabilities. Disability rights and genetics, at their extremes, represent two polarized paradigms.[2]

Selective Non Treatment of Infants

R v Arthur[3] was the first case of selective non-treatment of infants that brought the whole subject before the public conscience.[4] It has been said that there are surprisingly few substantive issues in medical ethics that Dr Arthur's case does not raise[5] and it remains an important landmark decision. The salient features of the case are that a baby was born with, apparently, uncomplicated Down's Syndrome and was rejected by his parents. Dr Arthur, a Paediatrician of high repute and impeccable professional integrity, wrote in the notes: "Parents do not wish it to survive. Nursing care only." He prescribed a drug, Dihydrocodeine, to be administered four-hourly. The child was not fed. He developed pneumonia and received no medical treatment.

Three days later, the baby died and Dr Arthur was charged, initially, and subsequently, the charge was reduced to manslaughter. Following Farquaharson J's controversial direction to the jury, Dr Arthur was acquitted. The Judge said:

> Where there is an uncomplicated Down's case and the parents do not want the child to live … I think there are circumstances where it would be ethical to put it upon a course of management that would end in its death. … I say that with a child suffering from Down's and with a parental wish that it should not survive, it is ethical to terminate life.[6]

The reasoning of the trial judge in the *Arthur* case must be subject to criticism. At the very least, the case raises a question about the inconsistency in the law's approach to the intentional taking of a person's life. The Judge drew a distinction between allowing the child to die by doing nothing (omission) and some positive act to bring about its death. But in criminal law, as illustrated in the case of *Gibbons v Proctor,*[7] a deliberate omission which results in the death of person for whom one is responsible, is murder.

In 1918, Walter Gibbins and his partner, Edith Proctor, were tried and convicted of the murder of Gibbins' seven-year-old daughter, Nelly. The child had died of starvation. Gibbins and Proctor were convicted of her murder and sentenced to death. The trial Judge's address to the jury in that case was fully approved by the Court of Criminal Appeal. It contained the following passage:

> If you think that one or other of these prisoners wilfully and intentionally withheld food from that child so as to cause her to weaken and to cause her grievous bodily injury as the result of which she died, it is not necessary for you to find that she intended, or he intended, to kill this child then and there. It is enough for you to find that he or she intended to set up such a set of facts by withholding food, or anything, as would in the ordinary course of nature lead gradually but surely to her death.

That statement of the law was settled jurisprudence in

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1 Section 1(1)(d).
2 Tom Shakespeare, "Disability, Human Rights and Contemporary Genetics", *Living with the Genome*, (Clarke and Ticehurst, 2006, Palgrave Macmillan) 157.
3 [1981] 12 BMLR 1.
4 Mason & McCall Smith, *Law and Medical Ethics* [London: 1999] at 369-370.
5 Gillon, "An Introduction to Philosophical Medical Ethics: The *Arthur* Case" in *British Medical Journal* [1985] 290 1117.
6 [1981] 12 BMLR 1 at 21-22. See also the leading article at the time: "After the Trial at Leicester" [1981] 2 Lancet 1085.
7 *R v Gibbins & Proctor* [1918] 313 CAR 134.

England nor had it ever been suggested that it applied only to lay people having a duty of care and not to the medical profession who also have such a duty.

Doctors stand in a special relationship to their patients. Once a patient is in her care, a doctor has a duty to act in that patient's best interests. She breaches that duty if she stands by and does nothing in circumstances where law and ethics indicate that she should act. The criteria by which the Court in *Arthur* concluded that a doctor may lawfully adopt a policy of "nursing care only", namely, (i) irreversible disability and (ii) rejection by a parent is by any standards, a remarkable interpretation of both medical and parental responsibilities and powers. Should the fate of a child depend on his parents' wishes? It has never been part of our law that parents may choose death for their children.

In respect of the decision in *R v Arthur* to withhold nutrition and hydration from a Down's Syndrome child, Mason and McCall Smith say

> to take such a life is to make a social rather than a medical decision—the fact that it was taken by a doctor rather than a member of the public should be irrelevant.[8]

In Re B (A Minor)

The *Arthur* case stands in contrast to *In Re B (A Minor).*[9] B was an infant suffering from Down's syndrome complicated by intestinal obstruction of a type which would be fatal *per se* but which was readily amenable to surgical treatment. The parents took the view that the kindest thing in the interests of the child would be for her not to have the operation and for her to die. The question: "To treat or not to treat?" came before the courts. Templeman LJ concluded that the Judge of first instance, in refusing to authorise the operation, had been too much concerned with the wishes of the parents. The duty of the court, he held, was to decide the matter in the interests of the child. In coming to the conclusion that these interests were best served by treatment, he said:

> It devolves on this court to decide whether the life of this child is demonstrably going to be so awful that in effect the child must be condemned to die or whether the life of this child is still so imponderable that it would be wrong for her to be condemned to die. Faced with [the] choice, I have no doubt that it is the duty of this court to decide that the child must live.[10]

In Re B suggests that a balancing exercise be conducted in assessing the course to be followed in the best interests of such children. The case did, however, leave the door open for an alternative decision for Templeman LJ also stated:

> There may be cases of severe proved damage where the future is so certain and where the life of the child is so bound to be full of pain and suffering that the court might be driven to a different conclusion.[11]

And such a different conclusion was reached in a number of subsequent cases involving the treatment of chronically ill children.

In Re J (A Minor)[12]

In a number of cases since *B,* the courts in England have permitted doctors to treat disabled children in a manner that would, allegedly, allow their lives to end peacefully and with dignity.[13] Such treatment as would relieve them from pain, suffering and distress could be given but it was specifically said to be unnecessary to use antibiotics or to set up intravenous infusions or nasogastric regimes. It was emphasised that such decisions were based on the paramountcy of the children's welfare and were in their "best interests".

In Re J (No. 2),[14] the Court refused to order intensive care for a child who suffered a brain injury after a fall and the mother's application was refused. The Court of Appeal refused to entertain the suggestion that it should direct clinicians to provide treatment against their best clinical judgement. And in *Re C*[15] Orthodox Jewish parents believed that life should always be preserved. However, the Court would not order treatment to be given. In *A National Health Service v D,* in 2000, the English High Court made a declaration sought by the NHS Trust responsible for a 19 month old disabled child's care.[16] It directed that in the event of cardiac or respiratory arrest, it would be lawful to administer only palliative care. The case involving *Charlotte Wyatt*, recently before the Courts again resulted in a similar order.

Assisted Nutrition and Hydration [ANH]

The fundamental inconsistency in the law's approach to the intentional taking of human life (first evident in the *Arthur* case) is particularly evident in a number of cases in which the question of assisted nutrition and hydration [ANH] is raised. The English cases indicate a strong judicial belief that ANH is a matter of clinical judgment, a belief that was reiterated last year in the case of *Burke v General Medical Council.*[17] Mr Burke had a degenerative condition known as cerebellar ataxia. In time, his condition will deteriorate to the point where, prior to becoming comatose, he will be unable to perform ordinary bodily functions by himself and he will need assistance in every aspect of his life, including obtaining nutrition and hydration. Despite this, he will be able to think and to appreciate his surroundings. Mr Burke was concerned that the General Medical Council's Guidelines might result in him being deprived of nutrition and hydration

8 Mason & McCaul Smith, *Law and Medical Ethics* (7th ed.) Oxford, OUP, 2006 547.
9 [1990] 1 AER 927.
10 Ibid. at 929.
11 Ibid.
12 [1990] 3 AER 930.
13 See, for example, *In Re C* [1989] 2 AER 782; and *In Re J* (A Minor) [1990] 3 AER 930.
14 [1992] 4 AER 614.
15 *Re C (A Minor)* (1997) 40 BMLR 31.
16 *A National Health Service v D* [2000] 2 FLR 677 at 686.
17 *Burke v General Medical Council* [2005] EWCA Civ 1003 (28 July 2005).

and that he would suffer the prolonged and distressing dying process which that deprivation would cause. Accordingly, he challenged the lawfulness of certain parts of the Guidelines, claiming that they infringed his human rights as guaranteed by the European Convention which was incorporated into British law by the *Human Rights Act, 1998*.

At first instance, Munby J. was satisfied that certain parts of the *Guidelines* were in breach of his rights and found largely in favour of Mr Burke.[18] He held that the starting point should always be in favour of saving life but acknowledged that there were exceptional circumstances, for example, where a patient is dying, that the interests of a patient would not require nutrition and hydration be given. Munby J. based his decision on what might be characterised as an unsophisticated description of a patient's right to choose treatment (as a corollary to his right to refuse). On appeal, the Court of Appeal overturned Munby J's decision and held that clinical decision making regarding the provision of food and hydration could trump a patient's wishes. In other words, a clinician could decide that the life in question should come to an end.

Is a doctor entitled to decide that a life should come to an end by withdrawal of ANH? Is that a medical or a social judgment? The vexed question was first raised in the *Bland* Judgment in which the House of Lords accepted, without question, that ANH was a medical matter.

Airedale NHS Trust v Bland

Until *Bland*, a person who is charged with a duty of care could not exercise that duty in such a manner as to bring about the end of the life of the person with whose care they are charged. [*Gibbins v Proctor*]

Tony Bland suffered catastrophic injuries following the 1989 disaster at the Hillsborough football stadium in England. He was diagnosed as being in a persistent vegetative state (PVS) in which most but not all brain function had ceased. For the four years Tony Bland was in hospital, he had breathed spontaneously without the need for a ventilator. His eyes were open most of the time, but he did not communicate with anyone, as far as could be determined. Because he could no longer swallow, he received his food and hydration through a tube. In 1993, after a lengthy court battle, his family and doctors won the right, via a declaration of the House of Lords, to withdraw the tube that fed him and gave him fluids. He died soon afterwards.

The Court in *Bland* accepted the argument that feeding via nasogastric tube was medical treatment because (according to Lord Keith) it was part of the overall *care regime* in place. For Lord Goff, he was satisfied that ANH was medical treatment because there was overwhelming evidence that in the medical profession, it is regarded as a form of medical treatment. Once they had established that ANH was medical treatment, then their Lordships in judging the action of a doctor who withdraws it, were able to retreat to more familiar decision-making territory and apply the standard principles governing the actions of a medical practitioner. In a sense, more basic ethical principles—such as, the sanctity of life or respect for the person—yielded to the professional judgement of the healthcare team. The Court held that because clinicians were of the view that ANH should be withdrawn on the grounds of futility, (it was not going to improve Bland's condition), then the Court would not second guess such judgment. Removal of ANH was lawful if it was based on clinical judgment.

Questions of a similar nature have come before the Irish Supreme Court in *Re a Ward of Court*[19] and the Supreme Court followed the reasoning of the House of Lords in the *Bland* case. At the time, the Irish Medical Council considered this matter and declared:

> Tube feeding is a normal part of patient care; every human being is entitled to feeding and hydration, and the removal of a feeding tube to starve a patient to death offends against medical ethics and leaves any doctor who does so exposed to disciplinary charges.

Ordinary Care or Medical Treatment?

Sheila A. McLean, Chair of the International Bar Association of Law and Ethics in Medicine questions whether the Courts have got it right in locating the provision of Assisted Nutrition and Hydration [ANH] firmly within the realm of medical treatment. She argues that the Courts have failed, singularly, to address this question which, in her view, is at the heart of the matter.

It might be thought common sense that nutrition and hydration are not medical matters but rather amount to no more than basic care.[20] Of course, ANH may be distinguished from standard feeding because it is not delivered in the same way. Thus, it might be argued that there is a difference between people eating and drinking for themselves and people requiring assistance from medical staff to receive nutrition and hydration.

Two points arise for consideration. Firstly, there are many people who receive assistance in feeding, yet we provide it anyway. Babies, the elderly, and people with spinal cord injury frequently receive assistance in feeding. Indeed, failure to feed a person for whom one is responsible is a criminal offence; murder, if the person subsequently dies as a result.[21] Secondly, because medical people are involved in inserting the tube and checking it periodically, does that make it a medical issue? If lawyers were shown how to do it—as undoubtedly they could be—it would not become a legal issue. McLean argues that the mere fact that nutrition and hydration are delivered by assisted means in a hospital environment does not change what it is—it does not transform it into a clinical matter any more than washing a person in a hospital setting becomes a medical act.

This, McLean argues, is important because once ANH is categorised as medical treatment rather than basic care

18 *R (On the application of Burke) v General Medical Council* (2004) 79 BMLR 126.

19 [1996] IR 1.

20 Sheila A. McLean, "From *Bland* to *Burke*: The Law and Politics of Assisted Nutrition and Hydration", *First Do No Harm: Law, Ethics and Health Care* (McLean, 2006, Ashgate, at 431.

21 *R v Senior* [1899] 1 QB 283.

the question as to its provision or not is judged by different standards. Whereas my failure to treat my child—no matter what the reason—would be regarded as a criminal offence, special rules exist when acts or omissions are deemed to be medical. The test applied when ANH is under consideration is not the rightness or wrongness of depriving someone of nutrition and hydration but rather what would a reasonable doctor do in the circumstances?

The crux of the question hinges on how we are to judge the provision of ANH. If it is basic care, then it must be provided unless we are prepared to say that we sanction the deliberate judgement that a person's life is not worth living; that he or she would be as well off, if not better off, dead. This is probably a bitter pill to swallow but it is *de facto* what we are doing. If, on the other hand, ANH is medical treatment, then its provision will be judged by different standards.

Those who defend the withdrawal of nutrition and hydration draw comparisons between sustaining a person by artificial feeding and sustaining him by artificial ventilation. If it is morally and legally acceptable to withdraw artificial ventilation from an irreversibly comatose patient why, then, should it not be morally and legally acceptable to withdraw artificial feeding? There is, however, a significant difference between the two activities. *Feeding* people is part of our *ordinary care* of them. At various stages, people are helpless in regard to obtaining or ingesting food. Other people feed them (cared for them) and consequently, they survive. Is not feeding a person by means of spoon, tube or bottle, most naturally understood as the extension of an ordinary pattern of care? By contrast, "making people breathe" is not part of our ordinary care of them; oxygenating others is not a routine part of what we do for each other. The reason is obvious. At any normal stage of extra-uterine life, we can breathe spontaneously and the air is there to be inhaled. Making someone breathe cannot be understood as an extension of ordinary care. It is an intervention which is more reasonably understood as having its justification in the promotion of medical goals (the restoration of health or of some approximation to health, or the palliation of symptoms). If such goals are not achievable, there can be no obligation to continue ventilation.

The "Best Interests" Test

A repeated justification for some of the decisions that authorize withdrawal of ANH is the application of the "best interests" test. Both American and English jurisprudence suggest that acting in the "best interests" of the patient may necessitate the intentional ending of his or her life by withdrawal of nutrition and hydration. This test, when applied with death as the only consequence, is odd. One does not have any interests if one is dead. It is incoherent to suppose that the death of a human being can be "good for him". If an act is good for a person, it improves his condition, or makes his life go better than it would have gone had the action not been performed. Setting someone's broken leg is good for him; feeding someone's hunger is good for him as is curing his disease. But one can never cure or benefit a person by ending his life. Death is not, as it were, the ultimate medicine.

Noted scientist-philosopher Leon Kass believes that putting doctors in the role of physician-euthanisers is oxymoronic. He wonders if one can "benefit the patient as a whole by making him dead"?[22] There is, of course, a logical difficulty: how can any good exist for a being that is not? To intend and to act for someone's good requires his continued existence to receive the benefit. Of course, the Courts do not always say that it is in the patient's best interest that he/she should die but, rather, that their feeding be discontinued. Being intellectually honest, should we not ask whether fudging the issue by re-phrasing words and side-stepping the centrality of intention does anything to advance public understanding of the ethical issues involved.

Is there not something of an inconsistency in how the law approaches the taking of human life? Whereas the criminal law has articulated, clearly, the requirements for unlawful killing perhaps, on the civil side, there's a certain failure to grasp the thorny issue of intention. Are we prepared to say that there is such a thing as a life not worth living and to accept the consequences that follow?

Euthanasia and Assisted Suicide

Article 2 of the European Convention on Human Rights provides that "No one shall be deprived of his life intentionally." In the ongoing international debate about the legalization of euthanasia, a significant point of reference has been the recommendation against legalization passed in 1999 by the Parliamentary Assembly of the Council of Europe.[23] Recommendation 1418 urged member states to "respect and protect the dignity of the terminally ill or dying persons in all respects" by recognizing their right to comprehensive palliative care and by upholding the prohibition against intentionally taking the life of terminally ill or dying persons.[24]

With advanced medical technology, we live longer now than we did in the past. Improvements in medical science have eliminated many life-threatening conditions but some remain incurable and may involve considerable suffering. There is an argument that says that people who are chronically or terminally ill should not have to remain alive. They should either have the choice to end their lives voluntarily (euthanasia) or have the assistance in the ending of their lives (assisted suicide) or have their lives ended for them if they cannot exercise choice (non voluntary euthanasia).

Euthanasia has many forms but, essentially, it involves the intentional bringing about of the death of a person who is ill. It may be voluntary or involuntary, passive or active but the critical factor is "intention"—the intentional ending of a life *now* that is not otherwise going to end now. The issue is raised in a number of areas, including, the selective non treatment of infants, the killing of the terminally ill and the withdrawal of assisted food and hydration from the chronically ill.

In the light of developments in the statutory laws of

22 See Hentoff, "Death as a Way to Cut Health Care Costs", *Village Voice* [19 April, 1994].

23 Protection of the human rights and dignity of the terminally ill and the dying. Council of Europe, Recommendation 1418 (1999). The Council of Europe was established in 1949 in order *inter alia* to defend human rights.

24 Ibid. at para 9.

Netherlands, Belgium and Switzerland and, in the case law of Britain, it is not surprising that in recent times moves have been made to revise the Council of Europe's position.[25]

Death with Dignity

American cases such as Karen Ann Quinlan, Nancy Cruzan and more latterly Terri Schiavo and others dealing with active or passive euthanasia often refer to a person's right to "die with dignity". The reasoning assumes that dignity is something that others can confer or withhold. Yet all the major international Conventions and Declarations on human rights rest upon the principle that dignity is a constituent of human nature and that human rights are acknowledged and protected because of the dignity of the person. All human beings in virtue of their natural abilities to participate in and instantiate value (truth, beauty, justice, friendship,) are *of value in themselves*.

It is arguable that intentionally ending a person's life is fundamentally inconsistent with an acknowledgement of that person's value. A person in a persistent non-responsive state *is* a human being and dignity inheres in such a person *now,* as a human being, by virtue of his or her humanity. Whatever else patients who are chronically ill may lack by virtue of their impaired conditions, they are not deprived of dignity. Thus, does legalizing euthanasia really "allow" a person to "die with dignity"? Is that not something they possess irrespective of the provisions of law?

Those who support a legal right to euthanasia or assisted suicide argue that each person out of respect for his or her dignity and value has a right to take decisions concerning his or her own life and death in accordance with his or her own values and beliefs, as long as no harm is done to others. Opponents, on the other hand, while supporting the right of patients to make a wide range of decisions concerning their medical treatment, reject *one* decision as being incompatible with the patient's dignity and value:-the decision to be intentionally killed or to be helped to commit suicide. John Keown writes:-

> To prohibit that choice does not deny the patient's dignity but affirms it, just as disallowing some other choices a person may want to make, such as to be executed rather than imprisoned or enslaved rather than free, equally respects his or her inalienable dignity. The fact that through depression or pain or loneliness, some patients may lose sight of their worth is no argument for endorsing their misguided judgment that their life is no longer worth living. Were the law to allow patients to be intentionally killed by their doctors the law would be accepting that there are two categories of patients: those whose lives are worth living and those who are better off dead.[26]

Pretty v United Kingdom

The European Court of Human Rights in its decision in *Pretty v The United Kingdom*[27] has determined that it is legitimate to control the manner in which scientific advances are made in order to enable consideration of the risks that may be involved. That case concerned the compatibility with human rights of restrictions on assisted suicide.

Diane Pretty contended that English law's prohibition of her chosen mode of death, killing by her husband at her request, breached her rights to determine how she died. Claims resting upon article 2 (the right to die) and article 3 (protection from inhumane and degrading treatment) were rejected firmly, as they had been by the House of Lords.[28]

The European Court was not persuaded that the right to life under Article 2 involved a negative right to terminate one's life. It held that, without a distortion of language, the Article could not be interpreted as involving a right to die. Nor does it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. The Court also rejected Mrs Pretty's contention that her suffering qualified as "degrading treatment" under Article 3 of the Convention. The primary obligation imposed by this provision was negative. The State must not inflict torture or inhuman or degrading treatment. The court in Strasbourg held that Mrs Pretty's right to "self-determination" under Article 8 of the Convention was not violated by the State's refusal to allow for assisted suicide. Article 8, it held, covered the manner in which a person conducted her life, not the manner in which she departed from it.

The European Court found that a blanket ban on assisted suicide was acceptable if there was a legitimate public interest in restricting Mrs Pretty's personal autonomy and if the restrictions were proportionate to that interest as to be "necessary in a democratic society". Member states, it held, are entitled to regulate activities which are detrimental to the life and safety of individuals.

Living Wills

Another area in which the interface between medicine and law arises is in the area of so called "living wills". Most advance directives are concerned with what is to be done after their makers have become incompetent or incapable of understanding the nature and quality of their options and actions, or of acting rationally on the basis of such understanding as they have. Such directives typically come into effect after a person has become incapable of performing legally significant acts such as the act of revoking the advance directive itself. Existing advance directive legislation provides that, *while competent*, makers of such declarations can freely

25 In September 2003 a Report entitled *Euthanasia* was passed by a narrow majority of the Council's Social, Health and Family Affairs Committee. The Report comprised a Draft Resolution and an Explanatory Memorandum which was written by Mr Dick Marty. That Report called for the legalisation of euthanasia but in April 2004 the Parliamentary Assembly sent it back to the Committee for reconsideration. A revised Report (Marty II) was produced in February 2005.

26 John Keown, "Defending the Council of Europe's Opposition to Euthanasia", *First Do No Harm: Law, Ethics and Health Care* (McLean, 2006, Ashgate, at 488.

27 European Court of Human Rights, 29 April 2002 [2346/02].

28 *R (Pretty) v DPP* [2002] 1 AER 1.

revoke them, even by a nod or a wink. These provisions testify to the common sense of the matter: people's assessment of their own interests and/or concerns often vary with circumstances. What seemed like a good idea at one point may no longer seem quite so. But the inner logic of advance directives is this: once one becomes incompetent, it is one's *past* assessments and directives that prevail over one's own present desires, however urgently felt and expressed, and over any assessment of one's best interests that may be made by one's family, friends and attending doctors and nurses.

Ronald Dworkin in *Life's Dominion* argues:

> A competent person's right to autonomy requires that his past decisions about how he is to be treated if he becomes demented be respected even if they contradict the desires he has at that later point.[29]

This conclusion, he accepts, "has great practical importance" and "very troubling consequences". He continues:

> We might consider it morally unforgivable not to try to save the life of someone who plainly enjoys her life, no matter how demented she is, and we might think it beyond imagining that we should actually kill her. We might have other good reasons for treating [her] as she now wishes, rather than as . . . she once asked. But still, that violates rather than respects her autonomy.[30]

Dworkin concludes that if we refuse to carry out an advance directive which a person, now happily demented, gave while competent, "we cannot claim to be acting for her sake". The practical conclusion of Dworkin's argument is that those who, when competent, have willed that they should die if they become incompetent have a right to be put to death when incompetent even though, at that time, they enjoy life and firmly wish to stay alive.

Considerations of principle aside, advance directives may present practical difficulties and living wills may frustrate rather than promote personal autonomy. Not every choice we make is rational. Not every choice is good. How is a person to predict the circumstances that materialise many years into the future? How is a person to know the condition that he may contract, the treatment that may be available, how he may feel then as distinct from now and whether his present perception of an illness will be borne out by his actual experience of it. Since he cannot know these things, precisely, he is forced into making a *general* directive.

The more general a directive is, the less likely it is to address the specific situation that actually materialises. Whereas a complex will can be interpreted at leisure by a probate lawyer trained for the task, a detailed advance directive may fall for more urgent interpretation by a harried and over-worked clinician in a casualty department with no such training in the interpretation of legal documents. Is it prudent to entrust one's life to what may be a rushed interpretation of a complex document by a busy hospital doctor? One American expert's study of advance directives has led him to conclude that it is not. He notes that, often, advance directives are vague, ill-crafted and confusing to lay people, lawyers and the medical profession who implement them. Stone claims that people, generally, do not understand the implications of the advance directives they draft or sign. He concludes:

> The bottom line, then, is that advance directives are often dangerously confused, even when they least appear to be, and those who implement them are often more so, though they usually do not know it. Consequently, signing a living will is imprudent, because, at the very least, you risk putting yourself at the mercy of people who do not know what it means. … Philosophical questions aside—why die stupidly?[31]

Conclusion

The ethico-legal problems that arise in the biosciences at life's various stages are complex in the extreme. People have different ideas about how they should be resolved. Judge McGovern asked:

> If the law is to enforce morality, then whose morality is it to enforce? [32]

Citing O'Higgins C.J. he quotes:

> Judges may and do share with other citizens a concern and interest in desirable changes and reform in our law; but under the Constitution, they have no function in achieving such by judicial decision.
>
> The sole and exclusive power of altering the laws of Ireland is, by the Constitution, vested in the Oireachtas.
>
> The Courts declare what the law is—it is for the Oireachtas to make changes if it so thinks proper.[33]

As we stand at the crossroads in this "brave new world", how we choose, through our laws, to respond to the problems we face will reflect not just the kind of people we are but the kind we want to become.

Advances in biomedicine pose difficult and complex challenges. But the mere fact that the issues are difficult does not absolve us from addressing them and addressing them well. Resolving the ethical and legal issues in biomedicine requires us to be critical in our scrutiny, to marshal all of the evidence, to weigh both sides of the argument, to have regard for competing values and co-existent rights, and, hopefully, to arrive at judgments that are in accordance with the requirements of justice. ■

29 Ronald Dworkin, *Life's Dominion* [London: 1993] at 228, 229.
30 Ibid. at 232.
31 Jim Stone, "Advance Directives, Autonomy and Unintended Death", [1994] 8 *Bioethics* 191.
32 *MR v TR & Others* at page 22.
33 *Norris v The Attorney General* [1984] IR 36 at 33.

The Renewal of a Summons

Yvonne Moynihan BL

Introduction

By virtue of Order 8, rule 1 of the Rules of the Superior Courts an order renewing a summons may be made where the court is satisfied that reasonable efforts have been made to serve the defendant or where other good reason exists. It is often of paramount concern to practitioners as a renewed summons is treated as having remained in force from the date of issue and thus prevents the Statute of Limitations from expiring. This article will focus on whether the balance of justice favours the continuance of a case.

Following the judgment in *John O'Grady v The Southern Health Board and Tralee General Hospital*[1] it was held that a court should not refuse to renew, where the case would otherwise be statute barred, unless the defendant demonstrates to the satisfaction of the court, the clearest possible case of actual prejudice, such that his defence to the claim has been in actual terms substantially impaired. The author will consider the evolution of the "other good reason" criteria and analyse where the balance of justice currently lies.

The *Baulk* and M*cCooey* approach

In *Baulk v Irish National Insurance Co Ltd*[2] the plaintiff applied to renew a summons more than two years after it was issued. The plaintiff contended that the defendant was at all times aware of the claim and that if the motion was renewed, the plaintiff would suffer a great detriment because the claim would be statute barred. Mr Justice Walsh denoted that as the defendants had been aware from an early point of the intention to pursue with a claim, no injustice had been done. He renewed the summons on the basis that "...the fact that the Statute of Limitations would defeat any new proceedings, which might be necessitated by the failure to grant renewal sought, could itself be a good cause to move the Court to grant the renewal".[3]

In the subsequent case of *McCooey v Minister for Finance*[4] the plaintiff applied to renew the summons on the basis that the defendant was aware of the plaintiff's intention to sue and that the claim would be statute barred if the application for renewal was refused. O'Dalaigh CJ emphatically adopted the *dictum* of Walsh J in *Baulk*, that the expiration of the Statute of Limitations constituted a sufficing reason to grant the renewal.

The Statute Is Not The Only Determining Factor

The rationale of *Baulk* and *McCooey* was not followed in subsequent High Court decisions. In *Prior v Independent Television News Limited*[5] the renewal of a summons was disputed by the defendant as he contended that he was no longer in a position to defend his claim adequately. As a result he asserted that he would be prejudiced in his defence because of the delay. Barron J assessed the situation and pointed out that prejudice to the defendant is equally as important as prejudice to the plaintiff. He thus engaged in a balancing exercise and weighed up the hardship caused to the plaintiff in depriving him of his claim and that which the defendant may endure by the impairment of his defence due to the lapse of time (which was 9 years). The learned judge distinguished the case from *McCooey* as the time span was longer and the defendants were unaware of the plaintiffs intention to pursue them in the courts. After serious consideration, the learned judge opined that justice required that leave to renew the summons should be refused. He based this decision on the grave delay that had prejudiced the defendant in that his ability to defend the claim had been seriously impaired.

The above principles were followed in *Sullivan v Church of Ireland*[6] where Laffoy J advanced that in order to make a determination on whether it would be in the interests of justice to refuse or renew the summons, the detriment to the plaintiff should be balanced against the detriment to the defendant. She found that as the defendants key witness had died, this detriment outweighed that of the plaintiff due to his failure to make reasonable efforts to effectuate service. She refused the renewal as the plaintiffs delay was so flagrant.

A similar stance was taken in *O'Brien v Fahy Trading as Greenhills Riding School*[7] where the Supreme Court highlighted that the defendant had only been informed of the intention to sue four years after the accrual of the action thereby greatly prejudiced her in making her defence. It was noted that the fact that a plaintiffs cause of action would be statute barred if not renewed was thus not the only factor to be considered. Barrington J asserted that when the defendant and their solicitor were prepared to swear affidavits that the defendant suffered an actual prejudice (as opposed to a theoretical one) the balance of justice would lie in refusing the renewal.

In *Martin v Moy Contractors Ltd & Ors*[8] the court in considering whether there was "other good reason" had regard not only to the excuse for the delay in that case (a frank inadvertence by the solicitor) but also to he fact that: "*in the present case de Beeres have not shown any specific prejudice". (Emphasis added).*

1 The High Court (Mr Justice O'Neill); February 2nd 2007.
2 [1969] I.R 66.
3 *Ibid.* at 72.
4 [1971] I.R 159.
5 [1993] ILRM 638.
6 [1999] I.R 214.
7 Unreported, 21st March 1997, Supreme Court.
8 Per Lynch J. 11TH February, 1999.

Presumed Prejudice and Actual Prejudice

In assessing the above cases, it can unequivocally be stated that the Statute of Limitations is not the only determining factor. Having established this, it can then be reasoned that if the plaintiff establishes a good reason for renewal, the court will then assess any prejudice caused to the defendant. In analysing prejudice, the significance of gross delay without any intimation that proceedings are being brought against a defendant is an element to urge the court not to renew a summons.[9] It should be acknowledged that the passage of time gives rise to a presumption of prejudice. [10] A defendant can go further and manifest that prejudice can be based on standards of actual prejudice where a plaintiff is dilatory to a high degree.

The observations of Hardiman J in *Gilroy v Flynn*[11] should be given particular attention as he averted to the rule change since the *Rainsford* and *Primor* cases to the effect that on a second application by a defendant to dismiss a plaintiff's claim for failure to deliver a statement of claim, the court shall order dismissal unless special circumstances explaining and justifying the failure.[12] The learned judge noted that:

> "...the courts have become evermore conscious of the unfairness and increased possibility of injustice which attaches to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrues...following such cases as *McMullen v Ireland* ECHR 422 97/98 July 29th 2004, and the European Convention on Human Rights Act 2003, the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.
>
> These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end...in particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of professional advisor, may prove an unreliable one".[13]

These observations were adopted by O'Sullivan J in *Allergan Pharmaceuticals (Ireland) Ltd v Noel Deane Roofing and Cladding Ltd and others*[14] where he deduced that the court will give in effect reduced weight to delay on the part of professional advisors. He explained that the courts are under an obligation, by virtue of the European Convention, to ensure civil actions are heard within a reasonable time and concluded that inadvertence is not sufficient to constitute a good reason for renewing a summons.

O'Grady v. The Southern Health Board And Tralee General Hospital

The judgment of Mr Justice O'Neill developed the law further and emphasised that if defendants do not demonstrate specific or actual prejudice to their defence, presumed prejudice is not sufficient. O'Neill J alleged that defendant prejudice can be dealt with in an application for dismissal for want of prosecution, whereas a refusal of the renewal will, where the limitation period has expired, result in irreversible defeat of the plaintiffs claim. He was of the view that not having yet received the statement of claim the defendants could not point to specific or actual prejudice at this preliminary stage in the proceedings.

Mr Justice O'Neill concluded that notwithstanding the inordinate and inexcusable delay on the part of the plaintiff, the time barring of the plaintiff's claim by non renewal of the plenary summons, in the absence at this stage of evidence of actual considerable prejudice to the defence, would be punitive on the plaintiff. At this preliminary stage it appears that we can deduce that the interests of justice lie in favour of the continuation of the case.[15]

Conclusion

It can be concluded that mere presumptive prejudice should not suffice to cause the refusal of the renewal. The evolution of "other good reason" has taken a new course. It has been stressed by the courts that there is an obligation on them to ensure that all proceedings are completed in a reasonable time frame. It was highlighted in *Gilroy v Flynn* that the ECHR necessitates a stricter approach. Notwithstanding that, Mr Justice O'Neill opined that such an approach must take place in the most appropriate procedural setting. This will occur only after a statement of claim has been delivered. The outcome of *O'Grady* is that it appears that gross delay can be excusable even if it unsustainable. A full consideration of the effects of the passage of time can only be considered when the defendant knows with precision and clarity whether his defence has been impaired – which is after the delivery of the statement of claim. The interests of justice favour the continuation of a case. Practitioners should be aware that defendant prejudice can be dealt with in an application for a dismissal for want of prosecution unless the clearest possible case of actual prejudice is presented. ■

9 McGrath, "Renewal of a Summons under Order 8 of the Rules of the Superior Courts" Bar Review 3(1997). McGrath expands on this and denotes that the Supreme court in *O'Brien* accepted that in *Baulk* and *McCooey,* the fact that the defendants in those cases had at an early stage been given an indication that a claim was being pursued and were thus given an opportunity to prepare was a significant part of the *ratio* of the case.

10 (Per O'Sullivan J) *Allergan Pharmaceuticals (Ireland) Ltd v Noel Deane Roofing and Cladding Ltd and others* [2006] IEHC 215.

11 [2005] 1 ILRM 290.

12 See *Allergan Pharmaceuticals (Ireland) Ltd v Noel Deane Roofing and Cladding Ltd and others.*

13 [2005] 1ILRM 290 at 293/294.

14 [2006] IEHC 215.

15 O'Callaghan, *"Renewal of summons in case otherwise time-barred not to be refused unless clear case of actual prejudice" The Irish Times*, 26th February 2007.