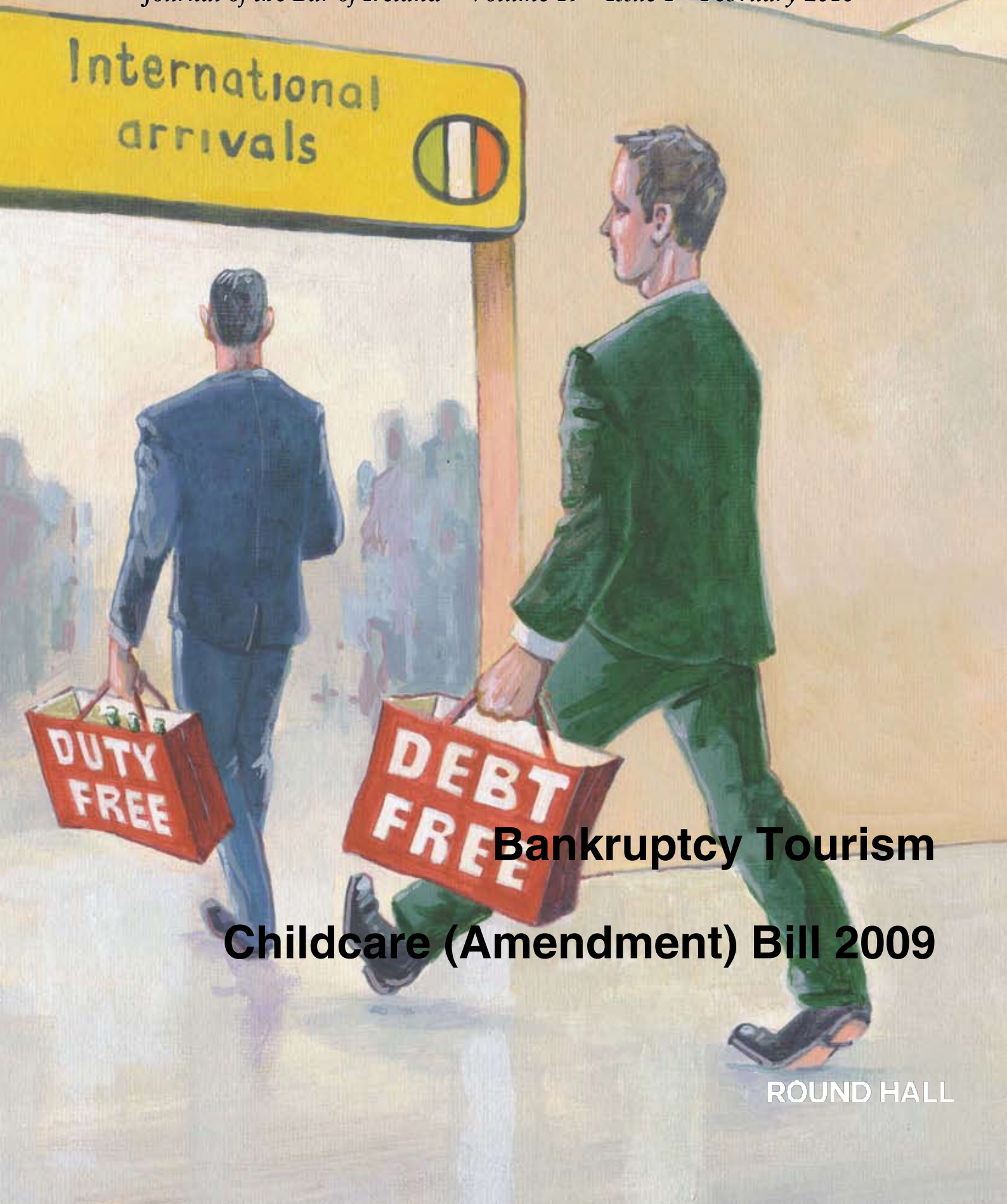
The Bar Review

Journal of the Bar of Ireland • Volume 15 • Issue 1 • February 2010



Bankruptcy Tourism

Childcare (Amendment) Bill 2009

ROUND HALL

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The Bar Review

Volume 15, Issue 1, February 2010, ISSN 1339-3426

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

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Subscriptions: January 2010 to December 2010—6 issues
Annual Subscription: €260.00 + VAT

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Are They Watching You? – The Criminal Justice (Surveillance) Act 2009

By AnneMarie Whelan BL

Introduction

The Criminal Justice (Surveillance) Act 2009 ("the Act") was signed into law on the 14th July 2009 and came into force on the 12th July 2009. The intention behind the legislation was to provide a legal framework for the admissibility of evidence gathered through the use of covert surveillance. It gives a legal basis to what is perceived to be existing practice and attempts to bring Irish law into compliance with the European Convention on Human Rights. It is entitled:

> "An act to provide for surveillance in connection with the investigation of arrestable offences, the prevention of suspected arrestable offences and the safeguarding of the state against subversive and terrorist threats, to amend the Garda Siochaina Act 2005 and The Courts (Supplemental Provisions) Act 1961 and to provide for matters connected therewith."

As a result of this legislation, practitioners will soon have to deal with a new type of evidence gathered through surveillance (hitherto inadmissible due to the lack of statutory controls) and we may also find ourselves mounting challenges to the constitutionality of some of the provisions. This article looks at the Act's provisions and asks if they go too far in impinging on personal privacy or go far enough in terms of regulating the area of surveillance?

The Scope of the Act

Despite the broad nature of the long title to the Act, the legislation actually only applies to the use of surveillance devices such as audio recorders (bugs) and video recorders in surveillance of suspects or locations where devices are physically planted. "Surveillance" is defined within the Act as "(*a*) monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications, or (*b*) monitoring or making a recording of places or things, by or with the assistance of *surveillance devices*;"[1] [emphasis added].

The parties to which the provisions apply are An Garda Siochana in respect of arrestable offences, the Defence Forces in respect of threats to the security of the State and the Revenue Commissioners in respect of Revenue Offences (which are set out specifically within the Act)[2]. Certain rank limitations are also applied[3] and the Act only permits "Superior Officers" to apply for an authorisation. In the case of An Garda Siochana a superior officer is defined as "not below the rank of Superintendant".

Unlike other areas of surveillance which are regulated e.g. data retention, and apply to even the most minor of offences, the application of the Act is limited to arrestable offences only i.e. offences carrying a sentence of 5 years or more. A "superior officer" must be investigating the commission or apprehended commission of an arrestable offence however it is not necessary that the superior officer identify a specific arrestable offence[4].

Procedure

A superior officer must apply to a District Court Judge for an authorisation to carry out covert surveillance save for cases of urgency. The application is to be made *ex parte* for obvious reasons. It is also to be heard otherwise than in public[5].

Where cases of urgency arise members of the relevant bodies are not required to apply for an authorisation but instead can seek approval from a superior officer[6]. While the circumstances which give rise to urgency under the Act are set out, the section effectively allows members to bypass the judicial process entirely. While there is a stricter time limit applied to approvals, it remains open to the relevant superior officer to apply for an authorisation within the time period[7].

Time Limits

An authorisation can only last up to 3 months[8] and an approval up to 72 hours. However, there is provision for the renewal of the authorisation for up to 3 months with no finite number of applications for renewal, the result being that, theoretically, a person could be kept under surveillance indefinitely.

Confidentiality and disclosure

Section13 provides, what is effectively, a complete ban on disclosing any information relating to the operation of the

1 s.1 Criminal Justice (Surveillance) Act 2009
2 s.4.
3 s.1.
4 s.5(3).
5 s.5.
6 s.7.
7 s.7 (10).
8 s.5(8).

Act's provisions including disclosing the existence of an authorisation or approval. It is broad in its terms and goes so far as to make unauthorised disclosure an offence punishable by a term of imprisonment up to 5 years. A distinction is draw between "relevant" persons and all other persons with the former being members of An Garda Siochana, the Revenue Commissioners or the Defence Forces. "Relevant" persons face higher penalties for revealing information.

As regards disclosure, s.15 is quite comprehensive in banning disclosure of documents, relating to the exercise of powers under the Act, save by authorisation from the Court. It states:

> "(1) Unless authorised by the court, the existence or nonexistence of the following shall not be disclosed by way of discovery or otherwise in the course of any proceedings:
> (a) an application under section 4 or 6;
> (b) an authorisation;
> (c) an approval granted under section 7 or 8;
> (d) surveillance carried out under an authorisation or under an approval granted under section 7;
> (e) the use of a tracking device under section 8; and
> (f) documentary or other information or evidence in relation to—
> (i) the decision to apply for an authorisation or an approval under section 7 or 8, or
> (ii) anything referred to in paragraphs (a) to (e)."

It also goes further in directing the Court to refuse disclosure where there is a material risk to the security of the State, the integrity of An Garda Siochaina, the Revenue Commissioners or the Defence Forces, a risk to the State's ability to protect people from terrorist or gangland activities or to protect witnesses.

Admissibility

The ultimate goal of the legislation is to arm the relevant bodies with evidence that can be used in prosecutions. The Act therefore clearly states that evidence obtained through authorised surveillance may be admitted in criminal proceedings[9]. Further provision is made for situations where there is an error on the face of an approval or authorisation and situations where the members acting on an authorisation or approval fail to comply with a condition attached thereto. In those circumstances, the evidence may still be admitted but factors to be considered by the trial Judge are included in the legislation[10]. The factors included are akin to those set down in *DPP v Kenny*[11] in respect of the admissibility of search warrants *e.g.* whether the error or omission was serious or merely technical in nature.

9 s.14
10 s.14(3)(b)
11 [1990] WJSC –CCA 417

Safeguards

The main form of safeguard provided for within the legislation is judicial oversight. The application for an authorisation must be made to a District Court judge and a High Court judge will be nominated to keep the system under review with an annual report[12].

The type of surveillance for which authorisation is sought must be proportionate to the rights of third parties and the aim sought to be achieved. The type of surveillance for which authorisation is sought must be the least invasive form of surveillance required in the circumstances and the District Judge should refuse authorisation in cases where the communications sought to be placed under surveillance are likely to be privileged. S.4 states:

> "(5) A superior officer who makes an application under *subsection (1)*, *(2)*, *(3)* or *(4)* shall also have reasonable grounds for believing that the surveillance being sought to be authorised is— (*a*) the least intrusive means available, having regard to its objectives and other relevant considerations, (*b*) proportionate to its objectives, having regard to all the circumstances including its likely impact on the rights of any person, and (*c*) of a duration that is reasonably required to achieve its objectives."

The legislation also includes a complaints procedure[13] which allows any person who believes that they might be the subject of an approval or authorisation to apply to the "Referee" for an investigation[14]. A Superior Officer can apply in certain circumstances, the High Court judge keeping the system under review may also request an investigation and the Referee may on his or her own initiative investigate. The Referee must investigate (unless the application is frivolous or vexatious) whether an authorisation or approval has been granted and if so, whether there has been any contravention. If there is a contravention, the applicant and any other persons materially affected by the contravention are to be informed in writing unless the Referee is of the opinion that it would not be in the public interest to do so. The Referee is also empowered to quash the authorisation or approval and make a recommendation that compensation of up to €5,000 be paid to the applicant. The Referee will then report to the appropriate Minister on the contravention[15]. If no contravention is found, the Referee will simply inform the applicant that there has been no contravention, no other details will be provided.

The Effect on Privacy

When State bodies are given greater powers which infringe

12 s.12
13 s.11
14 s.11 (12) In this section— "Referee" means the holder of the office of Complaints Referee under the Act of 1993;
15 The Garda Ombudsman Commission in cases involving Gardaí, the Minister for Finance in cases involving the Revenue Commissioners and the Minister for Defence in cases involving the Defence Forces,

the rights of civilians there will always be a question of human rights interference. In this particular situation, the concern attached to such interference is very real. What is at issue here is the ability of An Garda Siochana to "lawfully" enter into a person's private property to plant devices in an effort to capture incriminating communications or actions. The legislation was enacted in the context of increasing and strengthening the legal arsenal of An Garda Siochana in fighting gangland crime. Many civilians supported the idea of a free rein to bug the homes of gangland figures and other serious criminals, but have they considered that they themselves could be the subject of such investigation? The possibility of such a scenario arising is more likely when one considers that all persons working in Ireland are liable to taxation and could fall foul of the Revenue Commissioners who have also been given similar powers under the Act.

While there are safeguards within the legislation, no matter how strong a written provision is, ultimately the protection afforded by it depends entirely on how it is used and interpreted in practice. There remains a large amount of dependence on the beliefs of the Superior Officers in terms of the facts of a given situation when an application is made. It is always difficult for a District Court Judge in dealing with any *ex parte* applications seeking warrants, etc. to independently verify facts put to them, particularly by Members of An Garda Siochana. The result is that Judges are quite often forced into situations where they have to rely solely on the word of the applicant before them. It is always possible that an over-zealous member could misinterpret information brought to their attention as falling within the category for an authorisation but that interpretation will probably never be challenged. Even if we could assume, without doubt, that authorisations are only ever sought in situations which warrant such surveillance, there remains a possibility that the surveillance could be used for different means or that the surveillance goes beyond the terms of what the authorisation provided for. Restrictive rules on disclosure make it likely that this would never be discovered. Furthermore, even if a violation is discovered, evidence obtained in violation of the statute is not automatically excluded.

In relation to the overall supervision and review by a High Court Judge one would question the wisdom of appointing an already heavily worked Judge to such a task. Also, the minimum requirement to provide a single Annual Report is likely to amount to little more than a compilation of statistics. More worryingly, the fact that surveillance can be approved without an application to a Judge in cases of urgency means that such cases will not be independently supervised unless further time is required and an application for authorisation is sought. It is interesting to note that in its draft form the Act contained provision for a 14 day period for cases of urgency. Quite rightly this was reduced however, even a three day period affords leeway for abuse.

Furthermore, An Garda Siochaina are believed to have been using covert surveillance methods for years to increase intelligence and assist in getting more typical types of evidence. With this legislation, greater use will almost certainly be made of covert surveillance methods increasing the risk to normal civilians of having their privacy invaded. In fact recently, the numbers within the Garda National Surveillance Unit (which is likely to be making most use of the new provisions) increased. Added reliance on such methods clearly heightens the risk of covert surveillance intruding on areas where more traditional types of evidence could have been obtained.

Finally, the complaints procedure provided for within the Act can only be described as bizarre. It allows you to find out if a disclosure request has been made about you only by making a request (if you first believe that you might be the subject of an authorisation or approval!), but you will only be told if an approval or authorisation was made if it turns out that there has been a contravention and the Referee decides it does not offend the public interest to tell you. Also the decision of the "Referee" is final meaning that no further investigation into the matter will take place as there is no appeal system.

The Constitution and the ECHR

As with all European Convention rights, the actions must be "in accordance with law", "necessary in a Democratic Society" and any breach must be proportionate. In this case we are concerned with a breach of Article 8 ECHR which protects the right to respect for private and family life, the home and correspondence.[16]

The legislation appears to have been drafted with that provision in mind given some of the phrases chosen however, only time will tell if the provisions will stand up to the scrutiny of the European Court of Human Rights. Indeed our very own Superior Courts are likely to have to express an opinion on the constitutionality of the legislation given the existence of Art.40.3 of Bunreacht na hEireann relating to the inviolability of the home and Art. 38 in respect of the right to a fair trial.

However, a good measure of the strength of the protections within the provisions may be gained by looking at some of the caselaw of the ECHR in this area and also provisions in other jurisdictions, in particular the United Kingdom.

Caselaw

It is quite clear that the ECHR is not opposed to the use of covert surveillance however it has been insistent on the use of strict provisions to provide the maximum protection. It is also clear that the mere existence of legislation will not be sufficient *per se to* satisfy the necessity for actions to be "in accordance with law" and the ECtHR will assess the quality of the provisions set down in legislation. The Court has stated that there must be a:

> "measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by [Article 8.1]. Especially where

16 Article 8 ECHR states at paragraph 2."There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

> a power of the executive is exercised in secret, the risks of arbitrariness are evident…[17]"

As early as *Klass v Germany* (ECtHR, 6 September 1978) the European Court of Human Rights has dealt with the issue of covert surveillance directly and whether its use amounts to a breach of Art.8 ECHR. The Court stated that:

> "the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate…. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law".

In *Klass*, the Court found that the surveillance was in accordance with law as there were Parliamentary Acts which laid down strict procedures and conditions for the use of covert surveillance. The purposes of the surveillance were specifically stated and they were found to be necessary in a democratic society. The statute contained stringent preconditions and a number of provisions aimed at keeping the effect of the surveillance to an "unavoidable minimum". The emphasis of in the Court's ruling was consistently on the detailed provisions and criteria to be fulfilled within the German law and the Court was satisfied in that case that they were sufficient.

The question for Ireland is, therefore, whether the measures in the Criminal Justice (Surveillance) Act 2009 afford the same protection and satisfy the stringent criteria. It may only be a matter of time before they are tested as it remains to be seen how the provisions are in fact applied in practice.

The United Kingdom Position

More recently the ECtHR found a breach under Art. 8 in *Khan v United Kingdom* (ECtHR, 12 January 2000). In that case, Khan had been recorded in conversation with a Mr. B which incriminated Khan in drug dealing. Unknown to Khan, a bug had been placed in Mr. B's house where the conversation took place. At the relevant time, despite the existence of a Government White Paper from 1980, the Interception of Communications Act 1985 and Home Office Guidelines, no statutory framework existed for the use of covert listening devices. The United Kingdom shortly brought into force the Police Act 1997 to deal with the issue and ultimately the Regulation of Investigatory Powers Act 2000 ("RIPA") was enacted to cover covert investigative techniques comprehensively.

However, even with RIPA, the Surveillance Commissioner (not a High Court Judge) designated to keep that system under review, has raised huge concerns over breaches and most especially the (ab)use of the Statutory powers for trivial offences and not the offences targeted by legislation. The risk of similar breaches here exists and especially with the provision for approval without judicial oversight in cases of emergency.

Regulation

In 1998, the Law Reform Commission highlighted a need to bring regulation to the area of surveillance in all its forms. However, the reaction of the Government in bringing through legislation in this area has been extremely slow with the result that all developments have been *ad hoc*. This was despite opportunities existing to put in place a complete system of regulation (containing consistent principles to govern the use and oversight of such surveillance). Most notably with the mooting of the Privacy Bill, the Oireachtas could have linked the two issues (which are clearly related) however, the issue of surveillance was completely ignored.

While there exists some legislation regulating other forms of surveillance such as the interception of communications, use of CCTV, retention of data, etc. the passing of this specific Act was an opportunity to unify principles in relation to the general use of surveillance and its oversight. In this respect the scope of the legislation is quite limited and leaves other surveillance methods such as gps tracking unregulated (save for a temporal limit)[18]. Presumably, the inviolability of the dwelling as a Constitutional right had an impact and resulted in the focus being on "planted devices". The main thrust of the Act being that it allows Gardaí to break into private property to place (and remove) covert surveillance devices (such as video cameras and audio bugs) within the property and to use any evidence gathered with those devices in criminal prosecutions.

Much of the remaining legislation is also out of date, in particular the 1993 interception of communications legislation which with technological advances is no longer adequate to protect communications, especially by email and other internet uses.

Conclusion

Ultimately, regulation in this area has to be welcomed as a means of protecting personal rights to privacy and keeping Ireland in line when it comes to the ECHR. While the Criminal Justice (Surveillance) Act 2009 can be seen as a first step towards regulation in this area, it is only a small step with a lot more work to be done to regulate other forms of surveillance. Even at that, it is unlikely that the provisions will escape a Constitutional challenge or even a challenge under the ECHR, given the huge impact it will have on the admissibility of certain evidence and personal rights. ■

17 Malone v United Kingdom (ECtHR, 2 August 1984)

18 s.8 allows gps tracking for up to four months but there are no provisions for judicial oversight.

Bankruptcy Tourism

TED HARDING BL

Introduction

Petitioning for bankruptcy in the United Kingdom is suggested by some as a panacea for insolvent Irish citizens. Potentially, they could free themselves from debt after only a year.

What is the reality? This paper examines cross-border bankruptcies between EU member states, the phenomenon of "bankruptcy tourism", the legal principles that apply and the pitfalls to be negotiated.

Onerous bankruptcy regimes

Currently, severe bankruptcy and insolvency laws in various EU member states can impose crippling burdens upon a bankrupt. In Ireland, a bankrupt may remain "undischarged" for 12 years after adjudication, sometimes longer. In Germany it may take a bankrupt six-to-nine years to emerge from the process. In stark contrast, in the UK a bankruptcy can end after only 12 months.

The perception of the UK as a debtor-friendly jurisdiction for nationals of EU member states has led to the country becoming regarded as a "paradise" for opportunistic "bankruptcy tourists". For Irish people burdened by weighty debts, it may be tempting to execute such a strategy in Northern Ireland. The issue has yet to be tested in a court there.

The origins of bankruptcy tourism

A significant change in the law was brought about in 2002 with the coming into force of Regulation (EC) No. 1346/2000 ("the Regulation") in member states, other than Denmark. The Regulation dictates which member state will have jurisdiction in insolvency proceedings and which law will apply.

The Regulation is intended to regulate insolvency proceedings having cross-border *implications*.

Cases of insolvency with cross border effects are regarded as affecting the proper function of the internal market within the EU. With a view to developing more uniform procedures that would avoid incentives for "*forum shopping*"› the 2000 Regulation proposed solutions. Ironically it appears to have made cross-border bankruptcies between member states easier to complete, much to the concern of creditors.

The basis on which the Regulation applies

The fundamental basis for application of the Regulation to a personal debtor is expressed in Article 14: "This Regulation applies only to proceedings where the debtor's centre of main interest is located in the community". This does not mean that the Regulation will apply simply because a debtor has assets within the jurisdiction of any one Member State. The debtor's "Centre of Main Interest" (COMI) must be within a Member State.

Centre of Main Interest (COMI)

The Regulation does not define what is meant by the Centre of Main Interest. Paragraph 13 of the Recitals states that "the centre of main interest should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable to third parties".

The meaning of the Centre of Main Interest – The *Eurofood* case

The primary Irish case (and indeed the leading European authority) determining what constitutes COMI is the Eurofood case[1]. A reference to the European Court of Justice ("ECJ") was made by the Irish Supreme Court following a protracted "battle" between the Irish and the Italian Courts for jurisdiction to oversee the winding up of Eurofood, a wholly-owned, Irish-registered, subsidiary of the Italian Parmalat Group. The food group became engulfed in a major international financial scandal in late 2003, amid reports of falsified bank documentation and arrests of executives.

The High Court decision as to COMI

Kelly J., in the High Court, cited a passage from Moss Fletcher and Isaacs[2] which stated that the centre of main interest:

> "Is intended to provide a test in which the attributes of transparency and objective ascertainability are dominant features. This should enable parties who have dealings with the debtor to found their expectations on the reasonable conclusions to be drawn from systematic conduct and arrangements for which the debtor is responsible. In principle therefore it ought not to be possible for a debtor to gain advantages, at creditors' expense, from having resorted to evasive or confusing techniques of organising its business or personal affairs in a way

1 *In re Eurofood IFSC Limited* [2004] 4 IR 370 (HC); [2004] 4 I.R. 395 (SC), (C-341/04) opinion of Advocate General Jacobs on September 27th 2005, and Judgment of the Court (Grand Chamber) (C-341/04), May 2nd 2006

2 Moss Fletcher and Isaacs (EC Regulation on Insolvency Proceedings), Oxford University Press 2002

calculated to conceal the true location from which interests are systematically administered"[3].

The Court held that Eurofood's COMI was located in Ireland and that the appointment of the Irish liquidator had opened main proceedings for the purpose of the Regulation. The Italian court should have recognised the Irish proceedings by virtue of Article 16 and should have refused to open main proceedings in Italy.

The winding-up order was granted and the Italian administrator appealed to the Supreme Court.

The Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer certain questions to the Court of Justice for a preliminary ruling.

The Advocate General, in his opinion, upheld the right of the Irish court to determine the extent of its own jurisdiction without interference from other member states and found that the appointment of the Irish provisional liquidator had in fact constituted the opening of main proceedings which should have been recognised by the Italian court.

The decision of the ECJ broadly agreed with the Opinion of the Advocate General that one needs to look at the circumstances of each debtor, underlying that the Regulation was meant to prevent clashes of jurisdiction.

Forum Shopping in personal insolvencies – *Shierson v. Vlieland-Boddy*

While in the case of a company, under the Insolvency Regulation the registered office is presumed to be the primary evidence of the centre of main interest, it may be more difficult to determine the centre of main interest of a natural person.

There is no minimum period that a person must spend in an EU member state before it becomes their COMI.

The Court of Appeal for England and Wales had to consider COMI and allegations of forum shopping in the personal bankruptcy arena in *Shierson v. Vlieland-Boddy*[4].

The Court of Appeal decision

Chadwick L.J. gave the principal judgment in the Court of Appeal. He noted that the concept of COMI in the Regulation involved the debtor administering his interests 'on a regular basis' such that it is 'ascertainable by third parties'.

In five points, Chadwick L.J. summarised his decision on COMI. This represents the current state of English law:

> "(1) A debtor's centre of main interests is to be determined at the time that the court is required to decide whether to open insolvency proceedings. In a case where those proceedings are commenced by the presentation of a bankruptcy petition, that time will normally be the hearing of the petition.
>
> (2) The centre of main interests is to be determined in the light of the facts as they are at the relevant time for determination. But those facts include historical facts which have led to the position as it is at the time for determination.
>
> (3) In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be perceived to be doing by an objective observer. And it is important, also, to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence. The court should be slow to accept that an established centre of main interests has been changed by activities which may turn out to be temporary or transitory.
>
> (4) There is no principle of immutability. A debtor must be free to choose where he carries on those activities which fall within the concept of 'administration of his interests'. He must be free to relocate his home and his business.
>
> (5) It is a necessary incident of the debtor's freedom to choose where he carries on those activities which fall within the concept of 'administration of his interests', that he may choose to do so for a self-serving purpose. In particular, he may choose to do so at a time when insolvency threatens. In circumstances where there are grounds for suspicion that a debtor has sought, deliberately, to change his centre of main interests at a time when he is insolvent, or threatened with insolvency, in order to alter the insolvency rules which will apply to him in respect of existing debts, the court will need to scrutinise the facts which are said to give rise to a change in the centre of main interests with that in mind. The court will need to be satisfied that the change in the place where the activities which fall within the concept of 'administration of his interests' are carried on which is said to have occurred is a change based on substance and not an illusion; and that that change has the necessary element of permanence."[5] (Emphasis added)

Official Receiver v Eichler

In *Official Receiver v Eichler*[6], Mr. Eichler, a German citizen, owed over Stg£200,000 to creditors, all of whom were based in Germany. On 1 February 2007, having resided in England for almost six months, he petitioned for his own bankruptcy in England, declaring his COMI to be there.

The bankruptcy order was granted. Subsequently, the

3 *In re Eurofood IFSC Limited* [2004] 4 IR 370, p389

4 *Shierson v. (Clive) Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966

5 Op. cit. para 55

6 [2007] BPIR 1636

Official Receiver challenged its validity, arguing that Mr. Eichler's COMI was in Germany.

The court had to balance the first part of Recital 13 of the Regulation, ("where the debtor conducts the administration of his interests"), against the last part, ("and is therefore ascertainable by third parties").

Not alone were all of Mr. Eichler's debts incurred in Germany, all of his creditors were based in Germany and they would have understood Mr. Eichler's COMI to be in Germany. However, Mr. Eichler had purported to move his COMI to England and Wales six months earlier and had administered his interests from there ever since.

The court concluded that the presumption of residence was crucial. Therefore the original Registrar had been correct to grant the bankruptcy order.

Therefore while the Regulation provides a framework within which the courts of EU member states can recognise insolvency proceedings initiated in other member states, it does not provide an EU-wide insolvency regime.

Staubitz-Schreiber

In *Staubitz-Schreiber*[7] the ECJ considered a forum shopping appeal from the German courts. The applicant in the main proceedings was resident in Germany, where she operated a telecommunications equipment and accessories business as a sole trader.

Ultimately, the German Federal Supreme Court decided to stay the proceedings and referred the case to the ECJ for a preliminary ruling. It asked if the fact that the debtor moves her COMI to another member state after filing for insolvency, but before the proceedings are opened, is relevant for the question of jurisdiction.

The Court underlined that retaining the jurisdiction of the first court that is seised with the matter ensures greater judicial certainty for creditors. When assessing risk, creditors will take into account the risk of retrieving their money, according to the insolvency law regime that is applicable to the debtor when the lending takes place. Therefore, the ECJ concluded, the first court seised maintains jurisdiction, even if the COMI is subsequently moved to another member state – the legal phenomenon of *perpetuatio fori*.

The case is authority where a debtor moves his or her COMI between an application to open insolvency proceedings and the order made on that application. The COMI at the date of application is decisive.

Henwood v Barlow Clowes International Ltd (In Liquidation)

Henwood v Barlow Clowes International Ltd (In Liquidation), Hamilton & Jordan[8] illustrates the perils of forum shopping.

Mr. Henwood challenged the bankruptcy petition presented by Barlow Clowes International Limited and its liquidators. He claimed not to fulfil the requirements outlined by s.265 (1)(a) of the UK's Insolvency Act 1986, ("IA 1986"), and, in particular, that he was not domiciled in England or Wales when the petition was presented.

Mr. Henwood was born in England in 1948 and settled in the Isle of Man ("IOM") in 1975, where he purchased a substantial property as the matrimonial home, ("the Grange"). Following the collapse and subsequent liquidation of Barlow Clowes, for which Mr. Henwood acted as a financial adviser, he maintained that he and his wife were ostracised both professionally and personally on the IOM.

Having spent a short period of time in Mauritius, Mr Henwood and his wife leased a property there, ("the Villa"). Subsequently, they occupied the Villa for significant periods of time each year for a successive period of 14 years. Mr. Henwood and his wife caused various improvement works to be carried out, employed a number of permanent staff there, and stated it as their address in a number of official documents. Mr. Henwood also made enquiries concerning acquiring Mauritian citizenship. In 1998 Mr. Henwood purchased a substantial property in France. They frequently spent their summers at this property. English bankruptcy proceedings were initiated with a view to a trustee in bankruptcy facilitating the unravelling of Mr. Henwood's affairs to secure full payment of the debt.

However, where the debtor was asserting that his domicile of origin had changed to a domicile of choice elsewhere, namely Mauritius, the burden shifted to the debtor and is a question of residence with the necessary intention. The debtor must show a strong case on the evidence that he abandoned his domicile of origin, which is the place of his birth or the domicile of his parents. The debtor must show an intention to make the chosen country his permanent home and that he resided there, for an appreciable period.

Whilst Mr. Henwood might have moved deliberately in order to avoid bankruptcy proceedings in England or the IOM, this did not negate and may indeed have helped to establish the necessary intention.

The court decided "*with great reluctance*" that Mr. Henwood, had succeeded in demonstrating that he was not domiciled in England and Wales, but in Mauritius. Therefore the court had no jurisdiction to entertain a bankruptcy petition against him. The court decided that when Mr. Henwood moved to the Villa in Mauritius with his wife in 1992 he did so with the intention of living there permanently.

However, the Court of Appeal reversed the decision[9], holding that the judge had not considered all the circumstances that bore on the question of whether Mr. Henwood had had the requisite intention to reside permanently or indefinitely in Mauritius. The judge's assessment failed to take into account various important matters, especially the circumstances relating to his residence in France and his wife's absence from Mauritius.

The judge was also held to have failed to appreciate that Mr. Henwood's connection with the French property was a relevant circumstance. His connections with the French property were relevant to whether he intended permanently reside in Mauritius. The judge's conclusions could not stand.

7 *Staubitz-Schreiber* (case C-1/04) [2006] All ER (D) 65 (Jan). Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-701. The Court of Justice of the European Communities (Grand Chamber)

8 *Peter Stephen William Henwood v (1) Barlow Clowes International Ltd (In Liquidation)* (2) *Nigel James Hamilton (3) Michael Anthony Jordan* (2007) [2007] EWHC 1579 (Ch)

9 [2008] EWCA Civ 577

Mr. Henwood had failed to establish that his domicile of choice was Mauritius. The only conclusion could be that his domicile of origin had revived.

In Re TXU Europe German Finance BV

In *Re TXU Europe German Finance BV*[10] an English Registrar implicitly stated that forum shopping could undermine creditors' rights and that he might not have granted the order sought in the event the debtor's recent cross-border migration had caused prejudice to foreign creditors. The court was concerned with the question of whether it was possible to wind up two foreign companies voluntarily, where the COMI of both companies was the United Kingdom.

Further warning: the *Medicon* case

Medicon Limited was an English company. It carried out business mainly in Berlin. The company offered debt relief services through media advertising. The advertisements focused on the possibility of discharge from bankruptcy in the UK after only a year, compared with six-to-nine years in Germany.

The company was wound up in the public interest before Mr. Registrar Simmonds in England last year. This occurred in the context of a dispute over information given by the company to the courts and to the Official Receiver concerning the residence and employment of its clients, namely German nationals. The clients appeared to be living and working in England for approximately six months, when, in fact, this was found not to be correct.

The case has yet to be reported, however it appears to offer a further warning to those who have a simplistic view of the UK as a "debtor-friendly" jurisdiction.

Contact with *Creditors v. Mind of Management Concepts*

It has been suggested[11] that two concepts may be used when interpreting the cases cited above. They are broadly entitled the "contact with creditors approach" or the "mind of management approach". The first of these is a "contact with creditors approach" i.e. looking at the issue from the eyes of the creditor and determining the debtor's COMI. This concept draws on Recital 13, which provides that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis "and is therefore ascertainable by third parties".

In a Dutch case of *LJN*: AU7353,[12] a creditor had filed for insolvency proceedings concerning a debtor on the 13th of September 2005.

The debtor still continued to carry on business activities and he had several debts owed to the filing creditor. However, these factors were insufficient to prove that his COMI was in the Netherlands. It was held that the Dutch Courts did not have jurisdiction to open main insolvency proceedings.

This contrasts with the "mind of management" concept, sometimes referred to as the "head quarters" approach. In *Collins and Aikman Europe SA*[13] an application for Administration Orders had been made concerning 24 companies in the Collins and Aikman Corporation Group. One was incorporated in Luxembourg; six were incorporated in England; one in Spain; one in Austria; four in Germany; two in Sweden; three in Italy; one in Belgium; four in the Netherlands; and one in Ireland. The Collins and Aikman Group had its headquarters in the USA.

The Court had regard to Recital 13 and several English Court decisions on the centre of main interests, including *Brac Rent a Car International Inc*[14] and *re Daisytek-Isa Limited*[15] and looked to see if the head office functions were actually carried out in a member state other than the State in which the registered office was situated.

Main Proceedings

Article 3 (1) embodies the basic principle that the State within whose territory the debtor's COMI is situated is the internationally appropriate venue for insolvency procedures affecting the debtor's entire estate and hence possessing the attribute of extra territorial effectiveness.

The regime established under Article 3 is a mandatory one and will overreach any national rules of jurisdiction which are available to be employed in a case where the debtor's COMI is located outside the EU.

Article 3.2 specifies the basis for the exercise of a territorial jurisdiction by Member States other than that of the debtor's COMI.

Article 3.2 permits other Member States Courts to open insolvency proceedings only under strictly defined circumstances. These are: where the debtor possesses an establishment within the territory of the State in question and no other basis of jurisdiction is allowed; and the effects of such proceedings are strictly restricted to the assets of the debtor situated within the territory of the State in which the establishment is located.

They are therefore referred to as "secondary" or as "territorial"[16]. Article 2 (h) declares that for the purposes of the Regulation "establishment" shall mean any place of operations where the debtor carries out a non transitory economic activity with human means and goods". This means that the definition excludes the situation where there is merely

10 [2005] BPIR 209

11 See "The Changing Landscape of International Insolvency Law in Europe, paper presented during the conference "Developments in Cross Border Insolvencies; the Changing Landscape of US and Foreign law" American Bar Association, (International Section), New York, USA, 5-7th April, 2006 by Bob Wessels, (then Professor of Commercial Law Vrije University, Amsterdam, The Netherlands), now Professor of International Insolvency Law at the University of Leiden, the Netherlands

12 LJN: AU7353, decided by the District Court Dordrecht (The Netherlands) on the 23rd of November 2005

13 *Collins and Aikman Europe SA* [2005] EWHC 1754, (decision of the UK High Court of Justice, Chancery Division, Companies Court 15th July 2005)

14 *Brac Rent a Car International Inc* [2003] 1 WLR 40 1421

15 *In re Daisytek-Isa Limited* [2004] BPIR 30

16 See Article 3.4: "Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only."

a presence of assets within a Court's jurisdiction regardless of how large, small or valuable those assets might be.

The prerequisites therefore for the opening of secondary proceedings in a particular Member State are: firstly, that main proceedings have already been opened in the State where the debtor has his centre of main interest; secondly, that the debtor possesses an establishment within that Member State; thirdly that assets of the debtor are located or situated within that Member State; and fourthly that the proceedings must be for winding up, (and not for rehabilitation or rescue).

Insolvency proceedings are governed by the law of the Member State in which proceedings are opened, as was explained by Murphy J., in *Flightlease Ireland Limited*[17]. The Court said:

> "The applicable law – *lex forum concursus* – governs the effects of the insolvency proceedings both procedural and substantive. The purpose of the Regulation is to ensure that the creditors of an insolvent company domiciled within the Union are entitled to be treated equally in terms of their participation in the distribution of assets of the insolvent company... Uniformity of application of the law of the State of the opening of the insolvency proceedings is required in order to ensure that all claims in the insolvency proceedings are treated in the same manner"[18].

Secondary or territorial proceedings

Secondary or territorial proceedings may be opened either before or after the main proceedings have been opened. Article 3 (4) states that the opening of the secondary or territorial proceedings can only take place in advance of the opening of the main proceedings in two cases. The first of these is where the main proceedings cannot be opened because of conditions laid down in the law of the member state within whose territory the debtors COMI is situated.[19]

The second permitted case is where this is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory in which the establishment of the debtor is situated, or by a creditor whose claim arises from the operation of that establishment[20].

The more usual situation where one would expect secondary proceedings to be opened is where local creditors in the State in which the debtor has an establishment are of the view that they might fare less well under the main insolvency proceedings, notably if they enjoy the status of preferential or secured creditors according to the law of the State in which the establishment is situated. Such concerns are likely to be at the forefront of the minds of creditors in this country where there is a prospect that debtors may be tempted to take the route of the bankruptcy tourist.

Conclusion

The prospect of dealing with the implications of Ireland's crippling bankruptcy regime makes the notion of bankruptcy tourism intuitively highly appealing to heavily-indebted Irish citizens. There is no minimum period that a person must spend in an EU member state before it becomes their COMI.

Yet from the foregoing survey of the recent caselaw, it is clear that the route of the bankruptcy tourist is one that should only be contemplated by those debt-laden persons who are well-advised and meticulous in their planning.

The author wishes to acknowledge the assistance of Mr. Bill Holohan, Solicitor, Senior Partner in Holohan Solicitors, in the preparation of this article. ■

17 [2005] IEHC 274
18 Op. cit. para. 6
19 Article 3(4)(a)
20 Article 3(4)(b)

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 15, Issue 1, February 2010

A directory of legislation, articles and acquisitions received in the Law Library from the 20th November 2009 up to 25th January 2010.
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

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Validity – Payment of debt by installments – Committal for non–payment – Validity of statutory process – Constitutionality of legislation – Double construction – Whether measure proportionate – Absence of safeguards – Proportionality Personal rights – Fair procedures – Liberty – Whether guarantees of personal rights and personal liberty violated – Absence of safeguards – *The State (Healy) v Donoghue* [1976] IR 325; *Benham v UK* (1996) 22 E.H.R.R. 293; *S v Landy* (Unrep, Lardner J, 10/1/1993); *Kirwan v Minister for Justice* [1994] 2 IR 417; *JF v DPP* [2005] IESC 24, [2005] 2 IR 174; *Cafferkey v Campbell* [1928] IR 444; *DK. v Crowley* [2002] 2 IR 744; *Cahill . Reilly* [1994] 3 IR 547; *Hardy v Ireland* [1994] 2 IR 550 and *National Irish Bank Limited v Graham* [1994] 1 IR 215 considered; *Coetzee v Government of the Republic of South Africa* (1995) (4) SA 631 approved; *Heaney v Ireland* [1994] 3 IR 593 and *Saadi v UK* 13229/03 (Unrep, ECHR, 29/1/2008) applied; *Borowski v Canada* [1989] 1 SCR 342 considered; *G v Collins* [2005] 1 ILRM 1 followed - Enforcement of Court Orders Act 1940 (No 23), s 6 – District Court Rules 1997 (SI No 93/1997), O 53 – Constitution of Ireland 1937, Articles 34, 38, 40.3 and 40.4 – *Certiorari* granted and s 6 of Act found unconstitutional (2006/4300P – Laffoy J – 18/6/2009) [2009] IEHC 276
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People (DPP) v Walsh

Appeal

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complainant – Whether unfair or wrong to put evidence to jury - Whether trial judge correct in not acceding to defence application for direction – *R v Galbraith* [1981] 1 WLR 1039 applied - Appeal dismissed (169/2008 – CCA - 25/5/2009) [2009] IECCA 60
People (DPP) v Allen

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People (DPP) v Vardoshilli

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Res judicata – Double jeopardy – Whether accused in jeopardy during earlier inquiry by original trial judge – Whether earlier inquiry amounted to trial – Leave to appeal refused (168/2005 – CCA – 31/3/2006) [2006] IECCA 40
People (DPP) v Walsh

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Assaults – Arrest – Criterion of admitting offence – Claim that suitability for admission not discussed – Racial undertone to attacks – Failure to make full admission – Previous cautions under programme – Prosecution – Breach of statutory duty – Whether statutory procedure followed – Whether correct garda administered programme – Whether nature of scheme fully explained – Whether failure to adjudicate on suitability – Discretion – Fair procedures – *Audi alterem partem* – Whether right to make representations prior to submission of report – Delay – Balancing of interests of candidate with interests of victims and society – Nature of offences – Review of executive decisions – Whether duty to provide reasoned decision – Whether inordinate and blameworthy delay – *Eviston v Director of Public Prosecutions* [2002] 3 IR 260, *Dunphy (a minor) v Director of Public Prosecutions* [2005] 3 IR 585, *Lewis v Heffer* [1978] 1 WLR 1061, *H v Director of Public Prosecutions* [1994] 2 ILRM 285, *R v Durham Constabulary* [2005] UKHL 21, *McFarlane v Director of Public Prosecutions* [2008] IESC 7 (Unrep, SC, 5/3/2008) and *M(M) v Director of Public Prosecutions* [2007] IESC 1 (Unrep, SC, 23/1/2007) considered - Non-Fatal Offences Against the Person Act 1997 (No 26), s 3 - Children Act 2001 (No 24), ss 22 & 23 - Relief refused (2008/234JR & 2008/256JR – Hedigan J – 29/4/2009) [2009] IEHC 200
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Offences

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Lyndon v District Judge Collins

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People (DPP) v McDonagh

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Severity – Consecutive sentence - Offences committed whilst on temporary release - Drugs offences – Firearm offences – Whether sentences required to be consecutive to term of imprisonment appellant already serving

–Nature of offences – Previous convictions – No hope of rehabilitation – Appropriate sentence – Totality principle – Whether trial judge misled as to statutory provision – Whether error in principle - Misuse of Drugs Act 1977 (No 12), ss 3 and 15 – Firearms and Offensive Weapons Act 1990 (No 12), s 9 – Leave to appeal granted and sentence set aside to remove error from the record; same sentences to run consecutively imposed (178/2008 – CCA - 30/3/2009) [2009] IECCA 37
People (DPP) v Moloney

Sentence

Severity - Drugs offences – Guilty plea – No relevant previous convictions – Mitigating factors – Whether appellant should be treated as equally as co-accused who received lesser sentence – Onus on appellant to adduce evidence of parity of circumstances with co-accused - Leave to appeal refused (3/2009 – CCA - 29/6/2009) [2009] IECCA 70
People (DPP) v McEnroe

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Severity – Drugs offences – Sentence of eight years imprisonment with two years suspended imposed – Immediate admissions – Drug addiction – Previous convictions – Clean and drug free since offence – Material assistance to gardaí – Whether any error in principle – Appeal allowed; sentence of five years with two years suspended substituted (113/2008 – CCA - 31/3/2009) [2009] IECCA 39
People (DPP) v Kelly

Sentence

Severity – Drugs offences – Statutory minimum sentence – Exceptions – Ten year term of imprisonment imposed – Seriousness of offence –Whether any exceptional specific circumstances relating to appellant – Whether sentence unjust - Guilty plea – Whether trial judge took account of mitigating factors – Whether any error in principle – Misuse of Drugs Act 1977 (No 12), s 15A - Appeal allowed; sentence of seven years substituted - (230/2008 – CCA - 27/5/2009) [2009] IECCA 64
People (DPP) v Redmond

Sentence

Severity –Full admissions – Early plea – Seriousness of offence – Mitigating factors – Material assistance furnished to gardaí – Exceptional circumstances of rehabilitation - Sentence of seven years imprisonment imposed – Misuse of Drugs Act 1977 (No 12), s 15A – Appeal allowed; last two years of sentence suspended for a term of five years (137/2008 – CCA - 27/4/2009) [2009] IECCA 77
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People (DPP) v Duffy

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People (DPP) v O'Sullivan

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Severity - Sample counts of sexual assault - Sentenced for three offences only with 43 others taken into consideration – Five year concurrent terms of imprisonment with three years suspended imposed– Eight separate children over ten year time span – Serious consequences for victims – Abuse of trust – Grooming –– Whether trial judge obliged to impose sentence in respect of each offence – Appropriate sentence – Proportionality – Risk of re-offending – No remorse – Whether sentence excessive – Whether any injustice by construction of sentence – Whether sentence justified – Personal circumstances of appellant - Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 2 – Sexual Offenders Act 2001 (No 18), s 37 – Leave to appeal refused (144/2008 – CCA - 24/4/2009) [2009] IECCA 51
People (DPP) v O'Brien

Sentence

Severity – Sexual assault - Guilty pleas to two counts – Child of tender years – Victim impact statement – Abuse of trust – Incidents at lower end of scale – Appellant already serving 14 year sentence for other sexual assaults at time of sentence – Three year concurrent terms of imprisonment imposed to run consecutively to other sentence – Whether concurrent sentences should have been imposed in particular circumstances – Proportionality – Whether sentence excessive – Totality principle – Whether error in principle – Appeal allowed; consecutive sentence of three years with 18 months suspended substituted (140/2008 - CCA26/03/2009) [2009] IECCA 33
People (DPP) v O'Brien

Sentence

Undue leniency - Absence of any custodial sentence - Term of imprisonment of three years suspended for five years - Onus on DPP to establish that trial judge erred in principle in sentence imposed –- Unprovoked assault – Permanent disfigurement to victim's ear – Value of guilty plea on day of trial – Mitigating factors – Apology – Family circumstances – Compensation paid - Whether offence in principle warranted custodial sentence – Previous convictions – Nature of assault – Criminal Justice Act 1993 (No 6), s 2 - Non-Fatal Offences against the Person Act 1997 (No 26), s 3 - Application granted; term of imprisonment of two years with 18 months suspended for 5 years substituted (181CJA/2008- CCA - 23/4/2009) [2009] IECCA 47
People (DPP) v Foley

Sentence

Undue leniency – Review of sentence – Probation Act applied - Assault – Compensation – Remorse – Incorrect procedure followed by trial judge - Criminal Justice Act 1993 (No 6), s 2 - Application refused; accused discharged on bond of good behaviour for six months (77CJA/2008 – CCA - 16/01/2009) [2009] IECCA 4
People (DPP) v Buckley

Sentence

Undue leniency – Significant and serious offence – Violent disorder – Offences committed within prison system – Whether sentences inadequate – Sentences backdated - Whether sentences required to be consecutive as committed at time when

serving sentences of imprisonment - Guilty pleas – Previous convictions — Inadequacy of information before trial judge – Totality principle – Passage of time – Circumstances since commission of offence – Whether unjust to interfere with sentences - Criminal Justice Act 1993 (No 6), s 2 – Criminal Justice (Public Order) Act 1994 (No 2), s 15 – Criminal Law Act 1976 (No 32), s 13 – Sentences declared to be unduly lenient but no order substituted (80,81,83, 84 & 85CJA/2008 – CCA - 1/4/2009) [2009] IECCA 42
People (DPP) v Hanley

Sentence

Undue leniency – Review of sentence – Drugs offence – Three year term of imprisonment suspended in entirety imposed – No previous convictions – Drug addiction – Aggravating factors – Full rehabilitation – Marginal case - Criminal Justice Act 1993 (No 6), s 2 - Misuse of Drugs Act 1977 (No 12), s 15 – Application refused (143CJA/2008 – CCA - 27/4/2009) [2009] IECCA 76
People (DPP) v Murphy

Sentence

Undue leniency – Trial judge took into account 26 months already spent in custody – Sentence of three years with ten months suspended imposed – Released immediately - Onus on DPP to establish that trial judge erred in principle – Whether substantial departure from normal sentence – Convicted of robbery and attempted robbery with weapon – Drug addiction – Seriousness of offences – 23 previous convictions – Value of late plea in mitigation – No engagement with drug programme – Whether offences warranted significant and substantial custodial sentence – Whether trial judge departed from norm – New conviction for robbery between date of sentence and appeal - Criminal Justice Act 1993 (No 6), s 2 - Appeal allowed; sentence set aside and adjourned pending sentence on new charge in Circuit Court (25CJA/2008 – CCA - 23/4/2009) [2009] IECCA 48
People (DPP) v Murray

Sentence

Undue leniency - Possession of child pornography, production of child pornography and sexual exploitation of a child — Three offences - Maximum sentences of 14 years imprisonment – Term of three years imprisonment with 18 months suspended imposed – Seriousness of offences on scale – Guilty pleas - No signs of remorse – No apology – Alcohol dependency – No memory of events due to intoxication – History of abuse and poor health – Whether sentence imposed unduly lenient – Whether trial judge seriously in error – Seriousness of offence – Term of imprisonment served by time appeal came on for hearing - Criminal Justice Act 1993 (No 6), s 2 – Child Trafficking and Pornography Act 1998 (No 22), ss 3(2)(b), 5(1) & 6 – Application allowed; sentence of seven years with last three years suspended imposed (196CJA/2008 – CCA - 30/3/2009) [2009] IECCA 26
People (DPP) v Nagle

Sentence

Undue leniency – Possession of firearms offences - Sentence of seven years imprisonment suspended for seven years imposed with conditions attached - Onus on DPP to establish that trial judge erred in principle – Sentence imposed 12 years after offences committed – No re-offending in interim - Whether significant punitive element to sentence – Whether offences merited custodial sentence - Criminal Justice Act 1993 (No 6), s 2 – Firearms Act 1964 (No 1) - Application refused (115CJA/2008 – CCA - 23/4/2009) [2009] IECCA 46
People (DPP) v Smyth

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Evidence by complainant as to use of stick or cane during sexual assaults -Whether evidence had any prejudicial effect in overall context of evidence – Whether evidence part of *res gestae* – Whether trial judge should have acceded to defence application to discharge jury – Corroboration – No corroboration warning given – Discretion of trial judge as to whether warning should be given to jury - Whether trial judge exercised discretion wrongly - *R v Makanjuola* [1995] 3 All ER 730 and *People (DPP) v JEM* [2001] 4 IR 385 considered - Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 7 – Charge to jury - Delay – Whether jury should have been warned of risks and consequences of delayed trial - Whether trial judge erred in his charge – Sentence - Severity – Sexual assaults - Abuse of trust – Seriousness of offences – Seven year term of imprisonment imposed – Victim impact reports – No previous convictions – Personal circumstances –Whether trial judge committed error in principle - Leave to appeal against conviction and sentence refused (152/2008 – CCA - 27/03/2009) [2009] IECCA 24
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Undue influence

Improvident transaction – Presumption - Whether presumption of undue influence arose – Whether presumption rebutted – Whether transaction void for improvidence – Whether donor received adequate independent advice – Whether doctrine of improvidence applied to gifts – *Carroll v Carroll* [1999] 4 IR 241, *McGonigle v Black* (Unrep, Barr J, 14/11/1988), *Gregg v Kidd* [1956] IR 18, *Noonan v O'Connell* (Unrep, Lynch J, 10/4/1987), *McGuirk v Branigan* (Unrep, Morris J, 9/11/1992) and *Grealish v Murphy* [1946] IR 35 followed; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 and *Cheese v Thomas* [1994] 1 WLR 129 considered; *Hart v O'Connor* [1985] AC 1000, *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 and *Louth v Diprose* (1992) 175 CLR 621 not followed - Transaction set aside (1999/941P – Gilligan J - 13/2/2009) [2009] IEHC 199
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Marriage

Nullity – Consent – Informed consent – Whether conduct of respondent such that he lacked capacity to contract to valid marriage contract – Whether petitioner's consent to marriage fully informed by reason of fraud and misrepresentation of respondent – *PF v GOM (otherwise GF) (Nullity:consent)* [2001] 3 IR 1 applied - Constitution of Ireland 1937, Article 41.1.3° - Petitioner's appeal dismissed (8/2005 – SC – 6/3/2009) [2009] IESC 21
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Exemption - Examination results - Multiple choice questions – Finite pool of examination questions –Sufficient evidence – Potential harm to functions of notice party -Release of information would prejudice effectiveness of examinations – Public interest – Reasonableness – Whether reasonable evidential basis for decision - Whether respondent's expectation that harm would occur reasonable - *Deely v Information Commissioner* [2001] 3 IR 439 and *Sheedy v Information Commissioner* [2004] IEHC 192, [2005] 2 IR 272 applied – Freedom of Information Act 1997 (No 13), ss 7, 8, 21 & 42- Relief refused (2008/15 MCA – Sheehan J – 23/6/2009) [2009] IEHC 286
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Traveller accommodation

Travellers – *Mandamus* – Provision of suitable and adequate accommodation – Mobile home unfit for human habitation due to lack of maintenance - Overcrowding – Disability - Duty of housing authority – Loan for purchase of caravan – Failure to ensure maintenance of caravan – Overcrowding contributed to by disposal of second caravan – Grant under disabled persons grant scheme – Duty to consider long term housing needs – Cultural relativity – Knowledge of council of necessity for repair – Duty to inform applicants that council would not repair – Duty to engage with applicants to ensure necessary services could be accessed – Whether council engaged sufficiently - - Adaptations to caravan to accommodate disability – Whether rights of disabled person being vindicated – Obligation to provide adequate temporary accommodation – Damages for breach of rights - *Doherty v South Dublin County Council* [2007] IEHC 4, [2007] 2 IR 696 distinguished; *University of Limerick v Ryan* (Unreported, Barron J, 21/2/1991), *O'Brien v Wicklow County Council* (Unrep, Costello J, 10/6/1994), *County Meath VEC v Joyce* [1994] 2 ILRM 210, *Mongan v. South Dublin County Council* (Unrep, Barron J, 31/7/1995), *Ward v South Dublin County Council* [1996] 3 IR 195, *O'Reilly v Limerick County Council* [2006] IEHC 174 [2007] 1 IR 593, *O'Donnell v South Dublin County Council* [2007] IEHC 204, (Unrep, Laffoy J, 22/5/2007) considered – Housing Act 1988 (No 28), ss 9 and 13 – Housing (Traveller Accommodation) Act 1998 (No 33), s 6 – Housing (Disabled Persons and Essential Repairs Grants) Regulations 2001 (SI 607/2001) – European Convention on Human Rights 1950, arts 8 and 14 – Provision of adequate temporary accommodation directed and damages awarded to disabled applicant (2006/1339JR – Edwards J – 11/1/2008) [2008] IEHC 454
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Asylum

Leave – Country of origin information – Guidance note – Sufficiency of protection available – Risk of persecution on grounds of ethnicity – Ethnicity combined with political activity – Involvement in criminal activity – Test of anxious scrutiny –Whether finding that applicant not at risk inconsistent or irrational – Whether obligation to enquire whether change in country of origin situation permanent and durable – Whether substantial grounds for review – *O(H) v RAT* [2007] IEHC 299, (Unrep, Hedigan J, 19/7/2007) considered - Leave refused (2007/722JR – Cooke J – 25/3/2009) [2009] IEHC 170
W (Z W) v Refugee Appeals Tribunal

Asylum

Leave – Credibility - Adverse findings of credibility – Error of fact in decision of respondent - Failure to consider core claim- Obligation to consider country of origin reports – Reliance on one section of report to exclusion of other relevant sections –-Whether decision of respondent unreasonable - Extension of time – Good and sufficient reasons for delay - Refugee Act 1996 (No 17), ss 2,11 & 13 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 5 & 9 – Time extended and leave granted – (2007/1166 JR – Clark J – 16/6/2009) [2009] IEHC 283
U (NA) v Refugee Appeals Tribunal

Asylum

Leave – Credibility – Refusal of refugee status – Adverse credibility findings – Conclusion that fear of persecution not well founded – Country of origin information – Evidence of applicant contrary to county of origin information - Whether respondent failed to consider adequately or at all the evidence presented – Applicant's account of travel to Ireland lacking credibility - Whether conclusions reached by respondent as to credibility of applicant soundly based - Respondent's assessment of applicant's credibility regarding travel flawed – Respondent acted within jurisdiction in reaching all other conclusions – Issue of travel not critical or central to overall determination of credibility or asylum claim — *Imoh v RAT* [2005] IEHC 220 (Unrep, Clarke J, 24/6/2005), *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) and *ME v RAT* [2008] IEHC 192 (Unrep, Bermingham J, 27/6/2008) applied; *Da Silveira v RAT* [2004] IEHC 436, (Unrep, Peart J, 9/7/2004) and *Zhuchkova v Minister for Justice* [2004] IEHC 414, (Unrep, Clarke J, 26/11/2004) considered– Refugee Act 1996 (No 17), ss 11 & 13- Leave refused (2007/1422 JR- Irvine J-17/6/2009) [2009] IEHC 269
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Asylum

Leave – Reasons for decision - Failure to take into account all relevant matters – Decision of respondent missing paragraphs – Reasonable grounds to contend that respondent failed to consider ground of appeal - Failure to take into account previous decisions –Formulaic statement of words could not be relied upon as evidence that relevant matters had been considered – *Prima facie* case that both grounds of appeal and supporting documentation not considered - Failure to consider political affiliation – Credibility- Adverse finding of credibility clearly sustainable on evidence – Finding that applicant undocumented not undermined by statutory declaration of age – *McNamara v An Bord Pleanála* (Unrep, Carroll J, 24/1/1995), *GK v Minister for Justice* [2002] 2 IR 418 and *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) applied; *Idiakheuea v Refugee Appeals Tribunal* [2005] IEHC 150 (Unrep, Clarke J, 5/5/2005), *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412 considered – Refugee Act 1996 (No 17), ss 2 and 13 – Leave granted (2007/643 JR- Irvine J – 26/6/2009) [2009] IEHC 280
J (T) v Refugee Appeals Tribunal

Asylum

Leave – Recommendation of refusal – Affirmation of recommendation – Opinion of counsel that correct legal principles had not been applied – Refusal of application for legal aid – Extension of time – Time limit – Lack of awareness of content of legal opinion – Failure to explain delay – Reliance on potential strength of case – Discretion – Factors for consideration - Delay – Reason for delay – Strength of case – Complexity of legal issues – Language difficulties – Personal circumstances – Requirements of justice – Whether good and sufficient reason for extension of time – Whether marriage to European Union citizen relevant – *K(G) v Minister for Justice* [2001] ILRM 401, *CS v Minister for Justice* [2004] IESC 44, [2005] 1 IR 343, *I(H) v Minister for Justice* [2007] IEHC 235, (Unrep, McGovern J, 19/6/2007) and *Metock v Minister for Justice* [2009] 2 WLR 821 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Relief refused (2008/1359JR – Irvine J – 6/5/2009) [2009] IEHC 232
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Asylum

Leave – Stateless person - Credibility – Failure to establish well founded fear of persecution - Country of former habitual residence – Location of former habitual residence question of fact –Decision on country of habitual residence must take into account individual facts relating to applicant and up to date country of origin information – Whether applicant can have multiple countries of habitual residence – Whether respondent acted unreasonably and in excess of jurisdiction – *McNamara v An Bord Pleanála* (Unrep, Carroll J, 24/1/1995) and *Lennon v District Judge Clifford* [1992] 1 IR 382 applied – Refugee Act 1996 (No 17), ss 2 and 13- Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5- Leave refused (2007/1034 JR – Feeney J- 18/6/2009) [2009] IEHC 270
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Deportation

Interlocutory injunction - Pending determination on asylum applications of minor children - Fear of persecution – Deportation order – Representations to Minister – Births of minor children not notified to Minister – Ex parte *interim* injunction – Undertaking not to deport mother – Applicable principles – Legality of deportation order – Obligation to inform Minister of changed circumstances – Failure to inform Minister of pregnancy - Failure to challenge order – Failure to seek revocation of order – False averment that no other parent in State – Duty of utmost good faith – Deliberate withholding of information – Failure to make application on behalf of minor children until eve of enforcement of deportation order – Right of minor to make separate application – Delay – Benefit of family members being considered in same application – Best interests of children – *O(A) & L(D) v Minister for Justice*[2003] 1 IR 1, *N v Secretary of State for Home Department* [2005] 2 AC 296, *Agbonlahor v Minister for Justice* [2007] IEHC 166 (Unrep, Feeney J, 18/4/2007), *Akujobi v Minister for Justice* [2007] IEHC 19 (Unrep, McMenamin J, 12/1/2007), *Mamyko v Minister for Justice* (Unrep, Peart J, 6/11/2003), *Dada v Minister for Justice* [2006] IEHC 140 (Unrep, O'Neill J, 3/5/2006), *Nwole v Minister for Justice* (Unrep, Finlay Geoghegan J, 31/10/2003) and *P, B and L v Minister for Justice* [2002] 2 IR 164 considered - Refugee Act 1996 (No 9), s 5 – Immigration Act 1999 (No 22), s 3 – European Convention on Human Rights, article 8 – Injunction refused (2009/220JR – Clark J – 2/4/2009) [2009] IEHC 160
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Deportation

Leave – *Certiorari* - Deportation order – Refusal to determine asylum application - Inclusion of applicant in asylum application of mother – Alleged fear of persecution – Request for inclusion of applicant as dependent under application – Failure to give information regarding fears for safety of child – Negative credibility findings – Deportation orders in respect of mother and child – Refusal of subsidiary protection applications – Refusal of applications for humanitarian leave – Application for asylum on behalf of child – Refusal to accept and determine application – Extension of time – Factors for consideration – Delay – Whether applicants in receipt of legal advice – Reasons for delay – Strength of potential claims – Extent of potential injustice – Absence of separate questionnaire – Whether joint application loses validity where failure to make claim as to persecution on behalf of child – Whether appropriate for child to

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Interlocutory

Criminal trial – Challenge to constitutionality of legislation – Presumption of constitutionality – Effect of such injunction to prevent operation of statute – Whether fair case to be tried – Whether the balance of convenience lay in placing stay on criminal trial or allowing it to proceed – Very significant weight attached to need to ensure laws enjoying presumption of constitutionality enforced – Whether special or countervailing factors existed to minimise extent of interference with proper implementation of statute – *Pesca Valentia Ltd v Minister for Fisheries* [1985] IR 193 applied - Criminal Law (Sexual Offences) Act 2006 (No 15), ss 3(1) and s 5 – Injunction granted on conditions (2008/1990P – Clarke J – 21/4/2009) [2009] IEHC 206
D (M) v Ireland

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Contract

Disclosure - Material facts – Material non-disclosure - Life insurance - Policy conditional on full disclosure of material facts relating to proposer's state of health – Material non-disclosure or materially inaccurate information given by proposer to be judged by reference to knowledge of proposer -Whether answers given were truthful and to best of proposer's ability - Proposer unaware of underlying medical condition - Whether absolute warranty by proposer as to truth of facts stated – Whether material failure to disclose matters which were within knowledge of proposer so as to lead to the answer or failure to disclose being properly described as untruthful -Whether insurer entitled to repudiate policy where proposer in fact suffering from condition of which she was unaware – *Keating v New Ireland Assurance Company plc* [1990] 2 IR 383 applied - Plaintiff entitled to sum under insurance policy (2005/2031P- Clarke J – 12/06/2009) [2009] IEHC 273
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Delay

Extension of time – Discretion of Court – Good and sufficient reason – Factors to be considered regarding extension of time - Period of delay – Prejudice to first respondent – Reasons for delay – Intention to appeal within stated time limit – Matters relied on for extension of time must be on affidavit – Affidavit of applicant and solicitor – Strength of applicant's case – Immigration - Asylum - Credibility of applicant – Risk of harm to applicant because of sexuality – Whether real risk of harm to applicant arose - Whether second respondent applied correct legal test – Presumption of future harm – Whether second respondent had adequate regard to relevant matters - Burden of proof – Failure to establish well founded fear of persecution – Whether second respondent acted *ultra vires* – *S v Minister for Justice*[2002] 2 IR 163, *Muresan v Minister for Justice* [2004] IEHC 348 [2004] 2 ILRM 364, *CS v Minister for Justice* [2004] IESC 44 [2005] 1 IR 343, *GK v Minister for Justice* [2002] 2 IR 418, *Bugovski v Minister for Justice* [2005] IEHC 78 (Unrep, Gilligan J, 18/3/2005) and *Kramarenko v Refugee Appeals Tribunal* [2004] IEHC 101 [2004] 2 ILRM 550 applied – *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 considered - Refugee Act 1996 (No 17), s13 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Communities (Eligibility for Protection) Regulations 2006(SI 518/2006), regs 2 & 5 – Claim dismissed and extension of time refused – (2009/176 JR – Irvine J – 30/6/2009) [2009] IEHC 281
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Discretionary remedy

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Lease

Sub-lease – Covenant to pay for services – Covenant to pay insurance premiums – Demands for payment – Adequacy of services – Reasonable efforts to correct deficiencies – Whether deficiencies sufficient to justify refusal of payment – Judgment granted (2004/934S – de Valera J – 29/3/2009) [2009] IEHC 307
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Sub-lease – Covenants - Instrument of guarantee – Whether text of guarantee ambiguous – Whether guarantee limited to one plaintiff – Whether guarantee effective - Judgment granted (2006/2911P – de Valera J – 29/3/2009) [2009] IEHC 308
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Planning agreement – Re-zoning – Restricting or regulating development or use of land – Whether defendant had power pursuant to s. 38 to enter into agreement for transfer of land – Whether consideration provided for agreement – Whether agreement *ultra vires* – Local Government (Planning and Development) Act 1963 (No 28), s 38 – Plaintiff's appeal allowed (73/2006 – SC – 24/2/2009) [2009] IESC 16
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Exempted development

Loss of amenity – Removal of parking area – Inspection Erection of embankment on lands adjoining beach – Whether works exempted development — Whether failure to note reasons for decision – Whether failure to have regard to report of inspector – Whether reliance on inadequate and unreliable evidence – Deference to skill and knowledge of planners – Function of courts and planning authorities – Whether relevant material to support decision – Available documentation – Whether enhanced obligation to give reasons when departing from report of inspector – Interference with character of landscape – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39, *Grianan an Aileach Interpretative Centre Company Ltd v Donegal County Council (No 2)* [2004] 2 IR 625, *Sherwin v An Bord Pleanála* [2007] IEHC 227, [2008] 1 IR 561, *Criminal Assets Bureau v Hunt* [2003] 2 IR 168, *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642, *Deerland Construction v Aquaculture Licences Appeals Board* [2008] IEHC 289, (Unrep, Kelly J, 9/9/2008) and *Talbot v An Bord Pleanála* [2007] 2 IR 536 considered - Planning and Development Act 2000 (No 3), s 5 – Planning and Development Regulations 2001 (SI 600/2001), art 9 – Relief refused (2007/31JR – Hanna J – 27/3/2009) [2009] IEHC 230
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Planning

Change of use – Resolution – Local Area Plan - Manager's Report – Material alteration of Manager's report - Resolution to amend Manager's report – Invalid resolution - Order of Manager deeming resolution by elected members invalid - Application to set aside order of Manager – Requirements for effective resolution under the act - Resolution made otherwise than in accordance with legislation – Failure to give reasons for material alteration of Manager's Report - Whether resolution of elected members valid for purposes of Planning Acts – Whether Manager entitled to deem resolution by elected members invalid - *Locus standi* – Whether sufficient interest - *P & F Sharpe Ltd v. Dublin City and County Manager* [1989] I.R. 701, *Malahide Community Council Ltd v Fingal County Council* [1997] 3 I.R. 383 and *Ring v. Attorney General* [2004] IEHC 88 [2004] 1 I.R. 185 considered; *Child v. Wicklow County Council* [1995] 2 I.R. 447 and *Wicklow County Council v. Wicklow County Manager* (Unrep, Ó Caoimh J, 26/2/2003) applied - Planning and Development Act 2000 (No 30), ss 4 & 20 - Planning and Development (Strategic Environmental Assessment) Regulations 2004 (SI 436/2004), art 9 –Planning and Development Regulations 2001(SI 600/2001), arts 14G & 141– Habitats Directive (SI 94/1997), art 6(3) – Constitution of Ireland 1937, art 28A – Local Government Act 2001(No 37), s 132 - Relief refused (2008/1398JR) – McGovern J – 17/06/2009) [2009] IEHC 274
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Discovery

Further and better discovery – License agreement – Obligation to demise site – Arbitration – Rectification of lease – Voluntary discovery – Intention of parties – Claim of privilege – Obligation to accept affidavit on its face - Conclusiveness of sworn statement – Absence of fraud – Obligation to show more than suspicion – Inspection by court – Whether privilege properly claimed - *Bula Ltd v Crowley (No 2)* [1994] IR 54, *Phelan v Goodman* [2000] 2 IR 577, *Sterling-Wynthrope Group Ltd v Farbenfabriken Bayer AG* [1967] IR 97 and *Bula Ltd (in receivership) v Crowley* [1991] 1 IR 220 considered – Direction that document be included in affidavit (2008/1923P – McGovern J – 7/5/2009) [2009] IEHC 209
Leopardstown Club Limited v Templeville Developments Limited

Discovery

Public interest privilege – Documents produced in course of *ad-hoc* inquiry – Confidentiality – Proper administration of justice – Public interest in maintenance and viability of public inquiry – Documents created after event complained of - *Ambiorix Ltd v Minister for Environment (No 1)* [1992] 1 IR 277 applied; *Murphy v Corporation of Dublin* [1972] IR 215; D v NSPCC [1978] AC 171 and *Goodman International v Hamilton (No 3)* [1993] 3 IR 320 followed – Order refused (2004/19853P – O'Neill J – 28/5/2009) [2009] IEHC 259
Leech v Independent Newspapers (Ireland) Ltd

Discovery

Relevance – Necessity – Multi-party litigation - Appropriate party to make discovery – Sale of companies – Alleged breaches of warranty – Alleged misrepresentation – Want of disclosure – Chinese wall – Same firm of solicitors acting on behalf of both parties – Whether solicitors negligent and in breach of contract – Claim that solicitors aware of dispute between company and debtor prior to completion of sale - Agent - Whether application should be made as against principal - Whether documents within possession or power – Documents held by agent in capacity of agent – Documents prepared by professional adviser – Alternative means of proof – Administration of justice – Economy and expedition – Whether documents genuinely necessary – Extent of discovery already made — *Leicestershire County Council v Michael Faraday and Partners* [1941] 2 KB 205, *Bula v Tara Mines* [1994] 1 ILRM 111, *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* [1882] 11 QB 55, *Ryanair plc v Aer Rianta* [2003] 4 IR 264,

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Dismissal of proceedings

Death of important witness – Inherent jurisdiction of court to dismiss claim in interest of justice – Right to litigate – Whether defendant prejudiced in defence of proceedings due to death of witness – Whether defendant unable to effectively defend proceedings due to death of witness – *In Re Haughey* [1971] IR 217, *JF v DPP* [2005] 2 IR 174, *State (Quinn) v Ryan* [1965] IR 70 and *Tuohy v Courtney* [1994] 3 IR 1 considered; *Ewins v Independent Newspapers (Ireland) Ltd* [2003] 1 IR 583 applied; *Hughes v Moy Contractors Ltd* (Unrep, Carroll J, 29/7/99) distinguished - Rules of the Superior Courts, 1986 (SI15/1986), O 19, r 28 – Relief refused (2006/3113P – McKechnie J – 18/3/2009) [2009] IEHC 131
Killeen v Padraig Thornton Waste Ltd

Dismissal of proceedings

Delay – Inordinate and inexcusable delay - Balance of justice - No attempt made by plaintiff to reactivate proceedings – No reasons given for failure to reactivate proceedings - No specific prejudice established by defendant - General prejudice flowing from lapse of time - Whether delay inordinate and inexcusable - Whether balance of justice lay in favour of plaintiff - Scope and ambit of defence filed by defendant taken into account in considering balance of justice – Defamation – Justification - Necessity for plaintiff to act quickly in prosecution of defamation proceedings – Plea of justification *per se* is factor to be assessed in considering balance of justice- *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, *Gilroy v Flynn* [2004] IESC 98 [2005] 1 ILRM 290 and *Stephens v Paul Flynn Ltd* [2005] IEHC 148 (Unrep, Clarke J, 28/4/2005) applied - *Ewins v Independent Newspapers (Ireland) Ltd* [2003] 1 IR 583, *Comcast International Holdings Inc v Minister for Public Enterprise* [2007] IEHC 297 (Unrep, Gilligan J, 13/06/2007), *Desmond v Doyle* [2008] IEHC 65 (Unrep, MacMenamin J, 14/3/2008), *Rainsford v Limerick Corporation* [1995] 2 ILRM 561, *O'Domhnaill v Merrick* [1984] IR 151 considered; *Desmond v MGN Ltd* [2008] IESC 56 (Unreported, SC, 15/10/2008) distinguished- Rules of the Superior Courts 1986 (SI 15/1986) O 122, r 11 – Proceedings dismissed (1997/7917P, 1998/5041P, 1998/5044P & 1999/8966P – Dunne J -12/06/2009) [2009] IEHC 271
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Dismissal of proceedings

Delay - Inordinate and inexcusable delay – Want of prosecution – Complaints to gardaí – Garda investigation - Alleged failure to prosecute – Prejudice – Inability of defendant to give instructions due to Alzheimers – Death of witness – Absence of records – Personal injuries –Sexual assaults – Difficulties of plaintiff – Reason for delay - Inherent jurisdiction – Whether contribution to delay by defendant – Balance of justice – Fairness – Failure to make application at earlier stage – *Toal v Duignan (No 1)* [1991] ILRM 135 and *JR v Minister for Justice* [2007] 2 IR 748 considered – Relief refused (2001/5792P – Dunne J – 2/4/2009) [2009] IEHC 161
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Dismissal of proceedings

Delay - Inordinate and inexcusable delay – Want of prosecution – Prejudice – Death of witness – Personal injuries – Pupils in national school - Physical and sexual assaults –Pre-commencement delay – Post-commencement delay – Age of plaintiffs – Medical reports explaining delay – Plea of guilt – Whether religious order vicariously liable for actions of abuser – Issue of law – Consequences of delay – Whether fair trial possible – Inherent jurisdiction – Balance of justice – Conduct of both parties - *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459 considered – Relief refused (2000/8880P – Gilligan J – 16/12/2008) [2008] IEHC 458
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Dismissal of proceedings

Delay – Want of prosecution – Ownership of lands - Claim that execution of trust and conveyance obtained without consent – Delay in bringing application to hearing – Inordinate and inexcusable delay – Excuse – Involvement in other proceedings – Applicable principles – Inherent jurisdiction to control procedures – Balance of justice – Fairness – Delay on part of defendant – Acquiescence – Whether risk that fair trial not possible – Prejudice – Date of knowledge – Oral evidence – Costs incurred – Absence of specific prejudice – Presumption that good cause of action -*Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459*, Desmond v MGN Ltd* [2008] IESC 56 [2009]1 IR 737, *Birkett v James* [1977] 2 All ER 801 and *Truck and Machinery Sales Limited v General Accident* (Unrep, Geoghegan J,12/11/1999) considered – Relief refused (1999/8844P – Laffoy J – 3/3/2009) [2009] IEHC 265
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Inspection

Documents - Privilege – Legal professional privilege – Waiver of privilege – Disclosure to third party – Whether privilege may be waived – Whether disclosure of document to third parties amounts to waiver of privilege – *Fyffes plc v DCC plc* [2005] IESC 3, [2005]1 IR 59 followed; *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183 applied - Rules of the Superior Courts 1986 (SI 15/1986), O 31, r 19 – Inspection refused (250 & 251/2008 – SC – 4/3/2009) [2009] IESC 72
Redfern Ltd v O'Mahony

Inspection

Expert report - Discovery – Dismissal of claim for failure to comply with order for discovery – Reinstatement of claim – Reference to expert report in affidavit supporting application to reinstate action – Claim that privilege waived in relation to report – Whether reliance placed on content of document – *Byrne v Shannon Foynes Port Co* [2007] IEHC 315, [2008] 1 IR 814 and *Hannigan v Director of Public Prosecutions* [2001] 1 IR 378 considered – Finding that privilege not waived and order for inspection refused (1998/1138P – Cooke J – 18/5/2009) [2009] IEHC 306
Ryanair Ltd v Murrays Europcar Ltd

Particulars

Motion - Statement of claim – Alleged failure to provide open system of post-primary education – Teaching of curriculum predominantly through Irish – Alleged breach of rights – Notice for particulars served in Irish – Delivery of replies without prejudice to contention that particulars oppressive and prolix – Notice for further and better particulars – Purpose of pleadings – Defining of issues – Confining of evidence to relevant matters – Case to be met at trial – Whether particulars framed as interrogatories – Whether identity of witnesses could be sought – Adequacy of replies – *McGee v O'Reilly* [1996] 2 IR 229, *Mahon v Celbridge Spinning Company Ltd* [1967] IR 1, *Coyle v Hannon* [1974] NI 160 and *Lister v Thompson* (1890) 7 TLR 107 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 19 –Application refused (2008/3758P – Laffoy J – 27/4/2009) [2009] IEHC 267
Geaney v Board of Management Pobalscoil Chorca Dhuibhne

Renewal of summons

Set aside renewal – Absence of renewal stamp – Conditional appearance – Letter

seeking copy of affidavit grounding *ex parte* application – Refusal to provide affidavit – Whether good reason justifying renewal – Whether additional information that would have resulted in order not being made – Barring of claim – Delay – Prejudice – *O'Grady v Southern Health Board* [2007] IEHC 38, [2007] 2 ILRM 51 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 8 – Application refused (2002/3572P – Cooke J – 18/5/2009) [2009] IEHC 272
Kearns v Roches Stores

Stay

Interlocutory injunction – Appeal – Circuit Court order granting interlocutory injunction – Application for stay on interlocutory injunction pending hearing of appeal refused by Circuit Court - Appeal from decision of Circuit Court – Application for stay on order of lower court — Whether applicant has stateable ground of appeal – Applicant's case weak – Whether Court entitled to have regard to strength of applicants' case – Balance of convenience – *O'Toole v Radio Telefís Éireann (No 1)* [1993] ILRM 454, *Redmond v Ireland* [1992] 2 IR 362, *Emerald Meats Ltd v Minister for Agriculture* [1993] 2 IR 443 and *Irish Press plc v Ingersoll Irish Publications(No 3)* [1995] 1 ILRM 117 considered - Short stay allowed (2009/114 CA – Edwards J – 12/06/2009) [2009] IEHC 275
Galway City Council v Delaney

Strike out

Defence – Application compelling replies to particulars - Libel – Insurance company – Article claiming company engaged in unlawful and unethical practices – Alleged use of services of An Garda Síochána – Alleged access to confidential information – Entitlement to assume accuracy of internal memorandum – Qualified privilege – Public interest – Notice for particulars – Case to be made – Particulars of practices - Names of serving members – Names of victims – Purpose of pleadings – Rolled up plea – Clarification of issues – Broad outline of case to be met – Identity of witnesses – Whether plaintiff at litigious disadvantage without information – Inability to defendant to furnish information without access to files of plaintiff - *Mahon v Celbridge Spinning Co Ltd* [1967] IR 1, *McGee v O'Reilly* [1996] 2 IR 229, *ASI Sugar Ltd v Greencore Group plc* (Unrep, Finnegan P, 11/2/2003), *Cooney v Browne* [1985] IR 185, *McDonagh v Sunday Newspapers* [2005] IEHC 183, [2005] 4 IR 528, *Doyle v Independent Newspapers (Ireland) Ltd* [2001] 4 IR 594, *Johnston v Church of Scientology* (Unrep, SC, 7/11/2001), *Hickinbotham v Leach* (1842) 10 MW 362, and *Cooper Flynn v RTE* [2001] 3 IR 344 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 19 – Application refused (2007/2858P – Dunne J – 13/5/2009) [2009] IEHC 229
Quinn Insurance Ltd v Tribune Newspapers Plc

Strike out

Res judicata - Preliminary issue - Cause of action - Claim which should have been raised in earlier proceedings - Estoppel by omission – Abuse of process – Strike out of pleadings - Whether plaintiff estopped from maintaining claim by virtue of same arising out of matters which might have been raised in earlier proceedings - Whether maintenance of plaintiff's claim amounted to abuse of process – Whether plaintiff's claim could be struck out - Government departments entitled to the protection of law- Whether government departments could be subject to unjust harassment- *Henderson v Henderson* [1843] 3 Hare 100 applied; *Carroll v Ryan* [2003] 1 IR 309, *AA v Medical Council* [2003] 4 IR 302 and *Johnson v Gore Wood* [2002] 2WLR 72 considered – Claim struck out (2001/12014P – de Valera J – 29/03/2009) [2009] IEHC 255
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PRISONS

Detention

Conditions – Segregation unit – Operational security reasons for detention – Applicant posed threat to life of persons outside prison – Decision to detain applicant in manner complained of –Proportionality of decision to detain in manner complained of - Whether regime of detention lawful - Whether consistent with prison rules – Whether principles of natural justice apply to decisions relating to conditions of prisoner's detention – Prison rules– Reasonable grounds – Appropriate procedure –– Discretion of Governor - Rules of natural and constitutional justice apply to prison disciplinary hearings – Right to fair procedures - Judicial review – Leave – Limited leave granted - Application to amend statement of grounds – Exceptional circumstances – Facts not known at time leave was obtained – No prejudice to respondents - *Certiorari* – Failure to provide reasons - Constitutional law - Principles of natural justice - Right to bodily integrity – Competing constitutional rights – No specific constitutional right of prisoner to associate– Convicted prisoner continues to enjoy protection of constitutional rights –Limitation of Constitutional rights must be reasonable and necessary - Separation of powers – *Habeas corpus* - Appropriate procedure -Whether habeas corpus or judicial review appropriate procedure - *Murray v Ireland* [1991] ILRM 465, *Heaney v Ireland* [1994] 3 IR 593 and *Holland v Governor of Portlaoise Prison* [2004] IEHC 97 [2004] 2 IR 573 applied; *People (DPP) v Shaw* [1982] IR 1 distinguished - *State (Cannon) v Kavanagh* [1937] IR 428, *State (McDonagh) v Frawley* [1978] IR 131, *State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82, *State (Boyle) v Governor of Curragh Military Detention Barracks* [1980] ILRM 242,*Cahill v Governor of Curragh Military Barracks* [1980] ILRM 191, *State (Comerford) v Governor of Mountjoy Prison* [1981] ILRM 86, *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489, *O'Leary v Minister for Transport* [2000] 1 ILRM 391, *Hynes v Wicklow County Council* [2003] 3 IR 66, *Ó Síodhacháin v Ireland* (Unrep, Supreme Court, 12/2/2002), *Shine v Medical Council* [2008] IESC 41 (Unrep, Supreme Court,14/7/2008), *Cox v ESB (No 2)* [1943] IR 231, *Wildgust v Bank of Ireland* [2001] 1 ILRM 24, *Wolff v McDonnell* (1974) 418 US 539, *Kearney v Minister for Justice* [1986] IR 116, *Gilligan v Governor of Portlaoise Prison* (Unrep, McKechnie J, 12/4/2001), *People (DPP) v Delaney* [1997] 3 IR 453, *D v DPP*

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Devoy v Governor of Portlaoise Prison

Prison officers

Judicial review – Delay – Obligation to bring application promptly – Extension of time – Excuse for delay - Ongoing correspondence between parties – Delay due to failure to furnish reasons - Prejudice – Whether applicant furnished with reasons – Whether justification for delay – Wetting of officer with liquid believed to be urine – Testing for infectious disease – Sick leave - Remuneration for sick leave due to occupational injury – Decision that absence not be recorded as injury on duty – Legitimate expectation – Whether assurance given by prison officer – Absence of evidence that assurance given – Whether detriment caused by spending of money – Whether decision unreasonable - *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39, *De Róiste v Minister for Defence* (Unrep, McCracken J, 28/6/1999), *O'Flynn v Mid Western Health Board* [1991] 2 IR 223, *O'Connor v Private Residential Tenancies Board* [2008] IEHC 205 (Unrep, Hedigan J, 25/6/2008), *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301, *Faulkner v Minister for Industry and Commerce* [1997] ELR 107 and *Kelly v Leitrim County Council* [2005] 2 IR 404 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Relief refused (2008/906P – McMahon J – 13/5/2009) [2009] IEHC 311
McCarthy v Irish Prison Service

PROBATE

Will

Execution – Proceedings challenging will – Issues to be tried - Whether will duly executed – Whether testamentary capacity – Whether deceased knew and approved of contents of will – Legislative requirements - Evidence of mental health and capacity – Onus on person challenging will – Presumption of due execution and testamentary capacity - Whether moderate dementia impacted on capacity – Whether testator understood will was being executed – Whether testator knew nature and extent of estate – Whether testator able to identify persons expected to benefit – Whether testator able to decide on beneficiaries – Public policy – *Re Glynn deceased* [1990] 2 IR 326 – Finding that will validly executed and deceased had capacity (2007/7156P – Feeney J – 17/2/2009) [2009] IEHC 317
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TAXATION

Income tax

Relieving provision – Partnership – Meaning of "limited partner" – Meaning of "general partner" – Meaning of "proceedings" - Comity of laws – Test to be applied – Whether respondent limited partner – Interpretation of taxing statutes – Comity of laws – Principles applicable – Relieving provision – Whether definitions of terms specific to given statutes - *Revenue Commissioners v Doorley* [1933] IR 750 and *Harris v Quigley* [2006] 1 IR 165 considered; *Memec plc v Commissioners of Inland Revenue* (1998) 71 TC 77, *Major v Brodie* [1998] STC 491 and *Dreyfus v Commissioners of Inland Revenue* (1929) 14 TC 560 approved; *Inspector of Taxes v Kiernan* [1981] I.R. 117 considered - Partnership Act 1890 (53 & 54 Vict, c 39) – Limited Partnerships Act 1907 (7 Edw 7, c 24), ss 3, 4, 5, 6, 8, 9 and 10 – Investment Limited Partnerships Act 1994 (No 24), ss 3, 4, 6 and 43 – Taxes Consolidation Act 1997 (No 39), ss 305, 941 and 1013 – Case stated answered in negative (2006/572JR – Laffoy j – 28/11/2008) [2008] IEHC 403
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TORT

Negligence

Sexual abuse – Notice – Appeal – Whether employer on notice of abuse – Whether finding that employer not on notice supported by evidence – Role of Supreme Court on appeal – Findings of fact – Vicarious liability – Vicarious liability of employer – Whether Defence Forces liable for sexual abuse committed by its employee – Whether intimate, quasi-parental role – Whether close contact – Extension of doctrine of vicarious liability – Chilling effect - *Bazley v Curry* (1999) 174 DLR(4th) 45, *Jacobi v Griffiths* (1999) 174 DLR(4th) 71 and *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215 distinguished: *O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 I.R. referred to – Plaintiff's appeal dismissed (2007/310 – SC – 24/3/2009) [2009] IESC 22
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Exceptional circumstances

Extension of time - Residential Institutions Redress Board - Late application - Refusal to admit for redress –– Whether lack of knowledge of scheme for redress constituted exceptional circumstances – Whether respondent erred in fact and law – Whether substantial basis for finding of fact – Whether conclusion of respondent irrational and unreasonable – *O'Keeffe v An Bord Pleanála* [1993] IR 39 applied; *DVTS v Minister for Justice* [2007] IEHC 305 [2008] 3 IR 476, *R v London Borough of Brent ex parte Gunning* [1985] 84 LGR 168, *R v Secretary of State for Education, ex parte National Union of Teachers* [2000] All ER (D) 991 and *R v North East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622 distinguished – Residential Institutions Redress Act 2002 (No 13), ss 5 & 8 – Application refused (2009/253JR – O'Keeffe J – 24/6/2009) [2009] IEHC 284
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ACTS OF THE OIREACHTAS AS AT 22ND JANUARY 2010 (30TH DÁIL & 23RD SEANAD)

Information compiled by Clare O'Dwyer, Law Library, Four Courts.

Constitutional Amendments

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Signed 15/10/2009

Acts of the Oireachtas 2009

1/2009 Anglo Irish Bank Corporation Act 2009
Signed 21/01/2009

2/2009 Residential Tenancies (Amendment) Act 2009
Signed 28/01/2009

3/2009 Gas (Amendment) Act 2009
Signed 17/02/2009

4/2009 Electoral Amendment Act 2009
Signed 24/02/2009

5/2009 Financial Emergency Measures in the Public Interest Act 2009
Signed 27/02/2009

6/2009 Charities Act 2009
Signed 28/02/2009

7/2009 Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Act 2009
Signed 05/03/2009

8/2009 Legal Services Ombudsman Act 2009
Signed 10/03/2009

9/2009 Electoral (Amendment) (No. 2) Act 2009
Signed 25/03/2009

10/2009 Social Welfare and Pensions Act 2009
Signed 29/04/2009

11/2009 Industrial Development Act 2009
Signed 19/05/2009

12/2009 Finance Act 2009
Signed 03/06/2009

13/2009 Financial Services (Deposit Guarantee Scheme) 2009
Signed 18/02/2009

14/2009 Financial Measures (Miscellaneous Provisions) Act 2009
Signed 26/06/2009

15/2009 Nursing Homes Support Scheme Act 2009
Signed 01/07/2009

16/2009 Aviation (Preclearance) Act 2009
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Signed 12/07/2009

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Signed 12/07/2009

20/2009 Companies (Amendment) Act 2009
Signed 12/07/2009

21/2009 Enforcement of Court Orders (Amendment) Act 2009
Signed 14/07/2009

22/2009 Housing (Miscellaneous Provisions) Act 2009
Signed 15/07/2009

23/2009 Public Health (Tobacco) (Amendment) Act 2009
Signed 16/07/2009

24/2009 Health Insurance (Miscellaneous Provisions) Act 2009
Signed 19/07/2009

25/2009 Health (Miscellaneous Provisions) Act 2009
Signed 21/07/2009

26/2009 Harbours (Amendment) Act 2009
Signed 21/07/2009

27/2009 Land and Conveyancing Law Reform Act 2009
Signed 21/07/2009

28/2009 Criminal Justice (Miscellaneous Provisions) Act 2009
Signed 21/07/2009

29/2009 Oireachtas (Allowances to Members) and Ministerial and Parliamentary Offices Act 2009
Signed 21/07/2009

30/2009 Local Government (Charges) Act 2009
Signed 21/07/2009

31/2009 Defamation Act 2009
Signed 23/07/2009

32/2009 Criminal Justice (Amendment) Act 2009
Signed 23/07/2009

33/2009 European Union Act 2009
Signed 27/10/2009

34/2009 National Asset Management Agency Act 2009
Signed 22/11/2009

35/2009 Defence (Miscellaneous Provisions) Act 2009
Signed 24/11/2009

38/2009 Labour Services (Amendment) Act 2009
Signed 09/12/2009

41/2009 Financial Emergency Measures in the Public Interest (No. 2) Act 2009
Signed 20/12/2009

42/2009 Appropriation Act 2009
Signed 20/12/2009

BILLS OF THE OIREACHTAS AS AT 22ND JANUARY 2010 (30TH DÁIL & 23RD SEANAD)

[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.

Information compiled by Clare O'Dwyer, Law Library, Four Courts.

Adoption Bill 2009
Bill 2/2009
2nd Stage – Dáil *(Initiated in Seanad)*

Air Navigation and Transport (Prevention of Extraordinary Rendition) Bill 2008
Bill 59/2008
2nd Stage – Dáil **[pmb]** *Deputy Michael D. Higgins*

Anglo Irish Bank Corporation (No. 2) Bill 2009
Bill 6/2009
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Appointments to Public Bodies Bill 2009
Bill 64/2009
2nd Stage – Seanad **[pmb]** *Senator Shane Ross*

Arbitration Bill 2008
Bill 33/2008
Report Stage – Dáil

Broadband Infrastructure Bill 2008
Bill 8/2008
2nd Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Central Bank and Financial Services Authority of Ireland (Protection of Debtors) Bill 2009
Bill 20/2009
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Child Care (Amendment) Bill 2009
Bill 61/2009
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Civil Liability (Amendment) Bill 2008
Bill 46/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Civil Liability (Amendment) (No. 2) Bill 2008
Bill 50/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Civil Liability (Good Samaritans and Volunteers) Bill 2009 as initiated
Bill 38/2009
2nd Stage – Dáil **[pmb]** *Deputies Billy Timmins and Charles Flanagan*

Civil Partnership Bill 2009
Bill 44/2009
2nd Stage - Dáil

Civil Unions Bill 2006
Bill 68/2006
Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Climate Change Bill 2009
Bill 4/2009
2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Committees of the Houses of the Oireachtas (Powers of Inquiry) Bill 2010
Bill 1/2010
Order for 2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Bill 2009
Bill 51/2009
Passed by Dáil Éireann

Communications (Retention of Data) Bill 2009
Bill 52/2009
Order for 2nd Stage - Dáil

Companies (Miscellaneous Provisions) Bill 2009
Bill 69/2009
Committee Stage – Seanad *(Initiated in Seanad)*

Consumer Protection (Amendment) Bill 2008
Bill 22/2008
2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

Consumer Protection (Gift Vouchers) Bill 2009
Bill 66/2009
2nd Stage – Seanad **[pmb]** *Senators Brendan Ryan, Alex White, Michael McCarthy, Phil Prendergast, Ivana Bacik and Dominic Hannigan*

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad *(Initiated in Seanad)*

Corporate Governance (Codes of Practice) Bill 2009
Bill 22/2009
2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

Courts and Court Officers Bill 2009
Bill 57/2009
Committee Stage – Seanad {*Initiated in Dáil*}

Credit Institutions (Financial Support) (Amendment) Bill 2009
Bill 12/2009
2nd Stage – Seanad **[pmb]** *Senators Paul Coghlan, Maurice Cummins and Frances Fitzgerald*

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Feargal Quinn, Shane Ross, Ivana Bacik and Rónán Mullen*

Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010
Bill 2/2010
Order for 2nd Stage - Dáil

Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009
Bill 55/2009
Order for 2nd Stage - Dáil

Criminal Justice (Violent Crime Prevention) Bill 2008
Bill 58/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Criminal Law (Admissibility of Evidence) Bill 2008
Bill 39/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Criminal Law (Home Defence) Bill 2009
Bill 42/2009
2nd Stage – Dáil **[pmb]** *Deputies Charles Flanagan and Michael Ring*

Criminal Procedure Bill 2009
Bill 31/2009
Committee Stage – Seanad *(Initiated in Seanad)*

Data Protection (Disclosure) (Amendment) Bill 2008
Bill 47/2008
2nd Stage - Dáil **[pmb]** *Deputy Simon Coveney*

Defence (Miscellaneous Provisions) Bill 2009
Bill 58/2009
2nd Stage - Dáil

Defence of Life and Property Bill 2006
Bill 30/2006
2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Dog Breeding Establishments Bill 2009
Bill 79/2009
Order for 2nd Stage - Seanad

Dublin Docklands Development (Amendment) Bill 2009
Bill 75/2009
2nd Stage - Dáil **[pmb]** *Deputy Phil Hogan*

Electoral Commission Bill 2008
Bill 26/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Electoral (Gender Parity) Bill 2009
Bill 10/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Employment Agency Regulation Bill 2009
Bill 54/2009
Order for 2nd Stage - Dáil

Employment Law Compliance Bill 2008
Bill 18/2008
Awaiting Committee – Dáil

Ethics in Public Office Bill 2008
Bill 10/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
2nd Stage – Dáil *(Initiated in Seanad)*

Financial Emergency Measures in the Public Interest (Reviews of Commercial Rents) Bill 2009
Bill 39/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Fines Bill 2009
Bill 18/2009
Committee Stage - Dáil

Food (Fair Trade and Information) Bill 2009
Bill 73/2009
2nd Stage – Dáil **[pmb]** *Deputy Michael Creed and Deputy Andrew Doyle.*

Foreshore and Dumping at Sea (Amendment) Bill 2009
Bill 68/2009
Report Stage – Seanad *(Initiated in Seanad)*

Forestry (Amendment) Bill 2009
Bill 74/2009
Order for 2nd Stage - Dáil

Freedom of Information (Amendment) Bill 2008
Bill 24/2008
2nd Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Brendan Ryan, Alan Kelly, Michael McCarthy and Phil Prendergast*

Freedom of Information (Amendment) (No.2) Bill 2008
Bill 27/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
2nd Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Fuel Poverty and Energy Conservation Bill 2008
Bill 30/2008
2nd Stage – Dáil **[pmb]** *Deputy Liz McManus*

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
Bill 23/2006
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Houses of the Oireachtas Commission (Amendment) Bill 2009
Bill 72/2009
Report Stage - Seanad

Housing (Stage Payments) Bill 2006
Bill 16/2006
2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan*

Human Body Organs and Human Tissue Bill 2008
Bill 43/2008
2nd Stage – Seanad **[pmb]** *Senator Feargal Quinn*

Human Rights Commission (Amendment) Bill 2008
Bill 61/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Order for Report – Dáil

Industrial Relations (Amendment) Bill 2009
Bill 56/2009
Committee Stage – Seanad

Industrial Relations (Protection of Employment) (Amendment) Bill 2009
Bill 7/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Inland Fisheries Bill 2009
Bill 70/2009
2nd Stage - Dáil

Institutional Child Abuse Bill 2009
Bill 46/2009
2nd Stage – Dáil **[pmb]** *Deputy Ruairi Quinn*

Irish Nationality and Citizenship (Amendment) (An Garda Síochána) Bill 2006
Bill 42/2006
1st Stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke*

Legal Practitioners (Qualification) (Amendment) Bill 2007
Bill 46/2007
2nd Stage – Dáil **[pmb]** *Deputy Brian O'Shea*

Local Elections Bill 2008
Bill 11/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Local Government (Planning and Development) (Amendment) Bill 2009
Bill 21/2009
2nd Stage – Dáil **[pmb]** *Deputy Martin Ferris*

Local Government (Rates) (Amendment) Bill 2009
Bill 40/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Medical Practitioners (Professional Indemnity) (Amendment) Bill 2009
Bill 53/2009
2nd Stage – Dáil **[pmb]** *Deputy James O'Reilly*

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik*

Mental Health (Involuntary Procedures) (Amendment) Bill 2008
Bill 36/2008
2nd Stage – Seanad **[pmb]** *Senators Déirdre de Búrca, David Norris and Dan Boyle*

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Committee Stage - Dáil

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Bill 19/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Alan Shatter*

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Bill 32/2009
Committee Stage – Seanad *(Initiated in Seanad)*

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Bill 13/2009
2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

National Cultural Institutions (Amendment) Bill 2008
Bill 66/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Alex White*

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1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Offences Against the State Acts Repeal Bill 2008
Bill 37/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

Offences Against the State (Amendment) Bill 2006
Bill 10/2006
1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn*

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Paul Coghlan and David Norris*

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Bill 40/2008
Order for Report – Dáil

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1st Stage - Seanad

Planning and Development (Amendment) Bill 2009
Bill 34/2009
2nd Stage – Seanad *(Initiated in Seanad)*

Planning and Development (Amendment) Bill 2008
Bill 49/2008
Committee Stage – Dáil **[pmb]** *Deputy Joe Costello*

Planning and Development (Enforcement Proceedings) Bill 2008
Bill 63/2008
2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

Planning and Development (Taking in Charge of Estates) (Time Limit) Bill 2009
Bill 67/2009
2nd Stage – Dáil **[pmb]** *Deputy Sean Sherlock*

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
Committee Stage – Dáil

Privacy Bill 2006
Bill 44/2006

Order for Second Stage – Seanad *(Initiated in Seanad)*
Prohibition of Depleted Uranium Weapons Bill 2009
Bill 48/2009
2nd Stage – Seanad **[pmb]** *Senators Dan Boyle, Deirdre de Burca and Senator Fiona O'Malley*

Prohibition of Female Genital Mutilation Bill 2009
Bill 30/2009
2nd Stage – Dáil **[pmb]** *Deputy Jan Sullivan*

Property Services (Regulation) Bill 2009
Bill 28/2009
Committee Stage – Seanad *(Initiated in Seanad)*

Protection of Employees (Agency Workers) Bill 2008
Bill 15/2008
2nd Stage – Dáil **[pmb]** *Deputy Willie Penrose*

Public Appointments Transparency Bill 2008
Bill 44/2008
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Public Transport Regulation Bill 2009
Bill 59/2009
2nd Stage – Dáil *(Initiated in Seanad)*

Registration of Lobbyists Bill 2008
Bill 28/2008
2nd Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Residential Tenancies (Amendment) (No. 2) Bill 2009
Bill 15/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Road Traffic Bill 2009
Bill 65/2009
Order for 2nd Stage – Dáil

Sea Fisheries and Maritime Jurisdiction (Fixed Penalty Notice) (Amendment) Bill 2009
Bill 27/2009
2nd Stage – Dáil **[pmb]** *Deputy Jim O'Keffee*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Small Claims (Protection of Small Businesses) Bill 2009
Bill 26/2009
Order for Committee Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Social Welfare and Pensions (No. 2) Bill 2009
Bill 76/2009
2nd Stage – Seanad *(Initiated in Dáil)*

Spent Convictions Bill 2007
Bill 48/2007
Awaiting Committee – Dáil **[pmb]** *Deputy Barry Andrews*

Statute Law Revision Bill 2009
Bill 33/2009
2nd Stage – Dáil

Stem-Cell Research (Protection of Human Embryos) Bill 2008
Bill 60/2008
2nd Stage – Seanad **[pmb]** *Senators Rónán Mullen, Jim Walsh and John Hanafin*

Student Support Bill 2008
Bill 6/2008
Awaiting Committee – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005

Order for Report – Dáil

Twenty-ninth Amendment of the Constitution Bill 2009
Bill 71/2009
1st Stage - Dáil

Twenty-ninth Amendment of the Constitution Bill 2008
Bill 31/2008
2nd Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

Victims' Rights Bill 2008
Bill 1/2008
2nd Stage – Dáil **[pmb]** *Deputies Alan Shatter and Charles Flanagan*

Vocational Education (Primary Education) Bill 2008
Bill 51/2008
2nd Stage – Dáil **[pmb]** *Deputy Ruairí Quinn*

Witness Protection Programme (No. 2) Bill 2007
Bill 52/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabitte*

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.

Child Care (Amendment) Bill 2009: How we got here

Diane Duggan BL*

Introduction

In September 2009, the Child Care (Amendment) Bill 2009 was published in the Oireachtas. If it goes through the necessary stages successfully, it will establish in statute procedures that have been in place in the Irish courts for many years. These procedures are quite striking in their effect. Since the turn of the century in this country, it has been possible to deprive a minor of his liberty and detain him in a secure unit in the interests of his own welfare, without conviction. All of this can be done without any basis in statute and with the approval of the European Convention on the Protection of Human Rights and Fundamental Freedoms. The manner in which this law developed has been highly unusual in comparison to most legal processes and highly necessary in terms of the void that would otherwise have existed in child care law. This law essentially evolved through court initiated processes and case law precedent; in other words, judge-made law for the past decade.

At the time of writing, the Child Care (Amendment) Bill 2009 was ordered for second stage before the Seanad, where it was first published. The Bill amends significant parts of the Children Act 2001 and the Child Care Act 1991, and most notably introduces provisions for Special Care, where a minor whose behaviour constitutes a high risk to himself and others is placed in a secure unit – also known as secure detention orders. The Bill has been published at a time when Child Law in Ireland is in the midst of change. In the wake of the Commission to Inquire into Child Abuse Report[1] (Ryan Report), any new legislative provisions for the manner in which children are cared for and protected by the state are under enhanced scrutiny. This occurs against the backdrop of a proposed Constitutional Referendum regarding the rights of the child which may have significant implications for Child Law jurisprusdence in this country.

This article will examine:

- secure detention or Special Care procedures and their most unusual development in the Irish courts;
- what the new bill proposes to introduce;
- where it leaves us now at a time when the law surrounding children is under increasing scrutiny.

Detaining a Child without Conviction

The Child Care Act 1991 made statutory provision for the State to provide a level of care for minors when their welfare necessitates it. Upon its implementation however, the act did not make provision for secure care or the type of care that would be required for the detention of high risk children. Throughout the 1990's, a number of cases raised questions about the State's relationship with minors and the rights that accrued to children[2]. In *FN v Minister for Education and Others,*[3] Geoghegan J held *obiter* that the State was constitutionally obliged to place and maintain a child in a secure, residential unit in order to ensure the appropriate religious, moral, intellectual, physical and social education of the child. Geoghegan J refrained from going so far as to make declarations on the matter.

DG v Eastern Health Board and Others

While the numerous cases throughout the 1990's undoubtedly did much to inform and define the issues at stake for high risk children, the impetus for a regime of secure care is widely acknowledged to lie in the case of *DG v Eastern Health Board and Others*[4]. This was a case where the minor Applicant, suing through his Guardian *ad litem,* was granted leave by the High Court to seek relief by way of judicial review a declaration, *inter alia,* that the respondents by failing to provide for his suitable care and accommodation had discriminated against him as compared to other minors thereby depriving him of his constitutional rights under Article 40 and 42 of the Constitution. Further, the Applicant sought an order of *mandamus* directing the Respondents to provide for his suitable care and accommodation. The minor had been in care since the age of 2 and by the time of the Supreme Court hearing he was 17 years of age, with significant behavioural difficulties. In the High Court, Kelly J held that the minor should be housed and detained in St. Patrick's Institution, a juvenile prison, in the absence of any other suitable institution.

The Applicant appealed to the Supreme Court, wherein it was held[5] that the inherent jurisdiction of the High Court allowed the courts to do all things necessary to vindicate

* The author is sincerely grateful to Mr. Shane Costelloe BL for his input and assistance with this article.

1 Report available at: *http://www.childabusecommission.ie/*

2 *DT v Eastern Health Board,* Unreported, High Court, 14th March 1995; *DD v Eastern Health Board,* Unreported, High Court, 3rd May 1995; *Comerford v Minister for Education* [1997] 2 ILRM 234; *FN v Minster for Education* [1995] 1 IR 409.

3 [1995] 1 IR 409

4 [1997] 3 IR 511

5 Hamilton C.J., O'Flaherty, Keane and Murphy JJ. concurring; Denham J. dissenting

the personal rights of the citizen, and that in doing so it was permissible for a child to be placed in a juvenile prison. Hamilton CJ stated however that it was "*unfortunate and regrettable"* that a judge should have to make that decision[6]. The court held that it was within the inherent jurisdiction of the High Court to make such an order, citing *DPP v Shaw* with approval[7].

The *DG* case, like others that preceded it, raised the issue of competing rights and the court found that a harmonising exercise was necessary, whereby a priority of rights would be applied when it was not possible to resolve a conflict between competing rights[8], and it was thus held that the welfare of the child overrode his right to liberty.

The Applicant then appealed further to the European Court of Human Rights and was successful[9]. The State relied on the argument of the detention of the minor being necessary for his educational supervision, in accordance with Article 5(1)(d) of the Convention. The European Court rejected that argument and held that St. Patrick's Institution was not designed for educational supervision, and that the minor's detention there was in breach of the Convention. The Court were careful to present a wide definition of 'educational supervision'[10].

The provision of an actual unit to facilitate secure detention that would be compatible with the Convention came in the immediate aftermath of *DB v Minister for Justice and Others*[11] wherein the High Court granted a mandatory injunction directing the Respondents to build a secure unit. This was a highly unusual step, and the furthest the Irish courts had gone to at that point: Kelly J went beyond declaratory relief, but mandated the State to act, in circumstances where previous declaratory relief had not resulted in the appropriate action. In January 2001, Ballydowd Young People's Centre was opened in Co. Dublin, the first of three secure units that would operate in the State in the years that followed.

Secure Detention: Establishing a System

After the seminal decision of *DG,* many similar cases followed, all of which had their origins in judicial review proceedings but shortly became plenary proceedings, which was to be the norm for the High Court Minors' list. Notwithstanding the fact that proceedings were originally instituted by representatives on behalf of the minors, the Health Boards (subsequently the Health Service Executive) increasingly initiated plenary proceedings seeking *inter alia* an order permitting the detention of a minor they identified as being at risk and in need of secure care. This was a clear acknowledgment of the import of the previous decisions of the High Court and as a consequence of their statutory duty[12] to vindicate the welfare of minors within their areas – a cogent example of how this area of law diverted from traditional adversarial procedures[13] and very much so developed in its own way. Similarly, in a diversion from typical procedures, statements of claim or defences have not usually been filed despite the initiation of these cases as plenary proceedings. Generally, once parties are joined to the proceedings (the minor represented by a Guardian *ad litem,* and the parents if available), the case is adjourned from time to time during the currency of the minor's detention in a secure unit.

The unusual development of the area is not by accident, but by the careful management of the High Court judge overseeing the list. Since its inception, five judges have been responsible for the list, each for a significant period of time. These judges are, in chronological order, Kelly, Kearns, Butler, MacMenamin and Sheehan JJ. The great benefit of one judge being responsible for the list has been a consistency of approach, which arguably has been vital to the coherent development of the area. Each judge, during his tenure of responsibility for the list, has made himself available for any number of applications, emergency or otherwise in a manner that is unparalleled elsewhere in our legal system. This has afforded parties a level of access to the courts that is perhaps only otherwise seen in Article 40/*Habeas Corpus* applications.

Certain identifiable principles have emerged from case law and the prudent management of the Minors' list. These include:

- The High Court exercises its inherent jurisdiction to order the detention of a minor in secure care and must only do so in exceptional circumstances;
- The minor's right to liberty must be balanced with his right to life and welfare;
- An all embracing interpretation of 'educational supervision' must apply;
- A detention order must be for a limited and preferably brief period;
- The minor must be held in a secure and appropriate environment where their welfare and educational needs will be met, which does not include a penal institution.

As the area developed, it was not readily accessible for practitioners in the absence of statutes. This situation was ameliorated however with the handing down of three decisions in June and July 2007 by MacMenamin J. These were *S.S v Health Service Executive*[14], *Health Service Executive v D.K & Others*[15] and *Health Service Executive v W.R & Others.*[16] They were each designed to be read in conjunction with one another and in total amount to a virtual practice directive as

6 *Op cit* 4, at p.520

7 [1982] IR 1 at p.62, per Kenny J: "*It is part of the courts function to vindicate and defend the rights guaranteed by Article 40.3…If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all thing necessary to vindicate such rights*."

8 Adopting the *ratio* of *Attorney General v X* [1992] 1 IR 1

9 *DG v Ireland (2002) 35 E.H.R.R. 33*

10 "*In the context of the detention of minors, the words "educational supervision" must not be equated rigidly with notions of classroom teaching: in the context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, the local authority, or parental rights for the benefit and protection of the person concerned." Op cit* 8, at para. 80

11 [1999] 1 IR 29

12 Section 3 of the Child Care Act, 1991

13 The realm of Child Care law has since often been described as being inquisitorial and collaborative as opposed to adversarial

14 [2008] 1 IR 594

15 Unreported, High Court, 18th July 2007

16 [2008] 1 IR 784

to how proceedings of this type are currently brought, as well as clarifying some of the existing issues in the area. For those who practice in this area of law or have an interest in it they constitute essential reading.

In *Health Service Executive v W.R & Others*[17] MacMenamin J pointed to the non-adversarial approach of the HSE being of great benefit:

> "These three cases had a number of features in contrast to other previous hearings of this type in the last decade. In each of these cases the plaintiff, rather than relying on constitutional or legal defences, sought actually to address the underlying problems and to outline the approach which would be adopted to create an improved framework and procedure for the care of young persons at risk, such as the defendant. The plaintiff not only consented to the hearings; they took the role of initiators"[18].

Statutory Special Care: A false start

As far back as 2001, it was recognised that a statutory regime would be necessary for the secure detention of minors and with that purpose, section 16 of the Children Act 2001 proposed to insert a Part IVA into the Child Care Act 1991 dealing specifically with secure detention orders, or as it was named in the Act – Special Care Orders. It was envisaged that proceedings under this section would take place in the District Court, as with all other proceedings under the 1991 Act. As with many sections of the Children Act 2001, the commencement of the section was delayed, but eventually was brought into operation by Statutory Instrument Number 548/2004 - Children Act 2001, (Commencement) (No. 2) Order 2004.

However, this provision was never given practical effect, and the judicially formulated system that was emerging in the High Court has remained the status quo to this day. The reasons for this vary but it is most likely due to the fact that this area has evolved in such a sensitive and precise manner, that to remove it at this point from the jurisdiction in which it has developed, i.e. the High Court, could prove hugely damaging to the intricacies of the process that has taken years to become the concept it is today. To implement instead a new provision that better reflects the nature of the proceedings as they have been heard, and the potential issues that can arise from practical experience, thereby maintaining the proceedings within the court in which they have been cultivated, is a much more preferable option. This seems to be what is envisaged by the Child Care (Amendment) Bill 2009.

Statutory Special Care Attempt II: The Child Care (Amendment) Bill 2009

Under Section 9, the bill provides for a new Part IVA to be inserted into the Child Care Act 1991, completely replacing the old inactive Part IVA. The new Part IVA is comprised of sections 23A to 23NP, thirty sections in total. The bill goes much farther than simply restating the old inactive Part IVA with minor amendments; it seeks to address numerous issues on a much more detailed scale, much of which reflects typical High Court proceedings. Special Care is defined in section 23C as

> "the provision to a child of
> (a) care which address-
> (i) his or her behaviour and the risk of harm it poses to his or her life, health, safety, development or welfare, and
> (ii) his or her care requirements,
> and includes medical and psychiatric assessment, examination and treatment, and
> (b) educational supervision
> in a special care unit in which the child is detained and requires for its provision a special care order…." [19].

While section 23C defines special care, section 23H defines a Special Care Order This section specifically refers to the High Court being the court in which applications are brought. It descibes the criteria for a Special Care Order as being:

- the child has attained the age of 11 years;
- the behaviour of the child poses a real risk;
- other care provisions do not adequately address the child's needs;
- the child requires a level of care that can only be provided with a Special Care order;
- consultations have been carried out with relevant parties;
- a family welfare conference has been convened if necessary;
- the child requires special care for the purposes of their welfare;
- it is in the best interests of the child [20].

The bill contains a level of detail which clearly expresses the manner in which Special Care will operate on a practical level. The bill describes provision of special care units[21], the interaction of special care proceedings and criminal proceedings[22], notice of applications[23], reviews[24], extensions[25], interim special care orders[26], Garda assistance[27] and family

17 *Ibid 16*
18 *Op cit* 16 p.795

19 As inserted by section 9 of the Child Care (Amendment) Bill 2009
20 Section 23H(1) as inserted by section 9 of the Child Care Amendment Bill 2009
21 Section 23B as inserted by section 9 of the Child Care Amendment Bill 2009
22 Sections 23D and 23E as inserted by section 9 of the Child Care Amendment Bill 2009
23 Section 23G as inserted by section 9 of the Child Care Amendment Bill 2009
24 Section 23I as inserted by section 9 of the Child Care Amendment Bill 2009
25 Section 23J as inserted by section 9 of the Child Care Amendment Bill 2009
26 Section 23L as inserted by section 9 of the Child Care Amendment Bill 2009
27 Sections 23G, 23H, 23L, 23NA, 23NI and 23NO as inserted by section 9 of the Child Care Amendment Bill 2009

welfare conferences[28]. There are also numerous supplemental provisons which make clear the court's role in any adverse circumstances that may arise such as witholding a special care unit's address from named persons[29] or the failure to locate a child who is the subject of a special care order[30].

Most other sections of the bill are administrative measures absorbing special care proceedings into other relevant aspects of the Child Care Act 1991. Part 5 of the bill proposes to dissolve the Children Acts Advisory Board as part of the government's programme for rationalisation[31]. The main function of the board was to provide policy advice to the Ministers with responsibility for Health and Children, and it is envisaged that its functions will instead be carried out within the Office of the Minister for Children and Youth Affairs.

While Part IVA, on the face of it, appears to be incredibly extensive, much of the provisions do seem to reflect existing High Court procedures and this should ensure the smooth implementation of the Bill.

Criticisms of the Bill

While this bill goes to great lengths to place complex superior court proceedings on a statutory footing, in certain respects, the bill may have missed some opportunities.

Special Care Units

Currently, where the Health Service Executive wishes to seek an order for the detention of a minor in secure care, it must first satisfy the National Admissions and Discharge Committee (mostly comprised of authorities from the Special Care Units) that the application meets the pertinent criteria. This does not usually create a difficulty. However, in certain cases it can lead to the extraordinary position whereby the HSE, as plaintiff, is unable to secure the authority of the National Admissions and Discharge Committee for the detention of the minor even though the HSE is the body with ultimate control over its constituent committees including the NADC. Equally, while a case is before the High Court, a course of action may be agreed upon by the HSE and all other parties, but the Special Care Unit may not be in a position to comply. It has been suggested that in certain scenarios such as these, the NADC or the Special Care Units should have separate representation from the HSE when there is conflict. This is a matter that could have potentially been addressed in the bill.

Guardians ad Litem

The presence of Guardians *ad litem* in Child Care procedures is provided for in general terms in section 26 of the Child Care Act 1991. The Bill contains necessary amendments so that section 26 now also applies to special care. It is worth noting however that Guardians *ad litem* feature in all cases before the High Court and arguably are the only means of ensuring that the court receives professional input that is wholly independent of all other parties, and is a direct method of ascertaining the views of the minor. It is vital that the views of the minor are clearly put to the court in cases where their liberty is being deprived against their will. In those circumstances, it has long been advocated that Guardians *ad litem* should act and be appointed automatically in all cases[32]. In circumstances where Guardians *ad litem* do act in all High Court cases anyway, it would be no great leap to provide for it in statute. The current situation is that Guardians *ad litem* are appointed in circumstances where the court either on its own motion or upon application finds it necessary for them to act, which results in them currently acting in 25% to 30% of all child care cases before the courts, including District Courts. In the lower courts however, where Guardians are appointed less frequently, there may be difficulty in funding a system to have them appointed in all cases[33], however it is nonetheless a provision that children's rights organisations will continue to seek change on.

The most significant missed opportunity in this bill for Guardians *ad litem* seems to be the continued absence of statutory guidelines outlining their roles and functions. While MacMenamin J's 2007 *DK*[34] judgment sheds some light on the role, a statutory provision would have led to much greater clarity. This is a particular concern given that the profession is currently unregulated in Ireland. The guidelines published by the Children Acts Advisory Board in May of 2009[35] are helpful but are clearly lacking in any authority to regulate the profession and implement the guidelines. This is a void that could have been filled by the 2009 bill.

Aftercare

Aftercare as provided for in section 45 of the 1991 Act is becoming a more controversial area. Currently the Health Service Executive are not obliged to provide aftercare to minors upon reaching the age of majority, but can do so in certain circumstances. Provisions for aftercare in England and Wales[36] and Northern Ireland[37] state that it must be provided in all cases. Studies here have shown that within

28 Section 23F as inserted by section 9 of the Child Care Amendment Bill 2009

29 Section 23NA(2)(a)(i) as inserted by section 9 of the Child Care Amendment Bill 2009

30 Section 23NB as inserted by section 9 of the Child Care Amendment Bill 2009

31 The government's programme for rationalisation in 2009 has resulted in many state agencies being subsumed back into the Departments for which they functioned. Information received from the Department of Health and Children website (*http://www.dohc.ie/Agencies/)* states that the aim of rationalisation is to streamline service delivery, professional registration and policy making in a number of areas in the health sector, through the integration and /or amalgamation of functions.

32 Particularly by Child advocacy groups such as Barnardos

33 The HSE currently pays the legal costs of the Guardians *ad litem* under section 26(1)(b) of the 1991 Act

34 *Health Service Executive v DK,* Unreported, High Court, 18th July 2007, p.20 per MacMenamin J: *"The function of the guardian should be twofold; firstly to place the views of the child before the court, and secondly to give the guardian's views as to what is in the best interests of the child."*

35 *Giving a voice to children's wishes, feelings and interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991* (Dublin: Children Acts Advisory Board, 2009).

36 Children (Leaving Care) Act 2000 [England and Wales]

37 Children (Leaving Care) Act (Northern Ireland) 2002

two years of leaving care without aftercare, two thirds of minors become homeless[38] and could thus be a longer term drain on state resources. It is another issue that advocacy groups will be focusing on and arguably could have been dealt with in this bill.

Conclusion

The criticisms outlined above are perceived flaws in the system overall, and if they are not dealt with in this bill, they may be dealt with in others. It is hoped that the non-adversarial approach and innovative judicial procedures which have been a hallmark of developments in child care law to date, will survive the implementation of the bill and serve to complement the very first statutory basis for the secure detention of minors in this country. This area of the law warrants careful management and close scrutiny. It should be and will be revisited again and again. ■

38 *Left on Their Own* (Focus Ireland, 2002)

Drunk Drivers, Car Passengers and Contributory Negligence

Zeldine Niamh O'Brien BL

Introduction

Contributory negligence, the failure to take due care for oneself[1] is a statutory defence in both Ireland[2] and the UK.[3] The issue of passenger contributory negligence is, despite the decline in the prevalence of drink-driving, coming before the Courts in both the UK and Ireland with increasing frequency. *Hussey v Twomey* [2009] IESC 1 is the most recent case before the Irish Courts on this issue. This article analyses this decision and examines some of the objective criteria and personal characteristics relevant in determining when a plaintiff is under a responsibility to make enquiry as to the driver's state. Finally, it will consider the attitude of the Court to this kind of contributory negligence with other forms of passenger negligence, such as the failure to wear a seatbelt.

Hussey v Twomey

In *Hussey*, the plaintiff, a twenty-one year old commerce student, was travelling as a front seat passenger in a motor vehicle owned by the first defendant. The driver, the second defendant, was the boyfriend of the first defendant. Both the first defendant and the plaintiff had spent the evening at a bar where the plaintiff admitted to consuming six or eight alcoholic drinks. The bar was small and, although the plaintiff spent a much of her time at the pool table and not in the immediate vicinity of driver, there was no obstruction of her view of him or of her friend's group whilst they were present on the premises. She had shared a table with the driver for between half an hour and an hour towards the end of the evening. The driver then offered to take the plaintiff home in his girlfriend's car. The plaintiff accepted and sustained a lower back injury in the subsequent accident. In the High Court, Peart J found the defendant liable but found the plaintiff liable in contributory negligence and reduced damages by 40%. The Plaintiff challenged this latter finding on appeal. She submitted that the driver appeared to be *"fine"*. She maintained that if she had believed that he was drunk she would not have gone in the car with him. She also claimed not to have seen him drink any alcohol during the evening. Evidence from the Garda who attended the scene and called on the second defendant was that his eyes were blurred, his speech slurred and he was propped up by the door when standing. The Garda had to support his body as they moved from the doorway to the Garda's car. On the facts, Peart J. found that the plaintiff's conduct demonstrated a want of care, rather than a contributing factor to the accident itself.

Changing Societal Attitudes to Drink-Driving

The changing societal attitude to drink-driving was a factor which impacted on the Supreme Court's discussion of contributory negligence. Kearns J. observed:

> I think it fair to say that the society's understanding of the role of alcohol in driving cases has undergone radical change in the space of the last forty years…. any measure of tolerance towards intoxicated drivers and their passengers, if indeed it formerly existed to any appreciable degree, is very much a thing of the past.[4]

Zimring[5] supports this as does research conducted in Scotland,[6] England and Wales.[7] Drink-driving is perceived as anti-social but this perception is associated with being significantly over the limit, rather than borderline cases.[8] However, drunk driving is not viewed as a high risk activity[9] but rather a 'serious risk'.[10] The prevalence of taking lifts from those unfit to drive is symptomatic of the current levels of risk assimilation. The 2002 Omnibus survey indicated that one in eight (13%) of all respondents (both drivers and non-drivers) had been a passenger in a vehicle under the control of a driver they believed to be 'over the limit' in the previous year.[11]

Judicial Approaches to Passenger Negligence

The changing attitude to drink-driving is also evidenced

1 *Swan v. North British Australasian Co. Ltd.* (1863) 2 H. & C. 175, 181 per Blackburn J. and *Froom v. Butcher* [1976] Q.B. 286, 291 *per* Denning M.R.
2 Section 34 Civil Liability Act, 1961 (Ireland).
3 Section 1(1) Law Reform (Contributory Negligence) Act, 1945.
4 *Hussey v Twomey* [2009] IESC 9.
5 See Zimring, "Law Society and the Drinking Driver" in Laurence, Michael, Snortum, John R. and Zimring, Franklin E. (eds) *Social Control of the Drinking Driver*, (University Chicago Press, 1988), 371, at p.381.
6 TNS System 3, *Drinking and Driving 2007: Prevalence, Attitudes and Decision-Making* (Edinburgh, 2007).
7 Institute of Alcohol Studies, *Drinking and Driving Fact Sheet* (IAS, St. Ives, 2009).
8 *Ibid.*, para.6.4.
9 TNS, *supra*, para. 6.19
10 TNS, *supra*, para. 6.19.
11 See Lader, Deborah and Meltzer, Howard, *Drinking: Adult's Behaviour and Knowledge in 2002 - A Report on Research using the ONS Omnibus Survey produced by the Social Survey Division of the Office for National Statistics on behalf of the Department of Health*, (ONS, London, 2002), Appendix C p.67 *et seq*.

in the change in judicial approaches to the contributory negligence of such passengers. In *Judge v. Reape*,[12] the driver had collected his passenger in Ballina, Co. Mayo at approximately midday intending to drive to Dublin. The accident occurred at midnight at Kinnegad. During the intervening twelve hours, the driver and passenger had made seven stops and at six of which both the plaintiff and the defendant had imbibed alcohol. At the time of the accident, the defendant had consumed a gallon and three pints of beer and a small whiskey, and the plaintiff only slightly less.[13] The jury, however, acquitted the plaintiff of contributory negligence.[14] In *Hussey*, Kearns J. observed that these facts "would nowadays cause national outrage."

Both Canada and Australia permitted such contributory negligence claims in decisions reported in 1955[15] and 1948[16] respectively. *Owens v Brimmell*[17] is one of the first cases where contributory negligence was pleaded successfully against a passenger in the UK. In *Owens*, the plaintiff and defendant were friends and had spent an evening giving their custom to several public houses together. After they had both drunk a considerable amount of alcohol, the defendant drove the plaintiff home. He crashed and the plaintiff was injured. The defendant admitted to negligence but argued that the plaintiff had contributed in failing to wear a seatbelt and in accepting a lift knowing, or being reckless to the possibility, that the defendant's ability to drive was impaired by drink. Watkins J observed that whether the principles of contributory negligence could be relied upon successfully was "a question of fact and degree to be determined in the circumstances out of which the issue is said to arise."[18]

The factual matrix will be thoroughly examined to this end. Thus in *Traynor v Donovan*,[19] the defendant driver had a blood/alcohol level of 168 mg; the plaintiff met the defendant in a pub thirty minutes previously but she had not noticed any sign of impairment and had called supporting police evidence. No deduction was made. Similarly in *Campbell v Jelley*,[20] the Court held that the defendant has not discharged the burden of proving that the plaintiff had been negligent in accepting a lift on the basis of his apparent condition. Both plaintiff and defendant had consumed six pints of beer at lunchtime. They parted for tea and met again at 21:30 and had a further two pints together. The accident occurred on the way home at 23:00. The evidence of the plaintiff's widow was that the defendant had appeared perfectly sober at 21:30 and later when he informed her of the crash. This was so even though he has a blood alcohol level of 131mg.

In the more recent case of *Gleeson v Court*,[21] the plaintiff was the sixth passenger of a car with an inebriated driver. Owing to the number of passengers, the plaintiff had volunteered to ride in the boot of the vehicle. When the vehicle crashed, he was flung out of the car and injured. All of the passengers had been drinking, including the plaintiff. The driver was nearly over twice the legal limit. The plaintiff was aware that the driver had consumed alcohol such as to render him unfit to drive as were the other passengers. The driver's appearance indicated this. Liability was admitted and the plaintiff's damages were reduced for the initial election to travel.

The growing lack of sympathy towards plaintiffs who agreed to be driven by drunk drivers was evident in the High Court in *Devlin v. Cassidy & Anor*.[22] In that case, the Plaintiff, the driver and a third party had imbibed a couple of pints of Danish lager each and some sandwiches in one public house, followed by three or four more pints each at a disco bar. The parties were seated together in the first pub but did not keep to each other's company at the disco bar. The third party drove the plaintiff and the driver to a third premises where further drink was consumed, although the plaintiff was of the view that the driver had only consumed one further pint at the new venue. The driver's blood alcohol content was twice that of the legal limit and there was evidence of ecstasy consumption. The plaintiff was of the view that the driver had consumed five pints and 'looked sober'. Peart J. held that the plaintiff, in allowing himself to be driven by the driver on this occasion, had failed in the duty of care which he owed to himself.

Factors Relevant to a Finding of Contributory Negligence

In *Hussey*, the Court favoured an objective test to determine the issue of contributory negligence, but accepted it could not be absolutely objective and may take account the personal characteristics of the particular plaintiff. Self-intoxication will not be a factor but other circumstances surrounding the election may be taken into account.

Plaintiff's Awareness of Driver's Intoxication

The burden of proving the plaintiff's awareness of the driver's level of intoxication is on the defendant.[23] From *Hussey*, actual awareness of the driver's consumption of alcohol by the plaintiff does not have to be shown for the defence to be successfully raised; constructive knowledge will suffice. The question is whether the "passenger should have realised, or did realise, the risk being undertaken." In *Owens*, Watkins J. noted that both parties were reasonably intelligent young men and the plaintiff must have appreciated that to continue the bout of drinking would be to expose him to "the risk of

12 [1968] I.R. 226.
13 [2009] IESC 9, *per* Kearns J commenting on *Judge v Reape* [1968] IR 226.
14 The Supreme Court directed a re-trial on the issue of contributory negligence.
15 *Car and General Insurance Corporation Ltd. v. Seymour and Maloney* [1955] 1 D.L.R. 824
16 *Insurance Commissioner v. Joyce* [1948] 2 A.L.R. 356 77 C.L.R. 39.
17 [1977] Q.B. 859; [1977] 2 W.L.R. 943; [1976] 3 All E.R. 765; [1977] R.T.R. 82. See Roberts, Richard L.J., "Riding with a Drunken Driver and Contributory Negligence Revisited," (2004) 1 *J.P.I. Law* 21.
18 *Ibid*, p.867.
19 [1978] CLY 2612.
20 [1984] ICLY 2296 (November 2nd, 1983, Newcastle Crown Court, Hall J.)
21 [2007] EWHC 2397 (QB); [2008] R.T.R. 10 (QBD). See Deal, Katherine, "Negligence of passengers," (2007) 1(4) *P.I.B.U.L.J.* 38-41 and the comments at (2008) *L.L.I.D.* Feb 8, 6 and [2008] 2 *J.P.I. Law* C104-105.
22 [2006] IEHC 287 (31 July 2006). See "Did passenger know or ought to have known driver uninsured?" (2007) 25(5) *I.L.T.* 71.
23 *Malone v Rowan* [1984] 3 All E.R. 402, p.404E.

being driven later by someone who would be so much under the influence of drink as to be incapable of driving safely". However, he was satisfied that it was likely that they in fact gave little, if any, thought to the possible consequences of drinking so much or were recklessly indifferent to them.[24]

The test of constructive knowledge requires that the unfitness to drive be obvious to a lay person.[25] In *Brignall v Kelly,* McCowan LJ refused to accept the proposition "that if a man in a public house observes another man drink one pint of lager and give no sign of intoxication, he cannot accept a lift from him without interrogating him as to exactly how much he has had to drink".[26] This remains the law. In *Booth v White,*[27] the Court of Appeal held that the failure to inquire of the driver how much alcohol he had imbibed was not contributory negligence. The hardening of social attitudes to drink-driving did not affect the underlying principle.[28] In *Booth*, both parties had engaged in a heavy drinking session as they were in the habit of doing. In the subsequent accident, the plaintiff suffered multiple injuries to his leg and arm. The defendant was convicted of drink driving, being nearly twice over the legal limit. The Court rejected the view that the law had evolved from an assessment of whether a driver is safe to drive a car, to a duty to include questioning of the driver.[29] In doing so, the English Courts have avoided "the introduction of the fine grades of constructive knowledge familiar to the equity lawyer into tort law".[30] In *Hussey*, the Supreme Court similarly required the prospective passenger only to ascertain whether the driver was fit to drive. However, the full extent of such an inquiry in Irish law has not yet been elucidated.

Plaintiff's own intoxication

All authorities, including *Hussey*,[31] are consistent on the issue of the plaintiff's own intoxication - it cannot be relied on to avoid contributory negligence and particularly "to avoid the consequences of facts which would otherwise have been reasonably discernible".[32] This is clearly logical; after all why should "someone who has deprived themselves of the capacity to perceive a danger should be in a better position than a sober person"?[33] The possibility of reliance by a plaintiff who has been involuntarily intoxicated remains open; in such cases, there has been no conscious disregard of safety by a plaintiff.

24 *Gleeson v Court* [2007] EWHC 2397 (QB); [2008] R.T.R. 10 (QBD), per Foster J. at para.23.
25 *Traynor v Donovan*, Unreported 1978 Sheldon J.
26 CAT 17th May 1994.
27 [2003] EWCA Civ 1708;(2003) 147 S.J.L.B. 1367. See generally Comment, "Personal Injury – Road Traffic Accident – Drink Driving," [2004] *J.P.I. Law* 1, C32 and (2004) 7(3) *P Injury* 5-6.
28 See Merkin, Robert and Stuart-Smith, Jeremy, *The Law of Motor Insurance*, (Sweet and Maxwell, London, 2004) p.248.
29 [2003] EWCA Civ 1708, per Brooke LJ para.16.
30 Porter, Martin, "Personal Injury Update," [2003] *NLJ* 1905, at 1906.
31 See also *Devlin v Cassidy and Anor* [2006] IEHC 287.
32 [2009] IESC 1, per Kearns J.
33 *Gleeson v Court* [2007] EWHC 2397 (QB); [2008] R.T.R. 10 (QBD), para.23.

Personal Characteristics of the Plaintiff

In taking account the personal characteristics of any given plaintiff, the test avoids the rigidity of a purely objective test. In *Hussey*, example of such characteristics provided included passengers under a disability by reason of age or infirmity. Other disabilities may also be taken into account, such as a plaintiff's inability to see or smell. In such cases, a plaintiff may be totally or partly relieved of the responsibility to make an enquiry.

Circumstances Surrounding the Election to Travel

The Court held in *Hussey* that the circumstances in which a plaintiff elects to travel as a passenger must be taken into account. The example provided included the case of a passenger travelling in a taxi, though this could be extended to those availing of private coaches.

Apportionment of Liability and the Seat-Belt Defence

In *Car and General Insurance Corporation Ltd. v. Seymour and Maloney*,[34] at first instance, a finding of 25% was found. Similarly in *Miller v. Decker*,[35] the trial judge reached the same finding. In both cases, the plaintiffs were actually aware that the driver was intoxicated. In *Owens*, the plaintiff's damages were reduced by 20%. In *Gleeson*, Foster QC held that choosing to travel with a driver who was adversely affected by alcohol was a factor that standing alone would result in a reduction of 20% following Watkins J. in *Owens v Brimmell.*[36] However, permitting the plaintiff to ride in the boot was an additional factor that would bring about a finding of 25% contributory negligence.[37] Both the decision to ride in the boot, which had been permitted by the driver and for which he also bore some responsibility, and the election to travel with an intoxicated driver flowed flow from the same cause, i.e. the plaintiff's impaired decision making. Therefore to avoid double counting and to distinguish between the parties' relative blameworthiness, liability was apportioned 70%:30% defendant to plaintiff. In *Hussey*, the Supreme Court upheld the finding of 40%. There was some doubt as to whether the plaintiff had in fact been wearing a seatbelt, although it was accepted ultimately that she was seat-belted. The Court observed further:

> "[T]he apportionment of contributory negligence in respect of travelling with an intoxicated motorist is quite different from the type of contributory negligence which arises from the failure to wear a seatbelt... In the context of a passenger travelling with an intoxicated driver, the fault lies in the decision to travel with such a driver in the first instance. The more the passenger should have realised, or did realise, the risk being undertaken, the greater the degree of

34 [1955] D.L.R. 824.
35 (1954) 13 W.W.R.(N.S.) 642; [1957] S.C.R. 624.
36 [1977] R.T.R. 82
37 *Froom v Butcher* [1975] R.T.R. 518.

> contributory negligence. There is thus scope for a much higher finding of contributory negligence in this context than in the case of a failure to wear a seatbelt."

The general rule of apportionment in cases relating to a failure to wear a seatbelt is a finding of 25% where the failure made a material contribution to the damage and is a stand-alone factor.[38] The percentage, though arbitrary, attempted to bring some certainty to negotiation, which it succeeded in doing. The comments in *Hussey* confirm the attitude to apportionment adopted in England to date and in Ireland of the lower courts. However, it bodes ill for plaintiffs that both fail to wear a seatbelt and elect to travel with a drunk driver. In *Hussey*, 40% was applied to what was essentially a stand-alone case of election as the Court had accepted the plaintiff's evidence to the effect she had been wearing a seatbelt at the time. In *Devlin*, the reduction was 50%, again as a stand-alone factor. Where both factors were present, a plaintiff could well face a reduction of the majority of damages depending on the Court's view on double-counting. It is unclear if the Courts will simply reduce the aggregate by a third as was done in *Gleeson* or if another less arbitrary approach would be adopted.

Conclusion

Contributory negligence may be successfully raised as a defence in an action by a passenger who elected to travel with a driver under the influence. Either actual or constructive knowledge of the driver's unfitness to control a vehicle will suffice. The test may require that the plaintiff make an inquiry but this is an assessment as to the prospective driver's ability to control the vehicle and not a request for information on the amount of alcohol imbibed. A plaintiff's own intoxication will not shield him from his own poor decision-making in electing to travel. However, though an objective test is applied the Court will have regard to the characteristics of the plaintiff and the circumstances of the case. The findings of contributory negligence, where the election to travel is a stand-alone factor, are higher in Ireland than in the UK. Furthermore, the Irish Courts in *Hussey* have determined that there is scope for a much higher finding of contributory negligence where a passenger elects to travel with a drunk driver than in cases where a passenger has failed to wear a seatbelt.

A less sympathetic view to plaintiffs who elect to drive with drunken drivers resulting in higher findings of contributory negligence is ultimately to the economic benefit of drunken drivers; high findings mitigate the financial exposure of the drunk driver to liability. It may be argued that the previous approach in providing a more limited defence of contributory negligence resulting in increased financial liability would have been a strategy more likely to promote a reduction in the levels of engagement in the particular risky activity by individuals and accordingly result in an overall reduction in accidents. However, it is equally correct that an apportionment of liability that favours the plaintiff would not serve to act as a measure to reduce overall activity level, in this case, the level of passengers driving in a vehicle under the control of a drunken individual. By reducing recovery, theoretically there is a motive to reduce engagement in the risky behaviour. A reduction in the risky behaviour should correspondingly result in a reduction in the activity. However, this will only occur if there is a shift in risk perception associated with the activity. In light of this, a harsher penalty in damages towards such passengers appears prudent. ■

38 See *Froom v Butcher* [1976] Q.B. 286, CA (Civ Div). See Palmer, Adrian, "Failure to Wear a Seatbelt and Contributory Negligence," (2001) 2 *J. of P.I. Law* 149.

A Report from the Conferencia Anual de la Abogacia Espanola

Turlough O'Donnell SC

The Spanish Bar conference was held in Madrid on the 11th December 2009, with participants from many countries, including France, Germany, Italy, Croatia, Albania, Brazil and Denmark. Eva Massa from the Law Society and I represented Ireland.

In the morning there was an international round table event.

The topic for discussion was: "Where should the juvenile correction systems lead". Issues such as the age of criminal responsibility, detention of minors and the expungement of criminal records for minors attaining their majority were discussed. From the range of interesting comment, I recall two contributions in particular. The first was from Dominique Attias, a member of the Paris Bar and expert in children's law: " a society which is in fear of its young people is a society in decline". The second was from Anne Birgitte Gammeljord, President of the CCBE, to the effect that in light of the European arrest warrant, there was a need for standardization of issues such as age of arrest and age of criminal responsibility and a need for common procedural safeguards across the EU. Another delegate from France mentioned the usefulness of Penalnet – a network of Criminal lawyers in Europe -as a means of getting basic information on procedures in the various states.

Legal journalists from newsmedia such as: El Pais, El Mundo, and Cadena SER participated in the roundtable discussion. They contributed in relation to the general issues and also on matters of particular concern, such as anonymity for minors. This part of the roundtable ought to be very interesting for us. We have distinguished legal journalists. We should encourage greater dialogue with them on legal issues. I don't know why I found lawyers and journalists all being part of the same dialogue so intriguing and refreshing. After all, we *are* part of that great and continuing dialogue on issues of human rights and freedoms. Of course we hold each other to account and of course this leads to conflict. But it is nonsense to believe that the relationship is *merely* adversarial. It never was. Read about Erskine's defence of Tom Paine and be reminded again of the strong common bond.

The unspoken assumption that there is an unending and exclusively adversarial relationship between law and journalism is, no doubt the result of many causes but some blame should attach to the (until recently fashionable) ideology that everything could be defined as a commodity and that vicious competition would always produce a good result. The corrosive ideas that journalism is all about sales and advertising and law is all about service providing and time-costing and all this shameless worship of "The Market", keeps journalists and lawyers from seeing what they have in common – a shared pursuit of truth and justice. We should have more dialogue between the two professions .

The openness of the Spanish Bar to this dialogue may perhaps derive from their clear belief that human rights issues are the business of all, not just the lawyers.

Following the roundtable, that evening there was the annual conference of the Consejo held at the Real Academia de Jurisprudencia Y Legislacion de Madrid. The human rights awards were presented to Juan Ignacio de la Mata –for his work in defence of young immigrants against arbitrary repatriation.

Ela Bhatt, an Indian lawyer, received an award for her work in defence of Indian women. In 1972, she set up an organization called SEWA which provides microcredit to small businesses. She is recognized as one of the most important activists in the feminist labour movement and in the area of microcredit and co-operativism. A further award was made for innovative work with prisoners . In the category of media, an award was made to a distinguished photojournalist, Gervasio Sanchez. He has worked in areas of conflict from Latin America, to former Yugoslavia, Africa and Asia. His photographs are simple, powerful, and horrific.

Awards were also made to distinguished lawyers, Aurelio Menendez Menendez and Antonio Garrigues Walker, the latter being founder of Spain's biggest law firm which now employs about 1200 lawyers.

The exciting thing about the Spanish Bar is the bringing together of people from the worlds of legal journalism , photo journalism , human rights activism, with lawyers – all interested in human rights and all making a contribution to the dialogue. At this particular conference, the most powerful contribution was made - without words – through the silent photographs of Gervasio Sanchez. We, who are so good with words, should remember that they are not everything. Sometimes they just get in the way.

And so, as Tony O'Riordan gets the Public Interest Law Alliance (PILA) up and running and draws together all those interested in access to justice and human rights, I suggest that he gives the journalists, the photojournalists, and all those activists interested in human rights – whether lawyers or not – a seat at the table.

The President of the Consejo is Carlos Carnicer Diaz. He argues that the struggle for human rights is indistinguishable from the practice of law. He and the Consejo should be an inspiration to us. ■