# The Bar Review

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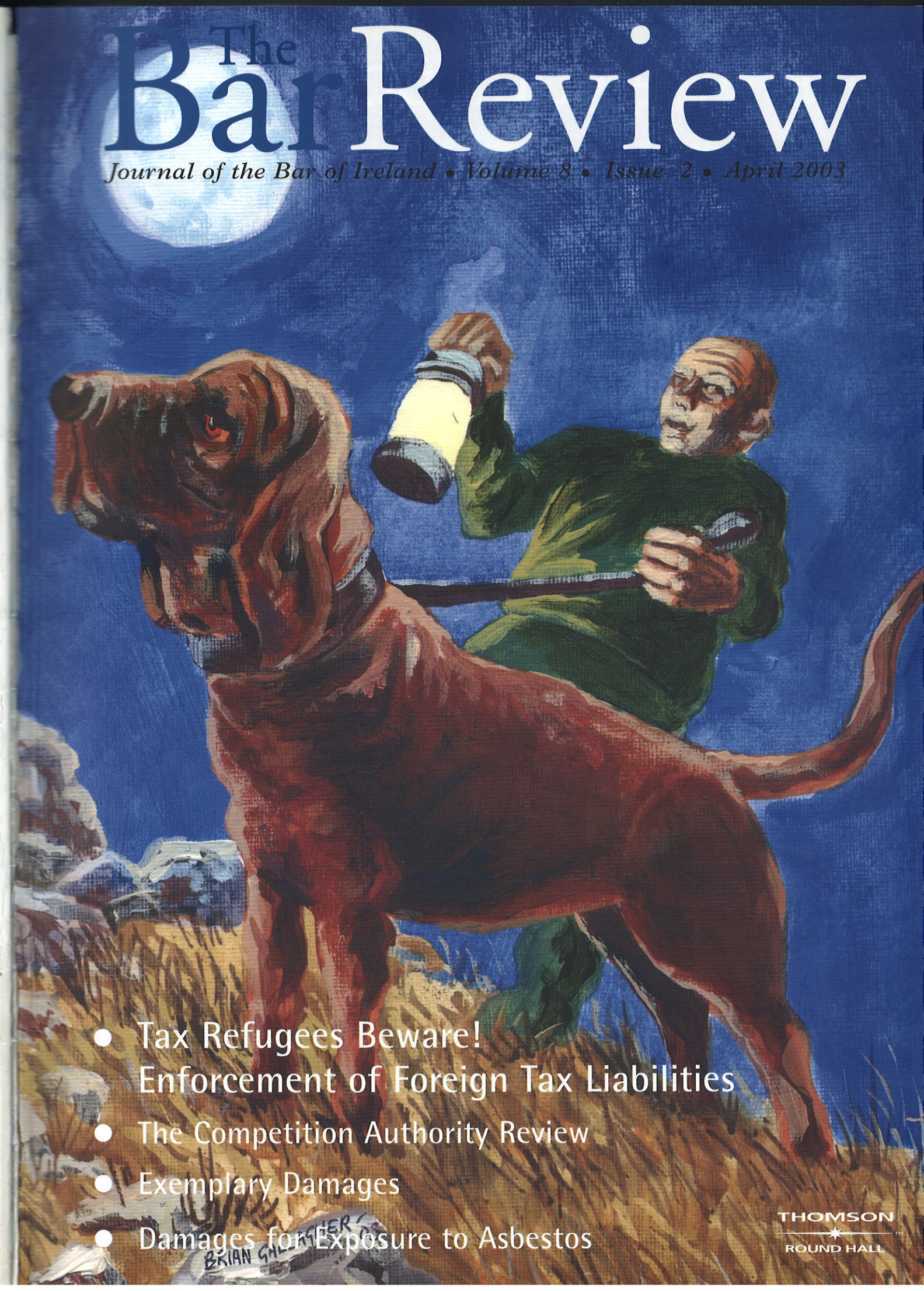

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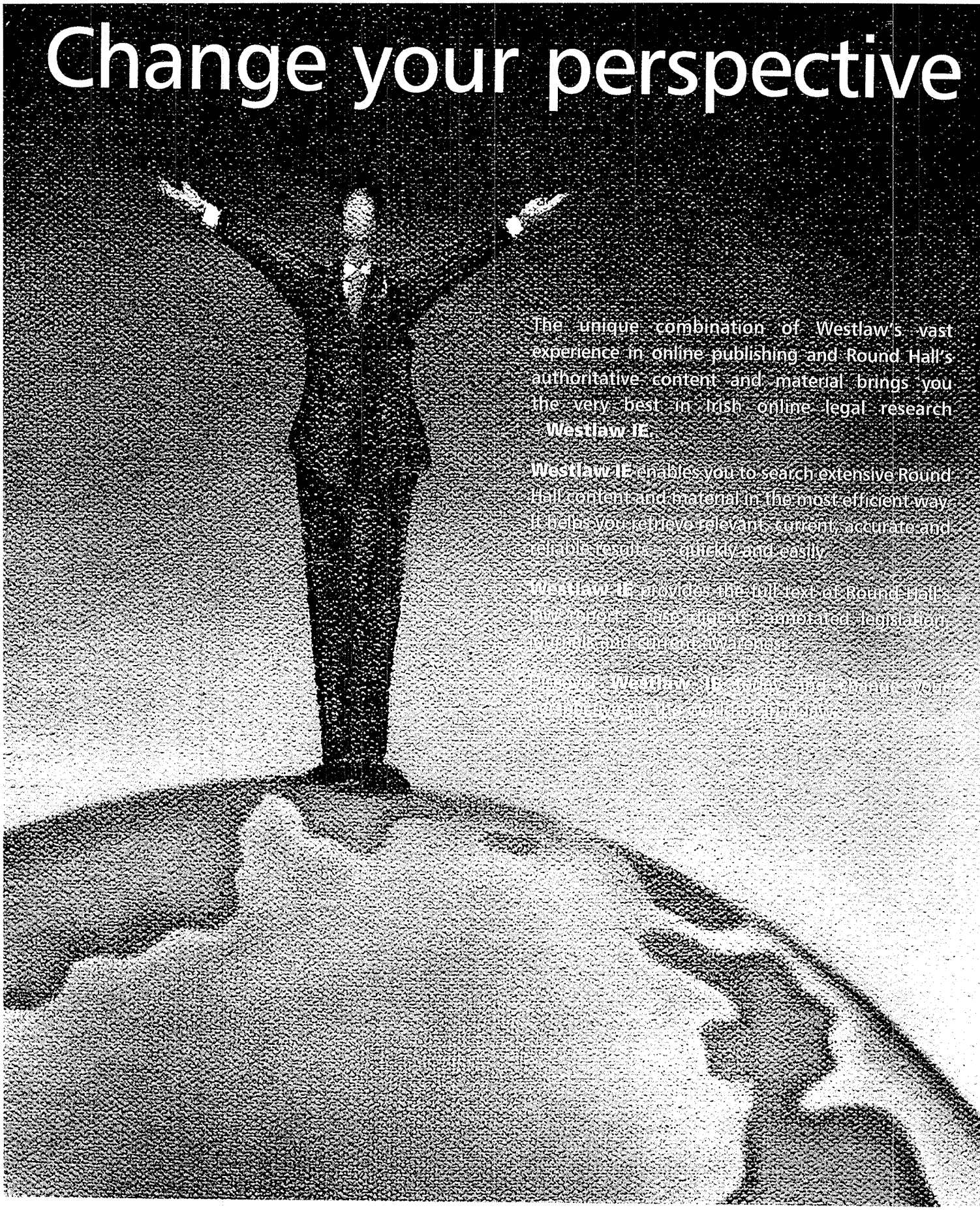


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# The Bar Review

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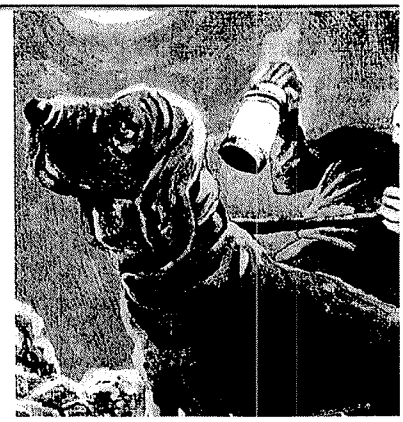


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# Obituary

## Mr Justice Thomas F. O'Higgins 1916-2003

### By Mr Justice Tom Finlay

I have enjoyed the friendship of Tom O'Higgins for the full of 60 years and a golden gift it has been. I therefore welcome the opportunity to write a short appreciation of him and have decided that it is appropriate that I should exclusively deal with his career as a barrister and Irish judge.

Tom was called to the Bar in 1938, having gained first place and the Senior Victoria Prize in the Bar final exams. He immediately went on the Midland Circuit. When I joined that circuit in 1944, Tom was not only a busy, popular and able member of it, but held a like position in that part of the Northern Circuit covering Cavan, Monaghan and Leitrim.

Though practising on two circuits was not very unusual at that time, it was sometimes the source of mild contention among members of those circuits. However, Tom's complete integrity and excellent companionship made his position in each circuit entirely acceptable and very popular. The most he had to suffer as a result of what might be described as his dual mandate, was occasional post-prandial references to him by a somewhat conservative Father of the Northern Bar as "our brother of the half-blood."

By that time, Tom was a very good advocate indeed, always in complete control of his brief, strong, but never aggressive in argument or cross-examination and practical in his approach to the problems of any case. He already demonstrated the overriding concern with justice, which was to inform his entire career as a lawyer, right up to his eventual retirement from the bench of the European Court of Justice.

He took silk in 1954, but later that year, upon the formation of the inter party government, he was appointed Minister for Justice. The position that he held as the Minister of a key department made not one whit of difference to his manner, or the way he conducted himself. His innate modesty remained as it had always been and his complete capacity to deal with every person equally on his or her own terms was undiminished.

Upon the defeat of the government in 1957, Tom returned to practise at the Bar as a Senior Counsel. He rapidly became a busy senior, particularly involved in the common law and criminal side of the work of the courts. He was an excellent colleague to work with, as I did, first as a junior and later, as a fellow senior. He was wise and shrewd in his assessment of a case, practical in his approach to it and above all, constantly concerned with the interests of his client, who was quite frequently the small man, rather than a large company.

The fact that his practice mainly involved common law cases, jury tort actions and the defence of jury criminal trials, probably masked for some, the extent of Tom's comprehensive grasp of the law and his capacity to understand and express a point of law before a court. However, those who had worked with him at the Bar were not surprised when, upon appointment to the Supreme Court as Chief Justice, he delivered many clear, lucid and illuminating judgments on complicated questions of law.

Although he worked full-time as a barrister between 1957 and 1973 and at the same time, was an active senior politician and member of the Dáil, Tom never permitted the two activities to invade each other. It was typical of his quiet adherence to principle, even at a cost to himself, that he ceased to practise as an ordinary junior in Laois or Offaly after he had been elected as a deputy for that constituency, lest there might be an apparent conflict of interest in his position, on the one hand, as a deputy and on the other hand, as a lawyer practicing in that area. I have no doubt that his career at the Bar made a significant contribution to its development at a very important time.

Tom was appointed to the High Court in December, 1973 and as Chief Justice to the Supreme Court in October, 1974, resigning from that court upon his appointment as a judge of the European Court of Justice in January, 1985.

His contribution to the judiciary, particularly as Chief Justice, has in my view, been very great indeed. Not only did the Supreme Court under his chairmanship, deliver a number of important decisions dealing with constitutional issues of fundamental rights, but also, Tom gave to the judiciary a cohesion which I do not think had so clearly existed before that time. He was particularly anxious to reach out to all the courts, ensuring that there was a close sense of collegiality between all the members of the judiciary. He also greatly improved the relationship between the courts in Ireland and those in Northern Ireland. As President of the High Court at that time, I received from him the greatest possible assistance and support on the many problems I brought to him.

It is extremely difficult, without using extravagant language (which he would have hated) to adequately describe what a splendid friend and companion Tom O'Higgins was. On circuit or in the Kings Inns, his sense of humour, kindness and enthusiasm enlivened every occasion when he was present.

He and his wife, Terry, were generous and gracious hosts. Equally, they were splendidly charming and entertaining guests. At the top of my personal list of priorities, Tom was, on a river bank or lake, the most perfect companion. ●

# The Competition Authority review of professions

Paul McGarry BL[1]

## Background

On 20th March 2003, the Competition Authority held a press briefing to launch a report[2] commissioned by it and prepared by an undertaking called *Indecon Economic Consultants*. The report purports to be an analysis of the activities of a number of professions in the technical, medical and legal fields. Despite the coincident launch of hostilities in the Middle East, the event received considerable media attention.

The report is not the culmination of a process, but rather a step in the ongoing evaluation of these professions by the Authority. The Authority is careful to point out that the report does not represent its own views, but that it is intended to act as a basis for its ongoing review. The next step (following consultation) is that the Authority will publish a report on each one of the individual professions.

With a view to gathering information, the Authority asked a number of questions of the Bar Council and Kings Inns; subsequently the consultants requested information on further issues and circulated an opinion-survey to individual members of the Law Library. It also appears (from the report) that a survey of the attitudes to barristers on the part of the general public, solicitors, and insurance companies was also carried out.

## General comments on the report

The consultants set out to examine activities that they considered likely to restrict competition, and in this context, the notion of price competition is very much to the fore. The standard phrase: "it is considered that this is likely to distort or restrict competition on the marketplace" is liberally sprinkled throughout the document. In fact, the consultants have not identified any actual example of distortion of competition that is or has taken place.

Despite this reliance on potential restrictions as a basis for its findings, where the report is open to serious question is in the lack of any argument advanced in support of these conclusions. The *modus operandi* appears to have involved the making of general observations, requests for the views of the professional representative bodies, followed by the statement that it did not accept these views. In most instances, where the report is critical of the rules of the profession, there is no alternative argument advanced in favour of the consultants' view.

Unusually for a report of this type, the consultants place heavy emphasis on a form of "opinion survey" (much like an opinion poll) where they appear to have asked samples of certain groups (general public, solicitors, insurers) whether they believed that there was sufficient price competition between barristers. The relative value of this unscientific approach is exemplified by the finding that although a significant proportion of the general public believe that there is little or no price competition between barristers, the report goes on to state that 90% of the same sample of the general public had not come across a barrister (in a professional capacity) in the previous five years.

The issues canvassed by this simplistic opinion survey are irrelevant in any realistic assessment of the market because they are entirely subjective. The only issue on which opinion does not appear to have been canvassed is the one that is the most relevant, i.e. whether there is a demand on the part of any of those questioned for a change in relation to certain practices, and if so, what change, and why.

Any analysis of a sector from a competition viewpoint must start with an objective assessment of the factual conditions in relation to the market. This applies regardless of whether the investigation is into competition between two shops in a small town or in relation to the provision of barristers' services throughout the jurisdiction as a whole.

It is wholly inappropriate to arrive at conclusions of the type contained in the report without first defining the market, the number and size of the operators on the market (both supplier and consumer), the nature and type of the services provided, the cost of delivery of the service, the type of customer that receives the service (and a corresponding analysis of that operator), the ultimate price to the consumer, comparisons between a range of similar services provided by reference to price, and so on.

Such an approach might be described as an expert economic analysis of the market and would be the most basic proof required if, say, a party considered making an application to the courts for a declaration that another party was in breach of the Competition Act. The fact that the consultants have not examined any of these criteria leads to the inevitable conclusion that this report cannot be described as an objective fact-driven analysis of the market.

To examine the nature of a rule from a competition perspective, it is necessary to look at the actual effect of its operation on the market. In order for a competition body to show that a rule or practice should be changed, it should proceed on the assumption that the change would result in

(a) the provision of services which clients do not presently have, and which they desire to obtain and /or
(b) that the change will result in more cost effectiveness in the provision of legal services, and that this cost effectiveness would revert to the original client.

Where they conclude that a rule or practice may distort competition, the consultants also appear to have ignored the question as to whether this

1. The opinions expressed are those of the author.
2. The Report is available on the website of the Competition Authority at www.tca.ie

rule or practice may be objectively justified. This is a fundamental principle of competition law and it has been the contention of the Bar Council that in circumstances where a rule is seen to be restrictive of competition, then it can be objectively justified in the interests of public policy and the administration of justice.

Having overlooked many of the fundamental requirements for an examination of the relevant market and failed to provide any basis for the conclusions, it is tempting to form the view that the conclusions were for some reason inevitable. It is unsurprising that this illogical directional approach to the study has resulted in the following generalised statement:

> " The facts point towards a profession in which normal competitive behaviour is lacking or absent altogether."

## Practices / rules not regarded as restricting competition

If the initial questionnaire can be regarded as having identified the issues about which the Authority and the consultants were anxious to discuss, then the report can be said to highlight those practices and rules that potentially restrict competition. In this regard, the report is at least as interesting for what it omits as for what is included.

The consultants requested the views of the Bar Council on a number of issues that do not feature in the conclusions or that are expressly regarded by the consultants as not likely to restrict competition. These include the following:

- the existence of senior and junior counsel,
- the manner in which panels of barristers in specific areas (insurance, the state) are organised,
- the operation of the practice of "*no foal no fee*",
- the self regulating nature of the disciplinary procedures, and
- the requirement that a barrister's practice be her/his primary occupation.

Comment in respect of some of these issues is ignored, leading to the conclusion that the consultants did not consider that they do restrict competition. Others are the subject of favourable comment in the report; one example is the disciplinary procedures where the consultants state:

> "we have reviewed the procedures and believe they are designed to protect consumer interests and high standards in the profession. We do not believe they restrict or distort competition on the market."[3]

The consultants also concluded that:

> "the arguments submitted by the Bar Council in support of the existence of a senior rank within the barristers' profession are justified on competition grounds. As well as providing a signal of high quality to solicitors and clients, the title also provides a career structure to more junior members (in the same way as a hospital consultant does in the medical profession or university professor does in the academic world) and this acts to increase the level of competition on the market, other things being equal."[4]

Even insofar as the above items are concerned, it is disappointing that the consultants appear to have refused to go further and accept the arguments of the Bar Council to the effect that certain of these characteristics and practices might actually enhance competition.

## Practices / rules alleged to distort competition

Set out below are the main objections raised by the consultants to barristers' practices, together with a commentary on each. It is worth repeating that the conclusions appear to be derived from a combination of the opinion survey and the straightforward rejection of the arguments advanced by the Bar Council. The conclusions in relation to the provision of educational courses at Kings Inns are omitted, although examination of same clearly recommends itself.

One further general observation relates to the ongoing comparison in the report between the situation in Ireland and that pertaining to practice at the Bar in England and Wales. The conclusions in the report are remarkably similar to those issues that have already been the subject of adverse comment by the Office of Fair Trading there. Interestingly, some of those comments have already been the subject of a rethink arising out of recent scandals in the corporate sector. It has never been the case that the barristers' profession in Ireland can be objectively or realistically compared with that in England and Wales, given the different rules that apply, the size of the market, the nature of the solicitors' profession there, and so on. It is strange that the consultants did not examine other good alternatives for comparison available elsewhere, for example individual Australian states, Scotland, and South Africa.

### 1. The absence of remuneration of devils during their period of pupilage is likely to act as an entry barrier to the profession.

This issue has been examined over the past ten years and on a number of occasions by the Bar. Aside from the liability (and insurance) issues surrounding the creation of a contractual relationship between master and pupil (or the Bar Council and pupil), the suggestion has always been rejected by a large majority of pupils themselves. The suggestion that lack of remuneration acts as a barrier to entry is not supported by any statistical fact. Indeed it is easy to see how a system that provided for pupils to be paid in their first year would lead to a higher rate of barristers leaving practice once the period of pupilage had ceased.

The reason why pupils are not paid is because they are still completing their formal training and educational process. This training is provided free to them by experienced practitioners who help them to learn the practicalities of their trade. There is no obligation on the pupil to perform work for their master, and in reality it is the pupil that selects the person who is to become their master. It is because of this and because of the fact that the master devotes a considerable amount of professional time and energy to assisting the pupil, that at one stage it was considered more appropriate for the master to be remunerated. In addition, pupils are entitled to undertake work on their own account when they commence in practice and it is presumed that if they were in a form of contractual relationship, this would no longer be the case.

The cost barrier to entry identified by the consultants is not significant given that the cost of entry into the profession is already very low by comparison with other professions. A barrister commencing in practice benefits from having no overheads, low insurance premium, reduced subscription rates and access to common services because of the pooling of resources and expertise in the Law Library. Compare the cost of commencement in practice of a newly called barrister to that of a dentist or medical practitioner establishing a practice.

3. This passage is at para. 5.56 of the report.

4. Para. 5.95 infra.

Finally, if masters were required to pay their pupils, it is certain that there would be a dramatic decrease in the number of persons available and willing to act as pupil masters, and this could not be said to be in the interest of prospective pupils, the profession and the system of justice as a whole.

## 2. The rules preventing barristers from advertising are likely to restrict the operation of competition between barristers.

Comparative advertising in any profession has only recently been allowed on a limited basis, and attempts at European level to expand the concept have been largely unsuccessful. The restrictions on advertising by the solicitors' profession have been the subject of a complete *volte-face* on the part of the regulators of that profession over the past 10 years. The initial liberalization of advertising in that profession was the result of competition-type arguments not dissimilar from those contained in this report. It is now generally accepted that - contrary to the conclusion in this report - some forms of advertising have the actual effect of driving up the cost of litigation and are not in the public interest.

It is always tempting for consultants to conclude that more advertising reduces cost and increases competition. It is not clear to whom it is envisaged a barrister would direct her/his advertising, given the nature of the market for barristers' services. It may be that a barrister that opted to advertise would be less likely to be instructed by a potential client that came across her/his publicity. Interestingly, since the Australian competition regulators insisted that the Bar remove the restriction on advertising in 1997, the number of barristers that chose to advertise can be counted on the fingers of one hand, it appears that their experience was not exactly favourable. Although it can be said that advertising has a role to play in lowering the standard and quality of service, it has yet to be shown that it has the effect of enhancing competition.

## 3. The prohibition on clients directly accessing the services of barristers in all areas of work (including contentious work) is likely to restrict competition between barristers.

## 4. The customs and traditions serving to minimize the number of 'solicitor advocates' in the superior courts limit the supply-substitutability between the two branches of the legal profession and therefore are likely to restrict competition on the market for barristers' services.

These two conclusions are complementary and can be examined together. Independent referral is one of the core principles that defines the nature of the work of a barrister. The Bar has always advanced the view that the differentiation between the functions of litigator and advocate reflects important differences of function.

The work of a barrister in the context of litigation largely depends on the exercise of individual skill and judgment. There is a genuine public interest in the availability of skilled advocates and ensuring that the widest possible number of same are available. Barristers have to remain objective and independent and they have overriding duties to their client and to the court. They are not equipped for direct dealing with the public and they cannot handle clients' money. As a result, their overheads are low and clients receive the highest standards at the most competitive price.

If this conclusion is followed up, there would be one legal profession and all of the best advocates would work for the largest and most expensive firms based in Dublin. It is inconceivable that the client who is financially or geographically challenged would be able to avail of the services of the leading advocates. The USA is a good example of the type of system that might emerge if the professions were fused, and there, the cost of taking a case to court is probably the highest in the common law world.

Without the availability of a separate independent Bar, competition among solicitors would be severely diminished. Every member of the Irish Bar is available equally to every solicitor, and to every firm of solicitors, whatever their size or characteristics. A solicitor knows that he can call upon any member of the Bar who has the necessary experience and knowledge to provide his client with the best quality service. This is a particular feature of the market for barristers' services where solicitors represent the ultimate consumers and advise them in relation to the selection of a barrister to represent them in litigation. This was not picked up on by the consultants.

Interestingly, there has been no great demand either from the general public or from members of the solicitors' profession for a relaxation of this rule. Perhaps this is because solicitors already enjoy rights of audience before the superior courts. More likely it is because the structure of the solicitors' profession in Ireland, with a huge number of practitioners in firms consisting of three lawyers or less, means that it is more cost effective for such firms to engage the services of any barrister to deal with whatever litigation problem arises. Therefore, small firms of solicitors can choose from one of 1,400 barristers on a case-by-case basis.

Direct professional access (DPA) does exist at present, in a limited form and subject to the person requiring access, making an advance application to the Bar Council. The author can see this system further developed so as to avoid the requirement that in order to avail of DPA, a person must be a member of another professional body and apply to the Bar Council in advance. The obligation to ensure that the advice sought does not relate to contentious matters might be left to the individual barrister, subject to the scrutiny of the Bar's professional practices committee, in light of the fact that this system of self- regulation has obtained the seal of approval of the consultants hired by the Competition Authority.

## 5. The prohibition on fully qualified barristers, having fulfilled the pupilage requirements as well as being called to the Bar (i.e. in-house barristers), competing with practising barristers (members of the Law Library) is likely to restrict competition on the market for barristers' services.

## 6. The requirement that barristers operate only as sole practitioners, and the prohibition on barristers forming multidisciplinary practices with other professionals are likely to restrict competition on the market for barristers' services.

It is correct that a distinction be made between barristers and non-practising barristers. In-house barristers are not independent of their employers and operate as their full-time legal advisers. They could not be subject to the conduct requirements relating to independence and the requirements of the cab-rank rule. They are not subject in this way to any professional or disciplinary code or sanction for breach of same. They are under no recognized duty to the court. Because their career and future is linked with the interest of their employer, they are open to the perception that they act in accordance with the pressure that this situation evokes.

Partnerships of barristers would in fact reduce the number of barristers available to clients and increase the likelihood that conflicts of interest would prevent certain barristers from taking certain cases. This reduction in the number of available barristers would obviously restrict competition. If the Irish Bar were divided into a number of large chambers or partnerships, the net effect would be to restrict the possibility for clients and solicitors to select from the widest possible pool of barristers available, since clients would (not unrealistically) object to having both sides of a case represented by barristers from the same chambers.

The independence of the practitioner is an issue that also needs to be considered in this context. In many societies, there is a recognition that the potential imbalance between parties to litigation can be offset by guaranteeing equal access of parties to the resources of the Bar. This applies whether the proceedings involve the State - in the context of a criminal trial - or a large corporation against an individual citizen. It is equally reasonable to assume that an individual in these circumstances is entitled to avail himself of the services of a barrister who is, and is seen to be, completely independent of any conflict or perception or suspicion of same. The so-called "cab rank rule" is the manifestation of this principle in practice. The fact that many landmark decisions of the Irish courts in recent times were conducted by barristers operating on a no-foal, no-fee basis is testimony of the value of this system.

In addition, the practice of a barrister in most jurisdictions is essentially a low overhead activity that is best suited to practice by a sole practitioner (i.e. it guarantees a better quality of service). Sharing of costs through the operation of the library system and the pooling of expertise provides a benefit to clients and lowering of costs, without the inherent conflict that may result from the sharing of profits in the context of a partnership.

Barristers are retained because of their legal knowledge and experience, access to legal data and forensic ability. Access to legal data is readily available to all barristers who subscribe to the library system. This means that a barrister can practice effectively without a significant support staff and consequently with low overheads. This has a significant effect, both on costs and on the quality of service, since it frees a barrister from the administrative responsibility entailed in running a large office and staff, and reduces the ultimate cost to the consumer of the service.

A similar argument can be made about the question of multi-disciplinary practices (MDPs). If barristers were permitted or encouraged to form partnerships with solicitors or other professionals, then they would be exposed to obligations in relation to accounting and the handling of clients' money. The cost of compliance with such a system would be passed on to the client.

The European Courts of Justice has already decided that a ban on lawyers forming partnerships with other professionals can be justified in the public interest, and the ban on partnerships and the sole practitioner rule operated by the Irish Bar should be seen in this context. In the case of *Wouters v Netherlands*[5], the Court arrested the trend towards the so called 'one stop shop' trumpeted by large firms of solicitors, accountants, consultants, and other professionals. Subsequent scandals arising directly from the conflicts created by the operation of such businesses in the USA and elsewhere, underpin the rationale behind the operation of the ban on partnership for lawyers, and by extension, the sole practitioner rule operating in the Irish Bar.

In *Wouters*, the ECJ commented:

> "More particularly, account must be taken of the objectives [of the prohibition], which are here concerned with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience...It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of these objectives."

What is surprising is that the consultants' report does not explain how allowing barristers into partnerships and MDPs would encourage competition. There are solicitors in Ireland who practice as advocates and compete directly with barristers. This is also the case in other common law jurisdictions. If the premise for enhanced competition is a greater number of available practitioners, then it is clear that, as an Australian study from 1992[6] found:

> "in partnerships, competition would be reduced as there would be a conflict in one partner taking a brief against another. It would be particularly likely to be the case in narrow areas of specialisation."

Cost is the other factor of relevance. It has nowhere been shown that allowing barristers to form partnerships would result in reduced costs. Because of the higher service delivery costs of solicitors, it is the contention of all independent Bars that the reason why barristers compete successfully with solicitor advocates is because it is more cost efficient. Put simply, if it were the case that solicitor advocates were capable of delivering a quality advocacy service at a cheaper cost to clients, there is no reason why this would not be the prevailing practice.

In 1992, the Office of Fair Trading in the UK, after conducting an analysis of a similar rule prohibiting Scottish advocates engaging in partnerships with each other, with solicitors, or in MDPs, concluded that none of these prohibitions had a significant anti-competitive effect. This conclusion was apparently reached because of the entitlement of solicitors to engage in advocacy before the courts.

## Conclusion

This report is a step in an ongoing process and attention will now focus on the Competition Authority in its stated aim of examining the possibilities for reform of the various professions. The consultants have implicitly or expressly accepted that certain practices and rules do not restrict competition, although they stop short of identifying any that might enhance or benefit competition.

The value of the report is significantly undermined by the fact that it ignores the logic that a conclusion must be derived from an objective fact-based assessment together with a cogent argument in its favour. The conclusions are largely based on a rejection of the arguments of the professional bodies consulted together with a simplistic opinion survey.

The report fails to look at the issue of whether there is any demand for any of the changes that are implied in its conclusions and overlooks the fact that certain of the practices and rules that it impugns are beneficial from a competition perspective. Finally, the consultants have not considered the question of whether competition restrictions (if they are ultimately so found) can be objectively justified.

This approach follows a trend in the formulation of competition reports about the legal profession around the world. The focus of the concern appears to relate to restrictions largely imposed by the profession upon itself in the public interest. It does not derive from any unmet or unsatisfied demand from consumers. The failure to associate customer concerns with the findings suggests that the conclusions are based on academic competition theory rather than actual market distortion. Any proposal for reform must be the result of a conclusion derived from an objective analysis that actual market distortion exists and that the rule impugned is not objectively justifiable. This is the approach that must be taken by the Competition Authority.

This report appears to have fallen foul of the cart-and-horse analogy, and it is suggested that prior to reaching any further conclusions, it would be preferable to set out what is meant by the words "market", "competition", "distort", "restrict", and "enhance", before moving on to what is likely to be understood by the word "reform". ●

5. Case C-309/99 ECJ 12/02/02

6. University of New South Wales, Prof. Ian McEwin, 08/1992

# Exemplary Damages; Teaching wrongdoers that tort does not pay

David McParland BL

## Introduction

The recent decision in *Crofter Properties Ltd v. Genport Ltd*[1] refocuses attention on the position of exemplary or punitive damages in Irish law, and the circumstances in which these damages will be awarded by the courts. The judgment by McCracken J. is significant as the court awarded IR£250,000 for exemplary damages in addition to an award of IR£50,000 for general damages. This shows that in an appropriate case, a court may make a large award of exemplary damages where it considers that a defendant's conduct is sufficiently deserving of condemnation.

## Aggravated and exemplary damages

Practitioners are sometimes confused as to the distinction between aggravated and exemplary damages. This may be partly because there are relatively few reported decisions by the Irish courts on the subject and partly because, in certain cases, there may be an overlap of the elements giving rise to an award of aggravated or exemplary damages. Another reason may be that practitioners and judges tend to approach damages in a practical way, with the view that as long as the quantum of the award does justice to the plaintiff, the designation of the damages is less important.

This approach is illustrated by the case of *Kennedy v. Ireland.* [1988] I.L.R.M. 472. The facts of this case are well known. The Minister for Justice unlawfully issued warrants authorising the tapping of the plaintiffs' telephones. Hamilton P. in the High Court recognised that this was an infringement of the plaintiffs' constitutional right to privacy that was "carried out deliberately, consciously and unjustifiably". In assessing damages, he stated that "the plaintiffs are in my opinion entitled to substantial damages and it is, in the circumstances of this case, irrelevant whether they be described as 'aggravated' or as 'exemplary' damages."[2]

The relationship between compensatory damages, aggravated damages and exemplary damages was fully analysed in the later case of *Conway v. INTO* [1991] 2 I.R. 305. At page 317, Finlay C.J. stated that in any case for damages for tort or breach of a constitutional right, there are three headings of damages which are potentially relevant:

1) Ordinary compensatory damages; consisting of general and special damages;

2) Aggravated damages; which are compensatory damages increased in part by a recognition of the added hurt or insult to a plaintiff who has been wronged and in part, also a recognition of the cavalier or outrageous conduct of the defendant. Aggravated damages may be awarded for (but are not limited to):

   a) the manner in which the wrong was committed, involving elements such as oppressiveness, arrogance or outrage, or

   b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done, or the threat to repeat the wrong, or

   c) the conduct of the wrongdoer and/or his representatives in the defence of the plaintiff's claim, up to and including the trial of the action.

3) Exemplary or punitive damages; which are damages arising from the nature of the wrong committed or the manner of its commission. Exemplary damages are intended to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case; the court's decision should publicly be seen to punish the defendant for his conduct by awarding such damages, quite apart from the court's obligation to compensate the plaintiff for the damage which he has suffered. "Punitive" and "exemplary" damages should be recognised as being the same.[3]

The above definition includes an obvious overlap between aggravated and exemplary damages concerning the conduct of a defendant. Without doing an injustice to this analysis, a more simplistic but perhaps easier to remember rule of thumb for practitioners might be:

1) Aggravated damages are a subset of compensatory damages that are directed to a plaintiff as additional compensation in recognition of the exceptional features that add to or exacerbate the plaintiff's injury;

1. Unreported, High Court 10th of September 2002
2. At p. 479. Despite this statement by Hamilton P., the headnote of the report in the I.L.R.M. describes the damages awarded as "aggravated".
3. In *Kennedy v. Ireland,* Hamilton P. had found that there was a difference between punitive and exemplary damages, basing this on the distinction in the terminology of Sections 7(2) and 14(4) of the Civil Liability Act, 1961. In *Conway v. INTO,* the Supreme Court held that exemplary and punitive damages were the same. It preferred the term exemplary damages.

2) Exemplary or punitive damages are damages over and above compensatory damages. They are not intended to compensate the plaintiff but rather are directed against the defendant to make an example of, or to punish him for his wrongdoing.

## Aggravated damages: the conduct of the defence

Of particular interest to lawyers acting for a defendant is the passage in *Conway v. INTO*, which states that aggravated damages may be granted because of "the conduct of the wrongdoer and/or his representatives in the defence of the plaintiff's claim, up to and including the trial of the action". If a court feels that a defendant has behaved particularly badly in defending the action, this may lead to an increased award of damages to the plaintiff. The following cases are examples of this.

In *Kennedy v. Hearne* [1988] I.L.R.M. 52 (High Court) and 531 (Supreme Court), the plaintiff, who was a solicitor, claimed damages for libel and breach of constitutional rights against the Revenue Commissioners. In the High Court, Murphy J. found the plaintiff was libelled and allowed the sum of £500 "under the general heading of damages". He also allowed an additional £2,000 as aggravated damages and referred to "the way the case was met" by the defendant. Murphy J. stated that counsel for the defendant "made it clear that the purpose of [his] cross examination was to establish that the plaintiff was a cheat with no reputation that could be damaged as a result of the alleged libel"[4]. On appeal, in the Supreme Court, Finlay C.J. emphasised the defendant's conduct in the High Court trial. He contrasted the seriousness of the original defamation made to a limited number of people, with the "accusations made in open court in Dublin".[5] Finlay C.J. concluded that the High Court award of aggravated damages was "significantly inadequate", and substituted a figure of £10,000.

In *FW v. BBC* (Unreported, High Court, 25 March 1999), the plaintiff sued the BBC for damages following the broadcast of his name in a television programme on child sexual abuse, despite undertakings given to him that his identity would be protected. The defendant admitted liability and the case involved the assessment of damages only. Barr J. found that prior to the trial, a psychologist retained by the defendant, in assessing the plaintiff, subjected him to oppressive questioning on the detail of his childhood abuse. The psychologist also warned the plaintiff that he would have to undergo a similarly detailed cross-examination concerning the abuse in court. The court found that the plaintiff had suffered substantial additional anguish prior to the trial, as a result of the "gross negligence and professional incompetence" of the psychologist. He awarded the plaintiff £15,000 for aggravated damages in addition to general damages of £75,000.[6]

## Exemplary damages for breach of constitutional rights

In an appropriate case, the courts may award exemplary damages to vindicate and defend a citizen's constitutional rights, or rather to punish the defendant's disregard of those rights and to deter any breach in the future. In 1990 and 1991, the Supreme Court decided two cases which involved the wilful infringement by the defendant of the plaintiffs' constitutional rights -- *Conway v. INTO* [1991] 2 I.R. 305 and *McIntyre v. Lewis* [1991] 1 I.R. 121.

The case of *Conway v. INTO* involved the assessment of damages where the court found that in the course of an industrial dispute at a national school, the defendant teachers' union, had conspired to deprive the plaintiff and other children of their constitutional right to education. In the High Court, Barron J. made an award to the plaintiff of £1,500 for exemplary damages. This figure was based on a total exemplary award of approximately £100,000 against the defendant, divided among seventy plaintiffs. The Supreme Court approved this award and emphasised the value of exemplary damages as a necessary means of vindicating constitutional rights.

The decision in *Conway v. INTO* was significant in Irish law in that the Supreme Court did not follow the restriction imposed on awards of exemplary damages by the House of Lords in *Rookes v. Barnard* [1964] A.C. 1129. In that case, Lord Devlin held that the entitlement to exemplary damages was limited to the following categories only:

1) the oppressive, arbitrary or unconstitutional action by servants of government;

2) where the defendant's conduct has been calculated by him to make a profit for himself, which may well exceed the compensation payable to the plaintiff; or

3) where exemplary damages are expressly authorised by statute.[7]

The effect of *Rookes v. Barnard* was to exclude awards of exemplary damages in cases that did not fall within one of the above categories. However, the judgment of Lord Devlin was subject to much adverse comment and indeed, was not followed in many jurisdictions throughout the common law world.[8]

Clearly, the conduct of the defendant trade union in *Conway v. INTO* did not fall within the categories listed by Lord Devlin. However, in rejecting the limitations set out in *Rookes*, Finlay C.J. stated at page 320:

4. At page 63
5. At page 540
6. See also de *Rossa v. Independent Newspapers plc.* [1999] 4 I.R. 432. In approving the jury's award of £300,000 for libel, the Supreme Court appeared to find that the jury's award of "general compensatory damages" was based, at least in part, on the defendant's conduct in defending the action.
7. At page 1226
8. In *Uren v. John Fairfax & Sons Pty. Ltd* [1967] A.L.R. 25, the High Court of Australia refused to follow it as did the courts in Canada and New Zealand. See also, *Broome v. Cassell & Co* [1971] 2 Q.B. 354, where the English Court of Appeal criticised the judgment and found they were not bound by it.

> "It seems clear to me that the court could not be availing of powers as ample as the defence of the Constitution and of constitutional rights requires unless, in the case of breach of those rights, it held itself entitled to avail of one of the most effective deterrent powers which a civil court has: the awarding of exemplary or punitive damages."

McCarthy J. stressed at page 326, that the courts are charged with the defence of the Constitution and of constitutional rights:-

> "The purpose of awarding such damages is truly to make an example of the wrongdoer so as to show others that such wrongdoing will not be tolerated and, more to the point, will not be relieved on payment of merely compensatory damages. Every member of the judiciary has made a public declaration to uphold the Constitution; it would be a singular failure to do so if the courts did not, in appropriate cases such as this, award such damages as to make an example of those who set at nought constitutional rights of others."

Griffin J. concurred at page 323, finding that the award of exemplary damages was justified in this case:

> "Such damages may be awarded where there has been, on the part of a defendant wilful and conscious wrongdoing in contumelious disregard of another's rights. The object of awarding exemplary damages is to punish the wrong doer for his outrageous conduct, to deter him and others from such conduct in the future and to mark the court's (or the jury's) detestation and disapproval of the conduct."

In *McIntyre v. Lewis*, the Supreme Court considered an award by a jury in the High Court to a plaintiff for assault, false imprisonment and malicious prosecution. The plaintiff sued the State and members of the gardai who the court found "from the very beginning conspired together to concoct a malicious prosecution and conceal their own assault; they conspired to pervert the course of justice." The Supreme Court allowed an award of £5,000 for general damages and awarded £20,000 in respect of exemplary damages.

As regards the quantum of the award, McCarthy J. stated at page 138:

"In my opinion, the damages appropriate to a case of this kind must reflect the proper indignation of the public at this conduct, whatever windfall it may prove for the plaintiff in the result".

Though O'Flaherty J. agreed with his Supreme Court colleagues, he sought to lay down a conservative marker for future cases on the quantum that might be awarded where exemplary damages are appropriate. In *Rookes*, as well as limiting the categories where an exemplary award could be made, Lord Devlin also sought to restrict the quantum and had set out three considerations to be applied when awarding exemplary damages. At page 140 in *McIntyre*, O'Flaherty J. adopted these principles. They are in summary:-

1. the plaintiff cannot recover exemplary damages unless he is the victim of punishable behaviour. In awarding exemplary damages to punish a wrongdoer, the court should not award the plaintiff a windfall;
2. the power to award exemplary damages constitutes a weapon which, while it can be used in the defence of liberty, can also be used against liberty. There was a need for restraint in the amount of damages that should be awarded;
3. the means of the parties, irrelevant in the assessment of compensation are material in the assessment of exemplary damages. Everything that aggravates or mitigates the defendant's conduct is relevant.

O'Flaherty J. then commented at page 141;

> "The award of exemplary damages is anomalous and where such damages are awarded -which should be very rarely in my judgement - the judge or jury must keep them on a tight rein. If the compensatory amount includes aggravated damages, then I believe if any award is made by way of exemplary damages, it should properly be a fraction rather than a multiple of the amount awarded by way of compensatory damages (including aggravated damages)."

The above comments by O'Flaherty J. on exemplary damages being a fraction of the compensatory damages award, must be regarded as *obiter dicta* as the actual award by the Supreme Court in this case (with which O'Flaherty agreed), consisted of £5,000 general damages and £20,000 exemplary damages. Therefore, the Supreme Court had actually granted exemplary damages that were a multiple rather than a fraction of the compensatory award.

## Crofter Properties Ltd v. Genport Ltd

The assessment of quantum of an award of exemplary damages was considered in the case of *Crofter Properties Ltd v. Genport Ltd.*[9] This case arose from a dispute between the landlords and tenants of Sach's Hotel, Dublin. The plaintiff claimed arrears of rent in excess of IR£500,000 and the defendant counterclaimed for damages for injurious falsehood, negligent misstatement and defamation. This arose out of a "bizarre background" of anonymous telephone calls made to the police in the U.K., where the caller alleged that the hotel was being used by subversives. The court found that Ms. D., who held a senior position in the plaintiff company, made the malicious calls with the intention of damaging the hotel's business.[10] In assessing damages,

9. Unreported High Court, 10th September, 2002.

10. In a judgment dated the 23rd April, 2002, McCracken J. dismissed the counterclaim, finding that in making the malicious calls, Ms D. had not acted on the plaintiff's behalf. On appeal, this finding was overturned by the Supreme Court on the 9th July, 2002, and the case was remitted to the High Court where McCracken J. assessed damages.

McCracken J. held that the defendant was entitled to "substantial general damages based on the likelihood of various kinds of loss including loss of reputation". He assessed general damages at IR£50,000.

In relation to exemplary or punitive damages, McCracken J. commented that Ms. D had probably committed a criminal offence under the law of the U.K. He also stated:

> "it is quite clear that the calls were made maliciously and ... with the intention of causing damage to the defendant. The behaviour of Ms. D. was quite beyond the bounds of normal civilised behaviour and far outside any accepted commercial relationships. It was calculated to damage the defendant unlawfully and through unlawful means to gain a benefit for the plaintiff."

McCracken J. found that another factor that should be taken into consideration was that Ms. D. gave false evidence under oath and in his view, committed perjury. He said that her position was even more reprehensible as she chose, when giving her false evidence, to try to paint herself as a person of strong religious beliefs, notwithstanding the fact that she was prepared to lie under oath.

In considering the quantum of the award, McCracken J. quoted from the judgment of McCarthy J. in *McIntyre v. Lewis*: "the damages appropriate to a case of this kind must reflect the proper indignation of the public at this conduct, whatever windfall it may prove for the plaintiff in the result".

McCracken J. also quoted from the judgment of O'Flaherty J. in *McIntyre*, but favoured the more liberal approach taken by McCarthy J.

> "I have to say that I would prefer the view of McCarthy J., that if the conduct of the guilty party is such as requires them to be punished or made an example of, then the damages should be awarded, on that basis, without regard to the possibility of a windfall to the innocent party."

In assessing exemplary damages, McCracken J. said that this was "an extremely bad case, and one in which there must be a substantial penalty imposed". He assessed exemplary damages at IR£250,000, multiplying the general damages award by five. McCracken J. ruled that the defendant was entitled to set off his total award of IR£300,000 under the counterclaim against the plaintiff's substantial claim of £588,605.

## Exemplary damages under statute

There are some specific instances where exemplary damages are available under statute. These include the Competition Act, 1991, the Copyright Act, 1963, and the Landlord and Tenant (Amendment) Act, 1980.[11]

A statute that confers very significant rights in respect of damages is the Hepatitis C Compensation Tribunal Act, 1997. The Act established a statutory scheme of compensation for persons infected by contaminated blood products received within the State. Under s. 11 of the Act, where the tribunal makes an award to a claimant, the claimant is entitled to apply for a further payment amounting to 20% of their award "in lieu of the tribunal assessing and awarding aggravated or exemplary damages". In the alternative, under s. 5(3), a claimant may run the issue of aggravated or exemplary damages before the tribunal and "the tribunal may make an award in respect of aggravated or exemplary damages where the claimant establishes a legal entitlement to such against a relevant agency or the Minister for Health."[12]

In the case of other statutes that allow the recovery of damages for breach of statutory duty, it is a matter of interpretation whether exemplary damages are recoverable where there are no directions in the Act. It is reasonable to argue that if the legislature intended to exclude the recovery of exemplary damages in particular circumstances, it would expressly state this in the statute.

## No exemplary damages in fatal cases: the Civil Liability Act, 1961

The Civil Liability Act, 1961, excludes the recovery of exemplary damages in fatal cases. Section 7(2) of the Act contains an express exclusion of exemplary damages where a cause of action survives for the benefit of the estate of a deceased person. Section 49(1) of the Act also excludes exemplary damages in cases where the defendant has caused the deceased's death.[13] The exclusion of exemplary damages seems unfair in fatal cases. One can envisage a situation where a defendant causes the death of a person through reckless conduct, which should be punished by an award of exemplary damages. These provisions were criticised by the Law Reform Commission, which stated:

> "there seems to be no sound reason in principle to exclude exemplary damages in cases of wrongful death. Since the injury caused is obviously of the utmost gravity and could involve serious misconduct, exemplary damages might well be appropriate." [14]

The Commission recommended legislation amending the Civil Liability Act to allow the recovery of exemplary damages in fatal cases. It recommended that the monetary limit on damages for mental distress contained in s. 49 of the Act should not preclude the award of exemplary damages in wrongful death cases.

It is submitted that the courts should be allowed to award exemplary damages in fatal cases when the circumstances justify such an award. The public interest in punishing the wrongdoer ought to outweigh considerations of policy that limit damages in fatal cases.

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11. Section 6(3)(b) of the Competition Act, 1991 allows "damages including exemplary damages"; s. 22(4) of the Copyright Act, 1963, allows "additional damages"; s.17(4) of the Landlord and Tenant (Amendment) Act, 1980 allows "punitive damages";
12. The Act of 1997 was amended by the Hepatitis C Compensation Tribunal (Amendment) Act, 2002. A "relevant agency" is the Blood Transfusion Service Board or the Irish Medicines Board. There is a similar provision to s. 5(3) for dependants of a deceased person under s. 5(2A)(c). The majority of claimants choose the payment of an additional 20% under s.11. The author is aware of one case where the tribunal adjudicated upon the issue and awarded substantial aggravated or exemplary damages.
13. Although s. 49 does not expressly refer to exemplary damages, it confines the damages available in wrongful death cases to damages "proportioned to the injury resulting to the death to each of the dependants" and to a fixed sum for mental distress.
14. See pages 51-52 of the Law Reform Commission's Report on Aggravated, Exemplary and Restitutionary Damages, August 2002: LRC 60-2000.

## Conclusion

The decision in *Crofter Properties Ltd v. Genport Ltd* shows that where the conduct of a defendant is sufficiently deserving of punishment, an Irish court may take a liberal approach to exemplary damages by making a large award of exemplary damages. The decision is also interesting in that, unlike *Conway and McIntyre*, the case involved the commission of torts in a commercial relationship rather than the breach of constitutional rights. The decision must also be seen as another nail in the coffin of the House of Lords decision in *Rookes v. Barnard*. A lawyer in an Irish court can now state with some confidence that the restrictions on entitlement and quantum in Rookes do not apply in Irish law.

The award of exemplary damages was described by Lord Devlin as "a weapon". It is submitted that this weapon should be wielded by the Irish Courts when a defendant is guilty of negligence to such an extent, that his acts or omissions fall within the wilful or reckless category. An appropriate situation may be where a defendant acts in flagrant disregard of the health and safety of the public or his own employees. This may be particularly appropriate in the case of a defendant with deep pockets who cuts corners in order to make a profit. Even the restrictive approach taken by Lord Devlin recommended the punishment of a wrongdoer "where the defendant's conduct has been calculated by him to make a profit for himself, which may well exceed the compensation payable to the plaintiff". The object of awarding exemplary damages is "to teach a wrongdoer that tort does not pay."[15]

15. Per Lord Devlin in *Rookes v. Barnard* at page 1127

# Enforcement of Foreign Tax Liabilities - All's changed utterly?

Patrick Hunt S.C.

## Introduction

Very few Irish judgments have been reported verbatim in the official reports in England. One of the notable exceptions is the case of *Peter Buchanan Limited v. McVey*, which was reported in the 1954 volume of the Irish Reports, and subsequently made it to the 1955 volume of the Appeal cases at page 516. Of particular note are the cogent statements of principles by Kingsmill Moore J. in the High Court judgment, which was affirmed in the Supreme Court. His judgment succinctly encapsulates the principles underlying the policy that nations should not recognise or enforce the fiscal laws of foreign countries. However, much has changed since *Buchanan* was decided in 1950. A recent EU Council Directive extends the ambit of an earlier Directive and effectively allows for the principle of direct enforcement of other EU country's tax liabilities, including income and capital taxes. On its face, this Directive could have far-reaching consequences for those who owe tax in other EU countries. Much of course, will depend on the manner of its application in practice.

## EU Directives

In an overlooked incursion on the principle of sovereignty regarding the enforcement of foreign penal laws, the EU promulgated Council Directive 76/308/EEC (as amended in 1979), which provided for the enforcement in other Member States of recovery proceedings in relation to custom duties (including VAT), agricultural levies, refunds and other subsidies. By Statutory Instrument No. 406/1980, the Irish Government gave effect to the value added tax section of these mutual assistance regulations. Therefore, since 1980, it seems it was possible for foreign (EU) VAT to be enforced in Ireland, though this does not appear to have happened in practice.

Somewhat surprisingly, the issue of enforceability of UK VAT came into focus in the case of *Bank of Ireland v. Meeneghan* [1994] 3 I.R. 111, without the authorities apparently adverting to their new power to seek enforcement via the Council Directive and Statutory Instrument of 1980.

In *Meeneghan*, there had been a Confiscation Order under s. 71 of the UK Criminal Justice Act, 1988, in respect of VAT that had been fraudulently evaded in the UK. The Order was directed, inter alia, to Bank of Ireland where Mr. Meeneghan had deposited money. Costello J. determined the interpleader summons in favour of Mr. Meeneghan because of the lack of enforceability of foreign revenue law. In so doing, Costello J. applied the principles from *Buchanan v. McVey* and quoted from Marshall C.J. in the U.S. case, "*The Antelope*" 1825, the classic statement that "the courts of no country execute the penal laws of another." Strangely, the UK Revenue did not seem to advert to their powers under the 1976 Directive, which ought to perhaps have been invoked in advance of the proceedings to register a judgment directly.

The situation has moved on, and on the 15th June, 2001, the Council promulgated Directive 2001/44/EC whereby the 1976 Directive was effectively extended to include taxes on income and capital as well as other miscellaneous taxes, including excise duties and interest, administrative penalties and fines.

The Directive prescribed implementation not later than the 30th June, 2002, but the Irish Government implemented it on the 25th September of that year by Statutory Instrument No. 462/2002. This Directive effectively allows for the principle of direct enforcement of other EU country's penal statutes, including income and capital taxes, by means of the mechanism and procedures laid down. These regulations also encompass VAT previously covered by the Statutory Instrument of 1980. They stipulate that if a request is duly made in accordance with the Council Directive by a competent authority of another Member State, the Collector General shall, in accordance with the provisions of the Regulations, collect the amount of the claim specified.

Article 5(5) deems an amount claimed by a competent authority of another Member State to be a debt due to the Minister for Finance in respect of tax due under the care and management of the Revenue Commissioners. This effectively gives it the same status as an Irish tax liability.

All claims made shall carry interest at the rate of 0.0322% for each day or part of a day from the time that the claim becomes due and the various interest provisions of the Taxes Consolidation Act, 1997 apply. The Regulations provide that the various enactments in the 1997 Act relating to the recovery of taxes (other than miscellaneous Irish tax specific sections), apply in relation to the collection of taxes pursuant

to an enforcement request from another Member State's competent authority.

Very significantly, s. 1002 of the 1997 Act, which allows the Revenue Commissioners to issue a notice of attachment (effectively garnishee orders issued by the Revenue Commissioners without the necessity of going to court), is applicable to the collection procedure envisaged by the Regulations. This would obviously facilitate the freezing of bank accounts.

This regime would appear to be immune to constitutional challenge by virtue of the provisions of Article 29.5 of the Constitution, since its adoption has been necessitated by the obligations of membership of the European Union.

It also appears to be retrospective in that there is no exception for taxes that fell due prior to the adoption of the Regulations, provided the request is made subsequent to September, 2002 by a competent authority of a Member State. This aspect of the law may also be immunised against constitutional infirmity.

This aspect is particularly ironic since the *Buchanan v. McVey* case concerned the unsuccessful attempt by the plaintiff company, a spirit and wine merchant, to recover monies paid to Mr. McVey, a director, which he obtained tax free. These sums from the company and deposited in Ireland, had been subjected to retrospective taxation. Dealing with the issue of retrospectivity, Kingsmill Moore J. said at 1954 I.R. 91:

> "Retrospective legislation such as was brought about by the Finance Act, 1943 has recently come in for much criticism from sober thinkers on the grounds that it is ethically and politically immoral. The Defendant was emphatically of this opinion, though indignation more than niceties of political ethics seems to have been his motive force."

Given the manner in which the 1980 Regulations regarding VAT recovery went unnoticed, as evidenced by the procedure adopted by the UK Revenue authorities in the *Bank of Ireland v. Meeneghan* case, it remains to be seen whether the 2002 Regulations will have the earth shattering effect that they appear to have. This will depend of course on the manner in which these Regulations are applied in practice.

## Conclusion

Things have come a long way from 1950, when Mr. Justice Kingsmill Moore in the *Buchanan* case quoted with approval from the judgment of the leading United States jurist Judge Learned Hand in the case of *Moore v. Mitchell* (Judge Hand was referred to by Kingsmill Moore as being well known as an authority on conflict of laws in the US, where this issue had special importance, and has often been mentioned as the most eminent US jurist never to have been appointed to the US Supreme Court):

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognise those arising in a foreign state, if they run counter to the 'settled public policy of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will not be found to accord with the policy of the domestic state. This is not a troublesome but delicate enquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between foreign states and its own citizens or even those who may be temporarily within its borders. To pass judgment upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which the courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor (sic). Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as criminal laws. No court ought to undertake an enquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

Lofty sentiments indeed, but easily overtaken by the tide of European integration.

All's changed utterly. Tax refugees beware. ●

# NEWS

## The Calcutta Run 2003

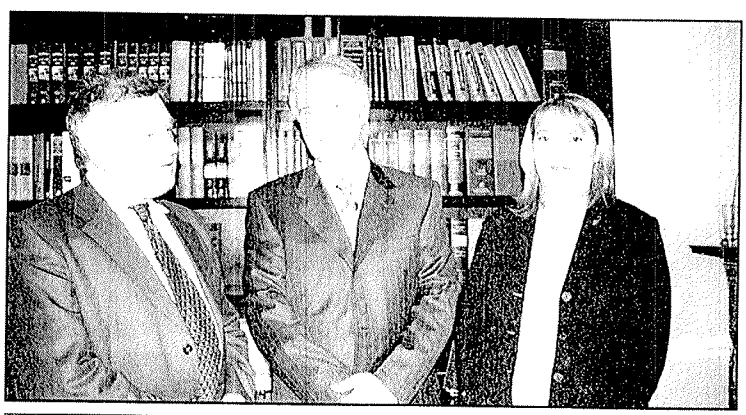
The Hon. Chief Justice, Ronan Keane, has agreed to be the official starter of this year's Calcutta Run, an annual 10k Fun Run/Walk which has raised over €600,000 to date for two charities which help homeless children in Dublin and Calcutta. 2003 marks the fifth Calcutta Run in aid of Goal and Fr. Peter McVerry's Arrupe Society. It will take place on Saturday 17 May, 2003, starting and finishing at the Law Society's headquarters in Blackhall Place. The Calcutta Run is open to everybody. All we ask is that you raise as much money as you can to help take kids off the street. If you would like to take part or learn a little bit more about the charities funded by the run, please contact us at run@calcuttarun.com or 01 649 2071 or visit us at www.calcuttarun.com. Ercus Stewart SC has been one of the key Law Library supporters, so feel free to contact him as well, if you need any further information.

## Northside Community Law Centre

The Bar Council and the Community Liaison Fund have provided money to fund a short research paper into the history and present day workings of the Northside Community Law Centre. It is not envisaged that the research project will be a lengthy one. It is hoped that the paper will be published in the Bar Review and that it will contribute to the ongoing debate on the need for an adequate system of civil legal aid.

Applications are invited from juniors of five years standing or less and should be made within 14 days to Jeanne McDonagh, Law Library, 158 Church Street, Dublin 7

## Launch of "Criminal Procedure"



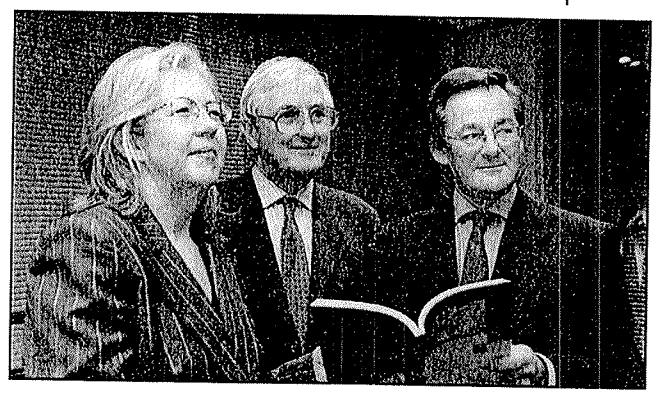
L-R: At the launch of "Criminal Procedure" are The Hon. Mr Justice Adrian Hardiman, The Supreme Court; Professor Dermot Walsh, author; and Ms Elanor McGarry, Director of Round Hall.

## Kings Inns Planning Application for 11 Henrietta Street

The planning application for the restoration/conservation of the Society's property at 11 Henrietta Street has been lodged with Dublin City Council. It is hoped that approval will be forthcoming in April 2003.

The objective of this project is to conserve the layout and decorative aspects of the building as they were in the 18th century and at the same time to equip it with cabling, central heating and other modern facilities. The project will take at least one year to complete. At the launch of the plans in late January, the Knight of Glin (Chairman of the Irish Georgian Society) and Dr Edward McParland (Trinity College) expressed their support for this very commendable project.

## Launch of Law Reform Commission report



Pictured at the launch of the Law Reform Commission report on "The Deductibility of Collateral Benefits from Awards of Damages", are Dorothea Dowling, Chairperson of the Personal Injuries Assessment Board, the Hon. Mr Justice Hugh Geoghegan and the Hon. Mr Justice Declan Budd, President of the Law Reform Commission. The report considers whether and to what extent s. 2 of the Civil Liability (Amendment) Act, 1964, should be amended to ensure a person who claims damages for personal injuries does not receive double compensation.

## Visit of the Chief Justice to US

Last October, the Hon. Chief Justice, Ronan Keane, was invited to attend a "Celebration of Excellence" in the United States Supreme Court. The intention was to recognise the bonds between the American Inns of Court Foundation and King's Inns. The President of the Foundation, Justice Holland of the Delaware Supreme Court and the Chief Justice signed a Declaration of Friendship on behalf of both institutions. Mutual visitation privileges between King's Inns and the American Inns were established in early 2002. Since then many lawyers from the United States have visited King's Inns during their holiday period in Ireland.

# Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 8, Issue 2, Apr 2003

A directory of legislation, articles and written judgments received in the Law Library from the 22nd January, 2003 to 6th March, 2003.

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

## ADMINISTRATIVE LAW

Article

Locus standi and the use of incorporated companies in judicial review applications
Carolan, Eoin
2002 ILTR 298

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SI 552/2002

Irish nationality and citizenship regulations 2002
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## ADVOCACY

Article

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O'Halloran, Barry
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## AGRICULTURE

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Bovine diseases (levies) regulations, 2002
SI 596/2002

Diseases of animals act 1966 (classical swine fever) (restriction on imports from Germany) (no 2) (third amendment) order 2002
SI 515/2002

Diseases of animals act 1966 (classical swine fever) (restriction on imports from France) (second amendment) order 2002
SI 516/2002

Diseases of animals act, 1966 (control on animal and poultry vaccines) order 2002
SI 528/2002

## ANIMALS

Statutory Instruments

Diseases of animals act 1966 (classical swine fever) (restriction on imports from Germany) (no 2) (third amendment) order 2002
SI 515/2002

Diseases of animals act 1966 (classical swine fever) (restriction on imports from France) (second amendment) order 2002
SI 516/2002

Diseases of animals act, 1966 (control on animal and poultry vaccines) order 2002
SI 528/2002

## ARBITRATION

Stay
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Abbreviations

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

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# What is coming down the tracks in Ireland

The Hon. Mr. Justice Paul Carney*

When I was called to the Bar 37 years ago, the topography of legal Dublin was totally different to what it is now. The area in which we are gathered at present was not then part of legal Dublin but was devoted to the production of John Jameson Whiskey. Solicitors firms were rigidly divided between two areas of the city. Those who considered themselves respectable were congregated around Fitzwilliam Square and the decoratively seedy, as they were then, criminal offices were located along the Quays and in the immediate environs of the Four Courts. The Fitzwilliam Square offices would not allow a criminal client darken their doors. If by any chance one of their clients got into a spot of criminal bother, he would be sent down to see Mr. Ringrose in Chancery Place. A leading firm then located in Pembroke Street had I believe on its office walls a notice headed "Counsel acceptable to this office" which concluded with the words "Kevin Haugh (RTA only)". I myself as a criminal practitioner, unlike Judge Haugh, never achieved even limited certification in Fitzwilliam Square.

The top commercial offices have now left Fitzwilliam Square and are dispersed between Docklands and other developments throughout the city. While I do not expect them ever to welcome clients charged with jumping out of the bushes, I believe that in respect of certain crimes, their attitude towards participating in the work of the criminal courts is inevitably going to change. An early sign of this was when the retiring Chief Superintendent of the National Bureau of Fraud Investigation walked straight into a consultancy with one of the major commercial firms of solicitors now located in Docklands. Criminal work is a highly specialised area requiring very particular skills. In light of the coming involvement of the major commercial offices with the criminal courts in the area of competition law, money laundering and commercial frauds of various kinds, I see them having to buy in the skills of those who have received their training in the criminal courts. I am aware that there is already in place an arrangement between one of the major criminal offices and a commercial one.

Nor has the relationship over the years between the commercial and criminal Bar been necessarily an easy one. There was in particular an atmosphere of tension between the two when one of the commercial practitioners at the Bar is alleged to have referred to his criminal colleagues as the "Alternative Bar". I myself have always taken the view that someone who has not defended in a murder trial is not really a barrister at all but I accept that that is not a widely shared view. I believe our English colleagues are used to assembling a legal team comprising various skills, including, for example, a specialist on the rules of evidence. I see coming down the tracks a situation in which those defending heavy criminal trials in the commercial area will have to put together teams of people possessing various skills. Experience of the commercial field will require to be balanced in the Criminal Courts by the nimble footed practitioner who is an expert in the rules of evidence, the voir dire or cross-examination, whatever you call the skills acquired in the criminal courts initially in the jumping out of the bushes cases.

There are major changes ahead in criminal jurisdictions. Our visitors may not appreciate that in this country, we live in the pre-Dr. Beeching era. I pause to wonder how many people nowadays know who Dr. Beeching was. Having been chairman of Imperial Chemical Industries he reformed the railways in Britain and then turned his hand to the courts, designing the Crown Court, which is a single unified national court for crime, having within it judges of all ranks. When sitting within the city of London, it is in the interest of the tourist trade known as the Central Criminal Court, which in this country is the criminal division of the High Court manned exclusively by High Court Judges with Chinese walls keeping it in watertight isolation from the rest of the judiciary.

When I came to the Bar, it was possible by a process of transfer to have any indictable case brought before the Central Criminal Court. The transfer would, in the first instance, be from the District Court to the Circuit Court and subsequently, from the Circuit Court to the Central Criminal Court. This process was being abused for the purpose of delay so that cases involving the theft of a chocolate bar came before the Central Criminal Court with some degree of regularity. To deal with this abuse, the legislature wielded a sledge hammer to crack a nut and left the Central Criminal Court with jurisdiction only in treason, piracy and genocide (of which we've had none since the foundation of the State), and murder and rape. Within recent months, a jurisdiction has been added under the Competition Act but as a matter of practical reality, the Central Criminal Court at the present time is exclusively trying murder and rape. This has the consequence that as a High Court Judge, I cannot try a billion euro fraud case, not because it is above my jurisdiction, but because it is beneath it. As a matter of history in the fraud area, little has been prosecuted. There has been the Aer Lingus

* This speech was delivered by the Hon. Mr Justice Paul Carney to a meeting of the European Circuit of the English Bar, held in the Arbitration Centre, Distillery Building in December of 2002.

holiday case and a money laundering prosecution in Cork, but little further springs readily to mind. Financial crime is now trans-national and I do not believe it will be tolerated by the European Union, in particular, if it is left unprosecuted, particularly where it affects the budget of the Union. Such a situation would immediately attract the attention of the forum shoppers we keep hearing about. One matter which would concern me is the undoubted success in this country of the Criminal Assets Bureau. It would be a great temptation for the State to content itself with the enormous confiscations it is making with the low threshold of proof and reversal of the burden of proof rather than undertaking the burden of proof to the criminal standard in a prosecution in a criminal court. It is not in my view open to the State to adopt any such policy having regard to the European obligations resting on the prosecuting authority which have now been enshrined in domestic law under Part 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

Matters which cannot come before the criminal division of the Superior Courts include

1. The billion euro fraud I have already referred to.

2. A prosecution should it arise in relation to senior members of any of the three branches of government relating to alleged criminal misconduct in the discharge of the functions of their office.

3. Trans national money laundering cases.

These are but three examples of many cases which cannot reach the Superior Courts for trial but must be disposed of at the level of what are technically termed inferior courts of limited and local jurisdiction.

The Criminal Justice (Theft and Fraud Offences) Act, 2001 has overnight swept aside centuries of law and replaced it overnight with a new statutory code. This is clearly going to call for extensive statutory interpretation which as the law stands at present, will have to be undertaken at Circuit Court level throughout the country. These cases will be prosecutable only before juries and jury trials do not afford the trial Judge the luxury of reserving his or her judgment for the purpose of considering statutory interpretation. It will have to be done immediately. The Circuit Court, in my view, has been traditionally associated with rapid fact finding rather than statutory interpretation and may not be an appropriate venue for the initial implementation of Part 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and similar legislation, particularly, if by reason of the place of arrest, it is sitting in a remote part of the country away from law library facilities. The validity of this concern on my part has I believe been recognised in s. 11 of the Competition Act, 2002 which provides that offences under s. 6 and s. 7 of the Competition Act relating to anticompetitive agreements, decisions and concerted practices and offences relating to the abuse of a dominant position may only be tried on indictment in the Central Criminal Court. To deal with this new jurisdiction, the Central Criminal Court has taken its first ginger steps in the area of ticketed judges by having Competition Act cases when they come to us dealt with by one of three specialist judges and a specialist registrar.

It is generally agreed that the allocation of criminal jurisdiction to the Central Criminal Court is irrational though there is no agreement as to how matters should be resolved. The issue is being faced in the Working Group on the Jurisdiction of the Courts established by the Courts Service under the chairmanship of Mr. Justice Fennelly of the Supreme Court. As Mr. Justice Fennelly has referred to my having taken public positions for some time in relation to criminal jurisdictions, I don't feel compelled to stay neutral until we have concluded our deliberations in the Working Group. I am of course only one voice on the working group and do not purport to express any collective view. A case of high monetary value may fall to be resolved by a simple finding of fact while a case of small monetary value may raise issues of great complexity, which have to be confronted for the first time and overnight if there is a jury involved, which is of necessity the case under Article 38 of the Constitution. Reallocating jurisdictions according to the crime charged, for example sending rape cases back to the Circuit Court, does not seem to me to meet the challenges we confront. In my view we must take a very close look at the Crown Court model in which a Criminal Court would be staffed by Judges of all ranks, with each case finding its level within that system according to its particular facts and importance, and not simply according to the description of the charge. ●

# Damages for Exposure to Asbestos

Anthony Moore BL

## Introduction

The recent Supreme Court decision in *Fletcher v. Office of Public Works*[1] deals with the question of whether or not it is possible for a plaintiff to recover damages for the development of psychiatric illness where that illness has been caused by a morbid fear of contracting a fatal disease following exposure to asbestos. This was un-chartered territory for Irish law, and obliged the court to engage in a broad and illuminating discussion of the circumstances in which damages for psychiatric illness are awarded and the extent to which questions of policy require the courts to place limits on recovery for such injury.

## The Facts

The plaintiff in this case had been exposed to significant quantities of asbestos dust in the course of his employment. On being informed of this, he became worried and angry. A consultant psychiatrist diagnosed "reactive anxiety neurosis." The plaintiff's injury was purely psychiatric and he did not display any physical symptoms. The evidence before the High Court was that the plaintiff was at risk of developing asbestosis and at an increased risk of developing lung cancer, but that it was unlikely that he ever would. Exposure also meant that he was at risk of contracting mesothelioma, an eventuality characterised as "very remote". There were no physical manifestations of exposure to asbestos, such as pleural plaques.[2]

The trial judge found that the plaintiff had suffered a psychiatric illness as a result the exposure to the asbestos dust and that it was reasonably foreseeable that this would result in psychiatric illness in a person of normal fortitude. Accordingly, he held that the plaintiff was entitled to recover damages in the sum of £48,000. The defendants appealed, arguing that, as the plaintiff had not suffered any physical injury, he was not entitled to recover damages for mere psychiatric illness.

## The Law

The trial judge had decided the case on the basis that the reasonable foreseeability test had been satisfied, i.e. that the psychiatric illness was reasonably foreseeable and that the defendants owed him a duty of care not to cause him a reasonably foreseeable injury. However, in the Supreme Court, both Keane C.J. and Geoghegan J, who delivered written judgments, took the view that that was not sufficient to dispose of the matter. Nor was the fact that the plaintiff suffered a psychiatric, as opposed to physical injury, sufficient to relieve the defendants of liability, as compensation for nervous shock is recoverable in Irish law.[3]

The court considered the conditions for liability for nervous shock laid down by Hamilton C.J. in *Kelly v. Hennessy* [1995] 2 I.R. 253. A plaintiff who wished to recover for such injury needed to show:-

1. that he had suffered a recognisable psychiatric illness;
2. that such illness was shock induced;
3. that the nervous shock was caused by the defendant's act or omission;
4. that the nervous shock sustained was by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff;
5. that the defendant owed him a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock as opposed to personal injury in general.

1. Supreme Court, Unreported, 21st February, 2003

2. Exposure to asbestos can result in the development of diseases such as asbestosis, mesothelioma and lung cancer. Asbestosis is a type of pulmonary fibrosis, which results in the fibrous tissues of the lung being abnormally scattered and spread apart. Here a prolonged period of exposure to asbestos is usually required, following which, it may take 10 to 40 years for the disease to develop. Mesothelioma is an extremely rare form of cancer which spreads across the lining of the abdomen or chest. Unlike asbestosis, the risk of developing this disease is not dependent on prolonged exposure to asbestos. It is invariably fatal. Exposure to asbestos also significantly increases the danger of contracting a number of types of cancer, including lung and gastro-intestinal cancers. Exposure to asbestos may also result in the formation of pleural plaques and pleural thickening. Pleural plaques are small, hard, plate-like surfaces on the pleura, the membranes that line the chest cavity. They are not usually disabling and tend to show previous exposure to asbestos. Pleural thickening is a diffuse fibrosis in the pleura. Asbestos fibres that move from the lung to the pleura cause the pleura to thicken causing a widespread fibrosis to develop.

3. *Bell v. Great Northern Railway* (1890) 26 I.R (Ir) 428; *Kelly v. Hennessy* [1995] 2 I.R. 253

In *Alcock v. Chief Constable of Yorkshire Police* [1992] 1 A.C. 310, Lord Ackner stated that

> "Shock...involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system".

The court concluded that the plaintiff here had not suffered a nervous shock. Keane C.J. stated;

> "[T]here was no shock of that nature: no sudden perception of a frightening event or its immediate aftermath, disturbing the mind of the witness to such an extent that a recognisable psychiatric illness supervened".

In reaching this decision, he had regard to the decision of Brennan J. in the Australian case *Jaensch v. Coffey*[4], where Brennan J. stated that psychiatric illness that was not caused by shock but by something else, did not entitle the injured person to damages, even though it was reasonably foreseeable that psychiatric illness might be a consequence of the defendant's carelessness. By way of example, Brennan J. mentioned a spouse worn down by caring for an injured husband and a parent who suffers psychiatric illness as a result of the conduct of a brain-damaged child. Neither have any claim against the tortfeasor who caused the injuries.

Geoghegan J. held that *Kelly v. Hennessy* had no relevance to the instant case, stating that the decision in that case should only be taken to relate to accident damage.

Accordingly, the court concluded that, for the plaintiff to recover damages, it would have to be in respect of a psychiatric disorder brought about otherwise than by nervous shock. Thus, the nub of the case was, as Geoghegan J. stated at the outset, "to what extent and subject to what limitations, an action may lie in negligence where the sole injury for which damages are sought to be recovered is a psychiatric condition resulting from fear of contracting an illness...in the future..."

## Policy Considerations

In considering this question, the court considered a number of overseas judgments where similar issues had arisen. A common factor in those decisions was the reliance by the various courts on policy considerations as justification for placing limits on a defendant's liability or rejecting liability altogether.

Having adverted to the "floodgates" argument, Keane C.J. noted further that the courts often adopt a circumspect approach to psychiatric illness, as unlike physical injury, it is less susceptible to precise diagnosis. He also pointed to the danger that relaxation of the rules governing the awarding of compensation in the area of psychiatric harm could greatly increase the potential class of plaintiffs and result in liability being imposed on defendants disproportionate to their wrongful conduct.

He laid particular emphasis on two specific policy considerations, the first of which was the undesirability of awarding damages to plaintiffs whose psychiatric condition was due to an unfounded fear of contracting a disease. He stated that:

> "A person who prefers to rely on the ill-informed comments of friends or acquaintances or inaccurate and sensational media reports rather than the considered view of an experienced physician should not be awarded damages by the law of tort".

One justification for this approach was that to allow recovery in such cases would be to reward ignorance regarding a disease and its causes. This was of particular relevance in the instant case in view of the fact that there was a degree of irrationality about the plaintiff's fear, bearing in mind that the medical evidence deemed the likelihood of his contracting asbestosis and mesothelioma as "unlikely" and "very remote" respectively.

The second justification was that to allow compensation for such injuries could have ramifications for the producers of prescription drugs, in circumstances where, after a manufacturer placed a drug on the market, it transpired that it was potentially harmful, resulting in a multiplicity of claims, large awards, and the possible denial of insurance to pharmaceutical companies who sought to guard against the financial consequences of such eventualities. Here Keane C.J. quoted with approval a passage from the judgment of Baxter J., giving the opinion of the majority of the Supreme Court of California, in *Potter v. Firestone Tyre and Rubber Company*[5], where it was held that there could be no recovery for fear of cancer in a negligence action unless a plaintiff was "more likely than not" to develop cancer.[6]

In relation to the second point, the danger for pharmaceutical companies of placing a particular defective product on the market would be limited in so far as liability was judged by reference to their state of knowledge at the time of doing so, which would allow them to rely on a "state of the art" defence.

He concluded that these policy considerations required that Irish law should not be extended so as to allow recovery by the plaintiff.

Interestingly, Keane C.J. opined that the law would be in an "unjust and anomalous state" if a plaintiff who had been medically advised that he would "probably suffer" from a disease as a result of negligence on the defendant's part was unable to recover damages for a recognisable psychiatric illness resulting from his being so informed. This seems to mirror the approach of the Californian Supreme Court in *Potter*. Whilst that statement is clearly obiter in view of the fact that the plaintiff in *Fletcher* had been informed that the chance of his developing the feared diseases was unlikely and remote, it leaves open the possibility that compensation may be payable where the psychiatric illness

4. 155 C.L.R. 549
5. 25 Cal Rptr 2d 550
6. Baxter J. stated that: "In the absence of present physical injury or illness, recovery of damages for fear of cancer in a negligence action should be allowed only if the plaintiff pleads and proves that the fear stems from a knowledge which is corroborated by reasonable medical and scientific opinion that it is more likely than not that cancer will develop in the future due to its toxic exposure...[T]he fact that one is aware that he or she has ingested or otherwise been exposed to a carcinogen or other toxin without any regard to the nature, magnitude and proportion of the exposure or its likely consequences, provides no meaningful basis upon which to value the reasonableness of one's fear".

complained of is coupled with a probability of contracting a disease as a result of the defendant's negligence. Probability will be determined by the medical evidence available.

Geoghegan J. also considered some English and Australian cases on nervous shock for the purpose of establishing the importance of policy factors in placing limits on damages in those cases.[7] Policy factors had been used in such cases to justify differences in treatment as between "primary" and "secondary" victims. He took the view that, if policy factors applied there in determining the existence of a duty of care, they applied *a fortiori* "in the much vaguer cases where a condition considered psychiatric by the medical profession has arisen merely from worry that a disease might be contracted.." He held that it would be unreasonable to impose a duty of care on employers to take precautions against their employees contracting a fear of developing a disease, in circumstances where that fear led to the development of a psychiatric condition. He took the view that to award liability in such cases would be to discriminate between those who had developed a recognisable psychiatric illness and those who had merely become anxious and would remain so for the duration of their lives but who could not be said to have developed a psychiatric illness.

## Conclusion

The Supreme Court in this case chose explicitly to recognise pragmatic policy grounds as a basis for refusing to hold the defendant liable. As a passage from the decision of Lord Hoffmann in *White v. Chief Constable of Yorkshire Police* [1999] 2 A.C. 455 quoted by Geoghegan J. makes clear, the court was faced with a choice between giving effect to an Aristotelian system of corrective justice, where there is no distinction to be drawn between physical and psychological injury, and a cruder, more pragmatic view deriving its force from the fact that, for a variety of factors, many injuries, even tortious ones, go unpunished and uncompensated. As Lord Hoffmann stated

> "On this view, a uniform refusal to provide compensation for psychiatric injury adds little to the existing stock of anomaly in the law of torts and at least provides a rule which is easy to understand and cheap to administer".

Although the rule laid down in *Fletcher* may be easy to understand and apply, there is likely to be further development of caselaw in this area. It is implicit from the judgment that exposure to and inhalation of asbestos does not constitute a physical injury. Something more is required. Both judges left open the question of whether the existence of pleural plaques would constitute a physical injury within the meaning of the Civil Liability Act, 1961, as amended.[8] If this is the case, then presumably any psychiatric injury stemming from a consequent fear of developing an asbestos-related disease would be subject to compensation. Likewise, the extent to which compensation may be payable where the psychiatric illness complained of is coupled with a probability of contracting a disease as a result of the defendant's negligence, is also unclear. The Supreme Court may not have spoken the last word on this topic. ●

7. *McLoughlin v. O'Brian* [1982] 2 All E.R. 298; *Jaensch v. Coffey* 155 C.L.R. 549; *Alcock v. Chief Constable of Yorkshire Police* [1992] 1 A.C. 310; *Page v. Smith* [1996] 1 A.C. 155; *White v. Chief Constable of Yorkshire Police* [1999] 2 A.C. 455.

8. Section 2 of the Civil Liability Act, 1961 provides that "'personal injury' includes any disease and any impairment of a person's physical or mental condition and 'injure' shall be construed accordingly".

# Psychiatric Injury and the Employment Appeals Tribunal: A Double Bite at the Compensation Cherry?

John Eardly BL

## Introduction

Section 7(1) of the Unfair Dismissals Act 1977 provides, *inter alia*, that an employee who has been unfairly dismissed may receive an award of compensation in respect of any financial loss incurred by him and attributed to the dismissal, as is just and equitable in all the circumstances of the case. Section 7(2)(a) directs that, in determining the amount of compensation payable, regard should be had, *inter alia*, to the extent, if any, to which any financial loss suffered by an employee was attributable to an action, omission or conduct of the employer. Section 7(3) provides that financial loss includes any actual loss and any estimated prospective loss of income attributable to the dismissal.

However, there is a subtle tension in the above provisions. This is because they contain two potentially distinct concepts. On the one hand, compensation may be awarded for financial loss attributable to *the dismissal*. On the other hand, there is compensation for financial loss attributable to *an action, omission or conduct of the employer*. It had been considered that both were essentially one and the same test and that the material nexus related essentially to the event of dismissal itself. Indeed, the wording of the 1977 Act lends authority to such a view when it refers to s. 7(2) being without prejudice to the generality of the provisions of s. 7(1), which contains the requirement that compensation be attributable to the dismissal.

What is not clear is the extent of an employer's liability for the future financial loss of an employee as a result of his inability to return to the workforce due to illness or injury sustained *before* the dismissal? In short, to what extent is it permissible to take into consideration pre-dismissal events when the statutory criteria expressly require compensation to be attributable to the dismissal itself?

This situation is most relevant in the case of psychiatric ill-health sustained over time as a result of an employee's exposure to harassment, bullying or discrimination, rather than through the infliction of a sudden, distinct trauma in line with the nervous shock model of law, i.e, the stress-related, not shock-related illness. The events resulting in the future financial loss of a dismissed employee due to a stress-related injury may have occurred well before the actual dismissal itself. Moreover, in most of these cases, the matter is made even more complicated by the constructive nature of the dismissal, when an inability to tolerate the adverse conditions ultimately provokes the resignation of the employee, rather than a formal decision by the employer himself.

## What the Common Law Says

In recent years, the civil courts through the common law have been increasingly willing to hold in favour of wronged employees who suffer objectively certifiable psychiatric-related injuries in the course of employment. This is despite the fact that liability for such injuries remains tightly circumscribed by the traditional principles of contract and negligence. Moreover, Irish courts have maintained a healthy scepticism of such purely psychiatric injury claims and are inclined to assess them in light of appropriate policy considerations rather than a rigid application of any one test. This has been most recently evident in the case of *Fletcher v. Commissioner for Public Works in Ireland*, (Unreported, Supreme Court, 21st of February, 2003.)

Nevertheless, apart from these understandable strictures, the common law has become increasingly open in its recognition of the psychiatric effects of employment-related stress and the causes thereof and has been willing to award damages as a result.[1]

One can argue that compensation for stress and psychiatric-related injury is an inappropriate heading of award before the Employment Appeals Tribunal since, firstly, relief is available at common law and, secondly, the infliction of injury is invariably a pre-dismissal factor outside the scope of the statutory citeria. However, this reasoning does not appear to reflect the current approach of the EAT, an approach which appears to have received the implicit, though not express, blessing of the Supreme Court.[2]

1. See the cases of *Walker v. Northumberland County Council* [1995] All ER 737; *Kerwin v. Aughinish Alumina*, Unreported, High Court, 21st of November 2000 per O'Neill J.; *O'Byrne v. Dunnes Stores*, Unreported, High Court, 16th October 2002 per Smyth J.

2. *Carney v. Balkan Tours Limited* [1997] 1 IR 153. In that case, Murphy J. upheld the lawfulness of the EAT looking to the pre-dismissal actions of the employee contributing to her dismissal rather than to the pre-dismissal actions of an employer causing injury.

## Recent Innovations

In *Allen v. Independent Newspapers (Irl) Limited*[3], the EAT took the view that in constructive dismissal claims, there are circumstances when a future loss of earnings, caused by work-related stress suffered *before* the dismissal, is now also attributable to the actual dismissal and may be compensated accordingly. The case involved the issue of compensation for stress and bullying in the workplace and the applicant was awarded £70,500 in compensation (equating to 78 weeks gross remuneration) for her constructive dismissal claim. Most interestingly, this included future financial loss due to the work-related stress injuries. As such, it seems that in bullying and harassment cases, employers are now potentially exposed to higher compensation awards from the EAT.

In other words, an employee with a psychiatric injury, alleged to have been suffered through work-related bullying and stress, can claim that, because it is attributable wholly to the same conduct that also led to the constructive dismissal, then his loss of future earnings is now equally deserving of compensation from the employer in the event that he remains unfit to return to work as a result.[4]

From the perspective of employers, this entire approach may be criticised for two reasons. In the first instance, such losses are arguably not attributable to the dismissal, as required under statute, but to a pre-dismissal injury or illness only. Moreover, as outlined above, an employee already has a remedy for these psychiatric illnesses by way of damages for a personal injury at common law. In the second instance, it imposes liability on employers to compensate workers for stress and bullying related injury in circumstances where such liability would not be imposed by the civil courts at common law. The test in *Allen* was that the illness must be "wholly attributable to the same conduct" that gave rise to the resignation. On this basis, once a tribunal satisfies itself that the conduct and associated working conditions justified the resignation of the employee in the first place, then the issue comes down to the simple connection being made between the illness caused and the conduct alleged. However, this test omits the vital requirement of the civil courts that the employer must also *reasonably foresee* the injury before liability attaches.

Despite these concerns, an English decision of the House of Lords has now similarly confirmed this fundamental shift towards compensating work-related stress in successful statutory dismissal claims along similar lines to *Allen*.

In *Johnson v. Unisys Limited*[5], the plaintiff had started working for Unisys Limited, an international software company, in 1971. At the end of 1985, he suffered a psychological illness brought on by work-related stress. He was prescribed anti-depressants by his doctor and had to take time off work. In 1994, he was summarily dismissed for some alleged irregularity. He claimed unfair dismissal before an employment tribunal, which upheld his claim. It was found that the company had not given him a fair opportunity to defend himself and had not complied with its own disciplinary procedures. Some two years later, Mr Johnson commenced a claim for damages against the company at common law on the grounds of breach of contract and negligence. He argued that as a consequence of both the fact of dismissal and the manner in which it was carried out, he had suffered a nervous breakdown that affected his family life and had made it impossible for him to find work. He became depressed, attempted suicide and started to drink heavily. In 1994, he spent five months in a mental hospital and had been readmitted on occasion since then. He considered that he would never find remunerated employment again and estimated his loss of earnings to be in excess of STG£400,000. He instituted proceedings that ultimately came to the House of Lords.

Although, the plaintiff's appeal to the House of Lords was rejected, the rejection was expressly not on the basis of the grounds on which he was seeking compensation. Indeed, on that point, his right was upheld. In particular, it was held that:

> "[h]is most substantial claim is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such a loss is a consequence of the dismissal which may form the subject matter of a compensatory award...The emphasis is upon the Tribunal awarding such compensation as it thinks just and equitable."[6]

Therefore, although, not directly dealing with a constructive dismissal, this judgment has supported the approach adopted in cases like *Allen* in that it accepts that psychiatric illness and injury is rightfully a factor within the scope of what is just and equitable for unfair dismissal compensation. As a result, it equally has important implications for the manner in which such all such cases (especially constructive dismissal claims for bullying and harassment) may be compensated over the coming years.

## Some Caveats

It is important to point out that the legislation being interpreted by the Law Lords in *Johnson*, unlike the statutes still in place in Ireland, has removed the condition of "financial loss" and replaced it simply with the condition of "loss". In turn, this UK "loss" criterion must be attributable to action taken by the employer.[7] Therefore, in the course of the decision, and, in what was described as a "comment that will reverberate through tribunal corridors across the land", it was confirmed that this "loss" now also permits compensation to be awarded in England for the distress, humiliation and damage to reputation in the community or to family life as a result of dismissal.

However, despite this distinction, from the perspective of Irish legislation, this decision remains a persuasive authority since the psychiatric illness claim was dealt with solely in the context of *financial loss* (rather than mere 'loss') and in accordance with what is just and equitable in all the circumstances of the case, the very same criteria currently applicable in Irish law.

## From Actual to Latent Injury

Finally, this emerging trend has received its greatest impetus to date in a decision of the Irish EAT in 2002. Indeed, in arriving at its decision, the EAT introduced a new factor to its material considerations, namely, the *Code of Practice on Harassment and Sexual Harassment At Work 2002*[8].

3. UD 641/2000.
4. Authority for *Allen* decision was the Irish Supreme Court judgment of *Carney v. Balkan Tours Ltd.* [1997] 1 IR 153; the English case of *Devine v. Designer Flowers Wholesale Florist Sundries Ltd* (1993) IRLR 517; the English case of *Hilton International Hotels (UK) Ltd v. Faraji (1994)* IRLR 265.
5. [2001] UKHL 13.
6. [2001] UKHL 13.
7. Section 123(1), Employment Rights Act 1996 (UK).
8. Two Other Codes of Practice on Workplace Bullying were also introduced in 2002 further to the Health Safety Authority and the Labour Relations Commission.

*In Browne v. Ventelo Telecommunications (Ireland) Limited*[9], the claimant's problems began with the respondent in January, 1999. In or around July 1999, the claimant began experiencing sexual harassment of an explicit nature from a senior manager in the organisation. This behaviour occurred over a period of months and on numerous occasions. This situation was made particularly severe as the human resource manager of the respondent was also actually implicated in the unlawful activities. As a result, the claimant employee made a complained to the managing director of the respondent. She was requested to put her complaint in writing and she duly did so. Thereafter, a formal complaints procedure under the internal human resource manual was invoked. The complaint was substantiated and she received a letter from the respondent acknowledging that her complaint was well founded. However, the respondent was willing to accept an apology from the manager who had harassed her. The claimant received a written apology from that individual and was asked to sign a letter agreeing to waive her entitlement to pursue further legal proceedings arising out of the matter. She refused. Thereafter, she alleged that she was subjected to a campaign of bullying, harassment and intimidation that ultimately left her with no option but to resign. She pursued a claim for constructive dismissal through the EAT under the unfair dismissals legislation.[10]

As a result of this litany of hostility, the EAT determined that the claimant had been constructively dismissed. She was awarded €10,000 or €12,697 in compensation for the unfair dismissal. The tribunal accepted the fact that the claimant had only been out of work for a *one month* period and that her financial loss attributable to the dismissal was relatively small. Nevertheless, the tribunal equally relied on the fact that financial loss includes not just actual loss but also any estimated prospective loss of income attributable to that dismissal. Therefore, the tribunal decided that, in the present case, it must have regard to the terms of the relevant Codes of Practice and, in particular, the *Code of Practice on Sexual Harassment and Harassment At Work 2002*.

Therefore, in arriving at its conclusion on this basis, the following factors were relied on;

- the claimant was very distressed by the behaviour of her employer and was still coming to terms with it;
- an employee suffers short and longterm damage as a result of this unlawful conduct. On this point, the tribunal specifically relied on the terms of the *Code of Practice on Sexual Harassment and Harassment at Work;*
- in light of the Code and because the claimant may not have fully come to terms with the conduct of her employer, there is a possibility that she may incur a loss or diminuition of her earnings into the future as a result of the nature of the constructive dismissal;
- as a result, although her actual loss was small, her prospective loss, because of any of these aforesaid longterm effects on her into the future, may be greater. Therefore, the amount of compensation was measured in accordance with that potential future damage as was just and equitable in all the circumstances of the claim here.

Like *Allen*, this case expands the boundaries of the scope of the test for compensating future financial loss attributable to dismissal. However, it goes even further than *Allen*. In this case, Ms. Browne, unlike Ms. Allen, had found new employment and had returned to work within one month of resigning. It was also not suggested that she was unfit to return to work. The issue of income disparity between the old and new jobs did not arise in this determination either. Ms. Allen, on the other hand, was compensated for loss of future earnings arising out of an actual stress-related illness that complicated and postponed her return to the workforce. Moreover, the test in *Allen*, required an employee to show an actual stress-related illness since, in order to recover compensation, Ms Allen had to show her illness was because of, and connected to, the bullying and harassment at issue. This involved some form of diagnosis. No formal diagnosis was required in *Browne*. In simple terms, while the basis for compensation in *Allen* was actual damage to health, the basis for compensation in *Browne* was potential or latent damage.

The *Browne* award was made possible expressly by the tribunal's reliance on and application of the Code of Conduct and on what was considered to be just and equitable. Instead of requiring medical diagnosis, the guidance of the Code sufficed. This is the final innovation of this determination.

Whatever about the practical application of this approach into the future, the potential for innovations of this nature by the EAT has serious implications regarding the financial exposure of employers and for their legal advisers in defending such claims.

## Conclusion

The clear distinction in bullying cases between work-related stress and unfair dismissal has become blurred and may be breaking down. This absorption of stress-related illness into the unfair dismissal scenario is particularly important, given the parallel developments in the common law. It also emphasises the unrelenting and creeping advance of the employer liability compensation regime. On the other hand, the facts and the nature of the more recent cases may ultimately prove to be legal anomalies rather that the embyronic steps towards a generalised and more liberal rule. In other words, only time will tell whether Irish employees will ultimately get that elusive double bite at the compensation cherry. ●

# Improving Legislation in Ireland: Current Developments

Brian Hunt[1]

## Introduction

The Irish statute book[2] has been greatly neglected for many years and, as a consequence, it is in need of radical reform as regards coherence and accessibility. The current system by which we effect legislative change may be negatively described as "amendment heaped upon amendment". Some statutes have been amended many times, while other have lain dormant and un-enforced for centuries. Significant measures to improve the statute book have now been pioneered by the Statute Law Revision Unit[3] (which is attached to the office of the Attorney General) under the Directorship of Edward Donelan. The initiatives of the SLRU, together with those of other interested stakeholders, will go a long way towards providing a more modern, user-friendly statute book.

## Availability of Statutes on CD and Internet

In recent years, the Office of the Attorney General has been involved with the production and launch of the Statutes on CD-Rom. In addition, the SLRU have been responsible for updating the Chronological Tables. Following the most recent update, the statutes and statutory instruments from 1922 to 2001[4], along with the Chronological Tables are now available on one CD[5]. This work has also resulted in all of this information being fully accessible on the web-site of the Office of the Attorney General.[6]

## e-Government[7]

Plans are at an advanced stage to radically change the way government business is carried out. The "e-Government" proposal should see the introduction of a "digital-paper" concept across all government departments, which would reduce paper dependency and provide a technological base for cabinet business. The roll-out of "e-Cabinet" is expected to begin in September of this year and should lead to Acts becoming available on-line moments after promulgation and Statutory Instruments becoming available, immediately after their making.

## Law Reform Commission Report

Following extensive public consultation, the Law Reform Commission[8] published its report entitled "*Statutory Drafting and Interpretation: Plain Language and the Law*"[9] in 2000[10]. The LRC report made 17 well-considered recommendations and observations, many of which focussed on improving legislation. The publication of the Report marks a milestone in the drive towards better legislation in Ireland. In contrast to many other incisive reports which are left to gather dust, this LRC Report seems destined to be far more fully implemented than the Renton Report[11] has been in Britain.

## Interpretation Bill 2000

At present, statutory interpretation is governed primarily by the Interpretation Acts of 1889, 1923, 1937, and 1993[12]. All of these Acts are due to be repealed by the Interpretation Bill[13], which is presently making its way through the Houses. The Law Reform Commission report was preceded by the publication of the Interpretation Bill 2000. Pursuant to an undertaking given in 2001 by the then Chief Whip, Seamus Brennan[14], a number of significant amendments were made to the Interpretation Bill at Committee Stage so as to reflect many of the recommendations of the LRC.

In the Dáil, Minister Hanafin stated that the Interpretation Bill was required to deal with changing constitutional and statutory developments since 1937. The Minister went on to point out a number of other reasons:

> "First, to provide new definitions to terms frequently used nowadays in statutes and statutory instruments; second, to consolidate provisions that have been added by Interpretation (Amendment) Acts since 1937; third, to modernise the language used in the Interpretation Act and, fourth, to take account of developments in statutory interpretation by the courts."[15]

Section 11 of the Bill allows for the use of examples in legislation for the first time. Section 26(2)(e) should facilitate a gravitation towards the use of less convoluted language in legislation[16], as stated by the Minister:

> "Although the Bill is of a technical nature and of interest primarily to the legal community, I feel it is very important. It will effect a much-needed modernisation and simplification of the language of the rules and definitions found in the former Interpretation Acts and add new rules and definitions. This will have a positive knock-on effect for the drafting and interpretation of our legislation."[17]

1. Dip LS, BA, MLitt, Dip IS, Dip Int Arb, ACI Arb, Research Officer, Office of the Parliamentary Counsel to the Government. The views expressed are personal and do not necessarily reflect the views of the Office of the Parliamentary Counsel to the Government.
2. There is no "statute book" as such, rather this is the term used to refer to the collection of statute law which governs us.
3. From here on referred to as "the SLRU".
4. The feasibility of making pre-1922 statutes available electronically is at present being examined by the SLRU. Subject to sufficient resourcing being made available, it is likely that work on this project should commence shortly.
5. For further detail, contact Government Publications. Price of CD is €35.
6. www.attorneygeneral.ie
7. For further information, see: http://www.gov.ie/egovernment.asp
8. From here on referred to as "the LRC".
9. (LRC 61-2000). This Report is available on-line at: http://www.irlgov.ie/lawreform/publications/Report/2000/
10. This was preceded by the publication of a Consultation Paper in 1999 (CP14-1999).
11. The Preparation of Legislation (London, 1975) Cmnd. 6053. The function of the Renton Committee was to review and report on the form, drafting and amendment of legislation. Though 27 or so years have elapsed since its publication, its findings are still very relevant.
12. The Interpretation (Amendment) Act 1997 has not been repealed and remains in force. The 1997 Act deals with a very specific matter, not interpretation in the general sense. It deals with the consequences of the abolition of a common law principle.
13. Section 3(1) of the Act.
14. Deputy Brennan, where he said that "aspects of the Report ... will be reflected on Committee Stage of the Interpretation Bill". Dáil Debates 26th June 2001.
15. http://www.gov.ie/debates-02/14Nov/Sect2.htm
16. Section 26(2)(e) provides: "Where an enactment ('the former enactment') is repealed and re-enacted, with or without modification, in another enactment ('the new enactment'), the following provisions apply: ... (e) to the extent that the provisions of the new enactment appear to have expressed the same idea in a different form of words are in substance the same as those of the former enactment, the ideas in the new enactment shall not be taken to be different merely because a different form of words is used.".
17. ibid.

## Legislative Drafting Manuals

A legislative drafting manual has been prepared by the Chief Parliamentary Counsel, for use by parliamentary counsel. The manual deals with the structure of legislation, the standard features of an Act, and the use of language. Many of the LRC recommendations dealing with legislative drafting, particularly those dealing with style, have also been addressed by it.[18] A drafting manual relating solely to the drafting of statutory instruments has also been prepared by a senior Parliamentary Counsel and this will be available to Government Departments.

Allied to the production of the manuals is the on-going process of developing a series of "boiler-plate" or standard provisions, which parliamentary counsel are engaged in. This should lead to greater consistency in future legislation.

## Statute Law (Restatement) Act 2002

As a consequence of the "amendment heaped upon amendment" approach, a reader of one Act may well be unaware of the subsequent amending Act. One might mistakenly believe that the older Act accurately states the law at the time of reading.

The recently enacted Statute Law (Restatement) Act, 2002 seeks to remedy this problem. This Act confers upon the Attorney General the power to publish a collection of directly related legislation incorporating amendments, to be known as a "Restatement". The restatement idea is to be welcomed as there is an increasing acceptance that consolidation is a time consuming process with little political appeal. Restatement offers a faster, less expensive and pragmatic alternative to traditional consolidation. In accord with s. 4 of the Act, a restatement will not amend existing legislation. For that reason the process of restatement will not require parliamentary scrutiny. However, Restatements will be laid before the Houses once they have been certified by the Attorney General.

The Restatement idea was devised in 1999 by Michael McDowell S.C., the then Attorney General and Edward Donelan, Director of the SLRU. Variations on the restatement idea operate in other common law jurisdictions such as the United States, Canada and Australia. The Irish model most closely resembles the procedures in place in New South Wales and Queensland. These procedures enable legislation which has been amended to be reprinted so that legislation can always be read as an updated, coherent narrative. Some important provisions of the Statute Law (Restatement) Act, 2002 Act are worth highlighting. Section 2 authorises the Attorney General to certify and publish Restatements and allows a Restatement to omit spent, repealed or surplus aspects of the Acts being restated. Section 2(3) provides that a Restatement can include a statutory instrument. Section 3 provides that a Restatement may be annotated so as to show the origin or history, or the date of commencement of its provisions and adds that the Restatement may contain any other information that the Attorney General feels is necessary. Section 4 states that a Restatement will not have the force of law and does not change the law. However, s. 5 provides that, once certified, a Restatement is evidence of the law contained in it. Section 5(2) states that a Restatement will be judicially noticed. Effectively, this means that on its publication, each Restatement will be brought to the attention of members of the judiciary.

A typical Restatement will consist of a number of chapters. For example, a principal Act that was amended by two "Amendment" Acts and other unrelated Acts will be comprised of four chapters.[19] Chapter 1 will contain the principal Act as amended. It will be followed by chapter 2 which will contain extracts of the first "Amendment" Act which could not be incorporated into chapter 1. Chapter 3 will contain extracts of the second "Amendment" Act which could not be incorporated into chapter 1. The final chapter will feature a series of amendments to the restated Acts which could not have neatly been incorporated into the previous chapters. The advantages of Restatements are numerous. In particular, each Restatement should be viewed as being a comprehensive, stand-alone document setting out the statute law on a given area, which may be cited in court. As well as rendering the law more coherent and accessible to the lay person, Restatements should save practitioners a considerable amount of time in seeking to ascertain an up-to-date version of the statute law in a particular field.

A number of "pilot" Restatements have been prepared by the SLRU and it is envisaged that a comprehensive program of Restatements will be drawn up by the SLRU in conjunction with the Departments.

## Regulatory Impact Assessment[20]

In its Report on Regulatory Reform in Ireland[21], the OECD found that Ireland needed to take a number of steps to enable it produce high quality regulation. To this end, the OECD strongly recommended that Ireland consider implementing a system of Regulatory Impact Assessment[22]. By way of advancing the issue, the government set up a high level group to oversee the implementation of the report. This group has published a consultation document "*Towards Better Regulation*".

The OECD state that RIA amounts to an improvement in the basis for regulatory decisions through an analysis of the impact of new regulatory proposals.[23] The aims of RIA is to inform the decision making process and to improve transparency and government accountability. It involves an analysis of the financial cost, and can also involve an examination of the effect that the new law will have on sectors of society. Presently in Ireland, before becoming law, policy proposals effectively receive a two-dimension analysis, with the emphasis on function and enforcement, with little regard for the financial cost of the law on the government and citizens and its effect on society in general. The publication of the White Paper should see some concrete proposals on the system of RIA (if any), which Ireland will adopt.

## Explanatory Memoranda Accompanying Bills

Explanatory memoranda are published on the initiation of virtually every Bill. Essentially they provide a short summary of the effect of the Bill. At present, they are prepared primarily for use by members of the Oireachtas, but are however, available for purchase with the Bill on its publication and are also available on the internet. In their Report entitled, '*Statutory Drafting and Interpretation: Plain Language and the Law*'[24], the Law Reform Commission noted concerns that both the "quality and content" and also the length of the memoranda varied, and were of the view that the quality had in fact declined over the years.

In the light of these criticisms, the Office of the Parliamentary Counsel have examined the matter and have proposed a range of reforms[25]. If implemented, these reforms should greatly enhance the informative value of explanatory memoranda - particularly for members of the public. ●

18. The Drafting Manual has not been published externally.
19. The effect of Statutory Instruments will also be incorporated into Restatements.
20. Sometimes referred to as Regulatory Impact Analysis.
21. Paris, 2001.
22. From here on referred to as "RIA".
23. By 1996, more than half of the OECD countries had adopted an RIA programme.
24. December, 2000. (LRC-61-2000).
25. Aspects of the reforms have been highlighted by the Chief Parliamentary Counsel in a paper entitled "Effective Drafting Techniques" delivered at Clarity/Statute Law Society Conference, Cambridge 12 - 14 July 2002.

# Security for Costs and the Separate Corporate Personality

Cathal Murphy BL

It is an established principle of company law that a corporation possesses a separate legal personality to that of its officers and members[1]. Accordingly, when a company incurs a debt, it is the company that is liable to meet that debt. However, through case law and legislation, certain exceptions to this general rule have been developed and there are now a number of situations where the officers and members of a company can be held personally liable for the debts of the company.[2] One issue that frequently arises is the extent to which a corporate entity can be utilised to avoid future legal obligations or to avoid a situation where parties to litigation are exposed to the risk of a substantial costs award being made against them. This article analyses the manner in which the courts deal with those situations where a corporation is established solely as a vehicle to avoid personal liability.

## Future Legal Obligations

In *Adams v. Cape Industries* [1990] Ch. 433, the defendant had operated a subsidiary in the United States that was subsequently wound up due to a judgment against it in the sum of $20 million. The business of the subsidiary was taken over by another company, CPC. CPC was not a subsidiary of the defendant but was controlled by it. In further litigation, judgment was obtained against CPC in the sum of $15.64 million. The plaintiffs sought, unsuccessfully, to enforce that judgment against the defendant. While acknowledging that one of the purposes behind the establishment of CPC was to protect the defendant from future tortious liability, the Court of Appeal accepted that CPC was a separate legal entity. Slade L.J. stated:

> "We do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is a member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law...".

The views expressed in that case are similar to those in an earlier Irish case of *Roundabout Ltd v. Beirne* [1959] I.R. 423. A company owned a pub and a trade dispute arose with the employees. In order to avoid future picketing of the pub, a new company was incorporated and the pub was leased to that company. Dixon J. held that the new company was a separate legal entity, which was not involved in a trade dispute with the employees and granted an injunction to the new company to restrain future picketing of the pub. Although, *Adams v. Cape Industries* involved an attempt to impose the liability of CPC on another company, as opposed to officers or members, and *Roundabout Ltd.* involved the right of employees of one company to picket the premises of another company, in both cases, the court was unwilling to disregard the separate legal personality of the companies involved. In both cases, it was accepted that it was perfectly legal and permissible for the parties involved to arrange their affairs so as to take advantage of the law governing limited liability companies, even in circumstances where the decision to do so was solely for the purpose of avoiding future legal obligations.

## The Formation of Companies to Pursue Litigation

However, what approach have the courts adopted in respect of the incorporation of companies for the purpose of pursuing litigation. In the recent past, and in the context of judicial review proceedings in respect of planning, the Irish courts have delivered a number of judgments on this issue. In *Lancefort v. An Bord Pleanála & Ors (No. 2)* [1999] 2 I.R. 270, the Supreme Court delivered a comprehensive judgment on the issue of whether a company without property or economic interests can have *locus standi* to institute judicial review proceedings in respect of planning decisions. In the course of their judgments, Keane C.J., and Denham and Lynch JJ. all expressed views on the use of such companies as a "fire-wall" protecting the individuals behind such companies from any order for costs that might be awarded against the company. On the use of a company for the purposes of litigation, Denham J. offered the following views:

> "The fact that a company is the vehicle for the action does not bar access - it is a valid vehicle. Concerns that it is a shield from financial ruin for individuals and unfair to other parties have been met in this case by the orders for security for costs...".

Keane C.J. approved the dicta of McGuinness J. in *Blessington Heritage Trust Ltd v. Wicklow County Council* (High Court, Unreported, 21/01/98):

> "In cases like the instant case, it may well be argued,..., that companies such as the applicant have been incorporated simply to afford the true applicants 'a shield against an award of costs'.... I have no doubt that this is a relevant factor and one which must cause concern to a developer such as the notice party. Over reliance on the incorporation of companies such as the applicant in this case may tip the balance too far in favour of objectors or concerned local persons: on the other hand, blanket refusal of *locus standi* to all such companies may tip the balance too far in favour of the large scale and well-resourced

1. *Salomon v. Salomon & Co.* (1897) A.C. 22.
2. Courtney on the *Law of Private Companies* (2nd Ed.) identifies six broad categories where the separate legal personality of the Company may be overlooked by the Courts. For example, pursuant to Section 297A of the Companies Act, 1963 ("the Act"), where the officers of a company are held to have traded recklessly, or fraudulently, they can be held personally liable for the debts of that company.

developer. It seems to me that the balance is best preserved by the course followed by the learned Morris J. The court should look at the factual background in each case and, if necessary, maintain the balance by making an order for security for costs".

Keane C.J. then expressed the following view:

"It is, understandably, a matter of concern that companies of this nature can be formed simply to afford residents' associations and other objectors immunity against the costs of legal challenges to the granting of planning permissions.... It must also be remembered that, in the case of such a company, the High Court may order security for costs to be provided under Section 390 of the Companies Act, 1963...".

Lynch J. was somewhat critical of the use of such companies and offered the following view:

"In the vast majority of cases, the decision of [An Bord Pleanála] should be the end of the matter. Further proceedings by way of judicial review should be the rare exception rather than the rule and should be brought only on weighty grounds. In general and apart from very exceptional circumstances, I see no need for the incorporation of bodies such as the applicant to engage as a further tier of scrutiny in planning matters. Certainly the proliferation of such companies is undesirable because their backers may thereby, without financial risk to themselves, unjustly delay still further developments which have been investigated in detail by the local planning authority and by the first respondent...".

Therefore, it seems that the prevailing view in the High Court and the Supreme Court is that in circumstances where a company is used as a vehicle to prosecute judicial review proceedings, adequate protection is afforded respondents and notice parties by an application for security for costs under s. 390 of the Act.

## Security for Costs

Section 390 of the Act provides:

"Where a limited company is plaintiff in any action or other legal proceedings, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is a reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require *sufficient security* (emphasis added) to be given for those costs and may stay all proceedings until such security is given".

Unlike an order for costs made under Order 29 of the Rules of the Superior Courts where the normal rule is to order security for costs in an amount equal to a third of the estimated legal costs of the party seeking security, the wording of s. 390 of the Act allows the court to order security for costs that is "sufficient". In *Lismore Homes Ltd (In Receivership) v. Bank of Ireland* (High Court, Unreported, 24/03/00), McCracken J. interpreted the term "sufficient" as follows:

"It is certainly arguable that the use of the word 'may' in section 390 gives a general discretion to the court, but on the whole I think it is more likely that that word refers to the making of the order for security for costs rather than to the amount thereof...If the discretion was intended to be in relation to the amount, I think the word 'sufficient' would not have been used, but it is in the section and it must have a meaning. The question can be posed: sufficient for what? I think that question is answered in the section by saying 'for those costs' that is the costs of the defendant if successful in his defence. This seems to me to be the only logical construction of the section".

In the recent related cases of *Spin Communications Ltd v. IRTC & Maypril Ltd and Hot Radio Company Ltd v. IRTC and Maypril Ltd* (High Court, Unreported, 14/04/00), Keane C.J. had to consider when it was appropriate to order security for costs in favour of a notice party, and the correct interpretation of s. 390 of the Act. In the former case, Keane C.J. held that where the notice party is a party with a vital interest in the outcome of the proceedings, the notice party should be joined to the proceedings and is entitled, in appropriate circumstances, to an order for security for costs. In the latter case, Keane C.J. affirmed the order of Kearns J. who had awarded security for costs to the notice party in an amount equal to the estimated total costs of the notice party. While referring to previous case law in relation to companies challenging planning decisions, Keane C.J. noted that the court's view had been that such companies should not be unduly impeded in accessing the courts. However, he noted that the present applicants were a business enterprise and that:

"...they were not to be equated with the sort of applicants who have been looked on somewhat benevolently by the courts in other areas of the law, who are doing a public service by litigating matters which would otherwise not be litigated and who have simply not the financial resources to meet orders for costs given against them".

In relation to the amount of security for costs, Keane C.J. expressed the view that the overriding consideration is whether the amount ordered by way of security for costs would act to stifle the litigation. In the context of the present case, he concluded that there was no suggestion that the order made by Kearns J would act to stifle the litigation, as there were parties behind the applicant who could meet the order for security for costs.

Another point worth noting is that in *Lancefort*, the Supreme Court approved of the approach of Morris and McGuinness JJ. who both looked to the actions of the backers of Lancefort Ltd to establish the *bona fide* nature of the legal proceedings. Although this was done in the context of a consideration of the *locus standi* of Lancefort, it seems that there is no logical bar to the court examining the actions of the backers of a company in the context of an application for security for costs. In granting leave to the applicants in *Lancefort*, Morris J. also ordered security for costs stating:

"I believe that the opportunity now presents itself to them to demonstrate their commitment by providing the necessary funds to support the company's application. For that reason, I do not see that an order requiring that provision be made for security for costs will in any way stifle the action".

## Conclusions

It appears from the case law that the use of a company as a method of avoiding future obligations, although arguably unfair, is permissible in some circumstances. In the absence of changes to the legislation, recent decisions have suggested a retreat by the courts from the earlier expansion of the circumstances where the courts were willing to disregard the separate legal personality of a company.

Further, where individuals incorporate a company solely for the purposes of pursuing litigation, the courts appear to have sought to balance the competing interests of the parties through the recognition that the provisions of s. 390 of the Companies Act, 1963, afford adequate protection to a defendant who might otherwise be faced with an unenforceable award of costs in favour of that defendant. ●

# Criminal Procedure

## By Dermot Walsh.

Published by: Thomson Round Hall, 43, Fitzwilliam Place, Dublin 2;
ISBN: 1-85800-223-0; price: €299

## Reviewed by Mark O'Connell, BL

The Irish criminal law library has been well served in recent years with the publication of a number of valuable books. But standing head and shoulders above these worthy tomes is Professor Dermot Walsh's "Criminal Procedure". It will be appreciated by all who work in the criminal courts and particularly by barristers and solicitors.

The most recent practitioners' book in criminal law was "*The Irish Criminal Process*", written by Ryan and Magee in 1983. Since then, that book has continued to be useful, though the huge legal changes in the interim have limited its benefit, particularly in recent years. Professor Walsh's book fills the vacuum created by these changes.

He notes that in the last twelve years, the Irish criminal justice system has changed dramatically. If the pace of legislative change from the foundation of the state to the end of the 1980s could be described as a gentle breeze, he says the 1990s can be aptly likened to a hurricane with little sign of abating. He is not exaggerating; no less than 42 significant pieces of legislation have been enacted since 1990.

Not surprisingly, these changes have made the criminal process much more complex. Moreover, Professor Walsh believes that they have underpinned a collective will to respond to heightened organised crime and the growing number of child abuse cases that have come to light. He is also of the view that the changes represent a desire to make it easier to secure convictions and to create a more unrelenting system for suspects and offenders. In support of this claim, he cites the strengthening of the powers enjoyed by Garda°, the erosion of the right to silence and a significant number of other procedural changes such as the requirement regarding advance disclosure by the defence, the shifting of the evidential burden onto the accused, proof by certificate or documentary evidence, the admission of video-taped evidence, the weakening of the right to bail and the abolition of the preliminary investigation.

Added to this have come major initiatives from the European Union and an increasingly tough, albeit, reasoned approach taken by judges of the Irish criminal courts. All of which make a book as up-to-date and as thorough as this one so necessary.

The 22 chapters bring the reader through the various stages of the criminal procedure in a practical, logical and chronological manner. Within each chapter is set out all of the requirements that must be observed by the practitioner in the course of a prosecution, from jurisdictional points to arrest, detention, interview, the obtaining of evidence, bail applications, legal representation, the preparation of the prosecution, the sending forward of an accused for trial, the indictment, the arraignment, the entry of a plea and the conduct of the trial.

Each of these stages impose on the parties different obligations, all of which are set out in this book and are wonderfully supported by references to the latest criminal statutes and case law. Its logical structure is complemented by a writing style which - because it is clear and concise - sets it apart from many other legal textbooks, criminal or otherwise.

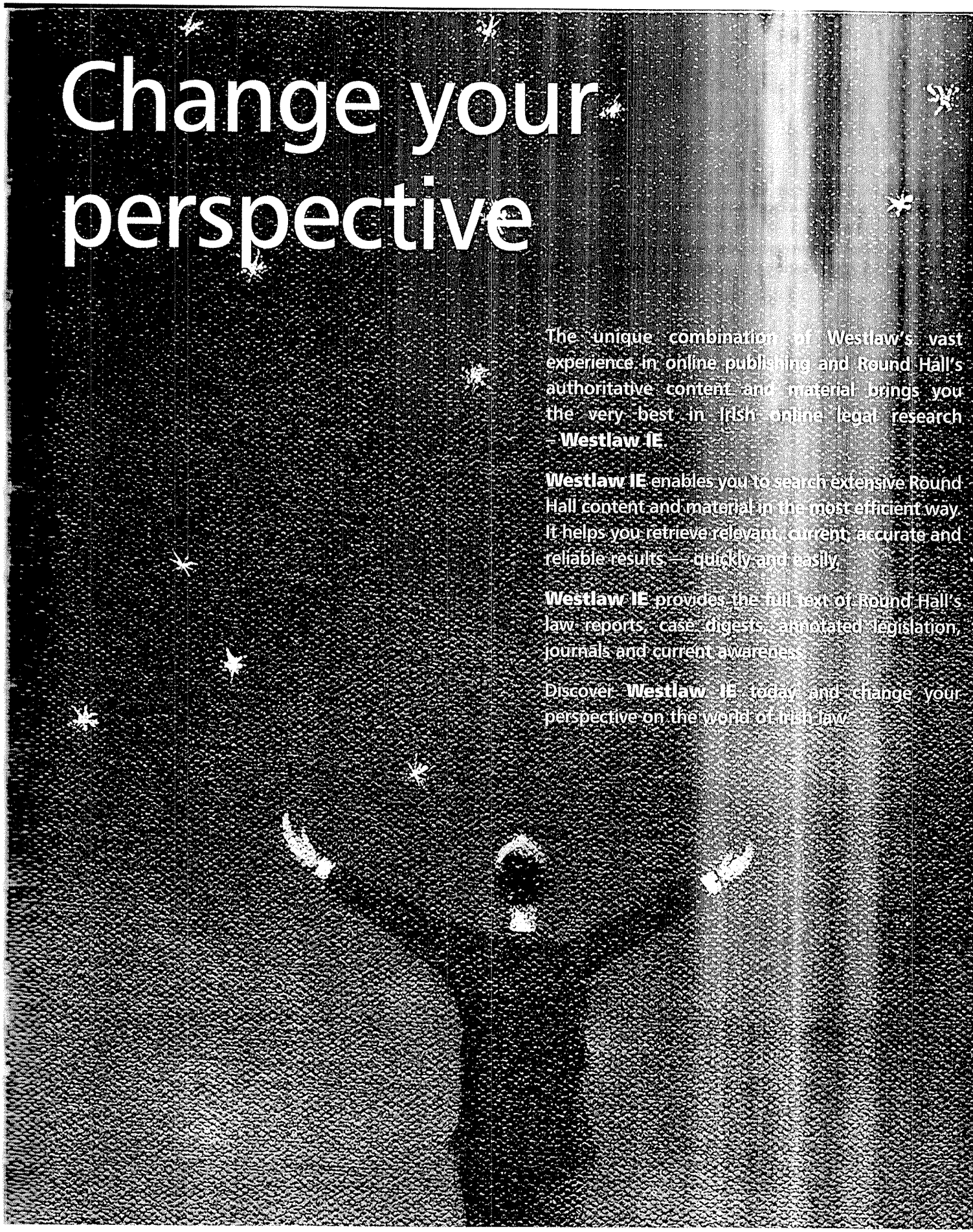
For instance, in chapter 19, which comprises 71 pages, Professor Walsh takes the reader through all of the steps in a criminal trial, from the prosecution and defence making their respective cases to the closing addresses, summing-up, jury deliberations, the giving of the verdict and publicity during the trial. To the cynical practitioner, such a guide might have the echo of a secondary school civics book but, in actual fact, the author provides an effective checklist of do's and don'ts for prosecution and defence lawyers alike. In so doing, he reminds us of many important minor and not-so-minor points. He advises, for example, that the prosecution counsel should make available to the court all important witnesses - including those who may be deemed unsupportive of the prosecution case. The prosecution counsel is an officer of the court whose primary role is to assist in the administration of justice, not merely to secure a conviction. Therefore, he or she is required to produce for the defence any witness needed by the accused. In support of this, the author is bang up-to-date with his caselaw! The footnote refers the reader to a decision taken just a few months ago in O'Regan v. DPP [2002] 2 ILRM 68.

The most recent caselaw contains judicial interpretation of the newer criminal legislation and statutory instruments and will provide genuine help to practitioners. In terms of day-to-day practice, this book provides a resource that is of tremendous practical benefit at the hearing of virtually any criminal matter.

In his preface, Professor Walsh set out the aims he had in mind when he began writing this book. The goals were ambitious but he has succeeded in achieving all of them, not least his wish to make criminal procedure more comprehensible to barristers and solicitors but also to judges, garda°, probation officers, prison managers, court officials and journalists. Whether intended or not, members of the criminal community also stand to learn a great deal from this book about how the criminal law operates.

By all accounts, the benefits of this work will continue long into the future. Professor Walsh notes that the pace of change has not lessened and anticipates more statutes in the years to come. To keep up with developments, he plans to publish further editions and in looseleaf format. In the meantime, the "first edition of Walsh" stands as an exemplary piece of legal writing, which will be of enormous help to anyone involved in criminal law. ●

*Criminal Procedure is published as part of the Round Hall Brehon Library.*

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**PADRAIC HANNON**
**DEIRDRE HARAHAN**

EBS
BUILDING SOCIETY

Tied Mortgage Agent, acting solely for EBS Building Society.
It is not within the terms of our authorisation to accept cash (other then in relation to acting as a deposit agent for EBS Building Society) or other funds or securities from our clients or to act on a discretionary basis in the management of clients funds.