The Bar Review

Journal of the Bar of Ireland • Volume 10 • Issue 2 • April 2005

- Freeing the Law: BAILII and IRLII
- Assessing the Refugee Appeals Tribunal
- The Civil Liability and Courts Act 2004 (Part II)

THOMSON ROUND HALL

The Bar Review

Volume 10, Issue 2, April 2005, ISSN 1339 - 3426

Contents

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

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

Subscriptions: January 2005 to December 2005 - 6 issues
Annual Subscription: €188.00
Annual Subscription + Bound Volume Service €288.00

For all advertising queries contact:
Directories Unit. Sweet & Maxwell
Telephone: + 44 20 7393 7000

The Bar Review April 2005

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

The Civil Liability and Courts Act 2004 (Part II)

David Nolan SC

Introduction

On the 31st March, 2005, the remaining provisions of the Civil Liability and Courts Act, 2004 came into operation pursuant to the Civil Liability and Courts Act, 2004 (Commencement) Order 2004 (S.I. 544 of 2004). This article follows on from an article by this author in the Bar Review Vol.9, Issue 5 (November 2004), which dealt with the provisions that came into effect on the 20th September, 2004, such as a "Letter of Claim" and "the Book of Quantum". Part II will now deal with the remaining provisions of the legislation.

There is no doubt that this Act has already changed the face of personal injury litigation, and no doubt will dramatically alter the manner in which personal injury litigation is conducted in the Circuit and High Courts into the future.

Amendment of the Statute of Limitations - Section 7

Probably the most significant change to the present law is contained in Section 7 of the Act. This amends the Statute of Limitations (Amendment) Act of 1991 substituting a period of two years in place of three years, in which a personal injury action can be instituted from the date of accrual of the right of action or the "date of knowledge" (which ever occurred later).

Section 7 (d) amends Section 5 (a) of the 1991 Act and is somewhat confusing. It reads as follows:

> "5 (a) - (i) where the relevant date in respect of a cause of action falls before the commencement of Section 7 of the Civil Liability and Courts Act, 2004, an action (being an action to which Section 3 (i), 4 (i), 5 (i) or 6 (i) of the this act applies (in respect of that cause of action shall not be brought after the expiration of -
>
> (a) two years from the commencement, or
>
> (b) three years from the relevant date,
>
> which ever occurs first.
>
> (ii) in this section "relevant date" means the date of accrual of the cause of action or the date of knowledge of the person concerned as respects that cause of action whichever occurs later".

On first reading, it would seem that the appropriate statutory period for an accident, which may have taken place on (say) 1st March, 2005 would be two years and one month, as opposed to three years.
However, this section must be seen in the light of the Personal Injury Assessment Board Act of 2003, which has the effect of stopping the provisions of the Statute of Limitations (Amendment) Act, 1991 while a case is being considered by the Personal Injury Assessment Board. (See Section 50 of the Personal Injury Board Act, 2003).

There is no doubt that there is a significant potential for confusion as to when the statute will apply, given the interaction between Section 50 of the Personal Injury Assessment Board Act, 2003 and Section 7 of this act.

New Rules of Court

Pursuant to Section 9 of the act, the Rules Committee of all the Courts, will bring in new rules of court which shall prescribe a period of time for the service of documents or the doing of any "other thing" rising out of the act. Section 9 will have a very significant practical effect upon the conduct of proceedings before a Court. It underlines the function of the Court, which is to ensure that parties to actions comply with the Rules of Court in relation to personal injury actions so that the trial of the action can take place within a reasonable period after proceedings have been instituted.

In point of fact, the present Rules of the Superior Courts already provide for the period within which a document may be served or a "thing may be done". Section 9 (ii) of the act, attempts to curtail the Courts discretion to extend time beyond the prescribed time period set out in the rules.
The Court will only be entitled to extend the time for the filing of a Defence or the filing of a Verifying Affidavit or "the doing of any other

thing" if (a) the parties to the action agree to the period being extended, or (b) the Court considers that, in all the circumstances, the extension of the period by such further period as the Court may direct, is necessary or expedient to enable the action to be properly prosecuted or defended, and the interest of justice required the extension of the period by that further period.

In order to ensure that the Rules of Court are complied with, the Act specifically empowers the Court to make such orders as to the payment of costs as it considers appropriate (Section 9 (iii)).

One must await the publication of the new Rules generated by this Act by the Rules Committee, but the likelihood is that such rules will not be dramatic in nature.

Personal Injury Summons – Section 10

Section 10 of the Act creates an entirely new summons called a "Personal Injury Summons". While the length, shape and form of such a summons will be determined by the Rules Committee, it must contain the following matters.

a) The plaintiff's name, the address at which he or she ordinarily resides and their occupation.
b) The plaintiff's PPS number under Section 22 (iii) of the Social Welfare (Consolidation) Act of 1993, as inserted by Section 14 of the Social Welfare Act, of 1998.
c) The defendant's name, the address at which he or she ordinarily resides (if known to the plaintiff) and his or her occupation (if known to the plaintiff).
d) The injuries the plaintiff alleges that he or she has been occasioned by the wrong of the defendant.
e) Full particulars of all items of special damage claimed by the plaintiff.
f) Full particulars of the acts of the defendant constituting the wrong, and the circumstances relating to the commission of the wrong.
g) Full particulars of each instance of negligence by the defendant.

In essence therefore, a Personal Injury Summons is an amalgamation of a Personal Injury Summons and a Statement of Claim, which must not only set out the particulars of wrong of the defendant but also the circumstances relating to the commission of that wrong. It would seem therefore that it is no longer acceptable to simply state that the defendant failed to take care or failed to exercise caution.

Also, fulsome detailed particulars will be required to be delivered more in a narrative form than the present standard form of pleading.

If the Court believes that Section 10 (2) of the Act has not been complied with in the manner in which the Personal Injury Summons has been drafted, the Court may direct that the action shall not proceed any further until the plaintiff complies with such conditions that the Court may specify, or if it considers that the interest of justice so require, it may dismiss the plaintiff's action. The Court is given a further discretion to take into account, in deciding to make an order for the payment of costs of the hearing of the action, the manner in which the Personal Injury Summons was drafted. The Court is also given the right, to draw such inferences from the failure to properly draft a Personal Injury Summons as "appear proper".

It is arguable, that the provisions of Section 10 add nothing new to the Courts power. Having said that, there is no doubt that the thrust of the Section and indeed the Act, is to require parties to disclose as much information as possible at the commencement of the action in a manner in which could be described as "full and frank".

Section 11 of the Act deals with a request for further information. This is similar to a Notice for Particulars and shall contain the following particulars.

a) Particulars of any personal injury action brought by the plaintiff in which a Court made an award of damages;
b) Particulars of any personal injury action brought by the plaintiff which was withdrawn or settled;
c) Particulars of any injuries sustained or treatment administered to the plaintiff that would have a bearing on the personal injuries to which the personal injuries action relates;
d) The name of any persons from whom the plaintiff received such medical treatment.

This is similar to a standard request for a Notice for Particulars generated by any prudent solicitor acting for a defendant and as such, is nothing new. However, now it has been given a statutory basis.

Failure on the part of the plaintiff to comply with any such request, is dealt with in a similar manner as a failure under Section 10.

Defence – Section 12

Section 12 deals with the Defence which is to be filed. From a practical perspective, this may well give rise to the greatest difficulty. As all practitioners are aware, it sometimes happens that even in cases where it is obvious that liability could not be an issue, a full Defence may nevertheless be filed together with pleas of contributory negligence. Based upon Section 12, those days would seem to be gone. Now a Defence must be specific. Under Section 12 (i), a Defence to a personal injury action must specify the following matters:

a) The allegations specified, or the matters pleaded in the Personal Injury Summons of which the defendant does not require proof;
b) The allegations specified, or the matters pleaded in the Personal Injury Summons of which he or she does require proof;
c) The grounds upon which the defendant claims that he or she is not liable for any injuries suffered by the plaintiff;
d) Where the defendant alleges that some or all of the personal injuries as suffered by the plaintiff were occasioned in whole or in part by the plaintiff's own acts, the grounds upon which he or she so alleges.

Given what seems to be the relatively strict timeframe within which the pleadings are required to be exchanged, it would seem that a prudent Counsel acting for the defendant will require a consultation with the client or alternatively have a detailed attendance on such a consultation, before they are in a position to draft the appropriate Defence.

It would seem that the obligation to fully plead in both a Personal Injury Summons and a defence is underlined in Section 13 of the Act. This emphasises the requirement that any pleading served by either a plaintiff, a defendant or a third party must contain full and detailed particulars of the claim, or the denial, and of each allegation, assertion or plea compromising that claim or denial.

Verifying Affidavit - Section 4

The concept of a Verifying Affidavit seems to be borrowed from family law and the intent seems to be to assist in the prosecution of parties to an action where it is found that they have given false or misleading evidence, as defined by Section 25 and 26 of the Act (See *The Civil Liability and Courts Act 2004*, 9 Bar Review, Issue 5 November 2004). The section warrants a close and serious scrutiny. It applies to any party to an action whether they be a plaintiff, defendant or third party.

Under Section 14 (1), where a plaintiff serves any pleading or provides information, they must swear an affidavit verifying those assertions or allegations or other further information. If the action was brought on behalf of an infant, then it is the next friend who is obliged to swear the affidavit. Such an affidavit, must state that the deponent honestly believes the assertions, allegations or further information to be true. Whether the issue of "honesty" will be determined from an "objective" or "subjective" point of view remains to be seen.

From a practical perspective, the affidavit must be lodged not later than 21 days after the service of the pleading or such longer period as the Court may direct, or the parties may agree.

As has previously been stated, this section applies to existing actions pursuant to Section 14 (8). However such an affidavit does not have to be lodged in Court until 7 days before the date fixed for the trial of the personal injury action concerned (See Section 14 (4) (b)).

Mediation Conference

Section 15 introduces a novel concept in personal injury actions, namely that of "mediation". Many commentators have remarked that this provision has no place in such an act and that its mandatory requirements, defeats the whole purpose of mediation.

Mediation has been described as:-

> "the intervention in negotiation or a conflict, of an acceptable third party who is limited or has no authoritative decision-making power, but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of the issues in dispute"[1]

Under Section 15, upon the request of any party to a personal injury action, the Court may at any time before the trial of the action and if it considers that the holding of a mediation conference would assist in reaching a settlement, direct the parties to meet and discuss and attempt to settle the action. The Section therefore gives a mandatory power to the Court. If the Court directs such a meeting, it must take place.

However if it does take place, and one of the parties to the mediation conference decides not to actively participate in the conference, there is nothing that the Court can do.

The chairman of such a mediation conference who is appointed by the Court, can be either be a practicing barrister or practising solicitor of not less than 5 years standing or alternatively, a person nominated by a body prescribed by the Minister, and has the obligation under Section 16 of submitting to the Court a report.

The report shall state whether the mediation conference took place or not. If it did not take place, the reasons why it did not take place. If it did take place, the report will state whether or not a settlement had been reached. If a settlement was reached, then the terms of the settlement are contained in the report and it is signed by the parties thereto. The report is given to each party and submitted to the Court. There is no provision however for the chairperson to inform the Court why a settlement was not reached at a mediation conference. This is seen by most commentators as a very significant weakness in this provision.
It remains to be seen what effect, if any, these provisions will have on the running of a personal injury actions. There are few enough personal injury actions that would benefit from mediation rather than negotiation.

Formal Offers - Section 17

Section 17 introduces a further novel document in personal injury actions. The likelihood is it will give rise to confusion in the short term. After a prescribed date (being such date before the commencement of the trial of the personal injury action concerned as is prescribed by Order of the Minister), a plaintiff must serve a notice in writing of an offer of terms of settlement on the defendant. This is a mandatory requirement. The figure presumably will be based upon the plaintiff's lawyers assessment of the general damage valuation of the claim together with special damages already occurred and an assessment of what special

1. See Moore, C.W. (1996) The Mediation Process: Practical Strategies for resolving conflict, (2nd End. Ed.) San Francisco: Jossey Bassy) at p.15.

damages in the future are likely to be incurred based upon an actuarial assessment.

Thereafter, the defendant shall serve upon the plaintiff an offer of settlement or alternatively a notice stating that he is not prepared to pay any sum of money to the plaintiff in settlement of the action. Both of these documents are then lodged in Court.

The terms of these "offers" or "counteroffers" will not be communicated to the Judge until after he or she has delivered judgment. Then, notwithstanding that the plaintiff may have won the case, the Judge is obliged to look at the "offers" and consider two things. Firstly, the Judge must consider the terms of the formal offer and secondly must consider the reasonableness of the conduct of the parties in making their formal offers before making an order for payment of the costs of the action.

Section 17 (6) of the Act makes it clear, that the section is in addition and not "in substitution for any Rule of Court providing for the payment into Court of a sum of money in satisfaction of a cause of action or the making of an offer of Tender of payment to the other party or parties to an action."

It is submitted, that this is a further potential obstacle to awarding a plaintiff costs in a case that has been successfully litigated. These provisions do not stymie a Court jurisdiction in regard to costs but the Court must "have regard" to the matters set out above.

It is unclear when the provisions of Section 17 will come into effect. We must await the Order of the Minister as to the "prescribed date" and the "prescribed period".

Pre-Trial Hearing - Section 18

Section 18 gives statutory force to the Courts pre-existing power to direct a hearing to be held before the trial of the action for the purposes of determining what matters relating to the action are in dispute.

Prior to the introduction of S.I. 391 of 1998, (relating to the exchange of reports and preparation of a Schedule of Witnesses), the then President of the High Court, Costello P, suggested personal injury actions may benefit from such pre-trial hearings. Ultimately that idea evolved into S.I. 391 of 1998 as we now know it.

All parties to a personal injury action shall be entitled to be heard at the hearing, and the hearing will be presided over by either a Judge, Master of the High Court, a Deputy Master of the High Court or an officer nominated by the President of the High Court. In the case of the Circuit Court, the hearing could be heard by a Circuit Court Judge, a County Registrar or a member of staff of the Circuit Court office as the President of the Circuit Court may direct. In the District Court, the hearing will be heard by a District Court Judge. This section is regarded as being supplemental and not in substitution of any other powers of Court in giving directions in relation to the hearing of the case.

Expert Evidence - Section 20

Section 20 is another novel departure from standard practice. Under this section, a Court may appoint "approved persons" as it considers it appropriate, to carry out investigations into and give expert evidence in relation to such matters as the Court may decide.

It is mandatory, for all parties to a personal injury action to co-operate with such a person and provide them with any report or document and information which they may have prepared in relation to the case.

Exactly who the "approved person" may be, is a matter for a decision by the President of the High Court in consultation with Presidents of the Circuit and District Courts. Presumably these will be engineers, doctors or actuaries etc. It is submitted, that there are few enough cases which would warrant the appointment of such "approved person" by a Court, since by so doing, the Court would be in essence appointing its own expert to in some way, arbitrate between the plaintiff and the defendants experts. We will have to wait and see how this works in practice.

Collateral Benefits - Section 27

Section 27 amends Section 50 of the Civil Liability Act 1961 and Section 2 of the Civil Liability (Amendment) Act of 1964. These sections deal with the sums which are not to be taken into account in assessing damages in a personal injury action.

Under the newly inserted sub-section 2, a charitable gift when made to the plaintiff by a defendant, can be taken into account in assessing the damages recoverable in an action. Prior to this, under Section 50 and Section 2 of the respective acts, an account could not be taken of any sum payable in respect of an injury under a contract of insurance or any pension, gratuity or other benefit payable under statute or otherwise, in consequence of the death of the deceased, or the injury to the injured party.

This issue was the subject matter of a decision of Geoghegan J. in the High Court in the case of *Green v. Hughes Haulage Limited and Coleman* [1997] 3 I.R. 109, where an injured party was receiving an income pursuant to an employee benefit plan, which provided an income in the event of a long term injury or illness, so long as the recipient remained disabled. The defendants argued that the value of these payments should be calculated and deducted from the plaintiff's loss of earnings claim.

Geoghegan J. held that the monies payable should not be deducted having regard to the terms of the 1964 Act. He formed the view, that it was reasonable in the circumstances, to assume that Section 2 of the 1964 Act was intended to be interpreted in a manner similar to Section 50 of the 1960 Act and accordingly, the sum could not be taken into consideration in assessing the damages.

The amendments of the principal Acts by Section 27, now allow a defendant to give a "gift" to a plaintiff (which presumably would be similar to the amount of any employee benefit plan) so that such a sum can be taken into consideration in reducing the amount of damages. However, the defendant, as the donor of the gift, must inform the

plaintiff in writing that he will apply to the Court for the damages to be reduced by the amount equal to the amount of the gift, or the value of the gift, as may be appropriate.

Undeclared Income

Prior to the introduction of this section, there was some confusion as to precisely the correct method to be adopted in calculating income, profit or gain, which has been lost either to the injured person or dependants of a deceased, which had not been the subject of accurate tax returns. In the case of *Fitzpatrick v. Furey* (unreported, 12th June 1998), Laffoy J. formed the view, that public policy considerations precluded her from quantifying the loss of dependency on the basis of a deceased's declared and undeclared income for the accounting year prior to their death.

However in the case of *Downing v. O'Flynn* [2000] 4 IR 383, the Supreme Court did not accept Laffoy J's views in this matter. The Court came to the view that the failure of the deceased to declare his income for income tax purposes did not prevent the Court from making an award for loss of dependency reflecting monies paid from that income during the deceased's lifetime, which award must be calculated on the basis of the deceased's net income.

Section 28 alters the situation in non-fatal accidents. In such cases, where the plaintiff makes a claim, and has not made a return of taxes in accordance with the Taxes Consolidation Act, of 1997 or has not otherwise notified the Revenue Commissioners, the Court shall, for the purposes of assessing damages, shall disregard any income, profit or gain, made by the plaintiff, unless the Court considers that in all the circumstances, it would be unjust to disregard such income, profit or gain. It is important to note that the Section does not apply to causes of action accruing before the 31st March, 2005.

This would seem to be something of a half-way house between Laffoy J's approach in *Fitzpatrick* and the Supreme Court's approaching in *Downing* in that it does not apply to dependency actions pursuant to Section 48 of the Civil Liability Act, 1961.

Conclusion

It is submitted that now that the Civil Liability and Courts Act, 2004 is fully operational, the landscape of personal injury actions will undoubtedly change significantly. Such change will place a significant onus upon practitioners to ensure not only that full information is furnished by a plaintiff and is honestly given and not misleading in any material respect, but also that the time frames as set out in the rules of the Superior Courts are adhered to as strictly as possible.

It is submitted that the thrust of the new Act contains more penalties for plaintiffs than defendants in that if a plaintiff gives false or misleading information in any material respect, which they know to be false or misleading, their action may be dismissed. There is no similar penalty on a defendant who gives false or misleading information in any material respect which they know to be false and misleading. This lacuna can be easily rectified, with an amendment to Section 26 of the Act to allow a Court to strike out a defendant's Defence where it gives false or misleading information. ●

Book Launch

Pictured at the launch of "Child Law" by Geoffrey Shannon at The Law Society of Ireland were L-R: Mr Justice Michael Hanna; Mr Justice John Mac Menamin; Minister of State in the Department of Health and Children, Brian Lenihan TD; Geoffrey Shannon; and Mrs Justice Catherine McGuinness of the Supreme Court.

Assessing the Refugee Appeals Tribunal: The Case for the Publication of Decisions

Sunniva McDonagh BL

Introduction

These reflections on the Refugee Appeals Tribunal have been germinating since the appointment of the writer as one of the original members of the Refugee Appeals Tribunal (established November, 2000). They have been committed to paper as a contribution to the ongoing debate concerning the asylum process in this jurisdiction. They are written partly in response to a critique made of the Tribunal by the Master of the High Court (reported in the Irish Times, 20th November 2004). The processes of the Tribunal are subject to judicial review and in that context, the Master was reported as having made some general assertions.

The Master was quoted as criticising the Tribunal in the manner in which it dealt with asylum cases. He claimed that many decisions of the Refugee Appeals Tribunal were judicially reviewed on the grounds of unreasonableness involving unsupported findings without a factual basis, clear factual inaccuracies and inconsistencies and omissions. He indicated that a significant number of cases are settled, meaning that the claim for judicial review was well founded.

While any contribution to the debate is to be welcomed, I know I am not alone among Members of the Tribunal in feeling that a blanket criticism of the Tribunal is unwarranted. It is possible to have been a member of the Refugee Tribunal since its inception and to have heard over 600 cases and never to have been successfully judicially reviewed, nor to have had any case settled prior to trial. That is not to say that there does not appear to be something unsatisfactory about the fact that over 400 asylum judicial review cases have been taken, most of which are against the Refugee Appeals Tribunal (according to the article).

One major obstacle in relation to assessing the performance of the Tribunal is the absence of published decisions. This article seeks to argue that the publication of decisions of the Tribunal would greatly assist the dialogue among those practising in the area of asylum law. The publication of decisions would help remove any mystery surrounding the operation of the Tribunal and would lead to greater transparency and consistency of decisions. It would also help to alert practitioners to the necessary, but sometimes difficult, task entrusted to Members of the Tribunal. While the statutory provisions concerning publication are somewhat ambiguous, it is clear that a formal decision to publish is not one which can be taken by an ordinary Member of the Tribunal.

Use of Judicial Review to examine workings of Tribunal

The only decisions which are currently available for scrutiny are those the subject mater of judicial review. However, judicial review is not a satisfactory mechanism for providing an overview into the workings of the Tribunal for the following reasons:-

i. Judicial review is an instrument of review rather than a full appeal. Whilst a valuable remedy, it is directed at the decision-making process rather than the result. This means that a *prima facie* case is only made out when the Tribunal has acted otherwise than in accordance with the principle of reasonableness and/or fair procedures. It therefore presents an incomplete picture of the Tribunal due to the fact that the majority of decisions are not judicially reviewed.

ii. A practice has arisen whereby the Refugee Appeals Commissioner does not review decisions of the Tribunal. Of course, it may be that the RAC is fully satisfied with the deliberations of the Tribunal in all of the cases in which decisions of the RAC have been set aside. Alternatively, there may be some policy reason why the RAC does not judicially review the Tribunal, as it is hard to believe that the RAC has been entirely in agreement with every one of thousands of decisions. This means that the only decisions which are reviewed are decisions where applicants are unsuccessful in their asylum application. Judicial review therefore provides no insight whatever into the Tribunal's reasoning behind successful applications for refugee status. It must be unhelpful to those wishing to examine the workings of the Tribunal that the Tribunal has proceeded on the basis that its decisions will not be challenged by the RAC. Successful applications, which are nonetheless flawed, also deserve scrutiny.

Arguments for Publication

There must be a presumption in favour of publishing decisions as this would provide greater transparency. There does not appear to be any overriding principle which would militate against such publication. (Such publication would retain the anonymity of the applicant through the use of initials.)

The only apparent reason advanced in principle as to why decisions should not be published arises from the fact that most asylum applicants are not successful: Many, if not most, asylum applicants are found not to have established their credibility. The argument goes that if the decisions of the Tribunal were published, some potential asylum seekers would be encouraged to fabricate claims on the basis of the factual matrices of published decisions.

However this consideration does not outweigh the factors in favour of publication. Such publication, even if not of all decisions (as this might prove administratively burdensome), should be representative of the decisions in general. To ensure a representative cross section of decisions are published, an independent specialist might oversee the process.

Benefits of Publication

Publication would also bring many specific benefits for those interested in scrutinising the Tribunal's decisions. It would provide greater openness about the operations, practices and procedures of the Tribunal. It would enable a consensus to emerge in relation to best practice and allow wider comment and analysis. It would also bring to a broader public a greater awareness of the difficult issues which need to be confronted. In this article, I would like to focus on particular issues that emerge on a continuous basis that would benefit from analysis and scrutiny by those practising in the area.

(1) Interpretation of Legal Concepts

Certain key legal concepts arise in the application of asylum law. The legal advisors of applicants must be in a position to advise their clients. In the absence of the publication of any positive asylum decisions, advisors are ignorant as to the basis of successful decisions. What constitutes "*membership of a particular social group*"? How should the "*internal relocation*" principle be applied? Is the Tribunal examining the case *de novo* or conducting a more limited form of appeal (as the Regulations might envisage)? What constitutes persecution on cumulative grounds?

One particular example illustrates the importance for practitioners of knowing how legal interpretations are approached. Sometimes a "*change of circumstance*" takes place in the country of origin after the applicant leaves. A number of possible approaches can be found in the textbooks to this issue. If there has been a civil war, a return to democracy, or a U.S. led invasion since the applicant left, does that affect his application? If he would have qualified for refugee status in this jurisdiction had his case been determined immediately on his arrival here some years ago, should he still gain recognition now? Does the burden of proof shift to the RAC to justify returning somebody to a country of origin where there has been a significant change of circumstance? The UNHCR has refocused this writer's attention on Article 41 of the UNHCR Handbook. This provides that fear must be reasonable. However "*exaggerated fear*" may be justified in certain circumstances. This would appear to suggest that somebody who has suffered torture at the hands of the state in his or her country of origin may nonetheless be justified in having a well founded fear of persecution if returned, notwithstanding that the source of persecution is no longer in power.

In recent times the concept of "*exaggerated fear*" would appear to have particular relevance to some asylum seekers from Iraq. In some cases, the source of persecution may no longer officially exist. However the ongoing effects of previous torture, imprisonment or the deaths of loved ones at the hands of the State, may result in such a person having an "*exaggerated fear*" which is nonetheless reasonable. Since positive decisions are never published, legal advisors may be unaware of how asylum law is applied in this jurisdiction.

(2) Promoting Consistency of Approach

It is desirable that the approach of Members to issues before them be consistent insofar as this is possible. In certain cases, the lack of consistency as between Members can lead to certain anomalies. The consequences of lack of consistency in approach can be considered by taking as an example the concept of "*adequate state protection*". One Member might accept the credibility of an applicant but conclude that there was adequate state protection available to the applicant from the police or the Ombudsman in his country of origin. Another Member might accept the applicant's credibility in relation to an identical set of facts but take the view that there was no adequate state protection. The country of origin information relied on by this Member might indicate that the Ombudsman was an ineffective protection against corrupt and powerful mafia agents in relation to whom the police turn a blind eye. It is submitted that consistency in relation to whether adequate state protection is available in an applicant's country of origin is imperative. It is not acceptable that an applicant's chance of being successful should be determined by a subjective view of what should be capable of being assessed objectively, namely, whether the state can give meaningful protection. Publication should ensure greater consistency of approach to such matters.

(3) Examining Credibility

One of the most difficult tasks facing the Tribunal is to listen to heartrending stories and yet still embark on a critical assessment of their credibility. Practically every asylum seeker tells a story which, if believed, is one of suffering and hardship.

Even without the publication of decisions, practitioners appear to be aware that most applicants who are not successful fail by reason of the fact that their credibility has not been accepted. It does no service to the asylum process to shirk from assessing credibility. An assessment of credibility requires a careful analysis of the applicant's circumstances. For example, if he states that he suffered religious persecution in a particular city, one would examine as to how he came to be in the city in the first place, his knowledge of the city, his knowledge of his claimed religion, his knowledge of the precise riots complained of and his location in relation to same. It also requires the consideration of relevant and specific country of origin information in some detail. It happens not infrequently that on such an examination, it is demonstrable that the person has no knowledge of the city which he claims to have lived in for a number of years or of the name and location of the church, his membership of which gave rise to his being targeted.

The experience in other jurisdictions suggests that some decision-makers find it easier to decide a case, not on credibility, but on some other factor such as the possibility of so-called "*internal relocation*" in the country of origin. Relying on this ground means the decision maker does not have to conclude that someone is not telling the truth. It is also easier to

write such a decision as it does not demand a radical consideration of the facts. For example, if somebody claims to have escaped religious persecution in the northern part of a large African country, it requires little consideration to accept this at face value, but to state that there are over 100 million people in that country and that relocation to a large city in the south would not cause the applicant problems. If such a decision is then judicially reviewed, the decision of the Tribunal might appear very harsh: the credibility of somebody who fears for his life having been accepted, but it being callously suggested that he or she should simply relocate to another city. The truth may be that the decision maker formed a view that the story was not credible, but refrained form expressing this view.

In assessing credibility, one must also have regard to the danger of imputing one's own cultural preconceptions to people from very different cultures and levels of educational attainment. In this regard, I recall an applicant who alleged that he had been a child soldier in Sierra Leone during the civil war. His credibility at first instance had not been accepted partly due to the fact that he could not recall the different colours of the various bank notes in his country. On appeal, the Presenting Officer on behalf of the RAC fairly stated he was not relying on this ground as a general inquiry among his colleagues had elicited that many of them could not name the colours of the Irish bank notes.

(4) Application of Credibility Assessments

How credibility is examined has further implications in relation to comparative recognition rates. Recognition rates are relevant in two ways:

(a) Recognition Rates: Specific Countries

> Criticism has been made of the Tribunal because of its failure to recognise refugees from places such as Somalia and Sierra Leone at times when these countries were internationally recognised as refugee producing countries. It has been alleged that the Irish recognition rates are lower than those of other countries. However, perhaps what is not fully appreciated is that sometimes persons from third countries claim to be from Somalia or Sierra Leone. If it is held by the Tribunal that these persons have not established that they are from Somalia or Sierra Leone, then it is unfair to criticise the recognition rate for those claiming to come from such countries. The only true statistic is to take the number of asylum seekers whom it is accepted come from these countries and then to analyse recognition rates for those applicants. Publication would allow for this differentiation to be made.

(b) Recognition Rates of Individual Members

> Publication would also bring some transparency in relation to the recognition rates of individual members. Few generalisations can be made in relation to recognition rates as the range of cases presented is very varied. However, disquiet has been voiced concerning a perceived wide discrepancy between Members in relation to recognition rates.
>
> It has been a matter of comment, and indeed alleged in the High Court, that some Members appear to have exceptionally low recognition rates, bordering on zero. If some Members have never had the experience of hearing meritorious cases, there is a danger that there would be a perception that this could be accounted for by the temperament of such Members. Publication would allow for analysis as to whether any such discrepancies (if such are found to exist) are accounted for by the different mix of cases allocated to Members or are due to other factors such as the application of differing standards concerning the assessment of credibility. If it emerges that differing recognition rates are due to the case mix allocated to Members, one would have to question any mechanisms which would seem to have deprived some Members of dealing with any, or all but a couple of meritorious appeals.

(5) Treatment of Separated Children in the Asylum Process

I have been involved in hearing the cases of minors since distinct procedures were adopted to hear these cases in 2002. I found it initially surprising that my recognition rates in relation to the hearings involving minors was lower than that relating to adults. The fact that many of these cases, despite a liberal application of the benefit of the doubt in relation to credibility, are simply not credible is a matter of particular concern. An unsuccessful adult asylum seeker may in reality be an economic migrant. Can the same generally hold true for a child who arrives alone in this country?

This is of particular concern because of the manner in which a certain category of minors have been dealt with. The only statutory provision dealing with minors is Section 8(5) of the Refugee Act 1996. This provides that where an immigration officer or the RAC becomes aware that a minor is not in the custody of any person, they will inform the Health Board and thereupon the provisions of the Childcare Act 1991 will apply. The Health Board has established a special unit entitled "*The Separated Childrens' Unit*" to look after such children. However the RAC and the Health Board have divided these children into two categories, namely those they refer to as "*unaccompanied minors*" and those whom they refer to as "*accompanied minors*". "*Accompanied minors*" include minors who are claimed by a person alleged to be a relative or family member on or subsequent to arrival in this jurisdiction. Full responsibility for the pursuing of an asylum claim then falls to such person (and indeed whether to pursue the claim in the first place). However, there does not appear to me to be any statutory provision allowing the Health Board to discharge these children to the care of such guardians without any further State involvement.

According to UNHCR "Separated Children" are:

> "Children under 18 years of age who are outside their country of origin and separated from both parents, or their previous legal/customary primary caregiver." (par. 2.1 "Separated Children in Europe Programme: Statement of Good Practice", published jointly by UNHCR and Save the Children in 2000.)

The word "*separated*" is used rather than "*unaccompanied*" because it better defines the essential problem that such children face, namely, that they are without the care and protection of their parents or previous legal guardian. The careful use of "*previous*" in relation to primary care givers should also be noted.

Paragraph 2.2 of the Statement of Good Practice provides:

> "While some separated children appear to be 'accompanied' when

they arrive in Europe, the accompanying adults are not necessarily able or suitable to assume responsibility for their care."

UNHCR recommend that each separated child is provided with an independent guardian to safeguard his or her interests. It is noteworthy that best practice requires that even if the child is allowed live with persons who claim to be relatives, such child remains a separated child for the purposes of the asylum process with all necessary safeguards afforded to such children.

I believe all "*Separated Children*" should continue to have an independent person to safeguard their interests in the asylum process. The practice of treating some of these separated children as so-called "*accompanied minors*" is fraught with child protection difficulties.

This member has come across cases where "*accompanied minors*" have been placed with most unsatisfactory persons as guardians. While the Health Board might have had no initial concerns in placing these children with such persons, it has become clear during the determination of the asylum claims of these minors that these persons were not suitable. The following examples illustrate the point, although they are not an exhaustive list of cases giving rise to concern.

1. A 17 year old girl who was "*reunited*" with a relative claiming to be her half-sister and discharged to her care. This person put pressure on the girl to withdraw her asylum claim and put her out of her house, leaving her homeless. She was brought to her embassy by this person to obtain an emergency travelling certificate to send her home. The girl told her legal advisors that she wished to pursue the claim. The Tribunal felt that not only was the guardian not a suitable guardian, but was acting to the detriment of the minor's asylum claim. The Tribunal also felt that by reason of the fact that the girl was homeless, that the Health Board had an ongoing obligation under the Childcare Act in relation to the welfare of the child. The Health Board disagreed.

2. A 4 year old boy arrived in this jurisdiction. He was subsequently "*reunited*" with a man claiming to be his father. The asylum claim presented on behalf of this 4 year old boy was presented by this man. This man was himself a failed asylum seeker who had been found not to be credible. He did not claim to have been married to the boy's mother, had never lived with her or indeed lived in the same part of the country as she had. He presented school reports which could not have been completed by the boy in his country of origin as the boy was manifestly unable to speak English, let alone undertake written exams two years previously, at the age of two. In addition, he presented a birth certificate which was demonstrably false as he stated it had been obtained as an earlier one had been lost. However, the birth certificate presented gave the date of *registration* of the birth as the date of the new birth certificate. The father stated he was unable to contact the boy's mother as he did not have her mobile phone number. In addition, the boy was brought to this country by a "*pastor*" whom the father could neither identify nor contact.

3. A fifteen year old boy was made to work full time and prevented from attending school by the person into whose care he was placed by the Health Board.

4. A minor placed with her eighteen year old sister as "*guardian*". This sister was also an asylum seeker and herself fleeing alleged sexual abuse.

5. An educated girl in secondary school in this jurisdiction whose "*uncle*" produced a birth certificate which contradicted the age the girl had given. The girl broke down and said she didn't in fact know how old she was.

6. A girl placed with her half sister, who claimed to share a common father with the girl. However, the application revealed that if the relationship was as stated, the father would have become a father at the age of three.

7. A girl whose guardian was her "*aunt*". Her aunt failed to appear on one occasion and the case was adjourned. On the next occasion, the "*aunt*" was not present either. However, a lady was there representing the interests of the girl. When asked for her identity, she revealed that she was the girl's natural mother: she alleged that she had been separated from her daughter shortly after the girl's birth in her country of origin. She herself had come to Ireland to seek asylum some few years previously. Completely unknown to her, her daughter for unrelated reasons came later to Ireland. The applicant had not known her natural mother. Coincidentally her "*aunt*" had bumped into her natural mother in Moore Street and reunited the pair. The mother then wished to act as guardian.

Serious issues are raised in relation to the treatment of so called "*accompanied*" minors which deserve further debate. I am not alone among Members in declining to hear such cases in the absence of satisfactory safeguards for these vulnerable children.

No system can prevent the tragic trafficking of children. However, releasing "*Separated Children*" to adults who claim them and allowing such adults to process their claims without any further involvement on the part of the State would appear to be a most unsafe procedure to adopt in relation to the protection of vulnerable children. UNHCR Guidelines exist in part to prevent child trafficking. There is no legal obligation on the State to follow these Guidelines but having regard to their purpose, it appears imperative that they should be followed. Furthermore the constitutional rights of such children to fair procedures in the determination of their case cannot be vindicated without having an unequivocally independent advocate to act on their behalf.

5. Procedures which disentitle an applicant to an oral hearing on appeal.

Publication would allow for an appraisal of the "*papers only*" appeal mechanism.

Certain amendments introduced by the Immigration Act, 2003, disentitle an applicant to an oral hearing in circumstances other then where an application is "*manifestly unfounded*". It is not unreasonable, if an application fails to disclose any grounds which could justify a determination of refugee status, that it be deemed manifestly unfounded, with an applicant not enjoying the benefit of an oral hearing. However, the 2003 Act is more far-reaching than this. Under the new Section 13(5) where the report of the RAC includes any of the findings specified in subsection 6 in its decision, any appeal which an applicant has will be without an oral hearing. Section 6 includes grounds such as where the applicant, without reasonable cause, has failed to make an application as

soon as reasonably practicable after arrival in the State, or that the applicant lodged a prior application for asylum in another State party to the Geneva Convention. The legislation envisages that the Tribunal on a "*papers only appeal*" will either confirm the decision of the RAC or declare the applicant a refugee.

These procedures present clear problems by virtue of the inclusion of criteria other that that the application is manifestly unfounded. This is because the Tribunal, under the manifestly unfounded procedures, can easily conclude that an application is not manifestly unfounded by reason of the fact, for example, that the credibility of an applicant was not accepted but the story (if accepted) would justify a finding of a well founded fear of persecution. The matter would then be referred back to RAC for further consideration.

However, under the new procedure, the Tribunal, without the benefit of an oral hearing, is attempting to determine whether or not an applicant is a refugee, rather than simply whether or not the case is manifestly unfounded. This is a crucial distinction. As already pointed out, the most important determination in this process is an assessment of credibility. If the RAC has found that an applicant is not credible, how can the Tribunal revisit that decision in any meaningful way without hearing oral evidence from the applicant? What if the applicant, in his or her notice of appeal, provides an explanation for a negative finding on credibility? For example, an applicant may fail to disclose initially that she has been sexually abused or the extent of such abuse. It is a well recognised psychological phenomenon that disclosure of abuse is gradual and therefore, the fact that the abuse was not disclosed at an early opportunity is not necessarily something which should be held against an applicant in relation to credibility. How can the Tribunal test this explanation? Was the failure to disclose the abuse due to psychological factors inhibiting disclosure or, has the issue of abuse been thought up for the purpose of the appeal?

What of an applicant who states that he has received multiple beatings from the police? Whether this constitutes harassment or amounts to persecution is a finely balanced decision. If the RAC decides that this is harassment only and not persecution on cumulative grounds, how can the Tribunal without further questioning of the applicant, revisit this decision?

The Executive Committee of the UNHCR (Conclusion No. 8, 1997) states that applicants not recognised as refugees should be given time to appeal for "a formal reconsideration of the decision either to the same or to a different authority, whether administrative or judicial, according to the prevailing system." Goodwin-Gill in "*The Refugee in International Law*" (2nd edition) at pages 331 to 332 comments on the appeal or review. He notes that some States have responded to the crisis in numbers in refugee procedures by abolishing appeals, or levels of appeals, or by confining review to legal issues. He concludes that "at both national and international levels, some sort of appeal, going both to facts and to legality, offers the best chance of correcting error and ensuring consistency".

The new procedure does not offer any meaningful appeal in relation to facts and is open to criticism for this reason. It is hard not to conclude that the lack of an oral hearing in cases other than those which are manifestly unfounded gives rise to a suspicion that the Tribunal is merely engaged in some form of rubber-stamping. It should be noted that not all members have agreed to hear these cases.

Conclusion

Feedback from practitioners would be welcome as a contribution to the ongoing debate about how the rights of asylum seekers can best be vindicated in the asylum process. ●

(The author is a member of the Refugee Appeals Tribunal. The views expressed in this article are the personal views of the writer.)

Joyce Reading

Pictured at the reading of a paper on "James Joyce's Legal Dublin" by Brian McMahon, were Mr Justice Adrian Hardiman and Brenden Kilty S.C. The reading took place in the James Joyce house of "The Dead" in Dublin 8.

Strasbourg – Experience Gained

Kate O Toole

As the inaugural McCarthy Scholar, I spent six weeks last summer (2004) working in the Court of Human Rights. The following essay is a personal account of my time spent in Strasbourg. It provides me with a welcome opportunity to thank all those who have contributed to the funding of this very valuable and unique scholarship.

During my years of studying law, European Court Reports have been a frequent reference point. However all my reading of its case law had failed to make the institution real for me. This perception changed forever when I walked past the line of flags representing the different member states and climbed the red sandstone steps that led to the main entrance of the Palais de l'Europe (the headquarters of the Council of Europe).

The Court of Human Rights, the Council of Europe and the European Parliament are located in three separate buildings, facing each other from opposite banks at a crossing of several rivers. Although simple and modern in style, and all differing from each other, the three are every bit as impressive as the gothic cathedral that stands in the centre of the city. The Court building is designed to represent a steamboat turning the corner, symbolic of its pivotal role in Europe's search for justice.

Here, at the Palais de Droits de l'Homme, The secretary to the Head of Stagaires welcomed me and showed me to my office in the basement. I was assigned to the Research Division under the supervision of Peter Kempees (a Dutch man who had written several well known texts on the Convention). He took great care to ascertain what I wanted to gain from my time as a stagaire. After careful consideration he concluded that working on an annotation of the Rules of Court would suit my purposes. He also recommended I spend as much time as possible viewing cases before the court – advice that I took very seriously.

So my first four weeks were spent working on a practitioners guide to the Rules of the Court. It was my job to write a brief note on each rule, comparing it to the old Rules and noting any changes. This work did indeed give me a greater understanding of the constitution and decision making procedures of the Court. Within a few weeks the knowledge I acquired allowed me to view cases in an entirely different light.

The remainder of my time was spent working with the head of the Research Division, Monserrat Enrich-Maas. Her work focussed primarily on queries from the Grand Chamber on specific points of law. She asked my to write a piece for the Court explaining 'in simple terms' the law relating to contempt of court. This was to help the judges reach an informed decision on a case that was pending final judgment at the time. It became clear to me during the course of my research that a certain degree of ignorance of the Common-Law system exists in the Court. The majority of judges come from a Civil Law background and are quite sceptical of the operation of the Common-Law. They also find some difficulty in interpreting Common-Law material and putting it in proper context. Even within the Research Division, the purpose of which is to clear up such difficulties, the same misunderstanding prevails. Coming from a Common-Law system, this is a useful insight.

I took every opportunity to watch the Court hearings first hand. This brought home to me some of the factors that influence the Courts when making decision, and what style of presentation was most persuasive. It became apparent to me that judges are very conscious of the political and legal implications of their judgements on Member States. Therefore it is very important for State Counsel to emphasise the impact that condemnation of a particular law will have both within their own jurisdiction and on legislation in other countries. This is not always clear to the Court, but when clear, seems to carry a lot of weight.

Time constraints are always a big factor in the Court's proceedings. Clear, concise, controlled argument is most desirable. Emotive appeal is not appreciated unless the Court has a political agenda. In a case where there is a clear breach of rights, the Court may wish to attract media attention. This engages public interest and exerts pressure to comply with the Court findings.

The single most important thing to bear in mind is that the normal procedure of a case through the Court of Human Rights is a written one. Very few cases ever get an oral hearing so it is crucial to remember, when initiating a case, that the written statement is quite literally everything. With upwards of 45,000, cases a year it is imperative to eliminate as many cases as quickly as possible. To ease the burden on judges, files of cases that seem inadmissible (at a glance) are generally passed on to stagaires. The stagaire must read all the documents and assess the merits of the case; using earlier decisions of the Court to support their conclusion. Then he/she summarises his/her findings in one page. This one page summary serves as the decision of the court at Committee level. Given the system that operates, it is very advisable to write in a manner that will be clearly understood by even a relatively inexperienced legal mind. Witness contributions would also need to be given due attention with a view to producing a thoroughly clear statement. Remember that the stagaire, who usually works in the Court for no more than three months, is the first line of resistance your case will encounter. Even when a case succeeds in working its way up to a higher level, the stagaire's input may influence the outcome.

The buildings were impressive, the institutions intriguing, and my fellow workers helpful and friendly. It must also be said that the Irish judge, Mr Justice Hedigan was kind enough to make his office available to me should I need any assistance. He arranged to meet on a couple of occasions to check if everything was going smoothly. I felt my time in Strasbourg was well spent and the knowledge I gained invaluable. One is subsumed into the culture of the Court at an alarming rate and the demystification process is quite complete within six weeks. I can never be overawed by the mere mention of the Court of Human Rights because, for a brief moment, it was my home. Yet I remain in awe of its enormous potential for good in our increasingly complex and confused world. ●

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 10, Issue 2, April 2005

Edited by Desmond Mulhere, Law Library, Four Courts.

A directory of legislation, articles and written judgments received in the Law Library from the 8th February, 2005 to 18th March, 2005.

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

ADMINISTRATIVE LAW

Statutory Instruments

Appointment of special adviser (department of education and science) order, 2004
SI 797/2004

Oireachtas (ministerial and parliamentary offices) (secretarial facilities) (no. 5) regulations 2004
SI 888/2004

Oireachtas (ministerial and parliamentary offices) (secretarial facilities) (no. 6) regulations 2004
SI 889/2004

ADOPTION

Adoption
Consent - Children - Refusal to consent to adoption - Medical evidence - Fostering - Abandonment - Delay in bringing proceedings - Whether parental rights abandoned - Whether appropriate to make adoption order - Adoption Act, 1988 section 3 (2000/108M - Peart J - 14/07/2004)
B (WH) and S (W) and S (E) v An Bord Uchtála

AGRICULTURE

Statutory Instruments

Bovine tuberculosis (attestation of the state and general provisions)(amendment) order, 2005
SI 7/2005
Bovine diseases (levies) regulations, 2004
SI 838/2004
Control of animal remedies and their residues (amendment) regulations 2004
DIR 2003/74, DIR 2001/82
SI 827/2004
Control of bulls for breeding (permits) (amendment) regulations 2004
SI 662/2004

ANIMALS

Statutory Instruments

Bovine tuberculosis (attestation of the state and general provisions)(amendment) order, 2005
SI 7/2005

Bovine diseases (levies) regulations, 2004
SI 838/2004

Control of animal remedies and their residues (amendment) regulations 2004
DIR 2003/74, DIR 2001/82
SI 827/2004

Control of bulls for breeding (permits) (amendment) regulations 2004
SI 662/2004

ARBITRATION

Award
Enforcement - Expert - Difference between arbitrator and expert (2004/45SP Laffoy J - 30/07/2004)
Collis Lee v Millar

Award
Enforcement - Public policy - Whether enforcement order should be made - Arbitration Act, 1980 section 9 (2003/44SP - Kelly J - 19/05/2004)
Brostrom Tankers AB v Factorias Vulcano SA

Case stated
Admissibility of expert evidence - Whether discrete question of law - Arbitration Act, 1954 section 35 (2004/191SPCJ6 - Finlay Geoghegan J - 27/05/2004)
JJ Jennings Ltd v O'Leary

Library Acquisition
Capper, Phillip
International arbitration: a handbook
3rd ed
London: LLP, 2004
C1250

BUILDING LAW

Library Acquisition

Keane, David
Building and the law
4th ed / revised and expanded
Dublin: Royal Institute of Architects of Ireland, 2003
N83.C5

CANON LAW

Article

Murdoch, Henry
Bell, book and candle
2004 (Dec) GLSI of Ireland 8

CHARITIES

Library Acquisition

Law Reform Commission
Consultation paper on charitable trust law general proposals
Dublin: Law Reform Commission, 2005
N215.C5

COMPANY LAW

Declaration of restriction
Whether the respondents acted responsibly in relation to the conduct of the affairs of the company - Companies Act, 1990 section 150 -Company Law Enforcement Act, 2001 section 56 (2003/387COS - Finlay Geoghegan J - 06/05/2004)
Stafford v Higgins

Directors
Restriction - Executive and non-executive directors - Duties of non-executive directors - Whether directors acted responsibly - Companies Act, 1990 section 150 (2003/239COS - Finlay Geoghegan J - 20/07/2004)
Kavanagh v Delaney

Liquidation
Preferential status - Whether claimants entitled to preferential status on grounds that injuries resulted by accident - Interpretation of Companies Act, 1963 section 285(2) (g) (2002/268COS - Carroll J - 04/02/2004)
In re Irish Ispat Ltd

Liquidation
Restriction of directors - Whether respondents acted honestly and responsibly in relation to affairs of company - Whether respondents should be restricted from acting as company directors - Companies Act 1990, section 150 (2003/247COS - Finlay Geoghegan J - 13/02/2004)
In re Colm O'Neill Engineering Services Ltd.

Receivership
Directions - Leases created by company - Impact of negative pledge clauses in prior mortgage debentures - Whether leases contravened negative pledge clause in mortgages - Whether plenary proceedings appropriate - Companies Act, 1963 section 316 (2004/23COS Laffoy J - 30/07/2004)
Salthill Properties Ltd, In re

Shareholders Agreement
Whether the respondent was entitled to have the order stopping the transfer of shares continued when it was established that he would not be entitled to retain the shares in specie - Rules of the Superior Courts Order 46 (2003/82MCA - Laffoy J - 30/07/2004)
Lee v Buckle

Articles

Cassidy, Pamela
No such thing as bad publicity?
2004 (Dec) GLSI 15

Murray, Sean
The companies (auditing and accounting) act 2003
2004 (Nov) ITR 471

COMPETITION LAW

Library Acquisitions

Competition Authority
Study of competition in legal services
Dublin: Competition Authority, 2005
N266.C5

Van Bael, Ivo
Competition law of the European Community 4th ed
The Hague: Kluwer Law International, 2005
W110

CONSTITUTIONAL LAW

Library Acquisition

Doyle, Oran
Constitutional equality law
Dublin: Thomson Round Hall, 2004
M208.C5

CONTRACT LAW

Lease
Undertaking - Interlocutory injunction - Whether it was appropriate to grant an injunction restraining the defendants from doing certain acts in circumstances where there was no longer anything to restrain (2004/18543P - Peart J - 20/08/2004)
Kennedy v Mahon

CRIMINAL LAW

Appeal
Prejudicial remarks made by trial judge - Alleged endorsement of evidence by trial judge - Whether real danger that trial judge's remarks could have influenced jury - Whether trial rendered unfair and unsatisfactory - Murder - Joint venture (128/2002 - Court of Criminal Appeal - 19/03/2004)
People (DPP) v Hourigan

Appeal
Whether point of law of exceptional public importance on which it was desirable in public interest that appeal by taken - Empanelling of jury - Treatment of hostile witness - Whether point argued before CCA - Courts of Justice Act, 1924 section 29 (137/2000 - Court of Criminal Appeal - 05/02/2004)
People (DPP) v Kenny

Appeal
Conviction - Application for leave to appeal from conviction of Special Criminal Court - Evidence - Admissibility - Perjured evidence - Deliberate alteration of police interview notes - Whether trial court adverted to possibility of other evidence being tainted with illegality - Character of accused - Previous convictions adduced at trial - Whether Special Criminal Court entitled to reach guilty verdict on evidence adduced - Whether conviction should be quashed as unsafe - Explosive Substances Act 1883, section 3 - Criminal Law (Jurisdiction) Act, 1976 section 4 (25/2002 - Court of Criminal Appeal - 21/01/2005)
People (DPP) v Murphy

Appeal
Offence of affray - Whether prima facie case of affray - Whether judge erred in charge to jury in relation to law when two views open - Criminal Justice (Public Order) Act 1994 (109 & 110/2001 - Court of Criminal Appeal - 12/02/2004)
Reid v DPP

Appeal against conviction
Grounds of appeal - Refusal to consider application for adjournment - Whether refusal breached applicant's right to fair trial (18/2003 - Court of Criminal Appeal - 03/12/2004)
DPP v Desmond

Appeal
Conviction - Charge to jury - Corroboration - - Whether trial judge's charge to jury sufficient - Whether leave to appeal should be granted (58/2002 - Court of Criminal Appeal - 28/07/2004)
People (DPP) v Roche

Appeal
Conviction for murder - Charge to jury - Erroneous charge on issue of provocation - Whether erroneous charge automatically renders conviction unsafe - Whether conviction unsafe - Whether leave to appeal should be granted (45/2003 - Court of Criminal Appeal - 28/07/2004)
People (DPP) v Ceka (aka Kryxi)

Case stated
Making of valid complaint - Issuing of summons - Practice and procedure - Jurisdiction of District Court - Whether summons issued within applicable time limit - Whether invalidity of summons cured by attendance - Courts (Supplemental Provisions) Act, 1961 section 52 - Petty Sessions (Ireland) Act, 1851 (2003/1930SS - Murphy J - 04/05/2004)
DPP v Garbutt

Case stated
Statutory interpretation - Practice and procedure - Issuing of warrant - Drugs offences - Arrest - Assault - Whether warrant improperly issued - Courts (Supplemental Provisions) Act, 1961 - Petty Sessions (Ireland) Act, 1851 (2003/964SS - Smyth J - 17/02/2004) FL 10061
DPP v Dwyer

Case stated
Legal Aid - Practice and procedure - Fair procedures - Sentence hearing - Whether legal aid certificate could be granted for sentence hearing only - Whether case should be heard de novo - Criminal Justice (Public Order) Act, 1994 - Criminal Justice (Legal Aid) Act, 1962 (2003/2164SS - Smyth J - 01/07/2004)
DPP (Kearns) v Maher

Delay
Judicial review - Sexual offences - Explanation for delay - Prosecutorial delay - Whether real and serious risk of unfair trial (2003/24JR - O Caoimh J - 02/04/2004)
O'Donnell v DPP

Delay
Judicial review - Prohibition - Sexual offences - Delay in making complaint - Complainant and prosecutorial delay - Whether defence prejudiced by delay - Dominion - Whether applicant responsible for delay - Whether real and unavoidable risk of unfair trial - Whether accused's ability to defend himself impaired by delay - Whether further prosecution of offences should be prohibited (2001/63JR - O Caoimh J - 26/02/2004)
S (T) v DPP

Delay
Judicial review - Prohibition - Sexual offences - Delay in making complaint - Whether defence prejudiced by delay - Whether real and unavoidable risk of unfair trial - Whether further prosecution of offences should be prohibited - Appeal - Inferences of fact made from evidence by court at first instance - Whether appellate court should depart therefrom (101/2003 - Supreme Court - 19/05/2004)
D (D) v DPP

Extradition
Delay - Practice and procedure - Grounds of ill health - Whether unjust to deliver up plaintiff - Whether plaintiff able to give instructions - Extradition Acts, 1965-1994 (2001/34Sp - O Caoimh J - 02/07/2004)
Carne v Assistant Garda Commissioner

Judicial Review
Delay - Right to expeditious trial - Sexual offences - Prejudice - Dominance - Stress and anxiety caused to accused - Whether order of prohibition should be granted - Whether real risk of unfair trial - Whether defence of accused prejudiced (2001/627JR - Quirke J - 30/04/2004) FL 10068
G (V) v DPP

Judicial review
Delay - Right to expeditious trial - Sexual offences - Pre-trial publicity - Prejudice - Dominance - Whether order of prohibition should be granted - Whether real risk of unfair trial (180/2003 - Supreme Court - 30/07/2004)
O'R (D) v DPP

Sentence
Unduly lenient – Whether trial judge erred in reducing sentence to take account of effect of s. 11(1) of Criminal Justice Act 1984 – Criminal Justice Act, 1993 section 2 (117/2003 – Court of Criminal Appeal – 19/02/2004)
People (DPP) v Doyle

Sexual offences
Delay – Lapse of time – Prosecutorial delay – Pre-trial anxiety – Death of witnesses – Whether delay in making complaints explained – Whether real and serious risk of unfair trial (2001/670JR/705JR – O Caoimh J – 06/02/2004)
O'G v DPP

Library Acquisition

Stone, Richard
The law of entry, search and seizure
4th ed
Oxford: Oxford University Press, 2005
M580.2

Statutory Instruments

Circuit court rules
(European arrest warrant act 2003) 2005
SI 57/2005

Criminal justice act 1994 (section 46 (1) order 2005
SI 18/2005

Criminal justice act 1994 (section 47(1)) order 2005
SI 19/2005

Criminal justice act 1994 (section 55 (1)) order 2005
SI 20/2005

European arrest warrants act 2003 (designated member states) order 2005
SI 27/2005

Rules of the superior courts (European arrest warrant act 2003 and extradition acts 1965 to 2001), 2005
SI 23/2005

DAMAGES

Article

Cassidy, Pamela
No such thing as bad publicity?
2004 (Dec) GLSI 15

EDUCATION

Statutory Instrument

Appointment of special adviser (department of education and science) order, 2004
SI 797/2004

EMPLOYMENT LAW

Contract of employment
Terms and conditions - Implied term - Wrongful dismissal - Whether term that plaintiff could not be dismissed in certain circumstances should be implied into employment contract - Whether plaintiff wrongfully dismissed - Damages (2003/10331P - Laffoy J - 29/10/2004)
McGrath v Trintech Ltd.

Article

Lane, Abbie
Increase your productivity and make stress work to your advantage
2005 (Jan) ITR 93

EQUALITY LAW

Library Acquisitions

Doyle, Oran
Constitutional equality law
Dublin: Thomson Round Hall, 2004
M208.C5

Law Society of Ireland
Discrimination law

London: Cavendish Publishing Limited, 2005
M208.C5

EUROPEAN LAW

Article

Byrne, Dermot
Implementation of EU directive to facilitate collection of trans-EU tax liabilities
2004 (Nov) ITR 503

Statutory Instrument

European arrest warrants act 2003 (designated member states) order 2005
SI 27/2005

EVIDENCE

Library Acquisitions

Inns of Court School of Law
Evidence 2004-2005
2004/2005 ed
Oxford: Oxford University Press, 2004
L90
Thomson Round Hall
The expert witness directory of Ireland 2005
Dublin: Thomson Round Hall, 2004
M604.9.C5

EXTRADITION

Statutory Instrument

Rules of the superior courts (European arrest warrant act 2003 and extradition acts 1965 to 2001), 2005
SI 23/2005

FAMILY LAW

Wardship proceedings
Injunction - Disability - Ward of court - Medical visit - Opposition by family of plaintiff - Whether injunction preventing medical assessment should issue - Whether wardship proceedings interfered with family unit - Courts (Supplemental Provisions) Act, 1961 (2004/2188p - Kelly J - 19/03/2004)
Dolan v Registrar of Wards

Library Acquisition

Solicitors Family Law Association
International aspects of family law
2nd ed
Kent: SFLA, 2004
N170

FISHERIES

Statutory Instruments

Alfonsinos (fisheries management and conservation) regulations 2005
SI 28/2005

Black scabbardfish (fisheries management and conservation) regulations 2005
SI 29/2005

Blue ling (fisheries management and conservation) (no. 2) regulations 2004
SI 795/2004
Cod (fisheries management and conservation) regulations 2005
SI 30/2005

Common sole (fisheries management and conservation) regulations 2005
SI 31/2005

Control of fishing for salmon (amendment) order 2005
SI 21/2005

Control of fishing for salmon by drift net (Kerry fishery district) (amendment) order 2005
SI 22/2005
Deep sea fishing allocations and orange roughy protection areas regulations 2005
SI 44/2005

Fishing effort for vessels in the context of recovery of certain stocks regulations 2005
REG 27/2005, REG 423/2004
SI 45/2005

Fisheries (miscellaneous commercial licenses) (alteration of duties) order, 2004
SI 818/2004

Greater silver smelt (fisheries management and conservation) regulations 2005
SI 32/2005

Haddock (fisheries management and conservation) (no. 2) regulations 2005
SI 34/2005

Haddock (fisheries management and conservation) (no. 3) regulations 2005
SI 35/2005

Haddock (fisheries management and conservation) (no. 4) regulations 2005
SI 36/2005

Haddock (fisheries management and conservation) regulations 2005
SI 33/2005

Hake (fisheries management and conservation) regulations 2005
SI 37/2005

Monkfish (fisheries management and conservation) (no. 2) regulations 2005
SI 39/2005
Monkfish (fisheries management and conservation) regulations 2005
SI 38/2005

Orange roughy (fisheries management and conservation) regulations 2005
SI 40/2005

Plaice (fisheries management and conservation) regulations 2005
SI 41/2005
Road traffic (national car test) (amendment) regulations 2005
SI 62/2005

Roundnose grenadier (fisheries management and conservation) regulations 2005
SI 42/2005

Salmon rod ordinary licenses (alteration of license duties) order 2004
SI 861/2004

Whiting (fisheries management and conservation) regulations 2005
SI 43/2005

FREEDOM OF INFORMATION

Access to records
Data on time allocated to political parties by RTE - Whether Information Commissioner erred - Freedom of Information Act 1997 - Freedom of Information Act 1997 (Prescribed Bodies) Regulations 2000 (2002/16MCA - O Caoimh J - 11/06/2004)
RTE v Information Commissioner

HEALTH

Statutory Instrument

National breast screening board (establishment) order, 2004
SI 891/2004

IMMIGRATION

Asylum
Lack of credibility - Practice and procedure - Judicial review -Fair procedures - Whether decision of Refugee Appeals Tribunal flawed - Whether failure to properly consider evidence of applicant - Refugee Act, 1996 - Illegal Immigrants (Trafficking) Act, 2000 (2003/440JR - Herbert J - 05/03/2003)
A (EJ) v Refugee Applications Commissioner

Asylum
Judicial review - Refugee - Leave application - Discovery - Refugee Act, 1996 - Whether an applicant for leave was entitled to discovery of documents at the leave stage (2003/653 - Peart J - 19/03/2004)
S (G) v Minister for Justice, Equality and Law Reform

Asylum
Ultra vires - Deportation order - Judicial review - Whether the applicants were deprived of fair procedures in their application for asylum - Immigration Act, 1999 (Deportation) Regulations, 2002 - Refugee Act, 1996 (2003/915JR - Butler J - 02/12/2004)
Sibiya v Minister for Justice, Equality and Law Reform

Asylum
Internal relocation - Nigeria - Judicial review - Whether option of internal relocation was something which Tribunal was entitled to take into account (2002/702JR - Peart J - 26/05/2004)
A (O E W) v Minister for Justice, Equality and Law Reform

Asylum
Judicial review - Leave - Correct legal approach to assessment of applicant's credibility - Proper approach where applicant failed to seek state protection - Assessment of cumulative effect of incidents - Forward looking test - Extension of time - Substantial grounds - Illegal Immigrants (Trafficking) Act, 2000 section 5 (2003/5JR - Finlay Geoghegan J - 02/04/2004)
K (N) v Refugee Appeals Tribunal

Asylum
Judicial review - Leave - Manifestly unfounded - Religious persecution - HIV status - Whether tribunal erred (2003/542JR - Peart J 26/05/2004)
O (A) v Refugee Appeals Tribunal

Statutory Instruments

Immigration act 1999 (deportation) regulations 2005
SI 55/2005

Immigration act 2003 (removal of places of detention) regulations 2005
SI 56/2005

INFORMATION TECHNOLOGY

Article

Burnett, Rachel
Drafting and negotiating computer contracts
2nd ed
Haywards Heath: Tottel Publishing, 2005
L157

INTERNATIONAL LAW

Library Acquisitions

Capper, Phillip
International arbitration: a handbook
3rd ed
London: LLP, 2004
C1250

Solicitors Family Law Association
International aspects of family law
2nd ed
Kent: SFLA, 2004
N170

JUDICIAL REVIEW

Certiorari
Planning and environmental law - Practice and procedure - Leave to appeal - Administrative law - EIS - Functus officio - Whether points raised of exceptional public importance - Whether certificate of appeal should be granted - Local Government (Planning and Development) Act, 1963 - 1999 - Planning and Development, Act 2000 (1999/358 - Murphy J - 04/02/2004)
Arklow Holidays Ltd v Wicklow County Council

Certiorari
Mandamus - Unreasonableness - Transfer of Sentenced Persons Act, 1995 - Transfer of Sentenced Persons (Amendment) Act, 1997 - Whether the Minister's decision was unreasonable or irrational in that there was no material to sustain that decision (2002/111JR - Kearns J - 05/11/2004)
Nash v Minister for Justice, Equality and Law Reform

Customs offence
Declaratory relief - Whether section 89(b) of the Finance Act, 1997 is unconstitutional (2003/168 & 169JR - O Caoimh J - 30/07/2004)
Osmanovic v DPP

Delay
Injunction - Whether the delay in complaining impaired the accused's ability to defend himself and created a real and serious risk of an unfair trial (2002/23JR - Smyth J - 14/05/2004)
T (D) v DPP

Employment law
Fair procedures - Disciplinary proceedings - Statutory interpretation - Allegations of misconduct - Prison - Time limits - Whether holding of disciplinary inquiry in breach of fair procedures - Whether respondent precluded from proceeding with disciplinary hearing - Whether memorandum incorporated into legislation - Prison (Disciplinary Code for Officers) Rules, 1996 SI 289/1996 (2002/799JR - Smyth J - 05/05/2004)
Curley v Governor of Arbour Hill Prison

Fraud
Conspiracy - Obtaining by false pretences - Prohibition - Whether the delay by the respondents in prosecuting the offences breached the applicant's right to a trial in due course of law and with due expedition (2003/448JR - O'Leary J - 29/07/2004)
Leahy v Judges of the Circuit Court

Personal Injuries Assessment Board
Jurisdiction - Procedures - Personal Injuries Assessment Board adopting procedure of refusing to communicate with claimant's solicitors - Whether respondent acting outside statutory authority by adopting procedure of refusing to communicate with claimant's solicitor - Whether should be quashed - Whether respondent acting ultra vires - Personal Injuries Assessment Board Act 2003, section 7 (2004/785JR - MacMenamin J - 25/01/2005)
O'Brien v Personal Injuries Assessment Board

Prohibition
Sexual offence - Whether the Garda° were required to seek out and obtain statements from individuals whom the claimant met the night prior to the alleged incident - Bunreacht na Eireann Article 38.1 (2004/267JR - O Caoimh J - 18/05/2004)
C (D) v DPP

Prohibition
Delay - Whether or not the abuse may have caused or created a disability of such a degree as to prevent the complainant from bringing forward a complaint - Whether the delay in complaining created a real risk of an unfair trial for the applicant (2001/628JR - Kearns J - 22/10/2004) FL 10142
H (T) v Kennedy

Prohibition
Delay - Lapse of time before applicant charged - Delay of 4 1/2 years in District Court - Documentary evidence - Whether fair trial not possible (2002/773JR - O'Caoimh J - 09/07/2004)
Noonan (Hoban) v DPP

LAND LAW

Property
Completion notice - Specific performance - Motion to dismiss - Delay - Claim for interest - Conveyancing - Contract - Practice and procedure - Time limits - Service of completion notice - Whether vendors entitled to interest - Whether claim should be dismissed (2001/14106P - Smyth J - 09/06/2004)
Birmingham v Coughlan

LEGAL PROFESSION

Library Acquisition

Sarkin, Jeremy
The administration of justice: current themes in comparative perspective
Dublin: Four Courts Press, 2004
L205

Statutory Instrument

Rules of the superior courts (lawyers' establishment regulations) 2005
SI 15/2005

LIQUIDATION

Appeal
Application for extension of time to appeal - Whether the defendant's application was vexatious or an abuse of process (1996/2FJ - Peart J - 15/11/2004)
London and Global Ltd v Lamb

LOCAL GOVERNMENT

Library Acquisition

School of Law, Trinity College
Local authorities' new legal duties: implications for practice
M361.C5

MEDICAL LAW

Statutory Instrument

National breast screening board (establishment) order, 2004
SI 891/2004

NEGLIGENCE

Damages
Road traffic accident - General and special damages - Whether plaintiff entitled to damages for infliction of emotional suffering (2001/16312P - Ryan J - 23/02/2004)
O'Connor v O'Driscoll

Library Acquisition

School of Law, Trinity College
The civil liability and courts act 2004: practical implications for personal injuries litigation.
Dublin: School of Law, Trinity College, 2004
N33.3.C5

PENSIONS

Articles

Kavanagh, James
The winding-up of occupational pension schemes
2005 (Jan) ITR 68
Thornton, Fiona
Taxation of pensions on trial
2004 (Nov) ITR 499

PLANNING & ENVIRONMENTAL LAW

Judicial review
Certiorari - Whether European directives correctly transposed - Whether leave to seek judicial review should be granted (2004/34JR - Kelly J - 21/04/2004)
Cosgrave v An Bord Pleanála

Judicial review
Time limits - Whether good and sufficient reason to extend time - Planning and Development Act, 2000 section 50 (2004/363JR - Peart J - 30/06/2004)
Marshall v Arklow Town Council

Library Acquisition

Dodd, Stephen
The planning and development act 2000
Dublin: Round Hall Ltd, 2004
N96.C5

PRACTICE & PROCEDURE

Amendment of pleadings
Notice of discontinuance - Prejudice - Whether amendment should be allowed - Whether notice of discontinuance could be withdrawn - Rules of the Superior Courts, 1986 (1996/2739P - O'Sullivan J - 29/01/2004)
Smyth v Tunney

Costs
Public interest - Defendant resident outside the jurisdiction - Whether costs follow the event (1994/1751P - Peart J - 23/06/2004)
Short v Ireland

Costs
Lodgment - Taxation of costs — Whether the plaintiff was entitled to costs on the High Court scale or on the Circuit Court scale - Rules of the Superior Courts 1986 (RSC) Order 22 r 4 (3) of the -Courts and Courts Officers Act, 1995 section 27(3) (324/2003 - Supreme Court - 14/05/2004)
Cronin v Astra Business Systems Ltd

Costs
General rule on costs - Election petition - Exceptional costs orders - Rules of Court - No allegation of wrongdoing - Rules of Superior Courts Order 99 - Electoral Act, 1992 (2003/43MCA - Kelly J - 31/03/2004)
Sinnott v Martin

Discovery
Matrimonial proceedings - Further and better discovery - Financial information - Master of the High Court (2003/36 - Master Honohan - 28/07/2004)
D (F) v D (PJ)

Dismissal of proceedings
Military service - Medical grounds - Want of prosecution - Discovery process - Delay in producing documents - Whether claim should be dismissed for want of prosecution - Whether delay had prejudiced defendants - Rules of the Superior Courts, 1986 (1998/11905P - Laffoy J - 23/01/2004)
McGrath v Minister for Defence

Litigation
Commercial law - Notice for further and better particulars - Whether particulars already furnished - Rules of the Superior Courts 1986 (1996/8200P - Finnegan P - 16/01/2004)
A.S.I Sugar Ltd v Greencore

Release of documents by third parties
Request not pursuant to order, rule or statutory provision - Documents deemed to be in possession of the Special Criminal Court - Trial of respondents concluded - Appeal procedure for all respondents not concluded - Request in nature to discovery procedure - Offences Against the State Act, 1939 sections 41, 43 (Special Criminal Court - 07/02/2005)
People (DPP) v McKevitt

Striking out
Discovery - Defence -Whether an order striking out the defence for failure to comply with discovery should be discharged when the order for discovery is complied with (1997/5233P - O'Leary J - 14/07/2004)
Joseph O'Connor (Nenagh) Ltd v ESB

Statutory Instruments

Circuit court rules (European arrest warrant act 2003) 2005
SI 57/2005

Rules of the Superior Courts (order 77 (amendment) rules), 2005
SI 51/2005

PROBATE

Library Acquisition

School of Law, Trinity College
New developments in probate and succession: implications for legal practitioners
Dublin: School of Law, Trinity College, 2004
N127.C5

PROPERTY

Easements
Rights of way - Prescription - Doctrine of lost modern grant - Whether use of right of way sufficient to warrant implication of lost modern grant - Whether right of way should be inferred - Whether presumption rebuttable - Abandonment - Non-use of right of way for number of years - Abandonment not lightly inferred - Whether right of way abandoned by dominant tenement - Prescription Act 1832, sections 1, 2 and 4 - Prescription (Ireland) Act 1858 (2001/135CA - Herbert J - 14/05/2004)
Orwell Park Management Ltd v Henihan

Article

Murphy, Alan
A practical outline of issues relating to co-ownership agreements
2004 (Nov) ITR 506

REFUGEES

Statutory Instruments

Immigration act 1999 (deportation) regulations 2005
SI 55/2005

Immigration act 2003 (removal of places of detention) regulations 2005
SI 56/2005

ROAD TRAFFIC

Judicial review
Road traffic offences - Disqualification order - Stay - Whether Circuit Court jurisdiction to make disqualification order - Road Traffic Act, 1961 section 30 - Rules of the District Court, Order 194 (2000/97JR - Smyth J - 15/06/2004)
Waldron v Earley

Offences
Consultative case stated - Drunken driving - Whether the accused was entitled to be informed by An Garda Siochana of the possible defences to a prosecution for failure to provide two breath samples - Courts (Supplemental Provisions) Act, 1961 section 52 - Road Traffic Act, 1961 section 49(8) - Road Traffic Act, 1994 (2002/68SS - O Caoimh J - 20/04/2004)
DPP v Cabot

Statutory Instruments
Road traffic act 2004 (commencement) (parts 1 and 2 and sections 27 and 32) order 2005
SI 8/2005

Road traffic act 2004 (commencement) (parts 3 and 4) order 2005
SI 26/2005

Road traffic (construction, equipment and use of vehicles) (amendment) regulations 2005
SI 12/2005
Road traffic (ordinary speed limits - certain vehicles) regulations 2005
SI 9/2005

Road traffic (speed limit - traffic signs) regulations 2005
SI 10/2005

Road traffic (traffic and parking) (amendment) regulations 2005
SI 11/2005

SHIPPING

Maritime lien
Contract - Arrest of vessel - Credit and security - Claim for fuel supplied - Vessel operated by third party - Whether ship could be arrested in respect of debts incurred by third party - Brussels Convention on the Arrest of Seagoing Ships, 1952 (2003/10930P - Finnegan P - 27/04/2004)
Campus Oil Ltd v Owners of MF/V Avro Hunter

SOCIAL WELFARE

Library Acquisition

Social welfare (miscellaneous provisions) act 2002 (section 16) (commencement) order 2005
SI 16/2005
Social welfare (miscellaneous provisions) act 2002 (section 16) (no. 2) (commencement) order 2005
SI 58/2005

SOLICITORS

Article

O'Boyle, Conal
The quiet man
2004 (Dec) GLSI 12

SPECIFIC PERFORMANCE

Appeal
Proprietary estoppel - Circuit appeal - Whether the plaintiffs and the defendants reached an agreement in relation to the surrender of a right of way (2004/133CA - Hardiman J - 02/04/2004)
Owens v Duggan

SUCCESSION

Library Acquisition

School of Law, Trinity College
New developments in probate and succession: implications for legal practitioners
Dublin: School of Law, Trinity College, 2004
N127.C5

TAXATION

Corporation tax
Assessment of - Whether the process of timber harvesting qualified as a process of manufacture of goods - Taxes Consolidation Act, 1997 (2003/853R - Carroll J - 21/07/2004)
Neeson Inspector of Taxes v Longford Timber Contractors Ltd

Employed person
Merchandiser - Whether a contract of service or for services - Whether merchandiser insurable person and within PAYE system of taxation - Tests to be applied (2003/959R - Carroll J - 07/12/2004)
Lynch (Inspector of Taxes) v Neville Brothers Ltd

Taxation
Statutory interpretation - Exercise of share options - Definition of emoluments - Case stated - Whether respondent chargeable person - Whether respondent liable for surcharge - Taxes Consolidation Act, 1997 (2003/963R - Carroll J - 21/07/2004)
Crowley (Inspector of Taxes) v Forde

Articles

Byrne, Audrey
Taxation issues affecting co-habitees and proposals for law reform
2004 (Nov) ITR 485

Byrne, Dermot
Implementation of EU directive to facilitate collection of trans-EU tax liabilities
2004 (Nov) ITR 503

Cannon, Patrick
Stamp duty land tax planning for Irish investors in UK real estate
2005 (Jan) ITR 73

Gallagher, John
The principles of VAT - impact of ECJ case law
2005 (Jan) ITR 90

Gallagher, Lorna
VAT repayments revisited - the foundation for a hidden precedent
2004 (Nov) ITR 514

Kennon, Ethna
Implications of VAT invoicing regulations for companies
Kelly, Melissa
2004 (Nov) ITR 523

Kerr, Fred
French capital gains tax new rules from 1 January 2004
2005 (Jan) ITR 63

Maguire, Tom
Section 811 TCA - a brief review and the Canadian connection
2004 (Nov) ITR 489

McLoughlin, Kevin
Bringing it all back home! The new US dividend repatriation incentive - an overview
2005 (Jan) ITR 45

O'Connor, Michael
VAT and reversionary interests in property
2005 (Jan) ITR 81

Thornton, Fiona
Taxation of pensions on trial
2004 (Nov) ITR 499

Trueick, Jim
Exemption from income tax for certain payments from employments
2004 (Nov) ITR 477

Twohig, Brendan
Transfer of a site to a child - CGT and stamp duty exemptions
2005 (Jan) ITR 59

Library Acquisitions

Law Reform Commission
Report on a fiscal prosecutor and a revenue court
Dublin: Law Reform Commission, 2004
M335.C5

Revenue Commissioners
Guide to the legislative process: Revenue legislation services
Dublin: The Revenue Commissioners: 2004
M335.C5

Statutory Instruments

Finance act 2004 (Commencement of section 18(2)) order 2004
SI 758/2004

Finance act 2004 (commencement of section 28) order 2004
SI 814/2004

TORTS

Negligence
Concurrent wrongdoer - Whether the Garda° acted in breach of their duty of care in pursuing a driver who was traveling at high speed for committing a traffic offence (LK5023 - Finlay Geoghegan J - 17/02/2004)
Hayes v Minister for Finance

Negligence
Personal injuries - Road traffic accident - Damages - Assessment (2001/16113P - O'Donovan J - 30/07/2004)
Lyden v McBreen

Personal Injuries
Damages - Whether the plaintiff was capable of obtaining work in the future (1997/4093p - Smith J - 22/03/2000)
O'Connell v McCormaic

Personal injuries
Duty of care - Forseeability - Occupational stress - Damage to health of employee - Whether reasonably foreseeable - Whether breach of duty by employer not to cause stress-related injury to employee - Health, Safety and Welfare at Work Act 1989, sections 6 and 12 - Safety, Health and Welfare at Work (General Application) Regulations 1993 (S.I. No. 44), regulations 5, 8, 9, 10, 11 and 13 (2003/10331P - Laffoy J - 29/10/2004)
McGrath v Trintech Ltd.

Library Acquisition

School of Law, Trinity College
Local authorities' new legal duties: implications for practice: Trinity
M361.C5

TRANSPORT

Library Acquisitions

Clarke, Malcolm Alister
Contracts of carriage by land and air
London: LLP, 2004
Yates, David
N328

Glass, David A.
Freight forwarding and multimodal transport contracts
London: LLP, 2004
N328

Statutory Instruments

Carriage of dangerous goods by road act 1998 (appointment of competent authorities) order 2005
SI 24/2005

Carriage of dangerous goods by road (fees and section 18 payments) regulations 2005
SI 25/2005

Iarnród êireann - Irish Rail (Killarney - Tralee) (Farranfore level crossing) order 2005
SI 50/2005

Iarnród êireann - Irish Rail (Mallow - Tralee) (Banteer level crossing)
Order 2005
SI 49/2005

Transport (delegation of ministerial functions) order 2004
SI 840/2004

TRUSTS

Library Acquisition

Law Reform Commission
Consultation paper on trust law general proposals
Dublin: Law Reform Commission, 2005
N210.C5

AT A GLANCE
RULES OF COURT

Circuit court rules (European arrest warrant act 2003) 2005
SI 57/2005

Rules of the superior courts (European arrest warrant act 2003 and extradition acts 1965 to 2001), 2005
SI 23/2005

Rules of the superior courts (lawyers' establishment regulations) 2005
SI 15/2005

Rules of the Superior Courts (order 77 (amendment) rules), 2005
SI 51/2005

European directives implemented into Irish Law up to 18/03/2005 Information compiled by Robert Carey & Vanessa Curley, Law Library, Four Courts.

Control of animal remedies and their residues (amendment) regulations 2004
DIR 2003/74, DIR 2001/82
SI 827/2004

European Communities (additives, colours and sweeteners in foodstuffs) (amendment) regulations 2005
DIR 2003/115, DIR 1994/35
SI 61/2005

European Communities (avian influenza) (control on imports of avian products and live birds from certain Asian countries) (amendment) regulations 2005
DEC 2004/851
SI 913/2004

European Communities (avian influenza) (control on imports of avian products and live birds from certain Asian countries) regulations 2004
DEC 2004/122
SI 432/2004

European Communities (conservation of wild birds (Aughris Head SPA 004133)) regulations, 2004
DIR 1979/409, DIR 1992/43
SI 910/2004

European Communities (conservation of wild birds (Ardboline and Horse Island SPA 004135)) regulations, 2004
DIR 1979/2004, DIR 1992/43
SI 911/2004

European Communities (conservation of wild birds (Duvillan Islands SPA 0044111)) regulations, 2004
DIR 1979/409
DIR 1992/43, Articles 6(2), (3) and (4) and Article 7
SI 895/2004

European Communities (conservation of wild birds (Helvick Head coast SPA 004112)) regulations, 2004
DIR 1979/409, DIR1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 896/2004

European Communities (conservation of wild birds (Illanacrone and Inishkerragh SPA 0004132)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 909/2004

European Communities (conservation of wild birds, (Illaunonearaun SPA 004114)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 897/2004

European Communities (conservation of wild birds, (Inishduff SPA 004115)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 898/2004

European Communities (conservation on wild birds (Inishkeel SPA 004116)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 899/2004

European Communities (conservation of wild birds (Ireland's Eye SPA 0004117)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 900/2004

European Communities (conservation of wild birds (Keeragh Islands SPA 004118)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 901/2004

European Communities (conservation of wild birds) (Loop Head SPA 004119)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 902/2004

European Communities (conservation of wild birds (Magharee Islands SPA 004125)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 907/2004

European Communities (conservation of wild birds, (Rathlin O'Birne SPA 004120)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (6) and Article 7
SI 903/2004

European Communities (conservation of wild birds (Roaninish SPA 004121)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 904/2004

European Communities (conservation of wild birds (Skerries Island SPA 004122)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 905/2004

European Communities (conservation of wild birds (Slyne Head Islands SPA 004123)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 906/2004

European Communities (conservation of wild birds (Sovereign Islands SPA 004124)) regulations, 2004
DIR 1979/409, DIR 1992/43
SI 912/2004

European Communities (conservation of wild birds (Tormore Island SPA 004126)) regulations, 2004
DIR 1979/409, DIR 1992/43, Articles 6 (2), (3) and (4) and Article 7
SI 908/2004

European Communities (consolidated supervision of credit institutions) (amendment) regulations 2004
DIR 2002/87
SI 730/2004

European Communities (credit institutions) (fair value accounting) regulations 2004
DIR 2001/65
SI 720/2004

European communities (distance marketing of consumer financial services) regulations 2004
DIR 2002/65
SI 853/2004

European communities (financial conglomerates) regulations 2004
DIR 2002/87
SI 727/2004

European Communities (foodstuffs intended for particular nutritional uses) regulations 2005
See SI as it implements a lot of directives
SI 66/2005

European Communities (hygiene of foodstuffs) (amendment) regulations 2005
DIR 2004/4, DIR 1996/3, DIR 1993/43
SI 67/2005

European Communities (income tax relief for investment in corporate trades - business expansion scheme and seed capital scheme) regulations 2004
DEC C-2004/3617
SI 757/2004

European Communities (internal market in electricity) regulations 2005
DIR 2003/54, DIR 1996/92
SI 60/2005

European Communities (introduction of organisms harmful to plants or plant products) (prohibition) (amendment) regulations 2004
DIR 2003/116
SI 117/2004

European Communities (introduction of products of animal origin from third countries for human consumption) regulations 2004
DIR 2002/99
SI 893/2004

European Communities (licensing and supervision of credit institutions) (amendments) regulations 2004
DIR 2002/87
SI 734/2004

European Communities (life assurance) (amendment) regulations 2004
DIR 2002/87
SI 733/2004

European Communities (life assurance) framework (amendment No. 2) regulations 2004
DIR 2002/87
SI 729/2004

European Communities (Newcastle disease) (control on imports of avian products from Bulgaria) regulations 2005
DEC 2004/908
SI 17/2005

European Communities (non-life insurance) (amendment) regulations 2004
DIR 2002/87
SI 732/2004

European Communities (non-life insurance) framework (amendment) regulations 2004
DIR 2002/87
SI 728/2004

European Communities (nutrition labelling for foodstuffs) regulations 2005
DIR 1990/496, DIR 2003/120
SI 65/2005

European Communities (pesticide residues) (foodstuffs of animal origin) (amendment) (No. 2) regulations 2004
See SI as it implements a lot of directives
SI 239/2004

European communities (pesticide residues) (cereals) (amendment) (no.3) regulations 2004
See SI as it implements a lot of directives
SI 576/2004

European Communities (protection of consumers in respect of contracts made by means of distance communication)

(amendment) regulations 2005
DIR 2002/65
SI 71/2005

European Communities (sampling methods and methods of analysis for the official control of the levels of certain contaminants in foodstuffs) regulations 2005
See SI as it implements a lot of directives
SI 68/2005

European Communities (supplementary supervision of insurance undertakings in insurance group) (amendment) regulations 2004

DIR 2002/87
SI 731/2004

European communities (units of measurement) (amendment) regulations 2004
DIR 89/617
SI 859/2004

Fishing effort for vessels in the context of recovery of certain stocks regulations 2005
REG 27/2005, REG 423/2004
SI 45/2005

Bills in progress up to 07/03/2005 Information compiled by Damien Grenham, Law Library, Four Courts.

Adoptive leave bill, 2004
Committee -Seanad

Broadcasting (amendment) bill, 2003
1st stage -Dail

Child trafficking and pornography (amendment) (no.2) bill, 2004
1st stage- Dail

Civil partnership bill, 2004
1st stage- Seanad

Comhairle (amendment) bill, 2004
1st stage - Dail

Consumer rights enforcer bill, 2004
1st stage -Dail

Criminal Justice bill, 2004
1st stage-Dail

Criminal law (insanity) bill, 2002
Committee - Seanad

Disability bill, 2004
2nd stage - Dail

Dormant accounts (amendment) bill, 2004
Report- Seanad

Driver testing and standards authority bill, 2004
1st stage- Dail

Electricity regulation (amendment) bill, 2003
2nd stage - Seanad

Electoral (amendment) bill, 2005
1st stage- Dail

Enforcement of court orders bill, 2004
2nd stage- Dail

Enforcement of court orders (no.2) bill, 2004
1st stage- Seanad
Finance bill, 2005
1st stage-Dail

Fines bill, 2004
1st stage- Dail

Freedom of information (amendment) (no.2) bill, 2003
1st stage - Seanad

Freedom of information (amendment) (no.3) bill, 2003
2nd stage - Dail

Fur farming (prohibition) bill, 2004
1st stage- Dail

Garda Siochana bill, 2004
Committee-Seanad

Grangegorman development agency bill, 2004
1st stage - Dail

Health (amendment) bill, 2005
Ist stage- Dail

Health (amendment) (no.2) bill, 2004
1st stage- Dail

Health and social care professionals bill, 2004
Report stage- Seanad

Housing (state payments) bill, 2004
1st stage- Seanad

Human reproduction bill, 2003
2nd stage - Dail

International criminal court, 2003
1st stage - Dail

International peace missions deployment bill 2003
2nd stage - Dail

Interpretation bill, 2000
Committee- Dail

Irish nationality and citizenship and ministers and secretaries (amendment) bill, 2003
Report - Seanad

Land bill, 2004
2nd stage - Seanad

Law of the sea (repression of piracy) bill, 2001
2nd stage - Dail (*Initiated in Seanad*)

Local elections bill, 2003
1st stage -Dail

Maritime safety bill, 2004
1st stage-Seanad

Money advice and budgeting service bill, 2002
1st stage - Dail (*order for second stage*)

National economic and social development office bill, 2002
2nd stage - Dail (*order for second stage*)
National transport authority bill, 2003
1st stage - Dail

Offences against the state acts (1939 to 1998) repeal bill, 2004
1st stage-Dail

Parental leave (amendment) bill, 2004
1st stage - Seanad

Patents (amendment) bill, 1999
Committee - Dail

Planning and development (acquisition of development land) (assessment of compensation) bill 2003
1st stage - Dail

Planning and development (amendment) bill, 2003
1st stage - Dail

Planning and development (amendment) bill, 2004
1st stage - Dail

Planning and development (amendment) bill, 2005
1st stage - Dail

Planning and development (amendment) (no.2)

bill, 2004
1st stage -Dail

Planning and development (amendment) (no.3) bill, 2004
1st stage- Dail

Postal (miscellaneous provisions) bill, 2001
1st stage -Dail (*order for second stage*)
Proceeds of crime (amendment) bill, 1999
Report - Dail

Proceeds of crime (amendment) bill, 2003
1st stage - Dail
Public service management (recruitment and appointments) bill, 2003
1st stage - Dail

Railway safety bill, 2001
Committee - Dail

Registration of deeds and title bill, 2004
1st stage - Seanad

Registration of lobbyists bill, 2003
1st stage- Dail

Residential tenancies bill, 2003
2nd stage - Dail

Safety, health and welfare at work bill, 2004
1st stage- Dail

Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000
Committee - Dail

Sea pollution (miscellaneous provisions) bill, 2003
1st stage - Seanad

Social welfare and pensions bill, 2005
1st Stage - Dail

Statute law revision (pre-1922) bill, 2004
1st stage - Seanad

Sustainable communities bill, 2004
1st stage - Dail

The Royal College of Surgeons in Ireland (Charter Amendment) bill, 2002
2nd stage - Seanad **[p.m.b.]**

Totalisator (amendment) bill, 2005
1st stage - Seanad

Transfer of execution of sentences bill, 2003
Committee - Seanad

Twenty-fourth amendment of the Constitution bill, 2002
1st stage- Dail
Twenty-seventh amendment of the constitution bill 2003
2nd stage - Dail

Twenty-seventh amendment of the constitution (No.2) bill 2003
1st stage - Dail

Veterinary practice bill, 2004
1st stage- Seanad

Waste management (amendment) bill, 2002
2nd stage- Dail

Waste management (amendment) bill, 2003
1st stage - Dail
Water services bill, 2003
1st stage - Seanad

Whistleblowers protection bill, 1999
Committee - Dail

Acts of the Oireachtas 2005 (as of 18/03/2005)

2/2005 Criminal Justice (Terrorist Offences) Act 2005
Signed 08/03/2005

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
IELJ = Irish Employment Law Journal
IFLR = Irish Family Law Reports
IILR = Irish Insurance Law 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

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

The P.I.A.B. and claims involving the M.I.B.I. - A Reply to the Alternative View

Bernard Barton SC, Cathleen Noctor BL and Richard Lyons BL

Introduction

The last edition of the Bar Review published an article[1] in which, Stuart Gilhooly, solicitor, offered an alternative view to that expressed by Cathleen Noctor B.L. and Richard Lyons B.L. ("the authors") in the November 2004 edition of the Bar Review[2]. The opportunity to reply to Mr. Gilhooly's article and to expand upon the observations made in November is appreciated. It is proposed to reply to the following points and observations made by Mr. Gilhooly, namely:-

1. a personal injuries claim against the M.I.B.I. falls within the provisions of Section 3(d) of the P.I.A.B. Act 2003 ("the Act") and the "very wide definition" of "civil action" in Section 4(1) of the Act;
2. the M.I.B.I. can be a respondent to a claim before the P.I.A.B.;
3. a declaration to enforce a judgment against the M.I.B.I. in an uninsured motorist claim does not constitute another cause of action on the basis that the relief claimed does not stand on its own and is consequential on an award for damages against the uninsured motorist.
4. where a person is caused injury by an uninsured motorist, it is sensible to identify both the M.I.B.I. and the P.I.A.B. as respondents on the P.I.A.B. application form so that, if the award is rejected by either party, proceedings can be issued against both;
5. if a claimant issues proceedings directly against the M.I.B.I. without first applying to the P.I.A.B., s/he risks the possibility of the M.I.B.I. defending the proceedings on the basis that they were brought in breach of the Act and, if the M.I.B.I. succeeded in this defence, the claimant may find that s/he is statute-barred from subsequently making an application to the P.I.A.B.

For the purposes of this article, "uninsured motorist" refers to the owner/user of a mechanically propelled vehicle for which there is no insurance or inadequate insurance and "untraced motorist" is used in relation to a claim arising out of injury caused by a motor vehicle whose owner and user remains unidentified or untraced.

"Civil action" under the P.I.A.B. Act 2003

Pursuant to Section 3 of the Act, the P.I.A.B. is now operational, *inter alia*, in relation to:-

"(b) a civil action by a person against another person arising out of that other's ownership, driving or use of a mechanically propelled vehicle, ...

(d) a civil action not falling within [Section 3(a)-(c) of the Act] (other than one arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person)."

Section 4(1) defines "civil action" as meaning:-

"an action intended to be pursued for the purpose of recovering damages, in respect of a wrong, for-

(a) personal injuries, or

(b) both such injuries and damage to property (but only if both have been caused by the same wrong),

but does not include-

(i) an action intended to be pursued in which, in addition to damages for the foregoing matters, it is bona fide intended, and not for the purpose of circumventing the *operation of section 3*, to claim damages or other relief in respect of any other cause of action ...".

It is clear from the foregoing that the P.I.A.B. has jurisdiction in relation to certain "civil actions". The meaning of a "civil action" cannot, however, be considered in isolation from the meaning of "wrong".

"Wrong" under the P.I.A.B. Act 2003

Section 4(1) of the Act provides that "wrong" has the same meaning as it has in the Civil Liability Act 1961[3]. Thus, "wrong" is "a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed, or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the wrong is intentional."[4] It is submitted that the jurisdiction of the P.I.A.B. is confined in the foregoing terms.

1. Gilhooly, *PIAB and MIBI claims - An Alternative View*, Bar Review, Volume 10, Issue 1 (February, 2005), p. 25.
2. Noctor and Lyons, *Personal Injuries Assessment Board and Claims Involving the M.I.B.I.*, Bar Review, Volume 9, Issue 5 (November, 2004), p. 160.
3. Section 2(1) of the Civil Liability Act 1961.
4. Section 4(1) of the Act.

Cause of action against the M.I.B.I.

Regardless of whether one examines the nature of the cause of action that a person might have against the M.I.B.I. by reference to Section 3(b) or Section 3(d) of the Act, it is necessary to scrutinise whether or not a person's cause of action against the M.I.B.I. is "an action intended to be pursued for the purpose of recovering damages in respect of [a tort, breach of contract or breach of trust...]". This requires a consideration of the meaning of "cause of action", the classic formulation of which is to be found in the judgment of Lord Esher M.R. in *Read v. Brown*[5], as follows:-

> "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved".[6]

The nature of a claimant's cause of action against the M.I.B.I. depends upon whether s/he was injured by an uninsured or untraced motorist. The facts that a claimant must prove in order to succeed against the M.I.B.I. are dictated by the terms of the successive agreements concluded between the M.I.B.I. and various government Ministers ("the M.I.B.I. Agreements").

A claimant who is injured by an uninsured motorist must prove, *inter alia*:-

1. s/he was injured by the negligent user of a mechanically propelled vehicle ("vehicle") in a public place[7];
2. the user complained of is user for which compulsory insurance is required by Section 56 of the Road Traffic Act 1961;
3. s/he has obtained judgment against the user[8] of that vehicle[9];
4. the judgment was not satisfied in full within 28 days from the date upon which the claimant became entitled to enforce the judgment[10];
5. s/he has complied with the conditions precedent to the liability of the M.I.B.I. under the relevant M.I.B.I. Agreement;[11] and
6. s/he "enforce[s] the provisions of the Agreement" by the means identified by the Agreement. In this regard, Clause 2 of the 2004 Agreement provides that a claimant for compensation "must" seek to enforce it by "citing the [M.I.B.I.] as co-defendants in any proceedings against the owner and/or user of the vehicle giving rise to the claim ..."[12].

A claimant who is injured by an untraced motorist must prove, *inter alia:-*

1. s/he was injured by the negligent user of a vehicle in a public place[13]; and
2. the user complained of is user for which compulsory insurance is required by Section 56 of the Road Traffic Act 1961;
3. the owner and user of the vehicle remain unidentified or untraced.[14]
4. s/he has complied with the conditions precedent to the liability of the M.I.B.I. under the Agreement;[15] and
5. s/he "enforce[s] the provisions of the Agreement" by the means identified by the Agreement. In this regard, Clause 2 of the 2004 Agreement provides that a claimant for compensation "must" seek to enforce it by "citing the [M.I.B.I.] as sole defendant".[16]

A claimant does not have a cause of action against the M.I.B.I. unless s/he can establish all of the facts in either of the above categories. The cause of action against the M.I.B.I. in each of the foregoing situations is completely different to a cause of action against a traced and (un)insured motorist. In the latter situation, the claimant's cause of action may be commonly described as one in negligence and, more specifically, the claimant must prove that the motorist owed him/her a duty of care, breach of that duty of care, causation and damage. A cause of action against the M.I.B.I. is entirely different. It is not proved by establishing the factual components of a tort alone but requires, in addition, proof of all of the facts in either of the above categories. Mr. Gilhooly's view is that Section 4(1)(i) was not intended to exclude M.I.B.I. claims from the P.I.A.B.'s jurisdiction. This contention is, however, disputed and it is submitted that the Act is open to being interpreted as having been intended not to give the P.I.A.B. jurisdiction in respect of M.I.B.I. claims. This view is not intended to be an attack on the P.I.A.B. but is proposed as an objective analysis of what appears to be the position with respect to claims against the M.I.B.I. Thus, it is submitted that a claimant's cause of action against the M.I.B.I. is not a civil action that is covered by the P.I.A.B. in terms of Section 4(1)(i) and is entirely distinct from any cause of action that a claimant has against a traced and (un)insured motorist who injures him/her. While Mr. Gilhooly's submission is that Section 4(1)(i) "was intended to deal with situations where there are two separate causes of action arising out of the one accident", we submit that it is incorrect to interpret the combined effect of Section 3 and Section 4(1)(i) as affording the P.I.A.B. jurisdiction in relation to claims against the M.I.B.I.

It is submitted that the distinction between the causes of action is apparent from the fact that the M.I.B.I. is not automatically liable to satisfy a judgment entered against an uninsured motorist that is not satisfied within 28 days. Thus, the current legal position is that judgment in default of appearance or defence against an uninsured motorist does not bind the M.I.B.I. *per se*. The Agreements do not identify the M.I.B.I. with the uninsured motorist or indeed an untraced motorist at any time prior to the claimant demonstrating that the conditions precedent to the liability of the M.I.B.I. have been met.[17]
By way of example, the M.I.B.I. may defend proceedings in which a

5. (1888) 22 Q.B.D. 128.
6. *Ibid.* at p. 131 (citing *Cooke v. Gill Law* Rep. 8 C.P. 107). This definition was approved by the Supreme Court in *Hegarty v. O'Loughran* [1990] 1 I.R. 148 at p. 154.
7. Clause 4 of the 2004 Agreement and Clause 4 of the 1988 Agreement.
8. Having regard to Section 118 of the Road Traffic Act 1961 it may also be necessary for the claimant to name the owner of the vehicle as a defendant if the owner was not the user thereof at the time of the accident.
9. Clause 4 of the 2004 Agreement and Clause 4 of the 1988 Agreement.
10. *Ibid.*
11. Clause 3 of the 2004 Agreement and Clause 3 of the 1988 Agreement.
12. Clause 2.2 of the 2004 Agreement.
13. Clause 4 of the 2004 Agreement and Clause 4 of the 1988 Agreement.
14. Clause 6.1 of the 2004 Agreement and Clause 6 of the 1988 Agreement.
15. Clause 3 of the 2004 Agreement and Clause 3 of the 1988 Agreement.
16. Combined effect of Clause 2.2-2.3 of the 2004 Agreement and Clause 2(2)-(3) of the 1988 Agreement. See *Feeney v. Dwane and O'Connor* and *Feeney v. M.I.B.I.* (unreported, High Court, *ex tempore*, Johnson J., 30th July, 1999) and *Bowes v. M.I.B.I.* [2000] 2 I.R. 79.
17. See *Curran v. Gallagher, Gallagher and M.I.B.I.* (Unreported, Supreme Court, per Keane and Lynch JJ., (Murphy J. dissenting), 7th May, 1997) and Rothwell v. M.I.B.I. [2003] 1 I.R. 268, per Hardiman J. (Murray and Geoghegan JJ. concurring) at p. 276.

claimant claims compensation for injury caused by an untraced motorist on grounds that would not be available to the responsible motorist (e.g. the claimant did not comply with one or more of the conditions precedent to the liability of the M.I.B.I. under the Agreements). Likewise, the M.I.B.I. may defend a claim that it is liable to satisfy a judgment that a claimant obtains against an uninsured motorist on grounds that would not be available to the uninsured motorist (e.g. the accident did not occur in a public place or that the user complained of was not user for which insurance was compulsory under Section 56 of the Road Traffic Act 1961). In this situation, however, the claimant would still be entitled to recover damages against the uninsured motorist.

For the foregoing reasons, it is submitted that Mr. Gilhooly's view, that a claimant's cause of action against the M.I.B.I. is not a separate cause of action from his/her cause of action against a motorist, is open to dispute. Mr. Gilhooly further considers that "P.I.A.B. would doubtless argue that M.I.B.I. are ... *de facto* indemnifiers of [uninsured motorists] as it is they who will eventually have to pick up the tab"[18]. While the P.I.A.B. might make this argument, it is submitted that it is fundamentally flawed and is one that the M.I.B.I. could resist for the simple reason that the M.I.B.I. is not identified with an uninsured motorist, nor vicariously liable for the negligence of an uninsured motorist, and there is no basis upon which it might be asserted that the M.I.B.I. is automatically obliged to satisfy a judgment that a claimant obtains against an uninsured motorist.

Reliefs sought against the M.I.B.I.

In proceedings against the M.I.B.I. as sole defendant in the case of an untraced motorist, the claim is made on foot of the Agreement[19]. The claimant seeks a declaration that the M.I.B.I. is obliged to compensate him/her and an order for the performance of the Agreement[20] and compensation.

In proceedings against an uninsured motorist and the M.I.B.I. as co-defendants, a claimant claims damages against the uninsured motorist for his/her negligence. The claim against the M.I.B.I., however, is made on foot of the Agreement and the reliefs sought are a declaration that it is obliged to satisfy any judgment that is entered against the uninsured motorist that is not satisfied within 28 days and an order directing the M.I.B.I. to satisfy any such unsatisfied judgment.

Mr. Gilhooly submits that the authors' argument that an M.I.B.I. claim is outside the scope of Section 4(1)(i) is based on "the practice in most such claims to seek a declaration to direct that the judgment is satisfied by the M.I.B.I." and that this is "a technical point"[21]. Putting aside what practice exists, where the M.I.B.I. refuses compensation or offers inadequate compensation, the appropriate course of action for a claimant is to bring a claim to "seek to enforce the provisions of [the Agreement]" (Clause 2) which requires that a claimant claim a relief that will oblige the M.I.B.I. to compensate him/her in accordance with the Agreement. It is for this reason that it is appropriate that a claimant seeks a declaration that the M.I.B.I. is obliged to compensate him/her in respect of an untraced motorist *or* that it must satisfy any unsatisfied judgment obtained against an uninsured motorist, as appropriate. Indeed, the M.I.B.I. has in the past taken the point that, having regard to the nature of the relief, which is claimed against it in the Circuit Court, a claimant should, strictly speaking, proceed against it by way of an equity civil bill.

The reliefs sought against the M.I.B.I. are different from the reliefs sought by a claimant against an (un)insured motorist. In the former category, compensation under the relevant Agreement is claimed rather than damages for a wrong. A claim for a declaration that the M.I.B.I. is obliged to compensate a claimant and a claim for compensation under the relevant Agreement is clearly "other relief in respect of [a cause of action other than a claim for damages for a tort, breach of contract or breach of trust]".

For this reason, it is respectfully submitted that Mr. Gilhooly's first point is flawed, namely that a personal injuries claim against the M.I.B.I. falls within Section 3(d) of the Act and what he considers to be a very wide definition of civil action in Section 4(1) of the Act. For the same reasons, it is submitted that Mr. Gilhooly's third point can be disputed, namely that "a declaration to enforce a judgment against the M.I.B.I. in an uninsured motorist claim does not constitute another cause of action ... the relief claimed does not stand on its own and is consequential on an award for damages against the uninsured motorist".

The M.I.B.I. as a respondent

Mr. Gilhooly notes that, in the context of a claim to the P.I.A.B., a respondent is "the person or each of the persons who the claimant alleges in the application is or are liable to him or her in respect of the relevant claim". He considers that where a claimant is injured by an untraced motorist, "the only person against whom a claim can be made is the M.I.B.I., therefore it clearly falls within the definition of respondent". He believes that "there is no reason why this claim should be treated any differently to any other personal injury claim and therefore why the legislature would need to bar P.I.A.B.'s jurisdiction".[22]

However, "respondent" is described in the Act by reference to the "relevant claim" and "relevant claim" is defined as "a civil action to which this Act applies".[23] If, as submitted, a claimant's cause of action and the reliefs sought against the M.I.B.I. do not fall within the statutory definition of "civil action", Mr. Gilhooly's second point, that the M.I.B.I. can be a respondent to a claim before the P.I.A.B. is incorrect.

Mr. Gilhooly's view is that "it ... seems sensible to identify both the uninsured motorist and M.I.B.I. respondents on the P.I.A.B. form". Regardless of what is sensible, however, it is submitted that the Act does not provide for naming the M.I.B.I. as a respondent.

18. At p. 26.
19. Clause 2.2 of the 2004 Agreement provides that "A person claiming compensation ... must seek to enforce the provisions of this Agreement by [one of three means]".
20. These reliefs are necessary notwithstanding the fact that there is no privity of contract between a claimant and the M.I.B.I. Regarding the absence of privity, see Murphy J. in *Bowes v. M.I.B.I.* [2000] 2 I.R. 79. See also *Hardy v. M.I.B.* [1964] 2 Q.B. 745, [1964] 3 W.L.R. 433, [1964] 2 All E.R. 742; [1967] 1 Lloyd's Rep. 397; *Fire, Auto and Marine Insurance Co. Ltd. v. Greene* [1964] 2 Q.B. 687, [1964] 3 W.L.R. 319, [1964] 2 All E.R. 761; *Gurtner v. Circuit* [1968] 2 Q.B. 587, [1968] 2 W.L.R. 668, [1968] 1 All E.R. 328, [1968] 1 Lloyd's Rep. 171; and Gardner v. Moore and M.I.B. [1984] A.C. 548, [1984] 2 W.L.R. 714, [1984] 1 All E.R. 1100.
21. At p. 25.
22. At p. 26.
23. Section 9 of the Act.

Two further matters are worthy of mention. Firstly, on a practical level, the P.I.A.B.'s "Application for Assessment of Damages under Section 11 of the Personal Injuries Assessment Board Act 2003"[24] does not mention the M.I.B.I. or any issue relevant to the absence or adequacy of insurance and it is submitted that the current application form is properly confined to the matters in respect of which the P.I.A.B. has jurisdiction.

Secondly, it is submitted that Mr. Gilhooly is incorrect in stating that, if either the uninsured motorist or the M.I.B.I. rejects the award, the claimant may issue proceedings against both of them. Without prejudice to the authors' contention regarding the absence of jurisdiction, the Act clearly states that if there is more than one respondent and one such respondent accepts an award made by the P.I.A.B., the P.I.A.B. will issue an authorisation to the claimant that will enable him/her to issue proceedings against the non-participating respondent(s) only. Thereafter the claimant cannot pursue further remedies against the participating respondent[25]. For the foregoing reasons, the accuracy of Mr. Gilhooly's fourth point is disputed.

Issuing proceedings against the M.I.B.I. without first going to the P.I.A.B.

The fifth point upon which it is proposed to comment is Mr. Gilhooly's view that, if a claimant issues proceedings directly against the M.I.B.I. without first applying to the P.I.A.B., s/he risks the possibility that the M.I.B.I. will defend the action on the basis that it was brought in breach of the Act[26] and that, if the M.I.B.I. succeeds in its defence, the claimant may ultimately find that s/he is statute barred from claiming against the M.I.B.I. before the P.I.A.B. This is indeed a very important observation, particularly in the context of the new 2-year limitation period. However, such a claimant could vigorously pursue delivery of the M.I.B.I.'s defence and seek the trial of a preliminary issue on the question of validity of the proceedings[27]. Furthermore, if we are correct in our submission that the P.I.A.B. has no jurisdiction to deal with claims affecting the M.I.B.I., the making of an application to the P.I.A.B. in respect of such a claim may not stop the limitation period. Such a claimant therefore runs the risk that any court proceedings subsequently issued by him/her may be statute barred. No doubt this question will be answered in the future.

Current position in terms of issuing proceedings against the M.I.B.I.

The authors understand that the Central Office is prepared to issue proceedings against the M.I.B.I. where the M.I.B.I. is named as a co-defendant with an uninsured motorist. In such cases, however, it is advisable to state on the face of the summons that, in addition to claiming damages against the uninsured motorist for personal injuries (and property damage), the plaintiff is claiming other relief in respect of another cause of action to which the Act does not apply. Likewise, where the M.I.B.I. is named as a sole-defendant in proceedings for the enforcement of the terms of the Agreement, the summons should state on its face that the plaintiff is claiming relief in respect of a cause of action other than that prescribed by Section 3 the Act.

Current position in terms of applications affecting the M.I.B.I. before the P.I.A.B.

According to the M.I.B.I.'s website, it appears that the M.I.B.I. is of the view that a person who may ultimately claim compensation from the M.I.B.I. must apply to the P.I.A.B. and therefore that the P.I.A.B. has jurisdiction to deal with claims against it. If, however, we were correct in our contention, the M.I.B.I.'s interpretation of the Act would be mistaken and the P.I.A.B. would have no such jurisdiction regarding such claims. The authors understand that the P.I.A.B. has not yet issued its first order to pay. It therefore remains to be seen what stance will be taken by the M.I.B.I. when a claimant presents it with an order to pay in expectation that the M.I.B.I. will satisfy it.[28]

In conclusion, it appears that the competing interpretations of the effect of the statutory provisions, insofar as claims against the M.I.B.I. are concerned, will only be resolved by a decision of the courts ●

Cathleen Noctor and Richard Lyons are the authors of a book on the M.I.B.I that will be published shortly.

24. This requires a claimant to furnish "Details of the Party you believe to be responsible - i.e. your employer / property owner/motorist" and "If Motor please provide the following additional details" which requires the insurance company and policy number.
25. Section 15 of the Act.
26. Section 12 of the Act.
27. If the Central Office or a Circuit Court Office deems it appropriate to issue proceedings against the M.I.B.I. and if the M.I.B.I. considers that the proceedings should not have issued against it, it is arguable that the M.I.B.I. should bring a motion to have the proceedings set aside as irregular and/or to have the proceedings deemed void (O. 124, r. 1 of the Rules of the Superior Courts, 1986; O. 67, r. 7 of the Circuit Court Rules, 2001). Such an application must be brought within a reasonable time and the court will refuse such an application if the moving party has taken any fresh step after he acquires knowledge of the irregularity.
28. As an aside, Mr. Gilhooly agrees with the authors that the M.I.B.I. would not necessarily be made aware of an application being made to the P.I.A.B. However, he considers that it would be naive to believe that the M.I.B.I. would not adopt a mechanism for finding out (at p. 26). However, this raises the issue of the legal basis upon which the M.I.B.I. might find out about such claims otherwise than from a claimant who complies with the conditions precedent to the liability of the M.I.B.I. under the Agreements. Apart from Section 86 of the Act which enables the P.I.A.B. to supply certain details "for the purpose of their being entered in a central database", the other bases upon which the P.I.A.B. might rely as giving it authority to communicate generally with the M.I.B.I. must be considered, and whether same are affected by the fact that the P.I.A.B. does not appear to be registered with the Data Protection Commissioner.

Freeing the Law: BAILII and IRLII

Dr John Mee, Law Faculty, University College Cork[1]

Introduction

This article discusses the British and Irish Legal Information Institute (BAILII: *www.bailii.org*) and the Irish Legal Information Initiative (IRLII: *www.irlii.org*). These websites provide free searchable access to primary legal materials from Ireland and Britain, as well as a variety of services to enhance access to secondary legal materials. The article will briefly trace the history of BAILII and IRLII, explain what they have to offer and also seek to set them in the broader context of developments in other jurisdictions.

The Establishment of BAILII

The genesis of BAILII can be traced to a "Free the Law" meeting in London in November 1999, which was addressed by Professor Graham Greenleaf, one of the co-founders of the Australasian Legal Information Institute (AustLII). AustLII had been offering a very successful service since 1995 and had revolutionised access to legal information in Australia. The meeting in question generated a great deal of enthusiasm about the prospect of developing a similar service in the United Kingdom and Ireland, with Laurie West-Knights and Lord Justice Henry Brooke to the forefront of the effort.

There were in fact a great many technical and bureaucratic obstacles in the way. However, matters were moved forward rather more quickly than might have been expected by the initiative of Professor Andrew Mowbray, the other co-founder of AustLII. With remarkable determination and effort, he had developed a working prototype of BAILII by early 2000. I became involved as then Dean of the Law Faculty at University College Cork and, working with Andrew Mowbray, took responsibility for organising the Irish contribution to the nascent BAILII website. I organised a meeting of interested parties in Dublin in February 2000 and, thanks to the co-operation of the Courts Service and the Attorney General's Office, the Irish contribution to BAILII was extremely strong from the outset. We also triggered considerable interest from Northern Ireland and the consolidated Northern Irish statutes going back to 1495 were included on BAILII from the start.

The BAILII website had its first public launch in April 2000 at University College Cork. The support which BAILII has received from the Irish judiciary, in particular from the former Chief Justice Ronan Keane, was in evidence from the beginning and Mr Justice Iarfhlaith O'Neill of the High Court kindly performed the launch.

Not long afterwards, the formal BAILII charitable corporation was incorporated in London and took over responsibility for running BAILII. I am the Irish trustee-director. The other trustee-directors are Lord Justice Brooke (Chairperson), Lord Mark Saville, Professor Philip Leith (Northern Ireland), Professor Alan Paterson (Scotland), Robin Ap Cynan (solicitor, representing Wales); Professor Andrew Mowbray (AustLII) and Clive Freedman (barrister). Irish funding for BAILII has come from the Law Society of Ireland and the Arthur Cox Foundation and, in 2004, the Bar Council of Ireland generously provided €10,000 in funding. The main BAILII operation is located in London at the Institute of Advanced Legal Studies, Russell Square and is headed by Joe Ury, the Executive Director of BAILII. As at October 2004, BAILII included 46 databases covering 7 jurisdictions. The system contains around 7.5 gigabytes of legal materials and around 400,000 searchable documents with about 15 million internal hypertext links.

The Wider Movement to Free the Law[2]

BAILII is one of an increasing network of legal information institutes which are being developed around the world. The first of these, simply called LII (Legal Information Institute), was established in 1992 at Cornell in the United States. As well as AustLII and BAILII, there is now also the Canadian Legal Information Institute (CanLII),[3] the Pacific Islands Legal Information Institute (PacLII),[4] the Hong Kong Legal Information Institute (HKLII),[5] the Southern African Legal Information Institute (SAFLII),[6] the New Zealand Legal Information Institute (NZLII),[7] JuriBurkina (covering Burkina Faso)[8] and Droit Francophone[9] which covers francophone countries, initially focusing on West and Central Africa.[10]

At a meeting of Legal Information Institutes in Montreal and Sydney in 2002 and 2003, a declaration was adopted which indicates the common

1. This article draws upon a shorter piece by the author entitled "Freeing the Law in Ireland" which was published in Delia Venables' Internet Newsletter for Lawyers Nov/Dec 2004.
2. See generally Greenleaf "Global Legal Research: WorldLII and the Future", Delia Venables' Internet Newsletter for Lawyers Jan/Feb 2005.
3. See www.canlii.org.
4. See www.paclii.org.
5. See www.hklii.org.
6. See www.saflii.org.
7. See www.nzlii.org.
8. See www.juriburkina.org.
9. See http://portail.droit.francophonie.org.
10. As Greenleaf comments (see note 2 above, p 1): "A goal of the free access to law movement is to help create free Internet access to law in developing countries, preventing its publication becoming the monopoly of any organisation (including governments)."

goals of the LIIs.[11] The declaration reads in part:

> "Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;
>
> Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge;
>
> Independent non-profit organisations have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published."

The declaration goes on to explain that "public legal information" means "legal information produced by public bodies that have a duty to produce law and make it public" and it includes "primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry."

Another aim of the Legal Information Institute movement is the development of methods of accessing legal information on a global basis. To this end, global hubs are being developed. The various LIIs have worked together to create WorldLII (*www.worldlii.org*) which is hosted and run by AustLII. This provides searchable access to 455 databases from 55 countries (including all the BAILII databases), with the numbers growing by 25% each year. The idea is to have a common interface for users, which masks the technical differences between the sites of individual LIIs. WorldLII is essentially an English language hub, with Droit Francophone providing the beginnings of a French language hub.

Material on BAILII of Irish Interest

An unusual feature of the Irish situation is that, until very recently, BAILII has provided the only free access to the decisions of the Irish courts. BAILII contains a more or less comprehensive collection of the decisions of the Irish Supreme Court going back to 2001 (with a fair number of additional cases from 2000, 1999 and 1998). The High Court is also well-represented with a collection of over 1,500 decisions going back to 1997. Recently, a Court of Criminal Appeal database has also been added, with cases from 2004.

The fact that, until late in 2004, there was no official website providing access to judgments (and the related fact that there has been no fully reliable feed of electronic judgments available to BAILII) has made more challenging the task of building up these databases. This has required ongoing work at University College Cork (with the assistance of law students) to make the cases ready for BAILII. Most of the Irish judgments on BAILII have been obtained from the Courts Service, although some have been scanned at University College Cork and others have been obtained from other sources.

BAILII also has decisions of the Competition Authority going back to 1996 and of the Information Commissioner back to 1998, as well as the reports and consultation papers of the Irish Law Reform Commission from its establishment in 1976. In terms of legislation, BAILII has Irish statutes going all the way back to independence in 1922 and the statutory instruments from 1922-1998.

A major advantage of BAILII is the ability to search across a range of databases, including both legislation and case law, which span a number of different but cognate legal jurisdictions. BAILII also has legislation from Northern Ireland, England, Scotland and Wales, as well as databases of the decisions of English, Scottish and Northern Irish courts and tribunals. Furthermore, the site also includes decisions of the House of Lords and the Privy Council (going back to 1996 in each case). A recent addition is a database of decisions of the European Court of Justice (including the Court of First Instance) since 1954.

In late 2004, the Courts Service began to put up judgments on its website (*www.courts.ie*). The Courts Service site at present contains Supreme Court cases going back to 2001 and Court of Criminal Appeal cases from 2004 (with High Court cases, from 2004 onwards it seems, to be added fairly soon). This long-awaited development is much to be welcomed and it is hoped that it will facilitate the future development of BAILII's Irish collection. It is normal for LIIs to operate alongside official governmental sites which provide free access to case law. One advantage of a site such as BAILII is that it allows one to access a variety of information (judgments, legislation, law reform publications, tribunal decisions, foreign cases etc) in a uniform format at one easily searchable site. Sites such as BAILII also serve as a guarantee for the public that, in difficult economic times, governments will not be able to change their policy and begin to extract a charge for accessing legal information. In the Irish context, it seems that there is the further advantage that BAILII's collections go further back into the past than appears to be envisaged for the Courts Service site (e.g. there are over 300 extra Supreme Court cases on BAILII as compared to the Courts Service site).

The role of IRLII

In 2001, I established the IRLII (Irish Legal Information Initiative) website at www.irlii.org, hosted by University College Cork. (IRLII is, by the way, pronounced as "early", and BAILII is pronounced as "bay-lee"). It is managed by myself and a part-time postgraduate coordinator, Micheal O'Dowd (whose technical skills have facilitated a recent comprehensive redesign of the site). While it is a 'LII' like BAILII, AustLII or CanLII, IRLII is called an 'Initiative' rather than an 'Institute' to emphasise that it is intended as a complement to BAILII rather than as a rival.

IRLII started life as a simple webpage, where recent judgments could be uploaded pending their availability on the BAILII database. At that stage, it took some weeks for new cases to be uploaded onto the BAILII website. Now that BAILII's permanent staff, led by Joe Ury, have been established in London, the Irish judgments can be promptly loaded onto the main BAILII site. However, rather than discontinue the IRLII service, the decision was taken to broaden its appeal.

IRLII now offers customised access to the BAILII site for Irish users. Moreover, it offers five additional services which go beyond the type offered on the main BAILII site: the IRLII Index of Irish cases, the Leading Cases database, the Periodicals Index, the Statutory Instruments Index, and Statutes. These will now be explained in turn.

11 See www.worldlii.org/worldlii/declaration/.

1. The *IRLII Index of Irish Cases* endeavours to index all judgments delivered by the Superior Courts in Ireland since 1997 (whether or not the judgment is on BAILII), while selected earlier judgments are also indexed. Where the full text of a judgment is available on BAILII, a hyperlink is provided. Citations to the Irish Reports and the Irish Law Reports Monthly are also provided where applicable. The Index can be sorted by date or alphabetically.
2. As part of a Leading *Irish Cases* project funded by the Arthur Cox Foundation, UCC Faculty of Law lecturers have identified more than 200 Irish cases from over the decades which are of particular importance in a variety of legal subject areas. IRLII staff have scanned and proofread the relevant cases, which are grouped on the IRLII site under 22 subject headings. All these cases have been added to the main BAILII databases but it is only possible to view them by subject area on IRLII. (Interestingly, BAILII has recently obtained considerable funding from UK sources to allow a similar project to proceed in relation to leading UK cases).[12]
3. The *Periodicals Index* is concerned with secondary legal sources, and is quickly proving to be the most popular IRLII resource. The articles in seventeen Irish legal periodicals are indexed since 1997 (although some periodicals have ceased to exist and more have come into being since that date). Due to copyright restrictions, the full text of each article is not available but the title, author, citation and keywords relevant to each article are provided. The index can be searched, either by author and title, or by keyword, or can be browsed by journal title.
4. The *Statutory Instruments Index* is the only freely available index to Irish statutory instruments for 2004. Although instruments and regulations up to 2003 are available from the Attorney General's website (see *www.irishstatutebook.ie*), there is no comprehensive source of more recent secondary legislation. IRLII updates the statutory instruments index whenever new material is notified in Iris Oifigiúil, and a hyperlink is provided if the particular piece of legislation is available online on a government department website or elsewhere (although unfortunately many recent statutory instruments are not available anywhere on the web).
5. IRLII also provides access to HTML versions of recent Irish statutes. These are subsequently uploaded to BAILII.

IRLII is still being developed and expanded. The most recent feature is the 'search by citation' function which allows a user to retrieve a case using the vendor-neutral citation[13] or commercial citations such as those used by the Irish Reports or the Irish Law Reports Monthly.

There would be obvious advantages in integrating the IRLII services into the main BAILII site. However, in its current state of development, the BAILII site is concerned with providing free access to primary legal materials and the more varied services offered by IRLII do not comfortably fit within that model. It is likely that IRLII will continue to exist as a separate site for the foreseeable future but as the BAILII project develops we will continue to explore the possibilities for bringing the two websites closer together.

Vendor-Neutral Citations

One aim of BAILII has been to promote good practice in relation to vendor-neutral citations (sometimes referred to as "court-designated" citations).[14] A vendor-neutral citation is a unique officially-designated identifier for every judgment circulated by a Courts Service. This identifier is intended to ensure that, where a judgment is later cited in Court or referred to in another judgment or is reported, digested or indexed, the number will uniquely identify the decision regardless of whatever other citation or reference is used (e.g. IR or ILRM).

In recent years, courts in other jurisdictions have been requiring that the vendor-neutral citation be used when referring to cases in submissions to Court, even where reported references are also used. Thus, the vendor-neutral citation becomes part of the official 'name' of the case, along with the names of the plaintiff and the defendant. In 2001 and 2002 the English courts adopted a system of vendor-neutral citation.15 Thus, for example, the first decision of the House of Lords in 2004 is to be cited as *Regina v Webber* [2004] UKHL 1. To refer to the tenth paragraph of that case, one would write: *Regina v Webber* [2004] UKHL 1 at [10]. Similarly, the High Court of Australia uses the style: [2005] HCA 1.

Anyone who has encountered the alphabet soup of, for example, family law case names, will see the merit in having a definitive means of identifying individual cases. Vendor-neutral citations are valuable in allowing indexers to keep track of the increasing volume of case law, in allowing convenient and uniform citation of unreported judgments, in avoiding difficulties caused by the fact that a judgment may be reported in a number of different locations and in allowing courts to refer conveniently to decisions from other jurisdictions. From the point of view of systems such as BAILII, the use of vendor-neutral citations also makes it much easier to add value to the provision of information via the internet, for example through the automated insertion of hyperlinks whenever one judgment is referred to in another judgment on the system.[16]

Until recently there was no official system of vendor-neutral or court-designated citation for Irish cases. In order to encourage the introduction of such a system, BAILII has from the start adopted an unofficial model of neutral citation designed to show the possibilities which exist. For the purposes of its recently-introduced website, and following representations from BAILII, the Courts Service has agreed to adopt the style proposed by BAILII. Thus, Supreme Court decisions are referred to in this style: "AG v Dyer [2004] IESC 1" and Court of Criminal Appeal cases in this style: "DPP v Botha [2004] IECCA 1". When High Court cases are added, the BAILII style of "X v Y [2005] IEHC 1" will be employed.

The agreement on a universal style of identifying Irish cases is greatly to be welcomed. The adoption by the Courts Service of the BAILII style of vendor-neutral citations has required a once-off adjustment of the urls (web addresses) for Supreme Court cases on BAILII (from 2001 to 2004), since the BAILII system requires that the url be based on the vendor-neutral citation of the case in question.[17]

12. This funding, roughly UK£220,000 from JISC (the Joint Information Systems Committee, a UK educational funding body), will also fund further improvements to the BAILII search engine. This should be of direct benefit to Irish users (and the creation of a Leading UK Cases database is also likely to be beneficial to users in this jurisdiction).
13. See the discussion of vendor-neutral citations in the next section of this article.
14. For a discussion of the relevant issues, see Mowbray, Greenleaf and Chung "A Uniform Approach for Vendor and Media Neutral Citation - the Australian Experience" available at http://austlii.edu.au/~andrew/citation.html. See also "Citations and Access to Judgments: Report and Resolution of the BILETA Citations Workshop held at SCRIPT, University of Edinburgh 11-12 March 2000" available at www.bileta.ac.uk/citations/citreport.html.
15. See the explanation at www.bailii.org/bailii/citation.html.
16. This takes place already on BAILII but it involves the time-consuming creation of tables linking commercial citations to the cases on the system.

Although the adoption of the vendor-neutral citations on the Courts Services website (and by BAILII and, for example, the Irish Reports) clearly gives them an official status, it remains to be seen whether their full potential will be exploited in the short term. In England, the process has required the courts to issue practice directions explaining the system of vendor-neutral citation and making stipulations to their usage.[18] It is to be hoped that, perhaps when the High Court cases are added to the Courts Service website and the system has been consolidated, a practice direction would be forthcoming which would set out clear instructions in relation to the use of the vendor-neutral citations.

It is worth noting that s. 46 of the Courts and Court Officers Act 2002 requires the Courts Service to keep a register of reserved judgments.[19] This provision has recently been brought into effect by statutory instrument with a starting date of March 31st 2005.[20] It would seem that the introduction of the register, which will necessarily involve naming and keeping track of judgments, could also provide a convenient opportunity to copper-fasten the new system of vendor-neutral citations. A further step, which would increase the utility of vendor-neutral citations but which has not yet been accomplished, would be the inclusion of official paragraph numbering in Irish judgments.

Conclusion

One aim of legal information institutes has always been to raise the bar in terms of commercial publishing, making it clear that one cannot charge the public simply for providing basic legal information without adding any value. Recent developments, most notably the inception of a judgments database on the Courts Service website and the adoption of vendor-neutral citations, show an improvement in the climate within which BAILII and IRLII operate. The two websites, the future generosity of their donors permitting, will continue to develop and expand the services they offer and will work together with similar projects across the world towards the creation of an efficient world architecture for free access to legal information. ●

17. For an aid to finding the new citations (for example in order to update hyperlinks to relevant judgments), one may go to www.ucc.ie/law/irlii/irliiindex/cnewcite.php. Alternatively, one can find the new url on BAILII itself, by going to www.bailii.org/ie/cases/IESC and finding the case alphabetically or by date. Note that in a few instances BAILII has Supreme Court cases from the relevant years which are not on the Courts Service site. Such cases do not yet have an official vendor-neutral citation and we have given them a number in a separate sequence beginning with 200 to indicate that the numbers are unofficial.
18. See the Practice Directions collected at www.bailii.org/bailii/citation.html.
19. See O'Mahony "No Reservations" (2002) 96(6) *Law Society Gazette* 33.
20. See Courts and Court Officers Act 2002 (Section 46) (Commencement) Order 2004 (S.I. No 712 of 2004).

Arbitrators' Immunity From suit at Common Law

Karl Monahan BL

Introduction

Section 12(1) of the Arbitration (International Commercial) Act, 1998 provides:

> "An arbitrator shall not be liable for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator, unless the act or omission is shown to have been in bad faith."

It is questionable whether this provision applies only to arbitrators in international commercial arbitrations or whether it applies to all arbitrators. In support of the former proposition is the fact that the provision is contained in an Act dealing with international commercial arbitration and is not incorporated in the Act by way of amendment to domestic legislation[1]. This is the interpretation favoured by Stewart[2]. In support of the latter proposition, is the fact that the provision is not stated to be restricted to arbitrators in international arbitrations. The Act is only restricted to international arbitrations to the extent identified in the definition section, which defines "arbitration agreement" as "an arbitration concerning international commercial arbitration". Arbitrators are not similarly defined and so the question is open as to whether the protection provided by Section 12(1) applies to arbitrators in domestic arbitrations.

This article explores whether in the face of this uncertain position, arbitrators in domestic arbitrations enjoy immunity from suit at common law in the event that Section 12(1) does not afford protection to them[3].

Was it necessary for the legislature to introduce section 12(1) of the 1998 Act because at common law arbitrators are not immune from suit for their actions *qua* arbitrator? Or was it the case that Section 12 was introduced to remove any potential uncertainty from the law and to send a clear signal to those who would consider Ireland as a venue for international arbitrations that arbitrators are immune? It is submitted that the latter is the case and that the pre-existing mischief in the common law remedied by Section 12(1) was merely uncertainty as to the position of arbitrators with regard to liability for their conduct of arbitral references.

Parties' Relationship with the Arbitrator

This uncertainty springs from the various ways of viewing an arbitrator's position[4]. Arbitrators are appointed under an arbitration agreement and in this regard, the arbitrator's relationship with the parties could be regarded as contractual, thereby giving rise to an action against the arbitrator for breach of contract arising from the arbitrator's performance of his/her duties under the contract. The arbitrator may also be said to be tortiously liable for defamatory statements or negligent performance of his/her duties as arbitrator. Alternatively, arbitrators may have a special judge-like status[5] and on that basis be immune from suit in like manner as judges.

There has been a certain amount of confusion in the case law regarding the arbitrator's contractual relationship with the parties to the arbitration. In *Cie Europeene v. Tradax*[6], Hobhouse J in the English High Court considered "...questions relating to the commercial contract" and stated that "Such questions are the subject matter of the arbitration. Errors in the determination of those questions do not without more show any breach of the arbitration contract. The arbitrators are not parties to the commercial contract and are not, in the proper sense of that word, bound by it." While Hobhouse J says that arbitrators may not "without more" be liable for a breach of the arbitration contract, his Lordship does not explain what would constitute the additional factor tipping the scales in favour of an arbitrator's liability. It is not unreasonable to assume that *mala fides* on the part of the arbitrator would be sufficient to dissolve his/her immunity. If this is the only factor which would have this effect, then Hobhouse J is effectively enunciating the principle that arbitrators are immune from suit in the absence of mala fides, which, in substance, is the manifestation of the "judge-like status" view of the arbitrator's position (as to which, see below), although his Lordship couches this in the language of contract.

In *K/S Norjarl v Hyundai*[7], Browne-Wilkinson V.C. cited the *Tradax* case in support of the proposition that "On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract..." However, while not shaking off the manacles of a contract, his Lordship diluted the contractual statement of the arbitrator's position by examining the quasi-judicial nature of an arbitral tribunal. Having stated that "An arbitrator, par excellence, is in a quasi-judicial position"[8] and having noted that, unlike a judge, arbitrators are

1. As is the case with Sections 17 and 18 dealing respectively with Interest and Small Claims procedure.
2. Stewart, S.C., Ercus, *Arbitration Commentary and Sources*, First Law, Dublin, 2003, p. 63.
3. It should be noted that whatever the outcome of this discussion, the parties to an arbitration are free to confer immunity upon the arbitrator and many arbitration rules provide for such an immunity.
4. As to which, see Sutton and Gill, Russell on Arbitration, 22nd Edition, Sweet & Maxwell, London, 2003, pp. 153 - 154
5. Mustill & Boyd, *Commercial Arbitration*, 2nd Ed. at p. 221 state that "When the arbitrator enters on the reference, he is clothed with the power to affect the rights, not only of the appointing party but also of his opponent: and this power continues until the reference has run its course..."
6. [1986] 2 Lloyd's Rep. 301 at p. 306
7. [1991] 1 Lloyd's Rep. 524 at pp. 536 - 537
8. [1991] 1 Lloyd's Rep. 524 at p. 536

paid by the parties to the dispute upon which they adjudicate, Browne-Wilkinson V.C. held that while the arbitrator was in a contractual relationship with the parties to the arbitration, (s)he also enjoyed a quasi-judicial status:

> "...I find it impossible to divorce the contractual and status considerations: in truth the arbitrator's rights and duties flow from the conjunction of those two elements."[9] His Lordship proceeded to state that "By accepting appointment, the arbitrator assumes the status of quasi-judicial adjudicator..."[10]

It is respectfully submitted that having established that the common law position of arbitrators is one of a quasi-judicial nature, which by necessary implication carries with it the protections and immunities attendant upon those in judicial office, it is unhelpful to attempt to graft onto the arbitrator's position notions of contractual relations with the parties, as such relations would by definition admit of an action against the arbitrator for the allegedly unsatisfactory discharge of obligations under the alleged contract. It is submitted that if the arbitrator is immune from such actions, it is illusory to speak of any contractual relationship existing between the arbitrator and the parties in the traditional sense.

In the case of *Manning v Shackleton*[11], the Irish Supreme Court in dealing with the position of a property arbitrator under the Acquisition of Land (Assessment of Compensation) Act 1919 held that:

> "It is not in dispute that the respondent, in conducting an arbitration under the provisions of the Act of 1919, was bound to act in accordance with well established principles of natural justice and fair procedures. One can indeed go further and describe his functions under the relevant legislation as quasi-judicial in nature."[12]

For completeness, it may be noted that absent any immunity, arbitrators may be liable to the parties in tort for their misdeeds on the basis that they are in a relationship of proximity with the parties in circumstances where it is reasonably foreseeable that any negligence in their conduct may have an impact on either or both of the parties.

Consequences of Quasi-Judicial Status

In *Sutcliffe v Thackrah*[13], Lord Reid was firmly of the view that arbitrators enjoy immunity from suit: "...those employed to perform duties of a judicial character are not liable to their employers for negligence. This rule has been applied to arbitrators for a very long time. It is firmly established and could not now be questioned."[14] Despite this emphatic statement of principle, his Lordship was uncertain as to the root of the immunity: "It must be founded on public policy but I am not aware of any authoritative statement of the reason for it. I think it is right but it is hardly self-evident."[15]

Viscount Dilhorne[16], speaking of the immunity conferred upon judges and others involved in court proceedings was of the view that such immunity "...does not mean that the law fails to recognise the obligations of judges ... to exercise care. The law takes the risk of their being negligent and confers upon them the privilege from inquiry in an action as to whether or not they have been so. The immunity which they enjoy is vital to the efficient and speedy administration of justice." If the immunity is to be justified as a guarantee of speed and efficiency, this speaks loudly in favour the immunity being conferred upon arbitral tribunals, whose very existence is the product of a desire for speed and efficiency in dispute resolution greater than that of the courts.

Further, it is submitted that the entitlement of a litigant to expect a fearless and independent tribunal in a court of law must be grafted onto the arbitral tribunal in circumstances where the parties have agreed to substitute the determinative functions of an arbitrator for those of the Court. The parties' decision to opt for a relatively time-efficient, cost-effective and potentially expert tribunal in place of the courts discloses no rationale for depriving them of the safeguards of justice which are attendant upon the ordinary courts.

One of the most important of these safeguards is the judicial immunity from suit designed to reinforce the independence of the decision-making process of the courts. In the case of *Macaulay & Co. Ltd. v. Wyse-Power*[17], a defamation case involving the utterance of a sitting Circuit Court Judge, the High Court considered the utility of judicial privilege. The report discloses the Court's view that:

> "It was better that an individual should suffer than that the course of justice should be hindered and fettered by apprehensions on the part of a Judge that his words might be made the subject of an action...The People were entitled to have the opinion of a Judge without the fear of his words being challenged elsewhere."

Judge-arbitrator analogy

It may be questioned whether there is sufficient congruence between the foundation, character and role of the courts and those of arbitral tribunals to warrant the extension of the judicial immunity from suit to the latter. The courts are established by or under the Constitution while arbitrators are appointed by contractual agreement. The Constitution identifies the courts as the vehicle for the administration of justice, essential to which is the judicial immunity from suit discussed *supra*, while the notion of the administration of justice is one expressed in very few (if any) arbitration agreements. Notwithstanding this, it is submitted that the arbitral tribunal selected by the parties is selected for the purpose of administering justice to the extent identified by the arbitration agreement. If not expressly stated, this intention may be implied using the well-established officious bystander[18] and business efficacy[19] tests. On this basis, it follows that an arbitrator requires immunity from suit to facilitate the proper discharge of his/her functions

9 [1991] 1 Lloyd's Rep. 524 at p. 536
10 [1991] 1 Lloyd's Rep. 524 at p. 537
11 [1996] 3 I.R. 85
12 ibid. at p.94, *per* Keane J
13 [1974] A.C. 727, a case dealing with "quasi-arbitrators"
14 [1974] A.C. 727 at p.735
15 [1974] A.C. 727 at p.735
16 [1974] A.C. 727 at p.758
17 27 ILTR 61 at 63

18. See *Shirlaw v Southern Foundries* (1926) Ltd. [1939] 2 KB 206. Presumably, were an officious bystander to suggest to the parties to the arbitration agreement that there should be an express provision in the agreement that the arbitrator should discharge his/her functions so as to ensure that the dispute submitted to arbitration be disposed of in a just manner, they would suppress that bystander with a common "Oh, of course."
19. See *The Moorcock* (1889) 14 PD 64

and the effective administration of justice as between the parties. It could hardly be assumed that the parties to an arbitration would intend that their chosen arbitrator, for example, reach a decision based not on the strength of the evidence presented but rather on the fear of subsequent litigation. Further, as arbitrators are bound by the rules of natural and constitutional justice, it follows that they act in some sense judicially[20].

The U.S. Supreme Court has held that "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants....he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."[21] Lord Denning's view was that "Each [judge] should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?'"[22]. This reasoning, apposite as it is to judicial decision-making, commends itself all the more to the quasi-judicial decision-making of an arbitrator. While in the absence of immunity, a judge made the subject of litigation for negligent decision-making could possibly rely on the vicarious liability of the State with its infinitely deep pockets, an arbitrator is in a far less comfortable position and would therefore be far more susceptible to the fear of future litigation when reaching a decision.[23]

In many instances, parties to commercial agreements opt to submit future disputes to arbitration rather than the courts because of the efficiency and privacy of the former. However, if arbitrators did not enjoy immunity from suit, it is likely that in an effort to avoid liability for negligence they would be more inclined to allow both sides to adduce lengthy and potentially irrelevant evidence lest their refusal to hear such evidence should later form the basis of an action against them, thereby thwarting the ends of efficiency. Of course, this would present the arbitrator with an intolerable dilemma in that if (s)he were to allow one party to adduce unduly lengthy or irrelevant evidence, the other party could sue the arbitrator for negligently allowing the arbitration to run on incurring unnecessary costs. Exposing the arbitrator to liability for the conduct of the arbitral reference would also be detrimental to the privacy of the parties' dispute as Court proceedings would possibly be held in public.

The availability of a facility to sue an arbitrator for negligence in the performance of his/her functions would entail a potential liability on the part of the arbitrator equal to the value of the arbitral award and any costs paid by the disgruntled party. Thus, an arbitrator in a large commercial arbitration making a multi-million Euro award could be exposed to a huge liability in the event of subsequent litigation for negligence. If arbitrators were exposed to this risk, the pool of willing arbitrators may be reduced, to the detriment of the arbitration-using public. As Lord Fraser colourfully put it in *Arenson v Casson Beckman Rutley & Co* "...public policy requires that [judges] should not be liable to harassment for actions by disappointed litigants; '...otherwise no man but a beggar, or a fool, would be a judge."[24] In the absence of immunity for arbitrators, it may be assumed that no man but a beggar or a fool would be an arbitrator.

Immunity – A step too far?

It need not be feared that immunity from suit affords arbitrators so great a degree of protection that they may misconduct themselves with impunity. Indeed, it may be that the very element of control over arbitrators exercisable by the Courts forms part of the rationale for the arbitrators' immunity, as stated by Lord Morris in *Sutcliffe v Thackrah*[25]:

> "I think it must now be accepted that an action will not lie against an arbitrator for want of skill or for negligence in making his award. The reason for this may be that the public interest does not make it necessary for the courts to exercise greater powers over arbitrators than those which they possess, such as the power of removing for misconduct or of correcting errors of law which appear on the face of the award."

In this regard, the High Court has ample powers, including the power to remove an arbitrator for misconduct[26] or failure to use reasonable dispatch[27], to set aside an award on the ground of misconduct[28], to grant relief where the arbitrator is not impartial[29] and to remit or set aside an award on the basis of an error of law[30]. Furthermore, it is accepted at common law that even the immunity of judges is not absolute and will not apply if the Judge acts in bad faith:

> "If the Lord Chief Justice himself, on the acquittal of a defendant charged before him with a criminal offence, were to say: 'That is a perverse verdict', and thereupon proceed to pass a sentence of imprisonment, he could be sued for trespass."[31]

It follows from this, that at common law, the immunity of arbitrators must also be qualified by a 'bad faith' exception, thereby mirroring the provisions in the 1998 Act and ensuring that arbitrators are not given an entirely unfettered hand in the conduct of arbitral references.

A note of caution

Although they enjoy immunity from suit for their conduct qua arbitrator, arbitrators must be cognisant of the fact that the immunity only applies to their conduct in so far as that conduct is judicial. In this regard, the speech of Lord Simon in *Arenson v Casson Beckman Rutley & Co* is instructive:

"But in my view the essential pre-requisite for him to claim

20. See *Manning v Shackleton* [1996] 3 I.R. 85 at p. 94
21. *Pierson v Ray* 386 U.S. 547 at p. 554
22. *Sirros v Moore* [1975] 1 Q.B. 118 at p.136
23. For a detailed discussion of judicial immunity and the rationale underlying it, see *Sirros v Moore* [1975] 1 Q.B 118
24. [1977] A.C. 405 at p. 440, his Lordship quoting from Stair, Institutions of the Law of Scotland, IV. 1.5.
25. [1974] A.C. 727 at p. 744
26. Section 37, Arbitration Act, 1954
27. Section 24, Arbitration Act, 1954
28. Section 38, Arbitration Act, 1954
29. Section 39, Arbitration Act, 1954
30. Section 36, Arbitration Act, 1954. Common law jurisdiction affirmed in *Keenan v Shield Insurance Co. Ltd.* [1988] I.R. 89
31. *Re McC* [1985] A.C. 528 at 540

> immunity as an arbitrator is that, by the time the matter is submitted to him for decision, there should be a formulated dispute between at least two parties which his decision is required to resolve. It is not enough that parties who may be affected by the decision have opposed interests - still less that the decision is on a matter which is not agreed between them."[32]

The result of this would appear to be that there is no immunity for a supposed arbitrator who, for example, undertakes to determine the value of an antique collectable in circumstances where neither party has a fixed view on the value of the item.

Of more concern to arbitrators are the incendiary *dicta* of Lord Kilbrandon in the *Arenson* case:

> "I have come to be of the opinion that it is a necessary conclusion to be drawn from *Sutcliffe v Thackrah* [1974] A.C. 727 and from the instant decision that an arbitrator at common law or under the Acts is indeed a person selected by the parties for his expertise, whether technical or intellectual, that he pledges skill in the exercise thereof and that if he is negligent in that exercise he will be liable in damages."[33]

However, this was a minority view in *Arenson*, and it is respectfully submitted that it is an erroneous interpretation of the *Sutcliffe* case, as *Sutcliffe*, while not concerned with arbitrators directly (but rather so-called "quasi-arbitrators"), took as its starting point the rule that arbitrators are immune from suit.

Lord Kilbrandon was also of the view that the Judge-arbitrator analogy did not hold good and was of the view that different considerations applied.[34] However, arbitrators may draw comfort from the fact that Lord Kilbrandon's is a lone voice in the arbitral wilderness and that in the *Arenson* case itself, the other Law Lords supported the proposition that arbitrators enjoy immunity from suit. Lord Salmon's view was that the judicial immunity extended to arbitrators when they were acting judicially:

> "The law also accords the same immunity to arbitrators when they are carrying out much the same functions as judges."[35]

His Lordship had no difficulty in locating the rationale for this immunity within the same public policy which founds the judicial immunity, as can be seen from the following passage which also illustrates the comprehensive nature of the immunity:

> "The immunity relates not only to claims for damages for negligence. It relates to all kinds of civil claims including, for example, claims for damages for defamation. It exists not for the protection of judges and arbitrators but for the protection of the public in cases in which truly judicial functions are being discharged."

Conclusion

On the basis of the above, it is submitted that the position at common law is that arbitrators in domestic arbitrations enjoy immunity from suit in like manner as Judges performing judicial functions. This is the same level of protection extended to arbitrators under the 1998 Act, whether the immunity provided by that Act extends to all arbitrators, or only those engaged in international commercial arbitrations. ●

32. [1977] A.C. 405 at p. 424
33. [1977] A.C. 405 at p. 431
34. [1977] A.C. 405 at p. 431
35. [1977] A.C. 405 at p. 431. Lord Simon's (albeit circumspect) support for the immunity is evident at p. 416, Lord Wheatley's speech is in general concurrence with Lord Simon's and Lord Fraser expresses support for the arbitrators' immunity at p. 440