The Bar Review

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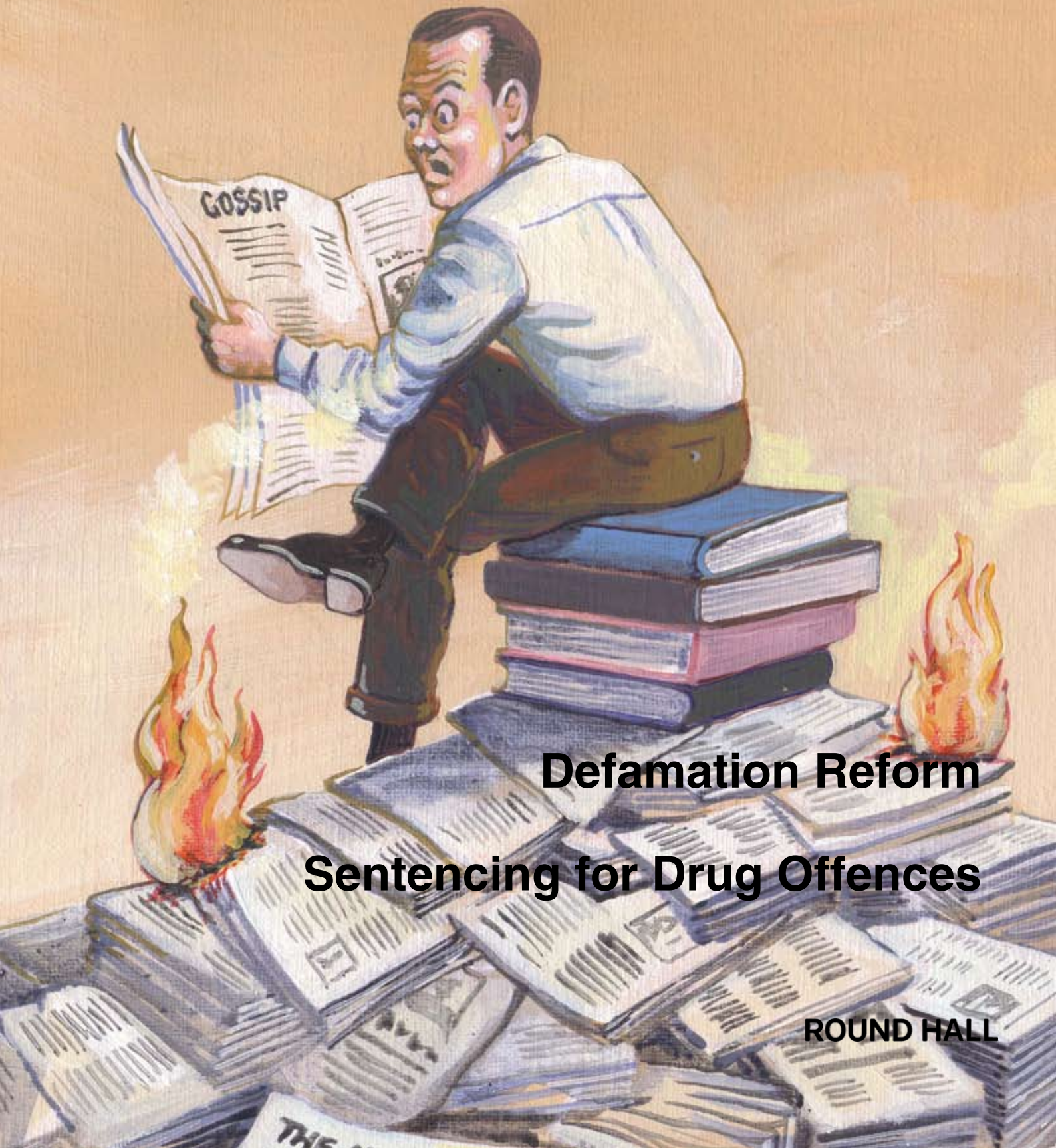

Defamation Reform

Sentencing for Drug Offences

ROUND HALL

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Hayes solicitors

The article on journalistic privilege in the December 2009 issue of the Bar Review stated that documents, the subject of the recent *Mahon & Ors v Keena & Kennedy* Supreme Court decision, had been destroyed on legal advice. As is clear from evidence considered by both the High Court and Supreme Court and the judgments of those Courts, the destruction took place following the respondents/appellants taking legal advice. We accept that was the case.

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Sentencing 15A offences

Rebecca Smith BL*

Introduction

Section 15A of the Misuse of Drugs Act 1977[1] introduced the now well known "*mandatory minimum sentence*" of ten years for those convicted of possessing drugs for sale or supply where the value exceeds €13,000. A person convicted of the offence must receive a sentence of ten years unless there are "*exceptional and specific circumstances*" which make it unjust to impose that sentence. Although referred to as a mandatory minimum sentence this is technically incorrect given the judicial discretion to deviate from the ten year sentence in certain circumstances. It is more appropriate to refer to it as a presumptive mandatory minimum sentence.[2] The courts have grappled with what constitutes exceptional and specific circumstances that allow them to depart from the presumptive mandatory minimum. This article attempts to set out those general principles and to examine the more recent authorities from the Court of Criminal Appeal.

Section 27 of the Misuse of Drugs Act 1977

A consolidated s.27 of the Misuse of Drugs Act 1977, as amended[3] now provides for the penalties in relation to a s.15A offence. The main provisions are as follows:

> "(3A) Every person guilty of an offence under section 15A or 15B of this Act shall be liable, on conviction on indictment—
>
> (a) to imprisonment for life or such shorter term as the court may determine, subject to subsections (3C) and (3D) of this section or, where subsection (3F) of this section applies, to that subsection, and
>
> (b) at the court's discretion, to a fine of such amount as the court considers appropriate.
>
> (3B) The court, in imposing sentence on a person for an offence under section 15A or 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.
>
> (3C) Where a person (other than a person under the age of 18 years) is convicted of an offence under section 15A or 15B of this Act, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.
>
> (3D)(a) The purpose of this subsection is to provide that in view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under section 15A or 15B of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so.
>
> (b) Subsection (3C) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for that purpose the court may, subject to this subsection, have regard to any matters it considers appropriate, including—
>
> (i) whether that person pleaded guilty to the offence and, if so—
>
> (I) the stage at which he or she indicated the intention to plead guilty and
>
> (II) the circumstances in which the indication was given, and
>
> (ii) whether that person materially assisted in the investigation of the offence.
>
> (c) The court, in considering for the purposes of paragraph (b) of this subsection whether a sentence of not less than 10 years imprisonment is unjust in all the circumstances, may have regard, in particular, to—
>
> (i) whether the person convicted of the offence concerned was previously convicted of a drug trafficking offence, and
>
> (ii) whether the public interest in preventing drug trafficking would be served by the imposition of a lesser sentence."

* Barrister-at-Law. My thanks to Isobel Kennedy SC for her helpful comments and observations while composing this article but all responsibility for errors and omissions is my own.

1 As inserted by s.4 of the Criminal Justice Act 1999.

2 In *DPP v McGinty* [2007] 1 I.R. 375 Murray C.J. stated that the section had sometimes been misleadingly referred to in public debate as if the Oireachtas intended that in all cases of a conviction under s.15A, the minimum ten years imprisonment should be imposed, when this was far from the case. See also the comments of Denham J. in *DPP v Lernihan,* unreported, Court of Criminal Appeal (Denham, deVelera and McGovern J.J.) April 18, 2007, at page 11 of the unreported judgement Denham J states:

> "*although widely referred to as a mandatory minimum sentence it is not a true mandatory sentence, such as is provided for in the crime of murder.*"

3 As amended by s.84 of the Criminal Justice Act 2006 and s.33 of the Criminal Justice Act 2007.

Under the amended provisions introduced in the 2006 Act, a person convicted of a subsequent second offence under s.15A or s.15B cannot avail of the discretion and a minimum ten year sentence must be imposed.[4] The subsection states that a person "*shall*" serve the sentence which implies that the subsequent sentence imposed cannot be suspended. A sentence imposed under s.15A may not be remitted or commuted[5] but a convicted person is entitled to remission.[6] It should also be noted that temporary release is restricted for those convicted pursuant to a s.15A charge as it cannot be granted unless there are exceptional reasons and only for a limited time.[7]

Unusually, the concept of a reviewable sentence is maintained.[8] A reviewable sentence, whereby a court imposes a sentence with the power to suspend the balance of the sentence on a future date, was deemed undesirable as a general sentencing practice in *DPP v Finn*[9] but is specifically legislated for in relation to s.15A offences. If the court is considering a review, it can take into consideration whether or not the accused was under the influence of drugs at the time and, if satisfied, may list the sentence for review after the expiry of half of the sentence imposed. At that stage, if the court is satisfied, they may suspend the balance of the sentence on any conditions it sees fit having regard to any matters it considers appropriate.[10] The reviewable aspect *only* applies however when the presumptive mandatory minimum sentence of ten years or more has been imposed.[11]

General principles from case law

A sentencing court does not have to impose the presumptive mandatory minimum if there are specific and exceptional circumstances which relate to either the offence or the offender such as to depart from it.[12] In considering when to depart from the ten year sentence, the following general principles have emerged:

- The court must always consider the maximum sentence as well as the presumptive mandatory minimum. It is inappropriate to use the ten years as a benchmark from which a court can add or reduce years. The following passage from Murphy J in *DPP v Renald*[13] is frequently cited:

  "Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there is no question of the minimum sentence being ignored…even though that sentence may not be applicable in a particular case, the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission. That is not to say that the minimum sentence is necessarily the starting point for determining the appropriate sentence. To do so would be to ignore the other material provision, that is to say the maximum sentence."[14]
- If an accused does not plead guilty or co-operate, it is not the position that he must automatically receive a sentence of at least ten years.[15]
- If a court is satisfied that there are specific and exceptional circumstances such that a ten year sentence should not be imposed, the court can depart from the presumptive mandatory minimum; however the sentence imposed should still reflect the gravity of the offence.[16]
- The sentencing process is not an exact mathematical process whereby a certain number of years are deducted from the ten year presumptive mandatory minimum sentence for each specific and exceptional circumstance.[17]
- A court may impose a suspended sentence for those convicted of a s.15A offence but only where there are very exceptional circumstances and the imposition of a suspended sentence would uphold the interests of justice.[18]

Plea of guilty and circumstances of plea

A plea of guilty is considered an exceptional and specific circumstance notwithstanding that there is nothing exceptional about pleading guilty to the offence.[19] However, the stage at which the plea is entered is relevant and specifically referred to in the section. A late plea will obviously not attract the same level of mitigation.[20]

4 Ss.3(E) and 3(F). This is subject to an exception for those under the age of eighteen at the time of sentencing.
5 s.3(G)
6 s.3(H)
7 s.3(I)
8 Ss.3(J) and 3(H).
9 [2001] 2 I.R.25. A reviewable sentence was commonly known as a "Butler Order" originally from the decision of Butler J. in the case of *State (Woods) v Attorney General* [1969] I.R. 285. The *Finn* decision confirmed that such sentences were undesirable because of their lack of uncertainty and interference with the executive power.
10 s(3)(K)
11 *DPP v Dunne* [2003] 4 I.R. 87.
12 The circumstances relating to the offence or the offender must be both exceptional and specific; *DPP v Botha* [2004] 2 I.R. 375 at 384, where Hardiman J held that the circumstances must be both exceptional and specific as the conjunctive form of the words left no other conclusion open.
13 Unreported, Court of Criminal Appeal (Murphy, Lavan and Budd J.J.) November 23, 2001.
14 Per Murphy J. at page 6 of the unreported judgement.
15 *DPP v Duffy,* unreported, Court of Criminal Appeal (Keane C.J., O'Higgins and Butler J.J.) December 21, 2001. See also *DPP v Shakele*, unreported, Court of Criminal Appeal (Finnegan, Herbert and Hedigan J.J.) February 25, 2008, where the court held that notwithstanding that the applicant had fought the case "*tooth and nail*" the trial judge had imposed too high a sentence which effectively penalised him for exercising his right to a trial. The Court reduced a sentence of thirteen years with two years suspended to ten years with two years suspended.
16 *DPP v Henry*, unreported, Court of Criminal Appeal (Keane C.J., Barr and Herbert J.J.) May 15, 2002.
17 *DPP v Rossi and Hellewell,* unreported, Court of Criminal Appeal (Fennelly, O'Neil and White J.J.) November 18, 2002 (*ex tempore*).
18 *DPP v McGinty* [2007] 1 I.R. 633; *DPP v Alexiou* [2003] 3 I.R. 513.
19 See the comments of Geoghegan J in *DPP v Ducque* unreported, Court of Criminal Appeal (Geoghegan, Budd and O'Neil J.J.) July 15, 2005, at page 10 where he states that "*there is nothing exceptional about a plea of guilty; it is one of the commonest occurrences in any criminal trial."*
20 *DPP v Henry*, unreported, Court of Criminal Appeal (Keane C.J.

A plea of guilty can overlap with providing material assistance. However, where there is an overlap this should not necessarily result in a separate reduction in sentencing. In *DPP v Galligan*[21] the Court of Criminal Appeal noted that:-

> "In some cases, sentencing judges attribute separate values to individual mitigating factors. That may, on occasion be justified to the extent that they can be clearly segregated…..the judge should, however, bear in mind that there may be an element of overlap between the specified circumstances…the trial judge was correct to assess the extent of any mitigation in one reduction, without differentiation, of three years."[22]

Material assistance

Material assistance was discussed by Denham J in *Davis v DPP*[23]:

> "The issue of 'material assistance' may take many forms. The most basic is to admit the offence. Secondly, an admission may be made together with showing the Gardaí drugs, etc, relating to the specific offence in issue. Thirdly, there is a much more significant material assistance where an accused assists the Gardaí in relation to other offences and criminality. This latter is a matter of great public interest, and has been given significant weight in other cases."[24]

1. Plea of guilty

A plea of guilty is considered material assistance as discussed above.

2. Admissions made

When an accused makes admissions this can be of material assistance to the Gardaí. The level of mitigation this will attract depends on the circumstances; for example a person caught red-handed will not attract as much mitigation. In *DPP v Brodigan*[25] the court found:-

> "..the admissions in particular were of very considerable value, because it would have been necessary for the prosecution to have proven that the applicant was in actual possession of the drugs…the court considers that the assistance given by the applicant to the prosecution or to the gardaí in relation to the matter was very material assistance."[26]

The courts have also held that informing the Gardaí that the drugs found did not belong to anyone else is material assistance.[27]

3. Provision of information

The most significant form of material assistance is providing Gardaí with independent information. In defining this aspect of material assistance, the courts have focused more on what does not constitute material assistance as opposed to what does. In *DPP v Henry*[28] the Court of Criminal Appeal increased a sentence from four years to six years because although the respondent had materially assisted, he had been given too much credit by the sentencing judge in circumstances where he had refused to indicate who other persons involved were.

Most notably, the legislation does not provide for an alternative to hearing evidence outside of a courtroom relating to material assistance. A person may not want the extent of his co-operation relayed in open court as he may be in fear of others finding out about his assistance. It is unfortunate that recent amendments did not address or provide for an alternative for those who may wish to convey to a court how co-operative they were but are scared of any possible consequences of same.

Can a court take into consideration the quantity, value or type of the drugs?

The question of how much weight a court can give to the quantity, value and type of drugs involved has been considered by the courts.[29] In relation to the type of drugs the courts have held that in general a sentencing judge should not distinguish between them, although in certain circumstances the type of drug can be of "*limited assistance*".[30] However, in respect of the quantity and value of the drugs; a court can take this into consideration as held by the recent decision of *DPP v Long*.[31] In that case the DPP brought an appeal submitting that the trial judge was incorrect in failing to take into account the gravity of the offence, having regard to the value of the drugs, namely cocaine, worth €111,370. The court concluded:-

> "… the Court has no hesitation in concluding that

Barr and Herbert J.J.) May 15, 2002. In that case the Court noted that the sentencing judge had given too much credit for a plea of guilty in circumstances where it was only entered the day before the trial.

21 Unreported, Court of Criminal Appeal, (Fennelly, Kelly and Peart J.J.) July 23, 2003.

22 Per Fennelly J. at page 9 of the unreported judgment.

23 Unreported, Court of Criminal Appeal (Denham, Feeney and McGovern J.J.) February 19, 2008 (*ex tempore*).

24 Per Denham J. at page 5 of the unreported judgment.

25 Unreported, Court of Criminal Appeal (Macken, Budd and McCarthy J.J.) October 13, 2008.

26 Per Macken J. at page 2 of the unreported judgment. See also *DPP v Fitzgerald*, unreported, Court of Criminal Appeal (McCracken, Gilligan and Dunne J.J.) February 9, 2006 where McCracken J held that there was material assistance as the applicant had co-operated, pleaded guilty and had told the Gardaí what he knew about the drugs and showed them where all available drugs were.

27 See *DPP v Barrett*, unreported, Court of Criminal Appeal (Geoghegan, Peart and O'Leary J.J.) July 12, 2004.

28 Unreported, Court of Criminal Appeal (Keane C.J. Barr and Herbert J.J.) May 15, 2002.

29 *DPP v Botha* [2004] 2 I.R. 375, *DPP v Benjamin* Unreported, Court of Criminal Appeal, (Denham, Johnson and O'Sullivan J.J.) January 14, 2002 (*ex tempore*); *DPP v Gilligan* [2004] 3 I.R. 87.

30 *DPP v Renald*, unreported, Court of Criminal Appeal, (Murphy, Lavan and Budd J.J.) November 23, 2001. The court held that the application of s.15A was determined by the value, rather than the category of the drugs involved; however, it could be a factor to which a sentencing judge in his or her discretion might attach some "*limited significance*".

31 Unreported, Court of Criminal Appeal, (Kearns, Budd and Clark J.J.) October 31, 2008.

> the quantity and value of drugs seized are critical factors to be taken into account in evaluating the overall seriousness of the offence. That is implicit from the terms of s.15(A) itself which provides a separate and more draconian regime of sentencing for a person found in possession of controlled drugs which exceed a certain value…it is true that this Court has not specifically stated until this case that the value of the drugs seized is an important factor in sentencing but that is plainly to be inferred from a number of pronouncements of this Court when dealing with drug cases."[32]

The courts have also held in *DPP v Finnamore*[33] that there is no requirement in law that every bag containing drugs found must be individually analysed and added together in order for the prosecution to prove that the drugs were valued over €13,000. In this regard *DPP v Connolly*[34] should be noted. There the applicant argued that as not only were not all bags analysed, but the purity of the drug was not 100% pure and therefore it could not be proved definitively that the value of the drugs amounted to over €13,000. The Court rejected this argument citing the *Finnamore* decision and stated that there were satisfied that there was fair evidence before the jury for them to reject or accept the evidence of the expert as to whether or not the powder in each of the bags was the same and the value was that of over €13,000.

Previous drug trafficking offence

A court must now also take into account whether or not the accused has previous convictions for a drug trafficking offence.[35] It is submitted that the insertion of this provision into the 2007 Act was unnecessary as a judge would *always* consider this. A matter which has caused more difficulty at sentencing hearings is whether or not evidence of previous involvement in the drugs trade can be given. In *DPP v Gillligan No.2*[36] the Court held that a judge may not have regard to evidence of other criminal activity which has not been the subject of any conviction. This was followed by *DPP v Long*[37] where Macken J held that the sentencing judge did not clearly and unambiguously avoid the difficulties of separating the two. A sentencing court will also not allow inappropriate evidence of a dramatic character, such as grading an accused on a drug dealing scale of one to ten.[38]

The case of *DPP v McDonnell*[39] should also be noted. There the Court of Criminal Appeal held that the sentencing judge went beyond what was permissible when he asked "*how long the applicant had been in the trade*".[40] The Court held that admissions at a sentencing hearing of hearsay evidence to suggest the commission of prior criminal offences for which an accused had not been tried, would infringe the accused's right to a trial in due course of law. However, the Court of Criminal Appeal held that hearsay evidence of character, antecedents and background information of an offence, including the extent of the role of the accused may at the discretion of the sentencing judge be admitted. It is then up to the judge to decide what weight should be attached to the evidence as required. However, notwithstanding this decision, the dividing line is still somewhat far from clear and further issues may emerge in this respect.

Is the public interest served by the imposition of a lesser sentence?

Another new provision in the legislation is the concept of whether the public interest is served by the imposition of a lesser sentence. The inclusion of this provision suggests that a court should consider that the public interest will *not* always be served by committing an offender to prison. In *DPP v McGinty*[41] a five year suspended sentence was upheld on appeal for undue leniency. The court held that where there are special reasons of a substantial nature and wholly exceptional circumstances, the imposition of a suspended sentence might be appropriate in the interests of justice.[42]

Other factors considered exceptional and specific circumstances

An examination of the case law reveals that the courts have stated that the following can be deemed exceptional and specific circumstances:

Absence of previous convictions

The courts have held that in a situation where a person has never come to the court's attention before, the judge can treat that as an exceptional and specific circumstance. A person who has minor previous convictions, which are not relevant, will be treated as a first time offender.[43] Similarly an offender who has previous convictions which date back sometime will be entitled to have those offences disregarded.[44]

Foreign national

Many foreign nationals who find themselves before the courts are couriers or "*mules*" who have been paid small amounts of

32 The court in that case increased a two year sentence to a six year sentence with the last three years suspended.
33 Unreported, Court of Criminal Appeal (Macken, Feeney and McGovern J.J.) July 1, 2008.
34 Unreported, Court of Criminal Appeal (Denham, Herbert and Hanna J.J.) May 12, 2009.
35 Section 3(N) of s.27 of the Misuse of Drugs Act 1977, as amended, provides that a drug trafficking offence has the meaning it has in s.3(1) of the Criminal Justice Act 1994.
36 [2004] 3 I.R. 87.
37 Unreported, Court of Criminal Appeal (Macken, Lavan and Murphy J.J) April 7, 2006, at page 2 of the unreported judgement.
38 *DPP v Delaney*, unreported, Court of Criminal Appeal (Hardiman, McCracken and Smyth J.J.) February 28, 2000.
39 Unreported, Court of Criminal Appeal (Kearns, Budd and Herbert J.J.) March 3, 2009.
40 The case related to a s.15 charge only, however, the principles are applicable.
41 [2007] 1 I.R. 633.
42 See also *DPP v Ryan* at page 8 below.
43 In *DPP v Galligan*, unreported, Court of Criminal Appeal (Fennelly, Kelly and Peart J.J.) July 23, 2003, the applicant had been convicted of some road traffic offences and required to contribute £500 to charity, however for the purpose of sentence, the court held that the applicant should be treated as a first offender.
44 In *DPP v Botha* [2004] 2 I.R. 375 the Court of Criminal Appeal upheld a five year sentence for a South African national who had two previous convictions for fraud and theft from 1985 and 1986. The court held that the previous convictions should be disregarded having regard to the remoteness in time.

money to smuggle drugs through customs. In *DPP v Renald*[45] the court acknowledged that foreign nationals would have difficulties in serving a sentence in this jurisdiction. This was a factor considered when the court reduced the applicant's five year sentence to five years with two years suspended.

Courier/Mule

The courts have recognised that vulnerable persons in society are used for the transport of drugs frequently.[46] In such circumstances the courts have acknowledged that these vulnerable persons rarely achieve personal gain and are essentially used as "*patsies*" for drug dealers. In *DPP v Whitehead*[47] the appeal court reduced the applicant's sentence of seven years with one year suspended to three and a half years because the sentencing judge did not give due consideration to the fact that she was used as a courier.[48]

Duress

Where a person has voluntarily associated himself with illegal activity, such as the drugs trade, it is not a defence in law to say that they were under duress to hold / courier drugs.[49] However an applicant's motivation for involvement in the offence is a relevant factor that a sentencing court can take into account. The Courts have held that what is regarded as vulnerable can also include those who are addicted to drugs and those who are vulnerable to drug dealers as they are in fear and are forced to hold or carry drugs. In *DPP v Spratt*[50] the court noted that the applicant:-

> "…because of his indebtedness he was to some extent vulnerable. This is not quite the same as the vulnerability of a drug addict with a very expensive habit who can be forced or encouraged into dealing in drugs or carrying drugs much more readily but is a factor which we will take into account in his personal circumstances." [51]

Health grounds

In *DPP v David Kinahan*[52] the applicant was described as a man with serious health problems. The Court of Criminal Appeal increased the suspended portion of his sentence from ten years with two years suspended to ten years with five years suspended as they felt that these issues were personal difficulties which not taken into account by the sentencing judge.[53]

Drug free

In *DPP v Mark Ryan*[54] the Court of Criminal Appeal upheld a five year suspended sentence as the accused, who was addicted to drugs at the time of offence, had been able to show that he had been drug free for a period of four years since the offence.[55]

Conclusion

The provisions of sentencing s.15A offences has been described as "*a revolutionary alteration superimposed on the conventional principles of sentencing*"[56] However as a sentencing procedure it can lead to unfairness for those who come before the courts. Whilst it is accepted that the dangers of drugs and their threat to society can never be underestimated, it is unclear why those who are caught with firearms are only subject to a presumptive mandatory sentence of five years.[57] However, those vulnerable persons in society who are used as couriers are subject to the presumptive ten year mandatory minimum. It is accepted that the exceptional and specific circumstances do tend to guide judges away from the ten years in appropriate circumstances, but nonetheless the figure is constantly present in a sentencing judge's mind.

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45 Ibid at footnote 13.

46 In *DPP v Alexiou* [2003] 3 I.R. 513 the courts recognised that those involved at the lower end may be taken advantage of because of their vulnerability. In that case the Court upheld a four year suspended sentence as the accused was a vulnerable person of low intelligence who had been paid a small amount of money to act as a courier.

47 Unreported, Court of Criminal Appeal (Kearns, Budd and Clark J.J.) October, 20 2008 (*ex tempore*).

48 Conversely those who are involved at a high end will not be treated leniently. In *DPP v Henry*, unreported, Court of Criminal Appeal (Keane C.J., Barr and Herbert J.J.) May 15, 2002 (*ex tempore*) the Court increased a sentence of four years to six years as it found that the respondent was an essential cog in the machine and whilst he was not the mastermind, he played a significant part.

49 The courts have held that the defence of duress is precluded when an accused ought reasonably to have known that his association with the illegal activity might lead to coercion. See for example the cases of *DPP for Northern Ireland v Lynch* [1975] A.C. 653; *R. v Heath* [2000] Crim L.R. 10; *R. v Hasan*, Times Law Reports, March 21, 2005; *R v. Z* [2005] 2 A.C. 467.

50 Unreported, Court of Criminal Appeal (Finnegan, Murphy and deVeleara J.J.) December 10, 2007.

51 Finnegan J. at page 2 of the unreported judgement.

52 Unreported, Court of Criminal Appeal (Finnegan, Hanna and McCarthy J.J.) 14 January 2008 (*ex tempore*).

53 See also *DPP v Vardacardis* unreported, Court of Criminal Appeal (Keane C.J., Quirke and Butler J.J.) January 20, 2003 (*ex tempore*). In that case the accused was a female 65 year old South African national suffering from cancer; the Court held that the judge was correct to take into account her extremely poor state of health and her age into consideration. They held that the sentence imposed of eight years, one and a half to be served, with six and a half to be suspended on condition that the accused leave the country was not unduly lenient.

54 Unreported, Court of Criminal Appeal (Fennelly, McGovern and Birmingham J.J.) April 28, 2008 (*ex tempore*). See also *DPP v McGinty* ibid.

55 In that situation they decided to keep the five year suspended sentence but with the condition attached that the respondent continue to submit himself to regular drug testing.

56 *DPP v Dermody* [2007] 2 I.R.622.

57 Part 5 of the Criminal Justice Act 2006 brought into effect a presumptive mandatory minimum sentence of five years for those caught with firearms with exceptions provided for, similar to those in s.15A.

The criminal liability of passengers in a car*

Paul G. Gunning BL

Introduction

When a person accepts a lift in a car from another, what duty is expected of that person to ensure the car is not about to be used in a criminal enterprise? Given that once the car starts there is almost nothing the passenger can do alter events, is there an obligation on that passenger to check the car for criminal materials such as a bomb or weapons?

On 30th June 2007, a jeep packed with explosives and gas canisters crashed into Glasgow international airport in a terrorist attack which caused significant property damage but fortunately did not result in any loss of life. At trial, the accused, a Dr. Abdulla Bilal, advanced the superficially attractive argument that he had not taken any active role in the Glasgow attack, but rather, had merely accepted a lift to the airport from a friend. [1] Dr. Bilal was convicted on 16th December 2008 at Woolwich Crown Court on two charges of conspiracy to commit murder and conspiracy to cause explosions.[2] He was subsequently sentenced to thirty two years in prison for his role in these offences.[3]

Complicity of offenders

The common law on complicity has long held that all parties to a criminal enterprise are principal offenders. This is reflected in section 7(1) of the Criminal Law Act 1997 which states that any person who "aids, abets, counsels or procures" the commission of an indictable offence shall be punishable as a principal offender. What is not so clear is whether a mere passenger in a car participates in an offence such as vehicular manslaughter committed by the driver.

Unfortunately, there is no reported caselaw in this jurisdiction on this matter. However, some guidance is contained in *Criminal Law* by Charleton based on a number of UK cases which have addressed this issue.[4]

Charleton states, "[*p*]*articipation in manslaughter has been found in respect of a passenger in a car, where the car was stolen, and driven with criminal negligence by the driver*".[5] However, it is argued in the present article that a closer analysis of the caselaw on which the authors rely would suggest the situation is not so clearly defined.

* With thanks to John D. Fitzgerald BL for his helpful comments which enabled the speedy completion of this article. All views expressed and errors made are entirely those of the author.

1 The Telegraph, 9th January 2009, www.telegraph.co.uk
2 New York Times, 16th December 2008
3 Reuters, 16th January 2009, http://uk.reuters.com/article/domesticNews/idUKTRE50F3OO20090116
4 Charleton, McDermott & Bolger, *Criminal Law* (Butterworths, 1999)
5 Ibid, p.218

Existing case law

In *Baldessare* the appellant was the passenger in a car which was being taken for a joyride.[6] The car knocked down and killed an elderly woman. Both the appellant and the driver were acquitted of charges of larceny due to lack of evidence of intention to permanently deprive the owner of the car but convicted of manslaughter. On appeal the Court held that the central question was whether there was any evidence on which the jury could properly find community of purpose and action.[7] Taking into account all the circumstances of the case; the joyride, it was a dark night and the car had no proper lights, the speed of the car and its movements before and after the collision, the Court of Appeal held that there was sufficient evidence for the jury to find both driver and passenger guilty and dismissed the appeal. While holding on the facts of this case that the dangerous circumstances in addition to presence provided sufficient evidence for community of purpose and action, the Court supported the view that mere presence in the passenger seat is not enough to constitute participation in a crime.

It is submitted that even this higher standard, i.e. more than mere presence, for finding the passenger complicit is of questionable validity. There is no suggestion that the appellant was aware of these circumstances before he entered the car and once having entered the car, he was no longer in a position to control the car. Further, while it might be open to question whether the existence of dangerous driving conditions is sufficient evidence of common design, this case does not support the view that mere presence is sufficient evidence to prove common design.

In *Du Cros v Lambourne* the appellant appealed against a conviction for unlawfully driving his motor car at a speed dangerous to the public.[8] There was a conflict of evidence as to whether the appellant was the driver or passenger in the car. The Court affirmed the decision of the lower court on the basis that, on the facts of the case, it was immaterial whether the appellant was driver or passenger. This was because he was the owner of the car, and if the other party present, a lady named Ms. Godwin, was driving, she was doing so with his consent and approval. The Court was of the view that he must have known the speed was dangerous and being in control of the car ought to have prevented the dangerous driving. Darling J. stated:

> The appellant was the owner of the car and in control of it, and he was therefore the person to say who

6 *Cyril Baldessare*, 22 Cr. App. R. 70
7 Ibid, 72
8 [1907] 1 KB 40

> should drive it. The case finds that he allowed … Miss Godwin to do so; that he knew that the speed was dangerous, and that he could and ought to have prevented it.[9]

This case clearly supports the proposition that mere presence in the car and knowledge of the crime is not sufficient of itself to attach criminal liability to the passenger in a car. In other words, the proposition that mere presence was sufficient in this case was contingent on various additional factors. The facts of this case which supported participation were the accused's ownership of the car, his control over the situation, and his knowledge of the dangerous nature of the driving coupled with his presence in the car. Where these additional factors are not present, the position would appear to be that as stated in *Ross v Rivenall* to which I now turn.[10]

In *Ross v Rivenall* the appellant was found in the back seat of a stolen car with three other men. The car had been driven a mere six miles from where it had been stolen before it ran out of petrol at 1.55am. When discovered by police, the car's lights were on, there was no key in the ignition and the wiring had been tampered with. The appellant made no attempt to explain his presence in the car, nor had he attempted to leave the car. Subsequently, at the police station he claimed that he had merely accepted a lift from the other men in the car.[11]

The Court held that given his presence in the car, his failure to behave as would be expected of a person who had merely taken a lift, the time of night, the failure to leave the car and the general circumstances, there was sufficient evidence of association between the appellant and the driver of the car for the jury to consider whether he was a participant in the crime of unlawfully taking and driving away a motor vehicle, and unlawfully using the vehicle without there being in force a policy of insurance.[12] Despite dismissing the appeal, Donovan J. clearly stated that "mere presence is not evidence of complicity in the offence".[13]

Similarly, in *R v Stally,* the appellant and another man met two girls on a night out. The girls invited them to a party but a taxi refused to take them to the party as one of the girls was ill. The appellant then went to find another taxi. When he returned, the other man had stolen a van in which all four departed. He pleaded not guilty to the charge of taking and driving away a motor vehicle without lawful authority contrary to section 28(1) of the Road Traffic Act, 1930 but was convicted. On appeal the Court held that it was not sufficient that he entered the vehicle knowing it to be stolen. He could only be convicted if the taking had been a joint enterprise. This is further support for the proposition that presence in a car, even where one is aware the car is stolen, is not sufficient to show participation in the crime.

Analysis of the current position

It is apparent from the above case law that mere presence in a vehicle does not constitute participation in a crime, whether that crime is the actual theft of the car or a crime committed while the car is in motion (e.g. vehicular manslaughter). Participation requires community of purpose or a joint enterprise. This can only be found where there are factors in addition to presence in the car (though presence itself is not necessary). In *Baldessare,* community of purpose was found through presence in the car and the surrounding circumstances of the crime, e.g. poor light, driving behaviour etc; in *Du Cros v Lambourne* participation was found through presence and the fact that the appellant owned the car and exercised a degree of control over the car and the driver. In none of the above cases was participation in the crime found through mere presence and indeed, this was explicitly rejected by the court in *Ross v Rivenall.*

Where the car is stolen and the passenger is aware of this fact, the appropriate charge would be that of allowing oneself to be carried in a stolen car contrary to section 112(1)(b) of the Road Traffic Act 1961, though in such cases the issues of knowledge and recklessness would have to be proved.

Withdrawal from a common design

The above discussion on the position of a passenger in a car also begs the question of how would such a passenger withdraw from a criminal enterprise, assuming he had already entered into one. In *People (AG) v Ryan,* the Court of Criminal Appeal set out the law relating to withdrawal from a common design.[14] In that case, one group of men attacked another group of men and women outside a dance resulting in the death of one man and the serious injury of another – both from the latter group. Mr. Ryan was a member of the attacking group and carried a wheel brace concealed in his jacket during the assault. He took no active part in the assault but stood beside the principal offender as he dealt the fateful blows. This was held to be sufficient to bring him within the common design.

It was contended that Ryan withdrew from the common design by his passive role and the fact that he spoke to one of the women in the opposing group reassuring her that there would be no fighting. The Court held that this was not sufficient to constitute withdrawal from a common design.[15] It was held that in order to withdraw from such a common design, Mr. Ryan would have to have made some positive steps in support of this. He would have to have disarmed himself, leave the scene or take some other such positive action.[16]

It is interesting to note that had Mr. Ryan tried to calm the principal aggressor by speech alone, then the court was of the view that "something could be said for the case made" (i.e. that he withdrew from the common design).[17] This is far from a judicial pronouncement that words alone can constitute withdrawal from a common design but rather are evidence in support of such a contention. In the context of a passenger in a car, it is hard to see how such a passenger could meet this standard of withdrawal from a common design. The passenger cannot physically alter the course of events once he/she consents to getting in the car. The most that could be done would be to attempt to calm or dissuade

9 Ibid, 46
10 [1959] 1 WLR 713
11 *Ibid*
12 *Ibid*
13 *Ibid*, 716
14 Frewen (1977) 304
15 Ibid, p.313
16 Ibid
17 Ibid

the driver by speech alone. In Dr. Bilal's case, had his story been accepted, it would have been near impossible for him to withdraw from the criminal enterprise or do anything to prevent it without the risk of grave personal injury. This presents obvious difficulties for the minimum requirements of a trial in due course of law.

Proposals for reform

Given the common law position as outlined above, it is respectfully submitted that the standard to be applied is unjust. It is difficult to see how a passenger would be capable of influencing the behaviour of the driver. If a passenger enters a car, even one which he knows to be stolen, he is not then in a position to control the activities of the driver. Further, in some of the above cases, it was held that even in a car which was not stolen, the passenger would be a participant in any subsequent crime. *Du Cros v Lambourne* represents the most extreme example of this approach. The appellant in that case was held to be a participant on the basis that he owned the car and was therefore in control. It is very difficult to see how a person can control the car from the passenger seat, even if he does own it.

It is submitted that before a passenger in a car would be held to be a participant in such a crime, there should be evidence of real community of purpose; this could take the form of intent to aid and assist in the commission of the crime committed by the driver. It is submitted that the standard for showing participation should be in the nature of some positive action. The alternative is to convict people for crimes which they had no actual role in whatsoever. However, none of this would solve the difficulty of a passenger attempting to withdraw from a common design. It would appear that some lower form of withdrawal would have to be accepted here such as verbally attempting to dissuade the driver alone. ■

Bar Benevolent Fund

Juliet Fitzgerald BL

The Bar Benevolent Fund has been a feature of the Bar for many years. Despite this, however, very little is known of its origin. Until recently, there was a notice on the wall of the main floor of the Law Library dated 1916, which outlined that the Annual General Meeting of the Bar Benevolent Fund had taken place. At that time, the committee consisted of only six members, whereas today it is ten. Otherwise, little else is known of its history or beginning, which is in-keeping with the strict policy of confidentiality with which it has always operated.

The purpose of the Bar Benevolent Fund is to come to the aid of colleagues and their families who for one reason or another are experiencing financial hardship. Over the years, the fund has assisted with the private affairs of those in need or their loved ones. Contributions to the fund by colleagues are seen as a recognition that we are a member of a privileged profession. It expresses a feeling of collegiality with our colleagues and an obligation to provide in advance, or as the occasion requires for the misfortune that may come our way in the future or the way of our colleagues.

There is a policy of absolute secrecy governing the operation of the Bar Benevolent Fund. The number of colleagues who have received assistance is confidential. The policy of silence is such that absolutely no information about beneficiaries of any kind is ever given. A mere global figure and an example of the type of financial help available is mentioned in the letter circulated annually. It is feared at times that some colleagues in need do not apply for assistance as it would cause an embarrassment that often arises from the human wish not to be seeking 'charity'. However, the monies are better seen by applicants as a fund, subsidised by their colleagues to which they have recourse to when the need arises.

There are few rules and guidelines governing the operation of the fund. In general, only members of six years standing as barristers, or their dependents are eligible for aid. This however, is never relied on where a serious need is discerned. Generally, donations to the fund exceed the amount paid out. In the 2008/2009 accounting year, just over 40% of Senior Counsel and only a little over 5% of the Junior Bar made contributions. This was down on the previous years, and may be a reflection of the current financial crisis which has befallen us. In essence, however, the fund is in need of ongoing contributions. Colleagues are urged to bear the good work of the Bar Benevolent Fund in mind when asked to consider making a contribution in the future. ■

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ADMINISTRATIVE LAW

Statutory Instrument

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CONTRACT LAW

Building contract

Privity of contract – Exceptions to privity of contract – Whether employer in building contract can sue for losses incurred by third party – Whether party can sue for losses incurred by third party where no other remedy available – *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 and *Linden Gardens Trust Ltd v Linesta Sludge Disposals Ltd.* [1994] 1 AC 85 followed - Rules of the Superior Courts 1986 (SI 15/1986), O 62, rr 2 and 5 – Arbitration Act 1954 (No 26), s 35 – Questions answered (2009/242SS – Ryan J – 16/10/2009) [2009] IEHC 467
Bowen Construction Ltd v Kelcar Developments Ltd

Breach

Settlement terms - Earlier proceedings settled by parties – Terms of settlement in dispute – Conflicting accounts of terms of settlement – Finding of fact – Obligation on parties to act reasonably – Contract of employment - Career break - Plaintiff seeking reinstatement to original locus - Mandatory injunction – Whether tantamount to specific performance of employment contract – Damages – Whether mandatory injunction appropriate in circumstances – *Cahill v Dublin City University* [2007] IEHC 20 [2007] ELR 113 considered - Health Act 1970 (No 1) - Declaratory relief granted; injunctive relief refused (2008/6113P – Laffoy J – 26/5/2009) [2009] IEHC 418
McNamara v Health Service Executive

Sale of land

Continued validity – Whether contract validly rescinded – Whether contract capable of enforcement – Whether valid and subsisting arbitration clause – Limitation of scope of arbitration clause – Whether dispute governed by arbitration clause – Whether appropriate to fully stay proceedings pending arbitration – Incorporated Law Society General Conditions of Sale 2001, clause 33 and 51 - Partial stay on proceedings granted (2009/1477P – Clarke J – 2/7/2009) [2009] IEHC 320
Kelly v Lennon

Sale of land

Duress – Undue influence – Unconscionable bargain – Improvident transaction – Setting aside transaction - Actual undue influence – Whether contract procured by duress or undue influence – Equity - Principles to be applied – Conduct of land transfer irregular - No independent legal advice received by plaintiff - Plaintiff in poor psychological and physical condition at time of contract - Plaintiff under serious disadvantage - Plaintiff actively seeking defendants to purchase land not bar to plaintiff's claim of unconscionable bargain or improvident transaction – Whether improvident transaction or unconscionable bargain -Defences – Laches – Acquiescence - Clean hands – Whether plaintiff delayed

– Remedies – *Restitutio in integrum* - Damages – Aggravated damages – Principles to be applied - *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 followed; *Carroll v Carroll* [1999] 4 IR 241, *Grealish v Murphy* [1946] IR 35 and *Conway v Irish National Teachers Organisation* [1991] 2 IR 305 applied – Transfer set aside and damages awarded (2002/2652P - Laffoy J – 24/8/2009) [2009] IEHC 405
Keating v Keating

Specific performance

Dissolution of partnership agreement – Breach of contract - Terms of agreement – Implied terms – Contractual time limits – Time of the essence – Whether time of the essence – Whether time could be implied as being of the essence - *Trollope & Colls Ltd v Northwest Metropolitan Regional Hospital Board* [1973] 2 All ER 260, *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* [1938] 38 SR (NSW) 632 and *United Yeast Company Ltd v Cameo Investments Ltd* [1977] 111 ILTR 13 considered; *Hopkins v Geoghegan* [1931] IR 135 applied – Relief granted (2008/1767P – McGovern J – 24/4/2009) [2009] IEHC 190
O'Connor v McNamara

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Carey, Gearoid
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COSTS

Article

McCormack, Yvonne
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COURTS

Jurisdiction

Ombudsman – Appeal - Statutory appeal distinguished from ordinary judicial review – Principles to be applied – Jurisdiction of ombudsman – No challenge to procedures followed by respondent- Finding of respondent based on objective analysis of evidence before him - Whether decision of respondent vitiated by serious and significant error or series of errors– Financial services – Whether appellant provided financial service to notice party –Whether appellant acted as financial service provider - Failure by appellant to disclose interest in property sold to notice party – Duty of care to notice party – *Murray v Irish Airlines (General Employees) Superannuation Scheme* [2007] IEHC 27 (Unrep, Kelly J, 25/1/2007) approved; *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323 (Unrep, Finnegan P, 1/11/2006) applied – Central Bank Act 1942 (No 22), ss 2, 57CL, 57CM, 57BB, 57BK, 57BX, 57 BY & 57CI – Appeal refused (2008/122MCA – McMahon J – 27/8/2009) [2009] IEHC 407
Square Capital Ltd v Financial Services Ombudsman

CRIMINAL LAW

Appeal

Miscarriage of justice – Newly-discovered fact – Admission by complainant that evidence false – Whether applicant entitled to certificate that newly–discovered fact showed miscarriage of justice – Whether requirement existed for state to be culpable in miscarriage of justice – *People (DPP) v Pringle (No 2)* [1997] 2 IR 225 applied; *People (DPP) v Meleady (No 3)* [2001] 4 IR 16 and *People (DPP) v Shortt (No 2)* [2002] 2 IR 696 followed - Criminal Procedure Act 1993 (No 40), s 9 – Certificate pursuant to s 9 granted (228/2008 – CCA – 27/4/2009) [2009] IECCA 43
People (DPP) v Hannon

Appeal

Point of law - Application to appeal - Whether decision involved point of law of exceptional public importance - Whether issue of law required clarification - Whether any confusion about law - Distinction between unsworn and sworn testimony – Charge to jury - Courts of Justice Act 1924 (No 10), s 29 - Application refused (67/2004 - CCA - 11/7/2008) [2008] IECCA 179
People (DPP) v Allingham

Appeal

Supreme Court - Newly discovered fact – Photographs of post mortem not made available to defence at trial – Emergence of technology capable of determining authenticity of statements relied upon by prosecution at trial – Application to have conviction quashed as miscarriage of justice previously rejected – Request for referral of question of law to Supreme Court – Whether Court of Criminal Appeal had jurisdiction to refer matter to Supreme Court where application for miscarriage of justice already refused – Whether appropriate for Court of Criminal Appeal to engage with questions of fact – Whether appropriate to limit potential effect of newly discovered facts to effect on jury as opposed to effect on trial judge determining admissibility of evidence – *DPP v Gannon* [1997] 1 IR 40, *DPP v O'Brien* (Unrep, CCA, 29/1/1990), *People (DPP) v Willoughby* [2005] IECCA 4 (Unrep, CCA, 18/02/2005) and *People (DPP) v O'Regan* [2007] IESC 38 [2007] 3 IR 805 applied; *R v Galbraith* 73 Cr App R 124 CA considered - Courts of Justice Act 1924 (No 10), s 29 – Criminal Procedure Act 1993 (No 40), s 2 – Application refused (116/2003 – CCA – 27/5/2009) [2009] IECCA 56
People (DPP) v Kelly

Bail

District Court – Sentencing – Fair procedures – Whether remand in custody pending sentencing amounted to revocation of bail – Whether grounds for revocation of bail required to be notified – Whether revocation of bail amounted to *de facto* sentence – *Rice v Mangan* [2004] IEHC 152 (Unrep, O'Neill J, 30/7/2004) and *Howard v. Early* (Unrep, SC, 4/7/2000) followed - Constitution of Ireland 1937, Article 40.4.2° - Release ordered (2009/477SS – Peart J – 31/3/2009) [2009] IEHC 380
Devoy v Governor of the Dóchas Centre

Evidence

Admissibility – Fair procedures – Statement by accused – Voluntary statement – Exculpatory statement – Caution – Judges' Rules – Whether suspect should be cautioned prior to making voluntary witness statement – Whether breach of Judges' Rules require voluntary statement inadmissible - Right to silence – Statement by accused in custody – Obligation to record commencement and conclusion times of interview – Whether prejudicial to accused to admit evidence of availing of right to silence – Telephone records – Right to privacy – Formal proof of licence – Whether formal proof that O2 Ireland was licensed operator necessary – *People (DPP) v Finnerty* [1999] 4 IR 364 distinguished; *People (AG) v Cummins* [1972] IR 312 applied; *People (DPP) v Breen* (Unrep, CCA, 13/3/1995) considered - Postal and Telecommunications Services (Amendment) Act 1999 (No 5), s 7 - Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (SI 74/1997) – Appeal dismissed (186/1997 – CCA – 6/3/2009) [2009] IECCA 18
People (DPP) v O'Reilly

Evidence

Admissibility - Identification evidence – Admission on evidence of prevalence of gun crime in area – Recognition evidence – Warning to jury – Absence of requisition – Applicable legal principles – Balancing of prejudice and probative value of evidence – Attempted murder - Possession of firearm and ammunition with intent to endanger life –Distinction between murder and attempted murder – Life imprisonment – Whether excessive weight attached to deterrence – Whether sentences excessive – *People (AG) v Casey (No 2)* [1963] IR 33, *DPP v Maguire* [1995] 2 IR 286, *R v Fowden* [1982] Crim LR 588, *R v Grimer* [1982] Crim LR 674, *People (DPP) v Foley* [2006] IECCA 72 [2007] 2 IR 486, *DPP v Allen* [2003] 4 IR 295 and *R v Oosthuizen* [2005] EWCA Crim 1978 considered - Appeal against conviction refused; sentence reduced to 15 years (129/2007 – CCA – 19/12/2008) [2008] IECCA 138
People (DPP) v Larkin

Evidence

Admissibility - Incriminating verbal statement – Questioning while under physical restraint – Armed gardaí - *Voir dire* - Possession of firearm – Grounds of appeal - *People (DPP) v Kehoe* [1986] ILRM 690 distinguished - Firearms Act 1964 (No 1), s 27A – Appeal allowed and conviction quashed (263/2007 – CCA – 16/12/2008) [2008] IECCA 136
People (DPP) v Breen

Evidence

Admissibility – Inviolability of dwelling – Evidence obtained on foot of faulty warrant – Exclusion of evidence obtained by breach of constitutional rights – Whether trespasser or squatter can have constitutionally protected dwelling – Whether squatter having dwelling – *People (AG) v O'Brien* [1965] IR 142 and *People (DPP) v Kenny* [1990] 2 IR 110 followed - Constitution of Ireland, 1937, Article 40.5 – Appeal allowed, conviction quashed (147/2007 – CCA – 2/4/2009) [2009] IECCA 31
People (DPP) v Lynch

Evidence

Admissibility – Search - Document found during search – Relevance of document – Application to exclude document from evidence – Whether trial judge correct to admit document into evidence - Small portion of evidence in case – Whether jury entitled to attach weight to document - Appeal dismissed (174/2007 - CCA - 12/12/2008) [2008] IECCA 166
People (DPP) v Lynch

Evidence

Hearsay rule – *Res gestae* – Whether statements contemporaneous – Whether possibility of concoction – Fair trial – Jury – Interference – Failure to discharge jury - *People (AG) v Crosbie* [1966] IR 490, *Ratten v R* [1972] AC 378, *People (DPP) v Mulder* [2007] IECCA 63, [2007] 4 IR 796 and *R v Andrews* [1987] AC 281 followed – Appeal dismissed (111/2008 – CCA – 8/5/2009) [2009] IECCA 52
People (DPP) v Lonergan

Practice and procedure

Time limits – Extension of time - Application for extension of time to lodge application for review of sentence - Original time limit of 28 days extended to period not exceeding 56 days – Purpose of enlarged period – Whether Director entitled to properly consider judgment and sentence and to give due regard to whether application ought to be made for review of sentence - Whether any specific criteria fixed - Justice of case - Technical default of one day - Whether reasonable grounds for appeal – Whether any prejudice to respondent - *Eire Continental Trading Co v Clonmel Foods Ltd* [1955] IR 170 applied- Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice Act 2006 (No 26), s 2(3) - Application granted (274CJA/2008 - CCA - 15/12/2008) [2008] IECCA 169
People (DPP) v Fitzgerald

Proceeds of crime

Restraint order – Application to vary - Drug related offences – Plaintiff seeking order restraining defendant from dealing with assets – Notice party wife of defendant – Claim that notice party beneficial owner of 50% of assets - Whether notice party beneficial owner of 50% of bank accounts in joint names – Realisable property – Whether wife's share of bank account gift - Whether wife's share of bank account realisable property – Presumption of advancement – Plaintiff not entitled to rely on presumption of advancement to establish gift -Restraint procedure interlocutory in nature - Whether restraint procedure interlocutory in nature – Meaning of gift under the Act – Claim that defendant would dissipate assets – Whether property held by defendant likely to represent payment or reward for drug trafficking activity – Express entitlement of DPP to apply for restraint order - Whether plaintiff appropriate party to bring application for restraint order – Confiscation order – Likelihood that confiscation order may be made - Principles to be applied – Civil standard of proof - Whether reasonable grounds for making confiscation order – Delay – Whether unjustified delay in bringing proceedings – General undertaking as to damages – No requirement to provide undertaking as to damages – Entitlement to damages or compensation on a statutory basis - Whether general undertaking as to damages necessary in restraint order proceedings – *Ex parte* procedure -No obligation on plaintiff to establish urgent situation in order to use *ex parte* procedure – No obligation on plaintiff to notify defendant of intention to apply for restraint order – European Convention on Human Rights – Property rights - Defendant not deprived of property rights without any effective remedy – Whether Defendant deprived of property rights without any effective remedy - Restraint order varied – *Minister for Justice v Devine* [2006] IEHC 216 [2007] 1 IR 813 and *Murphy v GM* [2001] 4 IR 113 distinguished – *Gibson v Revenue and Customs Prosecution Office* [2008] EWCA Civ 645 [2009] 1 QB 348 followed – *Pettit v Pettit* [1970] 1 AC 777 and *Stack v Dowden* [2007] 2 AC 432 considered – *C(J) v C(JH)* (Unrep, Supreme Court, Keane J, 4/8/1982) applied – Criminal Justice Act 1994 (No 15) ss 3, 4, 23, 24,31, 63, 65 - Misuse of Drugs Act 1977 (No 12) ss 3, 15 – Criminal Assets Bureau Act 1996 (No 31) s 10 – Prosecution of Offences Act 1974 (No 22) s 3 – Restraint order varied (2008/28MCA – Feeney J – 2/4/2009) [2009] IEHC 196
Director of Public Prosecutions v B (M)

Road traffic offences

Service of summons - *Certiorari* - Claim that conduct of proceedings unfair – Evidence - Whether conduct of proceedings unfair – Relief refused (2006/1195 JR - Relief refused – (2006/1195 JR – O'Neill J – 23/7/2009) [2009] IEHC 444
Treacy v Anderson

Search

Police – Powers – Common law powers to search – Statutory powers to search – Reasons for search – Reasonable cause to suspect – Basis for suspicion – Admissibility of evidence –No evidence given of consent to search – Whether general knowledge not specific to accused could provide basis for reasonable cause to suspect – Whether obligation to inform accused of reason for search – Whether necessary to inform accused of statutory basis of power of search – *DPP (Stratford) v Fagan* [1994] 3 IR 265, *Hayes v Minister for Finance* [2007] IESC 8, [2007] 3 IR 190, *DPP v Finnegan* [2008] IEHC 347, [2009] 1 IR 48 considered; *Bates v Brady* [2003] 4 IR 111 and *DPP (Sheehan) v Galligan* (Unrep, Laffoy J, 2/11/1995) applied - Misuse of Drugs Act 1977 (No 12), s 23 – Courts (Supplemental Provisions) Act 1961 (No 39) – Firearms and Offensive Weapons Act, 1990 (No 12), s 9(1) – Prosecutor's appeal by case stated allowed (2007/865SS – Clark J – 16/7/2009) [2009] IEHC 368
DPP (Higgins) v Farrell

Sentence

Backdating – Custody - Whether error in principle to allow or disallow any element of back dating – Unclear from transcript reason upon which the learned trial judge picked date to which sentence back dated – Court unaware of basis upon which sentence imposed - Absence of any indication within transcript as why particular date selected - Appeal allowed; sentence backdated to date upon which applicant taken into custody (242/007 - CCA - 6/11/2008) [2008] IECCA 153
People (DPP) v Faulkner

Sentence

Evidence - Hearing – Hearsay evidence – Opinion evidence – Admissibility – Co-accused – Mitigating factors – Culpable role – Appeal dismissed (193/2008 – CCA – 3/3/2009) [2009] IECCA 16
People (DPP) v McDonnell

Sentence

Severity – Assault - Guilty plea – Unprovoked offence – Whether offence towards top end of seriousness of offences of this nature – Numerous previous convictions - Whether any error in principle in sentence - Whether some element of rehabilitation should be provided for - No evidence of attempts at rehabilitation - Non Fatal Offences Against the Person Act 1997 (No 26), s 3 - Leave to appeal refused; four year term of imprisonment and three year term of imprisonment respectively affirmed (239/2007 and 135/2008 - CCA - 6/11/2008) [2008] IECCA 152
People (DPP) v Foley & Barrett

Sentence

Severity - Assault causing harm - Sentence of four years imposed - Seriousness of offence - Whether charge appropriate - Offence at very

top end of seriousness of offences on scale – Whether any error of principle - Totality principle – No prospect of rehabilitation – Previous convictions - Non Fatal Offences Against the Person Act 1997 (No 26), s 3 - Leave to appeal against sentence refused (51/2008 - CCA - 17/11/2008) [2008] IECCA 158
People (DPP) v Hennessy

Sentence

Severity – Co-accused - Discrepancy between sentence of co-accused and applicant - Principle of consistency and conformity – Whether any error of principle - Misuse of Drugs Act 1977 (No 12), s 15A - Criminal Justice Act 1994 (No 15), s 4 - Appeal allowed; sentence of five years substituted for sentence of eight years - (42/2008 - CCA - 17/11/2008) [2008] IECCA 157
People (DPP) v Lynch

Sentence

Severity - Dangerous driving causing death - Sentenced to five years - Maximum sentence of five years - Seriousness of offence - Speed - Complete disregard of Road Traffic Acts – History of disqualifications - Under influence of drugs – Whether any error in principle in sentence imposed – Possibility of rehabilitation – Whether all mitigating factors adequately taken into account - Road Traffic Act 1961 (No 24), s 53(1) and 112 - Road Traffic Act 1968 (No 25), s 51 - Road Traffic Act 1994 (No 7), s 49 – Leave to appeal refused (59/2008 - CCA - 24/11/2008) [2008] IECCA 163
People (DPP) v Connors

Sentence

Severity - Drugs offences – Guilty plea – 98 previous convictions - Offences committed while on bail for burglary charges - Difficulty with drugs - Whether six year sentence consecutive to four year sentence for burglary excessive – Whether quantity of drugs significant factor in determining appropriate sentence to be imposed – Leave to appeal refused (107/2007 - CCA - 31/10/2008) [2008] IECCA 148
People (DPP) v Hayes

Sentence

Severity - Drugs offences – Guilty plea – Purely financial motives – No drug dependency - No previous convictions – Bail revoked - Whether revocation of bail influenced sentencing judge - Whether material assistance rendered – Seriousness of offence – Whether sentencing judge assessed sentence correctly - Leave to appeal refused (233/2007 - CCA - 31/10/2008) [2008] IECCA 147
People (DPP) v Kelly

Sentence

Severity – Drugs offences – Penalty provisions – Attempting offences – Whether legislative scheme permitted imposition of custodial sentence – Whether error in principle – Whether sentence disproportionate given sentences of co-defendants – Failure to argue penalty provisions before sentencing judge – Prior conviction for drugs offence – Construction of penal statute – Appropriate sentence – Admissions – Early plea of guilt – Rehabilitation – Personal circumstances - *People (DPP) v Boyce* [2008] IESC 62 [2009] 2 IR 124 considered - Misuse of Drugs Act 1977 (No 12), ss 3, 21 and 27 – Sentence set aside and new sentence imposed (219/2007 – CCA – 11/12/2008) [2008] IECCA 135
People (DPP) v Quigley

Sentence

Severity – Drugs offences - Possession for sale or supply - Three year sentence imposed - Cooperation with gardaí in search and at interview - Early plea of guilty - Lack of previous convictions - Circumstances of offence - Misuse of Drugs Act 1977 (No 12), ss 15 and 27 - Leave to appeal refused (93/2008 - CCA - 6/11/2008) [2008] IECCA 154
People (DPP) v Geoghegan

Sentence

Severity – Drugs offences - Possession for sale or supply – Sentenced to six years – Seriousness of offence - Value of drugs – Nature of drugs – Factors to be taken into account – Mandatory minimum sentence of 10 years – Whether any error in principle - Misuse of Drugs Act 1977 (No 12), s 15A – Criminal Justice Act 1999 (No 10), s 4 - Leave to appeal refused (54/2008 - CCA - 24/11/2008) [2008] IECCA 161
People (DPP) v McClean

Sentence

Severity – Drugs offences - Sentence of ten years – Whether any error of principle in manner in which trial judge arrived at sentence - Value to be attributed to plea of guilty – Whether plea entered at earliest possible time - Maximum sentence of life imprisonment - Circumstances of offence - Circumstances of offender - Possibility of rehabilitation - Previous convictions - *People (DPP) v Ross* [2008] IECCA 40, (Unrep, CCA, 12/3/2008) mentioned - Misuse of Drugs Act 1977 (No 12), s 15A - Criminal Justice Act 1994 (No 15), s 4 - Leave to appeal against sentence refused (03/2008 - CCA - 17/11/2008) [2008] IECCA 156
People (DPP) v Guilfoyle

Sentence

Severity – Drugs offences – Sentenced to six years – Whether trial judge had sufficient regard to evidence of rehabilitation – Whether trial judge failed to structure sentence so as to provide for element of rehabilitation - Misuse of Drugs Act 1977 (No 12), s 15A – Appeal allowed; last two years of sentence suspended on terms for a four year period (30/2008 - CCA - 7/11/2008) [2008] IECCA 178
People (DPP) v Young

Sentence

Severity – Drugs offences – Value of plea - Whether any error in principle – Whether adequate allowance made for plea of guilty –Whether applicant suffered from any serious dependency – Whether fact that applicant foreign national significant factor in mitigation - Deterrence - Application for leave to appeal dismissed (223/2007 - CCA - 29/7/2008) [2008] IECCA 184
People (DPP) v Soneye

Sentence

Severity – Drug offences – Whether specific and exceptional circumstances - Whether sentences unjust in all circumstances - Matters to be taken into account - Whether sentencing judge erred in principle - Whether sentences imposed unduly severe in circumstances of case - Whether sentences had adequate regard for the important factor of real possibility of rehabilitation - Whether court fell into error in principle in failing to have regard to significant mitigating factors – Whether mitigating factors should have persuaded judge to consider imposition of a suspended portion of sentence – *People (DPP) v Power* [2007] IECCA 75, (Unrep, CCA, 21/7/2007) and *People (DPP) v Renald* (Unrep, CCA, 23/11/2001) mentioned - Misuse of Drugs Act 1977 (No 12), ss 15A and 27 - Leave to appeal allowed; last two and a half years of each sentence suspended (267/2007 & 2/2008 - CCA - 7/11/2008) [2008] IECCA 176
People (DPP) v O'Donovan & Duggan

Sentence

Severity – Error - Technical mistake - Sentencing judge told by both counsel that applicant on bail in respect of two counts when on bail in respect of one count only – Whether sentencing fell into error in principle - Whether any error in principle by sentencing judge not acceding to proposal made by psychiatrist on behalf of applicant – Whether any lack of proportionality or undue harshness in sentence - Sentence increased from five years to six years to reflect technical error by judge (20/2008 - CCA - 7/11/2008) [2008] IECCA 177
People (DPP) v Juszczak

Sentence

Severity – Error on part of sentencing judge - Whether trial judge relied on hearsay evidence - Whether sentencing judge committed error in principle by asking garda question which elicited hearsay evidence - Whether judge failed to put enough emphasis in structuring sentence on requirement of rehabilitation - Whether sufficient credit given to applicant for co-operation and for plea of guilty - Whether sentence excessive or disproportionate - Gravity of offence - Whether sentence appropriate to offences – Leave to appeal refused (1/2008 - CCA - 4/12/2008) [2008] IECCA 164
People (DPP) v Jasalskis

Sentence

Severity –Hierarchy of offences - Seriousness of offence – Circumstances of offence - Moral turpitude – Whether trial judge failed to identify where offence lay on scale – Whether sentencing judge erred in principle - Illegal Immigrants Trafficking Act, 2000 (No 29), s 2(1) - Leave to appeal against sentence refused (183/2007 - CCA - 17/12/2008) [2008] IECCA 181
People (DPP) v Ilori

Sentence

Severity – Manslaughter – Diminished responsibility – Guilty plea – Whether sentence of life imprisonment permissible – Criminal Justice Act 1999 (No 10), s 29 – Criminal Law (Insanity) Act 2006 (No 11), s 6 – Sentence reduced from life to 20 years (213/2007 – CCA – 27/5/2009) [2009] IECCA 57
People (DPP) v Crowe

Sentence

Severity - Possession of firearms - Presumptive minimum term of imprisonment for first offence of not less than five years - Term of five years imprisonment imposed - Seriousness of offence on scale – Whether exceptional and specific circumstances – Factors to be taken into account - Appropriate sentence - Mitigating factors - Personal circumstances – Whether any error of principle - Firearms and Offences (Weapons) Act 1990 (No 12), s 12A(6) - Criminal Justice Act 2006 (No 26), s 65 - Leave to appeal refused (254/2007 - CCA - 24/11/2008) [2008] IECCA 160
People (DPP) v Kelly

Sentence

Severity - Unprovoked and serious assault – Effect on victim – Sentenced to four years - Maximum sentence of life imprisonment - Mitigating factors –Whether pattern of previous offending not so serious as to warrant four years on first occasion to be sent to prison – Whether any error of principle – Whether sentence excessive - Criminal Justice (Theft and Fraud) Offences Act 2001 (No 50), s 14(1) - Leave to appeal refused (55/2008 - CCA - 24/11/2008) [2008] IECCA 162
People (DPP) v Larkin

Sentence

Undue leniency - Applicable principles – Overall scheme of offence - Nature of offence - Appropriate starting sentence - Whether sentencing judge committed error in principle – Whether savagery of assault should have attracted higher starting point - Criminal Justice Act 1993 (No 6), s 2 - Non Fatal Offences Against the Person Act 1997 (No 26), s 4 - Application granted; sentence set aside with sentence of 10 years substituted (150CJA/2008 - CCA - 3/11/2008) [2008] IECCA 151
People (DPP) v Jarosz

Sentence

Undue leniency - Application for review of sentence on grounds of undue leniency Positive report of probation officer - No previous convictions - Implications of community service order - Criminal Justice (Community Service) Act 1983 (No 23) – Criminal Justice Act 1993 (No 6), s 2 - Application dismissed (60CJA/2008 – CCA – 24/7/2008) [2008] IECCA 180
People (DPP) v Keogh

Sentence

Undue leniency – Robbery – False imprisonment – Guilty plea – Absence of responsibility for possession of firearm or threat to kill – Endorsement of probation report by principal garda witness – Content of probation report – Applicable principles – Onus of proof – Weight to be afforded to reasons of trial judge – Whether substantial departure from appropriate sentence – Whether aggravating and mitigating features taken into account – Interests of society – Interests of accused – Whether decision rational – *DPP v Byrne* [1995] 1 ILRM 279; *People (DPP) v Clarkin* (Urep, IECCA, 10/2/2003); *People (DPP) v Barrett* (Unrep, CCA, 19/5/2003) and *People (DPP) v Keegan* (Unrep, CCA, 28/4/2003) considered – Non-Fatal Offences Against the Person Act 1997 (No 26), s 15 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 - Application refused (129/2007 – CCA – 19/12/2008) [2008] IECCA 137
People (DPP) v de Paor

Trial

Separate trials - Four counts on indictment - Application made for separate trials for each count – Similarity of offences – Proximity of dates and areas where alleged offences occurred - Whether trial judge entitled to exercise discretion to refuse application – Whether evidence tendered at trial overwhelming – Whether evidence adequate to render conviction safe - Appeal dismissed (146/2007 - CCA - 12/12/2008) [2008] IECCA 167
People (DPP) v Lynch

Trial

Verdict – Particularisation of count – Jury – Juror in personal difficulty – Separation of jury – Prosecuting counsel commenting on matter of fact in closing speech – Whether count sufficiently particularised – Whether necessary for jury to reach verdict on agreed basis of fact – Whether jury under pressure to reach verdict – Whether separation of juror irregular – Whether permissible for prosecuting counsel to comment on credibility of complainant – *R v Carr* [2000] 2 Cr App R 149 and *R v Brown* (1984) 79 Cr App R 115 considered - Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 2 – Sex Offenders Act 2001 (No 18), s 37 – Conviction quashed; no retrial ordered (157/2008 – CCA – 29/7/2009) [2009] IECCA 87
People (DPP) v R (M)

Warrant

License – Requirements of section – Whether warrant bad on face - Whether statute existed – Whether statutory requirement for warrant to show on face that District Judge satisfied as to grounds for issue – Whether statutory requirement for warrant to record who swore information – Whether prescribed form for warrant in question existed – Whether matter ought properly be challenged before trial judge – Whether failure to precisely identify title of act fatal to warrant - *Byrne v Grey* [1988] IR 31 and *Simple Imports Ltd v Revenue Commissioners* [2000] 2 IR 242 applied; *DPP v McGoldrick* [2005] IECCA 84 [2005] 3 IR 123 considered - Licensing Act (Ireland) 1874 (37 & 38 Vict, c 69), s 24 - District Court Rules 1997 (SI 93/1997), O 34 - Relief refused (2008/394JR – O'Keeffe J – 27/5/2009) [2009] IEHC 254
McGlinchey v Gibbons

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DEFAMATION

Criminal libel

Leave to commence criminal prosecution for libel – Principles to be applied – Defamed person deceased – Newspaper article concerning circumstances of death - Applicants relatives of deceased –Necessity to establish that statements complained of defamatory of living persons – Defamation of persons by reason of statements regarding deceased – Intent to injure living persons –Whether intention could be inferred - Whether clear *prima facie* case to answer in criminal court – Whether libel serious enough to invoke criminal law – Whether libel likely to provoke breach of peace – Public interest – Freedom of expression – *Goldsmith v Pressdram* [1977] QB 83 followed; *Hilliard v Penfield Enterprises Ltd* [1990] 1 IR 138 and *Mahon v Post Publications Ltd* [2007] 3 IR 338 applied; *De Libellis Famosis* (1605) 5 Co Rep 125, *R v Topham* (1791) 4 TR 126, *R v Ensor* (1887) 3 TLR 366, *Von Hannover v Germany* [2004] EMLR 21, *Pfeifer v Austria* (2009) 48 EHRR 8, *Dalban v Romania* [1999] ECHR 226 and *Gallagher v Independent Newspapers* (Unrep, Finlay P, 3/7/1978) considered – Defamation Act 1961 (No 40), s 8 – Leave refused (2008/28 IA – Gilligan J – 28/5/2009) [2009] IEHC 458
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EMPLOYMENT LAW

Legitimate expectation

Period of service – Extension - Change of policy – Whether plaintiff had legitimate expectation he would be permitted to complete period of service – Whether actionable legitimate expectation - Office holder – Defence forces – Contract – Change of policy – Physical injury – Discharge – Whether contractual relationship in existence between plaintiff and defendants – *State (Gleeson) v Minister for Defence* [1976] IR 280 and *Byrne v Ireland* [1972] IR 241 considered; *Glencar* Exploration *plc v Mayo County Council (No 2)* [2002] 1 IR 84 approved; *Glover v BLN Limited* [1973] IR 388 applied - Defence Act 1954 (No 18), ss 53 & 65 – Defendants' appeal dismissed (239 & 349/2006 – SC – 28/7/2009) [2009] IEHC 62
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Child abduction

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IMMIGRATION

Asylum

Appeal - Fair procedures – Country of origin information – Trafficking – State protection – Well founded fear of persecution – Claim that country of origin unable to provide protection in spite of willingness – Whether state concerned provided reasonable protection in practical terms – Claim of selective use of country of origin information by respondent – Claim of failure by respondent to consider conflicting country of origin information – States not required to provide perfect protection – Whether respondent acted in breach of fair procedures - Whether respondent failed to consider all evidence relating to state protection – *A(OA) v Minister for Justice* [2007] IEHC 169 (Unrep, Feeney J, 9/2/2007) applied; *O(AB) v Minister for Justice* [2008] IEHC 191 (Unrep, Birmingham J, 26/6/2008), *O(H) v Refugee Appeals Tribunal* [2007] IEHC 299 (Unrep, Hedigan J, 19/7/2007), *Canada (AG) v Ward* [1993] 2 SCR 689 considered - Refugee Act 1996 (No 17), ss 11,13 & 16 – Relief refused (2006/1261 JR – Clark J – 11/2/2009) [2009] IEHC 51
T (AA) v Refugee Appeals Tribunal

Asylum

Appeal – Procedures – Errors in interpretation - Country of origin information - Adverse credibility findings based on unfair interpretation of witness answers - Error of fact by Tribunal – Whether error of fact sufficiently serious and fundamental as to render decision irrational – *P v Refugee Appeals Tribunal* [2007] IEHC 415 (Unrep, Feeney J, 7/12/2007) applied – Relief granted (2007/1411 JR – Clark J – 11/6/2009) [2009] IEHC 287
K (E) v Refugee Appeals Tribunal

Asylum

Judicial review - Credibility – Report of commissioner - Failure to establish well founded fear of persecution - Allegation that respondent failed to take relevant matters

into account – Country of origin information relied upon not disclosed to applicant – No statutory obligation to notify applicant in advance of country of origin information used to verify credibility of applicant - Availability of alternative remedy by way of statutory appeal - Criteria applicable to exercise of discretion to grant leave –Whether non disclosure of country of origin information rendered statutory appeal inappropriate and inadequate - Whether case 'exceptional' for purpose of exercise of discretion - Whether obligation on respondent to disclose country of origin information relied upon – *A v Minister for Justice* [2009] IEHC 215 (Unrep, Cooke J, 29/4/2009), *D v. Refugee Applications Commissioner* [2009] IEHC 77 (Unrep, Cooke J, 27/1/2009), *Stefan v Minister for Justice* (Unrep, Supreme Court, 13/11/2001) considered; *A v Refugee Applications Commissioner* [2008] IEHC 26 (Unrep, Birmingham J, 02/07/2008) applied - Refugee Act 1996 (No 17), ss 2, 11,13 – Immigration Act 2003 (No 26), s 10 – Application rejected (2006/1186JR – Cooke J – 20/4/2009) [2009] IEHC 216
A (RL) v Minister for Justice

Asylum

Judicial review – Country of origin designated as safe - Applicant asserting risk of rape due to ethnically motivated reasons – Appeal on paper only – Fair procedures – Country of origin information - Whether legitimate expectation applicant's case would be assessed by female officer experienced in dealing with claim involving sexual violence – *Z v MJELR* [2008] IEHC 36 (Unrep, McGovern J, 06/02/2008) and *Akintunde v Refugee Applications Commissioner* [2009] IEHC 215 (Unrep, Cooke J, 29/4/2009) followed - Refugee Act 1996 (No 17), ss 2, 11A and 13 – Relief refused (2006/1491JR – McMahon J – 22/5/2009) [2009] IEHC 231
N (N) v Refugee Applications Commissioner

Asylum

Judicial review – Country of origin designated as safe - Applicant HIV positive – Statutory appeal lodged but rejected as out of time – Failure to raise HIV status as grounds for asylum - Whether failure to take into account persecution of applicant by reference to HIV status – Whether obligation on respondent to anticipate possible variations on fear of persecution where not specifically raised by applicant – Whether exceptional case so as to warrant granting of relief notwithstanding availability of statutory appeal –Whether UNHCR handbook had force of law - *Ajoke v MJELR* [2009] IEHC 216 (Unrep, Cooke J, 30/4/2009) considered - Refugee Act 1996 (No 17), ss 11B, 12 and 16 – Relief refused (2006/1219JR – Cooke J – 20/5/2009) [2009] IEHC 234
N (N) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Error of fact in respondent's decision – Error of fact not substantially challenged on appeal – Finding of negative credibility associated with error of fact – *P v Refugee Appeals Tribunal* [2007] IEHC 415 (Unrep, Feeney J, 07/12/2007) applied – Relief granted (2007/1411JR – Clark J – 11/6/2009) [2009] IEHC 287
K (E) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave – Delay – Extension of time – Good and sufficient reason to grant extension of time – Applicant's solicitor ceased to practice – Applicant unable to obtain legal representation due to financial constraints – No relationship of reciprocity between length of delay to be excused and strength of applicant's case – Whether good and sufficient reason to grant extension of time – Whether strength of applicant's case relevant when considering delay – *A v Refugee Appeals Tribunal* [2007] IEHC 290 (Unreported, High Court, Peart J, 27th July 2007) and *GK v Minister for Justice Equality and Law Reform* [2002] 2 IR 418 considered - Refugee Act 1996 (No 17) ss 13 and 17- Illegal Immigrants (Trafficking) Act 2000 (No 29) s 5- Extension of time refused (2007/1431JR – Cooke J – 6/5/2009) [2009] IEHC 218
Q (NX) v Refugee Applications Commissioner

Asylum

Judicial review – Leave – Minor applicants - Application of mother for asylum refused - Claim that view of Tribunal Member in relation to application of mother infected children's application - Lack of consideration of discrete point of applicants' ethnicity - Cumulative effect of errors and misstatements by tribunal member – *Adam v Minister for Justice* [2001] 3 IR 53 considered - Refugee Act 1996 (No 17) s 13 – Leave granted (2007/726JR – Clark J – 18/3/2009) [2009] IEHC 169
J (B) v Refugee Appeals Tribunal

Asylum

Judicial review - Leave – Negative credibility findings – Knowledge of geography of alleged homeland - Claim of flawed assessment of credibility - Claim of inadequate consideration of medical evidence of applicant – Claim that respondent engaged in impermissible speculation and conjecture - Substantial grounds – Whether substantial grounds - Whether Tribunal member gave inadequate consideration to medical evidence of applicant – Whether assessment of applicant's credibility flawed – *Okeke v Minister for Justice* [2006] IEHC 46 (Unrep, Peart J, 17/2/2006) and *ME v Refugee Appeals Tribunal* [2008] IEHC 192 (Unrep, Birmingham J, 27/6/2008) applied - Refugee Act 1996 (No 17) ss 11, 13 – Leave refused (2007/1177JR – Clark J – 18/3/2009) [2009] IEHC 127
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Asylum

Judicial review – Leave - Negative credibility findings – Medical evidence of applicant – Claim that assessment of medical evidence flawed – Jurisdiction of Tribunal - Finding by tribunal member that issue of *refoulement* not within remit of tribunal – Error of law in so finding – Whether assessment of medical evidence flawed – Whether issue of *refoulement* could be considered by Tribunal – Whether respondent had erred in law - Refugee Act 1996 (No 17), s 5 – Limited leave granted – (2008/639JR – Birmingham J – 21/1/2009) [2009] IEHC 185
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Asylum

Judicial review – Leave – Substantial grounds - Credibility – Country of origin information - Adverse credibility findings – Whether respondent entitled to make finding based on evidence before it – Leave refused (2007/348 J – McGovern J – 6/2/2009) [2009] IEHC 50
K (A) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave – Substantial grounds – Post traumatic stress disorder – Capacity to give evidence – Allegation that respondent failed to assess capacity of applicant to give evidence – Failure of applicant to raise question of capacity at hearing - Whether post traumatic stress disorder affects capacity to give evidence – Option of internal relocation – Whether option of internal relocation existed – *Khazadi v Minister for Justice* [2006] IEHC 175 (Unrep, MacMenamin J, 2/5/2006) and *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367 distinguished - *D v TS (Simo) v Minister for Justice* [2007] IEHC 451 (Unrep, Edwards J, 30/11/2007), *UI v Refugee Appeals Tribunal* [2008] IEHC 345(Unrep, Edwards J, 29/10/2008), *A (G) v Refugee Appeals Tribunal* [2009] IEHC 157 (Unrep, Clark J, 31/3/2009) and *Camara v Refugee Appeals Tribunal* (Unrep, Kelly J, 26/7/2000) considered –Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Refugee Act 1996 (No 17), ss 11 and 16 – Leave refused (2007/1044JR – Clark J – 3/4/2009) [2009] IEHC 168
J (N) v Refugee Appeals Tribunal

Asylum

Judicial review – *Refoulement* – Applicant asserting risk of persecution on basis of being failed asylum seeker if *refouled* - Tribunal member having erred in concluding tribunal had no jurisdiction as to question of *refoulement* – Negative credibility findings – Country of origin information – Previous tribunal decisions – Whether failed asylum seekers a social group – Whether respondent failed to consider element of applicant's claim – Whether respondent's technical error as to jurisdiction fatal to decision – Whether court should exercise discretion not to quash decision in circumstances where applicant could derive

no benefit from relief - *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083 (19/11/2008) approved; *W124 v Minister for Immigration and Multicultural Affairs* [2001] FCA 1387, *Ali v Minster of Citizenship and Immigration* [2008] FC 448, *SI v Refugee Appeals Tribunal* [2009] IEHC 8 (Unrep, Finlay Geoghegan J, 16/1/2009), *A v Secretary of State for the Home Department* [2007] 1 WLR 3134, *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, *Lema v Refugee Appeals Tribunal* [2009] IEHC 26 (Unrep, Clark J, 21/01/2009) and *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416 (Unrep, Clarke J, 09/12/2005) considered – Refugee Act 1996 (No 17), ss 2, 5, 16 and 17 – Relief refused (2008/639JR – Irvine J – 28/5/2009) [2009] IEHC 268
V (F) v Refugee Appeals Tribunal

Citizenship

Judicial review - Application for costs – Applicant seeking to compel respondent to provide him with timeline for determination of application for citizenship – Leave granted - Applicant subsequently granted citizenship – Applicant's proceedings withdrawn on applicant's view that matter moot – Applicant asserting prejudice due to inability to vote – Failure to inform respondent of any special circumstances – Separation of powers - Whether entitlement to apply for naturalisation constitutional or statutory – Whether naturalisation a right or privilege - Whether applicant for citizenship could enjoy personal rights prior to grant of citizenship – Whether appropriate to direct respondent to carry out discretionary functions within given time limit - *M (K) v Minister for Justice, Equality and Law Reform* [2007] IEHC 234 (Unrep, Edwards J, 17/07/2007), *Phillips v Medical Council [1992] ILRM 469*, *Ó Murchú v Registrar of Companies [1988] IR 112* and *Halowane v Minister for Justice, Equality and Law Reform* [2008] IEHC 280 (Unrep, Finlay Geoghegan J, 30/07/2008) distinguished - Irish Nationality and Citizenship Act (No 26), s 15A – Applicant refused costs, discretion to make no order for costs in favour of respondent exercised (2008/1204JR – Clark J – 29/7/2009) [2009] IEHC 354
N (A) v Minister for Justice, Equality and Law Reform

Deportation

Foreign national parent of Irish born child and step parent of Irish citizen child – Factors to be taken into account when making deportation order – Whether substantial reason for making deportation order – Whether deportation order proportionate – Whether factual matrix considered in making deportation order – *Dimbo v Minister for Justice* [2008] IESC 26 (Unrep, SC, 1/5/2008) applied - Irish Nationality and Citizenship Act 1956 (No 26), ss 6A and 6B – Refugee Act 1996 (No 17), ss 2 and 5 – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on Human Rights Act 2003 (No 20), s 3 – Immigration Act 2004 (No 1), s 5 –European Convention on Human Rights, article 8 – Judicial review refused (2008/622JR – Cooke J – 19/5/2009) [2009] IEHC 448
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Deportation

Judicial review – Breach of private and family rights – Asylum and leave to remain refused - Whether respondent considered rights of remaining family members - *EM (Lebanon) v Secretary of State for the Home Department* [2008] 3 WLR 931 followed; *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 3 IR 795, *BIS (Sanni) v Minister for Justice, Equality and Law Reform* [2007] IEHC 398 (Unrep, Dunne J, 30/11/2007), *Pok Sum Shun v Ireland* [1986] ILRM 595, *PF v Minister for Justice, Equality and Law Reform* (Unrep, Ryan J, 26/1/2005), *YO v Minister for Justice, Equality and Law Reform* [2009] IEHC 148 (Unrep, Charleton J, 11/03/2009), *Sezewn v The Netherlands* (2006) 43 EHRR 621, *Mason v The Austria* (App No 1638/03, 23/6/2008 [GC]), *A v Sweden* (1994) 18 EHRR CD 209, *Berrehab v Netherlands* (1988) 11 EHRR 328, *Olsson v Sweden* (1989) 11 EHRR 259, *Moustaquim v Belgium* (1991) 13 EHRR 802, *Boughanemi v France* (1996) 22 EHRR 228, and *Radovanovic v Austria* (App. No. 42703/98, 22/4/2004) considered; *R (Mahmood) v Home Secretary for the Home Department* [2001] 1 WLR 840 distinguished; *Beoku – Betts v Secretary of State for the Home Department* [2008] 3 WLR 166 not followed – Constitution of Ireland, Art 41 – European Convention on Human Rights, art 8 – European Convention on Human Rights Act 2003 (No 20), s 3 – Immigration Act 1999 (No 22), s 3 (6) – Refugee Act 1996 (No 17), s 5 – Criminal Justice (UN Convention against Torture) Act 2000 (No 11), s 4 - Deportation order quashed (2008/1145JR – Harding Clark J – 26/5/2009) [2009] IEHC 245
A (M) v Minister for Justice, Equality and Law Reform

Deportation

Judicial review – Leave - Applicants father and child – Child an Irish citizen – Applicants asserting breach of personal and family rights under Constitution and Convention – Proper criteria to be considered by State in deciding whether to issue deportation order – Whether substantial grounds for granting of leave - Whether substantial reason requiring deportation order identified - *Oguekwe v MJELR* [2008] IESC 25 [2008] 3 IR 795 applied; *Y (HL) v MJELR* [2009] IEHC 96 (Unrep, Charleton J, 13/02/2009) followed; *McNamara v An Bord Pleanála* (Unrep, Barr J, 10/5/1996) and *Huang v Secretary of State for the Home Department* [2007] 2 WLR 581 considered; *R (Mahmood) v Home Secretary for the Home Department* [2001] 1 WLR 840 doubted – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave granted (2009/193JR – McMahon J – 22/5/2009) [2009] IEHC 235
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Deportation

Judicial review – Leave - Delay – Good and sufficient reason - Principles to be applied – Statutory time limits and extent of delay to be considered – Whether applicants in receipt of legal advice – Reasons for delay – Strength of potential claims – Balance of justice – Applicant refused service of deportation order – Deliberate avoidance – Delay inordinate –Failure by applicant to accept legal advice – No good reasons advanced for delay – No injustice to applicant in failing to extend time – *A(J) v Refugee Applications Commissioner* [2008] IEHC 440 (Unrep, Irvine J, 3/12/2008), *A(J) v Refugee Applications Commissioner* [2008] IEHC 431 (Unrep, Hedigan J, 18/12/2008) and *Kouaype v Minster for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005) applied - Illegal Immigrants (Trafficking) Act 2000 (No 29) - Illegal Immigrants (Trafficking) Act 2000 (No 29) – Leave refused (2008/878 JR – McMahon J – 24/6/2009) [2009] IEHC 393
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Deportation

Judicial review – Leave – Mother and child – Deportation order against mother - Claim that no consideration given to best interests of child – Family unity – No application for asylum for minor at time deportation order was made in respect of mother – No deportation order made in respect of child – Adequacy of consideration of child's position when making deportation order for mother – Whether consideration of child's position adequate - Applicant arguing issue previously determined by court – Application misconceived – Order of costs against applicants – *N(A) v Minister for Justice* [2007] IESC 44 (Unrep, Supreme Court, 18/10/2007), *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795 and *O v Minister for Justice* [2003] 1 IR 1 distinguished - *E(CI) v Minister for Justice* [2007] IEHC 302 (Unrep, Peart J, 27/7/2007), *P, L &B v Minister for Justice* (Unreported, Supreme Court, 30/7/2001) and *Kouaype v Minster for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005) considered – Refugee Act 1996 (No 17) ss 3, 5 & 13 – Immigration Act 1999 (No. 22) s 3 – Criminal Justice (UN Convention Against Torture) Act 2000 (No 11) s 4- Leave refused (2005/1122JR – Clark J – 21/4/2009) [2009] IEHC 186
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Naturalisation

Citizenship - Certificate of naturalisation – Refusal to reconsider application - Being of good character – Absolute discretion of respondent – Claim that applicant came to adverse attention of garda – Disputed claim – Applicant not charged or convicted of any offence – Irrationality of decision – Non compliance with conditions of naturalisation –Whether decision immune from judicial review in light of absolute discretion of

respondent - *Pok Sun Shun v Ireland* [1986] ILRM 593 distinguished – Irish Nationality and Citizenship Act 1956 (No 26), ss 14, 15 & 16 - Relief refused (2009/1080 JR – Cooke J – 18/6/2009) [2009] IEHC 449
B (A) v Minister for Justice

Residency

European citizen – Free movement of persons – Permanent residence – European law – Whether period of residency prior to accession of home member state can be included in application for residency in host member state – *McCarthy v Home Department* [2008] EWCA Civ 641 (Unrep, English CA, 11/6/2008) approved - European Communities (Freedom of Movement of Persons) (No 2) Regulations 2006 (SI 656/2006) – Council Directive 2004/38/EC – Application dismissed (2008/1079JR – Cooke J – 15/10/2009) [2009] IEHC 447
B (I) v Minister for Justice, Equality and Law Reform

Visa

Judicial review – Wife of non – EU national - *Bona fides* of marriage – Husband failed asylum seeker with temporary leave to remain in State – Arranged marriage – Whether respondent erred in viewing lack of time together as material to *bona fides* of marriage - Whether failure of respondent to properly consider positive credibility findings in asylum application – *A v Minister for Justice, Equality and Law Reform* [2005] IEHC 393 *[2005] 4 IR 564*, *Fitzpatrick v Minister for Justice, Equality and Law Reform* [2005] IEHC 9 (Unrep, Ryan J, 26/01/2005), *TC (Cirpaci) v Minister for Justice, Equality and Law Reform [2005] 2 ILRM 547, Gül v Switzerland* (1996) 22 EHRR 93, *Pok Sun Shum v Minister for Justice, Equality and Law Reform [1986] ILRM 593 Osheku v Ireland [1986] IR 377, In re the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360, FP v Minister for Justice, Equality and Law Reform [2002] 1 IR 164, AO v Minister for Justice, Equality and Law Reform [2003] 1 IR 1 and Bode (a minor) v Minister for Justice, Equality and Law Reform* [2007] IESC 62 [2008] 3 IR 663 considered - Refugee Act 1996 (No 17), s 2 and 16 – European Communities (Eligibility for Protection) Regulations 2005 (SI518/2006) – Immigration Act 2004 (Visas) (No 2) Order 2006 (SI 657/2006) – Relief refused (2008/1418JR – Clark J – 11/6/2009) [2009] IEHC 279
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INFORMATION TECHNOLOGY

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INJUNCTIONS

Interlocutory

Contract – Breach of contract – 'Shop in shop concession' agreement – Alleged invalid termination of agreement – Fair issue to be tried - Damages adequate remedy – No suggestion defendant unable to pay damages – Loss to plaintiff readily quantifiable – Voluntary liquidation of defendant imminent – Whether damages adequate remedy - Balance of convenience – Breakdown of relationship between parties – *Curust Financial Services Ltd v Loewe-Lack-Werk* [1994] 1 IR 450 and *Campus Oil v Minister for Industry (No. 2)* [1983] IR 88 applied; *O'Sullivans Pharmacies and Beauticians (Sarsfield Street) Ltd v Health Service Executive* [2008] IEHC 106 (Unrep, Laffoy J, 14/3/2008), *Sheridan v The Louis Fitzgerald Group Ltd* [2006] IEHC 125 (Unrep, Clarke J, 4/4/2006) and *Whelan Frozen Foods Ltd v Dunnes Stores*[2006] IEHC 171 (Unrep, MacMenamin J, 17/2/2006) distinguished; *Ó Murchú v Eircell Ltd* (Unrep, Supreme Court, 21/2/2001) considered; *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 followed - Relief refused (2009/1435P – Laffoy J – 3/4/2009) [2009] IEHC 181
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Interlocutory

Defamation – Slander – Order restraining repetition of alleged slander – Statutory injunction - Election candidate – Statutory prohibition on making false statements – Intervention of court only appropriate where statutory prohibition infringed – Evidence of making or publication of false statement of fact – Basis for grant of statutory injunction – Established risk or likelihood that disputed statement would be repeated before election - Whether injunction necessary to afford candidate protection – Whether plaintiff established risk that disputed statement would be repeated before election – Injunction – Fair issue to be tried - Balance of convenience – Damages adequate remedy – Right to free speech – Undesirability of fettering freedom of speech – Slim possibility of repetition of slander - Court must exercise particular caution before intervening in course of election – Possibility of material effect of defamation on election result -Whether plaintiff established fair issue to be tried – Whether damages adequate remedy where election candidate unsuccessful – *Cullen v Stanley* [1926] 1 IR 73 distinguished - *Evans v Carlyle* [2008] IEHC 143 [2008] 2 ILRM 359, *Cogley v RTE* [2005] IEHC 180 [2005] 4 IR 74 and *Reynolds v Malocco* [1999] 2 IR 203 considered - *Campus Oil v Minister for Industry (No. 2)* [1983] IR 88 and *Sinclair v Gogarty* [1937] 1 IR 377 applied – *Bonnard v Perryman* [1891] 2 Ch. 269 followed - Prevention of Electoral Abuses Act 1923 (No 38), s 11 – Relief refused (2009/3270P – Cooke J – 20/4/2009) [2009] IEHC 187
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Interlocutory

Mandatory injunction – Contract - Breach of contract – Terms of contract - Dispute resolution clause – Attempt to side step dispute resolution mechanism on temporary basis –Principles to be applied - Potential affected party not before court - Whether open to court to intervene in light of dispute resolution clause –Whether permissible to avoid dispute resolution clause – Whether good reason to depart from dispute resolution clause – *Ó Murchú t/a Talknology v Eircell Ltd* (Unrep, SC, 21/2/2001), *Telenor Invest AS v IIU Nominees Ltd* (Unrep, O'Sullivan J, 20/7/1999), *Cable & Wireless plc v IBM UK Ltd* [2002] 2 All ER (Comm) 1041 considered; *Shelbourne Hotel Holdings Ltd v Torriam Hotel Operating Company Ltd* [2008] IEHC 376 (Unrep, Kelly J, 18/12/2008) distinguished; *Re Via Networks (Ireland) Ltd* [2002] 2 IR 47 applied - Reliefs refused (2009/5407P – Laffoy J – 15/7/2009) [2009] IEHC 419
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Remedies

Legitimate expectation – Public interest – Declining economic circumstances – Representation – Identifiable group – Existence of transaction or relationship – Procedural or substantive legitimate expectation – Whether legitimate expectation can be outweighed by public interest – Whether group too large – Whether doctrine of legitimate expectation can be relied on to obtain benefit – Whether Minister for Finance entitled to withdraw early retirement scheme - *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84 applied; *Keogh v CAB* [2004] IESC 32, [2004]

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MENTAL HEALTH

Detention

Assisted admission – Removal to approved centre - Recommendation for involuntary admission – Applicant restrained in public place and removed to hospital – Outside agency engaged for purposes of "assisted admissions" procedure – Applicant not contending detention unlawful – Applicant seeking nominal damages - Whether employees of agency "staff" of approved centre – Whether applicant moved promptly - *O'Brien v Personal Injuries Assessment Board* [2006] IESC 62 [2007] 1 IR 328 applied; *L(R) v Clinical Director of St Ita's Hospital* (Unrep, Supreme Court, 15/2/2007), *AM v Kennedy* [2007] IEHC 136 [2007] 4 IR 667, *WQ v Mental Health Commission* [2007] IEHC 154 [2007] 3 IR 755, *PMcG v Mater Hospital* [2007] IEHC 401 [2008] 2 IR 332, *Condon v Minister for Labour* [1981] 1 IR 62, *McCormack v Garda Complaints Board* [1997] 2 IR 489, *MM v Clinical Director of the Central Mental Hospital* [2008] IESC 31 [2008] 4 IR 669 and *Johns v Australian Securities Commission* [1992] FCA 169 considered – Mental Health Act 2001 (No 25), ss 5, 9, 12, 13 and 73 – Health Act 2004 (No 42), ss 59 and 75 - Mental Health Act 2001 (Approved Centres) Regulations 2006 (SI 551/2006) – Declaration that employees of outside agency not staff of approved centre granted (2007/816JR – O'Keeffe J – 21/5/2009) [2009] IEHC 253
F (E) v Clinical Director of St Ita's Hospital

Detention

Mental disorder – Involuntary admission – Improvement of condition of patient - Subsequent revocation of admission order – Status of patient following revocation of order – Capacity to make full and informed decision - Patient incapable of consenting to detention - Patient not permitted to leave secure unit unaccompanied - *De facto* detention - Best interests of patient – Whether patient detained voluntarily - Whether detention unlawful – Whether patient capable of consenting to detention - Whether patient capable of making decision to remain voluntarily – *R v Bournewood Community and Mental Health NHS Trust, ex parte L* [1998] 3 All ER 289 and *L v United Kingdom* [2004] ECHR 45508/99 considered and distinguished; *In Re A Ward of Court (No 2)* [1996] 2 IR 79, *Fitzpatrick v. K(F)* [2008] IEHC 104 [2009] 2 IR 7, *JH v Russell* [2007] IEHC 7 [2007] 4 IR 242, *MR v Byrne* [2007] IEHC 73 [2007] 3 IR 211 and *EH v Clinical Director of St. Vincent's Hospital* [2009] IEHC 69 (Unrep, O'Neill J, 6/2/2009) considered- Mental Health Act 2001 (No 25) ss 3, 10, 16, 18, 23, 24, 28, 29, 56 & 57 - European Convention on Human Rights Act 2003 (No 20) s2 - Application refused (2009/112SS – Peart J – 15/5/2009) [2009] IEHC 236
McN (M) v Health Service Executive

Detention

Independent report - Independent medical examiner omitted interview with responsible consultant psychiatrist – Whether more than one responsible consultant psychiatrist - Tribunal – Renewal order – Claim that procedures adopted for tribunal hearing not in accordance with statute – No dispute regarding mental disorder suffered by applicant – Whether defects so fundamental as to invalidate report - Whether detention lawful – Whether failure to interview applicant rendered detention unlawful - Mental Health Act 2001 (No 25), ss 15, 17, 23 & 24 – Detention lawful (2009/610 SS – Peart J – 23/4/2009) [2009] IEHC 488
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SI 494/2009

Occupational pension schemes (wind-up)

regulations 2009
SI 509/2009

Pensions insolvency payment scheme 2010
SI 4/2010

PHARMACY LAW

Statutory Instrument

Health services (drugs payment scheme) regulations 2009
SI 536/2009

PLANNING & ENVIRONMENTAL LAW

Enforcement notice

Validity of notice – Severance - User – Intensification – Change of use - Date of service of notice – Compliance date - Whether notice *ultra vires* respondent – Whether statutory requirement to set out investigation made prior to issuing notice – Whether requirement to state that respondent had considered matters outlined in statute – Whether notice went beyond requiring alleged unauthorised development to cease – Whether respondent acted capriciously – Whether failure to identify site with sufficient precision – Whether subdivision of site constituted intensification – Whether failure to specify period for compliance – Whether necessary to show respondent had not acted *bona fide* or had taken into account irrelevant considerations - *Dundalk Town Council v Lawlor* [2005] 2 ILRM 106, *Bord na Mona v An Bord Pleanala* [1985] IR 205 and *O'Keeffe v An Bord Pleanala* [1993] 1 IR 39 applied; *Galway Council v Davoren* (Unapproved, Quirke J, 2005), *(R) Lyons v West Berkshire District Council* [2003] JPL 1137, *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642, *McCormack v Garda Siochána Complaints Board* [1997] 2 IR 487, *Monaghan County Council v Brogan* [1987] IR 333 and *Stanley v Garda Siochána Complaints Board* [2000] 2 ILRM 121 considered - Planning and Development Act 2000 (No 30), ss 3, 152, 154 and 157 – Local Government (Planning and Development) Act 1963 (No 28) – Order severing part of enforcement notice granted (2006/467JR – O'Keeffe J – 28/5/2009) [2009] IEHC 285
Flynn Machine & Crane Hire Limited v Wicklow County Council

Planning permission

Objective bias – Reasonable apprehension that decision maker biased – Waste facility – Landfill - Previous judicial review- Prejudgment of same issue by members of board - Recommendations by court - Failure by board to act on judicial recommendations regarding composition of deciding panel – Onus on board to avoid perception of prejudgment – Legal duty – Doctrine of necessity – Whether evidence established objective bias – Whether justified by way of legal defence – *DD v Gibbons* [2006] IEHC 33 [2006] 3 IR 17 distinguished; *Coughlan v Pattwell* [1993] 1 IR 31, *O'Neill v Beaumont Hospital Board* [1990] ILRM 419, *O'Callaghan v Mahon* [2007] IESC 17 [2008] 2 IR 514, *O'Neill v Irish Hereford Breed Society Ltd* [1992] 1 IR 431, *Johnson v Darr* 144 Tex 516 272 SW 1098 [1925], *Bennett v British Colombia Securities Commission* [1994] CAN L II 912(BCCA), *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369 considered; *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412 and *Dublin Wellwoman Centre Ltd v Ireland* [1995] 1 ILRM 408 applied - Fair procedures –Court order in respect of subject land not followed – Reasons not given - Duty to give adequate reasons – Test to be applied – Whether inadequate reasons given –Permission granted without conditions - Alleged failure by board to adequately consider relevant environmental considerations in accordance with statute – Whether decision irrational – Whether board failed to adequately address itself to material considerations – Whether consequently decision itself made without jurisdiction – *Mulholland v An Bord Pleanála* [2005] IEHC 306 [2006] 1 IR 453 applied; *Weston v An Bord Pleanála* [2008] IEHC 71 (Unrep, MacMenamin J, 14/3/2008), *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953, *Talbot v An Bord Pleanála* [2008] IESC 46 [2009] 1 IR 375, *O'Donoghue v An Bord Pleanála* [1991] ILRM 750, *White v Dublin City Council* [2004] IESC 35 [2004] 1 IR 545 considered - Practice and procedure - *Locus standi* – Attorney General and State – Role of Attorney General in protection of public interest – Whether State may seek subsequently to impugn decision of board –Whether State and Attorney General had legitimate interest – Statutory interpretation – Directives - Objective of directive to be considered –Ambiguity - Principles to be applied in case of ambiguity – Jurisdiction – Jurisdictional deficiency of board - Board acting in excess of jurisdiction - Failure to address relevant legal consideration – Incorrect legal questions posed - Roles of agencies – Failure to carry out complete lawful environmental impact assessment - Demarcation of roles – Public participation –Non compliance with legislation - *Martin v An Bord Pleanála* [2007] IESC 23 [2008] 1 IR 336 applied; *Moore v Attorney General* [1930] 1 IR 471, *TDI Metro Ltd v Delap (No 1)* [2000] 4 IR 337, *Maher v An Bord Pleanála* [1999] 2 ILRM 198, *Pfeiffer v Deutches Rotes Kreuz* [2005] ICR 1307, *O'Connell v Environmental Protection Agency* [2003] 1 IR 530, *Commission v Germany* C 431/92 [1996] 1 CMLR 196 , *Commune de Mesquer v Total France SA* C188 07 [2009] All ER (EC) 525, *Commission v Ireland* C 215/06 [2008] ECR I-04911, *Klohn v An Bord Pleanála* [2008] IEHC 111 [2009] 1 IR 59, *Edwards v Environment Agency* [2008] 1 WLR 1578, *Commission v Ireland* C216/05 [2006] ECR I-10787, *Commission v Ireland* C 66/06 [2008] All ER (D) 208 (Nov), *Wells v Secretary of State* C201/02 [2004] ECR I-723 [2005] All ER (EC) 323, *Berkeley v Secretary of State for the Environment* [2000] 3 WLR 420, *SIAC Construction Ltd v Mayo County Council* [2002] 3 IR 148, *Sweetman v An Bórd Pleanála* [2007] IEHC 153 [2008] 1 IR 227, *Cairde Chill an Disirt Teo v An Bórd Pleanála* [2009] IEHC 73 [2009] 2 ILRM 89 considered - Planning and Development Act 2000 (No. 30), ss 34 & 160 – Local Government (Planning and Development) Act 1963 (No 28), s 26 -Waste Management Act 1996 (No 10), ss 4, 5, 40, 42 & 54 – European Convention on Human Rights Act 2003 (No 20), s 6 – European Communities (Environmental Impact Assessment) Regulations 1999 (SI 349/1989), reg 11 – Council Directive 2003/35/EC – Council Directive 85/337/EE – Leave granted (2008/1071JR – MacMenamin J- 8/7/2009) [2009] IEHC 346
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PRACTICE & PROCEDURE

Contempt

Application for stay - Attachment and committal – Appeal from order of Circuit Court attaching and committing solicitor for failing to comply with order – Test to be applied – Balance of convenience – Contempt no longer on-going - Whether appeal should operate as stay – Whether appropriate for solicitor to act for himself in proceedings in which he was party – Whether appellant had arguable case – Whether necessary to show curial deference to lower court in contempt case - Rules of the

Superior Courts 1986 (SI 15/1986), O 61, r 6 - *Sinnott v Minister for Education* [2001] 2 IR 549 and *State (Quinn) v Ryan* [1965] IR 70 considered – Stay granted (2009/128 CA – Edwards J – 26/5/2009) [2009] IEHC 260
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Delay

Motion to re-enter proceedings - Inordinate and inexcusable delay - Balance of justice – Challenge to legislation - Antiquity of factual circumstances on which proceedings founded and multiplicity of proceedings arising out of same factual circumstances considered – Fact that impugned legislation repealed - *Croke v Smith No 2* [1998] 1 IR 101 distinguished; *Desmond v MGN Ltd* [2008] IESC 56 (Unrep, Supreme Court, 15/10/2008) applied – Mental Treatment Act 1945 (No 19) ss 163, 172, 184, 185,186,260 - Mental Health Act 2001 (No 25) - Statute of Limitations Act 1957 (No 6) – Constitution of Ireland art 40 – Motion dismissed (1995/8934P – Laffoy J – 16/3/2009) [2009] IEHC 182
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Judgment

Set aside - Fraud – Perjury – Proof – Burden of proof – Rigorous standard of proof – Privilege in respect of oral testimony –Agency – Witness for party – Whether agent of party - *Meek v Fleming* [1961] 2 QB 366 and *Sphere Drake Insurance plc v Orion Insurance Co plc* [1999] EWHC 286 (Comm) (Unrep, English HC, Langley J, 11/2/1999) followed – Application dismissed (2007/53MCA – McKechnie J – 5/5/2009) [2009] IEHC 484
Kelly v UCD

Locus standi

Supreme Court appeal - Preliminary issue - Competition law – Plaintiff seeking declaration that respondent statutory body not empowered to sell headstones –Whether plaintiff had *locus standi* to challenge *vires* of defendant – Whether alternative remedy – Whether complaint to Competition Authority or European Commission viable alternative remedy – Whether plaintiff required to litigate these avenues to prove absence of alternative remedy – Whether purported change in opinion of Competition Authority of relevance - *Deane v VHI* [1992] 2 IR 319 considered - Competition Act 1991 (No 24), s 3 – Dublin Cemeteries Committee Act 1970 (No 1), s 19 – Plaintiff determined to have *locus standi* for the purposes of bringing appeal (256 & 270/2006 – SC – 28/5/2009) [2009] IESC 47
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Moot

Test of mootness – Whether substantive issue alive – Whether proper basis for entering into merits of proceedings – Whether question of mootness connected with factual issues falling for consideration – Whether hearing of substantive issue necessary – *Borowski v Canada (Attorney General)* [1989] 1 SCR 342 approved; *O'Brien v Personal Injuries Assessment Board* [2006] IESC 62, [2007] 1 IR 328 applied - District Court Rules 1997 (SI 93/1997) – Guardianship of Infants Act 1964 (No 7), s 3 – Proceedings dismissed as moot (2008/999JR – Clarke J – 2/7/2009) [2009] IEHC 321
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Strike out

Claims of plaintiff bound to fail –Principles to be applied -Whether established that claims of plaintiff bound to fail – Whether plaintiff had arguable case – Whether claims frivolous and vexatious - Solicitor undertaking - Alleged breach of undertaking – Alleged misrepresentation and misstatement – No loss demonstrated – Priority of interests of receiver over judgment mortgagee –*Res judicata* - Issue estoppel - Whether matters determined in earlier proceedings –*Henderson v Henderson* [1843] 3 Hare 100 applied; *Carroll v Ryan* [2003] 1 IR 309, *McCauley v McDermot* [1997] 2 ILRM 486, *Belton v Carlow County Council* [1997] 1 IR 172 and *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1985] 3 All ER 52 considered – Relief granted (2005/2463P – Clarke J – 31/7/2009) [2009] IEHC 454
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PROPERTY

Judgment mortgage

Proceeds of crime - Application for well charging order over subject property – Ownership of subject property asserted by notice party – Claim that impugned property not that of defendant - Defendant convicted of drug related offences – Claim that dealings of defendant and notice party overlapping – Determination of ownership matter for court – Rules of evidence - Onus of proof - Onus on applicant to substantiate claims that defendant had interest in subject property – Whether evidence of applicant substantiated claim that notice party had interest in property – Whether applicant entitled to well charging order - Whether defendant had disposing power over subject property – Application for orders for accounts and inquiries – Evidence of overlap between dealings of defendant and notice party - Order granted – Whether applicant entitled to order for accounts and enquiries – *Tempany v Hynes* [1976] IR 101, *Containercare (Ireland) Ltd v Wycherley* [1982] IR 143, *Irwin v Deasy* [2006] IEHC 25 [2006] 2 ILRM 226, considered; *Naughton v Naughton* (Unrep, SC, 9/11/1993) and *National Irish Bank v Arnold* [2007] IEHC 382 (Unrep, Finlay Geoghegan J, 12/11/2007) applied; *Ulster Bank Ireland Ltd v Whitaker* [2009] IEHC 16 (Unrep, Clarke J, 21/1/2009) approved - Judgment Mortgage (Ireland) Act 1850 (13 & 14 Vict, c 29), ss 6 and 7 – Proceeds of Crime Act 1996 (No 30), s 8 – Relief partly refused (2008/864SP – Murphy J – 18/6/2009) [2009] IEHC 351
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TAXATION

Freezing order

Criteria – Inspection of documents and furnishing of information in relation to first and second respondents from financial institutions – Application to prevent first and second respondents from dissipating assets – Whether order preventing first and second respondents from dissipating assets properly made – Whether consent obtained for purpose of application for inspection of documents and furnishing of information covered application to prevent dissipation of assets – Whether authorised officer should have resorted to alternative statutory powers before making application – Whether material disclosed illegally by Criminal Assets Bureau to applicant – Whether disclosure in breach of respondents' constitutional rights – Whether disclosure of material was made *ultra vires* – Whether court should apply criteria for making of *Mareva* type injunction – *People (DPP) v Kenny* [1990] 2 IR 110 considered; *O'Mahony v Horgan* [1995] 2 IR 411 distinguished - Criminal Assets Bureau Act 1996 (No 31), s 8 – Taxes Consolidation Act 1997 (No 39), s 908 – Orders properly made (2008/98MCA – Laffoy J – 3/4/2009) [2009] IEHC 184
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TORT

Medical negligence

Surgery – Claim that operation performed incorrectly - Claim that failure to refer plaintiff to specialist surgeon negligent - Standard of care – Principles to be adopted when assessing

standard of care – General and approved practice – Whether defendant to be judged against standard applicable to specialist surgeon – *Dunne v National Maternity Hospital* [1989] 1 IR 91 applied – Claim dismissed (2004/459P – Charleton J – 23/4/2009) [2009] IEHC 189
English v North Eastern Health Board

Negligence

Liability – Causation - Fire in plaintiff's premises – Damage caused to premises and business - Cause of fire unknown – Equipment supplied by defendant possible cause of fire – Probability of cause of fire not adequately established – Standard for establishing facts as a matter of probability - Whether fire caused by defendant as a matter of probability – Claim dismissed (2002/15756P – Birmingham J – 2/4/2009) [2009] IEHC 180
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Negligence

Personal injuries - Assault – Prior criminal proceedings – Defendant convicted – Claim of contributory negligence - Reduction of damages –Claim for aggravated damages – Alleged provocative words and conduct by plaintiff – Evidence – Concurrent wrongdoing – False and misleading evidence by plaintiff – Whether plaintiff contributorily negligent – Whether aggravated damages should be awarded – Whether evidence of plaintiff false and misleading – *Hackett v Calla Associates Ltd* [2004] IEHC 336 (Unrep, Peart J, 21/10/2004) and *Carmello v Casey* [2007] IEHC 362 [2008] 3 IR 524 applied; *Plaistowe v Daly* [1832] NSWSC 22, *Thorn v Hunt* [1838] NSCW 95, *Grealy v Casey* [1901] NIJR 121, *Lane v Holoway* [1968] 1 QB 379, *Fontin v Katapodis* [1962] 108 CLR 177, *Murphy v Culhane* [1977] 1 QB 94, *Ward v Chief Constable of the Royal Ulster Constabulary* [2000] NI 543 considered; *Cooper Flynn v RTE* (Unrep, SC, 19/5/2000) distinguished - Civil Liability and Courts Act 2004 (No 31), ss 2, 26, 34 & 35 – Action dismissed (2008/351P- Hanna J – 28/7/2009) [2009] IEHC 416
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Personal injury

Prisoner on prisoner assault – Negligence – Duty of care - Face slashing – Weapon not recovered – Evidence given by retired prison governor as to whether incident preventable – No evidence of risk evaluation - Whether level of supervision adequate – *Muldoon v Ireland* [1988] ILRM 367, *Bates v. Minister for Justice* [1988] 2 IR 81, *Kavanagh v Governor of Arbour Hill* (Unrep, Morris J, 22/4/1993), *Boyd v Ireland* (Unrep, Budd J, 13/5/1993), *Howe v Governor of Mountjoy Prison* [2006] IEHC 394 (Unrep, O'Neill J, 31/10/2006) and *Breen v Governor of Wheatfield Prison* [2008] IEHC 123 (Unrep, Gilligan J, 11/4/2008) considered - €40,000 awarded to plaintiff (2003/13989P – White J – 25/5/2009) [2009] IEHC 257
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European communities (capital adequacy of credit institutions) (amendment) regulations 2009
DIR/2006-48
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European communities (licensing and supervision of credit institutions)(amendment) regulations 2009
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SI 513/2009

European communities (minimum conditions for examining vegetable and plant species) (amendment) regulations 2009
DIR/2009-97)
SI 518/2009

European communities (quality and safety of human blood and blood components) (amendment) regulations 2009
DIR/2009-135
SI 507/2009

European communities (restrictive measures) (Iran) (amendment) regulations 2009
REG/423-2007
SI 482/2009

European communities (value-added tax) regulations 2009
DIR/2006-112, DIR/2008-8, DIR/2008-9, DIR/2008-117
SI 520/2009

European communities (vehicle drivers certificate of professional competence) (amendment) (no. 2) regulations 2009
DIR/2003-59
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European grouping of territorial cooperation regulations 2008
REG/1082-2006
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Waste management (management of waste from the extractive industries) regulations 2009
DIR/2006-21
SI 566/2009

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DIR/2006-12
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ACTS OF THE OIREACHTAS (30TH DÁIL & 23RD SEANAD)

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

1/2010 Arbitration Act 2010
Signed 08/03/2010

2/2010 Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010
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BILLS OF THE OIREACHTAS (30TH DÁIL & 23RD SEANAD)

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

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

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

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

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

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

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

Child Care (Amendment) Bill 2009
Bill 61/2009
Committee Stage – Seanad *(Initiated in Seanad)*

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

Civil Liability (Amendment) (No. 2) Bill 2008
Bill 50/2008
1st Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins (Initiated in Seanad)*

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

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

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

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

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik*

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

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

Consumer Protection (Amendment) Bill 2008
Bill 22/2008
1st Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

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

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

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

Credit Institutions (Financial Support) (Amendment) Bill 2009
Bill 12/2009
1st Stage – Seanad **[pmb]** *Senators Paul Coghlan, Maurice Cummins and Frances Fitzgerald (Initiated in Seanad)*

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

Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010
Bill 2/2010

Order for 2nd Stage - Dáil

Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009
Bill 55/2009
Committee Stage – Seanad *(Initiated in Dáil)*

Criminal Justice (Public Order) Bill 2010
Bill 7/2010
Order for 2nd Stage - Dáil

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

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

Criminal Law (Insanity) Bill 2010
Bill 5/2010
Committee Stage – Seanad *(Initiated in Seanad)*

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

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

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

Dog Breeding Establishments Bill 2009
Bill 79/2009
Committee – Seanad *(Initiated in Seanad)*

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

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

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

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

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

Energy (Biofuel Obligation and Miscellaneous Provisions) Bill 2010
Bill 6/2010
Committee Stage – Seanad *(Initiated in Seanad)*

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

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

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

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Bill 9/2010
Report Stage - Dáil

Fines Bill 2009
Bill 18/2009
2nd Stage – Seanad *(Initiated in Dáil)*

Food (Fair Trade and Information) Bill 2009
Bill 73/2009
1st Stage – Dáil **[pmb]** *Deputies Michael Creed and Andrew Doyle*

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

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

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

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
1st Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
Bill 23/2006
Order for 2nd Stage – Seanad **[pmb]** *Senator Brendan Ryan (Initiated in Seanad)*

George Mitchell Scholarship Fund (Amendment) Bill 2010
Bill 4/2010
Order for 2nd Stage - Dáil

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

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

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

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

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

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

Inland Fisheries Bill 2009
Bill 70/2009
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Institutional Child Abuse Bill 2009
Bill 46/2009
2nd Stage – Dáil **[pmb]** *Deputy Ruairi Quinn*

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

Land and Conveyancing Law Reform (Review of Rent in Certain Cases) (Amendment) Bill 2010
Bill 11/2010
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

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

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

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

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

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik*

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

Merchant Shipping Bill 2009
Bill 25/2009
Committee Stage - Dáil

Ministers and Secretaries (Ministers of State Bill) 2009
Bill 19/2009
1st Stage – Dáil **[pmb]** *Deputy Alan Shatter*

Multi-Unit Developments Bill 2009
Bill 32/2009
Committee Stage – Seanad *(Initiated in Seanad)*

National Archives (Amendment) Bill 2009
Bill 13/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

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

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

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

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

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

Ombudsman (Amendment) Bill 2008
Bill 40/2008
Order for Report – Dáil

Petroleum (Exploration and Extraction) Safety Bill 2010
Bill 3/2010
Committee – Dáil *(Initiated in Seanad)*

Planning and Development (Amendment) Bill 2010
Bill 10/2010
Order for 2nd Stage – Dáil **[pmb]** *Deputies Joe Costello and Jan O'Sullivan*

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

Planning and Development (Amendment) Bill 2008
Bill 49/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Joe Costello*

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

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

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

Privacy Bill 2006
Bill 44/2006

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

Prohibition of Female Genital Mutilation Bill 2009
Bill 30/2009
Committee Stage – Dáil **[pmb]** *Deputy Jan Sullivan*
Property Services (Regulation) Bill 2009

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

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

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

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

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

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

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

Small Claims (Protection of Small Businesses) Bill 2009
Bill 26/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

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

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Bill 6/2008
Awaiting Committee – Dáil

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Bill 33/2005
Order for Report – Dáil

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Order for 2nd Stage – Dáil

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Bill 71/2009
1st Stage – Dáil **[pmb]** *Deputy Alan Shatter*

Twenty-ninth Amendment of the Constitution Bill 2008
Bill 31/2008
1st Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

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

Whistleblowers Protection Bill 2010
Bill 8/2010
Order for 2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

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

ABBREVIATIONS

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Law Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

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

Defamation Reform and the 2009 Act: Part I

Hugh I. Mohan SC & Mark William Murphy BL

Introduction

Rarely has a piece of legislation been discussed so much and awaited for so long as is the case with the new Defamation Act 2009, which was brought into force on New Year's Day 2010[1]. The process of overhauling defamation law in Ireland began over twenty years ago, in January 1989, when the then Attorney-General requested the Law Reform Commission to "undertake an examination of and conduct research into and formulate and submit proposals for reform of the law of defamation and contempt of court".

The law at that time constituted the common law of defamation as it had developed over the centuries and one piece of legislation, namely the Defamation Act 1961. Up until the 1980s, the press played a largely passive role in Irish society. The 'red-tops' or tabloids had not yet made it across the Irish Sea. There were three national daily newspapers: The Irish Indepenent, The Irish Press and The Irish Times, each serving their own constituency. The Sunday Newspapers were, by and large, much thinner affairs than the current models. There was little intrusion into the personal lives of our citizens and not much investigative journalism. However, as the 80s came and went, the landscape changed. The English tabloids arrived and this was matched with our own 'red-tops' making it onto the scene, notably The Sunday World. As in most other things, we followed our larger neighbour, and as the press got more aggressive across the water and took a more intrusive approach, not just into public life, but also into the lives of our more interesting citizens, the writs began to increase. When that happened, the debate in this jurisdiction began in earnest. The debate centred on the issue as to whether public individuals have private lives and can keep them private, and whether freedom of the press allowed public discourse and comment on such matters. Was the 'public interest' to be equated with something in which the public might be interested?

The powerful press lobby argued from time to time (very publicly) for 'reform' of what it considered the antiquated libel laws of this jurisdiction. It did so individually and collectively, driven by organisations such as the National Newspapers of Ireland. (RTÉ was governed by its own rules and regulations in the Broadcasting Act, and there had not yet developed an independent radio and television market.)

However, the very people who could change the laws were the same sector of society which was being targeted by this new special investigative reportage, not just regarding their public duties but significantly also in relation to their private lives. The Law Reform Commission took up the Attorney-General's request and in 1991 published a very detailed consultation paper on the civil law of defamation[2]. An absence of political will ensured that matters were not progressed (in the face of occasional media complaints when large jury awards were made), until eventually Minister for Justice Michael McDowell promised libel reform, and established an advisory committee to report to the Government in 2005. The Defamation Act 2009 does not replicate in their totality the proposals contained in the Report of the Legal Advisory Group on Defamation, but does so in large measure.

The purpose of this Article is to examine the new legislative regime which now governs the law of defamation. Part I highlights some key elements of reform and certain practical new remedies for the plaintiff under the new regime. It then moves on to look at some of the defences available under the 2009 Act, although perhaps the most important defence - that of fair and reasonable publication on a matter of public interest – is left for fuller discussion in Part II of the Article. Part II takes up that topic and completes the Article by looking at some miscellaneous defences, as well as the controversial question of the making of submissions and giving of directions on damages. The issue of criminal liability under the new Act – specifically the new offence of publication or utterance of blasphemous material[3] – is not covered.

Key Elements of Reform

The 2009 Act abolishes the Defamation Act 1961 in its entirety[4], and sets new parameters within which "the tort of defamation"[5], as it is now called, is to operate.

Perhaps the most significant practical development in the Act is that the limitation period is reduced from 3 years (for slander) and 6 years (for libel) to 1 year for the tort of defamation (or, in exceptional cases where the interests of justice so require, 2 years)[6]. However, there are many other important changes. A cause of action in defamation now

1 Defamation Act 2009 (Commencement) Order, S.I. 517 of 2009.

2 Report on the Civil Law of Defamation (LRC 38-1991) (December 1991); available at: http://www.lawreform.ie/publications/data/volume10/lrc_67.html

3 S.36 Defamation Act 2009.

4 S.4 Defamation Act 2009.

5 The torts of libel and slander are no longer so described. They are now collectively described as the tort of defamation: s.6(1) Defamation Act 2009. This is more than a change in nomenclature and has at least one immediate practical impact, in that special damage (i.e. some pecuniary loss) is no longer required to be proved to ground a claim in respect of slander. The scope for taking actions over defamatory speech is thereby dramatically increased.

6 S.38 Defamation Act 2009.

survives the death of either plaintiff or defendant[7]. The 'multiple publication' rule at common law has been abolished in favour of a single publication rule[8], whereby only one cause of action is occasioned by repetitious publication of the same defamatory statement by the same publisher to various persons. Under the old rule contained in the old case of *Duke of Brunswick v Harmer*[9], each separate publication of an original defamation gave rise to a separate cause of action (although this was subject to the doctrine of abuse of process). This created a particularly acute difficulty for those newspapers maintaining Internet archives, as a fresh defamation would be deemed to have occurred every time a reader accessed on-line an archived article containing a defamatory statement (a legal state of affairs which was recently found by the European Court of Human Rights *not* to contravene Article 10 of the European Convention on Human Rights[10]). Now, archivers have considerable protection in that a plaintiff has one cause of action only in respect of a multiple publication[11], subject to a judicial discretion to grant leave to bring further actions if "the interests of justice so require"[12].

One aspect of defamation law which has been completely reversed by the 2009 Act is that defendants may now make a lodgment in both High Court and Circuit Court actions without any admission as to liability[13]. The jurisdiction of the Circuit Court has also been increased to €50,000[14], although it might be doubted whether this will expand the volume of Circuit Court defamation litigation to any significant extent.

Plaintiffs' Remedies under the New Act

A number of key new remedies are open to a plaintiff under the 2009 Act. One such remedy is the new 'correction order', whereby a Court can direct publication by the defendant in such terms as it deems fit where there has been a finding that the defendant made a defamatory statement[15]. This is a radical new remedy which involves Irish courts actually prescribing "the form, content, extent and manner of publication of the correction". The ignominy of suffering a full correction to be published by a newspaper, perhaps on its front page, may be expected to have a dramatic effect on whether a case is fought or compromised by media defendants.

An order of prohibition may also be made by the Court, restraining the publication – or further publication – of a defamatory statement[16]. The Court must be of the opinion that the statement is defamatory and that there is no defence which is reasonably likely to succeed. The fact of the making of such an order may be reported, provided the statement itself is not reported[17]. The traditional reluctance of the Irish courts to suppress publishers in advance of publication, however, may militate against this remedy proving a prevalent feature of defamation litigation.

An interesting new remedy is the declaratory order, which provides a 'fast-track' approach for the plaintiff[18] to establish that what was published was defamatory of the plaintiff. The expeditious nature of the procedure derives from the fact that an application for a declaratory order is made simply by way of via originating Notice of Motion and Affidavit. However, the obvious concomitant (and necessary) disadvantage of seeking a declaratory order is that the applicant is debarred from instituting other proceedings in respect of the same cause of action[19] and damages are not available[20], so in practice the declaratory order may only be attractive primarily to plaintiffs such as politicians or public figures, who are more concerned with setting the record straight quickly and efficiently than with extracting recompense. The Court (sitting as a judge alone) must be satisfied that there is no defence to the application, and that the defendant has failed to accede to a request to publish an apology.

There is a procedure under the 2009 Act whereby summary judgment can be granted to a plaintiff. The procedure is similar to that outlined above in respect of prohibition orders in that it proceeds by notice of motion and affidavit and the test for the Court (sitting alone) is whether (a) the statement is defamatory; and (b) there is no defence available which is reasonably likely to succeed[21]. The application may be refused if the Court is satisfied, on the application of the defendant, that the statement complained of cannot reasonably bear a defamatory meaning[22].

There is a new obligation on both parties to a defamation action to swear affidavits verifying assertions and allegations of fact[23]. Placing such an onus on plaintiffs to ensure the accuracy of such facts as are pleaded in their Statement of Claim is an important addition to this area of law and brings this particular tort in line with the changes wrought by the Civil Liability & Courts Act 2004[24].

A new process now exists under the 2009 Act whereby an interlocutory ruling may be sought as to whether a statement is reasonably capable of bearing the imputation pleaded by the plaintiff, and as to whether that imputation

7 S.39 Defamation Act 2009.
8 S.11 Defamation Act 2009.
9 *Duke of Brunswick v Harmer* (1849) 14 QB 185 (recently upheld in the UK in the context of Internet publications in *Berezovsky v Michaels* [2000] 1 WLR 1004; and in *Godfrey v Demon Internet Limited* [2001] QB 201).
10 *Times Newspapers Ltd (nos.1&2) v UK*, 10 March 2009 (Appls. 3002/03 & 23676/03); [2009] EMLR 254. The Court of Appeal's decision giving rise to the ECtHR litigation is *Loutchansky v Times Newspapers Ltd (nos.2-5)* [2001] EWCA Civ 1805; [2002] QB 783. See Rory Dunlop, *Article 10, the* Reynolds *test and the rule in the* Duke of Brunswick*'s case - the decision in Times Newspapers v United Kingdom* (2006) 3 EHRLR 327.
11 S.11(1) Defamation Act 2009.
12 S.11(2) Defamation Act 2009.
13 S.29 Defamation Act 2009.
14 S.41 Defamation Act 2009.
15 S.30(1) Defamation Act 2009.
16 S.33 Defamation Act 2009.
17 S.33(2) Defamation Act 2009.
18 S.28 Defamation Act 2009.
19 S.28(4) Defamation Act 2009. However, a declaratory order may be combined with, for example, a correction order or an order of prohibition.
20 S.28(8) Defamation Act 2009.
21 S.34(1) Defamation Act 2009.
22 S.34(2) Defamation Act 2009.
23 S.8 Defamation Act 2009.
24 S.8(6) Defamation Act 2009 provides that it shall be an offence knowingly to make a false or misleading statement in such an affidavit, punishable on summary conviction to a fine up to €3,000 and/or imprisonment for up to 6 months, and on conviction on indictment to a fine up to €50,000 and/or imprisonment for up to 5 years.

is reasonably capable of bearing a defamatory meaning[25]. This directly mirrors the situation in the UK, where such pre-trial applications are brought on a reasonably frequent basis, although it remains to be seen whether many such applications will be brought in this jurisdiction, save in the more 'obvious' situations.

Whilst the above shows that the legal landscape has been altered to a considerable degree by the 2009 Act, it is important to note that certain cornerstones of the law of defamation have simply been re-stated. For example, the presumption of falsity remains[26]. And the definition of a defamatory statement is one which "tends to injure a person's reputation in the eyes of reasonable members of society"[27], which is the essence of the common law definition of defamation. In addition, a number of key defences to defamation have been retained or re-stated. This article now turns to look at the playing-field for defamation defendants in the wake of the 2009 Act.

Defences under the New Act

Section 15(1) of the 2009 Act abolishes all pre-existing common law defences to defamation. That leaves the defences contained in Part 3 of the 2009 Act[28] as the consolidated source of all options for defence lawyers in one piece of legislation. Some defences are familiar and have been merely 'tweaked' (or effectively re-enacted), some have been abolished entirely, and some are quite new.

Truth

The old common law defence of justification has been effectively re-incarnated in the form of the defence now to be known as the "the defence of truth"[29]. This defence retains in s.16(2) the criticised[30] feature of s.22 of the 1961 Act, whereby a defendant succeeds if his/her publication contains a number of allegations capable of being separated, some of which are found to be true and some of which are not, and where those allegations which are proved are sufficiently significant and sufficiently stain the plaintiff's reputation that the unproved, more minor, allegations are seen to have no appreciable impact on the plaintiff's reputation. A good example of a case where this feature of the defence of truth/justification succeeded is the case of *Irving v Penguin*[31], where allegations that the plaintiff was anti-Semitic, had portrayed Hitler in an unduly favourable light, was a Holocaust denier etc, were found to have been justified, but other allegations, including that he had connections with terrorist groupings were not. Overall, the defence of justification succeeded as these unjustified allegations were considered relatively minor and, given the successful proof of the more substantial allegations, not to have caused any material harm to the plaintiff's reputation. Under the 2009 Act the question will be now, as it has been in the past: what is the 'sting of the libel', and has the defence of truth been established in that respect? The 2009 Act mirrors the old s.22 of the 1961 Act in providing that the defence of truth "shall not fail by reason only of the truth of every allegation not being proved" if the unproved words do not materially impact upon the plaintiff's reputation, in light of the truth of the remainder of the statement[32]. Accordingly, factual inaccuracies relating to minor or non-material matters of a publication such as dates, times or places peripheral to the general allegation do not bar the defence of truth (just as they did not bar the defence of justification).

As with justification, truth is a complete defence to an action for defamation and does not depend in any way upon the defendant's state of mind. Malice, or an erroneous absence of belief in the truth of the statement, is irrelevant to the applicability of the defence.

Absolute Privilege

The defence of absolute privilege previously existed both at common law and in statute[33]. Absolute privilege is now securely placed on a comprehensive statutory footing by s.17 of the 2009 Act. S.17(2) expands upon the old common law position, and lists an extensive – though not exhaustive – list of specific examples of statements which will attract absolute privilege under the new 2009 regime. At first glance, these specific examples might be considered reflective of the pre-existing ambit of absolute privilege, embracing as they do the traditional tripartite structure of government and extending protection to statements made in an (1) executive/governmental; (2) legislative/parliamentary; or (3) judicial/quasi-judicial context. However, the enumeration of such specific categories - some 23 in number - is a significant new development which should not be underestimated from a practical perspective in that it makes certain that uninhibited coverage of any or all of the types of proceedings listed in s.17(2) is in the public interest. Furthermore, doubts previously expressed as to, for example, the entitlement of courts of local and limited jurisdiction, or coroners' courts, to the defence of absolute privilege, have been dispelled in one stroke[34]. Although Presidential Privilege is not referred to in

25 S.14 Defamation Act 2009.

26 Pursuant to s.16(1) of the 2009 Act, it is a defence to an action for defamation "for the defendant to prove that the statement in respect of which the action was brought is true in all material respects" (emphasis added.)

27 S.2 Defamation Act 2009.

28 Other than defences contained elsewhere in statute or in an act of the European Communities (or regulations giving effect to such acts).

29 S.16 Defamation Act 2009.

30 See McDonald, *Irish Law of Defamation* (2nd ed., 1989), 98

31 *Irving v Penguin* [2000] EWHC QB 115

32 S.16(2) Defamation Act 2009.

33 S.18 Defamation Act 1961 rendered privileged any fair and accurate report of publicly heard court proceedings in the State or in Northern Ireland which was published or broadcast contemporaneously with such proceedings. The scope of the old common law and statutory position is deliberately retained in that any statement, in respect of which absolute privilege could properly have been invoked immediately prior to the commencement of s.17(1) 2009 Act, is to be treated as absolutely privileged following the commencement of s.17(1) 2009 Act.

34 The list in s.17(2) includes, *inter alia*, statements made in a House of the Oireachtas by a member of a House of the Oireachtas (s.17(2)(a)); or contained in a report of such a statement, which report is sanctioned by a House of the Oireachtas (s.17(2)(b)); or made in proceedings before a committee of such a House or of both Houses (s.17(2)(l)); made in the European Parliament by an MEP (s.17(2)(c)); or contained in a report of such a statement which is sanctioned by the European Parliament (s.17(2)(d)); or made in proceedings before a committee of the EP (s.17(2)(m));

s.17 of the 2009 Act, it must be the case that communications made by the President in the exercise of his or her functions would not be susceptible to a claim for defamation, by virtue of Article 13.8 of the Constitution.

The most important criterion for the successful invocation of absolute privilege at common law was that the statement be adequately connected to the proceedings which formed the basis for the privilege. Completely irrelevant defamatory statements wholly unconnected to the occasion of privilege did not attract immunity from liability. With that in mind, an interesting aspect of s.17(2) of the 2009 Act is that certain of the examples listed include the proviso "where the statement is connected with those proceedings", while other examples do not. For example, a statement made in the course of proceedings before a Tribunal of Inquiry is absolutely privileged "where the statement is connected with those proceedings" (s.17(2)(n)), whereas a statement by a witness in judicial proceedings is simply stated to be absolutely privileged without further clarification (s.17(2)(g)). What of witnesses who take the stand following the commencement of the 2009 Act and make statements which are irrelevant and defamatory of another? McMahon & Binchy considered, prior to the arrival of the 2009 Act, that such statements were not absolutely privileged[35] but rather qualifiedly so. This may now have changed. The new position in s.17 seems to be consonant with the reasoning of O'Flaherty J in *Looney v Bank of Ireland* [1996] 1 IR 157, where he spoke of:

> a ... fundamental point which is the need to give witnesses (and also indeed the judge) in Court, a privilege in respect of oral testimony and also with regard to affidavits and documents produced in the course of a hearing. Such persons ... are given immunity from suit. Otherwise, no judge could go out on the bench and feel that he or she could render a judgment or say anything without risk of suit. Similarly witnesses would be inhibited in the way they could give evidence. The price that has to be paid is that civil actions cannot be brought against witnesses even in a very blatant case.

Finally, absolute privilege remains a complete defence to defamation and is undefeated by malice.

Qualified Privilege

The common law position in relation to the defence of qualified privilege is re-stated and placed on a statutory footing[36]. A defendant to a defamation action is not liable where he/she proves:

(a) the statement was published to a person or persons who:
  (i) had a duty to receive, or interest in receiving, the information contained in the statement, or
  (ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and
(b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons.

The First Schedule annexed to the 2009 Act will attract qualified privilege, either (a) without explanation or contradiction or (b) subject to such explanation or contradiction[37]. The latter types of statements do not attract qualified privilege if the plaintiff requested the defendant to publish (in the same medium of communication as the allegedly defamatory statement) a reasonable statement by way of explanation or contradiction, and the defendant fails to do so or does so inadequately or unreasonably in all the circumstances.

The 2009 Act, as enacted, has jettisoned what would have been a major development relating to the circumstances in which a defendant may *lose* the benefit of the defence of qualified privilege. S.17 of the Defamation Bill 2006 provided that the defence would be lost if the plaintiff could prove:

(i) that the defendant did not believe the statement to be true;
(ii) that the defendant acted in bad faith, out of spite, ill-will or improper motive;
(iii) that the statement bore no relation to the purpose of the defence;
(iv) that the manner and extent of the publication of the statement exceeded what was reasonably sufficient in all the circumstances.

This intended expansion of the scope by which qualified privilege could be lost would have granted plaintiffs a broader canvas with which to portray a picture of malice. Under the 2006 Bill, for example, spite would have been transformed from evidence going to prove malice into an actual *definition*

or contained in a court judgment (s.17(2)(e)); or made by a judge or person performing a judicial function (s.17(2)(f)); or made by a witness or legal representative or juror in judicial/quasi-judicial proceedings (s.17(2)(g)); or made in the course of proceedings pursuant to Article 37 of the Constitution (whereby limited functions of a judicial nature may be delegated by law to non-judges) (s.17(2)(h)); which are fair and accurate reports of judicial proceedings in the State or in Northern Ireland (s.17(2)(i)) or proceedings to which s.40 Civil Liability and Courts Act 2004 applies (s.17(2)(j)) or proceedings publicly heard or adjudicated upon by a court or arbitral tribunal established under an international agreement to which the State is a party, including the ECJ, CFI, ECtHR and ICJ (s.17(2)(k)); or made in the course of Tribunal proceedings established under the Tribunals of Inquiry (Evidence) Acts 1921-2004 (s.17(2)(n)) or contained in a report of any such Tribunal (s.17(2)(o)); or made in the course of proceedings before a commission of investigation established under the Commissions of Investigation Act 2004 (s.17(2)(p)) or contained in a report of any such commission (s.17(2)(q)); or made in the course of a Coroner's inquest or contained in a decision or verdict given at such an inquest (s.17(2)(r)); or made in the course of an inquiry authorised by the Government/a Minister/the Oireachtas or a House thereof/a court (s.17(2)(s)) or in the course of an inquiry conducted in Northern Ireland by a comparable person or body (s.17(2)(t)) or contained in a report of any such inquiry (s.17(2)(u)); made in the course of arbitral proceedings (s.17(2)(v)); or made pursuant to a court order (s.17(2)(w)).

35 McMahon & Binchy, *The Law of Torts* (3rd ed,. 2000), para.34:153

36 S.18 Defamation Act 2009.

37 S.18(3) Defamation Act 2009. Although more detailed than the Second Schedule to the Defamation Act 1961, this list effectively mirrors what went before.

thereof: as Cox rightly describes it, "a radical departure from the common law position"[38]. For it to suffice for a plaintiff to establish simply that the manner and extent of publication exceeded what was reasonably sufficient would have been a serious overhaul of the law of qualified privilege.

S.17 of the 2006 Bill would have gone towards countermanding the effect of the law as developed in such recent cases as *McCormack v Olsthoorn* [2004] 1 IEHC 431. In that case (against the backdrop of a so-called 'stop thief!' factual scenario) Hardiman J was concerned that the law should reflect the realistic responses of reasonable persons to situations where they believe their property has been stolen. The absence of reasonable grounds for publishing a statement in such circumstances in the heat of the moment would not *per se* remove the privilege. Had s.17 been enacted as drafted, such an absence of reasonable grounds might well have precluded a defendant from relying on qualified privilege on the basis that "the manner and extent of the publication of the statement exceeded what was reasonably sufficient in all the circumstances".

However, this development was abandoned by the Oireachtas. The defence is lost "where the plaintiff proves that the defendant acted with malice"[39]. Unsurprisingly, malice is not defined in the legislation and it may be expected that the established common law jurisprudence on the establishment of malice may be relied upon in future.

Qualified privilege may still be relied upon by a defendant who has mistaken his/her recipient for an interested person[40]. Where a co-defendant fails to establish qualified privilege, his/her co-defendants may still rely on the defence unless they were vicariously liable for the acts or omissions of the first defendant giving rise to the cause of action in defamation[41].

Honest Opinion

The defence of 'honest opinion'[42] is to some extent an old friend in new clothes: the defence of 'fair comment' redressed. However, the new defence of honest opinion is arguably more restrictive than that of fair comment in that, to establish that he/she honestly held the opinion, the defendant must establish that he/she believed in the truth of the opinion at the time of publication. Heretofore, fair comment could be relied upon by showing that the statement represented commentary rather than fact which was fair in an *objective* sense. Fairness did not have to be reasonable, but rather was simply required to have some minimum level of relevance to certain true facts upon which it was based.

The requirement for a defendant to prove that (s)he believed in the truth of the opinion[43] is something new, which will require the defendant positively to aver that he believed in the truth of the opinion (or believed that the author believed in the truth of the opinion). The old defence of fair comment required it to be shown simply that an objectively honest person could make the comment on the basis of the available (true) facts. The new defence of honest opinion requires the defendant *himself* to have believed the opinion (or to have believed that the author believed the opinion). This is an extra hurdle for the defendant, which may not be as easy to establish.

Honest opinion is available as a defence to defamation where the following 3 criteria are established by the defendant:

(a) the defendant believed in the truth of the statement (as explained above);
(b) (i) the opinion was based on allegations of fact
    I. specified in the statement containing the opinion, or
    II. referred to in that statement, that were known, or might reasonably be expected to have been known, by the persons to whom the statement was published,
    or
  (ii) the opinion was based on allegations of fact to which
    I. the defence of absolute privilege, or
    II. the defence of qualified privilege,
    would apply;
    and
  (iii) the opinion related to a matter of public interest.

Where the opinion is based on allegations of fact, a defendant cannot rely on honest opinion unless either (a) he proves the truth of all the allegations; or (b) where some allegations are proved and some not, the defendant's opinion is honestly held in light of the allegations of fact which have been proved.

The defence of honest opinion is not withheld from a defendant merely because a joint publisher did not honestly hold the opinion, unless the first defendant was vicariously liable for the acts/omissions of the joint publisher giving rise to the cause of action in defamation[44]. ■

Part II of this Article to be published in the next edition of the Bar Review, will examine, amongst other things, the important new defence of fair and reasonable publication on a matter of public interest.

38 Cox, *Defamation Law* (2007), 289
39 S.19(1) Defamation Act 2009.
40 S.19(2) Defamation Act 2009.
41 S.19(3) Defamation Act 2009.
42 S.20 Defamation Act 2009.
43 S.20(2) Defamation Act 2009.
44 S.20(4) Defamation Act 2009.

Rule of Law Initiative – the Kenya experience

Rithika Moore-Vaderaa BL

In October 2009, I represented the Bar Council of Ireland, in a needs assessment mission to Kenya, on the Kenyan Justice System. This originated from an email, titled "Kenya" which surfed into my inbox, sometime in 2008. It came via the Rule of Law Initiative. Curious, I opened it. The subject was to investigate doing a Rule of Law project in Kenya.

From the early stages, I advertised for a small team. The terms of employment included; no pay, long hours, and unlimited set-backs. Endeavouring them to "*be true*" like Mahatma Gandhi was stretching it. The team includes; Ercus Stewart SC, Diane Duggan BL and Mernan Femi-Oluyede (solicitor). Our objective is; to provide legal assistance, enhance Rule of Law in Kenya, empower people on the ground to affect positive change themselves and operates from a "what they need" approach, to how we can assist to those needs.

But where to start? The team launched into discussions, with the Law Society of Kenya ("LSK"), who presented a detailed report, identifying numerious issues (including reform of the judicial sector).

The contents of the report explained how the post-election violence of 2007, led Kenya into unprecedented violence, ethnic animosity and mass displacement. This was ignited by suspicions of ballot-rigging. Between Dec 2007 and March 2008, sexual violence became rampant. It consisted of rape, gang rape, defilement, genital mutilation, sodomy, forced circumcision and sexual exploitation. Both sexes of every age were targeted. The perpetrators, were state security agents, (e.g. the police), neighbours, and relatives. It left 1,133 Kenyans dead, 3,561 seriously injured and over 300,000 displaced from their homes. Prior to the elections, Kenya had enjoyed relative stability. However public confidence in the judicial system has virtually collapsed. Why? In part due to the delay in investigations and prosecutions, and the disappearance of key witnesses relating to the post election violence. Without swift reform in the judicial system, and political will, the Rule of Law in Kenya threatens to collapse in full, by the next elections, scheduled for 2012.

A number of issues within the judicial sector are of immediate concern. For instance; there are only 4 magistrates, who must case manage the concerns of four million people, who reside in their district, i.e. the slums of Nairobi; Nearly 1 million cases remain in backlog. It was obvious, the team alone could not provide all solutions. Raising the LSK issues onto the international stage, would be key for us.

We presented our objectives, with the report sent by LSK to The International Bar Association Human Rights Institute ("IBAHRI"). The IBAHRI co-ordinated, with the International Legal Assistance Consortium ("ILAC") and with the support of the Law Society of Kenya ("LSK") scheduled a trip in October to Kenya. By the invitation of IBAHRI, I (on behalf of the team) was included as part of the delegation of legal experts who were to conduct a needs assessment mission.

The October mission coincided with the former UN Secretary-General Kofi Annan four-day assessment visit. We were fortunate to meet him. His presence was aimed to keep the Kenya on the international radar. The international dimension was enhanced by the ongoing work by the International Criminal Courts. It was a bonus when the National Press and TV began reporting our mission and this notably raised the LSK efforts. Further during our visit, the Chief Justice, appointed a President for the High Court and Circuit Court equivalent.

On February 15 2010, the mission findings were published. The report outlines major obstacles facing the judicial system, and assesses where international and regional expertise may be most constructively applied in order to provide assistance.[1]

For the team, the trip, forged connections with and between the following;

1. NUI Human Rights Center, Galway with University of Nairobi. The latter are at the initial stages of setting up a The Centre for Human Rights and Peace (CHRP). In March the Kenyan Ambassador, will give a talk in NUI on the constitution.
2. The Center for Justice and Crimes against Humanity (CJCH) with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law of Lund, Sweden (RWI);
3. Strengthened ties with LSK.

To date, the team, would like to acknowledge the following; Members of the Bar Council, Mr. Justice Garret Sheehan, Micheal Greene (consultant) in A&L Goodbody Solicitors and Caroline O'Connor BL, who continues to act on our behalf, while posted out in Nairobi with the UN.

The Irish appear to be held in high regard in East Africa. It became self evident that our constitution, the independence of our judiciary, the Northern Ireland peace process, and the relentless work by missionaries, commands huge respect. On a personal note, it heightened my awareness of how lucky, we in Ireland are. ■

1 Available at: http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx

Portmarnock Golf Club Decision: A Step Backwards For Equality Law?

Clodagh Marry BL

The recent judgement handed down by the Supreme Court in the case of *Equality Authority v Portmarnock Golf Club & ors and Cuddy & anor v Equality Authority*[1] affirmed the decision of the High Court that the golf club in question was legally entitled to exclude women from becoming members of the club. On the face of it, this conclusion does not sit easily with the progressive laws on equality between the sexes. How can one conclude that a club which excludes women from its membership can be said to treat both men and women equally?

This Article examines the decision of the Supreme Court and the previous decisions of the District Court and the High Court in this case. It begins with examining the law in this area and what the position in relation to gender equality is. Secondly, it takes a closer look at the questions in issue in this case, observing that this case had little to do with the law of equality and more to do with statutory construction. Thirdly, it concludes that the two judges who delivered minority opinions had the better approach.

The Law in Ireland

The freedom to associate is a constitutionally recognised right which permits people to associate with whomever they choose and conversely not to associate with those with whom they do not wish to. Thus one may establish, for example, an African club and exclude from it any person who is not of African descent. This, Hardiman J. notes "is the immemorial position at law"[2] and, it may come as a surprise to many to realise that the equality legislation, does not alter that position. So what effect does Irish equality have on this position?

Equal Status Act 2000

The Equal Status Act 2000 was introduced to promote equality and prohibit certain types of discrimination, namely the nine categories as set out in section 3 thereof, including discrimination on the basis of gender. In other words, treating men and women differently, simply on the basis that they are of different sex, is prohibited under Irish Law.

Section 8 of the Equal Status Act 2000 deals with registered clubs and states that such a club can be declared "a discriminating club" if, for example, "it has any rule, policy or practice which discriminates against a member or an applicant for membership". It is not unlawful to be declared "a discriminating club", the sole consequence being that, if a registered club is so declared, its' certificate of membership is suspended for a stated period and if it continues to be a discriminating club then Statute provides that any such club is not permitted to serve alcohol on the premises. Thus, in effect, there is no legal prohibition on a club discriminating against a member (or group of members) once it adheres to this statutory 'penalty'.

An exception clause is contained in Section 9 of the 2000 Act. Section 9(1) provides, that notwithstanding that a club may be deemed a discriminatory club under section 8, it will be exempt from such a categorisation if-

> "its principal purposes is to cater only for the needs of
>
> (i) persons of a particular gender, marital status, family status, sexual orientation, religious belief, age, disability, nationality or ethic or national origin ...."
>
> (ii) persons who are members of the travelling community, or
>
> (iii) persons who have no religious belief,
>
> it refuses membership to other persons"

The Club in the Portmarnock case argues that it falls within subsection (i) of this section in that its principal purpose is to cater only for the needs of persons of a particular gender i.e. men.

The nub of the Equality Authority's argument was that the term "need" should be narrowly construed and that giving the term its' ordinary and natural meaning, golf could not be said to constitute a "need" of gentlemen, for playing golf is not a necessity. If the court found in their favour in this regard, Portmarnock Golf Club would not be able to bring itself within this exception and so ought to remain caught by the provisions of section 8 and be declared to be "a discriminating club" for the purposes of the legislation.

The Issues

The Equality Authority took a case to the District Court seeking a declaration that Portmarnock Golf Club should be declared "a discriminatory club". The EA's case was grounded on the fact that the legislation in fact permits a club that has been registered to establish itself in what would otherwise be a discriminating manner, once it accepts (or a Court declares) that it will be categorised as "a discriminating club" for the purposes of the equality legislation. Such a declaration has the effect that any such club will be prohibited from selling any alcohol beverages on the premises of the club. The Portmarnock Golf Club is a registered club and is, prima facie, subject to this penalty. This matter was not in contention at trial. The issue that arose was whether the club in question

1 [2009] IESC 73

2 [2009] IESC 73 Hardiman J's judgement, p 3-4

could come within the exception to this law, as provided for in section 9 of the 2000 Act.

As noted above, to come within section 9(1)(i) the Club must prove that its principal purpose is to cater only for the needs of a particular gender. So firstly the Court had to examine what is the main purpose of the Club. It had to then examine whether it caters only for the needs of, in this case a particular gender.

Interpreting what the principal purpose of Portmarnock Golf Club is, became a large part of the Judges' written decisions. Further debate was heard over what method of interpretation should define the word 'needs' and whether this should be broadly or narrowly defined. As will be seen, the method of interpretation adopted by the respective judges in the District, High and Supreme Courts ultimately determined the issues in the case.

The Analysis

On the 20th February, 2004, District Judge Collins applied the ordinary and natural meaning to the words in contention and made the determination that

> "[t]he principal purpose of the club is to play golf. The ordinary words of the terms of the statute do not ascribe to mens golf as a special need (sic)."

The Defendants were dissatisfied by Judge Collins decision on a point of law and appealed the decision, by way of Case Stated, to the High Court.

Similar to the submissions made in the District Court, Portmarnock Golf Club argued that the principal purpose of the club is to cater only for the needs of persons of a particular gender that is male golfers, as the club refuses membership to any other person. On the proper construction of section 9(1)(a) of the Equal Status Act 2000, it was argued, the club is not a discriminating club for the purposes of section 8 of the Act. The Equality Authority on the other hand reiterated their submissions that there must be some logical nexus between the objectives of the club and the category of persons catered for in order for the section 9 exemption to apply. It also submitted that the words of section 9 are clear and that the principal purpose of a golf club is clearly not to cater for the needs of persons of a particular gender but rather to play golf. Further the Authority argued that the term "need" should be narrowly construed and should not include playing golf.

The golf club was successful in its appeal. O'Higgins J in the High Court accepted the club's interpretation of section 9 and held that the principal purpose of the golf club "is to cater only for the needs of male golfers and therefore comes within the exception … provided by section9."[3]

In assessing the case before him, the learned Judge considered it "instructive and helpful" [4] to ask what kind of single gender clubs are contemplated by the Act as falling into the exceptions specifically provided for in section 9 and found it "significant" that the Court was not provided with any such example. The Court found that the Authority's submission that the term "needs" be narrowly interpreted was "unduly stringent" as it would render the section 9 exemption quite meaningless and require words to be read into the statute. O' Higgins J. considered that

> "[i]n a tolerant and free and increasingly diverse society, it is not surprising that the type of exemptions envisaged in s.9 were enacted – as a result of which – in terms of registered clubs – it is permissible to have – exclusively – a bridge club for Bulgarians, a chess club for Catholics. … and a golf club for gentlemen"[5].

The Equality Authority appealed this decision and the matter came before the Supreme Court in 2009. The five Judges hearing the case adopted a similar approach as did the High Court. The issue was one of interpretation. What amounts to the principal purpose? What does the word "only" refer to? How should the term "needs" be interpreted? Should this include recreational needs or be limited to only that which is necessary?

Hardiman J. noted the "novel and ingenious argument"[6] advanced on the part of the Equality Authority whereby emphasis was placed on the introductory words of section 9(a). He rejected the submission to narrowly interpret the term "needs" and stated that the Authority's attempt to persuade the Court that there must be some logical connection between the objects of a club and the gender they cater for was "manifestly ludicrous". He concluded that to cater for the needs of male golfers was the principal purpose of the club. Similar to the judgement handed down by the High Court, Mr Justice Geoghegan held that the expression "principal purpose" relates to the category of persons whose needs are catered for and not to the activities of the club. Macken J. did not give a judgement, but concurred with the above mentioned judges to form a majority.

This author would argue that it is not correct to align the purpose of the Club with its membership rather than its activity. Surely the purpose of the club is to carry on the activity for which the club was established, rather than a club being established solely to cater for its members.

The minority took a different approach. Denham J followed the "cardinal rule" as expounded in *Howard v Commissioner of Public Works*[7] that "[i]f the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense." Following this approach, the learned Judge first looked in the Club's rules to determine the principal purpose of the Club and found that, even in the name the purpose was alluded to- Portmarnock *Golf* Club. She then interpreted "to cater for" in its ordinary meaning to mean "making a provision for". Finally Denham J. examined the meaning of "needs", finding that it raises the concept of necessity and is not simply a choice. On this analysis, the Judge concluded that the principal purpose of the club is to play golf and that it does not simply cater for men but for women also, in a different manner. She accepted the

3 [2005] IEHC 235 at 4826
4 Ibid. p 4815
5 Ibid. p 4825
6 [2009] IESC 72 at p 52 of Hardiman J.'s judgement
7 [1994] 1 I.R. 101 at p. 151

submissions by the EA that there must in fact be a logical connection between the objects of the club and the gender and found that such a connection was not present in this case, concluding that-

> "[t]here are no "needs" connected to the men who are gentlemen members as to necessitate the club and enable it receive the protection and be an exception to the general rule as provided for in section 9 of the Act of 2000."[8]

Fennelly J found it difficult to find fault with the finding of the District Court that the principal purpose of the club was to play golf, adding that it is"[i]n any event quite obviously correct."[9] In support of his conclusion ,the learned Judge relied on Rule 14.4 of the Club Rules which provide that "[t]he Club, being primarily devoted to golf, being an athletic purpose, may admit persons under the age of eighteen years....."[10]

It is of significance that while noting that the club also caters for women, in that they can use the facilities of the club but cannot become a member of the club, Hardiman J. rejected the argument that women were also catered for by the club, stating that "Portmarnock's purpose, I am satisfied, is to cater for the needs of male golfers"[11] and that it is necessary to distinguish between the Club's purpose and what the Club is obliged by law to do. It is my opinion that the majority judgments were not correct in this analysis.

It is this author's submission that the majority judgments should have laid more emphasis on the fact that the Club allows women to play golf on their premises, either with or without a member, on the payment of a green fee. The Golf Club also provides changing facilities and locker rooms for women as well as a ladies' scorecard. Women are also entitled to access the bar and restaurant on the grounds of the Club (although neither male nor female non-members can consume alcohol on the premises). And, most importantly, the golf club facilitates the playing of golf by women under the Irish Ladies' Golfing Union. Clearly this indicates that Portmarnock Golf Club also caters for, and provides the facilities for women to play golf. Unfortunately, only Denham J. and Fennelly J. laid sufficient emphasis on these significant facts.

Conclusion

There was no disagreement that Portmarnock Golf Club discriminates against women. The issue was whether it came within the statutory exception provided for in section 9 of the equality legislation. This came down to interpreting the section, especially the introductory sentence of section 9(1). What was the principal purpose of the club? If it was to cater only for the needs of a specific gender, it would be covered by the exception. It is respectfully submitted that "male golfers" is not a gender. Males are. Does the club cater only for the needs of men? No. It also clearly caters for women too, albeit in a different way. As the Club caters for both genders, and not only for the needs of men, it cannot come within the section 9(1) exception. It remains to be captured under the net of section 8 of the 2000 Act in that it has a rule which discriminates against a member or an applicant for membership i.e. women. Consequently it ought to be declared a "discriminating club" for the purposes of the legislation and be refrained from serving alcohol on its' premises.

The fact that this golf club was able to argue its' way into the coveted exception contained in section 9(1) of the 200 Act is, it is submitted, a setback for our progressive equality laws. It is also, in this writer's view, not a good day for the canons of interpretation. ■

8 [2009] IESC 73 at Denham J.'s judgement p. 24
9 [2009] IESC 73 at Fennelly J.'s Judgement p. 14
10 Rule 14.4 of Portmarnock Golf Club Rules
11 [2009] IESC 73 at Hardiman J.'s judgement p. 65

Robert Emmet Afterschool Club

Emma Keane BL and Susan Murphy BL

"I wish that my memory and name
may animate those who survive me"
(Robert Emmett, 1803)

The Robert Emmet Community Development Project ('RECDP') operates in the Oliver Bond Street area of Dublin's South West Inner City. It is based on the Aisling Project in Ballymun; an intensive intervention programme for children of high need. The aim of the REDCP is to offer as much out of school support as possible to a number of children, over a period of years. The idea is that as the RECDP is based in the community, the support it provides can last over the children's transition into adulthood. It aims to provide safety, structure and boundaries. The RECDP runs an Afterschool Club ('the Club') which includes homework supervision for a selection of pupils from St. Audeon's National School. After homework, the children partake in games and group activities, such as cooking, artwork and swimming. A number of members of the Bar volunteer to assist the children with their homework for around one hour per week. We have been volunteering on Thursday afternoons for about four months now, and our time has been incredibly rewarding and fun-filled.

Each weekday, 13 children, aged between 9 and 11 years old, are collected from school and brought to the Mendicity Institution ('The Institution'), Island Street. The Institution is affectionately referred to by the children as 'the Mendo'. The children are provided with a nutritious meal from the Institution, and help with their homework. The children were nominated by the school to partake in the Club having been selected as being the most in need of the service, taking into account the likelihood of them leaving school at an early age. The RECDP is a registered charity, and it depends on donations, volunteers, and a small number of staff. The Bar became involved following an appeal by the organisers. As with so many projects in these times funding was being cut back and volunteers were badly needed. As many readers already know the Bar has been involved with St Audeon's for many years through the production of Nastaise Leddy's plays and more recently through a Breakfast Club.

The Club is run very efficiently by Máirín Ó Cuireáin and Hilda Mungereza. Prior to volunteering, we attended a meeting at which we were given information about the organisation. We were requested to fill in Garda Vetting Forms and to provide a referee along with our application forms. We were prepared with a list of 'Do's and 'Don't's and general guidance on how to interact with the children. We were encouraged to let the children know that we had been to college, and to discuss with the children the benefits of education. We also attended an afternoon training session on Child Protection.

Our first day is one which we could never forget. It began with us all introducing ourselves. We were instructed to state our names and which football team we supported. The typical introduction each child would give consisted of a proclamation: 'My name is Joe Bloggs. I support Manchester United because Liverpool are (insert relevant expletive)!' The children looked at us, the Black Suits, in curiosity. They asked us some questions. Some of them seemed incredulous when we told them that we were not being paid to help them with their homework, but that we wanted to be there. We noticed a plaque on the wall of the Institution, dedicated to the memory of a barrister, Daniel Kinahan, who had assisted in the Institution in the mid nineteenth century. It's nice to think that this is not the first time that strange Black Suits have ended up helping out at the Institution.

There are generally one or two children sitting at each table in the room. One volunteer is assigned to each table. We focus on maths and English. Some children gleefully explain to us various definitions from the maths lexicon. Did anyone know that the word "tessellate" means to form or arrange small squares in a checkered or mosaic pattern? It took a nine year old boy to teach us that!

In December each of us was presented with a handmade card and an invitation to a Christmas dinner in the Institution. It was a fantastic party. A number of the children's teachers came, as well as previous volunteers. The Community Liaison Committee of the Bar enabled us to provide huge bags of presents for the children. A modest donation was also given to assist in the running of the Afterschool Club. The children's eyes were as big as saucers when they were given their giant bags with books, colouring sets, jewellery-making kits, sets of magic tricks, and selection boxes! One normally gloomy little boy ran over to each of us with a beaming smile. He shook our hands and thanked each of us in turn. We were touched.

On being asked about their favourite aspects of the Club, the children's answers were as follows:, "trips on a Friday"; "being nominated to be in the Club"; "getting our dinner"; "cooking" and "the helpers". Maths, English and spelling were mentioned as their favourite subjects in school. The favourite day to come to the Club varied with each child, some preferring Thursdays as that is when they cook, others chose Fridays as that is when they go swimming. The most touching response came from one of the youngest children who said Monday was her favourite day because "it's a fresh start"!

We would like to thank the Bar Council for their support, and to thank Sunniva McDonagh S.C. for organising for members of the Bar to help out at the Afterschool Club. We are delighted to be part of such a wonderful programme.

If anyone would like to take part in the Afterschool Club, or to make a donation, please contact Sunniva McDonagh S.C. ■