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Order 56A and the Cost implications of refusal to engage in ADR

Julia Fox BL

Introduction

Statutory Instrument No.502 of 2010 came into force on the 16th November, 2010. This S.I. introduces Order 56A into the Rules of the Superior Courts. It also inserts a new Order 99 1B. Together, these rules facilitate referral by the Superior Courts of proceedings, or issues in proceedings, to alternative dispute resolution "ADR" and provide that the refusal or failure without good reason of a party to engage in ADR may be taken into account by the court when awarding costs.

Order 56A provides the following:-

> "2.(1) The Court, on the application of any of the parties or of its own motion, may, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the Court considers just and convenient and—
>
> (i) invite the parties to use an ADR process to settle or determine the proceedings or issue, or
>
> (ii) where the parties consent, refer the proceedings or issue to such process,
>
> and may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the Court may specify.
>
> (2) Where the parties decide to use an ADR process, the Court may make an order extending the time for compliance by any party with any provision of these Rules or any order of the Court in the proceedings, and may make such further or other orders or give such directions as the Court considers will facilitate the effective use of that process....
>
> (ii) by the insertion immediately following rule 1A of Order 99 of the following:
>
> "1B. Notwithstanding sub-rules (3) and (4) of rule 1, the Supreme Court or the High Court, in considering the awarding of the costs of any appeal or of any action, may, where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any ADR process referred to in Order 56A, rule 1, where an order has been made under rule 2 of that Order in the proceedings."

"ADR" is defined in Order 56A, rule 1 as mediation, conciliation or another dispute resolution process approved by the Court, but does not include arbitration. The new rules provide that a costs sanction *may* be applied where a party unreasonably fails to participate in ADR so the court has discretion as to whether to penalise a party. The central question this article seeks to address is in what circumstances a judge might penalise on costs a successful party who refused to engage in ADR.

The new rules are not without precedent. Rule 6(1)(xiii) of Order 63A of the Superior Courts provides that the Commercial Court Judge may direct *"that the proceedings or any issue therein be adjourned for such time, not exceeding twenty-eight days, as he considers appropriate to allow the parties time to consider whether such proceedings or issue ought to be referred to a process of mediation, conciliation or arbitration...."* The direction can be given upon application of any of the parties or upon the judge's own motion. In the Commercial Court, Mr Justice Kelly frequently adjourns proceedings to allow the parties to consider ADR. Order 63A does not contain any explicit costs sanction for an unreasonable refusal to use ADR but it is recognised that a court can depart from the general rule that 'costs follow the event' where a party has unreasonably ignored an opportunity to settle.[1] Nonetheless, this author is not aware of any reported instances from the Commercial Court of an adverse costs award being made against a successful party who refused to engage in ADR. This is most likely because if a direction is made, parties will engage in ADR for fear of cost consequences if they refuse.

Section 15 of the Civil Liability and Courts Act 2004 provides that a judge may, upon application of a party to a personal injury action, and where he considers it would assist in reaching a settlement, direct the parties to meet to discuss and attempt to settle the action at a 'mediation conference'. The direction can only be made at the request of one of the parties and if neither party requests it the court cannot compel the parties to mediate. Section 16 provides that upon hearing submissions by either party and if satisfied that a party failed to comply with a direction to hold a mediation conference, the court can make an order directing a party to pay the costs of the action or such part of the costs as the court so directs. There have been very few personal injuries cases since the introduction of the 2004 Act in which a mediation conference pursuant to s.15 has been requested by a party[2] and no reported cases where a cost sanction was imposed for a refusal to mediate.

Halsey v Milton Keynes General NHS Trust, Steel v Joy and another

The seminal judgment in the UK dealing with the imposition

1 *Flannery v Dean* [1995] 2 I.L.R.M. 393

2 Law Reform Commission Report "Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010) p.136

of costs sanctions for the failure to engage in ADR is *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another*[3] . The judgment relates to two separate appeals to the Court of Appeal where unsuccessful claimants sought to have adverse costs orders made against successful defendants on the basis that the defendants had refused to mediate. The claimant in *Halsey* had claimed against the defendant for damages pursuant to the Fatal Accidents Act 1976 arising out of the medically negligent treatment of her husband. Her claim was dismissed in the County Court and costs were awarded to the defendant despite the fact that the defendant had refused invitations by the claimant to mediate. The *Halsey* portion of the Court of Appeal's judgement clarified the factors that an UK court will take into account when considering such costs orders. Irish courts might find the judgment persuasive. The Law Reform Commission in its Report "Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010)" stated that, in general terms, the guidelines set out in *Halsey* are appropriate in the context of determining whether a costs sanction should be applied.[4] The following is a summary of the findings in *Halsey:*-

1. To oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court.[5]

The Court of Appeal was influenced by the decision of the European Court of Human Rights in *Deweer v Belgium* which held that the Convention right of access to court may be waived, for example by means of an arbitration agreement, but such waiver should be subject to "particularly careful review" to ensure that the claimant is not subject to "constraint"[6]. Equally, it could be argued that the right to litigate recognised under Article 40.3 of the Constitution would be engaged if a truly unwilling party was compelled to mediate.

2. That in deciding whether to deprive a successful party of some or all of his costs on the grounds that he refused to agree to ADR, it had to be borne in mind that such an order was an exception to the general rule that costs should follow the event and the burden was on the unsuccessful party to show why the general rule should be departed from.[7]
3. That such departure was not justified unless it was shown that the successful litigant acted unreasonably having regard to all the circumstances of the case (the burden being on the unsuccessful party).[8]

Since Irish law has similar rules in relation to costs i.e. the judge has discretion and in general costs follow the event[9], it seems that as in England, the burden ought to be on the unsuccessful party to show why the successful party acted unreasonably and therefore should be penalised on costs.[10]

In deciding whether a party has acted unreasonably in refusing ADR, the Court of Appeal held that the following should be taken into consideration. It was not meant as an exhaustive list.

(a) The nature of the dispute

The Court of Appeal stated that the subject matter of some disputes renders them intrinsically unsuitable for ADR: for example, where the parties wish the court to determine issues of law or construction; where a party wants the court to resolve a point of law and a binding precedent would be useful; where injunctive or other relief is essential to protect the position of a party.[11]The Law Reform Commission recommended in its Report that except where the Court determines otherwise, parties in family law cases should not be subject to costs sanctions for unreasonable refusal to consider mediation or conciliation.[12]

(b) The merits of the case

The fact that a party reasonably believes that he has a strong case is relevant to the question of whether he had acted reasonably in refusing ADR. The Court held:-

> "The fact that a party unreasonably believes that his case is watertight is no justification for refusing mediation. But the fact that a party reasonably believes that he has a watertight case may well be sufficient justification for a refusal to mediate."It also noted that 'large organisations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy. They calculate that such a defendant in particular, may at least make a nuisance-value offer to buy off the costs of a mediation and the risk of being penalised in costs for refusing to mediate even if ultimately successful'.[13]

(c) Other settlement methods have been attempted.

The fact that settlement offers have already been made, but rejected, is a relevant factor since it may show that one party is making an effort to settle while the other has unrealistic

3 [2004] 1 W.L.R. 3002
4 Law Reform Commission Report "Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010) p.92
5 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3007
6 (1980) 2 EHRR 439
7 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3008
8 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3008
9 Rules of the Superior Courts, Order 99
10 "The burden should be on the refusing party to satisfy the court that mediation or conciliation had no reasonable prospect of success", Law Reform Commission Report "Alternative Dispute Resolution: Mediation and Conciliation"(LRC 98-2010) p.92,
11 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3009
12 Law Reform Commission Report "Alternative Dispute Resolution: Mediation and Conciliation" (LRC 98-2010) p.92-93. The Law Reform Commission gave a family probate dispute as an example of a family law dispute where the court might find it appropriate to impose such a costs sanction.
13 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3010

views of the merits of his case. However, the Court said it should be noted that mediation often succeeds where previous attempts to settle have failed.[14]

(d) The costs of mediation would be disproportionately high

This is a factor, particular where the stakes in the litigation are comparatively low. The court noted that a mediation can sometimes be at least as expensive as a day in court.[15]

(e) Delay

If mediation is suggested late in the day, acceptance of it may delay the trial of the action and this is a factor that may be taken into account in deciding whether a party was unreasonable in refusing to agree to ADR.[16]

(f) Whether the mediation had a reasonable prospect of success

This may be relevant to the reasonableness of one party's refusal to accept ADR. One party may reasonably take the view that mediation has no prospect of success because the other party is most unlikely to accept a reasonable compromise. However, a successful party cannot rely on his own unreasonableness to argue that there was no chance of a successful mediation and thereby his refusal to mediate was not unreasonable. [17]

It is submitted that these factors might all be taken into account whether it was one of the parties or the court itself that had suggested ADR. However, as the Court of Appeal in *Halsey* noted:

> "…The stronger the [court's] encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party's refusal was unreasonable."[18]

While noting that the Admiralty and Commercial Court ADR direction (which is similar to Ord.63 A, Rule 6(1)(xiii)) did not actually compel the parties to engage in ADR, the Court said that:

> '…[A] party who, despite such an order, simply refuses to embark on the ADR process at all would run the risk that for that reason alone his refusal to agree to ADR would be held to have been unreasonable, and that he should therefore be penalised in costs. It is assumed that the court would not make such an order unless it was of the opinion that the dispute was suitable for ADR.'[19]

This is equally applicable to Order 56A, which requires that the court be satisfied that the matter is appropriate for ADR before it makes any order facilitating the parties in the use of ADR.

McManus v Duffy[20]

The 2008 High Court decision of *McManus v Duffy* demonstrates that while *Halsey* may be viewed as a persuasive authority in Irish courts, particular statutory provisions may call for variations in its application. This case dealt with the question of whether the court should direct mediation under s.15 of the Civil Liability and Court Act 2004 in circumstances where a party claimed to be unwilling to participate. Mr Justice Feeney directed that the parties engage in ADR even though the defendant argued that it was an unwilling participant and that mediation was not likely to result in a successful settlement. Mr Justice Feeney noted that even though the defendant felt that mediation was unlikely to succeed, this did not mean *unwillingness* to proceed. He considered the relevant English authorities, in particular the decision in *Halsey*. He held that the issue under s.15 of the 2004 Act was whether mediation was *likely to assist*, not whether mediation had a reasonable prospect of success. The test was whether there were benefits to be gained from mediation, as distinct from a likelihood of reaching a settlement. As has been noted by one commentator, *"this represents a much diluted threshold from that in Halsey and indeed, it is difficult to conceive of a case where mediation will not assist, even if it has little reasonable prospect of success.* [21] Unlike s.15 of the 2004 Act, the new Order 56A does not refer to the question of whether ADR is likely to assist. Nonetheless, it is possible that a court considering a costs sanction pursuant to Order 99 1B may adopt Mr Justice Feeney's test and ask not whether ADR was likely to succeed in reaching settlement, but rather was it likely to assist.

A Good Faith requirement

Some commentators have questioned whether the behaviour of the parties during mediation should be taken into account when deciding the issue of costs.[22] In particular, should parties be required to demonstrate good faith during the process if they are to avoid costs sanctions? In general, the contents of mediation are confidential and the court deciding on costs will not be privy to the conduct of either party during mediation. Mediations are normally held subject to a confidentiality agreement. In addition, communications made in the course of mediation are privileged [23] and confidentiality

14 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3010
15 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3010
16 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3011
17 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3011
18 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3012
19 *Halsey v. Milton Keynes General NHS Trust, Steel v Joy and another* [2004] 1 W.L.R. 3002 at 3011
20 [2008] G.L.S.17
21 Carey —"Reasonableness and Mediation: A New Direction?" (2010) 28 ILT 207.
22 Law Report Commission Report "Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010) p.90
23 Oral and written statements made on a without prejudice basis during negotiations towards the settlement of a dispute are inadmissible in subsequent court proceedings relating to the same subject matter. See *Greencore Group plc v Murphy* [1995] 3 I.R. 520

is often seen as the cornerstone of successful mediation.[24] The "EU Directive on certain aspects of mediation in civil and commercial matters", due to be implemented by 21st May, 2011, emphasises the importance of confidentiality in the mediation process.[25] While a judge determining costs will normally have regard to a report made by the mediator, confidentiality dictates that the mediator's report will contain very limited information. The Civil Liability and Court Act 2004 provides that the chairperson shall prepare and submit to the court a report which sets out where a mediation conference did not take place, the reasons as to why it did not and where mediation did occur, a statement as to whether or not a settlement was reached and where a settlement had been reached, a statement of the terms of settlement signed by the parties.

However, in *Kay-El (Hong Kong) Ltd v Musgrave Ltd*, Mr Justice Kelly noted that '*the mediator expressed the view* [in her report] *that the parties came to the mediation in good faith and made genuine efforts to reach a compromise. Such being so, the lack of success at mediation carries no costs implications for the litigation*."[26]Here the mediator appears to have expressed a view on the conduct of the parties during the mediation and Mr Justice Kelly appears to have taken this view into account in determining costs.

In general in the UK there has been no good faith requirement on parties to mediation. However a different situation pertained recently in the case of *Seventh Earl or Malmesbury & Others v. Stutt & Parker*[27] Here, the Court utilised the principle in *Halsey* to conclude that even where parties participate in mediation, they might be penalised on costs if their conduct during mediation is unreasonable. This case involved a property dispute in which it was alleged that surveyors had been negligent in connection with an airport leasehold carpark. The mediation failed and at trial damages were awarded to the plaintiff in the sum of approximately £900,000, substantially less than the £87.8 million claimed, there having been a pivotal issue over how losses should be assessed.

Very unusually, both parties waived their right to confidentially. The Court reduced the plaintiff's costs by 20% on the basis that the plaintiff had acted unreasonably during mediation by taking a position which was *"plainly unrealistic and unreasonable"*. It concluded that *"had they made an offer which better reflected their true position, the mediation might have succeeded."* Mr Justice Jack held that the adoption of an unreasonable position at meditation was *"not dissimilar in effect to an unreasonable refusal to engage in mediation."*. It remains to be seen whether this signals a change in approach in the UK to the good faith requirement or whether this was a unique case because of the parties' very unusual decision to waive confidentiality.

The Law Reform Commission in its Report recommended that while a court should encourage the parties to enter into the mediation process in good faith, it should not impose a good faith requirement as this would risk undermining key principles, including the right to self-determination, the voluntary nature of the process, the neutrality of the mediator and the confidentiality of the process. It stated that if judges could adjudicate on bad faith claims by using mediators' reports, this might distort the process by damaging the participant's faith in the confidentiality of mediation communications and the mediators' impartiality. On the other hand, the Commission took the view that objectively verifiable actions, such as complete refusal to consider mediation could attract a costs sanction. It would be inappropriate that subjective matters, such as the state of mind of the parties, result in any sanction.[28] The Commission approved of the fact that the guidelines in *Halsey* allow the court to determine whether to impose costs sanction without having to explore the subjective intentions of the parties during mediation.[29]

Conclusion

It is likely that in due course a case will arise and our Superior Courts will give a detailed judgment on the criteria to be applied in deciding whether to penalise a party for refusing to engage in ADR. In the meantime, in appropriate cases, it will be necessary to advise clients of Order 56A of the Rules of the Superior Courts and the potential costs consequences of refusing to engage in ADR. It is likely that Irish courts will continue to view the *Halsey* decision as providing sound guidance on the criteria that a court might apply in considering costs sanctions. Given the Law Reform Commission's opposition to enabling courts, when considering costs, to take into account the parties' behavior during mediation as well as the emphasis placed on confidentiality in the recent EU Directive, it seems there will be resistance to imposing any good faith requirement on parties using ADR. On the other hand, it may be that following on from the *McManus* decision, it will be increasingly difficult for a party to successfully argue that its refusal to engage in ADR was reasonable. ■

24 Law Report Commission Report "Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010) p.33

25 Article 7 of the Directive provides:-"Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process" except in certain defined circumstances.

26 (Unreported, High Court, Kelly J. December 2, 2005 [Commercial Court] p.3

27 [2008] EWHC 424 .

28 Law Report Commission Report "Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010) p.90-91

29 Law Report Commission Report "Alternative Dispute Resolution: Mediation and Conciliation (LRC 98-2010) p.92

New look Drug Treatment Court offers hope for the future

Tom Ward, Chief Clerk of the Dublin Metropolitan District Court

Dublin Circuit and District Courts

Introduction: Press reports in 2009 following deliberations of the Public Accounts Committee gave the impression that the Drug Treatment Court was to be wound up following a review by the Department of Justice and Law Reform. However before and since that date, huge efforts have been made to support the operation of the Court so that more people are encouraged to participate.

The principal achievement over the past year has been the agreement of a new strengths-based approach to determining the progress of participants. Critics of the programme had suggested that the standards sought from participants were so high as to put people off even considering participating. In addition, the assessment of the success of participants (either 'pass' or 'fail') masked the huge progress that individuals were making. Almost 85% of those who graduated from the programme were found not to have been convicted of an offence since graduation and significant progress was also made among those who did not manage to complete the programme.

Under the new system, participants continue to be tested as part of their treatment with progress measured over the period of participation. A greater weighting is ascribed to positive behaviours, such as not coming to unfavourable notice of the Gardaí. Participants receive credits for attending the in-house support group which is based on the '12 steps' approach to managing addictions. Interim achievements are recognised and on-going feedback is provided throughout a participant's time on the programme. Those who achieve a silver standard, but do not manage to attain gold, may be the subject of a report from the Drug Treatment Court Judge to their Sentencing Judge, proposing a suspended rather than a custodial sentence.

A new Support and Advisory Committee, comprising senior managers from the Health Service Executive, An Garda Síochána, the Probation Service, City of Dublin VEC, Health Research Board and the Courts Service, assists the Court.

The Court hopes to be able to accept participants with addresses outside the Dublin North Inner City in the near future. In the meantime, it continues to encourage referrals from those with addresses in Dublin 1, 3 or 7.

To participate a person must be over the age of 18, have pleaded guilty or been found guilty in the District Court of a non-violent criminal offence, and be dependent on prohibited drugs. They must be willing to co-operate with the Court, stop offending, avail of appropriate drug treatment and participate generally in the programme. Prospective participants or their legal representatives should apply to the sentencing judge when their case is before the Court.

Anyone interested in getting more information of the Court should phone 01-8886294 or e-mail drugtreatmentcourt@courts.ie. ■

New Edition of Bankruptcy Law and Practice launched

Pictured at the launch of the second edition of Bankruptcy Law and Practice in The Distillery Building are L-R: Bill Holohan Solicitor, The Hon. Ms Justice Elizabeth Dunne, and Mark Sanfey, Senior Counsel. This title is published by Round Hall which is part of Thomson Reuters.

Right of Access to a Solicitor in Garda Custody

Brian Storan BL*

Introduction

Recent judgments of the European Court of Human Rights,[1] the Supreme Court,[2] and the UK Supreme Court[3] strengthen a detainee's right of access to a solicitor in police custody prior to questioning.

Whilst the constitutional right of reasonable access to a solicitor in garda custody is well established,[4] the parameters of the right have not been clearly set. The Supreme Court has ruled that the right to *reasonable* access does not preclude questioning,[5] or even the admission of inculpatory evidence[6], after a detainee's request for advice but before a solicitor is available. Thus the scope of what Carney J describes as "…one of the most important constitutional rights of the citizen",[7] has been whittled down since it was first recognised in *People (DPP) v Healy.*[8]

Salduz v Turkey

The decision of the European Court of Human Rights in *Salduz v Turkey*[9] suggests a higher bar may be required in order to fulfill our obligations under the European Convention of Human Rights. The United Kingdom[10], France[11] and The Netherlands[12] have recently altered their régimes in order to strengthen the right in line with the principles enunciated in *Salduz.*[13]

The kernel of the Grand Chamber's *Salduz* judgment is stated at paragraph 55:

> "[T]he Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective', article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

Cadder v Her Majesty's Advocate (Scotland)

In *Cadder v. Her Majesty's Advocate (Scotland)*,[14] the UK Supreme Court overruled a seven member decision of the High Court of Justiciary[15] which had upheld Scottish legislation[16] allowing questioning to proceed without guaranteeing prior independent legal advice.

The Scottish Court, in upholding the statute, cited the significant régime of other safeguards available to detainees. The safeguards referred to by the Scottish Lord Justice General are worthy of reproduction as most aspects are strikingly familiar to the Irish reader:

> "[T]he detainee's right to be cautioned on his detention and on arrival at the police station; the right, if arrested, to have a solicitor informed of what has happened and to a subsequent interview with him before his appearance in court; the fact that he may not, after caution and charge, be further questioned by the police; the fact that in all serious cases the interview is tape recorded and in some cases recorded on video; the fact that police are not entitled to coerce the detainee or otherwise to treat him unfairly, and that if they do any incriminating answers will be rendered inadmissible; the fact that the accused has an absolute right to silence, and that the jury is expressly directed that it may not draw any inference adverse to the accused from the fact that he declined to answer police questions; the fact that an accused cannot be convicted on the basis of his own admission alone, as Scots law requires that there be corroboration by independent evidence; and the fact that a person may not be detained for more than six hours from the moment of his detention."[17]

* With thanks to Rita Kilroy BL, LL.B (Dub.) BCL (Oxon.) PhD (Dub.), James Dwyer BL and Brendan Grehan SC for their helpful advice. Mistakes and omissions are mine.

1 *Salduz v Turkey* (2008) 49 EHRR 421.
2 *DPP v McCrea* [2010] IESC 60.
3 *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43.
4 [1990] 2 IR 73.
5 *O'Brien v DPP* [2005] IESC 29.
6 *People (DPP) v Buck* [2002] 2 IR 260.
7 *Barry v Waldron* (ex tempore, High Court, 23rd May 1996 at p. 2706).
8 *People (DPP) v Healy* [1990] 2 IR 73 (hereafter '*Healy*').
9 (2008) 49 EHRR 421 (Hereafter *'Salduz').*
10 *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43 (hereafter '*Cadder*').
11 Conseil Constitutionnel: Décision No 2010-14/22 QPC, 30 July 2010.
12 LJN BH3079, 30 June 2009, Netherlands Supreme Court; *cf. Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43 at [49].
13 It seems that Ireland may the only member state where the right of access to a solicitor prior to questioning is not in line with the Article 6 ECHR standard as elucidated in *Salduz;* See further *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43 at [49].
14 [2010] UKSC 43.
15 *HM Advocate v McLean* [2010] SLT 73; [2009] HCJAC 97.
16 Section 14 and s.15 Criminal Procedure (Scotland) Act 1995.
17 *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43 at

The UK Supreme Court considered the Scottish system did not survive scrutiny in light of the "statement of principle applicable everywhere in the council of Europe area"[18] enunciated in *Salduz*. Rodger LJ opined that, although admirable, the Scottish "protections cannot, and do not, make up for the lack of any right for the suspect to take legal advice before being questioned."[19]

Brown LJ agreed with Hope LJ that the room for flexibility is narrow and a departure from the requirement set out at paragraph 55 of *Salduz* could only be permitted if the facts of the case make it "impracticable to adhere to it."[20] He reasoned that:

> "The Strasbourg jurisprudence makes plain that it is not sufficient for a legal system to ensure that a suspect knows of his right to silence and is safeguarded (perhaps most obviously by the video recording of any interviews) against any possibility that by threats or promises of one sort or another, he may nonetheless be induced against his will to speak and thereby incriminate himself. It is imperative too that before being questioned he has the opportunity to consult a solicitor…"[21]

Constitutional Right of Reasonable Access to a Solicitor

The right to legal assistance is expressly provided for within the wording of the Article 6.3 (c) ECHR right to a fair trial. Bunreacht na hÉireann also guarantees a right of reasonable access to a solicitor. Whilst a detainee's right of reasonable access to a solicitor is undoubtedly concomitant to Article 38.1 due process; there is also a compelling argument that the right of access enjoys a protection either as a freestanding right under Article 40.3.1°, or as an adjunct to the privilege against self-incrimination.[22]

In *People (DPP) v Conroy*,[23] Walsh J, in a dissenting judgment described garda questioning of a detainee after a request for a solicitor but before legal advice had been given as a "constitutionally forbidden procedure."[24] Walsh J's reasoning is directly in line with that of the Grand Chamber in *Salduz*.

Subsequently, the Supreme Court in *People (DPP) v Healy*[25] confirmed a detainee's right of reasonable access to independent legal advice as constitutional in origin and as having a vital function in ensuring fair procedures.[26] A solicitor who was present at the garda station, having been requested on behalf of the detainee, was denied access on the basis that it would be 'bad manners' to interrupt interviewing gardaí.

The constitutional right developed through determinations of the admissibility of evidence obtained when access to a solicitor was not provided for. The superior courts have concentrated on whether an alleged breach is conscious or deliberate. Thus, the motives and subjective mindset of detaining gardaí in refusing access become paramount.

In *People (DPP) v Buck*,[27] the Supreme Court found that there was 'no causative link' between garda questioning before the arrival of a solicitor and the subsequent making of incriminating statements. The Court held that *bona fide* attempts by An Garda Síochána to contact a solicitor were sufficient to vindicate the detainee's right of access.[28]

The position of the Supreme Court in *Buck*[29] is based on the assumption that interviews in a series can be treated individually and their admissibility examined separately. It is submitted that this is not an accurate reflection of the organic nature of police interviews. It is respectfully suggested that the effect of Keane CJ's remarks that "[t]he admissibility of any incriminating statement made by the person concerned before the arrival of the solicitor should be decided by the trial judge as a matter of discretion..." is to engage the trial judge in an artificial adjudication of separate aspects of the interview process .[30]

In *O'Brien v DPP*,[31] garda attempts to contact a solicitor

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paragraph 27 referring to *HM Advocate v. McLean* [2010] SLT 73 *per* Hamilton LJG at paragraph 27.

18 *per* Hope LJ allowing the appeal in *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43 at paragraph 41

19 *ibid* at paragraph 92

20 *ibid* at paragraph 41 *per* Hope LJ

21 *ibid* at paragraph 107 *per* Brown LJ.

22 *People (DPP) v Healy* [1990] 2 IR 73 does not clearly specify the locus of the constitutional right. The Court's reasoning suggests that the right is protected under Article 38.1. For instance, see Finlay CJ at page 81: 'The availability of advice from a lawyer must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of a detained person and his interrogators." This would tally with the ECHR jurisprudence which derives the right of access as a function of Article 6 ECHR. However, *Healy* also cites Walsh J's dissent in *DPP v Conroy* [1986] IR 460 at page 478 approvingly. *Conroy* locates the right in Article 40.3.1° ('The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.') It is arguable that a stand alone unenumerated right exists under Article 40.3.1°.

It is also suggested that the repeated references to 'unlawful detention' on foot of a breach of the right of access suggests a protection under Article 40.4.1°. Some commentators consider that the right is derived under Article 38.1 as an adjunct to the privilege against self-incrimination or the right to silence. See further: Butler, 'The Right to be Informed of the Right to a Lawyer – The Constitutional Dimension' (1993) 3(2) ICLJ 173; Hogan, 'Law of Confessions in the United States and Ireland' (1988) 10 DULJ 43; Daly, 'Does the Buck stop here? An Examination of the pre-trial right to legal advice in light of *O'Brien v DPP*' (2006) 28 DULJ 345; McGrath, *Evidence* (Round Hall, Dublin 2005) at 373 [8-13].

23 [1986] IR 460.

24 *ibid* at page 479.

25 *People (DPP) v Healy* [1990] 2 IR 73.

26 *People (DPP) v Healy* [1990] 2 IR 73 at 81 *per* Finlay CJ.

27 [2002] 2 IR 268 (herefter '*Buck*').

28 *People (DPP) v Buck* [2002] 2 IR 260. A detainee at Clonmel garda station was questioned by two sets of detectives over a two-hour period before attempts were made to contact a solicitor. The gardaí then encountered *bona fide* difficulties in finding an available solicitor. A third set of detectives continued to question Mr Buck. He then had a brief consultation with a solicitor whom he could not afford to retain. He subsequently made inculpatory written statements. Also see *People (DPP) v AD* [2008] IECCA 101 at page 21: "…it has not been established that such a relationship of cause and effect existed between the denial [of the right of reasonable access to a solicitor] and that part of the interview admitted in evidence."; *People (DPP) v Darcy,* Unreported, Court of Criminal Appeal, 29th July 1997; *People (DPP) v Reddan,* Unreported, Court of Criminal Appeal, 4th December 1995.

29 *ibid.*

30 *ibid per* Keane CJ at page 466.

31 [2005] IESC 29.

were held to have been *mala fide* when interviews of the detainee proceeded[32] and a second six-hour period of detention was authorised[33] without access to a solicitor being provided. The Supreme Court held that the unlawfulness of the detention was later cured by the arrival of the solicitor. McCracken J found no causative link with incriminating statements made after legal advice had been given. Statements made by the detainee when he was in unlawful custody were held to be inadmissible, whilst the later inculpatory statements were admissible.

It is submitted that attempts to subjectively analyse the intent of detaining gardaí, a function of the conscious and deliberate breach discourse, obfuscate[34] and render the right of reasonable access to a solicitor amorphous. The ECHR position – which echoes Walsh J's pithy prescience in *Conroy* – is unambiguous: questioning should not proceed until access to a solicitor is provided.[35]

Right to have a Solicitor Present at Interview

Lavery v MIC, Carrickmacross Garda Station[36] suggests that the right of reasonable access to a solicitor does not extend to an entitlement for a solicitor to be present during questioning.[37] This has not been constitutionally challenged since. Such a challenge may be ripe in the case of a particularly vulnerable or juvenile suspect in garda station detention.[38]

The right of access to a solicitor for legal advice prior to questioning is all the more urgent considering the "fundamental dilemma"[39] confronting a suspect facing the consequences of the introduction of adverse inference provisions.[40] Yet *Lavery* is authority that a solicitor attending at a detaining garda station is not entitled to be provided with a list of questions or interview notes.[41]

Other Evidence Obtained in Breach of the Right of Access

In *DPP v McCrea*,[42] Hardiman J affirmed a District Court decision to dismiss a charge of refusal to provide a breath specimen under the Road Traffic Acts[43] because the right of reasonable access to a solicitor was not provided for. The Court's judgment is somewhat terse[44] and confines its *ratio* to its specific facts.[45] Notwithstanding this, the High Court judgment was not overturned and it is notable as an authority that not only inculpatory statements resulting from questioning, but also real evidence obtained by legislatively sanctioned procedures, should be inadmissible if the right of reasonable access is breached.

However, in *People (DPP) v Creed*[46] the Court of Criminal Appeal allowed the admission forensic evidence obtained after "heavily and legitimately criticized"[47] unsuccessful attempts by a member-in-charge to provide access to a solicitor.[48] The Court reasoned that "given that under the

32 The detainee requested a solicitor but did not nominate one. Gardaí at Pearse Street, Dublin 2 contacted Mr Gaffney, a busy sole practitioner operating in Tallaght, Dublin 24, whom they knew or ought to have known would not be able to arrive at the station for a considerable period.

33 Section 4(3)(b), Criminal Justice Act, 1984.

34 *cf DPP v Creed* [2009] IECCA 95 at 102, 103: "A deliberate and conscious violation of rights may indeed render a detention wholly unlawful and render any evidence taken as a consequence of it, inadmissible. Where, however, there has been no deliberate and conscious violation of the constitutional right to access to a solicitor but where reasonable efforts have not been made to obtain a solicitor and the accused has not acquiesced in that situation, it must then be a matter of discretion for the trial judge to rule as to whether any particular evidence obtained in that context should be admitted or not. It does not at all follow that because there was no deliberate and conscious violation of the right, that it would be a fair procedure towards the accused to admit evidence obtained in the absence of a solicitor when reasonable efforts have not been made to obtain one."

35 *Şükran Yildiz v Turkey*, application no 4661/02, 3 February 2009; *Amutgan v Turkey*, application no 5138/04, 3 February 2009, paragraphs 17-18; *Plonka v Poland*, application no 20310/02, 31 March 2009, paragraph 35; *Pishchalnikov v Russia*, application no 7025/04, 24 September 2009, paragraph 70; *Dayanan v Turkey*, application no 7377/03, 13 October 2009, paragraphs 32-33; *Fatma Tunç v Turkey*, application no 18532/05, 13 October 2009, paragraphs 14-15. It was applied in *Amutgan v Turkey* although the applicant had confirmed to the trial judge the accuracy of his confession and admitted that he had carried out a number of armed activities: paragraph 7; and in *Dayanan v Turkey* notwithstanding the fact that the applicant made use of his right to remain silent whilst in custody: paragraph 29. (As referred to in *Cadder v Her Majesty's Advocate (Scotland)* at paragraph 47.)

36 [1999] 2 IR 390 (hereafter '*Lavery*').

37 *ibid* at 396 *per* O'Flaherty J, *obiter* as analysed by Walsh, *Criminal Procedure* (Round Hall, Dublin, 2002) p.274 at [5-110]. Curiously the judgment does not make any reference to the *ratio* of *People (DPP) v Healy* [1990] 2 IR 73 at 81: "The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such a person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory."; See further: *Barry v Waldron* High Court *ex tempore per* Carney J, 23 May 1996.

38 Changes to the regime in the Netherlands have been effected since *Salduz* to provide for the presence of lawyer during police questioning of a juvenile suspect: Netherlands Supreme Court. LJN BH3079, 30 June 2009.

39 *Murray v UK* (1996) 22 EHRR 29 at [66].

40 See further: McGillicuddy, 'Restrictions on the Right to Silence under the Criminal Justice Act 2007 – Part 2.' (2008) ICLJ 112; McInerney, "'Equality of Arms" Between the Suspect Interrogated in Garda Custody and the Gardaí.' [2010] 1 Judicial Studies Institute Journal 1, 21.

41 MacEntee SC, QC & Breen BL, 'The Right to Silence in light of Deaglan Lavery v The Member-in-Charge, Carrickmacross Garda Station' (1999) 5 Bar Review 6; McGillicuddy, 'Restrictions on the Right to Silence under the Criminal Justice Act 2007 – Part 2' (2008) ICLJ 112; Jackson, 'Re-conceptualising the right of silence as an effective fair trial standard' (2009) ICLQ 835; Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination' (1995) 54 CLJ 342.

42 [2010] IESC 60 (hereafter '*McCrea*').

43 Section 13(2) Road Traffic Act, 1994, as amended by s.23 of the Road Traffic Act, 2002.

44 At pages 13 -14, Hardiman J expressly states that his judgment does not consider the ambit of the constitutional right of access to a solicitor.

45 At page 12 the Court commented *obiter* that 'there is no doubt that the right of access to a solicitor by a detained person cannot in all circumstances be a right to access "instanter".

46 [2009] IECCA 95.

47 [2009] IECCA 95, 100.

48 A Tallaght solicitor was nominated by the detained suspect. The Naas member-in-charge called the solicitor's office landline a number of times late on a Saturday night. He made no attempts to obtain a mobile number for the solicitor. Neither did he inform the detainee that the Tallaght solicitor was not available - contrary

Criminal Justice (Forensic Evidence) Act 1990, the hair sample could be procured without consent, it would have been reasonable to assume the applicant did not require a solicitor in connection with it."[49]

DPP v Creed seems at odds with the judgments in *McCrea*.[50] In this regard, Hope LJ's application of Article 6 ECHR in *Cadder* is relevant: "…the *Salduz* principle cannot be confined to admissions made during police questioning. It extends to incriminating evidence obtained from elsewhere as a result of lines of inquiry that the detainee's answers have given rise to."[51]

Recent Developments

The Court of Criminal Appeal in *People (DPP) v Gormley*[52] held that once gardaí do not "engage in colourable stratagems"[53] and take reasonable steps to assist a detainee in obtaining legal advice in line with the custody regulations,[54] they are not obliged to wait for the arrival of a solicitor prior to commencing an interview. An interview had proceeded after a solicitor had been contacted but before legal advice had been given. Inculpatory statements made during the interview were admitted.[55] The decision to allow questioning which proceeded before the anticipated arrival of the solicitor is subject of an appeal to the Supreme Court as a point of law of exceptional public importance.[56]

Clearly circumstances might arise, such as remoteness of location combined with an anti-social hour, such that the attendance of a solicitor at a garda station could prove difficult to effect.[57] However, it is hard to conceive of a set of circumstances whereby telephone advice to a detainee could not be provided[58] as a measure to avoid an interview proceeding without independent legal advice. Telephone access "necessarily implies, except in the most exceptional circumstances, a right to consult with the solicitor in private, in the sense of out of the hearing of police officers or prison warders."[59]

In *DPP v Bryan Ryan*[60], the Court of Criminal Appeal (*per* Murray CJ) accepted that the right of access to a solicitor by telephone or otherwise "necessarily embraces being afforded a meaningful opportunity to obtain legal advice". However, the Chief Justice found that on the particular facts of the case, the unconstitutionality of the applicant's detention was "cured" by a brief telephone conversation with his solicitor.

The defendant was interviewed six times. The trial judge, White J, had described the constitutional right of access to a solicitor as "roundly and flagrantly breached and abused" by interviewing Gardaí. Thus, the majority of the admissions made during the interview process were deemed inadmissible. However, at a point during his fifth interview the detainee had a telephone conversation with his solicitor. Despite its duration being less than 85 seconds, the detainee indicated satisfaction to Gardaí. The trial court admitted inculpatory statements made in the remainder of that fifth interview into evidence.

The Court of Criminal Appeal emphasised that although the telephone consultation was brief, there was no suggestion that it was cut short by An Garda Síochána; and that the questions asked were manifestly fair and did not seek to exploit knowledge that could only have been gained through earlier questioning.

The Court rejected counsel's argument that there was a general causative link, "as a matter of human psychology", as well as specific causative links with questions asked and answered at earlier stages of the interview process.

Murray CJ laments the "lack of a coherent practice or training of garda officers as to the manner in which arrested persons should be treated so as to ensure that full and substantive effect is given to the right of access to a solicitor, having regard to established principles of law applicable to

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to custody regulation 9(2)(a)(ii) - nor did he endeavour to contact another local solicitor. Interviews proceeded and forensic evidence was taken from the suspect.

49 [2009] IECCA 95, 103 (page 9 of judgment).

50 *DPP v McCrea* [2009] IEHC 39, High Court *per* Edwards J; [2010] IESC 60, Supreme Court *per* Hardiman J. It is notable that the facts of *McCrea* are analogous with the facts of *Walsh v O'Buachalla* [1991] 1 IR 73, in which case Blayney J indicated that the applicant's right of access to a solicitor had not been infringed. The Court went on to hold that even if the right had been infringed, access would have been futile in circumstances where there was a statutory obligation on the applicant to give a specimen. The judgments in *McCrea* are in line with New Zealand and Canadian jurisprudence (*cf R. v Bartle* (1995) 118 DLR (4th) 83; *Noort v Ministry of Transport* [1992] 3 NZLR 260; Butler and Ong, 'Breach of the Constitutional Right of Access to a Lawyer and the Exclusion of Evidence – The Causative Link' (1995) 5 ICLJ 1995; McGrath, *Evidence* (Round Hall, Dublin 2005) at 374 [7-31] - [7-33]).

51 *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43 at paragraph 48; *Gäfgen v Germany,* application no 22978/05, 30th June 2008; *Brusco v France*, requête no 1466/07, 14 octobre 2010.

52 [2010] IECCA 22 (hereafter '*Gormley*').

53 *ibid* at paragraph 11.

54 Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 [S.I. No. 119/1987].

55 The applicant's s.4 CJA 1984 detention began at 2pm. At 2.15pm He made a request for legal advice and nominated two particular solicitors. One of those solicitors made contact at 3.05pm and told detaining Gardaí that he would be present at the station "shortly after 4pm". The first interview commenced at 3.10pm and concluded at 4.46pm. The solicitor arrived at 4.48pm. A consultation took place before a second interview. Inculpatory statements made by the accused at the first interview were held to be admissible.

56 Certificate under Section 29(2) of The Courts of Justice Act 1924 (as amended by the Criminal Justice Act 2006 and by the Criminal Justice Act 2007) was grantedissued on 16th in February 2011.

57 *cf DPP v Madden* [1977] IR 336 as referred to by Hardiman J at page 13 of *DPP v McCrea* [2010] IESC 60: '…the former Chief Justice emphasised the need to construe the word "reasonable" having regard to all the circumstances "and, in particular, to the time at which access is requested and the availability of the legal adviser or advisers sought'. See also *People (DPP) v Gormley* [2010] IECCA 22 at paragraph 11.

58 *People (DPP) v Gormley* [2010] IECCA 22 at paragraph 13: "It should be recalled that whereas a face to face interview is the most usual means of obtaining legal advice it may be where that is not available the advice could be given by telephone. A solicitor is entitled to a private phone communication. Failure to afford telephone access might well amount to a denial of reasonable access to legal advice."

59 *People (DPP) v Finnegan* (Court of Criminal Appeal, 15th July 1997, page 1009). The Court found that there was a breach of Mr Finnegan's constitutional rights when he was denied private access by telephone to his solicitor. A common law right of access to a solicitor in private also exists, *cf Chief Constable of RUC v Begley* [1997] 1 WLR 1475.

60 [2011] IECCA 6; 11th March 2011.

such a right including principles stemming from the case-law of the European Court of Human Rights."[1]

Article 6 ECHR,[2] and a meaningful interpretation of the right of access to a solicitor under Bunreacht na hÉireann, demand that a suspect in garda detention is not questioned until every effort to provide access to a solicitor has been made. We await the delivery of a concrete set of principles, either through legislation[3] or a Supreme Court decision, allowing Ireland to comply with its international obligations. ■

1 *ibid.*

2 Right to a Fair Trial, Article 6(1), 6(3)(c) ECHR: "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;" as interpreted in *Salduz v Turkey* (2008) 49 EHRR 421.

3 For instance, legislation might provide for a break in the running of prescribed time limits during a s.4 CJA 1984 detention whilst the arrival of a solicitor is awaited.

An Update on the Law on Drunk Driving

Yvonne Moynihan BL

Introduction

The law in relation to drunken driving is notoriously technical. In defending or prosecuting a person charged with drunken driving, a practitioner will have to be well-versed and acquainted with the myriad of technical defences that arise. The area is heavily litigated and this is partly as a result of the introduction of evidential breath testing and the intoxilyzer machine.[4] Since the introduction of the intoxilyzer, there have been a plethora of legal challenges.[5] Nevertheless, the Supreme Court has ruled on the constitutionality of the intoxilyzer and determined that the procedural measures providing for the measuring of breath/alcohol do not interfere with an accused's right to a fair trial.[6]

Because of the Herculean efforts to challenge the law in relation to drunken driving, there is substantial caselaw in the area. This article proposes to examine a number of recent cases and is intended as a practical guide for practitioners with regard to recent developments in the law on drunk driving.

Section 17 Certificate

In essence, a section 17 certificate is a printout from an intoxilyzer machine which processes the concentration of breath/alcohol. Section 17 of the Road Traffic Act 1994, as amended by section 23(1) of the Road Traffic Act 2002, provides for the procedure following the taking of a breath specimen under section 13 of the 1994 Act.[7] The procedure prescribed by section 17 is outlined below.

Where a person has provided two specimens of breath, the specimen with the higher reading will be disregarded. The tested person is to be supplied immediately by the Garda with two identical statements produced by the apparatus in the prescribed form as set out in the Road Traffic Act 1994 (Section 17) (Prescribed Form and Manner of Statements) Regulations 2010. Under s. 17(3), a person shall, where requested by a member of the Garda Síochána, (a) acknowledge receipt of the statements by placing their signature on each of them and (b) return either one of these statements to the member. Section 21(1) states that the statement is sufficient evidence of the facts stated in it, without proof of the signature on it and of compliance by the Garda of the requirements imposed on him prior to and in connection with the supply of the specimen.

In terms of the jurisprudence that has developed, the first and most simple factor which practitioners should be aware of is that the section 17 certificate is a necessary proof. In that regard, the certificate must be handed into court if the prosecution seek to rely on the presumption contained in section 21. This was established in *Fitzpatrick v. D.P.P.*[8] where O Neill J. held that a District Judge had erred in law in convicting an accused under s. 50(4) of the Road Traffic Act 1961 in circumstances where the prosecution failed to put the section 17 certificate into evidence. The learned judge opined that the certificate is an essential proof. However, the judge suggested that where a certificate has been lost or destroyed, it would be possible to prove the certificate in the course of oral evidence. Therefore, from a prosecution perspective, the non-production or loss of the certificate is not fatal to a prosecution provided it is proved by other legal means.

Regarding the requirement that both the accused and the Garda sign the certificate, case-law has established that this is mandatory and that failure to do so is fatal to a prosecution. Attention is drawn to two cases. First, it was postulated by Murphy J. in *D.P.P. v. Keogh*[9] that there is a penal element involved in relation to section 17 which therefore necessitates that the matter must be dealt with in a strict manner. He

4 Evidential breath resting was introduced in practice in 1999. The Lion Intoxilyzer 6000IRL was approved on the 30th September, 1999, and the Intoximeter EC/IR was approved by the 4th November, 1999. See De Blacam, *Drunken Driving and the Law*, 3rd edition, p. 63.

5 Such challenges include challenges to the intoxilyzer analysis, the statutory procedure itself and the section 17 certificate.

6 *McGonnell & Ors. v. Attorney General and D.P.P.* [2007] 1 I.R. 400.

7 Section 13 of the Road Traffic Act 1994 provides for the obligation to provide a specimen following arrest under s. 49(8) or s.50 (10) of the Road Traffic Act 1961, as amended.

8 [2007] I.E.H.C. 383 (Please note that this case is currently under appeal)

9 Unreported, High Court, Murphy J., 9th February, 2004

observed that the purpose of the signature is to authenticate the certificate and that this could therefore be contrasted with a case which involved a mere technical error. The learned judge maintained that as the procedure is prescribed by statute, it has to be interpreted more strictly.

Second, in *D.P.P. v. Freeman,*[10] MacMenamin J. held that a section 17 certificate not signed by a Garda prior to the accused is not "duly completed" therefore the certificate does not amount to evidence. Consequently, the learned judge articulated that the statutory presumption could not apply. Once signed by the Garda, it is "duly completed" and must then be signed by the recipient. Relying on *McCarron v. Groarke*[11], where Kelly J. observed that the failure to comply with the provisions of s. 18 (2) of the 1994 Act was an actual failure of compliance with a statutory provision in mandatory terms, MacMenamin J. also found that there had been a real failure of compliance. He claimed that it was something more than a mere technical "error" or "slip". What occurred, he asserted, constituted true prejudice or detriment - the denial of an opportunity for independent verification of the sample which should have been provided.

What can be extrapolated from the above decisions is that there is a clear difference between a purely technical error and a failure to comply with a mandatory entitlement. The above cases can be compared with the decision in *D.P.P. v. Barnes*[12] where it was established that a mere typographical error on a section 17 certificate is not fatal to prosecution and does not detract from due completion of the document because the error can not create any injustice or expose the accused to any risk of injustice. In that case, the certificate referred to the offence as an offence contrary to section 49, although the accused was charged with an offence contrary to section 50. Similarly, in *Ruttledge v The D.P.P.,*[13] Dunne J held that errors in the section 17 certificate created by inputting information incorrectly were not fatal to the prosecution case.

Section 18

Like section 17, precedent has determined that the requirements of s. 18 of the 1994 Act are mandatory and must be strictly adhered to. To ensure optimum compliance, the procedures for this provision are regulated by the Road Traffic Act 1994 (Sections 18 and 19) (Prescribed Forms) Regulations 2010.[14]

Section 18 is relevant to prosecutions where a requirement has been made of an accused under s. 13(1)(b) to provide a sample of blood or a sample of urine. The provision requires that a doctor shall divide a specimen of blood or urine provided by an accused into 2 parts and place each part in a container which he or she shall seal and then complete the form prescribed.[15] Where the specimen has been divided, a member of the Gardaí shall offer to the person one of the sealed containers with a statement in writing that he or she may retain one of the containers.[16] The sample is then taken by the doctor and subsequently tested by the Medical Bureau of Road Safety ("MBRS"), which certifies the result. This must be done "as soon as is practicable".[17]Following this, this certificate is used in court in the same way as a statement of the evidential breath test. It shall be presumed until the contrary is shown that subsections (1) to (3) have been complied with.

It is clear from the case-law that where there has been a clear failure to comply with a mandatory requirement, which according to the statute must be followed, what follows is that evidence will be inadmissible. Thus it is a mandatory requirement to offer the container and the statement in writing to the arrested person.[18] It was set out previously in *McCarron v. Groarke*[19] and *D.P.P. v. Reville*[20] that where the statement in writing referred to in s. 18(2) has not been offered to the arrested person, there cannot be a conviction.

In *D.P.P. v. Reville,*[21] the District Judge stated the following question for the opinion of the High Court: "Whether having found as a matter of fact that the statement in writing referred to in section 18(2) of the Act of 1994 had not been offered to the accused, I was correct in law in holding that there could be no conviction for the offence charged and accordingly in dismissing the summons against the accused." O'Caoimh J., in answering the case stated in the affirmative, opined that they were mandatory in terms and not merely directory. Therefore, if there has been a failure to comply with the requirements, the statement cannot amount to evidence.

This position has been confirmed recently in *D.P.P. v. Egan*[22] where Kearns P. stipulated that the requirements of s. 18 have to be strictly complied with. In that case, it was found that the requirements of s. 18 had not been complied with in that there was a direct conflict between the details on the form completed by the designated doctor under s. 18 and the certificate issued by the MBRS pursuant to s. 19 of the Act of 1994. The doctor admitted in evidence that he failed to label and/or seal the outer container with any details relating to the accused and the MBRS certificate stated that there was no name on the container. This case was similar to the decision in *D.P.P. v. Croom-Carroll*[23] where it was held that the outer cardboard container in which the specimen is placed is the "container".

Notwithstanding the strict requirements of the section, recent decisions have been made which are favourable to the prosecution. In *D.P.P. v. Kennedy*[24] it was found that it is not fatal to a prosecution if a doctor had the container in his hand at the time of the offer from a Garda. Once the doctor used the proper form, he had complied with his duty under the Regulations. Further, in *D.P.P. v. Hopkins*[25] it was held that the incorrect labelling of a specimen container does not have such a bearing on the fairness of the blood specimen procedure so as to render any of the evidence obtained

10 [2009] I.E.H.C. 179
11 (Unreported, High Court, Kelly J., 4th April, 2000)
12 [2005] 4 I.R. 176
13 (Unreported, High Court, Dunne J., 7th April, 2006)
14 S.I. No. 434 of 2010
15 Section 18(1)
16 Section 18(2)
17 Section 18(3)
18 De Blacam, *Drunken Driving and the Law*, 3rd edition, p. 87
19 (Unreported, Kelly J., 4th April, 2000)
20 (Unreported, High Court, O'Caoimh J., 21st December, 2000)
21 (Unreported, High Court, O'Caoimh J., 21st December, 2000)
22 [2010] I.E.H.C. 233, (Unreported, High Court, Kearns J., 11th June, 2010)
23 [1999] 4 I.R. 126
24 [2009] I.E.H.C. 361
25 [2009] I.E.H.C. 337

thereunder inadmissible. The doctor recorded the accused's date of birth rather than the date of taking the sample. Accordingly, no real prejudice arose from the breach.

So, it can be gleaned from the decisions that while the incorrect labelling of a container is not lethal, the failure to sign the statements or write the name of the person on the outer container is.

Section 19

Section 19 of the 1994 Act deals with the obligations of the MBRS to perform the analysis of a sample which has been forwarded under section 18 "as soon as practicable". By virtue of s. 19(1), the MBRS must analyse the specimen "as soon as practicable" after it receives it. With regard to s. 19(3), the MBRS must also send to the Garda Station and to the defendant the certificate "as soon as practicable" after analysing the specimen.

The effect of these two sections may be summarised as indicating that the MBRS has two obligations with regard to time; the first is to analyse the specimen "as soon as practicable" after it receives it, and the second is to send to the Garda Station and to the defendant the certificate "as soon as practicable" after analysing the specimen. There is a rebuttable presumption arising from the production of the certificate itself that these two obligations, *inter alia*, have been complied with by the MBRS and that therefore the onus of establishing that they have not is upon the defendant.

Costello J. in *Hobbs v. Hurley*[26] laid down the following propositions in relation to the consideration of "as soon as practicable":(i) The words "as soon as practicable" are not synonymous with an obligation to forward it as soon as possible; (ii) the obligation imposed by the section is contained in a penal statute and so must be strictly construed; and (iii) surrounding circumstances should be considered.

One of the latest cases concerning section 19 has confirmed that a second analysis of a specimen for the presence of a controlled drug does not constitute delay. In *Sweeney v District Judge Fahy*[27], it was contended, *inter alia*, that a section 19 certificate was not valid as it was not furnished as soon as was reasonably practicable by the MBRS, but rather was furnished over some 13/14 weeks from the date that the applicant provided a blood sample. It was claimed by the applicant that there were not fair procedures as the applicant had already been served with a certificate recording the absence of alcohol in his system and believed the matter completed. However, there was a re-analysis of the specimen which determined that there was a presence of cocaine. The D.P.P. argued that the second analysis was done within the six month period within which the prosecution could be commenced and there was nothing in the legislation to prevent the second analysis from taking place.

O'Keeffe J. held that the fact that the State had the opportunity to re-analyse the specimen does not amount to the denial of fair procedures to the applicant. He stated that there was no representation made by the Gardaí that a second analysis would not take place. The learned judge relied on *D.P.P. v. Corrigan*[28] expounding that at all times the applicant could have tendered evidence to rebut the statutory presumptions, but he did not so elect.

It is important to point out that, in defending a case under this provision, evidence must be adduced to rebut the presumption. Moreover, it is a vital prerequisite that there is evidence of the effect or consequence of delay.

Disclosure

An accused can be entitled to make an application to have the intoxilyzer apparatus examined by an independent expert, as was decided in *Whelan v. Kirby*[29], on the basis of constitutional fairness. In a subsequent case, *D.P.P. v. Moore*[30], the High Court held that a District Court judge was entitled to authorise the presence of an engineer at the testing and inspection of an intoxilyzer machine, particularly where no objections had been raised by the prosecution.

Notwithstanding the above, the right to inspection/ disclosure in relation to the intoxilyzer is not absolute. Recent case-law has confirmed this. The issue was discussed by O Neill J in *Morgan v. Collins & D.P.P.*[31]. There, the defence sought disclosure of the maintenance records of the intoxilzer. The application was refused on the basis that the application was premature as the accused could apply for disclosure at trial if he could show it was relevant to his defence. Nonetheless, O Neill J made a number of observations regarding disclosure.

The learned judge concluded that an accused would have to point to some circumstance which, if established in evidence at the trial, would undermine the accuracy of the printout from the intoxilyzer machine. He took the view that the statutory presumption would be undermined as furnishing the maintenance record would place an obligation on the prosecution to support the evidential status of the printout. Ultimately, he determined that disclosure would be made available if it is necessary to ensure a fair trial and fair procedures and where justice demands it.

In *Thompkins & Aronu v. D.P.P. & District Judge O'Neill*[32], O Neill J. propounded that disclosure could not be ordered against persons or entities that are not party to the proceedings – in that case the MBRS. The facts of the case were that the applicants provided blood and urine samples to the Gardaí for the purpose of testing for intoxicants by the MBRS. In each case, the results confirmed the presence of various drugs in each of the applicant's systems, but also indicated that the level of alcohol was below the legal limit. The applicants both stated that to vindicate their right to a fair trial, they were entitled to information relating to the issue of whether the tests undertaken by the Bureau were carried out as soon as practicable. However, as O Neill J. pointed out, it was settled since the decisions in *D.P.P. v Sweeney*[33], *DH v His Honour Judge Raymond Groarke & Anor*[34]and *H.S.E. v His Honour Judge Michael White*[35] that disclosure must be confined to parties to the proceedings.

26 (Unreported, High Court, Costello J., 10th June, 1980)
27 [2009] I.E.H.C. 212
28 [1980] I.L.R.M. 145
29 [2005] 2 I.R. 30
30 [2006] I.E.H.C. 142
31 [2010] I.E.H.C. 65
32 [2010] I.E.H.C. 58
33 [2001] 4 I.R. 102
34 [2002] 3 I.R. 522
35 [2009] I.E.H.C. 242 (Unreported, High Court, Edwards J., May 22, 2009)

Disclosure was also refused recently in *Oates v. District Judge Browne & D.P.P.*[36]. The applicant, who had been convicted for drunken driving, argued that his conviction was invalid because the judge in the case refused to have a forensic scientist examine the intoxilyzer. Charleton J. held that there was no engagement by the applicant with the evidence and nor did he exercise his right to present any contradictory evidence. The learned judge relied on *Morgan v. Collins*[37] contending that there has to be a basis as to why disclosure or inspection is sought, unless it is self-evident. Nothing was advanced by the applicant by way of evidence that would have tended to demonstrate that a particular defence would be aided by the material sought. In civil terms, the application for disclosure was nothing more than a fishing expedition.

Therefore, it can be garnered from the recent disclosure cases that the tenet of *D.P.P. v Gary Doyle*[38], that the right to disclosure in the District Court is not an unlimited one, is still prevalent in contemporary case-law. If disclosure is to be ordered, it must be limited to the parties in the case and will only be directed if there is an engagement with the evidence and if the requirements to a fair procedures demand it.

36 [2010] I.E.H.C. 381
37 [2010] I.E.H.C. 65
38 [1994] 2 I.R. 286

Conclusion

In summary, the recent decisions delineated above illustrate that the procedures in relation to drunken driving, in particular the procedures under ss. 17, 18 and 19 of the 1994 Act, contain a penal element that is mandatory. Consequently, any divergence will prove fatal. These provisions will be repealed respectively by s. 33 of the Road Traffic Act 2010, when it is commenced, and will be replaced by ss. 13[39], 15[40] and 17[41] of the 2010 Act.[42] The technicalities of the procedures involved in a drunken driving case quite often result in mistakes by the prosecution. Errors can be made with regard to the correct procedure in the handling and processing of a specimen, whether of breath, blood or urine. On that basis, it is crucial for practitioners to check to see whether or not there has been compliance with proper procedures and whether there is evidence of conformity with such mandatory obligations. ■

39 Procedure following provision of breath test under s.12.
40 Procedure regarding taking of specimens of blood and provisions of specimens of urine
41 Procedure at Bureau regarding specimens
42 The provisions are essentially a restatement of the law

Bar Council Scholarships

Roderick Maguire BL, Bar Council Treasurer, presenting scholarships to Niamh Ward, Stanhope Street School and Srujana Vedicherla, Mount Carmel Secondary School. The Bar Council scholarships give financial assistance to the students towards their third level education.

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Road traffic offence

Evidence - Statutory procedures - Statutory presumption –Specimen container not labelled - Non compliance – Strict interpretation - Whether presumption of compliance – Whether trial judge correct in dismissing claim in absence of evidence from prosecution of compliance with provisions of statute – Whether failure to comply with statute – *DPP v Croom-Carroll* [1999] 4 IR 126 and *DPP v Kemmy* [1980] IR 160 applied; *McCarron v Groarke* (Unrep, Kelly J, 4/4/2000), *Weir v DPP* [2008] IEHC 268 (Unrep, O'Néill J, 29/7/2008), *State (Murphy) v Johnston* [1983] IR 235, *DPP v Syron* [2001] 2 IR 105, *DPP v Daly* (Unrep, Kelly J, 20/12/2001), *DPP v Reville* (Unrep, Ó Caoimh J, 21/12/2000), *DPP v Hopkins* [2009] IEHC 337 (Unrep, Hedigan J, 7/7/2009), *DPP v Nangle* [1984] ILRM 171, *DPP v Noonan* (Unrep, Ó Caoimh J, 16/12/2002), *Fitzgerald v DPP* [2003] 3 IR 247, *DPP v Greeley* [1985] ILRM 320 and *DPP v Freeman* [2009] IEHC 179 (Unrep, MacMenamin J, 21/4/2009) considered - Road Traffic Act 1994 (No 7), ss 18 & 19 - Road Traffic Act 1961 (No 24), ss 13 & 49 – Summary Jurisdiction Act 1857, s 2 - Question answered in affirmative (2009/2072SS – Kearns P – 11/6/2010) [2010] IEHC 233
DPP v Egan

Sentence

Severity – Assault causing harm – Upper end of scale - Relevant sentencing considerations – First offence – Co-operation – Timing of guilty plea – Rehabilitative efforts – Appeal allowed – Sentence of four years reduced to four years with final two years suspended (198/2009 – CCA – 12/4/2010) [2010] IECCA 93
People (DPP) v Cawley

Sentence

Severity – Burglary - Sentence of four years imprisonment – Whether any error in principle - Drug addiction – Previous offences committed while on bail - 126 previous convictions - Application for leave to appeal refused (230/2009 - CCA - 23/6/2010) [2010] IECCA 66
People (DPP) v Robbens

Sentence

Severity – Co-accused - Disparity of sentencing – Inability to distinguish between degree of responsibility of participants in offence –Insufficient reason for disparity in sentencing of participants - *DPP v Duffy* [2003] 2 IR 192 followed – T*he People (Attorney General) v Poyning* [1972] IR 402 considered – Sentence affirmed but balance of sentence suspended (50/09 – CCA J – 17/2/2010) [2010] IECCA 92
People (DPP) v Connors

Sentence

Severity – Consecutive sentences - 31 counts of child sexual abuse involving rape and indecent assault in respect of three sisters over period of years - Total sentence of 20 years imprisonment imposed - Whether overall result error in principle - Principles of totality and proportionality - Overall impact of sentence – Component parts of sentence - Whether sentence excessive overall - Artificiality in dividing up sentence between offences in respect of different complainants - Whether preferable to restructure component parts of sentence - *DPP v Z* (Unrep, CCA, 29/7/1997) and *DPP v McKenna (No 2)* [2002] 2 IR 345 approved - Criminal Law (Amendment) Act 1935 (No 6) - Criminal Law (Rape) Act 1981 (No 10) - Adjustments to sentences made to maintain consistency; cumulative total of 20 years imprisonment imposed (60/2004 - CCA - 1/7/2010) [2010] IECCA 68
People (DPP) v Farrell

Sentence

Severity - Disqualification from driving for life - Factors built into sentence not directly punishment – Impossible and impracticable to impose conditions on disqualification– Long period of time elapsed since disqualification –No evidence of breach of disqualification - *O'Byrne v Minister for Finance* [1959] IR 1; *Conroy v Attorney General and Another* [1965] IR 411 considered –Disqualification lifted (13/09 – CCA – 22/2/2010) [2010] IECCA 35
People (DPP) v Reilly

Sentence

Severity – Drugs offences – Ecstasy, cannabis, cocaine – Relevant sentencing considerations – Duress – Accused to derive no benefit from possession - First offence – Co-operation – Guilty plea – Rehabilitative efforts – Whether sufficient weight to element of duress – Misuse of Drugs Act ???, s 15A - Sentence of seven years with one year suspended reduced to seven years with final three years suspended (169/2009 – CCA – 17/5/2010) [2010] IECCA 43
People (DPP) v Kirwan

Sentence

Severity – Drugs offence – Foreign national – Custodial sentence - Sentence of seven years imposed – Whether sentence unduly severe - Failure to make specific reference to mitigating factor of foreign national being incarcerated in prison – Rehabilitation - Whether mitigating factors adequately taken into account – Whether error in principle - Sentence quashed; six years imprisonment imposed (319/2009 - CCA - 24/6/2010) [2010] IECCA 67
People (DPP) v Bogers

Sentence

Severity - Drugs offences - Nature of drugs - Value of drugs - Whether any error in principle - Whether policy of Oireachtas not to draw distinction between cannabis and other allegedly more serious drugs - Circumstances in which plea arose - Statutory minimum sentence – Exceptional circumstances - *DPP v Gilligan* [2006] IESC 42, [2007] 1 ILRM 182 applied - *DPP v Byrne* [2003] 4 IR 423 and *DPP v Reinald* (Unrep, CCA, 23/11/2001) considered - Misuse of Drugs Act 1977 (No 12), s 15A - Application refused (260/2009 - CCA - 24/6/2010) [2010] IECCA 60
People (DPP) v Freeman

Sentence

Severity – Drugs offences – Obstruction of gardaí taken into account – Heroin – Relevant sentencing considerations – Previous suspended sentence of two years – Lack of co-operation – Supportive father - Deeply addicted to heroin – Whether possibility of rehabilitation sufficiently considered – Misuse of Drugs Act ???, ss. 15 & 21 - Sentence of five years reduced to five years with one year suspended conditional upon drug free status and rehabilitative co-operation (167/2009 – CCA – 17/5/2010) [2010] IECCA 42

People (DPP) v O'Sullivan

Sentence

Severity – Drugs offences - Personal circumstances and character of accused - Rejection of defence of personal use by jury - Conviction - Three year term of imprisonment imposed - Whether number of plants considerably in excess of that required for personal use - Sufficient consideration not given to unlikely possibility of re-offending - Whether sufficient deterrent achieved by length of time served in prison by date of appeal - Misuse of Drugs Act 1977 (No 12), ss 3, 15, 17 and 27 – Appeal allowed; balance of sentence suspended; sentence of time served substituted (194/2009 - CCA - 28/6/2010) [2010] IECCA 70
People (DPP) v Huibregtse

Sentence

Severity – Drugs offences – Possession for sale or supply – Relevant sentencing considerations – Caught red-handed – Little co-operation - Appeal refused – Sentence of three years not changed (179CCA/2009 – CCA – 10/5/2010) [2010] IECCA 47
People (DPP) v O'Callaghan

Sentence

Severity – Knife offence - Insufficient regard to deterrent element of knife – Pessimistic view of probation officer – Prospect of leading non criminal life –Sentence varied and suspension element reduced (160 CJA/09 – CCA - 22/2/2010) [2010] IECCA 37
People (DPP) v Reddy

Sentence

Severity - Leave to appeal – Serious offence –Error of principle in sentence imposed- Consideration of mandatory minimum sentence – Consideration of maximum sentence– No reference to absence of previous convictions in sentence – Leave to appeal refused (215/08 – CCA – 17/2/2010) [2010] IECCA 90
People (DPP) v Concannon

Sentence

Severity - Probation report –Expression of remorse – Submissions on sentence – Reduction in sentence – Variation in sentence – Suspended sentence – Sentence varied (240CJA/08 – CCA – 18/12/2009) [2009] IECCA 160
People (DPP) v O'Brien

Sentence

Severity – Robbery – Threat to kill charges taken into account – Gun charged with CS gas – Victims unaware of nature of ammunition - Relevant sentencing considerations – Multiple aliases – Discretion to refuse to adjourn to obtain probation report – No appeal against deportation to Georgia at end of sentence – Discretion to consider willingness to be deported pursuant to any suspended portion of sentence – *People (DPP) v Mulhall* [2010] IECCA 1, (Unrep, CCA, 16th July 2010) distinguished - Appeal refused – Sentence of seven years not changed (180CCA/2009 – CCA – 10/5/2010) [2010] IECCA 48
People (DPP) v Pakurian (aka Bakuradze; aka Kivisalu)

Sentence

Severity - Road traffic offences - Four months imprisonment imposed - Probation report - Rehabilitation - Unlikeness to re-offend - Insufficient regard to previous good character - Effect of term in prison on person of Russian origin - Criminal Justice (Community Service) Act 1983 (No 23), ss 8, 11 and 71 - Leave to appeal granted; conviction quashed and 100 hours community service imposed (255/2008 - CCA - 24/6/2010) [2010] IECCA 58
People (DPP) v Petrosius

Sentence

Severity - Serious offences - Concurrent sentence – Consecutive sentence – Rehabilitation necessary - Sentences affirmed subject to variation in consecutive element of one sentence (261/08 – CCA – 17/2/2010) [2010] IECCA 91
People (DPP) v Kenny

Sentence

Severity – Several offences - No differentiation made between offences – Very serious harm caused required consideration – Error in principle– Sentence varied (61 & 62 CJA/09 – CCA – 22/2/2010) [2010] IECCA 36
People (DPP) v Lackey and McHugh

Sentence

Undue leniency - Assault causing harm - Burden on prosecution – Whether error of principle – Whether departure in substantial way from appropriate sentence - Compensation paid to injured party - Appropriate level of sentence in absence of compensation – Criminal Justice Act 1993 (No 6), s 2 – Non Fatal Offences Against the Person Act 1997 (No 26), s 3 - Application for review refused (249CJA/2009 - CCA - 23/6/2010) [2010] IECCA 63
People (DPP) v Corrigan

Sentence

Undue leniency – Discretion in sentencing– Guilty plea – Genuine intention to rehabilitate – Sentence affirmed (154CJA/09 – CCA – 1/3/2010) [2010] IECCA 38
People (DPP) v Conroy

Sentence

Undue leniency – Drugs offences - Minimum mandatory sentence – Foreign national - Whether ample circumstances to mitigate sentence - Unique personal circumstances - Extremely vulnerable person - Very low intelligence - Extraordinary disadvantages and difficulties - Extreme financial circumstances - Backdated sentence of one and a half years imprisonment and applicant ordered to remain outside state for period of five years – Misuse of Drugs Act 1977 (No 12), s 15 - Application rejected (207CJA/2009 - CCA - 23/6/2010) [2010] IECCA 62
People (DPP) v Liriano

Sentence

Undue leniency - Drugs offences - Presumptive minimum sentence of 10 years – Whether sentence constituted error in principle – Period of suspension - Weight to be given to plea as mitigating factor - Whether plea communicated at earliest possible date - Date on which plea communicated - Degree of co-operation and assistance in investigation - Personal circumstances and history - New circumstances at date of appeal – Rehabilitation - Sentence of seven years with four years suspended imposed - Misuse of Drugs Act 1977 (No 12), s 15A and 27 - Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice Act 1999 (No 10), s 5 - Sentence set aside; seven year term of imprisonment with two years suspended imposed (250CJA/2009 - CCA - 23/6/2010) [2010] IECCA 64
People (DPP) v Hamilton

Sentence

Undue leniency –Manslaughter – Patricide - Suspended sentence of six years – Relevant sentencing considerations – Use of word 'provocation' in non-legal sense – Appeal refused – Sentence not changed (143CJA/2009 – CCA – 1/3/2010) [2010] IECCA 40
People (DPP) v Cunningham

Sentence

Undue leniency - Onus of proof on prosecution - Weight to be given to trial judge's reasons for imposing sentence - Correct approach for court to apply in review of sentence –Review of sentence

- Five year term of imprisonment suspended for ten years imposed - Whether trial judge erred in principle in not having any adequate regard for gravity of offence – Whether length of sentence imposed failed to adequately reflect seriousness of offence - Whether exceptional circumstances to justify not imposing custodial sentence - *DPP v Byrne* [1995] 1 ILRM 279 applied; *People (DPP) v WC* [1994] 1 ILRM 321 mentioned - Road Traffic Act 1961 (No 24), s 112 - Firearms Act 1964 (No 1), s 27B - Road Traffic Act 1968 (No 25), s 65 - Criminal Law (Jurisdiction) Act 1976 (No 14), s 9 - Criminal Justice Act 1984 (No 22), s 14(5) - Firearms and Offensive Weapons Act 1990 (No 12), s 4 - Road Traffic Act 2002 (No 12), s 23 - Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice Act 2006 (No 26), s 99 - Application refused (291CJA/2008 - CCA - 21/6/2010) [2010] IECCA 52
People (DPP) v O'Callaghan

Sentence

Undue leniency - Possession of firearm - Mandatory minimum sentence - Applicable principles - Onus on prosecutor – Whether substantial departure from appropriate sentence – Whether significant error in principle - Whether sentencing judge could ignore mandatory minimum sentence - Degree of risk of re-offending – Circumstances at date of sentence - New material placed before court - Suspended sentence of five years imprisonment imposed - *DPP v Rinald* (Unrep, CCA, 23/11/2001) approved - Criminal Justice Act 1993 (No 6), s 2 - Declaration that sentence should stand in light of new material before court despite error in principle (278 & 279CJA/2009 - CCA - 23/6/2010) [2010] IECCA 65
People (DPP) v Farrell & Furlong

Sentence

Undue leniency – Possession of firearms, ammunition and drugs - Prescriptive mandatory minimum sentences - Nature, circumstances, gravity and accumulation of offences - Failing to introduce consecutive element to overall sentencing - Aggravating factors - Weight to be given to trial judge's reasons for imposing sentence – Sentenced to six years imprisonment in total - Whether any error in principle - Correct approach for court to apply in review of sentence – *DPP v Byrne* [1995] 1 ILRM 279 applied; *People (DPP) v WC* [1994] 1 ILRM 321 mentioned – Firearms Act 1964 (No 1), s 27A - Misuse of Drugs Act 1977 (No 12), ss 5, 15A and 27 - Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice Act 1999 (No 10), ss 4 and 5 - Criminal Justice Act 2006 (No 26), s 59 - Criminal Justice Act 2007 (No 29), s 38 - Application refused (94CJA/2009 - CCA - 21/6/2010) [2010] IECCA 55
People (DPP) v Purcell

Sentence

Undue leniency - Possession of firearms, ammunition, explosives and drugs - Multiplicity of offences - Failing to have sufficient regard to gravity of offences - Appropriate sentence- Failing to give sufficient reason for suspension - Correct approach for court to apply in review of sentence – Whether any error in principle - Onus of proof on prosecution - Sentenced to five year term of imprisonment with final three years of sentence suspended - *DPP v Byrne* [1995] 1 ILRM 279 applied; *People (DPP) v WC* [1994] 1 ILRM 321 mentioned ; *People (DPP) v Clail* [2009] IECCA 13, (Unrep, CCA, 9/2/2009) considered - Explosive Substances Act 1883, s 4 - Firearms Act 1964 (No 1), s 27A - Criminal Law (Jurisdiction) Act 1976 (No 14), s 8 - Misuse of Drugs Act 1977 (No 12), ss 15 and 27 - Misuse of Drugs Act 1984 (No 18), ss 6 and 14 - Criminal Justice Act 1993 (No 6), s 2 - Offences Against the State (Amendment) Act 1998 (No 39), s 15(4) - Criminal Justice Act 1999 (No 10), ss 4 and 5 - Criminal Justice Act 2006 (No 26), s 59 - Criminal Justice Act 2007 (No 29), s 38 - Application refused (103CJA/2009 - CCA - 21/6/2010) [2010] IECCA 56
People (DPP) v Creighton

Sentence

Undue leniency - Possession of firearm and ammunition - Correct approach for court to apply in review of sentence – Sentenced to seven year term of imprisonment - Whether trial judge overlooked significant aggravating factor - Failure to give weight to previous relevant convictions - Whether any error in principle in sentence - Onus of proof on prosecution - *DPP v Byrne* [1995] 1 ILRM 279 followed; *People (DPP) v WC* [1994] 1 ILRM 321 mentioned – Firearms Act 1964 (No 1), s 27A- Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice Act 2006 (No 26), s 59 - Criminal Justice Act 2007 (No 29), s 38 - Application refused (59CJA/2009 - CCA - 21/6/2010) [2010] IECCA 54
People (DPP) v Curtin

Sentence

Undue leniency - Possession of firearm and ammunition - Prescriptive minimum term of imprisonment of five years - Sentenced to four year term of imprisonment - Correct approach for court to apply in review of sentences – Failure to recognise gravity of offences – Appropriate starting point for sentence - Weight to be given to presumptive sentence of five years - Aggravating factors - Nature of gun - Place where gun brandished - Whether trial judge erred in principle - *DPP v Byrne* [1995] 1 ILRM 279 applied; *People (DPP) v WC* [1994] 1 ILRM 321 mentioned - Firearms Act 1964 (No 1), s 27A- Criminal Justice Act 1993 (No 6), s 2 - Criminal Justice Act 2006 (No 26), s 59 - Criminal Justice Act 2007 (No 29), s 38 - Sentence quashed; six year term of imprisonment imposed (274CJA/2008 - CCA - 21/6/2010) [2010] IECCA 53
People (DPP) v Fitzgerald

Sentence

Undue leniency – Reason for suspending entirety of sentence not persuasive – First serious conviction – Some intention to rehabilitate –Sentence varied (214CJA/09 – CCA – 1/3/2010) [2010] IECCA 39
People (DPP) v Sloan

Sentence

Undue leniency - Robbery and drugs offences –Onus of proof on prosecution - Weight to be given to trial judge's reasons for imposing sentence - Mandatory minimum presumptive sentence of 10 years– Whether exceptional and specific circumstances - Nature, circumstances and gravity of offences – Seriousness of offence - Value of drugs - Failure to give sufficient weight to aggravating factors – Relevant previous convictions - Weight of guilty plea when caught red handed – Correct approach for court to apply in review of sentence - Whether any error in principle - Sentence of two years imprisonment imposed - Whether trial judge fell into error in not considering each offence and determining where each lay on spectrum - *DPP v Byrne* [1995] 1 ILRM 279 applied - *People (DPP) v WC* [1994] 1 ILRM 321 mentioned – Misuse of Drugs Act 1977 (No 12), ss 3, 15A and 27 - Criminal Justice Act 1993 (No 6), ss 2 and 3 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 – Application granted; sentences quashed; sentences of five years imprisonment to run concurrently for each offence imposed (73CJA/2009 - CCA - 21/6/2010) [2010] IECCA 57
People (DPP) v Delaney

Trial

Charge to jury - Drugs offences - Possession for sale or supply - Treatment of evidence by trial judge – Whether charge in entirety satisfactory - Defence requisitions refused - Questions posited from jury – Trial judge answered jury's

questions without submissions from counsel - Whether defence prejudiced by judge's oversight - Failure to alert jury to inconsistencies in prosecution evidence - Whether verdict of jury perverse – Whether weight of evidence could not support safe conviction - Whether any error in principle or in law - Misuse of Drugs Act 1977 (No 12), ss 1, 3, 5, 15, 17, 27 and 29 - Misuse of Drugs Act 1984 (No 18), ss 2, 11 and 6 – Criminal Justice Act 1984 (No 22), s 22 - Misuse of Drugs Regulations 1988 (SI 328) Appeal dismissed (2009/194CCA & KY/34/2008 - CCA - 28/6/2010) [2010] IECCA 69
People (DPP) v Huibregtse

Trial

Right to silence - Presumption of innocence – Impermissible comments and prejudicial remarks by prosecution - Comments on accused's failure to give evidence - Whether trial judge erred in refusing to discharge jury - Whether comments capable of being cured by judge's charge - Whether trial judge corrected or offset prejudicial effect of remarks - Whether comment by counsel for prosecution could have influenced jury's consideration of overall evidence in manner adverse to the applicant - Amelioration of statutory rule - *DPP v Corbally* [2001] 1 IR 180, [2001] 2 ILRM 102; *R v Bathurst* [1968] 2 QB 99, [1968] 1 All ER 1175; *DPP v Connolly* [2003] 2 IR 1 and *DPP v Maples* (Unrep, CCA, 30/3/1992) considered - Criminal Justice (Evidence) Act 1924 (No 37), s 1(b) – Conviction set aside; retrial directed (194/2008 - CCA - 17/6/2010) [2010] IECCA 61
People (DPP) v M (P)

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Free Movement of Persons

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European Arrest Warrant

Correspondence – Breach of peace - Insulting police officers after having been placed in police car – Not in public place – Breach of peace not corresponding – Gas pistol – Definition of firearm moot where incorrect name on offence – Surrender ordered but limited to certain offences (2009/115Ext – Peart J – 13/5/2010) [2010] IEHC 207
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European Arrest Warrant

Correspondence – Description of offence – Firearms offence - Whether sufficient in this jurisdiction to constitute corresponding Irish offences – Whether sufficient to constitute firearms offences – Whether sufficient to constitute offence of perverting course of justice – Firearms Act 1925 (No 17), ss 2, 15 – Firearms Act 1964 (No 1), s 27B – Criminal Justice (Theft and Fraud) Offences Act 2001 (No 50), s 12 - European Arrest Warrant Act 2003 (No 45), ss, 5, 21A, 22, 23, 24; Council Framework Decision of 13/6/2002, Art 2.2, Part III – Order for surrender granted (2009/323Ext & 2010/24Ext – Peart J – 17/6/2010) [2010] IEHC 262
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European Arrest Warrant

Correspondence – Flee – Whether sufficient in this jurisdiction to constitute corresponding offence – Whether sufficient to constitute aiding and abetting offence where only reference to underlying offence is 'stealing' - Whether respondent

fied Poland - *Minister for Justice, Equality and Law Reform v Sas* [2010] IESC 16, (Unrep, SC, 18/3/2010); *Attorney General v Dyer* [2004] IESC 1, [2004] 1 IR 40 applied - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 4 - European Arrest Warrant Act 2003 (No 45), ss 10, 21A, 22, 23, 24 – Criminal Law Act 1997 (No 14), s 7 - Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28) – Council Framework Decision of 13/6/2002, Part III – Order for surrender granted (2009/256Ext – Peart J – 15/6/2010) [2010] IEHC 260
Minister for Justice, Equality and Law Reform v Majewski

European Arrest Warrant

Correspondence – Specialty - Dishonest and intentional gain by deception – Credit fraud – Bank loan application based on false information– Wife bearing obligations of joint debtor despite absence of consent to bank loan – Whether causal link between deception and loss – Whether entitled to consider information provided by Slovak 'report' in addition to warrant itself when assessing correspondence and specialty – Presumption under specialty will not be breached – *Attorney General v Dyer* [2004] IESC 1, [2004] 1 IR 40 considered - European Arrest Warrant Act 2003 (No 45), s 22(3) - Criminal Justice (Theft and Fraud) Offences Act 2001, s 6 - Surrender ordered (2009/64Ext – Peart J – 14/5/2010) [2010] IEHC 208
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Presumption of constitutionality – Equality – Good name – Property rights – Right to earn living – Proportionality – Public fishery – Extension of licence – Public interest – Common good – Whether s 19A(4) constitutional – Whether s 19A(4) fails to defend and vindicate defendant's rights – Whether extension of licence constituted unjust attack – Whether defendants could establish that subsection could not be applied constitutionally – Whether defendant has *locus standi* to challenge section – *Moore v Attorney General* [1934] IR 44; *East-Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317; *Loftus v Attorney General* [1979] IR 221 and *Casey v Minister for Arts, Heritage, Gaeltacht and the Islands* [2004] 1 IR 402 considered – Fisheries (Amendment) Act 1997 (No 23), ss 19A(4) and 75 – Sea-Fisheries and Maritime Jurisdiction Act 2006 (No 8), s 101 – Foreshore Act 1933, s 3 – Fisheries and Foreshore (Amendment) Act 1998 (No 54), s 3 – Constitution of Ireland 1937, arts 10 and 40 – Application rejected (2007/810P – De Valera J – 29/6/2010) [2010] IEHC 281
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Compensation

Assessment - Exposure to risk of contracting infectious disease - Jurisdiction and role of Court in assessing claim – Onus of proof – Approach of Court in assessing claim - Test of recoverability – Test for determining causation – Affect of incorrect medical advice on causation – Obligation to award damages where liability and causation established – Factors for consideration in assessing damages – Affect of failing to mitigate loss on claim – Whether compensation ought to be awarded - Whether medical advice furnished incorrect – *Quantum* of compensation appropriate - *Fletcher v Commissioners of Public Works* [2003] 1 IR 465; *O'Looney v Minister for the Public Service* [1986] 1 IR 543 applied - *Gavin v The Criminal Injuries Compensation Tribunal* [1997] 1 IR 132; *Reg v Criminal Compensation, Ex p Ince* [1973] 1 WLR 1334; *Harrington v Minister for Finance* [1946] 1 IR 320; *Majca v Beekil* 682 NE 2d 253; *Minister of Pensions v Chennell* [1947] 1 KB 250; *Crowley (inf) v AIB Ltd* [1987] 1 IR 282 approved - *McGee v Minister for Finance* [1996] 3 IR 234; *Wilkinson v Downton* [1897] 2 QB 57; *Forbes v Merseyside Fire* [2002] EWCA Civ 1067 (Unrep, CA (Civ), 15/7/2002); *Roswell v Prior* (1701) 88 ER 1570; *Scott v Shepherd* (1773) 2 Wm Bl 892; *Cunningham v MacGrath Bros* [1964] 1 IR 209; *Breslin v Corcoran* [2003] 2 IR 203 considered – Rules of the Superior Courts 1986 (No 15/1986), O 38 - Garda Síochána (Compensation) Act 1941 (No 19), ss 2, 5, 6, 7, 8, 9, 10 - Garda Síochána (Compensation) Act 1945 (No 1) - European Convention on Human Rights 4/11/1950, art 6 – Compensation awarded (2009/219SP, 2009/40SP, 2008/4465SP – Irvine J – 15/6/2010) [2010] IEHC 247
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Credibility - Function of Tribunal in assessing credibility - Effect of assessment of credibility on assessment of documents – Circumstances where applying forward-looking test appropriate - Whether substantial grounds – Leave granted (2007/1677JR – Clark J – 15/6/2010) [2010] IEHC 312
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Asylum

Fear of persecution – Previous UK asylum application – Non-oral appeal – Presumption that applicant not refugee – Onus of proof – Credibility – Nationality – Inconsistencies in account – Future risk to applicant – Minor applicant – Substantial grounds – Country of Origin information not specifically referred to – Whether new explanations considered on appeal – Whether rational and substantial basis for finding lack of credibility – Whether grounds reasonable, arguable and weighty – Whether breach of fair procedures – Whether all relevant documentation considered – Whether applicant of sufficient age to describe experiences – *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *T v Refugee Appeals Tribunal* (Unrep, HC, Peart J, 27/7/2007); *T(Z) v Minister for Justice, Equality and Law Reform* [2009] IEHC 509; *S v Refugee Appeals Tribunal* [2007] IEHC 276; *N v Refugee Appeals Tribunal* [2009] IEHC 434 and *N v Refugee Appeals Tribunal* [2005] IEHC 441 followed – *I v Minister for Justice, Equality and Law Reform* [2005] IEHC 182; *L v Refugee Appeals Tribunal* [2009] IEHC 26; *M v Refugee Appeals Tribunal* [2005] IEHC 363; *P v Minister for Justice, Equality and Law Reform* (Unrep, HC, Cooke J, 19/5/2009); *I v Refugee Appeals Tribunal* (Unrep, HC, Peart J, 9/12/2005); *K(G) v Minister for Justice, Equality and Law Reform* [2002] 2 IR 418; *L v Minister for Justice, Equality and Law Reform* (Unrep, HC, Clark, 21/1/2009); *I v Refugee Appeals Tribunal* [2009] IEHC 94 and *I v Minister for Justice, Equality and Law Reform* [2005] IEHC 416 considered – Refugee Act 1996 (No 17), ss 11(a)(1)(b), 13(6) and 16(16)(a) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5(2) – Leave refused (2007/1645JR – McCarthy J – 4/10/2010) [2010] IEHC 344
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Judicial review – Leave - Fair procedures – Failure of respondent to undertake age assessment – Applicant not treated as unaccompanied minor - Appropriateness of remedy sought – Adverse credibility findings – Whether breach of fair procedures – Whether respondent obliged to undertake age assessment – Whether any failure invalidated report of respondent - Whether judicial review appropriate remedy - *AM v Refugee Applications Commissioners* [2005] IEHC 317 [2006] 1 IR 476 distinguished; *Odunbaku (A minor) v Refugee Applications Commissioner* [2006] IEHC 28 (Unrep, Clarke J, 1/2/2006) considered – Refugee Act 1996 (No 17), ss 8 &13 Leave refused (2007/871JR – Birmingham J – 4/6/2010) [2010] IEHC 245
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Asylum

Judicial review – Leave – Late appeal - Delay – Delay caused by solicitor – Subsequent delay caused by applicant – Duty to give reasons – Delay in furnishing reasons – Whether timely challenge brought to decision of respondent - Whether delay caused by applicant – Whether duty to give reasons – Whether failure to give reasons invalidated decision - *Duba v Refugee Appeals Tribunal* (Unrep, Butler J, 22/1/2003) considered; *Deerland Construction Ltd v Aquaculture Licences Appeal Board* [2008] IEHC 289 [2009] 1 IR 673 applied – Refugee Act 1996 (No 17), s 17 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5- Relief refused (2008/298JR – Birmingham J – 4/6/2010) [2010] IEHC 246
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Deportation

Judicial review – Leave – Substantial grounds – Incorrect statement in letter from respondent– Material mistake – Substantive validity of decision of respondent – Reasons for deportation – Common good – Conduct and character of applicant - Whether substantial grounds raised – Whether mistake material – Whether valid reasons for order of deportation – Whether order for deportation in interests of common good –*P v MJELR* [2002] 1 IR 164 considered – Immigration Act 1999 (No 22), s 3 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2010/23JR – Cooke J – 8/6/2010) [2010] IEHC 222
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Deportation order

Family life – Citizen children – Rights of State – Proportionality – Insurmountable obstacles – Risk of serious harm – Treatment of failed asylum seekers – Substantial grounds – Whether deportation necessary or justified – Whether respondent's assessment unreasonable or disproportionate – Whether State entitled to interfere with family life by

deportation of member – Whether applicants had choice of maintaining family as unit – Whether armed conflict in Congo constituted obstacle, special reason or insurmountable obstacle – *R (Mahmood) v Home Secretary* [2001] 1 WLR 840; *Lobe v Osayande* [2003] IESC 3; *Dimbo v Minister for Justice, Equality and Law Reform* [2008] IESC 1 and *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 IR 795 considered – *Boultif v Switzerland* (5427/00) distinguished – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Refugee Act 1996 (No 17), s 5 – Criminal Justice (United Nations Convention against Torture) Act 2000 (No 11), s 4 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Constitution of Ireland 1937, arts 40 and 41– European Convention on Human Rights and Fundamental Freedoms, art 8 – Leave refused (2010/238JR – Cooke J – 25/6/2010) [2010] IEHC 250
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Deportation

Judicial review – Procedure – Effect of application – Whether institution of judicial review proceedings challenging validity of deportation order acts as automatic stay on order pending outcome of proceedings – *Abdolkhani & Karimnia v Turkey* (App No 30471/08), (Unrep, ECHR, 22/9/2009), *Adebayo v Commissioner of An Garda Síochána* [2006] IESC 8, [2006] 2 IR 298 and *Conka v Belgium* (App No 51564/99), (2002) 34 EHRR 1298 considered;
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Deportation order

Revocation - Declaration implementation of order would be unlawful – Interlocutory injunction - Circumstances where order of *mandamus* compelling decision appropriate – Circumstances where declaratory relief permissible in absence of primary relief by way of *certiorari* or *mandamus* – Balance of convenience - Effect of false information on interlocutory injunction application – Whether declaratory relief indirect attempt to challenge validity of deportation order - Whether stateable case or arguable grounds for judicial review – Whether interlocutory injunction appropriate – *Point Exhibition Co Ltd v The Revenue Commissioners* [1993] 2 IR 551; *LC v Minister for Justice* [2006] IEHC 36, [2006] IESC 44, [2007] 2 IR 133 applied – *Nearing v Minister for Justice* [2009] IEHC 489, (Unrep, HC, Cooke J, 30/10/2009) approved - *Lelimo v Minister for Justice* [2004] IEHC 165, [2004] 2 IR 178 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 84 - Refugee Act 1996 (No 17), s 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 - European Convention on Human Rights 4/11/1950, art 8 – Leave granted (2010/709JR – Cooke J – 15/6/2010) [2010] IEHC 223
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Deportation order

Unsuccessful asylum application – Subsidiary protection – Rights of family unit – Right of unborn child – Arguable grounds – Relevant considerations – Whether grounds amounted to change of circumstances which would render continued implementation of existing order unlawful – Whether decision *ultra vires*, arbitrary, irrational, unreasonable or disproportionate – Whether decision flew in the face of reason or common sense – Whether arguable case made out – *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3; *State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] IR 642 and *O'Keeffe v An Bord Pleanála* [1993] IR 39 followed – *Kouaype v Minister for Justice, Equality and Law Reform* [2005] IEHC 380; *A(M) v Minister for Justice, Equality and Law Reform* (Unrep, HC, Cooke J, 17/12/2009); *I v Minister for Justice, Equality and Law Reform* [2009] IEHC 334 and *U(H) v Minister for Justice, Equality and Law Reform* [2009] IEHC 598 considered – Immigration Act 1999 (No 22), s 3 – Constitution of Ireland 1937, art 40.3.3° – European Convention on Human Rights, art 8 – Leave refused (2010/1264JR – Cooke J – 7/10/2010) [2010] IEHC 351
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Subsidiary protection

Fear of persecution – Serious harm – Real risk – Continuing persecution – Inhuman and degrading treatment – Credibility – Medical reports – Female genital mutilation – Whether applicant had already been subjected to persecution or serious harm – Whether applicant at risk of further torture – Whether real risk that applicant would be subjected to FGM if returned to Nigeria – Whether respondent failed to take individual position and personal circumstances into account – Whether compelling reasons that warrant determination that applicant eligible for protection – Immigration Act 1999 (No 22), s 3 – Refugee Act 1996 (No 17), s 17 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 4 and 5 – European Convention on Human Rights and Fundamental Freedoms, art 8 – Universal Declaration of Human Rights, art 5 – Application rejected (2010/171JR – Cooke J – 25/6/2010) [2010] IEHC 249
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Interlocutory injunction

Adequacy of damages – Breach of contract – Dental Treatment Services Scheme – Risk to practice – Past and future losses – Irreparable harm – *Stare decisis* – Discretionary remedy – Whether damages adequate remedy – Whether defendant able to pay damages – Whether losses suffered capable of quantification – Whether probable future losses capable of quantification – Whether insolvency or going out of business could constitute irreparable harm – Whether likely that plaintiffs might have to terminate practices for substantial period of time– Whether defendant entitled to unilaterally vary terms of scheme – *Campus Oil v Minister for Industry (No 2)* [1983] IR 88 followed – *Reid and Turner v HSE* [2010] IEHC 292; *Irish Trust Bank Ltd v Central Bank* [1976/77] ILRM 50; *Curust Financial Services Ltd v Loewe-Lack Werk* [1994] 1 IR 450; *Ó Murchú T/A Talknology v Eircell Ltd* [2001] IESC 15; *Sheridan v The Louis Fitzgerald Group Ltd* [2006] IEHC 125; *Smith Kline Beacham plc v Genthorn BV* (Unrep, HC, Kelly J, 28/2/2003) and *Clane Hospital v VHI* [1998] IEHC 78 considered – Application refused (2010/7042P – Irvine J – 12/8/2010) [2010] IEHC 346
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Right to privacy – Freedom of expression – Public interest – Protection of rights of others – Competing interests of individual and community – Media publicity following release from prison – Publication of articles and photographs – Information identifying address – Right to life – Right to have and maintain a permanent dwelling – Right to earn a living – Balance of convenience – Whether there should be publication of details in relation to sex offenders upon their release – Whether infringement of plaintiff's rights justified in the public interest – Whether interference with freedom of expression sought justified – Whether restriction proportionate to aim – Whether freedom of expression outweighed plaintiff's rights – Whether real risk to life – Whether any benefit in prohibiting further publication – Whether damages adequate – *Mahon v Post Publications Ltd* [2007] 3 IR 338 followed – *Kennedy v Ireland* [1987] IR 587; *McGee v Attorney General* [1974] IR 284; *Norris v Attorney General* [1984] IR 36; *Herrity v Associated Newspapers (Ireland) Ltd* [2009] 1 IR 316; *Von Hannover v Germany* (2005) 40 EHRR 1; *Sciacca v Italy* (2006) 43 EHRR 20; *Campus Oil Ltd v Minister for Industry and Commerce (No 2)* [1983] IR 88; *Educational Company of Ireland Ltd v Fitzpatrick* [1961] IR 323; *Dunne v Dun Laoghaire-Rathdown County Council* [2008] 1 IR 568; *Cream Holdings Ltd v Banerjee* [2005] 1AC 253; *Foley v Sunday Newspapers Ltd* [2005] 1 IR 88; *Bonnard v Perryman* [1891] 2 Ch 269; *Reynolds v Malocco* [1999] 2 IR 203; *Cogley v RTE* [2005] 4 IR 79 and *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 considered – *Callaghan v Independent News and Media Ltd* [2008] NIQB 15 distinguished – Sex Offenders Act 2001 (No 18) – Garda Síochána Act 2005 (No 20), s 62 – Prohibition of Incitement to Hatred Act 1989 (No 19), s 2 – Non-Fatal Offences Against the Person Act 1997 (No 26), s 10 – European Convention on Human Rights Act 2003 (No 20), ss 1, 2 and 3 – Constitution of Ireland 1937, art 40 – European Convention on Human Rights and Fundamental Freedoms, arts 8 and 10 – Application refused (2010/4661P – Irvine J – 18/6/2010) [2010] IEHC 248

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Certiorari- Discretionary remedy – Principles to be applied - Availability of alternative remedy - Conduct of applicant – Misleading court - Discretion of court — Whether alternative remedy available – Whether *certiorari* should be granted – Whether discretion of court exercised – *The State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381, *De Roiste v Minister for Defence* [2001] IR 190 and *McGoldrick v An Bord Pleanála* [1997] 1 IR 497 applied – Aviation Regulation Act 2001 (No 1), ss 38 & 40 – State Airports Act 2004 (No 32), s 24 - Relief refused (2010/107JR – Kelly J – 4/6/2010) [2010] IEHC 220

Ryanair Ltd v Commission for Aviation Regulation

Remedies

Effective remedy before national authority – Appeal to Supreme Court – Point of law of exceptional public importance – Refusal of leave against respondent's decision to make deportation order – Whether court was correct in finding that it was precluded from taking into account material not before respondent when he made decision – Whether judicial review proceedings constituted effective remedy – Whether law shown to be in state of certainty that required clarification for future cases – *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 followed – *Vilvarajah v United Kingdom* (1992) 14 EHRR 248; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; *G(C) v Bulgaria* (2008) 47 EHRR 51; *Abdolkhani and Karimnia v Turkey* (Application 30471/08)*; Izhevbekhai (PEI) v Minister for Justice, Equality and Law Reform* [2008] IEHC 23; *Glancré Teo v Mayo County Council* [2006] IEHC 250; *Raiu v Refugee Appeals Tribunal* (Unrep, HC, Finlay Geoghegan J, 26/2/2003); *Radzuik (IR) v Refugee Appeals Tribunal* [2009] IEHC 510; *Soering v United Kingdom* (1989) 11 EHRR 439; *Bensaid v United Kingdom* (2001) 33 EHRR 10; *State (Keegan)*

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LANDLORD AND TENANT

Lease

Default of rent – Summary summons - Arbitration –Arbitration clause - Stay pending arbitration – Entitlement to arbitration – Step taken in proceedings – Dispute between parties – Continuing interest on outstanding rent – Whether continuing interest on rent could be claimed in summary proceedings -Whether dispute arose - Whether step taken in proceedings – Whether filing replying affidavit step in proceedings -Whether arbitration clause applicable –Whether stay could be granted –*Pitchers Ltd v Plaza (Queensbury) Ltd* [1940] 1 All ER 151, *Campus and Stadium Ireland Ltd v Dublin Waterworld Ltd* [2005] IEHC 201 [2006] 2 IR 181, *Stokes v Kerwick* [1921] 56 ILTR 24 and *O'Dwyer v Boyd* (Unrep, SC, 4/7/2002) considered; *Gleeson v Grimes* [2007] 4 IR 417 applied; *Moohan v S&R Motors (Donega)l Ltd* [2007] IEHC 435 [2008] 3 IR 650 distinguished; *Gold Ores Reduction Company Ltd v Parr* [1892] 2 QB 14 followed – Relief granted (2009/1298S – Clarke J – 1/6/2010) [2010] IEHC 217
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MENTAL HEALTH

Detention

Admission order – Mental disorder - Voluntary patient released and readmitted as involuntary patient –Lawfulness of admission order – Lawfulness of admission requirements of Central Mental Hospital –Capacity of applicant – Treatment resistant schizophrenia - Whether admission order unlawful – Whether admission requirements of hospital lawful – Whether applicant had capacity – Whether mental disorder - *McN v Health Service Executive* [2009] IEHC (Unrep, Peart J, 15/5/2009), *Re a Ward of Court (No 2)* [1996] 2 IR 79 and *EH v Clinical Director of St Vincents Hospital* [2009] IESC 46 (Unrep, SC, 28/5/2009) considered - Mental Health Act 2001 (No 25), ss 3,8, 14, 18, 19, 21, 23 and 24 – Relief refused (2009/1069JR – Peart J – 4/6/2010) [2010] IEHC 243
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PLANNING & ENVIRONMENTAL LAW

Default planning permission

Decision out of time – Notice of decision of respondent - Discretion of court – Conduct of applicant – Proposed development materially contravened relevant development plan – Whether default planning permission should be granted – Whether decision of respondent out of time - Whether necessary to notify decision or merely make decision within statutory time limits– Whether contravention of relevant development plan – Whether contravention material – Whether conduct of applicant relevant in decision –*Monaghan UDC v Alf-a-Bet Promotions Ltd* [1980] ILRM 64, *Pine Valley Developments Ltd v Dublin County Council* [1984] IR 407, *McGovern v Dublin Corporation* [1992] 2 ILRM 314, *P&F Sharpe v Dublin County Council* [1989] IR 701, *Tennyson v Corporation of Dun Laoghaire* [1991] 2 IR 527 and *Molloy v Dublin Corporations* [1990] 1 IR 90 applied; *Flynn & O'Flaherty Properties Ltd v Dublin Corporation* [1997] 2 IR 558, *Freeney v Bray UDC* [1982] ILRM 29, *Calor Teoranta v Sligo County Council* [1991] 2 IR 267, *Marran v Dublin County Council* [1985] ILRM 593, *Walsh v Kildare County Council* [2001] IR 483, *The State(Conlon Construction Ltd v Cork County Council* (Unrep, Butler J, 31/7/1975), *Roughan v Clare County Council* (Unrep, Barron J, 18/12/1996) and *Maye v Sligo Borough Council* [2007] IEHC 146 [2007] 4 IR 678 considered – Planning and Development Act 2000 (No. 30) s 34 - Planning and Development Regulations 2001(SI 600/2001) – Local Government (Planning and Development) Act 1963 (No 28) s 26 – Relief refused (2003/397JR – de Valera J – 4/6/2010) [2010] IEHC 226
Maguire v Bray Town Council

Injunction

Unauthorised development – Unauthorised use – Conditions – Refusal of planning permission – Retention – Dwelling house – Effect of demolition on respondents' children – Planning and sustainable development of the area – Excessive density of development in rural area – Limited size of original landholding – Urgency – Undue delay – Discretionary relief – Whether development in breach of planning laws – Whether breach justified – Whether development materially contravened conditions – Whether decisions reflected legitimate planning objective – Whether inappropriate use of s. 160 proceedings – Whether s 160 could be invoked in circumstances other than of great urgency – *Dublin Corporation v McGowan* [1993] IR 405; *Stafford v Roadstone Ltd* [1980] ILRM 1; *Avenue Properties Ltd v Farrell Homes Ltd* (Unrep, HC, Barrington J, 27/5/1981); *White v McInerney Construction Ltd* [1995] 1 ILRM 374; *Dublin Corporation v Mulligan* (Unrep, HC, Finlay P, 6/5/1980); *Dublin Corporation v Lowe* (Unrep, HC, 4/2/2000); *Sweetman v Shell E & P Ireland Ltd* [2007] 3 IR 13; *Ryan v Roadstone Dublin Ltd* [2006] IEHC 53; *Kildare County Council v Goode* [1997] IEHC 95; *Dublin City Council v Matra* (1978) 114 ILTR 102; *Wicklow County Council v Forest Fencing Ltd* [2007] IEHC 242; *Curley v Galway County Council* (Unrep, HC, Kelly J, 30/3/2001); *Westport UDC v Golden* [2002] 1 ILRM 439; *Leen v Aer Rianta cpt* [2003] 4 IR 394; *Dublin Corporation v Garland* [1982] ILRM 104 and *Morris v Garvey* [1983] IR 319 considered – Planning and Development Act 2000 (No 30), ss 47, 50(2) and 160 – Local Government (Planning and Development) Act 1963 (No 28), s 27 – Relief granted (2007/76MCA – Edwards J – 29/6/2010) [2010] IEHC 254
Meath County Council v Murray

Planning permission

Intensification of use – Material change of use – Nature of activity – Proper and sustainable planning of area – Error of law – Unreasonableness – Requirement to state reasons – Fair procedures – Enforcement – Burden of proof – Whether material intensification of use – Whether respondent correct in refusing planning permission – Whether respondent abrogated itself from planning authority powers – Whether respondent entered realm of enforcement – Whether respondent acted unreasonably – Whether respondent committed error of law – Whether respondent gave proper reasons for its decision – Whether inspector's report rational – *Kelly v An Bord Pleanála* (Unrep, Flood J, 19/11/1993) and *Lancefort Ltd v An Bord Pleanála* (Unrep, McGuinness J, 12/3/1998) followed – *Deerland Construction Ltd v Aquaculture Licences Appeal Board* [2009] 1 IR 673; *Coffey v Heborn Homes* (Unrep, O'Hanlon J, 27/7/1984); *Butler v Dublin Corporation* [1999] 1 IR 565; *Patterson v Murphy* [1978] ILRM 85; *Lanigan v Barry* [2008] IEHC 29 (Unrep, Charleton J, 15/2/2008); *Cork County Council v Slattery Pre-Cast Concrete Ltd* [2008] IEHC 291 (Unrep, Clarke J, 19/9/2008); *Galway County Council v Lackagh Rock Ltd* [1985] IR 120; *Molembuy v Kearns* (Unrep, O'Sullivan J, 19/1/1999) and *Dublin County Council v Carty Builders and Company Ltd* [1987] IR 355 considered – Planning and Development Act 2000 (No 30), ss 34(10), 146A and 160 – Fisheries (Amendment) Act 1997 (No 23), s 40(8)(a) - Application dismissed (2009/521JR – Charleton J – 1/7/2010) [2010] IEHC 255
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Adjournment

Criminal investigation – Potential prosecution – Admissibility of evidence – Privilege against self-incrimination – Prejudice – Whether prejudicial or unjust to give evidence in civil proceedings – Whether civil proceedings presented risk to fair trial in criminal proceedings – Whether civil proceedings should be postponed until after criminal trial – *Dillon v Dunnes Stores Ltd* [1966] IR 397; *O'Flynn v Mid-Western Health Board* [1991] 2 IR 223 and *G(C) v Appeal Commissioners* [2005] 2 IR 473 considered – Constitution of Ireland 1937, art 38.1
Application refused (2007/8143 – Laffoy J – 1/7/2010) [2010] IEHC 263
Moore v Moore

Civil contempt

Standard of proof – Beyond reasonable doubt – Whether court order prohibiting entry onto land – Acquisition of ownership of land – Entry onto land contrary to court order –District Court order prohibiting entry operated after respondent acquired co-ownership of lands – Whether entry amounted to contempt – Whether order rendered moot by acquisition of ownership rights – Whether order absolutely prohibited any entry whatsoever – Whether duty to uphold solemnity of court order – *Competition Authority v Licensed Vintners Association* [2010] 1ILRM 374 followed – *National Irish Bank v Graham* [1994] 1 IR 215; *Re Bramblevale Limited* [1970] Ch 128; *Chelsea Man plc v Chelsea Girl Ltd* [1988] FSR 217 and *Redwing Ltd v Redwing Forest Products Ltd* [1947] 64 RPC 67 considered – Summary Jurisdiction Act 1857 – Courts (Supplemental Provisions) Act 1961 (No 39), s 51(1) – Gas Act 1976 (No 30), 26 – Gas (Amendment) Act 2000 (No 26), s 20 – Constitution of Ireland 1937, arts 40.3 and 43 – Questions answered in negative (2009/2068SS – Kearns P – 18/6/2010) [2010] IEHC 238
Muller v Shell E&P Ireland Ltd

Discovery

Relevance – Statutory requirement of judicial knowledge of Irish – Whether discovery relevant in judicial review proceedings – *Ó Monacháin v An Taoiseache* [1980-1998] TÉ 1; *Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland* [2003] 3 IR 528; *Re Rooney's Application* [1995] NI 398; *R v Health Secretary ex p Hackney London Borough Council* (Unrep, Eng CA, 24/7/1994); *Aquatechnologie Ltd v National Standards Authority of Ireland* (Unrep, SC, 10/7/2000); *State (Walshe) v Murphy* [1981] IR 275; *Murphy v Dublin Corporation* [1972] IR 215; *Minister for Education and Science v Information Commissioner* [2008] IEHC 279, [2009] 1 IR 588 consdiered - *Ambiorix v Minister for the Environment (No 1)* [1992] 1 IR 277 applied – *Leech v Independent Newspapers (Ireland) Ltd* [2009] IEHC 259, [2009] 3 IR 766 followed – Courts of Justice Act 1924 (No 10), s 71- Discovery ordered (2008/532 JR – Clarke J - 19/2/2010) [2010] IEHC 40
Mac Aodháin v Éire agus ar eile

Dismissal of proceedings

Delay – Want of prosecution - Inordinate and inexcusable delay - Balance of justice – Unfairness to certain defendants – Inherent jurisdiction to strike out proceedings – Constitution – Inherent jurisdiction and separation of powers - Difference and overlap between jurisdiction to dismiss for want of prosecution and inherent jurisdiction to strike out proceedings where unfair to allow to continue –Difference between test of balance of justice and test of fundamental unfairness – Medical negligence – Catastrophic injuries at birth in 1981 – Legal advice sought in 2000 – Whether delay in subsequent prosecution of proceedings - Complications arising from Medical Defence Union position – Consequent uncertainty as to whether defendant doctors covered by insurance or personally exposed - Wealth of written records and witnesses available – Records patently sufficient for formation of experts' opinions – High Court finding that delay was inordinate and inexcusable but balance of justice favoured allowing proceedings to continue – Whether High Court correct that balance of justice favoured allowing plaintiff to proceed – Consideration of severity of injuries when assessing balance of justice – Whether unfair to allow claim against defendant doctors to proceed - Consideration that due to Medical Defence Union position 3rd and 4th defendants may be personally exposed – Enormity of worry and upset consequent upon uncertainty of Medical Defence Union position - Consideration that 1st Defendant remains in proceedings – No prejudice in allowing case to continue – Consideration of level of detail in notice of indemnity and contribution – *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 and *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 approved; *O'Domhnaill v Merrick* [1984] IR 151, *Toal v Duignan (No 1)* [1991] ILRM 135, *Toal v Duignan (No 2)* [1991] ILRM 140, *Dowd v Kerry County Council* [1970] IR 27, *Allen v McAlpine* [1968] 2 QB 229, *Hogan v Jones* [1994] 1 ILRM 512, *Celtic Ceramics Ltd v IDA* (Unrep, SC, 4/2/1993], and *Calvert v Stollznow* [1980] 2 NSWLR 749, [1982] 1 NSWLR 749 considered; *Gilroy v Flynn* [2005] IESC 98, [2005] 1 ILRM 290, and *Stephens v Flynn Ltd* [2005] IEHC 148, (Unrep, HC, Clarke J, 28/4/05) doubted in part - Plaintiff's cross-appeal allowed; delay neither inordinate nor inexcusable - Claim against 3rd and 4th defendants struck out; indemnity and contribution claim against them by 1st defendant to proceed; claim against 1st defendant allowed to proceed (74,76,77 & 99/2008 – SC – 10/5/2010) [2010] IESC 27
Christopher McBrearty (apum suing by his mother and next friend, Anna McBrearty) v North Western Health Board, McFarlane, Glynn and Singh

Pleadings

Amendment – Parties - *Ex parte* application to amend plenary summons – Application for extension of time to amend – Libel claim – Proceedings issued against incorrect company – Prejudice – Whether application should have been on notice – Whether plaintiff statute barred – Whether court should add or substitute party where known limitation period expired – Whether error was clerical error – Whether entitlement of defendant to plead Statute of Limitations diminished

– *R v Commissioner of Patents, ex parte Martin* [1953] 89 CLR 381; *Sandy Lane Ltd v Times Newspapers Ltd* [2009] IESC 75 and *Kinlon v CIE* [2005] 4 IR 480 followed – *Re Meres Application* [1962] RPC 182; *O'Reilly v Granville* [1971] IR 90; *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuel Ltd* [1998] 2 IR 519 and *Southern Mineral Oil Ltd (in liquidation) v Cooney (No 2)* [1999] 1 IR 237 considered – Statute of Limitations 1957 (No 6) – Rules of the Superior Courts 1986 (SI 15/1986), O 15, r 13 and O 63, r 1 – Council Regulation (EC) No 44/2001 – Application refused (2009/6907P – Peart J – 28/6/2010) [2010] IEHC 259
Fitzgerald v MGN Ltd

Plenary summons

Issue – Issue by post – Prisoner - Failure to assist applicant in obtaining plenary summons – Whether claim in judicial review – Rules of the Superior Courts 1986 (No 15/1986) - Leave refused (2010/581JR – MacMenamin J – 16/6/2010) [2010] IEHC 337
Ryan v Governor of Midland Prisons

Preliminary issue

Application to have issue tried as preliminary issue – Circumstances where preliminary trial appropriate – Approach of Court in determining whether preliminary trial appropriate – Effect of delay on application - Whether preliminary trial appropriate – *McCabe v Ireland* [1999] 4 IR 151; *Murphy v Roche* [1987] 1 IR 106; *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459 applied - *PJ Carroll & Co Ltd v Minister for Health (No 2)* [2005] IEHC 267, [2005] 3 IR 457; *Kalix Fund Ltd & Anor v HSBC Institutional Trust Services (Ireland) Ltd* [2009] IEHC 457, (Unrep, HC, Clarke J, 16/10/2009) considered – *Cork Plastics Manufacturing & Ors v Ineos Compound UK Ltd* [2008] IEHC 93, (Unrep, HC, Clarke J, 7/3/2008); *McCann v Desmond* [2010] IEHC 164 (Unrep, HC, Charleton J, 11/5/2010) distinguished - Rules of the Superior Courts 1986 (SI 15/1986), O 25, 34, 63A – Foreshore Act 1933 (No 12) - Application dismissed (2001/15389P – Laffoy J – 20/5/2010) [2010] IEHC 294
Atlantic Shellfish Ltd v Cork County Council

Security for costs

Delay – Discretion of court - Onus of proof on defendant - Financial situation of plaintiff – *Bona fide* defence – Credible evidence of financial difficulties of plaintiff – Special circumstances – Inability to meet costs caused by wrongdoing complained of –Whether onus of proof discharged - Whether credible evidence produced – Whether inability to meet costs caused by wrongdoing complained of – Whether special circumstances – Companies Act 1963 (No 33), s 390 - *Interfinance Group Ltd v KPMG Peat Marwick* (Unrep, Morris P, 29/6/1998) and *Parolen Ltd v Doherty & Anor* [2010] IEHC 71 (Unrep, Clarke J, 12/3/2010) considered – Relief refused (2008/4767P – Clarke J – 4/6/2010) [2010] IEHC 234
James Elliott Construction Ltd v Irish Asphalt Ltd

Strike out

Abuse of process – Frivolous and vexatious – No stateable cause of action – Claims unsustainable – *Res judicata* - Attempt to relitigate family law matter – Isaac Wunder order – Whether abuse of process – Whether frivolous and vexatious – Whether stateable cause of action –*DK v King* [1994] 1 IR 166 and *Farley v Ireland* (Unrep, SC, 1/5/1997) applied – *Adam v Minister for Justice* [2001] 3 IR 53, *McCabe v Harding Investments Ltd* [1984] ILRM 105, *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, *Kelly v Ireland* [1986] ILRM 318 and *Breathnach v Ireland (No 2)* [1993] 2 IR 448 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 19 rr 27, 28 – Proceedings struck out; Isaac Wunder order made (2009/578PP – Lavan J – 4/6/2010) [2010] IEHC 273
O'M v O'Neill

Strike out

Contract for sale of land – Specific performance – Statement of claim - Claim bound to fail – Central issue of fact upon which claim based incorrect – Claim that plaintiffs unreasonable in bringing claim – Frivolous and vexatious - Inherent jurisdiction of court – Whether claim bound to fail – Whether basis for claim – Whether plaintiffs unreasonable in bringing claim – Whether claim should be struck out – Whether conduct of defendants relevant – Whether claim frivolous and vexatious– *Salthill Properties Ltd v Royal Bank of Scotland* [2009] IEHC 207 (Unrep, Clarke J, 30/4/2009), *DK v King* [1994] 1 IR 166, *McCabe v Harding Investments Ltd* [1984] ILRM 105, *Barry v Buckley* [1981] IR 306 and *Sun Fat Chan v Osseous Ltd* [1992] IR 425 applied ; *Lawlor v Ross* (Unrep, SC, 22/11/2001), *Farley v Ireland* (Unrep, SC, 1/5/1997), *Lowes v Coillte Teoranta* (Unrep, Herbert J, 5/3/2003), *O'Dwyer v Chief Constable of the RUC* [1997] NI 403, *Aer Rianta Cpt v Ryanair Ltd* [2001] 4 IR 607, *Supermacs Ireland Ltd v Katesan (Naas) Ltd* (Unrep, Macken J, 15/3/1999), *Ratcliff v Wilson* (Unrep, Macken J, 23/3/1999) and *Leinster Leader Ltd v Williams Group (Tullamore) Ltd* (Unrep, Macken J, 9/7/1999) considered - Rules of the Superior Courts 1986 (SI 15/1986), O 19, rr 27& 28 – Part of claim struck out (2009/2180P – Edwards J – 11/6/2010) [2010] IEHC 267
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Summary judgment

Contract – Consumers - Commercial lending - Loan agreement - *Bona fide* defence - Defence of *non est factum* – Business transaction - Whether defendants consumers for purpose of legislation – Whether *bona fide* defence disclosed –*Aer Rianta Cpt v Ryanair Ltd* [2001] 4 IR 607, *Tedcastle McCormack & Co Ltd v McCrystal* (Unrep, Morris J, 15/3/1999) and *Harrisrange Ltd v Duncan* [2003] 4 IR 1 applied; *Benincasa v Dentalkit* (Case C-269/95) [1997] ECR I-3767 followed – Consumer Credit Act 1995 (No 24), ss 30 & 38 –Partnership Act 1890 (???), ss 1, 5 & 45 – Liberty to enter judgment granted (2009/5142S – Kelly J – 3/6/2010) [2010] IEHC 219
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Summary judgment

Bona fide defence –Building agreement – Oral evidence – Whether oral evidence necessary -Whether *bona fide* defence disclosed –Adjourned to plenary hearing (2010/1156&1155S – Charleton J – 8/6/2010) [2010] IEHC 215
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SHIPPING

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SI 506/2010

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TAXATION

Income Tax

Assessment – Appeal against assessment – Right of appeal to Circuit Court – Determination of Appeal Commissioners – Interim appeals – Single right of appeal – Validity of assessment – Time Limit – Whether right to appeal Appeal Commissioners' ruling on preliminary issue pending determination of other grounds of appeal – Whether assessments issued outside time limit – Whether final and conclusive determination of appeal – *State (Whelan) v Smidic* [1938] 1 IR 627 considered – Taxes Consolidation Act 1997 (No 39), ss 924(2)(b), 933, 942, 950 and 955(3) – Application refused (Hedigan J – 1/7/2010) [2010] IEHC 264
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Employer - Breach of statutory duty - Personal injuries – Damages –Injury caused by defective work equipment – No blameworthiness on part of employer - Whether employer liable – Whether breach of statutory duty - *Everitt v Thorsman Ireland Ltd* [2000] 1 IR 256 applied – Safety Health and Welfare at Work (General Application) Regulations 1993 (SI 44/1993), regs 19 & 20 – Road Traffic (Bollards and Ramps) Regulations 1988 (SI 32/1988), reg 4 – Claim successful (2007/5400P – de Valera J – 4/6/2010) [2010] IEHC 328
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ABBREVIATIONS

A & ADR R = Arbitration & ADR Review
BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
ELR = Employment Law Review
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
LGR = Local Government Review
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

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Getting Blood ... out of a Lawyer

Ercus Stewart SC

Barristers could leave the Law Library, Four Courts or Distillery Building and be back in an hour having donated a pint of blood. If they donate plasma, they could be back at work in two hours. You can attend as late as 6.00pm. Hence this article. It is so easy, with no ill effects. Why not give it a go … and then continue to make a donation regularly. I am hooked. You could be too. And it does real good, at no cost to you.

It was Giovanni Torriano who first coined the phrase "you can't get blood out of a stone" in 1662, speaking of that which would be impossible. Getting blood out of a lawyer should be easier, though if all the lawyer jokes were true, one would wonder what runs in our veins. I believe donating blood is an honour, but also a civic duty.

The Irish Blood Transfusion Service needs approximately 3,000 units of blood every week. In our parlance, a unit is one pint of blood. We laypersons typically think of blood donations as whole blood or "red blood", which is the most common type of donation. There are some blood types which are always in short supply of whole blood (for instance, B and B- or AB). One can also give platelets only, "white blood" cells, or plasma. Platelets and plasma are vital for preventing massive blood loss in surgical patients, and are in particular demand for cancer and leukaemia patients, as well as those receiving chemotherapy or bone marrow transplants. Collecting platelets or plasma is essentially the same as for whole blood, but may differ in length of time.

How to donate

The process for drawing whole blood may take 20 minutes or so, although the entire procedure from arrival at the Blood Bank to leaving may be up to an hour. There is a brief health check involving taking blood pressure and answering a few simple questions and a brief rest with juice and biscuits before leaving. Platelet and plasma aphaeresis (or donations) take longer. It can take five times more blood (and multiple donors) to make up a unit of platelets or plasma. The need is great for each type of donation.

Before you donate, remember good health is vital. It is essential that donors maintain a healthy iron level in their blood. You get this through eating red meat, poultry, fish, green leafy vegetables (spinach, kale, etc.) and iron fortified cereals and raisins. You should be rested, although lawyers tend not to be. Drink plenty of fluids on the day you donate, and drink an extra 16 ounces of water and fluids just prior to the donation. You should also eat a healthy meal before donating, but avoid fatty foods (hamburgers or fries, ice cream) because fats in the bloodstream (which remain for several hours) can mask infections which might otherwise be present when the blood is screened. If you are a platelet donor, your system must be free of aspirin for two days prior to donating blood.

You should not be affected at all by donating blood, except by the good feeling that you've helped your fellow citizens in need. Few may feel slightly light headed, but if you do, just rest until the feeling passes. The processes itself is a safe medical procedure, and remember, your body will replace lost fluids within 24 hours.

Who may donate

Anyone from 18 to 65 may donate whole blood if they are in good health, weigh between 7 and 12 stones, and are not anaemic. To donate platelets and plasma, donors must be between 18 and 60+ and must weigh over 9 stone 7 lbs. You cannot donate blood if you have low (or high) blood pressure, low iron levels, have travelled to certain at-risk countries or have certain medical conditions or take certain medications, or if pregnant. All of this will be explained at the initial screening. For platelet and plasma donations, you cannot donate if you have had aspirin within the past two days, or if you are regularly medicated with aspirin or anti-inflammatory medications, or if you have ever received a blood transfusion yourself, or if you have ever been pregnant.

Diabetics can donate blood if they their blood sugar level is controlled, and if their blood pressure is below 180/100, but cannot if they have ever used beef insulin since 1980, the blood pressure is elevated, or the blood sugars uncontrolled. Some clinics prefer not to have diabetics donate.

Where to donate

There is a blood clinic at Lafayette House (O'Connell Street) at 1 – 5 D'Olier Street on the second floor. Call (01) 474-5000. You can make an appointment or drop in. Platelet collection is located at the National Blood Centre in St. James's Hospital on James' Street. (01) 432-2833. You must have an appointment for the first donation.

I urge my colleagues in the legal profession to think about taking this simple challenge, to be one of the many who already give the 3,000 units needed *every week* in Ireland. Lawyers have plenty of good blood to give. ■

Damages in Fatal Injury Actions – Selected Issues

Anthony Barr SC

Introduction

This article does not attempt to be a comprehensive analysis of the principles governing the award of damages in fatal injury cases. The topic is simply too wide and diverse to be encompassed in an article such as this. Instead, this article attempts to set out a number of current issues, which may be of interest to practitioners, because they are issues, which are likely to arise in practice when dealing with fatal injury cases. The reader will see that in some areas Irish law seems to be well settled, whereas in other areas the issues, which have been raised, have yet to be fully argued before the Irish courts. The issue as to whether the re-marriage of a spouse of the deceased in advance of the trial of the action ought to be taken into account when assessing damages, is one that has come before the Irish courts before, but is of such difficulty, that it is likely to trouble the courts again in the future. Answers are not always given to the questions raised, but at least practitioners will be aware of the issues in advance of bringing their cases to trial. In certain areas, one has to look to the decisions of the courts of England and Wales for guidance. I would enter the caveat, that care should be taken when looking at these decisions, as they are based on a different statutory regime to that in existence in this jurisdiction.

Loss of the Deceased's Services

The normal rule is that the damages recoverable under this heading are ascertained by reference to the actual cost, which would be incurred by the surviving spouse in replacing the services, which had been provided by the deceased. Normally these services would include matters such as: cooking, cleaning, collecting the children from school and minding the children. This head of loss is ascertained by calling evidence as to the cost of hiring a carer or housekeeper for the relevant period to provide the services. In *Cooper v Egan* [1], the mother of a small child, who was four months old at the time of the accident, was killed in a road traffic accident. The father was also seriously injured. The mother had a part time job at the time of the accident.The infant plaintiff was taken care of initially by the maternal grandparents. In assessing damages, the learned High Court Judge held that the plaintiff, who had sued on his own behalf and on behalf of his son, was entitled to damages in respect of the capital value of the loss of the mother's likely financial contribution to the family finances from her part time employment. In addition the plaintiff and his son were entitled to compensation for the loss of the wife's services as a housewife and mother. The amount of damages awarded for the loss of services was assessed by reference to expert evidence as to the cost of hiring a person to come into the home on a daily basis from 13.00 hours until 18.00 hours.

In *McDonagh v McDonagh* [2], a young woman was killed in a road traffic accident while travelling as a passenger in a car driven by her husband. She was the mother of young children and was also in temporary part time employment in a hospital. The father was unemployed. In the action, a claim was made for loss of pecuniary benefit and for loss of services. The father's sister had provided some services gratuitously for the family since the time of the accident. In the course of his judgement, Costello J. held that given the circumstances of the family, it was unlikely that the children would have gone on to third level education. Accordingly, the damages for loss of dependency would only be allowed up to the age of eighteen rather that twenty-one.

In assessing the value of the loss of personal services provided by the deceased, the Judge held that he would have to take account of the fact that the deceased had been in employment at the time of her death. Account would have to be taken for the fact that the services which a mother in full time employment could give her children, must of necessity be less than that given by a mother who works full time at home. The Judge stated that a discount was necessary in order to avoid double payment. The dependants were obtaining damages for loss sustained because of their mother's full time employment. They were not entitled in addition to damages based on the value of all the services, which a mother working full time at home would have rendered.

In addition, the Judge stated that account would have to be taken for the fact that the level of services required would vary as the children got older. It would not be necessary to have the children dropped to school or to have an adult there for them when they got back from school, as they got older. The judge noted that the assessment of damages in a case of this sort could not be done with scientific accuracy. In the circumstances, he was prepared to allow 50% of the cost of providing a daily help in the afternoons during the school term and in the mornings during the holidays and for the cost of employing someone to bring the children to school.

However, assessing the damages by reference to the commercial cost of hiring a nanny or housekeeper is not the only way of calculating this head of damages. A number of interesting alternative propositions have been put forward at various times. In *Stanley v Saddique* [3], the plaintiff's mother, the deceased, had been unreliable during her lifetime. After her death, the plaintiff's father met and married another woman, who provided a stable home for the plaintiff. The

1 Unreported High Court 20/12/1990

2 1992 1 IR 119

3 1991 1AER 529

defendant argued that as the plaintiff was better off in the home provided by the father and his new wife, than he would have been with his mother, there was no actual loss of dependency and therefore no entitlement to damages under this heading. The Court did not accept this argument. It held that on a correct interpretation of s.4 of the Fatal Accidents Act, 1976 (as amended), the benefits accruing to the plaintiff as a result of his absorption into the new family unit were to be disregarded for the purpose of assessing damages for loss of dependency under the 1976 Act.

However, the Court held that when assessing damages for the loss of a mother's services, the Court could have regard to the real possibility that due to her own shortcomings, she would not have been able to provide steady parental support. Accordingly, the multiplier/multplicand approach may not be appropriate and instead the Court would have to assess damages on a jury award basis.

A different problem arises where instead of engaging a nanny or housekeeper, the surviving spouse gives up work to look after the children. In *Creswell v Eaton*[4], a young mother who was twenty-six years of age was killed while crossing the road. She left three young children. She had been in part time employment at the time of her death. The children were initially taken in by their grandmother for two and a half years, until she had a stroke and died. They were then cared for by an aunt, who had a husband and two children of her own. The aunt was obliged to give up employment to look after her now extended family. The defendant argued that the damages should be assessed at the actual cost of hiring a nanny/housekeeper, but discounted by 50% to reflect the fact that the mother had been in part time employment. The plaintiff's argued that since it was accepted that the aunt had acted reasonably in giving up her employment to care for the children, this was a sufficient basis for recovering the aunt's full salary loss.

The Court held that since it had been entirely reasonable for the aunt to give up work and to remain unemployed so as to care for the children on a full time basis, damages for loss of services would be calculated by reference to the notional housekeeping wage for the short period during which the children were under the care of the grandmother discounted by thirty per cent to reflect the part time nature of the mother's services in the home and by reference to the aunt's net earning loss projected over the remaining period of dependency for each child, discounted by fifteen per cent to reflect the mother's part time care and the children's broadly diminishing need for care over time. It should be noted that the amount of the loss of the aunt's wages was merely the method of measuring the cost of supplying the services formerly provided by the mother. It was not a payment made to the aunt for providing the services.

A similar approach had been taken in the earlier case of *Mehmet v Perry*[5], where the mother had been killed in a road traffic accident leaving a number of children. They two youngest children, who were aged six and three at the time, suffered from a serious rare blood disorder. The father gave up employment to look after the whole family. The Court held that in view of the medical evidence concerning the two youngest children, the husband had acted reasonably in giving up full time employment to care for the family and it was reasonable that he should not take up full time employment until the youngest child reached the age of fifteen years. In the circumstances, the Court ruled that damages for loss of the wife's housekeeping services should be assessed by reference to the husband's loss of wages and not by reference to the reasonable cost of employing a housekeeper, since his wages represented the cost of providing the services of a full time housekeeper in substitution for the wife.

The English case law would suggest that where the surviving spouse gives up his or her own job in order to be able to look after the home and the children, provided the decision to give up work was reasonable in the circumstances, the value of the dependency will be taken to be the wages which he has lost by giving up his job, less any income, such as income support which he receives because he has no other source of income.[6] One of the considerations going to the reasonableness of the decision will obviously be the amount of the income, which he has lost by giving up his job. A Court might not be persuaded that a father acted reasonably in a particular case, if his income was significantly higher than the cost of employing help. It would depend on the children's ages and needs.

In Kemp & Kemp, "*The Quantum of Damages*", reference is made to the case of *Martin & Brown v Grey*[7] where the cost of providing a housekeeper at £29,000.000 a year was taken as a starting point. The figure was discounted to £22,500.00 a year and taken as the multiplicand. The Court was not prepared to calculate damages on the basis of the loss of earnings of the stepmother (who had given up work to make the provision) and which was put at £45,363.00 per annum. The guiding principle in the cases seems to be; that it must be established that it was reasonable in all the circumstances for the surviving spouse to give up employment so as to look after the children.

A further variant on the quantification of the damages under this heading occurred in a recent case where the defendant argued that the correct measure of damages under this heading should be ascertained, not by reference to the commercial cost of hiring a home help, but by reference to the amounts paid to people who fostered children within their own families. It was argued by the defendant's care expert that the amount paid to foster parents would be substantially less than the cost of providing equivalent care through a commercial nanny or housekeeper. This case was settled before it came to hearing, so we do not know what the response of the Irish Courts will be to this argument. My own view is that the defendant's comparison was not a reasonable one. It was not comparing like with like. People who provide foster care in their homes, do so not from a decision to enter into a commercially attractive arrangement, but are motivated by a desire to provide support and care for vulnerable children.

The Courts in England have tended to reach the same

4 1991 1AER 484

5 1977 2AER 529

6 Regard should be had to the Provisions of S.50 of the Civil Liability Act 1961 and S.285 of the Social Welfare Consolidation Act, 2005, which provide that certain payments and benefits are not to be taken into account when assessing damages under Part IV of the Civil Liability Act, 1961

7 Unreported 13th May 1998

view. In *Spittle v Bunney*[8], the infant plaintiff was three and a half years of age at the time of the mother's death. The father had abandoned her. The child was taken in by an aunt and her husband. The case concerned a claim for damages in respect of the loss of the mother's services. In assessing the value of the loss of services of the mother, the plaintiff argued that this should be measured by reference to the cost of hiring a nanny to provide those services. The defendants argued that the damages should be ascertained by reference to the payments made under the foster care scheme. The Court held that the cost of foster care was not the appropriate measure of damages because under the scheme, which had been opened to the Judge; no provision for payment to the foster parents was made. A similar argument had been made in *Creswell v Eaton*[9] and was also rejected. The learned trial Judge stated as follows at p.489:

> "A word about these fostering allowances. Although not insubstantial, they are paid entirely by way of reimbursement of the expense incurred in maintaining children: food, clothing, heating, travel and so forth. The underlying philosophy of the fostering scheme is that it should not be undertaken for gain. There is thus no profit to be made from such payments, no reward for the personal care involved in fostering children."

This argument, which was included in the defendant's care expert's report and thus formed the basis of the defendant's actuarial calculations, has not yet been considered by the Irish courts. It is an issue which plaintiffs' advisors are likely to have to address in future cases.

A further factor to be taken into account is the length of time for which these services should be provided and the extent to which they should be provided over time. This raises two distinct questions. In *McDonagh v McDonagh*[10], Costello J. had to decide whether the loss of dependency claimed on behalf of the infant children should extend after the age of eighteen years until they had finished university education. Having reviewed the evidence in relation to this particular family, he was forced to the following conclusion:

> "There are a great many injustices in Irish society and one of the most egregious is the fact that entry into third level education for young persons depends to a considerable extent on the level of income of their parents. I fully accept that the defendant would have hoped, like most parents hope, that his young children would gain a third level education, but the unfortunate fact is that he and his wife were living on a very low income and that it is very unusual for children living in homes with such a low income to gain the benefit of third level education. I must conclude therefore that the dependants have failed to establish that as a matter of probability they would, had their mother lived, been dependent on her beyond the age of eighteen."

Thus, in assessing the level of dependency, one must have regard to the circumstances of the particular plaintiffs and the circumstances in which they found themselves at the time of the death of the deceased. The second aspect, which must be taken into account when assessing the loss of dependency, is that regard must be had to the ages of the children. As children get older they will not require the same level of care. Also, older children in a family will be in a position to look after younger children e.g. by providing babysitting services for their younger siblings at the weekends. This means that the level of services, which were provided, by the mother or father would in all probability diminish over time. This must be taken into account when calculating the cost of providing those services by means of a carer or housekeeper.

In *Yardley v Brophy*[11], the plaintiff had been reared by his paternal grandmother, at first in Ireland and then in the U.K. The plaintiff did well at school and subsequently went on to university in London. In assessing the damages payable in respect of the loss of the mother's services, O'Neill J. stated that the level of services, which would have been provided by the mother, would have diminished over time as the plaintiff got older. In particular, they would have diminished considerably when the plaintiff went away to University. However, in reaching this assessment, one does not take account of the fact that if the accident had not occurred, the plaintiff would have had to have shared the services of the mother with his siblings and father. On this point, O'Neill J. stated as follows at p.4 of the judgement:

> "In my view, the Court in compensating for the loss of the care of the Plaintiff's mother, has to focus or cater for the situation in which the Plaintiff actually found himself after this tragic accident, namely, he lost a full time mother and carer. Assessing compensation on the basis that he would have had to share the time and services of his mother with his brother, Alex, and another sibling, is not an appropriate approach. A child of tender years cannot have half or a third of a carer. The entirety of their childhood needs have to be provided for, as indeed they were, by Mrs Yardley Senior and would have been by the Plaintiff's mother had she lived."

Thus in assessing damages for loss of dependency under the heading of loss of services provided by the father or mother within the home, account must be taken of the time which was available for the deceased to provide services within the home. Account must also be taken of the particular circumstances and expectations of the children at the time of the deceased's death. Lastly, account must be taken of the fact that the children's needs for such services will diminish over time.

The Provision of Gratuitous Services by Others

Often members of the deceased's family or other relatives will step in after the death of the deceased to provide services for the widow or widower and his/her children. Sometimes they may even take over the rearing of the child after the death of

8 1988 1WLR 847
9 1991 1AER 484 at P.489
10 1992 1IR 119
11 Unreported, O'Neill J. 23/1/2008

the mother. The question arises as to whether the fact that these services were voluntarily provided, should be taken into account when assessing this aspect of the loss of dependency of infant children. A review of the case law would seem to indicate that the provision of such services is not to be taken into account when assessing this head of loss.

In *Rawlinson V Babcock & Wilcox Limited*[12], the daughter had left school and was in employment at the time of her father's death. Her mother died seventeen months later. The daughter was taken in by the uncle and the question arose as to whether the benevolence of the uncle should be taken into account in computing the damages payable. The Court held that the precuniary value of the benevolence of the daughter's uncle was not a benefit to her resulting from her father's death, which ought to be taken into account in assessing damages.

A similar result was achieved in *Hay v Hughes*[13], where, following a fatal road traffic accident, which resulted in the death of a young husband and wife, the grandmother, who had three teenage children of her own, took in the two young children and cared for them. The defendants contended that in assessing the damages to which the boys were entitled under the relevant statutory provisions, the grandmother's services in caring for them should be taken into account in abatement of the loss suffered by the boys as a result of their mother's death; on the ground that the mother's services were benefits resulting from the mother's death, in that they were a predictable consequence of the fatality resulting from the accident.

The Court did not accept this argument. It held that in view of her circumstances at the time of the accident, it could not have been predicted with any certainty that the grandmother would take the boys into her care. Accordingly, the services, which the grandmother had provided and would continue to provide for the boys, were benefits resulting not from the death of their mother but from the decision made by the grandmother after the accident to take them into care. Those services were not to be taken into account to reduce the damages recoverable on behalf of the sons in respect of their mother's death.

A similar decision was reached in *Spittle v Bunney*[14], where the trial judge refused to take into account the voluntary services, which had been provided for the infant plaintiff by the aunt and her husband. The Court held that the provision of voluntary services by a member of the family in place of the services rendered by the mother, should not be taken into account because they did not "result from the death" of the deceased.

A similar approach has been taken in this jurisdiction. In *Cooper v Egan*[15], no deduction was made in the assessment of damages in respect of the voluntary services, which had been provided by the maternal grandparents who had cared for the infant plaintiff from the time of his infancy until he went to live with his father at the age of five years. In *McDonagh v McDonagh* [16], Costello J. held that the fact that the father's sister had provided support services for the family and would probably continue to do so after the trial of the action was irrelevant to the assessment of damages under this heading. In the course of his judgement in *Fitzsimmons v Telecom Eireann*[17] Barron J stated that voluntary benefits are disregarded not because they are voluntary, but because at the date of the death there was no reasonable expectation that they would occur. Finally, in *Yardley v Brophy* [18], the Court made no deduction from the assessment of damages due to the fact that the plaintiff's grandmother had looked after and cared for him on a voluntary basis since the time of the accident.

While the provision of gratuitous services will not prevent the dependants claiming damages for loss of services, this does not mean that the damages so recovered are payable to the person who provided the care for the dependants. In other words, the damages are designed as compensation to the statutory dependants for the loss of services provided by the deceased. They are not compensation or damages due to the carer for work done by them on a voluntary basis. This was made clear in *McDonagh V McDonagh*[19], where Costello J. made it clear that there can be no separate payment to the person who has provided the voluntary services:

> "I cannot in addition to this sum allow a claim for payment to the deceased's sister in law, firstly, because no agreement that she would be paid has been established, and secondly, because to allow it would involve a double payment, as the damages for loss of services gratuitously rendered have been calculated from the date of death."

This position should not be confused with the issue of "carers costs", which has arisen in general personal injury litigation. Even within that area there have been inconsistent approaches to this issue. In *Yun v MIBI & Tao* [20], Quirke J. awarded a sum of damages in respect of the continuous and comprehensive care given to the plaintiff by her boyfriend over the seven years since the time of the accident. He held that the plaintiff was entitled to recover damages to enable her to repay her boyfriend for the invaluable continuous care, which she had received, from him.

However, in *O'Brien v Derwin* [21], Charleton J. felt unable to award the wife of the plaintiff any compensation for the home care, which she had provided to him since the time of the accident. While the Judge had great sympathy for the position of the plaintiff's wife and the tremendous work that she had done, he was not satisfied on the authorities that he was entitled to make an award of damages for the care provided by her to her husband.

In England, it has been established that the damages obtained in respect of the services provided by a relative in a fatal injury case, are held in trust by the plaintiff for the relative: see *H v S*[22]. In that case, it was held that if appropriate, the Court should take steps to ensure that the trust is enforced

12 1966 3AER 882
13 1975 1AER 257
14 1988 1WLR 847
15 Unreported Barr J. 20/12/1990
16 1992 1IR 119
17 1991 1IR 536
18 Unreported O'Neill J. 23/1/2008
19 1992 1IR 119
20 2009 IEHC 318
21 2009 IEHC 2
22 2002 3 WLR 1179

for the benefit of the gratuitous carer, but it is not clear how, in practice, the Court might do this. However, in Ireland, it would seem that the damages recoverable by the statutory dependants for loss of services, which had been provided by the deceased, are recoverable for the use and benefit of the statutory dependants. Where replacement services have been provided by another member of the family, in the absence of any contract, they are not entitled to a share of the damages so recovered.

Extension of the list of Statutory Dependants

It is worthwhile noting that the list of statutory dependants has being extended over time. Section 47 of the Civil Liability Act, 1961 set out the list of statutory dependants on whose behalf a claim could be brought under Part IV of that Act. Section 47 was amended by s.1 of the Civil Liability (Amendment) Act, 1996, which substituted a new sub section to s.47. Essentially, it added to the list of statutory dependants by including in their number, a person whose marriage to the deceased had been dissolved by a decree of divorce that was granted under the Family Law Divorce Act 1996, or who had obtained a foreign divorce which was recognised in this jurisdiction.

It should be noted that s.49A provides that a divorced spouse, while being included in the list of statutory dependants, cannot participate in the award of damages in respect of mental distress caused to the person by the death of the deceased. Also included in the list of statutory dependants, are persons who were not married to the deceased but who, until the date of the deceased's death, had been living with the deceased as husband and wife for a continuous period of not less than three years. This sub-section was further amended by s.105 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010. This section provided that a "civil partner", within the meaning of the 2010 Act is included in the list of statutory dependants set out in s.47 of the Civil Liability Act, 1961.

Loss of Financial Support

Under this heading, the Court must look at the earnings, which the deceased had at the time of his/her death, together with an assessment of his/her future earning prospects. Obviously, much will depend on the type of earnings and the risks inherent in the continuation of the source of those earnings into the future. I only want to deal with one aspect under this heading. That is in relation to the assessment of damages where there are undeclared earnings. These are earnings, which have been legitimately earned by the deceased during his lifetime, but were not declared to the Revenue Authorities. There are conflicting decisions in this area.

In *Fitzpatrick v Furey & MIBI*[23], Laffoy J. held that in the absence of any compelling Irish authority on the issue, she was obliged to come to the view that the damages would have to be assessed not on the actual but undeclared earnings earned by the deceased prior to the time of his death but solely on the amount of his earnings which had been declared for tax purposes. However, an approach which may be seen as being somewhat more lenient, was adopted by the Supreme Court in *Downing v O'Flynn*[24]. In this case the deceased had operated a small retail fruit and vegetable business prior to his death. He had not made any returns to the Revenue in respect of his earnings from this business. On the appeal the defendants contended that the award, which had been made in the High Court, was contrary to public policy since it was based on the payment of maintenance from monies, of which part had been wrongfully withheld from the Revenue.

The Supreme Court in dismissing the appeal, held that the failure of the deceased to declare his income for income tax purposes, did not prevent the Court from making an award of damages for loss of dependency reflecting monies paid from that income during the deceased's lifetime, which award must be calculated on the basis of the deceased's income net of all tax due. In other words, when assessing the damages, which the defendant will be liable to pay to the dependants, the Court must look at the actual level of earnings earned by the deceased prior to the time of his death. From this figure must then be deducted the amounts which ought properly to have been paid by way of taxes, levies etc. One was then left with a net figure, from which one would have to ascertain the amount thereof which would have been applied to the use and benefit of the statutory dependants during the relevant period. Thus, the fact that the income was undeclared for tax purposes does not mean that it cannot be taken into account when assessing damages under Part IV of the Civil Liability Act, 1961.

It should be noted that s.28 of the Civil Liability & Courts Act, 2004 provides that in a personal injuries action, any income, profit or gain in respect of which the plaintiff is making a claim and in respect of which his said earnings were not properly declared to the Revenue Authorities, then such income shall for the purposes of assessing damages, be disregarded by the Court, unless the Court considers that in all the circumstances it would be unjust to disregard such income, profit or gain. However, the provisions of s.28 do not apply to an action under s.48 of the Civil Liability Act 1961.

Interest

When assessing the loss of services up to the date of trial, one has to look at the historical cost of furnishing those services and then add an appropriate rate of interest to bring the compensation up to the present values. This can be significant if there has been a considerable lapse of time between when the loss arose and the date of trial. In *Yardley v Brophy* [25], the plaintiff's actuary argued for the application of the Courts Act interest rate of 8% in respect of past losses. O'Neill J. did not accept this argument. He stated as follows in relation to past losses at p.7 of the judgement:

> "I am satisfied that using the Courts Act interest rate is not an appropriate and fair method of bringing historical cost up to present day values, because the 8% rate of interest greatly exceeds the prevailing rates of inflation over the intervening years. Clearly the best way of doing this is to increase the historic figure

23 1998 IEHC 91

24 2000 4IR 383

25 Unreported, O'Neill J. 23/1/2008

annually in accordance with inflation as reflected in the Consumer Price Index or depending on the particular cost involved, some other more relevant measure of inflation."

In that case the plaintiff's actuary had given evidence that the average rate of inflation over the period 1992 to 2008 was 3.1% which the Judge held could be accurately expressed as a 24% uplift on the historical figures. The defendants did not call any evidence to contradict this. O'Neill J. adopted the average rate of inflation of 3.1% for the uplifting of values by 24% as the best and fairest method of bringing historic values to their present day equivalent.

Re-marriage of Deceased's Spouse/Partner

This is one of the most difficult aspects of the whole area involving the assessment of damages in fatal injuries actions. The question is, to what extent, if any, should the prospect or fact of re-marriage be taken into account by the Court when assessing damages in respect of the loss of financial support or loss of services provided by the deceased's spouse or partner? The issue was touched upon by Costello J. in *McDonagh v McDonagh*[26], where the Judge simply stated that a discount would have to be made in respect of the commercial cost of providing a housekeeper to look after the children, due to the possibility that the husband might re-marry. Because of this fact and other matters, which had to be taken into account in discounting the commercial cost, he allowed half of the figure, which had been proposed as the commercial rate under this heading.

The issue arose much more strikingly in the case of *Fitzsimmons v Telecom Eireann*[27], where the plaintiff's husband had been killed when he came into contact with a loose telephone wire owned by the first named defendant, which had been dangling from a pole owned by the second named defendant. At the time of her husband's death in 1979, the plaintiff was thirty-four years of age and had five children ranging in age from two to eleven years. The plaintiff re-married in 1985 and had had another child prior to the trial of the action. The parties sought judicial guidance on the question whether the benefits arising from the widow's re-marriage should be taken into account in assessing damages and, if so, on what basis.

Having reviewed the authorities, Barron J. stated that the basis of the assessment of damages for fatal injuries is the balancing of losses and benefits. Like any other balance sheet, it seemed to him appropriate to determine first what items appear on the balance sheet and then, secondly, the amount of such items. He held that this would result in a two tier approach, whereby whether the particular item should appear for consideration would be determined as of the date of death and, if the evidence was to the effect that the items should be included as either a benefit or a loss of which account should be taken in the calculation of damages, that calculation should take place at the trial of the action. In relation to the issue of the prospect or fact of re-marriage, he stated as follows at p.552:

> "In the circumstances, I would answer the questions, which I have already posed in the following way. The evidence at the hearing to assess damages insofar as it relates to the re-marriage should be directed in the first instance to establish whether or not there was a reasonable expectation at the date of death that this would occur. On the basis that this has been established, the evidence should then be directed to determining the then value of the benefits accruing to each of the dependants by reason of that re-marriage. The onus of proof in each case lies on the defendants. The standard of proof of reasonable expectation is that of reasonable probability: *Pym v Great Northern Railway Company* (1863) 4B.&S396."

A curious feature of this decision is that based on a perceived probability, or lack of probability, at a particular point in time, being the date of death, a set of circumstances, which subsequently came to pass, being the plaintiff's re-marriage, could be ignored when assessing damages at the trial of the action. This just goes to show that this whole area is one that is beset with difficulty.

In the *Fitzsimons* case, the Court did not have to undertake this somewhat difficult analysis. The trial judge merely set down the scope of the inquiry that would have to be undertaken when assessing this head of loss. The case was settled, so it was not necessary to hold this inquiry. Similar problems have arisen in relation to the issues that are thrown up in relation to supervening tortious injuries, which occur after the accrual of the cause of action prior to the trial of the action: *Baker v Willoughby*[28], *Jobling v Associated Dairies Limited*[29], and *R.L. v Minister for Health & Children*[30].

In the United Kingdom, the matter has been resolved by statue, which provides that when assessing damages, the prospect or fact of the deceased's spouse remarrying is ignored. Under Irish law, it would appear that the Court is obliged to embark on a somewhat distasteful inquiry when it must assess the likelihood of a surviving spouse remarrying, when calculating the damages recoverable for loss of services or loss of financial support into the future.

The easier option may be for the legislature to provide that the prospect of re-marriage should be ignored when assessing damages under this heading. However, to do so, may be to ignore a future likely contingency and thereby do an injustice to the defendant. The Courts are willing to take account of future contingencies when assessing damages. This is done all the time when carrying out the so-called *Reddy v Bates* deductions in personal injuries litigation. If a person is killed, leaving a young spouse or partner, perhaps with a young child or children, is it right to ignore the possibility, or even a probability, that a young widow or widower in their twenties or early thirties, is likely to get married later in life and thereby may not suffer the loss of services or loss of income for the remainder of their life?

The alternative is to ignore that possibility so that if it occurs, and the new spouse or partner furnishes financial stability or other services, that is simply a windfall to the

26 1992 1IR 119, at 127
27 1991 1IR 536
28 1970 AC 467
29 1982 AC 794
30 Unreported, O'Neill J. 6/4/2001

statutory dependants. Whatever about the merits of this argument and the difficulty which might be encountered in trying to resolve it, one can only say that on the basis of the decision in *Fitzsimmons v Telecom Eireann*[31], one must somehow endeavour to assess the prospect of re-marriage at the time of death.

If the prospect of re-marriage seems probable at that time, i.e. if re-marriage is deemed probable at the time of death (though how one would prove such a probability is not at all clear), or more particularly if the surviving spouse had in fact re-married by the time of the trial of the action, then this would appear to be something that would have to be factored in when assessing damages under Part IV of the Civil Liability Act, 1961. While it is certainly not an easy issue, it is one that cannot be ignored by either the plaintiff or the defendant when preparing for the trial of the action.

31 1991 1IR 536

Conclusion

It is been said in a number of cases that the assessment of damages in fatal injuries cases cannot be done with scientific accuracy. This is because one is dealing with an assessment of probabilities both in relation to what would have been the deceased's ongoing ability to provide financial support and to provide other services to members their family. There are many variable factors, which can come in to play when carrying out this assessment. In addition, one also has to look at the likely needs of the statutory dependants over time and consider how they would have been satisfied had the deceased not been killed. In conclusion, one can only advise practitioners that the preparation of a claim for damages in a fatal injuries action, is one which should be undertaken with patience and careful attention. ■

Citizenship: The Court of Justice Decision in *Zambrano*

Aoife McMahon BL*

The recent judgment of the Court of Justice of the European Union (Court of Justice[1]) in the case of *Gerardo Ruiz Zambrano v. Office national de l'emploi*[2] marks an exciting milestone for the development of the entity of the European Union (EU). To appreciate its significance, it should be considered in the context of this development to date. This article will first set out a broad overview of the evolution of the objectives of what is now the EU. It will then examine the detailed Opinion of Advocate General Sharpston in this case before finally considering the judgment itself and its implications in this jurisdiction.

Free movement of nationals of member states of the EU (and all its former labels) has long been a fundamental component of the European integration project. Initially, this was confined to workers in line with the objective of the project at that time to create an internal market[3], an inherently trade orientated project based on the premise that mobile factors of production were more advantageous to trade between member states than those which remained static.

As what is now the EU has developed, so too have its objectives. Initially destined to serve the economic interests of the member states, it has gradually been conferred with greater competences in order to serve broader interests: from the creation of the internal market (exclusively economic) to a monetary union, to the establishment of an area of freedom, security and justice (comprising police and judicial cooperation) to the protection of fundamental rights.

The concept of 'Union citizenship' was introduced by the Treaty of Maastricht of 1992 through Article 20 TFEU (formerly Article 17 TEC, originally Article 8 of the Treaty of Maastricht). Elucidation of the precise meaning of this concept has since been left to the case-law of the Court of Justice and secondary legislation[4]. The *Zambrano* decision constitutes a further and potentially far-reaching progression in this regard. The material facts of this case clarify its significance in real terms.

Material facts of the Zambrano case

A reference was made by the Belgian Employment Tribunal to the Court of Justice in the context of proceedings between Mr. Ruiz Zambrano, a Columbian national, and the National Employment Office concerning the refusal of the latter to grant him unemployment benefits under Belgian legislation. Mr. Zambrano and his wife, also of Columbian nationality, have one child of Columbian nationality and two children of Belgian nationality. As visa holders, the family of three were permitted entry into Belgium on the 7th April 1999. On the 11th September 2000, Mr. Zambrano's application for asylum was refused and an order was made requiring him to leave Belgium. The family was nevertheless allowed to remain in accordance with the principle of non-refoulement.

Mr. Zambrano made three unsuccessful applications for a residence permit, although as a result of the third, he was granted a residence registration certificate covering his stay in Belgium from the 13th September 2005 to the 13th February 2006. He sought the annulment of those decisions and, in the interim, the suspension of the order requiring him to leave Belgium. At the time the reference for a preliminary ruling was made, these proceedings remained pending.

In October 2001, Mr. Zambrano obtained full-time employment with a Belgian company under an employment contract for an unlimited period. Although Mr. Zambrano was not in possession of a work permit throughout the five years he worked for this company, his work was declared to the Belgian National Social Security Office. His pay was subject to statutory social security deductions in the usual way and his employer paid the corresponding contributions. On the 10th October 2005, Mr. Zambrano's employment contract was temporarily suspended, at which point he applied for temporary unemployment benefits. On the refusal of this application on the ground that he did not hold a work permit (something in turn he could not obtain unless in possession of a residence permit), he initiated proceedings before the Belgian Employment Tribunal ('the first claim'), but was shortly after recruited to return to work full-time for the same company.

On discovering Mr. Zambrano at work while not being in possession of a valid work permit, an official investigator issued an order for the immediate termination of his employment contract. His employment contract was duly ended without compensation on the grounds of *force majeure*. Mr. Zambrano once more applied to the National

* Many thanks to Anthony Lowry BL for his advice on this article. All errors remain of course my own.

1 "Court of Justice" will be used as an umbrella term to denote the present Court of Justice of the European Union and the predecessors of this Court.

2 Case C-34/09, judgment of the Grand Chamber of 8th March 2011.

3 See Articles 45 and 46 of the Treaty on the Functioning of the European Union (TFEU) (formerly Articles 39 and 40 of the Treaty establishing the European Community (TEC), originally Articles 48 and 49 of the Treaty of Rome) and Council Regulation 1612/68/EEC of 15th October 1968 on freedom of movement of workers within the community.

4 See such cases as *Gryzelezyk* Case C-184/99 [2001] ECR I-6193, *Baumbast* Case C413/99 [2002] ECR I-7091, *Teixeira* Case C-480/08, judgment of 23rd February 2010 (not yet reported) and Directive 2004/38/EC of 29th April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states.

Employment Office, this time for full unemployment benefit, and was again unsuccessful. He brought a further action before the Tribunal challenging this decision ('the second claim').

The first claim and the second claim form the subject matter of the main proceedings before the referring court. The case was first considered at European level by Advocate General Sharpston, who delivered a comprehensive Opinion on the 30th September 2010.

Opinion of Advocate General Sharpston

AG Sharpston reformulated the questions submitted by the Belgian referring Court into three possible approaches the Court of Justice could take to this case:

I. Is cross-border movement required to trigger the Treaty's provisions on citizenship of the Union? Did the case at hand concern a 'purely internal' situation or was there a sufficient link with EU law for citizenship rights to be invoked? Does Article 21 TFEU[5] encompass two independent rights - a right to move *and* a free-standing right to reside - or does it merely confer a right to move (and *then* reside) [the 'free-standing right to reside' approach].
II. What is the scope of Article 18 TFEU (the prohibition of discrimination on grounds of nationality)? Can it be applied so as to resolve instances of reverse discrimination created by the provisions of EU law relating to citizenship of the Union? [the 'reverse discrimination' approach].
III. What is the scope of EU fundamental rights? Can they be relied upon independently? Must there be some point of attachment to another, classic, EU right? In the present case, the fundamental right in question is the right to family life [the 'EU fundamental rights' approach].

(i) A Free-standing Right to Reside

In relation to the first approach, AG Sharpston stated that recent case-law of the Court of Justice had diluted the requirement of cross-border movement to trigger the applicability of EU law to the extent that there were "citizenship cases in which the element of true movement is either barely discernable or frankly non-existent"[6]. In light of this development of the case-law, "it would be artificial not openly to recognise that ... Article 21 TFEU contains a separate right to reside that is independent of the right of free movement"[7].

Such a finding would seem to oppose a literal reading of Article 21 which uses the singular term "right", followed by a combination of "to move and reside freely". Nevertheless, the Court of Justice tends to favour a teleological or purposive approach and to date the purpose of this right has been tied in with economic interests and encouraging cross-border movement between member states. The matter to be determined by the Court was whether the purpose behind this right had evolved.

Aware of the significance of such a step, AG Sharpston took care to afford member states a certain margin of appreciation in this regard. First, she made it clear that "member states control who can become one of their nationals. The Court is here concerned exclusively with the rights that such persons may invoke, once they have become nationals of a member state, through their simultaneous acquisition of citizenship of the Union"[8]. Secondly, she acknowledged that in certain circumstances interference by a member state in the enjoyment of citizenship rights may be justified, provided the principle of proportionality is respected. The Advocate General specifically referred to one argument that could be used by a member state to justify any interference, namely the risk that a Union citizen would become an unreasonable burden on the public finances of such member state[9].

In relation to the case of Mr. Zambrano, AG Sharpston considered that the national court would have to take into account the following facts: that Mr. Zambrano worked full time for nearly five years, that his employment was declared to the Belgian National Social Security Office, that he paid the statutory social security deductions and that his employer paid the corresponding employer's contributions. It was clear therefore that he had in the past contributed steadily and regularly to the public finances of the host member state. She opined that these factors pointed to the conclusion that it would be disproportionate not to recognise a derivative right of residence in the present case. She nevertheless made it clear that ultimately this decision was one for the national court alone.

(ii) Reverse Discrimination

The second alternative approach placed before the Court was that Article 21 TFEU coupled with Article 18 TFEU (the prohibition of discrimination on grounds of nationality) would operate to prevent reverse discrimination and so bestow a similar right in reality on Union citizens.

In light of the recent evolution of the case-law of the Court of Justice diluting the distinction between economically active and non-economically active Union citizens[10] and removing the distinction between lawful and unlawful residence for the enjoyment of derivative rights by Union citizen family members[11], AG Sharpston suggested that it was now timely for the Court to deal openly with the issue of reverse discrimination i.e. the distinction between the rights enjoyed by Union citizens in a member state other than their country of nationality and those enjoyed by Union citizens within their country of nationality.

5 This article provides that "every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".
6 Para. 77 of the Opinion of AG Sharpston, see such cases as *Garcia Avello* Case C-148/02 [2003] ECR I-11613 and *Rottmann* Case C-135/08 [2010] ECR I-0000.
7 Para. 100 of the Opinion.
8 Para. 105 of the Opinion.
9 Here, she adopted the reasoning of the Court of Justice in *Baumbast* Case C413/99 [2002] ECR I-7091.
10 *Gryzelczyk* Case C-184/99 [2001] ECR I-6193.
11 *Carpenter* Case C-60/00 [2002] ECR I-6279 and *Metock* Case C-127/08 [2008] ECR I-06241.

Although an increasingly relaxed approach to the requirement of cross-border movement where the protection of fundamental rights is concerned resulted in a greater protection of such rights, it also created undesirable legal uncertainty. A better approach, in AG Sharpston's view, would be to formally expand the limits of Article 21, while setting out clear conditions that must be met in order to enjoy such additional protection. She proceeded to propose three cumulative conditions that could serve this purpose: 1) Article 18 TFEU should be interpreted as prohibiting reverse discrimination caused by the interaction of Article 21 TFEU with national law, 2) when such interaction entails a violation of a fundamental right protected under EU law and 3) where at least equivalent protection is not available under national law.

(iii) EU Fundamental Rights

A final alternative approach presented to the Court of Justice was to determine that Union citizens could rely on the fundamental right to family life independently of any other provisions of EU law. European fundamental rights can at present only be invoked when the contested measure comes "within the scope of application of EU law". The interpretation of this limit has proved problematic but is, in the Advocate General's view, an important matter to be resolved as "the desire to promote appropriate protection of fundamental rights must not lead to usurpation of competence. As long as the EU's powers remain based on the principle of conferral, EU fundamental rights must respect the limits of that conferral"[12]. She proposed that the clearest rule would be that, provided the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect a Union citizen even if such competence has not yet been exercised (as is presently required).

The Advocate General was of the view that such a considerable development would require both an evolution in the case-law of the Court and an unequivocal political statement pointing at a new role for fundamental rights in the EU. The problem with the present case was the material point in time for the application of EU law. This was on the 1st September 2003, on the occasion of the birth of Mr. Zambrano's second child - the entry into the equation of a Union citizen. At that time, the Court had clearly stated in Opinion 2/94 that the European Community had no power to ratify the European Convention of Human Rights 1950 (ECHR). The Charter of Fundamental Rights of the EU was still soft law, with no direct effect or Treaty recognition and the Lisbon Treaty had not yet even been drawn up. In this context, AG Sharpston did not feel that the necessary constitutional evolution in the foundations of the EU, such as would justify a finding that EU fundamental rights were capable of being relied upon independently as free-standing rights, had yet taken place.

This conclusion seemed to indicate, on the contrary, that given the evolution of fundamental rights in the EU legal structure since 2003, namely the conferral of a binding legal status on the Charter and the accession of the EU to the ECHR, the Court of Justice in the near future would be in a position to take such a step. Indeed, AG Sharpston stated explicitly "that (sooner rather than later) the Court will have to choose between keeping pace with an evolving situation or lagging behind legislative and political developments that have already taken place"[13].

Judgment of the Court of Justice

Of the three approaches proposed by the Advocate General to the Court of Justice, the first is the most far-reaching in terms of the duties of member states vis-à-vis Union citizens, in that the latter would in this case include their own citizens. The official removal of the cross-border movement requirement would bring the EU into the traditionally sovereign realm of the relationship between member states and their own citizens, an area previously classified as 'purely internal' by the Court. The second approach affords member states a greater margin of appreciation in that Union citizenship rights would not come into play unless national citizenship rights were less than equivalent to such. The first approach relating to citizenship rights is also broader in scope than the third approach relating to fundamental rights as the former incorporates both fundamental rights and the special state-citizen relationship.

This first approach is the approach the Court of Justice chose to take. The Court felt that as the Union Citizenship Directive 2004/38/EC contained an explicit cross-border movement requirement at article 3(1) of same, this Directive was not applicable to the present case. It instead based its conclusion squarely on the citizenship provisions of Article 20 TFEU, which did not depend for their application on any cross-border movement element and conferred "the status of citizen of the Union on every person holding the nationality of a member state"[14].

The Court held clearly and simply that "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union"[15]. As to the substance of EU citizenship rights, it can be gleaned from this judgment that Union citizens enjoy at a minimum a free-standing right to reside in their member state of nationality. The genuine enjoyment of the substance of this right requires a minor citizen to have the company of family members on whom he or she is dependent and furthermore to be afforded the possibility of having sufficient material resources to live. Specifically, the Court held that a refusal to grant a residence permit and work permit to a third country national with dependent minor children in the member state where those children are nationals and reside had the effect of depriving those children of the genuine enjoyment of the substance of their Union citizenship rights.

The pragmatic nature of the Court's approach is evident in its reasoning:

> "It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union,

12 Para. 162 of the Opinion.

13 Para. 177 of the Opinion.

14 Para. 40 of the Judgment.

15 Para. 42 of the Judgment.

would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union"[16].

Implications of the judgment in this jurisdiction

There has been much judicial consideration of the issue of the appropriate balance between the rights of Irish citizen children and the interest of the State in immigration control. The Irish Courts have tended to defer to a large degree to decisions of the Minister for Justice, Equality and Law Reform to deport family members of such citizens.

It has consistently been held that while an Irish citizen child has, *prima facie*, a right to remain in the State in the society, care and company of his or her non-national parents, this right is qualified and the parent of a citizen child may be deported even if the effect is that the child must follow. Such a deportation will be lawful once the Minister has considered all relevant factors of the individual case, identified a substantial reason for the deportation (such as the protection of the integrity of the State's asylum and immigration system) and concluded that the latter interest outweighs the rights of the citizen child. An Irish citizen cannot be directly deported, but constructive or *de facto* deportation can in this way be permissible in certain circumstances.

Several aspects of the judicial and executive approaches to this issue demonstrate the relatively light weight of the balance on the side of citizenship rights. In the recent decision of *Alli v. Minister for Justice*[17], a discussion of the concept of citizenship itself suggested that this was limited to "lifelong rights to hold an Irish passport, to enter and leave the State at will, to apply for employment and to vote in constitutional referendums… The removal of the citizen child's parents and the consequent following of that child do not strip the child of citizenship rights and privileges as those rights can be enjoyed fully when the child is of age if he/she seeks to return to the birth country". Another judicial pronouncement, though contained in a dissenting judgment, makes the argument that citizenship must be more than this: "the deportation of a child of tender years, in practice often in the early months of life, automatically and unarguably deprives that child of the possibility of being nurtured and educated in the country of his or her citizenship. The notion of postponement is offensive to logic… A child who is *de facto* deported from the State before his education commences cannot conceivably be 'part of the Irish nation' or 'share its cultural identity and heritage[18]."[19]

A further aspect of the approach taken to Irish citizen child cases which has diluted the concept of citizenship somewhat is the combined examination, evident in some ministerial decisions, of citizenship rights and of the rights protected by article 8 ECHR. In the former case, both a right of residence in one's country of citizenship and a right to respect for family life are at play; the deportation of the parent of a citizen child necessarily entails the interference with one or other of these. The examination for the purposes of article 8 ECHR seeks only to measure the extent of the interference with the right to respect for family/private life and the test applied to this end "necessitates an examination of the facts of the particular family and a realistic and reasonable assessment of why they cannot live together in their country of origin"[20]. This point of departure is not appropriate when considering citizenship rights and the special responsibility of a state towards its citizens.

A final indication of the limited value attached to the notion of citizenship in this jurisdiction is the nature of the facts considered relevant for the purposes of the ministerial assessment of each individual case. These have been held to include "the age of the child, the length of time he or she has been in the State, the part, if any, he or she has taken in the community … [and] his or her education and development within the State…"[21] These factors are personal to the citizen and suggest that there are different levels of citizenship. They can be contrasted with the factors AG Sharpston considered appropriate for the balancing exercise between the rights of Union citizens and the interests of member states, which are specific to the particular interests sought to be protected by the State such as, for example, the risk that a Union citizen would become an unreasonable burden on public finances.

The Court of Justice in *Zambrano* has, on the contrary, attached great value to the notion of citizenship. Unlike the Opinion of AG Sharpston, the judgment makes no reference to any proportionality test or balancing exercise that need be applied between the rights of Union citizens and the interests of member states. Underlying the conclusion is the proposition that although a member state has the sovereign power to determine to whom it will or will not grant citizenship, once such status is granted, the member state must take its corollary responsibilities seriously.

This case is significant both in terms of its effect on EU law and on Irish law. In respect of the former, it stands alongside such seminal judgments of the Court of Justice as *van Gend en Loos*[22], *Costa v. E.N.E.L.*[23] and *Cassis de Dijon*[24] in as far as it contributes to the continuing development of the

16 Para. 44 of the Judgment.

17 Joined cases of *Alli v. The Minister for Justice, Equality and Law Reform* [2009] IEHC 595, *Igiba v. The Minister for Justice, Equality and Law Reform* [2009] IEHC 593 and *Asibor v. The Minister for Justice, Equality and Law Reform* [2009] IEHC 594 (Unreported, High Court, Clark J., 2nd December 2009).

18 Of Article 2 of the Constitution of Ireland 1937.

19 Dissenting judgment of Fennelly J. in joined cases of *A.O. and D.L v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1, at pp. 184 to 185.

20 *Alli v. Minister for Justice* [2009] IEHC 595, at p. 22 of the judgment.

21 *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 I.R. 795, at p. 818, para. 68.

22 *van Gend & Loos v. Netherlands Inland Revenue Administration*, *Case* 26/62 [1963] ECR 1.

23 *Flaminio Costa v. ENEL*, Case 6/64 [1964] ECR 585.

24 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78 ECR [1979] 649.

EU. The old economic ideology of free movement behind the EU has been replaced with one based on fundamental rights. This judgment gives a basis in reality to the description of citizenship as the next step in the European incremental development strategy.

As regards its effect on Irish law, the judgment of the Court of Justice will require the executive and judiciary in this jurisdiction to reappraise the weight currently given to the rights of Irish citizens when balanced against the interest of the state in controlling immigration. At present, more than 100 applications for leave to seek judicial review of deportation orders on the ground that such constitute an unlawful interference with the rights of Irish citizen children are pending before the High Court. ■

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L to R: Mr Justice Ronan Keane, the Chief Justice (as he then was); Children of Calcutta; Sharon Corr at the 2010 Calcutta Run

Maurice Gaffney SC and his devil family

Maurice Gaffney SC recently celebrated over 60 years of practice at the Irish Bar with his devils and his devils' devils. A dinner was held in his honour at Kings Inns and to mark the occasion, Mr Gaffney composed a poem to his entire devil family. His first devil was Esther Hogan (now a solicitor) and she was followed by the now retired Circuit Court Judge, Mr Justice Harvey Kenny. Patrick Keane SC was Mr Gaffney's third devil, followed by the Hon. Mr Justice, Esmond Smyth, Judge of the High Court.

The poem is set out below.

DEVILS MAY CARE

One day my friend Esther came up to my floor
She was then only twenty-one and not a day more
She said: "Would it be an impossible bore
To let me study your methods of practice, and more
To bring me on Circuit at first as a visitor
So in time I may get to know a Solicitor
Who may start me off with some modest commission
Such as getting an Infant the Judge's permission
To settle some action for pitiful money
Together with costs, which for me would be honey!"
By way of reply I took from a cupboard
Two beautiful horns and asked her come forward
I fastened the first just above her right ear
And the next o'er the left, as I dropped a small tear
And I told her she must now accept without cavil
That for ever thereafter she'd be known as my Devil!

Then and since then its been my revelation
That friendship with Devils need not bring damnation.
In fact these same friendships have brought me great joy
Which grew with new Devils as each year passed by.
For Esther was followed by Harvey and then
Patrick then Esmonde appeared on the scene
Esmonde himself was the last of my lot,
The best bunch of Devils a Master e'er got,
The proof of their value was around us that night
When our ancient and loved King's Inns was bedight
With a gold chain of Devils that spanned fifty years
Some young, and some beautiful, all sure without fears
That so fecund a Bar may need fear the evils
That would surely arise if it found no lovely Devils!

THREE CHEERS FOR THE DEVILS

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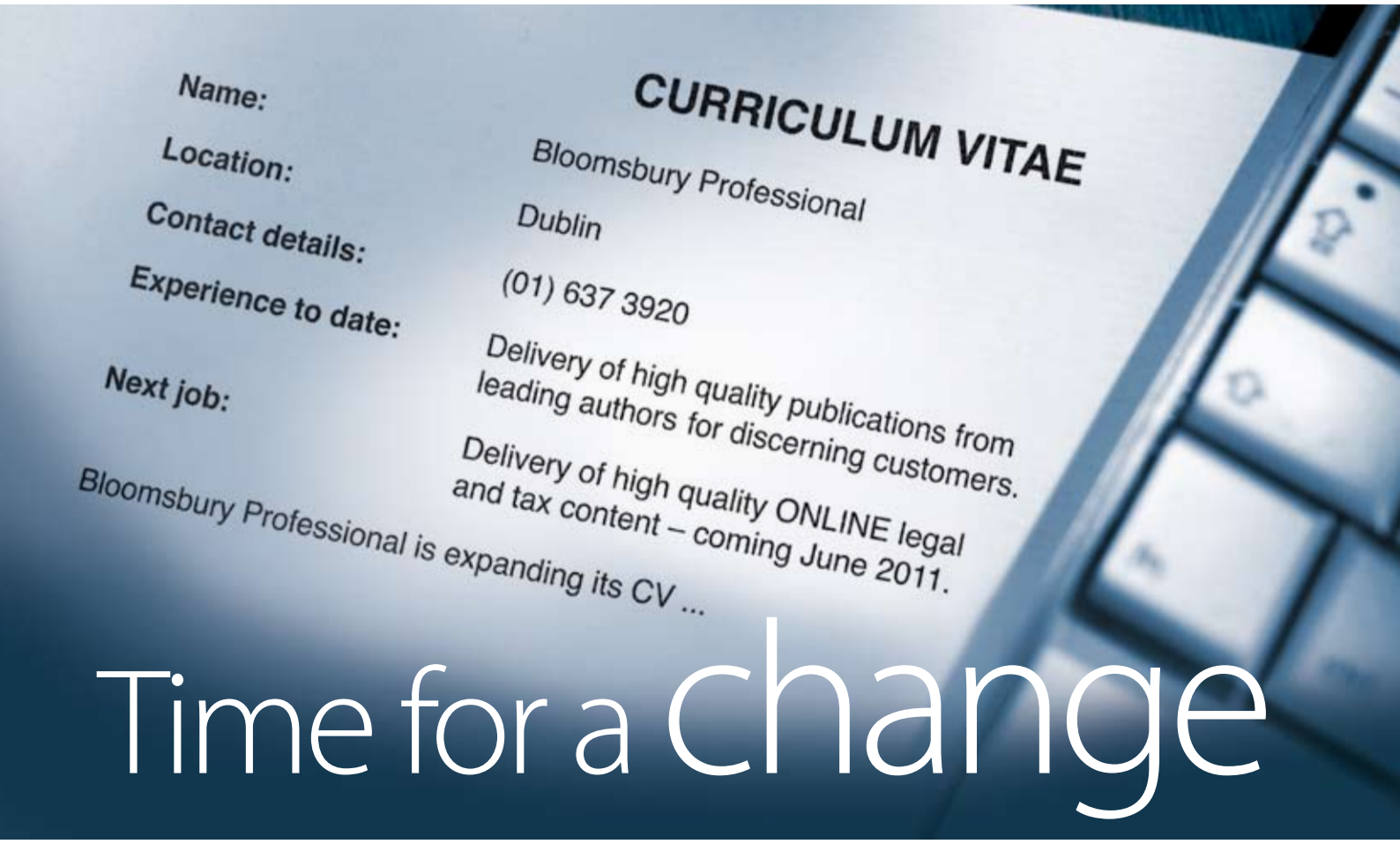

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