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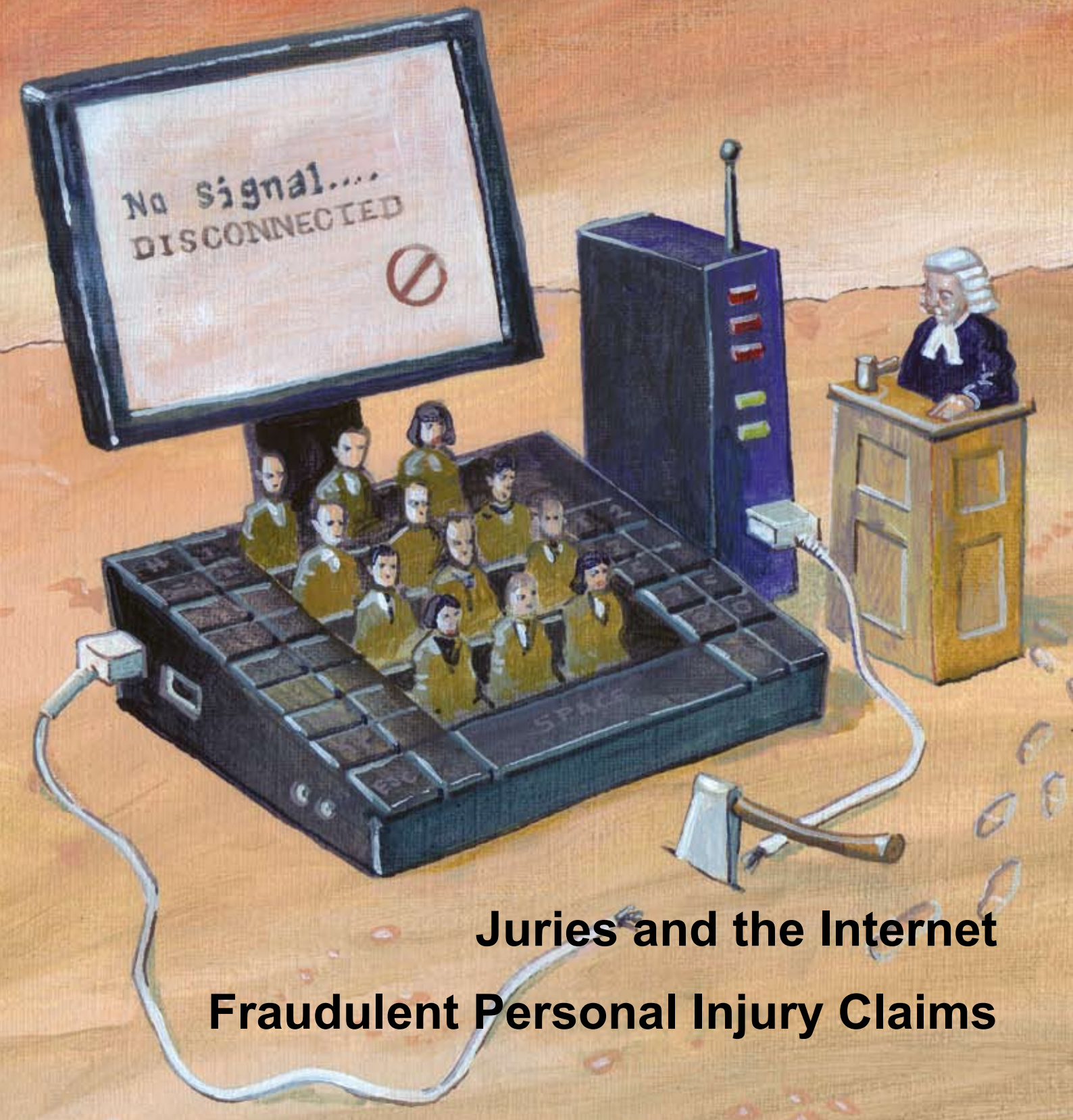

Juries and the Internet

Fraudulent Personal Injury Claims

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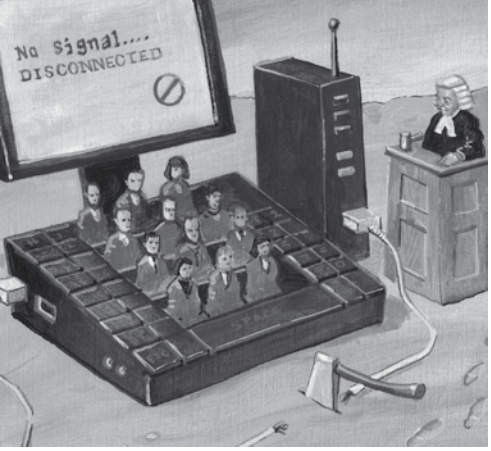

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Fraudulent and Exaggerated Personal Injury Claims – A Word of Warning

Anthony Barr SC

Introduction

Section 26 of the Civil Liability & Courts Act, 2004 (hereinafter referred to as the "2004 Act") provides for a somewhat draconian remedy to be applied where a Plaintiff has been found to have given false or misleading evidence. In short, his claim will be dismissed. This article looks at some of the leading cases, which have dealt with this topic with a view to identifying the areas where Plaintiffs have got into trouble. It also sets out the principles, which emerge from a review of the relevant case law.

Section 26 of the Civil Liability & Courts Act, 2004

Section 26 of the 2004 Act comes under the heading of "Fraudulent Actions" and provides as follows:

> 26. (1) If, after the commencement of this section, a Plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced evidence that –
>
> (a) is false or misleading in any material respect, and
>
> (b) he or she knows to be false or misleading,
>
> the Court shall dismiss the Plaintiff's action unless, for reasons that the Court shall state in its decision, the dismissal of the action would result in injustice being done.
>
> (2) The Court in a personal injuries action shall, if satisfied that a person has sworn an Affidavit under Section 14 that –
>
> (a) is false or misleading in any material respect and
>
> (b) that he or she knew to be false or misleading when swearing the Affidavit,
>
> dismiss the Plaintiff's action unless, for reasons that the Court shall state in its decision, the dismissal of the action would result in injustice being done.
>
> (3) For the purposes of this section an act is done dishonestly by a person if he or she does the act with the intention of misleading the court
>
> (4) This section applies to personal injuries actions –
>
> (a) brought on or after the commencement of this section, and
>
> (b) pending on the date of such commencement.

Early Cases

In *Mulkern v Flesk,*[1] liability was not in issue between the parties. However the Defendants applied to have the Plaintiff's action dismissed pursuant to S.26 of the 2004 Act, because the Plaintiff had stated to a prospective employer that she did not suffer from any back injury. The Plaintiff admitted in evidence that that had been a lie, which she had told to her prospective employer, because she wanted to obtain the job on offer. Kelly J. refused the Defendant's application and stated:

> "I do not accept that the Plaintiff gave false or misleading evidence. It is not to her credit that she told untruths to her perspective employer. I am satisfied that she very much wanted and indeed needed to obtain employment with Boston Scientific. That may explain why she was untruthful in her dealings with that employer, although it does not excuse such behaviour. But I do not accept that she gave false or misleading evidence to the Court."

One of the first cases to hold that S.26 did apply was *Carmello v Casey*[2]. In this case, liability had been conceded. The Plaintiff was a passenger in the car driven by the first named Defendant. The Plaintiff alleged that he had suffered a number of injuries in the road traffic accident, including facial numbness caused by a blow to the side of his face. It transpired that he had not disclosed to his doctors that he had been involved in a subsequent accident, when he had been struck in the face by the branch of a tree. In cross-examination, the Plaintiff stated that he simply did not recall any such incident. The Defendants had learned of it from documentation obtained in a different case. Peart J. held that on quantum, the Plaintiff would have been entitled to damages in the sum of €50,000.00 for his injuries. However, the Judge dismissed the Plaintiff's action under S.26 of the 2004 Act.

He held that the question for the Court under S.26 was whether on the balance of probability, the Court could be satisfied that in relation to his evidence and/or his verifying affidavit, the Plaintiff had knowingly given false and/or misleading evidence in a material respect. He held that the section was mandatory in its terms once the Court was satisfied on the balance of probability, unless to dismiss the action would result in injustice. The Court first had to look to the Plaintiff's evidence and then at all the surrounding circumstances, including what was contained in the pleadings,

1 (2005) IEHC 48, Unreported Kelly J. 15/2/2005.
2 (2008) 3 I.R. 524

the Replies to the Notice for Particulars and the medical reports and arrive at a conclusion as to the truthfulness of the Plaintiff on the balance of probability.

The Judge held that on the balance of probability, the Plaintiff had been deliberately untruthful in his pleadings, in his evidence and in his affidavit of verification in an effort to obtain an award of damages to which he was not entitled from the Defendants. He held that the Plaintiff knowingly gave false and misleading evidence contrary to S.26 (1) of the 2004 Act in relation to questions about his injuries, which was a material respect within the meaning of S.26. The Judge also held that he swore a verifying affidavit in respect of facts contained in the Statement of Claim and the Replies to a Notice for Particulars, knowing that some of what was contained therein in relation to his injuries was false and misleading contrary to S.26 (2) of the 2004 Act. The Judge pointed out that to knowingly give false evidence under oath was a serious criminal offence. Proof of such offence was beyond a reasonable doubt, but under S.26, the Court made its finding on the balance of probability.

Plaintiffs need to take care when they have a history of previous accidents. They need to take care when giving their pre-accident history to both treating and reporting doctors. In *Singleton v Doyle,*[3] the Plaintiff sued in respect of injuries suffered in a road traffic accident in 1999. She had been involved in a previous accident in 1990. Peart J. found that the Plaintiff was a poor historian in relation to her pre-accident medical history. However, he accepted that she was a *bona fide* witness and held that her credibility should not be cast in doubt as a result of discrepancies in her evidence.

Cross-examination had revealed that she failed to inform some of her medical professionals of what precise sequelae she suffered as a result of her previous accident in 1990. While some of the medical witnesses stated that it would have been helpful if they had been informed of these matters, none stated that this information would have affected the nature of the treatment, which they offered or recommended to the Plaintiff in relation to the injuries sustained in the 1999 accident. In the circumstances, Peart J. held that it was not a case in which the Court should regard the Plaintiff as having deliberately and materially concealed relevant information from her medical advisors in an effort to either exaggerate her claim, mislead the Court or mislead the medical professionals or to induce or enable them to give evidence which she knew to be false or misleading. In the circumstances, he did not apply the provisions of S.26 to the Plaintiff's case.

Donovan v Farrell[4] was also a case where the Plaintiff had failed to disclose part of her previous medical history. Peart J. declined to hold that the Plaintiff had been exaggerating her claim when she failed to mention to her doctor that she had suffered back pain during a pregnancy many years earlier. The Trial Judge was satisfied that the back pain which the Plaintiff had experienced during her pregnancy and for which she had received treatment at the time many years previously, was not relevant to the progress of the injury which she sustained to her back in the accident, the subject matter of the proceedings.

In addition, the Judge held that there was no doubt that when examined by the Defendant's doctor, the Plaintiff had told him that she was unable to do any gardening. Four days after that examination, the Plaintiff had been filmed by a private investigator cutting the front lawn of her home, carrying the mower back into the house, and sweeping up the cut grass and other garden debris. All of these activities involved bending and lifting. However the Judge noted that it was accepted that the mower was an electric motor and was not heavy. He also noted that the Plaintiff was not totally unrestricted in her movements and she appeared to take care in relation to how she bent down. In the circumstances, Peart J. was not inclined to penalise the Plaintiff in relation to stating her inability to do gardening so categorically, even though she ought to have given a more comprehensive answer to the doctor's questions in that regard.

Gammell v Doyle[5] was a very unusual case. The Plaintiff had attended at the licensed premises of the first named Defendant. The Plaintiff was bought a drink by the second named Defendant, who was there with his wife and another couple, attending a wake for a young man who had lived locally. The Plaintiff and the second named Defendant got into conversation. The second named Defendant maintained that the Plaintiff made numerous provocative statements concerning the second named Defendant's wife. After some time, the second named Defendant struck the Plaintiff forcefully in the face, causing him to suffer a nasal fracture and depression of the left zygoma; for which the Plaintiff required operative treatment under general aesthetic. The Plaintiff sued the first named Defendant in negligence and the second named Defendant for assault and battery. Prior to the action coming on for hearing, two things happened. Firstly, the second named Defendant pleaded guilty in the District Court to a charge of assault causing actual bodily harm; for which he received a suspended sentence of two years imprisonment. Secondly, the Plaintiff settled his action against the first named Defendant.

At the hearing, there was a total divergence of evidence between the Plaintiff and the second named Defendant as to the events leading up to the assault. The Plaintiff maintained that he was assaulted completely out of the blue for no reason whatsoever. The second named Defendant and his witnesses stated that the Plaintiff was drunk and provoked the second named Defendant by issuing threats and lurid remarks concerning the second named Defendant's wife. Hanna J. held that the Plaintiff had said "venomous, rude and provocative things" and had engaged in "a tirade of appalling abuse and lewd sexual references" as well as poking the second named Defendant with his finger while speaking to him. The Judge held that in the circumstances there would have to be a finding of 50% for contributory negligence against the second named Defendant. He held that the injuries would have warranted an award of general damages of €40,000.00. However, the Judge went on to accede to the Defendant's application to dismiss the Plaintiff's action pursuant to S.26 of the 2004 Act. He held that the Plaintiff's account of what had occurred was "both fanciful and self serving and deliberately so". He applied the following test when considering the application under S.26:

3 (2009) IEHC 382, Unreported, Peart J. 13/7/2009

4 (2009) IEHC 617, Unreported Peart J. 4/12/2009

5 (2009) IEHC 416, Unreported, Hanna J. 28/7/2009

> "I now turn to S.26 of the Civil Liability & Courts Act 2004. Again, this is set out above. A question I must ask myself is did the Plaintiff give false or misleading evidence to this Court knowing same to be false and misleading and was it material?… In the circumstances, in my view, the Plaintiff comes within the intended scope of S.26 of the Civil Liability & Courts Act, 2004. Since the law has imposed the appropriate penalty on the Defendant, Mr White, for his action, and since I am satisfied the Plaintiff has given false or misleading evidence knowing same to be the case with a view to affecting materially the outcome of the case, I dismiss the action."

As has been pointed out by both Professor Binchy[6] and by Judge McMahon[7]. S.26 applies only to personal injury actions. "Personal injury action" is defined by S.2 (1) of the 2004 Act as not including "an action where the damages claimed include damages for … trespass to the person". Thus, it would appear that actions seeking damages for assault and battery do not come within this section. This aspect does not appear to have been canvassed before the trial judge.

Abandoning Parts of the Plaintiff's Claim

Plaintiffs should be wary of making large or exaggerated claims, which are not properly grounded. The Courts will not allow Plaintiffs to simply jettison parts of their claim, which they feel they cannot maintain in evidence at the trial of the action. In *Farrell v Dublin Bus,*[8] liability was not in issue. Less than a week before the action was due to come on for hearing in July 2008, the Plaintiff furnished a report from an actuary showing a loss of earnings to the date of trial of €71,000.00 and a claim for future loss of earnings of between €161,452.00 and €343,000.00. The Defendants sought an adjournment of the matter to investigate this new head of claim. When the action came on for hearing in 2010, the Plaintiff formally discontinued her claim for future loss of earnings. The case was opened on the basis that the Plaintiff would confine her claim for past loss of earnings to the period from the date of the accident up to October 2007, when she commenced driving a taxi.

In the course of a detailed Judgement, Quirke J. made a number of observations about S.26. Firstly, he noted that it was mandatory in its terms. If the Courts were satisfied that a Plaintiff had given or adduced evidence that was false or misleading in any material respect, then it must dismiss the Plaintiff's claim unless this would result in an injustice being done. He noted that the purpose of this section was to discourage false and exaggerated claims and to express the community's disapproval of dishonest behaviour. He also made a number of observations in relation to the standard of proof in order to bring a case within Section 26, which are dealt with below. In relation to the abandonment of the claim for future loss of earnings, Quirke J. did not accept that this head of claim could simply be discontinued without some evidence as to why the claim had been made in the first place:

> "Where, as in this case, a claim for particular losses "in this case a sum up to € 343,000.00", is simply abandoned when challenged, it is inappropriate for a Plaintiff to simply proceed with his/her claim as if nothing unusual has occurred. Something unusual has occurred and must be satisfactorily explained to the Court. There is an obligation in such circumstances for the Plaintiff, preferably at the commencement of the hearing, to provide the Court with an adequate explanation why a claim was advanced in the first place and why it was abandoned. Failure to provide such an explanation will often give rise to an inference that the claim was not bona fide."

Quirke J. found that there were significant discrepancies between the Plaintiff's accounts of her physical capacity given to various Doctors and the extent of her movements as recorded by a private investigator retained by the Defendants. Also, the Judge did not accept that the Plaintiff had had only minimal earnings from driving a taxi in the years from 2008 to the date of trial. He reached this finding due to the fact that her lifestyle during this period included numerous holidays to the USA and the purchase of a number of new vehicles. Furthermore, no credible explanation had been offered for her failure to produce any documentary, or other evidence to support her claim for loss of earnings.

In the circumstances, where there was no credible explanation as to why she had abandoned the future loss of earning claim, no credible explanation as to the failure to produce documentary evidence to support the loss of earnings claim that she did maintain and no evidence which would explain her comfortable lifestyle between 2004 and 2008 at a time when she had claimed to have been incapable of earnings and was dependant upon Social Welfare benefits and no explanation as to the divergent accounts given to the medical experts, Quirke J. held that this claim would have to be dismissed.

A similar result was reached in *McKenna v Dormer*[9]. The Plaintiff alleged that after his accident he had not worked for 9 ½ years due to injury to his knee, when he fell from a ladder at a building site in September 2001. He sued his employer. The Court heard that the Plaintiff had been working for the Defendant for the entire period and that he had insisted on being paid in cash since shortly after the accident. It was also put to the Plaintiff in cross-examination that he had approached the Defendant in the foyer outside the Court and told him to say "you have not seen me for the last 9 ½ years". The trial judge, Quirke J. refused to allow the Plaintiff to abandon his loss of earning claim and dismiss the action on account of the false evidence given by the Plaintiff. The Judge also directed that the transcripts of the hearing should be forwarded to the DPP.

Higgins v Caldark Ltd[10] was a case where the Plaintiff also

6 "Damages in Tort Litigation: new Judicial approaches", Paper delivered at Trinity College Dublin, 5th December 2009.

7 "Damages in Tort Litigation: new issues", Paper delivered at Trinity College Dublin, 26th November 2011.

8 (2010) IEHC 327, Unreported, Quirke J. 30/7/2010

9 "Plumber allegedly gave false evidence", Irish Times 2/3/11 and 16/3/11

10 "Site worker who gave false information refused damages", Irish Times 19/11/2010

had his claim dismissed under S.26. The Plaintiff sued in respect of serious injuries to his thumb when his coat sleeve became entangled in the shaft of a tractor, which the Plaintiff was seeking to buy on behalf of the Defendant company, which company was owned by his brother. The Plaintiff sued Caldark Ltd claiming that another brother, who was also employed by the company, had negligently started the tractor when it was unsafe to do so. On the liability issue, Quirke J. held that the Defendant was liable for 75% of the injuries, with the Plaintiff being liable for 25% by way of contributory negligence, as he had suffered a previous similar injury some years earlier and had not kept a proper lookout on this occasion. However, Quirke J. noted that the Defendants had applied to have the action dismissed on grounds that the Plaintiff had sworn an affidavit that was false and misleading contrary to S.26 (2) of the 2004 Act.

The Judge noted that the Plaintiff had sworn an affidavit in December 2008 stating that the information supplied by him in relation to the loss of earnings was true and accurate. However, during the hearing, it emerged that the Plaintiff had failed to state that he had been paid more than €50,000.00 along with expenses and the provision of a vehicle by his brother's company between 2002 and 2004. On five occasions, between October 2005 and February 2006, the Plaintiff was recorded on video carrying out work on behalf of his brother's company on building sites in Dublin and Longford. The Judge noted that the Plaintiff had told a Vocational Assessor in 2005 that he was "virtually confined to the house" as a result of his injuries. In the circumstances, having regard to the false evidence tendered concerning the loss of earnings aspect and his evidence in relation to his capacity for work; the Judge dismissed the claim in its entirety.

Beware of Facebook Postings

Plaintiffs should be wary of the material they post about themselves on their Facebook pages. In *Danagher v Glantine Inns,*[11] the Plaintiff sued the Defendant in respect of injuries allegedly sustained while he was being ejected from the Defendant's nightclub premises on 27th December 2005. Irvine J. was satisfied on the evidence that the Plaintiff had been involved in a fight on the premises. She held that in the circumstances the Defendant was entitled to remove the Plaintiff from the nightclub and had not used excessive force to do so. Accordingly, the Plaintiff failed to establish liability against the Defendant.

In the course of his evidence, the Plaintiff had stated that as a result of the injuries suffered by him in the alleged assault, he had been greatly affected in his studies and in the pursuit of his recreational and sporting activities. He stated that the neck and back pain, which he suffered, had been so bad, that he had had to drop out of college for a year after the accident. It was put to him in cross-examination that he had participated in a charity parachute jump in July 2006. The Plaintiff denied this, stating that the jump had been the previous year and was only reported in the newspapers in 2006 because that was when the proceeds were handed over to the charity. However, when it was intimated that the Defendant would call evidence to establish that the jump occurred in July 2006, the Plaintiff conceded that it had occurred at that time. Irvine J. was satisfied that:

> "When he told the Court definitively that the parachute jump had taken place the year before the nightclub incident… he did so deliberately, hoping to mislead the Court on this most material issue knowing full well, that if he admitted his involvement in that jump, just six months after his alleged assault… it would completely undermine the extent of the injuries which he was contending for."

Neither did Irvine J. accept that the Plaintiff had attended his physiotherapist on more than seventy occasions and his G.P. on fifty occasions. The Judge noted that the Plaintiff had been unable to produce any receipts, or statement of account to back up this head of claim. The Judge also noted that the medical reports were silent on the number of treatments administered or the number of visits undertaken. Finally, in relation to the Plaintiff's claim that he had been greatly restricted in the sports, recreational and social aspects of his life, Irvine J. had regard to the evidence led concerning material posted by the Plaintiff on his Facebook page. She noted that a number of self-authored entries recorded the Plaintiff's participation in hurling, rugby and other sports. There were also entries concerning his social life including the following:

> "Favourite music: anything that will get me dancing and hitting the roof" and "ya I tink we mite be going out alrite, ul probably come across me drunk on a dance floor somewhere during d night anyways".

In the circumstances, the Judge held that the Plaintiff had deliberately overstated his injuries in the course of his evidence. Irvine J. finished her judgement with reference to S. 26 in the following terms.

> "Suffice to say that I am satisfied that the Plaintiff's denial of the parachute jump in which he participated in, in July 2006 was a deliberate effort to mislead the Court and was an act of dishonesty done for the purposes of advancing his claim. If it were not for the fact that the Court was dismissing the claim on liability grounds, the Court would, in any event, have been obliged to dismiss the Plaintiff's claim by reason of this statutory provision given the Defendant's application in this regard and having regard to the falsity of the Plaintiff's evidence in this issue."

The Onus and Standard of Proof

A number of the cases cited above establish that it is the Defendant who bears the burden of proving that the Plaintiff, by virtue of the evidence that he has given or the affidavits that he has sworn, has brought himself within the ambit of S.26 by giving false and misleading evidence. *Farrell v Dublin Bus*[12] dealt with the standard of proof, which is required to

11 2010 IEHC 214, Unreported, Irvine J. 26/3/2010

12 (2010) IEHC 327, Unreported, Quirke J. 30/7/2010

have a case dismissed under the provisions of this Section. Having referred to the Judgement of Hamilton C. J. in *Georgopoulos v Beaumont Hospital Board*[13] and to the Judgement of Henchy J. in *Banco Ambrosiano SPA & Others v Ansbacher & Co. Ltd & Others,*[14] Quirke J. stated as follows in relation to the applicable standard of proof:

> "Applying that standard to the facts of the instant case, I take the view that an adverse finding under S.26 of the Act has such grave implications and consequences for a Plaintiff that the Court should not make a finding unless it is satisfied that it is highly probable that the evidence which has been given or adduced by the Plaintiff has been false or misleading in a material respect. The Defendant must, therefore, discharge the onus of proving, as a high probability that the evidence, which has been given or adduced by the Plaintiff, has been false or misleading in a material respect. If that onus is discharged, the Court must dismiss the Plaintiff's claim unless otherwise satisfied, as required under the provisions of the section."

However, in the recent Supreme Court decision of *Ahern v Bus Eireann,*[15] the Supreme Court set out the onus of proof in the following terms:

> "It is for a Plaintiff in a civil action to prove their claim. Thus the Respondent had the onus of proving her claim on the assessment of damages before the High Court. Such an onus is on the balance of probabilities. However, in this case, the Appellant raised S. 26 of the Act of 2004. In such a circumstance the Appellant carries the onus of proof, which is also on the balance of probabilities."

At the commencement of the Plaintiff's case, the Plaintiff had withdrawn a claim for carer costs in the sum of €177,000.00. The reports of a nursing expert and of an actuary, which had been exchanged prior to the hearing, were not put in evidence. The Defendant argued that the action should be struck out under Section 26 of the 2004 Act on account of the Plaintiff having given false or misleading evidence and also due to the fact that the affidavit of verification in relation to the carer costs and the expert reports thereon, was also false and misleading. In relation to S.26 (1) of the 2004 Act, the Supreme Court made the following observations:

> "A claim under S.26 (1) of the Act of 2004 requires that several elements be proved, including that if a Plaintiff gives or adduces, or dishonestly causes to be given or adduced, evidence that is false or misleading in a material way and she knows it to be false or misleading, the Court shall dismiss the Plaintiff's action unless for stated reasons, the dismissal of the action would result in injustice being done. In this case there are no grounds for an appeal to succeed in relation to the Appellant's personal evidence, the learned trial Judge having held her to be an honest witness".

The Supreme Court noted that there was another element in S.26 (1), which related to a situation where a Plaintiff dishonestly causes someone else to give or adduce evidence that is false or misleading, and he or she knows it to be false or misleading. The Supreme Court noted that this did not occur in relation to the actuary or the nursing expert, as their reports had not been put in evidence and they did not give evidence at the trial of the action. The Supreme Court also looked at S.26 (2) in relation to the affidavit of verification, which had been sworn in respect of the Actuary's report and the nursing expert's report. The High Court Judge had stated that the Plaintiff's view that she had required a carer and would not have done so but for the accident was not a false or misleading statement, but rather a genuine statement of the Plaintiff's subjective belief. On that basis, the High Court had determined that the provisions of the section did not apply. The Supreme Court agreed with the approach, which had been adopted by Feeney J. and stated as follows:

> "I am satisfied that the learned trial Judge approached this case correctly. He considered the overall evidence and found that the Appellant was an honest woman and did not knowingly mislead the Court. "Knowingly" is a matter to which the test is subjective. On the evidence before the learned High Court Judge he was entitled to hold, as he did, that the Respondent did not knowingly mislead the Court to swear an affidavit that is false or misleading in any material respect."

A similar result was reached in *Corbett v Quinn Hotels Ltd*[16] where Finnegan P. held that the Plaintiff's evidence in relation to her various injuries had been misleading. However, he declined to dismiss the case pursuant to S.26 as he was satisfied that the Plaintiff gave her evidence honestly believing it to be true and she had not intended to mislead the Court in any respect.

In *Kerr v Molloy & Sherry (Lough Eglish) Ltd,*[17] even though the Court found that the Plaintiff had seriously exaggerated his injuries and that his evidence with regard to his inability to work due to his alleged injuries was false in a material respect, Herbert J. found that due to the content of the medical reports which had been admitted in evidence, that the Court was not at any stage misled by the Plaintiff's evidence. In the circumstances, Herbert J. held that it would have been "altogether disproportionate and therefore unjust" to dismiss the Plaintiff's action. However, the Judge commented that he would have done so had a claim for loss of earning, or a claim for loss of ability to compete in the labour market, been advanced by the Plaintiff.

Behan v AIB plc[18] concerned a case where a Plaintiff had suffered injury when she fell from a chair and injured her right knee. In reply to a Notice for Particulars seeking information as to whether she had any illness or medical complaint prior to or subsequent to the accident, she had replied "none relevant to the proceedings". However, in her evidence and in cross-examination she stated that she had hurt her left leg

13 (1998) 3IR 132
14 (1987) ILRM 669
15 (2011) IESC 44, Unreported, Supreme Court 2/12/2011
16 (2006) IEHC 222, Unreported, Finnegan P. 25/7/2006
17 (2006) IEHC 364, Unreported, Herbert J. 16/11/2006
18 (2009) IEHC 654. Unreported, Murphy J. 18/12/2009

a month after the accident, when she hit it against a filing cabinet and that she had pre-existing arthritis. The Defendant submitted that in the circumstances, in giving the reply that she did to the question raised in the Notice for Particulars and by swearing an Affidavit of Verification in the usual form in respect of those Replies, that she had breached S.26 (2) of the 2004 Act. The trial Judge refused to dismiss the Plaintiff's case on account of this Reply and dealt with the question of the Verifying affidavit in the following way:

> "Sub section two of that section refers to false or misleading Affidavits. While the Court does find the Reply to the [Notice for Particulars] to be incomplete, and to that extent to be misleading, the Court is not satisfied that Mrs Behan knew that her Reply was false or misleading when swearing the affidavit. The subsection does not provide that she ought to have known. As with all Affidavits, an Affidavit of Verification under S.14 must be full and frank. It is significant that S.26 requires proof on the balance of probability rather than it being beyond a reasonable doubt. The Court may, however, have regard to non-disclosure of relevant illnesses and treatments as affecting the Plaintiff's credibility."

In *Dunleavy v Swan Park Ltd t/a Hair Republic,*[19] the Plaintiff sued in respect of injuries, which he suffered while having hair treatment at the Defendant's salon. She claimed that the damage to her hair had had an adverse effect on the social and employment aspects of her life for a period of 18 months. The Defendant's maintained that in the preparation of her case, the Plaintiff had concealed vital information in relation to her social activities, the computation of her income, her prior psychiatric history and in relation to a road traffic accident in which she had suffered neck and back injuries. O'Neill J. did not accept this submission. He was satisfied that the Plaintiff was an honest person, who gave truthful evidence and endeavoured to give an accurate portrayal of how the damage to her hair effected her and the impact it had had on her life in general. In the course of his judgement he made the following observations in relation to S.26:

> "Finally, I wish to observe that S.26 of the Civil Liability & Courts Act 2004 is there to deter and disallow fraudulent claims. It is not and should not be seen as an opportunity to seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability. Great care should be taken to ensure, in a discriminating way, that clear evidence of fraudulent conduct in a case exists before a form of defence is launched which would unjustly do grave damage to the good name and reputation of a worthy Plaintiff."

The Judge awarded the Plaintiff €30,000.00 for general damages, together with a further €15,000.00 for loss of income from her work as an artist.

19 (2011) IEHC 232, Unreported, O'Neill J. 27/5/2011

Conclusions

While each of the decisions outlined above, tend to turn on their own specific facts, it is possible to set out the following principles or guidelines as emerging from the case law.

(1) The Defendant bears the onus of proving that the Plaintiff's case comes within the provisions of S.26 of the 2004 Act either by giving false or misleading evidence contrary to S.26 (1) or by swearing an affidavit of Verification of matters that were of themselves false or misleading contrary to S.26 (2).

(2) As in all civil cases, the Defendant must establish that the matter comes within S.26 on the balance of probabilities.

(3) Plaintiffs should take great care when formulating their claim for loss of earnings both past and into the future. They should be wary of pleading large losses under this heading, as they will not be allowed to simply abandon some or all of this claim prior to or at the hearing, without providing some explanation as to why it was put up in the first place. If a Plaintiff exaggerates this aspect, they run the risk of having their entire action dismissed.

(4) Care should be taken when drafting the affidavit of verification. If it is necessary to put in a caveat in relation to some of the matters pleaded, it would be a good idea to state this caveat clearly in the affidavit.

(5) Plaintiffs should be warned that they should take great care of the aspects of their claim, which they plead as part of their action. They should be warned that the consequences of a finding under S.26 mean that the trial judge must dismiss the action unless satisfied that an injustice would be done. Section 26 has been used to deny a Plaintiff a remedy even in cases where liability has been conceded, or where liability was actually established against the Defendant. In other words, by overstating either the effects of their injuries, or the extent of the financial losses, the Plaintiff runs the risk of having the entire case thrown out.

(6) The term "injustice" in S.26 is not defined in the Act. The proviso could be used when the Court is satisfied that while the Plaintiff exaggerated his injuries, he did so from an honest belief as to the extent of his injuries rather than in an effort to mislead the Court. The Court has refused to apply Section 26 where it would be totally disproportionate to do so.

(7) Younger Plaintiffs should be careful of what they post on their Facebook pages, as the Defendant's insurers will probably do a check of this medium in advance of the hearing. If they post something on their Facebook page that is inconsistent with the extent of the injury claimed in the action, this will be put forcefully in cross-examination and may be used to ground an application to have the action dismissed pursuant to S. 26 of the 2004 Act. ■

An internet enabled jury of one's peers[1]

Karen Murray BL[2]

Introduction

The jury is an ancient institution, one whose roots may be traced back beyond the *Assize of Clarendon* of 1166 to 8th Century Normandy.[3] It is an institution that has survived many challenges such as starvation and imprisonment in 1670;[4] the creation of the Irish Free State in 1922; and the introduction of women in 1976.[5] However, as an institution, the jury faces new challenges, not least the increasing complexity of modern society. Many sectors of society, such as financial services, are now so complex that they can be properly understood only by experts[6], if at all. It is possible that serious criminal charges will ultimately be brought in relation to the conduct of banks and other regulated financial service providers. If so, a jury made up of lay people may have to consider issues relating to the operation of this sector. It is unlikely that any member of the jury will have much, if any, prior knowledge of the financial services sector. Indeed it is quite likely that should someone with such knowledge be called to serve on such a jury, then their inclusion on the jury will be challenged by either prosecution or defence.[7] Prior to appointing him as Sole Member of the *Commission of Investigation into the Banking Sector in Ireland,* the Government was required to satisfy itself that '…having regard to the subject matter of the investigation…' Peter Nyberg had '…the appropriate experience, qualifications, training or expertise…'.[8] Yet should the State bring serious criminal charges on foot of the events that led to the collapse of that same sector, those charges will be heard by 12 adults who are expected to have no more than an ability to read and to be free from enduring impairments.[9] One person who has expressed concern about the possible outcome of such a trial is James Hamilton, the retired Director of Public Prosecutions, who has wondered whether bankers and financial institutions could escape prosecution on complex criminal charges unless they are tried in front of specially-trained jurors rather than a jury of ordinary citizens.[10]

A lack of specialised knowledge is one challenge facing the jury; a contrary challenge is offered by the possibility that jurors might access too much knowledge through smartphones and other internet enabled devices. The Juries Act 1976 requires that all jurors be citizens[11]; and citizens of Ireland are increasingly using internet enabled phones. In June 2011, there were some 583,755 subscriptions to mobile broadband services in Ireland, an increase of almost 15% on the previous year[12]. About four-fifths of all Irish smartphone users are thought to use their phones to access Facebook; about a quarter of them use Twitter.[13] One prediction has suggested that a majority of Irish adults will be smartphone users by the end of this year;[14] so of the proverbial twelve men (and now women) good and true[15], one can expect that at least six will have access to the mobile internet.[16]

In *de Burca and Anderson v Attorney General,*[17] the Supreme Court held that a criminal trial must involve a jury that is representative of a cross-section of the community.[18] 'There is no doubt that the primary aim of s. 5 of Article 38 in mandating trial by jury … is to ensure that every person charged with such an offence will be assured of a trial in due course of law by a group of laymen who, chosen at

1 The phrase a jury of one's peers may be traced back to Clause 39 of the Magna Carta of 1215, see Law Reform Commission, *Consultation Paper on Jury Service,* LRC CP 61-2010, footnote 32, p32

2 Karen Murray BL is the co-author of *Information Technology Law in Ireland* (2nd Ed. Tottel, 2007) and lecturer in law at the National College of Ireland.

3 Law Reform Commission, *Consultation Paper on Jury Service,* LRC CP 61-2010, p2

4 *Bushell's Case, 24 Eng. Rep. 1006 (1670)*

5 Juries Act 1976. Women were not entirely excluded by the Juries Act 1927, but they had to own property and then apply for inclusion on a jury panel. This had the effect of largely excluding women and this exclusion was held to be unconstitutional by the Supreme Court in *de Burca and Anderson v Attorney General*, [1976] IR 38.

6 'The supervision teams…lacked some of the specialised expertise needed…There were difficulties recruiting and retaining persons with the required expertise…' Honohan P., *The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008*, 31 May 2010, para 5.5, page 63. '…[A] preference for generalists, as opposed to individuals with greater technical expertise in specific problem areas, may have played a role' - Nyberg, Misjudging Risk: Causes of the systemic banking crisis in Ireland, para 4.9.5, page 87.

7 See Juries Act 1976, sections 20 and 21.

8 Commissions of Investigation Act 2004, section 7(4).

9 Neither requirement is absolute, but a potential juror's abilities and disabilities should not be such as to make it impractical for them '…to perform the duties of a juror…', Juries Act 1976, Schedule 1, as amended by Section 64 of the Civil Law (Miscellaneous Provisions) Act 2008. Indeed the National Adult Literacy Agency has found that 'Financial literacy difficulties are a major issue in Ireland…Many middle class adults appear to have difficulties understanding financial terms and words'. See http://www.nala.ie/content/literacy-and-financial-sector

10 Burke, *Banker trials would require specialist juries, says DPP,* Sunday Business Post, 23rd October 2011

11 Section 11 of the Juries Act 1976 requires that jury lists be randomly selected from lists of Dail electors, all of whom must be citizens. See Law Reform Commission, *Consultation Paper on Jury Service,* LRC CP 61-2010, para 2.01, page 31.

12 Comreg, *Quarterly Key Data Report*, September 2011, Doc. No. 11/66, p33, http://www.comreg.ie/_fileupload/publications/ComReg1166.pdf

13 Amarach Consulting, *The Smart Future,* May 2011, http://www.amarach.com/assets/files/The%20Smart%20Future.pdf

14 Amarach Consulting, 16th May 2011, http://www.amarach.com/blog/2011/05/the-smart-road-to-recovery.html

15 Cockburn and Green, *Twelve Good Men and True: The English Criminal Trial Jury 1200-1800,* Princeton 1988.

16 Amarach Consulting, 16th May 2011, http://www.amarach.com/blog/2011/05/the-smart-road-to-recovery.html

17 [1976] IR 38

18 Law Reform Commission, *Consultation Paper on Jury Service,* LRC CP 61-2010, p3

random from a reasonably diverse panel of jurors drawn from the community, will produce a verdict of guilty or not guilty, free from the risks inherent in a trial conducted by a judge or judges only, and which will therefore carry with it the assurance of both correctness and public acceptability that may be expected from the group verdict of such a representative cross-section of the community'.[19] The Constitution does not expect that the State will exclude from the jury room those who can access the internet from their mobile phones; on the contrary it requires that they be included. The inclusion of internet-enabled-jurors create a variety of issues for the courts, three of which have been considered in recent judgments: jurors using the internet to contact defendants; jurors using the internet to carry out their own, independent, research; and the nature of the warning to be given to jurors by trial judges.

Jurors contacting defendants: *HM Attorney General v Fraill*

The danger posed by jurors having internet access was dramatically illustrated by the English Court of Appeal decision in *HM Attorney General v Fraill.*[20] This decision followed on from a substantial trial in the Crown Court at Manchester of a number of defendants. Fraill was a juror at this trial. The Judge began the trial by giving the jury the following warning about using the internet: '…you will make your decision about this case based solely upon the evidence which you hear during this trial, in this courtroom and upon nothing else. Most of us these days have access to the internet, it contains lots of fascinating information…If you do have access to the 'net, members of the jury, please do not go on the 'net during this trial to explore any issues which may arise. That would be wrong…'[21] This Direction was repeated on a number of occasions during the trial and the Court of Appeal was satisfied that: 'No juror could have been in any doubt precisely what the direction was and precisely what it meant…' At the conclusion of the trial, the jury retired to consider its verdict and following a couple of days, delivered its verdict on a number of the defendants; acquitting one and finding others guilty on some of the charges.

Whilst the jury was considering its final charges, it became apparent to the Trial Judge that an unknown juror had been in Facebook contact with one of the defendants, Sewart, commenting that she was pleased that the defendant had been acquitted because she was 'with her the whole of the way'. [22] At that point, the Trial Judge did not know which juror had contacted the defendant in question. He adjourned jury deliberations and commenced to ask individual jurors: 'Have you at any stage during the period from the retirement of the jury until today contacted or attempted to contact any other person… by way of Facebook or email, about either your views of the evidence, your views of the jury verdict so far delivered and any reactions to such verdicts…'[23] Friall admitted that she had. The jury was then dismissed and an investigation into the contact between Sewart and Fraill then commenced. It transpired that Fraill had initiated contact with Sewart, sending a message to her Facebook account which read 'you should know me, I cried with you enough'.[24] Sewart responded with a Friend request, knowing that she was corresponding with a juror. Sewart followed up by asking 'what's happenin with the other charge',[25] to which Fraill responded 'cant get anywaone to go either no one budging pleeeeeese don't say anything cause jamie they could call mmisstrial and I will get 4cked toO'.[26] Sewart replied with 'I know I have deleted all the messages',[27] displaying a total ignorance of data retention law in the UK.[28] The communications between the two ended with Sewart texting 'I will be doin ha ha and trying for compo' and later 'keep in touch Ill get you a nice pressie if I get anything out of um…'.[29]

Afterwards, Sewart became concerned about what she had done. The Judges of the Court of Appeal rather drily noted that they were '…inclined to think that her anxieties were inspired less by her concern about the integrity of the judicial processes than by the risk she had run by becoming involved in the conversation'.[30] The Judges considered that Fraill was '…guilty of contempt of court because as a juror she communicated with Sewart via the internet and conducted an online discussion about the case with her when the jury deliberations had not been completed and verdicts had not been returned'. [31] The Court came to a similar conclusion about Sewart, the defendant whom Fraill had contacted. Fraill was sentenced to an eight month term of imprisonment; Sewart to two months, suspended.

Jurors conducting their own researches on-line: *Byrne v DPP*

In addition to finding that Fraill was guilty of contempt of Court because she had contacted a defendant, the English Court of Appeal also concluded that she was '… guilty of contempt of court for conducting research on the internet into the defendants in the criminal trial in which she was sitting as a juror for the purpose of obtaining further information of possible relevance to the issues at trial'. [32]

The possibility that jurors might use the internet to conduct their own research was considered by the Irish High Court in *Byrne v DPP.*[33] This judicial review concerned a particularly notorious crime, one whose circumstances were described as 'horrible'[34] by Charleton J. in the High Court. The facts were that a gang of vicious criminals kidnapped

19 Per Henchy J.
20 [2011] EWCA Crim 1570
21 Para 6.
22 Para 6.
23 Para 13.
24 Para 15.
25 Para 15.
26 Para 16.
27 Para 16.
28 The Data Retention Directive (Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC) was implemented in England and Wales by The Data Retention (EC Directive) Regulations 2009.
29 Para 16.
30 Para 17.
31 Para 35
32 Para 35
33 *Byrne v DPP* [2010] IEHC 382
34 [2010] IEHC 382, para 2

the family of a Securicor employee. Three members of the gang were arrested, charged, convicted and sentenced to twenty-five year terms of imprisonment. The defendant was another employee of Securicor, who was charged with various offences of kidnapping and robbery arising from the same crime. Given the nature of this crime, '…there was considerable newspaper and other media publicity…various specialist journalists engaged in speculation or guess work as to the nature of the criminal gang and their origins… It was…said that some of the gang members may have been involved in murder in the past. A view that the criminals were particularly vicious and well-trained was also widely aired…'[35]

The defendant was concerned that '…the adverse nature of pre-trial publicity can never be dissolved, whereby adverse publicity retreats from public view with the passage of time, because much of this material is stored on the internet'.[36] Therefore he applied to Court seeking to have '… the internet wiped clean of any publicity or comment about the charges which he faces or the conduct of a previous trial where the jury failed to agree a verdict against him or in his favour'.[37] The defendant sought that '…the Director of Public Prosecutions should write to the relevant internet service providers and demand that any offending material should be taken down. In the event of non-compliance, an application should be made to court in that regard'.[38] The Defendant argued that this was necessary because of the danger that '…jury members will conduct their own researches during the course of the applicant's forthcoming trial, find some of the material complained of and reach conclusions prejudicial to the case he may be asserting at the trial'.[39]

Charleton J. acknowledged that this was a real possibility, commenting that 'Those who are under 35 who are called for jury service can be expected to be particularly adept at internet searches. Many will carry portable devices whereby they can access the internet away from home, or even in the courtroom…. Surfing the web has become a pastime for many people. It can be expected…, that of the jury panel that may be called in Dublin to try the applicant and his co-accused on a re-trial, that many will be adept at internet searches and that a few of them may pursue this activity as a habitual pastime'.[40] In addition to the possibility that jurors might search the internet themselves, Counsel for the applicant also argued that '…members of the jury may be receiving messages on their mobile phones from persons who have looked at the internet and decided to randomly explore the case, or they may engage in social networking during the course of the trial, to the prejudice of a just disposal of the case and the appearance of justice'.[41]

In deciding whether or not to grant the orders sought by the applicant, Charleton J. began by explaining that there was no new test to be applied to a case of this type, rather he would apply the test set out in *Rattigan v. DPP*[42]: 'where there is a real and substantial risk of an unfair trial due to either delay in prosecution or adverse publicity, which could not be made fair by appropriate rulings and directions of the trial judge and by other circumstances, the trial should be prohibited…'.[43] Charleton J. held that the adverse publicity complained of by the applicant did not meet this test in this case, stating that he did '… not accept that the Director of Public Prosecutions must undertake the duty of sweeping the internet through extensive searches, and then engaging in correspondence with local and foreign internet service providers with a view to cleansing cyberspace of any potential reference to an accused person whose trial is pending'.[44]

Charleton J. was of the view that the 'world of the media is not the responsibility of the Director of Public Prosecutions'.[45] The application was refused. The correctness of Charleton J.'s decision would appear to have been resolved by subsequent events. Byrne the applicant was put on trial again, and again the subsequent jury failed to reach a verdict, precisely the same verdict as was reached in the first trial, before all the adverse publicity of which Byrne had complained in his judicial review.[46]

Warnings: *DPP v Timmons*

In *Byrne v DPP,* Charlton J. declined to issue a '… model warning to a jury panel …'[47] stating that it was not his function to do so. Instead he confined himself to recording the following observation: 'Recently, many judges have also added a warning that they should not surf the internet in relation to any participant in the case, be they a witness, the judge, counsel or an accused. It could be added that to do so is a contempt of court allowing the imposition of an appropriate, but potentially unlimited, fine or period of imprisonment. Some of the studies cited during the hearing of this case indicate that juries will be more inclined to heed such a direction if they are told of the reason behind it. That makes sense'.[48]

The content of a jury warning was one of the grounds raised recently in the Court of Criminal Appeal in *DPP v Timmons*[49] in which it was alleged that there had been a '… alleged failure of the trial judge to warn the jury not to carry out internet searches on the applicant…'. The defence alleged that '…on a quick internet search…' it had '…discovered a large amount of material concerning the case, which was highly prejudicial to the applicant'. On foot of this discovery, the trial judge was requested to issue a warning to the jury not to carry out internet searches. He duly warned the jury 'That the evidence in the case is what they heard at trial and that other evidence that they may or may not know of should not be attached to the case and that they should not speak or make any attempt to find out any more about any other evidence in the case'. On appeal it was argued that this warning was inadequate and that the jury should

35 Para 4.
36 Para 6.
37 [2010] IEHC 382, para 1
38 Para 1.
39 Para 1.
40 Para 9.
41 Para 10.
42 *Rattigan v DPP* [2008] 4 IR 639
43 Para 12.
44 Para 31.
45 Para 32.
46 *Man who avoided trial jailed for contempt*, The Irish Times, 3rd December 2011.
47 Para 33.
48 Para 36.
49 [2011] IECCA 13

have been warned '…not to carry out internet searches …'. The Court of Criminal Appeal held that this argument was of '…little or no merit…' The Court accepted that 'The learned trial judge gave a warning, correctly, but did not in that warning, emphasise the possibility of what might arise should an internet search be made'. However, the Court also accepted the reason why the trial judge did not go further and specifically warn jurors not to search on line for material relating to the trial before them.

Having reviewed the trial transcript, the Court found it to be clear that '…the learned trial judge was very alert to the fact that such a warning might well be disadvantageous to the applicant, as accused, by drawing attention to matters of which the jury was then unaware'. The Court held that '…the warning actually given by the learned trial judge was both measured and appropriate'. The Court held that to succeed on this ground the defence would have to show that there was '…a real and serious risk of there having been an unfair trial by virtue of the jury being contaminated in some way by knowledge, or the likelihood of knowledge, of material on the internet, and the jury thereby possibly becoming prejudiced or influenced against the applicant'. The Court of Criminal Appeal held that no such risk had been established in *DPP v Timmons*.

The future

The Irish judiciary appear to be concerned that jurors are using the internet inappropriately. These concerns culminated in an announcement in July 2011 that the Courts were establishing a new committee '…to address the dangers of jurors using the internet and social media during trials'. The Committee is chaired by a former Chief Justice, Mr Justice John Murray, and is reported to include Judge Carney and Judge Edwards of the High Court and Judge Hunt of the Circuit Court. [50]

The judgement of the English Court of Appeal in *HM Attorney General v Fraill* certainly suggests that serious problems do exist for the jury in the modern world. But that judgment also suggests that this problem may not be the internet, as is made clear by the following passage.

> "Judges… are aware that reference to the internet is inculcated as a matter of habit into many members of the community, and no doubt that habit will grow. We must however be entirely unequivocal. We emphasise … that if jurors make their own inquiries into aspects of the trials with which they are concerned, the jury system as we know it, so precious to the administration of criminal justice in this country, will be seriously undermined, and what is more, the public confidence on which it depends will be shaken. The jury's deliberations, and ultimately their verdict, must be based – and exclusively based – on the evidence given in court, a principle which applies as much to communication with the internet as it does to discussions by members of the jury with individuals in and around, and sometimes outside the precincts of the court. The revolution in methods of communication cannot change these essential principles. The problem therefore is not the internet: the potential problems arise from the activities of jurors who disregard the long established principles which underpin the right of every citizen to a fair trial".[51]

This is illustrated by the facts of *HM Attorney General v Fraill* itself. Friall and Sewart were in communication separate from their Facebook communications, Fraill having texted Sewart that 'awe fuck nos hw a didnt get caught wiv my nods and blinks hand signals…'[52] The significance of *HM Attorney General v Fraill* may be that it illustrates how electronic evidence can be used to gather the evidence of communications. Nobody seems to have noticed the nods, blinks and hand signals that would have appeared to have passed between Sewart and Fraill. Even if they had, such momentary communications would not have been preserved and so would have been hard to prove. In contrast, once Sewart and Fraill started communicating electronically, their communications were indelibly preserved.

If there is a challenge to the use of juries, the Internet is probably not it. The internet is simply one component of a rapidly changing and increasingly complex society. That rapid change and increasing complexity many not be, in itself, a challenge the Jury. In *de Burca and Anderson v Attorney General* the Supreme Court held that criminal trials must involve juries that are representative of a cross-section of the community including those who use internet enabled mobile technology. ■

50 Wood K., *Jurors in dock over internet use*, Sunday Business Post, 31st July 2011.

51 Para 29.

52 Para 16.

A Man Of Real Property

HENRY MURPHY SC

Hilary Term, Saturday 25th February 1950, Lansdowne Road, Four o'clock

Ireland leading Scotland by two George Norton penalties to nil
Ireland attacking the Havelock Square end.

A young barrister, winning his first cap in the number 13 jersey, receives the ball from his out half, the renowned Jack Kyle, in front of a capacity crowd that includes President Sean T O'Kelly and his colleague at the Bar, Taoiseach John A Costello.

> *"A brilliant handling movement puts Ireland into a commanding lead. The man who brings it off is Blayney number 13. Dashing past Burrell, he scores the try of the match safely converted by that great goal kicker George Norton,"* according to the distinctive voice of Pathe News. [google John Blayney v Scotland 1950]

> *"From a scrum close to the touch line on our left, about ten yards outside the Scottish twenty-five, the scrum half sent the ball out to Jack Kyle who immediately passed it to me. I saw that my opposite number was not up in time to get me, and went through outside him. Mick Lane was up with me on my right but there were two of the Scottish backs between me and him preventing me passing to him. So I kept going and made the line. I still do not understand how the full back did not get me. He must have thought I was going to pass. Delighted and surprised I grounded the ball,"* according to the young barrister and try-scorer John Blayney, over half a century later.

The number 13's *"sparkling run"* yielded a "*classic"* try "*which had the effect of turning the whole game"*. "*He ran superbly in that run and impressed our visitors more than any of our other backs"*. His try *"had an inspiring effect on the whole team"*. So said the newspapers the following morning.

"SMASHING 21-0 WIN FOR IRELAND", screamed a headline, at that time, our biggest ever win over Scotland. Our only victory of the season, the previous two seasons having delivered one Grand Slam and two Triple Crowns.

The following Monday morning, as John headed into Court 6, a colleague *"with a soft Northern accent,"* offered his congratulations, *"I never saw such a look of surprise on anyone's face as was on yours after you scored that try."* The Library at its most supportive.

In 1950, life in rugby was more modest. No team holiday in the Algarve, no coach to tell you how to play, not even a coach to bring you to the match, no sleepover in the Shelbourne, no bench full of impact substitutes, no pay packet and the try was worth three points.

John Blayney retired from rugby two years later. I first encountered him in Earlsfort Terrace in the late sixties, mainly in the Archbishop Walsh room, where he unravelled - for others - the exquisite mysteries of the Law of Real Property. Had I known then what I know now, namely, his pivotal role in our win over Scotland on the 25th February 1950, I might have paid more attention. Sixty one years on, of an idle moment, I wonder if this is the outstanding sporting achievement of Bar and Bench. ■

The Irish Rugby XV which defeated Scotland at Lansdowne Road on Saturday [February 25, 1950] by 21 points to nil. Back row—R.J.H. Uprichard, A. Curtis, D.E. McKibbin, J. Molony, J.W. McKay, M. Lane, L. Crowe; Middle—J. Blayney, D.J. O'Brien, Mr. W. Fallon, Pres. I.R.F.U., K. Mullen (capt.), J.E. Nelson, G. Norton; Front—R. Carroll, T. Clifford, J.W. Kyle

Legal The Bar Review Update

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A directory of legislation, articles and acquisitions received in the Law Library from the 1st February 2012 up to 31st March 2012
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Duties of examiner – Immunity clause – Scheme of arrangement – Residual debt fund – Whether implied authority for immunity clause – Whether jurisdiction to include immunity clause – Whether monies recovered under "residual debt fund" – Whether unfair prejudice on potential entitlements suffered by Revenue Commissioners – Companies (Amendment) Act 1990 (No 27), ss 18 and 22 – Taxes Consolidation Act 1997 (No 39), s 438 – Revised scheme directed (2010/522Cos – Clarke J – 28/1/2011) [2011] IEHC 28
Re Michael McLoughlin Pharmacy Ltd

Floating charges

Crystallisation – Fixed charges – Priority of preferential debtors – Automatic crystallisation – Effect of crystallisation – Debentures – Winding up – Whether "automatic crystallisation" of floating charge valid in this jurisdiction – Whether preferential debts continue to have priority if floating charge already crystallised at commencement of winding up – *In re Griffin Hotel Co Ltd* [1941] 1 Ch 129 not followed; *In re Permanent Houses (Holdings) Ltd* [1988] BCLC 563, *Stein v Saywell* (1969) 121 CLR 529, *In re Brightlife Ltd* [1987] Ch 200, *In re Keenan Bros Ltd.* [1981] 1 IR 401 and *In re Wogan's (Drogheda) Ltd.* [1993] 1 IR 157 followed - Companies Act 1963 (No 33), ss 2, 220, 285(1) & 285(7) – Interpretation Act 2005 (No 23), s 5 – Priority determined (2009/719, 720 & 721Cos – Finlay Geoghegan J – 25/3/20110 {2011] IEHC 113
In re JD Brian Ltd (in liquidation)

Receivership

Companies –Properties owned by companies – *Lis pendens* registered by plaintiffs against receiver – Purpose of *lis pendens* – Notice of pending proceedings – Proceedings related to ownership of interest in land – Role of receiver – Interest of receiver in properties – Whether interest of receiver justified registration of *lis pendens* – Whether *lis pendens* improperly registered – Whether *lis pendens* should be vacated - *Lis pendens* vacated (2003/9018P – Clarke J – 5/2/2010) [2010] IEHC 35
Moorview Developments Ltd v First Active plc

Register

Restoration – Voluntary winding up - Application by Revenue seeking to restore company to register – Alleged liability for tax – Pending criminal proceedings - No assessment raised – Creditor – Test to be applied - Whether application frivolous or vexatious – Whether petitioner acting bona fide - Whether petitioner responsible for costs arising in respect of application - *In re Nelson Car Hire Ltd* (1973) 107 ILTR 97 and *Re Deauville Communications Worldwide Ltd.* [2002] 2 IR 32 considered - Companies Act 1963 (No 33) s 311(8) - Company restored to register (2011/266Cos – Laffoy J – 22/6/2011) [2011] IEHC 251
Re Nalto Construction Ltd

Stockbrokers

Dissolution – Distribution of assets – Conversion – Method of valuation of shares – Date of wrongful sale – Whether shares should be valued at highest level – Whether shares should be valued according to mean, median or mode – Stock Exchange Act 1995 (No 9), s 30 – Share value determined (2001/168Cos – Murphy J – 21/3/2011) [2011] IEHC 163
Re W and R Morrough: Grace v Sheehan

Winding up

Costs – Petition to wind up company for failure to pay debts – Debt discharged by company before petition advertised – Petition not advertised – Petition withdrawn – Petitioner applied for costs of petition – Whether petitioner entitled to costs of petition where withdrawn before advertised – *Re Shusella Ltd* [1983] BCLC 505 distinguished; *Re Nowmost Co Ltd* [1996] 2 BCLC 492 considered - Companies Act 1963 (No 33), ss 214 and 216 – Rules of the Superior Courts 1986 (SI 15/1986), Os 74 and 99 – Costs awarded (2011/354Cos – Laffoy J – 25/7/2011) [2011] IEHC 319
Re MCR Personnel Ltd

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COMPETITION

Undertaking

Definition – Economic activity – Public authority carrying on economic activity – Characterisation of respondent's activity – Private ambulance service – Provision of ambulance services for transfer of patients – Whether Health Service Executive constituted "undertaking" – Whether respondent "engaged for gain" – *MOTOE v Dimosio* (Case C-49/07) [2008] ECR I-4863 and *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* (Case C-475/99) [2001] ECR I-8089 considered - Competition Act 2002 (No 14), ss. 3 and 5 – Health Act 2004 (No 42), s. 3 – Treaty on the Functioning of the European Union, Articles s 101, 102 and 106 – Preliminary issue decided for applicant (2010/200JR – Cooke J – 8/3/2011) [2011] IEHC 76
Medicall Ambulance Ltd v HSE

CONSTITUTIONAL LAW

Courts

Administration of justice – Legal aid – Fair trial – Trial in due course of law – Personal rights – Criminal law – Free legal aid scheme – Right to legal aid in preparation and conduct of defence in criminal proceedings – District Court – Application for legal aid – Refusal – Matters for consideration in assessing eligibility for legal aid – Gravity of offence – Risk of custodial sentence upon conviction – Whether correct to determine gravity of offence and hence eligibility for legal aid solely by considering likelihood of imposition of custodial sentence upon conviction – *The State (Healy) v Donoghue* [1976] IR 325 and *Carmody v Minister for Justice, Equality and Law Reform* [2009] IESC 71, [2010] 1 IR 635 followed; *Director of Public Prosecutions v Gary Doyle* [1994] 2 IR 286 considered - Criminal Justice (Legal Aid) Act 1962 (No 12), s 2 – Criminal Justice (Miscellaneous Provisions) Act 1997 (No 4), s 5(6) – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 4 and 53 – Constitution of Ireland 1937, Articles 38 and 40.3 – Applicant's appeal allowed (171/2007 – SC – 29/7/2011) [2011] IESC 36
Joyce v District Judge Brady

Delegated legislation

Statute – Statutory Instrument – Validity – Oireachtas – Exclusive function – Principles and policies test – Labour Court – Joint labour

committees – Statute delegating power of fixing minimum rates of remuneration and conditions of employment – Employment regulation order – Discretion – Whether sufficient principles and policies prescribed to govern exercise of law making power –Whether impermissible exercise of legislative function – Whether power exercised reasonably – *Cityview Press v An Chomhairle Oiliúna* [1980] IR 381, *Maher v Minister for Agriculture* [2001] 2 IR 139 and *Brennan v Attorney General* [1984] ILRM 355 considered - Industrial Relations Act 1946 (No 26), ss 42, 43 and 45 – Industrial Relations Act 1990 (No 19), s 48 – Employment Regulation Order Joint Labour Committee (for Areas Other Than the Areas Known, Until 1st January, 1994, As the County Borough of Dublin and the Borough of Dun Laoghaire) 2008 (SI 142/2008) – Constitution of Ireland, 1937, Articles 15.2.1° and 40.3 – Declarations granted (2008/10663P – Feeney J – 7/7/2011) [2011] IEHC 277
John Grave Fried Chicken Ltd v Catering Joint Labour Committee

Freedom of religion

Rights of child – Rights of parents – Parental failure – Parental refusal on religious grounds to consent to blood transfusion for baby – Test for State intervention to protect welfare of child – Whether State can override rights of parents to protect children – *North Western Health Board v HW* [2001] 3 IR 622 applied - Constitution of Ireland, 1937, Articles 34.1, 40.3.2°and 6.i, 41.1, 42.1 and 5, 44.2.1° - Relief granted (2011/33P – Hogan J – 12/1/2011) [2011] IEHC 1
Re Baby AB: Children's University Hospital v D(C)

Personal rights

Arrest – Legality – Plurality of motives for arrest – Principal reason for arrest – Failed asylum seeker – Deportation order – Suspected marriage of convenience – Proposed marriage to European Union national – Potential derivative right of residence – Whether arrest lawful where principal object to prevent exercise of right which, once exercised, would *prima facie* negate reason for arrest – *People (DPP) v Howley* [1989] ILRM 629 and *State (Trimbole) v Governor of Mountjoy Prison* [1985] IR 550 considered; *East Donegal Co-operative Livestock Mart Ltd v Attorney General* [1970] IR 317 applied - Immigration Act 1999 (No 22), s 5(1) – Constitution of Ireland 1937, Article 40.4.2º - Release directed (2011/51JR – Hogan J – 31/1/2011) [2011] IEHC 32
Ismailovic v Commissioner of An Garda Siochána

Personal rights

Immigration – Deportation – Judicial review – Constitutional rights – Whether test for judicial review ensured constitutional rights protected – Whether test for judicial review provided effective remedy under European Convention on Human Rights – Additional evidence – Whether court entitled to consider additional evidence – Whether inability of court to consider additional evidence constitutional – Whether inability of court to consider additional evidence compatible with European Convention on Human Rights – *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 applied; *ISOF v Minister for Justice (No 2)* [2010] IEHC 457, (Unrep, Cooke J, 17/12/2010) and *B v Minister for Justice* [2010] IEHC 296, (Unrep, Cooke J, 14/7/2010) followed; *Kay v United Kingdom (App. No. 37341/06)* [2010] ECHR 1322, [2011] HLR 13, considered - Immigration Act 1999 (No 22), s 3(11) – European Convention on Human Rights Act 2003 (No 20), s 5 – European Convention on Human Rights 1950, articles 8 and 13 – Constitution of Ireland 1937, Articles 40.3 and 41 – Relief refused (2009/329, 528, 531, 511 & 763JR – Hogan J – 7/6/2011) [2011] IEHC 214
Efe v Minister for Justice

Separation of Powers

Justiciability – By-election – Delay in moving writ – Whether constitutional obligation to hold by-election within reasonable time of vacancy occurring – Whether government failed to move writ in reasonable time - *Ahern v Minister for Industry and Commerce (No 2)* [1991] 1 IR 462, *MacPharthalain v Commissioners of Public Works* [1992] 1 IR 111 and *Murphy v Minister for the Environment* [2007] IEHC 185, [2008] 3 IR 438 considered; *East Donegal Co-operative Ltd v Attorney General* [1970] IR 317 applied; *Minister for Social Community and Family Affairs v Scanlon* [2001] 1 IR 64 and *Hanafin v Minister for the Environment* [1996] 2 IR 321 followed - Electoral Act 1992 (No 23), s 39(2) – European Convention on Human Rights Act 2003 (No 20), s 2 – European Convention of Human Rights, protocol 1, article 3 – Constitution of Ireland 1937, Article 16 – Relief granted (2010/959JR – Kearns P - 3/11/2010) [2010] IEHC 369
Doherty v Government of Ireland

Separation of powers

Justiciability - Oireachtas Committee – Disciplinary proceedings – Seanad Éireann – Senator – Complaint regarding claim for expenses – Investigation – Whether misrepresentation of normal place of residence – Report – Justiciability – Separation of powers – Exclusive jurisdiction of Oireachtas – Internal affairs – Right to vindicate good name – Right of access to courts – Natural justice – Fair procedures – Subject matter of inquiry – Definition of "normal place of residence" – Whether "specified act" committed – *Ultra vires* – Whether irrelevant matters considered – Statements – Bias – Objective bias – *Cane v Dublin Corp* [1927] IR 582, *In re Haughey* [1971] IR 217, *Maguire v Ardagh* [2002] 1 IR 385 and *Kenny v Trinity College Dublin* [2007] IESC 42, [2008] 2 IR 40 considered; *Wireless Dealers Association v Minister for Industry and Commerce* (Unrep, SC, 14/3/1956) and *O'Malley v An Ceann Comhairle* [1997] 1 IR 427 distinguished - Oireachtas (Allowances To Members) Act 1938 (No 34) – Ethics in Public Office Act 1995 (No 22) – Standards in Public Office Act 2001 (No 31) – Oireachtas (Allowances To Members) (Travelling Facilities and Overnight Allowance) Regulations 1998 (SI 101/1998) – Constitution of Ireland 1937, Articles 15, 34 and 40 – *Certiorari* granted (2010/1207JR – O'Neill J – 14/1/2011) [2011] IEHC 2
Calelly v Moylan

Statute

Constitutionality of legislation – Personal rights – Equality – Discrimination – Legislative measure objectively justified – Legitimate interest – Whether provision constitutional – Whether defendants had legitimate interest – Whether legislative measure objectively justified – Circuit Court – Preliminary issue – Application to determine whether sufficient case to put accused on trial – Appeal against order deeming sufficient case – Appeal on decision not available to accused but available to prosecution –Mutuality of procedures – Whether affording right to appeal to prosecution and not to accused unconstitutional – Whether right to mutuality of procedures – *Fitzgerald v DPProsecutions* [2003] 3 IR 247 applied; *DPP v Judge Kelliher* (Unrep, SC, 24/6/2000), *Killeen v DPP* [1997] 3 IR 218 and *Dillane v Ireland* [1980] ILRM 167 considered; *State (Hunt) v Donovan* [1975] IR 39, *Todd v Murphy* [1999] 2 IR 1 and *SF v Murphy* [2009] IEHC 497 (Unrep, Hedigan J,18/11/ 2009) applied - Criminal Procedure Act 1967 (No 12) s 4E (7) – Constitution of Ireland 1937, Articles 38.1, 40.1 and 40.1 – Claim dismissed (2009/1343P – Kearns P – 4/3/2011) [2011] IEHC 74
Brohoon v Ireland

Statute

Validity – Criminal offence – Non–national – Failure to produce passport or proof of identity – "satisfactory explanation" – Vagueness – Arbitrariness – Whether section of statute sufficiently precise to legitimately create criminal offence – Whether section of statute offended right against self–incrimination – Proportionality – Whether section of statute proportionate – Whether section of statute permitted abuse of process – *King v Attorney General* [1981] IR 233 considered - Vagrancy Act 1824 (5 Geo 4, c 83), s 4 – Refugee Act 1996 (No 17), s 9 – Immigration Act 2004 (No 1), ss 11, 12 & 13 – Constitution of Ireland 1937, Articles 38.1, 40.1, 40.3.1°, 40.3.2° & 40.4.1° – European Convention for the Protection of Human Rights and Fundamental Freedoms, articles 5, 6, 7 & 14 – Declaration & injunction granted (2008/792JR – Kearns P – 25/3/2011) [2011] IEHC 110
Dokie v Director of Public Prosecutions

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CONTRACT

Terms

Settlement – *Ad idem* – Whether binding - Estoppel – Full and final settlement of all claims subject to exception – Interpretation

of wording of exception – Whether entitled to consider what was said during negotiation of agreement to interpret exception – Whether action before court came within exception – *Chambers v Kelly* [1873] 7 IR CL 231 approved – Plaintiff precluded from prosecuting action (2003/858P – Herbert J – 30/3/2011) [2011] IEHC 130
Caruana v Fruit of the Loom International Ltd

COURTS

High Court

Inherent jurisdiction – Vulnerable adult – Person of unsound mind not so found – Detention of adult in psychiatric institution overseas – Application for detention in Central Mental Hospital – Medical condition falling outside provision of Mental Health Act 2001 – Absence of statutory provision to make orders sought – Best interests and welfare requirements of adult – Whether High Court had inherent jurisdiction to order detention of vunerable adult in psychiatric institution – *DG v Eastern Health Board* [1997] 3 IR 511 applied; *Re SA (Vunerable Adult with Capacity Marriage)* [2006] EWHC 2942 (Fam), [2006] FLR 867 considered; *In re F (Adult: Court's jurisdiction)* [2000] 2 FLR 512 distinguished; *Hutchinson Reid v UK* (2003) 37 EHRR 9 and *Winterwerp v Netherlands* (1979) 2 EHRR 387 considered - Constitution of Ireland 1937, Articles 40.3.1º, 40.3.2º and 40.4.1º – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, article 5(1) – Orders made (2011/1208P – Birmingham J – 3/3/2011) [2011] IEHC 73
Re O'B(J): HSE v O'B(J)

Precedent

Stare decisis – Court of equal jurisdiction – Fully argued case – Statutory interpretation – Purposive approach – Contrary view - Preliminary isse (2009/191MCA – Edwards J – 3/3/2011) [2011] IEHC 67
Environmental Protection Agency v Nephin Trading Ltd

Judiciary

Fair procedures – Bias – Objective bias – Test to be applied – Whether comment made by court in other proceedings gave rise to reasonable apprehension of bias – Delay – Rights of opposing party – Interests of justice – Objectives of Commercial Court - *O'Callaghan v Mahon* [2007] IESC 17, [2008] 2 IR 514, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451 and *Drury v British Broadcasting Corporation* [2007] EWCA 605, (Unrep, CA, 14/5/2007) approved – Relief refused but matter transferred to another judge (2010/208S – Kelly J – 30/6/2011) [2011] IEHC 244
Ryanair Ltd v Terravision London Finance Ltd

CRIMINAL LAW

Bail

Evidence – Hearsay evidence – Informer's privilege – Whether recognised evidential basis for admission of hearsay evidence from anonymous source – Whether strictly necessary – Revocation of bail – Whether District Judge personally satisfied as to adequacy of objections – Whether District Judge failed to exercise independent judgment – Whether order for revocation of bail may only be made by Judge who made the order admitting the person to bail – *People (DPP) v McLoughlin* [2009] IESC 65, [2010] 1 IR 590, *McKeon v DPP* (Unrep, SC, 12/10/1995) and *Vickers v DPP* [2009] IESC 58, [2010] 1 IR 548 applied; *Adams v DPP* [2000] IEHC 45, [2001] 2 ILRM 401 and *People (Attorney General) v O'Callaghan* [1966] IR 501 followed - Bail Act 1997 (No 16), s 6 – Constitution of Ireland 1937, Article 40.4.2º - Release refused (2011/868SS – Hogan J – 12/5/2011) [2011] IEHC 199
Clarke v Governor of Cloverhill Prison

Competition

Corporate crime – Contingent offence – Prevention, restriction or distortion of competition – Price fixing – Finding that offence committed – Conviction – Double punishment – *Jus tertii* – Right to good name – Whether undertaking committed offence – Whether director or manager could be convicted in absence of conviction of undertaking – Whether prosecution of undertaking necessary – Whether accused entitled to rely on position of company – Whether finding that undertaking committed offence violated constitutional rights – *R v Donald* [1986] 83 Cr App R 49, *People (DPP) v Roseberry Construction Ltd* [2003] 4 IR 338, *R v Dickson* [1991] BCC 719, *R v Cogan* [1976] QB 217, *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 and *Cahill v Sutton* [1980] IR 269 considered - Competition (Amendment) Act 2006 (No 4) – Competition Act 2002 (No 14) – Competition (Amendment) Act 1996 (No 19), ss 2(2) and 3(4)(a) – Competition Act 1991 (No 24), s 4(1) – Restrictive Trade Practices (Confirmation of Orders) Act 1972 (No 8) – Restrictive Trade Practices Act 1953 (No 14) – Courts of Justice Act 1947 (No 20), s 16 – Case stated answered in favour of prosecution (350/2008 – SC – 28/7/2011) [2011] IESC 32
People (DPP) v Hegarty

Evidence

Admissibility - Background evidence – Evidence of misconduct other than that charged – Test to be applied - Relevance of evidence – Necessity – Direction to jury – Credibility – Framing of indictment - *R v Pettman* (Unrep, CA, 2/5/1985), *Reg v M (T)* [2000] 1 WLR 421 and *R v W* [2003] EWCA Crim 3024, (Unrep, CA, 15/10/2003) considered; *People (Attorney-General) v Kirwan* [1943] IR 279 applied - Criminal Justice (Evidence) Act 1924 (No 37), s 1(f) – Appeal dismissed (375/2008 – SC – 8/4/2011) [2011] IESC 95
People (Director of Public Prosecutions) v McNeill

Insanity

Fitness to be tried – Criminal trial – Prohibition – Accused found unfit to be tried – Litigious advantage – Whether issue of fitness to be tried could be re-entered – Whether finding that accused unfit to be tried was litigious advantage – *Nolle prosequi* – Whether *nolle prosequi* could discharge previous finding that accused unfit to be tried – Whether accused deprived of benefit of previous determination – Whether significantly unfair – *Eviston v Director of Public Prosecutions* [2002] 3 IR 260 and *The State (O'Callaghan) v Ó hUadhaigh* [1977] IR 42 approved - Criminal Law (Insanity) Act 2006 (No 11), s 4 – Applicant's appeal allowed (382/2009 – SC – 22/7/2011) [2011] IESC 30
O'Callaghan v Director of Public Prosecutions

Jurisdiction

Guilty plea – Donation to charity – "Poor box" – Strike out – Whether District Court Judge has jurisdiction to strike out charge where accused pleads guilty and makes donation to charity – Whether judicial review appropriate remedy to challenge decision of trial judge – *People (DPP) v Nally* [2006] IECCA 128, [2007] 4 IR 145 and *DPP v Kelliher* (Unrep, SC, 24/6/2000) applied; *Balaz v Kennedy* [2009] IEHC 110, (Unrep, Hedigan J, 5/3/2009), *Roche v Martin* [1993] ILRM 651 and *Truloc Ltd v McMenamin* [1994] 1 ILRM 151 followed; *People (DPP) v Maughan* (Unrep, Ó Caoimh J, 3/11/2003) distinguished - District Court Rules 1997 (SI 93/1997), O 23, rr 1 and 3 and O 38, r 1(4) – Summary Jurisdiction (Ireland) Act 1850 (13 & 14 Vict, c 102), s 50 – Probation of Offenders Act 1907 (7 Edw, c 17), s 1(1) and (3) – Relief refused (2010/1560JR – Kearns P – 19/7/2011) [2011] IEHC 280
Director of Public Prosecutions v District Judge Ryan

Possession

"Has with" – Knowledge – *Mens rea* – Whether "has with" required element of knowledge – Judges' Rules – Discretion – Whether trial judge entitled to admit statement in evidence – *Minister for Posts and Telegraphs v Campbell* [1966] IR 69 and *People (Director of Public Prosecutions) v Byrne* [1988] 2 IR 417 followed; *CC v Ireland* [2005] IESC 48, [2006] 4 IR 1 distinguished; *R v Cugullere* [1961] 1 WLR 858 approved; *People (Director of Public Prosecutions) v Farrell* [1978] IR 13 followed - Firearms and Offensive Weapons Act 1990 (No 12), s 9 – Criminal Procedure Act 1993 (No 40), s 3 – One conviction affirmed, appeal on 2 convictions allowed (8/2009 – CCA- 3/3/2011) [2011] IEHC 5
People (Director of Public Prosecutions) v Ebbs

Practice

Abuse of process – District Court – Reissue of summons – Two sets of summonses returnable to different locations and dates – One set of summonses not served – Application to reissue set of summonses not served after other set struck out – Whether application abuse of process – Whether District Court had jurisdiction to hear complaint - *Director of Public Prosecutions v. O'Donnell* [1995] 2 I.R. 294 considered – Case stated answered (2010/2136SS – Sheehan J - 9/6/2011) [2011] IEHC 254
Director of Public Prosecutions (Garda Rafter) v Furlong

Rearrest

Detention – Charge – Requirement to charge forthwith following rearrest – Constitution – Right to liberty – Right to trial in due course of law – Whether charged forthwith – Judicial review – *Certiorari* – District Court – Jurisdiction – Preceding process – Whether District Court had jurisdiction to enter charge – Criminal trial – Evidence – Unfair trial – Video evidence – Duty of An Garda Síochána to seek out and preserve all evidence bearing on issue of guilt or innocence – Whether duty existed to preserve evidence having no bearing on guilt or innocence – Whether failure to preserve evidence could ground *certiorari* – *O'Brien v Special Criminal Court* [2007] IESC 45, [2008] 4 IR 514 distinguished; *State (AG) v Judge Fawsitt* [1955] IR 39, *DPP v Michael Delaney* [1997] 3 IR 453, *Killeen v DPP* [1997] 3 IR 218, *State (Trimbole) v Governor of Mountjoy Prison* [1985] IR 550 and *DPP(McTiernan) v Bradley* [2000] 1 IR 420 approved; *Dunne v DPP* [2002] 2 IR 305 considered - Criminal Justice Act 1984 (No 22), s 10(2) – Applicant's appeal dismissed (51/2008 – SC 21/12/2010) [2010] IESC 63
Whelton v O'Leary

Search warrant

Validity – Misdescription – Typographical error – Error in address of premises to be searched – Error not misleading – Whether warrant invalid – Whether error of fundamental nature - *People (DPP) v Edgeworth* [2001] 2 IR 131 applied; *People (DPP) v Balfe* [1998] 4 IR 50, *People (DPP) v Massoud* [2009] IECCA 94, (Unrep, CCA, 24/7/2009) and *People (DPP) v McCarthy* [2010] IECCA 89, [2011] 1 ILRM 430 and *People (AG) v O'Brien* [1965] IR 142 followed; *Kuruma v The Queen* [1955] AC 197 and *Mapp v Ohio* (1961) 367 US 643 considered; *Byrne v Grey* [1988] IR 31, *Director of Public Prosecutions v Dunne* [1994] 2 IR 537, *People (DPP) v Kenny* [1990] 2 IR 110, *Simple Imports Ltd v Revenue Commissioners* [2000] 2 IR 243, *People (DPP) v McGoldrick* [2005] IECCA 84, [2005] 3 IR 123 and *People (DPP) v McCarthy* [2010] IECCA 89, [2011] 1 ILRM 430 distinguished – Prosecutor's appeal allowed (9PX/2010 – CCA – 3/3/2011) [2011] IECCA 29
People (DPP) v Mallon

Sentence

Right to remission – Death sentence – Commuted by President of Ireland – Distinction between commutation and sentence – Whether power of commutation executive or judicial in nature – *Deaton v AG* [1963] IR 170, *Lynham v Butler (No 2)* [1933] IR 74, *The State (O) v O'Brien* [1973] IR 50, *Brennan v Minister for Justice* [1995] 1 IR 612, *Brennan v Minister for Justice* [1995] 1 IR 612, *Ryan v Governor of Limerick Prison* [1988] IR 198 and *Dowling v Minister for Justice* [2003] 2 IR 535 considered - Criminal Justice Act 1951 (No 2), s 23 – Criminal Law Act 1997 (No 14), s 11(5) – Criminal Justice Act 1990 (No 16), s 5 – Claim dismissed (2007/7061P – Hanna J – 15/4/2011 |) [2011] IEHC 190
Callan v Ireland

Strict liability offence

Refusal to provide breath sample –No requirement made to provide sample of blood or urine – Finding of special and substantial reason for applicant's failure to provide breath sample – Absence of offer of alternative sample – Applicant unaware of statutory defence to failure to provide breath sample of offering blood or urine sample – Applicant not informed – No offer made by applicant – Evidence applicant suffered from mild asthma and panic attacks –Whether onus existed on Garda Siochána to inform applicant of obligation – Whether absence of knowledge of applicant of defence open under the Act negated *mens rea* – Whether gardaí on notice at material time of special and substantial reason – Whether Act in breach of Constitution and State's obligations pursuant to European Convention of Human Rights – Whether fair procedures required making requirement to provide alternative where breath sample refused – *State (Healy) v Donoghue* [1976] IR 325, *Heaney v Ireland* [1994] 3 IR 593, *DPP v Cabot* [2004] IEHC 79 (Unrep, Ó Caoimh J, 20/4/2004), *DPP v Behan* (Unrep, Ó Caoimh J, 3/3/2003) and *DPP v Finnegan* [2008] IEHC 347 [2009] 1 IR 48 applied – *Sherras v De Rutzen* [1895] 1 QB 918 followed – *CC v Ireland* [2006] IESC 33 [2006] 2 ILRM 161 considered – *DPP v McGarrigle* [1996] 1 ILRM 271 distinguished – Constitution of Ireland 1937, articles 38.1 and 40.3 – European Convention on Human Rights and Fundamental Freedoms – Road Traffic Act 1994 (No 7), s 13 and 23(1) – European Convention on Human Rights Act 2003 (No 20), s 5 – Relief refused (2009/1067JR – Hanna J – 18/2/2011) [2011] IEHC 118
O'Connor v Judge O'Neill

Trial

Publicity – Fair trial – Internet publicity – Jury – Access to internet – Whether right to demand sweeping and cleansing of internet of prejudicial material prior to re-trial – Test in relation to adverse pre-trial publicity - Nature of publicity – Whether real risk of unfair trial – Access to internet by juries – Responsibility of Director of Public Prosecutions – Warnings and directions to juries - *Rattigan v. Director of Public Prosecutions* [2008] IESC 34, [2008] 4 IR 639 considered – Relief refused (2009/1283JR – Charleton J – 11/11/2010) [2010] IEHC 382
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Accommodation

Compensation – Minor – Assessment of damages for accommodation needs of minor plaintiff with disability during expected lifetime – Principles to be applied – Whether value of property at which plaintiff resided to be taken into account in assessing damages and if so, to what extent – Whether enhancement value of new property adapted to meet needs of plaintiff to be taken into account in assessing damages and if so, to what extent - Medical negligence – *Doherty v Bowaters Irish Wallboard Mills Ltd.* [1968] IR 277 applied; *Roberts v Johnstone* [1989] QB 878 distinguished; *Willett v North Bedfordshire Health Authority* [1993] PIQR Q166 approved - Damages assessed (2007/8367P – O'Neill J – 27/5/2011) [2011] IEHC 225
Barry (an infant) v National Maternity Hospital

Assessment

Agriculture – Seizure of cattle - Breach of agreement to return cattle to plaintiff – *Quantum* – Proper method of calculating loss – Compensation for capital value of animals and for losses incurred - Value of animals not returned – Loss of profits – Cost of purchasing new cattle - Loss of grant – Loss of winter milk bonus – Interest – Stress and inconvenience – *Hadley v Baxendale* (1854) 9 Ex 341; *Lennon v Talbot Ireland Ltd* (Unrep, Keane J, 20/12/1985); *Lee v Rowan* (Unrep, Costello J, 17/11/1981); *Grafton Court Limited v Wadson Sales Limited* (Unrep, Finlay P, 17/2/1975) and *Hanrahan v Merck Sharpe and Dohme (Ireland) Ltd* [1988] ILRM 629 considered – Damages awarded (2006/1811P – McMahon J – 26/11/2010) [2010] IEHC 442
Hanrahan v Minister for Agriculture

DEFAMATION

Identification

Evidence – Newspaper article – Reputation evidence ruled inadmissible on question of identification – Appeal – Whether article published of and concerning plaintiffs – Whether jury entitled to have regard to reputation evidence when considering identification issue – Whether substantial wrong or miscarriage of justice – Whether subsequent article referring to first article and naming plaintiffs admissible – Whether evidence of witness that other people identified plaintiffs from article admissible – *Hayward v Thompson* [1982] 1 QB 47, *Misir v Toronto Star Newspapers Ltd.* (1997) 105 OAC 270 and *White v Sayward* (1851) 33 Me 322 followed; *Grappelli v Derek Block Ltd* [1981] 1 WLR 822 and *Simons Proprietary Ltd v Riddle* [1941]

NZLR 913 distinguished; *Fullam v Associated Newspapers Ltd* [1953-54] Ir Jur Rep 70, *Jozwiak v Sadek and others* [1954] 1 WLR 275, *Du Bost v Beresford* (1810) 2 Camp 511 and *Cook v Ward* (1830) 2 CPD 255 followed - Rules of the Superior Courts 1986 (SI 15), O 36, r 36 and O 58, r 7(2) – Plaintiffs' appeal allowed, retrial ordered (275 & 277/2006 – SC – 1/6/2011) [2011] IESC 17
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Exceptional grounds – Relevance – Issues in dispute - Correctness of decision not in issue – Decision making process not impugned – Single electricity market - Licensing and bidding code of practice – Opportunity cost – Cost of regulatory compliance part of opportunity cost – Duty on applicant to reflect entire cost of carbon produced by generation activities – Whether decision *ultra vires* — *Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland* [2003] IR 528 and *Shortt v Dublin County Council* [2003] 2 IR 69 applied – *R v Secretary of State for Health ex parte Hackney London Borough* (Unrep, English Court of Appeal, 24/7/1994) followed – Electricity Regulation Act 1999 (No 23), s 40(D) – Relief refused (2010/1484JR – McGovern J – 8/3/2011) [2011] IEHC 127
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LAND LAW

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Estoppel by representation – Principles to be applied – Claim in respect of incident – Representation by insurers that they would be dealing with action on behalf of defendant – Defendant not liable in tort – Application to dismiss action – Whether defendant estopped by representation from denying liability – *Donegan v Minister for Education* [2007] IEHC 119, (Unrep, O'Neill, 16/3/2007); *Oakland Metal Co Ld v D Benaim & Co Ld,* [1953] 2 QB 261; *Finnegan v Richards* [2007] IEHC 134, (Unrep, McKechnie J, 20/4/2007); *Murphy v Grealish* [2006] IEHC 22, (Unrep, MacMenamin J, 11/1/2006) approved – *Ryan v Connolly* [2001] 1 IR 627; *Doran v Thompson Ltd* [1978] IR 223 applied – Health Act 1970 (No 1), ss 34 and 37

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Licensed premises

Duty of care – Suppliers of alcohol to customer – Liability of proprietor of licensed premises to persons who might be caused harm by customer – Customer served intoxicating liquor by third parties prior to driving motor vehicle – Whether duty of care on third parties as suppliers of alcohol to protect customer from risk resulting from self-induced intoxication – Whether foreseeable that if breached, customer might cause harm to others when driving motor vehicle - *Hall v Kennedy* (Unrep, Morris J, 20/12/1993), *Joy v Newell (t/a Copper Room)* [2000] NI 91, *Jebson v Ministry of Defence* [2000] 1 WLR 2055, *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) 207 ALR 52, *CAL (No 14) Pty Ltd (t/as Tandara Motor Inn) v Motor Accidents Insurance Board* (2009) 260 ALR 606 approved; *Stewart v Pettie* [1995] 1 SCR 131 distinguished; *O'Keeffe v Hickey* [2008] IESC [2009] 2 IR 302 applied - – Intoxicating Liquor Act 2003 (No 31), part 2, ss 2, 4, 9 – Road Traffic Act 2010 (No 25) - Claim dismissed (2006/4199P – Feeney J – 4/3/2011) [2011] IEHC 105
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Non–existent plaintiff – Dissolved company –Whether solicitor personally liable for costs of defence– Whether award of costs under inherent jurisdiction of court – Whether award of costs improperly or without reasonable cause incurred – Whether discretion of the court should be exercised in favour of solicitor for the plaintiff where solicitor not aware company was dissolved *ab initio* – F*ernée v Gorlitz* [1915] 1 Ch 177, *Kennedy v Killeen Corrugated Products Ltd* [2006] IEHC 385, [2007] 2 IR 561, *Nelson v Nelson* [1997] 1 WLR 233 and Yonge *v Toynbee* [1910] 1 KB 215 considered; *Simmons v Liberal Opinion Ltd* [1911] 1 KB 966 followed - Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 7 – Costs awarded against solicitor personally (2010/259MCA – Laffoy J – 18/2/2011) [2011] IEHC 111
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Response Engineering Ltd v Caherconlish Treatment Plant Ltd

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Plenary action

Declaratory relief – Judicial review – *Certiorari* – Limitation period – Whether reliefs sought by plenary action within scope of judicial review – Whether time limit applied by analogy to reliefs sought by plenary action – Whether good reason for extending time limit – Consent and compulsory purchase orders – Collateral challenge – Constitutionality of legislation – Whether pleas constituted collateral challenge to making of impugned orders – Locus standi – Whether time limit imposed by rule of court could curtail jurisdiction regarding challenge to constitutionality of legislation – *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301 distinguished; *Wandsworth LBC v Winder* [1985] 1 AC 461 followed; *Blanchfield v Hartnett* [2002] 3 IR 207 considered; *De Róiste v Minister for Defence* [2001] 1 IR 190 applied; *Cahill v Sutton* [1980] IR 269 considered; *AHP Manufacturing BV v Director of Public Prosecutions* [2008] IEHC 144, [2008] 2 ILRM 344 distinguished - Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Chancery (Ireland) Act 1867 (30 & 31 Vict, c 44), s 155 – Supreme Court of Judicature (Ireland) Act 1877 (40 & 41 Vict, c 57), s 28 – Gas Act 1976 (No 30), ss 32 and 40 – Gas (Interim) (Regulation) Act 2002 (No 10), s 23 – Constitution of Ireland 1937, Articles 34.3.2°, 40.3 and 43.2 – Held issue not time barred (2005/840P - Laffoy J – 4/3/2010) [2010] IEHC 363
Shell E & P Ireland Ltd v McGrath

Judgment

Execution of judgment – Cross-examination in aid of execution – Debtor's means – Oral examination – Scope of inquiry – Absence of express provision in Rules of Superior Courts – No provision requiring debtor to make information available prior to cross-examination –Whether power to order prior disclosure of relevant information – Whether power to order discovery of relevant information – Rules of the Superior Courts, 1986 (SI 15/1986) O 42, r 36 - Bank granted relief (2003/9018P & 2005/272S - Clarke J – 16/3/2011) [2011] IEHC 117
Moorview Development Ltd v First Active plc

Lis pendens

Ownership and interest in land – Receiver – Land subject of proceedings – Proceedings related to ownership of interest in land – Multiple defendants – Plaintiff pursuing *bona fide* issue against particular defendant – Owner of land proper defendant – Whether *lis pendens* capable of registration against company in receivership - *AS v GS* [1994] 1 IR 407 applied and *Bellamy v Sabine* (1857) De G & J 566 followed – *Lis pendens* vacated (2003/9018P – Clarke J – 5/2/2010) [2010] IEHC 35
Moorview Developments Ltd v First Active plc

Security for costs

Corporate plaintiff and individual plaintiff – Criteria for order against corporate plaintiff – Criteria for order against individual plaintiff – Order against corporate plaintiff structured in two stages – Whether orders for security for costs to be made – Whether special circumstances existed to prevent order against corporate plaintiff – Whether existence of individual plaintiff material to question of order for security for costs against corporate plaintiff – *Inter Finance Group Ltd v KPMG Peat Marwick* [1998] IEHC 217, (Unrep, Morris J, 29/6/1998), *Bula Ltd v Tara Mines Ltd (No 3)* [1987] IR 494 and *Lismore Homes Ltd (in receivership) v Bank of Ireland Finance Ltd* [1992] 2 IR 57 followed; *Jack O'Toole Ltd v MacEoin Kelly Associates* [1986] IR 277 applied; *Comhlucht Páipéar Ríomhaireachta Teo v Udarás na Gaeltachta* [1990] 1 IR 320, *Pearson v Naydler* [1977] 1 WLR 899 and *Moore v AG (No2)* [1929] IR 544 considered; *Pitt v Bolger* [1996] 1 IR 108, *Maher v Phelan* [1996] 1 IR 95, *Proetta v Neil* [1996] 1 IR 100, *European Fashion Products Ltd v Eenkhoorn* [2001] IEHC 181, (Unrep, Barr J, 21/12/2001) and *Collins v Doyle* [1982] ILRM 495 followed; *Malone v Brown Thomas & Co Ltd* [1995] 1 ILRM 369 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 29 – Companies Act 1963 (No 33), s 390 – Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention) – Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I) – Structured order made against corporate plaintiff, no order against individual (2008/8540P – Clarke J – 5/2/2010) [2010] IEHC 31
Salthill Properties Ltd v Royal Bank of Scotland plc

Summary summons

Claim for legal fees – Liability for costs of successful appeal to Supreme Court – Refusal of order for costs – Absence of defence – Absence of evidence that amount charged excessive – Absence of evidence that settlement reached – Whether failure to advise that costs order might not be made provided defence – Whether reasonable not to give advice – Whether advice would have been acted upon – Whether proceedings premature – Appeal of decision of Master - *Geoghegan v Harris* [2000]3 IR 536 considered - Judgment granted (200814927S – Kearns P – 10/12/2010) [2010] IEHC 484
Shaw v McCarthy

Summary summons

Illegible version of guarantee – Rectification on appeal – Whether contest entered - Absence of defence – Appeal of decision of Master – Judgment granted (2009/4479S – Kearns P – 10/12/2010) [2010] IEHC 480
Allied Irish Banks plc v McCarthy

Time limits

Appeal – Extension of time - Cross-appeal – Appeal on quantum - Cross-appeal on causation – Respondent informing applicant by letter of intention to appeal – Appeal lodged outside time limit – Whether applicant prejudiced – Whether respondent could put causation in issue in applicant's appeal against quantum – Respondent not party before tribunal – Statutory scheme – Whether Act limited cross-appeal to issue raised by claimant in appeal – Whether respondent entitled to raise by cross-appeal issue restricted from doing by way of appeal – Statutory provision obscure and ambiguous – Intention of Oireachtas – Long title to Act – Court jurisdiction to extend time to cross-appeal – *Eire Continental Trading Company Limited v Clonmel Foods Limited* [1955] IR 170, *Bank of Ireland v Breen* (Unrep, McCarthy J, 17/6/1987) and *DB v Minister for Health* [2003] 3 IR 12 applied – *Brewer v Commissioners of Public Works in Ireland* [2003] 3 IR 539 and *Hughes v O'Rourke* [1986] ILRM 538 considered – Hepatitis C Compensation Tribunal Act 1997 (No 34) (as amended), s 5(15) – Rules of the Superior Courts 1986 (SI 15/1986), O 122 – Rules of the Superior Courts (No 7) (Appeals from the Hepatitis C Compensation Tribunal) 1998 (SI No 392 of 1998), O 105A – Extension of time to appeal refused (2009/5CT – Irvine J, 18/2/2011) [2011] IEHC 132
M(C) v Minister for Health

Time limits

Appeal – Extension of time – Good and sufficient reason - Intention to appeal formed within time limit –Error on face of decision – No evidence of mistake –Whether tolerant approach to extensions of time warranted – Error in reasoning of respondent's decision – Error in description of critical term of insurance policy – Appellant aware of 21 day time limit – Delay blamed on financial difficulties and communications – Whether injustice to insurance company if appeal allowed – Function of respondent – Extension granted in unusual circumstances – Court granting order extending time to appeal unless respondent agreeing to remittal for reconsideration in view of error in reasoning – *Eire Continental Trading Company Limited v Clonmel Foods Limited* [1955] IR 170, *Brewer v Commissioners of Public Works in Ireland* [2003] 3 IR 539 and *Square Capital Limited v Financial Services Ombudsman* [2009] IEHC 407, [2010] 2 IR 514 applied – Central Bank Act 1942 (No 22) (as amended), s 57CL(3) – Rules of the Superior Courts 1986 (SI 15/1986), O 84C, r 1(5) – Relief granted (2010/267MCA – McMahon J – 11/3/2011) [2011] IEHC 137
Little v Financial Services Ombudsman

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Applications for leave to issue execution on foot of stale judgments and orders
2012 (19) 2 CLP 36

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SI 55/2012

District Court Districts and areas (amendment) (Ennis) order, 2012
SI 20/2012

District Court (districts) order 2012
SI 60/2012

District Court (fines) rules 2012
SI 39/2012

Rules of the Superior Courts (service) 2012
SI 15/2012

PRISONS

Assault

Duty of care – Foreseeability - Fear of co-accused – Protective custody – Fear of attack – Transfer – Authorities aware of concerns – Assault by fellow inmate in exercise yard on second day – Reception procedures – Plaintiff did not raise concerns on arrival – No protective custody facilities – Whether onus on prison authorities because of circumstances of transfer to make enquiries about possible associates of co-accused in new prison – Security system – System searching prisoners – Whether negligence established – Reasonable steps required to be taken to ensure prisoners not exposed to risk of damage – Balance security and rights of prisoners – No obligation to transfer plaintiff to safest prison – Difference case pleaded and made in oral evidence – *Creighton v Ireland* [2010] IESC 50 (Unrep, SC, 27/10/2010) and *Casey v Governor of Midlands Prison* [2009] IEHC 466 (Unrep, Irvine J, 27/10/2009) considered – *O'Neill v Dunnes Stores* [2010] IESC 53 (Unrep, SC, 16/11/2010) distinguished – Action dismissed (2004/16311P – Irvine J – 1/3/2011) [2011] IEHC 84
Sage v Minister for Justice

PRIVACY

Article

Lehnhardt, Eva
Privacy law and the German experience
2012 (2) ILTR 34

PROBATE

Administration of estates

Succession – Widow – Personal representatives – Extent of duty – *Keelan v Garvey* [1925] 1 IR 1 and *In re Michael Daily* [1944] NI 1 applied - Succession Act 1965 (No 27), s 126 (2007/8143P – Murphy J – 10/12/2010) [2010] IEHC 462
Moore v Moore

Will

Validity – Testamentary capacity – Whether deceased had testamentary capacity at time of execution of will – Onus of proof – Medical evidence – Complexity of will – Intention of testator – *Banks v Goodfellow* [1870] LR 5 QB 549 applied; *In re Key, dcd* [2010] 1 WLR 2020 considered - Succession Act 1965 (No 27), ss 77, 78 and 111- Will proved in solemn form (2009/3286P – Laffoy J – 21/12/2010) [2010] IEHC 475
Scally v Rhatigan

PRODUCT LIABILITY

Article

Carew, Sarah
Keeping abreast
2012 (Jan/Feb) GLSI 24

PROPERTY

Lawful possession

Injurious falsehood - Injunction – Declaratory relief – Sale of soil from defendant's land to plaintiff by third party – Declaration sought that soil in lawful possession of plaintiff – Injunction restraining defendants from communicating allegations of wrongdoing – Whether plaintiff in lawful possession – Ownership of material – Lawful possession of material – *Bona fide* purchaser for value without notice – Material severed from land – Chattel - Common law - Sale of goods – Definition of goods – *Nemo dat quod non habet* – Communications alleging wrongdoing – Whether repetition of allegations created liability in tort – Ingredients of injurious falsehood – *AIB v Finnegan* [1996] 1 ILRM 401; *Gannon v Young* [2009] IEHC 511 (Unrep, Laffoy J, 23/10/2009); *Kingsworth Finance Trust Co Ltd v Tizard* [1986] 1 WLR 783; *Sligo Corporation v Gilbride* [1929] IR 351 and *Scully v Corboy* [1950] IR 141 considered – Sale of Goods Act 1893 (, ss 21, 25 and 62 - Declarations and injunctive relief granted (2008/7269P – Laffoy J – 14/12/2010) [2010] IEHC 491
Roche Ireland Limited v O'Mahony

REAL PROPERTY

Adverse possession

Spouses – Registration of title – Joint tenancy –Constructive desertion – Severance – Statute of Limitations 1957 (No 6), ss 21, 24, 55, 71, 72 and 74 – Civil Liability Act 1961 (No 41), s 21(1) – Registration of Title Act 1964 (No 16), ss 31, 55 and 120 – Succession Act 1965 (No 27), s 126 (2007/8143P – Murphy J – 10/12/2010) [2010] IEHC 462
Moore v Moore

Judgment mortgage

Registered land - Joint tenancy – Enforcement – Creditor seeking order for sale in lieu of partition – Judgment mortgage against one joint tenant – Whether jurisdiction to make such an order – Act for Joint Tenants 1542 (33 Hen VIII, c 10) – Partition Act 1868 (32 & 33 Vict, c 40), ss 3 & 4 – Local Registration of Title (Ireland) Act 1891 (54 & 55 Vict, c 66), s 21 – Registration of Title Act 1964 (No 16), s 71 – Plaintiff's appeal dismissed (110/2006 – SC – 15/5/2011) [2011] IESC 15
Irwin v Deasy

Registered land

Joint tenancy – Severance – Judgment mortgage – Registration against interest of joint tenant – Debtor dying before execution – Whether registration gave rise to severance of joint tenancy - Whether surviving joint tenant took free of registered judgments – *Re Pollard's Estate* [1863] 32 LJ Ch. 657 and *York v Stone* [1709] 1 Salk 158 approved; *M'Ilroy v. Edgar* (1881) 7 LR Ir. 521 and *Re Scanlon* [1897] 1 IR 462 considered; *Lord Abergavenny's Case* (1604) Pasch 5 Jacobi approved - Judgment Mortgage (Ireland) Act 1850 (13 & 14 Vict, c 29), s 7 – Conveyancing and Law of Property Act 1881 (44 & 45 Vict, c 41), s 2(vi) – Local Registration of Title (Ireland) Act 1891 (54 & 55 Vict, c 66), ss 21 and 45 – Registration of Title Act 1964 (No 16), ss 62, 69, 71 and 72 – Succession Act 1965 (No 27) s 4(c) – Land and Conveyancing Law Reform Act 2009 (No 27) – Plaintiff's appeal dismissed (16/2009 – SC – 25/11/2010) [2010] IESC 58
Judge Mahon v Lawlor

REVENUE

Income tax

Time limit - Notice of tax avoidance – Approach to interpretation – Applicability of amendment to statute after the fact to interpretation of statute – Notice stating, *inter alia,* opinion tax avoidance transaction had occurred – Notice issued to respondent nearly nine years after income tax return relating to transaction filed – Whether Appeal Commissioner correct in law in holding four year time limit applied – *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64 approved – *Cronin (Inspector of Taxes) v Cork and County Property Co Ltd* [1986] IR 559; *Keogh v Criminal Assets Bureau* [2004] IESC 32, [2004] 2 IR 159; *Harris v Quigley* [2005] IEHC 81, [2005] IESC 79, [2006] 1 IR 165; *DB v Minister for Health* [2003] 3 IR 12 applied – Finance Act 1988 (No 12) – Finance Act 1989 (No 10) – Hepatitis C Compensation Tribunal Act 1997 (No 34), s 5 – Taxes Consolidation Act 1997 (No 39), ss 811, 811A, 895, 922, 933, 924, 941, 950, 951, 955, 956, 957, Parts 33 and 41 – Finance Act 2008 (No 3), s 140 – Appeal dismissed (2010/1020R – Laffoy J – 31/3/2011) [2011] IEHC 142
Revenue Commissioners v Droog

ROAD TRAFFIC

Statutory Instruments

Road traffic (courses of instruction) (learner permit holders) (amendment) regulations 2012
SI 4/2012

Road traffic (licensing of learner drivers) (certificates of competency) (amendment) regulations 2012
SI 3/2012

Road traffic (ordinary speed limit - buses, heavy good vehicles, etc.) (amendment) regulations 2012
SI 75/2012

Road traffic (traffic and parking) (amendment) regulations 2012
SI 74/2012

SALE OF GOODS

Article

White, Fidelma
Report on the legislation governing the sale of goods and supply of services: something old; something new
2012 (19) 2 CLP 23

SOCIAL WELFARE

Statutory Instruments

Social welfare and pensions act 2010 (section 12 and 13) (commencement) order 2012
SI 42/2012

Social welfare and pensions act 2010 (section 32) (transfer day) order 2011
SI 717/2011

Social welfare and pensions act 2010 (section 33) (appointment day) order 2011
SI 718/2011

Social welfare and pensions act 2010 (section 38) (appointment day) (No.2) order 2011
SI 716/2011

Social welfare (consolidated claims, payments and control) (amendment) (No.1) (overlapping benefits) regulations 2012
SI 38/2012

Social welfare (consolidated claims, payments and control) (amendment) (no. 2) (partial capacity benefit) regulations 2012
SI 43/2012

SOLICITORS

Lien

Return of client monies – Costs due - Entitlement to exercise lien over client account until costs due discharged - Rules of the Superior Courts 1986 (SI 15/1986), O 53, r 17 – Application refused; order directing payment out to defendants granted (2010/367SP– Kearns P – 10/12/2010) [2010] IEHC 481
McCarthy v Shaw

STATUTORY INTERPRETATION

International instrument

Purposive construction – Whether provision should be construed in accordance with intention of member states - Council Directive 2003/86/EC – United Nations High Commissioner for Refugees Guidelines on Reunification of Refugee Families 1983 – United Nations High Commissioner for Refugees Resettlement Handbook (Geneva, November, 2004) – United Nations High Commissioner for Refugees Executive Committee on Family Reunification Conclusions 21st October, 1981 – Relief granted (2009/794JR – Cooke J – 25/11/2010) [2010] IEHC 427
Hamza v Minister for Justice

Retrospective effect

Construction – Statute incorporating European Convention on Human Rights – Application to repealed legislation of requirement that statutory provisions be applied by courts in manner compatible with Convention - Whether exercise of power of commutation of sentence subject to constitutional justice – Fair procedures – *Dublin City Council v Fennell* [2005] 1 IR 604 applied, *Condon v Minister for Labour* [1981] IR 62 and *Sloan v Culligan* [1992] 1 IR 223 considered - European Convention on Human Rights Act 2003 (No 20), s 2 - Criminal Justice Act 1990 (No 16), s 5 – Constitution of Ireland 1937, s. 40.1 – Claim dismissed (2007/7061P – Hanna J – 15/4/2011) [2011] IEHC 190
Callan v Ireland

Article

Hunt, Emer
Impact of the Supreme Court in O'Flynn Construction on statutory interpretation
Galvin, Turlough
2012 (1) ITR 60

SUCCESSION

Voluntary carer

Contract – *Quantum meruit* – Unjust enrichment – Provision of voluntary care – Provision of professional services – Intention to create legal relations – Whether claim in *quantum meruit* or in unjust enrichment arises from provision of voluntary care - *McCarron v McCarron* (Unrep, SC, 13/2/1997), *Henehan v Courtney and Hanley* (1967) 101 ILTR 25 and *Chaieb v Carter* (Unrep, SC, 3/6/1987) applied; *Rogers v Smith* (Unrep,

SC, 16/7/1970) considered – Defendant's appeal allowed (2010/12CA – Hedigan J – 3/5/2011) [2011] IEHC 179
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Article

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Cowley, Richard
Vat on medical services
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Fatal injuries

Damages – Remoteness – Other expenses – Whether costs of legal representation at inquest recoverable – Whether phrase "other expenses actually incurred" could include cost of legal representation at inquest – *Grant v Roche Products (Ireland) Ltd* [2008] IESC 35, [2008] 4 IR 679, *Condon v CIE* (Unrep, Barrington J, 16/11/1984) and *Magee v Farrell* [2009] IESC 60, [2009] 4 IR 703 considered - Civil Liability Act 1961 (No 41), ss 48 and 49 – Damages including costs awarded (2008/1225P – O'Neill J – 27/5/2011) [2011] IEHC 226
Courtney v Our Lady's Hospital Ltd

TRANSPORT

Statutory Instruments

Roads act 1993 (classification of national roads) order 2012
SI 53/2012

Roads act 1993 (classification of regional roads) order 2012
SI 54/2012

Light railway (regulation of travel and use) Bye-laws 2012
SI 44/2012

Travel Agents (licensing) (amendment) regulations 2012
SI 61/2012

TRIBUNAL OF INQUIRY

Fair procedures

Evidence – Bias – Cross-examination - Entitlement to cross-examine on matters concerning allegations of bias – Entitlement to curtail time for cross-examination – Principles of judicial review – Whether decision to prohibit cross-examination reasonable and fair – Whether decision to curtail time for cross-examination reasonable and fair – Whether delay in bringing application – *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701, *Bailey v Flood* (Unrep, Morris P, 6/3/2000; SC, 14/4/2000), *Flood v Lawlor* (Unrep, SC, 24/11/2000), *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642, *In re Haughey* [1971] IR 217, *Maguire v Ardagh* [2002] 1 IR 385 and *O'Callaghan v Mahon* [2005] IESC 9, [2005] IEHC 265, [2006] 2 IR 32 applied - Constitution of Ireland 1937 – Relief refused (2010/1420JR – Hedigan J – 1/2/2011) [2011] IEHC 30
O'Brien v Moriarty Tribunal

TRUSTS

Variation

Amendment of settlement – Life assurance policy – Proposed scheme of arrangement – Intended effect – Whether proposed scheme of arrangement would have intended effect – Jurisdiction of court to approve or refuse scheme of arrangement – Jurisdiction of court to approve amended scheme of arrangement – Whether court could approve scheme of arrangement subject to amendment or modification – Practice and procedure – Special summons – Relevant person – Whether special summons should specify relevant person – Benefit to settlor – Detriment to other relevant persons – Identity of residual beneficiaries – Whether personal representative of settlor would distribute estate in accordance with will or on intestacy – Mental capacity of settlor – Whether court had jurisdiction to approve scheme of arrangement where adult incapable assenting by reason of absence of mental capacity – Revenue Commissioners – Notice – Obligation on Revenue Commissioners to apprise court of attitude to scheme of arrangement – *In re CL* [1969] 1 Ch 587 and *In re Tinker's Settlement* [1960] 1 WLR 1011 considered - Land and Conveyancing Law Reform Act 2009 (No 27), Part 5 – Scheme not approved; liberty to amend granted (2010/376SP – Laffoy J – 30/7/2010) [2010] IEHC 505
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WARDS OF COURT

Funds

Investment of funds in court – Function of investment committee – Consideration of views of committee of ward of court – *In re A Ward of Court (withholding medical treatment No 2)* [1996] 2 IR 79 considered - Courts (Supplemental Provisions) Act 1961 (No 39), ss 9 and 55- Relief refused (Kearns P – 4/4/2011) [2011] IEHC 129
Re H(M) a ward of court

WORDS AND PHRASES

"Member of family" – Refugee Act 1996 (No 17), s 18 (2009/794JR – Cooke J – 25/11/2010) [2010] IEHC 427
Hamza v Minister for Justice, Equality and Law Reform

AT A GLANCE

European Directives implemented into Irish Law up to 31/03/2012

European Communities (authorization, placing on the market, use and control of plant protection products) (amendment) regulations 2012
DIR/2010-54, DIR/2010-55, DIR/2010-56, DIR/2010-57, DIR/2011-14
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European Communities (conservation of wild birds (Drumcliff Bay special protection area 004013)) regulations 2012
DIR/2009-147, DIR/92-43 [DIR/1992-43]
SI 40/2012

European Communities (conservation of wild birds (Middle Shannon Callows special protection area 004096)) regulations 2012
DIR/2009-147, DIR/92-43, [DIR/1992-43])
SI 41/2012

European Communities (control of foot and mouth disease) regulations 2012
DIR/2003-85
SI 51/2012

European Communities (marketing of seeds) (amendment) regulations 2011
DIR/2010-60
SI 739/2011

European Communities mercury (export ban and safe storage) regulations 2012
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SI 27/2012

European Communities (minimum conditions for examining agriculture plant species) (amendment) regulations 2011
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SI 738/2011

European Communities (minimum conditions for examining vegetable species) (amendment) regulations 2011
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SI 736/2011

European Communities (Newcastle disease) regulations 2012
DIR/92-66
SI 57/2012

European Communities (official controls on the import of food of non-animal origin for pesticide residues) (amendment) regulations 2012
REG/1277-2011
SI 46/2012

European Communities (pet passport) regulations 2012
REG/998-2003, DEC/2004-650, REG/1994-2004, REG/2054-2004, REG/425-2005, REG/1193-2005, REG/590-2006, REG/1467-2006, REG/245-2007, REG/454-2008, REG/1144-2008, REG/219-2009, REG/898-2009, REG/438-2010)
SI 7/2012

European Communities (road transport) (organisation of working time of persons performing mobile road transport activities) regulations 2012
DIR-2002/15
SI 36/2012

European Communities (vehicle testing) (amendment) regulations 2012
DIR-2009/40
SI 58/2012

European Union (award of contracts relating to defence and security) regulations 2012
DIR/2009-8
SI 62/2012

European Union (Biofuel Sustainability criteria) regulations 2012
DIR/2009-28
SI 33/2012

European Union (copyright and related rights) regulations 2012
DIR/2001-29
SI 59/2012

European Union (Iran) (financial sanctions) regulations 2012
REG/961-2012
SI 34/2012

Financial transfers (Iran) (prohibition) order 2012
REG/961-2010
SI 35/2012

Statistics (retail sales) order 2011
REG/1165-98, REG/450-2003
SI 737/2011

ACTS OF THE OIREACHTAS AS AT 13TH APRIL 2012 (31ST DÁIL & 24TH SEANAD)

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

1/2012 Patents (Amendment) Act 2012
Signed 01/02/2012

2/2012 Water Services (Amendment) Act 2012
Signed 02/02/2012

3/2012 Energy (Miscellaneous Provisions) Act 2012
Signed 25/02/2012 (Only available electronically)

4/2012 Health (Provision of General Practitioner Services) Act 2012
Signed 28/02/2012 (Only available electronically)

5/2012 Bretton Woods Agreements (Amendment) Act 2012
Signed 05/03/2012

6/2012 Euro Area Loan Facility (Amendment) Act 2012
Signed 09/03/2012(Only available electronically)

7/2012 Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012
Signed 10/03/2012 (Only available electronically)

8/2012 Clotting Factor Concentrates and Other Biological Products Act 2012
Signed 27/03/2012 (Only available electronically)

9/2012 Finance Act 2012
Signed 31/03/2012 (Only available electronically)

10/2012 Motor Vehicle (Duties and Licences) Act 2012
Signed 02/04/2012 (Only available electronically)

BILLS OF THE OIREACHTAS AS AT 13TH APRIL 2012 (31ST DÁIL & 24TH SEANAD)

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

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

Advance Healthcare Decisions Bill 2012
Bill 2/2012
2nd Stage – Dáil **[pmb]** *Deputy Liam Twomey*

Advertising, Labelling and Presentation of Fast Food at Fast Food Outlets Bill 2011
Bill 70/2011
2nd Stage – Dáil **[pmb]** *Deputy Billy Kelleher*

Burial and Cremation Regulation Bill 2011
Bill 81/2011
2nd Stage – Dáil **[pmb]** *Deputy Thomas P. Broughan*

Central Bank and Credit Institutions (Resolution) Bill 2011
Bill 11/2011
2nd Stage – Seanad *(Initiated in Seanad)*

Central Bank and Financial Services Authority of Ireland (Amendment) Bill 2011
Bill 67/2011

2nd Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Central Bank (Supervision and Enforcement) Bill 2011
Bill 43/2011
Committee Stage – Dáil

Civil Registration (Amendment) Bill 2011
Bill 65/2011
Committee Stage – Seanad **[pmb]** Senator Ivana Bacik

Competition (Amendment) Bill 2011
Bill 55/2011
Committee Stage – Seanad *(Initiated in Dáil Éireann)*

Construction Contracts Bill 2010
Bill 21/2010
2nd Stage – Dáil **[pmb]** *Senator Fergal Quinn (Initiated in Seanad)*

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

Corporate Manslaughter Bill 2011
Bill 83/2011
2nd Stage – Seanad **[pmb]** Senator Mark Daly

Credit Guarantee Bill 2012
Bill 27/2012
1st Stage - Dáil

Criminal Justice (Aggravated False Imprisonment) Bill 2012
Bill 3/20122
1st Stage - Dáil

Debt Settlement and Mortgage Resolution Office Bill 2011
Bill 59/2011
Committee Stage - Dail

Dormant Accounts (Amendment) Bill 2011
Bill 46/2011
2nd Stage - Dáil *(Initiated in Seanad)*

Education (Amendment) Bill 2012
Bill 1/2012
Committee Stage – Dáil *(Initiated in Seanad)*

Electoral (Amendment) (Political Donations) Bill 2011
Bill 13/2011
Report Stage – Dáil **[pmb]** *Deputies Dara Calleary, Niall Collins, Barry Cowen, Timmy Dooley, Sean Fleming, Billy Kelleher, Seamus Kirk, Michael P. Kitt, Brian Lenihan, Micheál Martin, Charlie McConalogue, Michael McGrath, John McGuinness, Michael Moynihan, Willie O'Dea, Éamon Ó Cuív, Seán Ó Fearghaíl, Brendan Smith, Robert Troy and John Browne.*

Electoral (Amendment) (Political Funding) Bill 2011
Bill 79/2011
2nd Stage – Dáil *(Initiated in Seanad)*

Employment Equality (Amendment) Bill 2012
Bill 11/2012
2nd Stage – Seanad

Employment Equality (Amendment) (No. 2) Bill 2012
Bill 14/2012
Committee Stage – Seanad **[pmb]** *Senator Mary M. White*

Entrepreneur Visa Bill 2012
Bill 13/2012
1st Stage - Dáil

European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Bill 2011
Bill 45/2011
Order for 2nd Stage – Dáil

Family Home Bill 2011
Bill 38/2011
Order for 2nd Stage – Seanad **[pmb]** *Senators Thomas Byrne and, Marc MacSharry*

Family Home Protection (Miscellaneous Provisions) Bill 2011
Bill 66/2011
2nd Stage – Dáil **[pmb]** *Deputy Stephen Donnelly*

Finance Bill 2012
Bill 5/2012
Committee Stage – Seanad *(Initiated in Dáil)*

Financial Emergency Measures in the Public Interest (Reviews of Commercial Rents) Bill 2012
Bill 22/2012
1st Stage – Dáil **[pmb]** *Deputy Peadar Tóbín*

Fiscal Responsibility (Statement) Bill 2011
Bill 77/2011
2nd Stage - Seanad

Freedom of Information (Amendment) Bill 2012
Bill 15/2012
2nd Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Health (Professional Home Care) Bill 2012
Bill 6/2012
2nd Stage - Dáil

Human Rights Commission (Amendment) Bill 2011
Bill 52/2011
2nd Stage – Dáil **[pmb]**

Immigration, Residence and Protection Bill 2010
Bill 38/2010
Committee Stage - Dáil

Industrial Relations (Amendment) Bill 2011
Bill 39/2011
Committee Stage – Dáil **[pmb**] Deputy Willie O'Dea

Industrial Relations (Amendment) (No. 3) Bill 2011
Bill 84/2011
Committee Stage - Dáil

Landlord and Tenant (Business Leases Rent Review) Bill 2012
Bill 20/2012
1st Stage - Dáil

Legal Services Regulation Bill 2011
Bill 58/2011
Committee Stage – Dáil

Local Authority Public Administration Bill 2011
Bill 69/2011
2nd Stage – Dáil **[pmb]** *Deputy Niall Collins*

Local Government (Household Charge) (Amendment) Bill 2012
Bill 21/2012
1st Stage – Dáil **[pmb]** *Deputy Niall Collins*

Local Government (Household Charge) (Repeal) Bill 2012
Bill 18/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Brian Stanley*

Local Government (Superannuation) (Consolidation) Scheme 1998 (Amendment) Bill 2012
Bill 16/2012
Committee Stage – Dáil **[pmb]** *Deputy Mary Lou McDonald*

Medical Treatment (Termination of Pregnancy in Case of Risk to Life of Pregnant Woman) Bill 2012
Bill 10/2012
2nd Stage – Dáil

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

Mobile Phone Radiation Warning Bill 2011
Bill 24/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Mark Daly (Initiated in Seanad)*

NAMA and Irish Bank Resolution Corporation Transparency Bill 2011
Bill 82/2011
2nd Stage – Seanad **[pmb]** *Senator Mark Daly*

National Archives (Amendment) Bill 2012
Bill 8/2012
2nd Stage – Dáil

National Tourism Development Authority (Amendment) Bill 2011
Bill 37/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
2nd Stage – Seanad *(Passed by Dáil Éireann)*

Privacy Bill 2006
Bill 44/2006
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Privacy Bill 2012
Bill 19/2012
2nd Stage – Seanad **[pmb]** *Senators Sean D. Barrett, David Norris and Feargal Quinn*

Protection of Employees (Temporary Agency Work) Bill 2011
Bill 80/2011
Report Stage – Seanad *(Initiated in Dáil)*

Public Service Pensions (Single Scheme) and Remuneration Bill 2011
Bill 56/2011
Committee Stage – Dáil

Qualifications and Quality Assurance (Education and Training) Bill 2011
Bill 41/2011
Committee Stage – Seanad *(Initiated in Seanad)*

Reduction in Pay and Allowances of Government and Oireachtas Members Bill 2011
Bill 27/2011
2nd Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Registration of Wills Bill 2011
Bill 22/2011
Committee Stage – Seanad **[pmb]** *Senator Terry Leyden (Initiated in Seanad)*

Regulation of Debt Management Advisors Bill 2011
Bill 53/2011
2nd Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Reporting of Lobbying in Criminal Legal Cases Bill 2011
Bill 50/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator John Crown*

Road Safety Authority (Commercial Vehicle Roadworthiness) Bill 2012
Bill 25/2012
2nd Stage – Seanad

Road Transport Bill 2011
Bill 68/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Scrap and Precious Metal Dealers Bill 2011
Bill 64/2011
2nd Stage – Dáil **[pmb]** *Deputy Mattie McGrath*

Smarter Transport Bill 2011
Bill 62/2011
2nd Stage – Dáil **[pmb]** *Deputy Eoghan Murphy*

Social Welfare and Pensions Bill 2012
Bill 26/2012
2nd Stage - Dáil

Spent Convictions Bill 2011
Bill 15/2011
Committee Stage – Dáil **[pmb]** *Deputy Dara Calleary*

Statistics (Heritage Amendment) Bill 2011
Bill 30/2011
Order for 2nd Stage – Seanad **[pmb**] *Senator Labhrás Ó Murchú*

Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiries) Bill 2011
Bill 47/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Thirtieth Amendment of the Constitution (Treaty on Stability, Co-ordination and Governance in the Economic and monetary Union) Bill 2012
Bill 23/2012
1st Stage - Dáil

Thirty-First Amendment of the Constitution (The President) Bill 2011
Bill 71/2011
2nd Stage - Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
Report Stage – Dáil

Twenty-Ninth Amendment of the Constitution (Judges' Remuneration) Bill 2011
Bill 44/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Twenty-Ninth Amendment of the Constitution (No. 2) Bill 2011
Bill 14/2011
2nd Stage – Dáil **[pmb]** *Deputy Micheál Martin*

Veterinary Practice (Amendment) Bill 2011
Bill 42/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Whistleblowers Protection Bill 2011
Bill 26/2011
Order for 2nd Stage – Dáil **[pmb]** *Deputies Joan Collins, Stephen Donnelly, Luke 'Ming' Flanagan, Tom Fleming, John Halligan, Finian McGrath, Mattie McGrath, Catherine Murphy, Maureen O'Sullivan, Thomas Pringle, Shane Ross, Mick Wallace*

Wind Turbines Bill 2012
Bill 9/2012
Committee Stage – Seanad **[pmb]** *Senator John Kelly*

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
ELRI = Employment Law Review - Ireland
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
IIPLQ = Irish Intellectual Property Law Quarterly
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
KISLR = King's Inns Student Law Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
LG Rev = Local Government Review
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

Access to Justice in Malawi – Irish Rule of Law Project

Ruth Dowling BL

Irish Rule of Law International (formerly Pamodzi) is a non-profit charity established by the Law Society and Bar Council. It has set up projects in Ethiopia, Kenya, Kosovo, South Africa, Zambia and Malawi. The Malawi project is seeking to use the experience and knowledge of Irish lawyers to assist the criminal justice sector in Malawi with alleviating inhumane conditions in prisons by reducing the numbers held in pre-trial detention. The project intends to tackle overcrowding in the prisons through capacity building, training of police officers and magistrates, running bail clinics, becoming involved in the prosecution led diversion projects and representing defendants for minor cases in the Magistrates Court. This project is part funded by Irish Aid.

The overall goal for the Irish Rule of Law Malawi project is to increase access to justice for those within the criminal justice system in Malawi. As this is the first year of a pilot project we are piloting the programme out of Lilongwe, which is in the administrative central region. Two programme lawyers, Ruth Dowling BL and Sonya Donnelly BL have been based in the Department of Legal Aid offices since August 2011 with ongoing outreach clinic work within the local prisons. Lilongwe has two prisons in its immediate vicinity, Maula, an adult prison and Kachere, a juvenile facility. A third lawyer Carolann Minnock, Solicitor is based in the Director of Public Prosecution's office, with an ongoing placement in Lilongwe Police Station. The project seeks to implement a restorative justice programme, assist with the progression of cases and act as a prosecution liaison with juvenile justice cases.

The practices of excessive detention and the holding of prisoners on remand are very common in many African countries. In Malawi defendants face physical, financial and language barriers to legal representation. Most live in remote rural areas on an income of approximately €1 per day, and do not speak English – the language of the court. With no representation, defendants are often held in custody for years, often far longer than the maximum sentence allowed for the offences they are alleged to have committed, until a trial court acquits or sentences them. Warrants are regularly misplaced with prisoners becoming lost in the system. 90% of all detainees in Malawi will never have access to any legal representation, advice or assistance. The vast majority of those are persons who have allegedly committed minor offences.

At present Malawi spends €125,000 on legal aid for both civil and criminal matters annually. This is about €0.01 per capita on legal aid. This is compared to €315,500 on the DPP's office alone. The police prosecutors also have a separate budget for the prosecution of minor files. The DPP offices have prosecution lawyers to prosecute "heavy-weight" offences, ie murder, rape but it is the police prosecutors that prosecute 90% of cases.

The total number of employees in the Legal Aid Department as of November 2011 was 176 posts of which only 24 are for lawyers. At that time there were only 16 legal aid advocates. In a country with a population of 14 million people that is one legal aid lawyer for every 800,000 people. The Legal Aid Department offices are only situated in the three main cities - in Lilongwe, Blantyre and Mzuzu. The Legal Aid Department does not have representation in the remaining districts. The Mzuzu office usually operates with only one lawyer. Most people are living in rural areas and so transport to the cities to see a lawyer proves too costly.

There have been some progressive changes in the Malawian Legal System. The Malawian Constitution and recent case law provides a solid legal framework for regulating pre-trial detention, in particular the fair trial rights of accused people and the recent enactment of pre-trial detention time limits further strengthens these provisions. However officials, lower level Magistrates (lay judiciary) and police prosecutors must receive the necessary training in order for the new laws to have any positive effect. The lower Magistrates Courts (District Courts) operate often without any legally qualified person present. The vast majority of Magistrates do not have a law degree. Most prosecutors are police officers who have done a three or six month training course. Most often the accused is unrepresented. As a result, the criminal justice process and the strict custody time limits are routinely infringed with no consequence except to the accused person who remains in custody.

The overwhelming picture in terms of detention is that conditions of detention in police cells are poor, with little or no access to food and frequently custody time limits are exceeded. The project has come across detainees who had been kept in police custody for a number of months. The ageing state of many Malawian police stations and the insufficient capacity and nature of cell accommodation are the main cause of many of the major concerns and sufficient funds will remain a challenge for the foreseeable future.

While conditions in the prisons are also seriously overcrowded, there had been a brief hope that conditions would improve after the High Court in 2009 found for a detainee, that he had been subjected to torture and cruel, inhuman and degrading treatment, an infringement of his non-derogable rights under Section 44 of the Malawian Constitution. The court noted that overcrowding had contributed to the death of 259 inmates in a space of about 18 months. In its final paragraphs, the Court gave the State 18 months to improve conditions. Unfortunately at the time

of writing the judgment has not been complied with, as it was to have been by May 2011.

It is quite common to find homicide remandees who have been held in prison for upwards of four years having never been to Court and no indication of when their case will be heard. It appears that for homicide matters, it is the cases with stronger evidence (i.e. for which it would be easier to obtain a conviction) which are selected for trial. This effectively means that the weaker the case against the accused, the longer his/her pre-trail detention period will be.

In light of this, the programme lawyers are working on a project where they interview the longest remandees to get an understanding of their case. They are trying to get access to files through the criminal registry and are implementing a system of highlighting these cases to the DPP's office to have them listed for trial, or dismissed if the files are missing or incomplete. Or, they will work with legal aid lawyers and make a bail application.

The permanent project in Malawi has been up and running now since August 2011. Much work has been done to tackle the overcrowding and to improve the effectiveness of the system. However matters go at a slow pace. In December 2011 we brought six successful bail applications. These included;

- a female remandee who has been in pre-trial detention since 4th July 2011, who gave birth by caesarean section in prison three months ago
- a 62 year old man who had been in custody for seven years awaiting trial, he thinks bail had been granted to him years ago but he could not contact his family and therefore could not meet the surety condition and so has remained in custody
- a 28 year old man who was taken into custody at age 21 years and had remained in custody for seven years without having been to court and without having met a lawyer

Her Worship, Justice Chombo of the High Court in her judgment said "This Court decries the lack of seriousness with which the DPP handles these matters". She granted unconditional bail which is quite unusual in homicide matters, and declared that should the State fail to bring any proceedings within six months the High Court will consider them discharged of all charges.

Also in December 2011, IRLM secured the release of a Ugandan boy aged 16 from Kachere Juvenile Prison. He was brought before court in July 2011 for theft of a mobile phone. On hearing the case the court ruled that he should be unconditionally discharged. Unfortunately, the social welfare report incorrectly identified the boy as a refugee and the court ordered that he be returned to the nearby refugee camp. Instead, due to lack of transport, the boy was returned to Kachere Juvenile Prison. IRLM assisted with the release of the boy together with the support of the police.

Camp Court

Another young boy was being held in Kachere Juvenile prison until there was a "change in his behaviour". He has spent 2 years there. It was decided his behaviour had improved and so he should be released. However, as he was not a convicted person, it was not clear who had the authority to release him and so he remained in prison. This was highlighted by IRLM to the Prison Board of visitors and he was soon after released.

We also helped a juvenile who was arrested for murder in December 2009. Despite the prosecution stating in April 2010 that the case would be discontinued due to lack of evidence, the boy remained in prison until January 2012. IRLM worked with the prosecution and the prison services to secure the boys release.

Another project we are looking to become involved with is representing prisoners at the civil society led "camp courts". Sometimes the prisons in Malawi lack the transport or petrol to bring the prisoners to courts - or the courts lack the space to hold the prisoners in court cells. Accordingly, paralegals invite the Magistrates to establish 'camp courts' inside the prison. The paralegals draw up lists of those on remand that have overstayed, that are held unlawfully or that have been granted bail but cannot afford the terms set by the court. Magistrates attend court with the court clerk, police prosecutor and work through the list. They grant bail to some, reduce the bail set by an earlier court, set a date for trial and sometimes dismiss cases where the accused has overstayed. The main benefit of this is that prisoners see the law in action and Magistrates see conditions in the prisons and are able to do something practical to alleviate the situation. As a consequence, tensions in prison are reduced and the lower judiciary are more aware of utilising alternatives to prison in appropriate cases.

The Irish Rule of Law Project has secured some funding from some members of the Law Library. This funding will go towards mini-projects which will be set up in Lilongwe together with our partners on the ground to offer training to Police Prosecutors and Magistrates, to run Legal Advice clinics in the prisons and to increases the number of Camp-Courts being held.

The project has received mention in the national Malawi paper 'The Nation' as well as an online Malawi paper 'The Maravi Post'. The Irish Ambassador Ms. Liz Higgins has given us her full support along with the Malawian Ministry of Justice.

If you would like more information about this project, including a direct link to our fundraising page, you can access our website at www.irishruleoflawmalawi.com, as well as the IRLI website at www.irishruleoflaw.ie. ■

Prisoners sleeping in over-crowded cells

Unconstitutional Omissions

Yvonne Mullen BL

Introduction

Traditionally, when faced with the question of whether or not an Act of the Oireachtas is unconstitutional, a lawyer will tend to look for an active breach – an enactment that positively offends the Constitution. But what about that far more subtle breach, the omission? What part may the courts play when the legislature or the executive, either by accident or design, brings into force legislation that allows an unconstitutional lacuna to open up? What remedy may be offered in such circumstances? After all, it must be remembered that in *State (Trimbole) v Governor of Mountjoy Prison,*[1] the Supreme Court decreed in no uncertain terms that "the Courts not only have an inherent jurisdiction but a positive duty: (i) to protect persons against the invasion of their constitutional rights, (ii) if that invasion has occurred, to restore as far as possible the person so damaged to the position in which he would be had his rights not been invaded, and (iii) to ensure as far as possible that the persons acting on behalf of the executive who consciously and deliberately violate the rights of citizens do not themselves or their superiors obtain the planned results of that invasion".

How then may an applicant who is the victim of an unconstitutional lacuna obtain redress? After all, equity teaches us "where there is a right, there must be a remedy" (*ubi jus, ibi remedium).*

A Declaration of Unconstitutionality

The courts may strike down any Act of the Oireachtas, which they feel is not in compliance with the Constitution by making a declaration of unconstitutionality pursuant to Article 34.3.2. The effect is to banish immediately the offending legislation, and theoretically at least, it is as if it never existed[2]. This is the conventional approach to a declaration being made. It was succinctly expressed by Keane J in his judgement in *Somjee v Minister for Justice & Attorney General*[3], when he said:-

> "The jurisdiction of this Court in a case where the validity of an Act of the Oireachtas is questioned because of an alleged invalidity having regard to the provisions of the Constitution is limited to declaring the Act in question to be invalid, if that indeed be the case. The Court has no jurisdiction to substitute for the impugned enactment a form of enactment that it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment".

1 [1985] IR 550; [1985] ILRM 465

2 This is a simplistic assessment of the law – see *A v Governor of Arbour Hill Prison* [2006] 4IR 88, which dealt with the retrospective effect of a declaration of unconstitutionality. This topic is beyond the scope of this article.

3 [1981] ILRM 324

The case opened a rather appalling vista for those applicants who may be labouring under an unconstitutional omission. The learned judge found that, even if the plaintiff's case was well founded (which he had found it was not), that the only redress he could offer would be to strike down the legislation. Since that redress would not vindicate the plaintiff's constitutional rights by improving his position, a declaration of repugnancy would be simply an "academic exercise". This was a "fatal obstacle" to success. The adoption of such a rationale would lead to far more difficulties for those claiming an unconstitutional omission, as quite often they will be seeking a benefit or protection conferred on others but refused to them. If a successful argument could be made that by removing the benefit or protection from everyone they are in no better a position than when they began, then no redress would be available to an otherwise meritorious applicant.

However, the approach taken by Keane J has not always been followed, and indeed as will be seen below, has recently been called directly into question.

Unconstitutional Omissions in the Common Law

In *McKinley v Minister for Defence*[4] the plaintiff issued proceedings claiming that by reason of the negligence and breach of duty of the defendant, her husband had suffered serious personal injury, which rendered him sterile and impotent and by virtue of which she had suffered a loss and impairment of *consortium* and *servitium*. Traditionally the common law had only recognised the right of a husband to sue for loss of *consortium* and *servitium* of his wife, but not vice versa. This was based on the rather medieval concepts of a wife being a chattel of her husband.

Both parties agreed that the common law rules were unconstitutional vis a vis Article 40.1 of the Constitution, which provides:

> "All citizens shall, as human persons, be held equal before the law."

The State submitted that as the common law rule was clearly discriminatory it should be struck down, while the plaintiff argued that the courts had the power to extend the common law and that a constitutional construction should be placed on the doctrine. In this way the law would be subject to an evolution.

The majority of the Supreme Court agreed that the common law could be extended to allow a wife to take a loss of *consortium* claim regarding her husband's injuries. It found that, in principle, where a common law right offends

4 [1992] 2 IR 333

against the principal of equality, the court could redress the inequality by a positive declaration that the right vests in the party discriminated against and was not limited to simply striking the offending principal down.

Of course, the omission in *McKinley* was a lacuna in the common law and easily susceptible to judicial modification. Therefore the question of what remedy is available where a legislative omission becomes apparent still remains.

Divergent Approaches

Unfortunately, there is no clear precedent indicating in what manner a court should remedy unconstitutional lacunae. Attempts to resolve difficulties caused by gaps in legislation have ranged from "having a word in the ear" of the legislature to the prohibition of trials. While, of course, every case must turn on its facts, it is respectfully submitted that a clearer approach should be adopted in order to allow some certainty to prevail. The divergent approaches taken by the Superior Courts in these types of cases are demonstrated by the three cases outlined below.

In *McMenamin v Ireland, the Minister for Justice and The Attorney General,*[5] the applicant, who was a District Judge, challenged the constitutionality of section 2 of the Courts of Justice and Court Officers (Superannuation) Act 1961. That Act had reduced the pension of judges by one quarter, but had granted a retirement gratuity of equal value in lieu. Therefore at the time of the passing of the Act no overall reduction of judges' pay would have been affected. Any such reduction, of course, would have breached Article 35.5 of the Constitution, as it then stood.

Over the course of time, the judges of the District Court had suffered a real reduction in the value of their pension by reason of this scheme. By the time the applicant had come to retire, the value of the lump sum had been eroded by three percent. Mr Hogan BL (as he then was), for the applicant, described it as a "creeping unconstitutionality". Geoghegan J in the High Court found that the original enactment itself was not unconstitutional, but granted declaratory relief that "the State in permitting a gross inequality to arise between the reduction in pension of District Court judges and the cost of a lump sum gratuities intended to be met with such a reduction is in breach of its constitutional duty to secure pension rights for District Judges which were not irrational or wholly inequitable".

The main grounds of appeal put forward by the State included that the learned judge had erred in law and fact in granting such a declaratory order, "when the effect of so doing was to indicate to the Oireachtas the appropriate form of legislation to be passed to rectify the anomaly". It was argued that such a declaration was a breach of the doctrine of the separation of powers.

The Supreme Court unanimously upheld the State's appeal and refused to grant declaratory relief. However, each member of the Court expressed dissatisfaction with the situation relating to the pension arrangements of District Court Judges; finding them unjust in all the circumstances. Hamilton CJ bluntly asserted that "this situation requires to be remedied by the Oireachtas", but declined to direct the manner in which it should be remedied. O'Flaherty J concurred with the Chief Justice in this respect, describing the solution as one which "ideally balances an identification of the injustice that this case has illuminated with a preservation of the essential harmony that is required for the operation of the separation of powers".

In essence, the Supreme Court in this case announced to the Oireachtas that a lacuna had opened up and that it expected that it shoulder its constitutional responsibilities and remedy the situation. They duly complied and the Oireachtas (Allowances to Members), and Ministerial, Parliamentary, Judicial and Court Offices (Amendment) Act 1998 was passed. The relevant provisions were deemed to have come into force on the day the Supreme Court issued its admonishment.

In contrast, we can examine the attitude taken in the case of *S.M. v Ireland, the Attorney General and the Director of Public Prosecutions*[6]. The applicant, S.M. had issued a plenary summons challenging the constitutionality of s. 62 of the Offences Against the Person Act 1861, which provided for the sentencing of the common law offence of sexual assault as against a male person. The corresponding offence as against a female person carried a lesser maximum sentence than sexual assault of a male. Unsurprisingly, the Act was challenged on the basis that it created an unjustifiable inequality before the law, contrary to Article 40.1 of the Constitution. Laffoy J struck down the section on this basis, holding in her judgement that "all the court can do is to declare that the statutory maximum penalty provided for in s.62 on conviction of the common law offence is inoperative".

However, a reporter's note at the bottom of the judgment reveals that after hearing further submissions the learned judge was persuaded to make a declaration in the following terms:

> "A declaration that if the plaintiff were to be convicted and sentenced for the common law offence of indecent assault in respect of a male person, for the sentencing judge to apply the maximum sentence of more then the equivalent sentence that would have been available at the time of the offence for the indecent assault upon a female would be in breach of the plaintiff's constitutional right to equality".

The actual declaration made seems to fly in the face of the judgment itself and is in contrast with the judge's comments that she would not rewrite the law. It effectively seeks to place a cap on the jurisdiction of the trial judge – a cap which goes beyond the traditional remedies of prohibition, mandamus etc. However, the case itself is a pointer to how the law might develop in the future; that a declaration might be used to try and fill a legislative gap.

Finally, we should examine the recent decision in *Carmody v Minister for Justice & Ors*[7] to see a recent example of how the Supreme Court has dealt with a "creeping unconstitutionality". The applicant, Mr Carmody, was to be tried in the District Court with 42 offences, which in the main related to breaches of various regulations intended

5 [1996] 3 IR 100

6 [2007] 4 IR 369

7 [2010] 1 IR 635

to protect cattle from disease and prevent the spread of brucellosis. Section 2 of the Criminal Justice (Legal Aid) Act 1962 provided only for the assignment of a solicitor in the District Court, with no provision having been made for the appointment of counsel. In accordance with the Act, the applicant was only granted a solicitor to represent him at the hearing of his action. He contended that this was a breach of his right to a trial in due course of law, as it excluded even the possibility that the District Judge might consider granting a certificate for counsel.

Murray C.J. in his judgment looked closely at the history of the District Court, and in particular at the increase of its workload over the years, both in absolute terms and in the new and complex regulatory offences it now deals with. He concluded that it had "grown enormously" since its creation.

There was no doubt but that the applicant had a right to legal aid[8] but the question arose as to whether, over the course of time, a gap had emerged in the legislation. Legal aid for counsel should have been provided for in tandem with the increase in the range and complexity of offences that the District Court could provide for. Murray CJ held that:

> "In order to vindicate the constitutional rights of an indigent defendant in the District Court to a fair trial, he or she must be entitled to legal aid with representation by counsel as well as a solicitor where it is established that because of the particular gravity and complexity of a case or other exceptional circumstances, such representation is essential in the interests of justice. It follows that any such defendant must have the right to apply for legal aid and have the application determined on the merits."

Effectively, the court determined that the scheme to allow legal aid in respect of counsel was a constitutional imperative. However, a query was raised over what good would come from striking down the relevant legislative provision. If the court were to follow the logic in *Somjee,* this would mean that no remedy could be offered to the applicant. The court identified the issue as this:

> "the mischief complained of by the plaintiff stems not from the effect of its provisions but from a failure of the State to make provision at any time for such legal aid".

The failure to provide for legal aid was described as a "constitutional deficiency" rather than a positive act of repugnancy.

The court went on to suggest that there was nothing stopping the Oireachtas from passing such a scheme, whether by amending the Act or otherwise. This, of course, resonates with the course plotted by the Supreme Court in *McMenamin*. However, as well as having the "word in the ear" of the Oireachtas, the court emphasised that the plaintiff was entitled to have his constitutional rights vindicated. It granted a declaration that the plaintiff had a constitutional right to apply for legal aid, and prohibited his trial until this right could be afforded to him. Such a scheme was implemented very shortly thereafter.

In the author's opinion, this option has to be by far the most sensible and therefore attractive approach. It is cognisant of the fact that an individual has applied for his rights to be vindicated and grants relief in respect of that individual. While the court does point out to its constitutional neighbours that a deficiency exists (and suggests a remedy), it does not rely on comity to ensure that justice is done. It is respectfully suggested that goodwill should not be a substitute for a decisive legal outcome.

B.G. v District Judge Murphy, Director of Public Prosecutions and the Judges of the Circuit Court (no. 2)[9]

The issue has again been illuminated by a decision of Hogan J. The facts of *B.G. v District Judge Murphy & Others* have highlighted what can only be considered as a most disturbing oversight in the Criminal Law (Insanity) Act 2006.

The applicant in question was charged with a sexual assault contrary to section 2 of the Criminal Law (Rape) Amendment Act 1990. It appears from the judgment that evidence was presented that placed the applicant's mental health in some considerable doubt.

When the case had appeared in the District Court, the DPP had directed summary disposal of this indictable offence on a plea of guilty only, pursuant to section 13 of the Criminal Procedure Act 1967. However, a question arose as to the applicant's fitness to plead. In those circumstances, section 4(3)(a) of the Criminal Law (Insanity) Act 2006 was examined. That section provides:

> "Where an accused person is before the District Court (in this section referred to as "the Court") charged with a summary offence or with an indictable offence which is being or is to be tried summarily, any question of whether the accused is fit to be tried shall be determined by the Court."

As the applicant did not fit into either of the two categories provided by the section, Hogan J found that it followed that section 4(4)(a) of the same Act must therefore apply. That section provides:

> "Where an accused is before the Court charged with an offence to which paragraph (a) of subsection (3) applies, any question about whether that person is fit to be tried shall be determined by the court of trial to which the person would have been sent forward if he or she was fit to be tried and the Court shall send that person forward to that Court for the purpose of determining the issue".

The problem immediately becomes obvious. The learned Judge had previously decided that the effect of the 2006 Act is that the applicant had to be sent forward for trial to the Circuit Court in order to determine if he was fit to plead. If the applicant was later found to be fit to plead, he would be

8 *State (Healy) v Donoghue* [1976] IR 325

9 [2011] IEHC 445

deprived of the sentencing constraints of the District Court, and instead faced the full jurisdiction of the Circuit Court, in this case a maximum of 14 years. Furthermore, if the matter was to be disposed of in the District Court and the applicant wished to appeal, bail would be almost a certainty and a full *de novo* sentencing hearing granted. This stands in stark contrast with an appeal from the Circuit Court, where bail is only granted in the rarest of circumstances and a sentence interfered with only if an error in principle can be established.

The learned judge set out the applicant's argument as follows:

> "The applicant's case is accordingly that the construction of the 2006 Act gives rise to an unconstitutional lacuna in that he has no real means of availing of the opportunity – should this prove advantageous to do so after the determination of the fitness to plead issue – of pleading guilty before the District Court and thereby securing the benefit of the lower range of maximum sentences which might be imposed upon him."

They contended that this unconstitutional lacuna was a form of discrimination that was a breach of Article 40.1 of the Constitution.

The learned judge found that it was clear that the Oireachtas had failed to have regard to the rights of the mentally ill in this piece of legislation and that the discrimination that arose therefrom could not be objectively justified. It is clear from his decision that the omission was deemed to be an "accidental oversight" and that "the legislation had unintentionally yielded an anomaly". The judge then turned his mind to the issue of the remedy that should be granted.

In line with *Somjee,* he pointed out that striking down the legislation *simplicter,* would confer no benefit to the applicant. However, he expressly disagreed with the finding in that case that a court cannot do more then find an Act of the Oireachtas repugnant to the Constitution. He found that the superior courts may declare that a law fails to meet constitutional norms by reason of an unconstitutional omission. In this respect he relied on *Carmody*.

The judge also dealt with the issue of the separation of powers. He quite rightly accepted that he could not indicate to the Oireachtas how or in what manner a piece of legislation should be amended. However, he felt that in cases such as *Carmody* and the present case that "the process of judicial review of legislation may, however, contribute to effective law making in that – just as in the present case – it may throw up examples of anomalies or other instances of unconstitutional differentiation". In this respect, the judge has put his seal of approval on the practice of using the medium of the judgment to send a signal to the Oireachtas.

While Hogan J did adopt a *Carmody*-style declaration, unfortunately he did not follow its example to the end. Rather than providing the applicant with an order of prohibition of his trial, he elected instead to follow the precedent set in *S.M.* He declared that if the applicant was to be found fit to plead, and afterwards pleaded guilty that the sentencing judge could not apply a sentence longer than the District Court, as to do so would be a breach of the plaintiff's right to equality.

In this instance therefore, the High Court has sought to bind the Circuit Court's sentencing jurisdiction beyond what is provided for in legislation. The judge characterised it in dental terms, being the legislative equivalent of a temporary filling. While *S.M.* does provide a precedent for this, it is respectfully submitted that to have done so is to move directly into the realms of the creation of legislation. While it is clear that the court was striving to obtain justice, such an approach still allows for discrimination to occur – particularly in regard to any appeal. The solution reached in *Carmody* – prohibition of the trial pending the resolution of the anomaly – would appear to have provided a more comprehensive protection for the accused. Furthermore, it would remain within the more traditional remedies offered by the superior courts.

Conclusion

This is a question that is bound to crop up again in the future as further lacunae are identified. Unfortunately we have no clear decision on how to approach the issue, although *B.G.* does provide great assistance in defining the problem. At the time of writing, the case had not been appealed so the range of possible remedies available to a court are numerous. While this does allow flexibility to suit the needs of the case, a clarification from the Supreme Court must surely be welcome. ■

Help, I Need Somebody! Causation, Foreseeability and the Law of Rescue

Zeldine Niamh O'Brien BL*

> "Danger invites rescue. The cry of distress is the summons to relief... The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."
>
> - Justice Cardozo[1]

Introduction

The words of Cardozo J have oft found their voice in the case law[2] most recently in the decision of the Irish Supreme Court in *O'Neill v Dunnes Stores*.[3] There is no duty in Irish law to offer succour as Linden observed, "[t]he early courts were hesitant to undertake the job of requiring people to help their neighbors for their hands were full enough trying to prevent them from attacking one another."[4] It was the view of the Law Reform Commission that it was unlikely that any such duty would promote volunteering or active citizenship.[5] It will therefore remain the prerogative of the common law to regulate the claims of rescuers. The case of *O'Neill* concerned the recovery by such a volunteer rescuer or "amateur Good Samaritan"[6] for injuries inflicted by a third party in the course of rendering aid to a security guard in the employ of the Defendant. This article considers the position of such volunteer rescuers with regard to foreseeability as it arises at "a difficult intersection between two areas of the law of negligence… the rescuer cases and those cases in which it is contended that an alleged tortfeasor is responsible for injury caused by the wrongful acts of a third party".[7] It is the first time the Irish Supreme Court has imposed liability on the basis of the rescue principle.

The Law of Rescue

The principle of rescue has been formulated as follows:

> "if a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others. The rescuer may act instinctively out of humanity or deliberately out of courage. But whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can recover damages from the one whose fault has been the cause of it."[8]

Typically cases concern a situation of peril created or otherwise giving rise to a rescue as occasioned directly by the Defendant's negligence rather than by the deliberate conduct of a third party as seen in *O'Neill*. The position of the rescue principle in Irish law had been previously considered by the Supreme Court in *Phillips v Durgan*.[9] In that case, the plaintiffs who were married sought recovery in damages arising from injuries sustained in the course of an accidental fire on the premises of the Defendant. The wife had been engaged in cleaning a kitchen at the request of her brother, the Defendant. She slipped against a defective gas cooker and the cloth she held caught fire. Due to the greasy state of the kitchen, the fire spread rapidly. Her husband was injured in removing her from the kitchen. On appeal from the High Court, the Defendant submitted *inter alia* that the principle of rescue did not apply in Irish law. The Court rejected this submission. It found the principle of rescue as being focused on foreseeability and adopted the formulation in *Ogwo v Taylor*:[10]

> "only of a situation in which the court will rule as a foreseeable consequence of the negligent commencement of a fire that persons seeking to put out that fire, either by reason of their duty as officers of a fire brigade or by reason of their desire to prevent damage, whether to persons or property, may be injured by the existence of the fire. It is essentially,

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1 *Wagner v International Railroad Co.* (1921) 232 NYS 176, 33 NE 437. See generally "Right of Rescuer to Recover from Tortfeasor for Injuries Sustained," (1923) 9 *Vir. L.Rev.* 376.

2 See for example, *Haynes v Harwood* [1934] 2 KB 240, at 242; *Chadwick v British Railways Board* [1967] 1 WLR 912, at 921; *Baker and Anor v T.E. Hopkins and Sons Ltd.* [1959] 1 WLR 966, at 972; *Greatorex v Greatorex* [2000]1 WLR 1970, 1975; *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057, at 1110 and 1122, *McLoughlin v O'Brian and Ors* [1983] 1 AC 410, at 424 and *Tolley v Carr* [2010] EWHC 2191 (QB); [2011] R.T.R. 7 (QBD (Chester)).

3 [2010] IESC 53, [2011] 1 I.L.R.M. 461. See generally, O'Neill, "Rescuing the Law of Tort? The Decision of the Supreme Court in O'Neill v Dunnes Stores," (2010) 45(1) *Irish Jurist* 240.

4 Linden, Allen, "Rescuers and Good Samaritans," (1972) *10 Alta. L. Rev.* 89 at 90.

5 LRC, *Report on the Civil Liability of Good Samaritans and Volunteers* LRC 93-2009. See Malm, "Bad Samaritan Laws: Harm, Help or Hype?" (2000) 19 *L & Phil* 707.

6 Fulbrook, Julian, Comment [2011] *Journal of Personal Injury Law* C19, C20. For professional rescuers see for example *Ogwo v Taylow* [1987] 2 WLR 988, *Alcock v Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057, *Frost v South Yorkshire Constable* [1998] QB 254, *White v Chief Constable of South Yorkshire* [1999] 2 A.C. 455 (HL), *Kent v Griffiths* (No.3) [2001] Q.B. 36 (CA (Civ Div)), Jones, "Compensating Professional Rescuers," (1988) 104 *LQR* 195, Todd, Stephen "Psychiatric Injury and Rescuers," (1999) 115 *LQR* 345 and Gillespie, A., "Reconsidering the Good Samaritan: A Duty to Rescue?" (2008) 39 *Cambrian L. Rev.* 26.

7 *Ibid.*, per O'Donnell J.

8 *Videan v. British Transport Commission* [1963] 2 Q.B. 650 per Denning MR at p. 669, quoted and approved by Griffin J in *Phillips v Durgan* [1991] 1 IR 89 at p.96.

9 [1991] 1 IR 89; [1991] ILRM 321.

10 [1988] AC 437.

> therefore, a doctrine of foreseeability and cannot… come into operation without an initial negligence causing the fire."[11]

But the Court imposed liability on the basis of a breach in the primary duty of care owed to the Plaintiff and to her husband as the occupier of the premises rather than the rescue principle. *O'Neill* therefore represents not the first consideration of the rescue principle, but the first time liability has been imposed thereunder.

Facts of *O'Neill v Dunnes Stores*

In *O'Neill*, the Plaintiff's claim lay in respect of injuries sustained in the course of rendering aid voluntarily to a security guard in the employ of the Defendant supermarket, in dealing with two suspected shoplifters in the course of his employment. On the day in question, the Plaintiff was leaving the shopping centre when he witnessed a security guard, a Mr Keith Byrne, struggling with another man. Mr Byrne was the only security guard on duty. Mr Byrne had given chase to two individuals, Ciaran McCormack and Alexander Colville, who had been seen taking bottles of alcohol from the Defendant's off-licence. Mr McCormack fled out into the car park while Mr Colville was caught just outside the premises and attempted to bottle the security guard. In the course of the struggle, Mr Byrne asked a cleaner in the shopping centre to go and get help from the managers of the Defendant. The Plaintiff responded. He saw the thief, Alexander Colville attempting to get a bottle to strike Mr Byrne. There was a difference in the evidence presented before the High Court with the Plaintiff testifying that Mr Byrne asked him for help and Mr Byrne denying it. The trial judge accepted the Plaintiff's evidence and on appeal, the Appellant accepted that this was the factual basis upon which the Court was to proceed.

The Plaintiff went to Mr Byrne's assistance and Mr Byrne "did not turn it down".[12] He assisted him in restraining Mr Colville. At this point, Mr McCormack returned and commenced pulling and kicking at both Mr Byrne and Mr O'Neill, telling them to leave his friend alone. Mr Byrne phoned the gardaí on his mobile phone and they arrived shortly after. The Plaintiff continued to restrain Alexander Colville while Mr McCormack returned to the shopping centre. He became aggressive and was asked to leave, which he did. However, he then returned with a motor cycle chain and swung it, striking the Plaintiff across the face, fracturing his nose, injuring his face and driving the Plaintiff back against a pebble dashed wall injuring his back. Ciaran McCormack continued to do so until subdued by the gardaí.

Before the High Court, liability was imposed on the basis of the primary liability of a wrongdoer to a rescuer who responds to the peril created by the wrongdoer and the vicarious liability of an employer for the negligent acts of his or her employee. He awarded damages to the Plaintiff.

The appeal against the finding of liability was on four grounds: first, that the refusal of the Defendant's non-suit application was wrong; it was submitted the Plaintiff had no *prima facie* case; second, that there was no expert evidence to support the Plaintiff; thirdly and fourthly, the Defendant submitted that if there had been inaction on its part it had not led to the creation of the situation of peril nor did it give rise to the necessity of rescue rather the injuries had been caused by the wrongful acts of a third party. On the first ground, the Court adopted the approach seen in *Payne v Harrison*[13] and examined the entirety of the evidence to determine whether the trial judge had been correct in finding the Defendant liable. On the second ground, the Court stated that there was no absolute requirement that expert evidence be given and it was entitled to form its own opinion on matters not requiring special expertise.[14]

There was no evidence put before the Court as to the normality of the number of security on guards on duty for late night shopping in a store with the size and throughput of Dunnes Stores in Thurles. Evidence of a protocol emerged on cross-examination but the protocol itself had not been put in evidence directly. There were significant difficulties in treating this as evidence of general practice as the protocol was evidence only of the practice of the Defendant and as the evidence of the protocol entitled security to refrain only where he felt it was outside his capacities, it was therefore subjective. O'Donnell J for the majority concluded:

> "I would be very slow to impose through the law of negligence some inflexible rule that there must always be a minimum of two security guards in any store, at least on the limited evidence proffered in this case. I would be even more reluctant to stigmatise as negligent, the acts of the security guard who confronted, chased and detained a shoplifter – especially one who appeared unruly, intoxicated and given to violence. It is one thing for prudence to suggest caution rather than courage in certain circumstances; it is quite another that the law should demand caution and penalise courage."

It was this dearth of evidence that resulted in the dissent from Fennelly J. Nonetheless, the majority found that the Defendant had been negligent on a narrower basis. If there had been a system in place, O'Donnell J found it had failed and while the Court did not hold that two security guards should have been on duty, it did require that someone be available to assist the guard. The failure to equip the guard with a two-way radio which was more efficient for communication than the mobile phone with which he was furnished was a failure capable of being found by the trial judge as the necessary proof of fault or omission. The Court considered grounds three and four together.

Wrongful Acts of Third Parties and Foreseeability

This was the first occasion the Supreme Court had cause to consider the position of liability where the peril giving rise to the need for rescue was not caused by a Defendant, but rather by the wrongful act of a third party. The issue had been considered by the Circuit Court in *Millington v Taylor (t/a The Big Tree Public House)*,[15] where the plaintiff sued her employer for injuries sustained when she attempted to prevent a thief

11 [1991] 1 IR 89, *per* Finlay CJ at 94.
12 [2010] IESC 380.
13 [1961] 2 QB 403.
14 See *AG (Ruddy) v Kenny* (1960) 94 ILTR 185, *per* Davitt, P at 186.
15 Unreported, Dublin Circuit Court, McMahon J., July 17, 2002.

from removing the defendant's bar stock and appropriating her car. The thief had gained entry by the back door to the pub which could not be locked from the outside and was unlocked on the day of the theft. The Plaintiff sustained injuries when she was thrown from the bonnet of her own car while the thief was in command of the vehicle, having obtained her car keys while in the bar and loaded the stock into it. Liability was imposed on the defendant in these circumstances.

The Supreme Court in *O'Neill* accepted that:

> There is no reason in principle why, if on the established law a party can be liable for injury caused by the wrongful act of a third party, the first party's liability should not extend to any rescuer who is injured in an attempt to rescue an individual.

As seen in *Phillips*, the focus is centred on the forseesability of the rescue attempt. Indeed, remoteness is one means by which rescuer claims may be limited as occurred in *Crossley v Rawlinson*[16] where recovery for injury sustained by a rescuer who had successfully put out a fire from tripping in a pothole on the verge of the A12 was precluded on just such a basis.[17]

Novus Actus Interveniens

In *O'Neill*, the Defendant submitted that the criminal conduct constituted a *novus actus interviens*. Clerk and Lindsell identify four issues in this regard:

> "Was the intervening conduct of the third party such as to render the original wrongdoing merely a part of the history of events? Was the third party's conduct either deliberate or wholly unreasonable? Was the intervention foreseeable? Is the conduct of the third party wholly independent of the defendant, i.e. does the defendant owe the claimant any responsibility for the conduct of that intervening third party? In practice, in most cases of *novus actus* more than one of the above issues will have to be considered together.[18]"

The rationale of the rule is grounded in fairness.[19] The criminal behaviour of third parties as a *novus actus* was considered in the context of negligence by the Court of Appeal in *Chubb Fire Ltd v the Vicar of Spalding*.[20] In that case, the interior of a medieval church had been damages by the contents of fire extinguishers discharged by vandals who gained access to the premises being unlocked and unmonitored. The insurer brought an action in subrogation against, *inter alios*, the supplier of the extinguishers. The trial judge found that the malicious discharge of the extinguisher was foreseeable. On appeal, the Court found this approach too simplistic.[21] It was not sufficient to merely ask whether the acts of vandalism were foreseeable.[22] An action could be foreseeable but be no more than a "mere possibility".[23] The Court applied the doctrine of "new intervening acts" as set out in *Simmons v British Steel plc*[24] and in light of it, and the four issues identified by Clerk and Lindsell, concluded that the Defendant supplier was not liable for the damage done by the malicious discharge of the extinguishers.

In *O'Neill*, the Court distinguished between the two strands of authority concerning rescuers and the line of authority concerning third party wrongdoing:

> "The classic case where an initial act of negligence made a party responsible for the loss caused by the wrongful act of the third party is the well known case of *Home Office v Dorset Yacht Company* [1970] AC 1004, considered recently in this Court, in *Breslin v MIBI* [2003] 2 IR 203. The principle in the Dorset Yacht case was expressed succinctly, by McWilliam J in a Circuit Court case of *Dockery v O'Brien* (1975) 109 ILTR 127:
>
> > With regard to a *novus actus interveniens*, Lord Reid, in the *Dorset Yacht Company* case, said that, if what was relied on as a *novus actus interveniens* is the very thing which is likely to happen if the want of care which is alleged takes place, the principle involved in the maxim is no defence, and he added that, unfortunately, tortious or criminal action by a third party may be the very kind of thing which is likely to happen as a result of the wrongful or careless act of the defendant … This was the very kind of thing which a reasonable person should have foreseen."

Causation

The Court applied the test in *Dockery* and concluded that the actions of Mr. McCormack were "the very thing" that was likely to happen if the Defendant was negligent. It further held that there was "a strong connection" between the wrongdoing of the Defendant and what subsequently occurred. O'Donnell J stated *obiter* that even if no help had been forthcoming and the Plaintiff was injured in the same circumstances, liability would have been imposed on this basis. The Court continued to apply the usual *Hughes* proviso[25] to the requirement of foreseeability:

> "It was therefore entirely foreseeable that if a security guard was put in a situation requiring assistance and was obliged to seek assistance from a member of the public, and if that member of the public responded, then he may well have be injured in offering assistance. In this regard I think it is irrelevant that the precise nature of the savage attack on Mr O'Neill may not have been foreseen: it is enough that the type of

16 [1982] 1 W.L.R. 369; [1981] 3 All E.R. 674.
17 See Jones, Michael "Remoteness and Rescuers" [1982] *Modern Law Review* 342.
18 Clerk and Lindsell on Torts, 19th edn (2006) quoted with approval by Buxton LJ in *Roberts v Bettany* [2001] EWCA Civ 109 at [17] – [20] with Laws LJ concurring.
19 *Corr v IBC Vehicles Ltd.* [2008] 1 AC 884 *per* Bingham LJ at para. 15.
20 [2010] 2 CLC 277, [2010] NPC 92, [2010] EWCA Civ 981, [2010] All E.R. (D) 96.
21 Ibid., para. 66.
22 Ibid. See also *Smith v Littlewoods Organisation Limited* [1987 1 AC 241 at 260-261.
23 [2010] 2 CLC 277, [2010] NPC 92, [2010] EWCA Civ 981, [2010] All E.R. (D) 96, para66.
24 [2004] ICR 585 at para. 67.
25 *Hughes* v. *Lord Advocate* [1963] A.C. 837.

> damage – here physical injury caused by an attempt to restrain a wrongdoer – was readily foreseeable."

In such circumstances, the Court held that it was "necessary to consider whether the Defendant was a cause, rather than necessarily the proximate cause if any, of the Plaintiff's injuries, as long as the wrongdoing itself was the very thing which was to be anticipated as a result of the Defendant's negligence". On the evidence, the Court accepted that while it might have been said that the situation was caused at least in part by the wrongful shoplifting and attempt to escape of Mr Colville, there was "little doubt that the need for rescue by a member of the public was caused by the negligence of Dunnes Stores". As noted by O'Neill, this explicit abandonment of the 'but for' test was required to achieve the reconciliation of the two strands of law at the intersection.[26]

Contributory Negligence

A deliberate act of rescue will virtually never constitute a *novus actus*[27] nor will the defence of *volenti non fit injuria* avail[28] but the possibility of contributory negligence has been accepted.[29] In *Baker v Hopkins*,[30] Morris LJ observed:

> "If a rescuer acts with a wanton disregard of his own safety it might be that in some circumstances it might be held that an injury to him was not the result of the negligence that caused the situation of danger."[31]

The burden of so proving rests with the Defendant in such circumstances[32] and it has shown to be a particularly difficult burden to overcome, although not impossible.[33] Indeed, the greater the risk to others that the rescuer is trying to avert, the greater the imperilment to his or her safety the law will accept as reasonable.[34] O'Neill observes that this approach "can defended on the moral ground that altruistic acts should not be discouraged because they are good in themselves" and "on a more utilitarian extension of that analysis, which sees rescuers as socially useful".[35] Contributory negligence was raised as a defence in *Phillips* though not in *O'Neill*. The defence was also raised in the recent decision of the English High Court in *Tolley v Carr*[36] where the restrictive view of the defence was again evidenced:

> "The common law acknowledges the actions of [rescuers], which often involve bravery as well as bare humanity, in two ways. First, it imposes upon those who create such a danger a duty of care owed to those who go to the aid of people put at risk thereby, whether those who act are members of the professional emergency services or members of the public. Second, although of course relatedly, *the law is slow and cautious in finding negligence in those who imperil themselves to save persons from risks caused by the negligence of others.*"[37]

In *Tolley*, the Plaintiff sustained severe personal injuries when struck while moving the car of the Defendant from its location. The Defendant's vehicle had spun in slippery conditions. The Plaintiff had assisted the Defendant from the vehicle but the vehicle had come to a stop broadside on the road. In the course of moving the Defendant's vehicle, it was subject to a double impact, first by another car and then by a transit van resulting in him being thrown some thirty-five feet and sustaining multiple spinal fractures. The sole issue of dispute before the Court was the Plaintiff's negligence. Hinkinbottom J stated:

> "[I]t is the fact that a person imperils himself to avert the actual or perceived risk to others that is central to the assessment of the reasonableness of the act of that person. Therefore, although perhaps a plea of contributory negligence is particularly unattractive when the person imperilled is the very person whose negligence created that risk, who may have created the risk is less important than the position of the person put at risk… Similarly, in assessing whether the acts of a rescuer were in all the circumstances reasonable, it may not matter a great deal whether those acts were instinctive, or followed deliberation: either is regarded properly by the law as meritorious."[38]

He concluded that the Defendants had singularly failed to discharge their burden taking into account the carnage that was contemplated as resulting from a failure to remove the Defendant's vehicle. He accepted that the Plaintiff had checked for vehicles in the outside lane before moving the car but even if he had missed an oncoming vehicle, the law would be "slow to criticise those who, under the pressure they find themselves in, seek to reduce the risk of harm to others, by placing themselves at risk, in circumstances in which time is or is perceived to be of the essence and the risks to those in

26 (2010) 45(1) *Irish Jurist* 240.
27 *Clerk and Lindsall on Torts* , 20th edn (London: Sweet & Maxwell, 2010), at 2-114.
28 See *Haynes v Harwood* [1935] 1 KB 146, at 156-7, *Horsley v MacLaren* (1971) 22 DLR 3d 545, Binchy, "The Good Samaritan at the Crossroads: A Canadian Signpost" (1974) 25 *NILQ* 147, at 156-7 and Alexander,E.R. "One Rescuer's Obligation to Another: The 'Ogopogo' Lands in the Supreme Court of Canada" (1972) 22 *Univ. Tor. L. Rev.* 98.
29 For early American cases, see Shelton, Thos., "Compensation to Rescuers: A Question of Contributory Negligence," (1904)10 *Va L Reg* 671.
30 [1959] 1WLR 966. See V.T.H.D., "The Duty of Care to a Rescuer" (1959) XXV *Ir Jur* 7.
31 Ibid., at 977. See also *Corbin v. Philadelphia* (1900), 195 Pa. 461, 45 Atl. 1070,.49 L. R. A. 715, 78 Am. St. Rep. 825; *Peyton v Texas & P. Railway Co* , 6 So. 690, at 691, 41 La.Ann. 861 (1889) and *Haynes v Harwood* [1935] 1 K.B. 146. See generally "Right of Rescuer to Recover from Tortfeasor for Injuries Sustained," (1923) 9 *Vir. L.Rev.* 376.
32 Ibid, *per* Wilmer LJ at 984.
33 See *Cutler v United Dairies* [1933] 2 K.B. 297 and *Harrison v BRB* [1981] 3 All E.R. 679
34 [2011] RTR 7, [2010] EWHC 2191 (QB), para.22.
35 (2010) 45(1) *Irish Jurist* 240. See also Malm, *supra* and Note, "Torts. Negligence. Person Endangered by Own Negligence Liable to Rescuer for Injuries Sustained in Rescue" (1947) 14 *Univ. Chic. L. Rev.* 509.
36 [2011] RTR 7, [2010] EWHC 2191 (QB), para.22. See generally Fulbrook, Julian, Comment [2011] *Journal of Personal Injury Law* C19.
37 *Ibid.*, *per* Hinkinbottom J at para.21 [Emphasis added]
38 *Ibid.*, at paras.24-25.

endangered are or are perceived to be great".[39] He added that "exceptional bravery is not the same as foolhardiness".[40]

In *Phillips*, the Court rejected the defence of contributory negligence on the part of the husband in summary fashion:

> "What he did after the fire had started was the natural and obvious thing to do, and could not be an act of contributory negligence, namely, an attempt to put out the fire and to save his wife."[41]

Fulbrook notes that the defence "is perhaps in modern circumstances reserved for "near-suicidal" action".[42] In *O'Neill*, while contributory negligence was not pleaded, O'Donnell stated:

> "I consider that the appeal in this case should be dismissed. This is a result which I think accords with both legal principle and common sense. It would indeed be regrettable if the message delivered by the law of tort to a member of the public faced with a cry for help, is that if they intervene they do so at their own risk and that in all the circumstances it would be wiser to pass by on the other side. Lord Atkin observed that the example of the Good Samaritan in the parable may not answer all the questions of the law of negligence, but neither the law nor morality has ever sought to encourage imitation of the Levite."[43]

This general statement of the attitude underpinning the Court's approach suggests that the Irish Courts may be strongly inclined to the approach of *Tolley* with respect to contributory negligence.

Conclusion

On the position of the rescuer, Fleming wrote "[o]nce the Cinderella of the law, he has since become its darling".[44] It is clear following the decision of the Supreme Court in *O'Neill v Dunnes Stores* that this is also the case in the Irish law of negligence. Non-professional rescuers who volunteer in situations of peril, although bound to prove foreseeability of that rescue and the damage so occasioned have an advantage over other plaintiffs in negligence, *viz*, a more generous approach to causation. While contributory negligence was not raised as a defence, there is no reason to think that the Irish Courts would be disinclined to follow the approach in *Tolley* given the indulgence to altruistic conduct underpinning the reasoning in both *O'Neill* and *Tolley*. ■

39 *Ibid*., para.45.
40 See for example *Cutler v United Dairies* [1933] 2 K.B. 297
41 [1991] 1 IR 89 at 95.
42 [2011] *J.P.I. Law* C19, C22. See for example *ICI v Shatwell* [1965] A.C. 656; [1964] 3 W.L.R. 329; [1964] 2 All E.R. 999 and *Morris v Murray*[1991] 2 Q.B. 6; [1991] 2 W.L.R. 195; [1990] 3 All E.R. 801.
43 [2010] IESC 53.
44 *The Law of Torts* 5th edn, (Sweet and Maxwell, London), p.172 quoted by O'Donnell J in *O'Neill v Dunnes Stores* [2010] IESC 53.