The Bar Review

Journal of the Bar of Ireland • Volume 8 • Issue 3 • June 2003

- Flying by the seat of their pants! The MIBI and unseated passengers
- Criminal Law (Insanity) Bill 2002
- Proposals for court reform in personal injury claims

THOMSON
ROUND HALL

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THOMSON

ROUND HALL

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Literacy and the Law

Half a million Irish adults have problems reading and writing. Such adults face large obstacles in finding and holding jobs. They have difficulty understanding the tax and social welfare systems and in ascertaining their legal rights. Basic tasks such as opening a bank account or filling out an application for a driving licence can prove formidable. Low literacy skills can also hinder an understanding of the law and can prevent access to justice.

To raise awareness of this issue, the National Adult Literacy Agency (NALA) have chosen the theme of "Literacy and Law/Justice" for their September National Literacy Awareness Week to be held between September 22 and 28. The campaign is aimed at those who work in the sphere of law and justice and the intention is to assist them in dealing more sensitively and effectively with members of the public who have low literacy skills.

NALA is working closely with the Plain English Society, which has been leading the campaign in the UK to simplify the language of law. There will be three main themes for the campaign:

- how individuals' rights can be infringed through having low levels of literacy;
- how to "plain English" the law and make reports, forms etc. easier to read;
- the link between low levels of literacy and crime.

NALA has the support of various bodies, including the Bar Council, the Courts Service, the Department of Justice, the Law Society, the Prison Service and the Legal Aid Board. They are also deserving of our individual support.

Lawyers are frequently criticised for the over-use of legal jargon or for a failure to use plain language in legal documents or in court. Of course, the law is a technical subject and frequently, technical terms are required to explain complex ideas precisely. However, some steps have been taken to make the law somewhat more accessible to the layman.

The Courts Service have gone some way to promoting a greater understanding of the workings of the courts through simple pamphlets explaining the courts system and demystifying the legal process for members of the public. The Office of the Attorney General, through its Statute Law Revision Unit, has also been involved in the development of measures to make legislation more user-friendly. This comes in the wake of the Law Reform Commission report entitled, "Statutory Drafting and Interpretation: Plain Language and the Law", where the LRC has noted the ongoing use of archaic words in statutes and has commented on the desirability for shorter sentences and more readable legislation. As practitioners, we too, can play our part.

Technical terms are sometimes necessary. However, the truly great advocates are those that can simplify complex topics and make them clearly understandable and digestible for a jury. But, those tools of clarity and succinctness are no less appreciated by a judge, sitting alone. Given that judges have to absorb and evaluate large amounts of factual evidence and legal principle in a relatively short period of time, clarity of expression and succinctness of thought can greatly assist the administration of justice. Indeed complex language can often mask opaque reasoning and can delay the court process.

Similarly, with the drafting of pleadings and legal opinions, technical jargon is sometimes unavoidable. However, it is no bad discipline to clearly address the key issues at the outset in any case and to employ plain English, insofar as that is possible. Plain pleading will not only make court documents more accessible but can also assist the parties and the judge in ascertaining the real issues in dispute between the parties. While drafting legal contracts, lawyers should make a conscious effort to avoid archaic words, to use clear language and to avoid excessively long sentences. With respect to legal opinions, these are frequently prepared to allow a client to assess whether they have a strong case or whether litigation should be pursued. It is obvious that a lay client will always appreciate an opinion that states the legal position clearly without the use of technical language that can hamper understanding.

As lawyers, complex legal terms become embedded in our consciousness. We frequently forget that those terms may be indecipherable to those who have no familiarity with the law.

As part of the National Law Awareness Week, a half-day seminar will be targeted at law practitioners. NALA will be working with the various legal organisations during the campaign. For more information about the conference, contact NALA by phone 01 855 4332 or by email, *literacy@nala.ie*.

NEWS

Irish Barristers in bid to generate funds for GOAL

Ercus Stewart SC is hoping that his colleagues at the Bar will help him generate funds for GOAL, the international humanitarian organisation based in Dublin.

GOAL is currently working in 20 countries in the developing world. Because it has built up such a fine international reputation, GOAL can access funding from the big UN organisations, various governments and the EU, if it can first raise seed capital. This capital will then be supplemented to the tune of 10-1.

Bar Council Chairman, Conor Maguire, S.C., supports this appeal and every barrister is asked to contribute.

(1) Every €1 or, better still, €1,000 you can contribute is worth ten times that amount to GOAL
(2) You are entitled to tax relief on your donations

Donations should be sent to: GOAL, P.O. Box 19, Dun Laoghaire, Co Dublin, phone 01 2809779 to make a credit card donation or you can donate online at www.goal.ie

Bar Council and Round Hall Moot Court Competition

Pictured at the Bar Council and Round Hall Press Moot Court Competition, the Honorable Mr Justice Adrian Hardiman presents the trophy for Advocate of the Year, 2003, to Roisin Martin from the Institute of Professional Legal Studies in Belfast.

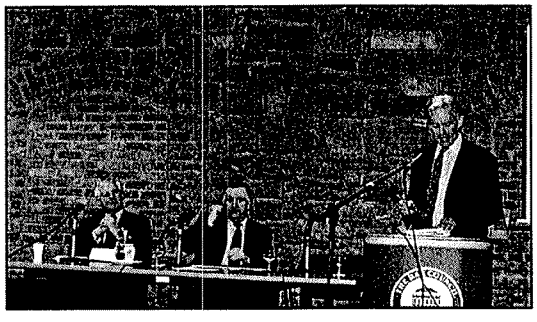
Special Olympics Fundraiser.

The recent Special Olympics Fundraiser in the Distillery Building raised over €10,000 for the Games and was a great night out. The organisers want to thank everyone who supported the night and who gave donations to this very important cause. We also want to thank all the staff and volunteers and Hanley at the Bar for providing the food.

Declaration of Friendship

Pictured at the formal receipt of a Declaration of Friendship, recognising the bonds between the American Inns of Court Foundation and the Kings Inns, are the Chief Justice, the Honorable Mr. Justice Ronan Keane and Conor Maguire SC, Chairman of the Bar Council. The Declaration was signed by the President of the American Inns Of Court Foundation, Mr Justice Holland of the Delaware Supreme Court and the Chief Justice.

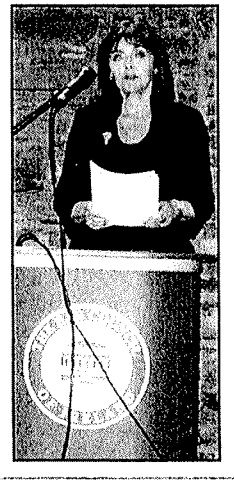
Bar Council Seminar on Arbitration



Pictured above at the Bar Council seminar on Arbitration, held in the Distillery Building in April, are (from left to right, James Connolly SC, Chairman, Arbitration Committee, Rory Brady SC, Attorney General, Moderator and Ercus Stewart, SC, author of *Arbitration, Commentary and Sources.*

Pictured right, Paulyn Marrinan Quinn SC, also at the Arbitration Seminar.

(Photos by Anthony P. Quinn SC)



Portrait of the Chief Justice

Pictured in front of the recently commissioned portrait of the Chief Justice are the Honorable Mr Justice Ronan Keane and the artist Tom Ryan. PPRHA.

Unseated Passengers and the MIBI

Cathal Murphy BL

Introduction

A number of cases have arisen where the central issue is whether the Motor Insurers Bureau of Ireland ("MIBI") is liable to compensate individuals who have been injured in accidents while travelling in the back of vehicles that have not been fitted with rear seats, when judgment has been obtained against the uninsured driver. To resolve this issue, it is necessary to examine the relevant provisions of the MIBI agreement, domestic legislation, and the European Community motor insurance directives.

The MIBI was incorporated in 1955 and in that year entered into an agreement with the Minister for Local Government to provide insurance cover in certain circumstances. The 1955 agreement was amended in March 1962, and was determined by an agreement entered into on December 30, 1964. Ultimately, a new agreement was entered into on December 21, 1988 (the "Agreement"), and this superseded all earlier agreements. The Agreement re-enacted a number of the provisions contained in the earlier agreements.

Unlike the earlier agreements, which were entered into in response to various changes in domestic law (e.g. the enactment of the Road Traffic Act, 1961), the Agreement was entered into with a view to complying with the requirements of Council Directive 84/5/EEC relating to insurance against civil liability in respect of the use of motor vehicles ("the Second Directive"). To date there have been four substantive directives enacted in the area of motor insurance. However, it is the provisions of Council Directive 72/166/EEC ("the First Directive"), the Second Directive, and Council Directive 90/232/EEC ("the Third Directive") that are of interest for present purposes.

The Agreement

For present purposes, the relevant clause of the Agreement is Clause 4(1). This defines the MIBI's obligation in the following terms:

> ".....If judgment in respect of any liability for injury to person or damage to property which is required to be covered by an approved policy of insurance under Section 56 of the Act is obtained against any person or persons in any Court established under the Courts (Establishment and Constitution) Act, 1961 (No. 38/1961) whether or not such person or persons be in fact covered by an approved policy of insurance and any such judgment is not satisfied in full within twenty eight days from the date upon which the person or persons in whose favour such judgment is given become entitled to enforce it, then MIB of I will, so far as such judgment relates to injury to person or damage to property and subject to the provisions of these presents pay or cause to be paid to the person or persons in whose favour such judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs (or such proportion thereof as is attributable to the relevant liability), or satisfy or cause to be satisfied such judgment, whatever may be the cause of the failure of the judgment debtor to satisfy same".

As can be seen from the above extract, the MIBI's obligation is not open ended. It is restricted to an obligation to compensate where there is a requirement, pursuant to Section 56 of the Road Traffic Act, 1961, for an approved policy of insurance to be taken out in respect of the liability in question. Accordingly, in order for the MIBI to be liable to compensate an individual injured while travelling in the rear of a vehicle not fitted with rear seats, there must be a requirement for an approved policy of insurance to be in existence in respect of such liability. It is therefore necessary to consider the relevant statutory provisions to determine whether, as a matter of law, such a requirement exists.

Domestic legislation

Section 56 of the 1961 Act provides that:

> "(i) A person (in this sub-section referred to as "the user") shall not use in a public place a mechanically propelled vehicle unless either a vehicle insurer, or an exempted person would be liable for injury caused by the negligent use of the vehicle by him at that time or there is in force at that time either:
>
> (a) an approved policy of insurance whereby the user or some other person who would be liable for injury caused by the negligent use of the vehicle at that time by the user, is insured against all sums without limit.....which the user or his personal representative or such other person or his personal representative shall become liable to pay to any person (exclusive of the exempted persons) by way of damages or costs on account of injury to person or property caused by the negligent use of the vehicle at that time by the user....."

Section 65(1) goes on to define "exempted person" in the following terms:

> "(a) Any person claiming in respect of injury to himself sustained while he was in or on a mechanically propelled vehicle.....to which the relevant document relates other than a mechanically propelled vehicle or vehicles forming a combination of vehicles

of a class specified for the purposes of this paragraph by regulations made by the Minister provided that such regulation shall not extend compulsory insurance for civil liability to passengers to:

(i) any part of a mechanically propelled vehicle, other than a large public service vehicle, unless that part of the vehicle is designed and constructed with seating accommodation for passengers;....."

The combined effect of Section 56 and Section 65(1)(a) is that a person using a vehicle must have an approved policy of insurance to cover any liability for personal injuries caused to persons other than exempted persons. Exempted persons are those persons claiming an injury sustained while in a vehicle other than those specified by ministerial regulation. The power of the Minister to exempt is circumscribed by the proviso that the obligation of compulsory insurance shall not extend to liability for injury to passengers in any part of a vehicle, unless that part of the vehicle is designed and constructed with seating accommodation. In other words, insurance can not be made compulsory in respect of such liability.

The Road Traffic (Compulsory Insurance) Regulations, 1962 (S.I. 14/1962) ("the 1962 Regulations") governed the position up to December 31, 1995, by listing the classes of vehicles that were specified for the purposes of Section 65(1)(a), subject to the limitation in that section. Regulation 6 of the 1962 Regulations provided that:

"(1) the following classes of vehicles are hereby specified for the purpose of paragraph (a) of sub-section 1 of Section 65 of the Act.

(a) Public Service vehicles;

(b) Vehicles constructed primarily for the carriage of one or more passengers;

(c) Station wagons, State cars and other similar vehicles which are construed or adapted for alternative purposes (including the carriage of one or more passengers) and which are fitted with seats, whether rigid, collapsible or detachable in the area to the rear of the driver's seat".

The effect of paragraph 1(c) of Regulation 6 was to exclude from the category of vehicles for which compulsory insurance was required, those goods vehicles or similar vehicles that had no rear seating. Consequently, as a matter of Irish law, prior to December 31, 1995, Clause 4 of the Agreement did not require the MIBI to compensate passengers in respect of injuries received in the rear of a vehicle without seating.

The 1962 Regulations were subsequently amended by the Road Traffic (Compulsory Insurance)(Amendment) Regulations, 1992 (S.I. 346/1992) ("the 1992 Regulations"). Regulation 4 of the 1992 Regulations substituted a new Article 6 for the original Article 6 of the 1962 Regulations. The new Article 6 provides as follows:

"(1) The following vehicles are hereby specified for the purpose of paragraph (a) of sub-section 1 of the Section 65 of the Act:-

(a) Vehicles, other than cycles, designed and constructed with seating accommodation for passengers;

(b) Cycles designed and constructed with seating accommodation for passengers;".

The effect of these changes was to extend cover to certain classes of passengers as of December 31, 1995. However, even under the post-December 1995 situation, the obligation of compulsory insurance does not extend to injury to passengers carried in vehicles that are not generally designed or constructed to carry passengers. Accordingly, as a matter of Irish law as it now stands, the MIBI is entitled to refuse to compensate in respect of such liability. However, as outlined above, the Agreement was entered into with a view to complying with the State's obligation to transpose the Second Directive into Irish law. This highlights the fact that one must consider the provisions of the motor insurance directives to determine whether the Agreement and current domestic law actually comply with European law.

The European Legislation

(i) The First Directive

The First Directive was adopted both with a view to facilitating the free movement of goods and persons by prohibiting border controls in respect of insurance for EC registered vehicles and also to safeguard the interests of any persons who were the victims of accidents caused by such vehicles. In order to give effect to these aims, Article 2 of the Directive provided that the Directive would take effect in respect of vehicles normally based in the territory of a Member State after an agreement had been concluded between the national insurers' bureaux "under the terms of which each national bureau guarantees the settlement, in accordance with the provisions of its own national law on compulsory insurance, of claims in respect of accidents occurring in its territory caused by vehicles normally based in the territory of another Member State".

Article 3 of the First Directive imposes an obligation on each Member State to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The obligation relates to the use of vehicles and Article 1 of the First Directive defines "vehicle" in the following terms:

"Any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails and any trailer, whether coupled or not coupled".

This definition applies for the purposes of all the insurance directives.

The obligation on the Member States to ensure that an approved policy of insurance is in existence in respect of the use of vehicles would appear to be rather far reaching. However, Article 4 of the First Directive goes on to provide for certain permissible derogations from Article 3. Article 4 provides, *inter alia*, that :

"A Member State may act in derogation of Article 3 in respect of:

(a) Certain natural or legal persons, public or private;...

(b) Certain types of vehicle or certain vehicles having special plates;...".

It is clear from the relevant provisions of the First Directive that it was permissible for Ireland to derogate from the general obligation prescribed by Article 3 in the manner in which Ireland did derogate under the 1962 Regulations. Ireland was entitled to exclude the liability for passengers travelling in the rear of vehicles without seats from its compulsory insurance requirements.

(ii) The Second Directive

The Second Directive required the Member States to make provision for a body to guarantee that the victims of an accident would not remain

without compensation where the vehicle which caused the accident was uninsured or unidentified. Article 1(4) of the Directive charged each Member State with the task of providing compensation for damage to property or personal injuries caused by an unidentified vehicle, or a vehicle for which the insurance obligation was not satisfied. The Second Directive therefore required the creation of national bureaux to deal with internal compensation claims. As referred to above, it was in response to this obligation that the Agreement was entered into. The Second Directive also served to extend the obligation of insurance to cover certain liabilities. However, the Second Directive did not restrict or amend, in any way, the Member States' entitlement to derogate, pursuant to Article 4 of the First Directive, in respect of certain liabilities. Accordingly, the Second Directive did not affect the legality of the 1962 Regulations.

The fact of the State's entitlement to derogate from the general obligation imposed under Article 3 of the First Directive has been confirmed by the European Court of Justice in the case of *Withers* v. *Delaney and Motor Insurers' Bureau of Ireland*[1]. This case arose out of a referral for a preliminary ruling by McMahon J., sitting in the Cork Circuit Court. The ECJ was called upon to answer three specific questions. However, as it answered the first question in a certain way, the ECJ felt it unnecessary to proceed to answer the other questions. The first question posed by McMahon J. was in the following terms:

> "Whether on a true construction of the provisions of the [First Directive] and the [Second Directive], Ireland was entitled on 23 July, 1995 to maintain legislation (Section 65 of the Road Traffic Act 1961) and the Road Traffic (Compulsory Insurance) Regulations 1962) which did not make compulsory insurance mandatory for passengers injured in a 'part of a vehicle, other than a large public service vehicle, unless that part of the vehicle is designed and constructed with seating accommodation for passengers'?".

The ECJ answered this question in the following terms:

> "...the First and Second Directives are to be interpreted as meaning that they do not preclude a Member State from maintaining national legislation which does not require compulsory insurance against civil liability arising from the use of motor vehicles to cover personal injuries to passengers carried in a part of a vehicle...unless that part of the vehicle was designed and constructed with seating accommodation for passengers".

Accordingly, until the time had elapsed for the transposition of the Third Directive into domestic law, it is beyond doubt that the relevant statutory provisions complied with European law. Therefore, under the regime imposed by the First and Second Directives, the State was not obliged to make insurance compulsory in respect of such passengers.

(iii) The Third Directive

The Third Directive was designed to cover, *inter alia*, the gaps which were viewed by the European Community as existing in the Member States in respect of compulsory insurance for passengers in motor vehicles. The preamble to the Third Directive states:

> "Whereas there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States; whereas to protect this particularly vulnerable category of potential victims, *such gaps should be filled*;" [Emphasis added.]

Accordingly, Article 1 of the Third Directive states that "...the insurance referred to in Article 3(1) of the [First Directive] shall cover liability for personal injuries to *all* passengers, other than the driver, arising out of the use of a vehicle". The definition of vehicle is that found in the First Directive. Pursuant to Article 6 of the Third Directive, Ireland was given until December 31, 1998 to comply with Article 1 as regards pillion passengers on motorcycles and until December 31, 1995, as regards other vehicles.

As outlined above, the 1962 Regulations were amended by the 1992 Regulations. This amendment seems designed to comply with the State's obligation to transpose the Third Directive into domestic law. The amendments effected by the 1992 Regulations extended the ambit of the State's compulsory insurance requirements to liability for injury to passengers travelling in vehicles with seating and passengers on motorcycles, but did not extend those requirements to passengers in vehicles, without seating. The question then is whether, as a matter of European law, the amendments effected by the 1992 Regulations were sufficient to properly transpose the Third Directive into domestic law? In other words, is the State obliged to make insurance compulsory in respect of such liability?

On a consideration of the relevant provisions of the Third Directive and the relevant jurisprudence of the ECJ, it seems that the relevant provisions of the 1992 Regulations fall short of the requirements of the Third Directive and that the State has failed in its obligation to properly transpose such Directive into domestic law by December 31, 1995.

The Third Directive imposes an obligation on the Member States to ensure that insurance is compulsory in respect of all passengers in vehicles. It is difficult to see how the 1992 Regulations can seek to impose a compulsory insurance obligation only in respect of injury to persons travelling in a vehicle with seating accommodation and not in respect of persons in a part of a vehicle without seats. It could perhaps be argued that individuals travelling in a part of a vehicle not fitted with seating are not "passengers" within the meaning of Article 1 of the Third Directive. However, it is clear from the judgment of the ECJ in *Withers* that this can not be a correct interpretation of the Third Directive. In *Withers*, the plaintiff did not rely upon the Third Directive, as the accident had occurred prior to December 31, 1995, the date by which Ireland had to transpose Article 1 of the Third Directive. On this point, the ECJ commented that the Third Directive "...cannot therefore be relied on by individuals before the national court". In this observation, the ECJ applied the established principle of EC law that the provisions of a directive cannot be relied upon against a Member State until there has been a failure by that Member State to transpose the directive into domestic law within the time allowed under the directive[2]. It could be argued that this comment by the ECJ suggests that had the accident occurred after December 31, 1995, the plaintiff could have relied upon the Third Directive, i.e. that the Third Directive had closed off all discretion on the part of Member States in respect of compulsory insurance.

In *Withers*, the ECJ also concluded that the Irish statutory provisions were permissible under the First and Second Directives, and it did so in the following terms

1 Case C 158/01 Unreported [2002] ECR

> "...the First and Second Directives do not require Member States to provide that compulsory insurance is to cover injuries to passengers carried in a part of a vehicle not adapted for the transport of seated passengers".

If the term "passengers" under the Third Directive were to be interpreted correctly as referring to individuals who were seated, there would be no requirement for the ECJ to use the term "seated passengers". Further, the ECJ also refers to passengers when discussing the unseated part of a vehicle.

It is also worth considering the earlier case of *Rafael Ruiz Bernaldez*[3] where the ECJ had occasion to consider the proper construction of the insurance directives. This case arose out of a referral for a preliminary ruling from the Spanish Courts. The proceedings before the national court were criminal proceedings against the driver of a motor vehicle for drunk driving. However, during the course of the trial, an issue arose as to whether national provisions that absolved an insurer of liability for injuries to third parties resulting from the drunk driving offence were compatible with the insurance directives. It is the ECJ's comments on the purpose of the insurance directives that are of relevance for present purposes:

> "18. In view of the aim of ensuring protection, stated repeatedly in the directives, Article 3(1) of the First Directive, as developed and supplemented by the Second and Third Directives, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all damage to property and personal injuries sustained by them....
>
> 19. Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3(1) would then be deprived of its effectiveness".

Therefore, it seems very likely, given this interpretation of the ECJ, that the Third Directive imposes an obligation on the State to ensure that passengers injured in the rear of a vehicle can get compensation, even when such vehicle does not have seating accommodation.

The Appropriate Remedy

On the assumption that the above analysis is correct, and that the Third Directive has not been properly transposed into domestic law, against what party should an injured party take legal action?

(i) The MIBI

A plaintiff could sue the MIBI, arguing that the Third Directive has direct effect and can be relied upon against the MIBI. In order to succeed in this argument, it would be necessary to establish that the Third Directive is capable of having direct effect. The fact that directives are capable of having direct effect has been long established by the ECJ, where the obligations being imposed on the Member State are sufficiently clear and exact[4]. Also, the ECJ seems to have taken the view that the insurance directives are capable of having direct effect[5]. In *Marshall No.1*[6], the ECJ has held that directives can only have direct effect against a Member State and not against non-State entities. However, the plaintiff in *Marshall No.1* could rely upon the relevant directive on the basis that the defendant, a health authority, was an emanation of the state. Therefore in order to succeed against the MIBI, it would be necessary to establish that the MIBI is an emanation of the State. In a series of decisions since *Marshall No.1*, the ECJ has expanded the concept of emanation of the state, and the types of bodies that fall within that term. In *Foster*[7], the ECJ commented that "...a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has, for that purpose, special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon". Clearly, the ECJ has applied an extremely wide definition to the concept of an emanation of the state.

In the case of *Mighell v. Reading*[8], the English Court of Appeal had to consider whether the English equivalent of the MIBI was an emanation of the state. Although the only judgment of the court on this point was that of Lord Hobhouse L.J., he did conclude that that body was not an emanation of the state. The issue as to whether the MIBI is an emanation of the State was raised in Ireland in the case of *Rooney v. O'Connor* where the plaintiff's counsel argued that the court should not follow the decision of the Court of Appeal in *Mighell* on the basis that that point had only been decided by one of the judges. However, there is no judgment in *Rooney* as that case settled. At present, the judgments of McMahon J in *Withers*, referred to above, and *Dublin Bus v. MIBI*[9] seem to be the only rulings delivered holding that the MIBI is an emanation of the State and is therefore a body in respect of which the Second Directive may be invoked. In *Dublin Bus*, the court had to consider Clause 7(2) of the Agreement, which provides for the payment of compensation for damage to property where the *owner or user* (emphasis added) of the *vehicle* causing the damage is untraced or unidentified. McMahon J. concluded that Clause 7(2) of the Agreement was an improper implementation of the discretion afforded Member States under the Second Directive to exclude compensation for damage to property caused by an untraced or unidentified vehicle (emphasis added). McMahon J held that the MIBI "...are liable as the Minister's partner in a flawed implementation process". McMahon J went on to award damages against the Bureau for losses sustained by the plaintiff as a result of the improper implementation of the Second Directive.

(ii) The State

The alternative, which only arises where the plaintiff is unsuccessful against the MIBI, is to sue the State for its failure to properly transpose the Third Directive into domestic law. The principle of state liability was established by the ECJ in *Francovich v. Italy*[10] where it was held that:

> "It is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible".

2. *Pubblcio Ministero v. Ratti* [1979] E.C.R. 1629
3. [1996] E.C.R. I-1829
4. *Marshall v. Southhampton and South-West Hampshire Area Health Authority* [1986] E.C.R. 723; *Fratelli Costanzo SpA v. Comune di Milano* [1989] E.C.R 1839; *Foster v.British Gas plc* [1990] E.C.R. I-3313
5. *Withers v. Delaney* [2002] E.C.R
6. *Marshall v. Southhampton and South-West Hampshire Area Health Authority* [1986] E.C.R. 723
7. *Foster v. British Gas plc* [1990] E.C.R I-3313
8. [1999] EULR 389
9. Unreported Oct. 29, 1999
10. [1991] E.C.R. I-5357

This statement has been confirmed on a number of occasions. However, the case law has set out a number of conditions that apply where an individual seeks to sue a Member State for damages for breach of Community law. The conditions are as follows:

(a) The rule of Community law infringed must be intended to confer rights on individuals;
(b) The breach of Community law must be sufficiently serious; and
(c) There must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

As outlined above, in *Dublin Bus v. MIBI*, McMahon J. awarded damages against the MIBI for its failure, as the Minister's partner, to properly implement the Second Directive. Accordingly, on the basis of the judgment of McMahon J., the insurance directives are capable of giving rise to an award of *Francovich* type damages.

In conclusion, whether the Third Directive can be invoked directly against the MIBI is far from settled as a matter of law. Therefore, the prudent course for a plaintiff would be to sue both the MIBI and the State, seeking satisfaction of the judgment from the MIBI under the provisions of the Agreement, or in the alternative, damages against the State for the failure to properly transpose the Third Directive into domestic law.

Conclusions

1. Prior to December 31, 1995, the date by which Ireland was obliged to transposes Article 1 of the Third Directive into domestic law, there was no obligation on the State to ensure that insurance was compulsory in respect of passengers in the rear of vehicles without seating accommodation.

2. The wording of the preamble to the Third Directive clearly states that the objective of the Third Directive is to close off gaps in compulsory insurance between the Member States. Article 1 of the Third Directive clearly states that the Member States are obliged to ensure that insurance is compulsory in respect of injury to *all* passengers travelling in vehicles. Since December 31, 1995, the State has been obliged to comply with Article 1 of the Third Directive. As the 1992 Regulations exclude liability for passengers in the rear of vehicles without seating from the requirement for compulsory insurance, the State has failed in its obligation.

3. The issue of whether the MIBI constitutes an emanation of the State is not settled. It is unclear whether the insurance directives can be relied upon against it. Therefore, in any proceedings, it would be prudent to join the State as a co-defendant. The primary claim is against the MIBI on the basis that the Third Directive has direct effect and therefore, the MIBI is obliged to compensate in respect of the liability. The alternative claim is against the State for damages arising out of its failure to properly transpose the Third Directive into domestic law. ●

Criminal Law (Insanity) Bill 2002: Putting the sanity back into insanity?

Simon Mills BL

Introduction

This article examines the provisions of the Criminal Law (Insanity) Bill, 2002, compares them to the law in force at present and examines some potential pitfalls in the Bill as presently constituted.[1] Key changes proposed by the Bill are the creation of a statutory basis for the insanity defence and for the principles governing fitness to plead (including appeals from such findings). The Bill also introduces the defence of diminished responsibility and provides for the inauguration of a body to review those detained by the courts on foot of findings of mental disorder.

In this review, we briefly summarise the current law before going on to consider in each case the impact that the Bill will have on both law and practice. It is important to state that this article does not purport to review existing law in detail; rather it seeks to give consideration to the proposed changes in the Bill.

Fitness to plead

(i) The present state of the law

Fitness to plead is concerned with the state of mind of an accused at the time he stands trial for an offence. Like the question of insanity, the law on fitness to plead is predicated upon 19th century legislation[2] and predominantly governed by legal definitions rather than medical paradigms. A corollary of this is that - akin to the definition of 'insanity' (see below) - an impairment rendering one unfit to plead need not be psychiatric or psychological, but can be physical in nature.[3] The determination is whether the accused is functionally fit to plead: the ability of the accused to understand the charges put to him and the proceedings that flow from the charges; the capacity to challenge evidence and jurors; the ability of the accused to seek, instruct and understand the advice of legal representatives. If the accused cannot function in these crucial respects, he will be unfit to plead.

Fitness to plead can be dealt with either at the commencement of, or during, the trial. In jury trials, the jury will consider the matter (a significant area of change in the Bill). If the matter arises prior to the trial, then a specific jury is empanelled to consider the fitness to plead of the accused. If questions arise during the trial, then the trial jury will consider the question of fitness. The issue may be raised by the defence, the prosecution or the trial judge.

Where there is no jury, then determination of fitness to plead falls to the judge, but it has been held that the District Court "should make no order of any description with regard to the further attendance of the accused or with regard to his custody"[4] if the accused is found unfit to plead. This too is an area that will be changed if the Criminal Law (Insanity) Bill becomes law.

Where a person is found unfit to be tried, the accused is subject to detention "at the pleasure of the Executive", although Casey and Craven (citing McAuley)[5] point out that

> "...the statutory provisions suggest that this is discretionary rather than mandatory, indicating merely that 'it *shall be lawful* for the court... to order such person to be kept in strict custody.'"[6] [italics added]

The implication is that those who are found unfit to plead but do not suffer from a psychiatric disability need not be committed, but conversely, it also means that those who are unfit to plead and who do suffer from a mental disorder may be detained indefinitely, notwithstanding the fact that they have not been tried.

(ii) The effect of the Bill

The first - and most obvious - change proposed by the Bill is cosmetic: the term 'fitness to be tried' replaces 'fitness to plead'. A more profound

1. My thanks to Michael Durack SC who provided me with much useful information on the law within the broad area of insanity as it currently stands.
2. Lunacy (Ireland) Act 1821, s. 17. The question is also canvassed in the Juries Act 1976.
3. *R v. Prichard* (1836) 7 C&P 303, where the accused was deaf mute.
4. *O'Connor v. Judges of the Dublin Metropolitan District* [1994] 3 IR 246
5. McAuley, *Insanity, Psychiatry and Criminal Responsibility*, Dublin, 1993. See in particular p. 140 *et seq.*
6. Casey & Craven, Psychiatry and the Law, Dublin, 1999, p. 439.

change is the removal of the necessity that is should be the jury that considers the issue of fitness to be tried in cases to be tried by jury: instead, as will be seen below, in all courts, the determination falls to be made by a judge sitting alone and hearing medical evidence.

A. Defining " fitness to be tried"

The statutory expression of 'fitness to be tried' is as follows:

> 3.-(1) Where in the course of criminal proceedings against an accused person the question arises, at the instance of the defence, the prosecution or the court, as to whether or not the person is fit to be tried, the following provisions shall have effect.
>
> (2) An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to-
>
> (a) plead to the charge,
> (b) instruct a legal representative,
> (c) make a proper defence
> (d) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or,
> (e) understand the evidence.

Note that the relevant statutory definition of 'mental disorder' - the prerequisite for unfitness to plead in the Bill - "includes mental illness, mental handicap or any disease of the mind, but does not include intoxication."[7] This definition seems to leave no room for those who are suffering from non-psychiatric or non-mental impediments to their fitness to be tried. It is presumed that in such rare cases, the common law articulation of the rules on fitness to plead will continue.

B. Procedure for the determination of fitness to be tried

In the District Court, where the accused is charged with a summary offence or with an indictable offence that is to be dealt with by summary trial, "any question whether or not the accused is fit to be tried shall be determined by the Court."[8] The District Judge may hear evidence from an "approved medical officer"[9] and where he is satisfied that the accused is suffering from a mental disorder "*within the meaning of the Mental Health Act 2001*" and is in need of inpatient care or treatment in a "designated centre",[10] he may commit the accused to detention.[11] If the accused is found fit to be tried, then the trial continues.

In circumstances where an accused is before the District Court for a trial other than for a summary offence or an indictable offence that is to be tried summarily, then the question on fitness to be tried is not to be decided in the District Court. Rather, the accused is to be sent forward to the court in which the matter would ordinarily be tried, if the accused were fit to be tried. The matter then falls to be determined by a judge sitting alone in that court.[12]

If the accused is fit to be tried before a court to which he has been sent forward by the District Court, then the provisions of the Criminal Procedure Act, 1967 will apply as if the accused had - on the date when he was sent forward for consideration of the question of fitness to be tried - been the subject of an order returning him to be tried. This is the case both when the accused is fit to be tried by the higher court and no consideration of the issue need be made and when the question of fitness to be tried is deliberated by the court and it is found that the accused is in fact fit to be tried.[13]

Where the accused appears before any court other than the District Court at first instance, the question of fitness to be tried is also to be decided by a judge sitting alone.[14]

The exercise of the courts' jurisdiction - and this applies to all courts - is subject to two conditions. Firstly, the consideration of a person's fitness to plead may, where it is expedient and in the interests of the accused to do so, be deferred until any time before the opening of the defence. Should the person be acquitted or discharged prior to the consideration of the question of fitness to plead, then the question need not be considered. Secondly, if the accused is found unfit to plead, the court may - on foot of an application being made - hear evidence as to whether the accused committed the act alleged. If the court is satisfied that there is a reasonable doubt, then the accused may be discharged, notwithstanding the finding of unfitness to plead.[15]

C. Powers of the courts

The courts have the power, having heard the evidence of an approved medical officer and any other evidence that may be adduced, to determine that the accused is suffering from a mental disorder within the meaning of the Mental Health Act, 2001 and is in need of in-patient care or treatment. If such a determination is made, then the accused may be committed to a specified designated centre.[16] To aid the courts in reaching a determination as to the mental health status of the accused, jurisdiction is conferred to allow them to commit the accused to a designated centre for a period of not more than 28 days and to direct that during that time, the accused undergo a psychiatric examination by an approved medical officer. The medical officer can then report back to the court to aid it in its deliberations.[17] Note that where the accused is not suffering from a mental disorder 'within the meaning of the Mental Health Act, 2001', the court would appear to have no statutory power of committal, notwithstanding that the accused may be suffering from a mental disorder within the meaning of the Criminal Law (Insanity) Bill.

7. Criminal Law (Insanity) Bill, 2002, s. 1(1)
8. Criminal Law (Insanity) Bill, 2002, s. 3(3)(a).
9. An 'approved medical officer' is defined as "a consultant psychiatrist (within the meaning of the Mental Health Act 2001)": see Criminal Law (Insanity) Bill, 2002, s. 1(1)
10. "Designated centres" are psychiatric centres or sections of prisons that have been designated by the Minister for Health and Children (with the consent of the Minister for Justice, Equality and Law Reform in the case of prisons) as a centre for the "reception, detention or treatment of persons or classes of persons committed thereto under the provisions [of the Bill]": see Criminal Law (Insanity) Bill, 2002, s.2.
11. Criminal Law (Insanity) Bill, 2002, s. 3(3)(b). This detention will continue until the incarceration is reviewed under s. 12 of the Bill by the Mental Health Review Board (see below).
12. Criminal Law (Insanity) Bill, 2002, s. 3(4)
13. Criminal Law (Insanity) Bill, 2002, ss. 3(4)(c) and 3(4)(e) respectively.
14. Criminal Law (Insanity) Bill, 2002, ss. 3(5)(b)
15. Criminal Law (Insanity) Bill, 2002, s. 3(7)-(8). The deferral of the hearing of submissions relating to fitness to be tried may be relevant in the case of appeals: the appeal court can consider whether prior to hearing submissions relating to fitness to be tried, the trial court should rather have acquitted the accused.
16. Criminal Law (Insanity) Bill, 2002, s.3 (3)(b) - for District Court - and s. 3(5)(c) - for other courts.
17. Criminal Law (Insanity) Bill, 2002, s. 3(6). The Mental Health Commission has criticised this 28-day detention period, suggesting that it be limited to 8 days.

D. Appeals

An appeal lies against any decision by the District Court that an accused is unfit to be tried. The Circuit Court, if it allows the appeal, can order that either the trial take place or that a retrial be held (depending on the point in proceedings where the decision on fitness to be tried was reached).[18] Where consideration of fitness to be tried has been postponed to a later stage in the initial hearing and the Circuit Court is of the opinion that - on the evidence - the accused should have been found not guilty before any thought was given to the issue of his fitness to be tried, then the Circuit Court shall direct that the accused be acquitted.[19]

If a decision on fitness to be tried is made by the Circuit Court, the Central Criminal Court or the Special Criminal Court, then an appeal lies to the Court of Criminal Appeal (CCA). Precisely the same options are open to the CCA as those available to the Circuit Court (discussed above): the court may order a (re-)trial or, if the circumstances permit, order that the appellant be acquitted.[20] There is a statutory bar on appeals to the Supreme Court on the question of fitness to be tried.[21]

Insanity

(i) The present state of the law

The defence of insanity is a question of the mental state of the accused at the time that he committed the offence of which he stands accused. The need for reform of the law on insanity has long been advocated. In *Neilan*, Keane J made the following observations:

> "... our law in this entire area is archaic and in urgent need of statutory reform... disfigured as it is, not merely by out-of-date conceptions of insanity but also by offensive descriptions of those suffering from mental illness, which have long passed out of the vocabulary of civilised people."[22]

In many ways, the need for reform could not be more obvious: the criminal law in Ireland has been reliant in large measure on the McNaghten Rules since their adoption in the middle of the 19th Century.[23] While the Irish courts recognise that they are not exhaustive of the definition of insanity,[24] the McNaghten Rules have remained the gold standard in spite of two problems. In the first place, the Rules were drawn up expressly with insane delusions in mind. Application of the Rules to other conditions has inevitably been piecemeal and has included wielding of the Rules in cases where there is no satisfactory psychiatric element, but where nonetheless, circumstances conspired to create a "disease of the mind", causing a "defect of reason".

The second problem is that as understanding of medical and psychiatric conditions has advanced, so also have certain conceptions become outmoded. Can depression or schizophrenia truly be categorised nebulously and unthinkingly as "diseases of the mind" as contemporary research demonstrates that biochemical or structural changes underpin many conditions that we regard as psychiatric? The changes brought about by research and understanding of psychiatric disorder have been encapsulated in a criticism made nearly 70 years ago and what was true then, is all the more vital now:

> "A vast area of research and discovery lies in the relatively short period of time between Hogarth's cartoon of Bedlam and current theories as to the upsetting of the glandular balance of the human body."[25]

Statutory authority for the detention of the person found "guilty but insane" in a psychiatric institution at the pleasure of the government has roots in the Trial of Lunatics (Ireland) Act, 1883,[26] which will be repealed if the Criminal Law (Insanity) Bill, 2002 becomes law. This jurisdiction has in turn been exercised predominantly in the light of the McNaghten rules, although the existence of psychiatric conditions that lie outside the remit of the Rules was identified by the Supreme Court in *Doyle v. Wicklow Country Council*.[27] Griffin J. noted that the Rules do not deal with volitional and emotional factors in mental disorders, including the question of insane impulse and - on the facts of that case - the court was prepared to accept the existence of a defence of "irresistible impulse."

More controversially, other cases have arisen - although not in this jurisdiction - where conditions that were manifestly non-psychiatric in nature were brought within the rubric of insanity, including arteriosclerosis, epilepsy and diabetes.[28] The problem, in part, has been that the law has not hitherto had much time for the minutiae of medical diagnosis and pathology:

> "[The law] is not concerned with the origin of the disease or the cause of it but simply with the mental condition which has brought about the act. It does not matter for the purposes of the law, whether the defect of reason is due to a degeneration of the brain or to some other form of mental derangement... it is of no importance to the law, which merely has to consider the state of mind in which the accused is, not how he got there."[29]

(ii) The effect of the Bill

The Bill creates a statutory footing for the insanity defence, although in spite of criticism of the description as judgmental and outmoded, the term "insanity" continues to be used in the Bill. As with 'fitness to be tried', the first evident change is in nomenclature: the old phrase "guilty but insane" is replaced by "not guilty by reason of insanity".

18. Criminal Law (Insanity) Bill, 2002, s. 6(1)
19. Criminal Law (Insanity) Bill, 2002, s. 6(2)
20. Criminal Law (Insanity) Bill, 2002, s. 6(3)
21. Criminal Law (Insanity) Bill, 2002, s. 6(5)
22. *People (DPP) v. Neilan* [1990] 2 I.R. 267, 289-90 (CCA)
23. *R v. McNaghten* (1843) 10 Cl & F. 200, [1843] 4 St. Tr. (n.s.) 930
24. *Doyle v. Wicklow County Council* [1974]
25. *People (Attorney General) v. O'Brien* [1936] I.R. 263 at 269-270.
26. Trial of Lunatics Act (Ireland), 1883, s. 2. Note that in summary trials a finding of "guilty but insane" results in unconditional discharge, not in detention: *State (C) v. Minister for Justice* [1967] I.R. 106. Involuntary psychiatric detention then becomes a matter for the psychiatric services. This situation will persist under the new Bill
27. *Doyle v. Wicklow County Council* [1974] IR 55.
28. *R v. Kemp* [1957] 1 Q.B. 399 (arteriosclerosis); *R v. Sullivan* [1984] A.C. 156 (epilepsy); *R v. Hennessy* (1989) 89 Cr. App. R. 10 (diabetes).
29. *R v. Kemp* [1957] 1 Q.B. 399, 407 *per* Devlin J

A. Defining 'insanity'

A "mental disorder" is defined such that it

> "...includes mental illness, mental handicap or any disease of the mind, but does not include intoxication."[30]

It is to be noted that there is no attempt to define a "disease of the mind" or explicitly to limit it to psychiatric disorders. It should be noted too that the definition of "mental disorder" differs from that contained in the Mental Health Act, 2001. The Bill defines the raising of insanity in the following terms:

> 4.-(1) Where an accused person is tried for an offence and, in the case of the District Court or Special Criminal Court, the court, or in any other case, the jury finds that the accused person committed the act alleged against him or her and, having heard evidence relating to the mental condition of the accused given by a consultant psychiatrist, finds that-
>
> (a) the accused person was suffering at the time from a mental disorder, and
> (b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she-
>
> (i) did not know the nature and quality of the act, or
> (ii) did not know what he or she was doing was wrong, or
> (iii) was unable to refrain from committing the act,
>
> the court or the jury, as the case may be, shall return a special verdict to the effect that the accused person is not guilty by reason of insanity.

Some of the changes are obvious. Firstly there is now an explicit requirement that evidence as to the mental state of the accused must come from a consultant psychiatrist. Secondly, the case of irresistible impulse is explicitly included, in keeping with the decision of the Supreme Court in *Doyle v. Wicklow County Council.* Lastly, the term 'defect of reason' - a vestigial remnant of the delusion-centred McNaghten Rules - is jettisoned.

B. Dealing with those found "not guilty by reason of insanity"

Many of the old difficulties with 'disease of the mind' persist under the proposed new principles. What of those conditions, such as epilepsy, which are non-psychiatric in nature, but which may rarely result in findings of "not guilty by reason of insanity"? The Bill deals with such matters by discriminating between a mental disorder as defined in the Bill (which includes 'any disease of the mind') and "a mental disorder (within the meaning of the Act of 2001)". Where a patient is found not guilty of an act by reason of insanity, it falls to the court to consider, on receipt of expert evidence, whether the accused is suffering from a mental disorder *within the meaning of the Act of 2001.*[31] If so, then the accused may be committed to a "designated centre"[32] for a period of not more than 28 days - although this period of examination and assessment may be extended, on application, for periods up to an aggregate of six months - during which period of periods the "approved medical officer" (the consultant in charge of the patient) shall report to the court on whether the patient continues to suffer from a mental disorder *within the meaning of the 2001 Act.*[33] If an accused is suffering from a mental disorder within the meaning of the 2001 Act, then he can be committed to a designated centre, where his mental state will be reviewed by the Mental Health Review Board[34] (see below).

The clear implication is that the law will continue to recognise two types of "insanity". One is conventional in nature, a psychiatric disorder that represents a risk of recurrence and necessitates treatment and another, less well-defined, that includes several categories of patient, perhaps including the accused who pleads automatism and the accused suffering from a "mental disorder" that arises from a physical condition. Only those patients who suffer from a mental disorder within the meaning of the 2001 Act may be involuntarily committed to hospital for treatment of their condition. This ongoing distinction begs one question. What of the non-psychiatric 'insane' patient who is discharged notwithstanding that he still suffers from the condition that caused him to be found not guilty by reason of insanity? Can he be incarcerated until his condition no longer poses a threat (in the case - perhaps - of epilepsy or arteriosclerosis) or can he be the subject of any form of compulsory treatment order? It appears not: on the contrary, it seems that the law continues to enshrine the principle that some 'insane' patients are more 'insane' than others.

C. Pleading insanity or diminished responsibility in murder trials

The Bill also lays down parameters for circumstances where - *in a trial for murder only* - the accused contends either that he was suffering from a mental disorder that means he should be found not guilty by reason of insanity, or a mental disorder such as constitutes diminished responsibility (see below). The judge shall permit the prosecution, where it wishes to do so, to adduce evidence to prove the alternative of the contention made by the accused and can direct to the prosecution at which stage in the proceedings the evidence may be adduced.[35]

D. Appeals

A new right of appeal is granted by the Bill to those found not guilty by reason of insanity.[36] A finding of the District Court that a person is not guilty by reason of insanity may be appealed to the Circuit Court on all or any of the following grounds:

30. Criminal Law (Insanity) Bill, 2002, s. 1(1)
31. Criminal Law (Insanity) Bill, 2002, s. 4(2). The 2001 Act's definition of 'mental disorder' refers to (i) mental illness, (ii) severe dementia and (iii) intellectual impairment. It specifically excludes conditions such as personality or addiction disorders.
32. See fn. 9
33. Criminal Law (Insanity) Bill, 2002, s. 4(3)(a)-(c)
34. Criminal Law (Insanity) Bill, 2002, s. 12
35. Criminal Law (Insanity) Bill, 2002, s. 4(4)
36. Criminal Law (Insanity) Bill, 2002, s. 7

- It was not proved that he committed the act in question (appellant to be acquitted if appeal upheld)
- That when the act was committed, he was not suffering from a mental disorder (a verdict of 'guilty' to be substituted if appeal upheld and the Circuit Court can then exercise such powers as the District Court would have had in the circumstances)
- That the court ought to have determined that the accused was unfit to be tried (such a finding substituted for the verdict, if appeal upheld)

A verdict of not guilty by reason of insanity that is handed down following trial on indictment in the Circuit Court, the Central Criminal Court or the Special Criminal Court may be appealed to the Court of Criminal Appeal on all or any of the same grounds as set out above and similar powers (*mutatis mutandi*) are available to the CCA in respect of circumstances where those grounds of appeal are upheld.

Diminished responsibility

(i) The law as it stands

The defence of diminished responsibility has not hitherto existed in Ireland.[37] Conversely, it has long been on the statute books in the United Kingdom and its elements are as follows:

- It applies only when a person murders another or is involved in the murder of another.

- The accused must be suffering "from such abnormality of mind as substantially impaired his mental responsibility for his acts or omission in doing or being involved in the killing."

- The abnormality of the mind may arise from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury.[38]

Under the English regime, where a person is found to be suffering from diminished responsibility, he is guilty of manslaughter rather than murder. The defence of diminished responsibility could be interpreted - in effect - as a 'sweeping-up mechanism', covering the margins of the legal definition of insanity: those who are not suffering from the "defect of reason" that is necessary for the McNaghten Rules to apply, but who are nonetheless not wholly responsible for their actions. Conditions meeting the criteria for diminished responsibility have included personality disorders, depression and epilepsy.[39]

(ii) The effect of the Bill

The Criminal Law (Insanity) Bill adopts an approach very similar to that in England and Wales. The defence applies only where a person is tried for murder and where

> "...the jury or, as the case may be, the Special Criminal Court finds that the person-
>
> (a) committed the act alleged,
> (b) was at the time suffering from a mental disorder, and
> (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act

the jury or court, as the case may be, shall find the person not guilty of that offence, but guilty of manslaughter on the ground of diminished responsibility."[40]

It remains at all times the burden of the defence to prove that the accused is not liable to be convicted of the offence.[41] There is no statutory scope for appeal from a finding of guilt of manslaughter on the ground of diminished responsibility.

Other Provisions

The Bill does not only reconfigure the definitions and procedures relating to pleas of insanity, diminished responsibility and unfitness to be tried. Among other matters, it should be noted that the Bill provides, by way of an overarching principle of practice, that no evidence relating to the mental state of the accused shall be adduced by the defence unless notice of intention to do so is given to the prosecution.[42]

The Bill also deals with the following areas:

(i) Mental Health Review Board

The Mental Health Review Board (MHRB) is a body created to discharge the obligation on the State under the European Convention on Human Rights to independently and speedily review the propriety of any involuntary detention. The Review Board

> "... shall be independent in the exercise of its functions under this Act and shall have regard to the welfare and safety of the person whose detention it reviews under this Act and to the public interest."[43]

It is proposed in the Bill that the MHRB will review the detention of those patients committed to designated centres under the Bill. It can have regard to the court record that prefaces any such detention and can appoint legal representation (under a legal aid scheme, unless the patient wishes to appoint his own legal team) to any patient who is subject to review. The MHRB has powers to compel reports, oral testimony, attendance, or the production of anything necessary for the fair disposal of matters and any failure to comply that amounts to contempt of the MHRB is an offence under the act.[44] Hearings are to

37. Although it was recommended as long ago as 1978: *Treatment and Care of Persons Suffering from Mental Disorder who Appear before the Court on Criminal Charges*, 3rd Interim Report of the Inter-Departmental Committee Mentally Ill and Maladjusted Persons, Dublin, Government Publications.
38. Homicide Act, 1957, section 2
39. *R v. Turnball* (1977) 65 Cr. App. R (personality disorder); *R v. Ford* [1972] Q.W.N. 5 (depression); *R v. Price* [1963] 2 QB 1 (epilepsy). Epilepsy has also been held to fulfil the criteria for insanity and for automatism. Which defence will be raised - whether insanity or diminished responsibility (or even automatism) - on the basis of the accused suffering from epilepsy will probably depend on the precise clinical manifestation of epilepsy in the individual. See Mills, *Clinical Practice and the Law*, Dublin 2002, chapter 11.40 Criminal Law (Insanity) Bill, 2002, s. 5(1)
41. Criminal Law (Insanity) Bill, 2002, s. 5(2)
42. Criminal Law (Insanity) Bill, 2002, s. 14.
43. Criminal Law (Insanity) Bill, 2002, s. 10(2)

be held in private and documents and reports of the MHRB and statements made at any meetings or sittings of the MHRB are absolutely privileged. The MHRB is obliged to review the detention of a patient (the term used in the Bill for an accused who has been detained as unfit to be tried or found not guilty by reason of insanity) at intervals not longer than 6 months,[45] although any patient may also apply to the MHRB for a review of his detention, which the Board shall carry out unless satisfied that it has already carried out a satisfactory review under the terms of the Bill.[46]

Where the clinical director of any designated centre (or the governor, where the designated centre is a prison rather than a hospital) becomes aware that a person is no longer unfit to be tried, then he is obliged to notify the MHRB "forthwith". Similarly, the clinical director or governor must notify the MHRB if he is of the opinion that the person detained - while still unfit to be tried - is no longer in need of inpatient treatment or care. The MHRB must then review the patient "as soon as may be" and determine whether to notify the court (if of the opinion that the patient is fit to be tried) or to release the patient (conditionally or unconditionally) or to commit the patient for further detention and treatment or care.[47]

(ii) Transfers and temporary release[48]

The clinical director of a designated centre may direct the temporary release or transfer to another institution of any patient to whom the Bill applies. The consent of the Minister for Health is necessary for transfers and the consent of the Minister for Justice, Equality and Law Reform for any temporary release. Release and transfer may be subject to conditions, which must be communicated to the patient in writing and with which the patient must comply. The patient shall be deemed unlawfully at large if he exceeds the time-limits of his release, or breaches a condition of his release or transfer and that patient may be arrested without warrant. The Bill also provides that continued detention shall be lawful in circumstances where the transfer of the patient to another hospital is necessary in order for the patient to receive treatment that is not available in the designated centre, although the Minister for Justice, Equality and Law Reform must be notified of any such transfer within 48 hours of it occurring.

(iii) Defence Act

The Bill furthermore proposes to amend the Defence Act, 1954, sections 202-203A, relating to:

* Mental disorder at the time of trial
* Mental disorder at the time of the commission of an offence
* Diminished responsibility

These amendments[49] seek - in effect - to apply the provisions of the Criminal Law (Insanity) Bill, 2002 to court martials, including provisions for review by the MHRB.

Conclusions

The Criminal Law (Insanity) Bill, 2002 has had a long gestation: first mooted in 1978 and promised by government as long ago as 1989. It places on a statutory footing the insanity defence and fitness to be tried. In creating a defence of diminished responsibility, it plugs a gap in the law, through which those who, by reasons of "non-insane" mental disorder, have perhaps been unduly harshly treated by the courts in the past.

The dichotomy between the definition of "mental disorder" in the Bill and the definition in the Mental Health Act, 2001, is perhaps understandable, given the difference in emphasis of each law. However, it may give rise to misunderstandings and confusion that could be circumvented by giving more careful consideration to how the different definitions can be reconciled, before the Bill is enacted by the Oireachtas. ●

44. Criminal Law (Insanity) Bill 2002, s. 10(3)-10(4)
45. Criminal Law (Insanity) Bill 2002, s. 12(2)
46. Criminal Law (Insanity) Bill 2002, s. 12(8)
47. Criminal Law (Insanity) Bill 2002, s. 12(3)-(7)
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Personal Injury Claims

Bar Council proposals for court reform.

The Bar Council has developed the following proposals to address public concern regarding the cost of personal injury litigation. These proposals have been formulated to enhance the efficiency of the courts, to reduce litigation costs and to eliminate fraudulent or exaggerated claims.

1. Introduction

The Bar Council recognises that the present system operated in the High and Circuit Court in respect of actions for compensation for personal injuries could be improved, and advocates the reform thereof.

1.2. In making proposals for reform, we hope to achieve the following:-

1.2.1. To make the system work more efficiently, effectively and at no extra cost.
1.2.2. Reduce the costs of litigation;
1.2.3. To help eliminate fraudulent and or deliberately exaggerated claims;
1.2.4. To bring a degree of conformity in relation to the size of awards;
1.2.5. To shorten the time between inception and conclusion of a claim

2. Proposals for reform

In order to achieve the above objectives, the Bar Council suggests the following changes:-

2.1.1. The amendment of the Statute of Limitations;
2.1.2. New rules in relation to the processing of personal injury claims;
2.1.3. Permitting each side in an action to address the Court on quantum;
2.1.4. The introduction of legislation to deal with fraudulent and/or deliberately exaggerated claims, and updating the law with regard to perjury.

3. The Statute of Limitations

At present, the time prescribed for initiating a claim for damages for personal injury is three years from the date of the accrual of the cause of action. The Council suggests that this should be shortened to a period of one (or, at most, two) years. We can think of no reason why a plaintiff should be allowed to wait for a period of three years before initiating proceedings. We believe that the present period serves only to delay conclusion of the claim, which thereby increases the costs of the action. In our opinion, the vast majority of claims are capable of being initiated within a year of the date of the cause of action. We are satisfied that the present rules which relate to "discoverability" can deal with any potential injustice that might arise should the limitation period be shortened.

4. Getting the Case to Court

The Bar Council proposes the adoption of new Rules of Court which would both streamline, and allow monitoring of, the progress of any action. At present, once a Civil Bill or Plenary Summons has been issued, a plaintiff has control of the pace of litigation until a hearing date is given. This usually has the effect of causing delays within the system, allowing costs to escalate. We believe it would be possible to minimise delay and reduce costs in the following way:-

4.1. When a Civil Bill or Plenary Summons is issued, in addition to being assigned a record number, the case should also receive a return date, three months from the date of issue.
4.2. The plaintiff would have the responsibility of serving Plenary Summons together with the Statement of Claim, or the Civil Bill, within one month of the date of issue, together with notification of the return date. Any applications regarding substituted service or deeming service good should be made not later than one month from the date of issue.
4.3. On the return date, the case would appear in a list before the Master of the High Court or the County Registrar (in the Circuit Court), who would have the power to strike out the proceedings, if, without good and valid reason, the proceedings have not been served.
4.4. The defendant would be obliged to enter an Appearance not later than the return date, and would have to apply to join any third party by that date.
4.5. The defendant would have a further period of two months in which to deliver a Defence before a second return date at which the Master or County Registrar would deal with any question of discovery, particulars, interrogatories or other interlocutory matter.
4.6. Any Third Party would have a period of two months from date of service of the proceedings in which to deliver a Defence or make any other application.
4.7. A plaintiff would be required to deliver an Affidavit verifying all the particulars contained in the claim by the

first return date. A defendant would be required to deliver an Affidavit verifying any positive pleading by the second return date. Any third party would be required to deliver an Affidavit verifying any positive pleading within two months of the service of proceedings.

4.8. Rules would provide for the extension of any time limits, but only for good and valid reason.

4.9. Each party would be obliged to furnish a list of witnesses, together with copies of any report from an expert intended to be relied on in Court.

4.10. Any expert retained by any party would be required to undertake in his report that he owed a duty to the Court to give an expert opinion for consideration by the Court, without bias towards, or against any party.

4.11. In the event of conflict of expert opinion, the Master or the County Registrar would have power to extend time so that the Court or any party might seek further or updated expert reports.

4.12. The Master or County Registrar would have responsibility for supervising a system of lodgement and or tender. A defendant could make or increase a lodgement or tender at any time before a date for hearing was allocated. A plaintiff could similarly notify the Court and the other party that a particular sum would be acceptable in settlement of the claim.

4.13. Either party could appeal any decision of the Master or County Registrar to a Judge.

4.14. At the conclusion of such procedural matters, the Master or the County Registrar would fix a date for a meeting of the parties, at which parties would be obliged to attempt to achieve settlement of the case, or to limit the number of issues to be tried. Each party would be required to issue a certificate that such meeting had taken place and list the matters (if any), which had been agreed before a trial date could be assigned. A date for trial would only be assigned on production of the certificates.

4.15. In the assignment of a trial date, each party would be required to give to the Court office an accurate estimate of the length of hearing required, and submit a list of dates which would be acceptable having regard to the availability of witnesses or other matters. Rules would provide for the cost implications of inaccurate estimates as to time. The Court office would nominate a date for hearing which would accommodate, to the greatest extent possible, the convenience of the parties, and be a date when a Court would be available to deal with the case.

5. Merits of the above system

5.1. The above system is designed to provide a more efficient processing of cases. The Court, through its officers, can supervise the pace of the litigation and prevent unnecessary delay. It would provide for an early identification of matters where liability is not in issue and allow a "fast tracking" of such cases.

5.2. The system could also prevent the engagement of unnecessary experts. A Court could review expert reports and call for additional or up to date reports.

5.3 At present, the above stages take place without the supervision of the Court, and take place as and when one party or the other so decides. The suggested system would put definite order and time limits in place, prevent delay and minimise costs. For the proper working of this system, it would be imperative that time limits were strictly adhered to and that strict penalties were in place to ensure compliance.

5.4 In recent years, there has been significant investment in the Court infrastructure, and we believe that the Courts are able to provide a much speedier service than was available in the past. We believe that virtually all delay at the moment is the responsibility of one party or the other, rather than any problem in the Court structure.

5.5 The present system for the trial of personal injury cases leaves it to the parties to decide if, and when, any pre-trial meetings for negotiation of settlement or otherwise take place. This can and does lead to unnecessary wasting of Court time and additional expense being incurred by the paying party. The Bar Council believes that the procedure provided for in the Rules of Court should be amended to encourage early settlement. The Rules should provide for mandatory pre-trial meetings to be held in every case.

6. Court Awards

6.1. The Bar Council advocates that either side should be allowed address the Court on quantum and refer to precedent in other cases. Allowing this change would assist the Courts in producing greater conformity in the awards made.

6.2 In addition, a better system of reporting Court awards and the publication of details of cases is advocated. This could lead to greater conformity of awards in both the Circuit and High Court.

7. New Legislation

It appears to the Bar Council that legislation is required to deal with the question of false and deliberately exaggerated claims. The offence of perjury needs to be considered and the law updated. Our suggestion of requiring an Affidavit to verify matters pleaded puts an onus on parties to ensure that a claim or defence is appropriate and not "puffed" or exaggerated. It also helps to ensure that a denial of liability is not entered merely as a holding mechanism.

8. Conclusion

We believe that our proposals could be introduced largely by changing Rules of Court, even while hoped for legalisation is being passed. We contend that they would produce an efficient system that is fair to all parties and which will greatly reduce costs. The Bar Council believes in the efficient delivery of service at as low a cost as possible, while at the same time ensuring that the principles of fairness apply to all parties in any dispute. ●

Legal Update

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A directory of legislation, articles and written judgments received in the Law Library from the 7th March, 2003 up to 8th May, 2003.

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(P.S) Copies of the acts/bills can be obtained free from the internet & up to date information can be downloaded from website : www.irlgov.ie

(NB) Must have "adobe" software which can be downloaded free of charge from internet

Abbreviations

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

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Ireland as a Venue for International Arbitration Five Years On - Where do we stand?

Colm ÓhOisín, B.L.

Introduction

With the enactment of the Arbitration (International Commercial) Act, 1998, for the first time, Ireland could truly say it was open for business as a venue for international arbitration. The adoption of the UNCITRAL Model Law ensured that parties seeking to arbitrate their disputes in Ireland would do so under a familiar legal framework, one which has been enacted to date in nearly 40 countries including Australia, New Zealand, Canada, Hong Kong, India, Germany, Singapore, Korea, the Russian Federation and Scotland and in the States of California, Connecticut, Illinois, Oregon and Texas.

In 1998, the Bar Council also opened the Dublin International Arbitration Centre in the Distillery Building. This Centre immediately provided a visual and geographic focus for the message that Ireland was an attractive place to arbitrate.

Five years have now elapsed since that new departure. What has changed in that time? Certainly one cannot say that there has been an overnight deluge of international arbitration work to Ireland. However, that should not be a surprise. Only the most superficial analysis of the market for international arbitration would suggest that all one had to do was to put up the 'Open for Business' sign, before the arbitration work would come flowing in. The reality, of course, is that competition between venues for international arbitration is intense. Arbitration is seen as a lucrative and prestigious speciality that brings benefits not just to local lawyers but to the local economy. Established centres of arbitration, such as London, New York, Paris and Geneva have a tradition and experience of hosting arbitrations that should not be underestimated. Newer centres, such as Hong Kong and Singapore, have aggressively marketed their own particular claims as suitable venues. Ireland is not alone in staking its claim as a new, alternative centre for arbitration.

Promoting Ireland as a Venue for International Arbitration

The principal obstacle hindering Ireland's ambitions in this area is the fact that it has little tradition as a venue for international arbitration. This is by no means an insurmountable obstacle, but it does mean that a considerable marketing effort is required. The marketing task, on the other hand, is helped by the fact that Ireland has many advantages as a location for arbitration. These have been recited on many previous occasions[1] but it is worthwhile listing these advantages once more -

* Firstly, we are English speaking.
* Secondly - and despite certain activities at Shannon - we are a neutral country with no history of colonisation.
* Thirdly, as mentioned previously, we have a familiar legal framework for international arbitration.
* Fourthly, we have a very reliable judicial system that supports the conduct of arbitration.
* Fifthly, we have a vibrant economy that has been an extraordinary economic success story.
* Sixthly, we have a pool of arbitration expertise, and
* Finally, we have some cost advantages over other centres, such as, London and Geneva.

One very significant recognition of these advantages occurred, when the American Arbitration Association opened the International Centre for Dispute Resolution in Dublin almost two years ago. This was a hugely significant development. The American Arbitration Association is a huge player in the international arbitration world and it now has its headquarters in Europe under the name the International Centre for Dispute Resolution in Dublin. With that decision, our credibility as a venue has increased considerably. Furthermore, under the direction of Mark Appel, Senior Vice President, the International Centre for Dispute Resolution has been promoting throughout Europe and beyond, not just ICDR Arbitration, but ICDR Arbitration *in Dublin*.

1. See "*Developing International Arbitration in Ireland*", Leila Anglade, Volume 5(3) Bar Review 143; "*Ireland as a Venue for International Arbitration*", Colm Ó hOisín, Volume 29(2) International Journal of Legal Information 244; "*Ireland as a place for International Arbitration*", Leila Anglade, Volume 12(2) American Review of International Arbitration 263

For our part, at the Dublin International Arbitration Centre, we launched some eighteen months ago a website - *www.dublinarbitration.com* - which promotes both the Centre and the whole concept of arbitration in Ireland. It makes the case for choosing Ireland, it explains the Irish legal system and explains our framework for international and domestic arbitration. Recognising our market, the website has also versions in French and in German.

The past five years have also seen the hosting of a number of international conferences in Dublin at which we have been able to promote our concept of Irish arbitration. Certainly, the feedback at these conferences has been extremely positive, particularly in relation to the facilities available here at this Centre.

As I have previously stated, however, we cannot expect overnight success in luring international arbitration to our shores. There is no question but that the number of international arbitrations coming to Ireland is on the increase. In this Centre, we have had arbitrations involving countries as diverse as Azerbaijan , United States, Canada and Dubai, Belgium and Spain and we are continually getting a large number of queries about our facilities. We have had very positive feedback from the users of the Centre and there is a continuing demand for the use of our facilities, particularly for domestic arbitration work.

There is no doubt that five years on, considerable progress has been made. However, there are clearly areas where further and more intensive efforts are required in order to guarantee Ireland's future as a centre for international arbitration.

'Singing off the same hymn sheet'

It is most desirable that various different sectors that have an interest in bringing arbitration work to Dublin, work together in the common cause. Solicitors' firms, barristers and members of the Chartered Institute of Arbitrators should all be communicating the same message. Solicitors have a particularly important role because it is they who negotiate and draft contracts in which arbitration clauses are inserted and in which the venue of the arbitration is invariably chosen. The large solicitors firms are in competition for many areas of work and co-operation on securing new areas of work may not be something that comes entirely naturally. However, there is no doubt that a far more effective message can be sold if there is a degree of coordination on this issue. Speaking at the ICDR forum in May 2002, William K. Slate II, President and Chief Executive of the American Arbitration Association, reminded the attendees of how the success of the American Arbitration Association in building up its volume of international arbitration lay in the fact that its arbitration clause is reposed in millions of contracts. There will, of course, be a significant time-lag before success in the insertion of Dublin arbitration clauses in contracts manifests itself in an increased volume of new arbitration in Ireland, but that should not discourage this necessary work.

Of course, one cannot expect solicitors to promote an Irish arbitration clause, without being confident that such clause is in the client's best interests. The message that we convey is not just aimed at foreign parties or other lawyers, but must also be aimed at the solicitors' profession in Ireland.

Support from the Courts

There are two somewhat contrasting aspects to the interrelationship between courts and arbitration. Firstly, it is highly undesirable that there be an excessive level of interference by the courts in the arbitral process. By choosing arbitration, the parties have expressed a preference not to resolve their dispute through the courts. In international arbitration, the parties are very unlikely to choose a country as a venue if its laws permit the courts to interfere with the arbitration or with the award. At the same time, however, court assistance in support of the arbitration is desirable. There may be circumstances where one of the parties may need to apply to the courts to assist the arbitral process, for instance to make interim or conservatory orders protecting assets or preserving the status quo or requiring measures to preserve evidence. In those circumstances, it is crucial that a party to an arbitration has ready access to the local court and that can be facilitated by an early hearing.

The perception that the courts are sensitive to the needs of commercial parties is obviously extremely important. I think it is interesting in this regard to look at the approach of the English courts system to its role in attracting international work to England. Recent statistics from the London Commercial Court indicate that in 55% of cases before it, neither party is from the UK.[2] The Court seems quite happy to provide a service that is an integral part of the infrastructure on which legal, banking and insurance services in the City of London depend. This infrastructure also makes London an attractive venue for arbitration and this again is something that can be exploited by its legal, banking and insurance services.

In the 27th Interim Report of the Committee on Court Practice and Procedure, it was recommended that, as a pilot project, a commercial court should be developed in Dublin as a matter of urgency. This Report also recognised that an Arbitration Centre could operate alongside the commercial court. Following on from that Report, the Committee, chaired by Mr. Justice Peter Kelly, has embarked on putting together draft Rules which will ultimately be forwarded to the Superior Courts Rules Committee. The establishment of an Irish commercial court is a very promising development.

Undoubtedly, the Irish Courts have, in the past, shown themselves to be sensitive to the commercial interests of parties and to the autonomy of parties in choosing arbitration over litigation. The words of the late Mr. Justice McCarthy in the case of *Keenan v. Shield Insurance Company* [1988] I.R. 89 have frequently been quoted to demonstrate this. He said: -

2. These statistics were indicated by Mr. Justice Gordon Langley, judge of the London Commercial Court in a speech given on 9th July, 2002, at a conference in Copenhagen organised under the Danish Presidency of the European Union and entitled "*Civil Litigation in the 21st Century.*"

> "...the field of international arbitration is an ever expanding one. It ill becomes the court to show any readiness to interfere in such a process; if policy considerations are appropriate as I believe they are ..., then every such consideration points to the desirability of making an arbitration award final in every sense of the term."

Significantly, those comments were made in the context of the Arbitration Acts 1954 - 1980, well prior to the enactment of the 1998 Act. The 1954-1980 regime gave the court a potentially extensive supervisory jurisdiction over arbitration. The court could set aside an award on the grounds of misconduct or on the grounds that the arbitration was improperly procured. It could also remit the award to the arbitrator because of misconduct, or error of law on the face of the record, on the grounds of an admitted mistake on the part of the arbitrator who requested the remission, or on the grounds of availability of fresh evidence. Quite apart from this, the 1954-1980 Acts also make provision for what was known as a special "case stated" procedure. During the course of the arbitration, the arbitrator could either, on his own initiative, or at the request of one of the parties, state a question of law arising in the course of the arbitration to the court. If the arbitrator refused to accede to a request of the parties to state the case, the court could direct him to state a case.

It is significant, however, that notwithstanding this potentially extensive supervisory jurisdiction, the Irish Courts have nonetheless exercised considerable restraint in interfering with the arbitral process. Nonetheless, the very availability of the remedies meant that a disappointed party to an arbitral award had the option of bringing proceedings in court to set aside the award or to seek its remittal, thereby involving the parties and possibly the arbitrator in significant additional costs.

The 1998 Act, as we know, created an entirely new regime for international commercial arbitration. It significantly reduces the scope for intervention from the Courts. The UNCITRAL Model Law brought into force by the 1998 Act specifically provides at Article 5 : -

> "In matters governed by this Law, no court shall intervene except where so provided in this law."

The grounds for setting aside an award are specified in Article 34 of the Model Law and these limited grounds are the only means of recourse against an award. The grounds mentioned in Article 34 are well recognised internationally.[3] They are virtually identical to the grounds specified in Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

Review of 1998 Act and the Superior Courts Rules

The 1998 Act, of course, retains the existing regime for domestic arbitration. We are not unusual in having a different framework for domestic and international arbitration. Countries such as, Belgium, France, Switzerland and Hong Kong have adopted a similar approach. The continued existence of the old regime for domestic arbitration has, however, the potential to cause a degree of confusion and perhaps a perception that Irish Courts are more willing to interfere in the arbitral process than is actually the case. Furthermore, competition is such between different venues that any perceived weakness will be fully exploited. I give as an example the following excerpt from the website of a large US firm of attorneys: -

> "If (as we suspect) the parties intend an arbitration to be an efficient dispute resolution mechanism, they will not want the national courts in the place of the arbitration to interfere with or disrupt the course of the arbitration. Thus it is fundamental that the place of the arbitration have a national law that is generally arbitration friendly.
>
> To understand this point, it is perhaps easier to describe a jurisdiction that is not conducive to arbitration. A jurisdiction is not conducive to arbitration if it permits repeated forays to the courts basically to appeal issues of law that arise during the course of the arbitration. This may sound bizarre, but it is the situation that existed in England into the late 1970's and continues in Ireland or other jurisdictions that maintain the so called 'case stated' procedure, even to-day."

Needless to say, the distinction between the regime for international commercial arbitration and domestic arbitration has been lost on that writer. But nonetheless, one can see the damage that can be caused to the message of Ireland as a suitable venue for international arbitration by such misunderstandings. Likewise, any caselaw, such as the decision of *McCarrick v. Gaiety (Sligo) Limited* [2001] 2 I.R. 266, that is seen as expanding the grounds upon which the Irish courts will interfere with an award (even if it be in the context of domestic arbitration), is unhelpful to the efforts to promote this jurisdiction[4].

There must be a case now to be made for a review of the 1998 Act to apply the UNCITRAL Model Law to all arbitrations, whether it be domestic or international commercial arbitration. Interestingly, it seems likely that such a move is quite likely to be taken in Hong Kong following a recent review by the Hong Kong Institute of Arbitrators Committee.

At the very least, serious consideration should be given to extending immunity from liability conferred on arbitrators in international commercial arbitration (save in the case of bad faith) to arbitrators in domestic arbitration proceedings. Likewise, consideration should be given to a provision confining the possibility of an order for costs against an arbitrator to situations where bad faith could be demonstrated.[5] Consideration might also be given to a repeal of section 13 of the 1998 Act, which provides that the normal time limit of 3 months for setting aside an arbitral award does not apply in a situation

3. The grounds are essentially: incapacity of parties or invalidity of arbitration agreement; absence of proper notice or violation of due process; excess of jurisdiction; composition of arbitral tribunal or procedural rules not in accordance with parties agreement or the Model Law; subject matter of dispute not arbitrable; award violates public policy of Ireland;

4. See "*Procedural Mishap and the Remission of Arbitral Awards* (2001), Martin Clarke, Volume 8 Commercial Law Practitioner 221; "*Remission to Remedy - Procedural Mishap*" Rory White and Ercus Stewart, January 2002 Bar Review. In McCarrick, Herbert J. stated that he could not see "any imperative of policy, reason or justice" which should cause the court "to set any permanent inflexible and immutable limits to the exercise of the wide power conferred upon it by the Oireachtas in s. 36(1) for the obvious purpose of ensuring justice and fairness between parties within the arbitration framework."

5. A restriction on an award for costs is not without precedent. Note, for instance, Section 96 of the Patents Act 1992 where in sub-section 8, it is stated that in an appeal under the Act, the Controller of Patents shall not be ordered to pay costs.

where the award conflicts with the public policy of the State. The section has the effect that there is no time limit in Ireland for setting aside an arbital award on the grounds of public policy. This is unpopular in an international context.

A further area that requires attention is the amendment of the Rules of the Superior Courts to accommodate the 1998 Act. Order 56 of the Rules of the Superior Courts is drafted with the 1954 to 1980 Acts in mind. Generally speaking, it provides that applications, such as applications to appoint or remove an arbitrator or to remit an award or to state a special case stated or to set aside an award may be made by Special Summons. It is highly desirable that Rules be enacted which specifically recognise the 1998 Act and applications made under that Act. Section 6 of the 1998 Act specifies that applications under the Act should be made to the President of the High Court, or such judge as may be nominated by the President. Section 7 of the Act states that the High Court, for the purposes of giving effect to Article 9 and Article 27, may make certain orders including an order for the preservation, interim custody or sale of any goods which are the subject matter of the proceedings, or an order securing the amount at issue. It would be helpful if the Rules reflected this jurisdiction and clarified the nature of the application that should be made to the President of the High Court. While the President of the High Court has been asked to deal with an application under the 1998 Act *(Euro Petroleum Trading Limited v. Trans Petroleum International Limited*, High Court, Record No. 2001 No. 560 SP), it has been accepted that a Special Summons was the appropriate form of procedure.[6] However, what would be the situation in an urgent application for interim measures, for instance, a mareva injunction, or the appointment of a receiver? The procedure that normally applies to Special Summonses may not be the most appropriate in those circumstances. Order 56 is also completely out of date in relation to proceedings to enforce an arbitral award. The 1980 Arbitration Act made provision for enforcement under the New York Convention of 1958 and under the Washington Convention of 1965. The UNCITRAL Model Law, at Article 35, contains provisions for recognition and enforcement. Clearly, rules are required which specifically recognise these new bases for enforcement. These matters are currently being brought to the attention of the Superior Courts Rules Committee.

Government Support:

It is quite clear that the Government will support the efforts to promote Ireland as a venue for arbitration. The IDA has already taken a great interest in the establishment of the International Centre for Dispute Resolution Office in Dublin. Enterprise Ireland has also supported an initiative to set up an online dispute resolution centre in Dublin. In a properly co-ordinated marketing approach, considerable assistance could be received from a network of IDA offices and Irish embassies throughout the world. The benefits of Irish arbitration clauses should also be re-emphasised to State bodies, such as the Irish Exporters Association.

Conclusion

A review of progress five years on from the 1998 Act reveals that there have been considerable advances made to position Ireland as an attractive venue for international arbitration into the future. However, it is also clear that considerable work remains to be done if we are to succeed in bringing a significant volume of international arbitration to Ireland. The marketing effort required must be professional, co-ordinated and focussed

The Bar and the Solicitors professions have a particular role to play. It is important that the two professions co-operate in their efforts to attract arbitration work and together enlist support from business and government. We all have a common interest in this project. ●

6. See Note on case by Klaus Reichert [2002] Int. A.L.R. N-1

The Outsider in Court

The Hon. Mr. Justice Paul Carney*

The outsiders whose position I propose to consider are the victims and families of victims awaiting a trial to come on in the Central Criminal Court. Having considered their position, I will make a proposal of an emergency nature to hold good between now and the final implementation of the Fennelly Commission's first module on criminal jurisdictions, Fennelly being due to report in this area within a matter of weeks.

To most commentators the victim is a statistic - this week's delay in the Central Criminal Court is 18 months; this week's delay in the Circuit is 3 weeks. I have a closer relationship with many victims. As the judge in charge of the list in the Central Criminal Court, some of them write to me and paint a picture of gratuitous suffering being inflicted on them by court delay.

The Central tries murder and rape. These are crimes in which predominantly the perpetrator and victim know one another. By reason of the liberal bail laws in operation, their paths may cross daily during the years which may elapse before the trial process concludes. Rape victims frequently cannot cope with the Leaving Certificate by virtue of what is hanging over them.

During a murder trial, Victim Support tend to choreograph six or seven relatives of the deceased into the benches behind junior counsel. I am not being critical - I am merely stating a fact and the reality is that they have to be there if they are to hear what is going on. They remain in place for every moment of the trial, however many days, weeks or months it takes and in particular they remain right throughout the pathology. Their eyes have no where much to go other than to look into mine and show the suffering of the wait and any adjournments which may have taken place, without their being informed, let alone consulted.

There would be very few contested murder trials if the crime was unlawful homicide, with the judge having the same discretion as to sentence as he does in manslaughter. It is very seldom an issue that the accused unlawfully killed the deceased. The issue is between murder and manslaughter. There is something in our culture that makes relatives of a person unlawfully killed demand a conviction for murder rather than any other form of words. The relative in the murder case will suffer again and be scarred further when the jury return with the formula "*not guilty of murder but guilty of manslaughter.*" They will feel the case has been lost. Only where there is a full blown conviction for murder will the relatives ever use the words "*well, justice was done*".

I also get to see the prosecutrix in a rape case when a verdict of acquittal comes in. I am using the neutral term prosecutrix deliberately because in some cases the jury will have concluded that the allegation is false. In other acquittals, that will not be the case but for some reason which it is not disclosed, and which may not be disclosed, they are not prepared to be satisfied to the standard of beyond reasonable doubt that the case has been proved. It could be the failure of a technical proof - we are not allowed to know. In all cases of acquittals, the prosecutrix will believe that she has been disbelieved.

In something of the order of 40% of rape cases, there is a plea of guilty. In the balance of contested rape cases, there is a majority of acquittals, something of the order of 55%. It should be remembered that juries are on average evenly sexually mixed so that the reality of an acquittal in a rape case is that women are not accepting that the allegations of, generally a woman, have been proved to the standard of beyond reasonable doubt. Those who make the most noise about rape cases tend to be those who have not attended one. My offers of permission to attend the in-camera hearings for study purposes extended to appropriate groups and individuals have been taken up to a remarkably small degree.

I will never forget one particular acquittal where the prosecutrix's screams from the Round Hall permeated every corner of the Four Courts complex and seemed to go on for a couple of hours. What I find personally upsetting about these incidents is that from processing, if not actually hearing, up to nearly 100 of these cases a year, I believe I can profile them to a high degree of accuracy and predict in which cases the acquittals are going to come.

The current delay in getting a case on to trial is hovering in the area of up to 18 months. While there is a no adjournment rule, judges cannot control some things like heart attacks and giving birth, so some are unavoidable. In that situation, the case may go to the bottom of the queue and take a further 18 months to get back on the rails. The result will be the same where a jury have failed to agree, or a judge has found it necessary to discharge the jury for one reason or another.

This rate of delay persists in spite of the following considerations:-

1. There has been a vastly increased commitment of judges to the Central Criminal Court. There are now always four judges assigned and I understand that the President of the High Court intends to maintain this level in Dublin, when I or some other judge, is conducting trials in Limerick, or elsewhere.
2. There is a very high rate of pleas of guilty, of the order of 40%. There is a special significant discount in sentence made available to an accused person who so orders his affairs so as not to occupy a trial date, for example, by pleading guilty on initial arraignment, or shortly thereafter, and thus makes his slot available for the trial of another accused person coming into the list. The nightmare from a listing point of view is that one day, every accused person will advert to the high rate of acquittals in contested rapes and say I will take my chances on a fight.
3. This year, 11 judges of the High Court are foregoing their vacation

* This speech was first delivered by Mr Justice Paul Carney at the Burren Law School on the 3rd May, 2003.

in September in an attempt to tackle the backlog. This exercise has not in fact worked and the backlog is more or less the same in spite of it. That means that, in real terms, the backlog is growing rapidly. This is a card which can only be played once.

Why do we have this backlog?

1. Firstly, obviously, by reason of the number of cases which are returned to the court. When I came to the Bar, Term in the Central started some weeks late and the junior judge dealt in short order with perhaps one murder and such cases as had been transferred. Now, six full-time judges could not keep pace.

   Nobody should think that when the decades-old sexual abuse cases have worked their way through the system, the problem will be solved or diminished. There seems to me to be two fertile sources of replenishment:-

   (a) the concept of the fair fight, which I grew up with, is gone. Nowadays, when somebody is bested in an argument, he may run home and return to the scene with the kitchen knife
   (b) a feed of pints combined with cannabis or other drugs frequently, in my experience in the Central, turns persons of good character and background into vicious rapists, in circumstances where they have little or no recollection of it.
2. Trials are long. The murder trials involving Catherine Nevin and the recent one involving the Chinese community each occupied a High Court judge for the entirety of a Hilary Term. Where a trial might be disposed of by a Circuit Court judge in two days, it tends to take nearly a week in the High Court. If an explanation is to be sought for this, those who prosecute or defend in both courts must give it. I have no apology to make for the cases I deal with not being rushed.
3. One file counting as one case may involve several trials by reason of the indictment having to be severed. For example, in the last list to fix dates, four trial dates in respect of one accused had to be fixed before four separate jury panels because the allegation was that he had violated four of his sisters. This situation tends to be a feature of cases involving school teachers in particular.
4. Juries fail to agree from time to time and there are also occasions when juries are discharged by the trial judge, by reason of something having been said in its presence, which should not have. Nothing can be done about a jury which refuses to agree even after coaxing by the learned trial judge. They are no longer confined without food or fire until verdict. As the law does not permit a jury which has retired to separate, they are now accommodated in a hotel until verdict or deadlock. This arrangement was introduced after the Ballyshannon murder case, where the jury was kept hard at it in Green Street Courthouse until 6.30 a.m. when they brought in a verdict. There were also around this time a number of appeals to the Court of Criminal Appeal on the grounds of alleged jury exhaustion.

So far as juries being discharged by the trial judge because something is blurted out by a witness or because counsel is excessively exuberant in his opening speech, my view is that this happens too often. Almost anything can be repaired in my view and the fact that evenly sexually mixed juries are acquitting in a majority of contested rapes satisfies me that juries will act only on the admissible evidence and follow any directions they are given by the trial judge.

The Fennelly Commission on the Jurisdiction of the Courts is due to report as regards criminal jurisdictions within weeks. This will be the first root and branch examination of criminal jurisdictions since the foundation of the State and why cases are dealt with where they are dealt with. One thing on which there has been unanimous agreement is that there is no logic to the present system. It has the effect that a murder or rape cannot get a trial for 18 months but a billion euro fraud could theoretically come on for trial in a lower court in 3 weeks in a remote part of the country.

Judge Fennelly has already identified in the public domain that the Indictable Crime Sub-Committee, of which I was chairman, has identified six or seven options including that of doing nothing at all. These options will require a very full public debate and presumably ultimately legislation.

It seems to me that the victims and others in the Central Criminal Court gratuitously suffering from a growing delay cannot afford to suffer still further while this debate takes place. I would purpose that for a period of two years, while the Fennelly debate take places, that the Circuit Court should be given a concurrent jurisdiction to try cases of murder and rape. Cases in the backlog should be sent back to their county of origin for trial before the Circuit judge there if:-

(a) He, or she, is prepared to accept them and
(b) the Central Criminal Court is prepared to release them. The Central should concurrently continue to deal with the backlog and with new cases as they are returned.

This proposal would achieve two objectives:-

1. It would relieve, if not abolish, the gratuitous suffering of victims and others to which I have referred and
2. It would serve as a testing ground for options to be presented by Fennelly and could be observed while the national debate to which I referred takes place.

Finally, if I could deal with the only item of what might be called breaking news in the Central Criminal Court. On the 8th of July next, the court will sit for the first time in the history of the State outside Dublin and will hear two cases in Limerick. Limerick was not initially contemplated as the first country venue. A shortage of jury court rooms was a factor which frequently inhibited getting trials on in the Central Criminal Court and initially, it was contemplated that a country venue with good jury court room accommodation might be found, with a number of counties grouped around it having cases waiting to get on. A situation developed, however, in Limerick that warranted that city being given priority. There has for some time been a disproportionate number of cases from that city in the list awaiting trial and their coming on in Dublin seriatim was having the effect that large numbers of Limerick policemen were being tied up permanently in Dublin to give evidence, perhaps relating to trivial matters but nonetheless, matters which require to be proved, such as preservation of scenes or the service of tea and biscuits when required by the regulations to persons in custody. If something was not done, it seemed to be the situation that there would be no policemen on the streets of Limerick for the foreseeable future and accordingly, the court has taken this initiative. As I said, the first case is listed for trial on the 8th of July. I do not intend at this stage to make any wholesale transfer of the backlog, but Limerick cases will be examined as they are returned for trial and if considered appropriate, fixed for trial in that city. I would hope and expect that further cities and counties will follow for visitation by the court. ●

If Not O'Keeffe, Then What?

Imelda Higgins BL

Introduction

When asylum or immigration decisions are judicially reviewed on the grounds of unreasonableness, the *O'Keeffe*[1] standard of reasonableness is currently applied. In a number of recent cases, the question has been raised as to whether this is an appropriate standard when fundamental rights such as the right to life, liberty and freedom from persecution are concerned. In particular, it is argued that *O'Keeffe* should be replaced with the 'anxious scrutiny' test now commonly applied by the English courts in cases where human rights are at issue[2]. The purpose of this article[3] is to analyse the 'anxious scrutiny' test and to consider whether this test is a more appropriate standard of review for refugee/immigration/asylum decisions than the *O'Keeffe* standard. However, before examining this issue, I will first look at the *O'Keeffe* test and recent asylum cases in which that test has been applied.

Application of the *O'Keeffe* Standard

The *O'Keeffe* standard of review is a notoriously stringent one, establishing as it does a no evidence rule. Thus a decision can only be successfully reviewed if the decision-making authority had no evidence upon which to base its decision. As Finlay C.J. in that case emphasised

> 'I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.[4]'

The effect of this no evidence rule is that irrespective of the weight of the evidence justifying a certain decision, the decision-making authority is entitled to come to a different decision, if there is any evidence to support it. Moreover, pursuant to the *O'Keeffe* test, it is for the applicant to establish that there was no relevant material before the decision making authority which could support its decision. Obviously the combination of the high standard of review and the need to satisfy the burden of proof makes it extremely difficult for an applicant to succeed in a judicial review application.

While *O'Keeffe* itself concerned the judicial review of a planning decision, the test has since been applied to the judicial review of decisions of the refugee/immigration/asylum authorities. In *Camara v. Minister for Justice*[5], Kelly J. applied that test when judicially reviewing a decision of the Refugee Appeals Authority on the grounds of unreasonableness or irrationality. Despite a finding by the Authority that the applicant had appalling scars to his upper body, consistent with the evidence he gave in relation to alleged torture, Kelly J. accepted that there was relevant evidence before the Authority which could support and justify a decision that the applicant's claim was lacking in credibility.

Although Kelly J. applied *O'Keeffe*, it is noteworthy that it was not argued before that court that *O'Keeffe* was an inappropriate test. While this argument was raised in the subsequent appeal to the Supreme Court, the case settled and no judgment was handed down.

In *Laurentiu v. The Minister for Justice*[6], the application of *O'Keeffe* was affirmed by Mr. Justice Geoghegan. In the course of his judgment in the High Court, he stated that

> 'it has been held time and again, that it is no function of the courts to consider the merits of an application for refugee status or asylum. The decision of the Minister on such an application could only be reviewed if that decision flew in the face of common sense and was wholly and clearly unreasonable. The principles laid down in *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39 apply'

In *Mohsen*[7], which concerned a challenge to the Refugee Appeals Authority, the High Court also considered the appropriateness of the *O'Keeffe* standard. Smyth J. reviewed a number of the English authorities which referred to the need for 'anxious scrutiny' of decisions impacting on human rights However, he was satisfied that even taking into account these decisions

> '.. there is no different standard for cases dealing with refugee/asylum/immigration matters and ordinary judicial review.[8]'

Smyth J. also refused to grant a certificate of leave to appeal his decision to the Supreme Court, on the basis that the point did not satisfy the criteria of Section 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, as it was not a point of law of exceptional public importance or public interest.

Zganat'ev concerned a Russian asylum seeker whose asylum application was considered to be manifestly unfounded by the Refugee Appeals Commissioner and the Refugee Appeals Authority. Finnegan J.[9] applied *O'Keeffe* but did grant a certificate of appeal to the Supreme Court. On the appeal, the High Court's decision was affirmed by McGuinness J.[10]

However, while the aforementioned judgments would appear to indicate that *O'Keeffe* is the appropriate standard of review in refugee/immigration/asylum cases, two Supreme Court judgments show that the question remains open. Thus, in *Zganat'ev*, McGuinness

1. [1993] 1 IR 39
2. The debate as to whether or not it is correct to apply *O'Keeffe* in this context was commenced by Hogan, 'Judicial Review, the Doctrine of Reasonableness and the Immigration Process' (2001) 6 Bar Review 329-332
3. Thanks to Eileen Barrington, B.L. for her very helpful comments on earlier drafts of this article.
4. at p. 72
5. (Unreported), High Court, Kelly J., 26 July, 2000)
6. [1999] 4 I.R. page 31
7. (Unreported, High Court, Smyth J., 12th March, 2002)
8. at p. 14
9. (Unreported, High Court, Finnegan J., 29th March, 2001)
10. (Unreported, Supreme Court, 1st March, 2002)

J, while upholding Finnegan J., indicated that the question as to how the application of the irrationality test should be applied was not settled. She stated that until a fuller argument on the correct interpretation to be applied to such phrases as 'anxious scrutiny' and 'heightened scrutiny' was opened before the court, it would be impossible for it to decide whether such additional elements should be applied to such an application for judicial review. Accordingly, pending the court deciding that issue, McGuinness J. considered that it was sufficient that the applicant's judicial review application received 'careful scrutiny', in the context of the *O'Keeffe* principles.

The reference to careful scrutiny is somewhat cryptic. Does it mean that the judge should be careful to ensure that there was some material supporting the decision-maker? Surely, this is always required in a judicial review case when applying the *O'Keeffe* standard. In any event, it is clear that the Supreme Court considered the applicable standard of review to be an unresolved question.

In the recent case of *Lobe and Osayande*[11] the question of the appropriate standard of review was also considered by the Supreme Court. In that case, four members[12] of the Supreme Court either questioned the appropriateness of applying *O'Keeffe* to the review of deportation orders or indicated that they regarded the question of the applicability of the *O'Keeffe* standard as being open.

It is clear from the above review of Irish case-law, that while for the moment *O'Keeffe* is the applicable test when considering the reasonableness of a decision in the refugee/immigration/asylum area, this matter can not be regarded as settled. In light of the comments of four of the seven judges sitting in the *Lobe and Osayande* case, it is only a matter of time before the question is fully litigated before the Supreme Court.

The anxious scrutiny test

The *O'Keeffe* standard in Irish law is based on the English *Wednesbury*[13] test. This test was expressly adopted into Irish law in *The State (Keegan) v. Stardust Victims Compensation Tribunal*[14]. Pursuant to that test, when reviewing a decision, the courts are confined to considering that decision

> "With a view to seeing whether it has taken into account matters which it ought not to take into account, or conversely, has refused to take into account or neglected to take into account, matters which it ought to take into account"[15]

Over the past years, the strict application of *Wednesbury* has been mitigated in cases dealing with human rights by the 'anxious scrutiny' test.

The phrase 'anxious scrutiny' was first used in the case of *Bugdaycay*[16]. In that case Lord Bridge said that:

> "... the resolution of any issue or act and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State, subject only to the court's power of review. The limitations on the scope of this power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.[17]"

Since *Bugdaycay*, the anxious scrutiny test has been applied in a number of judgments involving human rights issues. The expression of the test which is widely accepted by the English Courts[18] was set down in ex p *Smith*[19] as follows

> "The court may not interfere with the exercise of an administrative decision on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation, the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

The 'anxious scrutiny' test raises two issues. Firstly, what is meant by justification and secondly, whether it is for the applicant to establish that the decision is not justified or for the respondent to satisfy the court that it is.

Dealing with the second issue first, it appears from the case law that unlike under the classic *Wednesbury* approach, the burden of proof does not remain with the applicant throughout the proceedings. Once the applicant can *prima facie* establish a reasonable fear that his human rights will be infringed by virtue of the decision under review, the burden of proof shifts from the applicant to the respondent and it is for the respondent to adduce evidence to show that the decision is justified.

The shifting of the burden of proof is amply demonstrated by the case-law. In *Ex p. Smith*, a case which concerned the dismissal of homosexuals from the military, Simon Brown L.J. in the divisional court explained that

> "the minister on judicial review will need to show that there is an important competing public interest which he could reasonably judge sufficient to justify the restriction and he must expect his reasons to be closely scrutinised.[20]"

Reg. v. Lord Saville[21] concerned the judicial review of a decision to refer to soldiers by their full names in the context of the Bloody Sunday inquiry where these soldiers had been granted anonymity in a previous investigation. The court explained that in its judgment

> "the right approach here once it is accepted that the fears of the

11. (Unreported, Supreme Court, 23 January 2003)
12. Denham J., McGuinness J., Hardiman J., Fennelly J..
13. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp* [1947] 2 ALL E.R. 680
14. [1986] IR 39
15. *Wednesbury, supra* at 685
16. [1987] 1 ALL ER 940
17. at p. 952
18. see: *R. v. Secretary of State, ex p Canbolat*, [1998] WLR 1569; *Reg. v. Lord Saville of Newdigate*, Ex. p. A, [2000] 1 WLR 1855; and *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840
19. *Ex. P Smith* [1996] QB 517 at p. 554
20. *ibid*, at pg. 538
21. 2000 1WLR 1855,

soldiers are based on reasonable grounds should be to ask: is there any compelling justification for naming the soldiers, the evidence being that this would increase the risk?"[22]

Therefore, once the soldiers established that their fears were based on reasonable grounds, the decision could be successfully reviewed unless the authority could establish a compelling justification for the decision to withdraw anonymity.

Mahmood[23] concerned a decision of the Secretary of State to refuse a Pakistani citizen leave to remain on the basis of his marriage. In that case, Laws L.J. emphasised that a decision-maker must respect the fact that fundamental rights are concerned and that he is

"accordingly required to demonstrate that his proposed action does not in truth interfere with the right, or, if it does, that there exist considerations which may reasonably be accepted as amounting to a substantial objective justification for the interference"[24].

Once it is accepted that the burden of proof shifts to the respondent, the question arises as to what exactly the respondent is required to establish. It appears that a justification can constitute either one of two things. Firstly, the decision-maker can justify his decision by demonstrating that it does not interfere with the rights at issue. Secondly, where there is such an interference, the decision-maker may justify it by pointing to sufficiently compelling competing public policy considerations. However, it appears logical to assume that only certain types of decision may be justified by this second type of justification. Where the human right at issue is sufficiently weighty, such as the right to life, the only possible justification is that that right is not being interfered with.

This distinction is evident from the case-law. For example, *Bugdaycay*, concerned the applicant's right to freedom from persecution and the decision-maker was required to satisfy the court that this right was not in danger of being infringed. The decision was successfully reviewed because the court was not satisfied that the dangers and doubts involved in sending the applicant back to Kenya had been adequately considered and resolved[25]. There was no question of a competing public policy justification, nor could there be, given the United Kingdoms international human rights obligations. On the other hand, in *Mahmood*, which concerned the right to family life, the Secretary of State could either demonstrate that that right was not being infringed or that there was a competing public policy interest justifying the infringement. In that case, the decision was upheld as the course of action was dictated by the need to maintain firm and fair immigration control and there was no infringement of the right to family life. In *Ex p. Smith*, the applicants argued that the policy of the Secretary of State to dismiss homosexuals from the defence services was in contravention of their human rights and in particular, the right of an individual to live in accordance with his or her sexual orientation. Simon Brown L.J. in the divisional court accepted a restriction on that right based on the competing policy objective of the delivery of an operationally efficient and effective fighting force. This was upheld by the Court of Appeal.

Not only are there two types of justification which may be advanced by the decision maker but it appears that the degree of scrutiny with which the courts will examine the two justifications varies both as between the two justifications and in accordance with the right purported to have been infringed. Thus, where the justification advanced is that there is no infringement of a human right, the courts are likely to give less latitude to the decision maker's discretion and are more prepared to conclude that the decision-maker has acted irrationally. According to Lord Templeman in Bugdaycay

"where the result of a flawed decision may imperil life or liberty, a special responsibility lies on the court in the examination of the decision-making process[26]".

This readiness to intervene is particularly evident in *Turgut*[27], where the right that the applicant claimed was being infringed was the right to freedom from torture or inhuman or degrading treatment or punishment. According to Simon Brown LJ, who gave the lead judgment in the Court of Appeal, no special deference was due to the Secretary of State's conclusion on the facts in that case. The facts mentioned were firstly, that the right concerned was an absolute and fundamental right and not a qualified one, requiring a balance to be struck with some competing social need. Secondly, the court was as well placed as the Secretary of State to evaluate the risk once the relevant material was placed before it. Finally, the Secretary of State might have subconsciously wished to maintain his pre-existing stance and rationalised the material adduced accordingly. Simon Brown LJ explained that

"In circumstances such as these, what has been called the 'discretionary area of judgment' the area of judgment within which the court should defer to the Secretary of State as the person primarily entrusted with the decision on the applicant's removal is ... a decidedly narrow one[28]"

On the other hand, where the justification offered is that of a competing public interest, the courts are less prepared to consider a decision to be irrational due to the wider margin of discretion of the decision-maker. Thus in such cases, the decision-maker is simply required to establish that the decision is a reasonable one in that it does not fly in the face of common sense. As in the classic *Wednesbury* test, the courts are not concerned with the correctness of the decision but rather with its reasonableness and are prepared to adopt a broad understanding of what is reasonable.

In *Ex p. Smith*, Simon Brown LJ suggested the test was as follows:

"Can the Secretary of State show an important competing public interest which he could reasonably judge sufficient to justify the restriction. The primary judgment is for him. Only if his purported justification outrageously defies logic or accepted moral standards can the court, exercising its secondary judgment properly strike it down"[29]

He quoted with approval Neill L.J. in *Ex parte National and Local Government Officers' Association*, where Neill L.J. stated that

22. *supra*, at pg.1877
23. *Reg. (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840
24. supra, at pg 847
25. At p. 957
26. *supra*, at pg 956
27. [2001] 1 ALL ER 719
28. *ibid*, at p. 729
29. *supra*, at p. 540

> "the primary judgment as to whether the competing public interest justifies the particular restriction is for the minister. The Court is only entitled to exercise a secondary judgment by asking whether a reasonable minister, on the material before him, could reasonably make that primary judgment[30]".

In *Ex p Briand*[31], Lord Templeman stated

> "It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable[32]"

Logically, the degree of latitude enjoyed by the decision-maker within this second type of justification should vary depending on the right infringed and in particular, on the extent of that infringement. This does appear to be the approach adopted by the English courts. Thus, the more fundamental the right at issue and the more significant the infringement, the more difficult it is for the decision-maker to advance a sufficiently compelling public policy justification. In *Reg. v. Lord Saville*, the Court of Appeal stated:

> "The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with human rights involved and then apply the test accepted by Sir Thomas Bingham M.R. in *Reg. v. Ministry of Defence, Ex parte Smith* [1996] Q.B. 517 which is not in issue."

In *Mahmood*, Laws L.J. referred to a sliding scale of review pursuant to which

> "the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required"[33].

The final issue, in so far as the analysis of the English case-law is concerned is how the anxious scrutiny test fits with *Wednesbury* and in particular, whether it incorporates a different standard of review.

In the majority of cases where this issue has been addressed, the courts have stated that the test remains the *Wednesbury* test but adapted to the human rights context. In *Bugdaycay* itself, the court clearly considered the anxious scrutiny test to fall within *Wednesbury*[34]. Similarly, Simon Brown L.J. emphasised in *Ex. p. Smith* that

> "even where fundamental human rights are concerned "the threshold of unreasonableness" is not lowered[35]".

This test was upheld in the Court of Appeal[36]. The expression of the anxious scrutiny test laid down in that case, which reflects that court's endorsement of Wednesbury has been expressly adopted by the courts in ex parte Canbolat, *Reg. v. Lord Saville*, and *Mahmood*.

As explained by the Court of Appeal in *Reg v. Lord Saville*,

> "What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations"[37].

In reality, the question of *Wednesbury* or not depends on the view taken of the flexibility existing in that test. For those who are of the opinion that the *Wednesbury* test remains the same, irrespective of the policy area concerned, the anxious scrutiny test is clearly a departure from *Wednesbury*. On the other hand, for those who consider the *Wednesbury* test as inherently flexible, then the anxious scrutiny test falls well within its parameters. As pointed out by Sir Thomas Bingham, in *ex p. Smith* in response to an argument that a more exacting test than *Wednesbury* should apply

> "The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations[38]".

However, whether the anxious scrutiny test is *Wednesbury* or not, it is clear that it is a much different test to that laid down in *O'Keeffe*. As opposed to requiring the applicant to show that the decision maker had no evidence to support his decision, the decision-maker is required to demonstrate either the lack of a human rights infringement or the existence of substantive countervailing justifications for this decision. From the applicant's perspective, the English test is clearly a much more favourable standard of review and one that takes into account both the potential seriousness of the rights at stake and the difficult evidentiary requirements faced by the applicant under the classical test.

The Appropriateness of *O'Keeffe*

In light of the analysis undertaken by the English courts and the test applied there, the question arises as to whether the Irish courts should continue to apply the *O'Keeffe* test in refugee/immigration/asylum cases.

There are two main grounds why *O'Keeffe* should not be the test applied in the future. Firstly, application of *O'Keeffe* in refugee/immigration/asylum cases neither gives sufficient importance to the fundamental rights which are likely to be at issue nor the difficulty faced by applicants in discharging the burden of proof. *O'Keeffe* pushes the review standard so high that it is virtually impossible for an applicant to succeed. While it is true that the courts should exercise their judicial review powers with some restraint, they nevertheless have a duty to intervene in some circumstances. As Bingham M.R. remarked in *R v. Ministry of Defence, ex p. Smith*

30. *supra*, at p 797
31. [1991] 1 A.C. 696
32. *ibid*, at p. 751
33. at *para* 19
34. see, in particular, p. 952
35. at p. 538
36. at p. 556
37. at p. 1867
38. at p. 556

> "While the court must properly defer to the exercise of responsible decision makers, it must not shrink from its fundamental duty to 'do right for all manner of people[39]"

These words are echoed by Morris P. in *Bailey v. Flood* where he states that:

> "While the judiciary must ensure that abuses of power are uncovered and corrected, they must also seek to avoid undue interference in decision making functions which are the responsibility of the relevant administrative body.[40]"

Adopting the *O'Keeffe* standard effectively stymies the courts in fulfilling their duty to do right for refugees/asylum seekers.

The second principal argument against applying *O'Keeffe* is that the policy content and subject matter of decisions in the refugee/immigration/asylum area is sufficiently different from those of the planning authorities to render *O'Keeffe* inapplicable. In this respect, it is submitted that Keegan is the expression of the *Wednesbury* test in Irish law, and *O'Keeffe* is effectively a super *Wednesbury* test, appropriate in areas of substantial policy content and where the subject matter of the decision is removed from ordinary judicial experience, but not otherwise.

Thus, in so far as planning decisions are concerned, it is clear that the expertise of members of An Bord Pleanála is very different from that normally possessed by members of the judiciary. Secondly, as was recognised in *O'Keeffe*, decisions in the planning area involve determining

> "questions of the balance between development and the environment and the proper convenience and amenities of an area."

Such questions are largely ones of policy rather than law, requiring a knowledge of planning policy not only in the areas concerned, but also in other areas, and a degree of knowledge and vision concerning the future development of an area. Moreover, in such policy-laden areas where the subject matter is extremely specialized, a no evidence rule may well be appropriate. In technical areas, it may be difficult for the courts to determine the weight that should have been given to one factor or another in reaching its decision. Therefore, if there is any evidence to support the decision made, it may not be appropriate for the court to conclude that it prefers the opposite conclusion.

The situation with the refugee/immigration/asylum authorities is markedly different. In the first place, the expertise of those authorities is more akin to the expertise of the courts in so far as members of those authorities come from the legal profession. Moreover, while the courts may not know how to evaluate the importance of convenience versus amenities, they do know what weight to give to the material upon which refugee decisions are based. The courts are keenly aware of the fundamental and crucial importance of human rights. The courts can evaluate the importance of each of the factors taken into account by a decision-maker. Requiring the decision maker to justify their decision therefore makes sense in this context. For the courts to keep the same distance as they do in planning judicial review proceedings is to erode the role the courts are required to play in the protection of human rights.

If Not *O'Keeffe*, then what?

If, as is argued above, *O'Keeffe* is indeed an inappropriately stringent standard of review for refugee cases, the question arises as to what standard is appropriate. In my opinion, there is much to recommend the English approach, where the anxious scrutiny test ensures that the courts can take sufficient account of the human rights element in the decision which they are reviewing.

However, unlike the English situation, where application of the anxious scrutiny test can be reconciled with *Wednesbury*, it is difficult to see how such a test can be reconciled with *O'Keeffe*. Application of an anxious scrutiny test would require the abandonment of the no evidence rule in so far as refugee/immigration/asylum decisions are concerned.

In this respect, recourse to the standard of review set down in *The State (Keegan) v. The Stardust Victims Compensation Tribunal*[41] might prove of assistance. It will be remembered that in that case, Henchy J stated that

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra-vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties requires, *inter alia*, that the decision maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'[42].

The test set out in *Keegan* is much closer to that set out in *Wednesbury*, than the super *Wednesbury* approach of *O'Keeffe*. Application of the anxious scrutiny test in the *Keegan* context would simply require the courts to recognise, as the English courts have done, that what is reasonable where human rights are not at risk, may not be reasonable when they are in jeopardy. It would also require a recognition that, given the fundamental importance of the rights at issue, it is the decision-maker who should be required to justify his decision, as after all, he is in the best position to identify the reasons underpinning his determination. ●

39. *supra*, at pg 556
40. (Unrept., High Court 6 March, 2000)
41. [1986] IR 642
42. ibid, @ pg 658

Individual Rights: The EC prohibition of discrimination on grounds of nationality.

Massimo De Luca and Aideen Ryan[1]

Introduction

The Convention on the future of Europe has placed the issue of fundamental individual rights at the centre of the legal and political debate in the European Union. At this preliminary stage of the process towards the adoption of Europe's expected new Constitution[2], it is already apparent that certain fundamental choices must be confronted. In particular, the proposed incorporation of the Charter of Fundamental Rights into the new constitutional treaty and the possible accession of the European Union to the European Convention on Human Rights open new scenarios as far as the position of individuals rights under Community law is concerned.

This is happening at a time when key principles in European case law concerning the full protection of individuals' fundamental rights remain far from settled. For one thing, the case law of the European Court of Justice ("ECJ") has not yet settled the thorny issue of how fundamental principles, including, but not limited to, the principle of non-discrimination on grounds of nationality, may impact on relations between persons (both legal and natural) in the EU legal order. This is what is commonly referred to as the "horizontal effect" of EC law, to be distinguished from the "vertical effect", which relates to the effect of EC law in the relationship between legal and natural persons, on one hand, and the state and its emanations, on the other.

The possibility of direct applicability of certain Treaty articles on a "horizontal basis" could have repercussions on the operation of private law, contrary to the general assumption that private parties, in the ordinary course of their dealings, are immune from the application of general Treaty principles. It is no surprise, therefore, that Member States and, to some extent, the ECJ, have been reluctant to acknowledge the full and unconditional horizontal application of general principles of EU law.

This article reviews pertinent case law of the ECJ and concludes that a case can certainly be made that Article 12 of the EC Treaty, which prohibits discrimination on grounds of nationality, could have horizontal effect. This conclusion is based on a review of analogous areas of EU law where the problem of direct applicability has arisen in a similar way (in particular, the areas of the free movement of workers, free movement of goods, free provision of services and the right of establishment) and on how Article 12 EC interacts with the principles enshrined in these particular areas of EC law.

Having concluded in favour of a possible independent/residual horizontal application of Article 12 EC, we also explore the possible scope of such application and the grounds upon which discrimination might be justified.

The horizontal effect of Article 12 EC in the case law of the ECJ

To date, it appears that the ECJ has not taken a clear stance on the question of the horizontal application of the principle of non-discrimination on the grounds of nationality. A clear statement in this respect can only be found in the opinion of Advocate General Cosmas in the case of *Ferlini v. Centre Hospitalier de Luxembourg*[3]. Here a reference for a preliminary ruling was made to the ECJ on the compatibility with EU law of the application of different fees for medical and hospital care depending on whether the persons concerned were affiliated to the Luxembourg national social security scheme or not. The analysis of the Advocate General extended to consider the case where the service providers were legal persons governed by private law.

The AG found that the order for reference did not contain sufficient information on which any judgment as to the public or private character of those persons could be based[4]. The AG went on to say that,

> "I consider that, despite the serious reservations expressed from time to time in academic writings, the development of the court case law allows, in the present case, an affirmative reply to be given to the question whether Article 7 [now Article 12] may have what is

1. The authors, solicitors at McCann Fitzgerald, Dublin, would like to thank their colleague Philip Andrews for his comments and encouragement.
2. See at http://european-convention.eu.int
3. Case C-411/1998 Opinion of 21 September 1999; [2000] ECR I-8081
4. par. 71.

generally referred to as horizontal direct effect"[5]. The AG drew a parallel between the way Article 12 EC operates and the way Article 141 EC (formerly Article 119) has been applied to horizontal situations[6]:

"...it is indeed difficult to imagine that, while an employment contract between individuals must, pursuant to Article 119 of the EEC Treaty, comply with the principle of equal pay for male and female workers, in the case of a contract for the provision of medical and hospital care, it would be possible not to comply with the principle of equal treatment between nationals of the Member States of the Community, pursuant to Article 7 of the EEC Treaty. Consequently, even if that discrimination on the grounds of nationality were deemed to be attributable to the exercise of discretion by an individual hospital, such as the CHL, or the application by that hospital of a decision based on an agreement between the hospitals, such as the EHL, and those persons were held to be legal persons governed by private law, Article 7 of the EEC Treaty would still have to be held to be applicable."

What is interesting about AG Cosmas' opinion is that his interpretation of Article 12 EC points to a possible application of that Treaty provision beyond situations where the body to whom that provision is sought to be applied enjoys some form of legal or *de facto* regulatory power, as held in previous cases[7].

The judgment of the ECJ in *Ferlini* neither confirmed nor rejected the interpretation given by the Advocate General to Article 12 EC. However, in upholding the applicability of Article 12 EC to bodies such as the hospitals involved in the case, the court still seemed to rely on the existing case law by stating that:

"...Article 6 of the Treaty [now Article 12] also applies in cases where a group or organisation such as the EHL exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty."[8]

Based on the facts of this case, it remains difficult to understand what "*power*" EHL actually enjoyed. More fundamentally, the judgment of the Court does not challenge the Advocate General's view that Article 12 EC may be considered to enjoy horizontal effect in a number of situations beyond those which have been considered in previous case-law.

The Independent Application of Article 12 EC

Article 12 EC has often been invoked in conjunction with Treaty rules which provide for more specific fundamental freedoms (of movement, establishment, etc.). By way of example, reference can be made to the recent judgment of the ECJ in the Commission v. Italy case[9]. The court found that,

"the Italian Republic has failed to fulfil its obligations under Articles 12 EC and 49 EC".

However, the *Ferlini* case illustrates that Article 12 EC would be capable of application in cases where more specific provisions of the Treaty would not be applicable. In that case, the ECJ found that the rules on free movement of workers could not benefit the applicant. The Court went on to examine the applicability of Article 12 EC upon which it ultimately decided the case. Article 12 EC would therefore fulfil a gap-closing function in cases where the more specific provisions of the Treaty do not apply.[10]

However, the scope for a stand-alone application of Article 12 still remains somewhat ambiguous. On this point, the ECJ seems to take the view that the independent/residual application of Article 12 EC would be possible "within the scope of application of the Treaty"[11], a term that the Court seems to interpret widely. Of particular significance in this respect is the link that the ECJ seems to establish between the concept "scope of application of the Treaty", relevant for the purposes of the application of Article 12 EC, and the provisions of the Treaty on European Citizenship contained under Part II of the EC Treaty[12].

So, for example, in the *Martínez Sala v. Freistaat Bayern*[13] case, the ECJ found that the conditions of residence in Germany of a Spanish national who could not be regarded as being a "worker" for the purposes Article 48 EC (now Article 39 EC) on the free movement of workers fell, nonetheless, within the scope of the Treaty:

"As a national of a Member State locally residing in the territory of another Member State, the appellant in the main proceedings comes within the scope of ratione personae of the provisions of the Treaty on European citizenship"[14].

Based on similar reasons, the Court ruled in the *Bickel* case[15] that,

"...the right conferred by national rules to have criminal proceedings conducted in a language other than the principal language of the State concerned falls within the scope of the EC Treaty and must comply with Article 6 [now Article 12] thereof"[16].

The ground-breaking effect of the introduction of European citizenship on the application of the non-discrimination principle has been made apparent by the judgment of the Court in the *Grzelczyk*[17] case. In that case, the court acknowledged that situations that might not have been covered by the scope of the Treaty in the past could well be found to be subject to the discrimination principle following the introduction of the rules on citizenship.

5. par. 72.
6. See in particular Case C-43/75 *Defrenne v Sabena* [1976] ECR 455.
7. Case C-36/74 [1974] ECR 1405 *Walrave v Union Cycliste Internationale* For an up to date review of the case law on this point see also Peter Oliver "*Free movement of goods in the European Community*" Sweet and Maxwell 2003 page 73.
8. par. 50 of the judgment.
9. Case C-388/01 *Commission v. Italy*, judgment of 16 January 2003. This case concerned discriminatory conditions of access to museums and monuments in Italy.
10. See the opinion of AG Jacobs in C-92/92 and C-326/1992 *Phil Collins v. Imtrat Handelsgesellschaft mbH.* [1993] ECR I 5145 where the Court held that: "Copyright and related rights fall, by reason in particular of their effects on intra-Community trade in goods and services, within the scope of application of the Treaty, within the meaning of the first paragraph of Article 7. The general principle of non-discrimination laid down by the first paragraph of Article 7 is applicable to those rights, without there even being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty."
11. *Ibid.*, par. 28.
12. Article 18 of the EC Treaty, states that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect".
13. Case C-85/96 [1998] ECR I-2691
14. *Ibid.*, par. 61.
15. C-274/96 [1998] ECR I-07637.
16. *Ibid.*, par.
17. C-184/99 [2001] ECR I-6193, which dealt with the refusal by the Belgian authorities to correspond certain educational allowances to a French national.

Moreover, in the *Marie Nathalie D'Hoop case*[18], the Court clarified that the Treaty provisions on European citizenship and non-discrimination also benefit the nationals of a Member State in situations where the legislation of their own Member State would have the effect of treating them less favourably. In that case, a Belgian national who had completed her secondary education in France was denied certain unemployment benefits (tideover allowances) provided for under Belgian law. The Court stated that:

> "By linking the grant of tideover allowances to the condition of having obtained the required diploma in Belgium, the national legislation thus places at a disadvantage certain of its nationals simply because they have exercised their freedom to move in order to pursue education in another Member State.

Such inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move"[19]

The above case law has the potential of impacting on any legal situation in which an EU citizen may become involved, either while in a different Member State, or in his/her own Member State, if discriminated against on the basis of the previous exercise of his/her EU citizenship rights.

On the assumption that, as argued above, Article 12 is capable of having horizontal effect, there would seem to be an argument that its application can potentially extend to all areas of legal activity of EU citizens, including consumer contracts, tenancy and property contracts, employment contracts and so on. Presumably, even in situations where a Member State's legislation provides for equal treatment of non-nationals even in horizontal situations, Article 12 EC would take precedence and possibly lead to the dis-application of national rules which do not grant the same extent of protection.[20] The consequences of such an extreme interpretation would be very serious, especially if parties were to be allowed to take action on the basis of both direct discrimination, indirect discrimination and measures equally applicable to national and non nationals (on proportionality grounds)[21]. It is therefore important to understand to what extent private parties could object to a blanket horizontal application of the non-discrimination principle.

When Discrimination can be Justified

No clear case law has emerged to date as to the grounds on which discrimination in the context of Article 12 EC could be justified, either in respect of vertical or horizontal situations. Any tentative conclusion in this respect should probably be based on a parallel with the case law of the ECJ in the area of free movement of goods, workers and services and the right of establishment.

Hence, a distinction should first be made between direct and indirect discrimination, i.e. situations where non nationals are treated less favourably "*de jure*" and situations where measures applicable to nationals and non nationals are intrinsically liable to affect non nationals more negatively than nationals and there is a consequent risk that they will place the former at a particular disadvantage.

As far as direct discrimination is concerned, without attempting a full analysis of law on this point, the applicable principles are summarised in the *Commission v. Italy*[22] judgment, where the Court states that "...to the extent that the advantageous rates at issue provide for a distinction on the basis of nationality, it should be recalled that such advantages are compatible with Community law only if they can be covered by an express derogating provision, such as Article 46 EC, to which Article 55 EC refers, namely public policy, public security or public health. Economic aims cannot constitute grounds of public policy within the meaning of Article 46."[23]

In cases where Article 12 EC is applicable independently from other Treaty articles, there may be a question as to what extent Member States could justify discrimination on the same type of exceptions provided for in the area of free movement of goods, workers and services and the right of establishment. In fact, the Treaty does not provide for any express public interest grounds upon which discrimination under Article 12 EC could be justified.

However, because of the gap closing nature of Article 12 EC (as explained above), there seems to be an argument to say that the same express grounds provided for under other EC Treaty articles should also apply in relation to Article 12 EC. Any alternative interpretation would create the risk that measures which would be otherwise justified under the provisions on free movement of goods, workers and services and the right of establishment could still be found to be in breach of Article 12 EC. The same conclusion would also apply in cases where parties to a dispute try to rely on the horizontal effect of Article 12 EC.

In the *Bosman* case[24], UEFA raised the concern that the application of Article 48 EC (now Article 39) of the Treaty would have more restrictive consequences in the context of horizontal situations because only Member States would be able to rely on limitations justified on the grounds of public policy, public security or public health. In response to this concern the Court held that

> "There is nothing to preclude individuals from relying on justifications on the grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question"[25].

Transposed to the context of Article 12 EC, the principle in *Bosman* would imply by analogy that general interest type exceptions should also be available to private parties in cases of direct discrimination.
As to the possibility of justifying instances of indirect discrimination for the purposes of Article 12 EC, the Court has expressly referred to the case law on the area of free movement of workers[26], to the effect that

18. Case C-224/98 [2002] ECR I- 6191.19.
19. *Ibid.*, par. 34 and 35 of the judgment.
20. See for example the Employment Equality Act 1998 and The Equal Status Act 2000
21. As it has been the case in respect of breaches of Articles 28, 39, 43 and 49 EC.
22. C-388/01 quoted above
23. *ibid.*, par. 19
24. Case C-415/1993 [1995] ECR I4921
25. *ibid.*, par. 86.
26. See Case C-237/1994 *O'Flynn v. Adjudication Officer* [1996] ECR I-2617, par. 19 and 20, quoted in C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47, par. 21.

any measure which more adversely affects non nationals than nationals can only be justified

> "if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions"[27]

The nature and the extent of such considerations in the context of Article 12 EC is not clear. We note that in several cases, the Court rejected the contention of the defendant Member State that the measure could be justified. For instance, in the *Bickel* case, the ECJ held that, although the protection of a linguistic minority could constitute a legitimate aim, this would not justify a restriction on the use of German (i.e. the language which the national measure was intended to protect) by non-residents in the context of criminal proceedings. Presumably, the Italian government was concerned about the financial consequences of extending the facility to use German for judicial and administrative purposes in the Bolzano area to non-residents. However, no such consideration was given relevance by the Court.

More interestingly, the *Angonese*[28] case illustrates how the same test would operate in the context of horizontal situations. There the Court found that, in the context of a recruitment competition run by a private banking institution, the requirement that a candidate hold a certificate attesting to his/her bilingualism, which could only be issued by public authorities in the Bolzano area on the basis of an examination conducted there, would infringe the free movement of workers;

The Court held that the requirement, although indistinctly applicable to nationals and non-nationals, would actually constitute indirect discrimination insofar as non-nationals would be placed at a disadvantage[29]. The Court acknowledged that possession of a certain degree of linguistic knowledge may be legitimately imposed. However, this could only be so if such requirement:

> * were based on objective factors unrelated to the nationality of the persons concerned, and
> * if it were in proportion to the aim legitimately pursued[30]
>
> The case was decided on the basis of the provisions on free movement of workers but it is likely that the test would similarly apply in cases where non-discrimination on grounds of nationality is pleaded on a stand-alone basis.

However, the fact cannot be ignored that the application of Article 12 EC in the context of purely horizontal situations would be capable of severely affecting the contractual freedom of the parties, while hampering the necessary flexibility and legal certainty that private negotiations require. In other words, imposing on private actors, whatever their characteristics, the same standards of compliance with the non-discrimination principle which applies to Member States when enacting public measures, would be detrimental in terms of legal certainty and economic efficiency (something which should be paramount in the European legal order).

Unfortunately, the case law so far does not provide any guidance as to the extent to which private parties could rely on any such wider justification. Any attempt to develop possible arguments in this respect should be based on fundamental Treaty principles of fairness and proportionality. So, for example, the position of private parties having regulatory or quasi-regulatory power (of the type considered in *Walrave and Bosmann*[31] i.e. professional and trade bodies) should be distinguished from the position of private parties which do not have any such power. In the first case, the application of the same standards which are applicable to Member States may well be justified. Beyond cases where private organisations enjoy regulatory or quasi-regulatory powers, the application of the non-discrimination principle in a manner that would be proportionate and fair becomes more difficult. For example, it is unclear whether the market power and the size of the parties involved should play any role in determining the relevant standard.

Whatever the conclusion on this point, it would seem that in the ordinary course of private negotiations, private parties should be able to rely on justifications which go beyond those which apply to Member States on grounds of proportionality, fairness and economic efficiency. On this basis, there seems to be an argument that the application of Article 12 EC to instances of indirect discrimination, or measures indistinctly applicable to nationals and non-nationals should be seriously curtailed. Secondly, the imposition of specific obligations on non-nationals, which would not normally apply in respect of resident nationals (reference letters, official certificates and so on) and which could be otherwise regarded as being directly discriminatory could be, depending on the circumstances, justified in the context of private negotiations.

Conclusions

It now seems that the non-discrimination principle enshrined in Article 12 EC can be applied to horizontal situations. Based on the ECJ case law, the scope for application of this principle seems to be quite wide and could potentially encompass any situation in which EU non-nationals become involved, while present on the territory of a Member State. Questions remain as to the possible grounds upon which private parties can object to a blanket application of the principle of non-discrimination in the course of their activities. Private entities having regulatory or quasi-regulatory powers are likely to be expected to comply with the same standards which apply to Member States. However, insofar as other private entities are concerned, proportionality, fairness and economic efficiency should be paramount. ●

27. See *Bickel*, supra, note 14
28. Case C-281-98 *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-04139
29. *ibid.*, par. 40.
30. *ibid.* par. 42
31. *supra*, note 6 and 23.

Arbitration: Commentary and Sources

By Ercus Stewart SC FCIArb

The Honorable Mr Justice Finnegan and Ercus Stewart at the book launch.

Reviewed by Anthony P. Quinn SC FCIArb

Hardback, €130, Paperback €90.
Publishers; First Law.

As the President of the High Court, Mr Justice Finnegan, outlined at the recent launch, Ercus Stewart brings to this book an exceptional blend of academic and practical experience in arbitration and wider law. The author provides unique practical perspectives and informed insights into arbitration and the relevant legal context.

In a refreshing departure from the usual formats, this volume is a guidebook rather than a standard textbook. The starting point is the definition of arbitration as an alternative method to resolve disputes, which is final, binding and enforceable. Disputes are adjudicated by an impartial third party outside the courts system.

Arbitration and other forms of alternative dispute resolution (ADR) are used widely to resolve disputes in the construction industry and in some business sectors, such as the package holiday trade. Exponents of ADR who regret that its procedures have not become popular could pursue some of the practical suggestions made in the book.

The core is Part I, Commentary, which in thirteen chapters covers the arbitral process: agreement, primacy of arbitration, formal commencement, arbitral tribunals and hearing, awards, enforcement of awards, challenges, time limits, costs and fees, the High Court's jurisdiction, international arbitration and the UNCITRAL model law and fast track small claims schemes. Resolving employment disputes through statutory and other systems is considered in Chapter 13, which is informed by the author's expertise in labour law.

Part II contains relevant Irish court judgments. Cases from Ireland and other jurisdictions are also mentioned throughout the book. Though awards can be enforced through the courts, they do not provide an appeal system for the arbitral process because finality is vital. The courts protect parties to arbitrations from unfair or wrongful treatment. The golden thread of judicial support for arbitration was epitomized by McCarthy J. in *Keenan v. Shield* [1988] 1 I.R. 89: "Arbitration is a significant feature of modern commercial life....It ill becomes the courts to show any readiness to interfere in such a process....every consideration points to the desirability of making an arbitration award final. "

Part III contains appendices with relevant Acts, court rules, other rules (such as those of the Chartered Institute of Arbitrators - Irish Branch) and the international code of ethics. Articles from journals in Ireland and abroad are listed. The Acts of 1954 and 1980 are shown, as amended, with annotations to relevant English legislation, Irish and English cases and other materials.

Appendix C contains the Arbitration (International Commercial) Act 1998. Ireland's attraction as a base for resolving disputes arising in international trade has gained momentum from recent developments such as the activities of the International Chambers of Commerce, the Dublin-based International Centre for Dispute Resolution and especially the International Arbitration Centre promoted by the Bar Council.

Appendix H includes references to websites on arbitration, law, sports disputes and academic institutions. The excellent index covers Part I, Chapters 1-13, but not the appendices and cases, which are accessible through the contents pages and tables of cases and legislation.

Continuing judicial support for the arbitral process requires high standards from trained and informed practitioners. Thanks to Ercus Stewart's initiatives, supported by the King's Inns' education committee, Bar students now study arbitration. The Bar Council, the Law Society, DIT, UCD and the Chartered Institute of Arbitrators are also relevant to training and development. To utilise available expertise, the author proposes a State-supported fast-track claims scheme to resolve small commercial disputes.

Some readers may be disappointed on the lack of detail on specific aspects such as conciliation, compulsory acquisition of land, public service staff arbitration schemes and procedures in Northern Ireland. In this tome, however, over 600 pages are replete with facts, frameworks, stimulating ideas, precedents and guidelines on drafting arbitration clauses, awards and related court proceedings.

Lawyers and other participants in arbitration need this book. It is essential for practitioners working away from base. This comprehensive volume comes at an opportune time. The new Commercial court and improved management of court cases provide scope for expanding arbitration through the Irish courts system. There are also initiatives on schemes to resolve specific types of disputes between citizens and state agencies.

As Mr. Justice McCracken aptly states in the foreword: This book will fill a long-felt need by giving the practical aid that has been lacking, and will provide the necessary assistance both to lawyers and non-lawyers alike.

Thanks to Ercus Stewart SC, assisted by Rory White and by Bart Daly of First Law for providing this invaluable one-stop store of knowledge and expertise. ●

The Irish Planning Law Factbook

Edited by Berna Grist and James Macken

New

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The Irish Planning Law Factbook is a practical guide to the Irish planning system. Written by a team of legal and planning experts, it takes you step-by-step through the Irish planning system. As well as covering core planning areas, it also covers all instances where other statutes interact with the planning system – conservation, infrastructure and heritage – so you can be sure you have all the information you need to make a well-informed decision.

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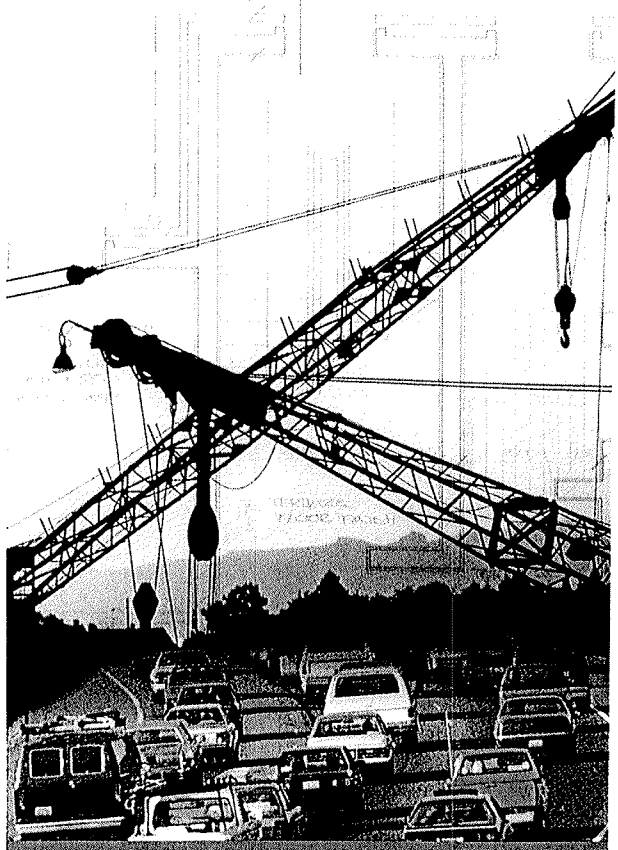

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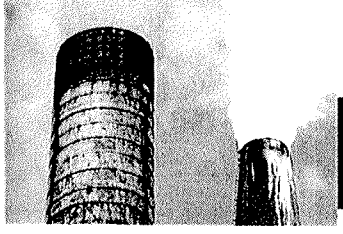

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