

The Bar Review

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- The Obligation to Seek Out and Preserve Evidence
- *Kobler* and Breaches of European Community law by the Supreme Court
- Legislation in Irish - A Lot Done, More to Do

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The Bar Review

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The Regulation of Judicial Conduct

The recent controversy surrounding Circuit Court Judge Brian Curtin has highlighted once again the dearth of established procedures to deal with issues of judicial conduct. Unfortunately, as a nation, we have encountered this problem before and have failed to address the issue. Now as a matter of urgency, it is incumbent on the government to bring forward legislation to establish detailed and fair procedures for ensuring the highest standards in judicial office without the trauma of a constitutional crisis any time an issue of judicial accountability arises.

In 1999, in the wake of the furore surrounding the so-called Sheedy affair and the subsequent resignation of a Supreme and High Court judge, it was widely accepted that some form of judicial council should be established to deal with issues of conduct and discipline. Also recognised was the deep sensitivity attached to any question of judicial misconduct, given the sanctity of the separation of powers doctrine enshrined in our constitution. However, even though the Constitution Review Group, the Working Group on a Courts Commission and the Committee on Judicial Conduct and Ethics have all examined this area and produced detailed reports on the matter, to date, the issue remains unresolved.

It appears that much of the work required to bring forward legislation in this area has already been completed. The Committee on Judicial Conduct and Ethics submitted a report to the then Minister for Justice in December 2000 recommending the establishment of a council made up of judges which would regulate professional conduct and ethics within the judiciary. This judicial council, of which all judges would be members, would also be empowered to deal with judicial studies and publications and conditions of work generally. It would also have powers to deal with instances of misconduct that are not serious enough to constitute "misbehaviour" within the ambit of the Article 35 impeachment provision in the constitution. This recognised that some misconduct might be relatively minor and merit only a private reprimand while certain other behaviour might merit impeachment in accordance with Article 35. The Committee's recommendations focussed not just on issues of misconduct but also on support for the judiciary in the area of training and continuing education. It was proposed, for example, that a Judicial Studies Committee would publish specimen directions for criminal trials and guidelines on sentencing.

A bill was brought before the Oireachtas in 2001, that broadly accepted the recommendations of the Committee. Unfortunately, the proposal was withdrawn because of disagreement on the proposed amendment to the constitution that would have required a two-thirds vote for the impeachment procedure in the Oireachtas rather than the simple majority currently required. Thus, the proposal was shelved. So once again, in the face of a potential constitutional crisis and in the absence of clear legislative guidance, the government finds itself forced to establish *ad hoc* procedures, with the threat of a legal challenge to these proceedings each step of the way.

We express no view on the Curtin controversy except to point out that the affair highlights a serious lacuna in the procedures for the regulation of judicial conduct. The government must address this issue now in a resolute fashion. The legislative solution must provide certainty but must also respect the independence and autonomy of the judiciary. Also, it would be a shame if the solution dealt only with the issue of ethics and conduct. It should also be an opportunity to ensure that judges are furnished with all the necessary resources, administrative support, continuing education and training so that they can carry out their judicial functions with maximum efficiency.

Bar Leaders Visit to Zimbabwe

The Chairman of the Bar Council, Conor Maguire SC, recently visited Zimbabwe as part of a delegation from the International Council of Advocates and Barristers sent to investigate breaches of justice in the regime of Robert Mugabe. The fact finding mission was organised to show solidarity with the beleaguered legal profession in Zimbabwe. Mr Maguire was joined by representatives from England, Scotland, Australia and South Africa and the group have compiled a report for the ICAB (formerly known as the World Council of Barristers and Advocates).

During the trip, the group met with a number of prominent barristers, along with the acting attorney general, Bharat Patel, and some other government officials. The group came to the conclusion that the independence of the judiciary in Zimbabwe has been severely compromised.

Firstly, a significant number of senior judges have been granted farms under the land resettlement scheme overseen by Robert Mugabe. The grant is at the will of the government and the farms may be taken back at any time without compensation. These same judges often have to adjudicate on the controversial legal and constitutional issues arising out of the land redistribution legislation, under which they themselves have received farms. Under such circumstances, judicial independence is severely compromised.

It was also found that there have been a high number of judicial resignations in recent times and at least some have been the result of political and other pressures. There is a clear perception that on occasions when a judge has given a decision contrary to the interests of the government, that judge is subject to pressure in one form or another.

There have also been assaults and interference with the work of judges in and around their courtrooms. The last Chief Justice Gubbay had his courtroom invaded by people who described themselves as war veterans. He was told by a minister that his safety could not be guaranteed, and these events led to his resignation. Judges who have given decisions unfavourable to the government have been arrested, and have been subject to humiliating treatment. There is also a pattern of personal attacks on judges in the government controlled press.

It was also found that barristers and other members of the legal profession have been subjected to intense pressure from the state but many continue bravely to speak out against the human rights abuses in their country. The ICAB provides resources such as textbooks for lawyers in Zimbabwe and is also seeking to highlight these injustices on the world stage.



Chairman of the Bar Council, Conor Maguire, is pictured in the Advocates Chambers in Harare together with members of the Zimbabwe Bar and Bar leaders from England, Scotland and Australia



Chairman of the Bar Council, Conor Maguire, presents a summary of the ICAB report on Zimbabwe to Arnold Tsunga, Director of "Zimbabwe Lawyers for Human Rights".



Artwork for Cancer Charity

Pictured at the release of a limited edition of 195 prints of the *Four Courts* by well-known artist Darren Hooper are L to R; John Mc Cormack, CEO of the Irish Cancer Society, The Chief Justice, the Hon. Mr. Justice Ronan Keane and Paul Hanna of Quantum Images. Each of the prints has been hand-signed and numbered by the renowned painter and has also been signed by the Chief Justice. Proceeds are in aid of the Irish Cancer Society.

Before going on general release, the prints are being offered exclusively to members of the legal profession by Dublin-based art publishers Quantum Images.

To purchase prints contact: Paul Hanna, Quantum Images, Alexandra House, The Sweepstakes, D.4

UCC Law Society 75th Anniversary

The Student Law Society at University College Cork is celebrating its 75th anniversary in the new academic year. To celebrate, the society is putting together a small book on its history and alumni for launch at a 75th Anniversary Ball in Spring 2005. The Society wishes to hear from past members and officers of the Society who would be interested in helping with the research. In particular, they are keen to receive photographs, memorabilia and society records. Those who are interested should write to Deirdre Duffy at the Law Society History Project, 6, Carrigside, College Road, Cork or e-mail at history@ucclawsoc.com



Planning Book Launch

Pictured at the recent launch of Simons, *Planning and Development Law* were L-R Garrett Simons BL, Catherine Dolan, Commercial Manager, Thomson Roundhall and the Hon. Mr Justice Aindrias O Caoimh of the High Court.

Thomson Round Hall Employment Law Conference

The first Thomson Round Hall professional development conference was held in association with DIT Legal Studies Department on the 15th of May on the topic of employment law.

It was chaired by The Hon. Mr Justice Roderick Murphy of The High Court who also made the opening address and welcomed over 80 employment law practitioners to the conference. Following his address on the development of employment law, Cliona Kimber BL editor of the new Thomson Round Hall Irish Employment Law Journal, delivered a paper on new legislation on fixed term contracts.

Marguerite Bolger BL addressed the provisions of the Equality Bill 2004 while new data protection laws were discussed by Carol Leland of A & L Goodbody. Geoffrey Shannon, solicitor, updated the audience on new developments in the area of health and safety, including stress/bullying, corporate manslaughter and the new smoking ban. Ercus Stewart SC advised on best practice in employment dispute resolution/arbitration. The conference also marked the launch of Thomson Round Hall's new Irish Employment Law Journal, an exciting new addition to Thomson Round Hall's stable of publications.



Pictured at Back Row: L-R: Niall Neligan, barrister and lecturer DIT; Elnor McGarry, General Manager Thomson Round Hall; The Hon. Mr Justice Roderick Murphy of the High Court. Front Row: L-R: Fergus Ryan, Acting Head of Legal Studies Dept, DIT; Geoffrey Shannon, solicitor and speaker; Cliona Kimber barrister and speaker and Carol Leland speaker from A & L Goodbody. Missing from the photograph are Marguerite Bolger BL and Ercus Stewart SC who also presented papers.



Employment Book Launch

Pictured at the launch of "Sex Discrimination at Work" is the author John Eardley B.L. The book is published by First Law.

Jesuit Programme for Lawyers.

A day of reflection has been organised by members of the Jesuit Order for practicing lawyers on Sept. 23rd, 2004, at Manresa House, the Jesuit Centre of Spirituality in Dublin. This will be followed by an evening of reflection on Sept. 30th. This programme is intended to respond to the constant demands of legal practice which make it extremely hard for a legal practitioner to create time and space for an inner life.

In order to book a place for this programme, please contact:- Manresa House, Jesuit Centre of Spirituality, 426, Clontarf Road, Dollymount, Dublin 3. Tel No. 01 - 8331352.

The Obligation to Seek Out and Preserve Evidence.

George Birmingham SC*

A number of recent cases have imposed an affirmative duty on the gardai to seek out and preserve evidence that may ultimately be helpful to an accused in conducting his defence. This duty is not absolute and it appears it is not to be interpreted as requiring the gardai to engage in a disproportionate commitment of manpower or resources in an exhaustive search for every conceivable kind of evidence. In this paper, I have outlined the seminal cases and have extrapolated the general principles that have emerged in this area of the criminal law.

The starting point for this line of jurisprudence is the decision of Lynch J. in the case of *Murphy v. DPP* [1989] ILRM 71, though it must be said that some of the judges who have been to the foreground of this area have managed to ground their views in a decision of C.B. Palles as far back as 1887 – the case of *Dillon v. O'Brien Et Davis* (1887) 20 LR. 300.

The decision in *Murphy* was straightforward enough, did not give rise to any immediate controversy, and did not spark any flood of applications. One of the more interesting features was that counsel for the D.P.P. was one Adrian Hardiman, barrister at law. That case arose out of a prosecution under s. 112 of the Road Traffic Act (unauthorised taking of a motor vehicle). At an early stage the applicant enquired as to whether the vehicle had been the subject of forensic examination and in particular, finger print examination. He was informed that it was not intended to conduct such tests and that the prosecution intended to rely on visual identification. It appears the prosecution were placing some reliance also on limited admissions, admissions to being in the car as distinct from being the driver. It is doubtful how useful these admissions would have been since it seems to emerge from the report that the live issue in the case was whether the accused was ever actually driving as distinct from allowing himself to be carried. Again, at an early stage, the defence sought facilities for an examination by their own expert. It appears the principle of an inspection had been conceded by the authorities. An expert was engaged but before the examination took place, the vehicle, which was in a crashed state, was returned to the insurance company for scrapping.

From the applicant's point of view the case was a strong one, a forensic examination was regarded as potentially clearly relevant at an early stage, the applicant had communicated an interest in having the vehicle examined, and the vehicle was released from garda custody at a time when there was no compelling pressure to do so before the requested examination had taken place.

Of interest is that Lynch J. was satisfied that the Court had been denied possible corroborative evidence of the applicant's denial and was in consequence satisfied that the applicant's opportunity of defending the case had been materially affected to his detriment. Lynch J. accepted that it might well be that nothing would have been discovered by the proposed forensic examination but what was sufficient was that the applicant had been denied the reasonable possibility of rebutting the evidence. Lynch J. summarised the authorities as being to the effect that evidence relevant to guilt or innocence must, so far as necessary and practicable, be kept until the conclusion of the trial. He observed that the relevant authorities applied to the presentation of articles which may give rise to the reasonable possibility of securing relevant evidence.

As stated previously, the *Murphy* case generated little controversy and the same may be said for the next case in the sequence, the case of *Braddish v. DPP* [2002] 1 ILRM 151. Time has moved on and Adrian Hardiman B.L., counsel for the DPP in *Murphy*, is now delivering the unanimous judgement of the Supreme Court. This was a security video case having its origin in a shop robbery in Limerick. The shop in question was robbed on 2nd July, 1997, video surveillance was in operation and the video was viewed by the investigating garda. He believed that he was able to identify the perpetrator of the robbery, which was caught on camera as the applicant. In these circumstances, he arrested the applicant on 14th October, 1997, justifying his request for the detention under s.4 of the Criminal Justice Act by reference to the video. During the detention, the applicant is alleged to have signed a statement admitting responsibility. Approximately 9 months later on 2nd July, 1998, he was charged and brought before the District Court. It was alleged, and while doubted by the respondent, seems to have been accepted by the Supreme Court, that on his first appearance in court, his solicitor requested any video footage or stills. This was followed up by a written request in December 1998, which was responded to in January 1999, with the comment that the videos were no longer available as they were returned to the owner after the accused admitted the crime. In the course of the judicial review proceedings, it was stated on behalf of the respondent that the video was returned "mistakenly on an unknown date between 3rd July, 1998 and 23rd December, 1998". Hardiman J. expressly endorsed the principles established by Lynch J. that evidence relevant to guilt or innocence must so far as necessary and practicable be kept until the conclusion of the trial. The principle also applies to the preservation of articles which may give rise to a reasonable possibility of securing relevant evidence.

*This paper was delivered at the Bar Council criminal law conference on 7th February, 2004

The Supreme Court was not impressed with the respondent's answer that this was not a video case or an identification case but was being put forward solely on the basis of a confession, on which the case would stand or fall. The Supreme Court referred to recent history in this and the neighbouring jurisdiction illustrating the risks involved in excessive reliance on confessions and indicated that confessions should if possible be corroborated.

It is worth recapping on some of the language of Hardiman J. The video tape was, he asserted, real evidence and the prosecution was not entitled to dispose of it. Referring to the letter from the Chief State Solicitor's Office and its reference to the fact that the video had been returned after the accused had admitted the crime and the possibility that this could be read as a suggestion that because the prosecution case was based on confession evidence that other items could be destroyed or rendered unavailable - he stated emphatically (*his words*) that this was not so. He said it was the duty of the gardai arising from their unique investigative role to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. That was so whether the prosecution proposed to rely on the evidence or not and regardless of whether it assisted the prosecution case or not. He went on to make clear that the evidence to which these principles applied were not only those with a direct and established evidential significance, but included those which may give rise to a reasonable possibility of securing relevant evidence. He emphasised the scope of this definition by referring to the leading civil discovery case - *Sterling Winthrop Snap Ltd. v. Farben Fabriken Bay* [1967] IR 67. This case confirmed that the scope of the obligation to discover extended not just to documents which would be evidence on any issue, but also documents which it is reasonable to suppose contain information which may, not which must, either directly or indirectly enable the party requesting the affidavit to advance his own case or to damage the case of his adversaries.

To summarise, neither *Murphy* nor *Braddish* generated much controversy. Each related to evidence the potential relevance of which was clear. In each case there were timely requests for access, the gardai were in undisputed possession of the article sought to be examined and parted with possession for no particularly compelling reason.

Notwithstanding that, Hardiman J. clearly had one eye to the future, because he stressed that it would be difficult to think of evidence more directly relevant than a video tape showing the commission of the crime. He was anxious to make clear that where the evidence is not of such direct and manifest relevance, the duty to preserve and disclose has to be interpreted in a fair and reasonable manner. The obligation established by *Murphy* was to preserve evidence so far as is necessary and practicable. This, he said, could not be interpreted as requiring the gardai to engage in disproportionate commitment of manpower or resources in an exhaustive search for every conceivable kind of evidence. The duty was to be interpreted realistically on the facts of each case.

The consensus that greeted *Murphy* and *Braddish* would not long survive. The next decision in this series of cases was *Dunne v. DPP* [2002] 2 ILRM 241. On this occasion, the Supreme Court could no longer achieve unanimity and indeed the case is notable for the particularly vigorous internal debate. Hardiman J., was in the majority, supported by McGuinness J. and Fennelly J., while on the other side of the argument, Fennelly J. dissented with some vigor, drawing an even more vigorous response from Hardiman J.

This was another surveillance video case - though the facts are less sharply defined than in *Braddish*. In particular, even after the hearing in the High Court by Kearns J., who refused relief, and the Supreme Court, it remains uncertain whether a tape from the robbed garage ever actually came into the possession of the gardai. It appears that the arguments for the respondent relied significantly on an affidavit from the officer in charge of the investigation, but who had not attended at the scene, to the effect that the tape was never given to or obtained by any member of the gardai. On this basis, the respondent emphasised what was seen as the fundamental distinction between this case and *Braddish*. The response of Hardiman J. was to pose the question - "distinction or difference"?. Even if the affidavit of the investigating garda was accepted, that begged the question "why"? It was clear, it would have been reasonable for any garda attending at the garage to inquire about the video and on the basis of past history of a number of similar raids, if he had sought the video he would have been given it.

So this was a distinction without a difference, according to Hardiman J. To conclude otherwise would, he felt, serve as an incentive to gardai not to seek out evidence.

Fennelly J. took a decidedly different approach. His starting position was that it was never shown that the video in question was in the possession of the gardai. He accepted that if this could be established, a *Braddish*-type conclusion would be reached. He focussed on the passage in *Braddish* that it was the duty of the gardai arising from their unique investigative role to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. The reference to seeking out was *obiter* and more importantly, he felt represented a very significant new step in the law. While he saw the statement as no doubt being a reasonable statement of the duty of policemen, it did not however necessarily follow that where an accused was able to establish that the gardai had failed to seek out evidence that would have had a potential bearing on the innocence of the accused, that would suffice to meet the test of a real and serious risk to a fair trial. He envisaged a rash of applications for prohibition. The danger that he saw was that this would develop a tendency to shift the focus of criminal prosecution on to the adequacy of the police investigation rather than the guilt or innocence of the accused.

McGuinness J., who was part of the majority judgment, commented that the issues raised by the case on the duty of the police to seek out evidence and the extent of that duty raised important issues which she hoped would arise again before a full court. In the meantime, she limited her decision to the facts of the case.

The next decision in this overview is a judgment on 6th February, 2003, again of Hardiman J. The decision dealt with two entirely separate appeals which had raised similar issues. These were the appeals of *James Bowes* and *Deirdre McGrath* (Supreme Court, 6th February, 2003). Both cases involve motor cars but other than that, the facts could scarcely have been more different. Mr. Bowes faced a charge under s. 15A of the Misuse of Drugs Act - the prosecution alleging that a very substantial quantity of heroin was found in a car boot being driven by Mr. Bowes. Ms. McGrath's case was entirely different. She faced a charge of dangerous driving causing death arising from a road traffic accident at Indreabhan, Co. Galway, involving a car driven by her and a motor cycle driven by the deceased in the case.

It appears that no one witnessed the accident and the prosecution was being mounted on the basis of certain remarks made by Ms. McGrath

to a woman and child in a house close to the accident scene. In addition, it was apparently intended to invite the jury to draw inferences from the position of debris on the road.

The nature of the offence is by no means the only area of contrast. In the case of *Bowes*, access to the vehicle was sought a few days before trial and the application for leave was made on the morning when the matter was listed for trial. In contrast, in the case of Ms. McGrath the request for an opportunity to examine the motor cycle was made within a few days of the book of evidence being served. Indeed, it appears that when she first appeared in the District court on the summons return date, that it was indicated to the Court on behalf of Ms. McGrath that depending on the contents of the book of evidence, that the defence might wish to have the motorcycle examined.

There was also a contrast in terms of when the vehicle was disposed of. In Mr. Bowes case, this was 12 months after he was arrested. In Ms. McGrath's case, the cycle was disposed of 2 1/2 months before proceedings against her were instituted.

However, perhaps the most fundamental divergence was in the degree of relevance.

In *Bowes* case, the car itself was not directly relevant to the case, except in the sense that the drugs were found in the boot of the car which was being driven by Mr. Bowes. In *McGrath*, the prosecution was proposing to present a case in the absence of any witnesses, on the basis of remarks made by her in the immediate aftermath of the accident at a time when, according to a garda who came on the scene, she was in a state of shock, and when accident reconstruction was always going to be a very significant element of the case. It appears that as soon as the summons was served, Ms. McGrath informed her solicitor who sought the advice of counsel whose immediate reaction was to recommend a forensic examination of both vehicles. A consultant engineer was indeed engaged but, the vehicle had already been disposed of 2 1/2 months before the summons was served on the solicitor consulted. In these circumstances, the engineer consulted found himself considerably disadvantaged, he was unable to ascertain the collision configuration. i.e. relative direction of movement. He was unable to deduce the closing impact speeds of the two vehicles. He was unable to satisfactorily eliminate any mechanical condition of the motor cycle that might have contributed to the course of the collision. It may be noted that in reply, a garda P.S.V. Inspector commented that he very much doubts if an examination would have thrown light on these matters.

These divergences led to different conclusions. In the case of *McGrath*, the Supreme Court concluded that Ms. McGrath had suffered the loss of a reasonable prospect of obtaining evidence to rebut the case made against her by reason of the gardai having parted with the motorcycle. In contrast, in the case of Mr. Bowes, the Court had very little difficulty concluding that there was no real loss of any opportunity to rebut the prosecution case.

A few other cases are worthy of mention, before I conclude this overview. Some cases focus particularly on the question of what is, and is not, practical and what demands can be realistically made of the gardai. This is emerging as a concern of the courts and indeed, it will

be recalled that even in some of the high water mark cases, there were cautions about making unrealistic demands. In *Gavin McKeown v. DPP*, in which the judgment was given by McCracken J. on 9th April, 2003, the Supreme Court upheld the refusal of the High Court to grant leave to appeal. The basic facts were that Mr. McKeown faced charges under s. 112 of the Road Traffic Act and of assaulting a garda. The prosecution case was that gardai had come upon the stolen vehicle in a car park, had seen the accused and a co-accused get out of the car, had approached them, there was a struggle and it was alleged in the course of the struggle, a garda was struck by the accused with a red petrol can. The accused was charged and bailed to appear before the District Court the following day. Ten months later, the solicitors for the accused wrote requesting details of any forensic results on the car and information on its present whereabouts, as well as seeking access to the red petrol can. The response to this was that no tests were carried out on the car, which had been returned to the owner on the day following the incident. As far as the can was concerned, gardai had returned to the car park on the day following the incident in search of it but failed to locate it. Apparently, prompted by the correspondence from the solicitors, the gardai re-established contact with the owner to see if the can was in the car when it was returned. It emerged that it was, and had been put in a shed by the owner.

McCracken J. commented that while the gardai may have been satisfied in their own mind that what they had witnessed in the car park was sufficient to secure a conviction, this was not the test, rather the test was whether the evidence, even if not to be used by the prosecution could be of assistance to the defence. The Court went on to observe that if a person is charged with driving a stolen car, quite often the stolen car is a vital piece of evidence. If the car could provide potential evidence favourable to the defence, it should certainly be made available to the accused person or his advisers where reasonably practical, before being returned to the owner. However regard must be had to the practicalities, and in particular to the rights of the unfortunate owner of the car who was obviously entitled to have it returned to him as quickly as possible. This concern for the interest of the car owner was also a factor in the decision of O'Hanlon J. in *Rodgers v. DPP* [1992] I.L.R.M. 695. The practicalities were to be judged on the facts of each case. It was suggested that the proper procedure would seem to be that if evidence of this nature is to be returned to its owner, where practicable that should only be done after notice has been given to an accused person or legal adviser and a reasonable time given for an accused or his advisers either to examine the evidence or to dispense with the examination.

In this case, the Court for the first time offered practical guidance and assistance as to how matters might be handled on a day to day basis. In *Bowes* and *McGrath*, the Supreme Court had commented that there may be a need for a more coherent practice among the gardai in the preservation or disposal of pre-trial evidence. It was suggested that the adoption and observance of suitable guidelines might assist in avoiding pre-trial litigation of this nature. In *Dunne*, Hardiman J. referred to the existence in Britain of guidelines and codes of practice and commented that both in relation to video evidence and more generally, there was a good deal to be said for adopting guidelines of this sort.

My understanding is that in August 2002, a Garda directive was circulated by the Commissioner to take account of the decisions in

Dunne and *Braddish* and that a further draft directive arising from *Bowes* and *McGrath* had been prepared and awaits approval for circulation from the Commissioner.

This concern to define the practical limits are even more to the forefront in the High Court judgment of Kearns J. in *Michael Scully v. DPP*, (21st November 2003). Like so many of these cases, this was a garage forecourt incident and as one would expect, there was a CC TV System in operation. However, the evidence of the investigating gardai and of the injured party was to the effect that the system in operation was a singularly ineffective one and did not cover the entire forecourt. Though part of the forecourt was visible, it was almost completely in darkness and showed nothing of evidential value. On this basis, the prosecuting garda decided not to take possession of the video. Support for the theory that the video was not performing was to be found in the fact that after the incident, the injured party went out and replaced the system that had been in operation at very considerable cost. Kearns J. was of the view that where it was being contended that evidence had either been lost or not obtained which might have some relevance in establishing guilt or innocence, the Court should not too quickly yield to an application to prohibit a trial. He felt it should not accede to such an application where an explanation is forthcoming for the absence of that evidence and that explanation establishes to the satisfaction of the Court that the evidence or material could have no possible bearing on the guilt or innocence of the accused. He was of the view that what he described as common sense parameters of reasonable practicality should apply to any determination of the scope of the duty on the gardai when seeking out or preserving evidence. The judgment given by Kearns J. draws heavily on the approach taken by Geoghegan J. in *Mitchell v. DPP* [2000] 2 ILRM 396. In this case, the applicant was contending that the garda video recording system in operation in Temple Bar as well as the CC TV system in a restaurant in Westmoreland Street were in a position to record matters which could have been of crucial assistance to him. The authorities contended that it was both unnecessary and impractical for the gardai to have retained custody of the video recording at issue as indications were that neither video recording contained any relevant data and the applicant had made no request to either retain or view the video recordings in the fourteen month period from the date he was charged. Geoghegan J. placed emphasis on the fact that the restaurant video tape was privately owned and that the gardai accepted as they were entitled to, that the cameras in the restaurant had not been pointing in a useful direction. Geoghegan J. felt that it was going too far to suggest that the gardai were required to give the applicant notice of the intention to destroy the tapes. He was also of the view that it was unreasonable to suggest that gardai were required to retain their own tapes.

To summarise, the principles that seem to emerge from the cases are as follows:-

1. Evidence relevant to guilt or innocence must, so far as is necessary and practicable, be kept until the conclusion of the trial. This principle also applies to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence.
2. The duty to preserve evidence is not absolute but is to be interpreted in a fair and reasonable manner. The obligation is not to be interpreted as requiring the gardai to engage in

disproportionate commitment of manpower or resources in an exhaustive search for every conceivable kind of evidence. The duty is to be interpreted realistically on the facts of each case.

3. The obligation is not just to retain and preserve but to seek out, subject to the qualification I have mentioned.
4. A trial will not be restrained simply by reason of the fact that the gardai were at some stage in possession of articles that might have been of evidential value, but have parted with possession. Remote, theoretical or fanciful possibilities will not lead to prohibition. The jurisdiction is to be exercised in a careful and realistic fashion
5. If the trial is to be prohibited, the applicant bears the burden of establishing that there is a real risk that by reason of those circumstances, he could not obtain a fair trial, that necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and direction on the part of the trial judge.
6. On the hearing of an application for judicial review, the focus must be on the fairness of the proposed trial and not on the discovery of shortcomings in the investigative process, except insofar as they impact on the prospects of a fair trial.
7. It follows that if the test is to be "the real risk of an unfair trial", the focus is on the fairness or otherwise of the intended trial without the missing evidence, and not on whose fault it is that the evidence is missing and what the degree of the fault may be.
8. While the focus is on the fairness of trial, the question of fault is not always irrelevant. There is a responsibility on a defendant's advisers, with their particular insight, to request material they identify as relevant and to do so in a timely fashion.

Notwithstanding the consistent emphasis that the obligation is to be interpreted reasonably, it must be said that the effect of these decisions is to impose considerable obligations on gardai and there will be practical difficulties. If we take the *McKeown* advices on how stolen motor car cases are to be dealt with, it will certainly extend significantly the period that many owners will be without their cars and presumably, that will have some impact on insurance costs. It will also mean that there will have to be arrangements for the secure preservation of vehicles while the defence advisers consider their position. While hard to quantify, it must also involve some diversion of garda resources and activity as it must mean that there will be cases where gardai would have formed the view that they had done enough to complete an investigation, will now find themselves with additional duties to perform in the original investigation before concluding it.

An innocent person charged with an offence will be distraught and outraged if a video is mislaid or not seized but a guilty defendant, including a defendant against whom there is overwhelming evidence, will feign the same emotions and will do all he can to change the focus from a determination of his guilt or innocence on to a probe into the missing evidence.

It must be said that the approach of our courts is a very advanced one by international standards. The English courts require bad faith, or at least serious fault on the part of the police, or alternatively, an established impossibility of a fair trial. So far as the established impossibility of a fair trial is concerned, the English courts are quite open in saying that such cases will be "few and far between". They also

express the "hope" that cases in the second category, which involve a lack of good faith or else that the prosecution has been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment, will be very rare.

It will be obvious that the English test is more onerous. Instead of being required to establish that there is a real risk of not receiving a fair trial, the barrier is set much higher and the obligation is to establish positively that a fair trial cannot be obtained.

The tensions I have referred to in the difference of approach between Hardiman J. and Fennelly J. and in the differences between the Irish and English courts are particularly obvious in the U.S. In 1988, the U.S. Supreme Court delivered judgment in the case of *State of Arizona .v. Youngblood* [1988] 488 US 51., a case which involved a radical change in how a defendant's due process rights under 14th Amendment are to be considered in the context of lost or destroyed evidence. Prior to *Youngblood*, the position would seem to have been that there was an obligation to preserve evidence but this was limited to evidence that might be expected to play a significant role in the suspect's defence. Evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

However in *Youngblood*, the Supreme Court by a 6:3 majority held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process. Accordingly, the Court found that failure by the police to preserve semen samples, though possibly negligent, did not result in a violation of Youngblood's right to due process.

The case involved the abduction from a church carnival, subsequent assault and repeated buggery of a 9 year old boy. The boy reported the incident to his mother who brought him to a nearby hospital where a doctor collected evidence by means of a sexual assault kit. Cotton swabs were used to collect saliva, blood, semen and hair samples that could have come from the assailant. Also taken were the young boy's tee-shirt and underwear. The state ran into difficulty in relation to the blood, hair and semen samples, because the quantity was inadequate for comparison purposes. In these circumstances, more than a year after the incident, the state forensic scientists turned their attention to the underwear. At trial, experts for both sides agreed that if the clothing had been examined earlier or refrigerated, then a semen stain on the underwear would very likely have conclusively determined Youngblood's involvement or non-involvement.

The case, which included a celebrated and acerbic dissent from Blackman J. who somewhat caustically commented "that the Constitution requires that criminal defendants be provided with a fair trial and not merely a 'good faith' try at a fair trial". The circumstances here, which may have been nothing more than police ineptitude, deprived the respondent of his guaranteed right to due process of law.

The case provoked considerable controversy and a considerable divergence in the response of state courts. A survey of how states responded in 2000 showed that 36 state's Supreme Courts had

endorsed the *Youngblood* approach, but 14 had refused to follow it. For a political animal, it is interesting to observe that the states which have dissented included those that would not normally be regarded as bastions of liberalism. Alaska was the first State to reject *Youngblood*, doing so within 6 months. Other states which rejected *Youngblood* included Tennessee, New Mexico and Delaware. In contrast, the California Supreme Court has twice placed California firmly in the *Youngblood* camp.

Those which have rejected *Youngblood* have instead opted for a balancing test more in tune with the traditional pre *Youngblood* approach. The formulation of the balancing test is not uniform and the elements to be factored into the equation vary somewhat from state to state but in general terms involves balancing the conduct of the prosecution and the degree of prejudice to the accused. The prosecution bears the responsibility of justifying or explaining their conduct and the defendant bears the burden of demonstrating prejudice.

Those who have supported *Youngblood* do so firstly, on the basis that it is clear cut and offers certainty and that it limits the extent of the obligation imposed on law enforcement agencies to a realistic level, and avoids what is seen as an injustice in denying the right to prosecute in the absence of wrongdoing.

In contrast, the proponents of the various forms of balancing tests see flexibility as its greatest strength - they indorse the view of Justice Stephens in *Youngblood*. He had concurred in the results but had declined to join the majority judgment because he felt it was unnecessarily wide and ignored the fact that there may well be cases where a defendant is unable to prove that the state acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defence as to make any criminal trial fundamentally unfair.

In summary, the Irish courts, led in the main by Hardiman J., have adopted a position which by international standards is very advanced both in terms of the obligation being couched in terms of an obligation to seek out and not merely to retain what they have already seized and in their emphatic rejection of any requirement to establish bad faith. Inevitably, this has and will precipitate further challenges to pending prosecutions. However, if the courts adhere to the requirement that the obligations are to be interpreted reasonably, and not used to impose standards that are impossible or unreasonably exacting, and the indications of Bowes, *McKeown* and *Scully* is that the courts will indeed do that, there is unlikely to be a flood of challenges.

If the attitude of the courts, requiring the investigators to go the extra mile, results in evidence being available to some innocent defendants which would not otherwise be, that is a development greatly to be welcomed. A further potential advantage is that there will be cases where precisely because real evidence is seized and retained, that the prosecution case will be a very strong one, provoking an early plea of guilty with a knock on saving in terms of garda and court time. Potentially, this could far outweigh whatever extra resources are deployed in seeking out and preserving the evidence. It must be said, though, that it is a further example of the tendency of The Irish criminal process to focus on procedural rather than substantive issues.●

Legislation in Irish- A Lot Done, More to Do.

John Smith BL

Background

Recent decisions of the Supreme Court and the recognition that has historically been given in the courts to Irish suggest that the State is sitting on a powder-keg by reason of its failure to implement the bilingual policy to which it is committed.

The legislative process of the State is outlined in Article 25 of Bunreacht na hÉireann, Article 25.4.4°-5° of which provides :-

4. I gcás an tUachtarán do chur a láimhe le téacs Bille i dteanga de na teangacha oifigiúla agus sa teanga sin amháin, ní foláir tiontú oifigiúil a chur amach sa teanga oifigiúil eile.

4. Where the President signs the text of a Bill in one only of the official languages, an official translation shall be issued in the other official language.

5. Chomh luath agus is feidir é tar éis Bille shíniú agus é a fhogairt ina dhlí, ní foláir an téacs den dlí lena mbeidh lámh an Uachtaráin nó, i gcás lámh an Uachtaráin a bheith le téacs Gaeilge agus le téacs Saes-Bhéarla an dlí sin, an dá theacs sínithe sin a chur isteach ina iris nó ina n-iris in oifig fhorálacha an dlí sin an téacs a chuirfead isteach ina iris, nó an dá téacs a chuirfead isteach ina n-iris, amhlaidh.

5. As soon as may be after the signature and promulgation of a Bill as a law, the text of such law which was signed by the President or, where the President has signed the text of such law in each of the official languages, both the signed texts shall be enrolled for record in the office of the Registrar of the Supreme Court, and the text, or both the texts, so enrolled shall be conclusive evidence of the provisions of such law.

The official languages referred to are, of course, Irish and English. Article 8 recognises the Irish language as the first official language by virtue of its status as the national language and accepts English as "a second official language". The pre-eminent status thus given to Irish has received repeated judicial recognition in the superior courts since the foundation of the State and is reflected in the statutory recognition of the State's obligation to provide services on a bilingual basis: see, for example, section 7 of the Courts Service Act, 1997 and the Official Languages Act, 2003.

In the early 1980's, bilingualism in the field of legislation collapsed. This led to both primary and secondary legislation being published in English only. This state of affairs was considered by the Supreme Court in *O Beoláin v. Fahy and Others* [2001] 2 IR 279 and roundly criticised. The entire Court reiterated that there was a constitutional obligation on the State to make an official translation available of such primary legislation as was signed in one official language only by the President - with the majority overturning the finding of the High Court that such

obligation only arose a "reasonable period" after the legislation was signed. The decisions of McGuinness and Hardiman JJ. were delivered in trenchant terms :-

"Deirimse go bhfuil an Stát thar thréimhse fada ama ag sárú an dualgais bunreachtúil seo go scannalach neamhnáireach agus go mba ceart don chúirt seo aird a dhíriú go poiblí ar nádúr sainordaitheach an dualgas atá leagtha síos in Airteagal 25.4.4. (McGuinness J at 294)

"It seems to me that the State has been flagrantly and over a long period of time in breach of this constitutional duty and it would be desirable for this court publicly to stress the mandatory nature of the duty set out in Article 25.4.4°."

"Ba gníomh gan tairbhe de ghnáth ag cúirt é ciall fhollasach airteagail den Bhunreacht a dhearbhu. Ach silim gur chóir don chúirt seo é sin a dhéanamh anseo mar gheall ar an teip nach feidir a shéanadh maidir leis an bhforáil bhunreachtúil shainordaitheach seo a comhlíonadh agus le súil trína dhearbhu go nglacfar go dáiríre leis an dualgas seo faoi dheireadh. Mura dtarlaíonn sé seo, b'fheidir go mbeidh ar iarratasóir éigin ar deireadh faoiseamh sainordaithe a lorg sa scéal. (Hardiman J. at 331)

"No doubt it would normally be otiose for a court to make a declaration confirming the plain purport of a constitutional article [25.4.4°]. But I think this court should do so here because of the undeniable failure to comply with this mandatory constitutional provision, and in the hope that by so declaring this duty, will at last be taken seriously. If this does not occur, it may be that some applicant will eventually be driven to seek mandatory relief in this regard."

The Court also considered the non-availability in Irish of the statutory instruments setting out the Rules of the District Courts and the forms prescribed for use in that court. The same majority of the Supreme Court (McGuinness and Hardiman JJ.) held that it was clearly in breach of both Article 40 (recognising the equality of citizens) and Article 34 (from which is derived the right of access to the courts) to deny an Irish language version of the rules to those who wished to conduct their business in Irish.

The decision of the Supreme Court has prompted the State to take remedial action in relation to the provision of bilingual versions of primary legislation but secondary legislation, other than that dealing with rules of court, continues to be published in English only. This has two important consequences. Firstly, a considerable body of the applicable law on any particular topic is still only available in English - which is *prima facie* at odds with the policy of bilingualism espoused by the State, the constitutional status accorded to Irish and the tenor of the judgments in *O Beoláin*. Furthermore, the fact that forms and certificates are only prescribed in English means that they are generally

made available to the public in this language only. This reduces the visibility of Irish and the practical ability of Irish-speakers to use their language of choice in conducting official business - even in the Gaeltacht - rendering exceptional and difficult that which is natural and readily available to those using English. On the face of it, this imposition of English is in breach of the same Article 40, which formed the cornerstone of the judgment in many recent cases on the issue of Irish, including *O Beoláin*.

A Duty to furnish Statutory Instruments in English and Irish?

Although McGuinness J. in *O Beoláin* expressly confined her decision to the statutory instrument containing rules of court, in reaching her decision she adverted to the State's statutory commitment to bilingualism and the relative ease with which such a policy can be put in place when implemented as a matter of course rather than as an afterthought:-

"Nil deacrachtaí dosháraithe ag baint le haistriúchán; is obair í a dhéantar go rialta agus go minic ar fud an domhain. Ins an Aontas Eorpach aistrítear gach cáipéis go h-alán teangacha - líon teangacha a bheas ag méadú amach anseo de réir mar a mhéadóidh an Comhphobal. Cé gur mionlach i gCeanada a labhraíonn Fraincis, bíonn gach cáipéis oifigiúil, cáipéisí cúirte, fógraí, foirmeacha agus comharthaí ina measc, ar fáil i bhFraincis agus i mBéarla. Níos gaire do bhaile, ní miste a rá gur fhoilsigh an Bord Séirbhíse Cúirteanna, ar a bhfuil dualgas reachtúil aird a thabhairt ar an bpolasaí dátheangach maidir le séirbhís chúirteanna ... a chead mórfhlean reachtúil straitéiseach le fíor-ghairid. Foilsíodh an plean sin go comhuaineach i nGaeilge agus i mBéarla." (at 293)

"The making of translations is not a matter of insuperable difficulty; it is a task regularly and frequently carried out throughout the world. In the European Union all documents are translated into multiple languages - a number of languages likely to grow in the future as the community enlarges. In Canada, despite the fact that only a minority of Canadians are francophone, all official documents, including court documents, notices, forms and signs are provided in both French and English. Nearer home one might point to the fact that the Courts Service Board, which is under a statutory duty to have regard to the policy of bilingualism in relation to Courts Services (see the Courts Service Act, 1998, s. 7), has very recently published its first major statutory strategic plan. This plan has been published simultaneously in Irish and English..."

Hardiman J. (who together with McGuinness J., formed the majority) did not confine his judgment simply to those statutory instruments which prescribed rules of court and put the matter even more forcefully :-

"I stát inarb í an Ghaeilge an teanga náisiúnta agus an chéad teanga oifigiúil agus atá geallta do pholasaí dátheangachais faoi shainordú reachtúil, is gá dlíthe a eisiúnt agus nuair atá sin riachtanach, iad a fheidhmiú i ngach ceann de na teangacha oifigiúla." (at 330).

In a State in which Irish is the national and first official language and which is committed to a statutorily mandated policy of bilingualism, it is necessary that the laws should be issued and where requisite, enforced in each of the official languages. and at page 321:-

"O tharla téamaí Airteagail 8 agus an polasaí oifigiúil dátheangachais a bhfuil an Stát geallta dó, caithfidh an Stát úsáid ceachtar den dá theanga a éascú gan idirdhealú. Tá sé ar neamhréir iomlán leis an dátheangachais dlíthe a chur ar fáil in aon teanga amháin agus ní dhéantar a leithéid go bhfios dom in aon tír dhátheangach eile."

"In view of the terms of Article 8, and the official policy of bilingualism to which the State is committed, the State must facilitate the use of either language without discrimination. The production of laws in one language only is totally inconsistent with bilingualism, and is not paralleled to my knowledge in any other bilingual country."

In making these observations, Hardiman J. did no more than render explicit the logic underpinning McGuinness J.'s decision and applied principles which have been laid down by the Irish courts over decades: namely that citizens are entitled to transact their business with the State in Irish if they wish, whether they speak English or not, and that no obstacle should be placed in the way of the Irish-speaker *qua* Irish-speaker in transacting his business. It is to this end that the State is committed to a policy of bilingualism in the provision of services. As accepted by Hardiman J., the publication of statutory instruments in English alone runs counter to this whole policy. Indeed, given that the vast bulk of legislation is now in the form of delegated legislation, to de-limit the obligation to make laws available bilingually to the "parent" Acts of the Oireachtas and not to their "offspring" statutory instruments would be illogical. Nor is it an answer for the State to invoke its own default (in allowing arrears of translation to arise) as a justification of denying rights to the citizen.

Neither Hardiman nor McGuinness JJ. had to analyse whether the reference in Article 25 to 'laws' extended to statutory instruments and grounded the obligation to publish such instruments in both English and Irish elsewhere. On the face of it, this appears to be in keeping with the wording of section 7 of Acht na dTeangacha Oifigiúla/Official Languages Act, 2003 (not yet brought into force) which provides :-

"A luaithe is feidir tar éis aon Acht den Oireachtas a achtú, déanfar an téacs den chéanna a chló agus a fhoilsiú go comhuaineach i ngach ceann de na teangacha oifigiúla."

"As soon as may be after the enactment of any Act of the Oireachtas, the text thereof shall be printed and published in each of the official languages simultaneously."

However, in view of the philosophical basis of *O Beoláin* and decisions such as that of the Canadian Supreme court in *A.G. Québec v. Blaikie* [1979] 2 S.C.R. 1016, it is far from certain that Articles 34 and 40 of Bunreacht na hÉireann alone underpin the case for bilingual statutory instruments. In *Blaikie*, the Canadian court considered section 133 of the British North America (Constitution) Act, which provided :-

"133. Either the English or the French languages may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Québec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act and in or from all or any of the Courts of Québec. The Acts of the Parliament of Canada and of the Legislature of Québec shall be printed and published in both those languages."

In 1977, the Québec National Assembly enacted the Charter of the French Language (Bill 101), which provided *inter alia* that Acts and delegated legislation need only be enacted in French and in *Blaike*, the validity of Bill 101 *vis a vis* the mandatory provisions of the Constitution Act was successfully challenged; the Court interpreting "Acts" as including statutory instruments (at p.1027):-

"It is apparent that it would truncate the requirement of s.133 if account were not taken of the growth of delegated legislation. This is a case where the greater must include the lesser."

It will be interesting to see the reaction of the Irish Courts to foreign judicial authority for propositions which they have hitherto instinctively reached.

Hardiman J. joined McGuinness J. in the view that the task of providing bilingual legislation was not one of insuperable difficulty or unreasonable demand, particularly when undertaken as a matter of course rather than as an afterthought :-

"Tá an dátheangachas nó an ilteangachas i réim i dtíortha iomadúla agus ar ndóigh cuireann an tAontas Eorpach doiciméid choimpléascacha ar doiciméid dhlíthiúla cuid mhór díobh ar fáil gach lá sna teangacha oifigiúla go léir. Níl aon amhras orm ach gur féidir na cáipéisí dlíthiúla ábhartha go léir a chur ar fáil i nGaeilge ...

Bilingualism or multilingualism is a living reality in many countries and of course the European Union daily produces complex documents many of them of a legal nature, in all official languages. I have no doubt that it is quite possible to produce all relevant legal materials in Irish ...

Is éard atá ag teastáil ná córas mar a bhí ann ar feadh na mblianta: ceann a chur cáipéisí dlíthiúla ar fáil go rialta sa dátheanga oifigiúla mar is léir a tharlaíonn i dtíortha eile a bhfuil polasáí dátheangach nó ilteangach iontu agus níl teip leanúnach a leithéid de chóras a sholáthar comhsheasmhach leis an mBunreacht (Hardiman J at 329)

What is lacking is a system which existed for many years : one which routinely produced legal materials in both official languages, as appears to happen in other countries with a policy of bilingualism or multilingualism and the continued failure to provide such a system is inconsistent with the Constitution.

As to this last observation, which directly echoes that of McGuinness J., it is worth recalling that the EU has a number of official languages. Regulations, directives, decisions, recommendations and opinions are promulgated simultaneously in those languages every working day in the *Official Journal of the European Communities*.

Prescribed Forms

Insofar as statutory instruments prescribe forms in English alone and make the use of these forms mandatory, the imposition of English on those whose language of preference is Irish is particularly acute. Furthermore, it appears to be well-settled not only by majority of the Supreme Court but also by long-standing decision of the High Court that such a practice is unconstitutional. As O'Hanlon J. stated in *O Murchú v. Cláraitheoir na gCUideachtaí* (1988) TE 42 (which decision was cited with approval in *O Beoláin*) :-

"Da mba rud é gur glac (an saoránach) leis an gcomhairle sin (i.e. a h-aistriúchán féin de na foirmeacha a sholáthar) do bhéadh uirthi an stró agus an dua a bhainfeadh le saothar an aistriúcháin do ghlacadh uirthi féin - nó bh'fheidir táille d'íoc le duine a bhéadh níos oílte ná i féin i gcursaí dlí agus teangan - agus ar deireadh báire ní bhéadh a fhios aici ... go riabh an leagan a chuirfí os (comhair an údaráis Stáit) "ar aon dul" leis an leagan oifigiúil ... atá ar fáil gan dua don té atá toilteanach an leagan Béarala d'úsáid."

"Had (the citizen) taken that advice (ie to provide her own translation) she would have had to undertake the inconvenience and the difficulty which would accompany the work of translation - or perhaps pay a fee to someone more qualified than herself in matters and language and at the end of the day she would not know if the version of the form presented to (the State authority) is of "like effect" to the official version ... which is available without difficulty to the person willing to use the English language version of the form."

The Consequences of Inaction

In the European Union, a law may not come into effect unless and until it has been promulgated in all of the official languages. In *Opel Austria GmbH v. Council of the European Union* (Case T-115/94) the European Court of Justice held at para. 127:-

"The issue of the Official Journal in which the contested regulation was published is dated 31 December 1993. According to Article 2, the regulation is to enter into force on the day of its publication in the Official Journal. However, according to written replies from the Publications Office to questions put by the Court, the Official Journal of 31 December 1993 was not made available to the public at the head office of the Publications Office in all the official languages of the Community until 4.45 pm on 11 January 1994...It follows that the actual date of publication of the issue of the Official Journal in question in the present case is 11 January 1994 and that the regulation did not enter into force until that date"

The Canadian case of *Re Manitoba Language Rights* [1985] 1 S.C.R. 721 is also instructive. When the province of Manitoba joined British North America in 1870, the territory boasted a small francophone majority and an Anglophone minority. As a result, section 23 of the Manitoba Act, 1870 provided:-

"23. Either the English or the French languages may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleadings or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both these languages."

By 1890, Anglophones had become the majority community in Manitoba and the provincial legislature enacted the Official Language Act (Manitoba), 1890. This provided *inter alia* that the Acts of the Manitoba legislature could be printed and published in English only.

The courts of Manitoba repeatedly ruled that the Act of 1890 was invalid: *Pellant v. Hebert* (1892) reported in 1981: 12 R.D.G. 242 (Man. Co. Ct.); *Bertrand v. Dussault* (1909) reported in 1977: 77 D.L.R. (3d) 458 (Man. Co. Ct.); and *R. v. Forest* (1976) 74 D.L.R. (3d) 704 (Man. Co. Ct.), but the practice of mono-lingual legislation continued. In 1978, the Act of 1890 was again successfully challenged in *Attorney General of Manitoba v. Forest* [1979] 2 R.C.R. 1032 but it was not until the case of *Re Manitoba Language Rights* that the Supreme Court considered the status of the monolingual legislation enacted since 1890. In delivering judgment, the Court held that the invalid current Acts of the legislature were to be deemed temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication. As in *Blaikie*, the words 'Acts of the legislature' in s. 23 of the Manitoba Act, 1870, were held to encompass "all statutes, regulations, and delegated legislation of the Manitoba Legislature, enacted since 1890."

Despite the minimum period of time granted to clear these arrears, the Court made it clear that the Acts and statutory instruments of Manitoba must from that day forth be enacted, printed and published bilingually or they would be "invalid and of no force or effect *ab initio*"(at 725).

Such a *via media* may recommend itself in Ireland where the arrears of statutory instruments are of a far lower order. However, the Irish authorities have little reason to be sanguine, given the minatory words of Hardiman J. in *O Beoláin* :-

Bheadh dul amú tromchúiseach ar na freagróirí ... dá nglacfaidís leis go mbeadh feidhm in aon chás da leithéid amach anseo leis an smainteoireacht arbh é a toradh gur diúltaíodh ordú toirmisc sa chás

seo. Agus í á teorannú féin le faoiseamh dearbhaithe tá an chúirt seo ag glacadh leis an ngníomhófar de réir na ndearbhuithe sa chás áirithe seo agus go ginearálta. Trí gan ghéarchéim nó náiriú a chur sa bhealach ar na húdaráis sa chás áirithe seo ... tá an chúirt ag léiriú an mheasa is airde ar na hargóintí a tugadh chun cinn maidir le ceart an phobail ionchúiseamh a dhéanamh. Mura ndéanfaí beart de bharr na ndearbhuithe a tugadh, dá neamhdhóchúlá é sin, d'athrófaí go sonrach cothromaíocht na gcearta sin a chuaigh i gcion ar an rogha bhreithiúnach a dhéanamh. Agus d'fhéadfadh sé seo tarlú i gcás a mbeadh géarchéim nó iogaireacht níos mó a baint leis ná mar atá leis an gcás seo faoi láthair.

It would be gravely mistaken for the ... respondents to assume that the considerations which lead to the refusal of an order of prohibition in this case would apply to any similar case in the future. In limiting itself to declaratory relief, the Court is making the assumption that the declarations will be acted upon both in the particular case and in general. In omitting, in this particular case, to confront the authorities with an emergency or embarrassment ... the Court is giving the fullest measure of respect to the arguments advanced in relation to the communities right to prosecute. If, most improbably, no action was taken on foot of the declarations made, the balance of these rights affecting the exercise of discretion would be significantly altered. And this might arise in a case more urgent or sensitive than the present one

Táthar ag súil go bhféadfar a leithéid de ghéarchéim a sheachaint sa todhchaí..." (at 332)

It is to be hoped that such an emergency may be avoided in the future ..."•

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Edited by Desmond Mulhere, Law Library, Four Courts.

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ADMINISTRATIVE LAW

Article

Spencer, Keith
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Equality bill, 2004 1st stage - Seanad	Proceeds of crime (amendment) bill, 2003 1st stage - Dail	5/2004 Motor Vehicle (Duties and Licences) Act 2004 <i>Signed 10/03/2004</i>
Freedom of information (amendment) (no.2) bill, 2003 1st stage - Seanad	Public service management (recruitment and appointments) bill, 2003 1st stage - Dail	6/2004 Public Health (Tobacco) (Amendment) Act 2004 <i>Signed 11/03/2004</i>
Freedom of information (amendment) (no.3) bill, 2003 2nd stage - Dail	Railway safety bill, 2001 Committee - Dail	7/2004 Public Service Superannuation (Miscellaneous Provisions) Act 2004 <i>Signed 25/03/2004</i>
Fur farming (prohibition) bill, 2004 1st stage - Dail	Registration of lobbyists bill, 2003 1st stage - Dail	8/2004 Finance Act 2004
Garda Siochana bill, 2004 1st stage - Seanad	Residential tenancies bill, 2003 2nd stage - Dail	9/2004 Social welfare (Miscellaneous Provisions) Act 2004 <i>Signed 25/03/2004</i>
Health (amendment) bill, 2004 1st stage - Dail	Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000 Committee - Dail	10/2004 Aer Lingus Act 2004 <i>Signed 07/04/2004</i>
Housing (state payments) bill, 2004 1st stage - Seanad	Sea pollution (miscellaneous provisions) bill 2003 1st stage - Seanad	11/2004 Air Navigation and Transport (International Conventions) Act 2004 <i>Signed 13/04/2004</i>
Human reproduction bill, 2003 2nd stage - Dail	Social welfare (miscellaneous provisions) bill, 2003 2nd stage - Dail	Abbreviations BR = Bar Review CIILP = Contemporary Issues in Irish Politics CLP = Commercial Law Practitioner DULJ = Dublin University Law Journal FSLJ = Financial Services Law Journal GLSI = Gazette Society of Ireland IBL = Irish Business Law ICLJ = Irish Criminal Law Journal ICLR = Irish Competition Law Reports ICPLJ = Irish Conveyancing & Property Law Journal IELJ = Irish Employment Law Journal IFLR = Irish Family Law Reports IILR = Irish Insurance Law Review IJEL = Irish Journal of European Law IJFL = Irish Journal of Family Law ILTR = Irish Law Times Reports IPELJ = Irish Planning & Environmental Law Journal ITR = Irish Tax Review JISLL = Journal Irish Society Labour Law JSIJ = Judicial Studies Institute Journal MLJI = Medico Legal Journal of Ireland P & P = Practice & Procedure
International criminal court, 2003 1st stage - Dail	The Royal College of Surgeons in Ireland (Charter Amendment) bill, 2002 2nd stage - Seanad [p.m.b.]	
International development association (amendment) bill, 2003 1st stage - Dail	Transfer of execution of sentences bill, 2003 1st stage - Seanad	
International peace missions deployment bill 2003 1st stage - Dail	Tribunals of inquiry (evidence) (amendment) bill, 2003 1st stage - Seanad	
Interpretation bill, 2000 Committee - Dail	Twenty-fourth amendment of the Constitution bill, 2002 1st stage - Dail	
Irish nationality and citizenship and ministers and secretaries (amendment) bill, 2003 1st stage - Seanad	Twenty-seventh amendment of the constitution bill 2003 2nd stage - Dail	
Law of the sea (repression of piracy) bill, 2001 2nd stage - Dail (Initiated in Seanad)	Twenty-seventh amendment of the constitution (No.2) bill 2003 1st stage - Dail	
Local elections bill, 2003 1st stage - Dail	Twenty-seventh amendment of the constitution bill 2004 2nd stage - Dail	
Maritime security bill, 2004 1st stage - Seanad	Waste management (amendment) bill, 2002 2nd stage - Dail	
Maternity protection (amendment) bill, 2003 Committee - Seanad	Waste management (amendment) bill, 2003 1st stage - Dail	
Money advice and budgeting service bill, 2002 1st stage - Dail (order for second stage)	Water services bill, 2003 1st stage - Seanad	
National economic and social development office bill, 2002 2nd stage - Dail (order for second stage)		
National transport authority bill, 2003 1st stage - Dail		
Ombudsman (defence forces) bill, 2002 1st stage - Dail (order for second stage)		

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

Suing the State for Breaches of Community law by the Supreme Court

Anthony Lowry BL

Introduction:

The European Court of Justice (hereinafter the 'ECJ') has recently delivered a decision of monumental importance in the case of *Kobler v. The Republic of Austria*¹ which definitively established that Member States can be rendered liable for breaches of European Community law committed by their Supreme Courts². As a result, all Irish Supreme Court decisions involving the appraisal of Community rights, delivered within the last 3 to 6 years³, are now open to challenge for breach of Community law⁴.

The case raised a number of important issues relating to Member State liability for breach of Community law within the context of the national legal systems, both in terms of the substantive content of the remedy and the extent of national procedural autonomy in the operation of the doctrine in the national legal orders.

Mr Kobler, an Austrian national, had been employed pursuant to a public law contract with the Austrian state as an ordinary university professor in Innsbruck. Upon his appointment, Mr Kobler had been awarded the salary of an ordinary university professor with a normal length of service increment. He applied to the competent administrative body in Austria, relying upon article 50A of the Gehaltsgesetz (hereinafter the 'GG'), seeking a special length of service increment (hereinafter the 'SLSI') applicable to university professors with fifteen years service at Austrian universities. Mr Kobler claimed that although he had failed to meet the length of service requirement with Austrian universities, he met the requirement if his service with universities outside Austria (and within the EU) was taken into consideration.

This claim was rejected and Mr Kobler appealed to the Verwaltungsgerichtshof (hereinafter 'the supreme administrative court') submitting that the limitation of the length of service requirement to Austrian universities constituted indirect discrimination, unjustified under Community law. Thereafter, on the 24th of June 1998, the Austrian court, having withdrawn its request for

a preliminary ruling⁵ dismissed Mr Kobler's application concluding that the SLSI was a loyalty bonus objectively justifiable on the grounds that it encouraged university professors to remain in Austria. Subsequent to this decision, Mr Kobler brought an action before the regional civil and commercial court of 1st instance in Vienna, seeking damages against the Republic of Austria for reparation of the loss he had suffered as a result of the refusal to extend the SLSI to him maintaining that the judgment of the supreme administrative court infringed directly applicable provisions of Community law, specifically Article 39 EC.

The regional court in Vienna then referred five questions to the European Court of Justice pursuant to the preliminary reference procedure. In substance these questions asked whether the acts of supreme courts could, in principle, render the State liable for breaching Community law and, if so, in what forum this claim should be pursued and upon what conditions such liability should be imposed. Finally, the Austrian court asked whether the Austrian Supreme Court's actions rendered the State liable on the facts.

The judgment of the court:

The court began by reiterating its position in *Brasserie de Pêcheur and Factortame*⁶ (hereinafter '*Brasserie*') that the doctrine of member state liability for breach of Community law applies, whichever authority of the member state was responsible for the breach. Echoing Advocate General Leger's opinion⁷, the court stated:

"In international law a state which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community legal order since all state authorities, including the legislature, are bound in performing their task to comply with the rules laid down by Community law which directly govern the situation of individuals."⁸

1. Case C-224/01 [2003] 3 CMLR 1003. See also opinion of Advocate General Leger, 8th April 2003.

2. References to 'Supreme Courts' should be understood throughout as references to national courts adjudicating at final instance.

3. The exact limitation period will depend upon the nature of the claim and the Statute of Limitations Act 1957, as amended.

4. See, generally, *Wattel* "Kobler, Clifit and Welthgrove: We can't go on meeting like this" [2004] 41 CMLRev 177-190.

5. The Court originally sought a preliminary reference from the ECJ on the issue, but this was withdrawn,

following an enquiry from the Registrar, on the basis that the legal issue the subject matter of the question submitted for a preliminary ruling had been resolved in the case of *Schoningh Kougebetopoulou*, Case C15/96 (1998) ECR I 47. The ECJ, in *Kobler*, note 1 above, indicated that the Austrian Supreme Administrative Court had submitted an inaccurate description of the SLSI, in its reference to the ECJ and this had caused the erroneous invitation to withdraw the preliminary reference.

6. Joined Cases C-46/93 and 48/93, [1996] ECR I-1029.

7. See note 1 above, at para's 45-47, where AG Leger

states that according to the principle of state unity, an unlawful act is necessarily attributed to the state and not to the state organ, which committed it, since only the state is a juristic person recognised as having rights and duties pursuant to international law. This principle was supported by Article 4(1) of the draft articles on the responsibilities of states drawn up by the international law commission and approved by the General Assembly of the UN on the 28th of January 2002.

8. See note 1 above, at para. 32.

The court drew attention to the essential role played by national judiciaries and to the fact that the full effectiveness of EC law would be weakened if individuals were precluded from obtaining redress for infringements of Community law attributable to courts of member states adjudicating at the last instance⁹. The court pointed out that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law and cannot ordinarily be corrected. The court made specific reference to Article 234 as indicative of the Treaty scheme to prevent rights conferred on individuals by Community law from being infringed by national courts.

The court then examined the core argument, that the imposition of such liability would infringe the principle of *res judicata* and interfere with the independence and authority of the judiciary, stating:

"In that regard, the importance of the principle of *res judicata* cannot be disputed. In order to ensure both stability of the law and legal relations and a sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.

However, it should be born in mind that recognition of the principle of state liability for a decision of a court adjudicated at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the state liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the state will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of state liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage." ¹⁰

On the issue of judicial independence, the ECJ pointed out that the principle of liability in question concerned not the personal liability of the judge, but that of the state. Therefore, the possibility that under certain conditions the state could be rendered liable for its judicial decisions contrary to Community law did not appear to entail any particular risk that the independence of the court to adjudicate at last instance would be called into question. The ECJ dismissed the argument that the extension of the principle of state liability to the decisions of courts of final instance would result in a diminution of the authority of that court, stating that:

"[T]he existence of a right of action that affords, under certain conditions, reparation of the unjust effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary."¹¹

Subject to the principle of effectiveness, it was for the national courts to designate the appropriate forum where individuals could obtain redress for breaches of EC law by courts of final instance. The court acknowledged the Advocate General Leger's opinion that although varying restrictions and conditions may apply to the imposition of liability for acts of the judiciary, most member states accepted the principle of state liability for judicial decisions in principle¹².

Finally, the court referred to the position under the European Convention on Human Rights and in particular Article 41 thereof, which entitles the European Court of Human Rights to order a state to pay damages for infringements of fundamental rights even where that infringement stems from a national court adjudicating at last instance¹³. In respect of the conditions that were to apply to assess whether or not a breach of EC law by a court of final instance was sufficiently serious for the purposes of imposing state liability, the court stated:

"[R]egard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the member states which submitted observations in this case have also contended. State liability for infringement of Community law by a decision of a national court adjudicated at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law."¹⁴

The ECJ stated that the relevant factors to be taken into consideration were the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC. Finally, the court ruled that these conditions did not preclude liability being imposed under less strict conditions on the basis of national law and, although the basis of member state liability for breach of EC law by courts adjudicating at final instance would be the applicable national rules, those rules must comply with the principles of equivalence and effectiveness.

The court then went on to consider whether or not the Austrian Supreme Administrative Court had committed a sufficiently serious breach, whilst acknowledging that they had no jurisdiction, pursuant to Article 234 EC, to decide whether a national provision was compatible with Community law. The court accepted the applicant's contention that the Austrian court had infringed Article 39 EC by upholding the administrative authority's decision to refuse to take Mr Kobler's period of employment in the universities located in other member states of the EU into account for the purposes of conferring the material benefit. However, in the opinion of the court, that breach was not sufficiently serious for liability to be imposed. The court's conclusion rested on the fact that Community law did not expressly cover the point and, moreover, the application of the relevant principles of Community law was not obvious. Finally, the Austrian court's failure to refer the matter for a preliminary ruling was based upon an incorrect

9. The Advocate General discussed the crucial role played by national courts in the implementation of Community law and protecting the rights of individuals, arguing, at para. 70, that it would amount to an insufferable paradox if member states could *prima facie* escape all liability for acts or omissions of its supreme courts when it

was those courts, which were specifically responsible for applying and ensuring compliance with Community law. The decisive role played by supreme courts of the member states for the application and enforcement of Community law carried with it as a *quid pro quo* accepting the principle of state liability for acts or omissions of

supreme courts.

10. See note 1 above, at para.'s 38-39

11. See note 1 above, at para. 43

12. See note 1 above, at para. 48. See also, AG Leger's Opinion, note 1 above, at para. 77-82.

13. Citing *Dulaurans v. France*, 21st March 2000.

14. See note 1 above, at para. 53.

reading of the court's earlier caselaw, which, in the Austrian court's opinion, obviated the need to refer the matter to the ECJ. Therefore, in those circumstances, the breach of EC law committed by the Austrian court was not considered to be manifest in nature and thus was not sufficiently serious.

Critical analysis:

The decision in *Kobler* raises a number of important issues worthy of further discussion. In the first place, the Advocate General's assertion that national judges are no longer, as Montesquieu believed, 'the mouthpiece of the law' when acting within the scope of EC law appears open to challenge¹⁵. This departure from the separation of powers doctrine is said to stem from the fact that national judges must cast a critical eye over domestic law to ensure its compliance with EC law. The archetypal example envisages national courts setting aside legislation validly enacted under domestic law in favour of justiciable EC norms. Of course, the Advocate General is quite correct in opining that such action ordinarily infringes the separation of powers doctrine. However, this viewpoint presupposes the absence of a lawful and, by extension, popular mandate to undertake this task and does not appear valid in this jurisdiction where the supremacy of EC law has a constitutional basis¹⁶ and, therefore, a legal and popular foundation. Indeed, this judicial role is similar to that entrusted to the superior courts to uphold the justiciable provisions of the Constitution. Unsurprisingly, the Court did not endorse this aspect of the Advocate General's opinion.

Secondly, the court relied heavily upon the principle, enshrined in Article 4(1) of the International Law Commission's draft articles on the responsibility of states, that the State must be viewed as a single entity for the purposes of public international law. As a result, state liability for breach of EC law is said to arise irrespective of the source of that breach and, therefore, Member States can be rendered liable for the misapplication of Community law by national courts adjudicating at last instance¹⁷.

Whilst the logic of this rationale is beyond reproach and, indeed, supported by the Court's earlier jurisprudence relating to Member State liability for breach of EC law, one cannot overlook the irony inherent in the Court's reliance upon a principle of international law to justify the extension of a doctrine that has no legal basis under the correct application of the rules of public international law¹⁸.

The third issue that arises relates to the concerns, raised by a number of Member States, that the imposition of liability for breaches of Community law for acts of national courts adjudicating at last instance may impinge upon the independence of the judiciary. The Court

rejected this proposition, distinguishing the liability of the state for acts of the judicial organ, from the personal liability of the judge for judicial acts. Only the latter category could, according to the Court, in any way bear upon the independence of the judicial organ.

*Casey*¹⁹ discusses this issue, in an Irish Constitutional context, casting doubt over the judgment of Flood J. in *Deighan v. Ireland*²⁰, where the above distinction was rejected²¹ and the possibility of state liability for acts of the judiciary discounted. *Casey* cites the following passage from the judgment of Walsh J. in *Meskeell v. CIE*²²:

"...a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any ordinary forms of action in either common law or equity and...the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right"

In the author's opinion, the European Court of Justice's position appears preferable to that of Flood J. since there is undoubtedly a qualitative distinction between personal liability of judges and state liability for acts of the judiciary in terms of the potential impact of liability for judicial acts upon the independence of the judiciary.

However, the ECJ's reasoning does little to resolve the over-riding difficulty of designating an appropriate forum in which such claims are to be heard.

The Court relied upon the further ground that most of the national legal systems had accepted the principle of state liability for acts of the judiciary in one form or another for acts of the judiciary as a matter of national law, citing paragraphs 77 to 82 of the Advocate General's opinion to support this conclusion²³.

However, the Advocate General's appraisal of the national rules relating to State liability for judicial acts merely served to highlight the considerable divergences in the approaches of the various Member States. For example, certain Member States limited liability to the procedural guarantees set out in Articles 5 and 6 of the ECHR, other Member States expressly excluded liability for the acts of superior courts. Indeed, Belgium was the only Member State that recognized, without limitation, the right to recover damages for breaches of national law committed by superior courts²⁴.

15 See AG Leger's Opinion, note 1 above, at para. 59 Article 29.4.3 of the Irish Constitution.

17 The Court was careful not to extend this principle to the actions of national courts generally, a view canvassed by the German and Netherlands Governments.

18 See *De Witte*, "Community law and National Constitutional Values" (1991) 2 LIEI 1: "The Costa controversy ... was about the internal primacy of EC Law, that is, the duty of national courts to enforce EC rules when they conflict with national legislation. Such a duty had never been considered to be a part of International Law, although the failure of courts to enforce International Treaty rules could, of course, be a contributory factor in the establishment of State responsibility under International law"

19 Constitutional Law in Ireland, 3rd Ed., pp. 306-8

20 [1995] 2 IR 56

21 Distinguishing *Maharaj v. Attorney General of Trinidad* (no. 2), [1978] 2 All ER 670

22 [1973] IR 121, at pp. 132-3

23. Interestingly, the Advocate General had referred to the European Convention on Human Rights Act 2003 as standing for the proposition that the Irish State would, in future, be rendered liable for breaches of the Convention committed by the judiciary. Leaving aside the question whether, in light of the High Court's decision in *Deighan v. Ireland*, such a proposition would be constitutionally permissible, it must be observed that the courts have been excluded from the definition of 'organs of the state' bound by the duty to act in accordance with the provisions of the Convention under the 2003 Act. This appears, *prime facie*, to rule out the possibility that liability of the state could arise under the 2003 Act for acts or omissions of the judiciary. There is, of course, the

residual argument that a failure by the courts to apply the terms of the Convention correctly could result in the denial of an effective remedy under Article 13 of the Convention. However, there remains a large degree of uncertainty as to how such claims will be received by the Courts and, in any event, it is premature to assume that such a claim will be successful.

24. In some ways this was analogous to the ECJ's decision in *Brasserie* where the Court found that liability for acts of the legislature was a principle common to all the Member State's legal systems notwithstanding the fact that considerable divergences existed between those systems.

National rules of *res judicata* represented the principle obstacle to recognition of a right to reparation for breaches of Community law committed by the Member State's supreme courts. The doctrine of *res judicata* is long established within the Community legal order²⁵. Nonetheless, a specific difficulty arises where Community rights are adjudicated upon before the national courts since the individual has no automatic right of recourse to the ECJ and is reliant upon the domestic court making a reference. In the absence of such a reference, one could argue that the decision of the national court cannot be *res judicata* since, pursuant to the doctrine of supremacy and direct effect, only the ECJ can conclusively rule upon the interpretation of Community law²⁶. However, this is a complex issue that highlights the tension inherent in the system for enforcement of Community law arising from the need to reconcile the objective of ensuring the effective and uniform application of Community law, with the deference shown by the ECJ to national procedural autonomy in the enforcement of Community rights²⁷. This explains the composite nature of the ECJ's decision that sought to balance these competing interests.

Firstly, the Court expressed doubts as to whether national rules of *res judicata* could apply in such a case, as the two actions would not necessarily have the same purpose or involve the same parties. In this regard, whilst there is quite clearly a distinction between the operation and function of the doctrines of direct effect and Member State liability for breach of Community law, the doctrine of issue preclusion prevents the re-litigation of a precise point that has been decided by a Court of competent jurisdiction²⁸ and since the Supreme Court's decision will have concluded that no breach occurred, the matter would appear to be *res judicata*²⁹.

The second ground upon which the Court rejected the *res judicata* argument proposed by the Member States raises an issue of broader and more fundamental importance. According to the Court, the obligation to make reparation for breaches of Community law perpetrated by Supreme Courts of the Member State did not carry with it the automatic duty to revise the original, erroneous, Supreme Court judgment. The Court's decision appears to leave open the possibility that national rules of *res judicata* will retain their validity in respect of judgments of national courts adjudicating at final instance concerning matters within the scope of Community law, even where the national court fails to make a request for a preliminary reference from the ECJ and falls into error. The Court makes explicit reference to 'judicial decisions which have become definitive after all rights of appeal have been exhausted'. Although an ambiguity remains as to whether 'rights of appeals' includes a preliminary reference to the ECJ, it appears that the Court recognizes the need to uphold judicial decisions where all domestic 'rights of appeal' have been exhausted, entailing ECJ recognition of national rules of *res judicata*.

In practice, the operation of domestic rules of *res judicata* could prevent an individual from relying upon a Community right to which they are properly entitled. Allowing the individual to claim for damages against the State does not, as the Advocate General correctly pointed out, provide full substantive reinstatement and, thereby, the optimum means of protection³⁰.

Moreover, if an individual's right to invoke such a Community right, in the face of a binding, conflicting national court ruling, were dependent upon the making of a referral for a preliminary reference by the national Court, this would introduce an unacceptably high degree of uncertainty for the individual³¹.

Finally, the fact that an individual's right to recover damages against the State for acts of the superior courts is limited to 'the exceptional case where the court has manifestly infringed the applicable law' places the prospect of success for such a litigant in the lower order of probability. Cumulatively, these considerations would arguably constitute an infringement of Article 47 of the Charter of Fundamental Rights of the European Union, which provides that 'everyone whose rights and freedoms guaranteed by the Union are violated has the right to an effective remedy before a Tribunal'³².

However, there are cogent countervailing reasons why the court might adopt such an approach. In the first place, the ECJ is not a Court of Appeal in any ordinary sense and exceptions exist to the mandatory duty to refer matters concerning the interpretation of Community law to the ECJ under Article 234(3)³³. Secondly, the court has consistently stated that in the absence of harmonized rules for the enforcement of Community rights, it is for the Member States to designate the courts or tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights, which the individual might derive from Community law. Thirdly, the ECJ recognizes the role fulfilled by national procedural rules that attempt to ensure the sound administration of justice and to preserve legal certainty, reflected, in the case of *res judicata*, in the latin maxims: "*interest reipublicae ut sit finis litium*"³⁴ and "*nemo debet bis vexari pro una et eadem causa*"³⁵. In such cases, the ECJ will permit national rules to procedurally limit the enforcement of Community rights, provided those rules comply with the principles of equivalence and effectiveness. The former principle requires the same procedural treatment of claims based on Community law as applies to claims based on domestic law, while the latter principle requires that national procedural rules must not render the exercise of community law rights impossible or excessively difficult.³⁶ The operation of national rules of *res judicata* amounts, in effect, to making the enforcement of Community rights impossible and would appear, therefore, to contravene the principle of effectiveness. However, this conclusion must be balanced against the negative practical implications for the legal systems of the Member States if national rules of *res judicata* were inapplicable where national supreme courts act within the scope of Community law.

In practice, this would have enormous adverse consequences for the Member States' legal systems since there could be no finality to Community law litigation before the national courts, unless there was a reference to the ECJ. Such a situation serves neither the interests of the national regulatory system, nor the interests of the Community courts, who could expect to be inundated with requests for preliminary references from national supreme courts seeking to ensure some finality to their decision-making³⁷. This may explain why the ECJ decision

25. See Joined Cases 79/63 and 82/63, *Reynier v. Commission*, [1964] ECR 259.

26. Case 161/73, *Rheinmühlen*, [1974] ECR 33, at pp. 38-9

27. For example, compare Case C-208/90, *Emmott* [1991] ECR I-4269 with Case C-410/92, *Johnson (no.2)* [1994] ECR I-5483

28. See, *McDermott, Res Judicata and Double Jeopardy*, Butterworths (1999), at p. 72.

29. Although the 'change of law' exception could, arguably, apply in such a case, an issue discussed further below.

30. See note 1 above, at para. 39.

31. See *Schermer and Waelbroeck, Judicial Protection in the European Union*, 6th Ed., at para. 910, on the inadequacies of

the preliminary reference procedure for the protection of the rights of individuals' in the context of challenging the legality of acts of the institutions of the Community.

32. See Article 13 ECHR to similar effect.

33. See the seminal judgment of *CILFIT*, Case 283/82, [1982] ECR 3415.

34. The general interest of the community in the termination of disputes and in the finality and conclusiveness of judicial decisions, see *McDermott, Res Judicata and Double Jeopardy*, op cit, at p. 19.

35. *Ibid*: The individual has the right to be protected from a vexatious multiplication of suits at the instance of an opponent.

36. See Cathrina Keville "The Principle of Effectiveness and the Development of a System of Remedies at EC Law" in *Irish Perspectives on EC Law*, edited by Lucey and Keville at p.5.

37. Although, as *Wattel* observes, this could well be the necessary corollary of the decision in *Kobler* itself, since national superior courts may be inclined to refer a question of Community law rather than risk rendering the state liable for breach of Community law, irrespective of the Court's decision in Case 283/81, *CILFIT*, [1982] ECR 3415, see "Kobler, Cifit and Welthgrove: We can't go on meeting like this" [2004] 41 CMLRev 177-190 at p.178.

expressly states that there is no necessity, as a matter of Community law, to over-rule earlier Supreme Court judgments where those judgments are subsequently shown to be contrary to a justiciable Community norm.

Although it now appears that the application of national rules of *res judicata* will not, *per se*, infringe the principle of effectiveness, the principle of equivalence will continue to apply to such domestic rules, at least insofar as they relate to administrative decisions. For example, *res judicata* will not defeat a subsequent action brought by an individual where the national court has the power to reopen the original administrative decision under domestic law, which had become final, and was, in light of an ECJ decision, based upon a misinterpretation of Community law, where a preliminary reference was not made and the individual brought the ECJ decision to the attention of the administrative body as soon as they became aware of it³⁸.

In respect of the doctrine of issue preclusion, the principle of equivalence would certainly require national courts to allow re-litigation of such issues on the basis of the 'change of law' exception upon the same terms as apply to decisions based on national law³⁹. However, ordinarily, where an individual seeks the full substantive

benefit of a Community norm denied to them in previous litigation, they will be faced with the doctrine of 'cause of action' estoppel, to which the 'change in the law' exception does not apply⁴⁰. A detailed analysis of this matter lies outside the scope of this article.

Conclusion:

The *Kobler* case clarified that the decisions of national supreme courts can render the State liable for breach of Community law. The restriction of this right to the decisions of national courts adjudicating at final instance preserves the respective roles of national and Community courts in the enforcement of Community rights. No such remedy should be available to litigants who fail to exhaust their domestic remedies since the mandatory duty to refer questions relating to the interpretation of Community law under Article 234(3) EC only applies to national courts adjudicating at last instance. Whether this, in and of itself, involves the *de facto* repeal of national rules of *res judicata* remains uncertain⁴¹. However, it appears that such rules retain their validity, provided they comply with the principle of equivalence. The operation of this principle in practice will, no doubt, be elaborated upon by the ECJ on a case-by-case basis.●

38. See Case C-453/00, *Kuhne & Heitz NV v. Productschap voor Pluimvee en Eieren*, Judgment of the 13th January 2004.

39. See *McDermott*, *Res Judicata and Double Jeopardy*, op cit, at p. 160-161.

40. *Ibid.*

41. See *Wattel*, "Kobler, Cilfit and Welthgrove: We can't go on meeting like this" [2004] 41 CMLRev 177-190, at p. 177.

Supreme Courts – what are they for?

Conor Maguire SC

This speech was delivered by the Chairman of the Bar Council, Conor Maguire, to the World Conference of Barristers and Advocates in Capetown, South Africa on 14 April, 2004

It is a privilege for me to address a conference such as this on a topic which seems to have increasing relevance to democracies in the common law world. I hope by giving some account of our court structure and in particular the Supreme Court and the part it has played in the development of our independent democracy, that our experience will be of interest to those jurisdictions that have more recently considered, or adopted the concept.

The question posed is "Supreme Courts – what are they for?" I am not providing a complete answer, but there are some pointers that emerge from an analysis of our legal system.

It is rare to find an unquestioned value in Western society. Perhaps one of the last remaining is democracy – the idea that all members of a society have a say in their government. And elected representatives make the laws by which that society lives.

But if elected representatives make the law, it is usually unelected judges who say what that law means. This is the paradox at the heart of western democracies – what we value most, the popular will of the people – is protected by the vestiges of an almost feudal courts system, that has as its apex, instead of a king, a supreme court – be it called by that name, or a Constitutional Court, or the House of Lords or High Court of Australia.

The idea of democracy sits well with the current social trends – the post-modern notion of no fixed, discernible truth; the Third Way and its attendant shunning of traditional trenchant politics. The idea of a Supreme Court does not fit so well. Old lawyers in old robes reading the tea leaves of the legislature to decide what they mean.

Turning to our jurisdiction, our Constitution provides in the first instance that the Irish Supreme Court is our final court of appeal. Each and every decision of the High Court, a court of full original jurisdiction in all matters, can be appealed to the Supreme Court. There are also courts of limited jurisdiction in the Irish legal system – the District Court and the Circuit Court – and the Supreme Court can deal with points of law that arise in these courts under the "case stated" procedure.

Secondly, the Supreme Court has the final say in interpreting the Constitution. The Irish Constitution, in Irish, Bunreacht na hEireann, specifically provides for the courts to review the legislation of the Oireachtas, our national parliament, to decide whether such legislation is in conformity with the Constitution.

The third role of the Supreme Court is set down in Article 26 of the Constitution. This allows the elected President, who signs all legislation into law, to send legislation to the Court for a determination on its constitutional status before it is signed and enacted.

The Supreme Court's main business is as an appellate court, and it combines the two roles of final court of appeal and constitutional court, that are divided in many other countries, such as here in South Africa.

Though our current Constitution, Bunreacht na hEireann, was adopted by plebiscite in 1937, it builds on the Constitution of the Irish Free State of 1922 which was adopted on achieving our independence. That Constitution still had the English Monarch as Head of State. The 1937 Constitution was a new departure, setting the stage for the declaration of a Republic in 1948, but it also allowed for continuity, just as its predecessor had done. With independence in Ireland, the laws did not change, but their basis did. While post-independence legislation is enacted by the Dail, our independent Parliament, pre-independence statutes, unless amended, still have force of law, but they are enforced in light of the Constitution.

The Supreme Court in Ireland has never been questioned as the Supreme arbiter of law. While it may be considered as old lawyers in old robes, perhaps the important thing is that it is seen as *our own* lawyers serving *our* public interest.

Unlike Britain, there was never tension in Ireland between the monarchy and parliament. Perhaps that's because the last time of effective Irish monarchy was arguably before the invasion of the Vikings. It ended with High King Malachi in 795 A.D. The historical tension in Irish political life was always between foreign rule and aspirations for self-government.

While the memory of bloody civil war in England and the fear of despotic rule arguably underscores the debate over the limited role of any Supreme Court there, that does not hold in Ireland. The notion of a Supreme Court in England, Lords by whatever new name, holding that Parliament's laws are invalid, perhaps reeks too much of a return to sovereign power for many in England, lawyers and laymen alike.

I can say with some confidence, but not smugly, that in Ireland, the Supreme Court is seen as learned and experienced, reflecting the supreme will of the people. The Supreme Court is the guardian of the Constitution, and as such has a unique role in interpreting the will of the people.

In the same way, the courts system protects our society. The system is traditional and perhaps autocratic, without the benefit of much democratic input. But it stands guard over the democracy at the heart of our society. It performs and is seen to perform an essential task.

Governments write the laws, but it is the courts, and most importantly the Supreme Courts, that speak those laws. Democracy is the way we select our governments. The actions of government cannot reflect badly on the notion of democracy.

We follow and accept the judgments of Supreme Courts because of their bona fides, which in turn reflects their independence and demonstrable fairness.

Our Attorney General, Rory Brady, yesterday dealt comprehensively with the appointment of judges but at this juncture I would like to say something about the composition of our Supreme Court. There are now eight sitting members of the Supreme Court, namely the Chief Justice and seven ordinary members. The President of the High Court is also an *ex officio* member of the Court. They are appointed either from the ranks of the High Court judges or directly from the Bar. Although that system is sometimes criticised, historically it has proved successful.

Changing role of the Supreme Court

With a United Nations where nations are not united and Common Law system where the law is not common – it is perhaps not surprising that Supreme Courts are not necessarily supreme. In Ireland, the Supreme Court's main job is to correct the homework of High Court judges. But increasingly, it does not have the final say in matters. The increasing role of the European Court of Justice, and the requirement to apply European law by national courts, means that for many matters, the Irish Supreme Court may be reviewed in its decisions in Europe.

Further, since the 31 December 2003, all Irish laws must be read in the light of our commitment to the European Convention on Human Rights. The Act that brought this in is similar to the 1998 Act in the UK, but it is anticipated that it won't have as great an impact in Ireland, as we already have the concept of antecedent fundamental rights in our Constitution, and since 1965 there has been a recognition in the Supreme Court that the rights set out in the Constitution are not finite and fixed, but encompass un-enumerated rights, that allows the Constitution to grow organically.

The Irish Supreme Court has always shown adaptability. It moved smoothly from the 1922 Constitution to the 1937 Constitution. Since 1973, it has shown such adaptability in taking its place in the "new legal order" of what is now the European Union.

I have described the Supreme Court as stringent but flexible. Perhaps part of the unqualified public acceptance of the Supreme Court is due to its ability to deal with changing circumstances and developments in Irish society. An example of this is the Court's interpretation of personal rights as contained in Article 40. In the 1960s, the Irish Supreme Court made some notable decisions on the constitutional validity of statutes that had significant implications in such areas of freedom of association, property rights, judicial power and personal liberty. It held, for instance, (*Ryan v. The Attorney General* 1965 I.R. 294) that the guarantee by the State to respect and as far as practicable to defend and vindicate the personal rights of the citizen, related not only to the personal rights specified in the Constitution in Article 40, but also to those other personal rights which may be formulated and defined by the Courts.

This body of jurisprudence has been built upon by successive Supreme Courts in the intervening decades. Subsequent decisions have extended these personal rights to include un-enumerated rights, such as the right to privacy, the right to earn a livelihood, the right to justice and fair procedures, the right to travel, the right to marry and others.

The overall impact of the courts in modern life, in their handling of constitutional issues, has undoubtedly been beneficial, rational, progressive and fair. The courts have stood guard over the Constitution. In their interpretation, they have protected the Constitution and at the same time interpreted it in such a way as to retain its relevance on a flexible but consistent basis.

What I have said thus far could be characterised as unqualified praise or endorsement of Supreme Courts. When I told one of my colleagues of my contribution in this regard, he made a point to emphasise the importance of the role of oral advocacy in our common law systems – an essential ingredient of a proper functioning Supreme Court. There appears to be a tendency to depend more and more on written submissions. There is thereby a trend to limit the extent of oral presentation in the interest of efficiency. This audience of advocates and barristers is well placed to recognise the value of proper oral presentation.

Returning to the question asked of us this morning, i.e. "Supreme Courts – what are they for?" Aside from fulfilling the roles I have outlined, in our jurisdiction since the foundation of the State, our Supreme Court continues to command the trust and respect of the lawmakers and the public at large.

I believe that if the people are the heart of a State, and the government is its brain, then the judiciary are its backbone. The courts in general, and the Supreme Court in particular, holds the system together in a stringent but flexible manner. ●

The European Convention on Human Rights Act 2003, a *Cause Célebre* for Privacy Rights in Ireland? – Part II

Martin Canny BL and Anthony Lowry BL

Introduction

The first part of this article discussed the possible horizontal effect of the European Convention on Human Rights (the “ECHR”) in Irish law following its incorporation into domestic law by the European Convention on Human Rights Act 2003 (the “ECHRA”). In this part of the article, it is proposed to analyse how the UK courts have approached several recent claims brought by media celebrities following press intrusions into their private lives. There, the English courts have used the doctrine of breach of confidence to decide these cases, a cause of action which has been given a “new strength and breadth”¹ following the incorporation into UK law of the European Convention on Human Rights by the Human Rights Act 1998 (the “HRA”). In that jurisdiction there has been considerable academic and judicial disagreement over the extent to which the ECHR has horizontal or indirect horizontal effect, such that private individuals will be able to rely on Convention rights in court proceedings against other individuals, or whether it will only have vertical effect, and so only be enforceable against the State. The HRA has led – thus far – to the English judiciary developing existing causes of action, and not creating a free-standing tort of invasion of privacy. With that in mind, it is worth analysing what the features of a breach of confidence action are, and following that, to ask how suitable a doctrine it is to resolve complaints of invasions of privacy.²

In a passage from *Coco v. A.N. Clark (Engineers)*³ that has been cited many times since, Megarry J. summarised the three traditionally accepted elements that are required for a successful action for breach of confidence as:

First, the information itself ... must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence.

Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.⁴

It is proposed to analyse how the UK courts have recently extended the scope of the doctrine through a liberal approach as to what these three elements involve.

1. The information must have the necessary quality of confidence.

This first element of a breach of confidence action can be broken down into several aspects.

(i) *The first requirement is that the complaint must concern protectable “information.”*

One point that has been accepted as axiomatic is that the information need not exist before it comes into the possession of the defendant. This is perfectly logical where the information concerns events observed by the defendant himself, while in a position of trust,⁵ but less so where the defendant has taken unauthorised photographs of the plaintiff. Such concerns were brusquely dismissed in *Douglas v. Hello! Ltd.*⁶ on the grounds that the information was what the couple looked like on their wedding day, which was not something that the general public knew. However, it has been noted that photographs have been treated differently to written accounts of events, even if an obligation of confidence attaches to both.⁷

(ii) *The information must not be in the public domain.*

This is perhaps the most serious shortcoming of a breach of confidence action when it is used to protect the privacy interests of an individual. The central point is that a confidence ceases to exist when others become aware of it. The plaintiff is left with a claim in damages against the person who wrongfully disclosed the information, but will have no claim against

1. Per Lord Woolf C.J. in *A. v. B. plc.* [2003] Q.B. 195; [2002] 3 W.L.R. 542, at para [4].
2. The House of Lords decision in *Campbell v. Mirror Group Newspapers* [2004] UKHL 22 (6 May, 2004) has come too late for a full discussion in the body of this article, but will be referred to mainly in the footnotes. In this appeal the House (by 3:2) reversed the decision of the Court of Appeal and restored the decision of Morland J., who had found for Ms. Campbell on

relatively narrow grounds.
3. [1969] R.P.C. 41.
4. *Ibid.*, at 47.
5. See *Woodward v. Hutchins* [1977] 2 All E.R. 751 and *Campbell v. Frisbee* [2003] E.M.L.R. 3; [2003] I.C.R. 141 (CA), where Naomi Campbell’s personal assistant revealed details of the model’s paramours.
6. [2003] 3 All E.R. 996. This is technically the sixth ruling given in the case. However, for the purposes of

this article, this will be referred to as *Douglas* (No. 2). *Douglas v. Hello! Ltd. (No. 1)* [2001] Q.B. 967 shall refer to the Court of Appeal judgment on the application for the interlocutory injunction.
7. Deazley, “Introducing Publicity Rights? Breach of confidence, the photograph and commodifying the image” (2003) 54 NILQ 99. See the discussion of *Theakston v. MGN Ltd.* [2002] E.M.L.R. 398, below, under the heading of “Defences”.

others who republish the information but who are not "tainted or associated with the original breach of confidence".⁸ However, the republication of photographs or retelling of private information will be no less – and perhaps even more – invasive of an individual's privacy rights. This point was emphasised in *Attorney General v. Guardian Newspapers Ltd. (No. 2)*,⁹ where Lord Goff stated that confidentiality does not attach to information once it has entered the public domain. He said that this "means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential".

In this case, the issue was directly confronted by the House of Lords. The Attorney General had sought an injunction to restrain several newspapers from publishing extracts from the book *Spycatcher*, which Peter Wright had written in breach of his duty of confidentiality to the Crown. However, copies of the book were freely available abroad, the British government being unable to block publication in several other countries such as Australia and the United States. Because of this, the Lords refused to grant an injunction to prevent further use of the information.

Lord Keith did recognise that although the confidences disclosed in *Spycatcher* were now public knowledge, cases could arise where, for example, secrets revealed in an American newspaper could still be the subject of an injunction to prevent republication in England if it would "bring it to the attention of people who would otherwise be unlikely to learn of it."¹⁰

The case of information obtained in a public place, where there is no pre-existing relationship of confidence – such as photographs of an individual on a public street – is perhaps the paradigm example of why breach of confidence is not an appropriate surrogate for an independent right to privacy. While only one of the post-HRA cases has had to directly confront this point, a weight of authorities would seem to indicate that there can be no confidence regarding to such information. This issue has also led to the European Court of Human Rights delivering its hugely significant decision in *Peck v. UK*.¹¹

In *Campbell v. MGN Ltd.*,¹² the plaintiff had complained of the disclosure of the fact of her attendance at Narcotics Anonymous meetings, and of photographs of her leaving a meeting. The court accepted Andrew Caldecott QC's distinction between a tort of invasion of privacy, which did not require a disclosure of confidential information, and a breach of confidence, which did. In short, the photographs "were of a street scene. They did not convey any information that was confidential... Without the captions the photographs were invasive, but did not convey confidential information."¹³

The use of the breach of confidence doctrine by the UK courts has to be contrasted with that of the European Court where, as noted above, in *Peck v. United Kingdom*¹⁴ it was held that footage of Mr. Peck walking

the streets in a distressed state following a suicide attempt was still capable of being "private" information. This was because there are a number of elements relevant to a consideration of whether a person's private life is concerned for activities that take place outside a person's home or private premises. Ultimately, "[a] person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive factor."¹⁵ It seems that both the intensely personal and traumatic acts of Mr. Peck that night and the fact that only a small number of passers-by would have seen him that night were important considerations in the classification of the information as private. Compared to the breach of confidence cases, this decision uses a different set of factors in determining whether an individual's right to privacy is engaged, and it has to be questioned whether the breach of confidence action can accommodate these other factors.

(iii) A third question which several judges in recent cases have asked under the "necessary quality of confidence" heading is whether the information disclosed was offensive in nature.

In *A. v. B. plc.*,¹⁶ Lord Woolf C.J. included a requirement that a private interest be identified, as one of 15 guidelines set out to aid judges faced with applications for interlocutory injunctions in breach of confidence and invasion of privacy cases. He approved the test used by Gleeson C.J. in *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd.*¹⁷ "The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."¹⁸

In *Campbell v. MGN Ltd.*,¹⁹ this test was used by Morland J. (and accepted on appeal by the Court of Appeal) as being part of the test of whether the information disclosed had the "necessary quality of confidentiality". Applying this test, the court drew an analogy between her therapy and medical treatment, and concluded that the information disclosed was confidential.

However, the concession by Naomi Campbell that there was a public interest in the press publishing the bare fact that she took illegal drugs was fatal to her case.²⁰ Her complaint, therefore, solely concerned the disclosure of information about treatment she was receiving for her drug problem at Narcotics Anonymous. The Court of Appeal held that this additional information was "not... particularly significant", and a "peripheral disclosure", and that the extra fact that she was attending NA meetings would not have been offensive to a reasonable person of ordinary sensibilities.²¹ This approach was adopted by Lords Nicholls and Hoffmann on appeal, but the majority judgments held that even peripheral facts about drug addiction treatment were significant, and that their disclosure could impede her recovery.

However, in *Douglas (No. 2)*, Lindsay J. pointed out that the first of Megarry J.'s elements of a successful action is itself a citation from Lord

8. Per Lord Griffiths in *Attorney General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, at 272. See Arnold, "Circumstances Importing an Obligation of Confidence" (2003) 119 LQR 195. In *Douglas v. Hello! Ltd. (No. 2)* awkward questions were side-stepped as to what the position would have been if the defendants had published their photographs one day after *OK!*, instead of attempting to steal their thunder.

9. [1990] 1 A.C. 109, at 282.

10. *Ibid.*, at 265. In *A. v. B. plc.*, [2003] Q.B. 195; [2002]

3 W.L.R. 542, and the various other cases involving secret relationships, the fact that a certain number of people may have seen the couple together in public was not held fatal to their claim for a breach of confidence.

11. [2003] 36 E.H.R.R. 41.

12. [2003] Q.B. 633; [2003] 2 W.L.R. 80.

13. *Op cit.*, at para [33]. Developments in other common law jurisdictions deserve to be noted as well. Contrasting approaches are evident in the cases of *Aubry v. Éditions Vice-Versa Inc.* [1998] 1

SCR 591; 157 D.L.R. (4th) 577 (Can SC) and *Hosking v. Runting* [2003] 3 N.Z.L.R. 385 (NZ HC).

14. [2003] 36 E.H.R.R. 41.

15. *Ibid.*, at para [58], quoting from PG and JH v. UK (App. No. 44787/98)

16. [2003] Q.B. 195; [2002] 3 W.L.R. 542.

17. [2001] 208 C.L.R. 199 (H.C.A.).

18. *Ibid.*, at para [42].

19. [2003] Q.B. 633; [2003] 2 W.L.R. 80.

20. This is discussed below under "Defences".

21. *Ibid.*, at paras [53]-[54].

Greene M.R. (from *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*²²) that stops mid-sentence.

Lindsay J. continued: "Lord Greene M.R.'s sentence in full read (with emphasis added): 'The information, to be confidential must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge.'²³ This factor will be revisited, briefly, where it rightly belongs – under the heading of whether "detriment" is necessary.

2. The "Obligation of Confidence"

The exact meaning of the second element of a breach of confidence action has proved somewhat elusive. Several early *dicta* state that a prior relationship between the parties is required for a confidence to be protected. These include the following statement by Costello J. in *House of Spring Gardens v. Point Blank*, that, in an action for breach of confidence a court must "firstly decide whether there exists from the relationship between the parties an obligation of confidence regarding the information which has been imparted."²⁴

However, the law has moved from this contract-based requirement of mutual obligations freely undertaken, to a purely equity-focused inquiry into how the recipient of information should act in the circumstances – i.e. how his conscience has been affected. It may be convenient to look separately at how the law treats personal information disclosed within a pre-existing relationship, and where no such relationship exists.

(i) Where there is no pre-existing relationship.

A widely quoted statement of what is necessary for an obligation of confidence to arise was provided by Lord Goff in *A-G v. Guardian Newspapers (No. 2)*:²⁵

"I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others ... [I]n the vast majority of cases ... the duty of confidence will arise from a transaction or relationship between the parties ... But it is well settled that a duty of confidence may arise in equity independently of such cases... [which] include certain situations, beloved of law teachers – where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary is dropped in a public place and is then picked up by a passer-by."

Following this *dictum*, several cases in the 1990's continued to relax the need for a pre-existing relationship. Interlocutory injunctions were granted in *Shelley Films Ltd. v. Rex Features Ltd.*²⁶ and *Creation Records Ltd. v. News Group Newspapers Ltd.*²⁷ to prevent the publication of photographs taken by conniving journalists. In the first of these cases, photographs were taken on the set of the movie *Mary Shelley's Frankenstein*, despite signs clearly stating that no photography was allowed. Deputy Judge Martin Mann Q.C. held that a fair question had been raised as to whether their publication would be a breach of confidence. In the latter case, the court also held that a serious case had been established that *The Sun's* photographer, while on the set of the Oasis photo shoot for the cover of their *Be Here Now* CD, had ostensibly agreed with the security staff's request not to take photographs. Because of this, his conscience was affected and the publishing of any photographs surreptitiously taken would amount to a breach of confidence. This conclusion was bolstered by *The Sun's* admissions in their newspaper that their photographer had successfully evaded the Oasis security team to obtain their "exclusive". These cases all pointed towards the courts now using a test of whether a "reasonable man" would think that any photographs taken would be subject to an obligation of confidence.²⁸

The acceptance of the reasonable man test, as a necessary and desirable extension of the doctrine in order to achieve compliance with the ECHR, was confirmed after a full trial in *Douglas v. Hello! Ltd. (No. 2)*.²⁹ As is well known, paparazzo Rupert Thorpe, having gained entry without an invitation to the celebrity wedding of Michael Douglas and Catherine Zeta-Jones, proceeded to take a number of slightly out-of-focus photographs which ended up as an exclusive spread in *Hello!* magazine. In doing so, he had evaded a considerable security presence, which was designed to safeguard the exclusivity of the wedding photographs, which *OK!* magazine had paid £1 million to secure. When Lindsay J. gave judgment in April 2003, he held that Mr. Thorpe knew of the steps to prevent unauthorised photography, so that "[s]uch images as were, so to speak, radiated by the event were imparted to those present, including Mr Thorpe and his camera, in circumstances importing an obligation of confidence."³⁰ Despite not having commissioned the photographs, and not caring about their provenance, *Hello!'s* knowledge of the exclusive contract and the security measures taken meant that the fact that they kept their eyes shut to the breach of confidence meant that their consciences were also affected.

All of these cases proceeded on the basis that the photographer had, by not objecting to the bans on photography, implicitly agreed to such a ban. It seems only a matter of time before the courts extend this reasoning to cover cases where no signs or security presence limit the defendant's freedom of action, but where his behaviour is unreasonable in all the circumstances.³¹ However, the limits of the circumstances in which the court will find the conscience of the defendant sufficiently affected for liability are not currently easy to predict.

22. [1948] 65 R.P.C. 203; [1963] 3 All E.R. 413, 415.

23. *Op cit.*, at para [182].

24. [1984] I.R. 611, at 663.

25. [1990] 1 A.C. 109, 281.

26. [1994] E.M.L.R. 134.

27. [1997] E.M.L.R. 444.

28. This development was noted by Phillipson and Fenwick in their influential article, "Breach of Confidence as a Privacy Remedy in the Human Rights Act Era" (2000) 63 MLR 660. See also Phillipson, "Transforming Breach of Confidence? Towards a

Common Law Right of Privacy under the Human Rights Act" (2003) 66 MLR 726. In the words of Lord Woolf C.J. in *A. v. B plc*, *op cit.*, at para [11] (ix), "a duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected."

29. [2003] 3 All E.R. 996 (HC).

30. *Ibid.*, at para [197].

31. This assimilation of tort terminology has been echoed by descriptions of breach of confidence as a tort by

Dame Butler-Sloss P. in *Venables and Thompson v. News Group Newspapers Ltd.* [2001] 1 All E.R. 908. However, this case has not been discussed in this article as it effectively disregarded the limits of a confidence action. Instead, it is submitted that it evidences a judicially-created special protective jurisdiction to injunct the disclosure of information that may cause harm if released. Its broader effect has not been widely followed; see also *X. (Mary Bell) v. MGN Ltd.* [2003] EWHC.

In particular, consider again the facts of *Peck v. UK*. Here, a factor militating against a breach of confidence claim was that it was clear that CCTV cameras were being used locally. However, the European Court held that his private life had been interfered with, in a way that was not justified, because of the use to which the information had been put. This would not seem to be a factor that the breach of confidence action takes into account. Despite the reasonable man undoubtedly thinking that the information in *Peck* was private in nature, this factor could not alter the fact that it did not possess the "quality of confidence".

(ii) Where there is a pre-existing relationship

Obviously, not every matter that is confidential to two individuals will be subject to a legal obligation of confidentiality. This issue has arisen in the context of one party to a relationship desiring to tell the press of the intimate facts of the relationship. When faced with such a situation, the courts have tended to find that the more permanent the relationship, the greater will be the obligation of confidence imposed. Thus, at the one extreme, confidential communications made within a marriage were protected against disclosure in *Argyll v. Argyll*,³² while the facts concerning a visit to a brothel were not found to be confidential in *Theakston v. MGN Ltd*.³³

In between these extremes, there is a divergence of judicial approaches. In *Barrymore v. MGN Ltd*.³⁴ the court prevented publication of the details of a homosexual relationship, as the information about the relationship in question was information for the relationship and not for a wider purpose.³⁵

However, in *A. v. B. plc.*, the Court of Appeal allowed the defendant newspaper publish the prurient details of the (married) plaintiff's intimate relationships with both C and D, two women he had been having affairs with. In this case, Lord Woolf C.J. said that the amount of privacy that he was entitled to was low, and that the women had a stronger right to tell their story. In effect, he took the opposite approach to that taken in *Barrymore*. This aspect of the case will be discussed below under the "public interest" defence.

3. "Unauthorised use" and the necessity for "detriment".

(i) Unauthorised use

It is normally self-evident whether the use of information is "unauthorised". However, in breach of confidence cases where the obligation of confidence has arisen despite the lack of a relationship of trust and confidence, whether the use is unauthorised will usually be co-terminous with whether the private nature of the acts justify inferring an obligation of confidence. This aspect of unauthorised use is discussed under that heading.

A more detailed examination of whether there was unauthorised use of – lawfully taken – CCTV footage was provided by the European Court in *Peck v. UK*.³⁶ Here, the central holding of the court was that Mr. Peck had given an implied consent to his being filmed on CCTV cameras and to a limited use of that footage for the purposes of combatting crime. However, when the footage of him walking the streets in a distressed state following a suicide attempt was used in a national campaign on the success of CCTV footage in preventing crime – in circumstances where his face was still identifiable – it was held to go beyond the consent he had given for use of the footage. This was because, applying the proportionality test, the use of the footage went beyond that which was necessary for the legitimate aim of preventing crime. This test requires that any interference with an individual's Art.8(1) right to privacy be proportionate to – that is, no more than is necessary for – the Art.8(2) limitation (which permits a public authority to interfere with privacy rights for the prevention of disorder or crime) being invoked, or to the Art.10 freedom of speech interest being pursued. In *Peck*, the legitimate aim of preventing crime did not require Mr. Peck's identifiable face to be broadcast on national television. Thus, the UK was in breach of Art.8.

It is worth mentioning at this point the continuing disagreement over whether privacy-invasive behaviour (such as phone-tapping or long-lens photography) is of itself sufficient for a successful breach of confidence action, or whether disclosure of the information is also a requirement. It is submitted that the *dicta* of Lord Woolf C.J. in *A. v. B. plc.*,³⁷ that breach of confidence can catch both forms of conduct, are a step too far, and that the comments of a differently constituted Court of Appeal in *Campbell* are correct.³⁸ This is another limitation of the breach of confidence doctrine, but one not further discussed here as press intrusions are inevitably carried out with an eye to publication.

(ii) Detriment

The second element is that the disclosure be to the detriment of the person communicating it (this has now been extended to include involuntary communications, where someone's privacy has been intruded upon). There have been several *dicta* suggesting that this is no longer necessary. These include Lord Keith in *Spycatcher* who gave the example of the "anonymous donor of a very large sum to a very worthy cause" who may wish to remain anonymous. Disclosure of this fact would not be to his detriment, but respect for confidences "may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence."³⁹

However, in several recent cases (such as *A. v. B. plc. and Campbell v. MGN Ltd.*) the courts, in assessing whether information has the "necessary quality of confidence" have required the plaintiff to prove that the disclosure be "highly offensive to a person of ordinary sensibilities". This effectively adds a requirement that the plaintiff prove detriment. Furthermore, it raises the level of detriment that the plaintiff must prove far beyond what the pre-Human Rights Act cases required. This is perhaps a necessary *quid pro quo* for the courts'

32. [1967] Ch. 302.

33. [2002] E.M.L.R. 398. Note however, that Ouseley J. only allowed the defendants publish the story of the plaintiff's visit, and not photographs taken of him at the brothel. Discussed below under "Defences".

34. [1997] F.S.R. 600. See also *Stephens v. Avery* [1988] Ch. 449.

35. *Ibid.*, at 602.

36. [2003] 36 E.H.R.R. 41.

37. *Op cit.*, at para [11(x)].

38. *Op cit.*, at para [33]. These are quoted above in the discussion on the "quality of confidence" at (ii)(b) – whether there can be a confidence as regards information obtained in a public place.

39. *Op cit.*, at 256. However, he added that the Crown was in a special position and would have to show likely harm to the public interest to prevent a disclosure on confidentiality grounds.

increasing latitude in finding that the information was disclosed in circumstances importing an obligation of confidence. Thus, whereas if a pre-existing relationship existed, the courts would readily find that any information subsequently disclosed outside that relationship was both unauthorised and leading to detriment, if no pre-existing relationship is required, such matters now require positive proof. It is submitted that this reflects the evolving nature of the cause of action. However, the House of Lords in the *Campbell* case has given a broader interpretation of information that possesses the "necessary quality of confidence", both in including all forms of drug treatment no matter how informal, and also in the tempering of the "highly offensive" standard by stating that you should ask if the disclosure is highly offensive to a reasonable person in the position of the plaintiff. These subtle refinements of the doctrine will undoubtedly increase the types of private information caught by the doctrine.

4. Defences: Press Freedom and the Public Interest in Disclosure.

Once the court has concluded that a breach of confidence has occurred, it then considers whether any defences raised should defeat the plaintiff's claim.⁴⁰ Whereas, when an almost contractual undertaking to maintain a confidence was required, the "public interest" defence to allow disclosure was narrowly drawn,⁴¹ it seems that as the net of the substantive cause of action is thrown wider, so too are the defences to a disclosure. Increasingly, Art. 10 freedom of speech arguments are accepted by the courts as justifying a disclosure whereas previously, only a most pernicious wrong or iniquity was sufficient. Secondly, it has become apparent that while previous case law would then only justify disclosure to those charged with investigating such wrongs, recent cases allow disclosure to the general public.⁴²

A broad outline of the factors that may favour disclosure in a particular case was provided by Lord Goff in *Attorney General v. Guardian Newspapers (No. 2)*:⁴³

"[A]lthough the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure ... It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure."

In *A. v. B. plc*,⁴⁴ Jack J. had prevented the defendants from publishing "kiss and tell" stories from two women with which the plaintiff, Premiership footballer Gary Flitcroft, had had extra-marital affairs. These injunctions were lifted by the Court of Appeal, where Lord Woolf C.J. placed great emphasis on the women's freedom of expression and

the public interest in allowing the press to publish what interests the public. Conversely, Jack J. had thought that there was no public interest in the articles. The footballer was not a public figure in any meaningful sense of the word, and had certainly not sought out publicity, or told incorrect stories concerning his private life. Thus, he found that there was "no public interest in the publication of the articles and the information which they contain." He saw "public interest" as "being in the interests of the public, and approximating to public benefit."⁴⁵

However, Lord Woolf C.J. showed that Article 10 ECHR provides a strong counter-weight to Article 8 and discharged the injunctions. He said that: "Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example. While Jack J. was right to say... that A had not courted publicity, the fact is that someone holding his position was inevitably a figure in whom a section of the public and the media would be interested."⁴⁶ It is unfortunate that he did not specify which was more important: that the undesirable behaviour deserved exposure, or that the plaintiff had waived his right to privacy by becoming a public figure. It also has to be asked whether publicising the plaintiff's extra-marital affairs would not in fact normalise or encourage such behaviour. Instead, perhaps his wife was the only one who should have been told. However, it has to be acknowledged that an argument can be made that if newspapers cannot publish information the public is interested in, this will lead to fewer newspapers, which is not in the public interest.⁴⁷

The "public interest" defence was also raised by the *Mirror* newspaper in *Campbell v. MGN Ltd*. Here, it was held that the *Mirror* was perfectly entitled to disabuse the public that the model's public pronouncements that she did not use illegal drugs were false. As discussed above, the Court of Appeal held they were allowed to disclose the "peripheral" information that she was attending Narcotics Anonymous, through photographs they had taken of her leaving a therapy session. However, Lord Phillips M.R. took a very different approach to the residual amount of privacy that celebrities retain, (absent any deception of the public), saying: "the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay."⁴⁸ This was because, "[w]hen Lord Woolf spoke of the public having 'an understandable and so a legitimate interest in being told' information, even including trivial facts, about a public figure, he was not speaking of private facts which a fair-minded person would consider it offensive to disclose."⁴⁹

5. Where the balance lies

The test for determining whether a disclosure is justified will depend on the countervailing interest involved. If it is simply the Art.8(2) limitation on the right to privacy (as in *Peck*) or the Art.10(2) limit on the freedom of expression (as in *London Regional Transport v Mayor of*

40. Although Lord Goff in *Spycatcher* considered that no confidence would exist to protect an iniquity, it is perhaps easier to classify it as a defence to a confidence claim.

41. One notable exception among pre-HRA judges in this regard - as in many others - was the inimitable Lord Denning M.R., who demonstrated a high regard for freedom of speech in such cases as *Hubbard v. Vosper* [1972] 2 Q.B. 84 and *Woodward v. Hutchins* [1977] 2 All E.R. 751.

42. The relatively high standard of "public interest" that had to be met before a disclosure to the public was

sanctioned can be gauged from *Lion Laboratories v. Evans* [1985] QB 526 (CA) and *National Irish Bank v. RTE* [1998] 2 I.R. 465 (SC). See Fenwick and Phillipson, "NIB v. RTE and finding the balance: breach of confidence, privacy and the public interest in England and Ireland" (Paper delivered at a Symposium on Freedom of Expression, 5th-6th Dec. 2003, TCD). This point was barely even considered in the *A. v. B. plc* case, where disclosure of the plaintiff's infidelity was allowed to the general public, and not just to his wife.

43. [1990] 1 A.C. 109, 282.

44. [2002] 1 All E.R. 449 (HC).

45. *Ibid.*, at para [67].

46. *Op cit.*, at para [43].

47. This line of reasoning is very far removed from the traditional doctrine of breach of confidence, but was also accepted in *Theakston v. MGN Ltd* [2002] E.M.L.R. 398, where the plaintiff, a children's television presenter, was able to secure an injunction to restrain the publication of "particularly intrusive" photographs but not of written accounts of this visit to a brothel.

48. *Op cit.*, at para [41].

49. *Ibid.*, at para [40].

London⁵⁰), ECHR caselaw has consistently held that a proportionality test should be used: this asks whether the disclosure (in the former case) or the restriction on free speech (in the latter) "meet[s] a recognised and pressing social need. Does it negate the primary right or restrict it more than is necessary? Are the reasons given for it logical?"⁵¹

However, if an Art.8 right to privacy stands in opposition to the Art.10 right to freedom of speech, the courts must balance both interests, and use what has been called a "dual proportionality" test. Neither right enjoys a "presumptive priority", so the relative weight of each must be compared. It can be argued that several recent cases have, while examining closely how much privacy the plaintiff was entitled to, failed to ask what value the expression had, and thus how much protection Art.10 afforded. The European Court has consistently held that this Article grants greater protection to political speech over artistic speech, with commercial speech ranking as least important. This has seemingly been overlooked in some cases.⁵² However, the House of Lords in the *Campbell v. Mirror Group Newspapers Ltd.* have reversed this trend, and have recognised that different classes of speech merit different levels of protection and that the courts must examine the relative weights of the two rights involved.⁵³

6. The limits of breach of confidence in protecting privacy

Breach of confidence is a doctrine that has undergone significant developments in transforming to become a privacy remedy in UK law. However, it has to be questioned whether it is a sufficiently broad cause of action to provide a remedy for all unwarranted invasions of privacy. The current approach of the judiciary in the UK, in stretching it at the edges so as to fill the gaps left by the absence of an independent cause of action protecting the right to privacy⁵⁴ is threatening to undermine it as a coherent legal doctrine. It is proving to be an inexact fit, which tends to obscure rather than clarify what the courts are doing, as they strain to adapt the concepts originally thought to define the legal protection for confidences so as to provide a remedy for press intrusions into people's lives. Historical and conceptual difficulties have remained that prevent it from covering all privacy breaches, and it remains to be seen whether it can further expand to cover filming in public places (such as in the *Peck* case), which is related to the general problem that it cannot prevent republication of information in the public domain.⁵⁵

7. The Right to Privacy under the Irish Constitution

The Irish courts have already recognised an unenumerated constitutional right to privacy, as flowing from Article 40.3.1, which provides that: "The State guarantees in its laws to respect, and, as far as

practicable, by its laws to defend and vindicate the personal rights of the citizen." This has been used to protect elements of an individual's "zone of autonomy" or "substantive" right to privacy, such as the right to bodily integrity⁵⁶ and the right to marital privacy.⁵⁷ It has also been invoked to protect aspects of "informational privacy", both as against the State (i.e. vertically),⁵⁸ and as against the private organs of the media (i.e. horizontally).⁵⁹ It is suggested that, rather than blindly following the UK jurisprudence, the Irish courts when next confronted with a case concerning the privacy interests of an individual, should use the constitutional right as a starting point for the case before them.

However, as there has been a dearth of cases on this horizontal right to informational privacy, there are at present no clear guidelines for potential litigants. The case law has developed on an *ad hoc* basis, and the scope of the constitutional right remains amorphous. This creates a very real problem for ordinary citizens who feel that their rights have been infringed, as the prohibitively high cost of a court action, and its inherently uncertain outcome, would deter such actions. However, when such a case comes before the Irish courts, it is submitted that the newly liberalised approach of the UK courts, witnessed in several recent breach of confidence cases, can serve as a starting point for determining the contours of the Irish right. However, what the Irish courts must focus on are the right to privacy aspects of that doctrine and they must strip away such limits as would defeat the protection of privacy afforded by it, such as, *inter alia*, the lack of protection against the republication of confidences once they are made public.

In structure, the constitutional right to privacy mirrors the right to privacy under Article 8 of the Convention, a point illustrated by the following excerpt from the judgment of Hamilton P. (as he then was) in the landmark case of *Kennedy v. Ireland*:

"The right to privacy is not an *issue*, the *issue is the extent of that right or the extent of the right 'to be let alone'...*It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, or by the requirements of the common good, and it is subject to the requirements of public order and morality."⁶⁰

Indeed, the proportionality test employed by the Irish courts could easily be adapted to deal with situations, particularly material to the present discussion, where the individual's right to privacy must be balanced against the freedom of expression of the press.⁶¹

The decision of the European Commission of Human Rights in the case of *E.N. v. Ireland*⁶² supports the contention that there is a strong correlation between the two regimes of privacy protection. In this case, the applicant challenged the taking of photographs outside her home by a private investigator employed in the course of a personal injuries

50. [2003] E.M.L.R. 88 (CA). See also *Jockey Club v. Buffham* [2003] E.M.L.R. 111 (HC), where the BBC's *Panorama* programme was allowed make use of documents disclosed in breach of confidence in a programme detailing corruption in the horse-racing industry. In neither of these cases was Art.8 engaged.

51. Per Sedley LJ. in *LRT v. Mayor of London*, *op cit*, at para [57]. A more detailed statement of how a proportionality test operates has been set out by the House of Lords in several recent cases including *R. v. Shayler* [2003] 1 A.C. 247 and *De Freitas v. Permanent Secretary of the Ministry of Agriculture* [1999] 1 A.C. 6; Clayton, "The Proportionality Principle" (2001) EHRLR 504.

52. See Phillipson, "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" (2003) 66 MLR 726. Note however

Jack J's judgment in *A. v. B. plc*, *op cit*, and Sedley LJ's comments in *Cream Holdings Ltd. v. Banerjee* [2003] 2 All E.R. 318 (CA), at para [88], that the matters before him relating to local government corruption were "incontestably a matter of serious public interest - certainly in comparison with the mildly pornographic material which the defendants in *A. v. B. plc* succeeded in investing with this quality." See also R. (on the application of Pro-Life Alliance) v. BBC [2003] 2 All E.R. 977 (HL).

53. *Campbell v. MGN Ltd.*, above n. 2, at para [55].

54. Most recently reaffirmed by the House of Lords in *Wainwright v. Home Office* [2003] 3 W.L.R. 1137.

55. Another point not touched on in the recent cases is whether damages are recoverable following a solely equitable breach of confidence where no injunction had

been sought pre-publication.

56. *Ryan v. Attorney General* [1965] I.R. 294.

57. *McGee v. Attorney General* [1974] I.R. 284.

58. *Kennedy v. Ireland* [1987] I.R. 587.

59. *X. v. Flynn, Drury and others* (Unrep. H.C., Costello J., May 19, 1994) and *Maguire v. Drury* [1994] 2 I.R. 8; [1995] 1 I.L.R.M. 108.

60. *Op cit*, at p. 594. Emphasis added. This passage was cited with approval by the Irish Supreme Court in the case of *Haughey v. Moriarty*, [1999] 3 I.R. 1.

61. See, Kelly, Hogan & Whyte, *The Irish Constitution*, 4th Ed., at para. 7.5.18 and para 7.1.56-67, see also the judgment of Mr Justice Costello in *Heaney v. Ireland* [1994] 3 I.R. 593.

62. Application No. 18670/91, 1 December 1993.

claim. The Commission declared the Irish litigation's application inadmissible on the basis of the individual's failure to exhaust the domestic remedy afforded by the constitutional right to privacy under Irish law, acknowledging that the Constitution could provide protection in these circumstances.

Moreover, a perusal of the case law where the right to privacy has been invoked shows clear substantive similarities in the protection of the right to privacy under the Convention and the Constitution. For example, in *Kane v. The Governor of Mountjoy Prison*,⁶³ the Supreme Court accepted that the right to privacy applied to surveillance of an individual in public and required justification.⁶⁴ Indeed, in *Hanahoe v. Hussey*,⁶⁵ Kinlen J. drew upon the jurisprudence of the European Court of Human Rights⁶⁶ to uphold the applicant's claim for damages for breach of privacy, stating: "The judgment of the European Court of Human Rights is not simply of persuasive authority. It has been accepted that in cases of doubt or where jurisprudence is not settled, the courts should have regard to the Convention for the Protection of Human Rights"

Two further cases deserve mention. In *Maguire v. Drury*⁶⁷ O'Hanlon J. refused to prevent several newspapers from publishing the story of a

man who claimed that his wife's affair with a priest was the cause of their marital breakdown. It was held that no obligation of confidence arose here, and that the constitutional right to privacy (whether derived from Article 40 or Article 41) was not infringed, as the alleged conduct was extra-marital in nature and had not been disclosed within the marital relationship. In *X. v. Flynn, Drury and others*,⁶⁸ Costello J. granted injunctions against several newspapers who had been aggressively reporting on the infamous "X case", to prevent their actions overstepping acceptable limits and infringing her right to privacy.⁶⁹

While regard could be had to how this has been achieved in other jurisdictions such as the United States,⁷⁰ Germany,⁷¹ France,⁷² Canada,⁷³ New Zealand⁷⁴ and Australia,⁷⁵ the primary source of such a reconciliation of rights to privacy and expression should be the caselaw of the ECHR, and the requirements of proportionality, as most recently set out in *Peck v. UK*.⁷⁶ Finally, the ECHR decision in *Peck* points the way to a more nuanced approach that balances the individual's expectation of privacy and the legitimate uses of the information. This should be accepted as the best way for Irish law to achieve conformity with its Convention obligations. ●

63. [1988] I.R. 757.

64. *Ibid*, at p. 769. See, to similar effect under the Convention, *Murray v. United Kingdom*, (1995) 19 E.H.R.R. 193, in respect of photographs, and *Kopp v. Switzerland*, (1999) 27 E.H.R.R. 91, in respect of covert surveillance.

65. [1998] 3 I.R. 69

66. Citing the case of *Niemitz v. Germany*, (1993) 16 E.H.R.R. 97.

67. [1995] 1 I.L.R.M. 108; [1994] 2 I.R. 8.

68. Unrep. H.C., Costello J., May 19, 1994.

69. However, certain other case law appears to display a lack of awareness of the relevant principles under the Convention: compare *Devoy v. Dublin Corporation*, Unrep. H.C., October 18, 1995, with *Klass and others v. Germany*, (1979-1980) 2 E.H.R.R.

214.

70. As discussed above, the "right to be let alone" has a long pedigree in the US since the seminal article by Warren and Brandeis, "The right to privacy" (1890) 4 Harv. L.R. 193, as developed by Prosser, "Privacy" (1960) 48 Calif. L.R. 383. However, the strong protection given to freedom of expression by the First Amendment has meant that when freedom of speech expectations collide with expectations of privacy, "privacy almost always loses": Anderson, "The Failure of American Privacy Law", in Markesinis (ed.), *Protecting Privacy* (Clarendon, Oxford, 1999).

71. Markesinis, *The German Law of Torts*, (3rd ed., 1994), pp 63-66; Markesinis, "Privacy, Freedom of Expression and the Human Rights Bill: Lessons

from Germany" (1999) 115 LQR 47.

72. Picard, "The right to privacy in French law," in Markesinis (ed.), *Protecting Privacy*, (Clarendon, Oxford, 1999).

73. See *Aubry v. éditions Vice-Versa Inc.* [1998] 1 SCR 591; 157 DLR (4th) 577.

74. See *P. v. D.* [2000] 2 N.Z.L.R. 591; *Hosking v. Runting* [2003] 3 N.Z.L.R. 385.

75. Following *A.B.C. v. Lenah Game Meats* [2001] 208 C.L.R. 199, which left the point open, in *Grosse v. Purvis* [2003] Q.D.C. 151, the Queensland High Court held that a stand-alone right of privacy exists in that jurisdiction, and found the defendant liable in damages for \$178,000 Aus. for stalking the plaintiff.

76. [2003] 36 E.H.R.R. 41.