The Bar Review

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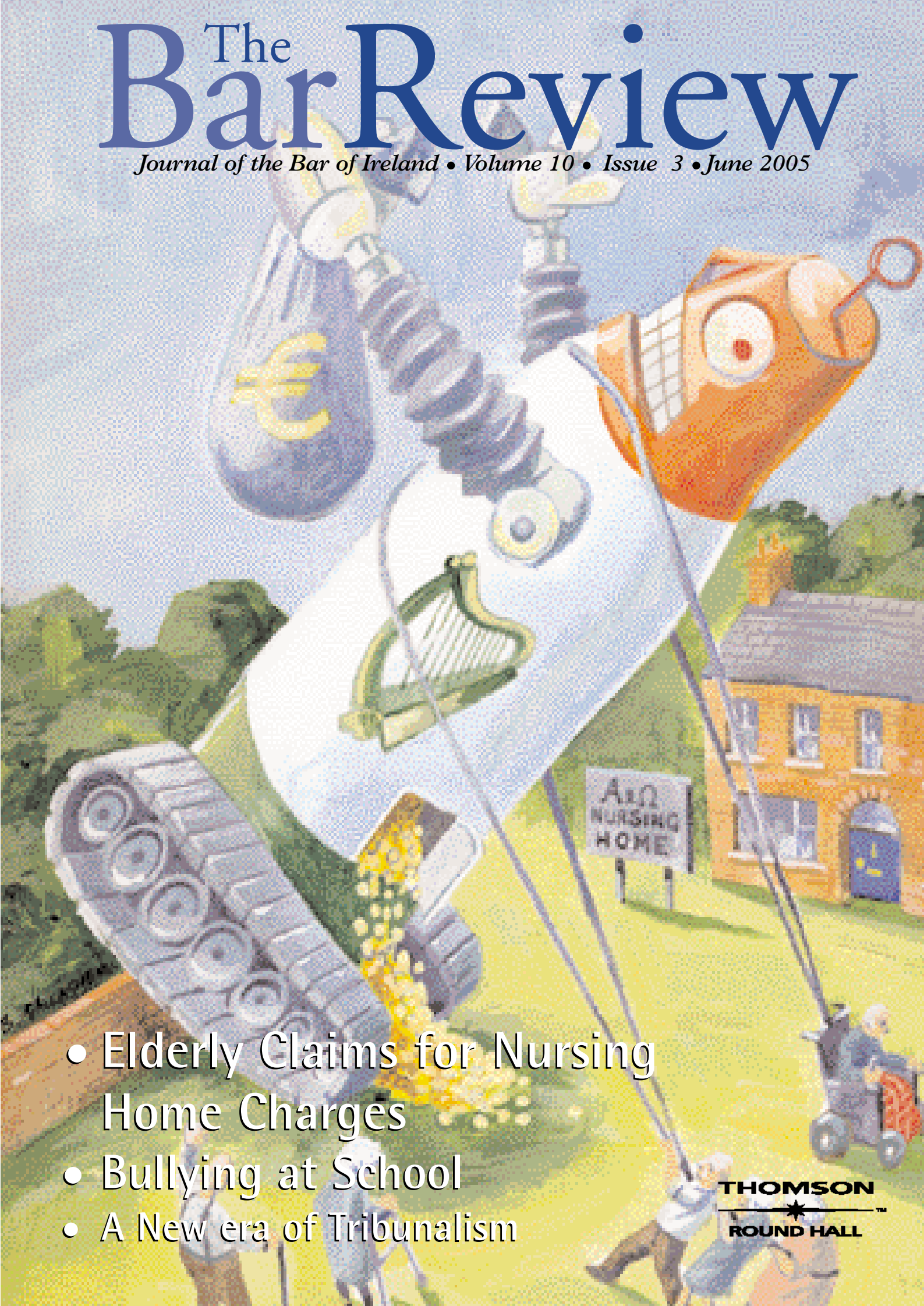

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The Bar Review

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Access to Justice - How Barristers Can Help

Frances Gardiner BL

On 4th May, the Bar Council, in association with Independent Law Centres Network, sponsored a seminar entitled "Access to Justice – How Barristers Can Help" in the Distillery Building, Church Street. Introducing the session, Chairman Michael Cush SC said the objective of the Bar Council's Voluntary Assistance Scheme is to increase access to barristers' services, expanding the long tradition whereby members of the Bar provide voluntary assistance to people of little means. All areas of law are covered by this scheme but the principal need arises in housing, social welfare appeals and debt related matters. Volunteers are always required and more barristers are urged to become involved to enhance the assistance available under the scheme.

Educating disadvantaged people on their legal rights, helping them to fight for these rights in an organised way and lobbying for change is the express aim of a range of organisations. In 2002, the Independent Law Centres Network was established to further the development of independent community law centres and to develop strategic partnerships with the Legal Aid Board and other relevant agencies.

Speakers from FLAC and Disability Legal Resource (Catherine Hickey), Community Law Centres (Colin Daly), Irish Traveller Movement and Immigrant Council of Ireland (Sinead Lucey) outlined their activities and future plans. FLAC expressed the need for more volunteers to assist their work.

Sue Gogan, representing Ballymun Community Law Centre, presented results from a survey on the 'Unmet Legal Need' of residents and community organisations in Ballymun, emphasising that legal need frequently reflects a lack of awareness of a legal right. When the centre was set up in 2002, the area had 21,000 residents and no solicitors. FLAC attended two evenings per week and Finglas was the nearest advice centre. Barriers to legal access include costs and lack of knowledge about legal services, the intimidating atmosphere of solicitors' offices, location, opening hours, transport and childcare. The most common legal problems relate to family issues (divorce, separation, fostering, adoption, domestic violence), housing and debt, followed by the threat of legal action itself and unfair treatment by the Garda Siochana.

Colin Daly of Northside CLC, in describing Community Law Centres, stressed the opportunities inherent in the remedy of judicial review to assert rights and seek relief. However, he contrasted the experience of high profile individuals with knowledge of the law and resources with that of the marginalised, for example, a single mother facing eviction because of the anti-social behaviour of her teenage son. Historically, neighbourhood law centres were established in the United States during the 'War on Poverty' of the 1960s instituted by the Johnson administration. They aim to fulfil the dual need for information and advice with lobbying for law reform and tackling the underlying causes of poverty. Northside CLC started off as Coolock CLC (established by FLAC in 1975) with community links forming a crucial component from the outset. It represented the next-of-kin of those who died in the 1981 Stardust fire. Unfortunately, casework has to be restricted, focusing on housing, debt and consumer issues and family law only in emergencies. Catherine Hickey of FLAC, traced the evolution of FLAC since its inception in 1969 as a campaigning organisation for equal access to justice to its 2005 People of the Year Award to three Council members for long service to FLAC. In 2003, FLAC recorded 6000 telephone advices, with 3500 at centres countrywide in 2004. In 2003, FLAC further developed its interest in the field of credit and debt law, issuing a report entitled "An End Based on Means" on how uncontested consumer debt cases are treated in the Irish legal system.

FLAC's mission "Access to Justice for All" is the subject of a report soon to be launched. Over the next five years, FLAC will continue to campaign for improved access to civil legal aid (following the landmark High Court judgment in *O'Donoghue v. the Legal Aid Board and others*) and for reforms to social welfare and debt law.

According to 2004 data collected by FLAC, family law is the issue most frequently discussed with clients, followed by employment law. In coming months, FLAC plans to reshape its public and media profile and to consolidate its alliance with Community Law Centres. The Disability Legal Resource (DLR) is a joint venture involving FLAC, the Irish Council for Civil Liberties and the Forum for People with Disabilities, and it exemplifies FLAC's desire to develop specialist law centres with expertise in particular areas. The aim of DLR is to assist people with disabilities to pursue their rights through existing legal mechanisms and to offer legal representation in cases where a broader public benefit may be obtained.

The Irish Traveller Movement, an umbrella group for traveller organisations, is another example of a specialist law centre. It aims to improve access for members of the Traveller community to expert legal advice and representation. The Immigrant Council of Ireland caters for immigrants, asylum seekers and refugees, with a vision that 'all people seeking to live in, living in or travelling to Ireland are guaranteed their human rights'. It offers free legal advice and information on issues such as residence permits, work permits, family reunification and deportation, and publishes guides for immigrants.

Frank Murphy of Ballymun Commuity Law Centre thanked the Bar Council and barristers who over the years, have given freely of their time in order to help the survival of the law centres. He suggested a joint working group between the Law Centres and the Law Library, given the substantial input by barristers to the work of the centres. Hugh Mohan SC, Chairman of the Bar Council, reiterated the willingness of barristers to be involved with Law Centres and emphasised the 'well of goodwill' within the Law Library that should be tapped in order to best use the available expertise of members.

Barristers interested in volunteering to work with any of the above organisations, should contact Jeanne McDonagh at the Bar Council office on Church Street, ext. 5014, outlining areas of speciality. ●

The Hague Convention and the habitual residence of newborn infants

Inge Clissmann SC and Paul Hutchinson

Introduction

The concept of habitual residence is central to return proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter the "Hague Convention")[1]. Article 12(1) sets out "the basic principle of the Convention"[2] which places an obligation on the Central Authority of a contracting state to return a wrongfully removed or retained child forthwith.

The Hague Convention is silent as to where or to whom the wrongfully removed or retained child is to be returned, however it is a generally accepted legal principle that the jurisdiction to which to the child should be returned is that of the child's habitual residence. Habitual residence is the only connecting factor mentioned in the articles of the Hague Convention. Indeed, it has been noted that "where else should a court send a wrongfully removed or removed child but to the environment and society of which the latter was a member"[3]? Nourse LJ (delivering the judgment of the court) in the English Court of Appeal decision of Re: A *(A Minor) (Abduction)*[4] considered the matter well settled[5]:

> "On a consideration of the Convention as a whole, in particular of the preamble, I think it is clear that what is contemplated is a return to the country of the child's habitual residence."

Whereas the Pérez-Vera Report suggests that the Hague Convention should be interpreted so as to be flexible as to the return location for a wrongfully removed or retained child[6], the weight of subsequent judicial authority seems to favour the legal certainty advocated above.

It is well-established law that where a child's parents have joint parenting rights under the law of the contracting state in which that child is habitually resident, one parent cannot unilaterally change that child's habitual residence without the consent of the other. For these reasons, the concept of habitual residence can be crucial in the determination of international custody disputes under the terms of the Hague Convention. Determining where a child's habitual residence is can effectively decide the case

The issue of a child's habitual residence becomes fraught with difficulty in the case of newborn infants, born either soon after the mother arrives in a new jurisdiction, or during a temporary stay in a new jurisdiction, especially in circumstances of relationship breakdown where the parents may be at cross-purposes as to their own immediate futures and that of the newborn child. The newborn child's habitual residence becomes the determining factor in the child's fate. The Supreme Court was faced with just such an issue very recently in the case of *P.A.S. v. A.F.S.*[7]

The Concept of Habitual Residence

As noted above, the concept of habitual residence is at the heart of the Hague Convention on Private International Law. However, the concept does not benefit from a comprehensive statutory or judicial definition. It is distinct from (and "less conceptually cluttered"[8] than) the notion of "domicile" and is not sub-divided in the same manner as the latter. Furthermore, as Binchy puts it[9]:

> "...intention, though still relevant, is a less controlling factor in the determination of habitual residence than it is for domicile. The courts need not in every case venture into the inner recesses of the subject's mind before coming to a conclusion as to where he or she has his or her habitual residence."

A degree of light was cast on the definitional vacuum by the English decision of *Cruse v. Chittum*[10] where habitual residence was described as "a regular physical presence which must endure for some time"[11] with a lesser element of animus than its sister-concept, domicile[12]. In *Leckinger v. Cuttriss*[13], Blayney J approved the English High Court authority of V v. B *(A Minor) (Abduction)*[14] which equated the concept

1. Incorporated into Irish law by the Child Abduction and Enforcement of Custody Orders Act, 1991.
2. See the official Explanatory Report to the Hague Convention by Professor E. Pérez-Vera at para. 27.
3. Beaumont & McEleavy, *The Hague Convention on International Child Abduction*, Oxford University Press (1999, Oxford) at 88.
4. [1988] 1 FLR 365.
5. *Ibid.*, at 373.
6. Pérez-Vera report at para. 110.
7. [2005] 1 ILRM 306; 24th November 2004, [2004] IESC 95.
8. Binchy, *Irish Conflicts of Laws*, Butterworths (Ireland) Ltd, (1988) at 98.
9. Binchy, *op cit.*, at 99.
10. [1974] 2 All ER 940.
11. *Ibid.*, at 943.
12. See generally, Cheshire & North's, *Private International Law*, Butterworths, 10th Ed., (1979, London) at 187-188.
13. Unreported, High Court, 9th July 1992 (Blayney J).
14. [1991] 1 FLR 226.

of habitual residence with "ordinary residence"[15]. Denham J in the Supreme Court decision *CK v. CK*[16] alluded to this comparison, but neither expressly approved or disapproved of it[17]. As such, the loose rule of thumb set out in *Cruse* is as close to a working definition is as available at the present time.

According to the English authority of *Re: V (Abduction: Habitual Residence)*[18] a child can only ever have one habitual residence at any given point in time for the purposes of the Hague Convention. Similarly, it is perfectly possible (in contrast to domicile) for a child to be without habitual residence at a particular time[19]. Thus, unlike domicile, habitual residence is a fluid concept that can be lost in a single day[20].

It is very much possible for a child to be born without habitual residence. There is a policy consideration voiced in the dissenting speech of Thorpe LJ in *Nessa v. Chief Adjudication Officer*[21] and the decision of Butler-Sloss LJ in *Re: F (A Minor) (Child Abduction)*[22] that children should not be deprived of protection under the 1980 Hague Convention by being without habitual residence for long periods of time. While this may be sound policy, it clearly accepts the principle that a child can indeed be without habitual residence. This conclusion was confirmed by Hedley J in the decision in *W. and B v. H (Child Abduction: Surrogacy)*[23]. There is authority from the U.S. Federal Court of Appeals[24] decision of *Delvoye v. Lee*[25] that where parental conflict exists contemporaneous to the child's birth, no habitual residence may ever come into existence[26].

The Acquisition of Habitual Residence by a Child

With this in mind, courts often find themselves in the position of having to determine if and when a child has acquired a new habitual residence. The House of Lords decisions in *R v. Barnet London Borough Council, ex parte Shah & Others*[27] and in *Re: J (A Minor) (Abduction: Custody Rights)*[28] are strong authorities for the proposition that habitual residence is ultimately a question of fact. Furthermore, it was held in the US Federal Court of Appeals[29] case of *Friedrich v. Friedrich*[30] that in determining habitual residence, the court must look back in time and not forward.

Two schools of thought have been identified in the case-law dealing with the acquisition by a child of a habitual residence: the "dependency" approach, and the "child-centred" approach[31]. The former approach adopts the two-step acquisition test (set out below) very much from the perspective of the child's dependency on its caregiver(s). Hale J stated in *Re: A (Wardship Jurisdiction)*[32] that there was a "strong burden" on anyone who wished to demonstrate that the habitual residence of a child is different to that of her parents[33]. In the German case 562 f 4374/98 of the Amtsgericht Munich (District Court)[34] a return order on foot of a custody dispute was refused on the basis of the child's habitual residence in Germany. This was on the basis that, even though the child lived in both the United States and Germany during the first year of his life, his primary residence and centre of his life was in Munich with his mother.

The latter approach focuses on the child's rights in respect of the determination of her habitual residence. The Texas Court of Appeal decision in *Flores v. Contreras*[35] is a good example of this. Here, a child was born in Mexico and spent the first 50 days of his life there. The child was taken to Texas by his parents, and subsequently his mother returned to Mexico alone and sought return of the child. This was ordered by the Judicial District Court of Bexar County, and affirmed on appeal by the Court of Appeals of Texas. Crucial in this decision was that an adult perspective on the comparatively short period of time the child spent in Mexico did not reflect the realities of habitual residence from the child's perspective, for whom 50 days constituted the bulk of his entire life.
With these operational perspectives in mind, the test for the acquisition of habitual residence demands consideration. Habitual residence is acquired by demonstrating[36]:

a) an "appreciable period of time" in the new place of residence, and
b) a settled intention to remain[37].

The dicta from Thorpe LJ's speech[38] in the House of Lords decision in *Nessa v. Chief Adjudication Officer*[39] would seem to represent good law in stating that it is the quality of the connection with the new place of residence which is decisive, as opposed to a nominal length of time. A hypothetical example of this was given by Lord Slynn in *Re: S (Custody: Habitual Residence)*[40] of a mother with sole parental rights, on whom the child's habitual residence depended, leaving one country to go to another with the established intention of settling permanently. It was pointed out that her habitual residence and that of the child may change very quickly. This was confirmed by Butler-Sloss J, in *V v. B (A Minor) (Abduction)*[41], who held that, when accompanied by a settled

15. If the concepts of ordinary residence and habitual residence are to be equated, the House of Lords has set down a useful definition of the former in the decision in *R v. Barnet London Borough Council, ex parte Shah & Others* [1983] 2 AC 309 as "refer[ring] to a person's abode in a particular place or country which he had adopted voluntarily and for settled purposes (which could include education), as part of the regular order of his life for the time being, whether of long or short duration, with the exception that, if his presence in a particular place or country was unlawful, for example in breach of immigration laws, he could not relay on his unlawful residence...".
16. [1994] 1 IR 250.
17. *Ibid*., at 259.
18. [1995] 2 FLR 992
19. For example, a child accompanying a parent or parents who have lost their prior habitual residence, but have not yet acquired a new one. See Lowe, Everall & Nicholls, I*nternational Movement of Children: Law, Practice & Procedure*, Jordan Publishing Ltd (2004, Bristol) at72-73.
20. Provided the individual leaves their place of habitual residence with a settled intention not to return: *Re: M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495; see Lowe, Everall & Nicholls, op. cit. at 58.
21. [1999] 1 WLR 1937.
22. [1992] 1 FLR 548.
23. [2002] 1 FLR 1008.
24. Third Circuit.
25. 329 F.3d 330 (2003).
26. However, the court pointed out that this was not to be read as automatically deeming the child's habitual residence to be that of his mother's.
27. [1983] 2 AC 309.
28. [1990] 2 AC 562.
29. Sixth Circuit.
30. 983 F.2d 1396 (1993).
31. See Lowe, Everall & Nicholls, *op. cit.* at 59-63. A third "parental rights" approach is now defunct having been decisively rejected by the English Court of Appeal in the decision in *Re: P (GE) (An Infant)* [1965] Ch 568.
32. [1995] 1 FLR 767.
33. See also: Re: *F (A Minor) (Child Abduction*) [1992] 1 FLR 548
34. 23 October 1998.
35. 981 S.W. 2d 246 (1998).
36. See Lowe, Everall & Nicholls, op. cit. at 54-57.
37. *Dickson v. Dickson* (1990) SCLR 692.
38. Thorpe LJ's speech was a dissenting one, but the *obiter dicta* referred to here is not inconsistent with the majority decision.
39. [1999] 1 WLR 1937.
40. [1998] AC 750
41. [1991] 1 FLR 266

intention to emigrate, a month can constitute "an appreciable period of time"[42].

The issue of settled intention is a trickier one for a court to answer, especially so in the case of infants. In many cases, the settled intention of an infant is necessarily the common settled intention of her parent or parents: see *Re: N (Abduction: Habitual Residence)*[43]. Indeed, even in cases where there is no common settled intention as between parents with joint-parental rights, the cardinal rule under the Hague Convention is that one parent cannot unilaterally change the habitual residence of a child without the consent of the other parent[44]. However, this leaves a lacuna in the law in circumstances where any common settled intention as between the child's parents is irreversibly fragmented prior to the child's birth. It was precisely this lacuna that faced the High Court and latterly the Supreme Court in *P.A.S. v. A.F.S.*

The Facts in P.A.S. v. A.F.S

The respondent in this case was an Irish woman who moved to Canada and worked illegally. She met and married the applicant, a Canadian man, and never changed her immigration status.

In May 2003, the respondent visited Ireland to attend a family function during a period where relations were not good with the applicant. The respondent collapsed while here and was diagnosed as having a brain tumour.

Not having health insurance in Canada, the respondent opted to have treatment in the United Kingdom, but was pregnant at the time and had to wait until the baby was born before she could have the necessary operation. She lived at home in Ireland with her parents during the interim. During this time, the applicant sublet the parties' Canadian apartment, and divided his time between Canada and Ireland. While in Ireland, he did contract work. Relations between the parties at this time were fraught. The Gardaí stopped the applicant's car on one occasion (for having no tax) and had found heroin needles and hash. The respondent's parents' house was subsequently searched, and criminal proceedings against the husband were pending at all material times. The baby was born in December 2003 in Ireland. The respondent went to the United Kingdom for her operation and returned to Ireland subsequently.

The parties had originally intended return to Canada in February following a recuperation period, but the respondent changed her mind at some point between the May 2003 and February 2004 due to the continuing deterioration of relations between her and the applicant.

The applicant returned to Canada in February, but the respondent only told him of her decision to stay on in Ireland a matter of days beforehand. The applicant was angry but went home nonetheless, and left the infant in the care of the respondent. In subsequent telephone conversations, the applicant told the respondent that she owed it to her mother-in-law to return to Canada. The mother-in-law rang the respondent and persuaded her to visit Canada so she could see the baby and promised the respondent that she would be free to go home afterwards.

It was accepted by all parties that the respondent only intended to visit Canada on a short term basis. However, she travelled to Canada with no return ticket home, and found herself effectively trapped there in circumstances where she was very unhappy, and entirely dependent on the applicant's family. After 6-8 weeks in Canada, she decided to leave. She informed the applicant that she was visiting friends, and instead crossed the border to New York with the infant and flew home (with the help of her brother).

The applicant immediately brought abduction proceedings and sought a return order in the High Court.

Some Confusing English Case-law

Before considering the how the matter was decided before the Irish courts, it is instructive to briefly consider some background information on the crucial issue in this case - can a child be habitually resident in a jurisdiction in which she has never set foot?

Up until very recently, it was accepted that a person could not be habitually resident in a place they had never been. The authority for this is the House of Lords decision of *Nessa v. Chief Adjudication Officer*[45] It was held that habitual residence was to be construed as a matter of ordinary language so that a person was not "habitually resident" in the United Kingdom unless he had in fact taken up residence and lived there for a period which showed that the residence had become, and was likely to continue to be, habitual. The requisite period of residence was not fixed, and whether and when habitual residence had been established was a question of fact to be determined on all the circumstances of each case (*per* Lord Slynn of Hadley[46]). This principle clearly ruled out an unborn child acquiring habitual residence either prior to her birth, or indeed subsequent to her birth in a jurisdiction in which she has never been[47].

This seemingly sound principle was cast into some doubt by Charles J in the English High Court[48] case of *B v. H (Habitual Residence: Wardship)*[49]. In this case, a Bangladeshi couple travelled to Bangladesh from England for what was believed by the pregnant wife to be a 4-5 week holiday. She gave birth in Bangladesh, and her husband refused to let her or her four children return to England. Following several incidents of domestic violence the wife returned to England alone and sought a divorce. She successfully applied to have all four children made wards and to have them returned. However, an issue arose as to the newborn infant's habitual residence.

42. A good example of this is Re: *Medhurst and Markle* (1995) 26 OR (3d) 178 where the child at issue was removed from Germany to Canada unilaterally by her mother (Canada being the mother's country of origin). The Ontario Court found that the child had been habitually resident in Germany prior to her removal, for the first two months of her life. It is also pointed out that parental country of origin is not a determinative factor. See also the Texas Court of Appeal decision *Flores v. Contreras* 981 S.W. 2d 246 (1998).
43. [2000] 2 FLR 899.
44. See *Re: P (GE) (An Infant)* [1965] 2 WLR 1; and *Re: A (Wardship Jurisdiction)* [1995] 1 FLR 767.
45. [1999] 1 WLR 1937.
46. *Ibid.*, at 1942.
47. See also the decision of McGuinness J in *CM & OM v. Delegación Provincial de Malaga Consejeria de Trabajoe y Asuntos Sociales Junta de Andalucia & others* [1999] 2 IR 363.
48. (Family Division).
49. [2002] 1 FLR 388

Charles J reasoned that "as a matter of act and common sense"[50] it did not make any difference as regards the newborn infant's habitual residence that she was born in a hospital abroad while the parents were on a temporary visit and pointed to the example of an unexpected premature birth while a newborn infant's parents are on holidays. The court reached the following conclusions[51]:

> "It follows that in my judgment the fact that the baby is born abroad does not *of itself*[52] found the conclusion that he (or she) is not habitually resident in England. Put another way, in my judgment if the issue is considered as a matter of fact, it is not the case that a baby cannot be habitually resident in England until he or she has, is (or has been) physically present here.
>
> In reaching that conclusion I accept that the cases dealing with the loss of habitual residence and the acquisition of a new one show that a person can have no habitual residence. But in my judgment different considerations apply on the birth of a baby with the result that if at the birth of the child the relevant parent or parents have a habitual residence that is the habitual residence of the child."

The court dismissed an argument by counsel for the Child and Family Court Advisory and Support Service that the infant in question in fact had no habitual residence until such time that he arrived in England[53] as confusing the concepts of habitual residence and domicile[54]. The court further pointed to the fact that habitual residence does not terminate during a temporary holiday.

However, it is respectfully submitted by the writers that this decision was made *per incuriam* of binding precedent. The clear *ratio decidendi* of the House of Lords in *Nessa* points to a diametrically opposite conclusion. Charles J attempted to distinguish *Nessa* on the basis that it did not deal with a newborn infant but it is not at all clear why this renders the principle defined in that case inapplicable. The submission made by the Child and Family Court Advisory and Support Service[55] is to be preferred as being in line with established principle and advantageous in terms of legal certainty and logic.

The decision in *B v. H (Habitual Residence: Wardship)* arose for consideration, but was neither confirmed nor refuted in the English High Court decision of *W. and B. v. H. (Child Abduction: Surrogacy)*[56]. This case concerned twin children born to a surrogate mother on foot of a surrogacy agreement between her and a Californian couple, in circumstances where only the husband had a biological connection with the children. The agreement was for the mother to give birth in California and to immediately relinquish possession of the children.

When the surrogate mother discovered she was carrying twins, a dispute arose. A Californian court awarded joint custody of the unborn children to the couple on birth. The surrogate mother did not contest the order, but returned to England determined not to give up the children. The Californian couple issued return proceedings but this was refused by Hedley J in the High Court. The children were held to be without habitual residence and the Convention was deemed to be of no application. Hedley J stated, without casting explicit doubts on the correctness of *B. v. H.,* that Charles J.'s conclusion may "run the very risk against which the Court of Appeal have repeatedly warned, namely confusing a legal and a factual proposition"[57]. While this hardly amounts to an outright rejection of Charles J's prior judgment, it certainly does suggest an element of doubt.

The High Court decision in P.A.S. v. A.F.S.[58]

Murphy J delivered the judgment of the High Court in this case. On the issue of the newborn infant's habitual residence, the court referred to three general principles set down by Waite J in *Re: B (Minors) (Hague Convention Case)*[59], none of which specifically addressed the issue before the court.

The court firstly dismissed the suggestion that the infant child would be in danger if a Return Order was made[60], and indicated that the matter would turn on the issue of the newborn infant's habitual residence at the date of the alleged abduction[61].

On the crucial point, Murphy J dismissed as irrelevant the decision in *Nessa* as "misconstrued given that the habitual residence of a child is that of its parents" without explaining in any detail why this was the case. In the same judgment, the definition of habitual residence was adopted from *Re: N (Abduction: Habitual Residence)* as a person's abode in a particular place or country which has been adopted voluntarily and for settled purpose as part of the regular order of his life for the time being whether of long or short duration, notwithstanding the fact that this definition does not seem to allow room for situations where habitual residence can be acquired without ever having been physically present in a jurisdiction.

As such, the High Court concluded that physical presence was not necessarily part of habitual residence, and that the latter was to be determined according to the habitual residence of the newborn infant's parents[62]. On a finding of fact, the High Court held that the respondent's sudden illness was the reason for her elongated stay in Ireland, notwithstanding the difficulties within the relationship. It was further held that when the respondent returned to Canada with the infant, she only intended to stay for a temporary period. Regardless of this, the High Court held that the newborn infant was habitually resident in Canada at the date of the alleged abduction on the basis of the parties' common intention and ordered the return on the infant. The respondent duly appealed to the Supreme Court.

The Supreme Court decision in P.A.S. v. A.F.S.[63]

Fennelly J gave the judgment of the Supreme Court on appeal. The court noted the objectives[64] and scope[65] of the Hague Convention and that the burden of proof fell on the applicant to prove that the infant was, immediately prior to the date of the alleged abduction, habitually resident in Canada. Notably, the court also accepted that it should[66]:

50. *Ibid.*, at 403.
51. *Ibid.*
52. Emphasis in original.
53 [2002] 1 FLR 388 at 403.
54. In so doing, Charles J relied in this on the decision of Sir John Balcombe in *Re M (Abduction: Habitual Residence)* [1996]1 FLR 887.
55. In that body's capacity as *amicus curaie.*
56. [2002] 1 FLR 1008.
57. *Ibid.*, at 1016.
58. Unreported, High Court, 13th Spetember 2004 (Murphy J), [2004] IEHC 323.
59. [1994] 1 FLR 394 at 395.
60 Within the meaning of Article 13 of the Hague Convention.
61. The High Court considered the considered the decision of the Supreme Court in *TM & DM, ex parte EM v. JM* Unreported, Supreme Court, 9th July 2003.
62. *Ibid*
63. [1995] 1 ILRM 306; Supreme Court, 24th November 2004 (McGuinness, Fennelly, and McCracken JJ) [2004] IESC 95.
64. Article 1 of the Hague Convention.
65. Article 4 of the Hague Convention.
66. [1995] ILRM 306 at 314-315.

> "endeavour, as far as possible, to interpret the Hague Convention harmoniously with the interpretation adopted by the courts of other contracting states. In practice, that means that we [the Irish courts][67] should try to follow those decisions. The Convention is an international agreement designed to resolve situations of personal conflict and the principle of comity and mutual trust between jurisdictions is of prime importance."

The court accepted that the determination of a child's habitual residence was one of fact. However, within this the court was uncomfortable with the notion expressed by McGuinness J in *CM & OM v. Delegación Provincial de Malaga Consejeria de Trabajoe y Asuntos Sociales Junta de Andalucia & others*[68] that a person must be physically present in a country for at least some reasonable period of time before he or she can be held to be habitually resident[69] (in effect the *Nessa* principle). In the court's view this was "too broad a proposition" and that[70]:

> "[T]he Convention deliberately left the notion of habitual residence undefined. The courts of the contracting states have to be free to apply it to the facts, having considered all the circumstances of the case. Human situations are infinitely variable. Habitual residence will be perfectly obvious in the great majority of cases. It is an obvious fact that a newborn child is incapable of making its own choices as to residence or anything else. What the courts have to look at is the situation of the parents and their choices. Where the child has, for a substantial period, been resident in one country with both its parents while they are in a stable relationship, particularly if they are of the same nationality, the answer will be fairly obvious."

Crucially, the court held that it was possible, in principle, for a child to be habitually resident in a jurisdiction where it had never physically been. It was the opinion of the court that flexibility demanded the inclusion of this possibility. However, the possibility was framed in the decision of the court in such terms as to suggest that these occasions will be the exception as opposed to the rule[71]:

> "I do not say that the place of birth of a child is an irrelevant fact. Clearly, it will be of prime importance in many cases. The facts of many cases will not be as benign as that of the premature birth during the weekend break in France. I do say, however, that to exclude, in every case, the possibility of a child being habitually resident in a country where it has never physically been is to introduce an unjustified restriction into the open and flexible notion adopted by the Convention"

The court accepted that the concept of "settled intention" is of limited use in cases of direct parental conflict, and warned against laying down rigid criteria for the acquisition of new habitual residence to preserve the flexibility aspect to the Hague Convention that weighed heavily on the court in this case.

On the facts in *S v. S*, the Supreme Court held that the infant child could not and did not acquire Canadian habitual residence on foot of travelling their with the respondent for what was only ever intended to be a temporary visit. Furthermore, the High Court had made no findings of fact in relation to the crucial issue of the fraught relations between the parties in the months before and after the birth of the infant. The Supreme Court felt that assumptions as to the stability of the relationship prior to the birth of the infant could not be made, and that the very real possibility that the respondent had decided to determine the relationship prior to giving birth had to be explored. The appeal was allowed and the matter remitted to the High Court.

The decision of the Supreme Court is to be welcomed, broadly speaking, on two grounds:

Firstly, the decision is unequivocally a "child-centred" (as opposed to "dependency" based) approach to the issue of determining the habitual residence of a child under the Hague Convention (as discussed above). This represents a welcome development in the recognition and vindication of the rights of the child, who is after the subject of proceedings, in the sphere of international and domestic private law[72].

Secondly, the decision acknowledges the reality that, it cases of parental conflict, it is notional to attempt to determine a child's habitual residence on the basis of parental common intention. Such a concept will have long ceased to exist, and it becomes necessary to ground habitual residence on other objective factors within a child's life.

On a more critical note, the Supreme Court placed an absolute premium on flexibility in defining habitual residence. Fennelly J noted that it "would be undesirable to lay down rigid criteria for the assessment of situations which are as variable as human nature". However, surely the same can be said for numerous family law situations. Human nature is no more or less variable in situations of international custody disputes than it is in equivalent domestic disputes, or indeed a whole host of other matters. The decision of the Supreme Court is tainted with an element of uncertainty. It is respectfully submitted that a great deal of flexibility could still have been allowed for within the boundaries of what is conceptually reasonable. Issues of parental custody rarely fall within the ambit of the Hague Convention where matters are clear cut. The families at issue are more likely to be in crisis than they are to be in harmony. In these circumstances, how is a parent to know whether they, or an errant spouse, are acting within the law or without where the boundaries are deliberately unclear? ●

67. Explanatory note added.68. [1999] 2 IR 363.
69. *Ibid.*, at 381.
70. [1995] 1 ILRM 306 at 316.
71. *Ibid.*, at 317.
72. See Kilkelly, *The Child and the European Convention on Human Rights*, Dartmouth Publishing Company Ltd. (1999) at 257-262.

Second Annual Thomson Round Hall Employment Law Conference

Thomson Round Hall held their second annual employment law conference in association with DIT Legal Studies Department at the DIT campus on Aungier Street on May 28th. It was chaired by The Hon. Mr Justice Roderick Murphy of The High Court who also made the opening address on the development of employment law in this jurisdiction and how it has evolved from the concept of status between master and servant to a more sophisticated understanding of agreement between employer and employee with implied statutory terms.

Following the opening address Cliona Kimber BL editor of the Employment Law Reports and the Irish Employment Law Journal, delivered a paper on the topical issues of agency workers and she concluded that there is a need for a legislative solution to regulate this area both so employers can plan their employment strategies and also to meet the needs of agency workers in Ireland. Marguerite Bolger BL dealt with the regulation of industrial relations and what occurs when an employer will not engage with a trade union. Tom Hayes, an employee relations consultant based in Brussels, gave an overview of the Information and Consultation Directive and the implications for Irish employers. He also covered future developments under the EU Social Agenda. Michelle Ni Longain, a solicitor and partner in BCM Hanby Wallace outlined the different fora for bringing an employment law claim.

The papers from this conference are available for purchase directly from Thomson Round Hall.

A New Era of Tribunalism - The Commissions of Investigation Act 2004

Keith Spencer*

Introduction

It is estimated that between 1997 and October 2003, the accumulated cost to the State of tribunals and other major enquiries was more than €100 million, that figure not including third party costs. The Law Reform Commission reported on tribunals of inquiry in 2003,[1]and in its Report it recommended that legislation be enacted providing for a low-key inquiry which focuses on malfunction of the system and not the wrongdoer. The Commissions of Investigation Act 2004 was enacted in order to give effect to many of the Commissions recommendations and it gives the State and the Oireachtas a flexible investigative mechanism, which can act as a precursor to, or an alternative to tribunals. The historic origins of the Act are grounded in the need to provide a means for the investigation into child sex abuse scandals. The Act arose from a need to provide a different mechanism for the investigation of matters of major concern that is, quick, cost effective, flexible, and reassuring to the public, in stark contrast to the current tribunal system. The Act contains provisions, which aim to streamline the investigative process by engaging and encouraging witnesses to offer assistance and information in private and in the absence of a solicitor or counsel. This article analyses and evaluates the provisions of the Commissions of Investigation Act 2004 and asks whether in the rush to curb tribunal spending, the Government and legislature have overstepped the mark by making deliberate and unjustified incursions into the constitutional rights of citizens.

The Establishment of Commission and matters of 'significant public concern'

It is important to note at the outset that this legislation does not replace or amend in any way the legislation under which tribunals of enquiry are established and operated.[2] Instead it adds to the range of mechanisms available for investigations and contains several new features that aim to ensure more timely and cost effective investigations which will enhance the ability of the commission of investigation to meet its objective of establishing the facts. The Act provides for tighter terms of reference in relation to the new mechanisms than were provided for in the current tribunal system. The broad terms of reference that were framed for the Beef Tribunal were undoubtedly a major contributory factor to the eventual loss of control and spiraling legal expenses that attended the Goodman affair.[3] In an effort to learn from past mistakes, the legislature in the 2004 Act has mandated that tighter terms of reference be drafted for commissions of investigation. The Act does not establish a single or permanent investigations body, rather, it provides for the establishment of commissions of investigation, as and when required, and the Act provides that several commissions can sit at any one time. The function of a commission of investigation will be to inquire into and report on matters referred to it that are considered to be matters of "significant public concern". The primary function of a commission is that of fact gathering and it is not charged with ascertaining the guilt, degree of culpability, or involvement of particular persons, however it is clear that this may be a by-product of the fact finding mission. Interestingly the Act does not venture a definition of the term, "significant public concern", even though such an issue constitutes the raison d'etre of a commission. However, during the passage of the Act it was broadly defined by the Minister Mr McDowell as an issue that is of more than mere interest to the public, it must instead, be an issue which has serious including, long-term, implications for public life. These implications could include the welfare and safety of a sector in society or the effective and safe operation of a significant public service. Ultimately, however, it will be left to the Government of the day to make a judgement in any particular case as to whether an issue is of such significant public concern that it requires investigation by a commission. Bearng in mind the profound consequences that any implication in the matters being investigated can have for witnesses, and the notoriety that has been foisted upon tribunal witnesses in the past, it is anticipated that it is only in exceptional cases of considerable public importance that the procedure will be invoked.

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1. Consultation Paper On Public Inquiries Including Tribunals Of Inquiry (LRC Cp 22 - 2003)
2. namely The Tribunals of Inquiries (Evidence) Acts 1921 to 2004.
3. See Rabbitte *"A Tribunal of Inquiry or an Investigation by Dail Committee?"* (1998) Bar Review 114

High level of ministerial involvement

It is worth noting that the Act provides for the establishment of a commission upon the proposal of 'The Minister' and following an order made by 'the Government'. This might face objection on the basis that it involves a sidelining of the Oireachtas, which can be seen as undemocratic. The role of the Oireachtas in the establishment of a commission of investigation is limited to the formal role of passing a positive resolution when the Government puts the proposed order before the House, and overall responsibility for the working of the Commission lies with the Minister, who determines the costs and the time frame, the identity of commissioners, and can amend the terms of reference without reference to the Oireachtas. It is conceivable that the government of the day, or at least particular Ministers, may at some stage be the subject of an investigation, or be implicated therein, and that because of this possibility, the public may not have full confidence in a commission of investigation that has been set up by the Government of the day and which reports to Ministers of that Government without any reference being made to the Oireachtas.

In response to this argument, one might point to Section 3(2) of the Act[4] as constituting sufficient involvement by the Oireachtas, as well as emphasizing the point that the consequences of the establishment of a commission of enquiry are materially different to those that result from the establishment of a tribunal of enquiry. While it is correct that the provision in section 3(2), mandating Oireachtas approval, is a negative resolution procedure and is commonly used by the Oireachtas as a means of keeping some control over delegated legislation, such a mechanism does not envisage any substantive Oireachtas input. Further, on the whole, one senses from the Act that there is a discernible policy which aims to ensure as little Oireachtas input as possible, within constitutional limits. Section 3 places responsibility for commissions firmly in the hands of the Minister for Justice, Equality and Law Reform and this is undoubtedly due to the perception that the Oireachtas has in the past been too liberal in setting the terms of reference, too generous in fixing time frames, and had not included adequate cost control mechanisms. The powers conferred on the Minister by the Act are extensive and this may be the subject of a challenge in the courts.

This trend towards 'Ministerial' rather than 'Oireachtas' involvement is continued in section 4 of the Act, which provides that the Minister is to set the terms of reference for the commission. Various amendments were argued for during the passing of the Act which advised that some power should be retained by the Oireachtas in setting the terms of reference. However these amendments were unsuccessful. Are the concerns that a copious amount of power has been bestowed upon the Minister adequately rebuffed by the simple response that the Oireachtas has a bad track record of drafting terms of reference? In the context of an Act that seeks to establish mechanisms to redress abuses of power carried out by persons in positions of great importance, it appears somewhat disingenuous to place an inordinate amount of power in the hands of one Minister. These concerns are compounded by section 6 and 7. Section 6 recognizes that the terms of reference may need to be altered after an investigation has begun. Once again, the Minister seems free to detemine when and how he can alter the terms of reference as very little Oireachtas involvement has been provided for in amending those terms. This is a sharp contrast to the situation pertaining in the context of tribunals where a resolution of both houses is required in order to amend an instrument establishing a tribunal.[5]

Section 7 deals with the appointment of commissioners, and it gives the Minister broad scope in deciding the identity of the persons who will serve on a commission. Given the varied circumstances and subject matter that will give rise to the need for investigation by a commission, this section has been cast in wide terms so as to maximize the pool of people from whom commissioners can be chosen. The dearth of restrictions on the Minister in the Act means that he has carte blanche in the appointment of commissioners and must only be satisfied that they have the necessary skill, experience and qualifications. This provision once again eschews Dail involvement and compromises the concept of democratic accountability.

Amnesty for co-operative individuals

Where a person comes before the commission and co-operates fully, and it later transpires that such an individual has questions to answer regarding some allegations related to the original investigation, then section 6(2) can provide considerable protection to such a person. It appears that section 6(2) might be used as a means of effecting a type of amnesty in respect of certain informants. It provides that;

> 6(2) A commission may not consent to or request an amendment of its terms of reference if satisfied that the proposed amendment would prejudice the legal rights of any person who has co-operated with or provided information to the commission in the investigation.

While this provision may prove valuable in procuring witnesses and extracting information, one can see the potential for its abuse. A party may readily comply with a commission and give evidence in order to safeguard their position, and where they have made generous offerings of evidence, it will be difficult for the commission to alter its terms of reference in an attempt to investigate this person further. This provision is however clearly reconcilable with the function of Commissions generally, as their primary role is that of fact-finding.

Tendering process for legal services

Section 8 of the Act is another effort at reducing the legal costs that are associated with tribunals. It deals with the recruitment and appointment of staff, including lawyers and other specialist staff, to advise and assist a commission and provides for an innovate tendering process in so doing. Section 8(2) was included as an amendment to the Bill as initiated. The section states that the Minister after consultation with the commission 'may' - not shall - direct that a competitive tendering process should be used. Whether or not a tendering process is used will depend to a large extent on the subject matter of the investigation, as there may be instances where the subject matter is so

4. 3.—(1) Following a proposal made by a Minister with the approval of the Minister for Finance, the Government may, by order, establish a commission to—
   (a) investigate any matter considered by the Government to be of significant public concern, and
   (b) make any reports required under this Act in relation to its investigation.
   (2) An order may be made under this section only if—
   (a) a draft of the proposed order and a statement of the reasons for establishing the commission have been laid before the Houses of the Oireachtas, and
   (b) a resolution approving the draft has been passed by each House.
5. The Tribunals of inquiry (Evidence) (Amendment) Act, 1998 which inserts s1.A into the 1921 Act provides for the amendment of the terms of reference.

specialized and the pool of expertise so small, that a tendering process would not be practicable. The tendering process is to be welcomed but it is debatable whether it will make much difference to the accrual of legal costs, especially where the State wishes to retain top counsel. The idea that eminent counsel will be secured at bargain basement prices as a result of a tendering procedure is not an altogether realistic prospect.

Investigations to be conducted in private

One of the major innovations provided for in this Act is contained in section 11. This is perhaps the most controversial provision in the legislation. Section 11 reads as follows;-

> **11.**(1) A commission shall conduct its investigation in private unless-
>
> (a) a witness requests that all or part of his or her evidence be heard in public and the commission grants the request, or
>
> (b) the commission is satisfied that it is desirable in the interests of both the investigation and fair procedures to hear all or part of the evidence of a witness in public.

The intention of this section and that of section 10[6], which sets out the guiding principles by which all commissions must operate, is that, in future, a less adversarial route will be taken in carrying out investigations, and it is in effect an attempt to remove strong, costly, legal teams from the picture. The sections allow for the work of commissions of investigation to be undertaken in private. Section 11 was hotly debated in both houses, it provides that legal representatives of other parties will be present only if the commission is satisfied that their presence is necessary in the interests of the investigation and of fair procedures. Cross-examination by or on behalf of other parties will take place only where the commission agrees. These provisions represent a departure from current practices employed in the context of tribunals. In support of the section, it can be emphasized that because the proceedings will generally be held in private the risk that a person's good name or reputation will be tarnished, is greatly reduced and therefore the same safeguards (i.e. having a legal team present, and being able to cross examine, set down in the case of in *Re Haughey* [1971] I.R. 217), are not necessitated. However the arguments advanced below expose the flaws in this reasoning.

The legislation aims to reduce the legal costs incurred by providing for hearings in private. Section 11(1)(a) allows for public hearings where so requested by a witness. It is envisaged that this provision has the potential to substantially increase the legal costs involved due to the fact that legal representation must be allowed, with a view to protecting one's constitutional right to a good name, where the hearing is a public one. It is also foreseeable, that this option to hold proceedings in public might be availed of by a witness who wishes to retard the proceedings in the same manner that we are accustomed to seeing in tribunals. Upon securing a public hearing, the witness will, in an effort to respect his constitutional rights, be entitled to the full panoply of legal representation in order to safeguard his constitutional right to a good name, and from that point on it is likely that every subsidiary issue will be challenged in the courts, thus hampering the velocity of proceedings and fueling legal costs. It is possible that this provision will be abused by witnesses, and that ultimately it could be used to thwart the aim of the legislation which is to provide a cost effective alternative to tribunals.

The Oireachtas has had to strike a balance between preserving a witness's right to a good name and at the same time implementing mechanisms that enable a commision to elicit information from witnesses without the threat of legal challenge. The legislation has done this by providing for hearings in private. This is a point of distinction between commission hearings and tribunal hearings that may or may not be the saving grace for the legislation. For the legislature to do this however, some concessions were necessary. Section 11(1)(a) represents one such concession by allowing the witness to request a public hearing, that may threaten to undermine the force of the Act. The fact that the commission has the discretion to grant or deny a public hearing may give rise to legal challenges. If a commission denies such a request, and the witness is denied legal representation at an interview in private, in circumstances where his good name may be besmirched, this may amount to a departure from fair procedures. It is clear from the following that the commission has control over who is present at interviews and over whether or not legal representatives can be marshaled to attend;-

> 11(2) Where the evidence of a witness is heard in private-
>
> (a) the commission may give directions as to the persons who may be present while the evidence is heard,
>
> (b) legal representatives of persons other than the witness may be present only if the commission-
>
> (i) is satisfied that their presence would be in keeping with the purposes of the investigation and would be in the interests of fair procedures, and
>
> (ii) directs that they be allowed to be present,

The ability of the commission to determine whether legal teams can be present would certainly be unconstitutional if the hearing were a public one, especially when one adverts to the emphatic dictum of O'Dalaigh CJ in Re *Haughey*[7] (which was endorsed more recently by Hamilton CJ in *Haughey v Moriarty*[8]);-

> "in the proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property or any of his personal rights jeopardized, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution, the State, either by its enactments or through the Courts must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights"

A witness may assert that, although the commission is merely said to have a fact finding function, nevertheless the serious consequences that an adverse finding of fact can have for his reputation demands that he has the option of having legal representatives present during interview, even if such is to take place in private.

6. Section 10 provides that the commission should seek the voluntary co-operation of witnesses and that it should aim to facilitate witnesses in that regard.
7. [1971] I.R. 217
8 . [1999] 3 I.R. 1

The end-product of Commission investigations

In order to evaluate the strength and likely success or failure of the above argument, one must consider exactly what the end result of a commission will be, and then compare these to the end-product of a tribunal of investigation. Only when one considers the consequences that will attend an investigation, can one make an assessment as to whether a witness should be accorded the full range of legal protections available. It was held in *Goodman International v Hamilton (No.1)*[9] that tribunals were not conducting the administration of justice and therefore the application of Article 37 of the Constitution did not arise. It was held by the court in that case that Article 37 could only apply where there is of necessity some form of trial or adjudication and that the determination of the truth or falsity of allegations did not amount to a usurping of the judicial function since the critical factor is trial and adjudication and not inquiry.[10] While it is clear that the object of tribunals and commissions of investigation alike is not to come to a verdict on the innocence or guilt of the parties involved, or to impose punishment or penalty, and that their findings cannot form the basis of either an acquittal or a conviction of a person on a criminal charge,[11] it is cold comfort to a witness that no penalty has been imposed by a commission or tribunal when a public report adumbrates his involvement in serious criminal matters.

The commission is responsible for submitting a report, which it has compiled based on the evidence received by it, to the Minister. It is not the job of the commission to speculate or to make findings or reach judgments based on the balance of the evidence. On the other hand, it would be unreasonable to expect the commission simply to set out the conflicting evidence and offer no comment, even where comment would be justified by the weight of the evidence before it. Section 32(2)(b) addresses this and allows a commission to indicate its opinion as to the quality or weight of evidence relating to the issue. The section does not go so far as to suggest that the commission may find one version of the evidence to be more credible than the other, but it does enable the commission to point out that, for example, certain disputed facts were corroborated by other sources or that a clear majority of witnesses supported one version as opposed to another. The potentially devastating effects that a commission's findings might have for the reputation of an individual can not be underestimated, and the resounding passage of Murphy J. in the Australian High Court in *Victoria v Australian Building Construction Employees and Builders Labourers Federation*[12] is worthy of reproduction here;-

> "It is a fine point to answer that the finding is not binding and does not of itself make the person liable to punitive consequences. It is by fine points such as this that human freedom is whittled away... If a government chooses not to prosecute, the fact that the finding is not binding on any court is of little comfort to the person found guilty; there is no legal proceeding which he can institute to establish his innocence. If he is prosecuted, the investigations and findings may have created ineradicable prejudice"

The Minister is obliged to publish the report of the commission.[13] The end result of a commission of investigation is in essence the same as that produced by a tribunal of enquiry. It is submitted that the practice of the commission, of hearing evidence in private, is not a panacea, which allows for the exclusion of legal representatives from the interview without treading on constitutional rights.

This deficiency is not remedied by the arrangements in section 35 which are supposedly designed to ensure that fair procedures and natural justice are respected. Under section 35, persons named in the report have an opportunity to seek to have changes or corrections made where they believe that fair procedures have not been respected. This can include going to the High Court for an order seeking changes or deletions of certain material. This is not to be taken as meaning that a report may never give details about named persons as it may do so if those details are consistent with the evidence that was before the commission, and where fair procedures have been respected. On its face, the section appears to seek to balance the need to respect fair procedures and the need to ensure the timely completion of investigations, as well as ensuring that the publication of reports is not unduly delayed by persons about whom unfavorable conclusions are drawn. However in light of the limitations that are placed on attendance by legal representatives in the preceding sections, section 35 is perhaps little more than a bad patch up effort which has been included as a token gesture of "fairness" which will serve to act as ammunition for the State in the event of a challenge to the legislation. It is clear that one aim behind this legislation is to reduce lawyers costs in these forms of inquiry. However, it must be appreciated that legal costs escalate in these matters because people prize that which they employ lawyers to defend, specifically their good name. One cannot expect witnesses to lie down and accept a fate determined by a commission whose assessment of the facts may suffer from bias or from a misunderstanding of events.

Privilege

Section 21 the Act states that it does not compel the disclosure of any privileged information or documents. However, that section later provides for an anomalous state of affairs. The Act requires in section 21(4)(a) that the commission must examine a document in order to determine whether it is in fact privileged. This provision allows for a situation where the members of a commission may look at a document, and upon determining that the document is in fact of a privileged nature, decide against allowing that document to be admitted as evidence. Despite this determination, the commission is aware of the document's contents, and cannot be expected to "disremember" that information in its entirety, such that it could not possibly have any effect on its findings. In short, the viewing of the document might serve only to contaminate the minds of the commission members, and it is submitted that perhaps the issue would be more appropriately dealt with by an independent forum, such as the Master of the High Court. This problem is compounded by the fact that the members of the commission will be drawn from varied walks of life, many of whom will

9. [1992] 2 IR 542
10. supra at page 607.
11. Section 19 of the Act provides that certain items and documents are inadmissible in evidence.
12. (1981-82) 152 CLR 25
13. Section 38

have no knowledge of the law relating to privilege. The purpose of the section is to find a way of overcoming difficulties presented by claims of privilege as such claims, especially where they are not justified, can seriously frustrate and delay the work of an investigation. Does the mechanism in this section do enough to ensure that genuine claims will be respected?

The Report

It is the responsibility of the Minister to make sure that the report submitted to him by a commission at the end of the investigation process is published.[14] This is in contrast to the procedure which follows the publication of tribunal reports, where, all interim reports and reports issued come first to the Clerks of the House who place them in the Oireachtas library for the members. The provision might be impugned on the basis that the Minister can, under this legislation, effectively make the report public in his own good time, and that where a report contained information that was unfavorable to the government of the day, it might be withheld, for example, until after a general election. However, these concerns are to some extent assuaged by the requirement that the report be made public "as soon as possible after it is submitted to him". However that language is itself open to interpretation and possibly manipulation.

Tribunalism alive and well?

The Act[15] envisages the establishment of a tribunal to investigate matters that were the subject of investigation by a commission. This demonstrates that the two mechanisms of investigation are to co-exist and shows that a report from a commission might in turn lead to the subsequent establishment of a full tribunal of inquiry. There are various circumstances in which a tribunal might still prove necessary. If a tribunal is established to inquire into a matter all or part of which was within a commission's terms of reference, then the Minister and the commission must furnish the tribunal with all evidence received relating to the matter upon the request of any member of the tribunal.[16] One point of departure between the two mechanisms is that since the 'referendum on cabinet confidentiality,' the Constitution now recognizes the special status of tribunals of inquiry. A commission of investigation appointed under this Act would not enjoy the powers that have been exclusively reserved for such a tribunal, i.e. to enquire into decision-making and discussions at a Government meeting.

Conclusion

On the whole, the Act takes a relaxed attitude to the rules of natural justice and while this may be permissible, given the private nature of hearings, such an approach could not be taken in the context of tribunals.[17] It remains to be seen whether the innovative measures introduced by the Act will weather the storm of legal challenge. However, one thing is certain. If the Act is widely used as an alternative to tribunals, it will greatly dampen the circus atmosphere that has surrounded tribunals in the past. Journalists will have to content themselves with leafing through weighty reports published long after public interest in the subject matter has waned. And although, witnesses may be spared the insidious celebrity that had been thrust upon them by public hearings, they may find themselves exposed to unwelcome findings in a commission report in circumstances where they were not allowed to have a lawyer present. ●

14.Section 38 15. Section 44 16. Section 45 17. where the safeguards set out in *In Re Haughey* ibid at fn 6 must be observed

Legal Update

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Edited by Desmond Mulhere, Law Library, Four Courts.

A directory of legislation, articles and written judgments received in the Law Library from the 19th March, 2005 to 13th May, 2005.
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1st stage- Dail

Consumer rights enforcer bill 2004
1st stage -Dail

Criminal Justice bill 2004
1st stage-Dail

Criminal law (insanity) bill 2002
Report - Seanad

Defence (amendment) bill 2005
1st stage - Dail

Disability bill 2004
2nd stage - Dail

Dormant accounts (amendment) bill 2004
Report - Seanad

Driver testing and standards authority bill 2004
2nd stage - Dail

Electricity regulation (amendment) bill 2003
2nd stage - Seanad

Electoral (amendment) bill 2005
1st stage- Dail

Enforcement of court orders bill 2004
2nd stage- Dail

Enforcement of court orders (no.2) bill 2004
1st stage- Seanad

Finance bill 2005
1st stage-Dail

Fines bill 2004
2nd stage- Dail

Freedom of information (amendment) (no.2) bill 2003
1st stage - Seanad

Freedom of information (amendment) (no.3) bill 2003
2nd stage - Dail

Fur farming (prohibition) bill 2004
1st stage- Dail

Garda Siochana bill 2004
Committee-Seanad

Grangegorman development agency bill 2004
1st stage - Dail

Health (amendment) (no.2) bill 2004
1st stage- Dail

Health and social care professionals bill 2004
Report stage- Seanad

Housing (state payments) bill 2004
1st stage- Seanad

Human reproduction bill 2003
2nd stage - Dail

International criminal court bill 2003
1st stage - Dail

International interests in mobile equipment (Cape Town convention) bill 2005
1st stage - Seanad

International peace missions deployment bill 2003
2nd stage - Dail
Interpretation bill 2000
Committee- Seanad (*Initiated in Dail*)

Investment funds, companies and miscellaneous provisions bill 2005
1st stage - Seanad

Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003
Report - Seanad

Land bill 2004
2nd stage - Seanad

Law of the sea (repression of piracy) bill 2001
2nd stage - Dail *(Initiated in Seanad)*

Local elections bill 2003
2nd stage -Dail

Maritime safety bill 2004
Committee-Seanad

Money advice and budgeting service bill 2002
1st stage - Dail (*order for second stage*)

National economic and social development office bill 2002
2nd stage - Dail (*order for second stage*)

National transport authority bill 2003
1st stage - Dail

Offences against the state acts (1939 to 1998) repeal bill 2004
1st stage-Dail

Parental leave (amendment) bill 2004
2nd stage - Dail (*Initiated in Seanad*)

Patents (amendment) bill 1999
Committee - Dail

Planning and development (acquisition of development land) (assessment of compensation) bill 2003
1st stage - Dail

Planning and development (amendment) bill 2003
1st stage - Dail

Planning and development (amendment) bill 2004
1st stage - Dail

Planning and development (amendment) bill 2005
1st stage - Dail

Planning and development (amendment) (no.2) bill 2004
1st stage -Dail

Planning and development (amendment) (no.3) bill 2004
2nd stage- Dail

Postal (miscellaneous provisions) bill 2001
1st stage -Dail (*order for second stage*)

Prisons bill 2005
1st stage - Seanad

Proceeds of crime (amendment) bill 2003
1st stage - Dail

Prohibition of ticket touts bill 2005
2nd stage - Dail

Public service management (recruitment and appointments) bill 2003
1st stage - Dail

Railway safety bill 2001
Committee - Dail

Registration of deeds and title bill 2004
1st stage - Seanad

Registration of lobbyists bill 2003
2nd stage- Dail

Residential tenancies bill 2003
2nd stage - Dail

Safety, health and welfare at work bill 2004
Report stage - Dail

Sea Pollution (hazardous substances) (compensation) bill 2000
Dail Éireann - Dail

Changed from:

Sea pollution (hazardous and noxious substances) (civil liability and compensation) Bill 2000

Sea pollution (miscellaneous provisions) bill 2003
1st stage - Seanad

Statute law revision (pre-1922) bill 2004
1st stage - Seanad

Sustainable communities bill 2004
1st stage - Dail

The Royal College of Surgeons in Ireland (Charter Amendment) bill 2002
2nd stage - Seanad [**p.m.b.**]

Totalisator (amendment) bill 2005
1st stage - Seanad

Transfer of execution of sentences bill 2003
Committee - Seanad

Twenty-fourth amendment of the Constitution bill 2002
1st stage- Dail

Twenty-seventh amendment of the constitution bill 2003
2nd stage - Dail

Twenty-seventh amendment of the constitution (No.2) bill 2003
1st stage - Dail

Veterinary practice bill 2004
Report - Seanad

Waste management (amendment) bill 2002
2nd stage- Dail

Waste management (amendment) bill 2003
2nd stage - Dail

Water services bill 2003
1st stage - Seanad

Whistleblowers protection bill 1999
Committee - 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

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

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Elderly Claims for refund of Nursing Home Charges

Alan Doherty BL and John Patrick Gallagher BL

Introduction

The recent judgment of the Supreme Court[1] on the constitutionality of the Health Amendment (No.2) Bill 2004 appeared to open the way for claims by a long list of potential litigants. These included patients wrongfully charged by Health Boards for certain institutional care services and the estates of such patients.[2] The recently announced legislative initiative proposing to refund living patients and the estates of deceased patients is designed with this potential litigation in mind. The key issue is therefore the extent, if any, to which the entitlements of potential litigants, particularly estates will exceed the boundaries of the scheme. That issue revolves around an examination of the forms of action appropriate to such claims and the barriers which may be raised in defence, particularly those arising from the passage of time.

The Background

The Supreme Court declared as unconstitutional the provisions of the Bill which purported to retrospectively validate certain charges.

> "it is declared that the imposition of a relevant charge is, and always has been lawful"[3]

To understand why retrospective legislation was proposed, it is necessary to consider the entitlements given to persons of physical or mental infirmity under the 1970 Act, and the manner in which those entitlements were subsequently compromised by the imposition of charges.

Section 52 of the Health Act 1970 placed an obligation on Health Boards to:

> *"...make available in-patient services for persons with full eligibility and persons with limited eligibility". (emphasis in all cases is added)*
>
> The "*in-patient services*" which the Health Boards were obliged to provide were defined in Section 51 as meaning:
>
> "Institutional services provided for persons while maintained in a hospital, convalescent home or home for persons suffering from physical or mental disability or in accommodation ancillary thereto".
>
> *"Institutional services"* are defined in s. 2 of the Health Act, 1947, as including the following:
>
> (a) maintenance in an institution,
>
> (b) diagnosis, advice and treatment at an institution,
>
> (c) appliances and medicines and other preparations,
>
> (d) the use of special apparatus at an institution."

"Fully eligible persons", were defined by Section 45(1) (a) of the Health Act 1970 as: "Adult persons unable without undue hardship to arrange general practitioner medical and surgical services for themselves and their dependants...", and also included *"the dependants of such persons"*. In effect, this equated to medical-card holders.

Section 53(2) of the Act permitted the charging of persons in the limited eligibility category. But in all other cases, Section 53(1) expressly and unambiguously precluded the levying of charges:

> "charges shall not be made for in-patient services made available under S. 52".

Various regulations were made from time to time pursuant to Section 53(2). They did not purport to charge *"fully eligible persons"*.

How then were charges imposed on medical card holders?

Initially, charges were imposed under the Health Act, 1953, which permitted the charging of persons (including medical card holders) who were in long-term residential care as beneficiaries of *"institutional assistance"* (Section 54 of the 1953 Act). This meant "shelter or maintenance in a county home or similar institution". It appears that the practice after the passing of the Health Act 1970 was to charge patients in most institutions: on the basis that they were in receipt of "institutional assistance", even where medical treatment was involved. This practice was foreclosed in 1976, with the decision of Finlay P in *In re Maud McInerney, a Ward of Court*[4], which decided that patients who received any medical care over and above pure maintenance, in a hospital or other essentially health care institutions mentioned in Section 51 of the Health Act 1970, fell outside the 1953 Act and within the 1970 Act.

Accordingly, subsequent to the High Court decision in *McInerney,* many persons in residential care in health care institutions could no longer be charged, even for the non-medical *"shelter or maintenance"* aspects of their care - at least not pursuant to the Health Act 1953. The McInerney decision was appealed to the Supreme Court and the developments prior to the hearing of the appeal were described by Murray C.J. as follows:

> "The Court has been informed that on 6th August, 1976, a date later than the High Court decision and earlier than the Supreme Court decision in *McInerney*, the Department of Health sent a circular letter to all Health Boards. The circular informed the Boards of the terms of the Health (Charges for in-patient services) Regulations, 1976. It pointed out that, by virtue of s. 53(2)(a) of the Act of 1970, these regulations did not relate to persons with full eligibility. It went on to state:

1. In the matter of Article 26 of the Constitution and the Health (Amendment) (No.2) Bill 2004, decision of the Supreme Court pronounced on the 16th day of February, 2005, by Murray C.J.
2. It was stated to the Supreme Court that some 275 000 patients would have received the relevant services.
3. S. 1(b) of the Bill
4. (1976) ILRM 229

> "However, in this respect, the precise definition of a person with full eligibility in s. 45(1)(a) of the Act should be carefully noted. A person who, while he was providing for himself in his own home, was deemed to have full eligibility could be regarded as not coming within that definition when he is being maintained in an institution where the services being provided include medical and surgical services of a general practitioner kind, with consequential liability for charges under the regulations."

> "It is accepted that, following Circular 7/76, Health Boards generally continued to charge patients with full eligibility for in-patient services. This may have involved the withdrawal of the relevant medical cards. The Court has been informed that the State was advised in 2004 that charges were imposed on a flawed legal basis, going back as far as 1976, on persons with full eligibility. The Attorney General has expressly accepted in his written submissions that since 1976, "there was no legal basis for imposing such charges on persons with full eligibility". The Court must assume, therefore, given the purpose of the Bill, that charges were made in contravention of the terms of s. 53(1) of the Act of 1970."

After adverting to a legislative development in 2001[5], which deemed all persons over 70 years of age fully eligible, irrespective of their means, the Chief Justice continued:

> "Thus, from the entry into force of that provision, all persons aged seventy or more were automatically and by that fact alone deemed to be fully eligible. Thereafter any charge imposed on such a person was indisputably imposed in direct contravention of s. 53(1) of the Act of 1970. Yet, it has been confirmed to the Court that the practice continued. It is, of course, the admitted purpose of the Bill to render lawful what was thus unlawful."

The Travers Report

The Travers Interim Report of March 2005[6] at Chapter 3 dealt with; "Legal Concerns with Respect to the Practice of Charges for Certain Long-Stay Patients in Health Board Institutions: Extent and Timing of the Knowledge of the Department of Health and Children", it stated:

> **"July 1976: In-Patient Service Regulation Made and Issued with Interpretative Circular 7/76 from Department of Health**
>
> 3.5 The In-patient Services Regulations were made in July 1976. They were issued to Health Boards in August 1976 together with Circular 7/76 discussed in Chapter 1 and Chapter 2 of this Report. Circular 7/76 effectively invited the Health Board CEOs to remove "full eligibility" status from persons availing of long-stay care services in health board institutions as described earlier in this Report.
>
> 3.6 It seems clear from the files of the Department that, initially the Department considered dealing with the negative consequences of the High Court decision in the *McInerney* case for the financial position of the health boards through primary legislation. In the event, however, the Department opted to deal with the issue arising through the making of regulations as provided for in the Health Act, 1970 and through the issue of Circular 7/76 contemporaneously with the issue of the regulations to health boards. It will be recalled that Circular 7/76 provides advice on how "full eligibility" under the Health Act, 1970 might be interpreted in the case of people in long-stay care who had "full eligibility" status before being admitted to that care. The approach adopted by the Department appears to be at variance with the substantive advice of its own legal advisor and was adopted, apparently, without the benefit of any alternative legal advice to be found, at this time, in the files of the Department made available for the purpose of this Report."

The extent to which the infirmity of the advice in Circular 7/76 was appreciated at various levels of the Boards and Departments may be the subject of further controversy. The materials considered by Travers and the findings of the Report are potentially significant in terms of informing the preparation of a case such as seeking discovery and perhaps even obtaining admissions, but obviously will not arrogate a Court's function in weighing the evidence.[7] Whether *"systemic corporate failure"*[8] and the other verdicts of the Travers report could be sustained at a trial with the inevitably more restrictive approach required by the rules of evidence and fair procedures remains to be seen.

Forms of Action

Overview

Persons who qualified for medical card treatment, who were in receipt of *"in-patient services"*, and who suffered a deduction of their pension at any time since 1976, clearly have a *prima facie* case for the repayment of some or all of these monies. The question is what form could such an action take? The Supreme Court did not purport to exhaustively define the nature of such claims, but in examining the *prima facie* property rights affected by the Bill, the Court did discuss some causes of action which might arise :

> "The actions for recovery could be based upon the law of restitution already discussed. They might be based on the modern approach to the recovery of money paid under a mistake of law (see *Rogers v. Louth County Council* [1981] IR 265). The action might take the simple form of a claim for the repayment of money had and received to the use of the plaintiff or a claim in equity for a declaration that certain monies were held in trust. The form of the action is immaterial for present purposes. What is clear is that the patients had a property right consisting of a right of action to recover the monies."

When discussing similar rights in *Murphy v The Attorney General*[9] the Supreme Court adverted to various forms of action with diverging views as to the most appropriate. The plaintiffs, who were husband and wife, sought to challenge provisions of the Income Tax Act 1967 which taxed a married couples more heavily than their single counterparts. The Supreme Court having held that the impugned sections were unconstitutional "spoke to the minutes of the Order", as to whether and to what extent the plaintiffs would be entitled to seek repayment of taxes overpaid. Henchy J's comments illustrated the fluidity in relation to the form which such actions may take:

> "The implied contention that the State is a constructive trustee of the money collected as income tax under the condemned sections is the counterpart in equity of a claim in common law for money had and received. In *Moses v. Macferlan* at p. 1012 of the report, Lord Mansfield held that "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity

5. Section 1 of the Health (Miscellaneous Provisions) Act, 2001
6. Report on Certain Issues of Management and Administration in the Department of Health and Children associated with the Practice of Charges for Persons in Long-Stay Care in Health Board Institutions and Related Matters laid before both Houses of the Oireachtas on 9 March 2005 by the Joint Committee on Health and Children.
7. In this regard see the comments made by the House of Lords in *Three Rivers II*, concerning the reliance by the Courts below on the factual findings of the Bingham Report (2001) 2 AER 513
8. Paragraph 7.4.3
9. (1982) IR 241

> to refund the money." Thus, he put the claim on the footing of equity, or unjust enrichment, rather than under the fiction of an implied promise to repay money had and received. Whether the action be framed at common law for money had and received or (as here) in equity for an account of money held as a constructive trustee for the plaintiffs, I would hold that, in the absence of countervailing circumstances (to which I shall presently refer), such money may be recovered."[10]

In the same decision Kenny J favoured a more traditional contractual construction of the right to redress[11]:

> "The flexible form of action for money had and received to the use of the first plaintiff includes a claim for money wrongly demanded and received by an official by virtue of his office."

The undifferentiated nature of claims of this kind is also evident in other decisions. We now attempt to list the various forms of action which may arise.

Restitution

While contractual, quasi-contactual and tortious causes of action are undoubtedly open and will be looked at further below, a distinct claim in restitution based on the concept of unjust enrichment has potential advantages for the claimant facing limitation defences[12]. A claim in restitution arising from unlawful charges might focus on the essential nullity of a demand for payment unsupported by lawful authority, as well as the coercive aspect present where it is the State making such a demand, rather then any supposed contractual analogy. That restitution can be seen as independent of contact and tort is apparent from the following dictum of Keane J. in the *Dublin Corporation* case:

> "It is clear that, under our law, a person can in certain circumstances be obliged to effect restitution of money or other property to another where it would be unjust for him to retain the property. Moreover, as Henchy J. noted in *East Cork Foods Limited v. O'Dwyer Steel Co.* [1978] I.R. 103, this principle no longer rests on the fiction of an implied promise to return the property which, in the days when the forms of action still ruled English law, led to its tortuous rationalisation as being "quasi-contractual" in nature. The modern authorities in this and other common law jurisdictions, of which *Murphy v. The Attorney General* [1982] I.R. 241 is a leading Irish example have demonstrated that unjust enrichment exists as a distinctive legal concept, separate from both contract and tort."[13]

Payments made under Mistake of Law

A potential head of claim in the restitutionary mould which merits particular attention is the burgeoning doctrine of payments made under mistake of law - adverted to by Murray CJ in the Article 26 proceedings. The leading decision in Ireland is *Elizabeth Rogers v Louth County Council*[14]. In that case, the defendants had misinterpreted the appropriate provisions of the Housing Act, 1966 for calculating the redemption price of certain annuities and consequently had overcharged the plaintiff for same (the Supreme Court had already declared the method of calculation unlawful in *Meade v Cork County Council*[15]). It is worth noting that the miscalculation derived from an instruction contained in a Ministerial directive, drafted in contemplation of otherwise entirely lawful legislation, which was mistakenly relied upon to justify payments for a number of years: a scenario strikingly similar to the Circular 7/76 debacle. It was common ground between the parties that the charge as calculated was without legal basis *and* that the monies paid by the plaintiff were paid under a mistake of law.

In arriving at its decision, the Supreme Court took guidance from the UK decision in *Kiriri Cotton Co Ltd v Dewani*[16], and Mr. Justice Griffin cited Lord Denning's judgement in the Privy Council (at page 204 of the report) as follows:

> "Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James L.J. pointed that out in *Rogers v. Ingham.* If there is something more in addition to a mistake of law -- if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake--then it may be recovered back; see *Browning v. Morris*, by Lord Mansfield. Likewise, if the responsibility for the mistake lies more on the one than the other--because he has misled the other when he ought to know better--then again they are not in *pari delicto* and the money can be recovered back . "

The additional element which was found to exist in the circumstances of Rogers which justified holding the mistake of law operative was the lack of voluntariness on the part of the plaintiff. This arose owing to the element of compulsion inherent in an official demand: the *colore officii* as earlier described in *Dolan v Neligan*[17].

Breach of Statutory Duty Simpliciter

On the basis that there was a well-defined statutory duty to provide free care to the persons who were wrongfully charged, and on the basis that the relevant provision was enacted particularly for the benefit of that group who form an identifiable class of persons; those prejudiced by the breach of that duty would seem to have a stateable case under this tortious heading[18]. This head of claim would appear to be particularly apposite for those persons who were not provided with care at all, and who in the alternative had to avail of private care.

Forms of Action requiring certain knowledge on the part of the Defendant

As was observed above, no case has yet been proven with respect to any given plaintiff. It appears however that the transparent illegality of at least some of the charges under review, disentitle the State from relying on prerogatives which may attach to a *bona fide* mistake, as it had been able to do in respect of the overpayments in the *Murphy* case[19]. In this regard Murray C.J. drew particular attention to the charging of all persons aged seventy or over, from 2001:

> The claims are to be extinguished whether or not the monies were collected in good faith. In this connection, it is particularly material that, apart altogether from the express prohibition of charging contained in s. 53(1) of the Act of 1970, as and from 2001, all persons aged seventy or over were entitled by statute to be treated as having full eligibility regardless or means. Nonetheless, collection of charges continued. Counsel for the Attorney General frankly and rightly accepted at the hearing that there was no conceivable basis upon which anybody could reasonably have thought the charges could lawfully be levied or collected from persons aged seventy or over after that time....The Court is satisfied, accordingly, that the *Murphy* judgment offers no support for the Bill, insofar as reliance is placed on equitable principles relieving defendants from full restitution on the grounds of good faith.

10. At page 316
11. At page 335
12. *The Law of Restitution*, Goff & Jones, 6th Edition, Chapter 4
13. (1996) 1 IR 468 at 483
14. (1981) IR 265
15. Supreme Court, 31 July 1974
16. (1960) A.C. 192
17. (1967 IR 247)
18. *Phillips v The Medical Council*, [1991] 2 IR 115
19. Cited above

Of course this is not the same thing as saying that the charges were made *mala fides*, and before briefly touching on the ingredients of actions grounded on fraud, it would be prudent to recall that such causes of action are not pleaded or advanced without clear instructions and credible evidence in support of the claim. In terms of practical and evidential considerations, claims would be more susceptible to proof under the forms of claim coming under the umbrella of restitution.

The Tort of Deceit

The basic elements of the tort of deceit are[20]:

1. an untruthful statement or representation of fact,
2. made in the knowledge of its falsity, or at least without any belief in its truth
3. with the intention that it would be relied upon
4. which false representation the plaintiff acted on
5. and suffered damage by so doing

Whether representations concerning matters of law can ground the tort of deceit is not conclusively decided; one might argue that they can, particularly where the respective parties are not on an equal footing[21]. Other than that, the major obstacles are the obvious ones: proving the fraud of the parties alleged to have so acted. If a plaintiff succeeds in making a case under this heading, a possible benefit would be the dove-tailing of the tort of deceit with the Statute of Limitations rules regarding actions based on fraud[22], which provisions are discussed below.

Misfeasance of Public Office

Another potential tortious head of claim with a knowledge component is that type of breach of statutory duty termed misfeasance of public office. The leading Irish decision is *Pine Valley Developments Ltd v The Minister for the Environment*[23], where the Supreme Court discussed the emergent cause of action in the context of a claim for damages resulting from an erroneous decision of the Minister to grant outline planning permission. In refusing the claim, Finlay CJ adopted the following summary of the law:

> "The present position seems to be that administrative action which is *ultra vires* but not actionable merely as a breach of duty will found an action for damages in any of the following situations:
>
> 1. If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence
> 2. If it is actuated by malice, e.g. personal spite or a desire to injure for improper reasons
> 3. If the authority knows that it does not possess the power which it purports to exercise."[24]

The doctrine is further narrowed by various riders which have been imposed by some of the leading English authorities with a view to protecting public administration from unreasonable interferences: for example that the act complained of must be a positive illegal act, and not merely a nullity[25].

On the assumption that the unlawful charges under review could only reasonably fall under the third of the three headings enumerated above, recent English case law might provide assistance to a prospective plaintiff. In *Three Rivers District Council and others v Bank of England (No 3)*[26] Clarke J relied on the judgment of the High Court of Australia in *Northern Territory v Mengel*[27] where establishing misfeasance involved showing that there was a lack of an *"honest attempt to perform the relevant duty"*. Clark J held that, even in the absence of actual knowledge, recklessness by an official as to the existence of a power to act might satisfy the "knowledge" part of the tort.

Breach of Fiduciary Duty

La Forest J in *Lac Minerals Limited v. International Corona Limited*[28], described a fiduciary as follows:-

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work of Fiduciary Obligations (1977) Page 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary"

This is not perhaps an obvious cause of action arising from the wrongful imposition of long-stay charges, but is one which might avoid the application of statutory limitation periods. Viability may depend on: the manner of imposition of the charges; the degree to which a patient's affairs were entrusted to the institution in which they received care; and the patient's general circumstances.

Claims For Interest

Whether interest should be payable on unlawfully demanded sums was considered by Keane J in *O'Rourke v The Revenue Commissioners*[29], where the plaintiff had been wrongly classified by the Revenue as a Schedule E employee and paid too much tax as a result. An amount was agreed between the parties and certified as overpaid; but because the parties had circumvented the formal statutory procedures for repayment, the taxpayer was held to have no entitlement to statutory interest under the Finance Act, 1976.

The plaintiff argued that he was nonetheless entitled to interest under the general principle of unjust enrichment. Deciding in favour of the taxpayer, Keane J held that there was no meaningful distinction between tax paid under a regulation subsequently found *ultra vires* (such as that which had attracted interest in *Woolwich Building Society*[30]) and amounts paid under a statutory provision, in itself lawful, but which had been misconstrued (the situation in *O'Rourke*). As the plaintiff in *O'Rourke* was not entitled to the statutory rate of interest under the Income Tax Acts, the Court applied its discretion as to what the appropriate rate should be and awarded the Courts Act interest at the rates prevailing.

20. Winfield and Jolowicz on Tort, 16th Edition, Page 370
21. Clerk & Lindsell, Torts (18th Ed, para 15-11
22. Section 71(1)(a) of the Statute of Limitations 1957
23. (1987) ILRM 747
24. At page 757
25. *Dunlop v Woollahra Municipal Council* [1981] 1 AER 1212
26. [2000] 2 W.L.R. 1220
27. [1995] 129 A.L.R. 1
28. (1989) 61 DLR (4) 14 at 28
29. (1996) 2 IR 1
30. (1993) A.C. 70

Limitations

There was comfort for prospective defendants in the Article 26 proceedings in so far as the Supreme Court adverted to the possible application of the Statute of Limitations to claims arising from the in-patient charges, as well as citing with approval Henchy J's dicta in *Murphy* where, after confirming the general right to recover sums unlawfully demanded, the learned Judge said[31]:

> "there may be transcendent considerations which make such a course undesirable, impractical, or impossible. Over the centuries the law has come to recognize, in one degree or another that factors such as prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, res judicata, or other matters (most of which may be grouped under the heading of public policy)..."

Survival of Actions for the Estates of Deceased Persons

It was anticipated by the Supreme Court in the Article 26 proceedings that many nursing-home claims will belong to the estates of deceased patients.

While examining the features of the property right which the retrospective provisions of the Health Bill purported to extinguish, the Supreme Court classed the right possessed by those who had been unlawfully charged as being in the nature of a chose in action, a right to sue. "The right in question ... is assignable and will devolve on the estates of deceased persons".

Section 7(1) of the Civil Liability Act 1961 provides that:

> "on the death of a person [...] all causes of action [...] vested in him shall survive for the benefit of his estate".

However, the estate will not be entitled to pursue any exemplary damages which may be the entitlement of the plaintiff personally (S.7 (2) of the 1961 Act). That may not be the only qualification to an estate's right of redress. It is conceivable that the principles of the law of restitution may weigh against awards of windfalls to relatives who might not have benefited, had the deceased been aware of the right of action.

Section 45[32] of the Statute, provides:

> "45. (1) Subject to section 71, no action in respect of any claim to the estate of a deceased person or to any share or interest in such estate, whether under a will, on intestacy or under section 111 of the Succession Act, 1965, shall be brought after the expiration of six years from the date when the right to receive the share or interest accrued."

The Supreme Court has held that this limitation applies only to actions in pursuance of a share in the estate (e.g. by beneficiaries against the personal representative), rather than actions brought by or on behalf of the estate insofar as actions for the recovery of land were concerned[33] where the applicable period was twelve years. It would seem therefore that any cause of action which has accrued to a patient who has died will have vested in his estate subject to the then applicable limitation periods (for example six years from the date of accrual in contract) and with the benefit of any "clock-stopping" provisions as may apply. There appears to be little in the way of Irish authority on this question.[34]

Contract, Quasi-Contract and Tort

The starting point is the limitation period of six years from the time of accrual, the basic period prescribed by the Statute of Limitations 1957 ("the Statute") in respect of causes of action based on contract[35], quasi-contract[36], and tort[37]. These basic limitations would cover claims for monies had and received[38], as well as for the tortious actions mentioned earlier. This of course is subject to the various exceptions which potentially stop the clock and which are discussed below.

Restitution on the Grounds of Unjust Enrichment

It is less straightforward determining what limitation, if any, applies to the categories of claim that can be brought under the heading of "unjust enrichment". As indicated above. actions for restitution on the grounds of unjust enrichment appear to be *sui generis*, and are not properly regarded as being in *"quasi-contract"* (and therefore not within S11(1)(b) of the Statute). On this line, one is heading towards the simple proposition that:

> "A cause of action for which the Act, or other legislation, makes no limitation provision is not subject to a limitation period".[39]

On the other hand, when the Statute was enacted in 1957 the disparate and emergent remedies based on unjust enrichment (*quantum meruit* etc.) all fell under the rubric of "quasi-contract", and the distinct legal concept of restitution did not clearly emerge until some time later. On this view 'restitution' could be subsumed within the heading *"quasi-contract"* for limitation purposes.

That the question is a vexed one was noted by Brooke L.J. in *Portman Building Society v Hamlyn Taylor Neck (a firm)*[40] who said in relation to the analogous UK provisions:

> "The law of limitation has grown up piecemeal over the last 450 years before the modern remedy of restitution was properly developed...The time and cost devoted to this appeal illustrates in my judgement the need for parliament to bring appropriate limitation rules relating to restitutionary remedies"

31. At page 314
32. As inserted by Section 126 of the Succession Act 1965
33. *Gleeson v Feehan* (No 1)[1991] ILRM 783
34. See REPORT ON THE STATUTES OF LIMITATIONS: CLAIMS IN CONTRACT AND TORT IN RESPECT OF LATENT DAMAGE (OTHER THAN PERSONAL INJURY) (LRC 64 - 2001) "Since there is no provision for a special limitation period for actions surviving for the benefit of the deceased's estate, the ordinary limitation period starting at the date of accrual applies. In circumstances where the six year accrual limitation period is still running at the date of death, the remainder will continue to run against the personal representative."
35. Section 11 (1)(a)
36. Section 11(1)(b)
37. Section 11 (2)(a)
38. Lord Green so assumed in *Re Diplock [*1948] Ch 465, 514
39. *Nelson v Rye*, [1996] 1 WLR 1378 at 1390
40. (1998) 4 AER 202, 209

It is not proposed to examine in a detail the provenance of claims based on unjust enrichment, with the limitation consequences which might flow from that. All that can be said with any degree of confidence is that if a statutory limitation period applies, then it would most likely be six years. Otherwise, limitation could be imposed by analogy with the Statute or via one of the juridical, discretion-based doctrines: laches; estoppel; non-culpable delay; or even a modification of the policy considerations contained in the *Murphy* decision.

Constructive Trusts and other Equitable Reliefs

It will be recalled that in the extract from Henchy J's judgment in *Murphy* cited above, he observed that: "the implied contention that the State is a constructive trustee of the money collected ... is the counterpart in equity of a claim in common law for money had and received."

Where such a constructive trust is found to exist, what limitation periods run with respect to recovery of trust property? In contrast with the corresponding provisions in the UK, constructive trustees are specifically excluded from the definition of "trustees" in Section 2(2)(a) of the Statute, a position which may be contrasted with that pertaining to express trustees who fall within Section 44 of the Statute and who are prevented from relying on the Statute in cases for the recovery of trust property in their hands.

Where the constructive trust operates concurrently with a common law cause of action, then the Court has a power to impose a limitation period by analogy with the Statute[41]. In a number of recent UK decisions[42] the view has been strongly expressed that for the purposes of limiting actions, it is illogical to maintain a distinction between common law causes of action, such as fraud, and their equitable counterparts.

Laches and other Discretionary Limitations

Where the relief sought is equitable in nature, unconscionable delay may bar the plaintiff by virtue of the doctrine of laches. In terms of laches, the discretionary manner in which the rule is applied makes it difficult to predict the manner or degree of limitation in any given case. The principal considerations affecting laches were recited by Lord Selborne L.C. in *Lindsay Petroleum Co. V Hurd*[43], where he stated that this equitable limitation would arise where:

> "It would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material...Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy".

Significant delay will have occurred by the time most of these claims are made, although little if any of it will have been culpable delay on the part of the claimants, such as would make the prosecution of their action unconscionable.

In any event, laches will not apply to many of the causes of action which are likely to arise; it being an equitable limitation. That said, in a number of leading Irish decisions, the mechanisms of equity (such as constructive trusts or the ordering of accounts or inquiries) have been employed in the service of causes of action based ostensibly on restitution and in this context it is conceivable that laches could be invoked to defend any claims.

A 'limitation' which pertains to claims for restitution and which is similar in some respects to laches is the defence of "change of position" - an emergent defence with few hard and fast rules. The essence of this defence is that the Courts will not order restitution in circumstances where the party alleged to have been enriched would be unfairly prejudiced by virtue of his actions or a change in circumstances which is consequential to his having received the monies in good faith[44]. One-sided fault on the part of the recipient is harmful to the defence. As Denning L.J. stated in *Larner v London County Council*[45]:

> "If the recipient was himself at fault and the paymaster was not - as, for instance, if the mistake was due to an innocent misrepresentation or a breach of duty by the recipient - he clearly cannot escape liability by saying that he has spent the money."

It could be said that the limitation elaborated by the Supreme Court in the *Murphy* case is founded on the 'change of position' defence. It will be recalled that in that case, a provision of the tax code was struck down as unconstitutional, and the question then arose as to whether the State would be obliged to repay monies gathered when the legislation was 'in-force' - both in respect of married couples generally and the applicant couple in particular. Although the Court held that as a matter of principle, the legislation was void *ab initio*, the fact that it had enjoyed the presumption of constitutionality at all relevant times, had been collected by the Revenue in good faith and integrated in the national finances, all led the Court to the conclusion that it would be inequitable to order for all relevant taxes to be repaid (in the case of the applicant litigants, it could be reclaimed from the date they had disputed its legality).

In so far as the Attorney General had argued during the course of the Article 26 reference that such considerations should operate to vitiate claims in respect of nursing home deductions, the Supreme Court rejected this argument:

> "The Court is satisfied, accordingly, that the *Murphy* judgment offers no support for the Bill, insofar as reliance is placed on equitable principles relieving defendants from full restitution on the grounds of good faith."

In the event that the State were to raise the defence of change of position in respect of individual claims, these reasons for distinguishing *Murphy* may also have a bearing.

Another possible ground for limiting claims is an ostensibly policy-based consideration: the potentially catastrophic effect that meeting all claims would have on the national finances. At an estimated cost of €500 million[46] the threat to the exchequer was not viewed by the Supreme Court in its Article 26 decision as being catastrophic.

'Non-Culpable' Delay

Any cause of action may be dismissed by the Court in the interests of justice, regardless of whether or not it has been commenced within the applicable limitation period. This may occur on the basis of the decision in *Primor Plc v. Stokes*

41. The survival of this long-standing being affirmed in Section 11(9)(b) of the Statute
42. For example Millett L.J.'s dicta in *Paragon Finance* [1999] 1 All ER, 400 at 408
43. (1874) L.R. 5 P.C. 221 at 239
44. *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548
45. [1949] 2 KB 683 at 688
46. An estimation referred to by the Court, based on a six year look-back

Kennedy Crowley[47] where Hamilton CJ summarised the legal principles in relation to dismissal for want of timely prosecution on the grounds of the plaintiffs inordinate and inexcusable delay.

In addition, a line of authority commencing with *O'Domhnaill v. Merrick*[48], including *Toal v. Duignan (No. 2)*[49], and culminating in the recent decision of Finlay Geoghegan J. in *Manning & Ors v. Benson & Hedges Limited & Ors*[50] establishes the jurisdiction to dismiss proceedings in the interest of justice, irrespective of whether there has been procedural default under statute or at common law.

Finlay CJ summarised the jurisdiction in *O'Domhnaill v. Merrick* as follows:

> "where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action."

Potentially, this jurisdiction seems most appropriate to those aspects of claims where there may be substantial dispute of as to matters of fact; such as claims based on or supported by allegations of fraud or *mala fides*, or reliance by a plaintiff on fraudulent concealment in answer to a plea of statutory limitation.

"Clock-Stopping" Provisions

There are a number of 'exceptions' derived from the Statute which if applicable prevent time from running as against the plaintiff.

Disability

It was thematic of the judgement of the Supreme Court in the Article 26 proceedings that the persons most affected by the unlawful charges were the elderly and infirm: the very persons most in need of the protection of the law.

In this regard, Section 49 of the Statute provides:

> "49(1) (a) If, on the date when any right of action accrued for which a period of limitation is fixed by this Act, the person to whom it accrued was under a disability, the action may, subject to the subsequent provisions of this section, be brought at any time before the expiration of six years from the date when the person ceased to be under a disability or died, whichever event first occurred notwithstanding that the period of limitation has expired."

The term "disability" is defined in Section 48 and for present purposes is relevant only in so far as it includes "persons of unsound mind". In *Rohan v Bord na Mona*[51] the provision was held to apply to a man who had sustained head injuries and who as a result was "unable to manage his own affairs". Lord Denning MR employed a similar formulation in *Kirby v Leather*[52]. "A person is 'of unsound mind' when he is, by reason of mental illness, incapable of managing his affairs in relation to the accident as a reasonable man would do". The extent to which the long list of potential claimants will fulfil this test remains to be seen.

Finally, with regard to disability, it is well accepted that this extension does not stop time running where the person was not disabled when the cause of action accrued, but later became so disabled[53]. Also, the exception only applies to the rule: in other words, if the action is limited otherwise than by virtue of the Statute, the disability provision will not be relevant.

Claims Based on Mistake

The potential significance of the *Rogers* line of authority discussed earlier is that Section 72(1) of the Statute of Limitations, 1957 would seem to apply:

> "**72.**-(1) Where, in the case of any action for which a period of limitation is fixed by this Act, the action is for relief from the consequences of mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it."

The combined effect of Section 72 and the rule in *Rogers* could significantly extend the limitation period which would otherwise apply to claims, although 'mistake' must be the basis for the claim and not merely the incident which gave rise to it. So, for example, where a mistaken belief as to the extent of a debt results in a creditor undercharging his debtor, the creditor's redress is an action on the debt; and not one where it is the mistake itself which gives rise to the cause of action (*Phillips-Higgins v Harper*[54]).

However an action in the line of *Rogers* appears to be founded on the mistake of itself, and should fall within Section 72. *Kleinwort Benson Ltd v Lincoln City Council*[55] supports this view. There, the House of Lords held that the UK equivalent of Section 72 (Section 32(1)(c) of the Limitation Act, 1980) was applicable to an action for the recovery of money paid to Lincoln City Council under a mistake of law by virtue of an *ultra vires* 'swap' agreement. However, this decision was a marked and conscious departure from previous authority and it has yet to be conclusively settled in this jurisdiction whether S.72 applies to mistakes of law.

Fraud and Fraudulent Concealment

Section 71 of the Statute of Limitations 1957 provides that where:

> "(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
>
> (b) the right of action is concealed by the fraud of any such person,
>
> the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or could, with reasonable diligence have discovered it."

It would appear there is no Irish case where it was argued that fraudulent concealment subsequent to the accrual of the cause of action could not avail the plaintiff. In arriving at its decisions in *Morgan v. Park Developments*[56], *McDonald v. McBain*[57] and *Heffernan v. O'Herlihy*[58] it seems to have been assumed that it could.

In the course of her judgment in *Morgan v. Park Developments*, Carroll J. relied on the following passages from the judgment of Lord Denning M.R. in *Keane v. Victor Parsons*[59]:

47. [1996] 2 IR 459
48. [1984] IR 151
49. [1991] I.R.L.M. 1
50. An unreported decision of the High Court, dated 30 July 2004
51. (1990) 2 IR 425 at 429
52. (1965) 2 QB 383
53. *Rohan*, at page 430
54. (1954) 1 Q.B. 411).
55. (1998) 4 A.E.R. 513
56. [1983] ILRM 156
57. [1991] 1 IR 284
58. (Unreported the High Court 3 April 1998)
59. [1973] 1WLR

> "The word 'fraud' here is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be 'against conscience' for him to avail himself of the lapse of time. The causes show that if a man knowingly commits a wrong (such as digging underground another man's coal); or a breach of contract (such as putting in bad foundations to a house), in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim. In order to show that he 'concealed' the right of action 'by fraud' it is not necessary to show that he took active steps to conceal his wrongdoing or breach of contract. It is sufficient that he knowingly committed it and did not tell the owner anything about it. He did the wrong or committed the breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by 'fraud' as those words have been interpreted in the cases ...
>
> If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different. So, if by an honest blunder he unwittingly commits a wrong (by digging another man's coal) or a breach of contract (by putting in insufficient foundations), he could avail himself of the Statute of Limitation."

In *Morgan*, the plaintiffs commenced proceedings against building contractors in respect of defective premises. The defendants claimed that the plaintiff's case was statute barred. It was alleged that many years prior to the commencement of proceedings, the defendants' foreman had stated to the plaintiff that a crack in the corner of a house was merely a settlement crack. Carroll J, further to Keane above, relied on the following passage in *Kitchen v. Royal Air Force Association and Ors.*[60], where Lord Evershed M.R. stated:

> "But it is now clear that the word 'fraud' in the section which I have read, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. ARTS Limited* that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwick did not attempt to find 200 years ago, and I certainly shall not attempt to do so now, but is, I think, clear that the phrase covers conduct which having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do to the other."

In *Heffernan v. O'Herlihy*, the plaintiff had instructed the defendant's solicitors to act for her in respect of a proposed action against Barrington's Hospital and a surgeon who had treated her. Proceedings were not commenced within the relevant limitation period and her action became statute barred. Relying on parts of the passages from Denning M.R. in *Keane v. Victor Parsons & Co.*, cited above, Kinlen J noted that the law in the United Kingdom had been amended by the Limitation Act 1980 so that a plaintiff had to show that his right of action had been 'deliberately concealed from him by the defendant'. Kinlen J stated:

> "It was reasonable that the plaintiff having been told that her claim was proceeding was left under the impression that it was in fact proceeding when to the defendant's knowledge, he had not issued a summons and the claim had been statute barred. It was only when her present solicitors investigated the matter, having got nothing more than a cryptic reply from the defendant sending on medical reports, he would possibly have known that she had a cause of action against her solicitor as a matter of probability. The court is satisfied that the defendant's failure to commence proceedings was concealed from the plaintiff, that it was fraud for the purposes of Section 71 (1) of the Statute of Limitations, 1957 and accordingly the time did not run against her until she discovered that fraud or could with reasonable diligence, have discovered it."

From the foregoing and other authorities it can be seen that knowledge by the defendant that charging practices were unlawful might be insufficient of itself to support a plea of 'fraudulent concealment'. There might have to be some further act concealing the right of action. On the other hand, such acts of concealment might not be necessary if the imposition of in-patient charges was viewed as a concealment of itself.

Conclusion

There is no dispute that persons wrongly charged for in-patient services over the years have rights of redress. It is the extent of these rights and the extent to which they are met by legislative intervention which is the real issue. In the light of the revelations of the Travers report and considering the class of persons most affected by the unlawful deductions, it seems likely that fraudulent concealment, disability and mistake are all potential answers to the statutory limitation periods apparently relied upon as justifying initiatives which fall short of compensating all potential claimants. It may rather be the constitutional jurisdiction of the courts to halt claims in the interests of justice which will delimit their extent.●

60. [1958] 1WLR 563

Mulvey v McDonagh and Bullying at School

Murray Smith BL

Introduction

The most recent major judgement in the area of school bullying is that of Johnson J. in the High Court case of *Nicola Mulvey (a minor suing by her mother and next friend Margaret Mulvey) v Martin McDonagh*.[1] It is an important case in terms of upholding the existing standard of care of a school towards its students, and in giving judicial sanction to an official definition of school bullying. For that reason, an account of the case is useful for all who work with the education sector.

The plaintiff's case

Nicola Mulvey, through her mother, took a case against Scoil Nano Nagle, Bawnogue, Clondalkin, Co. Dublin, claiming damages for personal injuries suffered by her from an assault by a fellow pupil or pupils, while attending the school at four years of age, on the last day of her first year, 25th June 1998. She alleged that she had been bullied since the previous October, and that numerous complaints had been made to the school; but the latter had been negligent in refusing to monitor the conduct of the pupils.

The evidence supporting the plaintiff's claim was mostly from herself and her mother. The latter claimed to have made a number of complaints about Nicola being beaten up in the schoolyard. In November 1997, an incident took place when the plaintiff's tracksuit trousers were pulled down. Her mother reported this to Sister Gemma, the class teacher, who appeared to have resolved the matter.

In December, on the last day of term, Mrs. Mulvey complained to Mrs. Mularkey, the Principal, that Nicola had been bullied that term. As Mrs. Mularkey was going to retire, she referred her to her successor, Mrs. Sweeney, who took up her duties the next term. On 9th January 1998, Mr. and Mrs. Mulvey met Mrs. Sweeney, who said that she would take more measures to monitor the schoolyard. At a later meeting, it was agreed that if Mrs. Mulvey had any further complaints, she should go directly to Mrs. Sweeney.

On 3rd February, Mrs. Mulvey said that she went to the classroom where Nicola was sitting, asked Sister Gemma for permission to address the class, and berated them for their treatment of Nicola, threatening to '"kick them up the backside"' if they did not stop.[2] Mrs. Sweeney came into the classroom towards the end of this address.

There were no more communications from Nicola's parents until 25th June, the last day of term, though Mrs. Mulvey claimed that Nicola was still being bullied. That day, Mrs. Mulvey claimed that Nicola had been beaten up and kicked by a number of people in the schoolyard. She was taken to Crumlin Hospital, her mother claiming that she 'was covered in bruises and that she had been covered in bruises for some considerable length of time, prior to this date'.[3]

The plaintiff gave evidence, which the judge hinted might be, in his opinion, the result of coaching by her mother, because it

> "agreed in almost every word with the evidence of the next friend and despite the fact that she was now ten appeared to have an extraordinarily good recollection of what took place when she was four years of age."[4]

Two expert witnesses supported the evidence of the plaintiff and her mother: Dr. Paul McQuaid and Professor Mona O'Moore. Both were 'very impressed' with the plaintiff and the next friend; and Professor O'Moore 'spoke at length about the evils of bullying, the necessity to deal with it and the methods which can be used to deal with it'. The problem about this evidence, in the eyes of the judge, was that 'they only heard the plaintiff and the next friend and did not have an opportunity of witnessing the witnesses for the defence or the manner in which they gave evidence'.[5]

The paediatrician who dealt with the plaintiff when she was brought to the hospital on 25th June gave evidence in which, despite the plaintiff's statement of claim, 'there was no damage to the spleen and no rupture of the spleen', and 'there was no bruising whatsoever on any part of the plaintiff's body'.

The judge said that it was 'very necessary' to note the evidence regarding the bruising

> "for had any noticeable bruising been noted on the plaintiff, then it would have become a social welfare matter for the hospital and it would have been investigated."[6]

The defence

The principal before Christmas, Mrs. Mularkey, said that she was unaware of any incident until the trouser pulling one in November, which Sister Gemma had 'dealt with to her satisfaction' and that no further complaints had been made to her until the last day of term. Sister Gemma gave evidence of her experience in dealing with four year olds, 'which was extensive and that she was totally aware of the difficulties of integrating children and of the difficulties they had in that first year of school'. She was

> "also deeply aware of bullying, as indeed was Mrs. Mularkey and the school had provided documents for the parents, had attended

1. [2004] 1 I.R., 497.
2. Ibid., p. 500.
3. Ibid.
4. Ibid.
5. Ibid., pp. 500-1.
6. Ibid., p. 501.

seminars and they were all very concerned about the question of bullying."[7]

She swore that the only complaints she had received from the mother during the year were:

1. the trouser pulling incident, which she had dealt with;
2. the address to the class in February, for which she denied any request was made by Mrs Mulvey; and
3. the incident on 25th June.

The judge found Sister Gemma to be 'a truthful, conscientious and extremely concerned person and a good and honest witness'.[8]

Mrs. Sweeney, the present principal, said that, after Christmas 'she had increased the number of teachers or assistants in the yard to monitor the school behaviour, so that there were now, at all material times, two teachers in the yard'. This was continued after the next friend addressed the pupils in February. The two teachers involved gave evidence to say that they had not witnessed 'any of the incidents of which the plaintiff and the next friend complained'.[9]

The decision

The judge ruled in favour of the school. There was, he said, in a number of incidents, 'a direct contradiction between the plaintiff's and defendant's evidence'. He preferred the latter; because he had the opportunity in the case of

> "watching the witnesses in court, of seeing them give evidence and of watching their reactions in the witness box under cross-examination. I have also taken the opportunity of visiting the school yard and I am satisfied that it is an open yard, not very large, in which any adult would have no difficulty in observing incidents as described by the plaintiff taking place."[10]

The evidence given by the defendant, which neither of the expert witnesses 'had an opportunity of seeing' was 'extremely convincing and I am satisfied that the defendant and each of the school's witnesses were responsible, caring, alert, concerned and truthful people'.[11]

In any disputes over the facts, the judge was satisfied,

> "having had the opportunity of watching both of them and listening to them, that the defendant's version of the evidence of what took place is far more reliable and acceptable and so I find."[12]

This, he felt, was borne out by the medical evidence, which showed that there was no bruising. He finally held that

> "the incident [on 25th June] did not take place as described by the plaintiff and that the injuries alleged to have been suffered, were not suffered. Any incident which may have taken place did not result in the personal injuries claimed by the plaintiff and was not as a result of any negligence or breach of duty on the part of the defendant."[13]

The law

(a) Case law

In terms of case law, the judge followed previous precedents that the degree of care to be taken in the case - which was accepted by both sides - was that of

> "a prudent parent exercising reasonable care and I accept that that must be taken in the context of a prudent parent behaving responsibly with a class of 28 four year olds having their first experience of mingling socially with other children."[14]

He was satisfied that this care was taken. While it was not cited in the judgement, the original case that established this level of liability was the English one of *Williams v Eady.*[15] The Court of Appeal heard a case by a schoolboy against a schoolmaster alleging negligence for an injury caused by the latter leaving a bottle containing a stick of phosphorus in a conservatory, to which the boys had access. The judge in the court of first instance directed the jury

> "that if a man keeps dangerous things he must keep them safely, and take such precautions as a prudent man would take, and to leave such things about in the way of boys would not be reasonable care."

The jury then found for the plaintiff.[16]

The schoolmaster appealed the decision to the Court of Appeal, which dismissed it. Lord Esher MR, who gave judgement for the court, held that

> "it was correctly laid down by the learned Judge, that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way."[17]

While Johnson J. noted that recent decisions in England and Scotland had appeared to indicate that the degree of liability should be that of professional negligence, he did not follow them. The only case cited to illustrate this other approach was the Scottish one of *Deborah Scott v Lothian Regional Council.*[18]

In that case, Lord McLean held that two guidance teachers - one of whom was the Assistant Head Teacher - in a secondary school had acted with professional care in their dealings regarding a student who was badly bullied. This was because, when the student tried to commit suicide after one incident and her father then visited the school, an

7. Ibid.
8. Ibid., p. 502.
9. Ibid., p. 503
10. Ibid., p. 503.
11. Ibid.
12. Ibid., pp. 503-4.
13. Ibid., p. 505.
14. Ibid., p. 504.
15. 10 TLR (1893-94), 41
16. Ibid., pp. 41-42.
17. Ibid., p. 42.
18. Unreported, Outer House, 29th September 1998. The text of the judgement can be found online at *http://www.scotcourts.gov.uk/opinions/MCL0709.html.*

offer was made to him of intervention by an educational psychologist or counselling. He refused this, saying that he and his wife would look after their daughter; and his very forceful manner did not encourage the teachers to go back to the parents with any advice. Also, the student did not report further bullying incidents to the school or her parents.

Johnson J. rejected this standard of care, although a passage from McMahon and Binchy's latest edition of *The Law of Torts* was quoted in the judgement:

> "the problems of care and control in a school bear some resemblance to those confronting a parent in the home but they are far from identical. It is possible that in a future decision an Irish court will drop the reference to 'careful parent; and stress the fact that it is the standard of the reasonable school teacher or manager which should prevail."[19]

(b) Definition of bullying

The Mulvey judgement is also important in that it gave judicial sanction to an official definition of school bullying, given in a Department of Education publication giving guidelines on dealing with such behaviour, intended to assist schools and to raise the awareness of bullying behaviour in the school community:

> "Bullying is repeated aggression, verbal, psychological or physical conducted by an individual or group against others. Isolated incidents of aggressive behaviour, which should not be condoned, can scarcely be described as bullying. However, when the behaviour is systematic and ongoing, it is bullying."[20]

Johnson J. held that 'I accept and adopt that definition of bullying'.[21]

New law

It should be brought to the attention of all involved in the education sector of the requirement, under section 23 of the Education (Welfare) Act, 2000, which became law on 5th July 2002,[22] that all recognised schools need to have a 'code of behaviour' for their registered students. Section 23(1) says that the board of management of such a school shall 'after consultation with the principal of, the teachers teaching at, the parents of students registered at, and the educational welfare officer assigned functions in relation to, that school', prepare such a code. In terms of what this code needs to contain, subsection (2) says that it shall specify:

(a) the standards of behaviour that shall be observed by each student attending the school;

(b) the measures that may be taken when a student fails or refuses to observe those standards;

(c) the procedures to be followed before a student may be suspended or expelled from the school concerned;

(d) the grounds for removing a suspension imposed in relation to a student; and

(e) the procedures to be followed relating to notification of a child's absence from school.

Subsection (3) says that this code of behaviour shall be prepared in accordance with such guidelines as may, following consultation by the [National Educational Welfare] Board with national associations of parents, recognised school management organisations and trade unions and staff associations representing teachers, be issued by the Board.

The principal of a recognised school shall, before registering a child as a student at the school under section 20 of the Act, provide the parents with a copy of the code of behaviour, and may, as a condition of registering the child

> "require his or her parents to confirm in writing that the code of behaviour so provided is acceptable to them and that they shall make all reasonable efforts to ensure compliance with such code by the child."[23]

A principal of such a school shall also, on a request made by a student registered at that school or by such a student's parent, provide the student or parent with a copy of the school's code of behaviour.[24]

While this code of behaviour does not mention the word 'bullying', the specified provisions, particularly in setting out, in section 23(2)(a)-(b), the standards of behaviour expected of students and the measures to be taken when a student fails or refuses to observe those standards, implicitly include the prohibition of it and the dealing with it when it occurs. Obviously, the Department of Education's *Guidelines*, previously mentioned in *Mulvey*, are an invaluable aid to schools in drawing up such a code.

Conclusion

The *Mulvey* judgement illustrates the importance of a school dealing properly with students being bullied in order to defeat cases claiming personal injury due to negligence. That case rested, as do all, on its particular facts, particularly the fact that the judge found those appearing for the defence more credible, in terms of the school's awareness of bullying and the measures taken to deal with complaints of it. Regarding the plaintiff and her mother, he hinted that the former had been coached by the latter, and also took into account the medical evidence that the former was not injured on 25th June in the manner claimed by the latter.

The judgement reiterated the existing law: the standard of care to be taken in such a case is that of a prudent parent, not the professional one followed by the courts in Great Britain. In terms of anything new, judicial sanction has now been given to the Department of Education's definition of school bullying. It is worth noting, there has been a change in the law since the events dealt with in *Mulvey*: a 'code of behaviour' - whose provisions require, among other things, that bullying be dealt with - is now required by statute.●

19. Bryan McMahon and William Binchy, *The Law of Torts*, Third Edition, (Dublin: Butterworths, 2000), p. 442.
20. Department of Education, *Guidelines on Countering Bullying Behaviour in Primary and Post-Primary Schools*, (Dublin: Stationary Office, 1993). This document can be found on the Department of Education's website at http://www.education.ie/servlet/blobservlet/school_bullying.htm.
21. *Mulvey v McDonagh*, p. 505.
22. Education (Welfare) Act, 2000, s. 1(3) stated that if the Act was not in operation, it would be in operation 2 years after the date of its passing. (The Act was signed into law on 5th July 2000.)
23. Education (Welfare) Act, s. 23(4).
24. Ibid., s. 23(5).