The Bar Review

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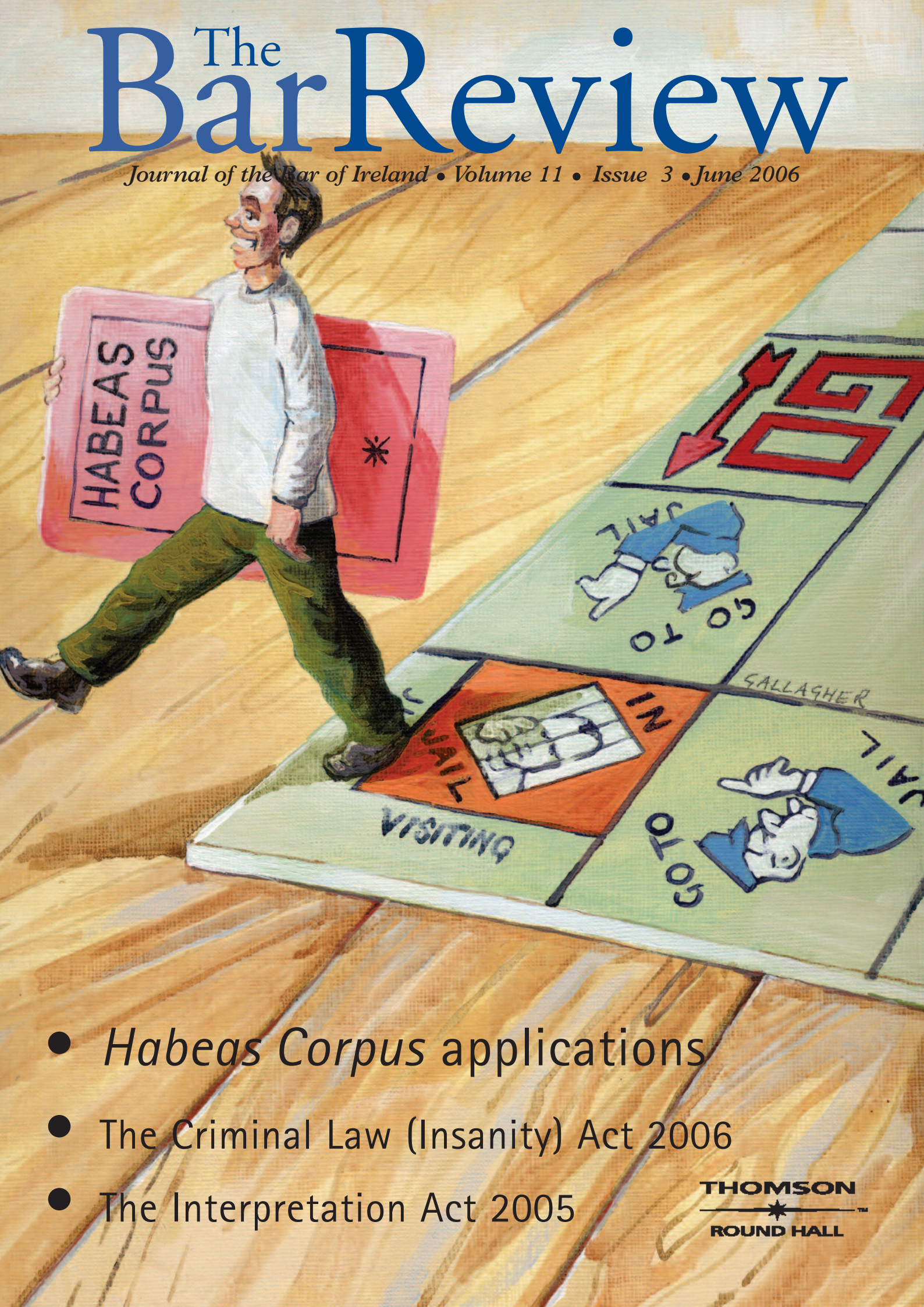

- *Habeas Corpus* applications
- The Criminal Law (Insanity) Act 2006
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THOMSON ROUND HALL

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Direct Professional Access

Professional organisations have been able to avail of direct access to barristers' services in certain areas for a number of years. However, in recent months, the Bar Council has been seeking to extend the remit of the scheme and to increase awareness among business entities and charitable or non-governmental groups as to the areas of work in which barristers services can be accessed directly, without first instructing a solicitor.

The aim of direct access is to provide cost-effective and speedy professional advice to a wide range of organisations. It is pro-consumer and pro-client and will complement existing legal services

The organisations that can avail of direct access to barristers in non-contentious work are many and varied. Professional organisations of accountants and architects are obvious examples. The list also includes large corporations as well as small and medium size enterprises, governmental departments, trade unions, the various regulators, charities and voluntary bodies, newspapers and other publications.

Against the backdrop of an increasingly regulated business environment, often with a European Union dimension, direct access will offer clients a straightforward direct means of interpreting regulations and obtaining guidance on legal issues from a range of experts in the relevant area of practice. High level advice and forward planning can often help organisations to save money by helping to avoid litigation in the long term. Organisations that wish to avail of barristers' services directly should register with the Bar Council.

Some examples of the type of work carried out under the scheme include advisory and opinion work, the drafting of policies and guidelines, for example for employers, or for organisations dealing with children or vulnerable groups, and reviewing prospective publications to advise as to the risk of defamation.

One key limitation on the work that can be undertaken by barristers under the scheme is that the work must be non-contentious in the sense that it does not involve litigation. Barristers do not have the administrative structure or facilities to conduct litigation or indeed to handle the matters that routinely precede litigation, without the involvement of a solicitor. If proceedings have been instituted in a matter on which direct access is sought, or indeed, if proceedings are pending, then the appropriate course is to advise the prospective client that he should instruct a solicitor in the matter.

When taking instructions under the scheme, barristers are advised to insist on receiving the instructions in writing. This will prevent subsequent disagreements as to the scope and content of such instructions. If practitioners have any questions or issues that arise from the operation of the scheme, these should be referred to the Professional Practices Committee of the Bar Council.

The Bar Council held a seminar on Direct Professional Access on the 25th May in the Morrison Hotel on Ormond Quay to increase awareness of the scheme. A wide cross section of the entities and organisations mentioned above attended and a number of speakers outlined the operation of the scheme generally and cited examples of when barristers' services can be accessed directly. It is anticipated that seminars such as these will greatly enhance the awareness and take-up of services under the scheme.

If you are interested in being included on the Direct Professional Access you can contact Jeanne McDonagh in the Bar Council offices for more information. ●

Pictured at the launch of "Wigs and Guns - Irish Barristers in the Great War", are Professor W. N. Osborough with broadcaster John Bowman and author Anthony Quinn SC. The book is published by Four Courts Press in association with The Irish Legal History Society.

The King of Swaziland's tenth wife, *Habeas Corpus* and the Irish Experience*

Micheál P. O'Higgins BL

Introduction

With a view to illustrating the many shapes and forms which *habeas corpus* applications can take throughout the world, I have chosen three examples at random from Swaziland, the United States of America and from our own jurisdiction during the time of the Civil War in Ireland.

In November of 2002 Zena Mahlanga, an eighteen year old High School student disappeared from her school and was taken to the Royal Palace of King Mswatti III, Monarch of Swaziland. King Mswatti was and is known for his voracious sexual appetite which gets fed at the annual Umhlanga (reed dance) ceremony. At the festival, 20,000 or so young maidens parade themselves topless before the king and his entourage, at the conclusion of which the lucky winner is plucked from obscurity and selected as the good king's latest wife. When Zena Mahlanga was allegedly abducted by associates of King Mswatti, the child's mother applied to the High Court in Swaziland for a writ of *habeas corpus*. The action was ultimately not proceeded with following the intervention of the Swaziland Attorney General. Negotiations ensued which concluded with the child becoming King Mswatti's tenth bride in May of 2004, proving conclusively that not even *habeas corpus* applications are beyond settlement.

Whilst the excesses of the King Mswatti regime may offend our sensibilities as lawyers operating in a climate of democracy, we would do well not to look down our noses too haughtily at the Swaziland experience when we consider two rulings from the US Supreme Court in *habeas corpus* applications brought by prisoners detained in Guantanamo Bay. In the cases of *Rasul v Bush* and *Handi v Rumsfeld*[1] it was held by a majority of justices that prisoners detained in Guantanamo Bay Detention Centre could question the legality of their detentions by filing *habeas corpus* petitions in US Courts. In the *Handi* case it was held that prisoners detained by the Bush administration as "enemy combatants" in what the administration termed the "war on terror" must be given some form of due process, including a hearing before a neutral party. Whilst the rulings have been heavily criticised by civil rights activists and persons concerned about fundamental freedoms, the significance of the *Rasul* and *Handi* cases for present purposes is the vivid illustrations they provide of a David taking on a governmental Goliath by availing of the doctrine of *habeas corpus*. The importance of this doctrine as a means of checking governmental excess and vindicating a citizen's rights where he says he is being wrongfully detained cannot be overstated.

Moving back to Ireland, we encounter the celebrated *habeas corpus* application of Erskine Childers. On the 10th November, 1922 Erskine Childers was arrested by the free state forces and subsequently charged before a military tribunal with the unlawful possession of a pistol. Counsel for Childers applied for a writ of *habeas corpus* after the military tribunal had over ruled the jurisdictional objections raised by the defence and had convicted Childers of the offence. Due to the destruction of the Four Courts, the business of the courts had been moved to the Kings Inns.[2] The stakes in the application were high - win the application and Childers was to be released, lose the application and he was to be shot. The case concluded after four full days of legal arguments. O'Connor M.R. gave an *ex tempore* judgement by candlelight in the dining hall of the Kings Inns. The main issue in the case was whether a state of war existed, sufficient to oust the jurisdiction of the court. This issue was decided against the prisoner, the court holding that a state of war was raging, even though the ordinary courts were functioning.

An appeal was immediately lodged against the decision, but despite this, Erskine Childers was shot by firing squad early on the following morning, Friday the 24th November, 1922. The similarity of subject matter

* This article is an edited version of a longer paper delivered at the Bar Council Judical Review Conference in March

1 Unreported New York Supreme Court 28.06.2004

2 The case is reported in the Irish Reports at [1923] IR 1 1R 5 and is the subject of a very interesting article by Gerard Hogan in a collection of essays about the history of the Four Courts. *The Four Courts: 200 Years* Edited by Caroline Costello The article is entitled *Hugh Kennedy, the Childers Habeas Corpus Application and the Return to the Four Courts* by Gerard Hogan S.C.

between the Guantanamo Bay cases and the Erskine Childers application provides a fine example of how the same issues concerning access to the courts and suspension of fundamental freedoms can arise, time and again, in different jurisdictions throughout the legal world.

Having developed as a common law remedy, *habeas corpus* was put on a statutory basis in the form of The *Habeas Corpus* (Ireland) Act 1782.[3] Whilst there is academic debate as to whether the Act still applies, in practice the act is no longer of significance, since applications for the release of a prisoner said to be in unlawful custody are now brought under the provisions of Article 40.4 of the Constitution which provides as follows:

> 2° Upon complaint being made by or on behalf of any person to the High Court or any Judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with law.

The procedure under Article 40 is straightforward. The complaint is usually made by way of an *ex parte* application grounded on an affidavit setting out the facts. Once a judge decides that an enquiry is warranted, the court may make an order for production of the body and will require the respondent to certify in writing the grounds of the detention. So, if an application for an enquiry is made at 11 in the morning, often times it is made returnable for 4 p.m. that day, by which stage the detainer of the applicant will be obliged to turn up in court and produce the body of the applicant and justify the legality of the detention. At this stage, which is known as the return stage, argument will take place concerning the legality of the detention. If satisfied that the detention is lawful, the court will discharge the preliminary order. Otherwise the court will direct the release of the person detained. Significantly, the onus is upon the detainer to justify the validity of the detention. That much is clear from Article 40.4.2 of the Constitution which provides that the High Court Judge is to order the release of the person unless satisfied that he is being detained in accordance with law.

A major advantage of the Article 40 procedure is the speed at which it can take place. It can be heard at any time of the day, at evening time and at weekends and applications will sometimes be entertained at the homes of High Court judges[4]. A matter which is sometimes overlooked is that Article 40 applications take priority over all other High Court business. The High Court is bound to hear an enquiry once it has been directed.[5]

As we have seen, situations in which an Article 40 or a *habeas corpus* application can and may be brought are many and varied. The procedure has been used to free slaves, Sommersett's case[6]; to question extradition proceedings, to free convicted persons, to free suspects being questioned under Section 30 of the Offences Against the State Act, to remedy the misuse of police power, to right an irregularity occurring in the course of a criminal trial, to correct an illegal and excessive sentence, to litigate a prisoner's living conditions in prison, to remedy the denial of access of legal advice to a prisoner in custody, to free a patient from a mental institution, to obtain the release of a child from the custody of a health board, to prevent the deportation of a refugee, and most controversially and most recently, to remedy a defect occurring in the course of a bail hearing.

The *McSorley* Decision – Is It Good Law?

The main focus of this article is to consider the more recent developments in the law of *habeas corpus* in this jurisdiction, including the displacement of the rule in *McSorley's* case which for over a decade had curtailed the utility of Article 40 applications and confined orders of release to cases involving highly exceptional facts. Before considering the McSorley case in detail[7], it is appropriate for us to consider the nature of the threshold which an applicant for relief under Article 40 has to meet. For a convicted prisoner, the bar is high. In *State (McDonagh) v Frawley*[8] O'Higgins C. J. explained;

> "For *habeas corpus* purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded. For example, if a judge at a murder trial in which the accused was convicted were to impose a sentence of imprisonment for life, instead of penal servitude for life as required by the statute, the resulting detention would be imposed technically without jurisdiction. But the prisoner would not be released under Article 40, Section 4, for it could not be said that the detention was not "in accordance with the law" in the sense indicated. In such a case the court would leave the matter of sentence to be rectified by the Court of Criminal Appeal; or it could remit the case to the court of trial for the imposition of the correct sentence.... the confinement of orders of release under Article 40, Section 4, to cases where the detention is not "in accordance with the law" in the sense I have indicated means that applications under Article 40 Section 4, are not suitable for the judicial investigation of complaints as to conviction, sentence or conditions of detention which fall short of that requirement".

In *State (Aherne) v Cotter*[9] Henchy J. was of a similar mind and held that

> "...before a convicted person may be released under a *habeas corpus* order, it has to be shown not that the detention resulted from an illegality or a mere lapse from jurisdictional propriety but that it derives from a departure from the fundamental rules of natural justice, according as those rules require to be recognised under the Constitution in the fullness of their evolution at the given time and in relation to the particular circumstances of the case."

3 That statute in large measure remains on the statute book. However, in *State (Walsh) v Lennon* 1942 IR 112, the High Court indicated that the common law remedy of *habeas corpus* was incompatible with the provisions of the Constitution. That notwithstanding, the current rules of the Superior Courts make detailed provision in Order 84 for *habeas corpus* applications which are governed by the *Habeas Corpus* Act of 1782.

4 See *Barry v Waldron* Unreported High Court

5 See *State (Rogers) v Galvin* [1983] IR 249 at 252 per Henchy J.

6 (1772) 20 St Tr 1.

7 [1997] 2 IR 258

8 [1978] IR 131

9 [1982] IR 188

It should be noted that the above descriptions of the *habeas corpus* threshold apply to the situation of convicted persons only. A less restrictive view is taken of applicants who enjoy the presumption of innocence. It is submitted that that is a reasonable distinction, having regard to the policy requirement that the courts pay due respect to the trial process, particularly in the context of indictable crime following an adverse verdict from a jury.

Whilst the bar is high for convicted persons, a number of cases indicate that release will be granted in those cases, where the circumstances require it. In *Carroll v Governor of Mountjoy Prison*[10] Peart J. released an applicant who had been convicted by a jury in his absence on fourteen counts relating to firearms offences. The applicant's release was ordered on the ground that the warrants detaining him were not sufficiently certain as to the length of the period of imprisonment the applicant had to serve.

A case on the other side of the coin is the decision of Laffoy J. in *Walsh v Governor of Limerick Prison*[11]. In that case Mr. Stephen (Rossi) Walsh sought his release under Article 40 on the grounds that the committal warrants from the Special Criminal Court pursuant to which he was being detained did not disclose jurisdiction on their face. In refusing to order the release of the applicant, Laffoy J. held that insofar as the warrant from the Special Court was defective for failure to disclose jurisdiction *ex facie*, that did not amount to "such a default of fundamental requirements that detention may be said to be wanting in due process of law".

Aside from the high threshold which applicants for release under Article 40 have to meet, further difficulties were presented by the decision of the Supreme Court in the case of *Paul Anthony McSorley v The Governor of Mountjoy Prison.*[12] In that case, the applicants had pleaded guilty before the District Court to offences under the Road Traffic Act 1961 and were sentenced to terms of imprisonment. The applicants were subsequently detained by the respondent governor pursuant to warrants of execution issued by the District Court. The applicants contended, and this was not disputed by the prosecuting garda in his affidavit, that at no time were the applicants offered the services of a solicitor or asked by the judge if they wished to seek the services or advices of a solicitor. The High Court had ordered the release of the applicants on the basis that the failure of the District Judge who proposed to impose a custodial sentence to advise an accused appearing before him without representation of his Constitutional right to legal aid was such a denial of justice as to render the convictions void. The High Court Judge felt bound by the decision of the Supreme Court in *Sheehan v District Judge Reilly*[13], which he felt justified his making an order under Article 40.4.2 for the immediate release of the applicants. On appeal by the respondent it was held by the Supreme Court[14], in allowing the appeal, that since neither the District Judge nor the Director of Public Prosecutions had been given an opportunity of making a case, there was a fundamental breach of the requirement of *audi alterem partem*. O'Flaherty J. gave the judgement of the court, stating as follows:

> "So, I conclude that in the circumstances of a case such as this where the District Judge's conduct of the proceedings is called into question, that the correct course for the Learned High Court Judge to have followed would have been to give leave to apply for judicial review in such a manner that the District Court Judge and the Director of Public Prosecutions would have been given an opportunity to make their observations. He could, of course, have stipulated that the matter should proceed with the same degree of expedition, or nearly so, as an enquiry under Article 40 but, that way, both the requirements of making sure that someone was in unlawful detention, on the one hand and reserving the rights of other parties would be met."

The Supreme Court's finding in the *McSorley* decision held that Article 40.4.2 was inappropriate, and that instead judicial review was the proper remedy, where the complaint implicated the conduct of some party other than the actual detainer. Two considerations underlay the Supreme Court's preference for judicial review over Article 40.4.2: First, the concern that fair procedures could only be accomplished by judicial review since Article 40.4.2 did not facilitate representation by parties other than the immediate detainer. Second, the fact that in the event of the application succeeding, the ancillary order of remittal could only be ordered on judicial review, that there was no jurisdiction to order remittal on Article 40.4.2.

In practice, the *McSorley* decision had a far reaching effect on Article 40 applications coming before the High Court. Counsel acting for a respondent would routinely wheel out the *McSorley* decision in support of the submission that Article 40 was an inappropriate vehicle wherever and whenever an applicant's grounding affidavit made any criticism of the judge. Thus, even in cases involving allegations of legal error by a judge, the *McSorley* rule, as it came to be applied, had the effect of marginalising Article 40 applications. Occasionally, Article 40 applications were turned into judicial review applications, and the *inter partes* hearing was turned into a leave application for judicial review. The temptation to adopt that course was all the greater where a respondent was in a position to offer terms of bail to an applicant. That at least meant that the person who was claiming that his detention was unlawful was getting out of prison, at least for the currency of the judicial review. The rule in McSorley was the subject of considerable academic criticism. See the excellent new text on the Law of *Habeas corpus* in Ireland by Kevin Costello[15] where the author concludes that "the ultimate effect of the McSorley principle, if pushed to its logical conclusion, would be to virtually displace entirely the use of Article 40.4.2."

10 Unreported High Court (Peart J) 12.1.2005
11 High Court (Laffoy J) 31.07.06
12 [1997] 2 IR 258
13 [1993] 2 IR 81
14 O'Flaherty, Keane and Barron J.J.
15 Published by Four Courts Press, at page 87 and onwards

A further practical objection to *McSorley* lies in the artificiality of the notion of a District Judge playing any meaningful part in a judicial review. Very rarely will a District Judge play an active role in defending judicial review proceedings, presumably on the basis of the inappropriateness of members of the judiciary becoming embroiled in controversies, swearing affidavits and being exposed to the risks of cross-examination. Indeed, in a number of cases it has been commented that it would be entirely inappropriate for a District Judge to swear an affidavit in a case, for these reasons.[16]

For a decade or so after *McSorley*, decision successful *habeas corpus* applications were confined to those situations where an applicant was in a position to identify a defect in his detention on the face of the record, or which involved such outrageous or exceptional facts as made the eventual release of the prisoner inevitable.

That position has now changed as a result of a recent decision in the Supreme Court in *McDonagh v Governor of Cloverhill Prison*[17] In *McDonagh*, a three person Supreme Court[18] held that in the context of a bail hearing in the District Court, where the procedural and other deficiencies in the hearing were such to invalidate essential steps in the proceedings leading to the applicant's detention, the appropriate remedy was release under Article 40, rather than any other alternative remedy.

The facts of *McDonagh* are instructive as they very much informed the approach which McGuinness J. took in her judgement. Each applicant was charged with the offence of assault contrary to Section 3 of the Non Fatal Offences Against the Person Act 1997. Both applicants appeared before the District Court seeking bail and the prosecution opposed bail in both cases. The prosecution relied on the seriousness of the charge and secondly on the fear that witnesses would be intimidated. The prosecuting garda stated in evidence that the charge before the court related to a shooting incident which had occurred on New Year's Day at a halting site in Coolock. He stated there had been an ongoing feud between two travelling families and he feared that as the applicant was related, the witnesses may be intimidated. The defence objected to this evidence on the basis that it was hearsay. The defence sought bail on the grounds that the only objection properly before the court was as stated on the charge and submitted that the gardai were satisfied with the applicant's identity and address. The District Judge refused bail stating that "this is an ongoing feud" and "that the test in relation to bail is 'whether this man is going to go out and murder someone'?" The judge further asked "is this man going to go out and assault someone again with a gun". The District Judge refused bail and the applicant was remanded in custody. The applicant's legal advisers brought a preliminary application for an enquiry under Article 40.4.2. The enquiry was directed by McMenamin J, who refused Article 40 relief.

On appeal to the Supreme Court, McMenamin J's order dismissing the application was set aside and the applicants were released. Counsel for the applicants argued that owing to the serious consequences of the refusal of bail, an accused person should be put on notice if an objection to bail under Section 2 of the Bail Act 1977 was to be made. He submitted that there was a complete absence of the characteristics of natural justice in the hearing before the District Judge. In addition it was said that the phraseology used by the District Judge ("is this man going to go out and assault someone again with a gun?") was totally contrary to the presumption of innocence. Any independent person watching the hearing before the District Court in the case would be fundamentally concerned as to its unfair and unjust nature. Significantly, it was argued that such a hearing was a nullity and that accordingly the applicants were not held in accordance with law and should be released by the Supreme Court.

The Supreme Court accepted counsel for the respondent's submission that the correct test to be applied was that set down by *Walsh in State (Royle) v. Kelly*[19].

In his judgement in *Royle*, Henchy J.[20] had set out the test:

> "The expression [' in accordance with the law'] is a compendious one and is designed to cover the basic legal principles and procedures which are so essential for the preservation of personal liberty under our Constitution that departure from them renders the detention unjustifiable in the eyes of the law. To enumerate them in advance would not be feasible and, in any case, an attempt to do so would only tend to diminish the Constitutional guarantee. The effect of that guarantee is that unless the High Court or, on appeal, the Supreme Court is satisfied that the detention in question is in accordance with the law, the detained person is entitled to an unqualified release from that detention. It is the circumstances of the particular case that will usually determine whether or not a detention is in accordance with the law".

In *Royle*, the prosecutor's claim for release was rejected. However, the Supreme Court in *McDonagh* emphasised that the matters of which the prosecutor in the *Royle* complained were difficulties over the appointment of a legal aid solicitor and the consequent failure to obtain a particular expert witness at his trial. The facts in *McDonagh* were very different. The District Judge did not appear to have given any consideration either to the objections to bail actually raised by the prosecution or to the question of hearsay. Instead he refused bail on what appeared to be a ground of apprehension that either or both of the applicants were going to, as he phrased it, "go out and murder someone". The Supreme Court pointed to the fact that both applicants had been charged with assault causing harm. Neither had been charged with a firearms offence, let alone with manslaughter or murder. Both applicants were clearly entitled to a presumption of innocence in regard to the offences with which they were in fact charged. In a refreshing willingness to call a spade a spade, McGuinness J. stated that it was highly improper for the District Judge to suggest that one or other of them was going to "go out and assault someone again". Whilst the learned High Court Judge in his judgement described the phraseology used by the District Judge as "unusual", in the view of the Supreme Court the matter was considerably more serious. The remarks made by the

16 See the decision of McKechney J. in *Stephens v Connellan* [2002] 4 IR 321
17 [2005] 1 ILRM 340
18 McGuinness Hardiman and Fennelly J. J.
19 1974 IR 259
20 At p.269

judge were both improper and entirely wrong in principle. Such remarks should not have been made in the context of a bail hearing, or indeed in any context.

McGuinness J. found that it was a requirement of natural and constitutional justice that an accused person should be given a proper opportunity either by means of evidence or through submissions to challenge an objection raised under Section 2 of the Bail Act 1997. None of that had occurred in the present case. The proceedings were *in essence unfair* (my emphasis). McGuinness J. concluded her judgement by finding that the test in *The State (Royle) v Kelly* had been met "and that the procedural and other deficiencies of the hearing before the Learned District Court Judge in this case were indeed such as would invalidate essential steps in the proceedings leading ultimately to the applicant's detention."

On the facts as they presented themselves in *McDonagh*, it is difficult to argue with any of the conclusions reached in the judgement. It is refreshing that the Supreme Court were prepared to frankly condemn the language used by the District Court Judge in the case, on the basis that it constituted a failure on his part to accord to the accused persons their Constitutional entitlement to the presumption of innocence.

More interesting for present purposes however is the contention that the proceedings "were in essence unfair" and that therefore it was appropriate for the court to go behind the *prima facie* valid remand warrant, and to release the applicants under Article 40.4.2 on the basis that the bail hearing conducted by the District Court Judge had been deficient and unfair.

It is submitted that that is quite a far reaching notion, which is likely to have significant implications for future cases. Whilst the case concerned a pre-trial hearing on bail, it is possible that the principle applied by the Supreme Court might in future cases be utilised by convicted prisoners seeking to obtain their release under Article 40. Pointing to defects in their trial, such potential applicants may seek to utilise the decision in *McDonagh* to argue that the trial process which resulted in their conviction was in essence unfair, and that therefore the High Court should go behind the *prima facie* valid committal warrant so as to supervise the fairness and legality of what went on before the trial judge. Were such applications to be successful, litigants in future cases might simply choose to avoid the discretionary waters of judicial review, opting instead to travel the surer ground of habeas corpus, where discretionary bars to relief are not in play. The disadvantages of such a development occurring are considered below.

Recent Article 40 cases clearly indicate that the *McSorley* decision has now been sidelined, almost to the point of collapse. That is so, notwithstanding that *McSorley* does not appear to have been cited in the *McDonagh* case. It was however cited in a more recent judgement of McMenamin J. in the High Court in which counsel for the respondent argued the availability of an alternative remedy point and also raised the audi alterem partem point identified in *McSorley*. The case in question is called *Nasiri v Governor of Cloverhill Prison.*[21] The facts of Nasiri were as follows:

The applicant had been arrested at Dublin Airport and brought by the Gardai to Santry Garda Station. He was detained pursuant to the provisions of Section 9 (8) of the Refugee Act 1996 as amended. The following day he came before the District Court and the Gardai applied to commit the applicant for a further period of detention under the provisions of Section 9 (10) of the Refugee Act 1996. In the course of the hearing, the Garda testified that the applicant had arrived on a flight from Barcelona and he was refused leave to land and when the applicant was questioned he said that he held an Iranian passport, that it was forged and that he paid €11,000 for it. The Garda also informed the District Court that the applicant had told members of the Gardai that he had an identification card from Afghanistan and concluded that the applicant had made "no reasonable efforts to produce identification". She also concluded that the applicant was in possession of forged identification. The solicitor acting on behalf of the applicant applied to the District Court for the applicant's release. The District Judge refused the application on the grounds that the applicant was "a liar and a fraud" and "had forged documents". It was submitted that at no stage during the District Court proceedings was there any evidence from the gardai to the effect that the applicant had lied in relation to any relevant matter on his apprehension, arrest and detention and nor had the applicant been charged with any offence of fraud.

Another disquieting aspect of the case was that the District Judge also had before him "information" which was not known to the applicant or his legal advisers at the time of the application. The matter only emerged in its true light in the course of the *habeas corpus* application before Judge McMenamin, when counsel for the respondent had properly drawn attention to the fact that there had indeed been additional material before the District Court Judge. The material in question also included a written memorandum of an interview between the Gardai and the applicant, and again this was not provided to the defence at the time of the hearing, nor were the defence made aware of it existence.

Judge McMenamin dealt first of all with the submission that the applicant should have proceeded by way of judicial review rather than by way of *habeas corpus* in accordance with the *McSorley* case. In rejecting that contention, McMenamin J. indicated that he considered himself bound by the Supreme Court decision in *McDonagh*.

Secondly, McMenamin J. focused on the issue of the District Court Judge having regard to the "information" which was not made available to the defence. Judge McMenamin stated that it was impossible to escape the conclusion that the "information" and the memorandum of interview were very likely to have formed part of the District Judge's considerations. That of itself rendered the proceedings before the District Court Judge constitutionally and procedurally flawed. Consideration of the principles enunciated in *Re Haughey*[22] demonstrated that the material in question should have been made

21 Unreported High Court (McMenamin J) 14.4.05
22 [1971] IR 217

available to the applicant prior to the hearing so that it could have been considered by the applicant and his legal advisers. The absence of such procedure meant that the applicant was simply not put on notice of the full case against him. In those circumstances, McMenamin J. concluded that a *habeas corpus* was merited. The want of fair procedures which occurred in the District Court was such as to render the proceedings "in essence unfair". McMenamin J's choice of words was instructive, having adopted them from the decision of the Supreme Court in *McDonagh's* case. The judge noted that the earlier decision of *McSorley* was not referred to in *McDonagh* and in any event, he concluded that the procedural and other deficiencies of the hearing before the District Court Judge in the case were indeed such as would invalidate essential steps in the proceedings leading ultimately to the applicant's detention, and that therefore, *habeas corpus* was the appropriate remedy.

Practical Implications of *McDonagh*

i) Undoubtedly there has been a large increase in the number of *habeas corpus* applications coming before the High Court. Many of these have been meritorious, some have not.

ii) A number of applicants have chosen to opt for the Article 40 procedure rather than proceeding by way of judicial review, or other statutory rights of appeal, for instance appealing to the High Court a refusal to grant bail.

iii) The increased number of successful Article 40 applications has taken a heavy financial toll on the state and also on the coffers of the Director of Public Prosecutions. Whilst financial considerations should not be allowed cloud issues of principle, there is the fact that errors made by District Judges, and sometimes court staff, have led to respondent Governors and the DPP paying out substantial funds in costs awards, often in circumstances where the error has arisen through no fault of the paying party. Defenders of the system would point to the need for higher standards at District Court level, improvements in the methods of selecting District Court Judges and the allocation of resources for the training of judges so that the basic errors which have predominated in the last two years and which have led to such a flood of High Court applications could be avoided, or at least minimised.

iv) Applicants dissatisfied for one reason or another with bail hearings in the District Court have shown an increased tendency to litigate their complaints not by going to Cloverhill High Court to appeal the refusal to grant bail (or a decision to fix excessive bail), but instead by opting for the Article 40 route, involving as it does a speedier and more efficient means of remedying the grievance complained of. Utilising the *McDonagh* judgement, applicants dissatisfied with their bail hearings have sought to circumnavigate the available High Court remedy, in preference for the jackpot option of an unconditional order of release.

I propose now to consider briefly the appropriateness of utilising the *habeas corpus* procedure as a means of remedying an unsatisfactory bail hearing, or the imposition of excessive bail terms by a District Judge.

Habeas Corpus as a Remedy for a Defective Bail Hearing

The decision in *McDonagh* (and also in *Nasiri*) very clearly indicates that *habeas corpus* lies to remedy a defective bail hearing where fair procedures have not been applied. The real question, which is considered in a little detail below, is precisely what is accommodated within the expression "fair procedures"? Put another way, what makes a proceeding unfair? Before considering that issue, it is appropriate to consider the approach adopted to this question by the English and American courts.

The practice in England and in the United States has been to resist the attempt to develop *habeas corpus* into a remedy for unlawful refusal of bail. The English courts have indicated a preference for remittal of the matter to the original court, or direction to pursue an appeal against refusal of bail. In *R v Richmond JJ.* ex p. Moles[23], the remedy of relief from *habeas corpus* for a person who regularly refused bail was described as unthinkable.

A good example of the United States attitude is to be found in the 1951 case of *Stack v Boyle* [24]. In that case, Vinson C. J. was of the view that whilst *habeas corpus* was an appropriate remedy for one held in custody for violation of the Constitution, the District Court should withhold relief in a *habeas corpus* action where an adequate remedy available in the criminal proceedings had not been exhausted: *Ex parte* Royall 117, US 241 (1886); *Johnson v Hoy*, 227 US 245 (1913).

Adopting a similar view, Jackson J. had this to say on the subject:

> "[Habeas Corpus] would best serve its purpose and be best protected from discrediting abuse if it is reserved for cases in which no other procedure will present the issues to the court. Its use as a substitute for appeals or as an optional alternative to other remedies is not to be encouraged. *Habeas corpus* is not, in the absence of extraordinary circumstances, the procedure to test the reasonableness of bail. .....
>
> In view of prevailing confusions and conflicts in practice, this court should define and limit the procedure with considerable precision, in the absence of which we may flood the courts with motions and appeals in bail cases...."

It is submitted that the main difficulty with the application of *habeas corpus* to a bail context is that the remedy of unconditional release is somewhat disproportionate. Since a *habeas corpus* application allows of only one question (is the detention lawful?) the inflexibility of the

23 Queen's Bench Div. 22.10.1980
24 342 US 1 (1951)

doctrine means that it will rarely be suitable as a remedy to cure an imperfection in a bail hearing. To take an example: Suppose the state had a legitimate concern that an accused will not turn up for his trial, or perhaps will intimidate central witnesses. There may be a history of bench warrants and there may even be a history of violence. Suppose in such a case, a District Judge misdirects himself on the law, or acts in some way as to unlawfully decline bail. In such circumstances, where the state has legitimate concerns grounded on evidence, what is to be the remedy? Proceeding by way of *habeas corpus* would provide a windfall for the undeserving accused, albeit one who has been unlawfully declined bail. Such a person will have an incentive to pursue a remedy by means of *habeas corpus* rather than by appealing the decision in the High Court. Since in a *habeas corpus* application the High Court Judge's role is largely limited to the function of releasing or not releasing the applicant, the question of remitting the matter back to the District Court to conduct a proper hearing, with the guidance of the High Court Judge's ruling, does not arise. It would arise in a judicial review context, where the power of remittal is available to the High Court Judge. It does not arise in a *habeas corpus* context, where relief is granted as of right[25].

The principle that *habeas corpus* is a writ of right accommodates the notion that *habeas corpus* is a non- discretionary remedy and that release cannot be withheld on grounds extraneous to the legality of the detention. Whilst that is the traditionally held view, there are cases where the remedy has been withheld on the grounds that the applicant had been guilty of an abuse of process[26] or where release has been refused on the ground that the public welfare might be compromised by releasing the applicant[27]. Similarly, the unrestricted right of a person who is detained to make a complaint may be withdrawn where the ground sought to be raised by the complainant is one which could have been submitted on an earlier occasion[28]. Release may also be withheld where the integrity of the administration of justice requires it and where an applicant's acquiescence debarred him from taking *habeas corpus*[29].

The abuse of process rule was applied in *The State (Byrne) v Frawley*[30]. In that case two days after the complainant had been arraigned before the jury empanelled in accordance with the Juries Act 1927, the Supreme Court declared the 1927 Act unconstitutional. Nonetheless the trial proceeded and the accused was convicted before such an unconstitutionally empanelled jury. The Supreme Court declined to proceed with the post conviction Article 40.4.2 enquiry on the ground that since neither at the trial nor in his grounds of appeal to the Court of Criminal Appeal, nor in a subsequent appeal to the Supreme Court, had the question of the constitutionality of the jury been raised on behalf of the applicant. The prisoner's apparent acquiescence, it was felt, had compromised his entitlement to proceed with the complaint. The Supreme Court, notwithstanding the serious jurisdictional defect involved, refused to release the applicant.

The above authorities do not sit well with the notion that a prisoner is entitled to *habeas corpus ex debito justitiae*. The traditional and long held view has been that relief by way of *habeas corpus* is a mandatory, not a discretionary remedy[31]. Questions as to the merits or otherwise of the applicant's behaviour ought not be taken into account in determining whether he is to be released. This is one of the major procedural advantages which the *habeas corpus* procedure enjoys over other forms of procedure. Other advantages include the fact that, unlike the position in other forms of civil proceedings, in Article 40 enquiries, the onus lies upon the respondent to justify the legality of the applicant's detention. From a practical perspective as well, it is often difficult for a respondent to marshal its forces for the *inter partes* hearing in circumstances where solicitors for the respondent are routinely under time pressure to retain counsel and arrange the attendance of witnesses. Too often, experience indicates that respondents are notified about cases for the first time, no more than half an hour before the hearing. In *habeas corpus* applications, lawyers for a respondent are often under pressure and have scant time to prepare evidence and submissions. The applicant's counsel has already turned the judge's mind with submissions made at the *ex parte* stage. A little like the footballer coming on as substitute late in the game, state counsel comes to the proceedings cold, having to play catch-up with everyone else, including the referee. Whilst judges will accommodate counsel as much as circumstances allow, the reality is that adjournments are rarely forthcoming as it means the applicant will be forced to spend another night in custody. An applicant thus enjoys a number of significant advantages if he can manage to bring an application under Article 40.4 rather than proceeding by way of any alternative remedy.

As stated, the problem about using the *habeas corpus* doctrine to correct an imperfection in a bail hearing is that, by so proceeding, the High Court is effectively usurping a District Judge's adjudicative function on the issue of bail. The inflexible nature of the *habeas corpus* remedy precludes the matter being remitted to the District Judge for hearing. Those two concerns lie at the heart of the US and English approaches to this question. The approach of the Irish Courts, as evidenced in *McDonagh* appears to be premised on the (not altogether objectionable) notion that one starts off on the premise that every accused is entitled to bail as of right, the State has one chance and one chance only to oppose bail and if it makes a mess of that opportunity, that is not the accused's fault, and he should be restored to the situation he was in prior to his arrest. Just as the prosecution in a criminal trial must come up to full proof, where they fail to do so the outcome should not be a retrial where it can mend its hand, but an acquittal, since the state has failed to take the opportunity to prove its case. Whilst this approach does have a certain attraction, it overlooks the fact that where a District Judge's refusal of bail is remedied in a *habeas corpus* application, there is no bond in position, requiring the attendance of the accused at the next remand. Whilst the District Court order is in place, directing the accused's attendance on the next date, the accused has not signed a bond so as to secure his attendance on the adjourned date, in default of which he will owe to the state a sum of money committed by that bond. Precisely what the legal position is in such circumstances is a little difficult to pin down. Whether a bench warrant could issue in such circumstances, where such an accused fails to turn up for the next remand, is open to question.

25 Costello at p.98 of his text attributes this expression to Sir. John Wilmot, then a judge at the Court of Kings Bench, who in an opinion delivered to the House of Lords in the late 18th century propounded the formula that *habeas corpus* was a writ of right, but not a writ of course.

26 *R v Governor of Pentonville Prison ex p. Tarling* [1979] 1 WLR 1417

27 *Re Shuttleworth* (1846) 9 QB 651, 662

28 *Re Thomas McDonagh* Unreported High Court 24.11.1969

29 See Decision of O'Caoimh J. in *Burns v Early* [2003] 2 1 ILRM 321, though it should be noted this was a judicial review application.

30 [1978] IR 326

31 *R v Pentonville Prison Governor ex p. Azam* [1974] AC 18 at 32

There is also the more fundamental issue raised in *McSorley*, and which it is submitted remains a fair observation, that where criticism is being directed at a judge's conduct, fairness dictates that the judge be given some opportunity to respond.

Development of the McDonagh theme

An interesting example of how the *McDonagh* principle might play out in practice is provided by two recent cases which came before the same judge who has been a key figure in the development of this line of jurisprudence. In the related cases of *Conroy v Governor of Cloverhill Prison and Leon Wright (A Minor) v Governor of St. Patrick's Institution*[32] the court had to consider two applications under Article 40.4.2 of the Constitution brought by applicants who had been refused bail in the District Court on the ground, it seemed, that there were further serious charges in the pipeline. McMenamin J. found as a fact that the District Judge in that case had misdirected himself in law and had applied the wrong test on bail. One of the applicants had in fact elected for the alternative course of appealing the refusal of bail to the High Court. However, the bail appeal had been adjourned on two occasions by the High Court, the first occasion because the state was anxious to check out an address and the second occasion because the case was not reached. That fact notwithstanding, McMenamin J. rejected the contention that the applicant had elected to pursue the alternative remedy of an appeal and was thereby estopped from pursuing his release by way of habeas corpus. McMenamin J. found that had the bail application proceeded and evidence been heard, he would in those circumstances have refused habeas corpus, but since that had not occurred, release under Article 40 should be granted under the decision of the Supreme Court in *McDonagh*. Most controversially of all, McMenamin J. found that the District Judge's error in applying the wrong test as to bail had rendered the proceedings unfair, in such a way as to bring into play the rationale adopted by the Supreme Court in *McDonagh*. The court rejected the contention by counsel for the respondent that the facts of the two cases were totally different and that the absence of any suggestion of misconduct on the part of the District Judge, or any breach of the principle of *audi alterem partem*, had rendered *McDonagh* entirely distinguishable. The court found that the failure of the District Court Judge to apply the correct test, and the District Judge's concentration on an irrelevant consideration had made the proceedings unfair. The court therefore felt bound by the decision in *McDonagh* and ordered the release of the applicants.

In a refreshing passage in the same *ex tempore* judgement, McMenamin J. had this to say about the importance of the *habeas corpus* doctrine and the need to recognise its limited application: "It does not allow for fudge solutions, or of shades of grey. It merely allows an order which says that the detention is lawful or unlawful."

Conclusion

In truth, some of the guidelines offered in the past as to the threshold which must be reached have been of limited assistance. Impressive descriptive passages such as that offered by *O'Higgins C. J. in The State (McDonagh) and Frawley*[33] may often be difficult to apply in practice. For a convicted person to be released on habeas corpus, there must be "such a default of fundamental requirements that the detention may be said to be wanting in due process of law." I must admit, I am not altogether certain what that means. It is perhaps somewhat blasphemous to add that Henchy J's stricture in *State (Aherne) v Cotter*[34] (quoted in full above) is also of questionable assistance: "it has to be shown not that the detention resulted from an illegality or a mere lapse in jurisdictional propriety but that it derives from a departure from the fundamental rules of natural justice...", Again, while that means the bar is high, it is not abundantly clear how high it is.

Nor is the phrase taken from *The State (Royle) v Kelly*[35] (approved in *McDonagh*) particularly clear -- that the irregularities or procedural deficiencies must be shown "to be such as would invalidate any essential step in the proceedings leading ultimately to his detention". The plain English offered by McGuinness J. in *McDonagh* does at least make clear what will suffice in the pre-trial *habeas corpus* situation: "If the proceedings which resulted in the detention were in essence unfair, *habeas corpus* will lie". It will be interesting to see how in future cases that characterisation of the applicable threshold will be applied, and whether in time, the principle is extended to cover post conviction cases, where the presumption of innocence no longer applies.

Whilst the disinclination in recent cases to adopt "fudge solutions" is to be wholeheartedly welcomed, legitimate questions remain to be asked concerning the lowering of the *habeas corpus* bar following the decision in *McDonagh* and the appropriateness of bypassing alternative remedies such as judicial review, in favour of an inflexible procedure which carries none of the deft touches of *certiorari*. Doubtless, in pre trial cases where there has been a flagrant breach of natural justice resulting in the accused's detention, it is not only open to a High Court Judge to grant release under Article 40, it is appropriate for him to do so. It is submitted that it is a good development that impropriety, misconduct (call it what you will) at District Court level is exposed and criticised, and that a fast and informal method is chosen to right the wrong which has thereby occurred. Where a man is in custody who should not be in custody, the first concern should be to get him out. That is the beauty of *habeas corpus* applications in that, in a matter of hours, the man's detainer must produce that person and justify his detention. It is difficult to identify a greater example of the Constitution at work, than a prisoner calling upon his jailer to show cause why he should not be set free. The procedure is an excellent one, it is fast, it is informal, it is powerful and it is straightforward. Where an unlawful detention is cloaked in a shroud of apparent legality, it allows a court to penetrate the material to ascertain the true position. The procedure guards jealously a citizen's right of access to the courts and it ensures that where the state is guilty of excess, the High Court is entitled to intervene. Long may it last. ●

32 *Ex tempore* judgement of McMenamin J. 16.03.06
33 [1978] IR 131
34 [1982] IR 188
35 [1974] IR 259

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Construction - Terms - Assurance given to plaintiffs in letter from management - Extent of assurance - Whether plaintiffs entitled to maintenance work commensurate with qualifications and experience following return from secondment to employment with defendant - Whether such entitlement to be limited in time - Whether plaintiffs entitled to damages in lieu thereof if such work not available - Transfer of undertakings - Collective agreement - Plaintiffs' appeal allowed (42/2004 - SC - 20/12/2005) [2005] IESC 84
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Disciplinary procedures
Medical practitioners - Misconduct - Suspension - Fair procedures - Suspension for purpose of carrying out investigation - Whether consultant entitled to know basis and substance of allegations prior to suspension - Whether entitled to make representations prior to suspension - Consultant's common contract - Interpretation - Whether investigation into misconduct only permissible under clause 1 - Immediate risk to safety, health or welfare of patients or staff - Whether suspension under clause 3 valid where no investigation in being under clause 1 - *Certiorari* granted (2003/295JR - Macken J - 5/9/2005) [2005] IEHC 349
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Fair procedures - Inquiry - Bullying and harassment - Flawed preliminary investigation - Whether report of first investigation could be relied on in second inquiry - Whether second inquiry tainted - Whether fair issue to be tried - Balance of convenience - *O'Brien v Aon Insurance Managers (Dublin) Ltd* [2005] IEHC 3 (Unrep, Clarke J, 14/1/2005) and Morgan v Trinity College [2003] 3 IR 157 followed - Injunction granted (2005/1503P - Clarke J - 3/6/2005) [2005] IEHC 170
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Hazards involving Dangerous Substances) Regulations 2000 (SI 476/2000), reg 29 - Planning and Development Regulations 2001 (SI 600/2001), regs 137 and 141 - Planning and Development Act 2000 (No 30), s 50 - Leave to apply for judicial review refused (2004/1164JR - Macken J - 26/7/2005) [2005] IEHC 344
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Twenty-seventh amendment of the constitution (No.2) bill 2003
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1st stage- Dail

Twenty-eighth amendment of the constitution bill 2006
2nd stage- Dail

Twenty-eighth amendment of the constitution (No.2) bill 2006
2nd stage- Dail

Twenty-eighth amendment of the constitution (No.3) bill 2006
2nd stage- Dail Dan Boyle

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

Waste management (amendment) bill 2003
2nd stage - Dail [pmb] Arthur Morgan

Water services bill 2003
Committee - Dail (Initiated in 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
GLSI = Gazette Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law
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The Criminal Law (Insanity) Act 2006

Tony McGillicuddy B.L.[1]

Introduction

The provisions of the Criminal Law (Insanity) Act 2006 will be brought into operation shortly.[2] It introduces significant procedural changes in the law governing fitness to plead (re-titled as fitness to be tried), including the abolition of the procedure whereby juries were empanelled to decide the issue. The Act codifies the insanity defence, while it also introduces diminished responsibility as a partial defence to charges of murder. In addition, the Act creates the Mental Health (Criminal Law) Review Board, which will review the committal of those persons found unfit to be tried or found not guilty by reason of insanity. This ends the role of the Minister for Justice in deciding on the length of detentions of such persons.

This article details the main changes in the Act concerning fitness to be tried, the insanity defence and diminished responsibility as applicable to murder charges. It also outlines the powers of the courts to order psychiatric care for mentally ill persons in the criminal justice system. Some reference is also made to provisions of the Act concerning the independent review of such detentions ordered by the courts.

Provisions

(a) Interpretation

A cornerstone of the Act is the definition to be used in determining if somebody is mentally ill at the plea stage or for the purposes of the imposition of criminal liability. The Act uses the term "mental disorder" for these purposes throughout the Act. As defined, mental disorder "includes mental illness, mental disability, dementia or any other disease of the mind but does not include intoxication".

Thus, the concept of a "disease of the mind" is maintained, although its provenance as a concept has been criticised because it is difficult to apply to conditions such as schizophrenia.[3] Neither is any guidance given as to what the other terms in the definition should convey. In contrast, the definition of mental disorder in the Mental Health Act 2001 defines the terms used therein.[4] Practitioners should be aware that courts exercising powers of committal to detention under the Act will, sometimes, be obliged to use the definition of "mental disorder" under the Mental Health Act 2001.

The definition excludes a state of intoxication from the definition of mental disorder. The concept of intoxication is given a wide definition, which would cover the effects of drugs as well as alcohol. The definition is that "intoxication means being under the intoxicating influence of any alcoholic drink, drug, solvent or any other substance or combination of substances".

Questions of interpretation could arise about excluding intoxication from the concept of mental disorder. As noted in a recent Supreme Court decision, in some cases an accused person's mental illness may be induced by alcohol.[5] In such cases, should the courts focus on the mental illness itself or on the conditions which caused it, something which the Circuit Court judge in that case adverted to?[6] The exclusion of the state of intoxication may be tested by such cases.

The Act also uses the term "designated centres", which is defined in s.3 of the Act. The Central Mental Hospital is to be a designated centre for the reception of persons committed by the courts. The Minister for Health can also select other psychiatric care facilities as designated centres. In addition, s.13(1) of the Act appears to envisage that a prison can be a designated centre. The "clinical director" of a designated centre has important functions under the Act for persons committed to his or her care by the courts.

(b) Fitness to be tried:

(i) Test for fitness to be tried

The issue of a person's competence to deal with the offences charged against him or her are central to the criminal justice process. Section 4 of the Act provides an all encompassing framework for this matter, with the issue now to be called "fitness to be tried" instead of fitness to plead. A fundamental change in procedure is that judges will now make the decision about fitness to be tried in all cases.[7] Also noteworthy is that the Act empowers judges to commit persons found unfit to be tried to detention in designated centres and makes provision to bring such persons before the court again if the person is believed to be fit for trial.

1 My thanks to Paul O'Higgins S.C., Seán Gillane B.L. and Niall Nolan B.L. for their comments and observations on this article. All responsibility for any errors and omissions is, of course, my own.

2 Statement on the Department of Justice website, available at www.irlgov.ie, that the provisions will be commenced on the 1st June, 2006.

3 Simon Mills, *Criminal Law (Insanity) Bill 2002: Putting the sanity back into insanity?* Vol 8(3) Bar Review 101 (June 2003).

4 Section 3 of the Mental Health Act 2001 provides: "mental disorder" means mental illness, severe dementia or significant intellectual disability... (2) In subsection (1)- "mental illness" means a state of mind of a person which affects the person's thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons; "severe dementia" means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression; "significant intellectual disability" means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person."

5 *DPP v Redmond*, Unreported, Supreme Court, 6th April, 2006. In that case, Geoghegan J. quoted the comments of Judge Haugh (as he then was), who queried whether the courts should focus on the condition itself or on the cause of the condition affecting the person when the act was committed.

6 Ibid.

7 Section 2 of the *Criminal Lunatics Act 1800* provided that juries were to decide the issue.

Under s.4, the issue of fitness to be tried can be raised by the defence, the prosecution or the judge. The criteria for the decision appear to be a restatement of the traditional grounds pertaining to the matter.[8] The person must be unfit to be tried by reason of a mental disorder "to understand the nature or course of the proceedings" so as to be able to do any one of following six things; plead to the charge, instruct a legal representative, elect for trial by jury where charges are for indictable offences which can be tried summarily, make a proper defence, challenge a juror or understand the evidence. The use of the word "or" in s.4(2)(e) suggests that the six criteria are alternatives.

Some commentators have questioned whether persons suffering from physical disabilities are covered by the section.[9] As the Act deals with those suffering from a mental disorder in relation to fitness to be tried, it would not appear that persons confounded by physical limitations from dealing with charges against them come under the remit of s.4 of the Act. Instead, it is suggested that the common law rules relating to fitness to plead would apply to such persons.

The Act is silent as who bears the onus of proof on the issue. Heretofore, the defence would have to prove unfitness to plead on the balance of probabilities,[10] whereas if the prosecution alleges unfitness to plead, it had to prove that contention beyond a reasonable doubt.[11] To this must be added the High Court decision of *Leonard v Garavan*, wherein McKechnie J. highlighted the obligation on the judge to ensure that an accused person is not exposed to a criminal process where lack of mental faculties is in issue.[12]

(ii) Decision-makers on fitness to be tried

Until now, the decision about fitness to be tried was made, where trials on indictment took place, by a jury. The Act changes the procedure so that the judge in the trial court will make the decision.[13] Where it arises, the person must be sent forward from the District Court to the court of trial for a determination of the issue in the court of trial.[14] Meanwhile, s. 4(3)(a) provides that in the District Court the relevant judge will make the decision about fitness to be tried for those persons "charged with a summary offence, or with an indictable offence which is being or is to be tried summarily."

Questions of interpretation may arise under this provision where an accused person can elect for summary trial of an indictable offence, one illustration being a minor theft offence.[15] Assuming that the DPP directs summary disposal of a charge and that the District Judge would accept jurisdiction, the charge does not become subject to a summary trial unless the accused person consents. In such a scenario is the District Judge dealing with "an indictable offence which is being or is to be tried summarily", because the charge cannot be tried summarily without the accused person's consent, which she may be unable to give at that point. The District Court may be unable to deal with the issue of fitness to be tried in those cases. As provided in s. 4(2)(c), however, the question of an accused person's ability to elect for jury trial is one of the questions relevant to a person's fitness to be tried, which may trigger the inquiry about fitness for trial being carried out by the District judge.[16]

(iii) Court orders

Where a judge finds somebody unfit to be tried, the judge is required to adjourn the proceedings until further order.[17] This appears to overrule the decision of the Supreme Court in *O'C v Judges of the Dublin Metropolitan District* to the effect that a court should make no order in such circumstances.[18] If the court orders that the accused person be detained in a designated centre, the Act provides mechanisms for bringing the matter back before the court if there is a change in circumstances. The clinical director of the designated centre where the person is detained can notify the court that in her opinion the person is no longer unfit to be tried.[19] In those cases, the Court must then order the person to be brought before it to be dealt with as the court thinks proper.[20] In addition, the Mental Health (Criminal Law) Review Board, which reviews any detentions ordered by the court after a finding of unfitness to be tried, can also order the person who is detained in a designated centre to be brought before the court to be dealt with.[21] Presumably, in such situations, the court would then hold a fresh inquiry on the issue of fitness to be tried.

The Act is silent on the scenario where a person is not detained in a designated centre. Such situations could arise where the court either orders out-patient care for the person or does not order that the person undergo any treatment. In such situations, the adjournment of the case to a future date may overcome the issue. Neither does the Act deal with a scenario for returning the matter to the court for persons ordered to be detained by a court where the Review Board subsequently decides that out-patient care or discharge is appropriate for the person.[22] The obligations of the clinical director and Review Board as outlined above appear to apply only to situations where person are "detained" in the designated centre, although in practice the clinical director or the Review Board might communicate with the court on any date to which the case was adjourned, if they form an opinion that there was a change in the person's circumstances.

(iv) Powers of committal

Following a determination of unfitness to be tried, a power of committal is entrusted to the judge if satisfied that the person is suffering from a "mental disorder" within the meaning of the Mental Health Act 2001 and requires in-patient care.[23] Alternatively, the judge can order the provision of out-patient care for the person if the judge is satisfied that the person is suffering from a mental disorder either as defined under the Act itself or within the meaning of mental disorder under the Mental Health Act 2001.[24] The power to order out-patient care or treatment should limit the power of committal to necessary cases only.

The Act allows, but does not require, a judge to order detention for assessment by a consultant psychiatrist before exercising a power of committal, although detention for this purpose is limited to 14 days.[25]

8 *R. v Pritchard* (1836) 7 C. & P. 303.
9 See Gerard Conway, *Fitness to Plead in Light of the Criminal Law (Insanity) Bill 2002:* (2003) Vol. 13(4) Irish Criminal Law Journal 2, and Mills, *op. cit.* above.
10 *R. v Podola* [1960] 1 Q.B. 325.
11 *R. v Robertson* [1968] 1 W.L.R. 1767.
12 [2003] 4 I.R. 60 at 82.
13 Section 4(4)(b) and s.4(5)(b).
14 Section 4(4)(a).
15 Section 53 of the Criminal Justice (Theft and Fraud Offences) Act 2001, under which an accused person has a right of election for trial on indictment for offences under that Act.
16 See the comments of Walsh J. in *The State (C.) v Minister for Justice* [1967] I.R. 106 at 120-121.
17 Section 4(3)(b) and s.4(5)(b).
18 *O'C v Judges of the Dublin Metropolitan District* [1994] 3 I.R. 246 at 252.
19 Section 13(3)(a).
20 Ibid.
21 Section 13(8) and s.13(10), where the Review Board carries out a review requested by the detained person or on its own initiative.
22 Section 13(5), (8)(b), (10).
23 Section 4(3)(b)(i) and s.4(5)(c)(i).
24 Section 4(3)(b)(ii) and s.4(5)(c)(ii).
25 Section 4(6)(a)(i). The consultant psychiatrist must be an "approved medical officer".

The psychiatrist must report to the court on whether the person is suffering from a "mental disorder" within either statutory definition of the concept.[26] The court can also consider other evidence in making its decision.

(v) Procedures for acquittal and discharge

Two innovative features of the Act are proposals to allow the evidence in a case to be given, in limited cases, even where fitness to be tried has not been determined. It appears that the rationale for such an approach is to ensure that such persons should only remain within the rubric of the criminal justice system if necessary.

The first such provision is s. 4(7), whereby a decision on fitness to be tried can be deferred until any time before the opening of the defence case. This allows a court to hear the prosecution evidence without the person pleading on the charges and, if appropriate, to return a not guilty verdict on the charges. This provision may be open to constitutional challenge, as the Supreme Court has stated that questions of fitness to plead must be dealt with before any other significant step in the trial process can take place.[27] The provision could withstand a challenge, however, if confined to situations which do not interfere with the accused person's rights to contest any of the prosecution evidence when the accused person may be unable to give specific instructions to his legal team to cross-examine witnesses.

The second innovation concerns the situation where a person is found unfit to be tried, as contained in s. 4(8). In such an instance, the court may, on application to it "in that behalf" allow evidence to be adduced as to whether the person did the act alleged. Where it is satisfied that there is a "reasonable doubt" about this, it is obliged to "discharge" the accused. Some of the terminology used in this provision is not entirely clear. Where trials on indictment are involved, should a judge or a jury make the decision that there is "reasonable doubt" about a person's guilt? Furthermore, what exactly does a "discharge" amount to and is it different from an acquittal? Proceedings under s. 4(8) cannot be reported on, if the court does not grant a discharge, until the final outcome in the criminal proceedings.[28]

(vii) Appeals:

The Act provides, in s.7, for appeals against the decision that a person is unfit to be tried, although the Act excludes appeals to the Supreme Court on the issue.[29] In addition, if the special verdict on insanity is returned, a person can appeal on the grounds that she was unfit to be tried.[30] If the appeal court overturns the conviction or special verdict on the basis that the person was unfit to be tried, it can carry out the functions of the trial court under s.4 of the Act.[31] Appeals can be brought by both the defence and the prosecution against decisions by the court exercising its power of committal.[32] The appeal court can consider new evidence given by a consultant psychiatrist on this matter.

(c) Verdict of not guilty by reason of insanity

(i) Insanity defence

Section 5 of the Act deals with the defence of insanity. The use of the word 'insanity' is maintained, though modern psychiatry may eschew using such a term for psychiatric illness. The terms of the verdict are modified, so that the verdict is now one of "not guilty by reason of insanity". The test for deciding that the defence is made out is outlined in s.5(1). The person must have suffered from a "mental disorder" at the time of the offence and

(a) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she
  (i) did not know the nature and quality of the act, or
  (ii) did not know that what he or she was doing was wrong, or
  (iii) was unable to refrain from committing the act

The requirement in the M'Naghten rules that the accused person be labouring under a "defect of reason" has been abolished.[33] Otherwise, the traditional criteria are maintained, with the addition of the ground of irresistible impulse as introduced by the Supreme Court *in Doyle v Wicklow County Council*.[34]

Section 5 requires the giving of evidence by a consultant psychiatrist "relating to the mental condition of the accused" when a court or jury is considering the defence.[35] In practice, such evidence was given in the majority of such cases. The section is silent on whether the accused person must establish the defence, as has hitherto been the position in law.[36] This omission is curious, since the Act sets out, in s.6(2), that for the partial defence of diminished responsibility it is for the accused person to establish the defence. Nevertheless, it is suggested that the burden will remain on the accused person to prove the defence, as every person is presumed in law to be sane until otherwise proven.[37]

(ii) Power of Committal

Where the special verdict is returned, the judge is not obliged to order a person's committal. This replaces the mandatory detention of such persons under the previous statutory regime.[38]. Under the Act, the trial court must decide whether the person found not guilty by reason of insanity is suffering from a mental disorder as defined in the Mental Health Act 2001 and is in need of in-patient care. If both criteria are met, the court must commit the person to a designated centre.[39] Thus, the definition of mental disorder under the Mental Health Act 2001 applies for the purposes of exercising the power of committal. The court can order detention to assess the person, before deciding to exercise its power of committal, although time limits apply to such detentions.[40] A report from the relevant psychiatrist would then be considered by the court.

26 Section 4(6).
27 Conway, *op. cit.* above, citing the Supreme Court decision in *O'C. v Judges of the Metropolitan District* [1994] 3 I.R. 246.
28 Section 4(9).
29 Section 7(5).
30 Section 8(1)(c) and s.8(6)(c).
31 Section 9(2).
32 Section 9(1).
33 *M'Naghten Rules* [1843] 10 Cl. & F. 200.
34 [1974] I.R. 55 at 71, following the decision of Henchy J. in *People (Attorney General) v Hayes*, Unreported, Central Criminal Court, November 13, 1967.
35 This would override the decision in *R. v Turner* [1975] QB 834, where it was held that psychiatric evidence was admissible only where the mental processes of the accused are claimed to be outside the normal scope and experience of ordinary people.
36 *People (DPP) v O'Mahoney* [1985] IR 517.
37 A re-iteration of this principle is contained in the judgment of Fennelly J. in *DPP v Redmond*, n.5 above.
38 Trial of Lunatics Act, 1883, s.2(2).
39 Section 5(2).
40 Section 5(3)(a); The initial period is for 14 days, although this can be extended up to a limit of six months.

As is pointed out by Mills[41], this leaves open the situation where somebody is found to be not guilty by reason of insanity of a criminal offence and, having been assessed, is found not to have a mental disorder within the meaning of the Mental Health Act 2001 or does have such a mental disorder, but does not require in-patient care. No express power to order some level of on-going out-patient care or treatment is provided for such cases, which is surprising.

(iii) Appeals

As set out in s.8 of the Act, an appeal lies from the trial court in respect of any cases where the special verdict was applied. Appeals may lie on the grounds that the commission of the offence was not proved, that the special verdict should not have been returned or that the person should have been found unfit to be tried by the court.[42] In hearing such appeals, the appeal court can consider new evidence relating to the mental condition of the appellant.[43] The appeal court can substitute a guilty verdict if it is satisfied that the special verdict should not have been returned. For murder convictions, this includes a power to substitute a verdict of manslaughter on the basis of diminished responsibility.[44]

Appeals can also be brought by the defence and the prosecution against decisions by the trial court exercising its power of committal.[45] The appeal court can consider new evidence given by a consultant psychiatrist on the matter. Meanwhile, where the appeal court overturns a conviction for an offence on the basis that the special verdict should have been returned, it is vested with the same committal powers as the trial court.[46]

(d) Diminished responsibility

Section 6 of the Act introduces a new partial defence to murder called diminished responsibility. Persons availing of this partial defence are to be found guilty of manslaughter. According to s. 6(2), the accused person bears the onus of proof to establish the defence. One might predict that proof on the balance of probabilities is required, as has applied to those who seek to avail of the insanity defence.[47]

The grounds for applying the partial defence are that the jury or the Special Criminal Court finds that the person:

(a) did the act alleged,
(b) was at the time suffering from a mental disorder, and
(c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act...

It appears that diminished responsibility may apply in those cases where the jury are not satisfied that the person charged with murder met the legal criteria for insanity at the time of committing the offence but, nevertheless, find that the person was labouring under a "mental disorder" such that their responsibility for their actions ought to be lessened. In its application, diminished responsibility could lead to a narrowing of the circumstances in which the irresistible impulse limb of the insanity defence applies by bringing some accused persons' mental conditions within the scope of diminished responsibility instead.[48]

Whether persons with personality disorders charged with murder can avail of the partial defence in this jurisdiction remains to be seen. In this regard, much focus will be placed on the definition of "mental disorder" in the Act itself, since this forms the basis of the partial defence. The definition of "mental disorder" may disavow an intention to include personality disorders within its terms, although the interplay between medical opinion and law on this issue is difficult to foresee.

Hence, the operation of the defence in England and Wales may not offer much guidance, as the definition there uses the phrase "abnormality of the mind".[49] An illustrative example of diminished responsibility in that jurisdiction was the case of Tony Martin.[50] His case gained public prominence because he asserted that he killed an intruder to his rural dwelling house in self-defence. He was nonetheless convicted of murder. The Court of Appeal dismissed a ground of appeal based on self-defence, but was decided that his murder conviction should be reduced to manslaughter on the basis of diminished responsibility. The court accepted evidence that Mr. Martin had a paranoid personality disorder when he killed the intruder.

The Act provides no power for the assessment of a person found guilty of manslaughter by virtue of diminished responsibility. Instead, the Act envisages that the person is subject to the normal sentencing options available to the court upon such a verdict being returned, even though such a person may be labouring under the same "mental disorder" at the time of the trial as he did when the offence was committed.

(e) Proving Insanity or Diminished Responsibility

The Act contains a provision about raising insanity or diminished responsibility in murder cases. Section 5(4) applies where an accused person raises either the insanity defence or the partial defence of diminished responsibility at trial. Where the person raises either defence, s.5(4) provides that the court shall allow the prosecution to adduce evidence tending to prove "the other of those contentions". The court can give directions as to when such evidence may be given.

The terms of the subsection appear otiose, since it is surely axiomatic that the prosecution is entitled to adduce evidence in any case to assist the jury on any defence raised, including the insanity defence.[51] The rationale for the subsection might arise from the corresponding

41 Mills, *op. cit.* above.
42 Section 8(1) and s.8(6).
43 Section 8(3) and s.8(8).
44 Section 8(8).
45 Section 9(1).
46 Section 9(2).
47 See *Dunbar* [1958] 1. Q.B. 1. The constitutionality of placing the burden of proof upon the accused person must be assessed in light of the Constitution and Article 6 of the European Convention on Human Rights. Decisions on the issue include *O'Leary v A.G.* [1993] 1 I.R. 102; *Hardy v Ireland* [1994] 2 I.R. 550; *Rock v Ireland* [1997] 3 I.R. 384; *R. v Lambert* [2002] 2 A.C. 545; *Attorney General's Reference No. 4 of 2002* [2005] 1 A.C. 264; *Davis v United States* (1895) U.S. 469; *R. v Chaulk* [1990] 3 S.C.R. 1303.
48 See *People (DPP) v O'Mahoney* [1985] I.R. 517 and the discussion on this point in McAuley and McCutcheon, *Criminal Liability*, Round Hall Sweet and Maxwell, (2000), at page 730.
49 Homicide Act, 1957, s.2.
50 *R. v Martin* [2003] Q.B. 1.
51 See the comments of Kenny J. in *People (Attorney General) v Messitt* [1972] I.R. 204 at 213, wherein he stated that it is "the duty of the prosecution to give any evidence which they have on which the jury might reasonably come to the conclusion that the accused was insane."

statutory provision in England,[52] which was enacted to resolve a conflict in the case law there as to whether the prosecution were entitled to adduce such evidence.[53] It is unclear whether the subsection means that the prosecution is prevented from adducing evidence that the accused person was not suffering from a "mental disorder" at all at the time of committing the act for the purposes of availing of either defence, although it is suggested that it does not.

Questions about the burden of proof and the standard of proof may arise in the limited number of cases in which insanity and diminished responsibility arise in trials. Where an accused person pleads insanity and the prosecution assert that diminished responsibility is applicable, it is open to argument as to where the onus of proof lies. In such cases, the question is whether the prosecution would bear the onus of proof and how this interacts with s.6(2) of the Act, under which the accused person bears the burden of proof about diminished responsibility. Similar questions would arise if the accused person raises diminished responsibility and the prosecution argues that the insanity defence applies. It is suggested that the general principle, that the prosecution must prove any assertion it makes beyond a reasonable doubt, should apply in such circumstances.[54]

(f) The Infanticide Act 1949

Meanwhile, the Act has also amended the Infanticide Act, 1949 by replacing the notion of lactation insanity as a ground for returning a verdict of infanticide with that of a "mental disorder" as defined under the Act. The offence of infanticide countenances a situation whereby a mother, by wilful act or omission, causes the death of her child where the child is less than 12 months of age. The Infanticide Act 1949 provided that a manslaughter verdict could be returned in such a situation where "the balance of her mind was disturbed...by reason of the effect of lactation consequent upon the birth of the child".

Section 22 of the Act replaces the reference to lactation with "mental disorder" as defined under the Act. The notion of lactation insanity was out-dated, since law reform bodies in other jurisdictions had heard medical testimony that there was little evidence to support its existence.[55] On conviction for infanticide, a woman is now to be dealt with under s.6(3) of the Act, as if she was found guilty of manslaughter on the basis of diminished responsibility.

(g) Notice of intention to adduce evidence

A statutory notification period is introduced under s.19 of the Act, where the defence intends to adduce evidence about an accused person's mental condition. Any such intention must be notified 10 days before the date on which the accused is asked to plead to the offence. Section 19 allows the evidence to be given, with the leave of the court, even if the notice period has not been observed.[56]

(h) Other provisions

Independent review of the detention of persons committed to designated centres by the courts is established by the Act, both for the committal powers relating to fitness to be tried and the insanity defence. This removes the role the Minister of Justice played in reviewing detentions. The Mental Health (Criminal Law) Review Board will carry out such reviews. Such reviews must be undertaken at least every six months,[57] or on application by the detained person[58] or upon the Review Board's own initiative.[59] Arising from this, there will be enshrined in law the type of continuing independent review, at reasonable intervals, of a person's detention that is required under Article 5(4) of the European Convention on Human Rights.[60] The Review Board can also review the level of in-patient care that a person is receiving and adjust the regime of care if appropriate.[61]

Under s.20 of the Act, the review provisions contained in s.13 apply to persons being detained on foot of decisions made before the Act came into operation. In other words, persons detained under the old law on fitness to plead and the special verdict of insanity can benefit from the review provisions provided under the Act. Section 14 of the Act provides for the temporary release of patients from designated centres. The transfer of prisoners to designated centres for receipt of psychiatric treatment is enabled by s. 15 of the Act, provided that certain conditions are satisfied. The Review Board can consider the ongoing necessity of such transfers,[62] although the clinical director of a designated centre can also order the transfer of a person back to a prison if satisfied that the person is no longer in need of in-patient care or treatment.[63] Finally, s.21 of the Act applies the new provisions on fitness to be tried, the insanity defence and diminished responsibility to trials of military offences with some necessary modifications for military criminal procedure.

Conclusion

The Act represents a step forward in the way those suffering from mental illnesses are dealt with in the criminal justice system. The codification of the principles and procedures under one umbrella statute should ensure a coherent response to persons suffering from mental illness, although critics will maintain that the Act does not adopt modern medical knowledge by continuing the use of such terms as "insanity" and "disease of the mind". The Act also provides for ongoing assessment of the necessity of detention of persons committed to in-patient psychiatric care under powers exercised pursuant to the Act, which is both welcome and long overdue. ●

52 Section 6 of the Criminal Law (Insanity) Act 1964, Ch. 84.
53 Smith and Hogan, *Criminal Law,* Butterworths, 9th Ed. (1999), at 211.
54 *R. v Grant* [1960] Crim. L.R. 424.
55 See Charleton, *Offences Against the Person;* Round Hall Press (1992), at para. 5.17, wherein the author notes the finding of the UK Criminal Law Revision Committee's report entitled "Offences Against the Person".
56 Section 19(2).
57 Section 13(2).
58 Section 13(8) and s.13(9).
59 Section 13(10).
60 See *Winterwerp v Netherlands* (1979) 2 E.H.R.R. 387 and *X. v United Kingdom* (1981) 4 E.H.R.R. 181 at 207
61 Section 13(5), (7), (8)(b), (9), 10.
62 Section 17.
63 Section 18.

The Interpretation Act 2005

David Dodd BL

Introduction

The courts have the constitutional responsibility for the administration of justice and thus for making determinations in justiciable disputes and for that purpose the courts are required to apply and thus interpret primary and secondary legislation. The Interpretation Act 2005 (hereinafter "the 2005 Act") was passed by the Oireachtas and commenced on the 1st January 2006. Many of the provisions of the 2005 Act are based on the recommendations of a comprehensive and thorough report of the Law Reform Commission issued in 2000 ("the Report").[1] This article focuses on three aspects of the 2005 Act[2]:

(i) its scope and application,
(ii) its treatment of obscure and ambiguous provisions, and provisions that on a literal interpretation would be absurd or would fail to reflect the plain intention of the legislature
(iii) its effect on the pre-Act approach to interpretation.

Legislating for interpretation generally

Heretofore, the resolution of disputes involving a point of interpretation have been determined by application of the interpretive criteria (rules, maxims, canons, principles, presumptions and other interpretive criteria)[3] established and derived from common law, the Constitution and Interpretation Acts. The interpretive criteria are principally neutral efficient tools to assist a court ascertain the intention or will of the legislature. A source of legitimacy for the application of the interpretive criteria by the courts, stems from what Bennion calls the 'basic rule of interpretation'.[4] This is the presumption that the legislature intends that its statutes be interpreted in accordance with the interpretive criteria, and that where these conflict, the problem is to be resolved by weighing and balancing the criteria.[5] The courts in turn assume the legislature, when enacting law, is fully aware of the interpretive criteria.[6]

Given that the legitimacy of the courts approach to interpretation, is in part, based on this assumption as to the legislature's approval of that approach, it would appear appropriate for, and open to, the Oireachtas to legislate for interpretation. Such interventions are subject to the Constitution, and thus there is a limitation on the degree to which the Oireachtas can direct the methodology of the courts in interpretation.[7] Previous Interpretation Acts, while of significance, largely left substantive issues in respect of the methods and tools of interpretation, and their development, to the courts themselves. It has been the trend in other jurisdictions for parliaments to intervene and express how they expect and intend their own enactments, and delegated legislation to be interpreted. Ireland, by enacting the 2005 Act, has now followed suit.

Scope and application of the 2005 Act

The provisions of the 2005 Act, depending on the provision in question, apply to "Acts", "instruments" and/or "enactments", as defined in s. 2 of the 2005 Act. The definition of "Act" expressly applies to Acts of the Oireachtas and statutes in force in Saorstat Eireann immediately before the date of the coming into operation of the Constitution and which continued in force by virtue of Article 50 of the Constitution. The definition of the instrument relies on the definition of an Act and thus expressly includes pre-2005 Act instruments,[8] and the definition of enactment in turn relies on the defined term Act and instrument.[9] Thus the Act, on its face, applies to all enactments in force in Ireland, passed before and after the 2005 Act, to the extent permitted by transitional provisions under s.4 of the 2005 Act. Section 4 provides some express limitations on the application of the 2005 Act.

Section 4 provides that a provision of the 2005 Act applies to an enactment except in so far as the contrary intention appears in (i) the 2005 Act,[10] (ii) the enactment itself or, where relevant, (iii) the Act under which an instrument is made. Section 4(2) provides that the provisions of 2005 Act that relate to other Acts also apply to the 2005 Act itself, unless the contrary intention appears in the 2005 Act.

The advantage sought by the drafter in applying the 2005 Act to all enactments is presumably one of coherence and clarity. It avoids the application of dual approaches to interpretation contingent on the date of passing of the enactment in question. If the Oireachtas deems a provision necessary in respect of the interpretation, then on it face it would appear to be useful to apply it to enactments passed before and after the 2005 Act. The previous interpretation acts did not apply to the retrospective extent that the 2005 Act does.[11] The general application of the 2005 to all Acts may raise a number of questions for the courts. For example, what is a court to do where provisions of the 2005 Act give rise to an different interpretation of a provision, which was not accepted before the 2005 Act, but which is now justifiable by application of the provisions of the 2005 Act. This would appear to be possible, on the premise that the 2005 Act must have altered the pre-existing law to

1 *Report On Statutory Drafting And Interpretation:* Plain Language and the Law
2 The 2005 Act also contains a number of additional provisions, which are outside the scope of this article.
3 Which includes the rule that the plain and ordinary meaning of words chosen by the Oireachtas to express its intention best expresses the intended legal meaning, *Howard v Commissioners of Public Works* [1994] 1 IR 101.
4 The 1922 and 1937 Constitution preserved the common law as its existed in Ireland before the establishment of Saorstat Eireann, including the common law approach to interpretation, provided that it did not conflict with any provisions of the 1922 or 1937 Constitutions.
5 Discussed at pp 468 - 469.
6 See, for example, the judgment of Murray J. (as he then was) in *Crilly v T. & J Farrington Limited* [2001] 3 IR 251, Supreme Court.
7 For example, following the *Crilly* case, it could be questionable whether the Oireachtas could provide that ambiguity in its provisions should be resolved by reference to Ministerial statements or statements of other promoters of Legislation. While this has been accepted in other jurisdictions, it would appear from the *Crilly* case that to allow Ministerial statements to have such a role in judicial interpretation, could undermine the constitutional role of the Oireachtas and the courts.
8 "statutory instrument" means an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act and references, in relation to a statutory instrument, to "made" or to "made under" include references to made,
9 "enactment" means an Act or a statutory instrument or any portion of an Act or statutory instrument;
10 Such a contrary intention appears in s. 3 and s.18 of the 2005 Act.
11 In respect of the Interpretation Act 1937 Act, for example, the Interpretation Act 1923 remained in force and applied to Acts of the Act of the Oireachtas of Saorstát Eireann which came into force before the coming into operation of the 1937 Constitution, by virtue of s. 4 and s. 5 of the Interpretation Act 1937.

some degree, and that interpretation pre-Act and post-Act must have changed in some respects.[12] The degree of that change is a different matter, and will be returned to later. If would seem to follow that at least some previous decisions, in respect of a statutory provision, might now, following the 2005 Act, be required to be decided differently, if the 2005 Act is to be applied retrospectively. The Act itself might be viewed as strictly silent as to that scenario, and it remains to be answered as to whether that potentially radical consequence, can reasonably be attributed to the Oireachtas by virtue of the provisions of the 2005 Act.[13] It may be that the courts find that a well-established interpretation of a provision, is not intended to be disturbed by the 2005 Act, there being no express provision contemplating such a change.

Interpretive Rules

Section 5 is the most significant provision in the 2005 Act and the most important legislative intervention by the Oireachtas in respect of statutory interpretation. In this regard, it is worth quoting Section 5(1) in full:-

> "In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -
>
> (a) that is obscure or ambiguous, or
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of-
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2(1) relates, the Oireachtas, or
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."[14]

Section 5 is directed at four types of interpretive doubt, namely where provisions are (i) obscure, (ii) ambiguous, or which on a literal interpretation (iii) would be absurd or (iv) would fail to reflect the plain intention of the maker. Section 5 envisages, that where a provision gives rise to one of these interpretive doubts, the plain intention of the Act itself be given effect to and that the plain intention of the legislature should be ascertained from the act as a whole. This gives effect to what had been articulated by a number of judges to be permissible at common law. Provisions that relate to the imposition of a penal or other sanctions are excluded from s.5,[15] such provisions remain to be interpreted in accordance with the pre-2005 Act law. The wording of s. 5 is for the most part identical to that recommended by the Report, which at paragraph 2.42, expresses the reason and purpose of s. 5:-

> "...we recommend a provision which retains the literal rule as the primary rule of statutory interpretation. The other significant feature of our proposed formulation is that it specifies exceptions to this primary approach, not only in cases of ambiguity and absurdity, but also - and here is the slight change from the common law as expressed in some judgments - where a literal interpretation would defeat the intention of the Oireachtas. The draft provision which we propose also indicates that such an exception should only apply where, in respect of the issue before the court, the intention of the Oireachtas is plain."

Paragraph 2.34 of the Report makes clear that, in the view of the LRC, the case law showed that there was a degree of uncertainty as to what the proper relationship between the literal and purposive rules of interpretation and that judges differed in their views as to how far one can go, in pursuit of purpose, beyond the literal meaning of a provision. Section 5 was enacted to provide clarity and uniformity in respect of that relationship. At paragraph 2.35 of the Report, the LRC stated that '...the Commission prefers the moderately purposive approach already adopted in several judgments, particularly the cases of *Nestor v. Murphy* and *Mulcahy v. Minister* for the Marine...It is worth stating, however, that this policy decision marks only an adoption of what we believe is best practice, as reflected by, and analysed in, judgments delivered in Irish cases.'

While the above may be a principal intended effect of s. 5, the precise meaning and effect of s. 5 has yet to be explored by the Courts and a number of questions arise as to the courts' approach to interpretation in light of s. 5. To make an inroad into understanding s. 5 some of the key terms used in the provision - 'obscurity/ambiguity', 'absurdity' and 'plain intention', requires consideration.

Obscurity and ambiguity

The distinction between plainness and ambiguity has always been central to the interpretation of statutes, and this importance is underlined by s.5. The word ambiguous, paradoxically, is itself capable of a number of meanings and is used in judgements to convey a number of different things. Murray J in *Crilly* considered the nature of ambiguity in the context of interpretation and stated that, '"Ambiguous" is an ambiguous term itself. Nearly every provision of an Act that becomes a subject of controversy and litigation could be said to be ambiguous to some extent. How ambiguous does an Act have to be before such a rule[16] came into play?'. Almost every statutory interpretation book, records cases (with some delight) of different judges considering the same provision, agreeing that a provision is entirely plain and unambiguous, but entirely disagreeing as to the provision's plain and unambiguous meaning. Ireland is no exception, and such examples serve merely to illustrate that determining ambiguity can itself be a difficult process.

Where a court states that a provision is ambiguous it can mean that there is some linguistic doubt as to the meaning attributable to the words used because a number of possible meanings exists. This may be caused by semantic ambiguity (a word has two or more meanings)[17] or syntactic ambiguity (the structure or grammar of a sentence can be read in two or more ways).[18] A provision may also be described as being ambiguous where there is doubt as to the scope of its intended application or effect. In such cases, what may be at issue is to what

12 The alternative is to hold that it is entirely declaratory.

13 In *Blue Metal Industries v R w Dilley* [1970] AC 827 at pp 848 Lord Morris stated in respect of the Interpretation Act 1897 of New South Wales that 'The Interpretation Act is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation'. Bennion says at pp 491 of *Statutory Interpretation* that 'an interpretation act does not operate in such a way as to change the essential effect of an enactment to which it applies'. While that holds weight in respect of interpretation acts the purpose of which is to collect generally applicable definitions and terms, the provisions of the Interpretation Act 2005 go much further than the mere defining of terms.

14 Section 5 (2) provides an identical provision in relation to a Statutory Instrument in respect of the plain intention of the maker of that Instrument.

15 The Law Reform Commission appears to have recommended that such statutes not be excluded from s. 5.

16 Referring to the admission of Ministerial statements as an aid to interpretation.

17 The case of *Jordan v O'Brien* [1960] IR 363 provides a classic example of semantic ambiguity in relation to the meaning of the word "family" in the Rent Restrictions Act 1946.

18 *O'Connell v Registrar General Of Births And Deaths, ex-tempore* judgment of Keane CJ, Supreme Court, 28 May 2001, illustrates that interpretation of syntax of a provision may decide a case.

degree general words need to be read down, if at all, in light of the context of the enactment in which they appear.[19]In another type of ambiguity, a provision that is seemingly clear when read in the abstract can retreat to uncertainty when the interpreter comes to apply the provision to a particular set of facts. When the interpreter asks 'does this enactment cover this set of facts', the answer can be argued either way, in such cases the enactment can also be said to be ambiguous.

The above are common forms of ambiguity, however the term ambiguity, can be used in an all-encompassing sense to refer to any doubt, conflict or alternative legal meaning or result arising in respect of a provision, irrespective of its cause. This use of the term ambiguity to refer to any statutory doubt, appears in the passage of Spigelman CJ in the Australian case of *Repatriation Commn v Vietnams Veteran's Association of Australia NSW Branch* (2000) 171 ALR 523 at 550:

> "The use of the word "ambiguity" in the context of statutory interpretation is not restricted to lexical or verbal ambiguity and syntactic or grammatical ambiguity. It extends to circumstances in which the intention of the legislature is, for whatever reason, doubtful."

However, notwithstanding the use of the term ambiguity in this widest sense, it is questionable if all interpretive conflicts can neatly be, or are usefully, viewed as derived from ambiguity, though of course, one might expect that alternative interpretations or constructions must arise between parties for a dispute to be before the courts.[20] An advantage of seeing all interpretive issues in terms of ambiguity, is to bring their resolution within the frame of s. 5, which would be beneficial from a coherency perspective.

If resorting to the plain intention is contingent on the obscurity and ambiguity of a provision, it is natural to ask, as Murray J asked in the *Crilly* case, how ambiguous does a provision have to be before the plain intention can be referred to? Such a question and approach, treats ambiguity as a matter of degree, and a similar approach is evident in other judicial considerations of both "plainness" and "ambiguity".[21]

Another related aspect of s. 5(1)(a) which the court may have to consider is the significance, if any, of the omission of the phrase 'on a literal interpretation' from s. 5(1)(a) in contrast to its inclusion in s. 5(2)(b). Does this give rise to the inference that s. 5(1)(a) is referring to obscurity and ambiguity which remains after the interpretive criteria have been applied but which have failed to resolve the obscurity or ambiguity. Is it at that point that resort may be had to the plain intention. The alternative is that what is envisaged is that on a prima facie literal reading, a provision appears obscure or ambiguous, in which case the plain intention is it to be resorted to, first and foremost.

Absurdity

Absurd comes from the Latin absurdus meaning out of tune. Absurd is defined by the Chambers Dictionary as 'not at all suitable or appropriate'. A further meaning is provided - "ridiculous; silly". The meaning intended by the Oireachtas is to be informed by consideration of the cases which have described it. The different use to which the term is used has neatly and concisely reviewed by the LRC at paragraph 2.04 and 2.05 of their Report:-

> "...Giving a somewhat wider meaning to 'absurdity' would mean that a provision would be considered absurd if it contradicted other elements of the same Act, presuming that the judge, in deciding the question, would at least bear in mind the other provisions of the Act in question. A wider meaning again would lead to the conclusion that the literal meaning of a provision would be absurd if its effect could not have been intended by the legislature - assuming, of course, that the judge is aware of what the legislature would have intended as the meaning of the statute. Bennion states that the English courts have preferred this last understanding of the term 'absurd'. Generally, the same has been true in Ireland, but there have been some exceptions (such as *Murphy v. Bord Telecom*, where a result that was clearly contrary to the legislature's intention (as gleaned from the Act) was given effect, because the Court felt that the provision was not 'absurd' in the narrow sense)."

It is clear then that at least in some judgements, where a purpose of an Act or provision is clear, and a possible meaning runs entirely counter or would defeat that purpose, than that meaning has been described as absurd. This latter aspect of absurd is expressly included in s. 5(1)(b) which clarifies the matter by requiring that resort to the plain intention of the Oireachtas should be had, where the literal meaning fails to reflect the plain intention.

Deciding whether something is in fact absurd, or fails to reflect the intention of the legislature poses difficulties itself, parties to a dispute and Judges may differ as to what they view as absurd. The case of *HMIL v. The Minister For Agriculture And Food* (Unreported, Supreme Court, 24 January 2002), illustrates that what can appear on one view to be absurd, may not be absurd, but in fact the intended result. In this case, at issue was the appropriate implementation, by way of domestic regulation, of European Regulations under which certain meat products were bought from relevant persons by the European Community. The relevant transposing regulations required that trimmings from the particular cuts of meat would be individually wrapped. The learned High Court judge was concerned with what he saw as a rigid and literal interpretation of the EC Regulation by the Minister, which in his view created wholly unnecessary problems for the exporter, the purchasers and others, and which he described as "an exercise in bizarre bureaucracy of ultimate absurdity". However following a reference to the ECJ, that 'absurdity' was held, in fact, to be exactly what was intended.

Plain intention

The phrase "the plain intention of the Oireachtas", which is so key to s. 5 (referred to on three occasions in s. 5), is also ambiguous and itself give rise to a number of meanings. Traditionally the Courts have held that the plain and ordinary meaning of the words chosen by the Oireachtas

19 The case of *Nestor v Murphy* [1979] IR 326 is a classic example of this kind of ambiguity of scope.

20 In s. 5 of the Interpretation Act, two of the four interpretive difficulties do not relate to ambiguity (or obscurity). Opposing constructions may arise because the Oireachtas has not expressed any view, as opposed to a view that is ambiguous. A question may arise between parties, which a statute simply does not expressly deal with or address. In such cases the court may be able to determine the legislature's intention by implication or it may be that the remedy lies, with the legislature. Intended transitional provisions and the reading of mens rea into certain criminal offences (where no express provision is provided), as well mandatory or directory requirements, are examples of interpretive issues which may not be best conceptualised in terms of, or resulting from, ambiguity per se.

21 Griffin J in *People (DPP) v Quilligan* [1986] IR 495 described a provision in a manner which indicated that ambiguity may be a matter of degree to be determined by a judge "In my opinion, the plain language used in s. 30 and 36 is so clear and unequivocal that the long title may not be looked at or used for the purpose of limiting or modifying that language."

itself to express its intention, is the meaning that best gives effect to the 'plain intention' of the Oireachtas.[22] When used in this sense, the phrase 'the intention of the legislature', and cognate expressions, are used as a shorthand reference to the intention that the court reasonably imputes to the legislature in respect of the text of an Act adopted and promulgated as law in accordance with the Constitution.[23] In the *Crilly* case, Murray J quoted with approval from the decision of Lord Nicholls in *R v Secretary of State for the Environment, ex p. Spath Holme Ltd.* [2001] 2 DPP 15 at p. 37 where he explored the meaning of the phrase 'intention of parliament', he said:-

> "The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used...Thus when the courts say that such and such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said ''We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used'."

The plain intention of the Oireachtas however is also used in judgements, in the sense of the purpose of the Oireachtas. It is submitted that its use, by the Oireachtas, in Section 5(1) is largely directed at this latter meaning, but not to the total exclusion of the former meaning. This appears to be so because, firstly what is expressed in s. 5 is the plain intention of the Oireachtas or parliament, not the plain intention of the Act. This leans toward 'plain intention' in the sense of purpose rather than meaning. Secondly, the plain intention of the Act as a whole, appears more apt to be taken to be referring to the plain intention in the sense of the purpose or objective. Thirdly, the plain intention is resorted to in circumstances where the language has failed in some respect, either because it is obscure/ambiguous/absurd or which fails to reflect the plain intention, again indicating that plain intention is used in the sense of purpose. The Law Reform Commission expressly used the phrase in the sense of purpose or objective.[24]

Having said that, the plain intention of an ambiguous provision may be ascertained by considering the Act as a whole, in a sense more closely tied to meaning rather than to purpose. For example, when expressions are repeated in the same Act, and more especially in a particular part of the same Act, it is presumed that they are intended to be given a common meaning, force and effect unless the context requires otherwise.[25] Thus the plain intention of the Oireachtas in respect of a word or expression which is ambiguous, may become clear by considering the use of that word or expression in the remainder of the Act. The plain intention may become clear by considering the Act as a whole, without any reference to the intention of the Oireachtas in terms of purpose of objective.

In s. 5, the Oireachtas refers not just to the intention, but refers to the 'plain' intention. The Report emphasised the point at paragraph 2.42: 'the draft provision which we propose also indicates that such an exception should only apply where, in respect of the issue before the court, the intention of the Oireachtas is plain. This begs a number of questions. What happens if the intention is not plain - does s. 5 have no role to play? Does the intention have to be plain on first reading, or is it plain after consideration of the interpretive criteria? Does s. 5 require the court to determine what that plain intention is - to resolve disputes as to that plain intention? If that is the case, the interpreter may feel, in some respects, that they have merely come full circle back to the precise problem of interpretation, identifying the plain intention of the Oireachtas. Just as disputes arise in respect of the plain intention of the legislature, in terms of intended meaning, difficulties and disputes arise, and can centre on, the precise intended purpose of a provision or Act.[26]

While the courts are obliged to give effect to the 'plain intention', where s. 5 applies, the courts can only ever 'give a construction' of an enactment, as opposed to rewriting an enactment. The courts' function remains one of interpreting as opposed to legislating, and the Oireachtas cannot, by virtue of s. 5, be taken to have delegated legislative power to the courts. The issue has arisen in other common law jurisdictions where legislatures have enacted s.5 type provisions. The views expressed in the Australian case of *R v L* (1994) 122 ALR 464 at p. 468-9, in respect of s.15AA(1) of their Acts Interpretation Act 1901 may recommend itself to the interpretation of s.5: "The requirement of s. 15AA(1) that one construction be preferred over another can have meaning only where two constructions are otherwise open, and s. 15AA(1) is not a warrant for redrafting legislation nearer to an assumed desire of the legislature."[27]

'Act as a whole'

Pre-2005 Act, where the text of a provision was plain and unambiguous no further interpretative criteria or consideration was normally considered necessary.[28] Where that approach did not resolve a dispute conclusively, the courts were entitled in seeking to give effect to the legislature's intention, to have recourse to other interpretive criteria as a means of identifying the intention of the legislature. An important one of these criteria was to look at the word or expression in the context of the provisions itself or the Act as a whole.[29] Reference to the Act as a whole, has been expressly endorsed as the appropriate way to ascertain the plain intention in the four causes of interpretive difficulties envisaged by s. 5.

The phrase reinforces the objective approach to statutory interpretation by reference to the text and Act itself, as opposed to reference to extrinsic aids to interpretation such as Ministerial statements, Oireachtas Committee reports, Bills or explanatory memoranda accompanying a Bill. The LRC placed emphasis on this point in para 2.33 with reference to the separation of powers and the Rule of Law:-

> "It is also a fundamental aspect of the Rule of Law that the law should be certain and accessible, and in our system, generally this means that the sole source of law should be within the four corners of the Act. However, we would emphasise that the purposive approach under examination in this chapter does not violate this principle. It is important to note that the proposal advanced in section F of this chapter relates to the purpose of the provision, as gathered from the Act itself."

However, the courts, pre-2005 Act could ascertain the intention of the Oireachtas, from well-established interpretive criteria unrelated to 'the

22 *Howard v Commissioners of Public Works* [1994] 1 IR 101

23 An example of the use of the phrase 'plain intention' to refer to meaning is evident in the comments of Denham J n *Howard v Commissioners of Public Works* [1994] 1 IR 101, Denham J where she states that 'if there is a plain intention expressed by the words of a statute then the court should not speculate but rather construe the Act as enacted'. [emphasis added].

24 At paragraph 2.02 f Chapter 2, section A.

25 State *(McGroddy) v Carr [*1975] IR 275 Supreme Court.

26 This is illustrated by the passage of Barron J in the High Court in *Saatchi v McGarry (Inspector Of Taxes),* Unreported, High Court, 30 July 1996, where he dismissed attempts by both sides to argue by way of 'perceived intention'

27 S. 15AA(1) makes expressly clear that "...a construction that would promote the purpose or object underlying the Act...shall be preferred to a construction that would not promote that purpose of object".

28 *Grealis v The Director of Public Prosecutions* [2001] 3 IR

29 Some differences arise as to whether a judge should always consider a provision in light of the Act as a whole and whether a provision can be declared truly plain and unambiguous without first considering the Act as a whole.

Act as a whole'. Arising from s. 5, a question for the courts will be to what extent this express endorsement of using the Act as a whole for ascertaining the plain intention, can be take in effect to revoke, or "downgrade", the application of other long standing, useful and efficient interpretive criteria. The degree to which the Oireachtas can be taken to intend a change in the law is unclear and not expressly dealt with. The point can be further illustrated by reference to more significant examples.

(a) In appropriate circumstances, courts could pre-2005 Act have reference to other Acts which are found to be in *pari materia*, and in such cases, words and expressions in enactments in *pari materia* were to be taken together as forming one system, and as interpreting and enforcing each other and it was to be assumed that universality of language and meaning was intended.[30] Recourse to such Acts has long been accepted as appropriate as a means of resolving ambiguity and arriving at the intended legal meaning of a provision and also for ascertaining the intended purpose of a provision.[31] In those cases, the plain intention of the legislature is not ascertained not from the 'Act as a whole', but rather by reference to other Acts.[32] .

(b) In addition to the status of Acts in *pari materia*, where a word or expression in an earlier Act has received a clear judicial interpretation, there is a presumption that a subsequent Act which incorporates the same word or expression in a similar context should be construed so that the word or expression is interpreted according to the meaning that has previously been ascribed to it, unless a contrary intention appears.[33] Similarly, when the legislature has adopted in its legislation a method of expression chosen by the judiciary to express a concept of common law or to interpret previous legislation, the word or expression should be construed so that it is interpreted according to the meaning that has previously been ascribed to it, unless a contrary intention appears.[34] These presumptions do not identify the plain intention from the 'Act as a whole', but rather by reference to pre-Act judicial decisions in respect of a term or expression, and on the assumption that the legislature is taken to be fully cognisant of such relevant decisions in respect of the term or expression.

(c) The examples in (b) illustrate a more general point, that the pre-Act legislative history, meaning the pre-Act law, and any defects in it, may be an informative aid to interpretation, where a doubt or ambiguity arises, and can be traced as far back to the formulation of the mischief rule in *Heydon's case*.[35] In *Action Aid Ltd v Revenue Commissioners*, Unreported, High Court, 15 January 1997, it was held that the use of pre-act common law was a long-established principle of statutory interpretation:-

> "This construction of the section finds support by the application of certain long-established and well known principles of statutory interpretation. In the construction of an enactment, due attention should be paid to relevant aspects of the state of the law before the Act was passed and where an Act uses a form of words with a previous legal history, this may be relevant in interpretation."

In cases where legislative history is a useful aid, the plain intention of the legislature is not ascertained from the 'Act as a whole', but rather by reference to the state of the law as it existed before the enactment was passed.

(d) The presumption of constitutionality would also not appear to sit neatly with an exclusive role for 'the Act as a whole'. One requirement of the presumption is that, if in respect of any provision, two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction.[36] When the double construction rule is applied, the plain intention of the legislature is not identified from the 'Act as a whole', but rather by reason of the presumption which is derived primarily from the Constitution (and logic), and the constitutional relationship, of the legislature and the courts.

The above are merely some examples, of which there are many more, of interpretive criteria that the Courts were entitled, pre-2005 Act, to have recourse to, to identify the intention of he legislature.[37] The issue is whether s. 5 gives rise to a clear and express intention to end the recourse to other interpretive criteria. The 2005 Act, while making express reference to considering the Act as a whole as a means of ascertaining the intention of the Oireachtas, appears to be silent in relation to the use of other secondary aids as a means of ascertaining either the intended meaning of a provision or the plain intention of the Oireachtas. It is to be presumed that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication. Where general words or provisions give rise to a narrow interpretation, and a wide interpretation which radically changes the law, the narrow interpretation is to be preferred. The basis for the presumption is that it is considered improbable that the legislature would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clarity. It would appear from the Report that s. 5 was never proposed to repeal or replace the pre-Act common law interpretive criteria, which are referred to in a number of places in the Report. For example, at Para 2.27, reference is made to the use of legislative history and at Para 2.53 in respect of the principle of doubtful penalisation, the report records that 'we do not intend to make any recommendations here that would interfere with this area, where the Courts are best placed to develop the law'. It remains to be seen whether the courts in Ireland give a broad or narrow interpretation to this element of s. 5.

Conclusion

The importance of the 2005 Act should not be underestimated and the 2005 Act, perhaps, raises as many intriguing questions as it answers. Undoubtedly many of these questions will be resolved by the courts in the years to come. ●

30 See for example comments of Lavery J in the *People (Attorney General) v Boggan* [1958] IR 67 at 75.

31 Of course, express provision can be made by the Oireachtas were it intends for acts to be construed *pari materia*.

32 Unless the phrase 'Act as a whole' can be strained to included Acts in *pari materia*.

33 See for example *Butterly v United Dominions Trust (Commercial) Limited*, [1963] IR 56

34 *O'Rourke v Grittar* [1995] 1 IR 541

35 *Heydon's Case* (1584) 3 Co Rep 7:

36 *McDonald v Born na Gcon* (1965) IR 217; *East Donegal Co-operative v the Attorney General* (1970) IR 317.

37 One could go on and mention Acts which transpose international instruments and European Community Legislative Instruments, in which case recourse may be had in certain circumstances to *travaux preparatoire*, and other aids.