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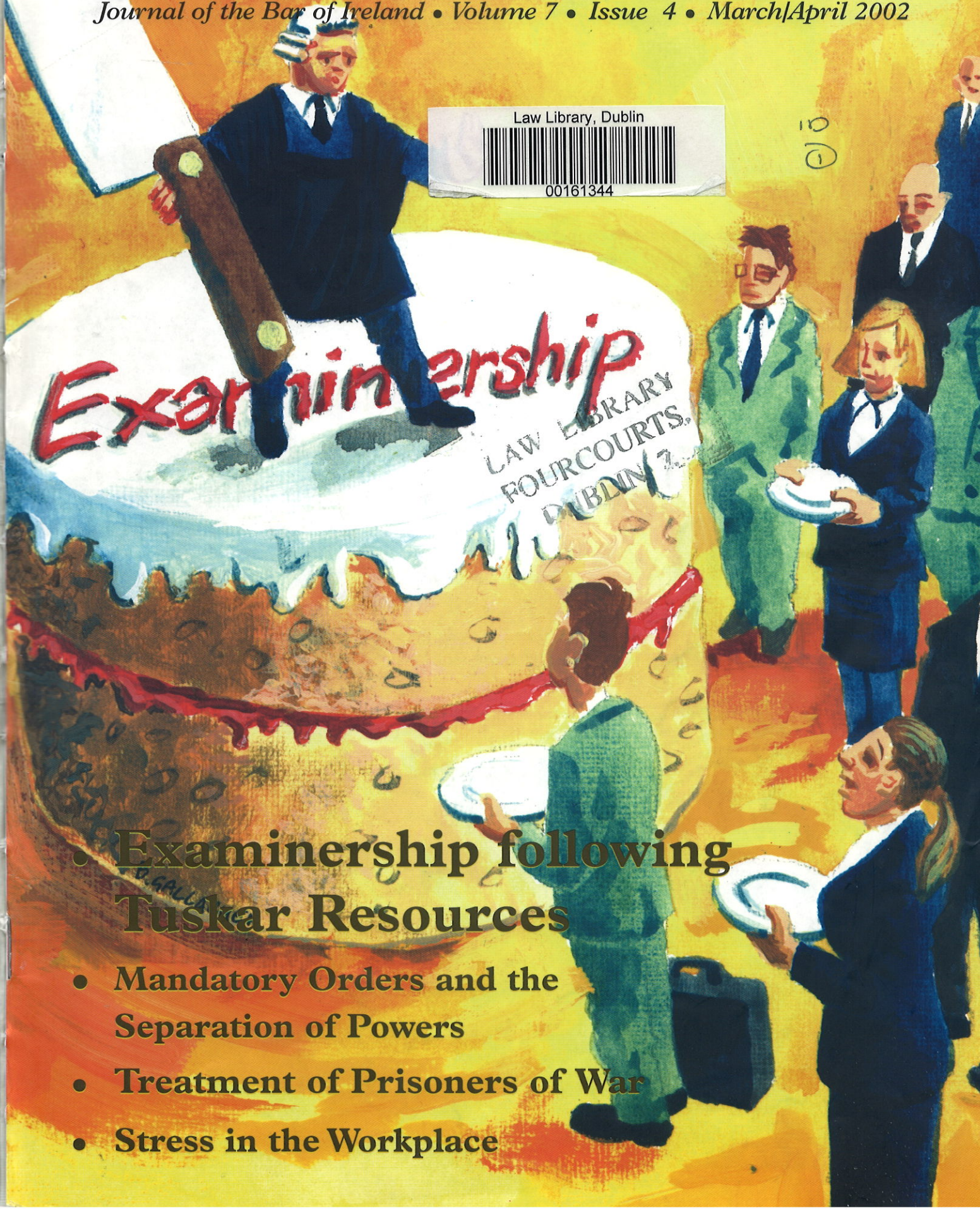

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- **Mandatory Orders and the Separation of Powers**
- **Treatment of Prisoners of War**
- **Stress in the Workplace**

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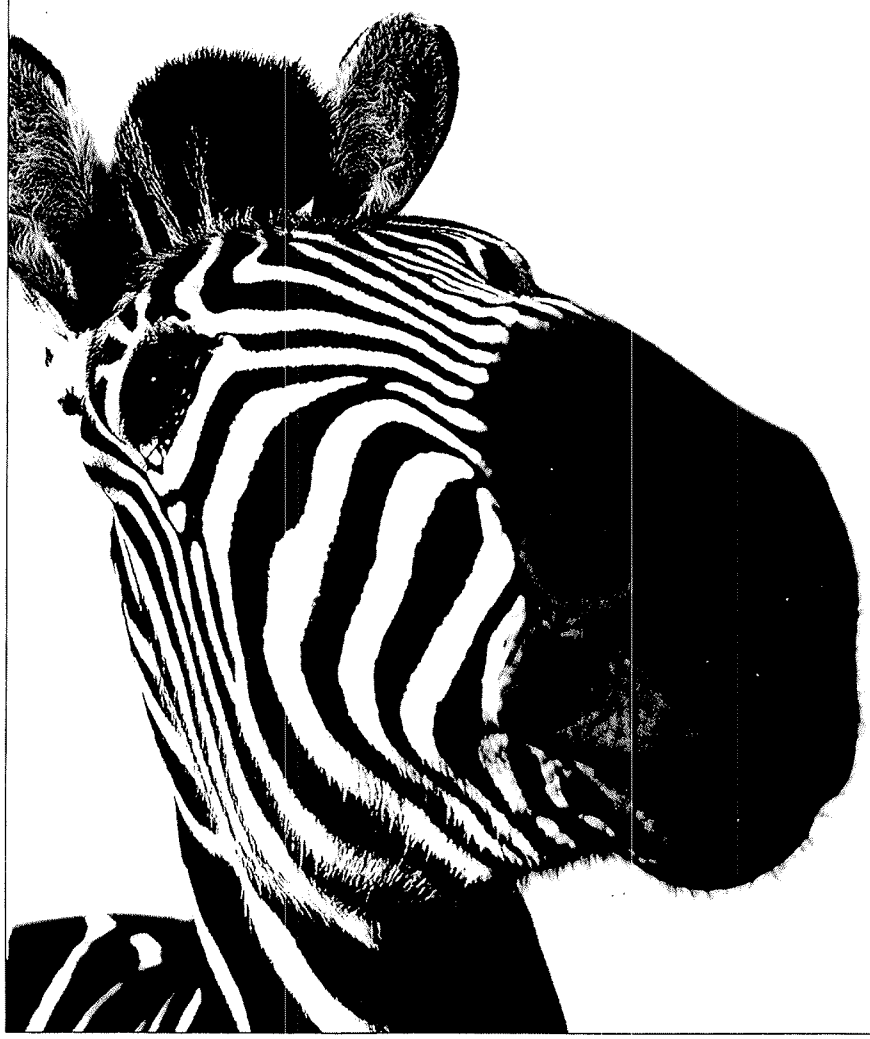

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Contents

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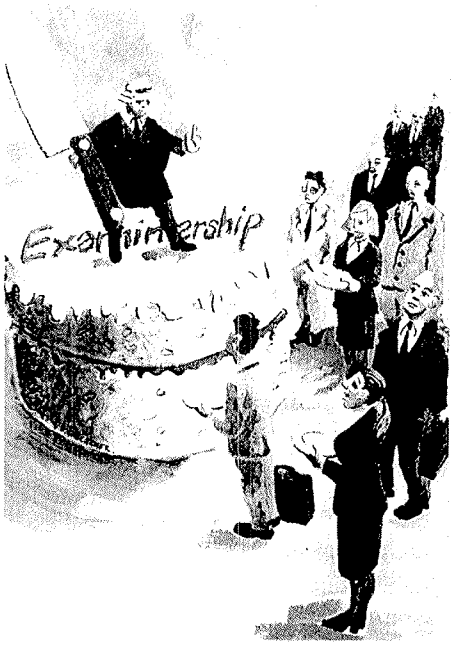

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HE CHANGING FACE OF DATA PROTECTION

Karen Murray BL considers the main provisions and implications of the Data Protection (Amendment) Bill 2002.

Introduction

The law of data protection can trace its roots back to the Strasbourg Convention of 1981, a Council of Europe Convention which was implemented in Ireland as the Data Protection Act 1988. At that time computers were very much main frame machines and the framers of this Convention would have viewed computers as large, expensive machines which could only be paid for by government departments and large commercial institutions such as banks. Computers could only be operated by certain companies, principally IBM and their specialised personnel, and in addition they were easy to control and monitor as they were highly centralised. The users of such machines could be carefully segregated, and their use controlled.

In the 1980's a number of things happened - technology changed, the PC became commonplace and the mainframe computer lost its central role. Now data collection and processing can be carried on at a desk or café. The international political context has also changed: following the fall of the Berlin Wall it became apparent that the East German Secret Police (Stasi) had monitored the activities of ordinary East Germans to an extraordinary extent. This led to heightened concerns about data protection, particularly in Germany. The response of the European Union was to introduce the Data Protection Directive 1995/46 which is now being implemented in Ireland in the following ways:

* In the short term, the government has introduced the EU (Data Protection) Regulations SI 626/2001 which will be law from 1 April 2002. This SI makes some limited amendments to the Data Protection Act 1988 dealing principally with security measures and the transfer of personal data outside the State.

* The government has also introduced the Data Protection (Amendment) Bill 2002 before the Oireachtas. This amends the Data Protection Act 1988 and seeks to fully implement the Directive.

Definitions

The Data Protection (Amendment) Bill 2002 is far more detailed than the old legislation although it expands on the original concepts of data protection as set out in the Data Protection Act 1988. The three main groups involved in data processing have not changed. Thus, a data subject is defined as "an individual who is the subject of personal data"; a data controller is defined as meaning " a person who, either alone or with others, controls the contents and use of personal data"; and a data processor "... means a person who processes personal data on behalf of a data controller". This does not include an employee of a data controller who processes such data in the course of his employment. However, the definition of 'Processing' is expanded under the new Bill. It means performing any operation or set of operations on the information or data, whether or not by:

(a) obtaining, recording or keeping the information or data,
(b) collecting, organising, storing, altering or adapting the information or data,
(c) retrieving, consulting or using the information or data,
(d) disclosing the information or data by transmitting, disseminating or otherwise making it available, or
(e) aligning, combining, blocking, erasing or destroying the information or data.

Registration

There are some minor changes under the new Bill regarding registration requirements. The Data Protection Act 1988 requires all public service organisations, financial institutions, insurance companies, direct marketing companies, credit rating agencies and debt collectors, persons holding sensitive data, telephone companies, and service providers to register with the Data Protection Commissioner.[1] Now, under the 2002 Bill, public registers will no longer have to register with the DPC, nor will non-profit organisations such as sports clubs be required to register in respect of their membership lists.[2]

Manual Files

The Data Protection Act 1988 only applied to data which could be processed 'automatically', essentially computerised databases. The Data Protection (Amendment) Bill 2002 will change this as it will extend the Act to 'manual data' held in filing systems. So a paper file will be covered. The effects of this provision may be limited as paper filing systems are becoming less common, but the main consequence is that controllers will no longer be able to avoid the application of the Data Protection Act 1988 by only using paper files.

The Data Protection Principles

The new Bill provides that a data controller is obliged to comply with the following data protection principles when processing data:

(a) the data must have been obtained and processed fairly and lawfully.
(b) the data must be accurate and complete and, where necessary, kept up to date.

(c) the data -
  (i) must have been obtained only for one or more specified, explicit and legitimate purposes,
  (ii) must not be further processed in a manner incompatible with that purpose or those purposes,
  (iii) must be adequate, relevant and not excessive in relation to the purpose or purposes for which they were collected or are further processed, and
  (iv) shall not be kept for longer than is necessary for that purpose or those purposes.[3]

This is a restatement of the current position as set out in the 1988 Act. The data controller must also apply "appropriate security ... taken against unauthorised access to, or unauthorised alteration, disclosure or destruction of, the data, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing". To identify appropriate security measures the controller may have regard to the availability of technology and cost, but he must ensure that these security measures are appropriate considering the harm which might result if they are breached, and he must also have regard to the nature of the data concerned. Employees and other persons such as contract staff must be made aware of these security measures.[4]

Criteria for making Data Protection Legitimate

A significant change under the new Bill is that data controllers cannot process data unless they comply with the principles of data protection as set out above and ensure that at least one of the following conditions have been met:

(a) That the data subject has given his or her explicit consent (or if the data subject is under the age of 18 years, that such explicit consent is obtained from a parent, guardian, brother, sister or grandparent of the data subject).
(b) That the controller is satisfied that the processing of the data is necessary for the performance of a contract to which the data subject is a party; or in order to take steps at the request of the data subject prior to entering into a contract; or in compliance with a legal obligation to which the data controller is subject; or to prevent injury or harm to the data subject.
(c) Processing is necessary for the administration of justice.
(d) Processing is necessary for the legitimate purposes of the controller except where it is unwarranted having regard to the rights of the subject.

The issue of consent is complex, but some guidance is provided by the Directive which defines consent as "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to the personal data relating to him being processed."

Fair Processing

The Data Protection (Amendment) Bill 2002 provides that if data is acquired directly from the data subject, and if data processing is to be considered fair, the data controller must ensure, as far as practicable, that the data subject is provided with or can access the information set out below:
(a) the identity of the data controller, or his or her representative;
(b) the purpose or purposes for which the data is intended to be processed;
(c) any other information which is necessary, having regard to the specific circumstances in which the data is or are to be processed, to enable processing in respect of the data to be fair to the data subject including but not limited to information as to the recipients or categories of recipients of the data; as to whether it is compulsory to reply to questions seeking personal data; as to the consequences of failing to reply; as to the existence of the right of access; and as to the right to rectify the data.

If personal data is not taken directly from the data subject he or she must still be informed about it either before the data is first processed or before it is transferred to a third party. In this case the data subject must be given the above information as well as the categories of information involved and the name of the original controller of the data.

This will not apply to data acquired for statistical purposes where the provision of the above information would be impossible or involve a disproportionate effort. Nor will it apply where the processing is necessary pursuant to a legal obligation other than one imposed by contract. For example, this might be revenue or social welfare data.[5]

Rights of the Data Subject

Under the Data Protection Act 1988 a data subject is given the right to establish the existence of personal data[6]; the right to access personal data[7]; the right of rectification or erasure of data[8] and the right to object to the processing of personal data for direct marketing purposes.[9] The principal new right contained in the Data Protection (Amendment) Bill 2002 is the right to object to processing. The Bill provides that an individual is entitled at any time to make a request in writing[10] to cease within a reasonable time, or not to begin, processing. This right cannot be raised if processing is authorised by an enactment, so for example a sexual offender could not object to the Gardai, Prison or Probation services processing details of their criminal record. An objection could succeed if the processing is causing or is likely to cause substantial and unwarranted damage or distress to the data subject.[11] However, the criteria to be applied are complex. The processing which is being objected to must fall into one of two categories:

* Processing carried out in the public interest or in the exercise of an official authority;

* for the purposes of the legitimate interests pursued by the data controller to whom the data are or are to be disclosed, unless those interests are overridden by the interests of the data subject in relation to fundamental rights and freedoms and, in particular, his or her right to privacy with respect to the processing of personal data.[12]

It is submitted that the difference between these two provisions is that processing for public interest or official purposes will be assessed on the basis of those purposes. Processing for other purposes will be assessed by balancing the needs and rights of the data controller and of the data subject. No objection can be raised where processing is carried on in the following circumstances:

(a) in a case where the data subject has given his or her explicit consent to the processing,
(b) if the processing is necessary-
  (i) for the performance of a contract to which the data subject is a party,
  (ii) in order to take steps at the request of the data

subject prior to his or her entering into a contract,
(iii) for compliance with any legal obligation to which the data controller is subject other than one imposed by contract, or
(iv) to protect the vital interests of the data subject,
(c) to processing carried out by political parties or candidates for election to or holders of elective political office, in the course of electoral activities, or
(d) in such other cases, if any, as may be specified by regulations made by the Minister.[13]

Once an objection is raised the data controller must serve a reply on the data subject within 20 days after receipt of the Notice. This must state whether or not the data controller has complied with the Notice or setting out the reasons why the data controller believes that the request is unjustified.[14] The data controller's decision can be appealed to the Data Protection Commissioner, who can serve an enforcement notice on the data controller requiring that he or she comply with the objection.[15]

Right of Access

Section 5 of the Data Protection (Amendment) Bill 2002 states that a data subject can write to a data controller enquiring if personal data relating to the data subject is being processed by him.[16] If the data controller is in fact processing personal data, the data subject must then be supplied with a description of:

* the categories of data being processed by or on behalf of the data controller;
* the personal data constituting the data of which that individual is the data subject;
* the purpose or purposes of the processing; and
* the recipients or categories of recipients to whom the data are or may be disclosed. [17]

The data subject is also entitled to receive in 'intelligible form' the information constituting any personal data of which that individual is the data subject, and any information known or available to the data controller as to the source of such data. If processing by a computer program or other 'automatic means' is being used as the sole basis upon which significant decisions relating to the data subject are being made, the logic or method of the computer program must be explained to the data subject. If the information is expressed in terms that are not intelligible to the average person without explanation, the information must be accompanied by an explanation of those terms.[18]

"The principal new right contained in the Data Protection (Amendment) Bill 2002 is the right to object to processing...Once an objection is raised the data controller must serve a reply on the data subject within 20 days after receipt of the Notice...The data controller's decision can be appealed to the Data Protection Commissioner, who can serve an enforcement notice on the data controller requiring that he or she comply with the objection."

Where personal data consists of an expression about the data subject by a third party, that personal data may be disclosed to the data subject without their consent.[19] This may mean for example that an employee may be able to get access to a reference sent in by a previous employer.[20]

Criminal Records

An abuse of the right of access emerged in the UK where employers would force employees or prospective employees to seek a copy of their criminal record from the Police under the UK's Data Protection Act. The 2002 Bill deals with this potential problem by providing that:

"A person shall not, in connection with
(i) the recruitment of another person as an employee,
(ii) the continued employment of another person, or
(iii) a contract for the provision of services to him or her by another person, require that other person
(I) to make a request under subsection (1) of this section, or
(II) to supply him or her with data relating to that other person obtained as a result of such a request.[21]

Any person who breaches the above will be guilty of an offence".

Automated Decision Making

One quite unusual provision in the Directive is that relating to 'automated decision taking'. A decision which produces 'legal effects' concerning a data subject or which significantly affects him, for example a decision connected with performance at work, reliability or conduct, may not be based solely on automatic means. There is no definition of 'automated means' but automated data is defined as being capable of being processed 'by equipment operating automatically in response to instructions given for that purpose.' A data subject can consent to this type of processing or, alternatively, the prohibition will not apply where a decision is made:

"(a) in the course of steps taken
(I) for the purpose of considering whether to enter into a contract with the data subject,
(II) with a view to entering into such a contract, or
(III) in the course of performing such a contract,
or

(b) is authorised or required by any enactment and the data subject has been informed of the proposal to make the decision, and either
(I) the effect of the decision is to grant a request of the data subject, or
(II) adequate steps have been taken to safeguard the legitimate interests of the data subject by for example the making of arrangements to enable him or her to make representations to the data controller in relation to the proposal."

Sensitive Data

There are restrictions on the processing of sensitive personal data, which is defined as data relating to:

(a) the racial or ethnic origin, the political opinions or the religious or philosophical beliefs of the data subject,
(b) whether the data subject is a member of a trade

union,

c) the physical or mental health or condition or sexual life of the data subject,
d) the commission or alleged commission of any offence by the data subject, or
e) any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.

This data cannot be processed by a data controller unless he complies with the data protection principles[22] and the criteria for making data processing legitimate[23] and, in addition, unless at least one of the conditions set out below are met. These conditions are complex and include *inter alia*:

(i) the data subject has given his explicit consent to the processing;[24]
(ii) the processing is necessary for the purpose of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment;
(iii) the processing is necessary to prevent injury or other damage to the health of the data subject or someone else;
(iv) where consent cannot be given by the data subject or is being unreasonably withheld;
(v) the data subject has deliberately made the information public;
(vi) the processing is required for the purpose of obtaining legal advice or for the purposes of, or in connection with, legal proceedings;
(vii) trade unions can process their own membership data but they cannot process the data of other trade unions;
(vii) the processing is necessary for medical purposes and is undertaken by a health professional or a person who owes a duty of confidentiality to the data subject.

Enforcement

The Data Protection Commissioner[25] retains responsibility for ensuring that the requirements of the Data Protection Act 1988 are complied with and he may do this by issuing an enforcement or information notice.

Under the Bill, section 11 of the Data Protection Act 1988[26] will be replaced by a new provision dealing with transfers of data outside the EEA. Transfers cannot be made from Ireland to a State outside the EEA unless the transfer is adjudged to be permissible in the light of complex and extensive criteria including the state of the law and codes of conduct of the country to which the data is being sent. One practical step taken to make this assessment easier is that if the EU decides that a country has adequate protections, a transfer to that country will be permissible. An example is that the EU Commission has recently held that Canada has met these criteria. Alternatively, a data controller can insert a contractual clause to guarantee that the data is protected. Such a contractual clause must conform to the standard form contracts provided by the Commission.

The Data Protection Bill 2002 recognises that an amicable resolution to a complaint between the parties may not necessitate any further action by the Data Protection Commissioner.[27] However, data protection rules can also be enforced by section 7 of the Data Protection Act 1988 which may render the data controller or processor liable under the law of torts. Section 7 provides that:

> "For the purposes of the law of torts and to the extent that the law does not so provide, a person, being a data controller or a data processor, shall, so far as regards the collection by him of personal data or information intended for inclusion in such data or his dealing with such data, owe a duty of care to the data subject concerned."

The Data Protection Bill 2002 does contain one innovation which may prove useful in this regard, in that it allows for 'prior checking'.[28] Prior checking may be carried out where data processing is of a kind likely to cause substantial damage or substantial distress to data subjects or otherwise significantly to prejudice the rights and freedoms of data subjects.[29] The data controller can apply to the Data Protection Commissioner who is required to respond to the data controller within 90 days stating the extent to which, in the opinion of the Commissioner, the proposed processing is likely or unlikely to comply with the provisions of this Act.[30] This means that data controllers can ensure that they are complying with Data Protection Act 1988 before they begin processing. ●

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1 There were 2,880 registrations at the end of 2000, which was a slight increase from the 2,775 registrations in 1999. Annual Report of the Data Protection Commissioner, 2000.
2 Section 14
3 section 3(a)
4 Section 2C
5 Section 2D
6 Section 3
7 Section 4
8 Section 6. The Data Protection Bill 2002 provides that a data subject will have the right to have incorrect information 'blocked', i.e., marked in a way that makes it impossible to process it in relation to the purpose for which it is marked.
9 Section 2(7). For a discussion on the rights of the data subject see Kelleher & Murray, *Information Technology Law in Ireland* (Dublin : Butterworths, 1997), Chapter 21.
10 See the Electronic Commerce Act 2000
11 Section 6(C)(1)
12 Section 6(c)(2)
13 Section 6(C)(3)
14 Section 6(C)(4)
15 Section 6(c)(5)
16 Section 5 of the DPB 2002, which will insert a new Section 4(a)(i) in DPA 1988.
17 Section 5 of the DPB 2002, which will insert a new Section 4(a)(ii) in DPA 1988.
18 Section 5 of the DPB 2002, which will insert a new Section 4(a)(ii) in DPA 1988.
19 Section 5 of the DPB 2002, which inserts a new section 4A(a) in the DPA 1988.
20 See *Spring v Guardian Assurance Plc* [1994] IRLR 460 in which it was held that where an employer provides a reference to a prospective employer, he owes a duty of care in the preparation of the reference and may be held liable in damages for negligent misstatement where that employee suffers any economic loss.
21 Section 5 of the DPB 2002, which will insert section 4(13) into DPA 1988.
22 Section 2
23 section 2A
24 For persons under 18 years see above on explicit consent.
25 See www.dataprivacy.ie
26 These provisions restate the position under Article 5 of the EU (Data Protection) Regulations, SI 626/2001.
27 Section 9 amends section 10 of the 1988 Act.
28 Section 12A of Data Protection Act 1988 will be inserted by Section 11 of Data Protection Bill 2002.
29 Section 12(A)(1) of DPA 1988 as will be inserted by Section 11 of DPB 2002.
30 Section 12(A)(3) of DPA 1988 as will be inserted by Section 11 of DPB 2002.

HE LAW OF WORKPLACE STRESS, BULLYING AND HARASSMENT

Wesley Farrell, B.C.L., A.C.I.Arb., B.L.

"[T]he duty of an employer towards a servant is to take reasonable care for the servant's safety in all the circumstances of the case." [1]

It is established law that employers have a duty to their employees to take reasonable care for their safety at work. Up to the beginning of the 1990's this duty almost exclusively concerned physical injuries. Since then, the law has developed to also include a duty to take reasonable care for their safety from mental, psychological or psychiatric injuries that emanate from workplace stress, harassment and bullying.

This article is written in light of two recent developments in the law relating to workplace stress, harassment and bullying. Firstly, in *Sutherland v Hatton,*[2] decided on 5 Feburary 2002, the English Court of Appeal made a comprehensive groundbreaking judgment on the legal duty imposed on employers in cases concerning workplace stress. Secondly, on 27th March 2002 three Codes of Practice relating to bullying and harassment were launched under the Safety, Health and Welfare at Work Act 1989, the Industrial Relations Act 1990 and the Employment Equality Act 1998. These Codes of Practice provide guidelines on arrangements, procedures and guidance in relation to workplace bullying and harassment.

Definitions

Workplace Stress: The E.U. Commission's document, 'Guidance on work-related stress' defines work-related stress as,

> "the emotional, cognitive, behavioural and physiological reaction to aversive and noxious aspects of work, work environments and work organisations. It is characterised by high levels of arousal and distress and often by feelings of not coping."

The Health and Safety Authority defines it as arising, "when the demands of the job and the working environment on a person exceeds their capacity to meet them."

Bullying: The Task Force on the Prevention of Workplace Bullying defines bullying as,

> "Repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but, as a once off incident, is not considered to be bullying"[3]

Harassment: Irish law has followed American jurisprudence by adopting the discrimination-based approach to harassment. In 1998 the Employment Equality Act was enacted which prohibits harassment[4] and defines it as occurring where one person is treated less favourably than another is, has been or would be treated on any of the following nine grounds:

* Gender
* Marital Status
* Family Status
* Sexual Orientation
* Religion
* Age
* Disability
* Race
* Membership of the Travelling Community[5]

Legal basis for workplace stress, bullying and harassment claims

An employer holds both a statutory and common law duty to take all steps reasonably practicable to ensure the safety of an employee at work.

Employers' statutory duty to ensure safety of employees

There are several provisions which provide protection to an employee from being subjected to stress, bullying and harassment in the workplace which include:

* Employment Equality Act, 1998
* Unfair Dismissals Act, 1977-1993
* Safety, Health and Welfare at Work Act, 1989
* Safety, Health and Welfare at Work (General Application) Regulations, 1993
* Code of Practice on the Prevention of Workplace Bullying made under Safety, Health and Welfare at Work Act, 1989

* Code of Practice detailing Procedures for Addressing Bullying in the Workplace made under Industrial Relations Act, 1990
* Code of Practice on Guidance on Prevention and Procedures for dealing with Sexual Harassment and Harassment at Work under the Employment Equality Act, 1998

Harassment Legislation

Irish case law has recognised harassment as a form of discrimination since 1985.[6] The 1998 Act prohibits sexual harassment, which is discrimination on the gender ground, and prohibits harassment in relation to the other eight grounds of discrimination referred to already.

Sexual harassment is defined as any act of physical intimacy, any request for sexual favours, any other act or conduct including spoken words, gestures or the production, display or circulation of written words, pictures or other material if the act, request or conduct is unwelcome and could reasonably be regarded as sexually offensive, humiliating or intimidating.[7]

Harassment in relation to marital status, family status, sexual orientation, religion, age, disability, race or membership of the travelling community is defined as any act or conduct including spoken words, gestures or the production, display or circulation of written words, pictures or other material if the action or other conduct is unwelcome and could reasonably be regarded, in relation to the relevant characteristic as offensive, humiliating or intimidating.[8]

The definition of harassment therefore combines both an objective and subjective test in that the act or conduct must be both unwelcome to the employee and be reasonably regarded as offensive, humiliating or intimidating.

Therefore the definitions of harassment include the two main kinds of harassment:

* Quid pro quo harassment: where sexual demands are made in return for some benefit, and
* Hostile environment harassment: where, for example pornographic or racist images are displayed in the workplace, yet are not directed at any individual.

Same-sex sexual harassment is not covered by the 1998 Act. However an action for such harassment may be pursued at common law. The Labour Court has held,

> "Where two persons of the same sex are involved, it is the court's view that particular circumstances must be established to justify the claim that the conduct of one constitutes sexual harassment of the other"[9].

However, harassment on any of the discriminatory grounds other than gender (sexual harassment) by someone of the same characteristic as the complainant is covered by the 1998 Act.[10]

If an employee is harassed by

* a fellow employee,
* his or her employer or
* his or her employer's client, customer or other business contact

and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it, then the harassment constitutes discrimination by the employer in relation to the employee's conditions of employment[11] and the employer is liable for that discrimination[12].

An employer is liable for harassment whether or not it takes place in the workplace if the employee is treated differently in the workplace (victimisation harassment) by reason of the employee's rejection or acceptance of the harassment or it could reasonably be anticipated that the employee would be so treated.[13]

Victimisation occurs where the dismissal or other penalisation of the complainant was solely or mainly occasioned by the complainant having, in good faith sought redress under this 1998 Act.[14] In the case of McCarthy v Dublin Corporation[15], the Equality Officer awarded €40,000 for victimisation which occurred after she had brought a complaint of discrimination against her employer. The award is possibly one of the largest made for victimisation where it had included being deliberately ignored for three and a half years by her manager, where an internal investigation regarding a bullying complaint was conducted contrary to fair procedures and where she was socially isolated at work.

The 1998 Act provides that it is a defence for an employer to prove that he or she took steps as were reasonably practicable to prevent harassment.[16]

An alternative cause of action for harassment is for breach of contract. In *Butler v. Four Star Pizza*[17] the plaintiff based her claim for sexual harassment on the breach of her contractual term to a workplace free from sexual harassment. Damages of £10,000 were awarded.

Harassment is also a criminal offence under the Non-fatal Offences Against the Person Act, 1997,

> "Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence."[18]

Workplace Bullying and Harassment Codes of Practice

The Task Force on the Prevention of Workplace Bullying recommended in its report[19] that three parallel Codes of Practice be drawn up, as separate codes were needed in order to have statutory effect under the relevant statutes. The Codes of Practice which were launched on 27th March 2002 are:

Code of Practice on the Prevention of Workplace Bullying made under Safety, Health and Welfare at Work Act, 1989[20]
This Code contains procedures to effectively and consistently address workplace bullying, guidance on how to prevent bullying and it identifies those responsible for the management and control of bullying.

Code of Practice detailing Procedures for Addressing Bullying in the Workplace made under Industrial Relations Act, 1990[21]
This Code sets out informal and formal procedures for addressing allegations of workplace bullying. It stresses the importance of absolute confidentiality as well as the importance of training or awareness for those involved in the procedures.

Code of Practice on Guidance on Prevention and Procedures for dealing with Sexual Harassment and Harassment at Work under the Employment Equality Act, 1998[22]
This code gives guidance on the meaning and prevention of harassment and sexual harassment. It also gives guidance on procedures to take to deal with harassment together with preventative measures.

Codes, although voluntarist, are developing a quasi-legal status. Codes are also admissible in evidence in Court proceedings[23].

Where an employee has been bullied at work, and following this being brought to the attention of the employer there is a failure to remedy the situation, the employee may, *inter alia*, sue the employer for breach of contract. An injunction may also be brought to restrain the breach of contract.

Health and Safety Legislation

The main health and safety at work legislation is the Safety, Health and Welfare at Work Act, 1989 and the Safety, Health and Welfare at Work (General Application) Regulations, 1993.[24] Unlike earlier legislation which covered only health and safety in industry, this Act and its Regulations cover health and safety in all workplaces. The Act and Regulations set out employers' statutory duties of care in detail. Section 6(1) of the 1989 Act states,

> "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees".

Although not expressly stated in the legislation, the employer's duty to ensure the safety, health and welfare at work of employees includes a duty to ensure the reasonable prevention of harassment, bullying and stress related injuries in the workplace. The breach of this legislation simpliciter is not a cause of action for an employee to sue an employer because its breach is a cause of action in respect of criminal proceedings not at civil law. However, an employer's duty of care to look after the health and safety of employees, including the reasonable prevention of harassment, bullying and stress related injuries in the workplace is implied into the contract of employment by the 1989 Act and 1993 Regulations. Breach of this duty goes to the root of the contract of employment and therefore such a breach of duty may be treated as a breach of the contract of employment.

Unfair Dismissals Legislation

Constructive dismissal arises where an employee is left with no option other than to resign because of the employer's breach of the contract of employment. The Unfair Dismissals Act, 1977-1993 defines constructive dismissal as,

> "the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer"[25]

It is important that the employee exhausts any grievance procedure with his or her employer, the result of which is unsatisfactory, before the employee resigns and claims constructive dismissal. The alternative to a constructive dismissal claim in the Employment Appeals Tribunal (EAT) is a wrongful dismissal claim in the Circuit Court or the High Court. Both claims cannot be pursued together[26]. A wrongful dismissal claim (the repudiation of the contract of employment by the employer) may be more difficult to prove than a constructive dismissal claim (the termination of the contract by the employee).

Constructive Dismissal arising from Harassment

In *O'Doherty v. Hennessy and Harrow Holdings Ltd*[27], the claimant, a kitchen assistant, resigned following sexual harassment by a member of her employer's family and her complaints went unheeded. The EAT held that she had been constructively dismissed and awarded her £8,840 compensation.

Constructive Dismissal arising from Bullying / a Hostile Work Environment

In Smith v Tobin[28], the claimant, who was a shop cashier, claimed the employer had accused her of stealing money and had told other employees to ignore her. The claimant resigned because of the resulting hostile treatment by other employees and the bad atmosphere in the shop. The EAT held that the onus is on the employer to ensure that staff are comfortable in their place of employment. It held that the employee had been constructively dismissed because the employer was aware of the bad atmosphere and did not act to relieve the situation. The EAT awarded her £750 compensation.

In *Kennedy v Foxfield Inns Ltd. trading as The Imperial Hotel*[29], the claimant was a waitress who had experienced rudeness and name calling in front of customers from a manager. When she started her employment he initially ignored her and then began to address disparaging remarks about her physical appearance to her supervisor. When working in the bar he would call her a 'slut' in front of customers. He also regularly slapped her and pulled her hair when he passed close to her. The complainant had complained on several occasions to no avail. On one occasion he had stood on her feet and slapped her on the back following which she resigned. The EAT held that she had been constructively dismissed and awarded her £266.

In *Reyes v Print and Display Ltd.*[30] Mr Reyes reported to his employers that he was being bullied. After an investigation the employer found these allegations to be well founded and moved him to another part of the premises. He was later requested to work in the same area as the bullies which he refused to do and as a result was suspended on full pay. The employer made proposals which the claimant refused as the hours did not suit his domestic arrangements. His pay was stopped, as he did not attend meetings to talk the matter over. Mr Reyes claimed constructive dismissal. However, the EAT determined that the employer had taken reasonable and proper steps in investigating and dealing with the claimant's allegations of bullying. It also determined that he was not unfairly dismissed, rather that he left voluntarily because of his inability to rearrange his domestic arrangements.

In *Leeson v Glaxo Wellcome Ltd.*[31], the claimant, who was private secretary to the managing director of the company, claimed that she had been bullied and victimised because the managing director had a number of concerns about her work, including timekeeping. She then resigned and claimed unfair dismissal in

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the EAT which awarded her £22,500 as it found the employer should have had procedures to resolve such a problem. On appeal, the Circuit Court held that the managing director's criticism was appropriate and overturned the determination of the EAT.

In the recent determination of the EAT, *Liz Allen v. Independent Newspapers (Ireland) Limited*[32], the EAT awarded Mrs Allen, £70,500 compensation, which included future financial loss, for constructive dismissal because of work-related stress injuries. Mrs Allen "was subjected to continuous harassment and bullying and that she was effectively isolated at work which conduct undermined her confidence and health to such a degree that she could not tolerate her working environment and was left with no other option but to resign."[33] The claimant was employed as crime correspondent with the respondent from August 1996 to September 2000. From the commencement of her employment it was alleged that a particular work colleague behaved in a hostile manner towards her, which included ignoring her and refusing to communicate with her. In August 1999, she was asked to write the "Keane Edge", which she did not want as she believed it would mean that she would no longer be crime correspondent which it is alleged angered the editor. At this time, it is alleged a colleague hurled a cigarette at her feet. Within a week of rejecting this offer she was sent a memo requesting her attendance in the office on a daily basis from 10am which meant that to work as an effective crime correspondent it would effectively mean that she was working constantly. Then the claimant heard rumours that another crime correspondent was being recruited. In September 1999, the claimant initiated a meeting with her immediate superior to inform him of the negativity and hostility in the workplace and that if it was not dealt with that she would have a nervous breakdown. Matters deteriorated following this meeting and she continued to remain largely unacknowledged. The work situation was affecting the claimant's morale in that she found it difficult even to pick up the phone to telephone her contacts. In January 2000 she advised her superior that she intended to take sixteen days leave in the Spring of 2000 to work on a book. A response was received to her March letter in April which took issue with her "unprecedented accumulation" of days off. The letter also advised of work practices that she was expected to adhere to: that the working day was from 10am to 6pm Tuesday to Friday and that "failure to comply with this constitutes absence from work and will be recorded as such on the official attendance record." The claimant viewed this as completely at variance with what had been agreed at the beginning of her employment. The claimant responded by letter in April 2000 arising from which there was a meeting and an apology for the letter; however, no written reply was given. Following this, the claimant initiated two meetings with the editor regarding the hostility in May 2000 and a further meeting with the group managing editor in June 2000. In August 2000, a new respondent was recruited by the respondent which assigned him crime stories and the claimant felt that stories were being taken away from her. In September 2000, a meeting was held to welcome the new reporter and to publicise a new appointment. At this meeting the claimant felt like "an invisible person". At this time the claimant was in considerable distress with symptoms of sleeplessness, palpitation, nervousness, headaches, poor appetite, concentration difficulties and loss of confidence. She again had a meeting with the group managing editor in September 2000 shortly after which she resigned and claimed constructive dismissal which was determined by the EAT.

Dismissal whilst on sick leave caused by work-related stress

In *Hyland v. Bestfood Services*[34], the complainant who was a factory supervisor felt under pressure at work because there were staff shortages and a large number of orders to be handled. She went home from work and to her doctor who told her that she was suffering from stress and was liable to have a heart attack. Her employer then dismissed her whilst on sick leave. The EAT determined that she had been unfairly dismissed and awarded her £26,650.

Employers' common law duty to ensure the safety of employees

Employers owe a common law duty to take reasonable care to ensure their employees' health and safety at work including safety from work related stress injuries, bullying and harassment. This duty has developed through the law of tort. The scope of an employers duty of care is divided into four separate headings by *McMahon and Binchy in "Law of Torts"*[35],

1. The provision of competent staff;
2. The provision of a safe place of work;
3. The provision of proper equipment; and
4. The provision of a safe system of work.

When an employer breaches this duty of care he or she is liable in negligence. In order to succeed in a claim of negligence, a duty of care must be established by the three-step approach set out by McCarthy J. in Ward v McMaster[36]:

1. The employer and employee must have a proximate relationship.
2. The injury complained of must be reasonably foreseeable.
3. There must be an absence of any compelling exemption based on public policy.

Once a duty of care is established, it must be shown that the employer breached that duty and caused or contributed to the

injury in order that the employer is found liable in negligence. An employer may also be found liable for the tort of intentional infliction of emotional suffering.

Development of Stress at Work Case Law

As the stress at work case law has evolved since the early 1990's the issue of foreseeability has been to the forefront. If an employer is on notice that a particular employee has a greater susceptibility to stress than others, the employer is under a greater obligation as work-related stress injury is therefore more likely to occur.

In one of the first reported cases in relation to work-related stress injuries, *Gillespie v Commonwealth of Australia*[37], Mr Gillespie, who was an administrative officer, claimed for stress-related injury following his deployment to a diplomatic mission in Caracas, Venezuela where he suffered unusual stresses and a hostile environment. He claimed that his employer:

* Did not give him proper warning of the environment he faced there
* Did not warn or protect him from such hardships in Venezuela as:
  - necessity to bribe customs officials and face threats of personal violence from them
  - necessity to be subjected to long periods of personal abuse from public service officials
  - personal violence in the streets of Caracas
  - difficulties in obtaining emergency medical assistance
  - necessity to engage in arguments with hotel staff concerning reservations even after written confirmation of reservations had been obtained
  - transport difficulties for his family
  - necessity to go long periods without water because terrorists bombed the Caracas water supply leading to the necessity to move from the house in which he lived with his family into a hotel until the water supply had been fixed
  - inability to engage in many social functions because of the impossibility of obtaining satisfactory babysitters
  - unavailability of inexpensive sporting and other recreational facilities
  - high cost of living, forcing him to live beyond his means.

He arrived there in October 1979 and was repatriated to Australia in June 1980 as he had a breakdown in health because of stress. His health continued to suffer and he was retired from public service on medical grounds in April 1986. The Supreme Court of the Australian Capital Territory gave judgment against the Plaintiff and held that it was not reasonably foreseeable that the plaintiff might be subject to some sort of psychological decompensation, beyond the difficulties and stresses to which most officers would ordinarily be prone in those circumstances. It held that the discharge of the employer's duty to take reasonable care for Mr. Gillespie required that he be given some preparation beyond that which was appropriate to less stressful posts. However, in view of the remoteness of the possibility that an officer would be subject to such an extreme reaction, reasonableness did not require the employer to give more than the most general warning.

It must, however, be noted that employees of the American Embassy were prepared to withstand the service in Venezuela because of the risk of psychological breakdown. Having regard to the development of case law, it would be difficult for an employer to avoid liability if an employee alleging work-related stress injuries could show that similar employers had preventative or remedial measures in place. ●

Article to be continued in next Issue

1. *Dalton v Frendo*, Supreme Court, 15 December 1977, page 4 of O'Higgins CJ's judgment.
2. *Sutherland v Hatton; Somerset County Council v Barber; Sandwell Metropolitan Borough Council v Jones; Baker Refractories Ltd v Bishop*, Court of Appeal (Brooke, Hale, Kay LJJ), 5th February 2002 [2002] EWCA Civ 76
3. "Dignity at Work: the Challenge of Workplace Bullying" (Dublin: Task Force on the Prevention of Workplace Bullying, Government Publications, 2001), at page vii.
4. Sections 23 and 32 Employment Equality Act, 1998
5. Section 6 Employment Equality Act, 1998 sets out the nine grounds.
6. *A Garage Proprietor v A Worker* EE O2/85
7. Section 23(3) Employment Equality Act, 1998
8. Section 32(5) Employment Equality Act, 1998
9. A Worker v. A Company (1992) 3 ELR 40; EEO 3/1991
10. Section 32(4) Employment Equality Act, 1998
11. Sections 23(1) and 32(1) Employment Equality Act, 1998
12. Section 15 Employment Equality Act, 1998
13. Section 23(2) and 32(2) Employment Equality Act, 1998
14. Section 74 Employment Equality Act, 1998
15. 2001 ELR 255
16. Sections 15(3), 23(5) and 32(6) Employment Equality Act, 1998
17. Judge Spain, 2nd March, 1995 Irish Times 3rd March 1995
18. Section 10 Non-fatal Offences Against the Person Act, 1997
19. "Dignity at Work - the Challenge of Workplace Bullying" March 2001
20. Section 30 Safety, Health and Welfare at Work Act, 1989 permits the National Authority for Occupational Safety and Health to draw up and issue Codes of Practice.
21. Industrial Relations Act, 1990 (Code of Practice detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002 (S.I. 17 of 2002) Section 42 Industrial Relations Act, 1990 permits the Labour Relations Commission to prepare draft Codes of Practice for submission to the Minister for Enterprise, Trade and Employment.
22. Section 56 Employment Equality Act, 1998 permits the Equality Authority to prepare draft Codes of Practice for submission to the Minister for Justice, Equality and Law Reform to further the elimination of discrimination in employment and/or the promotion of equality of opportunity in employment.
23. Section 42(4) of the Industrial Relations Act, 1990 (as amended by Section 105 Employment Equality Act, 1998); Section 31(2) Safety, Health and Welfare at Work Act, 1989; Section 56(4) Employment Equality Act, 1998
24. S.I. 44 of 1993. Other legislation includes: Factories Act, 1955; Mines and Quarries Act, 1965; Dangerous Substances Acts, 1972 and 1989; Safety in Industry Act, 1980; Fire Services Act, 1981; Maternity Protection Act, 1994; Occupiers Liability Act, 1995; Protection of Young Persons (Employment) Act, 1996; Organisation of Working Time Act, 1997
25. Section 1 Unfair Dismissals Act, 1977-1993
26. Section 15(2) Unfair Dismissals Act, 1977
27. 1993 ELR 161
28. 1992 ELR 253
29. 1995 ELR 318
30. 1999 ELR 224
31. 1999 ELR 170
32. Decision dated 2nd August 2001, UD641/2000
33. *Liz Allen v. Independent Newspapers (Ireland) Limited*, Decision dated 2nd August 2001, UD641/2000
34. UD 485/99
35. McMahon and Binchy, "Law of Torts" (3rd Edition) pages 500-501
36. 1988 IR 337
37. 1991 ACTR 1

THE SEPARATION OF POWERS THE GRANTING OF MANDATORY ORDERS TO ENFORCE CONSTITUTIONAL RIGHTS

Blathna Ruane BL considers the implications of the landmark Supreme Court decisions in Sinnott v Minister for Education & Others and TD v Minister for Education & Others.

Introduction

The recent Supreme Court decision of *TD -v- The Minister for Education, Ireland, The Attorney General, The Eastern Health Board and by Order The Minister for Health & Children*[1] addressed the politically delicate issue of the compatibility of the making of mandatory orders against the Executive with the constitutional principle of the separation of powers. That issue had also been raised less directly in the earlier decision of *Jamie Sinnott -v- Minister for Education, Ireland and the Attorney General.* Both cases concerned the enforcement of constitutional rights of particularly vulnerable members of society and attracted much public comment as a result.

TD concerned the extent to which the State could be compelled by mandatory orders to provide certain specified facilities for the purposes of vindicating constitutional rights of teenagers with behavioural problems in need of secure facilities for their care. *Sinnott* considered the extent of the educational rights of an autistic person and the degree to which the State could be obliged to provide certain facilities for him in vindication of those rights.

For those immediately concerned over the fate of such children, these cases were primarily about ensuring the proper provision of services. However the issue for the Supreme Court in *TD* was essentially one of the balance of power between the courts and the two other organs of government. Hardiman J. in *TD* articulated the issue as follows:

> "If the order made in this case is one that a Court can properly make, it ... would represent a significant transfer of powers. Though the other issues in the case are of great importance, especially to the individuals involved, this question is of transcending importance because the answer to it will affect the resolution of many other issues, and indeed the balance of power within our constitutional structures themselves."

Earlier he stated that if the judiciary were entitled to make such orders it:

> "... would represent an enormous increase in the power of an unelected judiciary at the expense of the politically accountable branches of government. It would attribute to the judiciary a paramountcy over the other branches in the form of a residual supervisory governmental power which, once asserted and exercised, would certainly be appealed to again and again. This paramountcy might develop in a context of widespread popular approval in a particular case, but it would be equally available in all such cases, regardless of public opinion. It would represent a very significant change in our constitutional order, not easily reversed."

In essence, the Supreme Court (Keane C.J., Murphy, Hardiman and Murray JJ, Denham J. dissenting) concluded in *TD* that the mandatory orders made were not compatible with the principle of the separation of powers as they involved the Court carrying out and determining matters more properly the function of the Executive, and that the Courts themselves had to be careful not to exceed the constitutional limitations of their own powers. They concluded that the respect which one great organ of State owes to the others requires obedience to both declaratory as well as mandatory orders, and that mandatory orders ought only be made in terribly extreme cases. Whilst it was already clear before *TD* that mandatory orders would only be made in exceptional circumstances, the effect of the Supreme Court's judgments has been to narrow even further the circumstances in which such orders can be made.

Sinnott

In *Sinnott* the Supreme Court set aside an Order made by Barr J in the High Court which had specified in detail the nature of the primary education and training which the Plaintiff, who was over the age of eighteen, was entitled to receive. Barr J made a mandatory order directing the Defendants to provide forthwith free primary education to him in the future appropriate to his needs as long as he was capable of benefiting from it. He was also held to be entitled to general damages up to the date of the order and in the future against the State for breach of its constitutional duty to provide for his primary education. There was also provision for damages to cater for his educational and ancillary needs for a two and a half year

period following the making of the order. The order also provided for a review by the High Court of the mandatory order and of the damages awarded at the end of that period.

The main issue on the appeal was whether Article 42.4, in requiring the State to "provide for free primary education", should be interpreted as creating a constitutional obligation on the State to provide such education to all persons, both adults and children, should an individual be in need of such education. The State also challenged the validity of the orders relating to the mandatory relief against the State and the post-trial implementation of the order by the State.

A majority of the Supreme Court (Denham, Murphy, Murray, Hardiman, Geoghegan, Fennelly JJ, Keane CJ dissenting) determined that the Plaintiff who was then aged twenty three did not have a constitutional right to the particular education and training which was at issue on the appeal. Because of that conclusion, it was unnecessary for them to determine whether they could make a mandatory order in the form made by Barr J. However four members of the Court commented on the issue, and the comments of Keane CJ and Hardiman J in particular were a strong foretaste of their later decisions in *TD*.

Keane CJ stated that the making of such mandatory orders was not consistent with the principle of the separation of powers. He described the State as having "conspicuously failed in their constitutional obligation to provide the education" to which the Plaintiff was entitled and he indicated that the "courts will ensure that the right is given full legal effect by whatever remedy is appropriate." However he considered that irrespective of the form of order, whether declaratory or mandatory, the respect which each of the three organs of government owe one another required obedience to either form of order. The raising of taxes and the appropriation of public monies being quintessentially matters for Dail Eireann alone, he believed that the appropriate form of relief was a declaration rather than a mandatory injunction.

Keane CJ said that neither the High Court nor the Supreme Court had ever gone further than finding[2] that a declaration could be granted that the expenditure of monies by the Oireachtas on an unlawful object - in that case the use of public funds to encourage a "yes" vote in a referendum - was in violation of the Constitution. He pointed out that the Courts had expressly refrained from granting an injunction restraining the expenditure of the monies already voted and he thought it was clear that the Supreme Court would not grant mandatory relief requiring the Oireachtas to provide funds for a particular purpose in order to uphold the constitutional or purely legal rights of members of the public.[3]

Keane CJ also said that he was of the view that the retention of jurisdiction in the case after a final judgment had been delivered was incorrect. Whilst understanding the misgivings of Barr J in the light of the previous conduct of the Defendants, he thought that the case should have been approached on the basis that if the Minister for Education was at any stage in the future found by the High Court to have been in breach of his or her obligation, then the powers of the Court to ensure the upholding and vindication of the Plaintiff's rights would, in the famous words of O'Dalaigh CJ in *The State (Quinn) -v- Ryan*[4] be "as ample as the defence of the Constitution requires." However he did not indicate what orders might appropriately be made in that context, nor the type of criteria which the Court would require to be satisfied before making further order.

Hardiman J. said that the effect of the orders was to make a decision and to enforce it on the Executive in relation to matters that would normally be within the discretion of the Executive. These were the matters of the services to be provided to the Plaintiff, the recruitment of persons to provide services, the mode of assessing the result of the provision of these services and the cost. Hardiman J said that the Court had in effect taken these decisions in lieu of any other body. These were decisions which were normally a matter for the legislative and executive arms of Government. He said that this was not merely a matter of demarcation or administrative convenience but it reflected the constitutionally mandated division of the general powers of Government set out in Article 6 of the Constitution.

Hardiman J quoted at some length the decision of Costello J (as he then was) in *O'Reilly -v- Limerick Corporation*.[5] Costello J had held that issues about the raising of monies through taxation and their distribution were for the Oireachtas to decide. The Court's function was to administer justice and that did not involve determining how money should be spent in any particular case. Costello J said that the Courts were unsuited to determining whether there had been an unfair distribution of national resources or the priorities to be given to competing claims *inter alia* because of the way that individual problems are brought before them. Costello J's analysis of matters which were appropriate for the Courts and those which were appropriate for the politicians had considerable influence on Hardiman J's judgment in *Sinnott* (with which Keane CJ agreed on this issue) and on many of the judgments in *TD*.

Hardiman J quoted Costello J who explained the central distinction between distributive justice, which is not the business of Courts, and commutative justice, which is a matter for the Courts, as follows:-

> "There is an important distinction to be made between the relationship which arises in dealings between individuals ... and the relationship which arises between the individual and those in authority in a political community (which for convenience I will call the Government) when goods held in common for the benefit of the entire community (which would nowadays include wealth raised by taxation) fall to be distributed and allocated."

Costello J continued:

> "An obligation in distributive justice is placed on those administering the common stock of goods, the common resource and the wealth held in common which has been raised by taxation, to distribute them and the common wealth fairly and to determine what is due to each individual. But that distribution can only be made by reference to the common good and by those charged with furthering the common good (the Government); it cannot be made by any individual who may claim a share in the common stock and no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due. This situation is very different in the case of commutative justice. What is due to an individual from another individual (including a public authority) from a relationship arising from their mutual dealings can be ascertained and is due to him exclusively and the precepts of commutative justice will enable an arbitrator such as a court to decide what is properly due should the matter be disputed. This distinction explains why

the Court has jurisdiction to award damages against the State when a servant of the State for whose activity it is vicariously liable commits a wrong and why it may not get jurisdiction in cases where the claim is for damages based on a failure to distribute adequately in the Plaintiff's favour a portion of the community's wealth."

Costello J went on to state:

"In relation to the raising of a common fund to pay for the many services which the State provides by law, the Government is constitutionally responsible to Dail Eireann for preparing annual estimates of proposed expenditure and estimates of proposed receipts from taxation. Approval for plans for expenditure, and the raising of taxes, is given in the first instance by Dail Eireann and later by the Oireachtas by the enactment of the Annual Appropriation Act and the Annual Finance Act. This means that questions relating to raising common funds by taxation and the mode of distribution of common funds are determined by the Oireachtas ..."

Hardiman J also referred to *Mhic Mathuna -v- Ireland*[6], *Boland -v- An Taoiseach*[7] and *Riordan -v- An Taoiseach* which emphasised that issues that were peculiarly matters within the field of national policy and which were to be decided by a combination of the Executive and the Legislature, could not be adjudicated upon by the Courts. He characterised the principle that a Court is not justified in taking a decision properly within the remit of the Legislature or Executive as an independent constitutional value.

Hardiman J said that the Courts always retained the necessary discretion to deal with an extreme situation of constitutional "meltdown" where a hypothetical government not only ignored a constitutional imperative but also defied a court declaration on the issue. While he acknowledged this reservoir of power of the Courts to deal with extreme cases where the Executive might ignore a constitutional obligation, he said the existence of such a power to deal with extreme cases could not form the basis for the exercise of such powers in any other circumstances. He cited several reasons for this limitation on the use of such powers by the Court:-

"Firstly, to do so would offend the constitutional separation of powers. Secondly, it would lead the Courts into the taking of decisions in areas in which they had no special qualification or experience. Thirdly, it would permit the Courts to take such decisions even though they were not, and cannot be, democratically responsible for them as the legislator and the executive are. Fourthly, the evidence based adversarial procedures of the Court, which are excellently adapted for the administration of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate message for deciding on issues of policy."[8]

Two other members of the Court touched briefly on the issue of granting mandatory reliefs. Denham J stated:

"In general the matter of a mandatory order will not arise. It is a practice for the executive, when an issue is being litigated that could give rise to a mandatory order to indicate that should the decision be against the State a declaratory order will be sufficient. Similarly, the courts assume that decisions will be implemented and that mandatory orders are not necessary. Thus a declaratory order, if any order is necessary, is usually appropriate. However, I would not exclude the rare and exceptional case, where, to protect constitutional rights, the court may have a jurisdiction and even a duty to make a mandatory order."

Geoghegan J said

"As this matter does not have to be decided by me having regard to my judgment I would reserve my position, but I do think in very exceptional circumstances it may be open to a court to order allocation of funds where a constitutional right has been flouted without justification or reasonable excuse of any kind. I would have great doubts, however, that the courts should ever involve themselves in making the detailed kind of orders that were made in some of the American cases cited in relation to education."

Geoghegan J's comments were *obiter* but nonetheless are interesting because they suggest a somewhat more interventionist approach in that he specifically envisaged that in very exceptional circumstances a mandatory order requiring allocation of funds might be possible where a constitutional right had been flouted without justification or reasonable excuse of any kind. His views in this regard particularly contrast with those of Keane CJ.

TD

Unlike *Sinnott*, the extent of the Superior Court's powers to grant mandatory relief was central to most of the judgments in *TD*. In *TD* the Supreme Court was asked to consider the validity of mandatory orders made to uphold constitutional rights. Kelly J in the High Court had granted certain mandatory injunctions which required the two Defendant Ministers to provide particular building facilities and high support units for teenagers with behavioural difficulties by specified dates. TD was one of a number of applicants who might be broadly categorised as disturbed minors in need of particular facilities to ensure their wellbeing.

The constitutional rights being upheld had already been defined previously in the High Court (*per* Geoghegan J) in *F(N) -v- Minister for Education.*[9] *F(N)* determined that where there was a child with very special needs which could not be provided by his or her parents or guardian, then there is a constitutional obligation on the State under Article 42.5 to make reasonable efforts to cater for those needs in order to vindicate the constitutional rights of the child. Geoghegan J had held that secure accommodation, services and such arrangements as were necessary to meet those requirements were not so impractical or so prohibitively expensive as to come within any notional limitation of the State's constitutional obligations. The State had not appealed the decision in *F(N)* and did not challenge the correctness of that decision in *TD*. However Murphy J questioned the existence of the constitutional rights defined in *F(N)*. Keane CJ expressed some reservations on it arising out of the correctness of passages in the judgment of O'Higgins CJ in *G -v- An Bord Uchtala*[10] upon which Geoghegan J had relied. Hardiman J reserved his position but indicated that he thought that the reservations expressed by Murphy J were 'weighty'. However because the State did not challenge the correctness of *F(N)*, most of the judgments related to the granting of mandatory orders rather than the existence of the constitutional rights which the orders were directed to enforce.

Apart from requiring the provision of the facilities by specified dates, Kelly J also provided that if there was to be any change in the timescale specified in the judgment, there would have to be an application to the Court by the Minister for a variation of the injunction. Kelly J stated that there would have to be objectively justifiable reasons present to warrant such a variation being granted. The effect of the orders made in terms of the facilities to be provided went beyond what was relevant to the particular applicants. The State appealed against Kelly J's orders on the basis that the Court was not entitled to make such orders because in doing so it infringed the separation of powers.

Kelly J identified four factors which he thought relevant in deciding whether or not to grant the relief sought. First, the High Court had already granted declaratory relief concerning the obligations of the State in such cases. Secondly he had regard to the fact that if the declaration was to be of any benefit to the minors in whose favour it was to be made, the necessary steps consequent upon it had to be taken expeditiously. Thirdly, the effect of a failure to provide appropriate facilities would have a profound effect on the lives of the children and put them at risk of harm. Fourthly, due regard had to be given to the efforts made on the part of the State to address the difficulties to date. Kelly J said that if the Court were to conclude that all reasonable efforts had been made to deal efficiently and effectively with the problem and that the State's response was proportionate to the rights which fell to be protected, then normally no order of the type sought would be made. He stated that he was not entering into questions of policy but if the Court was to honour its obligations under the Constitution to the minors then the injunction sought had to be granted. He said that the Minister had already decided upon the policy and this was the policy which was being implemented by his orders. If the Minister encountered difficulties beyond his control, he could apply to the Court for a variation of the order.

Incompatibility of Kelly J's orders with the separation of powers doctrine

The majority judgments held that Kelly J's order was incompatible with the doctrine of the separation of powers.[11] Keane CJ pointed out that the Ministers in *TD* were exercising the executive powers of State on behalf of the Government as a whole in building and staffing units. The monies required to provide and staff the units could only be made available to the Ministers by Dáil Eireann under the appropriation machinery prescribed under Article 17.2 of the Constitution and then only on the recommendation of the Government.

Keane CJ accepted that the Court could intervene to secure compliance by the Government with the requirements of the Constitution where it was shown that the Government had acted in contravention of it. The separation of powers would not preclude this. However he said that the orders made in *TD* and the similar orders made by Kelly J in an earlier case of *DB -v- Minister for Justice*[12] (which had not been the subject of an appeal) were without precedent in that they not merely found the Executive to have been in breach of their constitutional duties, they also required the executive power of the State "to be implemented in a specific manner by the expenditure of money on defined objects within particular time limits."

He then went on to say that in *TD* it was clear that following the decision in *F(N)*, the Executive had not taken the necessary steps to remedy the constitutional injustice which that decision had found to exist. Whilst it was understandable that in later cases the High Court had granted a declaration that the Executive were in breach of their constitutional duty to the applicant, the issue in *TD* was whether it could make an order specifying exactly how they were to remedy the breach. He concluded that the granting of the mandatory order infringed the separation of powers. It was of fundamental importance that each of the organs of Government should not only carry out their own duties but should recognise the boundaries within which they were confined in carrying out their functions. He disagreed with Kelly J's conclusion that he was not formulating policy, saying that Kelly J was effectively determining the policy which the Executive had to follow for dealing with particular social policies. The Executive was entitled to be flexible in its approach, while still respecting the children's constitutional rights, which was incompatible with requiring the Minister to revert to the High Court to allow a change in policy which did not accord with the terms of the order.

Keane CJ said that where a plaintiff successfully claims his constitutional rights have been violated by the State in the past and would continue to be so violated in the future unless the Court intervenes, this does not mean that the Courts are impotent when it comes to the protection of those rights. This was particularly relevant in a case where, as in *Sinnott*, it was not suggested that it was beyond the financial resources of the Minister to provide the facilities which the First Named Plaintiff required. Keane CJ was of the view that while in principle there was nothing to preclude the grant of mandatory relief directed to a Minister, he nonetheless considered it appropriate for the Courts to presume that where it grants a declaration that he or she has failed to meet his or her constitutional obligations, the Minister would take the appropriate steps to comply with the law as laid down by the Courts. He concluded that in the making of such mandatory orders Kelly J had 'crossed the Rubicon'.

Murphy J's judgment agreed with the Chief Justice's conclusion that the mandatory order was invalid, but his judgment focussed on the existence of the constitutional right in question rather than the mandatory relief.

Murray J said that, as the experience of many decades had demonstrated, the jurisdiction of the Courts envisaged by the Constitution is sufficiently ample to defend and vindicate rights guaranteed by the Constitution. In his view the broad assertion of jurisdiction to vindicate constitutional rights made by the Courts previously was circumscribed by the principle of the separation of powers. He said

> "Judicial statements as to the amplitude to the powers of the Court in this regard in such cases as *Quinn -v- Ryan* and *DG -v- The Eastern Health Board* could only be interpreted and applied within the ambit of the role conferred by the Constitution on the Courts with due respect to the role and function of the executive and the legislature. Any other approach would introduce incoherence into the concept of the separation of powers as delineated by the Constitution."

Murray J stated that the effect of Kelly J's order would tend to:

> "...undermine the answerability of the executive to Dail Eireann and thus impinge on core constitutional functions of both those organs of State."[13]

He distinguished between "interfering" in the actions of other organs of State in order to ensure compliance with the Constitution, and taking over their core functions so that they are exercised by the Courts. It was accepted that in determining cases brought before them, the Superior Courts could make orders affecting, restricting or setting aside actions of the Executive that were not in accordance with law or the Constitution or make declaratory orders as to its obligations. However the Courts were inappropriate institutions to make an order directing how national policy should be implemented rather than addressing issues on a case by case basis.

Murray J's view was that the functions of adopting a policy or a programme and deciding to implement it were core functions of the Executive, and it was not for the Courts to decide policy or to implement it. The Courts could determine whether such policy or actions to implement such policy were compatible with the law or the Constitution or fulfil obligations. Such exercises did not decide policy.

Hardiman J referred to his earlier comments in *Sinnott* on the incompatibility of making mandatory orders with the principle of the separation of powers and Costello J's comments in *O'Reilly*. He gave a narrow interpretation to the famous dicta of O'Dalaigh CJ in *The State (Quinn) -v- Ryan* by emphasising the context in which they were made, namely a habeas corpus application and, quoting Finlay CJ in *Crotty -v- An Taoiseach*[14], said that those statements must be read with the separation of powers which "is fundamental to all (the Constitution's) provisions" in mind. He quoted his own judgment in *Sinnott* where, referring to his reading of *Quinn*, he said "it is clear that it is not an assertion of an unrestricted general power in the judicial arm of government ..."

Hardiman J said the order of the High Court was one which purported to discharge a policy making and resource distributing function. The obligation to revert to the Court for a variation of the injunction was an express assertion of a power to control policy change in this area. He rejected all the suggested foundations for a jurisdiction to make the mandatory orders as being based on a misapprehension of the powers of the Superior Courts in relation to those of the other organs of Government. He stated

> "The Constitution, in my view, does not attribute to any of the branches of government an overall, or residual, supervisory power over the others. It creates three equal powers, none of which is generally dominant. Equality of the powers can only operate in practice on the basis that each has its discrete remit."

Hardiman J said that it was not for the Court or any other organ of Government to strike its own balance as to how the separation of powers was to be observed, thereby disagreeing with the dissenting judgment of Denham J, who considered that the Court had to balance the separation of powers principle with the principles of the obligation upon the Superior Courts to protect constitutional rights and the supremacy of the Constitution. The approach of balancing competing constitutional principles as part of the process of constitutional interpretation is one which has been frequently adopted by the Supreme Court, and Denham J's approach is consistent with that jurisprudence. In contrast Hardiman J follows the characterisation of the principle of the separation of powers as being "fundamental" to all the provisions of the Constitution, which gives the principle a kind of constitutional pre-eminence over other provisions. He concluded that the Court was not entitled to engage in a balancing exercise in regard to how the separation of powers was to be honoured.

Hardiman J considered that Kelly J's judgment reflected a view of the separation of powers which was unduly Court centred. He regarded Kelly J's statement that the Court has to "attempt to fill the vacuum which exists by reason of the failure of the legislature and the executive" as coming close to asserting:

> "...a general residual power in the courts, in the event of a (judicially determined) failure by the other branches of government to discharge some (possibly judicially identified) constitutional duty."

He said that if this were accepted it would have the effect of attributing a paramountcy to the judicial branch of government which he did not consider the Constitution vested in it.

He placed considerable emphasis on the necessity for the Courts to observe the boundaries to their own jurisdiction. One of the factors which influenced him in holding such a strong view on the necessity for boundaries was the consequences which could flow from the making of mandatory orders and in particular the problems raised by the Court's contempt jurisdiction. He stated:

> "One of the reasons why recognition of these boundaries is important is that a failure to recognise them can bring the Courts into unwarranted and unjustifiable conflict with the political branches of government. If an order of the sort in question here could properly be made, it could properly be enforced by the ordinary procedures for the enforcement of court orders in civil matters including contempt procedures. Assuming the order to be properly made, if a relevant minister changed his or her policy without the Court's sanction, or was tardy in implementing a policy enshrined in a court's order, the court might proceed to consider the question of contempt. But this would be a wholly unwarranted and unconstitutional proceeding because, in the words of Chief Justice Finlay :-
>
> 'Matters within the field of national policy, to be decided by a combination of the executive and the legislature, ... cannot be adjudicated upon by the Courts.'
>
> Accordingly, the fundamental requirement for constitutional harmony and modulation imperatively requires that the courts, as well as the other branches of government, recognise and observe the boundaries between them."

Clearly for Hardiman J the vista of the Courts being called upon to exercise their contempt jurisdiction against the Executive, with the consequential potential for unwarranted conflict with the Executive, was undesirable in the interests of the harmonious functioning of the Constitution.

Duty and obligation of courts to protect fundamental rights - dissent of Denham J

Denham J gave the only dissenting judgment and in many respects her judgment agreed with Kelly J's judgment. The fundamental difference between her judgment and that of the majority was her greater emphasis upon the supremacy of the Constitution and the role given to the Courts to guard fundamental rights, which she said had to be counter-balanced with the principle of the separation of powers. Denham J stated:

"*Sinnott and TD* show that while the Courts retain the jurisdiction to make mandatory orders so as to vindicate constitutional rights, in practice it would be an extremely rare occurrence indeed before a Court would ever be prepared to make a mandatory order against the Executive. Although the judgments do not indicate that obtaining a declaratory order initially is a prerequisite to obtaining a mandatory order subsequently, in practice it is likely to be considered so."

"The separation of powers is an important aspect of the Constitution. However, in addition to that doctrine there is the jurisdiction of the Courts to protect fundamental rights. This is not only a jurisdiction but a duty and obligation of the Courts under the Constitution."

Denham J said that the case law showed that in rare and exceptional cases, to protect constitutional rights, a court may have jurisdiction and even a duty to make a mandatory order against another branch of government. The separation of powers under the Constitution is not absolute. It is a fundamental principle underlying the exercise of the powers of the basic institutions of the State and is applied in a functional manner. The powers and duties of each organ of State extend across theoretical lines of separation, and indeed the checks and balances established in the Constitution breach a rigid concept of the separation of powers. The doctrine of the separation of powers had to be balanced with the role given to the courts to guard constitutional rights.

Denham J said that an important principle of the Constitution is that the Constitution is supreme and the Superior Courts are its guardian. The High Court was specifically given jurisdiction by the Constitution to consider and determine the question of the validity of any law having regard to the Constitution. The principle of the separation of powers and the principle that the Constitution is supreme have to be construed harmoniously. Where there is a balance to be sought between the application of the doctrine of the separation of powers and protecting rights or obligations under the Constitution, the Courts have a specific constitutional duty to achieve a just and constitutional balance. In his judgment Hardiman J had disagreed with Denham J on this point, saying that a court could not strike its own balance as to how the separation of powers was to be observed.

In arriving at her conclusion Denham J relied upon the very broad assertions of the wide powers available to the Courts to vindicate constitutional rights such as those made in *The State (Quinn) -v- Ryan*. She quoted *Byrne -v- Ireland*[15] where Walsh J had stated

"Where the people by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available."

Unlike the judgments of Murray and Hardiman JJ, her analysis did not narrow the force and scope of those assertions. She did not regard the principle of the separation of powers as circumscribing the general reservoir of power of the Courts to vindicate constitutional rights but she saw it as giving rise to a need to balance the two principles.

Denham J said that if it is either a matter of protecting rights and obligations under the Constitution or upholding the validity of a statute, then the Constitution must prevail. Whereas a declaratory order is usually preferable, there may be very rare occasions where a declaratory approach is not feasible and then the court has the power and duty and responsibility to uphold the Constitution and vindicate constitutional rights. This she said is at the core of the duty and the responsibility of the High and Supreme Courts.

Whilst Denham J, unlike Hardiman J, did not examine the implications of the exercise of the Court's contempt jurisdiction, which could arise in the event that a mandatory order was breached, she recognised the potential for conflict saying that the very nature of the division of power under the Constitution together with its checks and balances could cause tension between the organs of government, which tension could come and go. However she emphasised that all institutions of State have a responsibility to the State itself to act in a constitutional manner to the benefit of the State as a whole. Thus, where an issue arises and the boundaries of the separation of powers are in issue, "both of the relevant institutions should approach the matter constructively."

Denham J distinguished *O'Reilly* on a number of grounds including the fact that there Costello J did not determine that there was a breach of constitutional right. Rather he had analysed the concept of distributive justice. She agreed with Costello J's analysis and accepted that the distribution of the nation's wealth was a matter for the Executive and the Legislature but said that in *TD* the applicants were not making a case that the nation's wealth be justly distributed. Their cases had been brought to protect constitutional rights that had been recognised and acknowledged.

"Whilst the making of a mandatory order in the most general terms, requiring the State to fulfil its legal obligations, would not involve many of the issues raised by the type of order made by Kelly J, nonetheless once the order is made it could give rise to enforcement procedures, including contempt, with all of the difficulties for 'constitutional harmony' that would ensue."

Like Kelly J, Denham J considered that it was an important factor in the case that the mandatory order was to implement the State's own plan and that there was a right to apply to the Court. The nature of the order, while being in fact the policy of the Minister, corresponded also with the vindication of the previously recognised constitutional rights of the applicants and the obligations of the State. In any event the fact that the decision could affect executive policy did not seem to Denham J (unlike the majority) to put the decision beyond judicial limits. Earlier in her judgment Denham J referred to the impact of orders on policy, saying that a decision of a court even in relation to a single individual could affect policy. Just because a case affects a policy did not:-

"The fact that the threshold for obtaining interlocutory relief is so high appears to leave open the possibility that there will be some plaintiffs for whom in practice no meaningful relief will be available. This could arise in circumstances where a plaintiff was unable to meet the threshold for mandatory relief, where the State failed to comply timeously with declaratory orders made to vindicate the plaintiff's rights, where time is of the essence in the vindication of the constitutional rights in question and where damages are not an adequate remedy."

> "...*per se* render it unconstitutional or bring it into conflict with the principle of the separation of powers. Nor is it a reason to abdicate the responsibility of a court to give a decision on the constitutionality of a situation."

She cited a number of factors relevant to the analysis of the balance to be achieved between protecting constitutional rights and the application of the doctrine of the separation of powers, including the fact that the rights involved were described in *F.N.* which had not been challenged; the applicants' constitutional rights were not contested; in this instance time was of the essence; there had been culpable delay by the State and the order of the Court was to enforce the policy of the Executive - it was not a situation where the Court investigated the basis for a policy or established a policy. She considered that it would have been an abdication of judicial duty to continue to adjourn the applicant's cases by reference to a chimera of plans.

Denham J concluded that the orders made in *TD* were at the extremity of the Court's jurisdiction. In making any such order the Court had a heavy burden to acknowledge the respect it must give to the people's other organs of State and to act accordingly. However in the light of the exceptional circumstances of the case she was satisfied that the Court had a jurisdiction to make the mandatory order in issue which was necessary to vindicate the rights of the children.

Can mandatory orders ever be made against the executive?

Although the effect of the Sinnott and *TD* cases is to reduce even further the extent to which mandatory orders can be made, nonetheless the Courts still retain such a jurisdiction. Thus Murray J said in *TD* that a mandatory order directing the Executive to fulfil a legal obligation, without specifying the means or policy to be used in fulfilling the obligation, in lieu of a declaratory order as to the nature of its obligations, could only be granted, if at all, in exceptional circumstances where an organ or agency of the State has disregarded its constitutional obligations in an exemplary fashion. Insofar as *McKenna -v- An Taoiseach (No.2)*[16], *Crotty -v- An Taoiseach*[17] and *McMenamin -v- Ireland*[18] might be said to be authority for making some mandatory order where there is "a clear disregard" by the State of its constitutional obligations, it had to be borne in mind that in none of those cases was a mandatory order granted. Later he said the phrase "clear disregard" could only be understood to mean:-

> "...a conscious and deliberate decision by the organ of State to act in breach of its constitutional obligation to other parties accompanied by bad faith or recklessness. A Court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would impinge on the observance by the State party concerned of any declaratory Order made by the Court."

Murray J concluded that in *TD* there was no question of bad faith and that the elements necessary for granting a mandatory order were absent. He indicated that should the occasion arise for the Courts to consider making a mandatory order against an organ of State in lieu of a declaratory order, such an order could not be such as would involve the Courts in actually exercising the functions constitutionally reserved to those organs of State.

Murray J stated that he did not consider that "culpable slippage" of an administrative nature or "bureaucratic haggling", which may include serious legal questions of departmental competencies, or inefficiency may of themselves alone constitute grounds for a judicial mandatory order against the State. He said:-

> "[T]here may be other remedies if persons suffer damage as a result of such administrative deficiencies, but otherwise the Executive is, in principle, accountable to Dail Eireann for them."

Murray J's criteria in practice set a very high threshold before mandatory relief would be granted. They place relatively more emphasis on the intention of the organ of State and correspondingly less emphasis on the effect which the State's failure to comply has upon the parties to whom the duty is owed, than did the criteria identified by Kelly J.

Hardiman J specifically agreed with Murray J's judgment in regard to the circumstances in which the Court may make a mandatory order compelling the Executive to fulfil a legal obligation. Such an order could only be made as an "absolutely final resort" in "circumstances of great crisis" and "for the protection of the constitutional order itself." He did not believe that any circumstances which would justify the granting of such an order had occurred "since the enactment of the constitution sixty four years ago." Whilst as already indicated, Hardiman J regarded the need for "constitutional harmony and

modulation" as fundamental requirements, nonetheless he was prepared to forego those requirements where the constitutional order itself is threatened.

In *Sinnott* Keane CJ indicated that in principle mandatory relief could be directed to a Minister who had been provided with sufficient resources to discharge his or her constitutional obligations, and where there had been a failure to discharge those obligations. Nonetheless it was appropriate for the Courts to presume that where the Court grants a declaration that he or she has failed to meet his or her constitutional obligations, the Minister will take the appropriate steps to comply with the law as laid down by the Courts. Keane CJ appears to envisage therefore that the Courts retain a jurisdiction to make mandatory orders against Ministers, but ought rarely if ever make them.

Sinnott and *TD* show that while the Courts retain the jurisdiction to make mandatory orders so as to vindicate constitutional rights, in practice it would be an extremely rare occurrence indeed before a Court would ever be prepared to make a mandatory order against the Executive. Although the judgments do not indicate that obtaining a declaratory order initially is a prerequisite to obtaining a mandatory order subsequently, in practice it is likely to be considered so. If such an order is ever made, it is likely to be in very general terms only, directing the Executive to fulfil its legal obligations, would be limited to the circumstances of the individual plaintiff, and would not specify the means or policy to be used in fulfilling the obligation nor require the allocation of funds. The latter restriction will be particularly relevant in the context of so-called socio-economic rights. Whilst the making of a mandatory order in the most general terms, requiring the State to fulfil its legal obligations, would not involve many of the issues raised by the type of order made by Kelly J, nonetheless once the order is made it could give rise to enforcement procedures, including contempt, with all of the difficulties for "constitutional harmony" that would ensue.

The fact that the threshold for obtaining interlocutory relief is so high appears to leave open the possibility that there will be some plaintiffs for whom in practice no meaningful relief will be available. This could arise in circumstances where a plaintiff was unable to meet the threshold for mandatory relief, where the State failed to comply timeously with declaratory orders made to vindicate the plaintiff's rights, where time is of the essence in the vindication of the constitutional rights in question and where damages are not an adequate remedy.

Conclusion

TD was the first occasion for the Supreme Court to explore comprehensively the implications of the wide breadth of jurisdiction asserted by the Supreme Court a generation ago, in the context of mandatory relief against the Executive. The majority's judgments indicate that very broad assertions of wide jurisdiction to vindicate constitutional rights made previously must now be understood to have a significantly narrower meaning than their broad wording hitherto suggested. The Superior Courts' jurisdiction and the extent of the duty and obligation on the Courts to protect fundamental rights is more constrained by the principle of the separation of powers than might perhaps have been expected. Whereas the judgments of Barr J and Kelly J suggested that mandatory relief would be available for albeit exceptional cases, the Supreme Court has made clear that henceforth the power to make mandatory orders against the Executive is one which the Courts will keep in reserve for extremely rare occasions only. ●

1. Unreported, Supreme Court, 17 December 2001
2. *McKenna -v- An Taoiseach (No. 2)* [1995] 2 IR 10
3. He cited *Brady -v- Cavan County Council* [1999] 4 IR 99 in this regard. The dicta of Geoghegan J in *Sinnott* referred to below suggest that he might take a different view to Keane CJ on this issue.
4. [1965] IR 70
5. [1989] ILRM 181
6. [1995] 1 IR 484. Supreme Court [Unreported] 21 July 2000
7. [1974] IR 338
8. He added other factors to this list in his judgment in *TD* at pp.52-53 of the Unreported Judgment.
9. [1995] 1 IR 409
10. [1980] IR 32
11. A further important issue in the case was the question of the *locus standi* of the applicants, because the reliefs sought in terms of facilities went beyond anything relevant to themselves, individually or as a group. For reasons of constraints on space, the issue of *locus standi* is not considered here.
12. [1999] 1 IR 29
13. Hardiman J agreed with him on this conclusion.
14. [1987] IR 713
15. [1972] IR 241
16. [1995] 2 IR 1
17. [1987] IR 713
18. [1996] 3 IR 100

REATMENT OF PRISONERS OF WAR: AGE OLD PROBLEM FOR PROTAGONISTS

Dr. Ray Murphy, Irish Centre for Human Rights, NUI Galway, provides a comprehensive overview of the rules and principles governing the treatment of prisoners of war under international humanitarian law, and considers their application to the treatment of Taliban and Al Queda forces captured during the recent conflict in Afghanistan.

Introduction

The problem of how to deal with prisoners of war is not a new one - even the Old Testament calls for humane treatment of those captured in the course of armed conflict.[1] However, in ancient times the concept of prisoners of war was unknown. Captives were regarded as part of the spoils of victory, and they were frequently killed or enslaved. Not surprisingly, prisoners of war have traditionally been among the most vulnerable groups in situations of armed conflict. Their treatment is a question with which the laws of war have been particularly concerned. Their detention is a form of permissible internment, and it should come as no surprise to learn that that the laws governing armed conflict lay down detailed rules for their protection. This article examines the issue of who is a prisoner of war under international humanitarian law, and in particular considers whether the United States is correct in its interpretation and application of the law to the Taliban and Al Qaeda fighters detained at Quantanamo Bay in Cuba.

What are the Laws of War or International Humanitarian Law

International humanitarian law constitutes one of the oldest branches of public international law. Its two main branches are referred to as the law of the Hague and the law of Geneva. The law of the Hague regulates the means and methods of warfare. It is codified primarily in the Regulations respecting the Laws and Customs of War on Land ("the Hague Regulations") annexed to the 1907 Hague Convention IV ("the Hague Regulations"). These govern the actual conduct of hostilities during armed conflict such as the selection of targets and permissible weapons during armed conflict.

The law of Geneva is codified primarily in four conventions adopted in 1949, known collectively as the Geneva Conventions for the Protection of War Victims.[2] Their aim is to protect certain categories of persons, which include civilians, the wounded and prisoners of war. Significant aspects of the law of the Hague and the law of Geneva were merged in a common treaty regime in the 1977 Protocols Additional to the Geneva Conventions: one relating to the victims of international armed conflict ("Protocol I"), and the other to the victims of non-international armed conflicts ("Protocol II").[3]

Among the equivalent and interchangeable expressions - the "Laws of War", the "Law of Armed Conflict", and "International Humanitarian Law", the first is the oldest. The expression 'laws of war' dates back to when it was customary to make a formal declaration of war before initiating an armed attack on another state. Nowadays the term 'armed conflict' is used in place of war, and while the military tend to prefer the term law of armed conflict, the International Committee of the Red Cross ("ICRC") and other commentators use the expression international humanitarian law to cover the broad range of international treaties and principles applicable to situations of armed conflict. It also includes a number of rules of customary international law. The fundamental aim of international humanitarian law is to establish limits to the means and methods of armed conflict, and to protect non-combatants, whether they are the wounded, sick or captured soldiers, or civilians. [4]

International Humanitarian Law - Background

The norms regulating the conduct of combatants in times of conflict are not only of ancient origin but they are also found in diverse cultures on many continents.[5] Up until the end of the nineteenth century, the treatment of prisoners of war varied a

great deal depending on the parties to and nature of a conflict, and its geographical location. The killing or enslavement of prisoners was often linked to the failure to distinguish between combatants and non-combatants, and the obligation to distinguish themselves from civilians remains one of the fundamental rules that combatants must adhere to in order to be treated as prisoners of war.

The 1785 treaty of friendship between Prussia and the United States was one of the first international treaties to contain the obligation of the contracting parties to protect prisoners of war. Later, during the American Civil War, President Lincoln adopted the Lieber Code.[6] This contained detailed rules for the protection of, *inter alia*, prisoners of war.[7] What was really remarkable about this code is that it was introduced unilaterally in the course of a protracted and bitter civil war when the Union Government was intent upon defeating the Confederacy and ensuring that no state recognised it as legitimate. Despite the threat to the Union, Lincoln still had the foresight to introduce a comprehensive set of humanitarian rules governing the conduct of hostilities. Even today the rules of international humanitarian law applicable in internal armed conflict are not as extensive as those applied by the Union army at the time. Not surprisingly, the Code had a significant impact on later attempts by European states to formulate similar rules.

After the piecemeal development of humanitarian law at the end of the 19th century and the start of the 20th century,[8] the experience of World War II made the shortcomings in the legal regulation of this field all too apparent. This realisation led to the adoption in 1949 of the four Geneva Conventions for the Protection of War Victims.[9] The adoption of the Conventions, coupled with the earlier well developed body of Hague law governing the conduct of hostilities by armed forces, meant that traditional inter-state wars or "armed conflicts" to use the language of the Conventions, were now well-regulated, in theory at least.[10] The phrase "armed conflict" was employed to make it clear that the Conventions applied once a conflict between states employing the use of arms had begun, whether or not there had been a formal declaration of war.[11]

The actual codification and promotion of international humanitarian law has been undertaken primarily by the ICRC in Geneva. It can be argued that the UN should have played a more significant role in this regard, but the UN system was designed carefully to make war illegal and unnecessary.[12] Nowhere in the UN Charter is the concept of war mentioned. Having rendered the concept of the classical "war" redundant, it might have seemed unduly pessimistic for the UN to set about regulating that which no longer existed. It was not surprising then that the International Law Commission of the UN declined to do so when it came to considering the codification of humanitarian law in 1949. It was believed that if the Commission at the very beginning of its work were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the UN for maintaining peace.[13] In this way, the responsibility to codify and improve the principles fell upon the ICRC.

As the majority of armed conflicts in the Cold War period did not approximate to inter-state wars of the kind envisaged by traditional humanitarian law, certain obvious gaps in the legal regulation governing armed conflicts remained.[14] The adoption of the Conventions marked a break with the past in that Article 3 which was common to all four Conventions sought to establish certain minimum standards of behaviour "in the case of armed conflict not of an international character" which reached a certain (undefined) level of intensity. While of modest scope, this was a radical development.[15] Unfortunately, limitations on its application remain as states often deny that internal problems have risen to the required level of "armed conflict", which term Article 3 does not attempt to define, or argue that the conflict in question was not intended to be governed by the Conventions.[16] In an attempt to address these and other issues, Additional Protocols I and II were adopted in 1977.[17]

Protocol 1 applies to international armed conflict and brought what was often referred to as "wars of national liberation" within the definition of international conflicts.[18] Protocol II, on the other hand, did not apply to all non-international armed conflicts, but only to those that met a new and relatively high threshold test.[19] Despite the time and effort that was involved in drafting and agreeing the Protocols, the result was less than satisfactory, especially from the point of view of classifying armed conflicts to determine which Protocol, if any, applies in a given case. The applicability of Protocol II is quite narrow, and this helps explain in part why so many states are party to it.

If the broader picture of the development of humanitarian law over the last two decades is examined, it is evident that, in addition to their contribution to the regulation of non-conventional warfare, the 1977 Protocols are significant in two other respects. Firstly Protocol I represents the flowing together of Hague law and Geneva law in that it not only includes provisions designed to protect the civilian population and those hors de combat,[20] but also sets out new rules on the conduct of hostilities based on the principle of proportionality.[21] Secondly, both protocols represent a degree of merger of humanitarian law with its younger cousin, international human rights law, in that they incorporate detailed and explicit human rights guarantees, in some instances drawn directly from the International Covenant on Civil and Political Rights.[22] As a result, the Additional Protocols have blurred the distinction between what was traditionally seen as international humanitarian law that emphasised generic rights determined according to the status of certain participants or other groups caught up in an armed conflict, and the more individual based rights, which form the core of international human rights law.

Human rights and humanitarian law

Human rights and humanitarian law have different historical and doctrinal origins.[23] Previously, scholars assumed that in conflict situations, one or other regimes was applicable, depending on the categorisation.[24] However, Meron has pointed to a dangerous lacuna that may exist if and when the applicability of both regimes is denied.[25] Although humanitarian law was originally intended to govern situations of armed conflict between states, it has become increasingly important in the regulation of internal armed conflict.[26] Human rights, on the other hand, originated in the intra-state relationship between the government and the governed, and are intended to protect the latter against the former regardless of nationality.[27] But humanitarian law is also concerned with protecting basic human rights in armed conflict and other

Legal Update

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2001/740, 2001/763, 2001/789, 2001/848, 2001/911, 2001/938

Diseases of animals act, 1966 (classical swine fever) (restriction on imports from Spain) (no.2) order 2001 (amendment) order, 2002
SI 5/2002
DIR 2001/925

Registration of Potato Growers and Potato Packers Regulations, 2001
SI 637/2001

Aliens

Danalache v. Minister for Justice
Supreme Court: **Keane C.J.,**(ex tempore) Murphy J., McGuinness J.
30/03/2000

Aliens; applications for refugee status; applicants had received standard letter refusing application for refugee status in spite of different representations and different circumstances; applicants had been refused leave to seek judicial review of decision refusing such applications and issuing subsequent deportation orders; whether applicants had presented arguable case for saying that respondent had acted ultra vires in failing to have regard to the individual representations and individual circumstances of each of the applicants to whom standard letter had been addressed; whether applicants had presented arguable case that respondent's letter had indicated that he had had regard to matters in arriving at his decision to make a deportation order that are not referred to in relevant statutory provisions; s. 3(6), Immigration Act, 1999.
Held: Appeal allowed; leave granted to apply for judicial review.

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SI 567/2001

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SI 568/2001

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SI 14/2002

Bail

D.P.P. v. Beggs
Supreme Court: **Keane C.J.** *(ex tempore)*, Murphy J., Hardiman J.
31/03/2000

Bail; risk to witness; defendant seeks to appeal against refusal of application for bail; whether there had been evidence before trial judge which entitled him to reach conclusion that a witness would be at risk if bail had been granted; whether trial judge entitled to take into account evidence of a particular background of serious animosity between individuals concerned which made apprehension as to risk of threats or intimidation to witness more likely.
Held: Application refused.

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Coroners

Northern Area Health Board v. Geraghty
High Court: **Kelly J.**
20/07/2001

Coroner; deceased died at hospital managed and controlled by applicant; respondent, after considering request by deceased's daughter, decided to hold an inquest for purposes of allaying rumours and suspicions; whether respondent misapplied discretion or acted ultra vires; applicant contends respondent purported to extend his inquiry to the standard of care afforded to deceased while in care of applicant in a manner which had been unfair, unreasonable and in breach of natural justice; whether on the evidence applicant prejudiced by such alleged shortcomings; s. 30, Coroners Act, 1962.
Held: Application dismissed.

Article

The impact of the incorporation of the European convention on human rights on the practice of the coroner's court
Browne, Dervla
7 (2001) MLJI 71

Costs

Byrne v. Loughran
Supreme Court: **Keane C.J.** *(ex tempore)*, Murray J., Geoghegan J.
05/05/2000

Security for costs; dispute as to ownership of property; applicant had instituted proceedings against respondents seeking to get back possession and title deeds of property which he had previously transferred to them as part of agreement which he claims is now inoperative; applicant has few assets other than potential interest in aforementioned property; applicant seeks to appeal against order of security for costs made against him; whether court, in determining whether to make order for security for costs against plaintiff, may have regard to fact that plaintiff has made a prima facie case that his inability to give security flows from the wrong committed by defendant; whether, if what applicant avers in statement of claim in present case is true, his inability to provide security for costs would flow from wrong comitted by respondents; whether this had been an inappropriate case in which to order security for costs.
Held: Appeal allowed.

Irish Conservation and Cleaning Limited. v. International Cleaners Limited
Supreme Court: **Keane C.J.** *(ex tempore)*, Murray J., Geoghegan J.
19/07/2001

Practice and procedure; security for costs; plaintiff company consisted of two persons who had been previous employees of defendant; only customer of plaintiff had been defendant; whether, given that plaintiff is insolvent and will be unable to pay the costs of defendant if defendant successful in action, this is an appropriate case in which to order security for costs; whether trial judge had been correct in exercising discretion to refuse to grant order; whether special circumstances of plaintiff in case render order sought by defendant inappropriate.
Held: Appeal dismissed.

Mangan v. Independent Newspapers Ireland Limited
Supreme Court: **Keane C.J.** *(ex tempore)*, Denham J., Murphy J., McGuinness J., Geoghegan J.
25/07/2001

Costs; appeal against order for costs against defendant; trial judge discharged jury in libel action consequent on counsel for defendant's statement of law to jury; whether issue regarding this address to jury a matter which the trial judge competent to and capable of dealing with at that stage by appropriate direction to jury; whether trial judge, while entitled to exercise his discretion in this matter, erred in principles which he applied to resolution of matter.
Held: Appeal allowed; order for costs set aside.

Lismore Homes Ltd. v. Bank of Ireland Finance Ltd.
Supreme Court: Denham J., **Murphy J.,** Murray J., Hardiman J., Geoghegan J.
05/10/2001

Practice and Procedure; security for costs; sufficient security; High Court had ordered that plaintiff furnish security for costs of defendants in such amount as should be determined by Master of High Court and that all further proceedings be stayed pending furnishing of security; trial judge ordered that plaintiff furnish security for costs in sum of 50% of estimated total to defendants; whether sufficient security involves making a reasonable estimate of actual costs which it is anticipated a defendant will have to meet; whether trial judge's assessment of amount of security for costs realistic.
Held: Trial judge's findings upheld.

Criminal Law

J.O'C. v. D.P.P.
Supreme Court: **Keane C.J.,** Denham J., **Murphy J.,** Barron J*., **Hardiman J.*** (*dissenting)
19/05/2000

Criminal; delay; sexual offences; fair trial; due course of law; presumption of innocence; applicant had been charged with a number of counts of indecent assault between 1974 and 1978; applicant had sought and obtained in High Court order of prohibition restraining continuance of proceedings against him; it had been held that alleged victim's delay in reporting case had been caused directly or indirectly by actions of applicant, but that effect of delay would result in applicant being deprived of a fair trial; respondent seeks to appeal against finding that delay would result in applicant being deprived of a fair trial; applicant on cross-appeal seeks to challenge finding that alleged victim's delay in reporting case had been caused directly or indirectly by actions of applicant; whether mere lapse of time is of itself a bar to a prosecution; whether delay has been such that, having regard to nature of charges, a trial should not be allowed to proceed; whether, as a matter of probability, assuming the complaint be truthful, delay in making it had been referable to actions of applicant; whether degree of prejudice owing to delay suffered by applicant in instant case had been such as to give rise to a real and serious risk of an unfair trial; whether, in the absence of delay on part of those responsible for investigation and prosecution of crime, onus on defendant to prove affirmatively that fair trial is impossible; whether in the context of these specific civil proceedings, the court must proceed on assumption that

allegations are well founded and, to that extent only, presumption of innocence does not apply; whether, where complaint is of a repeated pattern of sexual abuse stretching over a relatively lengthy period, lack of detail as to dates on which abuse had allegedly occurred unduly prejudices applicant's ability to defend himself; whether applicant's state of health will unduly affect his ability to defend himself; whether absence of applicant's deceased wife as a witness unduly prejudices his ability to defend himself; Art. 38.1 of the Constitution.
Held: Appeal allowed; cross-appeal allowed; order substituted refusing application for an order of prohibition.

P. O'C. v. D.P.P.
Supreme Court: **Keane C.J., Denham J., Murray J., Hardiman J.,** Geoghegan J.
06/07/2000

Criminal; delay; sexual offences; fair trial; presumption of innocence; applicant, music teacher, had been charged on five counts of indecently assaulting one of his pupils between January 1982 and December 1983; applicant had obtained order of prohibition in High Court restraining respondent from further proceeding with prosecution on grounds of prejudice suffered by him owing to delay; respondent seeks to appeal against such finding; whether delay of alleged victim in reporting alleged crime to authorities explicable by reference to nature of alleged crime; whether, assuming allegation to be true, delay explicable with reference to dominion exercised by alleged perpetrator over alleged victim; whether degree to which applicant's ability to defend himself has been impaired is such that trial should not be allowed to proceed; whether, if applicant can demonstrate to court that it is probable that a specific defence which might otherwise have been open to him or her is no longer available because of the passage of time, the court may halt the trial on ground that there is now a real and serious risk of an unfair trial which cannot be avoided by the giving of necessary directions or rulings by trial judge; whether applicant is entitled to strike a reasonable balance between demonstrating prejudice and maintaining whatever degree of reticence and flexibility may be advised to him, bearing in mind the possibility that he may have to face trial; whether specific prejudice as a result of the delay has been established by the applicant in the present proceedings; Art. 38.1 of the Constitution.
Held: Appeal dismissed; judgment and order of High Court affirmed.

Meehan v. The D.P.P.
Supreme Court: **Keane C.J.** *(ex tempore),* Murray J., Fennelly J.
26/06/2001

Criminal; appellant seeks an order of certiorari in respect of his conviction in Circuit Court on grounds of entry into house without a warrant, that his counsel withdrew without his permission and that his solicitor put undue pressure on himself and his family to plead guilty; whether refusal of certiorari correct.
Held: Appeal dismissed.

McNamara v. The D.P.P.
Supreme Court: **Keane C.J.** *(ex tempore),* Murray J., Fennelly J.
26/06/2001

Criminal; practice and procedure; applicant had argued at trial that there had been some material in the form of photographs of motorcar where rape had allegedly taken place which he had not been presented with until day of sentencing; applicant appealing trial judge's ruling that it was matter to be dealt with by Court of Criminal Appeal; whether trial judge had been correct in considering that it was not an appropriate matter for judicial review.
Held: Appeal dismissed.

Kelly v. The Governor of Portlaoise Prison
Supreme Court: **Keane C.J.** *(ex tempore),* Murray J., Fennelly J.
26/06/2001

Criminal; conduct of trial; applicant appealing conviction on grounds that trial held in breach of Constitution, European Convention on Human Rights and other international conventions; whether any grounds which would justify an order being made by way of judicial review in respect of his conviction.
Held: Appeal dismissed.

Cremin v Judge Smithwick
High Court: **Kelly J.**
27/06/2001

Criminal; application for *certiorari*; applicant seeks to have conviction quashed; respondent had refused applicant's application for adjournment; applicant had been convicted and an appeal from this decision had been taken to Circuit Court; whether application had been made promptly; whether where a sufficient alternative and more appropriate remedy exists relief by way of *certiorari* should not normally lie; whether there are grounds for impugning decision of respondent; whether respondent had erred in law in exercising his discretion.
Held: Relief refused.

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SI 581/2001

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SI 636/2001

Environmental Law

O'Connell v. Cork Corporation
Supreme Court: **Keane C.J.** (*ex tempore*), Murphy J., McGuinness J.
31/07/2000

Environmental; waste management; mandatory duty of local authority; applicant seeks to appeal against refusal of leave to institute judicial review proceedings against decision of respondent to introduce sticker system on wheelie bins; whether applicant has raised an arguable case that introduction of sticker system for collection of waste is in breach of mandatory statutory duty of respondent to provide, arrange and operate such facilities as may be necessary for recovery and disposal of household waste arising within its functional area; s. 38, Waste Management Act, 1996.
Held: Appeal allowed.

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Fisheries

Daly v. The Minister for the Marine
Supreme Court: Keane C.J., Denham J., Murphy J., Geoghegan J., **Fennelly J.**
04/10/2001

Administrative; legitimate expectations; judicial review; EU Common Fisheries Policy; respondent operated a "replacement policy" requiring new entrants to the fishing fleet to demonstrate a ton for ton withdrawal from the register as a requirement to obtain a licence; as a result of that policy the tonnage assigned to a licensed vessel was a valuable commodity; appellant wished to sell tonnage of ship; consent of respondent was necessary for sale; letter from respondent to appellant offering licence subject to the condition that tonnage would be used for aquaculture purposes only, licence issued but did not state condition; appellant believed licence allowed demersal fishing; letter from respondent confirming view of appellant; letter issued in error; respondent refused to allow appellant to sell tonnage for replacement purposes; whether approach of trial judge that appellant did not have an expectation which was reasonable or legitimate for him to have correct; whether distinction between doctrines of legitimate expectation and promissory estoppel; whether second limb of promissory estoppel test, that other party

acted upon an unambiguous promise, altering his position to his detriment, satisfied by appellant.
Held: Appeal dismissed.

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SI 10/2002

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SI 644/2001

Continental shelf (designated areas) order, 2001
SI 657/2001

Fishing vessel (basic safety training) regulations, 2001
SI 587/2001

Fishing vessel (personal flotation devices) regulations, 2001
SI 586/2001

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SI 647/2001

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SI 24/2002

Freedom of Information

Deely v. The Information Commissioner
High Court: **McKechnie J.**
11/05/2001

Freedom of information; statutory interpretation; reasons for decisions; notice party had decided that appellant should be charged with road traffic offence; appellant seeks to invoke statutory provisions to obtain from notice party reasons for decision; whether interpretation of statutory provisions and documentation support view that reasons for decision should be given; whether common law right to reasons; whether a right to reasons because District Judge had directed that appellant should receive copies of statements made by intended witness at forthcoming trial; whether right to information extends to a requirement to give information which is contained in an exempt order; whether notice of refusal of request must mention public interest consideration; ss.18(2), 42(1), Freedom of Information Act, 1997
Held: Appeal dismissed.

Statutory Instrument

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SI 368/2001

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Planning

T.D.I. Metro Ltd. v. Judge Delap
Supreme Court: **Keane CJ., Geoghegan J., Hardiman J.**(*dissenting), Denham J., Murray J
05/07/2000

Planning; statutory interpretation; applicants had failed to comply with statutory obligation to obtain planning permission for development; whether planning authority can only prosecute for summary offence or whether it can also prosecute for indictable offences provided they are tried summarily; whether the expression "prosecuted summarily" should be interpreted narrowly so as to confine it to prosecution for summary offences; whether the declining of jurisdiction by District Court could have the effect of retrospectively rendering invalid the prosecution up to that point; s. 80, Local Government (Planning and Development) Act, 1963; s. 13, Local Government (Planning and Development) Act, 1982;
Held: Appeal allowed; order of *certiorari* of High Court set aside.

Fairyhouse Club Limited v. An Bord Pleanála
High Court: **Finnegan J.**
18/07/2001

Planning; substantial grounds; exempted development; applicant promoters of two day concert which at date of reference under s. 5, Local Government (Planning and Development) Act, 1963 was intended to be held on first named applicant's lands; applicants had also intended to hold further concerts at same venue in future; whether while issues in proceedings to an extent been overtaken by events, they are of practical consequence and accordingly not moot; whether substantial ground raised that respondent had no jurisdiction to decide on reference where event at date of decision had already taken place; whether substantial ground raised that respondent failed to provide any or any adequate statement of reasons for its decision; whether substantial ground raised that respondent's decision arbitrary, irrational and unreasonable; whether substantial ground raised that respondent took into account irrelevant considerations and/or matters in respect of which there was no or no sufficient evidence before it; whether substantial ground raised that respondent acted in breach of fair procedures by taking into account material in respect of which applicants were not afforded an opportunity to make submissions or to respond.
Held: Issues not moot; leave granted on one ground only i.e. that substantial ground raised that 1963 Act does not permit a reference by a person other than the developer or owner of the lands in question.

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Air pollution act, 1987 (licensing of industrial plant) (fees amendment) regulations, 2001
SI 575/2001

Local government (water pollution) (fees) regulations, 2001
SI 573/2001

Waste management (collection permit) regulations, 2001
SI 402/2001

Waste management (environmental levy) (plastic bag) regulations, 2001
SI 605/2001

Practice & Procedure

Murray v. Devil's Glen Equestrian Centre
Supreme Court: **Keane C.J.**,*(ex tempore)*
Murray J., Hardiman J.
07/03/2000

Practice and procedure; application to dismiss for want of prosecution; personal injuries; plaintiff had been injured in riding accident at defendants riding stables; plaintiff had issued plenary summons within statutory time limits, but had failed to issue statement of claim for further three and a half years; defendants had succeeded in having plaintiff's motion dismissed for want of prosecution; plaintiff seeks to appeal against this finding; whether delay inordinate and inexcusable; whether balance of justice in favour or against proceeding of case; whether fact that injuries had been relatively serious militates against striking out proceedings; whether defendants have suffered any prejudice owing to delay if action allowed to proceed.
Held: Appeal allowed.

Woolfson v. Healthcare Materials Management Board
High Court: **Finnegan J.**
29/06/2001

Practice and procedure; striking out application; applicant had sought review of an award of a contract to respondent on grounds *inter alia* that such award had breached EU law in relation to award of public supply contracts; respondent seeks to have applicant's application for such review struck out under inherent jurisdiction of court on basis applicant's claim cannot succeed; whether applicant's case, whether on agreed facts or on clear facts as established on affidavit, must fail.
Held: Relief refused.

Daly v. Limerick Corporation
High Court: **Morris P.**
11/07/2001

Practice and procedure; plaintiff seeks judgment in default of defence; plaintiff had issued Statement of Claim five years after issue of Plenary Summons; reply to Notice for Particulars had been issued four and a half years thereafter; whether plaintiff disentitled to relief in light of his prosecution of case to date; whether delay in delivering valid Statement of Claim, replying to Notice of Particulars or in processing case generally had been inordinate and inexcusable and of nature that if an application were to be brought by defendants to strike out plaintiff's case on grounds of delay it should be granted; whether court should extend time for

delivery of Statement of Claim; whether balance of justice requires court to find in favour of defendants.
Held: Relief refused.

Proceeds of Crime

McK v. C
Supreme Court: **Keane C.J.** *(ex tempore)*, Murray J., Fennelly J.
23/07/2001

Proceeds of crime; discovery; two appeals; in first appeal defendants seeking discovery from plaintiff in order to meet plaintiff's case relating to restraining disposal of their property, appointing a receiver over it and directing them to make full disclosure of means and income over last ten years; in second appeal application for discovery confined to two categories of document; whether in relation to first appeal, as discovery usually only arises once pleadings closed and as in this case no pleadings in strict sense, approach adopted by High Court judge subject to difficulty that it in effect imposes obligation on defendants to make specific plea to put before court information showing that properties legitimately acquired; whether High Court judge erred in holding that defendants in principle not entitled to discovery, as details of case not clear and so application is premature; whether in relation to second appeal High Court judge in error in treating application as premature and approaching it on basis that a further stage would be reached at which it could be said that pleadings could be regarded as closed.
Held: Appeals allowed; in relation to first appeal order of High Court set aside and matter remitted to High Court to be determined in the light of any further affidavits filed; in relation to second appeal, order granted in substitution for High Court order, requiring plaintiff to make discovery of documents referred to in notice of motion making clear that that would be an affidavit of discovery in the ordinary sense.

Criminal Assets Bureau v K.B.
High Court: **McCracken J.**
15/05/2001

Proceeds of crime; practice and procedure; defendant seeks to have plaintiff's proceedings for final judgment against defendant dismissed, stayed or remitted for plenary hearing; whether plaintiff has complied with all necessary technical proofs; whether reasonable probability of defendant having real and *bona fide* defence and of matters arising unable to be determined other than by way of plenary hearing.
Held: Proceedings not struck out; matter remitted for plenary hearing.

Property

Library Acquisitions

Fisher and lightwood's law of mortgage
Clark, Wayne
11th ed
London Butterworths 2002
N56.5

Stamp duty conveyances and leases of residential property Finance (no.2) act, 2000
Revenue Commissioners
[Dublin] Revenue Commissioners 2000 filed in black folder behind the desk
M337.5.C5

Road Traffic

Article

Driving under the influence of an intoxicant in Ireland
Flynn, K J
Harrington, G
7 (2001) MLJI 86

Sentencing

Article

Principles of sentencing: some recent developments
O'Malley, Thomas
1(1) 2001 JSIJ 50

Shipping

Library Acquisition

Kennedy and Rose the law of salvage
Rose, Francis D
Steel The Hon. Sir, David
Shaw, Richard A A
6th ed
London Sweet & Maxwell 2002
N334

Statutory Instruments

Licensing of passenger boats (exemption) (number 2) regulations, 2001
SI 631/2001

Merchant shipping (training and certification) (amendment) regulations, 2001
SI 629/2001

Social Welfare

Statutory Instruments

Social welfare (consolidated payments provisions) (amendment) (no. 6) (widowed parent grant) regulations, 2001
SI 548/2001

Social welfare (temporary provisions) regulations, 2001
SI 532/2001

Social welfare (consolidated contributions and insurability) (amendment) (No. 6) (Euro) regulations, 2001
SI 613/2001

Social welfare (consolidated payments provisions) (amendment) (no. 7) (euro) regulations, 2001
SI 614/2001

Social welfare (consolidated payments provisions) (amendment) (no.8) (increase in rates) regulations, 2001
SI 650/2001

Social welfare (consolidated supplementary welfare allowance) (amendment) (no.1) (Income disregards) regulations, 2001
SI 653/2001

Social welfare (liable relative) (amendment) (euro) regulations, 2001
SI 615/2001

Social welfare (occupational injuries) (amendment) (no.1) (euro) regulations, 2001
SI 617/2001

Social welfare (occupational injuries) (amendment) (no. 2) regulations, 2001
SI 652/2001

Social welfare (rent allowance) (amendment) (no.1) (euro) regulations, 2001
SI 616/2001

Social welfare (rent allowance) (amendment) (no. 2) regulations, 2001
SI 651/2001

Social welfare (transitional arrangements) (alignment of income tax year with calendar year) regulations, 2001
SI 654/2001

Social welfare act, 2001 (section 37(6)) (commencement) order, 2001
SI 618/2001

Solicitors

Fitzpatrick, In re
Supreme Court: **Keane C.J.,**(*ex tempore*)
McGuinness J., Hardiman J.
13/03/2000

Solicitors; striking off roll of solicitors; appellant had been struck from roll of solicitors for serious offences against disciplinary requirements of profession; whether sanction had been too severe; whether sanction entailed being struck off for life; whether appellant entitled to apply to have his name restored to roll in compliance with statutory provisions; whether Court could order that sanction only last for a specified number of years; s. 10, Solicitors (Amendment) Act, 1960; s.19, Solicitors (Amendment) Act, 1994.
Held: Appeal dismissed; jurisdiction to restore solicitor to roll solely and exclusively vested in High Court.

Statutory Instruments

Solicitors acts, 1954 to 1994 solicitors (practising certificate 2002 fees) regulations, 2001
SI 634/2001

Solicitors acts, 1954 to 1994 solicitors (practising certificate 2002) regulations, 2001
SI 635/2001

Sports

Dundalk A.F.C. v. F.A.I. National League
High Court: **Finnegan J.**
02/05/2000

Sports; contract; registration of players; authorisation to sign registration form; deduction of league points; notice party, Kilkenny City F.C., had been deducted three points by defendant for fielding allegedly unregistered player in a particular league match; notice party had instituted proceedings against defendant seeking to have decision to deduct points quashed; matter had been referred to arbitrator, who had decided that particular match should be replayed; notice party had won match, thus regaining lost points; this had resulted in notice party, and not plaintiff, qualifying for promotion play-off match; plaintiff seeks to have original decision to deduct three points from notice party upheld; whether rules of defendant, by which both plaintiff and notice party are bound, permit the referral of disputes over the registration of players to an arbitrator; whether allegedly unregistered player had been eligible to play as a properly registered player in initial match; whether Manager of notice party had been properly authorised to sign registration form on player's behalf; whether defendant's rules should be construed so as to require a personal signature; whether signature had been properly witnessed.
Held: Application dismissed.

Taxation

Article

Tax appeal hearings
Goodman, Aoife
7(2) 2001 BR 63

Library Acquisition

Stamp duty conveyances and leases of residential property Finance (no.2) act, 2000
Revenue Commissioners
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Statutory Instruments

Capital gains tax (multipliers) (2002) regulations, 2002
SI 1/2002

Finance act, 2001 (section 57) (commencement) order, 2001
SI 596/2001

Income tax (employments) (consolidated) regulations, 2001
SI 559/2001

Mortgage interest (relief at source) regulations, 2001
SI 558/2001

Value-added tax (imported goods) (amendment) regulations, 2001
SI 628/2001

Torts

Article

Is European products liability more protective than the restatement (third) of torts: products liability?
Pelly, Niall
2001 ILT 314 [part 1]
2002 ILT 9 [part 2]

Library Acquisition

The law of tort
Grubb, Andrew
London Butterworths 2002
N30

Trade Union

Library Acquisition

Trade union and industrial relations acts
Kerr, Anthony
2nd ed
Dublin Round Hall Ltd. 2001
N195.C5

Transport

Statutory Instruments

Licensing of passenger boats (exemption) (number 2) regulations, 2001
SI 631/2001

Transport (railway infrastructure) act, 2001 (part 2) (establishment day) order, 2001.
SI 649/2001

Tribunals of Inquiry

The Irish Haemophilia Society Ltd v. Lindsay
High Court: **Kelly J.**
16/05/2001

Tribunals of inquiry; evidence; legal professional privilege; applicant seeks leave to apply for judicial review; whether applicant has demonstrated an arguable case that respondent had been wrong in concluding that affidavit of discovery in the form presented had been correct and sufficient to establish legal professional privilege claimed by notice party; whether arguable case that respondent had reversed onus of proof; whether respondent correctly satisfied as to claim to legal professional privilege; whether respondent had been wrong in law and misdirected itself in refusing to carry out an inspection of the documents set forth in affidavit of discovery.
Held: Leave refused; respondent's decision affirmed that claim of legal professional privilege made by notice party had been properly made.

Wills

Library Acquisitions

Tristram and Coote's probate practice
Winegarten, J I
D'Costa, R
Synak, T
29th ed
London Butterworths 2001
N127

Williams on wills
8th ed
London Butterworths 2002
Volume 2 and Disk due Jan 2002
N125

AT A GLANCE

Court Rules

Ballina urban district boundary alteration order, 2001
SI 603/2001

Ballina urban district boundary alteration (supplementary) order, 2001
SI 604/2001

Castlebar urban district boundary alteration order, 2001
SI 638/2001

Castlebar urban district boundary alteration (supplementary) order, 2001
SI 639/2001

Circuit court (fees) (no.3) order, 2001
SI 598/2001

Rules of the superior courts (no.4) (euro changeover), 2001
SI 585/2001

Westport urban district boundary alteration order, 2001
SI 601/2001

Westport urban district boundary alteration (supplementary) order, 2001
SI 602/2001

European Directives implemented in to Irish Law up to 8/3/2002

Information compiled by Venessa Curley & Eve Moloney, Law Library, Four Courts.

Diseases of animals act, 1966 (classical swine fever) (restriction on imports from Spain) (no.2) order 2001 (amendment) order, 2002
SI 5/2002
DIR 2001/925

Diseases of animals act 1966 (foot-and-mouth disease) (restriction on imports from the United Kingdom) (No. 3) order, 2001
SI 6/2002
DIR 2001/740, 2001/763, 2001/789, 2001/848, 2001/911, 2001/938

European communities (welfare of calves and pigs) regulations, 2002
SI 7/2002
DIR 91/629, 91/630, DIR 97/2 [DEC 97/182/EC]

European communities (award of public supply contracts) (amendment) regulations, 2001
SI 611/2001
DIR 93/36/EEC
DIR 97/52/EC

European communities (award of public works contracts) (amendment) regulations, 2001
SI 612/2001
DIR 93/37/EEC
DIR 97/52/EC

European communities (cereal seed) regulations, 2001
SI 640/2001
DIR 66/402

European communities (data protection) regulations, 2001
SI 626/2001
DIR 95/46

European communities (guidelines for the assessment of additives in animal nutrition) (amendment) regulations, 2001
SI 556/2001
DIR 87/153, 2001/79

European communities (hallmarking of articles imported from other member states) regulations, 2001
SI 579/2001

European communities (processed animal products) (amendment) regulations, 2001
SI 553/2001
DEC 2001/165, DEC 2000/766, DEC 2001/9

European communities (supplementary protection certificate) (amendment) regulations, 2001
SI 648/2001
Council Regulation (EEC) No. 1768/92

European communities (pesticide residues) (foodstuffs of animal origin) (amendment) (no. 3) regulations, 2001
SI 620/2001 (made under various Directives see SI)

European communities (pesticide residues) (products of plant origin, including fruit and vegetables) regulations, 2001
SI 621/2001 (made under various Directives see SI)

European communities (pesticide residues) (cereals) (amendment) (no. 3) regulations, 2001
SI 622/2001 (made under various Directives see SI)

European communities (authorisation, placing on the market, use and control of plant protection products) (amendment) (no.4) regulations, 2001
SI 623/2001 (made under various Directives see SI)

European communities (classification, packaging and labelling of plant protection products and biocide products) regulations, 2001
SI 624/2001 (made under various directives see SI)

European communities (authorisation, placing on the market, use and control of biocidal products) regulations, 2001
SI 625/2001
DIR 98/8

European communities (noise emission by equipment for use outdoors) regulations, 2001
SI 632/2001
DIR 2000/14

Safety, health and welfare at work (chemical agents) regulations, 2001
SI 619/2001
DIR 98/24
DIR 2000/39

Acts of the Oireachtas 2001

Information compiled by Damien Grenham, Law Library, Four Courts.

1/2001	Aviation Regulation Act, 2001 Signed 21/02/2001 SI 47/2001 (Establishment Day)
2/2001	Customs And Excise (Mutual Assistance) Act, 2001 Signed 09/03/2001
3/2001	Diseases Of Animals (Amendment) Act, 2001 Signed 09/03/2001
4/2001	Broadcasting Act, 2001 Signed 14/03/2001
5/2001	Social Welfare Act, 2001 Signed 23/03/2001 S.I. 243/2001 = Part 5 Commencement. S.I. 244/2001 = S.38 Commencement.
6/2001	Trustee Savings Banks (Amendment) Act, 2001 Signed 28/03/2001
7/2001	Finance Act, 2001 Signed 30/03/2001 S.I. 212/2001 = Commencement Of S169
8/2001	Teaching Council Act, 2001 Signed 17/04/2001
9/2001	Electricity (Supply) (Amendment) Act, 2001 Signed 17/04/2001
10/2001	Housing (Gaeltacht) (Amendment) Act, 2001 Signed 23/04/2001

11/2001 Industrial Relations (Amendment) Act, 2001
Signed 29/05/2001
S.I. 232/2001 = Commencement

12/2001 Acc Bank Act, 2001
Signed 29/05/2001
S.I. 278/2001 = Commencement

13/2001 Valuation Act, 2001
Signed 04/06/2001

14/2001 Health (Miscellaneous Provisions) Act, 2001
Signed 05/06/2001
S.I. 305/2001= Commencement
S.I. 344/2001 = Commencement (No.2)

15/2001 Irish Nationality And Citizenship Act, 2001
Signed 05/06/2001

16/2001 Euro Changeover (Amounts) Act 2001
Signed 25/06/2001

17/2001 Health Insurance (Amendment) Act, 2001
Signed 27/06/2001

18/2001 Sex Offenders Act 2001
Signed 30/06/2001
S.I. 426/2001 = Commencement

19/2001 Carer's Leave Act, 2001
Signed 02/07/2001

20/2001 Horse And Greyhound Racing Act, 2001
Signed 02/07/2001

21/2001 Nitrigin Eireann Teoranta Act, 2001
Signed 03/07/2001

22/2001 Motor Vehicle (Duties And Licences) Act,2001
Signed 03/07/2001

23/2001 Vocational Education (Amendment) Act, 2001
Signed 05/07/2001

24/2001 Children Act, 2001-07-31
Signed 08/07/2001

25/2001 Mental Health Act, 2001
Signed 31/07/2001

26/2001 Irish National Petroleum Corporation Limited Act, 2001
Signed 09/07/2001

27/2001 Prevention Of Corruption (Amendment) Act, 2001
Signed 09/07/2001

28/2001 Company Law Enforcement Act, 2001
Signed 09/07/2001
S.I. 438/2001 = Commencement (No.2) Order.

29/2001 Agriculture Appeals Act, 2001
Signed 09/07/2001

30/2001 Oireachtas (Ministerial And Parliamentary Offices) (Amendment) Act, 2001
Signed 14/07/2001

31/2001 Standards In Public Office Act, 2001
Signed 14/07/2001

32/2001 Dormant Accounts Act, 2001
Signed 14/07/2001

33/2001 Ministerial, Parlimamentary And Judicial Offices And Oireachtas Members (Miscellaneous Provisions) Act, 2001-08-20
Signed 16/07/2001

34/2001 Adventure Activities Standards Authority Act, 2001-08-20
Signed 16/07/2001

35/2001 Human Rights Commission (Amendment) Act, 2001
Signed 16/07/2001

36/2001 Waste Management (Amendment) Act, 2001
Signed 17/07/2001

37/2001 Local Government Act, 2001
Signed ?

38/2001 Electoral (Amendment) Act, 2001
Signed 24/10/2001

39/2001 Industrial Designs Act, 2001
Signed 27/11/2001

40/2001 Fisheries (Amendment) Act, 2001
Signed 27/11/2001

41/2001 European Communities And Swiss Confederation Act, 2001
Signed 01/12/2001

42/2001 Youth Work Act, 2001
Signed 01/12/2001

43/2001 Ordnance Survey Ireland Act, 2001-12-13
Signed 05/12/2001

44/2001 Heritage Fund Act, 2001
Signed 10/12/2001

45/2001 Protection Of Employees (Part-Time Work) Act,2001
Signed 15/12/2001

46/2001 Horse Racing Ireland (Membership) Act, 2001
Signed 18/12/2001

47/2001 Asset Covered Securities Act, 2001
Signed 18/12/2001

48/2001 Air Navigation And Transport (Indemnities) Act, 2001

49/2001 Extradition (European Union Conventions) Act, 2001
Signed 19/12/2001

50/2001 Criminal Justice (Theft And Fraud Offences) Act, 2001
Signed 19/12/2001

51/2001 Social Welfare (No.2) Act, 2001
Signed 20/12/2001

52/2001 Appropriation Act, 2001
Signed 20/12/2001

53/2001 Referendum Act, 2001
Signed 22/12/2001

54/2001 Family Support Agency Act, 2001
Signed 22/12/2001

55/2001 Transport (Railway Infrastructure) Act, 2001
Signed 23/12/2001

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

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

Bills in progress up to 07/03/2002

Information compiled by Damien Grenham, Law Library, Four Courts.

Activity centres (young persons' water safety) bill, 1998
2nd stage - Dail [p.m.b.]

Aer Lingus bill, 2000
2nd stage - Dail (Initiated in Seanad)

Appropriation bill, 2001
1st stage - Dail

Arramara teoranta (acquisition of shares) bill, 2001
1st stage - Dail

Care of persons board bill, 2001
2nd stage - Dail

Censorship of publications (amendment) bill, 1998
2nd stage - Dail [p.m.b.]

Central bank (amendment) bill, 2000
2nd stage - Seanad (Initiated in Seanad)

Children bill, 1996
Committee - Dail

Civil defence bill, 2002
1st stage - Dail

Companies (amendment) bill, 1999
2nd stage - Dail [p.m.b.]

Competition bill, 2001
2nd stage - Dail (initiated in Seanad)

Companies (amendment) (no.4) bill, 1999
2nd stage - Dail [p.m.b.]

Communications regulation bill, 2002
1st stage - Seanad

Containment of nuclear weapons bill, 2000
Committee - Dail (Initiated in Seanad)

Control of wildlife hunting & shooting (non-residents firearm certificates) bill, 1998
2nd stage - Dail [p.m.b]

Corporate manslaughter bill, 2001
2nd stage - Dail [p.m.b.]

Courts bill, 2000
2nd stage - Dail

Courts bill, 2002
1st stage - Dail

Courts and court officers bill, 2001
1st stage - Dail

Criminal justice (illicit traffic by sea) bill, 2000
1st stage - Dail

Criminal justice (temporary release of prisoners) bill, 2001
1st stage -Dail

Criminal law (rape) (sexual experience of complainant) bill, 1998
2nd stage - Dail [p.m.b.]

Data protection (amendment) bill, 2002
1st stage- Seanad

Digital hub development agency bill, 2002
1st stage - Seanad

Disability bill, 2001
1st stage - Dail

Disability commissioner bill, 2001
1st stage - Seanad

Disability commissioner (no.2) bill, 2001
2nd stage - Dail [p.m.b.]

Dumping at sea (amendment) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Eighteenth amendment of the Constitution bill, 1997
2nd stage - Dail [p.m.b.]

Electoral (amendment) (donations to parties and candidates) bill, 2000
Committee - Dail [p.m.b.]

Electoral (control of donations) bill, 2001
2nd stage - Dail [p.m.b.]

Electricity regulation (amendment) bill, 2002
1st stage - Dail

Employment rights protection bill, 1997
2nd stage - Dail [p.m.b.]

Energy conservation bill, 1998
2nd stage - Dail [p.m.b.]

Equal status bill, 1998
2nd stage - Dail [p.m.b]

European convention on human rights bill, 2001
Committee - Dail

European union bill, 2001
Committee - Dail

Family law bill, 1998
2nd stage - Seanad

Finance bill, 2002
Report - Dail

Fisheries (amendment) (no.2) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Freedom of information (amendment) bill, 2000
2nd stage - Dail [p.m.b.]

Gas (interim) (regulation) bill, 2001
2nd stage - Dail (Initiated in Seanad)

Harbours (amendment) bill, 2000
Committee - Seanad

Health (miscellaneous provisions) (no.2) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Health insurance (amendment) bill, 2000
Committee - Dail

Health Ombudsman bill, 2001
2nd stage - Dail

Home purchasers (anti-gazumping) bill, 1999
1st stage - Seanad

Housing (miscellaneous provisions) bill, 2001
2nd stage -Dail

Housing (miscellaneous provisions) (no.2) bill, 2001
2nd stage - Dail

Human reproduction bill, 2001
1st stage - Dail

Human rights bill, 1998
2nd stage - Dail [p.m.b.]

Immigration bill, 2002
1st stage - Seanad

Independent Garda Ombudsman bill, 2001
2nd stage - Dail

Interpretation bill, 2000
1st stage - Dail

Irish nationality and citizenship bill, 1999
Report - Dail (Initiated in Seanad)

Landlord and tenant (ground rent abolition) bill, 2000
2nd stage - Dail [p.m.b.]

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

Licensed premises (opening hours) bill, 1999
2nd stage - Dail [p.m.b.]

Licensing of indoor events bill, 2001
1st stage - Dail

Local government (no.2) bill, 2000
2nd stage - Seanad (Initiated in Dail)

Local Government (planning and development) (amendment) bill, 1999
Committee - Dail

Local Government (planning and development) (amendment) (No.2) bill, 1999
2nd stage - Seanad

Local government (Sligo) bill, 2000
2nd stage -Dail [p.m.b.]

Mental health (amendment) bill, 2001
2nd stage - Seanad

Ministerial, parliamentary and judicial offices and oireachtas members (miscellaneous provisions) bill, 2001

National stud (amendment) bill, 2000
Committee - Dail

Official secrets reform bill, 2000
2nd stage - Dail [p.m.b.]

Ombudsman (defence forces) bill, 2002
1st stage - Dail

Ombudsman for children bill, 2002
Report - Seanad

Organic food and farming targets bill, 2000
2nd stage - Dail [p.m.b]

Partnership for peace (consultative plebiscite) bill, 1999
2nd stage - Dail [p.m.b.]

Patents (amendment) bill, 1999
Committee - Dail

Pensions (amendment) bill, 2001
Report- Seanad

Postal (miscellaneous provisions) bill, 2001
1st stage -Dail

Prevention of corruption bill, 2000
2nd stage - Dail [p.m.b.]

Private security services bill, 1999
2nd stage- Dail [p.m.b.]

Private security services bill, 2001
1st stage - Dail

Proceeds of crime (amendment) bill, 1999
Committee - Dail

Prohibition of ticket touts bill, 1998
Committee - Dail [p.m.b.]

Prohibition of female genital mutilation bill, 2001
2nd stage - Dail [p.m.b.]

Protection of patients and doctors in training bill, 1999
2nd stage - Dail [p.m.b.]

Protection of workers (shops) (no.2) bill, 1997
2nd stage - Seanad

Public health (tobacco) bill, 2001
Report - Dail

Public representatives (provision of tax clearance certificates) bill, 2000
2nd stage - Dail [p.m.b.]

Pyramid schemes bill, 2001
1st stage - Dail

Radiological protection (amendment) bill, 1998
Report- Dail (Initiated in Seanad)

Railway safety bill, 2001
1st stage - Dail

Refugee (amendment) bill, 1998
2nd stage - Dail [p.m.b.]

Registration of births bill, 2000
2nd stage - Dail

Registration of lobbyists bill, 1999
1st stage - Seanad

Registration of lobbyists (no.2) bill 1999
2nd stage - Dail [p.m.b.]

Regulation of assisted human reproduction bill, 1999
1st stage - Seanad [p.m.b.]

Residential institutions redress bill, 2001
2nd stage - Seanad (Initiated in Dail)

Road traffic (Joyriding) bill, 2000
2nd stage - Dail [p.m.b.]

Road traffic bill, 2001
Committee -Dail

Road traffic reduction bill, 1998
2nd stage - Dail [p.m.b.]

Safety health and welfare at work (amendment) bill, 1998
2nd stage - Dail [p.m.b.]

Safety of United Nations personnel & punishment of offenders bill, 1999
2nd stage - Dail [p.m.b.]

Seanad electoral (higher education) bill, 1997
1st stage - Dail [p.m.b.]

Seanad electoral (higher education) bill, 1998
1st stage - Seanad [p.m.b.]

Sea pollution (amendment) bill, 1998
Committee - Dail

Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000
2nd stage - Dail

Sex offenders bill, 2000
Report - Dail

Shannon river council bill, 1998
Committee - Seanad

Social welfare (miscellaneous provisions) bill, 2002
Committee - Dail

Solicitors (amendment) bill, 1998
Committee - Dail [p.m.b.] (Initiated in Seanad)

State authorities (public private partnership arrangements) bill, 2001
2nd stage - Seanad (Initiated in Dail)

Statute law (restatement) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Statute of limitations (amendment) bill, 1999
2nd stage - Dail [p.m.b.]

Succession bill, 2000
2nd stage - Dail [p.m.b.]

Surgeon General bill, 2001
2nd stage - Dail

Sustainable energy bill, 2001
Report -Dail (Initiated in Seanad)

Telecommunications (infrastructure) bill, 1999
1st stage - Seanad

Tobacco (health promotion and protection) (amendment) bill, 1999
Committee -Dail [p.m.b.]

Trade union recognition bill, 1999
1st stage - Seanad

Tribunals of inquiry (evidence) (amendment) (no.2) bill, 1998
2nd stage - Dail [p.m.b.]

Tribunals of inquiry (amendment) bill, 2001
2nd stage - [p.m.b.]

Twentieth amendment of the Constitution bill, 1999
2nd stage - Dail [p.m.b.]

Twenty- first amendment of the constitution bill, 1999
2nd stage - Dail [p.m.b.]

Twenty-first amendment of the constitution (no.2) bill, 1999
2nd stage - Dail [p.m.b.]

Twenty- first amendment of the constitution (no.3) bill, 1999
2nd stage - Dail [p.m.b.]

Twenty- first amendment of the constitution (no.4) bill, 1999
2nd stage - Dail [p.m.b.]

Twenty- first amendment of the constitution (no.5) bill, 1999
2nd stage - Dail [p.m.b]

Twenty-first amendment of the constitution bill, 2001
2nd stage - Dail [p.m.b.]

Twenty- first amendment of the constitution (no.2) bill, 2001
2nd stage - Seanad

Twenty-second amendment of the constitution bill, 2001
Committee - Dail

Twenty-third amendment of the constitution bill, 2001
Committee - Seanad

Twenty- fourth amendment of the constitution bill, 2001
2nd stage -Dail

Twenty- fifth amendment of the constitution bill, 2001
2nd stage - Dail [p.m.b.]

Twenty-fifth amendment of the constitution (protection of human life in pregnancy) bill, 2001
Committee - Dail

Udaras na gaeltachta (amendment)(no.3) bill, 1999
Report - Dail

UNESCO national commission bill, 1999
2nd stage - Dail [p.m.b.]

Victims rights bill, 2002
2nd stage - Dail

Waste management (amendment) bill, 2001
1st stage - Dail

Waste management (amendment) (no.2) bill, 2001
Report (Initiated in Seanad)

Whistleblowers protection bill, 1999
Committee - Dail

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

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

Abbreviations

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

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

situations of violence. Humanitarian law does not just bind state armed groups - other armed groups and individuals belonging to them are also bound by its provisions.[28] The application of such principles in non-international armed conflicts in not linked to the legitimacy of armed groups.[29]

The ICRC position is that humanitarian law principles, recognised as part of customary international law, are binding upon all states and all armed forces present in situations of armed conflicts.[30] In recent years various Security Council resolutions have called upon "all the parties to the conflict" to respect international humanitarian law.[31] However, in situations where that law does not apply, pending the establishment of the International Criminal Court (ICC), the international accountability of such groups for human rights abuses remains unclear (though such acts would be criminalised under domestic criminal law).[32]

The International Court of Justice in the *Advisory Opinion on Nuclear Weapons* looked at the relationship between international humanitarian law and human rights law.[33] The Court affirmed that they are two distinct bodies of law, and that human rights law continues to apply in time of war unless a party has lawfully derogated from them. It went on to state the relevance of humanitarian law:

> "In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the appropriate *lex specialis*, namely the law applicable in armed conflict."[34]

The effect of this is that international humanitarian law is to be used to interpret a human rights rule, and, conversely in the context of the conduct of hostilities, human rights law may not be interpreted differently from humanitarian law.[35] In this way there has been a significant overlap and convergence in humanitarian and human rights law, and the strict separation of the two is not always conducive to providing the maximum protection to victims.

Prisoners of War and the Geneva Conventions

Common Article 2 of the Conventions states that the Conventions apply "to all cases of declared war or any other armed conflict which may arise between one or more High Contracting Parties."[36] This was intended to cover as broad a range of armed conflict as possible.

The Third Geneva Convention of 1949 governs the treatment of prisoners of war. This applies to situation of international armed conflict such as occurred in Afghanistan with the commencement of military operations by the United States against the Taliban and Al Qaeda organisation. During World War II the treatment of allied forces captured by the Japanese was appalling, and so too was the treatment by German forces of captured Russians on the eastern front. The latter reflected a German policy that encouraged a view that Russians were in some way sub human or "Unter menschen". This was part of a broader policy to dehumanise the Slavs and others in order to justify the treatment meted out to civilians and captured soldiers. These and similar atrocities led to the adoption in 1949 of the Third Geneva Convention Relative to the Treatment of Prisoners of War.

This Third Geneva Convention contains one hundred and forty three articles and a number of annexes. It attempts to legislate for every facet of the prisoner of war regime, and to provide for all the situations and contingencies that arose for prisoners of war during World War II. While essential to provide for the proper treatment and safety of such prisoners, some administrative measures in the Third Convention could be dispensed with without seriously impacting on the life and well being of prisoners of war.[37]

However, the fundamental question for determination in the first place is entitlement to prisoner of war status. It is this question that is at the heart of the controversy regarding the status of captured Taliban and Al Qaeda fighters currently detained in Guantanamo Bay by the United States. Article 4 of the Third Geneva Convention was discussed at length during the Diplomatic Conference in 1949 that led to the adoption of the Geneva Conventions. It was considered essential that the text be explicit and easy to understand. This was to avoid the problems that arose with regard to partisan fighters during World War II, and to leave no doubt as to the categories of combatants covered by the Third Convention.

Unfortunately, the Geneva Conventions are not always as open to unambiguous interpretation as some commentators would suggest. However, adopting a broad purposive approach to interpretation, the key question is whether the Taliban and Al Qaeda fighters distinguished themselves from Afghan civilians? Although locating these fighters was obviously a problem, it has never been claimed that they were indistinguishable from the ordinary population. This, and the clear organisational and command structure of both groups, favours their categorisation as prisoners of war in accordance with the provisions of the Convention. It is also consistent with the spirit of the Conventions.

"It has been argued that article 4 of the Third Geneva Convention was never intended to include persons participating in a conflict of the kind taking place in Afghanistan, and indeed that the Geneva Conventions are obsolete in this context. This is neither factually nor legally correct. The Taliban fighters belonged to an organised armed group with a chain of command and the other characteristics of an armed force."

The category of fighter entitled to claim the privilege of prisoner of war status was expanded upon in the 1977 Additional Protocol I to the Geneva Conventions. This supplemented the Third Convention, mainly by its elaboration of who is, and who is not, entitled to the status of combatant and prisoner or war, and by providing further fundamental guarantees under article 75 that lay down several minimum rules of protection for the benefit of all those who find themselves in time of armed conflict in the power of a Party to the conflict.[38] It reiterated the general rule that although combatants are obliged to comply with international humanitarian law, violations of those laws shall not deprive combatants of their status as combatants or of their right to be prisoners of war.

This was a provision the United States was most anxious to ensure was included in the Additional Protocol owing to its own experience in Korea and Vietnam, where United States military personnel captured by the enemy were deprived of prisoner of war status on the grounds that they had committed war crimes.[39] Under the Third Geneva Convention and the Additional Protocol, prisoners of war may still be tried by a competent court or tribunal for crimes. However, this is not a reason to deny them prisoner of war status in the first place. In fact, the Conventions are specifically intended to protect prisoners and detainees from mistreatment in those circumstances. Although the United States has not ratified Additional Protocol I, many of its provisions are considered to be part of customary international law and therefore binding on all states.

Who is a combatant?

The definite link between combatant and prisoner of war status is one of the fundamental principles of international humanitarian law.[40] The question of who is a combatant is the key to determining whether a person participating in hostilities can be deemed a lawful combatant, and is entitled to be considered a prisoner of war under the Geneva Conventions.

The key to the Third Geneva Convention is article 4, since it defines the people who are entitled to prisoner of war status.[41] The general principle is the following: any member of the armed forces of a Party to a conflict is a combatant and any combatant captured by an adverse Party is a prisoner of war. Under the terms of article 4 a combatant is:

> - a member of the armed forces of a party to the conflict *as well as members of militias or volunteer corps forming part of such armed forces* (emphasis added);
> and, respecting the obligation to distinguish himself/herself from the civilian population.[42]

There are other categories of persons entitled to combatant status, who if captured must be accorded the status and rights of prisoners of war. These include, *inter alia*, captured members of irregular forces who are under responsible command, who wear or have a fixed distinctive sign, carry arms openly and respect international humanitarian law.[43]

It has been argued that article 4 was never intended to include persons participating in a conflict of the kind taking place in Afghanistan, and indeed that the Geneva Conventions are obsolete in this context.[44] This is neither factually nor legally correct. The Taliban fighters belonged to an organised armed group with a chain of command and the other characteristics of an armed force. The Al Qaeda and Taliban could not have sustained a campaign against the United States forces unless military structures were in place. In fact, the initial target of United States bombing was said to be the command and control facilities and the military infrastructure of these forces.

There is little in the way of accurate and objective intelligence information coming out of Afghanistan that can be relied upon, but it is evident from the fighting and related events that the Taliban and Al Qaeda organisation presented formidable enemies. Although the Al Qaeda fighters are more problematic than the Taliban military organisation, there is a clear reference in article 4 to volunteer groups forming part of an armed force belonging to a Party to the conflict.

It had been proposed at the drafting stage that the mention of militias or volunteer corps forming part of an armed conflict should be deleted, as these were covered by the expression "armed forces". However, this was not accepted when it was pointed out that certain countries still had militias or volunteer corps that, although part of the armed forces, were quite distinct from the army as such.[45] The mention of militias and volunteer forces was therefore maintained as it appeared in the earlier Hague regulations. It is very likely that the drafters of the Convention did not have in mind armed groups such as the Taliban and Al Qaeda. But this does not preclude an interpretation of the text that encompasses the fighters engaged in armed conflict with United States and other forces in Afghanistan.

The application of all four Conventions is determined by the existence of an armed conflict. The nature of the armed conflict will in turn determine the legal regime that will govern. Some international humanitarian law rights and obligations will apply regardless of the nature of the conflict,[46] e.g., the prohibition against torture, while others such as prisoner of war status and the combatants privilege apply only in international armed conflicts. The old just war theory has no relevance or application in this context, and all parties to an armed conflict, irrespective of the reasons for their involvement, are bound to abide by the principles of international humanitarian law.

As the United States did not recognise the Taliban government in Afghanistan, it has been argued that Taliban fighters are not entitled to prisoner of war status.[47] However, Article 4(A)(3) of the Third Convention makes it clear that recognition of a government is irrelevant to the determination of prisoner of war status.[48] Members of regular armed forces who profess allegiance to a government or an authority not recognised by the detaining power must still be afforded prisoner of war status. This makes the issue of recognition of the Taliban regime irrelevant to the determination of the status of their armed forces, and these forces are not required to satisfy criteria in addition to Article 4 (A)(3).

The ultimate aim of the rules of international humanitarian law is to ensure that humanitarian principles are upheld in situations of armed conflict, and that the categories of persons in need of protection can be identified and afforded the appropriate status and treatment in accordance with the relevant Convention. If a common sense approach is adopted to take account of the unconventional nature of contemporary situations of conflict, then it is submitted that the Taliban and

Al Qaeda organisation is, *prima facie*, of the kind envisaged under article 4. When there is doubt, the matter should be determined by a tribunal in accordance with article 5.

Additional Protocol 1 sought to solve many of the problems associated with article 4 of the Third Convention by providing an entirely novel approach to the question of defining "armed forces" and "combatants".[49] The definition of "armed forces" in Article 43, paragraph 1, reads as follows;

> "The armed forces of a Party to the conflict shall consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recoginzed by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."

This definition does not distinguish between regular armed forces of states, and the more loosely organised guerrilla or militia type armed groups found in contemporary armed conflicts. If the armed force or group is under a responsible command, has some degree of organisation, and an internal disciplinary system, then it will qualifiy for combatant status. The effect of Protocol 1 is to put all armed forces that meet these minimal conditions on an equal footing. In order to retain the status of combatant, and qualify for prisoner of war status, it is imperative to meet the obligation in Article 44 to distinguish oneself from civilians while engaged in the preparation or execution of a military operation.[50] Although these articles expand the definition of combatant to encompass groups not envisaged under the Third Convention, it is probable that they do not represent customary international law owing to objections by states to these provisions.[51] Conversely, nor can this development be considered a charter for terrorists, as acts committed by combatants contrary to international humanitarian law remain punishable, not by loss of prisoner of war status, but by criminal sanctions.[52]

United States Policy re Taliban and Al Qaeda fighters

A 1980 United States Department of Defence publication for the use of military personnel - *Prisoners of War: Rights and Obligations under the Geneva Convention* - refers to the leading role the United States has played among the world's nations in developing and expanding the rights and responsibilities of prisoners of war and their captors.[53] Fear of mistreatment is the greatest single deterrent to surrender. Furthermore, atrocities embitter and strengthen the will of the enemy, encouraging prolonged resistance. The publication appeals to the self-interest of military personnel, and the possibility that they too may be prisoners of war seeking humane treatment some day.

However, it is the paragraph dealing with the "Enemy in Your Hands" that is most enlightening. It states that the United States requires its military forces to obey the Geneva Conventions and that this has been the policy even when the enemy has blatantly violated the Conventions and has refused prisoner of war status to captured Americans. Even in such circumstances, it says that the United States has found it better to continue to apply the Geneva Conventions rather that descend to the enemy's level. It calls on all United States personnel to "treat anyone you capture humanely and in accordance with the Conventions."[54] Later, under the heading "Making the Convention Work", the document acknowledges that full compliance with the Third Geneva Convention is not always easy, especially in the heat of battle. Nevertheless, the United States expects compliance by all its military service personnel as its national reputation and the well being of its soldiers are at stake.

This publication was issued by the United States Secretary of Defense some twenty years ago, and one can only speculate as to what the current Secretary, Donald Rumsfeld, would make of his predecessor instructions. Under Common Article 1 of the Third Conventions, the United States has agreed to "respect and ensure respect for the Convention in all circumstances."[55]

Adherence to the Geneva Convention will not preclude charges of war crimes or other serious offences being brought against individuals detained, if evidence is available to support such charges. The Conventions do not require placing detainees in luxury cells or ignoring the security threat that such prisoners may continue to pose even in captivity. It merely requires according them the basic human rights that the bitter experience of past conflicts has led the majority of states to conclude is appropriate. However, Article 5 of the Convention is absolutely clear in one respect: prisoners are to be accorded the protection of the Convention until their status has been determined by a "competent tribunal".[56] Only such a tribunal of the capturing state (detaining power) may determine whether a person is entitled to be a prisoner of war or not. The United States Department of Defense document reiterates that everyone who is captured or detained during an armed conflict should therefore be treated as the Third Convention requires, until a proper tribunal can try his or her case.[57]

It would be a mistake to ignore the arguments that the Al Qaeda fighters are not a regular militia, but members of an organisation whose goal is to commit crimes against civilians and protected targets. Nevertheless, it would be difficult to prove that all those persons seized in Afghanistan can be held responsible under a broad conspiracy theory for crimes committed in the United States or against United States personnel by other members of the group. In the case of the Al Quaeda fighters the United States can exercise criminal jurisdiction in accordance with federal law, or in accordance with the laws of New York or the District of Columbia, where the September 11 and related crimes occurred.[58]

Right to humane treatment

It is prohibited to treat prisoners of war inhumanely or dishonourably.[59] Although there is no definition of what constitutes inhumane treatment, this is a basic theme of the Geneva Conventions.[60] Furthermore, what are regarded as the principal elements of humane treatment are listed in article 13, and further guidance can be found in relevant international human rights instruments. The detaining power must protect the prisoners at all times, and reprisals or discrimination against prisoners are expressly prohibited.[61]

The question of whether the measures taken in transporting the detainees constitute inhumane or dishonourable treatment is worthy of proper investigation, but the relevant articles of the

Convention are only applicable to prisoners of war. Amnesty International has noted that keeping prisoners "incommunicado, sensory deprivation, and the use of unnecessary restraint and the humiliation of people through tactics such as shaving them" are all classic techniques employed to break the spirit of individuals ahead of interrogation.[62] Even if the detainees are found by a competent tribunal not to be prisoners of war in accordance with the Third Convention, then they will at least be entitled to the protections afforded by the Fourth Geneva Convention for the Protection of Civilians.[63] Furthermore, international human rights law will apply to all categories of prisoner.[64]

There is a requirement to provide prisoners of war with living "conditions" of comparable standard to that in which the forces of the detaining power are accommodated in the same area.[65] This is clearly not the case in Quantanamo Bay, and it would present the United States with obvious practical and security dilemmas. Nevertheless, the requirement constitutes the minimum standard acceptable.[66] Interestingly, the photograph of the detainees that caused such an outcry in Europe and highlighted the issue of the prisoners, may have been in breach of the prohibition on making prisoners of war objects of curiosity.[67]

Right to interrogate prisoners of war

It has been suggested that a reason for United States reluctance to give the detainees prisoner of war status is because of the desire to question them in relation to events in Afghanistan and elsewhere, and the probable whereabouts of leaders. It is a common misconception that the only information that you can obtain from prisoners of war is his/her number, date of birth, rank, and name. In fact, this is the only information a prisoner of war is obliged to give to the detaining power under the Third Convention, but there is nothing that prohibits interrogating prisoners to learn more.[68] It is acceptable in such circumstances to offer inducements, and even to trick prisoners into supplying information. Any form of torture, physical or psychological, is prohibited, and the overall duty to treat all prisoners of war humanely continues throughout the period of internment or detention. This reflects the practical application of the Convention to armed conflict, and prisoners of war are often a source of valuable intelligence on enemy morale and deployment, e.g., Iraqi prisoners of war during the Gulf War were a useful source of information. The need to interrogate the detainees is therefore not a reason for not granting them prisoner of war status.

Release and Repatriation

As detaining prisoners of war amounts to a form of permissible internment, it is appropriate that the Third Convention should deal specifically with what happens to prisoners after hostilities have ceased. Article 118 provides that all prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. Somewhat surprisingly, there is no express provision for the direct repatriation of able-bodied prisoners while hostilities continue. Nevertheless, during the Vietnam War, American service men were released to "anti-war groups" in the United States, and during the Falklands conflict a number of repatriations took place before hostilities ceased. Article 117 provides that no repatriated person may be employed on active military service, and this seems to have been respected by both sides in the Falklands conflict.[69]

The question of involuntary repatriation has been an issue in a number of recent conflicts. After the Korean, Vietnam, Iran-Iraq and Second Gulf Wars, a number of prisoners refused repatriation. Some prisoners faced a real prospect of persecution on arrival in their homeland, and this did happen to many Ukrainian prisoners of war who fought with the German army and were repatriated at the end of World War II. In such situations the ICRC has a crucial role to play in ensuring that the detaining power is not imposing repatriation on unwilling prisoners, nor using the excuse that prisoners do not want to be repatriated in order to circumvent the obligations under the Convention. This issue must be decided on an individual basis by an independent body such as the ICRC. The official position of the United States is that prisoners have a right to decide about repatriation, and that each prisoner must consent to repatriation rather than being forced to return.[70]

A crucial question in the context of the Taliban and Al Qaeda detainees is when will hostilities cease, thus triggering the general duty to release prisoners of war. The phrase "without delay" in the first paragraph of article 118 indicates the obligation to release arises immediately after the cessation of actual hostilities, and is not dependent upon the corresponding conduct of the enemy. President Bush has declared war on terrorism, and he has warned the American public to expect a long campaign. The Convention does not provide any guidance on how it can be determined that the hostilities have actually ended. One formula preferred is if neither side expects a resumption of hostilities.[71] There is no requirement for a formal armistice or peace treaty, what matters is the actual or *de facto* cessation of hostilities, provided that these are unlikely to resume within a reasonable period. This has the effect of permitting parties to make a subjective assessment of the intention of the enemy, but as hostilities cannot be ruled out completely in the future, the mere fact that they could be resumed is not sufficient to prevent or delay repatriation. Given the ideological dimension to the current conflict, the question of cessation of hostilities will be especially problematic. However, with the establishment of a new government in Kabul, and the end to the bombing and conventional military operations by the United States and its allies, it will be difficult to argue that active hostilities against the Taliban have not ceased.

The duty to repatriate does not prevent prisoners of war against whom criminal charges including charges in respect of war crimes or crimes against humanity are pending, from being detained beyond the cessation of active hostilities.[72] This provision refers to specific individuals against whom charges are pending, and it does not justify denial of the right of repatriation on the basis that some among the prisoners may have been involved in war crimes. Prisoners of war cannot be retained on mere suspicion, in the hope or expectation that evidence may be found in the future which will allow the initiation of proceedings. If the United States has evidence against any of those detained in Cuba, then it may take proceedings to hold them accountable for their alleged crimes. In the meantime, such prisoners need not be repatriated at the end of hostilities.[73]

Conclusion

There is an issue of self-interest for all states and military forces in ensuring proper treatment of all prisoners. Even the Irish Defence Forces have experienced ill treatment as prisoners in the former Congo, and others have been captured and brutally killed in south Lebanon. At the end of the "Gulf War" the United States claimed that the treatment of enemy prisoners of war in United States custody was the best compliance with the Third Geneva Convention in any conflict in history. This was a fitting tribute to the United States and coalition forces. The Department of Defense Report concluded that the measures taken to comply with the Conventions had no significant impact on the planning and execution of military operations. In fact, by encouraging the surrender of Iraqi military personnel these safeguards may have speeded and eased operations.[74]

Adherence to international humanitarian law principles, and the granting of prisoner of war status to the detainees in Cuba, is not a threat to the security or national interest of the United States. The detaining power can still interrogate and prosecute prisoners of war without infringing the Third Convention. On 26 January, the United States Secretary of State broke rank and called on the Administration to apply the Geneva Conventions to all prisoners. It has now agreed to apply the Conventions, but not to grant prisoner of war status.[75] However, the Geneva Conventions do not provide for discretionary benevolence. They recognise two basic categories of persons in the context of armed conflict: the civilian and the combatant. They also establish a rule that it is not for the military forces that capture prisoners to determine their status under the Conventions. This must be done by a competent tribunal. In particular, it is not for a Secretary of Defense or his/her equivalent to make this determination unilaterally.

Since the adoption of the Lieber code, over the years the United States has done more than many other states to ensure that humanitarian principles are respected during armed conflicts. In the long term it has most to lose by its current policy in respect of the Taliban and Al Qaeda detainees. It is certain that United States soldiers will at some point in the future need the very protection that their own government is denying those captured in Afghanistan.

It is an indication of just how far the United States is willing to go in the war against "terrorists" that it declines to uphold the established principles of international humanitarian law. Is this all part of a policy to dehumanise the detainees in the eyes of United States public opinion, and thus rationalise the terrible events of September 11 in a way that feeds preconceived notions and prejudice? Will the United States, Europe or India be all the more secure for denying basic rights owed to combatants captured during an armed conflict? The answer must surely be no. A true measure of the strength of a democracy and its commitment to human rights can be determined by the manner in which it responds to crisis and real threats, even of the proportions caused by the September 11 atrocities. Conversely, the adoption of an à la carte policy in relation to international law serves the long term interests of all those who wish to destabilise an international system based on democratic values and respect for human rights. ●

1 See 2 Kings, 6:21,22.

2 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva I), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 (Geneva II), Geneva Convention Relative to the Treatment of Prisoners of War 1949 (Geneva III), and Geneva Convention Relative to the Protection of Civilian Person in Time of War 1949 (Geneva IV).

3 See generally *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1946*, Geneva, 1987.

4 See C. Greenwood, "The Relationship of *Ius ad Bellum and Ius in Bello*", 9 *Review of International Studies*, 1983; Hans-Peter Gasser, *International Humanitarian Law - An Introduction*, (trans. from German by S. Fitzgerald and S. Mutti, Haupt, Henri Dunant Centre, 1993; S. Nahlik, "A Brief Outline of International Humanitarian Law", *International Review of the Red Cross*, July-August 1984 and F. Kalshoven, *Constraints on the Waging of War*, Geneva: ICRC, 1987.

5 *Ibid* and J. Simpson Study, *Law Applicable to Canadian Forces in Somalia 1992/93*, Public Works and Government Services Canada, 1997, at 13.

6 In 1861 Francis Lieber, a professor of political science and jurisprudence at Columbia University, New York, prepared a manual based on international law (the Lieber Code) which governed the Union Army during the American Civil War (1861-65). See D. Schindler & J. Toman, *The Laws of Armed Conflict: A Collection of Conventions Resolutions and Other Documents*, 3 rd. ed., Geneva, 1988, 3.

7 Articles 49-59.

8 1899 saw the adoption of a treaty that made the principles of the 1864 treaty applicable to the wounded and shipwrecked at sea. In 1906 the 1864 treaty was revised, and in the following year the 1899 treaty was amended along the same lines. In 1926 a convention on the treatment of prisoners of war was adopted. See Kalshoven, op. cit., 9 - 10.

9 See note 2.

10 Art. 2 common to all four Geneva Conventions of 1949, *The Geneva Conventions of 12 August 1949 - Commentary: III Geneva Convention*, Geneva: ICRC, 1960, 20-23.

11 See C. Greenwood, "Scope of Application of Humanitarian Law", op. cit., 42-43. It should be noted that common article 3 of the Convention did outline minimum provisions that must be applied in situations of non-international armed conflict or internal conflict within a state.

12 T. Franck and F. Patel, "Agora: The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War: "The Old Order Changeth," *American Journal of International Law*, Vol. 85, 63. See also C. Greenwood, "The Concept of War in Modern International Law", *International and Comparative Law Quarterly*, Vol. 36, 1987. For general background on the UN and humanitarian law, see C. Bourloyannis, "The Security Council of the United Nations and the Implementation of International Humanitarian Law", *Denver Journal of International Law and Policy*, Vol. 20 (2), 1992, 335-355 and G. Abi-Saab, "The United Nations and International Humanitarian Law-Conclusions", *Actes du Colloque International de l'Universite de Geneve*, 1996.

13 S. D. Bailey, *Prohibitions and Restraints on War*, Oxford University Press, 1972, 92.

14 The 1999 Report of the Secretary-General on the Protection of Civilians in Armed Conflict makes depressing reading, see UN Secretary-General's Report on the Protection of Civilians in Armed Conflict, S/1999/957 of 8 September 1999.

15 G. Aldrich, "The Laws of War on Land", *American Journal of International Law*, Vol. 94, 2000, 42-59 at 59.

16 See G. Aldrich, "Human Rights in Armed Conflict: Conflicting Views", 67 ASIL Proc. 141, 142, 1973 and R. Baxter, "Some Existing Problems of Humanitarian Law", *The Concept of International Armed Conflict: Further Outlook 1,2* Proceedings of the International Symposium on Humanitarian Law, Brussels, 1974.

17 See generally *Commentary on the Additional Protocols, op. cit.*, at 33 and 1319.

18 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol 1), art. 1(4). This saved captured guerrilla fighters who met certain conditions from trial and potential execution for actions committed in the course of liberation wars, by granting such captives prisoner of war status. See generally C. Greenwood, "Terrorism and Protocol I", *Israel Yearbook of Human Rights*, Vol. 19, 1989.

19 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1). See B. De Schutter and C. Van De Wyngaert, "Coping With Non-International Armed Conflicts: The Borderline Between National and International Law", 13 *Ga. J. Int'l & Comp. L.*, Vol. 13, 1983, 285.

20 See for instance, arts. 52 - 56.

21 See especially arts. 57 & 58.

22 For instance the fair trial guarantees in Protocol 1 art. 75 and Protocol II art. 6 are clearly based upon, though are not identical to those in art. 14 of the ICCPR. For a discussion of this point see S. Stavros, "The Right to a Fair Trial in Emergency Situations", *International and Comparative Law Quarterly*, Vol. 41, 1992, 343.

23 See T. Meron, "The protection of the human person under human rights and humanitarian law", UN *Bulletin of Human Rights 91/1*, UN, 1992, 33-45. See also L. Doswald-Beck and S. Vite, "International Humanitarian Law and Human Rights Law" *International Review of the Red Cross, No. 293, 1993, and Minimum Humanitarian Standards, Report of the Secretary-General*, Doc. E/CN.4/1998/8, 5 January 1998.

24 See T. Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument", *Americacan Journal of International Law*, Vol. 77(3), 1983, 580-606, at 602.

25 *Ibid.*, see also T. Meron, *Human Rights in Internal Strife: Their International Protection*, Cambridge: Grotius, 1987, 3-49; T. Meron and A. Rosas, "A Declaration of Minimum Humanitarian Standards", *American Journal of International Law*, Vol. 85, 1991, 375-381 and Commission on Human Rights, "Minimum humanitarian standards - Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities", UN Doc. E/CN.4/1998/87, 5 January 1998.

26 See also C. Greenwood, "Scope of Application of Humanitarian Law", op. cit., 39-49 and D. Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *Recueil des cours*, Vol. 163, Hague Academy, 1979, 153-156.

27 T. Meron, *Human Rights in Internal Strife: Their International Protection, op. cit.*, 29.

28 See "Armed conflicts linked to the disintegration of State structures", *Preparatory document for the first periodical meeting on international humanitarian law*, Geneva: ICRC, 19-23 January 1998, 8. See also C. Greenwood, "International Humanitarian Law and United Nations Military Operations", *Yearbook of International Humanitarian Law*, Vol. 1, Dordrecht: Kluwer, (1998), 3-34 esp. 7-9.

29 It is the identification of the relevant legal prescription in the given context that is of central concern, see H. McCoubrey and N. White, *International Organizations and Civil Wars*, Aldershot: Dartmouth, 1995, 67.

30 D. Shagra and R. Zacklin, "The Applicability of International Humanitarian Law to United Nations Peacekeeping Operation: Conceptual. Legal and Practical Issues", *Symposium, op. cit.*, 40. See also F. Kalshoven, "The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit", *Yearbook of International Humanitarian Law*, Vol. 2, Dordrecht: Kluwer, 1999, 3-66, esp. 38 onwards; and ICRC Resolution XXXVII of the XXth International Red Cross Conference, Vienna, 1965 in D. Schindler and J. Toman, *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, (3rd. ed.), Dordrecht: Martinus Nijhoff, 1988, 259.

31 For example, see Resolution 814, 26 March 1993, para. 13 (Somalia), and Resolution 788, 19 November 1992, para. 5 (Liberia).

32 See D. Robinson and H. von Hebel, "War Crimes in Internal Conflicts: Article 8 of the ICC Statute", in *Yearbook of International Humanitarian Law, Vol. 2, 1999, op. cit.*, 193-209 and generally W. A. Schabas, *An Introduction to the International Court*, Cambridge: Cambridge University Press, 2001, esp. 1-20; M. C. Bassiouni, The Statute of the International Criminal Court - A Documentary History, New York: Transnational, 1998; R. Lee (ed.), *The International Criminal Court - The Making of the Rome Statute*, Dordrecht: Kluwer, 1999.

33 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 226 (1996). See generally L. Boisson de Chazournes & P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, 1999 and a number of articles in *International Review of the Red Cross*, No. 316, 1997, esp. C. Greenwood, "The Advisory Opinion on nuclear weapons and the contribution of the International Court of Justice to international humanitarian law", 65-75.

34 *Ibid.*, para. 25.

35 L. Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *International Review of the Red Cross*, No. 316, 1997, 35-55 esp. 45.

36 See *Commentary, III Geneva Convention, op. cit.*, 22-23. Both the USA and Afghanistan are parties to the Geneva Conventions.

37 For example, articles 70, 71, 76, and 77 relating to correspondence.

38 See *Commentary on Additional Protocols*, op. cit., 861.

39 See G. Aldrich, "Prospects for the United States Ratification of Additional Protocol 1 to the 1949 Geneva Convention", *American Journal of International Law*, Vol. 85, 1991, 1-12 at 8.

40 See H. Fischer, "Protection of Prisoners of War", in D. Fleck, *The Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, 1995, 701-800 at 704; and H. Levie, *Prisoners of War in International Armed Conflict*, U.S Naval War College, International Law Studies, Vol. 59, 1977, 34-84.

41 For a discussion of its interpretation on appeal from the Federal Court of Malaysia, see *Osman Bin Mohamed Ali v. The Public Prosecutor*, House of Lords (Privy Council), [1969], Appeal Cases 430; and *The Military Prosecutor v. Kassem and Ors.*, Israel, Military Court sitting in Ramallah. April 13, 1969, reported in E. Lauterpacht, (ed.), *International Law Reports*, Vol. 42, 1971, at 470.

42 Article 4 (A) (1) Third Geneva Convention.

43 Article 4 (A) (2) of the Third Convention.

44 See Human Rights Watch, "Background Paper on Geneva Conventions and Persons Held by U.S. Forces", 29 January 2002 and reported statements by US Secretary of Defense, Donald Rumsfeld, *New York Times*, 23 January 2002; see also Rowan Scarborough, *The Washington Times*, 26 January 2002. See also *USA Today*, January 31, 2002.

45 *Commentary III Geneva Convention, op. cit.*, 51-52.

46 See Military and Paramilitary activities, *Nicaragua v. United States*, 1986 I.C.J. 4, 122 esp. paras. 219 and 220. The ICJ contrasted the conflict between the Contras and the Sandinista Government with that between the US and Nicaragua. The first, as internal, was governed by common Article 3 only; the second, as international, fell under the rules governing international armed conflicts. The Court also affirmed that the fundamental general principles of humanitarian law (common Article 3, in the opinion of the Court), belong to the body of general international law, in other words, that they apply in all circumstances for the better protection of the victims, regardless of the legal classification of armed conflicts. See R. Abi-Saab, "Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern", *Essays in Honour of F. Kalshoven, Dordrecht: Maritinus Nijhoff*, 1991, 209-223.

47 Cf. Human Rights Watch, op. cit., 2.

48 *Commentary III Geneva Convention, op. cit.*, 61-64.

49 F. Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva, 1987, para. 75.

50 *Commentary on the Additional Protocols, op. cit.*, 527-539.

51 "The US believes this does not reflect customary international law and diminishes the distinction between combatants and civilians, thus undercutting the effectiveness of the Law of War", see *Operational Law Handbook*, International and Operational Law Department, The Judge Advocate General's School, US Army, 2002, 12.

52 Articles 85 and 115 Third Geneva Convention; and Aldrich, "Prospects for U.S. Ratification of Protocol 1", op. cit., 8-12; H.P. Gasser, "An Appeal for Ratification by the United States", in "AGORA: the US decision not to ratify Protocol I to the Geneva Conventions, *American Journal of International Law*, Vol. 81, 1987, 912-925; and H. McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts*. Dartmouth, 1990, 83.

53 *Prisoners of War: Rights and Obligations under the Geneva Convention* (DoD GEN-35A), Secretary of Defence, Washington, 1 March, 1980.

54 Ibid.

55 *Commentary, III Geneva Convention, op. cit.*, 17-18.

56 Ibid., 73 - 78. In Canada, for example, the Minister of National Defence, pursuant to section 8 of the Geneva Conventions Act, adopted specific regulations in 1991 respecting the determination of the entitlement of persons detained by the Canadian Forces to prisoner of war status. Section 4 of the regulations provide that a competent tribunal shall consist of one office of the Legal Branch of the Canadian Forces.

57 Department of Defense Document, *op. cit.*, 4

58 Professor C. Bassiouni, quoted in *Al-Ahram Weekly on Line*, Issues 571, 31 January - 6 February 2002.

59 Articles 13 and 14 Third Geneva Convention. On the treatment of POW's during the Iran/Iraq war, see Memorandum from the ICRC to the States Party to the Geneva Conventions of August 12, 1949 concerning the conflict between Islamic Republic of Iran and the Republic of Iraq, Geneva, May 7, 1983; and second Memorandum of February 10, 1984. On the rights of prisoners in general, see N. Rodley, *The Treatment of Prisoners Under International Law*, (2 nd. Ed.), Oxford University Press, 1999, esp. 277-308.

60 Article 12 First and Second Convention, and article 27 Fourth Convention. The term is taken from the Hague Regulations and the two 1929 Geneva Conventions.

61 Article 13 and 16 Third Geneva Convention.

62 Amnesty International, Press Statement, 22 January 2002.

63 See *Prosecutor v. Delalic and Others*, Case No. IT-96-21-A, Trial Chamber, 16 November 1998, paras. 236-277. This confirmed the view that there is no intermediate status, nobody in the hands of the enemy can be outside the law and must fall within one of the Conventions (para. 271).

64 The relevant provision include the International Covenant on Civil and Political Rights, Article 75 of Additional Protocol 1, and the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishement (which the USA has ratified).

65 Article 25 Third Convention. See also *United States of America, Plaintiff v. Manual Antonio Noriega, Defendant*, United States Court for Southern District of Florida. Opinion By: William M. Hoveler, December 8, 1992 (808 F Supp. 791 (1992).

66 This principle of assimilation is to be found in a number of articles of the Convention, see *Commentary, III Geneva Convention, op. cit.*, 192 and *passim*.

67 Article 13, Third Convention.

68 See article 17, Third Geneva Convention and Levie, *op. cit.*, 108. On the rights of prisoners in general, see N. Rodley, *op. cit.*, 46-106.

69 McCoubrey, "Protections of Prisoners of War", *op. cit.*, 107-109.

70 Department of Defense (U.S.A.), *Conduct of the Persian Gulf War - Final Report to Congress*, Appendix 0-20, April 1992.

71 G. Schwarzenberger, International Law, Stevens, London, 1968, 723; and *A Manual of International Law*, 5th Ed., Stevens, London, 1967, 215-206.

72 Article 119, para. 5, Third Convention. Article 82 provides that prisoner of war status does not protect from criminal offences that are applicable to the detaining powers' soldiers.

73 cf. articles 115 and 119, see *Commentary: Third Convention, op., cit.*, 534-537 and 553-557.

74 *Conduct of the Persian Gulf War - Final Report to Congress, op. cit.*, L-17.

75 *The Irish Times*, 8 February 2002.

THE GUNPOWDER PLOT

'THE FIRST ACT OF MODERN TERRORISM'

In light of the events of September 11th, ***Niall Neligan BL**** *examines the origins of modern terrorism, national security law and the lessons to be learned from legal history by examining the Gunpowder Plot 1605.*

Introduction

Antonia Fraser in her book 'The Gunpowder Plot: Terror & Faith in 1605' asks the question can violence ever be justified whatever the persecution, whatever the provocation? Indeed it has often been said that the terrorist of today is the statesman of tomorrow. That leads to another question, is terrorism justifiable when it is successful? Fraser goes on to point out a phenomenon in which a number of today's world leaders have in the past been involved - on their own recognition - in terrorist activities and have morally justified them on grounds of national or religious interest.[1]

Fraser also examines the word 'terror', and points out two different kinds.

> "There is the terror of partisans, of freedom fighters, or any other guerrilla group, carried out for the 'higher good of their objectives'. Then there is the terror of Governments directed towards dissident minorities."

Fraser's distinction is perhaps over simplified. For the purpose of the law there is no definition of terrorism under Irish Law. The closest approximation can be found under section 31 of the Emergency Provisions (Northern Ireland) Act 1978. Here 'terrorism' is defined as 'use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.' In addition, the section goes on to define a 'terrorist' as a person who is or has been concerned in the commission or attempted commission of any act of terrorism or in directing, organising or training persons for the purpose of terrorism.

The concept of terrorism is not a recent phenomenon. As far back as biblical times we have the example of the zealots. Indeed two groups of professional terrorists separate the Roman world from our own,[2] the killer cult known as the Assassins[3] and the Japanese Ninja of the 16th Century.

The word 'terrorism' as we know it today owes its origin to the violence of the French revolution. The word was born with the Reign of Terror, the use of the guillotine by the French revolutionaries to consolidate their regime by killing their enemies and intimidating the potential opposition.[4] Up until the 19th century terrorism usually meant state terror. This view however neglects the existence of various 'terrorist' plots from the 17th and 18th centuries, of which the Gunpowder Plot of 1605 was truly a landmark incident. Ironically the Gunpowder Plot of 1605 perhaps serves as a template for most acts of terrorism, including the incidents of 11th September 2001.

It may seem unusual, but there are indeed a number of similarities between the actions of the Gunpowder Plotters and the members of al-Quaida. In both incidents the main perpetrators were middle-class, educated, religious fanatics on the periphery of the main stream dedicated to 'striking a blow' against what they perceived to be an oppressive state. As in the case of the al-Quaida fighters who based their version of 'Jihad' on a loose interpretation of the Koran, the Gunpowder plotters were following an ancient tradition, based both on the Bible and on Greek and Roman literature, that it was a 'noble act to destroy a tyrant'. This was a well-worn path in 16th Century Europe, particularly arising out of the strife caused by the Reformation. In the 25 years before the Gunpowder Plot and the five years after it, the leader of the Dutch state and two successive kings of France were killed by Catholic assassins, while there were various plots to murder James I's predecessor Elizabeth. As a precautionary measure, Elizabeth herself had authorised the beheading of James's own mother, Mary Queen of Scots, after Mary had become directly involved in one of those plots.[5]

The Gunpowder Plot 1605

The Gunpowder Plot was a conspiracy to kill James I, King of England, as well as the Lords and the Commons at the state opening of Parliament on 5 November 1605. The plot was formed by a group of prominent Roman Catholics in retaliation to the oppressive anti-Catholic laws being applied by James I. The mistake is often made that Guy Fawkes[6] was the ring-leader of the plot, when in fact the real perpetrator or principal in the first degree was Robert Catesby. Catesby was a charismatic man in his early thirties, and a scion of one of the wealthy and powerful Catholic families in England.[7] Fawkes on the other hand was a thirty five year old mercenary soldier from Yorkshire, who had spent much of his career fighting in the Spanish Netherlands. All the conspirators apart from Fawkes were inter-related by marriage.

In May 1604, Catesby met Fawkes, Thomas Percy, Jack Wright, and Tom Wintour at an inn called 'The Duck and Drake' in London's fashionable Strand. It was at this meeting that Catesby came up with the master plan that became the Gunpowder Plot. He envisaged applying the recently developed gunpowder technology for political ends, namely the bombing of the House of Lords. To that end Fawkes was

required to requisition thirty-six barrels or 10,000 pounds of gunpowder. The ambition of the project should not be underestimated from a twenty first century perspective - on a par it would be the equivalent of detonating a tactical nuclear weapon in the heart of Washington D.C. thus destroying the political establishment in one stroke.

However, just as the plot was coming to fruition, plague intervened and the State opening of parliament was postponed. It was at this point in time that others were drawn into the plot, among them Sir Everard Digby, John Grant, Ambrose Rokewood, Francis Tresham, Thomas Winter's brother Robert, and John Wright's brother Christopher. It was then that Catesby's tight plan began to come apart at the seams. Catesby proposed to raise a cavalry uprising in the midlands, which would ride to Coventry and capture James's daughter Elizabeth. It was Catesby who recruited Francis Tresham into the plot, and this was perhaps his biggest mistake. Historically Tresham has been considered the principal double agent. Initially, he was reluctant to become involved and was concerned that several catholic peers who sat in the House of Lords would be blown up with the others. In particular, he was concerned for the safety of two of his bothers-in-law: Lords Monteagle & Stourton. Ten days before the opening of Parliament, Lord Monteagle received an anonymous letter from an unknown caller to his lodgings.[8] The letter read as follows:

> "My Lord, out of the love I bear to some of your friends, I have a care of your preservation. Therefore I would advise you, as you tender your life, to devise some excuse to shift of your attendance at this Parliament; for God and man hath concurred to punish the wickedness of this time. And think not slightly of this advertisement, but retire yourself into your country where you may expect the event in safety. For though there be no appearance of any stir, yet I say they shall receive a terrible blow this Parliament; and yet they shall not see who hurts them. This counsel is not to be condemned because it may do you good and can do you no harm; for the danger is passed as soon as you have burnt the letter. And I hope God will give you the grace to make good use of it, to whose holy protection I commend you."

Mounteagle brought the letter to Sir Robert Cecil, Chief Minister of James I. Cecil had been Chief Minister to Elizabeth I as had his father before him.[9] He also had inherited the most sophisticated 'spy rings' in early modern Europe from the late Sir Francis Walsingham. It has become a popular theory that the Gunpowder Plot was totally devised and engineered by Robert Cecil and his vast network of spies in order to further discredit the English Catholics. This theory is not as far fetched as it may seem, and indeed it is not beyond the realm of possibility that there was a set up of some design. Indeed, there were questionable actions by some of the plotters regarding their relationship with Cecil (relating to both Robert Catesby and Francis Tresham). Cecil alludes to the fact he had been aware of 'papist activities' for several months leading up to the gunpowder's discovery, but there is no evidence to support this other than his own word. Cecil's father, Lord Burleigh, had been intimately involved in the creation of the Babington Plot that led to the execution of Mary, Queen of Scots. And so with this family background it was natural for people to suspect that, to some extent, Cecil rigged the Gunpowder conspiracy himself. As soon as the plot was uncovered, Catholics in particular began to suspect - and to articulate that suspicion - that Cecil himself had, if not actually put the whole plot together, encouraged it, manipulated it, and brought it to fruition.

Certainly Cecil played a role in the uncovering of the plot, and it is evident that he orchestrated certain things in order to maximise his own reward from James. This is borne out in a number of actions, not least the delay of almost six days in informing James of the letter after receiving it from Monteagle, as well as the apparent doctoring of several crucial documents associated with the crime, including confessions.

Whether the letter was genuine, from a fellow Catholic concerned about Monteagle's welfare, or whether it was a forgery and sent from within government circles, is of course uncertain. In any event, on the 4th of November an initial search was made of the cellar (initially, it is said by Monteagle and the Lord Chamberlain, Suffolk), where they discovered Fawkes and the wood and coal Percy had provided with which to cover the kegs of powder. Sir Thomas Knyvett, a retainer of the Court, and Justice for Westminster, then searched the cellar thoroughly with a group of men at midnight, found the gunpowder, and arrested Fawkes. When news of the arrest of Fawkes leaked out, the main conspirators made a dash for their 'secure houses' in the Midlands. Fawkes was brought before Cecil and King James in the early hours of November 5th. He maintained a scornful attitude, and refused to answer questions about his co-conspirators. Not satisfied with his answers, he was placed on the rack until he signed a confession. The scene was set for a final shoot-out between government forces and the leading conspirators at Holbeach House in Staffordshire, in which several of the main conspirators including Catesby and Percy were killed.[10] The eight surviving conspirators were put on trial for treason.[11]

The Gunpowder Treason Trial 1606

The trial of the Gunpowder conspirators opened at Whitehall on the 27th day of January 1606.[12] The Conspirators were brought by boat from the Tower to the Court of Star Chamber in Westminster Hall. Once the Lords Commissioners - with the Lord Chief Justice Sir John Popham presiding - had taken their seats, the defendants were led in and set upon a scaffold in front of the Court. The arraignment was read by the Master of the Rolls, Sir Edward Phillips, to which seven of the eight conspirators pleaded not guilty. The trial was broken into three parts: 1) The Declaration, 2) The matter of Aggravation and 3) the matter of Probation. The substance of the declaration consisted of four parts: first, of the persons and qualities of the conspirators; secondly, in the matter conspired; thirdly, the means and manner in executing the conspiracy; and fourthly, the end and purpose of the conspiracy.

Phillips pointed out that the purpose of the conspiracy was to kill the King, the Queen and the Royal family, to stir rebellion and sedition, to subvert the established religion, and to invite foreign powers to invade the country. After completing his duties, Phillips made way for the principal counsel for the prosecution, Sir Edward Coke, the Attorney General[13] who had successfully prosecuted Sir Walter Raleigh in 1603. In his opening speech, Coke pointed out that the crimes with which the accused were charged were so heinous that they were 'without equal in fact or fiction'.[14] He then went on to draw an analogy between treason and a poisonous tree:

> "Treason is a like a tree whose root is full of poison, and lyeth secret and hid within the earth, resembling the imagination of the heart of man, which is so secret as God only knoweth it. Now the wisdom of the law provided for the blasting and nipping, both of the leaves, blossoms, and buds which proceed from this root of treason, either by words, which may be resembled to buds or blossoms, before it commeth

to such fruit and ripeness as would bring utter destruction and desolation upon the whole State." [15]

In setting forward the state's case, Coke described Catesby as a man endowed with a subtle and shifty wit and profound treachery. However he reserved his greatest venom for the Jesuits, of whom he launched into a bitter attack alleging that the true perpetrators behind the treason were the Jesuits, and in particular Garnet,[16] Tesmond and Gerard. In what can only be described as a show trial on a par with the famous show-trials of the Soviet Union in the 1930's, Coke denounced the 'Romish' religion as the See of all Evil. Coke proceeded to ask the question why had the conspirators chosen the houses of Parliament as their target? He answered his rhetorical question by quoting from the confessions of the conspirators: he said that the conspirators believed that unjust laws had been made there, and therefore it was a fit place in which to seek revenge:

"If any ask who should have executed this their justice, it was Justice Fawkes, a man like enough to do according to his name. If by what law they meant to proceed, it was Gunpowder Law."

At the close of his opening speech, Coke called for the ultimate penalty to be imposed against the conspirators: that they should be hung, drawn and quartered. After the reading of the examinations, the voluntary confessions and the voluntary declarations, seven of the plotters were found guilty. Digby was tried separately to the other plotters, alone among them he pleaded guilty. He made a public petition that since the crime was his own and not his family's, the punishment should be limited to him.[17] Digby asked to be beheaded, in the manner of a gentleman. This request was refused, and he too was accorded a traitor's death. The executions took place in two batches on the 29th and 30th January 1606.

The Modern Law and the Gunpowder Plot

Were the Gunpowder Plotters to be tried today in this jurisdiction (as opposed to England and Wales), they would be charged with a variety of different offences, as follows:

Treason

Article 39 of the Constitution provides that:

"Treason shall consist only in levying war against the State, or assisting any State or person or inciting or conspiring with any person to levy war against the State, or attempting by force of arms or other violent means to overthrow the organs of government established by this Constitution, or taking part or being concerned in or inciting or conspiring with any person to make or to take part or be concerned in any such attempt."

In order to give effect to Article 39, the Treason Act was passed in 1939. The Act served to amend and replace the Treasonable Offences Act of 1925 which had already been largely amended by virtue of the Offences Against the State Act 1939. Section 1, as amended by the Criminal Justice Act 1990, provides that:

"Every person who commits treason within the State shall be liable on conviction thereof to life Imprisonment."

In addition, section 1(3) provides that where someone is an Irish citizen or is ordinarily resident within the State, and commits treason while outside the State, they too shall be guilty of treason and liable to life imprisonment. Where a person is charged with treason, they shall be indicted before the Central Criminal Court, and shall "be arraigned and tried in the same manner and according to the same course and order of trial as a person indicted for murder is required by law to be arraigned and tried, and every person who, on such arraignment and trial, is found guilty of treason shall be convicted thereof and sentenced therefore in like manner in all respects as a person found guilty of murder is required by law to be convicted and sentenced."[18] The government of the day was careful to provide that no person shall be convicted of treason on the uncorroborated evidence of one witness.[19]

Section 2 of the 1939 Act provides penalties for those who harbour or comfort a person guilty of treason. The law provides that a person who engages in this activity shall be guilty of a misdemeanour and be liable to a fine not exceeding ú500, and shall be liable to imprisonment of up to two years.[20] Section 3 the Act provides for what is known as 'misprision of treason'. This provides that any person who knows that any act that may amount to treason, or proposes to be treason, or where treason has been committed and does not communicate this to either a District Court Judge or a member of the Garda Siochana shall be guilty of the misdemeanour of misprision of treason and shall be liable on conviction thereof to penal servitude for a term not exceeding five years or imprisonment for a term not exceeding two years.

Possession of Explosive Substances

Section 3 of the Explosive Substances Act 1883, as amended by Section 4 of the Criminal Justice Act 1976 and by Section 15 of the Offences Against the State (Amendment) Act 1998, provides as follows:

"A person who in the State or (being an Irish citizen) outside the State unlawfully and maliciously-

(a) does any act with intent to cause, or conspires to cause by an explosive substance an explosion of a nature likely to endanger life, or cause serious injury to property, whether in the State or elsewhere, or

(b) makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether in the State or elsewhere, or to enable any other person so to do,

shall, whether any explosion does or does not take place, and whether any injury to person or property is actually caused or not, be guilty of an offence and shall be liable, on conviction on indictment, to a fine or imprisonment for a life or both, and the explosive substance shall be forfeited."

Suspicion of Possession

Section 4 of the Explosive Substances Act 1883, as amended by section 18 of the Offences against the State (Amendment) Act 1998, provides that:

"Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does have it in his possession or under his control for a lawful object shall unless he can show that he made it or had it in his possession or under his control for a lawful object be guilty of an offence and shall be liable on conviction on indictment t a fine or imprisonment for a term not exceeding 14 years or both, and the explosive substances shall be forfeited."

Conspiracy

For any modern day conspirators, the inchoate offence of conspiracy would apply. A conspiracy exists in law where two or more people enter into an agreement to commit an unlawful action. Unlike attempts, conspiracies do not require any act towards the commission of the substantive offence; therefore the mere making of an agreement is sufficient. Agreements for the purpose of a conspiracy need not be formal. The *mens rea* of the offence is that the conspirators intended to commit the substantive offence. The courts have examined the mental element of conspiracy in a variety of cases, and notably in the cases of *O'Brien*[21], *Anderson*[22] and *Porter*.[23]

In the case of *Anderson*, Lord Bridge stated:

> "The necessary *mens rea* of the crime [conspiracy] is, in my opinion, established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve."

The next question to be addressed is precisely how much 'knowledge' would be required of the person who entered into the agreement. Herein is perhaps the fault line of the inchoate offence. This concept was explored in the case of *Porter*. In this case the accused was charged with possession of firearms. It was argued that he did not know what the package contained and therefore that there was insufficient evidence that he agreed to join the conspiracy. The Court of Appeal noted that a co-conspirator will rarely have absolute knowledge of all the steps to be taken by the other conspirators, and as a consequence such knowledge was not required to support a charge of conspiracy. The overall view of the law is that where a person deliberately shuts his eyes to a conspiracy he may be guilty of aiding and abetting in the commission of the offence.[24] This latter concept has taken on immense importance in the aftermath of the events of the 11th September 2001, where it has been alleged that many of the conspirators involved in the hijackings did not know or did not know the nature and extent of their mission beyond the hijacking of the aircraft.

Conclusion

It is surprising, in a jurisdiction which has been subject to an ongoing subversive threat, that we have not adequately defined the nature and extent of what is meant by a 'Terrorist' or indeed 'Terrorism' in our legislation. Ireland is not alone in that respect, and the matter will be formerly considered at the meeting of the World Jurist Conference in Madrid in the Spring of 2002.

The Gunpowder Plot may now be an incident in which only historians are interested today, but it serves as a template for modern terrorism, with the existence of desperate men intent on risking everything for the sake of a 'spectacular' attack on society. Although our current legislation dealing with offences against the State is among the most sophisticated of any jurisdiction, our law requires a fundamental overhaul. Finally, and by way of post-script, when we examine the character of Guy Fawkes, we need to ask whether he is an historical curiosity, or whether he bears any similarity to the suicide bombers of the 11th of September, or indeed the likes of John Walker ('the American Taliban') or Timothy McVeigh.[25]

As long as there are those who are prepared to engage in terrorism, liberal democracies like our own are arguably required to employ emergency powers and to maintain emergency courts. To answer Antonia Fraser's question, terrorism is never justifiable either when it is successful or unsuccessful, and for that reason it is imperative that we also have tribunals for incidents such as Rwanda and Bosnia. Since the decision of the *Pinochet* case by the House of Lords, it is an obligation on us all that those who profit politically from crimes against their own people or any other people should be subject to the rule of international criminal law.[26]

In that regard we must consider that the concept of terrorism includes not merely lone fanatics or small groups of subversives, but also those who engage in, organise and systematically develop terror against their own people, or those of another state, nationality, ethnic group or minority whether through the use of conventional or unconventional armed force. ●

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1. Menachem Begin and Yitzak Shamir were the respective leaders of The Irgun and Stern Gang that blew up civilians in the King David Hotel massacre in 1948.
2. Paul Elliott, *Assassin* (Blandford Press, London 1999).
3. The Assassins carried such an aura of fear and terror that today we take our word for political murder from this 11th century group.
4. *A Brief History of Terrorism*
5. Professor Ronald Hutton, Professor of English History, University of Bristol (interview Channel 4)
6. Fawkes adopted the name 'Guido' when he was in Spain, and signed his name on his confession accordingly.
7. His father, Sir William Catesby, was a noted recusant.
8. There has been a lot of suspicion regarding this unknown visitor, indeed the whole story may well have been a fabrication.
9. William Cecil, Lord Burghley.
10. Alan Haynes, *The Gunpowder Plot: 'Faith in Rebellion'* (Grange Books. London 1994)
11. The eight conspirators were: Robert Winter, Thomas Wright, Guy Fawkes, John Grant, Ambrose Rookwood, Robert Keyes, and Thomas Bates.
12. Official Transcript published by Robert Barker, London 1606 [Public Record Office London]
13. Coke had gained a fearsome reputation, having risen to prominence as a prosecutor at the trial of Dr Lopez and the Earl of Essex in 1601, when his style was unrelenting.
14. Though one may accuse Coke of hyperbole, his deduction is not without merit in light of the almost bizarre events of September 11th 2001.
15. Official Transcript
16. Fr Henry Garnet SJ was Superior of the English Province, and was executed even though he played no part in the plot, and indeed did everything in his power to prevent it.
17. He wanted his wife to have her jointure, his son the entailed lands, and his sisters the portions that were in his hands.
18. Treason Act 1939, section 1(3). The Act does not mention the possibility of being tried before the Special Criminal Court.
19. Treason Act 1939, section 1(4)
20. The Act originally provided for Penal Servitude, but that is now abolished.
21. (1954) 110 CCC1
22. (1986) 1 AC 27 at 39
23. (1980) NI 18
24. *Davies, Turner & Co Ltd -v- Cooper* [1974] AC 623 *per* Lord Goddard
25. McVeigh justified his attack on Federal Buildings in Oklahoma by reference to the Federal Bureau of Firearms and Tobacco's attack on the Branch Dividian compound at Wako.
26. The most striking feature of the *Pinochet* case was that a Spanish judge had the authority to order Pinochet's arrest for crimes committed mostly in Chile and mostly against Chileans. This authority derives from the rule of "universal jurisdiction": the principle that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern, no matter where the crime was committed, and regardless of the nationality of the perpetrators or their victims.

WOMEN IN LAW IRELAND

Ivana Bacik BL & Cathryn Costello***

Introduction

A major project is now underway which will examine the lives of lawyers in Ireland. The Department of Justice, Equality and Law Reform has funded this study, entitled 'Women in the Law' - the first major empirical study of the lives of lawyers in Ireland, and the role of gender difference in the professions.[1] The ultimate aim of the project is to develop a set of recommendations to advance the position of women in the law, encompassing legal education and academia, the legal professions, employed lawyers and judges.

The research co-ordinators are Professor Ivana Bacik, Reid Professor of Criminal Law, Ms Cathryn Costello, Lecturer in European Law and Director of the Irish Centre for European Law and Dr Eileen Drew of the Department of Statistics,[2] all of Trinity College. The Advisory Committee of the project comprises the Hon. Ms Justice Susan Denham of the Supreme Court, Ms Eilish Barry BL, Legal Adviser, Equality Authority; Ms Caroline Biggs BL, representing the Bar Council; Dr Caroline Fennell, University College Cork; Mr Ken Murphy of the Law Society and Ms Cathleen O'Neill, a Community Development worker with the Saol Project.

Why a study of women in the law?

The position of women in the law - towards a feminised profession?

The study was prompted by various factors. Clearly, the legal professions are becoming increasingly feminised. Women are now a substantial visible minority in all facets of the law, and now make up the majority of entrants to university law courses and professional courses, reflecting a shift to law as a feminised profession. In this respect, the legal professions appear to be more feminised than other areas. A 1998 survey of women in the workforce revealed that law had the highest proportion of women of all regulated professions. This progression is similar to experiences in some other countries, in particular the US and UK. However, in those other jurisdictions, it has been found that while many women progress in legal careers, the overall progression is not comparable with that of male lawyers. Indeed the now familiar terminology of glass ceilings was developed to capture a phenomenon first observed in legal practices in the US. Whether such a gender gap is also the case in Ireland, remains to be seen.

The absence of data & the realm of the anecdote

Following a successful conference on Women Lawyers held in Dublin Castle in November 2000, the researchers were struck by the lack of empirical data on women lawyers in Ireland, and the absence of scholarly research on this theme.

This absence is all the more striking when the vast literature in other states is considered. The preliminary phase of the research entailed conducting a literature review of similar studies abroad, resulting in the collation of over fifty reports.[3] Close to home, a study on women solicitors in Northern Ireland was carried out in 1999 by the Northern Ireland Association of Women Solicitors and the Equal Opportunities Commission.[4] Several studies have been carried out in the UK, including a 1992 study of sex equality at the Bar, following the establishment of a Sex Discrimination Committee in that year.[5] This led in September 1995 to the adoption of an *Equality Code for the Bar*. In the US, the American Bar Association established a Gender Bias Task Force in 1982. In 1987, under the initial leadership of Hilary Rodham Clinton, the ABA's Commission on Women in the Profession was established. Since then, it has published several reports, most recently *The Unfinished Agenda: Women in the Legal Profession* (2001).

In contrast, in Ireland professional bodies have not been prompted to take action in this area, and even basic historical gender data is difficult to locate or non-existent. The present project aims to fill the knowledge gap that currently exists.

Does gender difference make a difference?

One common finding in several of the studies reviewed is that there exists a reluctance to acknowledge gender difficulties in legal practice. This reluctance extends to women lawyers themselves, and is often attributable to individualised culture of legal practice. The 2001 ABA report noted that difficulties

were compounded "by lack of consensus that there are in fact serious problems. ... Yet a wide array of research finds that women's opportunities are limited by [various] factors."[6] The barriers identified were gender stereotypes, absence of support networks for women lawyers, workplace structures, sexual harassment, and more generally gender bias in the justice system. In preparing the groundwork for this project, through discussion meetings and preliminary focus groups, a similar hesitancy was encountered. However, despite this hesitancy, several problem areas were reported. This study aims to raise this discourse from the level of anecdote, and seeks to gather sound, qualitative and quantitative data.

Wider implications

Clearly, the position of women in the law has implications beyond the professions. Securing gender equality among the practising profession is a prerequisite for ensuring gender equality in the third arm of government - the judiciary. It has implications for the development of law through litigation and legislative reform. In addition, the study of gender equality in the legal professions has implications for many other areas. It is anticipated that the study will reveal the limits of anti-discrimination law in self-regulated professions and the influence of professional culture and perceptions of meritocracy on gender equality. As many lawyers are self-employed, the limits of legal redress in this context will also form an important part of the study. Thus, it is hoped that the study will have implication for equality law and policy generally.

Content & Methodology

The study will comprise several elements. Firstly, as already mentioned, a review of similar studies and literature globally has been carried out. Secondly, an analysis of existing statistics will be undertaken, to understand the progression of women in the law; that is, legal education and academia, the legal professions, employed lawyers and judges. Thirdly, qualitative interviews and focus groups will be held with key informants.

In addition, in order to obtain a more detailed picture of the experiences of women and men in the law, a survey will also be sent to a random sample of about 3 000 lawyers, both women and men. The questionnaire, entitled *Careers in the Law*, will be processed anonymously, and aims to provide a snapshot of career choices, progression, mobility, and the gendered experience of lawyers. It deals with topics such as the reconciliation of working and family life, career changes and attitudes to women lawyers. The questionnaire has been in preparation for four months, and employs best practice models in the social sciences. It has drawn upon surveys in other countries and been further refined by consultation with a number of practitioners, judges and academics.

Based on the responses to the questionnaires, and on other qualitative sources (in particular a series of interviews and regional focus groups), a report of the findings will be published together with recommendations to redress any problems revealed. This publication will be disseminated to legal professional bodies, universities, career guidance bodies, government departments, educational policy makers, professional associations of other regulated professions, trade unions and employers' organisations, and women's organisations. In addition, a conference will be held in summer 2003 in order to disseminate research and recommendations to contribute to mainstreaming of the recommendations. Thereafter it is hoped that the findings and recommendations will be translated into practice by the professional bodies and legal employers. It is anticipated that the process of on-going gender auditing will be continued in the future.

The project needs you...?

The project depends on the co-operation of the legal profession. Thus far, much assistance has been received from the two professional bodies - the Bar Council and the Law Society - from members of the judiciary, and from numerous other individual lawyers. Your co-operation, should you receive a questionnaire, is vital to ensure that the project generates coherent, practical and important findings and recommendations. Your assistance will be greatly appreciated by all those involved with the project. ●

If you would like to hear more about the project, please do not hesitate to contact us at the Law School, TCD, at womeninlaw@tcd.ie, or consult our website at www.tcd.ie/Law/womenlaw.html

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1. The Project is funded by the Equality for Women Measure of the Regional Operational Programmes of the National Development Plan, 2000 - 2006.
2. Dr Drew is the co-author of several studies on gender in other sectors, including *Gender Equality in the Civil Service*, Humphreys, Drew & Murphy, (Dublin: IPA, 1999)
3. This bibliography will shortly be available for review on the Women in Law website, <www.tcd.ie/law/womeninlaw.html>
4. EOC, *A Case for Equality: Gender Equality in the Solicitors' Profession in Northern Ireland*, (March 1999).
5. TMS Consultants, Without Prejudice? Sex Equality at the Bar and in the Judiciary, English Bar Council and LCD, (1992). Other studies include various publications of the Law Society of England and Wales, *Women in the Solicitors' Profession* (1997), *Equal Opportunities in Solicitors Firms, Equal in the Law* (1998), *Organisation and Perceptions* (1991).
6. Ibid, p. 5.

OIL IN TROUBLED WATERS - TUSKAR RESOURCES PLC THE COMPANIES (AMENDMENT) (NO. 2) ACT 1999

JOHN L. O'DONNELL SC appraises the first important Judgement on the law of examership following recent legislative amendment.

Introduction

Exploration shares are frequently investment rollercoasters. They can surge with word of the latest 'find', only to dive as more pessimistic mutterings are heard. In the midst of wildly varying rumours, one question the bewildered investor will ask is whether there is any likelihood of a return from the prospecting activities of the exloration company; a reasonable prospect of success, if you like. It is thus not without some irony that the first major judgment after the coming into effect of the 1999 Act (which significantly amended the law on Examinerships) should concern the fate of Tuskar Resources Plc, the well-known oil exploration company.

Background to the 1999 Act

There has been much criticism of the Companies (Amendment) Act, 1990 with the provisions of which established the principle of what we now know as examinership. Many, particularly secured creditors, felt that the 1990 Act set the bar too low for any Petitioner seeking Court protection, since any such Petitioner was only obliged to show that there was some identifiable prospect of survival of the company (and the whole or any part of its undertaking) as a going concern in order to obtain the requisite Order granting Court protection. The High Court and Supreme Court had resisted attempts to persuade them to redefine this low threshold[1]. However given the chorus of disapproval it is perhaps unsurprising that the Company Law Review Group recommended in its report of December 1994 that the bar should be raised so that a Court should have to be satisfied that there is a reasonable prospect of survival of the company, and the whole or any part of its undertaking, as a going concern before granting the necessary Court protection. This recommendation was given effect to in Section 5(b) of the 1999 Act which amended Section 2(2) of the 1990 Act.

"Many secured creditors felt that the 1990 Act set the bar too low for any Petitioner seeking Court protection ...The Company Law Review Group recommended in its report of December 1994 that the bar should be raised so that a Court should have to be satisfied that there is a reasonable prospect of survival of the company, and the whole or any part of its undertaking, as a going concern before granting the necessary Court protection. This recommendation was given effect to in Section 5(b) of the 1999 Act which amended Section 2(2) of the 1990 Act."

The 1999 Act also made a number of other changes to the provisions relating to examinerships. One of the most interesting was the requirement that a Petitioner ensure that his petition to the Court be accompanied by a report of an independent accountant.2 This report would contain information about the company as well as (in particular) a statement of its affairs including assets and liabilities. As well as indicating the opinion of the independent accountant as to whether or not the company (and the whole or any part of its undertaking) has a reasonable prospect of survival he is also obliged to detail how the company is to be funded during the protection period. In addition he must state the recommendations of the independent accountant as to which pre-petition liabilities should be paid. This procedure effectively supplants the Section 15 report (which is now abolished). The requirement that the report in question

accompany the Petition means that the Court will be apprised of considerable additional information as to the company's affairs before deciding whether or not to grant Court protection and to appoint an Examiner. The introduction of the requirement of this report from an independent accountant is undoubtedly open to criticism. It may be difficult to retain an independent accountant and obtain a report from him within 3 days of the appointment of a Receiver, for example. It is also clear that the preparation of an independent accountant's report is likely to add considerably to the cost of presenting a Petition. This may well represent difficulties for smaller companies. Difficulties may also occur where the Petitioner is a creditor, since a creditor may have trouble obtaining the necessary access to the books and records of the company. In introducing this pre-petitioner procedure, the Legislature felt that it would be justified in shortening the protection period (from 3 months to 70 days).[3]

Tuskar Resources Plc

Tuskar Resources Plc ("Tuskar")[4] was a public limited company whose shares were listed on the exploration securities market of the Irish Stock Exchange. The company was primarily engaged in oil exploration and production which activities it had pursued in various countries around the world since its incorporation in 1981. For the last two years the company's sole activity was in Nigeria but the company did not itself carry out business there; it did so instead through a subsidiary called Tuskar Resources Limited ("the Nigerian company") which was a Nigerian registered company.

One of Tuskar's creditors, Green Sea (which had provided various services to Tuskar including the tank facility whereby oil obtained could be processed and stored at sea) petitioned to have Tuskar wound up. Green Sea claimed that Tuskar owed it in excess of US$11,000,000 for the services so provided; Tuskar disputed the exact amount but did not dispute there was a very large amount of money due by it to Green Sea. Green Sea had previously obtained a worldwide Mareva Injunction against Tuskar in the United Kingdom.

Of relevance perhaps also was the fact that the Nigerian company also faced difficulties, in Nigeria. It was being sued by a company called Cavendish Petroleum Nigeria Limited ("Cavendish"), which disputed the Nigerian company's claim that it owned the oil mining lease granted by the Nigerian government to mine for oil in the area of Nigeria in question. Cavendish claimed that the lease had in fact been granted to them. Clearly the fact that the production company also was in some difficulty was a matter of concern. Critically, given that these difficulties were before a Nigeria Court and involved a Nigerian registered company (albeit a subsidiary of Tuskar) it was difficult to see what an Irish Court would be able to do to influence the outcome of those proceedings.

The Petition

Tuskar presented a Petition seeking Court protection under the Companies Amendment Acts, 1990-1999. An Interim Examiner, Mr. Jason Sheehy, was appointed to the company by McCracken J. Interestingly, Mr. Sheehy was the author of the independent accountant's report which accompanied the Petition seeking Court protection.

There was a serious dispute between Tuskar and Green Sea over elements of the evidence which was adduced at the hearing of the Petition. For example the Petitioner contended that Cavendish continued to be willing to deal with Tuskar and the Nigerian company in relation to the oil mining lease. Green Sea contended that the attitude taken by Cavendish at the most recent meeting of the parties (which both Green Sea and the Petitioner attended) indicated that Cavendish wanted nothing more to do with either Tuskar or the Nigerian company. This latter version appeared to be corroborated by minutes of the meeting taken by a representative of the Nigerian government.

It is also appeared that an entity called Reliance Trade Corporation Plc ("Reliance") which was a substantial trading company with influential contacts in West Africa was prepared to put in place a "reverse take-over" in which the assets and activities of Reliance would be incorporated into Tuskar; that entity would then explore other options in the area of oil exploration and otherwise. Under Reliance's proposal it would provide funding to facilitate the development of business and the implementation of a scheme of arrangement; in return for this Reliance would obtain a majority stake holding of not less than 51%. So there was certainly evidence of an indication of interest by a potential investor in Tuskar.

Issues

Several issues arose for determination.

(i) **Can the "independent accountant" be appointed Examiner?**

It was argued by Green Sea that the independent accountant who reports to the Court at the time of the Petition should not, as a matter of logic, be eligible for appointment as Examiner. McCracken J indicated he had considerable sympathy for the argument. He accepted, on the general basis that justice must be seen to be done, that there can be a question mark over how independent an accountant can be if the purpose of his report to the Court is to determine whether he personally should or should not be appointed to a position such as Examiner. The Court would be very slow to appoint an accountant previously associated with the company as Examiner, as his impartiality could be questioned. The cost, of course, of bringing in a second accountant after the (first) independent accountant has completed his report to the Court was a significant factor. Indeed this was one of the criticisms of the 1999 Act at a time when it was a Bill; that the introduction of a requirement for the provision of an independent accountant's report would make matters considerably more costly. McCracken J noted that there was no statutory restriction on the Court in appointing the independent accountant as Examiner but he indicated that there may be cases where it would be undesirable to do so. There must therefore be a risk attached to seeking to have the independent accountant appointed as Examiner in future cases and a more prudent course (despite the cost) would be to seek to have a separate Examiner nominee lined up if the Court were willing to grant protection.

(ii) **The requirements of the independent accountant's report**

The requirement of Section 3(3) of the 1990 Act[5] states that the independent accountant should give an opinion (emphasis added) as to whether the company and the whole or any part of its undertaking would have a

reasonable prospect of survival as a going concern. He is also obliged to state the conditions which he considers essential to ensure such survival. However an independent accountant is not required to set out in detail the evidence which leads him to this opinion. Thus it is reasonable to conclude that the obligation on the independent accountant is not to show that the company has a reasonable prospect of survival based on evidence, but rather to give his opinion as to whether or not the company can survive as a going concern, together with his reasons for his belief in this regard.

(iii) **The nature of the undertaking and/or business of a company seeking protection**

In order to grant protection the Court has to be satisfied that there is a reasonable prospect of the survival of the whole or any part of the company's undertaking as a going concern. This was undoubtedly critical in this case. The company seeking protection was Tuskar. It was a holding company. Its only "undertaking" was to hold shares in the Nigerian company, which in turn carried out trading. McCracken J was of the view that where the undertaking of a company consisted solely of the holding of shares in another company that would not under any circumstances be called a going concern. He indicated[6] "It seems to me that the wording of the Act precludes the Court from making an Order appointing an Examiner to a holding company simpliciter, and that indeed to do so, particularly in the circumstances of this case, would be totally contrary to the objects of the Act. The Act is intended to give a breathing space to try to get the affairs of an insolvent company put in order. This is frequently to the detriment of some creditors, particularly secured creditors, but the Legislature has considered that their interest may sometimes have to suffer if there would be a general benefit to other creditors, to the shareholders, and to the employees of the company. However these considerations are unlikely to apply to a pure holding company."

(iv) **The position of the Nigerian company**

McCracken J however made it clear that of course the Act did allow for the appointment of an Examiner both to a company and to a related company. In such a case both the holding company and trading company would be subject to Court protection and would come under the investigation of the same Examiner. This might be highly desirable particularly in a case where there were a group of companies trading within the jurisdiction. However McCracken J held that the definition of related company in Section 4(5) of the 1990 Act as amended did not include a company registered outside this jurisdiction. In this he relied on the definition of company contained in the Companies Act, 1963 meaning a company formed and registered under that Act, or an existing company[7]. It is clear that the Nigerian company was thus not encompassed by the definition of "company" and therefore could not be deemed to be a related company.

McCracken J however made it clear that even if he had been able to hold that the Nigerian company was in some sense a related company and therefore subject to the jurisdiction of the Court, he did not think it would be possible to do so in the instant case. Section 12 of the 1999 Act makes it clear that a Court may not make an Order in respect of a related company unless it is satisfied that there is a reasonable prospect of the survival of the related company on the whole or any part of its undertaking as going concern. In his view however, he did not have sufficient evidence before him to indicate such a reasonable prospect of survival for the Nigerian company. Indeed it appeared that the Nigerian company was incapable of carrying on its business at present because it had no storage facilities for any oil it might recover. It was also involved in litigation in Nigeria, the outcome of which appeared to be uncertain.

(v) **Other matters**

(a) **The reverse take-over**

In holding that there was no reasonable prospect of survival of the company on the whole or any part of its undertaking as a going concern McCracken J also placed reliance on other matters which had arisen before him in the course of the hearing. The proposed "reverse take-over" by Reliance was not, McCracken J felt, really a proposal to continue the undertaking of either the company or the Nigerian company as a going concern. Rather he deemed it to be a proposal to transfer other businesses at present operated by Reliance to Tuskar in return for a majority shareholding in Tuskar. In his view this was "well outside the purposes of the Act, and has nothing to do with the survival of any part of the undertaking of the company as a going concern. It was introducing a new undertaking to the company."[8]

(b) **Bad faith**

In addition, Tuskar alleged bad faith against Green Sea, contending that Green Sea's motive for opposing the application was to try to ensure that the Nigerian operation would cease and that thereafter Green Sea (perhaps in combination with Cavendish) would be then in a better position to obtain the lease at present held by Tuskar from the Nigerian authorities. McCracken J indicated that this could not be a ground for ruling out the opposition on the part of the creditor. An entity was entitled to protect its own interests insofar as its action are not illegal and it was in any event owed a great deal of money, much of which it was unlikely to

"It is clear that a company seeking Court protection now will need more than hope or good intentions. The preparation of a truly independent accountant's report is obviously now an inescapable condition of Court protection. A company will almost certainly need to provide hard evidence of how its own survival as a going concern will be financed during the period of protection if protection is granted at an early stage in order to convince a Court it has a reasonable prospect of survival."

recover, although it did claim to have a lien on oil at present stored on board the storage vessel on foot on which it would hope to recover in the course of the winding up.

Interestingly also Green Sea complained that the original Grounding Affidavit and the independent auditor's report were inaccurate. While McCracken J indicated that he had no doubt that they were "overly optimistic as to the future of the company" he did not think that over optimism is sufficient to show bad faith. In any event McCracken J was happy to rely on the discretion conferred by Section 4(A) of the Act, which provides that "the Court may decline to hear a Petition..." (emphasis added) if there is a failure to disclose information or exercise utmost good faith; the Act of course does not use the word "shall".

(c) **The dispute in Nigeria**

It was also clear that both Tuskar and the Nigerian company were in serious dispute with both Green Sea and Cavendish, neither of whom were prepared to negotiate with the company or with an Examiner. McCracken J held that the company had no prospect of success unless it could come to terms with those protagonists. In addition Tuskar owed an indeterminate but very large sum of money to Green Sea which there was no real prospect of being discharged. Tuskar (or the Nigeria company) also owed considerable sums to the Revenue and other authorities in Nigeria yet there was no evidence whatever of the financial position of the Nigerian company, its accounts or the attitude of its creditors.

Conclusion

The application by Tuskar was undoubtedly ham-strung by extra-territorial difficulties which could not have filled a Court with confidence. The fact that Tuskar was only a holding company (and the jurisdictional position of its trading company) only compounded these troubles. The extent of its liabilities (some $21,000,0000 according to its own estimated statement of affairs) could only have deepened the Court's concern.

But even taking these and the other matters outlined above into account, it is clear that the Court imposed a stricter test than it might have done previously, as it is now required to do under the 1999 Act. A company will of course be able to avail of the provisions of the legislation provided its circumstances are appropriate. A recent example of a successful examinership which concluded in the saving of approximately 300 jobs can be seen in *Re Castleholding Investment Co. Limited & Anor* [9] ("Antigen"). In *Antigen* all creditors, secured or otherwise, were being paid the amounts due to them at the date of the Petition in full (although payments were being deferred and made by instalments without interest). McCracken J refused to modify the scheme to allow for the payment of interest and/or immediate repayment of capital to the banks; to do so would be to effectively rewrite the scheme which in turn would require new meetings of creditors. McCracken J was not prepared to order this. Further, McCracken J did not believe that the banks were unfairly prejudiced in the light of the benefits they were receiving under the scheme. The fact that the shareholders of the companies in question were selling their shares to the investor in return for which shareholders were obliged to provide substantial warranties to the investor was not, in the view of McCracken J, under the scheme unfair or improper. McCracken J accepted that such an agreement between the investor and shareholders was an agreement made not within the scheme of arrangement but outside it.

But it is clear that a company seeking Court protection now will need more than hope or good intentions. The preparation of a truly independent accountant's report is obviously now an inescapable condition of Court protection. A company will almost certainly need to provide hard evidence of how its own survival as a going concern will be financed during the period of protection if protection is granted at an early stage in order to convince a Court it has a reasonable prospect of survival. These and other requirements mean that the process of Court protection is likely to be out of reach of many smaller companies, some of whom in any event may not have been appropriate candidates for applications of this kind. The current economic downturn will inevitably mean that more and more companies will seek to avail of Court protection as cashflows and belts tighten. Any company embarking on such a voyage nowadays should be very careful; the waters it is entering are deeper and more hazardous than before.●

1. See *Re Atlantic Magnetics Limited (In Receivership)* [1993] 2 I.R. 561. See also *Re Holidair Limited* [1994] 1 ILRM 481.
2. See what is now Section 3 (3A) and (3B) of the Companies (Amendment) Act 1990, as amended by the Companies (Amendment) (No. 2) Act 1999.
3. Section 5(1), as amended.
4. *In Re Tuskar Resources Plc* [2001] 1 I.R. 668.
5. As inserted by Section 7 of the 1999 Act.
6. At page 679 of the report.
7. Section 2 of the Companies Act, 1963, as amended.
8. At page 680.
9. High Court (McCracken J), Unreported, 8 November 2001

HE DISABILITIES BILL 2001

Shivaun Quinlivan, BA, LLM, BL, Law Lecturer NUI, Galway.

Introduction

Disability rights legislation was first anticipated with the publication of the Report of the Commission on the Status of Disabilities in 1996.[1] Legislation of this nature has been eagerly awaited, and in December 2001 the government published the Disability Bill 2001. The Bill was the result of consultation with the disability movement, yet when it was published it was not well received. The government made a number of concessions in respect of the Bill and finally it was temporarily withdrawn pending further consultation.[2] The aim of this paper is to look at the general concerns of the disability movement with the provisions of the Bill, to focus on some of the more specific issues in doing so, to highlight why the Bill was met with hostility, and to suggest a way forward for the Disabilities Bill.

In 1996 the Commission on the Status of People with Disabilities published its Report. This Report has been heralded as signifying the move from the charity model of dealing with people with disabilities towards a rights approach. The Commission's Report has received all party support and has been accepted as 'the blueprint for disability law reform in Ireland.'[3] The Commission made over four hundred recommendations many of which have been acted upon. To date we have seen the introduction of the Employment Equality Act 1998,[4] the National Disability Authority Act 1999, the Comhairle Act 2000 and the Equal Status Act 2000.[5] While not part of this package of reforms, the Mental Health Act 2001 may be regarded as a related development.[6] It could fairly be stated that all of these legislative enactments recognise two basic themes, that people with disabilities are part of the mainstream community and that they are the holders of rights within society.

Against this legislative backdrop, there was much expectation and anticipation about what should be in the Disabilities Bill, particularly in relation to the perceived necessity to complete or perfect the non-discrimination agenda, to provide individualised services and to address issues of accessibility.[7] The National Disability Authority (NDA) suggested in their submission that the Disabilities Bill should ensure that the right to participate in society is a reality for people with disabilities. This view was reiterated in December 2001 at the 'Get Your Act Together' conference which called on the government to embrace the equality agenda, an agenda which they stressed is broader than anti-discrimination: this agenda should include the right to participate.[8]

The Disabilities Bill 2001 failed to live up to expectation, and represents a lost opportunity to make a lasting positive impact on the lives of people with disabilities in Ireland. The Bill, as published, is fundamentally flawed: it is not rights based, it lacks enforcement mechanisms and represents a move away from the principle of mainstreaming.

Completing the non-discrimination agenda

The concept of duty-based legislation is to impose legal duties on those to whom it is directed. In the context of the Disabilities Bill there are duties in respect of needs assessments placed on the Health Boards,[9] the accessibility of streetscapes on the Local Authorities[10] and the provisions of advocacy services on Comhairle.[11] The duty-based approach harks back to the view that people with disabilities are the beneficiaries of State largesse, or the objects of charity. The rights based approach on the other hand recognises people with disabilities as being entitled as of right, that is entitled to participate and to contribute to society.

The anti-discrimination approach, coupled with the restrictive reasonable accommodation provisions contained within the Employment Equality Act 1998 and the Equal Status Act 2000, while very necessary, do not go far enough to tackle the social exclusion experienced by people with disabilities. There is a requirement to engage in some form of positive action to tackle the societal tools of exclusion. The legislation envisaged by the Commission on the Status of People with Disabilities would have tackled the exclusion experienced by people with disabilities in the context of the built environment, the communications environment, within the transport sector as well as in the provision of health, educational and other services.[12]

The disability movement clearly felt that it was a retrograde step to deal with crucial issues of access, advocacy and assessment of needs within the confines of duty-based legislation. Not alone was the legislation drafted as duty-based legislation but the second fundamental flaw within the Bill was that there was no method of enforcing compliance with the duties that were being legislated for.

Immunities

As the Bill is not rights based there is no right to go to court to enforce individual rights. However, the Bill also provided that there was no right to bring any public body to court to force them to comply with their legislative duties. [13] Section 47(1)(a) of the Bill stated:

> '(1) Nothing in this Act shall -
>
> (a) confer a right of action in any civil proceedings by reason only of a failure by a public body to comply with any duty imposed on it under this Act'

People with disabilities therefore had no means of ensuring that public bodies complied with their legislative duties.[14] It is hard to find a comparable provision within legislation of a similar nature. The Safety, Health and Welfare at Work Act 1989[15] contains a similar provision, but there are however obvious differences as the area of health and safety at work is well served by a whole array of common law remedies. This is not the case in the context

of the Disability Bill. The inclusion of section 47 was viewed with cynicism at best, and as an attack on the constitutional rights of people with disabilities at worst.

Part 4 of the Bill, dealing with the provision of Health Assessments, makes provision for a form of internal enforcement. This part of the Bill introduces a complaints officer,[16] or the possibility of referring a complaint to the Ombudsman.[17] The internal enforcement mechanisms envisaged within the Bill made little sense when a mainstream complaints body is already in existence which would be better positioned to enforce the legislation, namely the Equality Authority.

Mainstreaming

Mainstreaming as a theory adopts the view that all people should be considered when developing programmes, services or policies. Mainstreaming is, in effect, inclusion, that is delivering services to all members of the public including people with disabilities. The underlying policy is that separate provision inherently reinforces discriminatory attitudes towards people with disabilities, and it follows from this policy that legislative presumptions should be based on inclusion. However, within the Bill this is not the case.

In particular, because access is generally defined in section 3 of the Bill, and as the Bill is primarily aimed at public bodies, the relevant access is access to public or State services. Access is defined in terms of access that is common to all and, failing that, as separate access. Separate access is in turn considered when common access is not practicable, or the cost burdens are too great. There is no indication within the Bill as to who is to determine the issue of cost burdens, nor do we know what criteria will guide a determination as to what is or is not practicable. Of more concern is section 3(1)(b)(ii) where it states that separate access may be provided where common access "is not necessary for the benefit of persons with disabilities."

This provision suggests that there are services or areas of life that are being envisaged without the participation of people with disabilities. This form of exclusionary and paternalistic presumption is prevalent throughout the Bill,[18] and in some instances it specifies different and arguably discriminatory practices between different disabilities. Section 6(2), for example, relates to making information available in alternative formats, and for most people with disabilities this information will be made available on request. It is arguable that information should be automatically available in alternative formats where a public body is providing such information; making the information available only on request continues to ensure that information reaches people with disabilities later than everyone else. Of more concern however is section 6(2)(c) which states that a public body shall ensure as far as practicable that "any information with important implications for persons with a hearing impairment or learning disability is accessible to them."

It is vital that information is made accessible in alternative formats for people with disabilities, yet this section attempts to enshrine in legislation different levels of accessibility depending on a person's disability. What is the basis for suggesting that people with hearing impairments or learning disabilities should only be entitled to access information that has 'important implications for them.' This provision also begs the question, who will determine what information has 'important implications' for the groups in question?

From a mainstreaming perspective, the Bill as it is presently formulated is therefore regarded as fundamentally flawed, the underlying fault being the move away from the rights based approach. This move frustrates the equal right of people with disabilities to participate in society. This is surprising, because the disability rights agenda is not new, and furthermore it forms part of the general obligations assumed by Ireland in signing up to the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.

As stated above, there was an expectation that the Bill would address three issues. Clearly it has failed to perfect the non-discrimination agenda, but does the Bill deal adequately with the provision of individualised service or with the issue of accessibility?

Individualised service provision

Assessment of needs as envisaged by the Commission on the Status of Disabilities was an individualised assessment, addressing the life needs of an individual. On completing such an assessment it would be determined in conjunction with the individual what services were required. Services should be held to include health, educational, transport or other essential services having regard to life needs.[19] However, the Bill only envisaged the provision of health services[20] in isolation from other needs that an individual may have.

Section 23 provides that where a person with a disability applies to the Health Board for a health service, the Health Board must arrange for an assessment of that person's needs. When carrying out the assessment, the Health Board should ensure that the person being assessed is involved in the assessment, including any decisions in respect of treatment to be provided. Where the person being assessed cannot participate due to their age or particular disability, a representative may participate in the assessment on their behalf.[21] On completing the assessment, the deciding officer, a health board worker, must determine what services should be provided to a person with a disability. All assessments and decisions of deciding officers may be reviewed to take account of any changes in the person's circumstances, and should at all events be reviewed from time to time.[22]

On determining that a service is required, the Health Board is obliged to try to provide the service as soon as practicable and to the fullest extent possible. When determining what services should be provided, the Health Board may have regard to ensuring that resources available to it are used to provide the maximum benefit to persons within the Health Board area.[23] This is in effect the theory of the greatest good for the greatest number, and it provides a statutory opt-out for Health Boards in respect of those individuals who may require costly services. This will be a factor in determining what services are made available to individuals with disabilities, and it amounts to a considerable restriction on the duty imposed on the Health Board.

This Part of the Bill contains some level of enforcement, in that provision is made for a complaints officer, who may be an employee of the Health Board. There is a requirement that the complaints officer is independent in the performance of this work. Complaints may be made about any element of the assessment procedure. The Bill is silent on the possibility of complaining about a failure to provide the actual assessment within a reasonable time frame.[24] The recommendations of a complaints officer may be appealed to or enforced by the Circuit Court. The assessment procedure is also subject to a review by the Ombudsman.

There are a number of concerns with this provision, the most important being the narrow focus and the lack of independence of both assessment and complaint procedures. The assessment

procedure is triggered when an individual applies for a service from the Health Board, the Health Board carries out the assessment, the deciding officer is a Health Board worker, the complaints officer may be a Health Board worker, and the provider of the service is the Health Board. The procedure suggested within this Bill opens the door to possible conflicts of interest, which could operate to the detriment of the individual with a disability. Ideally the body carrying out the assessment of need should be separate and independent from the service provider, and the same principle should apply to the complaints body.

A further concern must be the narrow focus of the assessment. The Bill refers only to health services. When the idea for an assessment was originally conceived the reference was to life needs, not just medical needs. The inclusion of the assessment of needs is accepted as a vital element in ensuring equality for people with disabilities. The inclusion of this Part of the Bill is welcome, but it needs to be re-addressed.

Accessibility

Accessibility is also regarded as fundamental to participation for people with disabilities in society, and many of these issues are addressed within the Bill. The Bill provides for accessibility issues in both Part 2 and Part 3. Part 2 deals with accessibility of public buildings and services, whereas Part 3 deals with the transport environment. The primary concern in this area must be the timescales within which the various systems must be made accessible. Section 8, for example, does not require local authorities to make services available until the year 2010. These services include public phones, toilets, and streetscapes. These particular obligations are not new, and a number of such obligations are already reflected in the Equal Status Act.

At first blush many of these timeframes seem extraordinarily long. However, they involve rolling implementation and the dates mentioned in the Bill refer to the date by which full compliance must be in place. If the Bill is enacted it will come into force in 2003 except where it states otherwise.[25] Based on this, the timeframes are as follows: the advocacy procedure, sign language, accessibility of public buildings, services and heritage sites must be in place by January 2006;[26] by January 2010, streetscapes, city bus services and taxi services will be fully accessible;[27]]passenger rail and school bus services should be fully accessible by 2015 and finally rail platforms should be accessible by 2020.[28]

The difficulty is that some of the dates for final compliance are extremely long, in particular the requirement that train platforms be finally accessible by 2020 as mentioned in section 12. This is further complicated by the fact that all trains must be accessible by 2015, so we have the anomaly that accessible trains will be pulling up to inaccessible train stations. Without specifying each timeframe, a general suggestion would be to reassess and reduce the timeframes involved.

Compliance

The enforcement procedures proposed in this Bill are clearly problematic. The NDA has been given a role in ensuring compliance with the Bill. Section 10 of the Bill provides that the NDA shall monitor compliance with the provisions regarding accessibility of public buildings, and may request (not require) public bodies to comply with the provisions of the Bill. The NDA is also given functions in respect of monitoring and assisting public bodies to comply with the 3 percent employment quota in the public sector.[29] The NDA has received a number of additional functions, and it seems clear that it will have a significant role in ensuring compliance with the Bill.[30] Howver, the Bill fails to confer any significant additional powers on the NDA, which does question the efficacy of their role as monitors of compliance.

A final issue that needs to be addressed is the issue of resources. As many public bodies have received new functions, duties or competences, the issue of both human and financial resources must be addressed. The resource implications are significant and do not appear to have been addressed within the Bill.

Conclusion

The Disability Bill as presently formulated is regarded by the disability movement as fundamentally flawed and in particular its failure to endorse the rights based model of disabilities legislation is perceived to be the core problem. The difficulties relating to enforcement are seen to compound this core problem, while the extraordinary timeframes are regarded as an insult to many. The Bill was the result of consultation, and the government has stated that it will re-enter consultation with disability organisations before re-addressing the Disability Bill 2001. However the issues are clear. Most of the criticism of the Bill relates to the lack of individual enforceable rights in respect of the provision of individualised services and in respect of access to the built, transport and communications environment. These recommendations were first made in 1996 by the government's own Commission and they remain as compelling today as they were in 1996. ●

1 Commission on the Status of People with Disabilities, *'A Strategy for Equality.'*
2 *'Disability Bill to be shelved until after general election.'* The Irish Times, Feb. 21, 2002.
3 Quinn, 'Government needs to withdraw Disabilities Bill' The Examiner, Feb. 18 2002.
4 Kimber, *Equality and Disability, (Part 1)* (2001) Bar Review, 494, and Kimber, *Equality and Disability (Part 2)* -(2001) Bar Review,
5 Power, C., *The Equal Status Bill 1999, - Equal to the Task,* (2000) Bar Review 267.
6 This Act was introduced to bring Ireland into compliance with our obligations under the European Convention on Human Rights. See Keys, *'Mental Health Act, 2001 Annotated'* ICLSA Forthcoming.
7 *'Disabled at the centre of new authority's proposal'* The Irish Times, October 31, 2000.
8 'Get Your Act Together,' Conference Report (Draft) at page 6.
9 Section 23
10 Section 8
11 Section 33.
12 Commission on the Status of People with Disabilities, *'A Strategy for Equality'* pp 15-70.
13 'Backdown on disability Bill' The Irish Times, Feb. 20, 2002. Prior to the shelving of the Bill the Minister did signify that this section would be dropped from the Bill.
14 There is some internal enforcement contemplated within the terms of the Disabilities Bill. However, this is largely confined to the assessment of needs provisions.
15 Health, Safety and Welfare at Work Act 1989, section 60.
16 Section 26
17 Section 24
18 See also sections 6, 9 and 24 as other examples of this point.
19 Commission on the Status of People with Disabilities, 'A Strategy for Equality,' Recommendation 31 at 19.
20 Section 22
21 Section 23(3)
22 Section 25
23 Section 24
24 Section 26
25 Section 1
26 Sections 31, 39, 6 and 7 respectively.
27 Sections, 8, 12 and 18 respectively.
28 Section 12.
29 Section 43
30 Section 10, 50 - 61.

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