The Bar Review

Journal of the Bar of Ireland • Volume 10 • Issue 4 • July 2005

- The Future of Civil Legal Aid in Ireland
- Judicial Review and EU Directives
- The ECHR and the *De Rossa* Case

THOMSON
ROUND HALL

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Volume 10, Issue 4, July 2005, ISSN 1339 - 3426

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The Bar Review is published by Thomson Round Hall in association with The Bar Council of Ireland.

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Thomson Round Hall
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301 Fax: + 353 1 662 5302
Email: info@roundhall.ie web: www.roundhall.ie

Subscriptions: January 2005 to December 2005 - 6 issues
Annual Subscription: €188.00
Annual Subscription + Bound Volume Service €288.00

For all advertising queries contact:
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The Bar Review July 2005

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Continuing Professional Development

Inga Ryan

Continuing Professional Development (CPD) or Lifelong Learning is a concept so embedded in our culture that it has been embraced by every vocation. Indeed the Bar Council has held continuing legal education events for many years. Traditionally these events have been organised on a voluntary basis by a member of the Bar, known as the CLE Officer, who offers his or her services to arrange educational activities whilst also running a practice.

In September 2004, in light of the increasing importance of education and standards in the profession, a decision was made by the Bar Council to introduce a structured scheme of learning and development activities which contribute to barristers continuing effectiveness. This is in keeping with the objective of our members to provide a high level of expertise in all areas of law combined with skilled advocacy. The next step was to recruit a full time professional Continuing Professional Development Manager to administer and manage the scheme and I have recently been assigned to that position.

The Bar wishes to assist practitioners in staying up-to-date with developments and to facilitate their professional development. To this end the scheme will be flexible and easy to follow. I would welcome suggestions from members on how their development needs might be met and I can be contacted by email at IRyan@lawlibrary.ie or in writing at The Distillery Building, 145-151 Church Street. I have already received a good deal of positive feedback from practitioners who feel that this support is timely.

The scheme will come into effect in October 2005. It is proposed that members will be required to partake in ten hours relevant activities per year. In keeping with our flexible approach, the guidelines for activities are straightforward. Namely, that they should be of intellectual or practical content, deal with matters related to the practice of law, be conducted by people holding suitable qualifications and that they are relevant to a practitioner's professional development needs.

We are working on a programme of events together with the King's Inns. It is envisaged that we hold regular activities and these will be advertised on our website and via fliers.

Guidelines for Continuing Professional Development are in the process of being developed and will be forwarded to all members.

News

World Conference of Advocates and Barristers 15th to 17th April, 2006

The International Council of Advocates and Barristers is holding its next world conference of advocates and barristers over the Easter weekend 15th to 17th April, 2006 in Hong Kong. This follows upon two successful conferences held in Edinburgh and Capetown. The Council devotes itself entirely to pursuing the interests of independent referral bars. The Bar Council of Ireland is a constituent member of the International Council of Advocates and Barristers and strongly urges its members to attend at and participate at the conference.

Further details can be obtained from Paul Sreenan SC.

Jesuit day of reflection for lawyers.

On Saturday, September 24th, 2005, at Manresa House, the Jesuit Centre of Spirituality in Dublin, a day of reflection will be held for practising lawyers. This day is part of an ongoing programme organised by members of the Jesuit Order and legal practitioners. This day will include presentations from John Costello, Solicitor (Eugene F. Collins, Solicitors), Prof. Gerard Whyte, (Law School, Trinity College Dublin), Cathy Molloy, Theologian, (Jesuit Centre for Faith and Justice) and Patrick Treacy B.L.

In order to reserve a place, please contact :-

Manresa House,
Jesuit Centre of Spirituality,
426, Clontarf Road,
Dollymount, Dublin 3.
Tel No. 01 - 8331352.

Date: Saturday, September 24th, 2005
Time: 9.30 a.m. - 5.00 p.m.
Suggested contribution: €75.00.
Lunch will be provided during the day.

The Future of Civil Legal Aid in Ireland

Gerard Whyte BL*

Introduction

In two months time, we will mark the twenty-fifth anniversary of the opening of the first law centre operating under the auspices of the Legal Aid Board. Next December marks the tenth anniversary of the enactment of the Civil Legal Aid 1995 which placed State-funded civil legal aid on a statutory footing for the first time. In a year of such anniversaries, it seems especially appropriate that we take stock of where we currently stand in Ireland in relation to the provision of civil legal aid and that we attempt to mark out what possible developments might lay before us.

Back in 1984, writing about the then relatively new civil legal aid scheme, I had occasion to say:

> '[I]f we are to take the question of access to law seriously we must abandon the current Scheme and resort instead to a community based model which identifies itself closely with the needs and wishes of the underprivileged, rather than with the power-brokers of our society.'[1]

As Bob Dylan put it, 'Ah, but I was so much older then, I'm younger than that now.'[2] In fairness to my youthful analysis of the situation in 1984, it has to be said that, at that time, the extra-statutory scheme was severely hampered by a lack of resources. Only approximately thirty solicitors, operating out of thirteen centres, four of them in Dublin, were available to provide what was meant to be a nation-wide service; there was no provision for involvement of private practitioners and not infrequently, the centres had to close their doors to all but emergency cases in order to deal with the arrears of cases that had accumulated.

Achievements of Legal Aid Board

More than twenty years on, the situation is very different. Most obviously, the Legal Aid Board now employs approximately 110 solicitors in 33 centres[3] and the Board can now boast of having provided legal advice in more than 145,000 cases and legal aid in more than 79,000 since it commenced operations in 1980. Some aspects of the situation remain relatively unchanged. Thus family law still constitutes the majority of cases in which the Board has provided legal advice and/or aid,[4] though the extension of the Board's remit to cover the provision of legal services to asylum-seekers through the Refugee Legal Service has also generated a significant workload. It is probable, though there do not appear to be any recent figures on the point, that the majority of the Board's clients are female.[5]

A recent positive development, prompted by High Court litigation, is the reduction of waiting lists for appointments with LAB solicitors. As recently as last year, cutbacks in State funding for the statutory scheme had resulted in demand again outstripping supply, with waiting lists for first interview with Legal Aid Board solicitors extending up to 15 months in some cases.[6] The problem of delay in providing legal aid has come before the High Court on two occasions. In *Kavanagh v. Legal Aid Board*,[7] the plaintiff had had to wait almost twenty months to have her application for legal aid processed and granted and on foot of that, she sought, *inter alia*, damages for breach of statutory duty. This claim was dismissed by Butler J. who held that the Board's duty to provide legal aid and advice under s.5 of the Civil Legal Aid Act 1995 was qualified by reference to the fact that such services had to be provided 'within the Board's resources'. The waiting list adopted by the Board and applied in this case was the manner in which the Board allocated services in accordance with its resources.

More recently, however, the plaintiff in *O'Donoghue v. Legal Aid Board*[8] successfully sued the State arising out of the delay of 25 months in providing her with legal aid. Her claim was based on four different arguments, namely, breach of statutory duty on the part of the Board, negligence on the part of the Board, breach of constitutional duty on the part of the State and infringement of the European Convention on Human Rights by the State. In a judgment that completely exonerated the Board for any responsibility for the delay suffered by the plaintiff, Kelly J. followed *Kavanagh* in holding that the Board's statutory duty was limited to providing services within the limit of its resources[9] and that the

* B.C.L., LL.M., Associate Professor at Trinity Law School. This paper was delivered at the recent Civil Legal Aid Conference in Killarney

1. See Whyte, 'And Justice for Some' (1984) 6 DULJ 88 at 130.
2. 'My Back Pages' (1964).
3. Three of which are operated by the Refugee Legal Service in Dublin, Cork and Galway.
4. Thus the most recent annual report from the Board indicates that family law constituted approximately 90% of all cases of legal aid and 80% of legal advice cases in that year - **Legal Aid Board Annual Report** 2003, at p.10. Prior to the introduction of the Refugee Legal Service, family law accounted for a higher percentage of the total caseload of the Board. Thus, in 1999, family law constituted approximately 97% of all cases of legal aid and 90% of legal advice cases in that year - **Legal Aid Board Annual Report 1999**, at p.9.
5. The most recent figures available, for 1987-89, indicate that during that time, almost 80% of all persons granted legal aid certificates were women and approximately 75% of all applicants for legal services - see **Legal Aid Board Annual Report 1987, 1988 and 1989**, p.3 and para.15.6(d).
6. *The Irish Times*, 2 February 2004.
7. [2001] IEHC 149 (High Court, 24 October, 2001).
8. [2004] IEHC 413 (High Court, 21 December 2004).

delay here was caused exclusively by the lack of adequate resources provided to the Board. He also dismissed the claim grounded in negligence, saying,

> "I am unable to identify any act of negligence on the part of the Board or it's officers. They were simply being swamped with work and their cries for assistance went unheeded."

However in a ruling that has potentially great significance for applicants for civil legal aid, he held that the plaintiff had a constitutional right to civil legal aid derived from her constitutional right of access to the courts and her constitutional right to fair procedures.[10]

> "Applying the approach of Lardner J. in [*Stevenson v. Landy*[11] and *Kirwan v. Minister for Justice*[12]] it seems to me that the unfortunate circumstances of the plaintiff in the present case are such that access to the courts and fair procedures under the Constitution would require that she be provided with legal aid."

Moreover the delay in granting legal aid in the instant case amounted to a breach of this right for which the plaintiff was entitled to recover damages.

Kelly J. has thus become only the second Irish judge to recognise that the Constitution provides for a right to civil legal aid in certain circumstances. In *Stevenson v. Landy*[13] and *Kirwan v. Minister for Justice*,[14] Lardner J. had held that an impecunious litigant had a constitutional right to civil legal aid where s/he was contesting wardship proceedings taken by the State in respect of his/her child, or seeking release from detention under the Trial of Lunatics Act 1883, respectively. Kelly J. has now significantly broadened the extent of this constitutional right to cover impoverished litigants seeking a divorce[15] and maintenance for a dependant child. However his view of this constitutional right may be even more expansive still for he also referred to the 1995 Act as "[giving] substance, in many ways, to the constitutional entitlement to legal aid for appropriate persons."[16] This view is clearly of great significance both to the Board and to its clients for if it is accepted that the 1995 Act is a vindication of a constitutional right, a failure to comply with any aspect of that Act that results in a denial of legal aid will expose the Board to legal liability.[17]

Kelly J. also rejected the argument advanced by counsel for the State that the courts were precluded from intervening in this area by virtue of the doctrine of separation of powers as explained by the Supreme Court decisions in *Sinnott v. Minister for Education*[18] and *T.D. v. Minister for Education*.[19] He distinguished both cases on the ground that the instant case was not concerned with a claim for mandatory relief against the State and did not involve any question of a future breach of constitutional rights.

In the light of his conclusions on the Constitution, Kelly J. held that it was not necessary for him to rule on the plaintiff's entitlements under the European Convention on Human Rights. He did comment, however, that his conclusion as to the plaintiff's constitutional rights was completely consistent with the provisions of the Convention and that the reasoning in *Airey v. Ireland*,[20] in which the European Court of Human Rights held that the right of access to the courts protected by Article 6(1) of the Convention could, in some circumstances, oblige the State to provide civil legal aid, was applicable in the instant case.

Damages were calculated by Kelly J. as the additional amount of maintenance the plaintiff would probably have received had her case come before the courts more promptly, a sum of £2,080, together with a sum of £5,000 in respect of the stress and upset occasioned by the delay in providing her with legal aid. In deciding on how quickly the plaintiff should have been provided with legal aid, the judge adopted the Board's own target of two to four months from receipt of the application as reasonable.[21] The clear implication here, of course, is that a client of the Board who has to wait more than four months from the time s/he first makes contact with the Board before meeting with a solicitor has a *prima facie* entitlement to damages for breach of constitutional rights. At the same time, as *O'Donoghue* itself demonstrates, the amount of damages involved may be relatively low though, of course, if it could be shown that a person's constitutional rights had been infringed deliberately, consciously and without justification by the State, exemplary or punitive damages would be appropriate.[22]

9. In an attempt to circumvent this restriction on the extent of the Board's statutory duty, the plaintiff argued that she had a right to civil legal aid under the European Convention on Human Rights and that, accordingly, s.28(5) of the 1995 Act was applicable. This obliges the Board to provide civil legal aid to a person where the State is, by virtue of an international treaty, obliged to provide civil legal aid to that person and significantly in the present context provides that this obligation must be discharged "notwithstanding any other provision of [the 1995] Act". However this argument was rejected by Kelly J. who said:
Section 28 (5) will only operate where an international instrument expressly requires the State to provide civil legal aid. The instrument may prescribe requirements which have to be met. The European Convention on Human Rights does neither. Accordingly, even if the construction concerning the phrase "notwithstanding any other provision of this Act" operates to override the saver as to resources in s. 5, the section has no application to this case.
10. In coming to this conclusion, Kelly J. noted that in *Doran v. Ireland* (2003) ECHR 417, a complaint taken pursuant to the European Convention on Human Rights in respect of an inordinate delay in bringing to a conclusion proceedings for negligence, the State had contended that the plaintiffs arguably had a constitutional right to have their case decided within a reasonable period of time and he observed that "The submissions made to this court by the defendants other than the Board are in many respects the polar opposite of what was being said by them to the European Court of Human Rights in *Doran v. Ireland*."
11. High Court, 10 February 1993.
12. [1994] 2 IR 417; [1994] 1 ILRM 444.
13. High Court, 10 February 1993.
14. [1994] 2 IR 417; [1994] 1 ILRM 444.
15. It would seem to follow from the State's obligation to respect marital privacy and possibly also from its obligation to uphold the institution of Marriage that this right should also apply to impecunious litigants seeking a judicial separation.
16. In the immediately preceding paragraph, he also said: "The purpose of the 1995 Act is that persons who meet the necessary criteria shall receive legal aid. That carries the implication that the entitlement to legal aid will be effective and of meaning."
17. In particular, with constitutional rights at stake, the Board could be sued for breach of statutory duty - see *Parsons v. Kavanagh* [1990] ILRM 560, *Lovett v. Grogan* [1995] 1 ILRM 12 and discussion by the present author in **Social Inclusion and the Legal System: Public Interest Law in Ireland** (2002) at pp.70-72.
18. [2001] 2 IR 545.
19. [2001] 4 IR 259.
20. (1980) 2 EHRR 305.
21. The Board seeks to deal with emergency cases, such as, for example, cases of domestic violence, in a shorter time-frame.
22. See *Kennedy v. Ireland* [1987] IR 587, [1988] ILRM 472; *Conway v. INTO* [1991] 2 IR 305, [1990] ILRM 497. See also the comments of Barr J. in the High Court decision in *Sinnott v. Minister for Education* [2001] 2 IR 545 when he said, at p.598:
The conscious, deliberate failure of Department of Finance administrators to pay due regard to and take effective steps to honour the obligations of the State to Jamie Sinnott on foot of the *O'Donoghue* judgment opens up an issue as to whether punitive damages should be awarded against the defendants. As that point was not argued, I do not propose to pursue it in this judgment. However, it is proper to lay down a marker that the issue of punitive damages will arise if it transpires in future litigation that this warning is not heeded and decision-makers persist in failing to meet the constitutional obligations of the State to the grievously afflicted and deprived in our society with the urgency which is their right.

I understand that *O'Donoghue* has not been appealed and that as a result of this decision, the Board received a significant increase in funding which has enabled it to reduce the waiting list at most, if not all, centres to less than four months, the target set by Kelly J. in his judgment. This remarkable development has been achieved primarily through the reintroduction of the private practitioner scheme at Circuit Court level and if this results in the effective provision of legal services, *O'Donoghue* may yet come to be regarded as one of the more successful examples of litigation strategy.

The position with regard to the provision of legal aid in 2005 is, therefore, dramatically different from the experience in the 1980s and credit is due to many people, most notably the solicitors and other staff of the Legal Aid Board who often worked under very trying conditions, for the manner in which the Board initially survived and latterly built up its services over the years. Praise is also due to the many individuals who served as members of the legal aid board down through the years. Yet while it is only right to acknowledge the achievements of the Board and its staff, I hope that it will not be considered churlish of me if I refer briefly to aspects of the scheme that, in my opinion, are in need of improvement.

Limitations of statutory scheme

To begin with, the statutory scheme is not comprehensive. Perhaps the most significant of the sixteen or so restrictions on the provision of legal aid is the exclusion of tribunal cases (other than cases going before the Refugee Appeals Tribunal). This exclusion affects persons appearing before social welfare appeals officers and the Employment Appeals Tribunal, many of whom would, almost by definition, have limited income and yet whose legal situation may involve complex issues of law and fact. The Board is also precluded from acting in representative actions (such as those pursued during the 1980s by married women seeking social welfare equality arrears), test cases and a number of other designated matters such as defamation and certain disputes concerning rights and interests over land.[23] Moreover, the failure to provide for periodic review of the financial limits on eligibility leaves open the possibility that inflation will restrict the category of eligible applicants.[24]

In the light of these restrictions, the question may well be asked as to whether Ireland has complied fully with its obligations under Art. 6 of the European Convention on Human Rights. In *Airey v. Ireland*, the Court of Human Rights held that the State had to provide for legal assistance "when such assistance proves indispensable for an effective access to court...[because of] the complexity of the procedure or of the case."[25] It would seem arguable that at least some potential litigants who are unable to afford to pay for their own representation will be unable to obtain legal aid from the State because of the restrictive nature of the statutory scheme and that consequently, Ireland may still be in breach of its international obligations.

Strategic model of legal aid

But for some of us interested in the provision of civil legal aid, a more fundamental problem with the statutory scheme is that it focuses solely on the provision of conventional legal services to needy individuals and does not address the structural problems confronting disadvantaged communities.

The different models used for delivering legal services to the poor cover a spectrum ranging from those concerned solely with the servicing of individual cases to those "strategic" models which attempt to tackle the social problems confronting their client-communities.[26] Describing the differences between these two poles of the spectrum, Zemans comments,

> "[S]ervice models confine their attention to discrete claims and problems brought to a programme by an individual with a readily categorized legal problem. This approach grows directly out of the traditional approach to protecting rights which [is essentially legalistic and individual]...
>
> ...Inevitably over-loaded, service models can expend little time or energy in educating the community or on outreach programmes. Since service models accept the norms of the legal system and provide a service for poor people which, in the opinion of the administrators (inevitably lawyers), is the same for the poor as for the rich, poor people using service schemes face many of the same obstacles that they would encounter within the traditional setting. Such service models offer little recognition of the uniqueness of the poor person's lifestyle. They neither make the service psychologically more accessible, nor do they attempt to handle problems which have not been on the traditional agenda of legal services (e.g. eviction). The service model reinforces the distance between the "recipient" and the "deliverer" of the service by encouraging clients to assume passive and dependent roles in their relations with the legal-aid scheme. Lawyers write briefs; interview witnesses; negotiate settlements and go to court. The client's perspective is generally of an over-worked, under-paid lawyer who is dealing with the immediate problem and ignoring the fundamental cancer of poverty and poverty-related problems that continue to affect the client."[27]

Strategic models, in contrast, are

> "orientated to identifying the significant social problems facing the community it is serving. While dealing with the inevitable daily problems, a strategic legal-services programme attempts to develop a long-term approach of research, reform and education to deal with the more fundamental issues. Rather than handling cases which are relevant to the lawyer's experience, a strategic programme sets priorities in one or several areas of concern to a particular community such as the environment, housing, land-ownership, occupational health, or immigration. In concert with the geographic community or the community of interest, the professional will consider collective

23. In its **Report on Civil Legal Aid in Ireland** (Law Society of Ireland, 2000), the Family Law and Civil Legal Aid Committee of the Law Society of Ireland recommended, *inter alia*, that the remit of the Legal Aid Board be extended to include tribunal work, test cases and representative actions subject only to the merits test in the particular case - see p.8.
24. The Family Law and Civil Legal Aid Committee of the Law Society of Ireland recommended, *inter alia*, that eligibility criteria should be regularly reviewed in accordance with increases in the Consumer Price Index - *op. cit.*, at p.16.
25. (1979) 2 EHRR 305 at p.317
26. See Zemans, "Recent Trends in the Organization of Legal Services" (1985) *Anglo-American Law Review 283*; Paterson, "Legal Aid at the Crossroads" (1991) Civil Justice Quarterly 124.
27. *Op. cit.*, pp.291-2.

> issues or the complaints of a class of individuals... A significant distinction between the service and strategic models is in methodology. While the service model perceives itself as bound to the court and to litigation, the strategic model views advocacy as only one potential strategy. Other strategies might include tenant-organizing, lobbying the legislature, television and media coverage, or community picketing of a particularly abhorrent landlord."[28]

The Pringle Committee on Civil Legal Aid was very much alive to this distinction[29] and the majority Report recommended, *inter alia*, that in addition to servicing individual cases through lawyers in private practice and salaried lawyers in law centres, the Board should also seek to make the public more aware of their rights and that it should evaluate its work in order to identify any need for law reform.[30] However, despite persistent calls from the Non Governmental Organisation (NGO) sector for the implementation of this report, successive governments have simply ignored it and for some considerable time now it has been evident that a strategic model of legal aid will not be directly provided by the State through the good offices of the Legal Aid Board.

A rose by any other name?

Notwithstanding this reality, it is possible that the substance of the Pringle Report might yet be achieved through a public-private partnership. As I have already noted above, the Legal Aid Board provides a valuable service to low income individuals in need of legal aid and advice and also avails of the services of private practitioners in relation to certain categories of case going before the District and Circuit Courts. The Board has also engaged, albeit in a limited way to date, in the provision of information about legal rights to the general public and may, in the near future, intensify its efforts in this regard. A growing NGO sector, meanwhile, has attempted in various ways to provide a strategic model of legal aid in Ireland. For quite some time, the NGO sector was represented by two organisations, the Free Legal Advice Centres Ltd. and the Coolock Community Law Centre Ltd. (now called "Northside Community Law Centre"). However the past few years have witnessed a significant growth, relatively speaking, in this area with the emergence of the Ballymun Community Law Centre, Disability Legal Resource, Immigrant Council of Ireland and the Irish Traveller Movement Legal Unit. These organisations, together with FLAC and the Northside Community Law Centre, have come together under an umbrella body called the Independent Law Centres Network whose objectives are:

- To co-ordinate activities and undertake joint projects which will maximise the impact of legal services for the community;
- To target the legal system to ensure barriers to accessing legal services are addressed;
- To promote appropriate legal responses to poverty, inequality and human rights issues, including socio-economic rights; and
- To develop and implement campaigns for greater access to justice for all in solidarity with a range of organisations.[31]

However the NGO sector is still small and primarily based in Dublin, (though the specialist centres operated by the Irish Traveller Movement, Disability Legal Resource and Immigrant Council of Ireland take cases from outside Dublin that fall within their specialisation, while FLAC provides a more generalised service without any geographical limitations) and there is clearly a need for additional community law centres to be located in other centres of population, such as Cork, Galway and Limerick.

Developing some of the features of the legal aid scene in Ireland that I have briefly sketched and drawing them together could, I believe, result in the realisation of the essence of the Pringle Report. The Legal Aid Board should be permitted to continue to rely on private practitioners so as to enable it to provide a speedy and effective service to its clients; it should also expand its role in the provision of legal information to the general public. For its part, the NGO sector should seek to establish new centres and preferably outside the Dublin area. While not wishing to underestimate the enormity of this task, the recent example of the Ballymun Community Law Centre is a very encouraging sign that growth in this sector is possible. The final piece in the jigsaw is close co-operation between the Legal Aid Board and the NGO sector. A glimpse of what that co-operation might look like can be seen in the recent experience of the Ballymun Community Law Centre. The solicitor for BCLC is Frank Murphy, a solicitor on secondment from the Legal Aid Board, and the Board is represented on the Centre's management committee by Clare Kelly. Until relatively recently, the Board employed a law-clerk to work in the Centre on a part-time basis processing those applications for legal aid received by the Centre that would eventually be referred on to the Board. This type of co-operation, properly supported by the exchequer, represents the best hope of ensuring that marginalized individuals and communities are provided with the most effective form of legal aid, one that addresses the needs of the many low-income individuals who require legal advice and representation and that also looks beyond the circumstances of the individual case to see how law and society might be reformed in order to promote social inclusion. In this context, it is very regrettable that cutbacks imposed on the Board last year resulted in the withdrawal of the part-time law clerk from the Ballymun Community Law Centre.

Conclusion

Twenty-eight years on from its publication, it is possible to argue, looking at the current state of civil legal aid in Ireland, that the basic proposal of the Pringle Report - a mixed-delivery model combining both service and strategic elements - is attainable, even if not quite in the form anticipated in that Report. Though some concerns remain in relation to such issues as representation before tribunals, the service element, operating under the auspices of the Legal Aid Board, is otherwise reasonably well established and generally accessible. Given that the State is unlikely to commit itself to the development of a strategic model of legal aid, what is now required is both the further expansion of the NGO sector and close co-operation between that sector and the Legal Aid Board. In that regard, the recent experience of such co-operation in the establishment and operation of the Ballymun Community Law Centre is a very hopeful sign for the future.●

28. *Ibid.*, pp.292-3.
29. In its *Report on Civil Legal Aid in Ireland* (Law Society of Ireland, 2000) the Family Law and Civil Legal Aid Committee of the Law Society also recommended that civil legal aid should be administered through a combination of service and strategic model law centres, supplemented by a nation-wide panel of private solicitors - see p.12.
30. *Ibid.*, pp.12, 92-4.
31. See *Celebrating the European Convention on Human Rights 2003 - Airey v. Ireland: 25 Years On* (ILCN, 2004), p.5.

Sentencing Policy and a Guilty Plea in Sexual Offence Cases

Jack Hickey BL

It had been an established principle of sentencing policy in Ireland that where an accused person pleaded guilty to a sexual offence, or indeed any offence which did not carry a mandatory sentence, a court would not impose the maximum sentence. However, the effect of recent legislation and caselaw is that this principle is not always applied. The result is that an accused who pleads guilty to the crime of rape may still receive the maximum sentence, if there are exceptional circumstances relating to the offence.

In *G v. D.P.P.* 1994 I.R. 587, Carney J. imposed twelve concurrent life sentences where the accused had pleaded guilty to twelve sample counts of rape. The victims were three young girls aged between six and twelve and in a statement of admission, the accused said he had either raped or sexually abused these young children on over 400 occasions while babysitting. At that time, an accused could appeal directly from the Central Criminal Court to the Supreme Court (abolished by virtue of the Criminal Procedure Act, 1993). In the Supreme Court, Finlay C.J. relied on his earlier decision in *D.P.P. v. Tiernan* [1988 I.R.] 250 to hold that an admission of guilt followed by a plea of guilty in a rape case can be a significant mitigating factor because it "makes it possible for the unfortunate victim to have early assurance that she will not be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross examination." He went on to hold that because the maximum sentence was imposed by the trial judge, notwithstanding the fact that he accepted the importance and genuineness of the admissions and plea of guilty, this constituted an error in the application of the principles applicable to sentencing in a rape case. The Supreme Court substituted a fifteen year sentence on each count.

In the aftermath of the *G v D.P.P* case, the legislature intervened and passed Section 29 of the Criminal Justice Act, 1999 which provides:-

(I) in determining what sentence to pass on a person who has pleaded guilty to an offence, other than an offence for which the sentence is fixed by law, a court if it considers it appropriate to do so shall take into account-

a) the stage in the proceedings for the offence at which the person indicated an intention to plead guilty;

b) the circumstances in which this indication was given

(2) to avoid doubt, it is hereby declared that *subsection 1* shall not preclude a court from passing the maximum sentence prescribed by law, if, notwithstanding the plea of guilty, the court is satisfied that there are *exceptional circumstances* relating to the offence which warrant the maximum sentence.

This provision was not applied by the Court of Criminal Appeal in *D.P.P. v. G.McC* [2003] 3 I.R. 609. In that case, the applicant pleaded guilty in the Central Criminal Court to one count of male rape, several counts of sexual assault/indecent assault and several counts under the Child Trafficking and Pornography Act, 1998. There were six victims ranging in age between 10 and 17 years. Carney J. imposed a life sentence for the rape charge and the maximum sentence of 14 years for some of the offences under the Child Trafficking and Pornography Act, 1998 together with five year sentences for all the other charges, each to run concurrently. Geoghegan J. in giving judgment for the Court of Criminal Appeal held at page 616 of the judgment that:-

> "Of the mitigating factors, by far the most important is the plea of guilty. It is perfectly clear from the victim impact reports and the evidence that it would have been a devastating experience for most of these boys to have had to give evidence in court of what actually happened."

He went to say at page 618 that

> "Even in relation to a fully fought out rape case, a life sentence would be rare. The kind of circumstances that might justify it would be if the rape had been accompanied by extreme violence or if, say there had been a gang rape and in addition there were previous rape convictions."

The Court took account of the fact that the accused had no previous convictions and substituted for the life sentence a sentence of 10 years and reduced the maximum 14 year sentences under the Child Trafficking and Pornography Act, 1998 to 8 years to run concurrently.

However in the case of *D.P.P. v. D* (Unreported: McCracken J. 21st May 2004), the Court of Criminal Appeal took a radically different approach. Here the appellant pleaded guilty to ten sample counts of rape of three of his daughters and two sample counts of sexual assault of a fourth daughter. These were sample charges only and there were in fact 150 counts on the indictment and the abuse went on for twenty years. The trial judge imposed life imprisonment and the Court of Criminal Appeal upheld the life sentence. McCracken J. said that the offences disclosed a systematic and brutal pattern of sexual interference with young children

and that it was one of the worst cases of its type ever to come before the Courts. Victim Impact reports indicated the abuse has a seriously traumatic and lasting effect on each victim.

McCracken J. noted that the accused had not only pleaded guilty 'but that he had also made a comprehensive statement to the Gardai at the earliest opportunity, with the result that from a very early stage his daughters were aware that they would not have to go through the very disturbing experience of having to give evidence.' He referred to the decision of Finlay C.J. in the *G* case and then cited the provisions of Section 29 of the Criminal Justice Act, 1999, stating that it was introduced possibly in light of that decision. He held as follows:

> "The Court could only interfere with a sentence imposed by a trial judge if it can be shown that there was an error in principle involved. While the Trial Judge in the present case did not refer expressly to that section, nevertheless there could be no error in principle if he was satisfied that there were exceptional circumstances which would warrant a maximum sentence. In effect, this section outweighs any suggestion in the earlier cases that as a matter of principle a discount must be given for an early plea of guilty. (page 3 of the judgment)"

The Court of Criminal Appeal also upheld a life sentence imposed by Carney J. in the Central Criminal Court following a plea to five sample counts of unlawful carnal knowledge and one of sexual assault of three young girls in *D.P.P. v. Adams* (*Ex Tempore*: Kearns J. December 21st 2004). The offences came to light in 1997 when the accused's home was raided and some seventy photographs discovered of the accused involved in acts of sexual intercourse with young children. Evidence was given that the accused had numerous previous convictions including a conviction in 1987 for two indecent assaults and taking indecent photographs of children. This case can be distinguished from *D.P.P. -v- D* because there was no question of an early plea. The accused had challenged the manner in which he was extradited from Northern Ireland and also pursued a habeas corpus application. Section 29 of the Criminal Justice Act, 1999 was opened to the Court

Kearns J. held:-

> " the plea of guilty, when it came, came only some seven years down the road, when eventually the matter came before Judge Carney. A plea is of greater value when it is entered early and much less when it comes at the end of a series of legal challenges brought to stop a trial and try to effectively stop the ultimate stage of the proceedings where sentence is imposed. It was only at that stage when all these remedies ..were exhausted that this plea of guilty was eventually tendered and the court is disposed to accept... that a plea offered in these circumstances is of considerably less value to an appellant or an accused than when it is offered at an early stage."

However Kearns J. also held:

> "We also take the view that a life sentence should be imposed in these sort of cases in exceptional circumstances but the factors to which I have adverted and the previous history of the accused and the modus operandi of deceiving and gradually embroiling these young girls in systematic and depraved abuse shows that there are quite exceptional circumstances operating in this case ...this Court does not see fit to interfere in any way with the sentence imposed by the learned Judge."

In *D.P.P. v. R.McC* (Unreported, Fennelly J. 12th May 2005), the Court of Criminal Appeal also upheld a life sentence imposed by Carney J. following a plea to sexual offences. There were 43 counts on the indictment of rape, attempted rape and sexual assault of six different children. The accused pleaded guilty to 20 sample counts and the offences were committed over an eleven year period. What was particularly shocking about the case was that the accused had a chance to mend his ways when the early offences came to light in 1986 and again in 1987 and he was confronted, admitted abusing his daughters to the gardai and received counselling from a doctor and social worker. No prosecution resulted. What was not known at the time was that he was abusing his nieces. Fennelly J. said that it was clear that his daughters lived in genuine terror of his predatory and insatiable demands upon them. Fennelly J. reviewed the *G v. D.P.P.* case and Section 29 of the Criminal Justice Act, 1999. He quoted McCracken J.'s ratio in *D.P.P. v. D* to the effect that Section 29 outweighs any suggestion in the earlier cases that as a matter of principle a discount must be given for an early plea of guilty. Fennelly J. stated on the pre-1999 line of authority (the Court) would have to consider the undoubted presence of the classic mitigating factors of otherwise good character and an early plea of guilty. He also referred to the decision of Kearns J. in *D.P.P. v. Adams* as well as *D.P.P. v. Bermingham* (Unreported: Geoghegan J., 5th April 2005) where the Court of Criminal Appeal reduced a 21 year sentence to a series of concurrent 15 year sentences and in so doing, based its decision on Section 29.

Fennelly J. held:

> "Plainly, the decision in *D.P.P. v. D* represents a departure from the earlier line of authority to the effect that it was error in principle not to give credit for an early plea of guilty and expressions of remorse even for the most heinous of sexual offences.... This Court believe that, in the interests of coherence, it should, in resolving the issue before it follow this latest and carefully considered decision of the Court. Carney J. has expressed concern about the inconsistent jurisprudence of this Court. It is most undesirable to add to any such confusion." (page 10-11)

However the Court granted a certificate pursuant to section 29 of the Courts of Justice Act, 1924 referring a point of law of public importance to the Supreme Court. In essence the question posed will be whether Section 29 of the Criminal Justice Act, 1999 should be interpreted so as to overrule the prior case-law to the extent that it is no longer an error in principle to fail to make allowance for an early plea of guilty.

The real question posed by the aforementioned case law is *what advantage* there is to be had for an accused who is charged with the sort of offences which fall into the 'exceptional circumstances' category to plead guilty. In cases where there is a plea, Carney J. directs the transcript be made available to the Parole Board. Presumably the advantage of an early plea where a life sentence is still imposed is the possibility of a more favourable hearing from the Parole Board.●

Independent News and Media v. Ireland. The Judgment of the European Court of Human Rights

Patrick Leonard BL

On the 16 June, 2005, the European Court of Human Rights delivered judgment in the case of *Independent News and Media and Independent Newspapers (Ireland) Ltd v. Ireland*. One of the longest running disputes in Irish defamation law has thus been brought to a close. The application to the European Court of Human Rights arose out of the publication by the Sunday Independent on the 13 December, 1992, of an article concerning Proinsias de Rossa. At the time of publication, Mr. de Rossa was the leader of Democratic Left, a T.D. and was engaged in negotiations for the formation of a coalition government.

Mr. de Rossa began an action claiming damages for libel against Independent Newspapers. The first trial lasted eight days and ended when the jury was discharged following the publication of an article by Independent Newspapers. The second trial lasted 15 days and the jury failed to reach a verdict. Following a third trial, the jury found that the words published by Independent Newspapers implied that Mr. de Rossa had been involved in or tolerated serious crime and that he had personally supported anti-semitism and violet communist oppression. The jury went on to assess damages at IR£300,000.

Independent Newspapers appealed this decision to the Supreme Court, relying heavily on the decision of the European Court of Human Rights in *Tolstoy Miloslavsky v. The United Kingdom*[1]. Independent Newspapers contended that the size of the award was excessive and wholly disproportionate to any damage done to Proinsias de Rossa's reputation, that it was so high as to amount to a restriction on the right to freedom of expression, and that the supposed rule of law or practice which restrained a judge and counsel in defamation actions from offering specific guidance as to an appropriate level of damages was unconstitutional.

In the Supreme Court, the majority decision[2] was delivered by Hamilton C.J. and relied heavily on the previous Supreme Court decision in *Barrett v. Independent Newspapers Limited*[3]. It rejected the suggestion that juries should be given specific guidance as to the appropriate level of damages. In relation to the role of an appellate court, the majority held that as the assessment by a jury of damages in a defamation action has an unusual and emphatic sanctity, that an appellate court should be slow to interfere with it; but that nevertheless, a jury's discretion was not limitless, and an award must be fair and reasonable having regard to the relevant circumstances and must not be disproportionate to the injuries suffered by the plaintiff and the necessity to vindicate the plaintiff in the eyes of the public. The Supreme Court held that the appellate court was only entitled to set aside an award of damages by a jury in a defamation action if it were satisfied in all the circumstances that the award was so disproportionate to the injury suffered and the wrong done, that no reasonable jury would have made the award.

In the European Court of Human Rights, Independent Newspapers claimed that the failure to give guidance to the jury, and the appellate test did not vindicate its rights under article 10 of the European Convention of Human Rights. In support of this position, it relied on the decision of the European Court of Human Rights in the *Tolstoy Miloslavsky* case. That case arose out of a pamphlet written by Count Nikolai Tolstoy Miloslavsky about Lord Aldington concerning certain alleged activities of Lord Aldington during the Second World War. Lord Aldington sued Count Tolstoy Miloslavsky for libel and was awarded damages of £1,500,000 together with costs.

At the time, in England, an award could only be overturned by the Court of Appeal if it was so unreasonable that it could not have been made by sensible people, but must have been arrived at capriciously, unconscionably, or irrationally. This is what has been described as the '*pre-Rantzen*' test as it was overturned in a subsequent decision of the Court of Appeal in *Rantzen v. Mirror Group Newspapers (1986) Ltd.*[4]

Both the Court of Appeal in the *Rantzen* case, and the European Court of Human Rights in the *Tolstoy Miloslavsky* case held that this test did not offer adequate and effective safeguards against a disproportionately large award. As this was the relevant appellate test for Count Nikolai Tolstoy Miloslavsky, the Court of Human Rights held that:

> "Having regard to the size of the award ... in conjunction with the lack of adequate and effective safeguards at the relevant time

1. (1995)20 E.H.R.R. 442
2. [1991] 4 I.R. 1
3. [1996] I.R. 13.
4. [1994] Q.B. 670

against a disproportionately large award, the court finds that there has been a violation of the applicant's rights under Article 10 of the Convention."

In *Rantzen*, the Court of Appeal had lowered the test from:

"Was an award so unreasonable that it could not have been made by sensible people, but must have been arrived at capriciously, unconscionably or irrationally?"

to :

"Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and re-establish his reputation?"

This must be compared with the Supreme Court holding that the appellate court was only entitled to set aside an award of damages by a jury in a defamation action if it were satisfied in all the circumstances that the award was so disproportionate to the injury suffered and the wrong done, that no reasonable jury would have made the award. In a previous article[5], the writer expressed the view that the test applied by the Supreme Court lay somewhere between the *pre Rantzen* test which looked to see if an award was so unreasonable that it must have been made capriciously, unconscionably or irrationally and the *Rantzen* test which looked to see if the award was necessary to compensate the plaintiff. Obviously, given that the European Court of Human Rights had disapproved of the *pre-Rantzen* test, this begged the question as to whether the Irish test provided an adequate safeguard against disproportionate awards.

In the decision given by the European Court of Human Rights on the 16 June 2005, the approach of the Supreme Court has been vindicated. In relation to the direction to the jury, somewhat unconvincingly, the Court distinguished the *Tolstoy Miloslavsky* case on the basis that the direction to the jury in the *de Rossa* case was different to that in *Tolstoy Miloslavsky.*

In relation to the standard of appellate review, the Court stated that:

".....the Chief Justice also explained in some detail why the depth of appellate review of awards ..... was limited. Having underlined the 'unusual and emphatic sanctity' of jury awards so that Irish appellate courts had been 'extremely slow' to interfere with such awards, he expressly disagreed with the above-outlined Rantzen appellate test because he considered that its application would remove the sanctity of jury awards and would mean that an appellate court would no longer give 'real weight' to the possibility that the jurors' judgment was to be preferred to that of the judge.

Accordingly, the Chief Justice described the level of appellate control of jury libel awards as follows ... :

'... while awards made by a jury must, on appeal be subject to scrutiny by the appellate court, that Court is only entitled to set aside an award if it is satisfied that in all the circumstances, the award is so disproportionate to the injury suffered and wrong done that no reasonable jury would have made such an award.'

The applicants .... argued ... that this test was, in substance, no stricter than the inadequate appellate review in the *Tolstoy Miloslavsky* case. The Court considers this incorrect and is of the view that the appellate review is one of the main points of distinction between the two cases.

It is true that the Chief Justice stated that the depth of appellate review in Irish law could not be as intrusive as that developed in the *Rantzen* case .... cited with approval in the *Tolstoy Miloslavsky* judgment. It nevertheless remains that the nature of the Supreme Court's review was more robust than that at issue in the *Tolstoy Miloslavsky* judgment because of the requirement in Irish domestic law that jury awards in libel cases be proportionate ... It was the absence of this proportionality requirement in English law which meant that the libel award in the *Tolstoy Miloslavsky* case was considered to be 'particularly open to question'. That this requirement of proportionality distinguishes the appellate review at issue in the present and *Tolstoy Miloslavsky* cases is evident from the actual review conducted by the Supreme Court in the present case."

Therefore, the European Court of Human Rights relied heavily on the requirement of proportionality in Irish law in upholding the decision of the Supreme Court. Whereas some might well argue that the distinction between the *Tolstoy Miloslavsky* case and the *de Rossa* case is more apparent than real, this long running dispute as to the appropriate standard of appellate review of defamation awards is now closed, and legislative intervention will be required if there is to be any substantial change in Irish law.

In that regard, it will be remembered that the report of the Legal Advisory Group on Defamation has made a number of recommendations in relation to this area[6]. In particular, it suggested that parties should be entitled to make submissions to a court and address the jury concerning damages, and that the Supreme Court should be able to substitute its own assessment of damages for that awarded by the jury. Given the stated intention of the Minister for Justice to bring a new Defamation Bill before the Oireachtas this autumn, there is likely to be much debate on this area in the coming months. ●

5. Bar Review, Vol. 5, Issue 8, p.410.
6. See article by Eoin McCullough, Bar Review, Vol. 8, Issue 4, p.140.

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Journal of the Bar of Ireland. Volume 10, Issue 4, July 2005

A directory of legislation, articles and acquisitions received in the Law Library from the 14th May 2005 up to 4th July 2005.

Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

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Residential tenancies bill 2003
2nd stage - Dail

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

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

Sea pollution (miscellaneous provisions) bill 2003
1st stage - Seanad
Statute law revision (pre-1922) bill 2004
1st stage - Seanad

Sustainable communities bill 2004
1st stage - Dail

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

Totalisator (amendment) bill 2005
1st stage - Seanad

Transfer of execution of sentences bill 2003
Committee - Seanad

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

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

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

Twenty-eighth amendment of the constitution bill 2005
1st stage- Dail

Veterinary practice bill 2004
Report - Seanad

Waste management (amendment) bill 2002
2nd stage- Dail
Waste management (amendment) bill 2003
2nd stage - Dail

Water services bill 2003
1st stage - Seanad

Whistleblowers protection bill 1999
Committee - Dail

Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Society of Ireland
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland

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Judicial Review and the Transposition of EU Directives

Rosemary Healy Rae BL

Introduction

The question of whether proceedings asserting a failure to properly transpose a Directive should be brought by way of judicial review or by way of plenary proceedings has recently arisen in a number of cases. Each of the cases involved planning law issues and the question of whether certain EU Directives had been properly transposed into Irish law. The issue for discussion in this article is whether an alleged invalid transposition of European law into Irish law may be challenged by way of judicial review. While the article focuses on planning law, the principles discussed may apply equally to other areas of law.

Judicial Review

There has been a marked change in the profile and increase in the volume of judicial review applications in recent years. In addition to conventional judicial review, special statutory schemes of judicial review have also been introduced.[1] In many judicial review applications, time may be of the essence. For example, in planning cases, multi-million euro developments may be at stake and the review of a planning authority's decision may have far reaching effects. By using the judicial review system, applicants should be in a position to obtain a speedy review of the decisions of public bodies. However, the increase in the volume of judicial review proceedings has meant that, far from providing a speedy remedy, judicial review lists have become clogged up and significant delays in the determination of cases before the courts are not unusual.

Choices

The first step for a party wishing to challenge a decision of a public body is to decide what type of legal proceedings to bring. The obvious route for challenging a decision of a public body is by way of judicial review. As part of the proceedings the litigant may wish to challenge the legislation on which the decision was based. This may arise, for example, where the legislation involved is considered to be unconstitutional or contrary to European law. In these circumstances, the public body which made the decision will have done so on the basis of the existing legislation and will have been oblivious to the fact that the legislation under which it was acting might subsequently be challenged or declared invalid. The decision-making body will undoubtedly argue that it cannot be found at fault for applying domestic law. It was, in other words, simply "following orders". This means that the State, being responsible for the enactment of the impugned legislation, must necessarily be joined to any such proceedings.

The other option available to an aggrieved party is to challenge the impugned legislation by way of plenary proceedings. The difficulty is that some legislation specifically provides that a decision may only be challenged by way of judicial review.[2] If plenary proceedings are brought and the legislation is found to be invalid - what then happens to the decision made on foot of such legislation? In such circumstances, a party may effectively "win the battle but lose the war". The question is when a decision itself is challenged separately by way of judicial review proceedings, may such a challenge include an allegation of illegality based on failure to properly transpose a directive? The issues involved are best explained by way of practical examples taken from some recent cases involving planning law.

Judicial Review and Planning Cases

In *Lancefort v An Bord Pleanála*,[3] one of the many questions which arose during the application for leave to bring judicial review proceedings was whether an alleged failure to properly implement an EU Directive into Irish law could be challenged by way of judicial review. The Directive in question was Council Directive 85/337/EEC on the assessment of certain public and private projects on the environment. Morris J. dealt with this argument at p.517 of his judgment stating that:

> "In my view even if it be the case that Ireland has not adopted all measures which ensure that all projects likely to have significant effects on the environment are subject to an EIS/EIA, this fact does not and could not entitle the applicant to seek the relief which would result in condemning a decision of An Bord Pleanála legitimately reached in accordance with existing legislation. I am satisfied that the remedies available to the applicant by way of judicial review are limited to the decision making process and

1 See, for example, Section 50(2) of the *Planning and Development Act 2000*, section 43(5)(a) of the *Waste Management Act 1996*, and section 5 of the *Illegal Immigrants (Trafficking) Act 2000*.
2 See for example section 50(2) of the *Planning and Development Act 2000*.
3 [1997] 2 ILRM 508.

> nothing that has been advanced on behalf of the applicant demonstrates that there has been a failure on the part of the board in this regard.....The distinction to be drawn in this case is that the applicant has argued with considerable conviction that the State has not gone far enough in the manner in which it has implemented Council Directive 85/337/EEC. Even if it is correct in this, it does not form the basis of an application for judicial review as nothing has been shown, in the decision of the Board, which contravenes existing *legislation*."

It should be noted that these views were expressed at the application for leave to apply for judicial review stage and that this particular issue was not raised at the substantive case.[4]

In *Cosgrave v An Bord Pleanála*,[5] a similar issue arose. The Court ultimately held that it was not appropriate or permissible in judicial review proceedings to raise the issue as to whether certain EU Directives had been properly transposed into Irish law. In so doing, Kelly J. relied upon the decision of Morris J. in *Lancefort Ltd. v. An Bord Pleanála*.[6]

The applicant in Cosgrave was challenging a decision of An Bord Pleanála to grant planning permission for a waste disposal plant. One of the reliefs sought was a declaration that Ireland had failed to properly transpose into Irish law the provisions of Council Directives 85/337/EEC and 97/11/EC, which relate to the carrying out of environmental impact assessments on certain projects. The State, relying upon the comments of Morris J. in *Lancefort* discussed above, argued that it was impermissible to raise these issues in a judicial review application. On the other hand, An Bord Pleanála did not seek to make this point.

Counsel on behalf of the applicant argued that the facts in *Lancefort* differed from those in *Cosgrave* and that *Lancefort* ought not to be followed. Kelly J. rejected this view and was of the opinion that the complaints made [that the transposition of the EIA Directives precluded the Board from considering the risk of environmental pollution, and, therefore it was not possible for an environmental impact assessment to be carried out] were more generic in nature and did not depend upon any particular alleged deficiency in the transposition of the Directives and did not impact upon how the Board dealt with the appeal made to it in this particular case. Kelly J. was of the opinion that the views of Morris J. applied with equal force in this case and stated:

> "The relief which is sought in respect of the transposition of the directives does not relate to the particular decision of the Board that is sought to be challenged in these proceedings. It does not seem to me that it is open, having regard to that decision [*Lancefort*], which I follow, to permit of a judicial review application to be made on this basis. In essence what is being said is that the existing legislation, and which regulated the appeal which was dealt with by the board, was defective. That is not a view which is accepted for detailed reasons which were gone into both by the notice party, Greenstar Holdings, and the respondent, Ireland and the Attorney General. Even if there is force in the applicant's contention in that regard, it does not, I appears to me, entitle the applicant to have the board decision quashed, and that is the primary relief sought and what this judicial review application is really about"

Mr. Justice Kelly then went on to consider whether in such circumstances the applicant would be left without a remedy and concluded that "plenary proceedings are not out-ruled in circumstances such as this, with a view to testing, if the applicant wishes to do so, the way in which the directives were implemented. I am not making any determination on that, nor could I. It is sufficient for me to say on this application that I am satisfied that the decision in *Lancefort* seems to me makes both good sense and good law."

Again it should be pointed out that this decision was given at the application for leave to apply for judicial review stage. A certificate of leave to appeal was refused.

It may be argued that *Lancefort* merely established that judicial review cannot be used to challenge the transposition of a Directive where the facts of the case do not disclose any breach of the Directive's requirements. The decision in *Cosgrave* could also be categorised as holding that an applicant seeking to challenge the transposition of a Directive must establish a factual basis for contending that the alleged defective transposition has impacted on or affected the decision under challenge in some way material to the decision making process under challenge. In any event, in the case of *Martin* discussed below, the State chose to use these decisions as a basis for arguing that the alleged failure of the State to transpose the Directives could not be considered in judicial review proceedings

The question of the transposition of Council Directives 85/337/EEC and 97/11/EC came up for consideration again in the recent case of *Martin v. Ireland and the Attorney General, An Bord Pleanála, Indeavor Limited and Others*.[7] In this case, in their notices of opposition, the State and the Notice Party (Indeavor Limited) sought to again rely on *Lancefort* as a basis for arguing that the alleged failure of the State to transpose the Directives could not be considered in judicial review proceedings. The State argued this position during the proceedings.

An Bord Pleanála (the Board) did not support the State's procedural objection and considered that the transposition point was correctly raised in the judicial review proceedings. The Board was of the view that if its decision was based on impugned legislation or necessarily involved the application of the legislation such that the validity of the Board's decision depended upon the validity of the legislation, then the decision and the

4. Morris J. granted leave to appeal his decision to the Supreme Court which, apparently by agreement between the parties, remitted all matters in the proceedings back to the High Court for hearing (see *Lancefort v An Bord Pleanála,* Supreme Court, Unreported 17 July 1997). It appears that it was subsequently not necessary to consider the issue as the inadequate transposition point was not argued at the substantive hearing. See *Lancefort v. An Bord Pleanála & Ors* [1998] 1EHC 199, McGuinness J.
5. [2004] 2 I.R. 435.
6. [1997] 2 ILRM 508.
7. High Court, Smyth J., November 2004.

legislation were so intertwined that it was entirely artificial to require that they be challenged by way of two separate legal procedures.

By way of response to the State's arguments and in light of the views expressed by Kelly J. in *Cosgrave*, the applicant had issued a separate set of plenary proceedings in addition to the judicial review proceedings. In response to the plenary proceedings, the Board brought a motion to have such proceedings struck out as against the Board on the basis that the proceedings were in breach of section 50(2) of the Planning and Development Act 2000. This section requires challenges to the decision of the Board to be brought by way of judicial review.

The applicant in *Martin* was particularly concerned as to the correct procedural route not only as a result of the 'catch 22' position in which he found himself but also because it was considered that it might become appropriate to make a reference to the European Court under Article 234 of the European Treaty. The rules for such a reference would differ in the context of judicial review and plenary proceedings. In the context of judicial review proceedings, the High Court would be, for the purposes of an Article 234 reference, a court of final appeal.[8] In plenary proceedings, an appeal to the Supreme Court would be available.

Despite the fact that the issue as to whether or not the validity of domestic transposition of an EC Directive could be challenged in judicial review proceedings, was argued at length before Smyth J., the matter was never ultimately determined because, at the eleventh hour, the State withdrew this ground of opposition. The State indicated that it would consider its position in the future in the light of the submissions made by the Board and the fact that the notice party had not seen fit to pursue the point in argument. The State indicated that it was unlikely to raise this point again. From the point of view of future litigants, this was a rather unsatisfactory turn of events. Uncertainty subsists regarding this issue and, in particular, the validity of the approach adopted by the State and endorsed by the Court in *Cosgrave*.

Is it a "Catch 22" situation?

Section 50(2) of the Planning and Development Act 2000 provides that a person shall not question the validity of a decision of the Board on any appeal or referral otherwise than by way of application for judicial review under Order 84 of the Rules of the Superior Courts. A party wishing to challenge the decision of a planning authority or the Board therefore must clearly do so by way of judicial review.

Interestingly, the Act of 2000 specifically envisages a challenge to the validity of a law having regard to the Constitution in judicial review proceedings, by disapplying the general restrictions on appealing to the Supreme Court in such circumstances.[9]

If the challenge involves a question relating to the transposition of European law, the authorities quoted above seem to indicate that the matter must also be challenged by way of plenary proceedings. Apart from the issue of duplication of costs, the question of time limits is a serious consideration. The potential litigant must, on the one hand, observe the strict judicial review time limits[10], and on the other hand be prepared for a long wait (based on current lists) for the hearing of the plenary proceedings.

Why single out European Law?

Article 10 of the EC Treaty provides that Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty.

Each of the cases discussed above involved the question of transposition of European Directives into Irish law. In this jurisdiction, the constitutionality of Irish legislation has often formed the basis for judicial review.[11]

Based on the above authorities it seems that, when it comes to judicial review proceedings, European law issues are being treated differently from domestic law issues. Given the principles of equivalence and effectiveness, how can this be correct? The fundamental EU principle of equivalence means that procedural rules applicable to EU law issues must not be discriminatory or less favourable than those governing similar domestic actions. The principle of effectiveness means that the procedural rules in a member state must not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order. Not only must there be a remedy in the event of a breach, but the enforcement of community law may not be inhibited by undue procedural restrictions.[12]

In *Van Schijndel and Van Veen*, the Court held that:

> "...it is for the domestic legal system of each Member State to designate the Courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law."[13]

There is an established line of authority emanating from the ECJ indicating that it is the duty of Member States and all the authorities of Member States to ensure that the results prescribed by Directives are achieved.[14]

Given that an applicant may challenge the validity of a law having regard to the provisions of the Constitution in judicial review proceedings, any rule which restricts an applicant from raising questions of European law in judicial review proceedings would therefore seem to breach the principle of equivalence. The principle of effectiveness would also appear

8. An appeal to the Supreme Court being only available on the certification of a point of law of exceptional public importance. Smyth J overcame this point in a practical way by holding that whatever he decided on the issues raised - he would certify a question for the Supreme Court, if requested.
9. Section 50(4)(f)(ii).
10. Section 50(4)(a).
11. See, for example, *Daly v The Revenue Commissioners* [1995] 3 I.R. 1; *Laurentiu v Mnister for Justice Equality & Law Reform* [1994] 4 IR 26; *Hyland v Minister for Social Welfare* [1989] IR 624.
12. *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (Case C-312/93) [1995] ECR I-4599.
13. Joined cases C-430/93 and C431/93 at paragraph 17.
14. *R Wells v Secretary of State for Transport* C-201/02 (2004) 1 CMLR 31.

to be breached in circumstances where an applicant may not be able to secure the quashing of a decision where that decision has been taken in accordance with national law but contrary to European law.

Conclusion

Section 50 of the Planning and Development Act 2000 stipulates a special judicial review procedure for certain decisions of planning authorities and of An Bord Pleanála. Section 50(4) imposes a time limit of eight weeks for the issue and service of judicial proceedings, with provision for the High Court to extend the period. If applicants who wish to challenge the validity of a statutory provision or statutory instrument having regard to the provisions of European law are required to proceed by way of plenary proceedings, this may undermine the clear policy behind section 50(4). This section recognises, as indeed the courts have recognised on a number of occasions, the need for short time limits in respect of challenges to planning permissions and the need for parties to know with certainty, within a reasonable period, whether or not a particular development may proceed. In *KSK Enterprises Limited v An Bord Pleanála*, Finlay J. stated:

> "From these provisions, it is clear that the intention of the Legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular, one must assume that a person who had obtained planning permission should, a very short interval after the date of such decision, in the absence of judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."[15]

Any successful challenge to the validity of the law (Irish or European) under which the Board acts inevitably involves a challenge to the validity of a decision of the Board based on that law. Therefore, it seems that any plenary proceedings which seek to challenge the validity of the law in such circumstances are likely to contravene section 50 because they invariably involve a challenge to the validity of the Board's decision.

The difficulty with having two sets of proceedings relating to the same issues is obvious. If the plenary action is heard first and the plaintiff succeeds then the Court is faced with having to hold, contrary to section 50, that the Board's decision was invalid, or refusing to so hold and depriving the plaintiff of an effective remedy. If the judicial review action is heard first, the plaintiff is deprived of the benefit of certainty at the earliest possible stage to which the parties are is clearly entitled.[16]

Alternatively, if the two actions are heard together,[17] it is difficult to see what, if any, purpose is served by having a rule that the validity of legislation cannot be challenged in judicial review proceedings. A possible consequence of such a rule is that the proceedings might attract two sets of costs instead of one.

Unfortunately the issue remains unresolved, leaving an unsatisfactory situation which makes it difficult for prospective litigants and/or their legal advisors to decide how to proceed.●

15 *KSK Enterprises Limited v An Bord Pleanála* [1994] 2 IR 128 at p.135.
16 See *KSK Enterprises Limited v An Bord Pleanála* [1994] 2 IR 128.
17 As the Court deemed it appropriate to do in *Martin.*

Postal Voting - is it safe?

Liam Dockery BL

Vote Rigging Uncovered

Shortly before midnight on the 8th June 2004, English police raided a warehouse in Birmingham. Inside, in a dimly lit corner, they found several men sitting around a table covered with postal ballots. Some of these men were candidates in the local elections due to be held two days later. The vote-riggers had been caught red-handed. An elaborate plot to corrupt and defraud the elections had been uncovered. In May of this year, Richard Mawrey QC, sitting as an election commissioner, found that massive and systematic postal voting fraud had taken place and declared void the election of six Labour Party councillors in two Birmingham wards, Bordesley Green and Aston. The episode, he said, would "disgrace a banana republic". Such was the controversy surrounding the exposure of these defects in the postal voting system that the British government, in an unprecedented move, invited international observers to monitor the recent general election. However, it resisted calls by the opposition parties for amending legislation to be passed before the general election was held. Almost immediately after the election, the government changed tack and promised reforming electoral legislation in the Queens' Speech at the opening of the new parliament.

What happened and how?

In a 192 page judgment,[1] Mawrey found that the postal voting system contained no effective safeguards and was an invitation to fraud. Among the flaws were that an applicant for a postal vote could ask that the postal vote be sent to an address other than that of the voter; the procedure wherein postal ballots were sent out by ordinary mail in clearly identifiable envelopes was "tantamount to writing 'STEAL ME' on the envelopes" and those envelopes could easily come into the wrong hands; the scheme for registering postal vote applications was hopelessly insecure; the Elections Office had no means of checking the validity of the signature or of the application, nor had it a duty or the resources to carry out any checks; and the verification of postal ballots by a Declaration of Identity (DOI) was a "farcical" and pointless precaution because there was no means to verify the signature. Moreover, the law was indifferent as to how the completed ballot package got to the Elections Office. Some political parties actually encouraged their supporters to collect completed ballot packages from voters by promising to deliver those votes to the Elections Office.

Until 2000, only those people with a justifiable reason to vote by post could do so - but all parties supported a relaxation of the electoral laws and postal voting on demand was introduced. The effect of the change was that anyone could print an application form from the internet and apply to their county council to be put on the postal voters list without establishing any particular reason. The system was wide open to exploitation.

Could it happen in Ireland?

Postal voting has existed in Ireland since the Electoral Act, 1963 enabled certain citizens prescribed by law to vote in local and national elections and in referenda by way of postal ballot. Is it conceivable that the postal voting system in this jurisdiction could be abused in the same way and an election result overturned?

A number of categories of persons may be registered as postal voters.[2]

- Whole time members of the Defence Forces and members who live in military barracks may be registered either at the barracks or at their 'home' address.
- Civil servants and diplomats serving abroad and their spouses also have postal votes and are registered at the addresses where they would be ordinarily resident in Ireland were they not required to be at their foreign posting.
- Members of the Garda Siochana have the option of being registered as ordinary electors or as postal voters and, in either case, they are registered at their home address.

Like in the UK, the facility for postal voting has also been extended in this jurisdiction in recent years. The Electoral (Amendment) Act, 1997 increased the number of categories of electors which may be registered on the postal voters list. Now, persons who by virtue of their occupation, service or employment are unlikely to be able to go to their local polling station on election day to vote, may also apply for a postal vote.

The Irish system: eligibility, entry and exercise

The rules in Ireland are stricter. Part VII of The Electoral (Amendment) Act, 1997 provides a three stage process that must be completed before a person can validly exercise a postal vote. The first stage concerns eligibility; the second, entry in the postal voters list and the third, exercising that vote.

The registration authority (normally the local council) gives public notice of the category of electors entitled to apply to be entered in the postal voters list, the manner in which and the time before which applications must be submitted and the times and places at which application forms may be obtained. The registration authority arranges for the provision of application forms, which are distributed free of charge to any person who applies for one.

1. In the matter of a Local Government Election for Birmingham City Council, unreported
2. *Politics, Elections and the Law,* Noel Whelan, Blackhall Publishing, page 11.

Section 63(1) of the 1997 Act provides that an application must be made to a registration authority for entry on the postal voters list and the registration authority has to be satisfied that the circumstances of the elector's occupation, service or employment are such as to render it likely that he or she will be unable to go in person on polling day to vote. Section 63(2) ensures the inclusion of students in the postal voters list by defining the terms 'service' and 'employment' as "participation by a person on a full time basis on an educational course of study in an educational institution in the State". Thus, specific provision is made for postal voting by students.

Next, the provisions relating to entry of the application in the postal voters list are set out in section 64(1)(c) of the 1997 Act. The application form which has been duly completed is delivered or sent by post to the registration authority. Section 64(2) goes on to provide that an applicant must furnish to the registration authority a certificate from the applicant's employer, or, where the applicant is a student, a certificate from the registrar, or secretary, as may be appropriate, of the relevant educational institution. In every other case, an application must be supported by a statutory declaration in the form directed by the Minister. The registration authority may require an applicant to furnish any other information or documents in his possession or procurement, which the authority may require so as to be satisfied that the applicant is a person to whom section 63 applies[3]. All such applications must be received by the registration authority before the last date for making claims.

Once the registration authority is satisfied that an applicant -

(a) is an elector to whom section 63 applies,

(b) has duly completed the application form, and

(c) has furnished the certificate or statutory declaration required under section 64,

the registration authority shall -

(i) rule that the application is granted and mark the application form accordingly, and

(ii) notify the applicant of the decision.[4]

It is only when all of these requirements have been met that an elector will be registered on the postal voters list. But the remaining hurdle of exercising that vote has still to be crossed.

The provisions of Part XIII of the Electoral Act, 1992 apply to the issue and return of ballot papers by electors at a Dail election whose names are entered in the postal voters list subject to certain modifications which are set out in section 68 of the 1997 Act. The 1992 Act states that a returning officer for each constituency shall send to each Dail elector, whose name is on the postal voters list for the constituency, a ballot paper and if the ballot paper duly marked by the elector is received by the returning officer before the close of the poll, it shall be counted and treated in the same manner as a ballot paper placed in a ballot box in the ordinary way. As noted earlier, UK statutory provisions on postal voting are lax. In Ireland, the provisions of section 68 of the 1997 Act erect a substantial barrier in the way of any fraudster by providing that each registered postal voter must go to a Garda station to exercise their vote.

The postal voter must, in the presence of a member of the Garda Siochána, take the following steps in the following order:[5] -

(i) produce to the member of the Garda Siochána the envelope addressed to the elector..., the ballot paper (in relation to which the member of the Garda Siochána shall establish that it is unmarked) and a form of declaration of identity in the form directed by the Minister;

(ii) complete and sign the said declaration of identity;

(iii) hand the declaration of identity to the member of the Garda Siochána who shall, on being satisfied as to the identity of the person who has signed the declaration, witness the signature and stamp the declaration of identity with the stamp of the Garda Siochána station and destroy the envelope addressed to the elector;

(iv) mark, in secret, the ballot paper;

(v) place the marked ballot paper in the ballot paper envelope, and effectually seal such envelope;

(vi) place the ballot paper envelope and the completed declaration of identity in the covering envelope and effectually seal that envelope;

Having completed those steps the voter sends the last-mentioned envelope by post to the returning officer.

The emphasis on the secrecy of the ballot in the above provisions differ markedly from those in the UK. This perhaps reflects the concerns of courts in this jurisdiction to ensure that the constitutional obligation that voting takes place in secret is observed.[6] In the leading case considering the extent and purpose of the secrecy of the ballot, *McMahon v Attorney General* [1972] IR 69, O'Dalaigh CJ quoted approvingly from the judgment of Bartch J in the Utah Supreme Court in *Ritchie v Richards*[7], a case on the same point. This passage included a discussion on the object of the secret ballot requirement. According to Bartch J, "the framers of the constitution doubtless intended to make the veil of secrecy impenetrable so that the voter could make promises to whom he pleased, and vote as he pleased, without fear of afterwards having the secrecy of his ballot violated". Clearly, the object of the secrecy requirement as set out in Article 16.1.4 is not about secrecy for secrecy's sake but rather ensures that voters are free to exercise an independent vote, free from intimidation or inducement of any kind.

The procedure for postal voting by diplomats, gardai and members of the defence forces is more straightforward.[8] As soon as practicable after the close of nominations, the returning officer posts to each such elector, a ballot paper together with a declaration of identity, a ballot envelope and a cover envelope. The elector completes the declaration of identity himself and returns it with the ballot paper to the returning officer. The completed ballot paper is placed in a sealed envelope. This sealed envelope and the declaration of identity duly signed are then placed into a covering envelope and must be returned by post to the returning officer before the close of poll.

3. S.65 Electoral Act, 1992
4. S.67(1) Electoral Act, 1997
5. S.68 Electoral (Amendment) Act, 1997
6. Per O'Higgins CJ in *Draper v Attorney General* [1984] IR 277 at 290
7. Ritchie v Richards 14 Utah 345; 47 Pac.670
8. Politics, Elections and the Law, Noel Whelan, Blackhall Publishing, page 19

Offences and Penalties

The most dramatic penalty must be the overturning of an election result. This could happen if, for example, there was a significant breach of secrecy which might have affected the result[9] of the election. That principle has been given legislative expression in Article 4(3) of the Third Schedule to the Electoral Act, 1992.[10] Otherwise, the superior right of voters to vote will not be disturbed and there are obvious public policy reasons why this should be so. Recently, election results have been challenged on other grounds. In *Sinnott v Martin*,[11] it was alleged that non-compliance with certain provisions of Part V of the Electoral (Amendment) Act, 1997 relating to spending limits materially effected the result of the general election in the Cork South Central constituency in 2002 and accordingly an order that a fresh election be held was sought. That petition was dismissed by Kelly J. in the High Court.

There are several electoral fraud criminal offences on the statute book. In the past, there was provision under section 6(3) of the Prevention of Electoral Abuses Act, 1923 for the disqualification from voting of persons guilty of electoral offences but this was repealed by the Electoral Act, 1963. Current offences outlined in the Electoral Act, 1992 include:

- personation - where a person applies for a ballot paper in the name of some other person or, where a person applies for a ballot paper in their own name having already obtained a ballot paper at that election;[12]
- unlawfully supplying a postal ballot paper to any person and forging or fraudulently defacing any official envelope or form of declaration of identity or form of receipt used in connection with postal voting, or any other formal document used at an election. Any person found guilty of any of those offences is liable on summary conviction to a fine not exceeding €1,270 or, at the discretion of the court, to a period of imprisonment not exceeding 6 months, or both; and on conviction on indictment to a fine not exceeding €3,174 or, at the discretion of the court, to a period of imprisonment not exceeding two years, or both;
- interference with or destruction of postal ballots;
- failing to give information, or knowingly giving false information to a registration authority. The penalty on summary conviction is a fine not exceeding €634 and/or up to 3 months imprisonment;
- bribery, undue influence and breach of secrecy.

Who monitors elections?

There is no single body with overall responsibility for the conduct of elections in this country. A Referendum Commission established by the Referendum Act, 1998 provides information and fosters and promotes public debate on the issues in a referendum but has no powers to monitor or police the conduct of referenda. For a general election, once the Dáil is dissolved, the Clerk of the Dáil issues a writ to each returning officer for a constituency directing him to cause an election to be held. The conduct of that election is thus the sole responsibility of the returning officer.[13] He has no policing function, however, and has neither a duty nor the resources or powers to investigate fraud. Breaches of electoral law are investigated and prosecuted by the Gardai. The question arises as to whether they are the appropriate people to carry out that function. In the Birmingham electoral fraud case, the judge stressed that "police forces in general do not have, and cannot reasonably be expected to have, knowledge or experience of electoral law" and that "there are better uses for scarce police resources than policing local authority elections".

Certainly, fraud can be challenged by the use of the petition brought after the election. Petitions are civil actions brought by the losers against the winners. The petition procedure is, however, the only means of policing electoral fraud. Serious consideration should be given to the establishment of an electoral commission charged with the responsibility of conducting and policing all elections and offering redress where appropriate.

There are other reasons why such a body should be established. One is consolidation. Recently, the Referendum Commission criticized the spread of electoral functions among a variety of statutory bodies including the Referendum Commission, the Standards in Public Office Commission (in so far as it is concerned with electoral legislation), the Constituency Commission, the Commission on Electronic Voting and the Department of Environment, Heritage and Local Government. The Referendum Commission recommended the creation of an independent electoral commission to oversee referenda and elections at local and national level, enforce electoral legislation, monitor election spending, promote public awareness and regulate political parties. The Standards in Public Office Commission also raised the issue in its presentation to the Oireachtas Joint Committee on Finance and the Public Service in May 2005.

Conclusion

Postal voting is, arguably, the future of elections. Millions of voters applied to vote by post in the recent UK general election. But therein lies the challenge: to tackle apathy without encouraging fraud and to engender enthusiasm for participation without replacing it with disillusion and cynicism. All forms of democratic government are founded upon the right to vote[14] and a cornerstone of any liberal democracy is free and fair elections. For that reason, the conduct of elections is a matter of public interest. The theory of postal voting is sound, since flexibility, increased voter turn-out and greater participation are worthy goals to pursue. Although postal voting accounts for a very small number of votes cast in an election (approximately 0.5%), the misuse of even a handful of votes could have a significant effect on the result in any given constituency. Nonetheless, any deficiencies which might emerge in the electoral system are unlikely to be laid at the door of postal voting.

That is because postal voting in this jurisdiction contains effective safeguards. It is not on demand, political parties play only a minor part in the process and the 'three-step test' must be met. Irish voters can have confidence in the security and integrity of postal voting. The procedural steps required in the 1997 Act are detailed and allow postal voting to be extended in a manner which protects the secrecy[15] of the ballot and ensures that it is completed by the real voter.[16] The right to vote - as provided by Article 16.1.2 of Bunreacht na hEireann - and the freedom of communication on political and government matters,[17] which could be denied to some by the fraud of others, is assured. The system is not solely based on trust and proof of bona fides is required at each stage of the voting process. Overall, that challenge to strike a balance between making voting as simple and as widely available as possible without the inherent risk of abuse in postal voting has been met. The oft heard adage of 'Vote early and often' can safely be replaced by a more accurate refrain: 'Vote early and fairly!' ●

9. *Dillon-Leetch v Calleary,* Supreme Court, July 31, 1974
10. *JM Kelly: The Irish Constitution,* Hogan and Whyte, p 319, 4th Edition, 2003.
11. *Sinnott v Martin* [2004 1IR 158
12. S.134 Electoral Act, 1992
13. s.31 Electoral Act 1992 provides that "It shall be the general duty of the returning officer for each constituency to do all such acts and things as may be necessary for effectually conducting a Dail election in his constituency..., to ascertain and declare the results of the election and to furnish to the Clerk of the Dail a return of the persons elected for the constituency".
14. *Monaghan v Joyce Roebotham & Green,* 2004, NL SC TD 42
15. Article 16.1.4 Bunreacht na hEireann
16. See *McMahon v Attorney General* [1972] IR 69 where Pringle J stated that "the words 'secret ballot' in Article 16.1.4...mean a ballot in which there is complete and inviolable secrecy".
17. See *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520 wherein freedom of communication on political and government matters is described as a necessary implication of the Constitution because the "business of government must be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box."

Asbestos Litigation in the aftermath of *Fletcher*: The Minimum Actionable Damage for a claim in Negligence.

Martin Canny BL

Introduction

It is trite law to say that the cause of action for a claim in negligence is complete when a person who is owed a duty of care suffers injury or damage as a result of a breach of that duty. This is the point at which the Statute of Limitations starts to run.[1] Conversely, even if someone has been exposed to a risk of developing an injury at a future date, this will not give him an entitlement to claim damages unless and until the injury materialises. In this regard, it can be said that "damage is the gist of negligence" and that a plaintiff must establish that he has suffered what can be called the "Minimum Actionable Damage" before he can claim. This article proposes to analyse the recent Supreme Court decision in *Packenham v. Irish Ferries Limited (formerly known as B & I Limited)*,[2] which concerned a plaintiff who had been negligently exposed to asbestos at work. The central issue in the case was whether he had suffered an injury for which tort law could offer him a remedy, as he had - to date - manifested no sign of having developed a physical injury, and neither had he suffered a recognised psychiatric injury (as defined by the courts) as a result of his exposure.[3] The court in *Packenham* succinctly stated that the plaintiff there had no claim in tort as he had not to date suffered (a legally recognised head of) damage. This article proposes to analyse the wider import of the decision.

The Asbestos cases in the Irish Courts

Packenham is the latest - though perhaps not the last - instalment in a series of cases brought by employees who were exposed to asbestos at work, and who claimed damages in negligence for this despite not yet showing signs of having developed a physical injury.

In its earlier landmark decision in F*letcher v. Commissioners of Public Works in Ireland*,[4] the Supreme Court (reversing O'Neill J. in the High Court) denied the plaintiff recovery where he had suffered a recognised psychiatric injury as a result of his fear of developing mesothelioma. However, his medical experts conceded that he only had a remote chance of developing the disease. Against this background, and despite not challenging the trial judge's finding that the psychiatric injury was a foreseeable consequence of the negligence, the Court denied recovery on public policy and fairness grounds.

In this regard, it has been observed that in seeking to temper the rise of what is commonly called the "compensation culture" the Court arrogated onto itself what some describe as an almost quasi-legislative role. However, others see it as the Court instead legitimately seeking to balance both the requirements of "distributive justice" (which equates very generally with the common good) over "corrective justice" (i.e. compensation based on the principle that tort damages should strive to return the injured party to their pre-accident position).[5]

In the aftermath of Fletcher, the defendants in a number of asbestos cases where claims had been brought despite no physical disease being manifest brought applications to have the claims struck out:-

(i) Under Order 19 rule 28 R.S.C. as disclosing no reasonable cause of action or on the grounds that they are frivolous or vexatious, and

(ii) Pursuant to the inherent jurisdiction of the Court.

The High Court Order in *Packenham*

Having heard the arguments more fully discussed below, Finnegan P. ordered that the claims[6] before him be stayed indefinitely, but said that should a disease such as mesothelioma subsequently develop, the plaintiff could apply to the court to amend his pleadings to reflect this. In this regard, he stated that in determining whether an Order is appropriate to stay or dismiss proceedings:-

"the Court should have regard to whether on a successful

1. This is of course subject to the Statute of Limitations (Amendment) Acts 1991 and 2000.
2. Unreported, SC, *ex tempore*, 31st January, 2005, reversing HC, Finnegan P., 26th February, 2004. The Supreme Court decision also effectively reverses the decision of Finnegan P. in *Rafter v. The Attorney General et al.*, also delivered on the 26th February, 2004, in which the same order had been made.
3. Beyond the scope of this article is the "loss of a chance" doctrine which is sometimes applied in medical negligence cases where the plaintiff has been denied a chance of recovery of less than 50% by reason of the negligence of the defendant. The question of whether this is sufficient "damage" to claim in negligence for has recently been argued before the Irish Supreme Court in *Philp v. Ryan* [2004] IESC 105, Unreported, SC, 16th December, 2004 (where recovery was allowed) and before the House of Lords in *Gregg v. Scott* [2005] UKHL 2 (where recovery was denied on policy grounds).
4. [2003] 1 I.R. 465; [2003] 2 I.L.R.M. 94 (SC)
5. Contrast the views expressed by Lord Steyn, "Perspectives of Corrective and Distributive Justice in Tort Law" (2002) XXXVII Ir.Jur. (n.s.) 1 and Binchy, *Annual Review of Irish Law 2003* (2004, Dublin, Thomson Round Hall), at pp.526-532 - the latter's views are clear from the following quote: "Again, one can discern a tendency to blame people with psychiatric illnesses for their irrationality in becoming ill": *ibid.*, at 531.
6. See note 1, above.

application for amendment ,the plaintiff's claim might be sustainable: *Keaveney v. Geraghty.*[7] Again, the Court should be slow to exercise its jurisdiction to dismiss the action: *Sun Fat Chan v. Osseous Ltd.*[8]"[9]

It is apparent that this decision sought to strike a middle ground between striking out the claims (with attendant costs implications) in circumstances where the defendants had been guilty of gross negligence, and recognising that the plaintiffs' allegations were sufficient to bring a claim in negligence. However, the defendants appealed, seeking to avoid the spectre of having several hundred claims remaining "live" for an indefinite period.

The Supreme Court decision in *Packenham*

The Supreme Court gave an *ex tempore* judgment in *Packenham* on the 31st January, 2005, reversing Finnegan P. and dismissing the claims on the basis that they did not disclose a cause of action on the face of the pleadings. In effect, it was held that the plaintiffs had sued too early and that as they had not (yet) suffered any "damage" they could not yet sue for damages in negligence. The Court said that Finnegan P.'s order was "not correct or appropriate"[10] for the case, and that despite the evident sympathy which the learned President had for the plaintiffs, their claims must be dismissed.

The Court did say though that if actual physical injury did manifest itself at a later date that a claim in respect of this would not be *res judicata*. Further, it left to another day altogether the question of whether the cost of ongoing medical monitoring could in itself amount to damage in negligence.

The Place of Damage in the Law of Negligence

Despite the importance of knowing exactly when actionable damage has been suffered, the issue of "damage" within the tort of negligence has proven to be a little litigated and obscure area of the law. In explaining this, Markesinis and Deakin say that "[o]f all the conceptual elements of the tort of negligence... *damage* is by far the least developed - perhaps because until recently the use of juries meant that all aspects pertaining to this notion were left for them to determine."11 However, the outer limits of the tort of negligence will depend on exactly what damage is considered the minimum for an actionable claim. In a leading article that considers the area, Stapleton asks:-

> "Is it necessary, for example, to show that palpable and deleterious physical changes have occurred to the person or property of the claimant because of the defendant's fault, or is it enough to show the certainty, probability or possibility that such changes will occur in the future?"[12]

The Heads of Damage Arising in Asbestos Claims

In *Fletcher, Packenham* and many other asbestos cases, the plaintiff claimed that they had been exposed to asbestos, but had not yet suffered any recognised illness such as mesothelioma or asbestosis. It is perhaps easiest to consider separately the different heads of damage for which they claimed.

Was there Physical Injury?

Unfortunately, the important question of what exactly constitutes physical injury in asbestos cases was not answered in any of the recent cases. In *Packenham*, the affidavit evidence before the court did not even go so far as to show that the plaintiffs had developed asymptomatic pleural plaques, or that there had been implantation of asbestos fibres in the lungs. However, as counsel pointed out in the Supreme Court appeal, the current medical practice in Ireland in many cases will not discover scarring of the lungs, even though it may well be present. However, in *Fletcher*, Geoghegan J. did say that he thought that whether such occurrences could fall within the definition of "injury" within the Civil Liability Act 1961 would be "controversial... within this jurisdiction".[13] However, this *dictum* might itself be open to question in light of the recent decision of the English High Court in *Grieves v. F.T. Everard & Sons & British Uralite plc.*,[14]where it was held that the presence of pleural plaques on the lungs was sufficient damage for a claim in negligence. However, damages would not be available for this *per se*, but instead for the increased risk of future asbestos-related diseases that this would indicate as well as any attendant anxiety that this would give rise to.

The older cases that considered when actionable personal injury occurred arose in the context of limitation points. The leading case remains *Cartledge v. E. Jopling & Sons Ltd.*,[15] which held that the question of when damage arose did not depend on the discoverability of the personal injury. Instead, the injury occurred at an earlier date, namely the date of the "secret onset" of the disease.[16] Unfortunately, the only law lord who gave any guidance on what this meant was Lord Pearce, who said that the action accrued when there was "material damage by any physical changes in the body".[17] However, Stapleton has a strong point when she states that "the only scientifically meaningful point of onset must coincide with exposure - when, even if only microscopically, physical changes in the bodily processes are initiated which will eventually culminate in overt symptoms".[18] She continues, noting that the current approach:-

> "has the intrinsic practical drawback that it requires a plaintiff in effect to wait, perhaps until the appearance of discoverable symptoms, before he can sue, because until then proof that this notional point of 'secret onset' had been passed may well not be possible."[19]

7. [1965] I.R. 551, at 562 per Walsh J.
8. [1992] 1 I.R. 425.
9. *Op cit.*, n.2, at 2-3.
10. Counsel's note of the Supreme Court decision.
11. Markesinis and Deakin's *Tort Law*, (5th ed., 2003, Oxford), at p.82.
12. Stapleton, "The Gist of Negligence - Part I: Minimum Actionable Damage" and "Part II: The Relationship Between 'Damage' and Causation" (1988) 104 L.Q.R. 213, and 389: ibid., at 213.
13. *Op cit.*, n.4, at 144, 146. In reaching this conclusion, Geoghegan J. cast doubt on whether the decision of Girvan J. in the Northern Ireland Court of Appeal in *Bittles v. Harland & Wolff plc.* [2000] N.I.J.B. 209 was correct. In *Bittles* it was held that the presence of asymptomatic pleural plaques was 'damage' within the relevant British legislation. Section 2 of the Irish Civil Liability Act 1961 defines "personal injury" as *including* "any disease and any impairment of a person's physical or mental condition".
14. [2005] EWHC 88 (QB) (Holland J., 15 February 2005). This case contains an interesting discussion of the Irish Supreme Court's approach in *Fletcher: ibid.*, at para.69.
15. [1963] A.C. 758. This case was followed in *Hegarty v. O'Loughran* [1990] 1 I.R. 158; [1990] I.L.R.M. 403 (SC), where Finlay C.J. said that the limitations time limit started to run "when a provable personal injury, capable of attracting compensation, occurred to the plaintiff": *ibid.*, at 411.
16. *Ibid.*, at 772, 775 and 778.
17. *Ibid.*, at 779
18. *Op cit.*, n.12, at 218.
19. *Ibid.*

OInstead, she suggests that a better formulation would be in terms of "the production of a latent bodily condition certain to produce disabling personal injuries in the future".[20] This would instead require the plaintiff to prove on the balance of probabilities that he would suffer the injury. This however is not the approach currently taken by the Irish courts.

Mental Distress and Anxiety falling short of a "Recognised Psychological Illness"

Unlike in *Fletcher*, no real argument was raised by the plaintiffs in *Packenham* that they had suffered a "recognised psychiatric illness". While damages are occasionally recoverable for distress, anxiety and disappointment for breach of contract,[21] and while the asbestos cases do concern the implied terms of the plaintiffs' contracts of employment, the reality is that they are claims in negligence. From this perspective, Finnegan P. was surely correct when he said that "the law in general provides no remedy for annoyance, upset or distress".[22] In so holding, he was following such judges as Devlin J., who said "[t]he general principle embedded in the common law [is] that mental suffering caused by grief, fear, anguish and the like is not actionable."[23] However, as is obvious to all legal practitioners, a different situation governs those cases where "mental suffering [is] a concomitant of physical injury. This type of mental suffering is routinely recovered as 'pain and suffering'."[24] This places even more importance on deciding exactly what constitutes "physical injury", as discussed in *Grieves v. F.T. Everard & Sons & British Uralite plc.*,[25] discussed above.

Cost of Monitoring as a recoverable head of damage?

One final issue raised in argument but not directly decided on by either Finnegan P. (or the Supreme Court) was whether a plaintiff can recover the costs of future medical monitoring which is necessitated by his exposure to a substance such as asbestos, even if he has not yet, and may never ultimately develop an injury from this exposure.

This is an argument that has found some favour in the U.S. courts, but which has not as yet been raised on this side of the Atlantic.[26] For example, in the seminal decision of *Ayers v. Township of Jackson,*[27] the New Jersey Supreme Court allowed a claim by 339 residents whose well was contaminated by toxic pollutants leaching from the defendant's landfill for the cost of annual medical surveillance, which was necessitated by the increased risks of cancer and other diseases they now faced. The factors considered by the court included the level of exposure to the chemicals; their toxicity; the seriousness of the diseases that this could lead to and the benefits of early diagnosis of any such diseases. In reaching its decision, the following analogy was relied on:-

> "Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations."[28]

One issue continues to divide US courts on medical monitoring claims. Some courts have allowed medical monitoring claims to be brought absent a present physical injury. These include the Supreme Court of Pennsylvania, which held in *Simmons v. Pacor, Inc.*[29] that plaintiffs diagnosed with asbestos-related asymptomatic pleural thickening could recover the cost of future medical monitoring of their health. However, other courts have required that plaintiffs have a present physical injury before a claim for medical monitoring expenses can be brought. This was the case in *Metro-North Commuter Railroad Co. v. Buckley,*[30] where asymptomatic railroad workers negligently exposed to asbestos were denied recovery for medical monitoring costs under a federal employers' liability statute.[31]

In *Packenham* however, the matter was only briefly adverted to in legal argument, and no final conclusion was reached in respect of this part of the claim - its determination will thus have to wait for another day. While it can be classed as a form of pure economic loss, it is surely arguable that it is a real form of loss that should merit compensation in our law of negligence. There are strong arguments that such a loss should be recognised as a stand-alone head of loss in tort, and that such recovery should be available even where no physical injury is manifest.

Conclusion

The decision in *Packenham*, while perhaps correct on its facts (there being no evidence of even the borderline physical injuries outlined above), it is unfortunate that it shed little light on what will suffice as "damage" for a claim in negligence. While harsh on a class of plaintiffs who now face considerable costs bills, its result cannot be said to come as a surprise following cases such as *Fletcher*. In addition, it has definite echoes of decisions in other asbestos cases which seem designed to cut down on perceived problems with speculative claims in negligence. Finally, the case will perhaps provide a salutary lesson to practitioners that they must consider what 'injury' a plaintiff has in fact suffered before suing in negligence.●

20. *Ibid.*, at 218-219.
21. See Jarvis v. Swan Tours [1973] 2 Q.B.233, *Farley v. Skinner* [2001] 3 W.L.R. 899 (HL) and *Leahy v. Rawson*, Unrep. HC, 14 January 2003.
22. *Op cit.*, n.2, at 4.
23. *Behrens v. Bertram Mills Circus* [1957] 2 Q.B. 1, at 28.
24. *White (or Frost) v. Chief Constable of South Yorkshire* [1999] 2 A.C. 455, at 491 *per* Lord Steyn.
25. *Op cit.*, n.14.
26. See Stapleton, op cit., n.12, at 234.
27. (1987) 525 A.2d 287 (N.J. S.C.).
28. This analogy was cited from the earlier case of *Friends For All Children, Inc. v. Lockheed Aircraft Corp.* (1984) 746 F.2d 816 (D.C. Cir.), at 825, where a cost of monitoring claim was also allowed.
29. (1996) 674 A.2d 232 (Pa. S.C.).
30. (1997) 521 U.S. 424 (U.S. S.C.).
31. See further, Bohlken, "Fitting the Square Peg of Alternative Toxic Tort Remedies into the Round Hole of Traditional Tort Law" (1996) *Drake J. of Ag. Law* 263 and Jordan, "Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?" (1996) Houston L.Rev. 1473.