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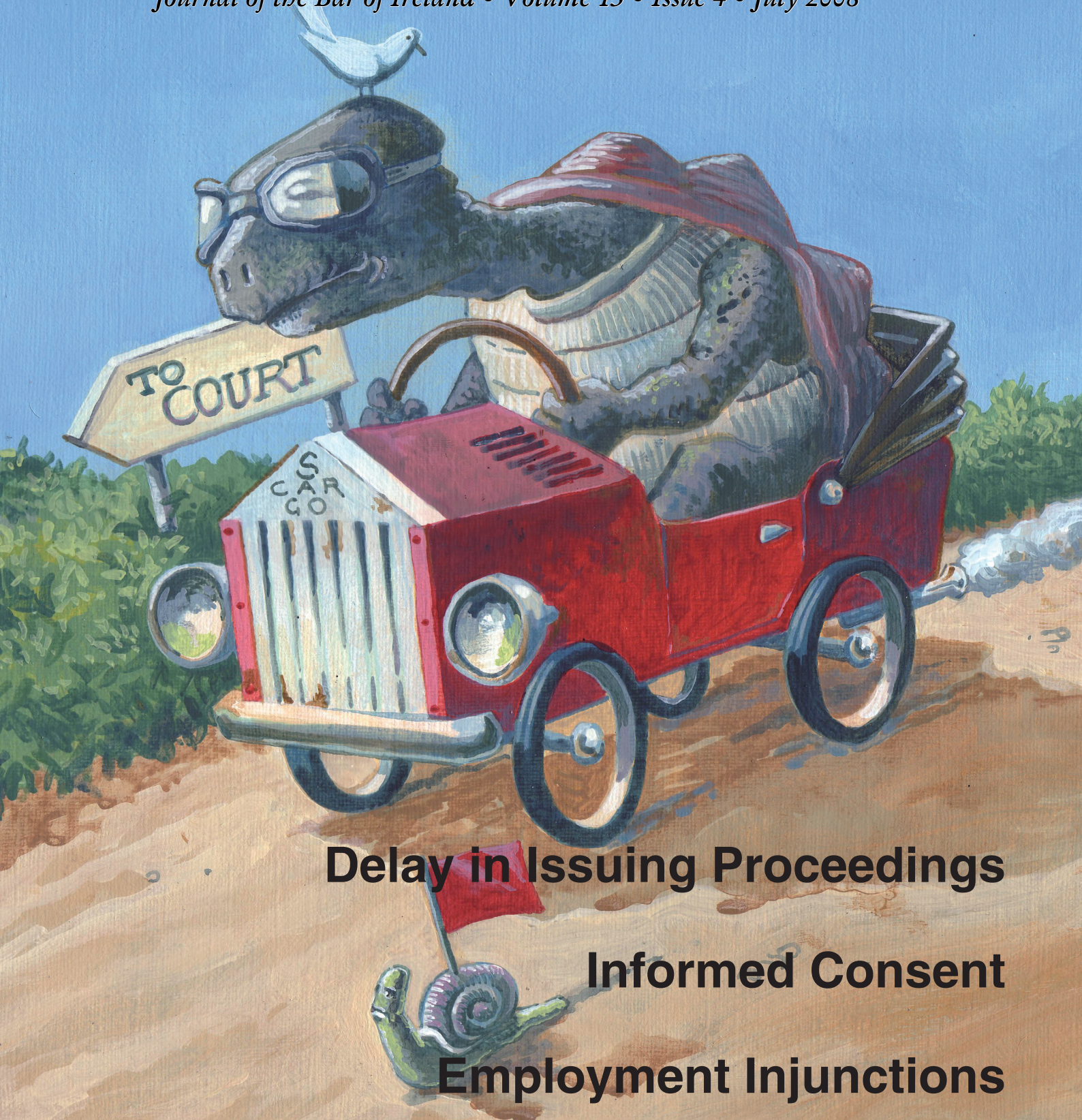

Delay in Issuing Proceedings

Informed Consent

Employment Injunctions

THOMSON
ROUND HALL

Cover Illustration: Brian Gallagher T: 01 4973389
E: bdgallagher@eircom.net W: www.bdgart.com
Typeset by Gough Typesetting Services, Dublin
shane@goughtypesetting.ie T: 01 8727305

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ROUND HALL

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Contents

Editorial Correspondence to:

Eilis Brennan BL
The Editor
Bar Review
Law Library
Four Courts
Dublin 7
DX 813154
Telephone: 353-1-817 5505
Fax: 353-1-872 0455
E: eilisebrennan@eircom.net

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

For all subscription queries contact:
Thomson Round Hall
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301
Fax: + 353 1 662 5302
E: info@roundhall.ie
web: www.roundhall.ie

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For all advertising queries contact:
Tom Clark,
Direct line: + 44 20 7393 7797
E: Tom.Clark@thomsonreuters.com
Directories Unit. Sweet & Maxwell
Telephone: + 44 20 7393 7000

Pre-Issue Delay in Civil Actions

JOANNE WILLIAMS*

"[T]o no one deny or delay right or justice." Magna Carta[1]

I. Introduction

'The law's delay' is one of 'the whips and scorns of time' lamented by Shakespeare in one of Hamlet's most searing soliloquies.[2] The prolonged nature of modern litigation continues to be a source of torment. Indeed, lengthy delays may make it impossible for a defendant to receive a fair trial. Simply put, "the chances of the courts being able to find out what really happened are progressively reduced as time goes on."[3]

One remedy for prejudicial delay is the courts' inherent jurisdiction to dismiss a case for want of prosecution. According to a clear line of case-law, a two-step test applies: it must first be established that the delay was both inordinate and inexcusable. Then, the courts will seek to achieve a 'balance of justice' between the competing rights of the parties.[4] The article focuses on the courts' evaluation of 'inordinate' delay in civil actions. In particular, it analyses the courts' approach to delay that occurs prior to the commencement of proceedings ("*pre-issue delay*").

The courts have recently adopted "a stricter approach on procedural default and time issues".[5] The Supreme Court indicated in 2005 that the principles applicable to want of prosecution may be revisited in an appropriate case.[6] The High and Supreme Courts have since warned that delay which would previously have been tolerated may now be regarded as inordinate.[7] Indeed the High Court has indicated that in an appropriate case, it may be necessary to consider whether or not the general rule applicable to *pre-issue delay* remains good law.[8] This article proposes that this rule should not continue to be of general application.

Relevant Periods of Delay

At present, when assessing the inordinacy of a period of delay, the courts' approach depends on whether the delay is *pre-issue* or *post-issue*. '*Pre-issue delay'* covers the time that elapses between the occurrence of the events giving rise to the cause of action and the issue of proceedings. All delay after the issue of proceedings is '*post-issue delay'*.[9]

A further period of delay will be addressed in this article, namely *'pre-expiry delay'*. *Pre-expiry delay* covers all delay incurred prior to the expiry of the limitation period, irrespective of the date of issue of the proceedings. *Pre-issue* delay will fall within this category, provided that the proceedings are issued within the relevant limitation period. *Post-issue* delay will also come within this period, to the point where the statutory limitation period expires.

II. Pre-Issue Delay:The Exclusionary Rule

The manner in which the Irish courts approach pre-issue delay mirrors the approach taken by the House of Lords in *Birkett v James*.[10] This case set down the principle that *pre-issue* delay, however inordinate, cannot of itself justify dismissal for want of prosecution; it simply gives rise to a duty of expedition in the conduct of the *post-issue* proceedings. This principle is hereafter referred to as "the *exclusionary* rule".

The Lords' decision centred around the relevance of two facts:

(i) The limitation period had not expired by the time the motion to dismiss was heard; and
(ii) The plaintiff had delayed in commencing the action (*pre-issue delay*).[11]

The rationale for the *exclusionary* rule can be understood only through an exploration of the reasoning employed as to these two issues.

Relevance of Limitation Period

It was crucial to the Lords' decision that at the time of the decision in *Birkett v James,* the limitation period applicable to the action had not yet expired. If the claim was dismissed at this stage, the plaintiff could simply issue fresh proceedings. The plaintiff would gain additional time to repeat the steps that he had already completed, which would only serve to prolong the length of time before the hearing. Lord Diplock noted that "[t]his can only aggravate; it can never mitigate the prejudice to the defendant".[12]

Lord Diplock considered that in the absence of an abuse

* LL.B., LL.M., BL. Legal Researcher, Law Reform Commission. The views expressed are personal and are not those of the LRC.

1 *Magna Carta 1215,* ch. 40 (17 John), repealed by *Statute Law Revision Act 2007* (No 28 of 2007).
2 *Hamlet, Act III.*
3 *J O'C v Director of Public Prosecutions* [2000] 3 IR 478, 499-500. Hardiman J discussed the principles applicable to civil and criminal actions.
4 See e.g. *Rainsford v Limerick Corporation* [1995] 2 ILRM 561; See also *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459.
5 *O'Grady v Southern Health Board* [2007] IEHC 38.
6 *Gilroy v Flynn* [2005] 1 ILRM 290, 294.
7 See *Stephens v Paul Flynn Ltd* [2005] IEHC 148; *Rogers v Michelin Tyre Plc* [2005] IEHC 294; *Stephens v Paul Flynn Ltd* [2008] IESC 4.
8 *Carlo Quintiliani v Iralco Ltd* [2007] IEHC 10.
9 The inordinacy of the *post-issue* delay is directly linked to the length of time involved. Each case is to be judged on its own merits. *Anglo Irish Beef Processors ltd v Montgomery* [2002] 3 IR 510, 520. See further Delany & McGrath *Civil Procedure in the Superior Courts* (2nd ed, 2005) at § 13-09.
10 [1978] 1 AC 297.
11 *Ibid*, 319.
12 *Ibid*, 322.

of process, the courts cannot prevent a plaintiff from issuing fresh proceedings before the expiry of the limitation period. He held that through a statutory limitation period, Parliament has manifested its intention that a plaintiff has a legal right to commence an action. If the courts could prevent a plaintiff from issuing fresh proceedings, it would be tantamount to the courts declaring the statutory limitation period to be too long.[13]

Lord Diplock consequently ruled that the non-expiry of the limitation period must always be "a matter of great weight" in an application to dismiss, and that the possibility that the plaintiff would issue a fresh writ is "generally a conclusive reason for not dismissing the action that is already pending."[14]

In sum, the Lords ruled that plaintiffs have a legal right to delay to the extent allowed by a statutory limitation period before commencing proceedings. In the absence of conduct amounting to an abuse of process, they cannot be penalised for so delaying.[15]

Relevance of Pre-Issue Delay

Lord Diplock went on to consider the relevance of pre-issue delay. Based on his conclusion as to the plaintiff's right to delay to the extent allowed by the limitation period, he held that "time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced […]."[16] He concluded that "the delay relied upon must relate to time which the plaintiff allows to lapse unnecessarily after the writ has been issued".[17] In other words, the courts cannot dismiss an action solely on the basis of *pre-issue* delay - the plaintiff must have delayed in the conduct of the *post-issue* proceedings.

Lord Diplock then affirmed the already established principle that *pre-issue* delay gives rise to a the following duty of expedition in the plaintiff's conduct of the *post-issue* proceedings:

> "A late start makes it the more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."[18]

Application in Ireland

Up to 1994, pre-issue delay was, of itself, considered relevant to the courts' analysis of inordinate delay in Ireland.[19] Since 1994, however, the *exclusionary* rule has been generally applied in Ireland, subject to the exception set out in section III. It is generally accepted that the *exclusionary* rule was first adopted in Ireland in *Hogan v Jones.*[20] This case involved four years of pre-issue delay. The parties agreed that this delay did not fall to be taken into account in calculating whether or not inordinate delay had occurred, but rather was material only to the subsequent conduct of the plaintiffs. Murphy J referred to *Birkett v James* as to the relevance of *pre-issue* delay and the duty of expedition.[21]

In *Stephens v Paul Flynn Ltd,* Clarke J noted that following the decision in *Hogan,* "it is clear that inordinate and inexcusable delay in the commencement of proceedings is not, in itself, a factor though it may colour what happens later."[22] He affirmed that "the court is confined, in determining whether a delay has been inordinate, to the period subsequent to the commencement of proceedings".[23] *Hogan* was again cited in *Rogers v Michelin Tyres Plc* as authority for the principle that "delay which is required to justify dismissal of an action for want of prosecution must relate to the time which the plaintiff allows to lapse unnecessarily after the proceedings have been commenced".[24] Thus, the *exclusionary* rule has come to be applied in Ireland. This is subject to an important exception, discussed in section III below.

Application of Duty of Expedition in Ireland

The duty of expedition was accepted by the Irish High Court in *Dowd v Kerry County Council,*[25] several years before the decision in *Birkett*. The duty of expedition now applied in the Irish courts was expressed by the Supreme Court as follows:

> "[W]hen the period of limitation for instituting proceedings has been all but allowed to expire, a plaintiff's solicitor should thereafter be astute to ensure that he is not dilatory in regard to any of the further procedural steps that are necessary to avoid the taint of prejudicial delay."[26]

In light of the recent change of emphasis with regard to delay, the High Court has stressed that "a stricter approach to compliance with reasonable time constraints [is] now mandated".[27] It can properly be assumed, therefore, that the duty of expedition will be carefully applied and stringently enforced.

III. Irish Exception

The *exclusionary* rule is not absolute. The House of Lords has taken a strict approach to its application, however, stressing in *Birkett v James* that it is "only in the most rare and exceptional

13 *Ibid*, 322. Lord Edmund-Davies agreed. *Ibid,* 332.
14 *Ibid*, 322.
15 See e.g. *Biss v Lambeth Health Authority* [1978] 1 WLR 382, 388 (CA).
16 *Birkett v James* [1978] 1 AC 297, 322 (HL).
17 *Ibid,* 322.
18 *Ibid,* 322. This duty was first established in *Rowe v Tregaskes* [1968] 1 WLR 1475 (CA).
19 See e.g. *Celtic Ceramic ltd v IDA* [1991] ILRM 248, 257.
20 [1994] 1 ILRM 512.
21 *Ibid*, 516.
22 *Stephens v Paul Flynn Limited* [2005] IEHC 148.
23 *Ibid.*
24 *Rogers v Michelin Tyre plc* [2005] IEHC 294. See also *Wicklow County Council v O'Reilly & Ors* [2007] IEHC 71, § 7.9.
25 [1970] IR 27, 33. *But see* the more cautious ruling of Ó Dálaigh CJ in the Supreme Court. *Ibid*, 42.
26 *Sheehan v Amond* [1982] IR 235, 237.
27 *Wicklow County Council v O'Reilly & Ors* [2007] IEHC 71.

circumstances" that an action would be dismissed before the expiry of the limitation period.[28] One such exceptional circumstance is an abuse of process.

The Irish courts have recognised a further exceptional circumstance: the courts may consider the inordinacy of *pre-issue* delay in the event of "limitation periods of extraordinary length".[29] Motions based on lengthy *pre-issue* delays alone were considered, for example, in *Toal v Duignan (No.1)*[30] and *(No.2)* (23 years' delay),[31] *Guerin v Guerin* (20 years' delay),[32] *Kelly v O'Leary* (50 years' delay),[33] and *J MacH v JM* (57 years' delay).[34] The running of the limitation period in each of these cases was *postponed* owing to the minority of the plaintiff.

The reason for the Irish Courts' recognition of this exception to the *exclusionary rule* was set out in *Southern Mineral Oil Ltd v Cooney.*[35] Keane J (as he then was) noted that actions subject to lengthy limitation periods may not be commenced for a long period after the events giving rise to the cause of action, perhaps running into decades. Such periods of *pre-issue* delay may be "so extreme that it would be unjust to call upon a particular defendant to defend himself". In such cases, the courts must apply the constitutional guarantee of fair procedures, and assess the inordinacy of the delay.[36] Keane J surmised that different considerations apply to cases involving a standard limitation period (i.e. 6 years or less), where lesser periods of pre-issue delay apply. He suggested that "in general it is obvious that the risk of such possible injustice is significantly less" and reasoned that this meant that in such cases, pre-issue delay "may not, of itself, be sufficient to justify the striking out of the proceedings."[37]

The Oireachtas has recognised this exception in the *Statute of Limitations (Amendment) Act 2000*, which creates a new category of 'disability' that postpones the running of the limitation period and includes a saver in relation to court's power to dismiss on ground of delay in the following terms:

> "Nothing in section 48A of the Statute of Limitations, 1957 (inserted by *section 2* of this Act), shall be construed as affecting any power of a court to dismiss an action on the ground of there being such *delay between the accrual of the cause of action and the bringing of the action* as, in the interests of justice, would warrant its dismissal."[38]

It is clear that the Oireachtas contemplated that dismissal could be based on *pre-issue* delay alone, in the context of a postponed limitation period. The House of Lords has, by contrast, refused to recognise lengthy limitation periods as an exceptional circumstance justifying the dis-application of the *exclusionary* rule.[39]

IV. The Courts' Convention Obligations

The application of the *exclusionary* rule in Ireland significantly reduces the scope of the courts' jurisdiction to dismiss for want of prosecution. This, in turn, hinders the courts' performance of their duties under Article 6 §1 of the European Convention on Human Rights, which guarantees that in the determination of his civil rights and obligations, everyone is entitled to a hearing "within a reasonable time".[40] The Supreme Court has recognised that under Article 6 §1, "the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil and criminal, are determined within a reasonable time"[41] and "to ensure the speedy resolution of matters brought before them."[42] This is the background to the following challenge to the continued application of the *exclusionary* rule.

V. Analysis

The analysis that follows is based on the three primary rationales given for the application of the *exclusionary* rule:

a) The plaintiff may issue fresh proceedings;
b) The delay is permitted by the statutory limitation period; and
c) It is unlikely that the defendant will be prejudiced.

(a) Fresh Proceedings

The decision in *Birkett v James* was based on the fact that at the time of the motion to dismiss, the limitation period had not yet expired. The plaintiff could therefore have instituted fresh proceedings. The distinction drawn between pre-issue and post-issue delay in the *exclusionary* rule, in this context of this reasoning, is flawed. Abuse of process aside, a plaintiff may issue fresh proceedings, following a dismissal, at any stage before the expiry of the limitation period.[43] The question is not whether the delay occurred prior to or following the issue of proceedings, but rather whether the application to dismiss is brought prior to or following the expiry of the limitation period.

This rationale for the *exclusionary* rule applies, therefore, only to applications brought at a time when fresh proceedings can be issued (i.e. when the limitation period has not yet

28 *Birkett v James* [1978] 1 AC 297, 328.
29 *Southern Mineral Oil Limited (in liquidation) v Coonev* [1997] 3 IR 549, 560.
30 [1991] ILRM 135.
31 [1991] ILRM 140, 142.
32 [1992] 2 IR 287, 293.
33 [2001] 2 IR 526. The plaintiff issued proceedings in 1998 in respect of personal injuries that allegedly occurred between 1934 and 1947.
34 [2004] 3 IR 385. *Ó Domhnaill v Merrick* [1984] IR 151 is also frequently cited in this context, but this involved a mixture of pre- and post-issue delay.
35 [1997] 3 IR 549.
36 *Ibid,* 562.
37 *Ibid*, 562.
38 Section 3, *Statute of Limitations (Amendment) Act 2000* (No. 13 of 2000). Emphasis added.
39 See e.g. *Tolley v Morris* [1979] 1 WLR 592.
40 See Delany *The Obligation on the Courts to Deal with Cases within a "Reasonable Time"* (2004) 22 ILT 249. See also *Doran v Ireland* [2003] ECHR 417; *McMullen v Ireland* [2004] ECHR 422; *Barry v Ireland* [2005] ECHR 865; *O'Reilly and anor v Ireland* [2006] 40 EHRR 40.
41 *Gilroy v Flynn* [2005] 1 ILRM 290, 293-4.
42 *Stephens v Paul Flynn Limited* [2005] IEHC 148.
43 The Statute does not prevent fresh proceedings being issued after the limitation period expires, but rather presents a defendant with an opportunity to plead that the plaintiff is out of time.

expired). Upon this reasoning, it is open to the courts to confine the application of the rule to such applications (which are not common),[44] and to disregard the relevance of the stage of proceedings (i.e. *pre-* or *post-issue*) at which the delay was incurred. The *exclusionary* rule would therefore be withdrawn from general application, and the courts would have more scope to guarantee the fair trial rights of defendants.

(b) Delay permitted by statutory limitation period

The second rationale for the decision in *Birkett v James* is that the House of Lords was unwilling to depart from the opinion of Parliament as to the appropriate length of a limitation period.[45] The Lords have retained this position, stating that "[t]he courts must respect the limitation periods set by Parliament; if they are too long then it is for Parliament to reduce them."[46]

This rationale does not apply in Ireland. The Irish courts have consistently stated that the fact that an action has been commenced within the period permitted by limitations legislation does not prelude a court from dismissing the action.[47] In *Toal (No.2),* the Chief Justice concluded that "to conclude otherwise is to give to the Oireachtas a supremacy over the courts which is inconsistent with the Constitution."[48] He continued as follows:

> "If the courts were to be deprived of the right to secure to a party in litigation before them justice by dismissing against him or her a claim which by reason of the delay in bringing it, whether culpable or not, would probably lead to an unjust trial and an unjust result merely by reason of the fact that the Oireachtas has provided a time limit which in the particular case has not been breached would be to accept a legislative intervention in what is one of the most fundamental rights and obligations of a court to do ultimate justice between the parties before it."[49]

Thus, the Irish Courts will not simply defer to the Oireachtas as to the appropriate length of a limitation period. Rather, the courts will balance the constitutional rights of the parties involved. Hence, the second rationale for the *exclusionary* rule does not apply in Ireland.

(c) Reduced Risk of Prejudice

As seen above, the Irish Courts have rationalised the application of the *exclusionary* rule on the basis that in general, applications to dismiss involve only a short period of *pre-issue* delay incurred during a standard limitation period (i.e. 6 years or less). Such limitation periods usually expire within a relatively short length of time after the event giving rise to the proceedings. The Courts have reasoned that it is probable, in these situations, that the defendant will have early notice of the likelihood of the proceedings being commenced.[50] The defendant will therefore have a reasonable length of time during which to carry out enquiries, to assess damages, and to present an adequate defence. It less likely, therefore, that the *pre-issue* delay will cause serious prejudice to the defendant. It follows that where the case is subject to a standard limitation period, "there will in many cases be no real or significant prejudice to the defendant."[51]

This reasoning does not constitute a solid foundation for excluding consideration of the inordinacy of pre-issue delay in all cases. To base a rule on a reduced likelihood of prejudice in "many cases" is to ignore the reality that even the shortest time limits can cause prejudice to a defendant. The English Court of Appeal and the House of Lords have accepted that delay in the first two or three years after the event is the most prejudicial of all.[52] The Supreme Court has noted that "there may, no doubt, be cases in which the lapse of a period of less than six years may irretrievably compromise the possibility of a fair trial".[53] To put an embargo on any pre-issue delay being considered of itself is to disregard the effect of such prejudice on the defendant's fair trial rights. Such a restriction fails to ensure "implied constitutional principles of basic fairness of procedures".[54] As recently stressed by the Supreme Court, it is essential that the defendant's Constitutional rights under Article 38.1 and the rights derived under Article 6 of the Convention to a trial with reasonable expedition be vindicated.[55]

The presence of *actual* or *presumed* prejudice to the defendant, or the lack thereof, is a matter which is addressed as a matter of course as a facet of the balance of justice.[56] If a court finds no prejudice, it can simply refuse to dismiss the case. There is no reason why the prejudice caused to defendants as a result of inordinate *pre-issue* delay could not be assessed at this stage.

VI. Conclusion: A New Approach?

As seen above, the Courts have signposted the possibility of a review of the *exclusionary* rule applicable to *pre-issue* delay. In the context of what the Supreme Court recently termed this "changing legal landscape",[57] it is proposed that the Irish courts could confine the application of this rule to cases where the application to dismiss is brought and heard before the limitation period has expired. It would thereafter be open to the courts to dismiss claims based on pre-issue delay alone, where 'the whips and scorns of time' have unduly prejudiced the defendant. ■

44 *Allen v Sir Alfred McAlpine & Sons Ltd & Anor* [1968] 2 QB 229, 259 (CA).
45 *Birkett v James* [1978] 1 AC 297, 322 (HL).
46 *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 2 WLR 578, 585 (HL).
47 See e.g. *Southern Mineral Oil Limited (in liquidation) v Coonev* [1997] 3 IR 549, 562; *J MacH v JM* [2004] 3 IR 385, 395.
48 *Toal v Duignan (No. 2)* [1991] ILRM 140, 142.
49 *Ibid*, 142-3.
50 *J McH v JM* [2004] 3 IR 385, 395.
51 *Ibid*, 396.
52 *Rowe v Tregaskes* [1968] 1 WLR 1475, 1477 (CA); *Birkett v James* [1978] 1 AC 297, 322 (HL).
53 *Southern Mineral Oil Ltd (in liquidation) v Coonev* [1997] 3 IR 549, 562.
54 *Ó Domhnaill v Merrick* [1984] IR 151, 159.
55 *McFarlane v DPP* [2008] IESC 7, at page 16.
56 *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459, 494.
57 *Stephens v Paul Flynn Ltd* [2008] IESC 4.

Book Review

Practice and Procedure in the Superior Courts

Second Edition

By Benedict Ó Floinn BL

Price €225
ISBN 978-1-847660589
Review by Mark O'Connell, BL

Practitioners wondering whether they need to acquire the second edition of Benedict Ó Floinn's Practice and Procedure in the Superior Courts need look no further than page 1 of the latest instalment. In the earlier offering, which was published in 1996, the author surprised us with the observation that the oft-used term, "proceedings", was nowhere defined in the Rules of the Superior Courts but he went on to tell us that Order 125 rule 1 indicated a degree of synonymity with "action", "cause" and "matter." In the latest edition, Ó Floinn elaborates with the information, supported by case-law, that the Court may entertain purely declaratory proceedings but can refuse to deal with proceedings that are moot or where a suitable alternative mechanism exists for their disposal.

Of course, there have been many changes in the law since Ó Floinn first provided the legal profession with the invaluable resource all of 12 years ago. Since the Superior Courts Rules Committee drew up the Rules of Court on December 19, 1985, 93 amending statutory instruments have been introduced, 75 in the period after the publication of the first edition.

Of particular interest to the personal injuries practitioners will be the inclusion of Order 1A and its annotation. This provision deals with the procedures to be followed by Personal Injuries Summons, including many useful pointers on mediation, formal offers and pre-trial hearings.

New rules, introduced in 2003 and Order 11C and governing the service of matrimonial and parental proceedings outside the jurisdiction, are explained in a lucid manner.

Practitioners will also be grateful for the steer in relation to the new Order 56A which deals with international commercial arbitrations under legislation enacted in 1998.

Similarly, the new arrangements introduced following the establishment of the Commercial List are explained in the section on Commercial Proceedings and Order 63A.

The new Order 63B which governs competition proceedings recites the Order and its 37 rules but regrettably without giving as much annotation as some practitioners may require. It may be unfair to criticise the author for this given that the new Order 63B was inserted in 2005 by SI 130 and amended a year later by SI 461/2006.

The book deals with Order 84A which addresses the review of the award of public contracts. The reader is directed to helpful case law and Orders of the Superior Courts.

Similarly, the new provisions regarding the procedure in statutory applications and appeals are adequately set out, as are those which relate to the Aviation Regulation Act 2001.

Order 106 of the Rules of the Superior Courts is the provision dealing with appeals to the Labour Court under the Anti-Discrimination (Pay) Act 1974 and the Employment Equality Act 1977. This Order was substituted by SI 293/2005 and Ó Floinn helpfully brings the reader around the 12 new rules with cross-references to other relevant Orders.

Other new Orders relating to the review of public contracts, the Investor Compensation Act 1998, appeals from the Hepatitis C and HIV Compensation Tribunal and the service of foreign process are explained well.

In his second edition, Ó Floinn provides practitioners with a helpful up-to-date annotation of those Rules that were in force when he first put pen to paper. In parallel with the provision of guidance to the new Rules, he includes ten additional Appendices.

In addition to 42 pages of cases, the older book runs to 1,381 pages and includes references to 214 statutes and 23 statutory instruments. The new tome has 57 pages of cases, there are references to 296 statutory provisions and 76 statutory instruments.

It therefore comes as little surprise that the updated book has almost 500 extra pages.

Once again, the consultant editor of Ó Floinn's latest work was the Honourable Mr Justice Seán Gannon, former judge of the High Court. This time around, Ó Floinn generously acknowledges contributions from William Abrahamson BL.

At a time when practitioners are invited to attend a bewildering number of worthwhile continuing professional development lectures and conferences and to subscribe to legal search engines, it is hard to see how they can also make the time to read the many fine textbooks being published in recent years.

Even with strong competition in the field of legal research and professional development, practitioners should make space on their desks for Ó Floinn's latest offering. ■

Informed Consent; the Irish and the English situations compared.

Emma Keane BL

Introduction

The phrase "informed consent" creates confusion, incites anger, and inevitably provokes controversy. A doctor has a duty to warn a patient of the risks inherent in a treatment, procedure, or operation. The law of negligence has been adapted by the courts in the last two decades to place an obligation on the doctor to provide information potentially beyond that sufficient to make the patient's consent valid. This is sometimes known as the duty to obtain the patient's "informed consent".[1] Despite the frequent use of this term by the Irish courts, English law does not recognize the doctrine of Informed Consent. The English courts consider the scope of a doctor's duty to warn, according to the *Bolam*[2] test.

This essay is a comparative analysis of the approaches of the Irish and English courts to the difficult aspects of the duty to warn and causation. It concentrates on the difficult aspects of the standard of disclosure, and causation, as the author has identified them to be, on a comparative basis. It will begin with a consideration of the human rights which may be relevant to the issue of failure to warn in the context of medical litigation and practice. The standard of a doctor's duty to warn will then be examined, as required by the Irish and the English Courts. This will be followed with a consideration of causation, and the problems this poses for the plaintiff. The essay will end with the author's suggestion of the best approach to failure to warn.

Human Rights

There are a number of human rights which are relevant to the issue of failure to warn. Some of these rights are protected under the Irish Constitution, and arguably under the English unwritten Constitution. Some rights are immediately identifiable under the European Convention on Human Rights ("the Convention"). The Convention was ratified by the U.K. when the Human Rights Act of 1998 was passed. The Convention was incorporated into Irish Law by the European Convention on Human Rights Act of 2003. The relevant human rights are likely to have a more pronounced affect on medical practice and litigation since its ratification.

The failure to warn could involve a breach of Article 9 of the Convention, which provides for freedom of conscience, in a situation where a patient is not warned of potential risks, or of Article 2, the right to life, in a situation where a patient is not warned that a treatment is life-threatening..

Situations where a patient is not warned of risks inherent in fertility treatment might involve the breach of the right to marry and to found a family under Article 12 or of the Article 8 right to privacy and family life.

A failure to warn might also breach the right to self determination and autonomy. This is related to the rights to physical and bodily integrity, and to equality, which are explicitly protected by Article 40 of the Irish Constitution, and arguably, to a number of Convention rights, including the right to freedom from discrimination under Article 14 of the Convention.

The Standard of Disclosure in the U.K.

The scope of a doctor's duty to disclose was considered by the House of Lords in *Sidaway* v *Board of Governors of the Bethlem Royal Hospital*[3]. The plaintiff, Mrs. Sidaway suffered ongoing pain in her neck, shoulders, and arm. She underwent a spinal operation by a neurosurgeon to relieve the pain. The operation carried a 1-2 per cent risk of damage to the spinal column and nerve roots. Damage to the spinal column occurred. The plaintiff was left severely disabled. She claimed on the basis of failure to warn of the risk of spinal damage. She had been warned of the risk of nerve damage only. Skinner J, at first instance, applying the *Bolam* test (or "Professional Standard Test") held that the standard of care required was that of the ordinary skilled man exercising and professing to have that special skill. He held that a doctor was not negligent if he acted in accordance with the practice accepted at the time as proper by a responsible body of medical opinion, notwithstanding that other doctors applied different practices. He dismissed the plaintiff's claim. The decision of the learned judge was affirmed by the Court of Appeal and the House of Lords. Lord Scarman, dissenting, favoured the adoption of a reasonable patient test.

Lord Templeman stated that where the practice of the medical profession is divided, "it will be for the court to determine whether the harm suffered is an example of a general danger inherent in the nature of the operation" and if so whether the explanation given to the patient was sufficient to alert him to the danger of harm. [4] This statement has been described as representing an "inroad" in the *Bolam* test.[5] It shows that even where a doctor would escape liability on application of the *Bolam* test, the court is willing to

1 I. Kennedy and A. Grubb., *Medical Law: Text with Materials*, at 677, (3rd ed., OUP 2000).
2 *Bolam* v *Friern Barnet Management Committee* [1957] 1 WLR 582.
3 *Sidaway,* [1985] AC 871.
4 *ibid* 903.
5 See, A. Gumbs, and P. Grundy, 'Bolam, Sidaway, and the

contemplate a situation where the court itself, and not the medical profession, decides the suitable standard.

Lord Bridge resisted creating a doctrine of informed consent at English Law. He acknowledged the "logical force", of the Canterbury doctrine, but rejected it. This doctrine derives from the American decision of *Canterbury* v *Spence & Washington Hospital Centre*[6], where the court held that the test for determining whether a particular risk should be communicated is its materiality to the patient's decision. A risk is regarded as material when a reasonable person, from what the doctor knows or ought to know to be the patient's position, would be likely to attach significance to that risk when reaching a decision. Lord Bridge in *Sidaway* regarded this doctrine as "quite impractical", for three main reasons:

1) Reference by a doctor to certain information may unduly influence the patient's decision.
2) It is unrealistic to confine expert medical evidence to an explanation of the primary medical factors involved and to deny the court the benefit of evidence of medical opinion and practice on the particular issue of disclosure being considered.
3) The objective test in *Canterbury* is so imprecise as to be meaningless.[7]

It is submitted, with respect, that Lord Bridge's reasoning fails to consider a number of factors. In relation to the first point, there is no need to fear that mentioning certain risks which are unlikely to materialize will be given too much weight by the patient. The doctor can use his tone and experience to help the patient to understand how small the likelihood is of such a risk eventuating. Furthermore, Lord Bridge fails to consider the defence of therapeutic privilege. Such a defence would allow the doctor to refrain from imparting certain information to a patient if he felt it was not in the patient's best interest to do so.

With regard to the second point, it is incorrect to assume that the expert medical evidence would be automatically confined to an explanation of the primary medical factors involved. There is nothing to prevent the medical evidence from being considered also in relation to the materiality of the risk and to assessing the practice which would be adopted by a responsible body of medical practitioners in the circumstances.

The objective nature of the test by no means makes the doctrine meaningless. Judges are often required to use an objective test in negligence cases. "It is of course difficult, but not so difficult that an injured plaintiff should be left without a remedy".[8]

Unrecognised Doctrine of "Informed Consent": A Fresh Approach" [1997] *Journal of Personal Injury Litigation* 211, at 213.

6 U.S. Court of Appeals District of Columbia Circuit 464 F 2d 772 [1972].

7 *Sidaway,* [1985] AC 871.

8 A. Gumbs and P. Grundy, 'Bolam, Sidaway, and the Unrecognised Doctrine of "Informed Consent": A Fresh Approach" [1997] *Journal of Personal Injury Litigation* 211, 216.

The Standard of Disclosure in Ireland

The Irish Courts seem to have accepted the doctrine of informed consent. The doctrine has now been endorsed by most of the common law countries, with the exception of England. An extremely important decision on this issue was the Irish High Court decision of Kearns J in *Geoghegan v Harris*[9]. This decision has not yet been approved by the Supreme Court, however, and its status remains uncertain.

The *Bolam* test has been rejected by the Irish courts in failure to warn cases. It is submitted that such rejection is to be welcomed. It is possible that the application of such a test to disclosure cases would fail to safeguard human rights, and would give excessive authority to doctors in an area of important public concern. Moreover, it is considered wrong that professional support for one doctor's practice of non-disclosure should be substituted for the court's decision-making function.

The Irish Supreme Court considered the Informed Consent doctrine in *Walsh v Family Planning Services*[10]. The plaintiff underwent a vasectomy operation. He suffered orchialgia as a result; a chronic, untreatable pain in the testicles, and loss of sexual capacity. He claimed that he had not been warned of the risk of developing orchialgia. The plaintiff lost his case. On the factual merits of the case, a majority of the Supreme Court held in favour of the defence. The majority of the judges opted for the test of what a reasonable doctor would disclose; a modified version of the professional standard test.

The informed consent doctrine was impliedly favoured by the minority in *Walsh*. Under the doctrine, the standard of disclosure is to be assessed according to what a reasonable patient would want disclosed in the circumstances. The doctrine gives greater leeway to the Court than it would be given under the professional standard test. The Court is still expected to consider expert medical evidence on the potential risks of the treatment and on the opinion of a responsible body of doctors, but under the doctrine, the Court is free to ignore that expert opinion. The majority of the Court in *Walsh*, took the view that the duty to disclose should be considered in accordance with professional practice.

In *Geoghegan v Harris*[11], the plaintiff underwent bone graft surgery for the purposes of a dental implant procedure. The outcome of the operation was that the plaintiff was left with chronic neuropathic pain. The risk of this condition was rare and remote. There was a less than one per cent risk of it occurring. But this was a grave, very painful condition. Before the operation, the doctor told the patient that no firm guarantees could be given and that as with all operations unanticipated complications could occasionally occur. He failed to disclose the risk which materialized. Although it was a very remote risk, it was one which was "known". The doctor stated in his evidence, however, that he had been "advised" that doctors were not required to disclose risks of less than 1per cent statistical occurrence. None of the medical experts at the hearing were aware of any reported occurrence of similar injury, but they acknowledged that where a nerve

9 [2000] IEHC 129; [2000] 3 IR 536, (High Court, 21st June, 2000).

10 [1992] 1 IR 496.

11 [2000] IEHC 129; [2000] 3 IR 536, (High Court, 21st June, 2000).

is traumatized, the patient may as a consequence suffer intractable neuropathic pain. Every one of the experts believed that the risk was too remote to require disclosure.

Kearns J. decided that the application of the reasonable patient test for the standard of disclosure was preferable to the professional standard. It seemed "more logical". It ensures that the patient makes the "real choice". The learned judge expressed support for the reasonable patient test, similar to that preferred by the courts in America and Canada, specifically in the cases of *Canterbury* v *Spence*[12] and *Reibl* v *Hughes*[13]. He continued:

> "As a general principle, the patient has the right to know and the practitioner a duty to advise of all material risks associated with a proposed form of treatment. The court must ultimately decide what is material. 'Materiality' includes consideration of both (a) the severity of the consequences and (b) statistical frequency of the risk."

Kearns J. was not dictating an absolute standard. He did not state that there was always a requirement to consider frequency, but noted the absence of such consideration in the case of *Walsh*. He said that "(e)ach case…should be considered in light of its own particular facts…to see if the reasonable patient in the plaintiff's position would have required a warning of the particular risk". Kearns J. seemed to accept that what must be disclosed is less than every possible known risk and will depend on the particular circumstances of the case.

It is stated in the *Annual Review of Irish Law* 2000 in relation to Kearns J. favouring the 'material disclosure' test, that "(p)recisely how this translates into practice in specific cases other than the instant case, awaits further analysis".[14] Healy opines that in showing its preference for the reasonable patient (or "informed consent") model, *Geoghegan* "expressly recognizes that risk-benefit ratios must not be evaluated in a coldly clinical, empirical light, solely by reference to statistical likelihood and without regard to severity of injury or the patient's right to assume the risk himself". Healy remarks that it is often difficult for the plaintiff to prove causation, and it is therefore "unlikely" that the decision in *Geoghegan* to approve the reasonable patient assessment of disclosure will "effect a radical change for litigant patients or precipitate a malpractice boom".[15] The importance of the decision is based in its findings in law, "which may well encourage similar deliberation by the Supreme Court in the near future".[16]

The Future Standard of Disclosure

It is hoped that the Irish Supreme Court will approve *Geoghegan* in the near future, subject to one qualification: It is submitted that there should be a less rigorous requirement for disclosure of risk of even severe consequences, where there is a minimal percentage risk of that eventuality occurring. This would prevent the placing of an impractical burden on the defendant doctor to warn of every risk of serious consequence, no matter how low the percentage risk may be. It is asserted that this approach would be preferable to adoption of the professional standard (or "*Bolam* test") as applied by the majority of the House of Lords in *Sidaway*. The reasonable patient test seems to be fairer. It considers the duty to disclose, according to the perspective of a reasonable patient, and makes this assessment realistic by taking into account the personal characteristics and circumstances of the particular plaintiff.

Causation

Causation is the hurdle at which most plaintiffs fall in failure to warn cases. The plaintiff must show that disclosure of the risk would have caused him to forego the treatment. In *Geoghegan*, Kearns J. pointed out the advantages and disadvantages of the objective and subjective tests for causation. The subjective approach would place the doctor in danger of the patient's hindsight and antipathy.

Kearns J. felt that the objective approach was not flawless either. It would not adequately safeguard a patient's right to make an informed decision, especially if the patient's own beliefs and values are diametrically opposed to those of the hypothetical "reasonable patient". The judge applied a hybrid objective-subjective model comparable to that used by the Canadian Supreme Court in *Reibl* v *Hughes*[17]. He assessed the likely reaction of a reasonable patient who has the subjective characteristics and concerns of the plaintiff. The evidence in *Geoghegan* strongly implied that the plaintiff was very enthusiastic to improve his teeth. It was unlikely that he would have decided to abandon the operation if he were told of the remote risk of neuropathic pain. Kearns J. held against the plaintiff on the causation issue.

Kearns J's decision has been subject to some criticism. Craven notes that the learned judge considered the elective nature of a procedure as part of his analysis of the issue of causation. Craven, warns that this "is potentially paternalistic and merely shifts the source of that paternalism from the bedside to the bench".[18] It is submitted, however, that this criticism is not entirely sound. The approach of Kearns J. is to be welcomed. There is nothing wrong with it being pragmatic. It is not paternalistic, and need not ever be so.

An important recent English decision concerning causation is *Chester* v *Afshar*[19]. Ms. Chester had been experiencing severe back pain. She was advised by a neurosurgeon, Dr. Afshar, to have three vertebrae removed. There was a 1-2% risk that the removal would cause paralysis. Ms. Chester was not warned of this. She suffered paralysis of the legs as a result of the operation. The trial judge, Taylor J., found that although the operation itself had been carried out by a man of skill, to the appropriate standard, "the defendant's failure to advise

12 U.S. Court of Appeals District of Columbia Circuit 464 F 2d 772 [1972].

13 (1980) 114 DLR (3d) 1.

14 Annual Review of Irish Law 2000, 439.

15 J. Healy, 'Informed Consent: What Irish law currently requires of Doctors', Medical Negligence Conference address at Trinity College, Dublin, 4th October 2003, 12.

16 *ibid* 12.

17 (1980) 114 DLR (3d) 1.

18 C. Craven, 'Consent to Treatment by Patients-Disclosure Revisited' (2000) 6 Bar Review 56, 113.

19 (2004) UKHL 41; (2005) 1 A.C. 134 (HL).

the claimant adequately was negligent under the principle in *Bolam*." The learned judge was persuaded by the majority view in the Australian High Court case of *Chappel* v *Hart*[20], and held that all Ms. Chester had to prove was that had she been adequately warned, she would not have undergone the operation when she did. He found that this causal link was established. His findings were upheld by the Court of Appeal, and by a majority of three to two of the House of Lords (Lords Bingham and Hoffman dissenting).

Ryan and Ryan remark that *Chester* "signals an approach to the causation question that is far more benevolent to plaintiffs". They express their opinion that the decision "is likely to emerge as an authority of some stature when the Irish courts revisit the issue". They welcome this approach as they state that "in an area such as informed consent, a strict application of the causation rules can generate harshness and, it is submitted, injustice".[21] This author disagrees with Ryan and Ryan. It is submitted that it is both likely and desirable that the Irish courts will refrain from following *Chester*. The decision is founded on dubious reasoning. It is suggested that Ms. Chester ought not to have won her case. There was no evidence to show that Ms. Chester would not have consented to surgery, had she been warned of the risk of damage. (This is unlike the plaintiff in *Chappell v. Hart*.) Had the warning been given and Ms. Chester undergone treatment at a later date, the risk attendant upon surgery would have been the same. Had the warning been given and Ms. Chester decided to have the surgery performed by a different doctor, the risk would again have been the same. (This is also unlike the situation in *Chappell*.) There was no suggestion "that Miss Chester was more at risk at the hands of Mr Afshar due to any lack of experience on his part than she would have been at the hands of anyone else"[22]

The issue of causation was considered only briefly by the Irish Supreme Court in *Walsh*. It was given most attention in the two dissenting judgments of McCarthy and Egan JJ. Both judges adopted a very favourable position to the plaintiff. Their approaches seem to be in line with *Chester*. Egan J. commented that he did not "consider it necessary that there should be proof by the plaintiff that had the proper warning been given to him, he would not have submitted to the original operation". These dissenting comments were the only comments at Supreme Court level in the context of informed consent.

In *Chester*, the majority of the House of Lords held that had the appropriate warning been given, Ms. Chester would not have undergone surgery on the day that she did, and she was deprived of the opportunity to undergo surgery on another occasion under different circumstances. It was held that to leave Ms. Chester without a remedy would leave the duty to warn an empty duty.[23] Stevens point out, however, that "(t)he duty to warn is not empty." We may feel sympathy for plaintiffs like Ms. Chester, "but this is not generally thought to be a sufficient reason for imposing liability".[24] Lord Walker stated that an honest claimant who admits that she would only have delayed the operation should not be treated less favourably than one who dishonestly attempts to persuade the court that she would not have had the operation at all.[25] It is submitted that this argument too is unconvincing. Stevens calls attention to the fact that "the risk of fraudulent claims is ever present in the tort of negligence and is not normally seen as a sufficient reason to abandon general principles".[26] It appears that the vast majority of academic commentary manifests skepticism and disapproval of *Chester*. It is submitted that such criticism is entirely warranted.

There is no express reference in *Chester* to the application of an objective, subjective, or hybrid test for causation. The author asserts that it can be implied that the court entirely disregarded the subjective test for causation. It glossed over the fact that there was no evidence that had Ms. Chester been warned of the risk, she would not have consented to the operation. It is suggested that had the court expressly applied a subjective, a hybrid, or even an objective test for causation, Ms. Chester's claim would have failed. It is submitted that it is unfortunate that the court in *Chester* did not apply the hybrid objective-subjective test for causation. The author believes that this is the most logical and just test to apply. Had it been applied, it is almost certain that Ms. Chester's claim would have failed. Dr. Afshar would not have been placed in the unfortunate position of being an insurer of risk.

Conclusion

There is much uncertainty concerning the scope of a doctor's duty to warn, in both Irish and English law. There is a great need for this matter to be cleared up, particularly considering the ratification of the Convention by both Ireland and England, and the rights which are potentially at stake. It is submitted that the approach taken by Kearns J. in the Irish High Court in *Geoghegan* is the preferable approach in failure to warn cases. The application of the reasonable patient test to the scope of a doctor's duty to warn is sensible and fair. It is hoped that the Irish Supreme Court will soon approve *Geoghegan*, subject to a less rigorous requirement of disclosure where the percentage risk is minimal. In relation to causation, the hybrid objective-subjective test, as applied by Kearns J., seems to be the best approach. An outright adoption of *Chester* could bring about an overly-benevolent approach to plaintiff patients and the danger of injustice to defendant doctors in cases in which they act with utmost skill.

Were the English courts to adopt a doctrine of informed consent, it is unlikely that there will be a significant change in the outcome of failure to warn litigation, since the majority of plaintiffs will continue to fail on the issue of causation. It is submitted, however, that were the doctrine adopted, a more logical and just result would be achieved. ■

20 (1998) 195 C.L.R. 232.

21 D. Ryan and R. Ryan, 'Causation and Informed Consent to Medical Treatment' (2003) 21 Irish Law Times 256, 256.

22 (2004) UKHL 41; (2005) 1 A.C. 134 (HL), at [68], per Lord Hope.

23 (2004) UKHL 41; (2005) 1 A.C. 134 (HL), at [87].

24 R. Stevens, 'An Opportunity to Reflect' (2005) 121 *Law Quarterly Review* 189, 194.

25 (2004) UKHL 41,101, per Lord Walker.

26 R. Stevens, 'An Opportunity to Reflect' (2005) 121 *Law Quarterly Review* 189, 194.

Round Hall Criminal Law and Employment Law CPD Events

Fergus O'Domhnaill

The following is a summary of some of the material considered by the speakers in their comprehensive papers at The Annual Criminal Law and Employment Law conferences. The complete set of materials can be purchased from Thomson Round Hall.*

Annual Criminal Law Conference

On April 12th, 2008, Thomson Round Hall held their Third Annual Criminal Law Conference. The event was chaired by the Hon. Mr. Justice Kearns, and was presented by an expert panel of speakers on Criminal Law. By way of introduction, Mr James Hamilton, the Director of Public Prosecutions, presented a paper on 'The Prosecutor's Role at Sentencing Hearings'. This paper examined the expansion of the traditional role of the prosecutor, which originally was limited to drawing legal precedents to the attention of the trial judge,[1] to include assisting the trial judge in arriving at what can be considered an appropriate sentence. In the DPP's Guidelines for Prosecutors, prosecutors are not permitted "[to] seek to persuade the court to impose an improper sentence nor should a sentence of a particular magnitude be advocated."[2] One area of sentencing which does not preclude advocacy, however, is the prosecutorial review of undue leniency.[3] Traditionally, the Supreme Court has rejected the notion of a standardisation or tariff of penalty for cases,[4] however, this reluctance seems to be disappearing from the case law.[5] The Director considered this trend in the law to be a major advance towards achieving consistency and fairness in sentencing.[6] Finally, the Director indicated that these developments have resulted in a practice in the Central Criminal Court whereby counsel, on instruction of the DPP, will opine as to where an offence should be located in the overall scale of gravity.

Sentencing Sexual Offenders

Tom O'Malley BL revisited the Supreme Court's decision in *People (DPP) v Tiernan*,[7] in a paper[8] entitled 'Tiernan Twenty Years On: Sentencing Sexual Offenders'. The paper began by discussing the significance of the Supreme Court's decision in detail, and tracing its development into the main sentencing principles we have today: proportionality,[9] whether delay and age affect prosecutions,[10] how multiple offences affect sentencing and how to treat the approach in *People (DPP) v Drought*.[11] Mr O'Malley argued in favour of a 'system of principled discretion whereby sentencing remains essentially discretionary ….but is guided by clearly articulated principles'. Mr O'Malley's suggested solution to achieve this aim is to compile research reports on a variety of commonly prosecuted serious offences setting out the range of fact situations in which these offences are committed, the factors which might be taken into account for sentencing purposes and the hierarchy of gravity in which variations of these offences may be ranked.

Test-Purchasing and the Law

Alisdair Gillespie of De Montfort University, Leicester, presented a paper on the emerging practice of 'Test-Purchasing and the Law'. Juvenile test-purchasing is currently used in Ireland in respect of the sale of tobacco to children,[12] and recent reports in the Irish press suggest this practice may be extended to the sale of alcohol. Mr Gillespie took a comparative approach to three key issues which affect this area of the law: entrapment, privacy, and the protection of the child-consumer. Whether the substantive defence of entrapment is available to an individual accused is now settled since the decision of the High Court in *Syon v Hewitt*,[13] where Murphy J. held that there was no "substantive defence of entrapment arising out of the use of the test purchase procedure". The paper also addressed the child protection issues that arise during the course of these operations.

Criminal Law (Insanity) Act 2006

Dara Robinson, Solicitor, scrutinized the Criminal Law (Insanity) Act 2006, and presented an insightful analysis of the recent changes to Insanity Law. Mr Robinson identified

1 See the obvious 'separation of powers' concerns expressed by O'Dálaigh C.J. on this role in *Deaton v Attorney General* [1963] I.R. 170, at 183.
2 *Guidelines for Prosecutors*, at para 8.20. This direction is mirrored in Rule 10.23 of the Code of Conduct of the Bar of Ireland.
3 Criminal Justice Act 1993, section 2(1).
4 See *People (DPP) v Tiernan* [1988] 1 I.R. 250, at 254.
5 See *People (DPP) v Kelly* [2005] 1 I.L.R.M. 19, where the method of arriving at a proportionate sentence was examined. See also *People (DPP) v Drought*, unreported, Central Criminal Court, May 4, 2007.
6 The pending Irish Sentencing Information System (ISIS) will effect further clarity in this regard when completed.
7 [1988] I.R. 250.
8 Not unlike Mr O'Malley's widely cited article on the constitutional aspects of sentencing considered in *Deaton v A.G.* [1963] I.R. 170. See "The Power to Punish: Reflections on *Deaton v A.G.*" in O'Dell (ed), *Leading Cases of the Twentieth Century* (Round Hall, 2000).
9 See *People (DPP) v. Kelly* [2005] 1 I.L.R.M. 19.
10 See the decisions in *H. v DPP* [2006] 3 I.R. 575 (on complainant delay) and *P.M. v DPP* [2006] 3 I.R. 172 (on prosecutorial delay).
11 Central Criminal Court, May 4, 2007.
12 See the *Tobacco Control Protocol* published under the authority of s.10(1) of the Public Health (Tobacco) Act 2002.
13 [2007] I.C.L.M.D. 22. There are, however, limits to how far a law enforcement officer can go in inducing a crime: see *R. v Looseley* [2002] 1 Cr App R 29, at 353-367, *per* Lord Nicholls.

two continuing concerns with the novel regime. First, there remains a single "designated centre" (the Central Mental Hospital), with operational responsibility for the entire State. Second, the resources allocated to address mental health issues are simply inadequate. Turning to the Act itself, the new legislation fails to provide any proper definition of 'insanity' which is in keeping with both modern and medical thinking. As a result, we will continue to see marginal insanity cases being the subject of valiant attempts by defence lawyers to satisfy the defence. Problems also persist with the question of fitness to be tried. The key difficultly lies in the District Court making such a finding without a requirement for the court to hear evidence from a psychiatrist, or any other witness. Our attention was also drawn to some of the procedural lacunae in the new legislation: for example, although section 13 allows the Mental Health (Criminal Law) Review Board to discharge patients conditionally, there is no power to recall any patient who fails to comply with conditions.

Criminal Justice Acts 2006 and 2007

Tony McGillicuddy BL concluded the presentations with a paper on the 'Criminal Justice Acts 2006 and 2007', which have made significant changes to criminal law practice and procedure. The paper focused on Part IV of the Act, which allows a court or jury to draw inferences from a person's silence during pre-trial investigations in defined circumstances.

Annual Employment Law Conference

On May 24th, 2008, the Fifth Annual Employment Law Conference took place in The Distillery Building. The conference was chaired by the Hon. Mr. Roderick Murphy.

Foreign Nationals in the Workplace

Cliona Kimber BL presented a timely paper on 'Foreign Nationals in the Workplace'. Beginning with a perusal of the legislation governing the employment of migrant workers, Ms Kimber considered the provisions of the Employment Permits Acts 2003 and 2006 and how they structure the various different categories of permit. Next, she focused on the developing case law in the courts upholding the rights of migrant employees under the Employment Equality Acts 1998-2004. Once a foreign national is in employment, regardless of status, they are entitled to the protection of employment rights in the same way as any other worker.[14] Finally, Ms Kimber considered the imminent European legislation regarding temporary agency work.

Industrial Relations and the Law

Tom Mallon BL presented a thought provoking paper on 'Industrial Relations v The Law' on how lawyers are becoming more and more involved in areas which had traditionally been the exclusive preserve of Trade Unions and Employers Representative Bodies. In his view, Trade Unions appear to have abandoned involvement in processing claims under the Unfair Dismissals Act and have largely abandoned processing claims under the Equality Legislation. In addition, they risk losing involvement in a number of other areas. In addition, Mr Mallon called for a review of the current split of work between the EAT, the Labour Court, the Equality Tribunal and the Rights Commissioner Service.

Legal Intervention in Pre-Dismissal Processes

Marguerite Bolger BL delivered a paper on 'Legal Intervention in Pre-Dismissal Processes – Injuncting the Disciplinary Procedure'. The High Court's clampdown on injunctions restraining the termination of a contract of employment has resulted in a greater tendency to seek injunctive relief at an earlier stage in employment relationships. Applications to intervene at a pre-dismissal stage to restrain matters like a disciplinary investigation or hearing are becoming more commonplace on the High Court Chancery list, and this paper surveyed a number of recent decisions.

Protected Disclosure

Frances Meenan BL delivered a paper on 'Protected Disclosure in Employment Law', which covered the law relating to 'whistleblowers' in Ireland. Where employees act as whistleblowers, they disclose work-related information that can be used to prevent harm or loss to the public. An employee might disclose a safety risk to other employees at work, an environmental or health hazard for members of the public, serious fraud, or gross waste of funds. Ms Meenan outlined the various instruments which include whistleblowing provisions,[15] in particular the more recent Health Act 2007[16] and Employment Law Compliance Bill 2008[17].

Health & Safety

Geoffrey Shannon of the Law Society presented a paper entitled 'Recent Developments in Health and Safety Law', which focused on the implications of the Safety, Health and Welfare at Work Act 2005. The new Act re-enacts an expanded version of many of the provisions contained in the 1989 Act, with some significant additions. Overall, the Act encourages business to take a proactive role in managing safety, and adopt a socially responsible attitude to employees.

** The full set of papers can be purchased directly from Thomson Round Hall for €145 each.* ■

14 Indeed, the standard employment rights may need to be applied subjectively to foreign nationals in order to take cognisance of their unique status. See the decisions in *Ms Ning Ning Zhang v. Towner Trading* DEC-E2008-001 and *Czerzki v. Ice Group* [2007] 18 ELR 221.

15 See for example the Standards in Public Office Acts 1995-2001; the Protections for Persons Reporting Child Abuse Act 1998; the Competition Act 2002; the Safety, Health and Welfare at Work Act 2005 and the Garda Síochána Act 2005 (coloured by the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007).

16 See generally section 55 of the Act. Section 55B defines what constitutes a "protected disclosure" for the purposes of the Act.

17 The proposed Section 50(1) provides a whistleblower with the option of approaching a member of the Gardaí to report an offence. Section 51 protects such a person from penalisation by an employer.

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 13, Issue 4, July 2008

A directory of legislation, articles and acquisitions received in the Law Library from the 12th May 2008 up to 23rd June 2008.
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

ADMINISTRATIVE LAW

Library Acquisition

Arden, Andrew
Local government constitutional and administrative law
2nd ed
London: Thomson Sweet & Maxwell, 2008
M361

Statutory Instruments

Agriculture, fisheries and food (delegation of ministerial functions) order 2008
SI 106/2008

Agriculture, fisheries and food (delegation of ministerial functions) (no.2) order 2008
SI 107/2008

Agriculture, fisheries and food (delegation of ministerial functions) (no.3) order 2008
SI 108/2008

Appointment of special advisers (Minister for Transport) order 2008
SI 129/2008

Ethics in public office (designated positions in public bodies)
SI 145/2008

Ethics in public office (prescribed public bodies, designated directorships of and positions in public bodies) (amendment) regulations 2008
SI 146/2008

AGRICULTURE

Statutory Instruments

Agriculture, fisheries and food (delegation of ministerial functions) order 2008
SI 106/2008

Agriculture, fisheries and food (delegation of ministerial functions) (no.2) order 2008
SI 107/2008

Agriculture, fisheries and food (delegation of ministerial functions) (no.3) order 2008
SI 108/2008

Diseases of animals act 1966 (notification and control of animal diseases) order 2008
SI 101/2008

ANIMALS

Statutory Instruments

Diseases of animals act (restriction on bird-shows or other events) (revocation) order 2008
SI 151/2008

Diseases of animals act 1966 (notification and control of animal diseases) order 2008
SI 101/2008

ARBITRATION

Award

Application to set aside – Time limit – Publication of award to parties – Extension of time – Discretion of court to extend time – *Bord na Mona v John Sisk & Son Ltd* (Unrep, Blayney J, 31/5/1990) applied; *Vogelaar v Callaghan* [1996] 1 IR 88 considered; *Brooke v Mitchell* (1840) 6 M & W 473 and *Hemsworth v Brian* (1844) 7 Man & G 1009 followed - Rules of the Superior Courts 1986 (SI 15/1986), O 56, r 4 – Extension of time refused and award enforced (2007/534SP – Kelly J – 19/12/2007) [2007] IEHC 468 *Kelcar Developments Ltd v MF Irish Golf Designs Ltd*

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Buhler, Michael W
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London: Sweet & Maxwell, 2008
Webster, Thomas H
C1250

Jenkins, Jane
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Biggleswade: Kluwer Law International, 2006
C1250

Kendall, John
Expert determination
4th ed
London: Sweet & Maxwell, 2008
N398.6

ASYLUM LAW

Articles

Brophy, Grainne
Steady traffick
2008 (April) GLSI 26

Curtis, Mary Elizabeth
Immigration, residence and protection bill 2008 and its provisions to detain asylum seekers
2008 ILT 124

BANKING LAW

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Scheme for transfer of shares – Opposition by minority shareholder – Transfer of beneficial ownership – Statutory notice pursuant to offer to acquire shares by transferee company – Application by dissenting shareholder – Test to be applied – Factors to be taken into account – Discretion of court – Purchase order – Whether scheme unfair – Whether independent legal advice given – Whether conflict between legislative provisions and articles of association – Onus of proof – *In re Fitzwilton plc* [2000] 2 ILRM 263, *In re Hoare and Company* [1933] All ER 105, *In re Press Caps Ltd* [1949] Ch D 434, *McCormick v Cameo Investments Ltd* [1978] ILRM 191, *In re Bugle Press Ltd* [1961] Ch 270 and *In re Sussex Brick Co Ltd* [1960] 2 WLR 665 considered. *Lee and Company (Dublin) Ltd v Egan Wholesale Ltd.* (Unrep, Kenny J, 27/4/1978), *Hawks v McArthur* [1951] 1 All ER 22 and *In Re Hafner, Olhausen v Powderly* [1943] IR 426 followed - Companies Act 1963 (No 33), s 204(1) – Applicant's appeal dismissed (79/2005 – SC – 31/7/2007) [2007] IESC 41
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European arrest warrant - Statutory interpretation – Words and phrases – "Detention order" – Principles to be applied – Legislative history – Nature of detention for which surrender can be ordered – Respondent absconding from detention in mental hospital in requesting state – Whether detention in mental hospital regime of punishment – Whether hospital order "detention order" – Whether surrender of respondent would breach rights under the European Convention on Human Rights – Whether surrender of respondent should be ordered – *Minister for Justice v Tobin* [2007] IEHC 15 (Unrep, Peart J, 12/1/2007) considered - Framework Council Decision 2005/584/JHA, articles. 1 and 2 – European Arrest Warrant Act 2003 (No 45), s 10 – Surrender ordered (2007/59EXT – Peart J – 19/12/2007) [2007] IEHC 443
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Free movement of persons

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Child abduction

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Child abduction

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Children

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Asylum

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Asylum

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Asylum

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Asylum

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Discovery

Privilege – Privileged documents mistakenly disclosed – Privileged documents inspected by other party – Whether privilege waived – Whether solicitor receiving documents realised mistake was made – Whether reasonable solicitor would on balance of probabilities have taken disclosure to have been result of mistake – Whether privileged documents deployed – Whether disclosing party relying on content of mistakenly disclosed privileged documents – Whether plaintiffs entitled to discovery of connected privileged documentation - *Re Briamore Manufacturing Ltdd* [1986] 1 WLR 1429, *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027, *Pizzey v Ford Motor Company* [1994] PIQR 15, *Shell E & P Ltd v McGrath* [2006] IEHC 409 (Unrep, Smyth J, 5/12/2006) and *Marubeni Corporation v Alafouzos* [1988] CLY 2841 followed; *Hannigan v DPP* [2001] 1 IR 378 distinguished – Relief refused (2006/5953P – Clarke j – 7/11/2007) [2007] IEHC 315
Byrne v Shannon Foynes Port Co

Discovery

Documents – Electronic database – Offer of concession of matters of evidence – Whether documents necessary for fair disposal of cause or matter – Whether discovery proportionate – Whether discovery should be limited to documents in existence – Whether order of discovery could require party to create documents not previously in existence – Whether different rules apply to discovery in competition cases – *Ryanair plc v Aer Rianta cpt* [2003] 4 IR 264, *Framus Ltd v CRH plc* [2004] 2 IR 20, *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652 and *Grant v South Western and County Properties Ltd* [1975] Ch 185 considered -Rules of the Superior Courts (SI 15/1986), O 31, rr 12 and 29, O63B, rr 4(1), (2), 5, 6, 6 (1) (x), 20 (1) (b) and 27 – European Communities (Interconnection in Telecommunications) Regulations 1998 (SI 15/1998) – Rules of the Superior Courts (No 2) (Discovery) 1999 (SI 233/1999) – Rules of the Superior Courts (Competition Proceedings) 2005 (SI 130/2005) – Postal and Telecommunications Services Act 1983 (No 24), s 111(2) – Competition Act 1991 (No 24), ss 4 and 5 – Competition Act 2002 (No 14), ss 4 and 5 –Treaty of Rome, Articles 81 and 82 – Defendant's appeal against making of discovery order allowed (374 & 375/2006 – SC – 5/12/2007) [2007] IESC 59
Dome Telecom Ltd v Eircom Ltd

Dismissal of proceedings

Want of prosecution - Delay – Personal injury – Medical negligence – Applicable principles - Whether delay inordinate and inexcusable – Whether delay adequately explained or justified – Legal Aid Board solicitor - Regard for passage of time - Whether risk of unfair trial – Incapacity of defendant - Inability of defendant to give evidence – Crucial nature of evidence – Potential unfairness - Action struck out (1992/4486P – O'Neill J – 6/4/2006) [2006] IEHC 453
Johnson v North Western Health Board

Dismissal of proceedings

Want of prosecution – Delay – Prejudice – Principles to be applied – Balance of justice – Inherent jurisdiction of court – Availability of witnesses – Whether delay inordinate and inexcusable – Whether real and serious risk of unfair trial – *Manning v Benson and Hedges Ltd* [2004] 3 IR 556 followed - Constitution of Ireland 1937, Articles 34.1 and 40.3 – European Convention on Human Rights Act 2003 – European Convention on Human Rights, article 6 – Claim dismissed (1999/8398P – Gilligan J – 12/7/2007) [2007] IEHC 467
F (D) v McGarty

Dismissal of proceedings

Time limit – Date of knowledge – Medical negligence – Whether claim statute barred – Delay – Whether plaintiff guilty of delay notwithstanding fact that proceedings commenced within limitation period – Whether defendant prejudiced in conduct of defence due to delay – Whether justice of case requiring proceedings to be struck out – Whether claim should be struck out on ground of delay – Statute of Limitations (Amendment) Act 1991 (No 18), s 2 – *O'Domhnaill v Merrick* [1984] IR 151, *Toal v Duignan (No 1)* [1991] ILRM 135, *Toal v Duignan (No 2)* [1991] ILRM 140, *McCabe v Ireland* [1994] 4 IR 151 and *Primor v Stokes Kennedy Crowley* [1996] 2 IR 459 applied; *Gough v Neary* [2003] 3 IR 92 considered – Proceedings struck out (1996/10270P– O'Neill J – 23/10/2007) [2007] IEHC 351
Byrne v O'Brien

Dismissal of proceedings

Want of prosecution – Failure to deliver statement of claim – Inordinate and inexcusable delay – Discretionary order – Whether balance of justice in favour of allowing claim to proceed – *Martin v Moy Contractors Ltd* (Unrep, SC, 11/2/1999), *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 and *Gilroy v Flynn* [2004] IESC 98, [2005]1 ILRM 290 followed - Rules of the Superior Courts 1986 (SI 15/1986), O 27, r 1 – Rules of the Superior Courts (Order 27 (Amendment) Rules) 2004 (SI 63/2004) – Plaintiff's appeal dismissed (204/2005 – SC – 25/2/2008) [2008] IESC 4
Stephens v Paul Flynn Ltd

Dismissal of proceedings

Inherent jurisdiction – Abuse of process - Whether claim frivolous or vexatious – Whether claim abuse of process – *Res judicata* – Whether issues already determined – Professional negligence action – *Barry v Buckley* [1981] IR 306, *Riordan v Ireland (No 5)* [2001] 4 IR 463 and *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 considered; *EO'K v DK* [2001] 3 IR 568 applied - Rules of the Superior Courts 1986 (SI 15/1986), O 19, rr 5(2) and 28 – Constitution of Ireland 1937, Articles 34 to 36 – Claims dismissed (2005/2424P – Irvine J – 24/1/2008) [2008] IEHC 18
Behan v Bank of Ireland

Dismissal of proceedings

Inherent jurisdiction - Reasonable cause of action – Frivolous and vexatious – Whether proceedings should be struck out – Rules of the Superior Courts 1986 (SI 15/1986), O 19, rr 27 and 28 – *Sun Fat Chan v Ossessous Ltd* [1992] IR 425 applied; *Flanagan v Kelly* (Unrep, O'Sullivan J, 26/2/1999), *Riordan v An Taoiseach* [2001] 4 IR 463 and *Fay v Tegral Pipes Ltd* [2005] IESC 34 [2005] 2 IR 261 considered – Order dismissing proceedings against second defendant (2007/433P– Irvine J – 14/11/2007) [2007] IEHC 385
Talbot v Hibernian Group Ltd

Leave to issue proceedings

Isaac Wunder order – Interpretation of order – Whether order requiring clarification – Plaintiff applying to High Court to amend pleadings – Whether plaintiff precluded from making application to High Court – Order that High Court having no jurisdiction to entertain plaintiff's application (1987/1120SP – Smyth J – 19/6/2007) [2007] IEHC 307
Rooney v Minister for Agriculture

Limitation of actions

Personal injury – Date of knowledge – Proceedings not issued within three year limitation period – Whether claim statute barred – No consent given to post-mortem examination – Plaintiffs aware post-mortem carried out by defendant – Whether justification in not commencing proceedings within statutory period – Wrongful removal and retention of organs following post–mortem examination without consent – *Philp v Ryan* [2004] IEHC 121 (Unrep, Peart J, 11/3/2004) not followed; *O'Donovan v Southern Health Board* [2001] 3 IR 385 applied - Statute of Limitations (Amendment) Act 1991 (No 18), s (2)(2)(b) - Plaintiffs' appeal dismissed (346 & 352/2004 – SC – 14/11/2007) [2007] IESC 50
Devlin v National Maternity Hospital

Pleadings

Amendment - Statement of claim – Additional plea – Insurer in liquidation - Contested application to amend pleadings – Whether application justified – Whether defendant prejudiced by change in *locus* - Whether hearing would have taken place prior to liquidation even in absence of application to amend – *Cropper v Smith* (1884) 26 Ch D 700, *Budding v Murdoch* (1874) 1 Ch D 42, *Sassoon v Cababe* [1879] WN 122, *Krops v Irish Forestry Board* [1995] 2 IR 113, *Croke v Waterford Crystal* [2005] 2 IR 383, *Shepperton Investment v Concast (1975) Ltd* (Unrep, Barron J, 21/12/1992), *McFadden v Dundalk Coursing Club* (Unrep, SC, 22/4/1994) and *Palamos v Brooks* [1996] 3 IR 597 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 28, r 1; - Civil Liability Act 1961 (No 41), s 48 – Defendant's appeal dismissed (301/2006 – SC – 27/7/2007) [2007] IESC 33
Allen v Irish Holemasters Ltd

Pleadings

Particulars of claim – Allegations of fraud in statement of claim – Whether further particulars required of plaintiff – *Arab Monetary Fund v Hashim (No 2)* [1990] 1 All ER 673, *Leitch v Abbott* (1886) 31 Ch D 374 and *Sachs v Speilman* (1887) 37 Ch D 295 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 5(2) – Application refused (2007/2069P – Clarke J – 14/12/2007) [2007] IEHC 428
National Educational Welfare Board v Ryan

Preliminary issue

Trial of preliminary issues of law – Facts in dispute – No facts conceded for purpose of preliminary issues – Whether appropriate to have preliminary issues of law determined – *Kilty v Hayden* [1969] 1 IR 261; *Tara Mines v Ministry for Industry and Commerce* [1975] IR 242; *BTF v DPP* [2005] IESC 37, [2005] 2 IR 559; *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 25 & O 34, r 2 – Applicant's appeal allowed (395/2006 – SC – 19/6/2007) [2007] IESC 25
N(R) v RAT

Security for costs

Judicial review of decision to award public contract - Whether possible to make order requiring provision of security for costs in application for review of award of public contract pursuant to Remedies Directive – Whether special circumstances justifying refusal of order for security for costs – Delay – Whether undue and substantial – Whether impairing effective implementation of Community Directives on award of public contracts - Council Directive 89/665/EEC - Companies Act 1963 (No 33), s 390 – Rules of the Superior Courts 1986 (SI 15/1986), O 29, r 1 and O 84A – *Dekra Éireann Teo v Minister for Environment* [2003] 2 IR 270 applied; *Jack O'Toole Ltd v MacEoin Kelly Associates* [1986] IR 277, *SEE Co Ltd v Public Lighting Services Ltd* [1987] ILRM 255, *Grossman Air Service v Austria* (Case C-230/02) [2004] 2 CMLR 2 and *West Donegal Land League Ltd v Údarás na Gaeltachta* [2006] IESC 29, [2007] 1 ILRM 1 considered; *Hidden Ireland Heritage Holidays Ltd v Indigo Services Ltd* [2005] IESC 38 [2005] 2 IR 115 distinguished – Security for costs refused (321 & 327/2004 – SC – 25/10/2007) [2007] IESC 48
Dublin International Arena Ltd v Campus and Stadium Ireland Ltd

Strike out

Locus standi – Whether plaintiff could maintain claim to prevent contractual relations while wife subject to coercion and undue influence – Affidavit of wife indicating capacity and absence of undue influence – Affidavit of solicitor indicating consciousness of responsibility to wife – Whether maintenance of proceedings in breach of rights of wife – *Cahill v Sutton* [1980] IR 269*; Lawlor v Planning Tribunal* [2007] IEHC 139, (Unrep, O'Neill J, 27/4/2007); *O'Connell v Cork Corporation* [2001] 3 IR 602 and *Irish Penal Reform Trust v Governor of Mountjoy* [2005] IEHC 305, (Unrep, Gilligan J, 2/9/2005) distinguished - Constitution of Ireland 1937, article 41 - European Convention on Human Rights, article 8 – Claim struck out (2007/7430P – Sheehan J – 26/11/2007) [2007] IEHC 411
Wymes v Roche

Third party

Service of third party notice – Application to set aside – Delay – Whether served as soon as reasonably possible – Negligence – Personal injuries – Civil Liability Act 1961 (No 41), s 28 – *Carroll v Fulflex International Co Ltd* (Unrep, Morris J, 18/10/1995) and *Boland v Dublin City Council* [2002] 4 IR 409 considered – Application to set aside third party notice refused (2003/1212P – McCarthy J – 25/7/200) [2007] IEHC 465
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PROPERTY

Equitable mortgage

Well charging order -Account and inquiry by Examiner – Application to discharge or vary certificate of Examiner – Role of Examiner – Adjudication on encumbrances – Priority of encumbrances – Basis for application to vary – Necessity for error by Examiner – Application for stay on payment of funds pending outcome of related proceedings – Consideration of application on own facts – Delay in pursuing related proceedings – Justice to position of parties - *Re Ryan (deceased) Field v Ryan* (1916) 50 ILTR 11; *Redmond v Ireland* [1992] 2 IR 362 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 50 – Application dismissed and distribution of funds ordered (1995/227SP – Finlay Geoghegan J – 12/11/2007) [2007] IEHC 382
National Irish Bank v O'Connor

Local government

Compulsory acquisition – Compensation – Injurious affection – Whether compensation limited to injurious affection of land acquired by acquiring authority – Non-tortious effect of activities on land not taken – Whether entitlement to compensation for entire depreciation in value of property – *In re the Stockport, Timperley and Altringham Railway Company* (1864) 33 LJQB 25, *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 H.L. 418, *Cowper Essex v Local Board for Acton* (1889) 14 App Cas 153 and *Edwards v Minister of Transport* [1964] 2 QB 134 followed; *Marshall v Department of Transport* [2001] HCA 37, (2001) 205 CLR 603 distinguished - Lands Clauses Consolidation Act 1845 (8 & 9 Vic, c 18), ss 63 and 68 – Constitution of Ireland 1937 Article 43 – Claimants' appeal dismissed (407/2003 – SC – 6/11/2007) [2007] IESC 49
Chadwick v Fingal County Council

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Statutory Instrument

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STATUTORY INTERPRETATION

Construction

Revocation of application of Act by statutory instrument – Transitional provision – Effect on existing extradition requests – Statutory interpretation – *O'Rourke v Governor of Cloverhill Prison* [2004] 2 IR 456 and *Criminal proceedings against Pupino (Case C-105/03)* [2005] ECR I-5285 considered -Extradition Act 1965 (No 17), s 8 – Interpretation Act 2005 (No 23), s 27 – Council Framework Decision 2002/584/JHA, article 32 – Appeal allowed and release of applicant ordered (428/2006 – SC – 28/11/2007) [2007] IESC 56
Attorney General v Abimbola

SUCCESSION

Probate

Practice – Costs – High Court order for costs – Discretionary order – Appeal on issue of costs – Principles to be applied – Claim of undue influence – Whether plaintiff entitled to full costs – *In bonis Morelli: Vella v Morelli* [1968] IR 11 and *Fairtlough v Fairtlough* (1839)

1 Milw 36 applied - Succession Act 1965 (No 27) – Plaintiff's appeal allowed (465/2006 – SC – 12/3/2008) [2008] IESC 10
Elliott v Stamp

Will

Proper provision – Duty to provide for children – Whether testator owing moral duty to children – Whether failure in moral duty to children – Other factors to be considered – Whether testator owing moral duty to persons other than his children – Appropriate division of estate – Succession Act 1965 (No 27), s 117 – *C v T* [2003] 2 IR 250 applied – Order that two children entitled to 80% of estate between them (2005/459 & 603SP – Clarke J – 23/11/2007) [2007] IEHC 399
C (A) v F (J)

TAXATION

Stamp duty

Case stated – Whether arrangement 'reconstruction' within meaning of Stamp Duties Consolidation Act 1999, s 80 - Streaming of shares - Ordinary shares redesignated and new class of shares created - Whether reorganisation qualified for exemption – Concepts of reconstruction and partition – Whether reorganisation *bona fide* scheme of reconstruction – Whether reconstruction and partition mutually exclusive – Objectives of statutory provision – Whether underlying ownership of undertaking substantially unaltered – *Res judicata – In re South African Supply and Cold Storage Co* [1904] 2 Ch 268, *Brooklands Selangor Holdings Ltd v IRC* [1970] 1 WLR 429, *Fallon v Fellows* [2001] STC 1409, *Swithland Investments Ltd v IRC* [1990] STC 448, *Baytrust Holdings Ltd v IRC* [1971] 1 WLR 1333 and *Hooper v Western Counties and South Wales Telephone Company Ltd* (1892) 68 LT 78 considered – Taxes Consolidation Act 1997 (No 39), s 941 – Companies Act 1963 (No 33), s 203 – Stamp Duties Consolidation Act 1999 (No 31), s 80 – Case answered in the negative (2007/329R – Edwards J – 18/12/2007) [2007] IEHC 466
Patrick W Keane & Company Ltd v Revenue Commissioners

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21(2008) ITR 65

Duggan, Grainne
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21 (2008) ITR

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SI 159/2008

Valuation act 2001 (global valuation) (EirGrid) order 2008
SI 158/2008

TORT

Negligence

Nervous shock – Conditions to be satisfied by plaintiff seeking to recover damages for negligent infliction of nervous shock – Post-mortem examination carried out without consent – Organs removed and retained – Plaintiff becoming ill on hearing – Plaintiff developing post-traumatic stress disorder – Whether nervous shock sustained by reason of actual or apprehended physical injury to plaintiff – Whether evidence that plaintiff suffered physical injury - *Byrne v Great Southern and Western Railway Company of Ireland* (1884) 26 L.R. Ir. 428, *Bell v Great Northern Railway Company of Ireland* (1895) 26 LR Ir 428, *Mullally v Bus Éireann* [1992] ILRM 722, *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, *Kelly v Hennessy* [1995] 3 IR 253 and *Fletcher v Commissioners of Public Works* [2003] 1 IR 465 considered – Plaintiffs' appeal dismissed (346 & 352/2004 – SC – 14/11/2007) [2007] IESC 50
Devlin v National Maternity Hospital

Negligence

Package holiday - Travel industry – Plaintiff injured whilst on package holiday – Circumstances where organiser liable – Standard of care in determining improper performance – Whether organiser liable for failure by service supplier to perform obligation under package holiday contract – Whether standard in determining improper performance strict liability or reasonable care – *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1996] 1 WLR 38, *Hone v Going Places Leisure Travel* [2001] EWCA Civ 947, (Unrep, CA, 13/6/2001), *Healy v Cosmosair Plc* [2005] EWHC 1657, (Unrep, QB, 28/7/2005)*; McKenna v Best Travel Ltd* [1998] 3 IR 57 followed; *Leitner v TUI Deutschland GmbH & Co KG (Case C-168/00)* [2002] ECR I-2631 considered - Package Holidays and Travel Trade Act 1995 (No 17), s 20 – Council Directive 91/314/EEC, article 5 – Defendants' appeal dismissed (111/2005 – SC - 4/12/2007) [2007] IESC 57
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Terms of reference – Jurisdiction – Interpretation of terms of reference – Compliance of tribunal with terms of reference – Whether tribunal had complied with requirements of terms of reference – Whether tribunal would have jurisdiction to proceed to public hearing if requirements of terms of reference not strictly complied with – Applicants' appeal allowed (37/2007 – SC – 4/7/3007) [2007] IESC 27
Fitzwilton Ltd v Judge Mahon

WARDS OF COURT

Jurisdiction

Preliminary issue – Whether High Court has jurisdiction to conduct preliminary examination as to whether options available other than wardship proceedings – Lunacy Regulation (Ireland) Act 1871 (34 & 35 Vic, c 22), s 12 – Courts (Supplemental Provisions) Act 1961 (No 39), s 9 – Appeal allowed (27/2005 – SC 4/7/2007) [2007] IESC 26
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AT A GLANCE

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Information compiled by Clare O'Dwyer, Law Library, Four Courts

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[pmb]: Description: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Arbitration Bill 2008
Bill 33/2008
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Biofuels (Blended Motor Fuels) Bill 2007
Bill 11/2007
2nd Stage – Dáil **[pmb]** *Deputies Denis Naughten, Richard Bruton, Fergus O'Dowd, Olivia Mitchell and Bernard J. Durkan*

Broadband Infrastructure Bill 2008
Bill 8/2008
1st Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Broadcasting Bill 2008
Bill 29/2008
Committee Stage – Seanad

Charities Bill 2007
Bill 31/2007
Committee Stage – Dáil

Chemicals Bill 2008
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Report and Final Stages - Dáil

Civil Law (Miscellaneous Provisions) Bill 2006
Bill 20/2006
Report Stage – Dáil

Civil Partnership Bill 2004
Bill 54/2004
2nd Stage – Seanad **[pmb]** *Senator David Norris*

Civil Unions Bill 2006
Bill 68/2006
Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Cluster Munitions Bill 2008
Bill 19/2008
2nd Stage – Dáil **[pmb]** *Deputy Billy Timmins*

Competition (Amendment) Bill 2007
Bill 47/2007
2nd Stage – Dáil **[pmb]** *Deputies Michael D. Higgins and Emmet Stagg*

Consumer Protection (Amendment) Bill 2008
Bill 22/2008
2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad *(Initiated in Seanad)*

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Feargal Quinn, Shane Ross and Ivana Bacik*

Defamation Bill 2006
Bill 43/2006
Report Stage – Seanad

Defence of Life and Property Bill 2006
Bill 30/2006
2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Dublin Transport Authority Bill 2008
Bill 21/2008
Committee Stage - Dáil

Electricity Regulation (Amendment) (EirGrid) Bill 2008
Bill 17/2008
Committee Stage – Dáil

Electoral Commission Bill 2008
Bill 26/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Employment Law Compliance Bill 2008
Bill 18/2008
1st Stage – Dáil

Enforcement of Court Orders (No.2) Bill 2004
Bill 36/2004
1st Stage – Seanad **[pmb]** *Senator Brian Hayes*

Ethics in Public Office Bill 2008
Bill 10/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
2nd Stage – Dáil *(Initiated in Seanad)*

Finance Bill 2008
Bill 3/2008
Committee Stage – Seanad

Fines Bill 2007
Bill 4/2007
1st Stage – Dáil

Freedom of Information (Amendment) Bill 2008
Bill 24/2008
2nd Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Brendan Ryan, Alan Kelly, Michael McCarthy and Phil Prendergast*

Freedom of Information (Amendment) (No.2) Bill 2008
Bill 27/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
2nd Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Fuel Poverty and Energy Conservation Bill 2008
Bill 30/2008
2nd Stage – Dáil **[pmb]** *Deputy Liz McManus*

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
Bill 23/2006
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Housing (Stage Payments) Bill 2006
Bill 16/2006
2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan*

Immigration, Residence and Protection

Bill 2007
Bill 37/2007
1st Stage – Seanad *(Initiated in Seanad)*

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Committee Stage – Dáil

Intoxicating Liquor Bill 2008
Bill 32/2008
1st Stage - Dáil

Irish Nationality and Citizenship (Amendment) (An Garda Síochána) Bill 2006
Bill 42/2006
1st Stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke*

Juries (Amendment) Bill 2008
Bill 25/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Land and Conveyancing Law Reform Bill 2006
Bill 31/2006
Committee Stage – Dáil *(Initiated in Seanad)*

Legal Practitioners (Irish Language) Bill 2007
Bill 50/2007
Committee Stage – Dáil

Legal Practitioners (Qualification) (Amendment) Bill 2007
Bill 46/2007
2nd Stage – Dáil **[pmb]** *Deputy Brian O'Shea*

Legal Services Ombudsman Bill 2008
Bill 20/2008
2nd Stage – Dáil

Local Elections Bill 2008
Bill 11/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senator Joe O'Toole*

Mental Capacity and Guardianship Bill 2007
Bill 12/2007
Committee Stage – Seanad **[pmb]** *Senators Joe O'Toole and Mary Henry*

Mental Health (Involuntary Procedures) (Amendment) Bill 2008
Bill 36/2008
1st Stage – Seanad **[pmb]** *Senators Déirdre de Búrca, David Norris and Dan Boyle.*

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Nuclear Test Ban Bill 2006
Bill 46/2006
Committee Stage – Dáil

Offences Against the State Acts Repeal Bill 2008
Bill

Offences Against the State (Amendment) Bill 2006
Bill 10/2006
1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn*

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad **[pmb]** Senators *Joe O'Toole, Paul Coghlan and David Norris*

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
1st Stage – Dáil

Prison Development (Confirmation of Resolutions) Bill 2008
Bill 35/2008
1st Stage - Dáil

Privacy Bill 2006
Bill 44/2006
1st Stage – Seanad

Protection of Employees (Agency Workers) Bill 2008
Bill 15/2008
2nd Stage – Dáil **[pmb]** *Deputy Willie Penrose*

Protection of Employees (Agency Workers) (No. 2) Bill 2008
Bill 16/2008
1st Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Alan Kelly, Michael McCarthy, Phil Prendergast and Brendan Ryan*

Registration of Lobbyists Bill 2008
Bill 28/2008
2nd Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
1st Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Spent Convictions Bill 2007
Bill 48/2007
2nd Stage – Dáil **[pmb]** *Deputy Barry Andrews*

Student Support Bill 2008
Bill 6/2008
2nd Stage – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
2nd Stage – Dáil

Twenty-eighth Amendment of the Constitution Bill 2008
Bill 14/2008
Report and Final Stages – Dáil

Twenty-ninth Amendment of the Constitution Bill 2008
Bill 31/2008
2nd Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

Victims' Rights Bill 2008
Bill 1/2008
1st Stage – Dáil **[pmb]** *Deputies Alan Shatter and Charles Flanagan*

Witness Protection Programme (No. 2) Bill 2007
Bill 52/200
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

ACTS OF THE OIREACHTAS AS AT 23RD JUNE 2008

Information compiled by Clare O'Dwyer, Law Library, Four Courts.

1/2008	Control of Exports Act 2008 *Signed 27/02/2008*
2/2008	Social Welfare and Pensions Act 2008 *Signed 07/03/2008*
3/2008	Finance Act 2008 *Signed 13/03/2008*
4/2008	Passports Act 2008 *Signed 26/03/2008*
5/2008	Motor Vehicles (Duties and Licences) Act 2008 *Signed 26/03/2008*
6/2008	Voluntary Health Insurance (Amendment) Act 2008 *Signed 15/04/2008*
7/2008	Criminal Justice (Mutual Assistance) Act 2008 *Signed 28/4/2008*
8/2008	Criminal Law (Human Trafficking) Act 2008 *Signed 07/05/2008*
9/2008	Local Government Services (Corporate Bodies) (Confirmation of Orders) Act 2008 *Signed 20/05/2008*

ABBREVIATIONS

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

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

Recent developments in Employment Injunctions

Tom Mallon BL

> "Where a servant is dismissed by his master during the period of service agreed upon, the Court will not grant an injunction to restrain the master from so doing."[1]

In coming to this conclusion, the author of *Smith's Law of Master and Servant* relied *inter alia* on the views expressed by Knight-Bruce LJ in the mid nineteenth century:-

> "We are asked to compel one person to employ, against his will, another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree, and good people do not always agree, enormous mischief may be done."[2]

The modern position can be traced to the decision of the Court of Appeal in *Hill v. C A Parsons & Co Limited*[3].

In that case, Lord Denning reviewed the historical position and in particular referred to the views expressed by Viscount Kilmur L.C. in *Vine v. National Dock Labour Board*[4] where, it was stated that.

> "If the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract."

Denning noted that accordingly the dismissed servant could not claim specific performance of the contract of employment and that he was left to his remedy in damages for breach of contract to continue the relationship for the contractual period. Denning however went on to say that this was the consequence of what he referred to as arising "in the ordinary course of things". He then went on to say that:

> "The rule is not inflexible. It permits of exceptions. The court can in a proper case grant a declaration that the relationship still subsists and an injunction to stop the master treating it as at an end. That was clearly the view of the Privy Council in the latest case on the subject, *Francis v. Kaula Lumpur Councillors* [1962] 1 W.L.R. 1411"

The decision in *Hill v. Parsons* was followed by Warner J in *Irani v. Southampton Health Authority*[5].

That case, which dealt with a Health Authority's failure to apply it own procedures in the dismissal of a medical practitioner, resulted in an injunction being granted restraining the defendant, until the trial, from implementing the notice purporting to terminate the plaintiff's employment before it carried out the procedure under the appropriate internal rule book.

The foundation of the jurisprudence in this jurisdiction is to be found in the decision of Costello J in *Fennelly . Assicurazione Generali SPA*[6]**.** In that case, the plaintiff claimed that he had a contract for a fixed period of 12 years and he challenged the employer/defendant's decision to make him redundant. Costello J, expressed the following views:-

> "In the meantime the plaintiff will be left without a salary and nothing to live on. The situation in which he finds himself would be little short of disastrous. It seems to me in that situation that the balance of convenience is in the plaintiff's favour."

The court ordered that the plaintiff be paid his salary pending the trial and that he perform such work, if any, as the employer required. That type of order is now commonly referred to as a "Fennelly Order".

The jurisprudence in this jurisdiction has developed significantly. *Fennelly* was developed by Keane J (as he then was) in *Shortt v. Data Packaging Limited*[7]. That case dealt with the threatened redundancy of a Director of the company in breach of the company's constitutional documents. The matter was further developed by Costello P. in *Phelan v. Bic (Ireland) Limited & others*[8]. In *Phelan*, the plaintiff was a managing director of the first named defendant. At a meeting of the Board of Directors, a decision was taken to terminate his office and to terminate his contract of employment. No notice had been provided of the meeting or of the proposals to remove him. In his *ex-tempore* judgement, Costello J. referred to a number of the earlier English decisions and noted that despite the old rule that the Courts do not grant injunctions in cases of termination of employment, they have granted interlocutory relief where it was in the interests of justice to do so.

> "The plaintiff has made out and established serious issues. Damages are not an adequate remedy. This

1 Smith's Law of Master and Servant, 8th Edition 1931
2 *Johnson v. Shrewsbury and Birmingham Railway Company* 3 DeG.M. and G.914
3 Ch [1972] 305
4 [1957] A.C. 488 at p. 500
5 [1985] I.C.R. 590
6 [1985] 3 ILT 37
7 [1994] ELR 251
8 [1997] ELR 208

> is not a case in which the plaintiff is destitute as in *Fennelly*. It now transpires he will get a pension and … he has been given two months salary in lieu of notice. … However, that does not end the matter…
>
> I have never come across a case where a managing director was dismissed in such a way other than in cases of serious misconduct. The plaintiff has made out a case for exemplary damages… Damages are not adequate to compensate the plaintiff. At the hearing, if the case is established, the judge may not grant damages as it is not adequate compensation but would allow the plaintiff to stay on as Managing Director.
>
> If I was trying this case today, all the facts which emerged in this case, if accepted by me, I would have decided in favour of the plaintiff and I would come to the view that the plaintiff is entitled to damages for the damage to and diminution in the plaintiff's reputation. There is a reasonable inference on the part of the public that such a summary dismissal was because of wrong doing and this on the part of the plaintiff. The defendants have been somewhat economical with the truth in telephone calls in which they say that he is retired. I therefore find on the facts of this case that damages are not an adequate remedy and the plaintiff in the normal course of events ought to anticipate a prospect of a court reinstating him to his previous position."

It is important to emphasise that the early English cases, including and in particular, *Hill v. Parsons* and the early Irish cases arose in the context of dismissals which did not call into question the employers trust and confidence in the employee. They largely centered around dismissals by reason of redundancy.

However, the Irish Courts over the last decade or so have developed the grounds on which injunctions will be granted to a much wider level than that which applies in England. In particular, interlocutory injunctions were granted in very many cases where the essential trust and confidence between the parties was, to say the least, questioned and in some cases, there can be little doubt but that the relationship was perhaps damaged beyond repair[9].

Throughout the same period, however, a number of judges refused to grant interlocutory injunctions to restrain dismissals[10]. The decision in *Philpott v. Ogilvy & Mather Ltd* was undoubtedly strongly influenced by the decision of the Supreme Court in *Parsons v. Irish Rail*[11]. In that case, Barrington J stated:-

> "The traditional relief at common law for unfair dismissal[12] was a claim for damages. The plaintiff may have been entitled to declarations in certain circumstance such as, for instance, that there was an implied term in his contract entitling him to fair procedures before he was dismissed. But such declarations were in aid of his common law remedy and had no independent existence apart from it. If the plaintiff loses his right to sue for damages at common law the heart has gone out of his claim and there is no other freestanding relief which he can claim at law or in equity. Under these circumstances I would dismiss the plaintiff's appeal."

Murphy J in *Philpott* relied on the foregoing and then drew a distinction between that case and other cases. Noting in particular that there was no allegation of misconduct, he referred back to the decision in *Phelan v. Bic* where it was held that the managing director had an entitlement to be made aware of any allegations of misconduct and that natural justice required that he be informed of those allegations before any action is taken.

The matter was considered at the trial stage by the late Carroll J in *Sheehy v. Ryan*[13]. The facts of that case were that the plaintiff had been employed as diocesan secretary for the diocese of Kildare and Leighlin by successive Bishops of that dioceses. She was advised in July 2002 that her employment was to be terminated by reason of redundancy. She initiated proceedings seeking, in particular, a declaration that the purported termination of her employment was unlawful and an injunction restraining the termination of her contract. She argued that she was entitled to employment until the age of 65 and furthermore, that she had not been afforded natural justice and fair procedures in the termination.

The findings of Carroll J are recorded in the head note as follows:

> "1. The position at common law is that an employer is entitled to dismiss an employee for any reason or no reason, on giving reasonable notice.
> 2. In the absence of a special condition in a contract of employment entitling the plaintiff to a job for life until she was 65, the plaintiff could be dismissed on reasonable notice.
> 3. The rules of natural justice regulating dismissal for misconduct have no application where the dismissal is for reasons other than misconduct
> 4. The diocese of Kildare and Leighlin did not change its identity upon the appointment of a new Bishop. A change in Bishops is more akin to a change in the managing director and cannot be construed as a transfer of an undertaking."

The unanimous judgment of the Supreme Court on the appeal in this case was delivered by Geoghegan J on 9th April 2008. The appeal was dismissed. At page 11 of the judgment, Geoghegan J made the following comment:-

> "Although the pension arrangements, as they normally do, contemplated retirement at 65, that fact alone could not possibly give rise to an implied term prohibiting premature termination."

9 See for example *Harte v. Kelly & others* [1997] ELR 125, *Boland v. Phoenix Shannon Plc* [1997] ELR 113, *Moore v. Xnet Information Systems Ltd & others* [2002] 13 ELR 65

10 See for example *Orr v. Zomax Ltd* [2004] 1 IR 486 and *Philpott v Ogilvy & Mather Ltd* [2000] 3 IR 206

11 [1997] ELR 2003

12 It is suggested that this should be a reference to "wrongful dismissal" so as to avoid any confusion with the statutory created concept of "unfair dismissal"

13 [2005] ELR 49 (a matter currently under appeal with the appeal due to be heard on the 19th February 2008).

Later in the judgment, at page 13, he stated as follows:-

> "The Judge in fact went on to point out that the Appellant had chosen a common law remedy. She could have initiated proceedings under the Unfair Dismissals Act or under the Redundancy Payments Acts. The Trial Judge then said that the position at common law is that an employer is entitled to dismiss an employee for any reason or no reason on giving reasonable notice. I would slightly qualify that by saying that it depends on the contract but in the absence of clear terms to the contrary which are unambiguous and unequivocal, that clearly is the position."

The jurisdiction to grant such injunctions was considered by the Supreme Court in *Maha Lingam v Health Services Executive*[14]. Whilst the interlocutory injunction was refused in that case by the High Court (Carroll J) and by the Supreme Court, some of the comments of the Supreme Court are very important. Fennelly J made the following observations:

> "… according to the ordinary law of employment a contract of employment may be terminated by an employer on the giving of reasonable notice of termination and that according to the traditional law at any rate, but perhaps modified to some extent in the light of modern developments, according to the traditional interpretation, the employer was entitled to give that notice so long as he complied with the contractual obligation of reasonable notice whether he had good reason or bad for doing it. That is the common law position …. This is an action brought at common law for wrongful dismissal in the context of which an injunction was sought. …
>
> …in substance what the Plaintiff/Appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So it is not sufficient for him simply to show a *prima facie* case and in particular the courts have been slow to grant interlocutory injunctions to enforce contracts of employment. None of this is to deny that there had been developments in the law in recent years …."

Referring to the *Fennelly* case, he then continued:

> "It is fair to say however, that there is a very strong trend in those cases to the effect that where a person has a clear right to either a particular period of notice or a reasonable notice or has a fixed period of employment, a summary dismissal or a dismissal without notice or without any adequate notice is a first step in establishing the ground for an injunction in those sort of cases. For reasons already given this is not such a case.
>
> A second element in cases of that sort is that, where a dismissal is by reason of an allegation of misconduct by the employee, the courts have in a number of cases at any rate imported an obligation to comply with the rules of natural justice and give fair notice and a fair opportunity to reply. This does not apply in the present case either. The defendant is not making an allegation of improper conduct so it is not the case and it is not contended that the results of natural justice apply"

It is very clear from the decision in *Maha Lingam* that the Supreme Court was given an opportunity to comment on the new developments. Far from casting any doubts on the granting of such remedies, it recognised the developing trend.

The decision in *Maha Lingham* was applied by Laffoy J in *Kurt Naujoks v. National Institute of Bioprocessing Research and Training Limited*[15]. In this case, counsel for the plaintiff accepted that to establish an entitlement to mandatory relief, the plaintiff had to discharge the onus recognised by the Supreme Court in *Maha Lingham* and show that the Applicant had a strong case and that he was likely to succeed at the hearing of the action. The counsel for the plaintiff also relied on the decision of Keane J in *Shortt v. Data Packaging Limited* [1994] ELR 251 and the decision of Costello P in *Phelan v. Bic (Ireland) Limited* [1997] ELR 208.

In that case, Laffoy J granted the injunction and she rejected an argument by the defendant based on the adequacy of damages when she said, at page 8 of the judgment the following:

> 'Turning to the issue of the adequacy of damages and where the balance of convenience lies, following the line of authority relied on by the plaintiff, I do not think that damages would be an adequate remedy for the plaintiff if he were to succeed in the action. Further, I consider that the balance of convenience lies in favour of granting the injunctive relief sought by him. I consider that the plaintiff has made a strong case that he will suffer irreparable loss, both financial and reputational, because of the nature of the position at issue here, his age, his prospects of finding alternative employment, his family circumstances, the fact that he relocated from Munich to Dublin to take up his position with the defendant and the manner in which the defendant has acted since October 12 last'

Maha Lingham was also referred to and followed by Clarke J in *Bergin v. Galway Clinic Doughiska Limited*[16] and by Irvine J in *Stoskus v. Goode Concrete Limited*[17].

In *Bergin* Clarke J dealt with the test at paragraph 4.5 (et seq.) of the judgment as follows:

14 Ex-tempore Judgement of Fennelly J, 4th October 2005

15 [2007] ELR 25

16 Unreported, Clarke J, 2nd November 2007 [2007] IEHC 386

17 Unreported, Irvine J, 18th December 2007 [2007] IEHC 432

> **"4.5** Applying *Maha Lingham* in *Naujoks v. National Institute of Bioprocessing, Research and Training* [2007] E.L.R. 25, Laffoy J. undoubtedly applied the strong case test in determining that the plaintiff had not discharged the onus in relation to what was described as the first strand of the plaintiff's case.
>
> **4.6** ….Where a plaintiff seeks to prevent an employer from exercising a prima facie entitlement to terminate a contract of employment, then that employee is, in substance, seeking a mandatory order requiring that his employment continue and that his employment entitlements are met.
>
> **4.7** It follows, in my view, that, in order to determine whether the first step towards granting such an order has been met, it is necessary that the plaintiff concerned establish a strong case.
>
> **4.8** It does not seem to me, on balance, to be logical to impose a different standard where the purported dismissal of the employee concerned stems from reasons other than misconduct on the one hand, or resulted from a finding of misconduct on the other hand… So far as the common law is concerned there is not, therefore, in my view, in principle, any difference between an allegation that an employer is in breach of contract by having failed to apply an appropriate process in leading to a conclusion of misconduct which in turn might lead to a dismissal on the one hand or had failed to (say) honour a fixed term contract for its full period, on the other hand. Both are allegations of breach of contract."

Later in the same judgment, at paragraph 4.11, Clarke J made important comments in relation to the timing of any application for interlocutory relief when he stated:-

> **"4.11** I should finally add that it does not seem to me to be appropriate to make a distinction as to the stage at which a disciplinary process has reached, in determining the entitlements of an employee to an injunction. It can hardly be the case that the entitlement or otherwise of an employee to an injunction could depend on whether he happened to get to court before a particular stage had been reached. An employee who has already been summarily dismissed is undoubtedly seeking a mandatory injunction if he seeks to restrain the employer concerned from acting as if he had been dismissed. If, whether by luck, diligence, prescience or a combination of any of those, the employee concerned happens to seek an injunction before the employer has made a final decision (even by, say, a matter of hours) such an application could be couched as one restraining the dismissal but, for reasons similar to those relied upon by Fennelly J. in *Maha Lingham*, I am satisfied that the substance of such an order, if made, remains mandatory. It was, amongst other things, for reasons such as that, that I expressed the view in *Becker v. St. Dominics Secondary School* (Unreported, High Court, Clarke J. 13th April 2006), and further cases which followed it, that the courts should only intervene in the middle of a disciplinary process in a clear case. I note that Feeney J. has expressed a similar view in a subsequent *ex tempore* judgment.[18]

Injunctions to restrain conduct short of dismissal

Applications for interlocutory injunctions to restrain conduct short of dismissal such as to restrain ongoing disciplinary procedures or investigations have rarely met with success. Injunctions were refused by Carroll J in *Foley v Aer Lingus*[19] and by Kearns J in *Morgan v Trinity College*[20]. The matter was most recently considered by Clarke J and Feeney J in two important decisions. In *Becker v Board of Management of St Dominick's School*[21] the plaintiff alleged that there was a conspiracy on the part of her employers to deprive her of fair procedures in relation to certain disciplinary proceedings which had been brought against her in relation to her work as a teacher in the school. Clarke J stated that a court should only intervene in the course of an uncompleted disciplinary process in a clear case. He said it did not seem proper that the Court should be invited to intervene at a variety of stages in the course of that process. He stated:

> "In general terms it seems to me that the circumstances in which the Court should intervene is where a step, or steps, or an act, has been taken in the process which cannot be cured and which is manifestly at variance with fair procedures and the entitlement to them."

In a judgement delivered one day earlier in *Conway v An Taoiseach & others*[22] the plaintiff claimed various declarations concerning the disciplinary investigation and process and sought injunctions restraining the disciplinary process and investigation. Feeney J expressed his opinion in the following terms:-

> "However, in considering whether such a process should be injuncted, the Court can have regard to the fact that it has been recognised by counsel for the defendants that the plaintiff can be represented at the process, that the existing complaints will not be altered in any material way and that it is open to Mr Maloney to consider and determine that facts should be established and/or tested by oral means, if he deems the same necessary to ensure a fair and proper hearing. Whether the testing of facts and/or information is required by fair procedures is a

18 This is a reference to Feeney J's decision in *Conway v An Taoiseach.*
19 [2001] ELR 193
20 [2003] 3 IR 158
21 Unreported Judgement delivered 13th April 2006, Clarke J
22 Feeney J, delivered 12th April 2006

matter for Mr Maloney based upon the nature of the information, the response thereto and any application that might be made for an oral hearing.

Given my view that the process is to be followed herein is a broad and non technical one. I do not consider that there is any real basis for claiming a requirement that an actual complaint be made by a complainant. If information comes to the attention of the employer (the State) which raises issues concerning an employee (civil servant), they are entitled to inquire into same. The Code does not require an actual complainant, nor do fair procedures, nor indeed does common sense."

Injunctions to Restore the Plaintiff to the job

The clear intent of a Fennelly Order is to ensure that the employee continues to be paid pending the trial. In that case and in the vast majority of other successful interlocutory injunction cases, that is the order that has been granted. Indeed in two of the few cases that have come to trial, the employee was not restored to his post. In *Cassidy v Shannon Heritage & others*[23] and *Maher v Irish Permanent Plc,*[24] both plaintiffs initially obtained interlocutory injunctions of the Fennelly type. In each case following the trial of the matter, the determination of the Court was that the dismissals were void by reason, in each case, of the breaches of fair procedures/natural justice. In each case, allegations of wrongdoing had been made against the employees and in neither case did the trial judge (Budd J and Laffoy J) direct their reinstatement after the trial. Rather in each case, they obtained declarations as to the invalidity of their dismissals but in each case the employer was specifically given the right to recommence the disciplinary procedures again and in neither case was the employee returned to his post.

The appropriateness of the remedy was considered by Clarke J in *Carroll v. Bus Atha Cliath/Dublin Bus*. In that case, at the interlocutory stage, Clarke J refused to restore the plaintiff to his post whereas at the end of the trial he did make declarations in favour of the plaintiff. He noted that a court can grant declarations concerning most alleged breaches by an employer of his contractual obligations. He then went on to discuss further remedies.

> "However, a more difficult question arises as to whether I should, beyond making such a declaration, make orders which would require the defendant physically to provide the plaintiff with work. I have been referred to some limited number of authorities which suggest that, in certain limited circumstances, the courts have, notwithstanding the general policy to the contrary, granted injunctive relief which has the effect of requiring that an employee be actually permitted to work. Many of those judgments appear to have arisen at an interlocutory stage. *O'Donnell v. Chief State Solicitor*[25], *Martin v. Nationwide Building Society*[26] and *Bryan v. Finglas Child and Adolescent Centre*[27]. The extent to which there may be, notwithstanding the general policy of the courts to the contrary, a jurisdiction to make a mandatory order which would have the effect of entitling an employee to return actively to work after appropriate findings at a plenary hearing is, therefore, open to significant doubt.
>
> Even if such a jurisdiction exists, it seems to me that it could, in principle, only arise in circumstances where it was clear that no other difficulties could reasonably be expected to arise by virtue of the making of an order. I am afraid that I am not satisfied that this is such a case. Having regard to the serious breakdown in relations between the parties, evidenced, not least, by the serious accusations made in the course of these proceedings, I am not satisfied that, even if there were a limited jurisdiction, in special cases, to make an order which would have as its effect the placing of a requirement upon the defendant to take the plaintiff back into active employment, it would be appropriate, in the exercise of my discretion, to make such an order in this case."

Clarke J went on to indicate that he would make an order similar to that made by Budd J in *Cassidy*, that is a declaratory order to the effect that the defendant is in continuing breach of contract with the plaintiff and accordingly, it would be necessary that the plaintiff would be restored with immediate effect to the payroll. Clarke J went on to state that whether or not he continues to be entitled to remain on the payroll is dependent on a number of factors including the outcome of disciplinary procedures which were then active.

The matter was also dealt with by the same judge in *Cahill v. Dublin City University*[28]. In that case, Clarke J held that the plaintiff's employment was invalidly terminated principally because it did not occur following appropriate procedures specified in a University Statute so as to comply with section 25(6) of the Universities Act 1997 or alternatively, by virtue of reasons identified relating to the meaning of the word "tenure" or on other procedural grounds which he addressed in his judgement. He then considered the appropriate order that he should make and he stated as follows:

> "It seems to me that it follows from the provisions of the 1997 Act, which limit the power to dismiss officers, and which require the court, in construing the statute, to lean in favour of a construction which favours the maintenance of academic freedom, that a court should, in turn, lean in favour, in an academic context, of making an order which preserves the entitlement of the academic office holder concerned to continue to operate as an academic in the university world. To take any other view would be to countenance a situation where, in an appropriate case, a university could exclude an academic from the ability to carry out his or her duties in the academic world

23 [2000] ELR 248
24 [1998] IR 302
25 [2003] E.L.R. 268
26 [2001] 1 I.R. 228
27 Unreported, High Court, Kelly J., 10th May, 2004
28 Unreported, Clarke J, 9th February 2007

in circumstances where the sanction imposed (either dismissal or suspension) was in breach of statute.

I am, therefore, of the view that where it is established that a suspension or dismissal of an academic office holder is in breach of the provisions of the 1997 Act, the court should lean in favour of making an order which would restore the academic concerned to their duties. In those circumstances the situation which pertains in the case of those office holders who are governed by the 1997 Act, may well differ from the situation which might ordinarily obtain in relation to an ordinary contract of employment…

At the time when the interlocutory application was being heard, no compelling reasons were put forward for suggesting that Professor Cahill could not carry out his duties. I, therefore, came to the view that there was a strong arguable case for the proposition that, in the event that Professor Cahill should succeed, it was likely that I would be persuaded to make an order which would have the effect of ensuring that he continued with his academic duties. It was for that reason that I took the unusual step of making an order which went beyond a so called Fennelly order.

However by the time when I gave initial judgment after the full hearing, it was clear that much water has passed under the bridge in DCU since the events of spring and early summer of last year. It was by no means clear that it was any longer possible to restore Professor Cahill to the precise academic position which he once held. In those circumstances, it did not appear to me to be, at present, appropriate to make any order beyond declaring that Professor Cahill remained in office and was entitled to the payment of salary.

It does seem to me that it follows from that declaration that DCU is obliged to take reasonable steps to ensure that appropriate academic duties are given to Professor Cahill. For understandable reasons (having regard to the fact that DCU took the view that Professor Cahill was dismissed) no such steps were taken prior to the resolution of these proceedings. However it seems to me that they must now be taken. Whether there may remain in place insurmountable barriers to Professor Cahill taking up appropriate academic duties in the future depends on how that process develops. I should also say that it seems to me that there is an equivalent obligation on Professor Cahill to be reasonable in the way in which he deals with such matters in all the circumstances of the case.

For the purposes of the situation as it presently obtains I should do no more than to indicate, in very general terms, that if it were to be established that DCU were to have acted unreasonably, and Professor Cahill to have acted reasonably, in relation to a process designed towards identifying whether it is possible to provide Professor Cahill with appropriate academic duties, then it might well be the case that a further order could be made by the court. In that context I will give the parties liberty to apply."

A recent case which got a considerable amount of publicity involved the managing director and another senior director of the company Payzone[29]. Whilst no written judgement in this matter is to hand, it is clear from the newspaper reports that the effect of the court's order was to restore the two purportedly dismissed executives to their posts. *The Irish Times* on 2nd February recorded Clark J's comment that the defendant's defence to the executive's claims of unlawful termination of contract was "devoid of merit" and that she said they were deprived of constitutional justice and fair procedures. She is also recorded as noting that there was "considerable merit" in the executive claims that the defendant has "no answer" to their claims and their contracts were not terminated in accordance with the terms of their own written contracts of service or in accordance with the company's own Articles of Association. She is recorded as saying that the case was among those "rare cases" where the breach of contract was so clear and the defence to the case so "devoid of merit" that the court should grant the injunction sought.

Conclusion

It is clear from all of the foregoing that the Irish Courts are and it is believed will continue to be willing to grant injunctions and declarations in employment cases. I suspect that the decision in *Payzone* and in *Cahill v. DCU* are exceptions to the generality of cases and that it is more likely that Fennelly type orders will be more often granted. But these two cases do recognise the possibility of an employee being restored to his post in exceptional circumstances. However the more common outcome is likely to be that envisaged by Clarke J in *Bergin* when he stated at paragraph 4.12:-

> "I should emphasise that, at a full trial, the employee concerned is, of course, entitled to whatever relief the court might consider appropriate although, again, on by far the preponderance of the authorities, it is likely that, in most cases, the employee will be confined to a claim in damages. Most of the exceptions stem from special circumstances. For example in *Carroll*, I declared void a decision to dismiss but, as is clear from the judgement in that case, it was in circumstances where the real issue was as to whether the plaintiff concerned was required to go straight to an appeal or was entitled to have a "first instance" hearing conducted again. I should also emphasise that there may be cases where, for one reason or another, different considerations apply. It is, for example, at least arguable that public law considerations come into play in at least some offices or employments which are governed directly by statute. It may well he that different considerations apply in such eases. The comments which I have made about the standard to be applied in this case are those which, in my view, are applicable to a purely private contract between two private individuals or entities." ■

29 See the Irish Times, 30th January 2008, 31st January 2008, 1st February 2008, 2nd February 2008, 4th February 2008 and 7th February 2008

Is There a Right to Privacy in Revenue Matters?

GRÁINNE DUGGAN BL AITI

Money matters often attract a veil of secrecy perhaps no longer deserving of 21st century Ireland and yet Irish citizens continue to demand total privacy in relation to their financial affairs. But is this expectation of privacy met under the provisions of our tax legislation? The legislature has prescribed instances where a taxpayer's privacy is to be respected, but it fails to establish any absolute right, and moreover, establishes a two-tier system whereby a taxpayer is entitled to privacy to a certain point and should he or she wish to proceed any further, is then required to put his or her finances entirely into the public domain.

The Administration of Justice in Public

Article 34.1 of the Constitution requires that justice be administered in public, save in such special and limited cases as may be prescribed by in law. Certain revenue proceedings do come within this exception but not all tax matters attract absolute confidentiality and there is an obvious inconsistency under the Taxes Consolidation Act 1997 (the TCA).

The intention behind Article 34.1 was summarised by Walsh J in *In Re R. Limited*[1] wherein he stated:

> "The issue before this Court touches a fundamental principle of the administration of justice in a democratic state, namely the administration of justice in public...The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases or that they should have had any business in the courts. Justice is administered in public on behalf of all the inhabitants of the State."[2]

As with many constitutional rights and requirements, a balancing of rights occurs and a hierarchy of rights established. The question a taxpayer must ask is whether or not the right to privacy of his or her own financial affairs is a right superior or inferior to the administration of justice in public.

1 [1989] I.R. 126
2 Ibid. at 134

Such Special and Limited Cases as may be Prescribed by Law

In civil proceedings (asides from family law situations) such special and limited cases as prescribed by law most often have regard to business secrets and confidential information. As we will see, the appeal procedures under the TCA provide for hearings *in camera* at Appeal Commissioner and Circuit Court stages and hearings in public at High and Supreme Court stages. Examples of special and limited cases as prescribed by law where cases may be heard in private include: oppression petitions under s205 of the Companies Act 1963; examinership proceedings under s31 of the Companies (Amendment) Act 1990; any application under the Investment Limited Partnerships Act 1994; and an appeal against a decision of the Controller of Patents, Designs and Trade Marks which concerns a patent application which has not been published. Curiously, s134 of the Bankruptcy Act provides that any proceedings under the Act may be heard in private, even though there does not seem to be any objective reasons for such privacy in bankruptcy matters, or certainly at least no more than those of a sensitive taxpayer.

The courts appear to be reluctant to hold commercially sensitive proceedings in private, even where granted the discretion to do so under the relevant pieces of legislation. In its Consultation Paper on the Consolidation and Reform of The Courts Acts,[3] the Law Reform Commission compared an application under s205 of the Companies Act 1963 with family law cases and noted that a "change in attitude in the courts became apparent in *In re R Ltd.*[4]"[5] and that the discretion to hold such petitions in private would not be exercised unless the "court is of opinion that the hearing of proceedings under the section would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company."[6] The Consultation Paper went on to state:

> "There is a clear contrast in the level of transparency between family law proceedings and company proceedings taken pursuant to section 205. Often, very sensitive commercial material is dealt with in public in section 205 cases. The inconsistency between section 205 cases and family law cases is stark."[7]

3 LRC CP 46-2007
4 [1989] 1 I.R. 126
5 Supra at para 3.90
6 Supra at p136
7 Supra at para 3.92

Is it fair to draw the same analogy to revenue proceedings? There appears to be a judicial reluctance to hold commercially sensitive proceedings in private but no such reluctance on the part of the legislature in relation to the early stages of revenue appeals. Is this distinction really justified?

Appeal Hearings under the Taxes Consolidation Act 1997

A person who is dissatisfied with an assessment to tax made by an inspector is entitled to appeal that assessment to the Appeal Commissioners.[8] Hearings before the Appeal Commissioners are held in private [9]and decisions are published on a limited basis in accordance with s944A of the TCA.

Either party to a determination by the Appeal Commissioners may bring an appeal to the Circuit Court under s942 of the TCA. This appeal is a complete re-hearing of the case and is also held *in camera*.

On the determination of the appeal before the Appeal Commissioners or the Circuit Court, either party may request a case stated to the High Court under s941 of the TCA, with a further right of appeal to the Supreme Court. These hearings are held in open court. Notably however, up until the Finance Act 1983, a case stated to the High Court, with an appeal to the Supreme Court (under the then equivalent of the TCA) was also held *in camera*. The Minister for Finance at the time, Alan Dukes, reasoned that the effect of the change to the *in camera* nature of the High and Supreme Court proceedings would be to:

> "...remove the incentive that exists in the present system to use the full length of the appeals procedure simply to delay the payment of tax which, in many cases, is known to be properly due."[10]

He also gave an indication as to why a distinction should be drawn between re-hearings heard *in camera* in the Circuit Court and hearings heard in public on a point of law in the High or Supreme Court:

> "The provisions of [the Finance] Bill are that the appeals to those higher courts would be on points of law. Therefore, I would not envisage that appeals that would be heard under the provision in question would be ones in which the total amount of tax would be the issue. The issue would be whether tax was properly payable or not in respect of a particular type of activity. When we reflect on it in that way we find there is quite an amount of justification for having such cases heard in court because, typically, it will be on a point of interpretation of the law as to whether a particular activity is or is not taxable, as to whether a particular device is a legitimate means of avoiding tax or not. And the hearing of those cases in public will be of advantage not only to the Revenue, in terms of their exemplary effect, but also of advantage to other taxpayers and to tax practitioners in that they would have a quicker means of access to information which they now get anyway in relation to cases that are heard *in camera*. That is the reason for this provision. It does not apply to appeals heard by appeals commissioners or appeals heard in the Circuit Court, because in those cases what is at issue is the actual amount of tax payable by the individual."[11]

Knowledge of the Proceedings

The importance of the requirement that justice be administered in public was neatly summarised by Hamilton CJ in *The Irish Times and Others v Ireland and Others*[12] wherein he stated that the requirement is necessary to ensure that the wider public would have "knowledge of the proceedings".

Section 944A of the TCA allows the Appeal Commissioners to publish, where they consider it appropriate, details of determinations made by them in tax appeal cases. However, where they decide to exercise this discretion, it is incumbent on the Appeal Commissioners to protect the identity of the taxpayers involved.

Adverse Publicity

When considering a further appeal to the High or Supreme Court on a point of law, taxpayer litigants often consider the fact that the public will have knowledge of their financial affairs to be so significantly discouraging so as not to proceed. As a class of litigants, they are not unique in their concerns. For example, a person wishing to bring a defamation action must also disclose his or her identity and the full facts of the matters complained of. Furthermore, the argument that certain litigation may cause the litigant embarrassment or adverse publicity is highly unlikely to make any progress before the courts. McCracken J in *Re Ansbacher (Cayman) Ltd.*[13] stated:

> "The fact that Article 34.1 requires courts to administer justice in public by its very nature requires the attendant publicity, including the identification of parties seeking justice. It is a small price to be paid to ensure the integrity and openness of one of the three organs of the State, namely, the judicial process, in which openness is a vital element. It is often said that justice must not only be done, but must also be seen to be done, and if this involves innocent parties being brought before the courts in either civil or criminal proceedings, and wrongly accused, that is unfortunate, but is essential for the protection of the entire judicial system."[14]

8 Section 933 TCA

9 Section 934 of the TCA lists those persons who may be present at an appeal and include an inspector or revenue officer, barrister, solicitor, accountant or member of the Institute of Taxation in Ireland.

10 Dáil Éireann - Volume 342 - 05 May, 1983 at para 417

11 Seanad Éireann - Volume 100 - 03 June, 1983 at para 1672

12 [1998] 1 I.R. 359

13 [2002] 2 I.R. 517

14 Ibid at 531-532

Doe & Anor v The Revenue Commissioners

The plaintiffs in *Doe & Anor v The Revenue Commissioners*[15] agreed a settlement with Revenue under a scheme called "Disclosure of Undeclared Liabilities of Holders of Off-Shore Assets" and Revenue wished to include the plaintiffs in the published list of tax defaulters, in accordance with s1086 of the TCA. The plaintiffs claimed that they fell within an exception to publication under s1086(4), as their relevant fine or penalty did not exceed 15% of the amount of tax included in the settlement concerned. Revenue disputed this. The plaintiffs sought to bring proceedings against Revenue to determine the precise extent of the penalty and thereby prohibit the inclusion of their names on a list of tax defaulters. In an effort to preserve their own identity, the taxpayers first brought a preliminary application seeking approval to issue their proceedings under assumed names and to allow at least part of the substantial proceedings to be held *in camera*.

In the course of his judgment, Clarke J considered the decision of Laffoy J in *Roe v Blood Transfusion Service Board*[16]. In *Roe*, the plaintiff had sought to maintain proceedings under an assumed name in circumstances where she contracted the Hepatitis C virus as a result of being treated with infected blood products:

> "The plaintiffs stated objective in seeking to prosecute these proceedings under a fictitious name is to keep her identity out of the public domain. In my view, in the context of the underlying rationale of Article 34.1, the public disclosure of the true identities of parties to civil litigation is essential if justice is to be administered in public. In a situation in which the true identity of a plaintiff in a civil action is known to the parties to the action and to the court but is concealed from the public, members of the general public cannot see for themselves that justice is done."[17]

Clarke J summarised the relevant principles in relation to the administration of justice in public as follows:

1. The obligation that justice be administered in public, save in special and limited circumstances, includes an obligation that all parts of the court process be available to the public;
2. In the absence of any express statutory provision, a court could only restrict the publication of a court hearing (including the names of the parties) where the damage that would result in not making the order could not be remedied by appropriate directions to the jury or otherwise; and
3. Only in very rare and unusual circumstances can a court interfere with the obligation that justice be administered in public to vindicate the right to a good name or privacy of a litigant.

The plaintiffs contended that they had an entitlement to confidentiality in relation to revenue matters. In response, Clarke J stated:

> "I am not, however, satisfied that there is any constitutional right, as such, to have one's tax affairs kept confidential...Any entitlement which a non compliant tax payer might have to confidentiality in their tax affairs is confined, therefore, to a statutory entitlement."

And even if such a right could be asserted, it would nevertheless have to be weighed against the fundamental requirement that justice be administered in public:

> "To the extent, therefore, that the plaintiffs may have a general constitutional right to privacy which applies to such matters concerning their revenue affairs as may be deemed confidential by statue and where there is no other overriding requirement (such as the proper determination of litigation), those rights cannot interfere with the clear and weighty constitutional obligation to the effect that justice be administered in public."

Conclusion

The decision in *Doe* firmly rejects any absolute right to privacy in revenue matters. However, the question remains as to whether or not a taxpayer deserves any level of confidentiality beyond his or her initial assessment to Revenue. The legislature deemed it necessary to remove the veil of privacy in respect of High and Supreme Court proceedings in 1983, perhaps it is now time for the newly appointed Commission on Taxation to consider removing the *in camera* nature of appeals before the Appeal Commissioners and the Circuit Court. ■

15 [2008] IEHC 5 (Unreported, High Court, Clarke J., 18th January 2008)
16 [1996] 3 I.R. 67
17 Ibid. at 71

Pupil Exchange Programme:

Verona
Sarah Enright BL

In April of this year I spent two weeks in a *studio legale* in Verona, Italy as part of the Pupil Exchange Programme. I was hosted by a small firm which consisted of four lawyers and which dealt primarily with a wide range of civil law. Although the lawyers shared an office, they each operated independently rather than as a single firm, which is quite common in Italy.

The ordinary level Italian courts (*tribunale*) operated in a much more informal manner than their Irish equivalents. This was particularly apparent in the civil courts. Judges often met with lawyers in their private rooms and almost all members of the legal profession dressed quite casually; For example, on one occasion, I saw a Judge wearing jeans while he presided over the court! The motion list in the civil courts was also dealt with in a less formal manner. The Registrar did not call out cases in turn; rather lawyers approached the bench on a 'first come, first served' basis and had a chat with the Judge about the matter at issue. Criminal proceedings, in contrast, appeared more formal in nature; the Public Prosecutor (*pubblico ministero*) and the Judge wore robes (*toga*) and the hearing was conducted in a similar manner to Ireland.

While attending in court, I was generally introduced to the presiding Judge as "*la dottoressa irlandesa*" (In Italy, university graduates are granted the title of "Doctor" upon completion of their degree) who was visiting Italy in order to observe how 'well' the legal system functioned. Such an introduction was usually greeted with outbursts of boisterous laughter from the Judge and surrounding lawyers. Therefore, I quickly garnered the impression that Italian lawyers are typically quite critical of their legal system.

During my time in Verona, I observed many differences between the Italian and Irish legal systems. The most immediate fundamental distinction is that the Italian legal system derives from the Romano Germanic legal tradition and operates as a civil law system. This system is characterised by its emphasis on legislation or codes and can be broadly divided into two spheres: public law and private law. The courts have limited powers in relation to the interpretation of legislation and decisions of courts are only binding on the parties to the relevant proceedings. Therefore, decisions of Judges do not become binding precedents as they do in Ireland. However, the reality in practice is that case law is frequently applied by the Italian courts and Judges rarely depart from established precedent.

The legal profession in Italy is made up of legal practitioners (*avvocati*) and the Magistracy. The distinction between Barrister and Solicitor does not exist. The Italian Magistracy comprises of the Judiciary and the Public Prosecutor. In contrast to Ireland, Italy operates a professional career judiciary. In order to enter the profession, graduates, on completion of their law degree, must sit a national entrance examination. Appointment as a trainee magistrate (*uditore giudiziaro*) is based on the results obtained in the national entrance exam. After 11 years as a magistrate in the ordinary courts, it is possible to be promoted to a Judge of a Court of Appeal and after a further seven years, to a Judge of the Court of Cassation, Italy's equivalent of the Supreme Court.

Belfast
Lucy McRoberts BL

An exchange to Belfast may not sound quite as exciting as a trip to Italy, but two weeks of intense exposure to the Northern Ireland legal system, where politics has played a central role, was an exceptionally rewarding experience.

Our exchange (exchange may not be the most accurate word to use as unfortunately no members of the Belfast Bar were sufficiently interested in coming to Dublin – maybe they thought we had too many devils already!) started with a guided tour of the Royal Courts of Justice, the Laganside Courts and the new Bar Library.

Laganside was opened in 2003 and accommodates 16 courts. It has very modern court facilities including, video links to the prisons and the Young Offenders Centre and a TV screen listing all the cases listing all the cases- nice! Its glass facade with views across the River Lagan and the removal of the massive security screens in front of the Royal Courts of Justice indicate the changed times in Northern Ireland since the end of "the troubles" and the implementation of the Good Friday Agreement 1998.

The Court structure is similar to Ireland with Superior Courts and Inferior Courts. There was an important change in 2005 with the introduction of the lay magistrate who sits alongside a legally-qualified Resident Magistrate (in England a lay magistrate is able to sit alone). Their purpose is to bring the communities closer to the justice system and enhance public confidence with greater transparency.

I spent most of my first week in the Family Care Centre, in a "*freeing for adoption*" hearing. In this application the court must determine whether the parents of the child are unreasonable in withholding their agreement to the adoption of their child. If the freeing for adoption is granted, parental responsibility is removed from the parents and the child is left in a situation where no one individual has parental responsibility. The Judge is to consider post adoption contact but cannot order such contact at this stage of the process.

This application is the most draconian application in family law and the only other European country it exists in is Portugal. It was abolished in England and Wales with the implementation of the Adoption and Children Act 2002, which emphasises the importance of contact between children and their birth parents. Although there is a review

of adoption law in Northern Ireland, which may see this type of application abolished, the freeing for adoption was granted in this particular case. Unlike here, the barristers still robe fully in family law proceedings.

We also had an afternoon in the High Court in front of Mr Justice Weatherup, who was hearing an application for judicial review. The applicant was making an application for judicial review of two separate decisions of the Secretary of State for Constitutional Affairs, not to recommend the applicant for appointment as Queen's Counsel.

In 2006 a new selection process in Northern Ireland was put in place for the appointment of Queen's Counsel, in response to the review of the position of Queen's Counsel in England and Wales. Previously, the appointment of Queen's Counsel was the government's responsibility, but this was removed and now the legal profession are directly responsible. Queen's Counsel is the equivalent of Senior Counsel in Ireland and if the next monarch of the United Kingdom is a King, then this position will be referred to as King's Counsel! Unfortunately, for the Applicant, his application was unsuccessful.

Mr Justice Weatherup kindly invited us to his Chambers and brought us on a tour of the infamous Judges corridor. Presently, there are ten High Court Judges- all male. They are presently advertising the position of High Court Judge, so maybe we will see the appointment of the first female High Court Judge in Northern Ireland soon.

We were also very fortunate to be carrying out our exchange at the same time as the opening of the Omagh Trial (Civil Action). In 2007, Sean Hoey, the only man to face murder charges in relation to the Omagh bomb, was acquitted of all charges. He was one of the last to be tried in Northern Ireland under the Diplock Court system- a juryless trial.

After the failed attempt to convict Mr Hoey (The Department of Public Prosecution's Bill is estimated around £16 million for the case), the families of those murdered have brought a civil action against five defendants, who they allege are responsible. All parties are being legally aided.

Interestingly, the case has made an historic move to Dublin to enable the Judge, Mr Justice Morgan, to hear evidence from over 20 members of An Garda Siochana. This is the first time a Northern Ireland Judge will take evidence on commission in another jurisdiction.

I spent my last week in the Magistrates Courts. Probably the most exciting moment of the week was when I was approached in the Antrim Magistrates and asked to do a contested motion by a desperate solicitor! I was tempted to say 'yes' as I thought to myself I could be waiting a long time in Dublin for this to happen!

While in Belfast, the Executive Council of the Inn of Court of Northern Ireland announced that the number of places available for trainee barristers at the Institute of Professional Legal Studies (King's Inns equivalent) would be increased to 30 (from 25) for the course commencing in September 2008. This news appeared to cause some concern amongst members of the Bar that there would not be enough work for all the new Barristers. Dublin hears you!

The authors wish to thank the Bar Council and Inga Ryan for their efforts in making the Pupil Exchange programme such a worthwhile experience. ■

Sauerkraut and Soccer at the Sheraton

Conor Bowman BL

I had a summer job once at Real Madrid. It was only for two weeks but, at eighty thousand euro a week, it was well worth it. I was injured at the time so I didn't actually get to play (because I had an ingrown toenail) but my contract stipulated that they still had to pay me anyway. Nothing however had prepared me for Munich. Last May (that's this year) a team no one had ever heard of landed on a balmy Friday night at Munich International Airport. It was a date which nestled exactly halfway between the annual licencing court sittings in Bavaria and Paul O' Higgins' birthday. The significance of that timing was not lost on the members of the Bar Soccer Club entourage.

The Arabella Sheraton had not seen so many couples beneath its roof since the mass marriage of 14,003 Moonies in April. They welcomed us with open arms, and a breakfast menu as cosmopolitan as might only have been expected if there had been a different result after the penalty shoot-out in 1945. The range of facilities laid on to assist the team in preparing for the match included topless sunbabes, nude saunas and corridors so long you could lose your fiancée *and* your sanity on the journey from the lift to your room.

On Saturday afternoon, at precisely 9am New York time, the match kicked off in a sunny suburb where the bus drivers are required to be complete prats before being allowed to drive PSVs. The opposition looked sharp in the warm-up but I'm afraid that was really about it. It is hard to find adjectives to aptly convey to you the depth of footballing-skill heresy which passed for a game-plan on the part of our German counterparts. One suspects that Klinsmann, Beckenbauer and the rest were avidly searching for a grave to get into in order to spin collectively in response. The Bar team were in sparkling form as Hardiman, Jeffers, Conroy, Dockery, Finnegan, Staines and Co. battled like Master's Court veterans against the Bratwurst Blitzkreig cooked up by the opposition as a dietary substitute for the feast of football we had been expecting. The Germans have won three World Cups (not these exact players of course) but it *is* a little hard to fathom. The 4-0 scoreline flattered the home team. One wonders if the nine 'sitters' were missed deliberately.

We visited Dachau, the Allianz Arena, the Marianplatz, and much else that the region has to offer. The Hofbrauhaus saw us munching sausage and sauerkraut and swining and dining to the strains of popular local music (the type you would make faces at rather than make love to the sound of, if you know what I mean). One interesting aspect of the trip was an organised outing to the Pasha nightclub. It is a club which also caters for the straight-but-curious and was an entirely appropriate venue in which to explore the intricacies of the European Union model.

South west of Munich there is a fantastic 14th or 15th century church decorated in extraordinary splendour in a village called Andechs. There we saw the surface scratched, as a lady in her 70's goose-stepped up and down in front of a brass band and a largely local audience in a beer-garden near the church. There was an interesting range of reactions, which seemed to run the full gamut of emotions from "They haven't gone away you know?" to nervous giggles in liederhosen. It was a moment in the week which reminded us of just how recent all of our recent history is. It did not appear to be the appropriate time to enquire about the level of refresher for a Junior in front of the County Reg during the, now legendary, Nuremburg taxation dispute! When did the appropriateness of the time ever deter me?

By the time we left Munich, its inhabitants were fairly devastated by the 4-0 scoreline I think it's fair to say. There was an element of putting a brave face on it by the airport security staff but you could see they were pretty shaken behind it all. If the Law Library is full of people who hated Maths, than Munich is brimming with citizens to whom football is everything. The melodic piano-playing which filtered down to the street from a student's residence was a strangely appropriate aural backdrop to our trip; it hinted at another time when everything was alright and the only thing to be found in a handful of dust was the devil's engagement ring and a promise to return. Sod them all at the Bernebau Stadium; Munich's the place to be in May. ■