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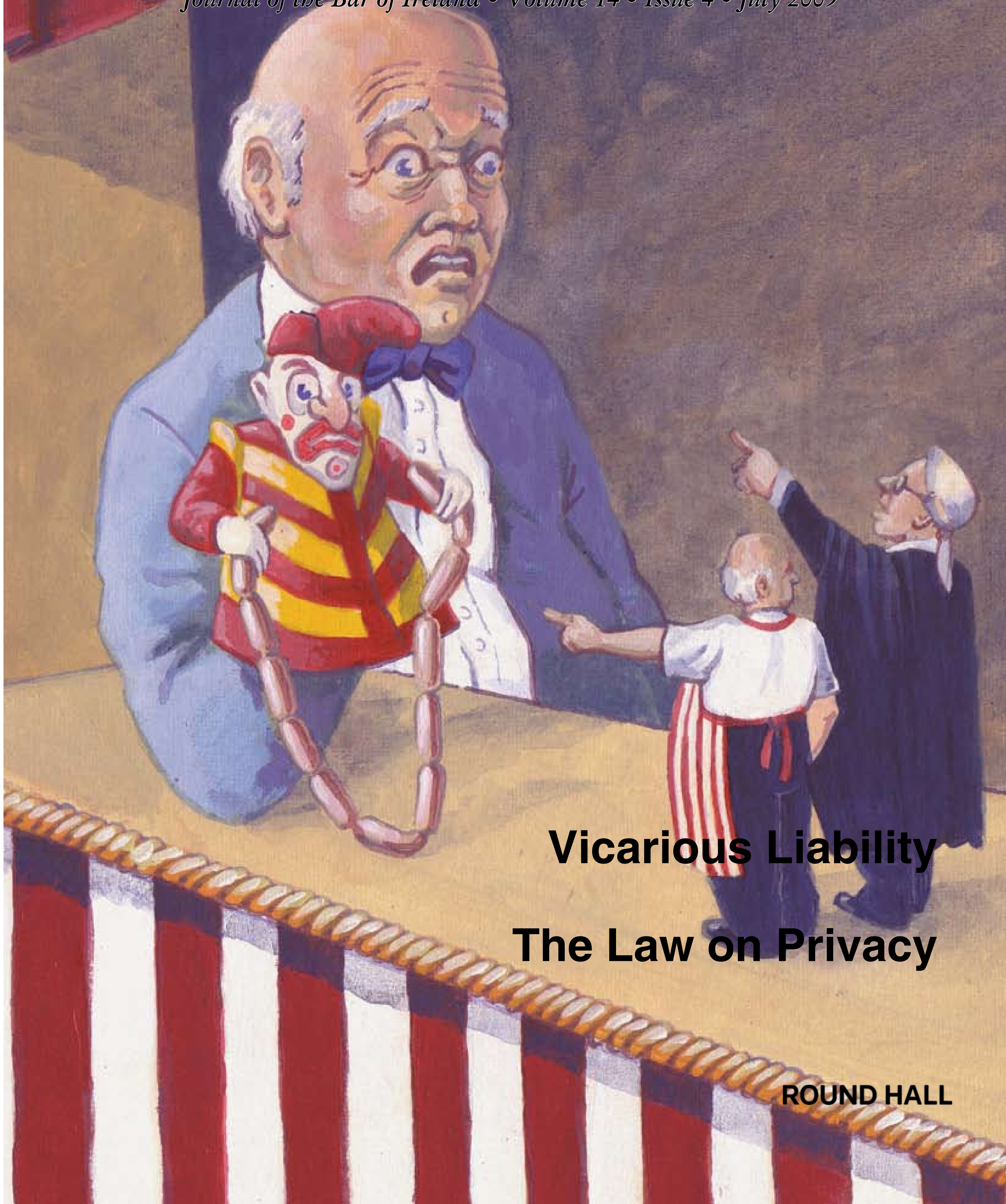

Vicarious Liability

The Law on Privacy

ROUND HALL

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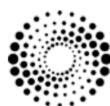

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The Law on Privacy

Robbie Slattery BL

Introduction

The law of privacy is one of the most fluid areas of our law, subject in recent times to differing approaches and unanswered questions. The law of defamation had up to now been used as a cause of action in cases essentially involving privacy. There are two primary areas where this has occurred: (i) wrongful use of a person's name, likeness or voice; and (ii) "false-light" invasion of privacy. Privacy has now been accepted as a stand-alone cause of action in this jurisdiction in two recent High Court decisions. What implication will this have, and is it desirable that appropriation and false-light claims be included in the privacy cause of action?

(i) Cases involving wrongful use of name, likeness or voice ("appropriation")

There are numerous examples of defamation cases involving appropriation. Despite the concept of "image rights" being a relatively new one, many of the cases are in fact quite old.

In *Tolley v. J.S. Fry* [1] the plaintiff was an amateur golfer. The defendant chocolate company published an advertisement featuring a caricature of the plaintiff with a packet of its chocolate in his pocket. The advertisement was published without the plaintiff's consent. The plaintiff's case was brought in libel and was ultimately successful. It was held that the advertisement bore an innuendo that the plaintiff had prostituted his reputation as an amateur golfer by endorsing the product. In describing the libel, Viscount Dunedin referred to "the caricature of the plaintiff…imbedded in an advertisement…held out as part of an advertisement, so that its presence there gives rise to speculation as to how it got there"[2].

This passages illustrates the fact that kernel of the plaintiff's grievance was appropriation. A jury ultimately found in favour of the plaintiff. However, it must be arguable that there was no defamation present. Amateur sportsmen, at least nowadays, regularly accept sponsorship. Amateur sportsmen regularly appear in advertisements of one form or another[3]. To base the decision on a thesis that creating an impression that an amateur sportsman had "prostituted" himself was defamatory is therefore questionable.

In *Dunlop v. Dunlop Rubber*[4] the plaintiff sought an injunction restraining the publication of advertisements containing pictures of him in absurd costume, or caricatures of him, which he claimed would expose him to ridicule or contempt. Although this was not the trial of the action, Powell J. accepted that there was a cause of action in libel, quoting from *Monson v. Tussauds*[5] to the effect that "[l]ibels are generally in writing or printing, but this is not necessary. The defamatory matter may be conveyed in some other prominent form; for instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures".

Dockrell v. Dougall[6] is an interesting authority in the sense that involved the use of the plaintiff's name alone. Here, a doctor's name had been used without his consent in the advertising material for a medicine. Although the plaintiff ultimately lost his action, the Court of Appeal indicated that it would have been open to a jury to find that the publication had been defamatory. The case was cited in the later case of *Tolley*, where Slesser L.J. felt that it: -

> "[S]eems to indicate that the mere fact that the defamation complained of does not arise from the words themselves as such but rather from the use of them collectively, as in an advertisement, does not necessarily deprive the plaintiff of the right of saying that in the special circumstances they defame him"[7].

In *Kaye v. Robertson*[8] the plaintiff suffered severe injuries in a car accident and was incapable of managing his own affairs. Agents of the defendant newspaper entered the plaintiff's hospital room and took photographs of him, including of large scars on his head from the accident. The plaintiff sought injunctive relief to restrain the publication of the photographs and an accompanying article. Part of the plaintiff's claim was based in libel, claiming that the article and photograph implied that he had given consent to an interview with the newspaper. At first instance, Potter J. granted the injunction based on the *Tolley* case. The Court of Appeal overturned this portion of the judgment, finding that even though it was arguable that it was a libel to imply that the plaintiff had consented to publication, an interlocutory injunction could only be granted where any jury would inevitably find libel, and that this was not the case. Although the Court of Appeal refused to hold that there was a libel to this higher standard of inevitability, what is interesting is the fact that it would probably constitute a libel, Glidewell L.J. stating that "it is…certainly arguable that the intended article would be libelous, on the authority of *Tolley v. Fry*…a jury would probably find that Mr. Kaye had been libeled".

1 [1931] A.C. 333.
2 *Ibid.* at p. 342.
3 See, for example, Lucozade Sport's sponsorship of the GAA, and advertisements featuring individual (amateur) players – see www.lucozadesport.ie, which features on its front page pictures of Colm Cooper, Kerry footballer.
4 [1920] 1 I.R. 280.
5 [1894] 1 QB 671.
6 (1899) 80 L.T. 556.
7 *Op. cit.* at p. 486.
8 [1991] FSR 62.

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In *Charleston v. News Group Newspapers*[9] the plaintiffs, famous actors, were depicted in photographs which had their faces superimposed onto the bodies of naked models in a pornographic context. This case produced a different verdict, despite the fact that on first blush it has certain similarities with the other cases cited in this section. The House of Lords held that the photographs could not found an action in libel in isolation from the text of the accompanying article, which had states that the plaintiffs had not consented to them being used and in fact criticised a computer game manufacturer.

The Australian case of *Obermann v. ACP Publishing*[10] involved a photograph of the plaintiff, a female water-polo player, taken while playing the sport with her swimming costume out of place and her breasts exposed. Beside the photograph was a caption stating: "only in women's water polo do you find spunkbubbles like these". Levine J. was satisfied that this was capable, *inter alia*, of defamatory meanings that the plaintiff had allowed herself be photographed with her breasts exposed; allowed pictures of her breasts be published so that men could achieve sexual gratification; and was the type of athlete who would allow herself be photographed in this way.

The American experience relating to appropriation claims is completely different. As early as 1890[11], it had been argued by American commentators that the courts should confront the privacy issue and deem it to be actionable. In *Pavesich v. New England Life Assurance*[12] an actionable right to privacy was recognised where an insurance company used the plaintiff's name and picture in advertising material without his consent. Indeed in *Haelan Laboratories v Topps Chewing Gum*[13] this right to privacy was developed into what could probably more accurately termed as a right to publicity, which appears to recognise the difference between privacy and commercial interests:

> "[I]n addition to and independent of that right of privacy … a man has a right in the publicity value of his photograph, i.e. the right to grant the exclusive privilege of publishing his picture …. This right might be called a 'right of publicity'"[14].

An older Australian case called *Henderson v Radio Corp.*[15] illustrates a further interesting distinction. Here, the plaintiffs were ballroom dancers whose picture was used on a record-cover without their consent. This appears very similar to the facts of *Tolley* on first glance. However, the High Court of New South Wales found this to be an actionable passing-off as opposed to libel, the decision being based on the photograph showing the plaintiffs in their profession, thereby creating an impression of endorsement by the plaintiffs and diminishing their capacity to earn money from licensing their pictures in a commercial context.

(ii) Examples of "false-light" claims

Prosser[16], in his seminal article on the subject, stated that a false light claim "consists of publicity that places the plaintiff in a false-light in the public eye"[17].

Again, some of the case law on the topic dates to the last century and many of the cases which deal with false light invasion of privacy are also mentioned under the previous heading. For example, the case of *Obermann v. ACP Publishing*[18] can be viewed as appropriation as outlined above, but is arguably better understood as a false-light claim. This argument is that the actions of the defendant, in publishing photographs of the plaintiff's exposed breasts, were portraying her in a false-light as a person who would allow this to take place *etc*. However, characterising the case as involving appropriation or false-light is irrelevant if one accepts the thesis that it should be neither, but rather a claim relating to privacy.

Prosser and Keaton[19] cite the case of *Lord Byron v. Johnson*[20] as the first example of a false-light claim. There, Lord Byron was successful in restraining an inferior poem from being represented as being written by him. The false-light therefore was the fact that the poem being associated with him tended to cast him in a false-light as it was inferior to his work. Another relatively early case was *Cassidy v. Daily Mirror*[21] where a newspaper published a photograph of a man with a woman, with a caption saying they were engaged to one another. The plaintiff was married to the man. Therefore, the photograph and caption taken together cast her in a false-light as their effect was to suggest that her husband was engaged to another woman. The Court of Appeal upheld the jury's finding that this was defamatory. In *Newstead v. London Express*[22] a newspaper reported that a Harold Newstead, a thirty-year-old Camberwell man was on trial for bigamy. This was true in relation to a certain man of that name, but the plaintiff was also called Harold Newstead, and similarly associated with Camberwell. The Court of Appeal again upheld a jury finding that this was defamatory, based on its casting the plaintiff in a false-light by imputing criminal conduct to him.

It can also be argued that the *Tolley*, *Kaye*, *Charleston* and *Dunlop* cases are either centrally or partially "false-light" claims. This is because in each claim, the case made by the plaintiff was that the pictures in question gave a misleading impression of them. In other words, the pictures told a mistruth, which lowered the plaintiffs in the eyes of others.

False-light claims in America are acknowledged to be a species of privacy. In *Cantrell v. Forest City*[23] the Supreme Court upheld a finding of false-light fit to go before a jury where a story published about the death of the father of a family in a bridge collapse contained false statements about the family. In *Peay v. Curtis Publishing*[24] there was an actionable false-light where the plaintiff's picture was used in an article

9 [1995] 2 A.C. 65.
10 [2001] NSWSC 1022.
11 See "*The right to privacy*", Warren and Brandeis, Harvard Law Review, Vol. IV No. 5, December, 1890.
12 122 Ga. 190, 50 S.E. 68 (1905).
13 202 F.2d 866 (2d Cir.1953).
14 *Ibid.* at p. 868.
15 [1969] RPC 218.

16 Prosser, *"Privacy",* (1960) 48 Calif. L. Review 383.
17 *Ibid.* at p. 398.
18 *Op. cit.*
19 Prosser and Keaton on Torts, 5th Ed., (1984).
20 (1816) Eng. Rep. 851.
21 [1929] 2 K.B. 331.
22 [1939] 2 K.B. 317.
23 (1974) 419 U.S. 245.
24 (D.D.C. 1948), 78 F.Supp. 305.

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about the cheating taxi operators. Similarly, in *Martin v. Johnson Publishing*[25] the plaintiff's photograph was used in an article about "man-hungry women"[26]. In *Hamilton v. Lumbermen's Mutual Casualty*[27] where the plaintiff's name was falsely used to advertise for witnesses to an accident, false-light was found.

Practical reasons why the law developed in this direction

(i) Original lack of privacy cause of action

Traditionally, policy decisions by the courts not to allow a cause of action for breach of privacy led to arguments being formulated to force what were essentially privacy claims into defamation, in order to provide plaintiffs with workable causes of action. It is arguable that this should never have occurred, and rather than stretching the law of defamation to intellectual extremes, the courts should simply have properly confronted the issue of privacy claims to begin with. That this is the position in England is illustrated by cases like *Bernstein of Leigh v. Skyviews & General Ltd*[28] and *Kaye*[29], where Glidewell L.J. stated that "[i[t is well known that in English law there is no right to privacy, and accordingly there is no right of action breach of a person's privacy". In *Wainright v. Home Office*[30] Mummery L.J. stated that "there is no tort of invasion of privacy".

In *Kaye v. Robertson*[31] there was explicit recognition by the court that defamation and malicious falsehood were being used to cover a situation where the primary cause of complaint was privacy being invaded by the use of an image. In the Court of Appeal Bingham L.J. stated that "[t]his case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens".

Again, in *Obermann v. ACP Publishing*[32] there is a somewhat artificial logic at play. The real wrong suffered by the plaintiff was a breach of her privacy in the photographs being circulated. Is it really likely that many readers would have actually thought that she had somehow allowed them to be taken when they were action shots in the heat of the game and, it appears from the judgment, not giving any impression of having been staged or posed? There is an argument that this is not a true defamation in that a right minded person would not have thought less of the plaintiff, as it was clear that she had not been complicit in the photographs. However, rather than recognise a claim based on the plaintiff's privacy, was it shoehorned into the field of defamation in order to avoid confronting the privacy issue?

It appears that in England in many circumstances, despite the emergence of the European Convention on Human Rights, there is still no actionable right to privacy. For example, in *MGN Ltd v. Attard*[33] photographs were taken of a one-year-old conjoined twin, for publication. The photograph was taken on a public street. Connell J. did not fully determine the issue, but expressed doubts as to whether Art. 8 of the ECHR was operative at all in a public setting such as a street. *Murray v. Big Pictures (UK) Ltd*[34] is a very recent example of the vexed question of a right to privacy in a public setting. This case involved pictures of the son of J.K. Rowling, the author of the *Harry Potter* series of books. The defendant took photos of the family on a public street, including the infant son. At first instance it had been held that the plaintiff had no right to privacy on a public street. However, the Court of Appeal overturned this finding, stating that "it is at least arguable that David had a reasonable expectation of privacy. The fact that he is a child is in our view of greater significance than the judge thought…"[35].

(ii) Alternative position in other jurisdictions

The position in other jurisdictions is different. In America, an actionable right to privacy has long been recognised, and is now refined into a categories first suggested by Prosser[36], as follows:

1. Intrusion upon seclusion or solitude, or into private affairs;
2. Public disclosure of embarrassing private facts;
3. Publicity which places a person in a false light in the public eye;
4. Appropriation of name or likeness.

Delany and Carolan[37] describe the situation in France as one where "contrary to the position in most common law countries, causes of action to prevent privacy have been available…since the 19th century, and there is a huge body of case law to the tort of breach of privacy". The authors further state that "[j]udges have traditionally taken a hardline approach to violations of the privacy rights of individuals, particularly in relation to the *droit á l'image* or the "right to one's image" of both private persons and public figures". The position in Canada is also interesting. Delany and Carolan[38] cite the case of *Les Editions Vice-Versa v Aubry*[39] where the Supreme Court of Canada endorsed a decision to award compensation to a woman whose photograph was taken, without her consent, sitting on a Montreal landmark. The Supreme Court upheld the award, despite finding that it was not defamatory, Lebel J. stating that: -

> "A person's presence in a public place does not remove the right of that person to anonymity, unless

25 157 N.Y.S.2d. 409.
26 The description used by Prosser, *Op. cit.*
27 La.App. 1955, 82 So.2d 61.
28 [1978] QB 479.
29 *Op. cit.*
30 [2002] QB 1334.
31 *Op. cit.*
32 See para. 2.8 above.
33 (Unreported, English High Court, Connell J., 19th October, 2001).
34 [2008] EWCA Civ 446.
35 *Ibid.* at paras. 45 – 46.
36 This categorisation of privacy claims first appeared in Prosser's 1960 article, *op. cit.*
37 "*The right to privacy*", Delany & Carolan, Thomson Roundhall Dublin, 2008 at p. 171.
38 *Op. cit.* at p. 109.
39 (1998) 157 DLR 4th 577.

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they are engaged in public life, or participating in artistic, cultural, professional or political events".

Irish privacy claims – a new vista?

The seminal case involving privacy in the constitutional setting is *McGee v. Attorney-General*[40]. There, the Supreme Court recognised marital privacy as an unenumerated right guaranteed by Articles 40 and 41 of the Constitution. In *Norris v. Attorney-General*[41] a right to privacy was acknowledged on one hand, however O'Higgins C.J. stated that the "right of privacy or, as it has been put, a right "to be let alone" can never be absolute. There are many acts done in private which the State is entitled to condemn, whether such be done by an individual on his own or with another"[42]. In *Kennedy v. Ireland*[43] the High Court held that privacy, although it was not specifically mentioned in or guaranteed by the Constitution, was a personal right of a citizen which flowed from the christian and democratic nature of the State. However, it was emphasised that the right was not unqualified, but was subject to the constitutional rights of others and the preservation of public order, morality and the common good.

Although this constitutional right to privacy was established, the more vexed question remained: was a breach of this right to privacy a cause of action on which a plaintiff could sue for damages. In *Kennedy v. Ireland*[44] damages were awarded against the state for breach of privacy but it was thought that the judgment was confined to situations where the state or an emanation of the state were being sued. There were also cases where interlocutory injunctions were sought for breach of privacy - *M. v. Drury*[45] and *Cogley v. RTE*[46]. However, the real development in the Irish law has come by virtue of two recent cases, *Sinnott v. Carlow Nationalist*[47] and *Herrity v. Associated Newspapers (Ireland)*[48].

Sinnott v. Carlow Nationalist involved the High Court (Budd J.) upholding an award made in favour of the plaintiff, a young GAA player who was pictured with his genitals exposed during a match. Unfortunately, no written judgment is available, making it impossible to analyse the full reasoning behind the decision. However, reports of the case appear to make it clear that the decision was based on a breach of the plaintiff's right to privacy. *Herrity v. Associated Newspapers (Ireland)*[49] is more instructive as a full judgment was delivered, which clearly accepts a cause of action in respect of breach of privacy. This means that at present, this jurisdiction does enjoy such a cause of action, and the courts have turned their back on the extended breach of confidence doctrine used in England. Dunne J. set out the following principles:

> "(1) There is a Constitutional right to privacy.
> (2) The right to privacy is not an unqualified right.
> (3) The right to privacy may have to be balanced against other competing rights or interests.
> (4) The right to privacy may be derived from the nature of the information at issue – that is, matters which are entirely private to an individual and which it may be validly contended that there is no proper basis for the disclosure either to third parties or the public generally.
> (5) There may be circumstances in which an individual may not be able to maintain that the information concerned must always be kept private…
> (6) The right to sue for damages for breach of constitutional right to privacy is not confined to actions against the State or State bodies or institutions"[50].

The European Convention on Human Rights also provides a framework in this context. Article 8 provides *inter alia* that "Everyone has the right to respect for his private and family life, his home and his correspondence…". Article 10 also comes into play, providing *inter alia* "Everyone has the right to freedom of expression…". The real issue therefore is the interplay between these rights. In *Peck v. United Kingdom*[51] it was recognised that CCTV footage of a man attempting to commit suicide was protected under Article 8, stating "the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen". It is clear that a person's right to privacy must be balanced against the protection for freedom of expression contained in Article 10. In *Von Hanover v. Germany*[52] it was stated that:

> "[T]he decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest"[53].

Desirability of appropriation and false light claims in privacy

(i) Appropriation claims

There are competing viewpoints as to whether or not it is desirable for appropriation claims to be included in the sphere of privacy. One of the best known judicial comments comes from the American case of *Carson v. Here's Johnny Portable Toilets*[54], as follows:

> "The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected

40 [1974] I.R. 284.
41 [1984] I.R. 36.
42 *Ibid.* at p. 64.
43 [1987] 1 I.R. 587.
44 [1987] 1 I.R. 587.
45 [1994] 2 I.R. 8.
46 [2005] 2 I.L.R.M. 529.
47 There is no written judgment in this case.
48 [2008] IEHC 249.
49 *Op. cit.*
50 *Ibid.* at pp. 28 – 29.
51 (2003) 36 EHRR 41.
52 (2005) 40 EHRR 1.
53 *Ibid.* at para. 76.
54 (1983) 698 F. 2 d 831.

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from the unauthorised commercial exploitation of that identity"[55].

This illustrates neatly that appropriation, at least in the context of a well-known subject, is connected primarily with commercial interests. Rather than privacy, it focuses on the right to make money from one's self. O'Callaghan[56] argues that in appropriation cases, a person's privacy is not at stake, stating that "the proprietary characteristics should be recognised and more appropriate legal tools should be used for the protection of such interests including *inter alia* intellectual property law…". Delany and Carolan[57] come to a like conclusion, and state: -

> "The 'appropriation' tort…appears to be premised on the protection of the plaintiff's property rights in relation to his name or likeness…The plaintiffs in these cases are clearly seeking to protect their proprietary interests over a commercially valuable commodity. It is more properly a species of intellectual property action"[58].

The case of *Irvine v. Talksport*[59] further supports this idea. Here, the plaintiff, a formula-one driver, brought a claim where the defendant radio station published a brochure using his image. The case was dealt with by Laddie J. as one clearly rooted in intellectual property law, without any consideration of defamation or privacy principles. Laddie J. concluded that:

> "Manufacturers and retailers recognise the realities of the market place when they pay for well known personalities to endorse their goods. The law of passing off should do likewise…Indeed, it seems to me that this is not a novel proposition in this country"[60].

However, even though appropriation of personality in a commercial context is not a privacy issue, the use of the image *etc.* of a non-celebrity still may well be. This type of complaint by a private person is essentially a privacy complaint, as it deals only with a private person's privacy being invaded, with no commercial, or proprietary element to the claim.

(ii) False-light claims

It is arguable that false-light claims are in reality defamation claims. This opinion is based on the theory that a false-light claim is not necessarily a privacy claim as the actions portraying the plaintiff in a false-light need not have occurred in breach of privacy. Any cause of action should arguably be based on a statement about a person lowering that person in the eyes of right thinking members of society or damaging their reputation by portraying them in a false-light.

This leads to a conclusion that such a claim should be a defamation claim and therefore not in privacy. For example, Delany and Carolan[61] state that "[t]he "false light" tort covers a situation in which a misleading impression of the plaintiff is presented to the public". There is also judicial comment in Australia[62] to the effect that appropriation cases concern commercial interests and false-light claims concern reputation, meaning that neither are strictly speaking within the sphere of privacy. This again reinforces an argument that as false-light is concerned with misleading impressions, falsity and reputation, it is properly to be considered an aspect of defamation.

However, there is a competing argument that false-light claims are separate as they are designed to protect a person from situations which would be offensive to a reasonable person, without having to show that their reputation has been damaged or that they have suffered loss. It is said that the false-light action does not need a technically false statement, only a misleading one, and "is intended primarily to protect the plaintiff's mental or emotional well-being"[63]. Therefore, it is arguable that the interests which it seeks to protect are different from those of defamation. Zuckman[64] criticises the very existence of false-light, but at the same time appears to acknowledge the fact that there is a fundamental difference between it and defamation: -

> "The serious problem arises…from the very nature of the tort as going beyond defamation. This problem threatens the tort's very existence. While all actionable defamatory statements place the victim in a false light in the eyes of those who receive and accept such communications, the tort also encompasses false non-defamatory statements, thereby increasing the chill on free expression".

This supports an ultimate conclusion that if false-light claims are to be recognised, then it should be within the sphere of privacy, as they are separate to the law of defamation. However, the real question perhaps, is whether such claims should be permissible at all.

Conclusion

It appeared until recently that there was no civil privacy claim against non-state bodies in Ireland or England. In Ireland, this has changed with the *Sinnott* and *Herrity* decisions. The privacy claim for damages now appears to be well-established, albeit without a Supreme Court determination of the issue. ■

55 *Ibid.* at p. 835.
56 *Op. cit.*
57 *Op. cit.*
58 *Op. cit.* at p. 94.
59 [2002] EWHC 367.
60 *Ibid.* at para. 43.

61 *Op. cit.* at p. 94.
62 See *Australian Broadcasting Corpn v Lenah Game Meats* [2001] HCA 63, specifically the judgment of Gummow and Hayne JJ at para. 125.
63 "False Light", Professor Edward C. Martin, Samford University – available at http://netlaw.samford.edu/Martin/AdvancedTorts/falselight.htm
64 "*The American torts of invasion of privacy: substantial corruption of English common law*", Harvey L. Zuckman, Ent. L.R. 1990, 1(5), 173-178.

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Judicial Immunity

Ted Harding BL

Liability of the State in respect of judicial error and the liability of members of the judiciary in the face of costs applications have been clarified by two recent important High Court decisions.

In *Kemmy v Ireland and the Attorney General*[1] it was held that a man whose rape conviction and three-year sentence was overturned on appeal was not entitled to damages from the State arising from unfairness due to an error by the judge presiding at his trial. McMahon J ruled that that this would amount to an "indirect and collateral assault" on judicial immunity.

The plaintiff, Joseph Kemmy, was convicted of rape and sexual assault at the Central Criminal Court on the 16th of December, 2000. Subsequently he was sentenced to three years' imprisonment for rape and one year for the sexual assault, to run concurrently from the 16th of December, 2000, with the balance of the sentence unserved as of the 16th of December, 2001 suspended.

On the 1st of December, 2003, Fennelly J, in the Court of Criminal Appeal, set aside Mr Kemmy's conviction and did not order a retrial.

The conviction was quashed on the grounds that the manner in which the trial was conducted was `unfair and did render the trial unfair'. By the time the plaintiff's conviction was set aside, his term of imprisonment had been long-since served and he had been released.

The Court ruled the original trial was unfair because the trial judge had read his own note of the complainant's evidence to the jury, without also reading Mr Kemmy's. It said that the Court of trial should also have heard a summary of the accused's evidence. The reading of the complainant's account alone must have created a risk of confusion in the minds of the jury, who had requested a transcript of the complainant's evidence.

The plaintiff contended that he suffered deprivation of liberty, loss and damage due to the manner in which his trial was conducted and that the quashing of his conviction did not remedy or diminish his claimed losses.

The plaintiff's conviction was not quashed on grounds that a newly-discovered fact showed that there had been a miscarriage of justice. Hence, he was not eligible to apply for compensation pursuant to Section 9 of the Criminal Procedure Act, 1993.

The plaintiff claimed damages against the State for infringement by the State, through its judicial organ, of his constitutional right to a fair criminal trial. Central to the plaintiff's action was his complaint that he did not receive a "fair trial" from the trial judge and his constitutional right thereto had been breached.

Damages were also sought against the State for the negligence and/or breach of duty of servants or agents of the State. If necessary, a declaration was sought that any common law rule of law which purports to grant judges of the High Court of Ireland personal immunity from suit in respect of acts done in the performance of their judicial duty is subject to and in accordance with the plaintiff's rights under the Constitution and is unconstitutional insofar as it purports to deny the plaintiff his right to seek damages against the State.

The defendants denied that they had any liability to compensate the plaintiff for any loss or damage that he was alleged to have suffered. It was further denied that the trial judge was personally liable to the plaintiff for alleged or any negligence or breach of duty in the manner in which he conducted the plaintiff's trial.

Absent any primary liability, it was asserted that none of the defendants was vicariously liable to the plaintiff for the action of the trial judge. It was further denied that judicial immunity from suit is subject to or secondary to any alleged rights of the plaintiff under the Constitution. The defendants denied that judicial immunity from suit in respect of acts done in the performance of judicial duty is unconstitutional.

McMahon J examined whether the State was vicariously liable for the failure of the trial judge to give the plaintiff a fair trial. The Court stated that in extending the ambit of a master's liability for the wrongs of a servant, such extensions are only justifiable where there is a strong element of control retained by the parties sought to be involved in the wrongs of the subordinate.

McMahon J held that it was difficult to adopt the theory of strict liability in the relationship that exists between the State (as a juristic person) and a judge acting as a member of its judicial arm in a judicial capacity "especially when one considers the relevant constitutional provisions relevant to such consideration, that is the separation of powers and the independence of the judiciary in particular."[2]

The Court held that it is:

> "... wholly inappropriate to attempt to describe the relationship between the State and a member of the judiciary in the Master/Servant terminology developed for the purposes of imposing vicarious liability for tortuous acts or omissions".[3]

On the question of the plaintiff's right to a fair trial, the Court stated that it:

> "...was of the view that the plaintiff's 'right to a fair trial' should more properly be referred to as an obligation on the State to provide a *fair legal system* within which the plaintiff's trial can take place. By providing an appeal system, the State has carried out its duty in this respect".[4]

1 High Court, Unreported, McMahon J, 25th of February, 2009

2 pp 31-32

3 P 32

4 pp 37-38

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In the Court's view, since the right to a fair trial includes an appeal process, the time to assess the fairness of the process, when the appeal is availed of, is after the appeal and not after the trial. McMahon J stated:

> "... the plaintiff's right was vindicated... by the appeal court... there has been no breach of the plaintiff's right to a fair trial".[5]

As the process to which the plaintiff had been subjected was not an unfair one, his action against the State on that ground failed.

McMahon J continued:

> "... many of the reasons which support personal judicial immunity – the promotion of judicial independence, the desirability of finality in litigation, the existence of an appeal and other remedies as well as the public interest – can also support the argument for State immunity in cases such as those before this Court... not to extend the immunity to the State in the present circumstances would represent an indirect and collateral assault on judicial immunity itself".[6]

The Court identified what it described as the "fundamental reason" for its conclusion:

> "... when the judge is exercising judicial authority he is acting in an independent manner and not only is he not a servant of the State in these circumstances, he is not even acting on behalf of the State. He is not doing the State's business. He is acting at the behest of the people and his mission is to administer justice".[7]

Rejecting the plaintiff's claim and indentifying a previously unenumerated constitutional right, McMahon J concluded that:

> "...the acceptance of personal immunity for the judiciary must logically extend to the State when sued directly for judicial error even when a fundamental right is asserted. That this immunity is not specially recognised in the Constitution, is no impediment, since the State immunity in these circumstances is a corollary of the personal immunity conferred on the judges and the State immunity can be inferred from the personal immunity long since recognised by our courts, though not explicitly acknowledged in the Constitution".[8]

In *O.F. v Judge Hugh O'Donnell and Ors.* and *M.I. v. Judge Hugh O'Donnell and Ors.*[9] the impact of the European Convention on Human Rights on the liability of members of the judiciary was among the issues that fell to be decided in judicial review proceedings.

The Court considered a series of issues arising from two sets of family law proceedings. The Court was asked to determine whether there is a prohibition on making an order for costs against a judge, where a judge has not intervened in the proceedings and there is no allegation of *mala fides* or impropriety on his or her part.

O'Neill J concluded that, bearing in mind the range of error that may be the subject of judicial review, without a full indemnity from the State, it would not be possible to retain judges, because of the risk to personal fortune.

O'Neill J referred to the judgment of Murphy J in *O'Connor v Carroll*[10] to the effect that unless *mala fides* or impropriety is alleged, the judge should not be joined. O'Neill J added that where a judge intervenes in a judicial review application to defend his or her order, necessarily the judge must engage in dispute on issues of law and/or fact with one or more of the parties to the litigation heard by the judge. He held that the consequence of this would be that "the judge abandons his or her stance as an independent impartial adjudicator to become a combatant in the dispute", thus damaging the independence of the judiciary.[11]

The Court addressed whether the non-joining of the judge and/or the prohibition of a costs order against the judge is a potential denial of access to a court or a tribunal, in breach of Article 6 of the European Convention on Human Rights, or a denial of an effective remedy in breach of Article 13.

It was held that the Convention does not require in all cases that there be provision in law for the recovery of costs by a successful party from the defeated party. Recovery of costs *per se* is not an essential feature of the right of access to Courts or tribunals (Article 6), or of an effective remedy (Article 13).

O'Neill J considered the reason, or the legitimate aim, for the rule excluding a judge from the proceedings and / or the prohibition on making a costs order. The Court endorsed the principle that the reason for the aforementioned rules was to protect and preserve the independence of the judiciary. But the rules do not apply where there is an allegation of *mala fides* or impropriety.

The fact that the avenue of an appeal to the Circuit Court was available to the applicants in the cases before O'Neill J was, in his view, a matter that ought to be considered.

In light of the foregoing conclusion, the Court stated that it was unnecessary to consider whether if it is concluded that a judge is a proper party, but costs should not be awarded against him or her, should the State be responsible for costs.

The basis for that proposition is that the judge, as a member of the judiciary, the judicial arm of the government of the State, is an office holder of the State. Hence the State ought to be liable in respect of acts done by a judge in the discharge of judicial office.

However, the Court offered an opinion on the topic. In its view, there was "... no good reason why the indemnity cannot be provided, leaving the conduct and control of the judicial review proceedings entirely in the hands of the judge concerned…"[12].

The Court refused the plaintiffs the costs orders sought in the proceedings. ■

5 p 39
6 p 39
7 p 40
8 p 42
9 High Court, Unreported, O'Neill J, 27th of March, 2009

10 [1999] 2 IR 160
11 p 25
12 pp 51-52

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Legal **The Bar Review** Update

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ADMINISTRATIVE LAW

Statutory Instruments

Agriculture, fisheries and food (delegation of ministerial functions) order 2009
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Agriculture, fisheries and food (delegation of ministerial functions) (no.2) order 2009
SI 190/2009

AGENCY

Library Acquisition

Christou, Richard
International agency and licensing agreements
5th edition
London: Thomson Sweet & Maxwell, 2008
C231

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Galway County Council v Samuel Kingston Construction Ltd

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Manorcastle Ltd v Commission for Aviation Regulation

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Air travel tax regulations 2009
SI 134/2009

BANKING

Article

Horan, Shelley
Bankjob
2009 (April) GLSI 20

Library Acquisition

Proctor, Charles
Goode on payment obligations in commercial and financial transactions
2nd edition
London: Sweet & Maxwell, 2009
N305

BANKRUPTCY

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Family law proceedings – Debt due on foot of order of court – Failure to comply

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Commission of investigation (child sexual abuse) (amendment) order 2009
SI 117/2009

COMPANY LAW

Article

Mansfield, Barry
Assessing the concerns of secured creditors in relation to the examinership process following re Birchport
2009 16 (4) CLP 80

Library Acquisitions

Davies, Stephen
Modern law of meetings
2nd ed
Bristol: Jordan Publishing, 2009
N263.9

Feeney, Michael
Taxation of companies 2009
13th ed
Haywards Heath: Tottel Publishing, 2009
M337.2.C5

CONFLICT OF LAWS

Library Acquisition

Ahern, John
The Rome II regulation on the law applicable to non-contractual obligations: a new international litigation regime
The Netherlands: Martinus Nijhoff Publishers, 2009
C2000

CONSTITUTIONAL LAW

Statute

Pre 1937 statute – Legislation amended after 1937 – Presumption of constitutionality – Double construction rule – *Jus tertii* - Criminal law – Sexual offences – Defence of mistake as to age – Consistency of similar offence previously undermined – Whether challenge premature – Whether construction of offence properly for trial court – Whether post-constitution amendment gave rise to presumption of constitutionality - *CC v Ireland* [2006] IESC 33 [2006] 4 IR 1, *GE v DPP* [2008] IESC 61 (Unrep, SC, 30/10/2008), *Chadwick v Fingal County Council* [2007] IESC 49 [2008] 3 IR 66, *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 and *ESB v Gormley* [1985] IR 129 applied; *Curtis v AG* [1985] IR 458, *Osmanovic v DPP* [2006] IESC 50 [2006] 3 IR 504, *Byrne v Grey* [1988] IR 31, *Cahill v Sutton* [1980] IR 269, *Norris v AG* [1984] IR 36, *A v Governor of Arbour Hill Prison* [2006] IESC 45 [2006] 4 IR 88, *Blanchfield v Hartnett* [2002] 3 IR 207, *McNulty v DPP* [2006] IEHC 74 (Unrep, Murphy J, 15/3/2006), *Re Equal Status Bill 1997* [1997] 2 IR 387, *State (Sheerin) v Kennedy* [1966] IR 379, *McDonald v Bord na gCon* [1965] IR 217, *Croke v Smith (No 2)* [1998] 1 IR 101, *Re Health (Amendment) (No 2) Bill 2004* [2005] IESC 7 [2005] 1 IR 188, *East Donegal Co-operative Livestock Mart Ltd v Attorney General* [1970] IR 317, *O'Brien v Keogh* [1972] IR 144, *In re Haughey* [1971] IR 217, *McMahon v Leahy* [1984] IR 525 and *Haughey v Moriarty* [1999] 3 IR 1 considered; *Kennedy v DPP* [2007] IEHC 3 (Unrep, MacMenamin J, 11/1/2007) and *Re Employment Equality Bill 1996* [1997] 2 IR 321 distinguished – Criminal Law Act 1997 (No 14), s 13 – Criminal Law Amendment Act 1935 (No 6), ss 1 and 2 – Constitution of Ireland 1937, arts 34.4.5 and 40.3.2 – Declaration that legislation inconsistent with Constitution refused (2007/657P – Murphy J – 19/12/2008) [2008] IEHC 427
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P (J) v Director of Public Prosecutions

Library Acquisitions

Gerangelos, Peter A
The separation of powers and legislative interference in judicial process: constitutional principles and limitations
Oxford: Hart Publishing Limited, 2007
M35

Tushnet, Mark
The constitution of the United States of America: a contextual analysis
Oxford: Hart Publishing, 2009
M31.U48

CONSUMER LAW

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District Court (consumer protection act 2007) rules 2009
SI 106/2009

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The formation of insurance contracts and the duty of insurers
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Defendants' costs in planning prosecutions
2009 IP & ELJ 7

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Failure to provide urine specimen –

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Signed by District Court clerk – Amendment of legislation permitting signing by clerk – Absence of reference to issuing of warrant by judge – Whether error on face of warrant – Whether defect sufficient to breach constitutional right – Whether document sufficient to constituted valid and lawful warrant for lawful detention – Deprivation of liberty – Necessity for additional recital regarding order of judge – *Simple Imports Ltd v Revenue Commissioners* [2000] 2 IR 243, *JOG v Governor of Cork Prison* [2007] 2 IR 203 and *State (McDonough) v Frawley* [1978] IR 131 considered – Constitution of Ireland, 1937, art 40.4.2° – Civil Law (Miscellaneous Provisions) Act 2008 (No 14), s 14 – Detention deemed unlawful and costs awarded to applicant (2008/1792SS - Peart J – 30/01/2009) [2009] IEHC 42
Macharia v Governor of Cloverhill Prison

Articles

O'Higgins, Michael P
Putting the chief justice on trial: recent developments in the law of prohibition: part 1
14(2) 2009 BR 5

Smith, Rebecca
Suspended sentences following the 2006 and 2007 Criminal Justice Acts
14(2) 2009 BR 32

Library Acquisition

Keijzer, N
The European arrest warrant in practice
Cambridge: Cambridge University Press, 2009
C214.E95

Statutory Instruments

Commission of investigation (child sexual abuse) (amendment) order 2009
SI 117/2009

District Court (criminal justice act 2006) rules 2009
SI 105/2009

Misuse of drugs act 1977 (controlled drugs) (declaration) order 2009
SI 121/2009

Misuse of drugs (amendment) (no.2) regulations 2009.
SI 122/2009

DAMAGES

Library Acquisitions

Biondi, Andrea
The right to damages in European law
London: Kluwer Law International, 2009
W86.Z8

Marshall, David
Compensation for stress at work
Bristol: Jordan Publishing, 2009
N198.5

DEFENCE FORCES

Statutory Instrument

Courts-martial (legal aid) (amendment) regulations 2009
SI 153/2009

EDUCATION

Article

Carrigan, Michael
Out of Africa

BR 4-2009.indd 68 03/07/2009 09:15:52

2009 (April) GLSI 38

Statutory Instrument

Education act 1998 (composition of National Council for Curriculum and Assessment) order 2009
SI 131/2009

ELECTIONS

Statutory Instrument

Local elections (forms) regulations 2009
SI 116/2009

EMPLOYMENT LAW

Dismissal

Interlocutory injunction – Chef – Contract – Offer of new contract – Refusal to sign – Clause seeking to remove entitlement to copyright in menus - Continuation of work on increased salary - Whether new contract not accepted – Unwillingness to follow policy – Allegation of lack of attendance – Allegation of failure to fulfil role – Work made by employee in course of employment – Principles applicable to grant of interlocutory injunction - Mandatory injunction seeking reinstatement pending determination of dispute – Right of appeal – Failure to produce authority regarding entitlement to copyright – Burden of proving copyright – Irretrievable breakdown of relationship – Imposing a contract of employment – Reasonable notice – Whether damages adequate remedy – Balance of convenience - *American Cyanamid Co v Ethicon Limited* [1975] AC 396, *Campus Oil Ltd v Minister for Energy (No 2)* [1983] IR 88, *Mahalingham v Health Service Executive* [2005] IEHC 185 (Unrep, SC, 4/10/2005*), Bergin v Galway Clinic* [2007] IEHC 186 (Unrep, Clarke J, 2/11/2007) and *Foley v The Post Office* [2000] ICR 1283 considered – Interlocutory relief refused (2008/10211P – McGovern J – 5/12/2008) [2008] IEHC 445
Doyle v Asilo Commercial Limited

Article

Cox, Neville Dr
Recent developments in the rules relating to workplace stress: the Supreme Court decision in Berber v Dunnes Stores
2008/9 3 (3) QRTL 17

Library Acquisitions

Byrne, Raymond
Safety, health and welfare at work law in Ireland
2nd edition
Cork: Nifast, 2009
N198.2.C5

Marshall, David
Compensation for stress at work
Bristol: Jordan Publishing, 2009
N198.5

EQUITY

Library Acquisition

Pettit, Philip H
Equity and the law of trusts
11th ed
Oxford: Oxford University Press, 2009
N210

EUROPEAN LAW

Articles

Abbott, Henry
The European Court of Justice and the protection of fundamental rights
2008 IJEL 79

Flynn, Brendan
Reaching the limits of law? An overview and assessment of 50 years of EU environmental law and policy
2008 IJEL 127

Gibbs, Nathan
The constitutional regime of European integration: the end-game or the end of the game?
2008 IJEL 35

Leal-Arcas, Rafael
50 years of trade policy: good enough or as good as it gets?
2008 IJEL 157

Nic Shuibhne, Niamh
The common market at 50
2008 IJEL 103

O Neachtain, Sean
The 50th anniversary of the Treaty of Rome - the growing power of the European parliament in Europe
2008 IJEL 19

Pech, Laurent
The fabulous destiny of the EC Treaty: from Treaty to Constitution to Treaty again?
2008 IJEL 49

Roche, Dick
50 years of the Treaty of Rome - Ireland's vision of European integration
2008 IJEL 7

Territt, Martin
50 years of the Treaty of Rome
2008 IJEL 13

Tonra, Ben
The European Union as a global actor
2008 IJEL 183

Walker, Neil
Europe at 50: a mid-life crisis? "Democratic deficit" and "sovereignty surplus"
2009 IJEL 23

Library Acquisition

Biondi, Andrea
The right to damages in European law
London: Kluwer Law International, 2009
W86.Z8

EXTRADITION

European Arrest Warrant

Correspondence – Minimum gravity - Whether facts in warrant gave rise to offence of making gain or causing loss by deception – Whether information failed to show dishonesty – Meaning to be given to word 'mislead' in warrant – Ordinary meaning – Whether use of word 'mislead' sufficient to include necessary element of dishonesty – *Minister for Justice v Dunkova* [2008] IEHC 156 (Unrep, Peart J, 30/5/2008) considered - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 6 - European Arrest Warrant Act 2003 (No 45), ss 5 and 13 – Surrender ordered (2008/94EXT – Peart J – 27/11/2008) [2008] IEHC 443
Minister for Justice, Equality and Law Reform v Tomella

European Arrest Warrant

Correspondence – Theft offences – Whether necessary ingredients for offences present – Forgery offence – Handing stolen goods offence – Offence of hiding driving licence – Whether correspondence to offence in State – Drugs related offences - Surrender for serving of sentence – Sentence imposed in respect of offence that corresponded and offence that did not – Whether sentence could be divided – Misuse of Drugs Act 1977 (No 12), s 15 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 4, 17 and 25 - European Arrest Warrant Act 2003 (No 45), s 13 – Surrender ordered (2008/74EXT – Peart J – 17/12/2008) [2008] IEHC 439
Minister for Justice, Equality and Law Reform v Nowakowski

BR 4-2009.indd 69 03/07/2009 09:15:53

Library Acquisition

Keijzer, N
The European arrest warrant in practice
Cambridge: Cambridge University Press, 2009
C214.E95

FAMILY LAW

Divorce

Ancillary relief – Children – Value of assets – Likely foreseeable income – Financial needs and responsibilities – Standard of living – Age of spouses – Duration of marriage – Whether physical or mental disability - Contributions – Accommodation needs – Necessity for proper provision for applicant and children of marriage – Family Law (Divorce) Act 1996 (No 33), ss 5 and 20 – Decree of divorce and orders for provision for applicant and children made (2006/86M – Sheehan J – 21/11/2008) [2008] IEHC 448
S (M) v S (P)

FISHERIES

Statutory Instrument

Control of fishing for salmon order 2009
SI 142/2009

FRAUD

Library Acquisition

MacDonald Eggers, Peter
Deceit - the lie of the law
London: Informa Law, 2009
M547.2

FREEDOM OF INFORMATION

Article

Byrne, Gerald
Private conduct and public interest: Zucker und Peitsche
2008/9 3 (3) QRTL 1

HEALTH

Statutory Instrument

Public health (tobacco) (product information) regulations 2009
SI 123/2009

HOUSING

Statutory Instrument

Housing (Local Authority loans) regulations 2009
SI 145/2009

HUMAN RIGHTS

Article

Abbott, Henry
The European Court of Justice and the protection of fundamental rights
2008 IJEL 79

Library Acquisition

Herne Hill, Lord Lester of
Human rights law and practice
3rd ed
London: LexisNexis, 2009
M201

IMMIGRATION

Asylum

Judicial review – Credibility – Adverse findings – Misunderstanding by respondent of applicant's account – One finding of lack of credibility thereby undermined – Appropriate test – Anxious scrutiny – Whether improper finding of adverse credibility severable – Whether finding of lack of credibility collateral to decision - *O'Keeffe v An Bord Pleanala* [1993] 1 IR 39, *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642, *BJN v Minister for Justice* [2008] IEHC 8 (Unrep, McCarthy J, 18/1/2008), *Mujiberehman Kamil v Refugee Appeals Tribunal* (Unrep, McCarthy J, 22/8/2008), *Mwiza v Refugee Appeals Tribunal* (Unrep, McCarthy J, 22/10/2008), *Kongue v Refugee Appeals Tribunal* (Unrep, McCarthy J, 29/10/2008) *GT v Refugee Appeals Tribunal* [2007] IEHC 297 (Unrep, Peart J, 27/7/2007) and *Sango v Refugee Appeals Tribunal* [2005] IEHC 395 (Unrep, Peart J, 24/11/2005) applied; *X v Refugee Appeals Tribunal* [2007] IEHC 422 (Unrep, Herbert J, 11/12/2007) distinguished – *Certiorari* granted, matter remitted to respondent (2006/643JR – McCarthy J – 28/11/2008) [2008] IEHC 406
R (R) v Refugee Appeals Tribunal

Asylum

Judicial review – Credibility – Irrationality – Whether respondent should have considered possibility of applicant's confusion – Whether necessary to put findings of incredibility to applicant – Whether failure to consider ethnicity and political affiliation – Whether UNHCR handbook envisaged applicant being given benefit of doubt - *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) and *Bujari v Refugee Appeals Tribunal* (Unrep, Finlay Geoghegan J, 7/5/2003) applied – Relief refused (2006/1072JR – McMahon J – 9/12/2008) [2008] IEHC 392
G (A) v Hurley

Asylum

Judicial review – Leave - *Certiorari* – Membership of social group – Refusal of refugee status – Forced marriage – Threats - Extension of time – Adverse credibility findings – Unsatisfactory explanation of arrival in State – Conclusion that fear of persecution not well founded – Whether conclusion that state protection could have been obtained irrational – Whether contrary to country of origin information – Whether failure to give sufficient consideration to adequacy of system of state protection – Standard of anxious scrutiny – Curial deference – Evidence of sanctions for forced marriages – National policy discouraging forced marriages – Adequacy of state protection – Evidence capable of supporting conclusion of tribunal – Failure to seek state protection – Whether decision of tribunal irrational or unfair – *Horvath v Secretary of State for Home Department* [2002] 3 All ER 577, *Vecevic v Minister for Justice* (Unrep, Finlay Geogeghan J, 8/10/2003), *Zhuchkova v Minister for Justice* [2004] IEHC 414 (Unrep, Clarke J, 24/11/2004), *VZ v Minister for Justice* [2002] 2 IR 135, *Camara v Minister for Justice* (Unrep, Kelly J, 26/7/2000), *JS v RAT* [2008] IEHC 245 (Unrep, Feeney J, 16/7/2008), *HO v RAT* [2007] IEGC 299 (Unrep, Hedigan J, 19/7/2007) and *OAA v Minister for Justice* [2007] IEHC 169 (Unrep, Feeney J, 9/2/2007) considered - Refugee Act 1996 (No 17), s 11 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2007/24JR – Edwards J – 25/11/2008) [2008] IEHC 425
O (V) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review - Leave – Credibility – Error of fact in country of origin information relied upon by respondent - *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *Olatunji v Refugee Appeals Tribunal* [2006] IEHC 113 (Unrep, Finlay Geoghegan J, 7/4/2006), *Ayaya v Minister*

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for Justice (Unrep, Finlay Geoghegan J, 2/5/2003), *Vidrashku v Minister for Justice* (Unrep, Finlay Geoghegan J, 17/10/2002), *Imoh v Refugee Appeals Tribunal* [2005] IEHC 220 (Unrep, Clarke J, 24/6/2005) and *Keagnene v Refugge Appeals Tribunal* [2007] IEHC 17 (Unrep, Herbert J, 31/1/2007) applied; *NK v Refugee Appeals Tribunal* [2004] IEHC 240, [2005] 4 IR 321, *AMT v Refugee Appeals Tribunal* [2004] IEHC 219, [2004] 2 IR 607, *R v Secretary of State, Ex Parte Adan* [1998] 2 All ER 453 considered – Leave granted (2006/902JR – McMahon J – 9/12/2008) [2008] IEHC 390
M (LL) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review - Leave - Credibility – Irrationality – Misunderstanding of applicant's account – Material error of fact - Appropriate standard – Anxious scrutiny – Curial deference – Whether error – Whether incumbent on respondent to specifically state that it was rejecting explanations of applicant and why – Whether permissible for respondent to foreclose on possibility of further persecutory risk notwithstanding doubts as to credibility - *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *Zhuchova v Refugee Appeals Tribunal* [2004] IEHC 414, (Unrep, Clarke J, 26/11/2004), *Da Silveira v Refugee Appeals Tribunal* [2005] IEHC 436, (Unrep, Peart J, 9/7/2005) applied; *O'Keeffe v An Bord Pleanala* [1993] 1 IR 39 considered – Leave granted (2007/338JR – Edwards J – 18/12/2008) [2008] IEHC 424
Y (G) v Refugee Appeals Tribunal

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Judicial review – Leave – credibility - Report of commissioner – Recommendation that well-founded fear of persecution not established – Finding that protection should be sought in second country of available nationality – Lodgment of prior application in another state party – Citizenship – Whether investigation and report infringed right to fair procedure – Reliance on documentary information not disclosed to applicant – Failure to await arrival of originals of documents – Criticism of legibility of copies – Application for originals – Request for postponement of negative recommendation – Whether failure to put matters to applicant – Failure to alert applicant to significance being attached to possibility of dual nationality – Whether substantial grounds for review – Availability of alternative remedy by way of statutory appeal – Appeal pending - Principles applicable to exercise of discretion to grant leave – Necessity to show fundamental flaw or illegality in report such that appeal an inadequate remedy – Absence of oral hearing on appeal – Whether potential unfairness could be cured by appeal – Discrepancy between significance of dual nationality finding to report and absence of significance during investigation – Whether failure to await receipt of originals serious violation of right to fair procedures – *Stefan v Minister for Justice* [2001] 4 IR 203, *VZ v Minister for Justice* [2002] 2 IR 135, *N v Minister for Justice* [2008] IEHC 308 (Unrep, Hedigan J, 9/10/2008), *Moyosola v Refugee Appeals Commissioner* [2005] IEHC 218 (Unrep, Clarke J, 10/5/2005) and *O(F) v Minister for Justice* [2007] IEHC 237 (Unrep, McGovern J, 16/5/2007) considered; *D(A) v Refugee Appeals Commissioner* [2009] IEHC 77 (Unrep, Cooke J, 27/1/2009) distinguished – Refugee Act 1996 (No 17), s 13 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Leave granted (2008/262JR – Cooke J – 27/1/2009) [2009] IEHC 64
M (J) v Refugee Appeals Commissioner

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Sun Shum v Minister for Justice [1986] ILRM 593, *Fitzpatrick v Minister for Justice* [2005] IEHC 9 (Unrep, Ryan J, 26/01/2005) considered - Refugee Act 1996 (No 17), ss 11 and 17(7) – Immigration Act 1999 (No 22), s 3 – Criminal Justice (UN Convention Against Torture) Act 2000 (No 11), s 4 - European Convention on Human Rights Act 2003 (No 20), s 3 - *European Communities (Eligibility for Protection) Regulations 2006* (SI 518/2006) – Council Directive 2005/85/EC, art 20 and recital 15 – Geneva Convention relating to the Status of Refugees 1951 Art 33 – Leave refused (2006/133JR – Hedigan J – 10/12/2008) [2008] IEHC 388
I (L) v Minister for Justice, Equality and Law Reform

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Judicial review - Leave – Substantial grounds – Credibility – Country of origin information – Applicant previously refused asylum in another State – Applicant precluded from oral appeal – Attorney General and Human Rights Commission not on notice of challenge - Whether denial of right to full appeal unconstitutional – Whether denial of right to full appeal contrary to European Convention on Human Rights – Whether issues arising capable of being dealt with by way of written appeal – Whether respondent had discretion to allow oral appeal - Whether applicant should be restricted in advancing arguments - *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *Z v Minister for Justice* [2002] 2 IR 135, *S v Refugee Applications Commissioner* [2008] IEHC 238 (Unrep, McMahon J, 11/7/2008) and *Camara v Minister for Justice* (Unrep, Kelly J, 26/7/2000) applied; *Mamatkulov v Turkey* (2005) 41 EHRR 25 considered; *Simo v Minister for Justice* [2007] IEHC 305 (Unrep, Edwards J, 04/07/2007) and *M v Refugee Applications Commissioner* [2005] IEHC 218 (Unrep, Clarke J, 23/6/2005) distinguished - Refugee Act 1996 (No 17), ss 13 and 11B - European Convention on Human Rights, art 6 – Leave refused (2006/957JR – Birmingham J – 8/12/2008) [2008] IEHC 399
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Judicial review - Leave - Humanitarian leave – Human sacrifice – Country of origin information – Refusal of refugee status –Criticism of report to minister – Material furnished to minister – Whether failure to engage with country of origin information – Whether obligation to give reasons for acceptance of some parts of information and rejection of other parts – Prohibition on refoulement as legal right – Whether fair procedure required minister to give reasons – Whether open to court to go behind reasoning - Whether special or changed circumstances – Decision of Supreme Court – Whether decision of High Court had effect on nature of right against refoulement - Whether substantial grounds for granting leave – Anxious scrutiny – *GK v Minister for Justice* [2002] 1 IR 418, *Baby O v Minister for Justice* [2002] 1 IR 169, *N v Minister for Justice* [2008] IEHC 107 (Unrep, Charleton J, 24/4/2008), *I v Minister for Justice* [2008] IEHC 23 (Unrep, Feeney J, 30/1/2008), *Kouaype v Minister for Justice* [2005] IEHC 380 (Unrep, Feeney J, 9/11/2005), *Kozhukarov v Minister for Justice* [2005] IEHC 424 (Unrep, Clarke J, 14/12/2005), *Dada v Minister for Justice* [2006] IEHC 140 (Unrep, O'Neill J, 3/5/2006), *GO v Minister for Justice* [2008] IEHC 190 (Unrep, Birmingham J, 19/6/2008), *O'Keeffe v An Bord Pleanala* [1993] 1 IR 39 and *N v Minister for Justice* [2008] IEHC 8 (Unrep, McCarthy J, 18/1/2008) considered - Refugee Act 1996 (No 17), s 5 – Leave refused (2008/344JR – McCarthy J – 28/11/2008) [2008] IEHC 405
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A (A) v Minister for Justice

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I (EP) v Minister for Justice, Equality and Law Reform

INSURANCE

Article

Ahern, Deirdre
The formation of insurance contracts and the duty of insurers
2009 16 (4) CLP 84

INTERNATIONAL LAW

Article

Samad, Mahmud
Demise of the forum conveniens? Life after Owusu and the High Court's decision in Goshaw
2009 ILT 86

Library Acquisition

Christou, Richard
International agency and licensing agreements
5th edition
London: Thomson Sweet & Maxwell, 2008
C231

LEGAL PROFESSION

Article

Flood, Deborah
Lands of opportunity?
2009 (March) GLSI 18 (part 1)
2009 (April) GLSI 24 (part 2)

Statutory Instrument

Solicitors acts, 1954 to 2008 (apprenticeship and education) (amendment) regulations 2009
SI 144/2009

LEGAL SYSTEMS

Library Acquisitions

Picard, Etienne
Introduction to French law
London: Kluwer Law International, 2008
L1.F72

Zekoll, Joachim
Introduction to German law
2nd edition
London: Kluwer Law International, 2005
L29.1

MEDIATION

Article

N398.4.C5
Feeney, Conor
Mediation in commercial disputes
14(2) 2009 BR 37

MEDICAL LAW

Library Acquisitions

Gueret, Maurice
Irish medical directory 2009-2010:: the directory of healthcare
Dublin: Irish Medical Directory, 2009

Maclean, Alasdair
Autonomy, informed consent and medical law: a relational challenge
Cambridge: Cambridge University Press, 2009
N185.122

MENTAL HEALTH

Involuntary patient

Mental disorder – Mental health tribunal – Review of detention – Detention after order revoked – Independent psychiatric consultant – Best interests of patient – Whether decision of mental health tribunal immune to contradiction – Whether period should elapse after decision of mental health tribunal before patient reassessed – Whether material change in condition of patient required to reverse decision of mental health tribunal – Whether consultant providing second opinion should be independent of approved centre – Whether consultant providing second opinion should be independent of patient's medical history – Whether detention lawful – Mental Health Act 2001 (No 25), ss 3, 4, 9, 17, 18, 23, 24 & 28 – Detention lawful (2009/81SS – Hedigan J – 6/2/2009) [2009] IEHC 47
C (C) v Clinical Director of St Patricks Hospital

Article

Nolan, Niall
Case law on the mental health act 2001: part 2
14 (2) 2009 BR 42

PLANNING & ENVIRONMENTAL LAW

Injunction

Further development – Breach of planning conditions alleged – Applicant in separate tenancy dispute with respondents – Whether applicant acting *bona fide* – Whether breaches of planning conditions – Whether minor or technical breaches permissible – Whether developer should be allowed margin of appreciation in relation to minor or technical breaches –

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Whether appropriate to take into account hardship to respondent and community - *White v McInerney Construction Limited* [1995] 1 ILRM 374, *Mountbrook Homes Ltd v Oldcourt Developments Ltd* [2005] IEHC 171 (Unrep, Peart J, 22/4/2005) and *Conroy v Craddock* [2007] IEHC 336 (Unrep, Dunne J, 31/07/2007) considered - Planning and Development Act 2000 (No 30), s 160 – Relief refused (2008/74MCA – Edwards J – 31/7/2008) [2008] IEHC 422
Dandean Ltd v Talebury Properties Ltd

Planning permission

Development - Quarry – Environmental impact assessment - Regulation of quarrying activities – Register of quarrying information –Alleged failure to require submission of adequate objective evidence as to pre-1964 status of quarry – Dispute regarding length of quarrying – Canons of construction – Size of quarry – Entitlement to compensation – *Locus standi* – Onus of proof – Whether sufficient interest – Perceived damage to home and life – Potential detrimental financial impact on value of property – Unreasonableness test – Whether decision flew in face of fundamental reason – *State (Abenglen Properties) v Corporation of Dublin* [1984] IR 381, *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84 - Planning and Development Act 2000 (No 30), ss 50, 216 and 261 – Application dismissed (2006/680JR – Hanna J – 19/12/2008) [2008] IEHC 449
Pearce v Westmeath County Council

Planning permission

Explosives – "Recipient competent authority" - Refusal of respondent to allow further use of explosives – Belief of respondent that use of explosives contrary to grant of planning permission - Conditions of planning permission – Construction of planning permission - Environmental impact statement – Whether planning permission allowed blasting – Whether respondent acted *ultra vires* – Whether respondent obliged to hear oral evidence before making decision – Whether respondent obliged to put communication from local authority in relation to planning permission to applicant prior to refusing permission to use explosives – Whether blasting would constitute intensification of permitted user – Whether respondent estopped from refusing further use of explosives having previously allowed use - *Readymix (Éire) Ltd v Dublin County Council* (Unrep, Supreme Court, 30/7/1974), *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1961] 2 AER 46, *FP v Minister for Justice* [2002] 1 IR 164 and *In re EJSI Investments Ltd* [1986] IR 750 applied; *Patterson v Murphy* [1978] ILRM 85, *Doupe v Limerick Corporation* [1981] ILRM 456, *Davy v Attorney General* [2008] IEHC 64 [2008] 2 ILRM 507 and *R v Cornwall County Council, Ex Parte Hardy* [2001] Env LR 25 considered; *Hempstown Stone Quarries v Superintendant Neville* [2005] IEHC 86 (Unrep, O'Neill J, 15/3/2005) distinguished – Planning and Development Act 2000 (No 30), ss 2, 154, 160, 173 & 261 – Mines and Quarries Act 1965 (No 7), ss 66 & 96 – Quarries Explosives Regulations (SI 237/1971, SI 1/1976 & SI 357/1995) - European Community (Placing on the Market and Supervision of Explosives) Regulations (SI 115/1995), regs 2, 8 and 9 – Council Directive 93/15/EEC – Relief refused (2008/157JR – Herbert J – 19/12/2008) [2008] IEHC 428
MF Quirke & Sons v Maher

Pollution

Certiorari – Conviction for litter pollution offence – Publican – Obligation to keep adjacent public place free of litter – Cigarette ends – Refusal of district judge to have regard to evidence of care taken - Finding that facts proved – Whether judge acted *ultra vires* in refusing to consider evidence of reasonable steps taken – Whether defence of reasonable care available – Whether strict liability offence – Delay – Principles applicable to delay – Conduct of parties – Good reason for adopting procedure – Absence of prejudice – *Locus standi* – Absence of reasonable care – Inability to rely on defence of reasonable care if available – Whether offence of strict or absolute liability – Entitlement to know legal elements of offence prior to appeal – Whether halfway house offence – Whether offence falls into category of public welfare offence – Interpretation of statute – Natural and ordinary meaning of words – Classes of offence - Provisions providing for prior or *ex post facto* opportunity to be heard – Offences of strict liability - Regulatory offence – Purpose of penalty – Enforcement of social control – Relevant factors – Moral gravity of offence – Social stigma – Penalty – Ease or difficulty of discharging duty – Whether absolute liability would encourage obedience – Ease or difficulty of enforcing law - Social consequences of non-compliance – *Desideratum* to be achieved – Possibility of receiving evidence of reasonable care on question of penalty without undermining enforcement – Difficulty in challenging evidence given in mitigation – *R v City of Sault St Marie* (1978) 85 DLR 161, *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267, *De Roiste v Minister for Defence* [2001] 1 IR 190, *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301, *Connolly v DPP* [2003] 4 IR 121, *Manning v DPP* [2004] IEHC 325, (Unrep, O'Leary J, 29/7/2004), *CC v Ireland* [2006] IESC 33, [2006] 4 IR 1, *Cahill v Sutton* [1980] IR 269, *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88, *Toppin v Marcus* [1908] 2 IR 428, *McAdam v Dublin United Tramways Company Limited* [1929] IR 327, *Sherras v De Rutzen* [1895] 1 QB 918, *Davies v Harvey* LR 9 QB 433, *Maguire v Shannon Regional Fisheries Board* [1994] 3 IR 580, *Gammon (Hong Kong) Limited v Attorney General of Hong Kong* [1985] AC 1, *Director of Corporate Enforcement v Gannon* [2002] 4 IR 429, *DPP v Deane* (Unrep, O Caoimh J, 3/3/2003), *Alphacell Ltd v Woodward* [1972] AC 824, *R v Warner* [1969] 2 AC 256 and *Sweet v Parsley* [1970] AC 132 considered – Litter Pollution Act 1997 (No 12), s 6 – Rules of the Superior Courts 1986 (SI 15/1986), O 84 - Relief refused (2006/832JR – McCarthy J – 17/10/2008) [2008] IEHC 446
Reilly v Judge Patwell

Articles

Flynn, Brendan
Reaching the limits of law? An overview and assessment of 50 years of EU environmental law and policy
2008 IJEL 127

O'Connor, John
Strategic infrastructure: the operation of the new procedures
2009 IP & ELJ 11

Ui Bhraonain, Sarah
Defendants' costs in planning prosecutions
2009 IP & ELJ 7

Whittaker, Alice
The waste framework directive: is it energy efficient?
2009 IP & ELJ 3

Library Acquisition

De La Rue, Colin M
Shipping and the environment: law and practice
2nd edition
London: Informa Law, 2009
N332

Statutory Instrument

Planning and development (regional planning guidelines) regulations 2009
SI 100/2009

BR 4-2009.indd 74 03/07/2009 09:15:54

PRACTICE & PROCEDURE

Contempt

In camera rule - Breach – Unintentional - Criminal Assets Bureau proceedings - Information relating to Criminal Assets Bureau application published by respondents in newspaper and in book – Court order that no information relating to application be published – Respondents not informed of court order – Penalty for contempt - Whether contempt shown – Whether contempt criminal or civil - Whether defence to show respondents not made aware of order – *MP v AP* [1996] 1 IR 144, *In re Kennedy and McCann* [1976] 1 IR 382, *The State (Keegan) v De Burca* [1993] 1 IR 223, *X County Council v A* [1985] 1 All ER 53 considered - Proceeds of Crime Act 1996 (No 30), ss 2 & 8 – Respondents found guilty of criminal contempt (2007/12CAB – McGovern J – 19/12/2008) [2008] IEHC 421
M (J) v Platinum Investment and Development Ltd

Costs

Costs following event – Liquidator – Company not insolvent at time of liquidation – Doubt as to whether insurance policy covered personal injury claims – Failure of directors to provide all necessary detail – Failure of liquidator to engage with directors as to question of solvency - Report provided to Director of Corporate Enforcement notwithstanding that company solvent – Director of Corporate Enforcement directed liquidator to seek to restrict directors – Application to restrict directors unsuccessful as company not insolvent – Whether liquidator liable for costs when obliged by Director of Corporate Enforcement to seek restriction – *Murphy v Murphy* [2003] 4 IR 451 applied; *Re USIT Ltd* [2005] IEHC 285 (Unrep, Peart J, 10/08/2005) and *Stafford v Beggs* [2006] IEHC 88 (Unrep, O'Leary J, 13/03/2006) considered - Company Law Enforcement Act 2001 (No 28), s 56 – Companies Act 1990 (No 33), ss 149 & 150 - Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 1 – No order as to costs made (2007/41COS – Finlay Geoghegan J – 19/12/2008) [2008] IEHC 423
Re Kranks Komer Ltd: McCarthy v Gibbons

Costs

Costs following event – Unsuccessful application - Housing – Failure of respondents to reply in meaningful way to correspondence from applicant's solicitors prior to initiation of proceedings – Failure of applicants to accept offer made on eve of hearing - Whether special circumstances warranted departure from normal rule - *Dunne v Minister for the Environment* [2007] IESC 60 [2008] 2 IR 775 considered – Applicants awarded half costs (2007/465JR – Peart J – 18/12/2008) [2008] IEHC 434
Dooley v Killarney Town Council

Execution

Court order – Inherent jurisdiction - Order for costs – Proceedings arising out of mining agreements and licences - Motion seeking dismissal of application – Taxation process – Whether application should be dismissed on grounds of delay – Relevant legal principles – Discretionary nature of order – Reasons for lapse of time since order – Whether good reason for lapse of time – Counterbalancing allegations of prejudice – Lengthy nature of litigation – Stay on order – Appeal – Inability to levy execution where stay on order – Certificates of taxation – Delay jurisprudence – *Smyth v Tunney* [2004] 2 ILRM 537 and *Fitzgerald v Gowrie Park Utilities Society Ltd* [1966] IR 662 considered - *Stephens v Paul Flynn Limited* [2005] IEHC 148 (Unrep, Clarke J, 28/4/2005), *Barry v Ireland* (ECHR, 15/12/2005), *McMullen v Ireland* (ECHR) 29/7/2004) and *Desmond v MGN Ltd* [2008] IEHC 56 (Unrep, SC, 15/10/2008) 56 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 42 – Relief granted and motion dismissed (1986/10898P – Dunne J – 19/12/2008) [2008] IEHC 437
Bula Ltd v Tara Mines Ltd

Library Acquisition

Reid, Colette
Law Society of Ireland
Law Society of Ireland manual: civil litigation
2nd ed
Oxford: Oxford University Press, 2009
L90.C5

Statutory Instruments

Circuit Court rules (service) 2009
SI 132/2009

Circuit court rules (trial) (No.2) 2009
SI 94/2009

District Court (forms) rules 2009
SI 92/2009

PROPERTY

Library Acquisition

Dray, Martin
Barnsley's land options
5th edition
London: Thomson Sweet & Maxwell, 2009
N74

PRIVACY

Article

Byrne, Gerald
Private conduct and public interest: Zucker und Peitsche
2008/9 3 (3) QRTL 1

ROAD TRAFFIC

Articles

Deane, Vincent
Road to nowhere
2009 (April) GLSI 28

Ryan, Ray
Contributory negligence: drink driving and inexperience cases examined
Ryan, Des
2008/9 3 (3) QRTL 6

Statutory Instruments

Road traffic act 2002 (commencement of certain provisions) (penalty points) order 2009
SI 149/2009

Road traffic act 2006 (part commencement section 16) (penalty points) order 2009
SI 148/2009

Road traffic acts 1961 to 2007 (fixed charge offences) (prescribed notice and document) regulations 2009
SI 113/2009

Road traffic (driving instructor licensing) regulations 2009
SI 146/2009

Road traffic (licensing of drivers) (amendment) regulations 2009
SI 130/2009

Road traffic (specialised vehicle permits) regulations 2009
SI 147/2009

SHIPPING

Library Acquisition

De La Rue, Colin M
Shipping and the environment: law and practice
2nd edition
London: Information Law, 2009
N332

BR 4-2009.indd 75 03/07/2009 09:15:54

SOLICITORS

Articles

Carrigan, Michael
Out of Africa
2009 (April) GLSI 38

Darby, Nicola
Seeking closure
2009 (April) GLSI 35

Flood, Deborah
Lands of opportunity?
2009 (March) GLSI 18 (part 1)
2009 (April) GLSI 24 (part 2)

STATUTORY INTERPRETATION

Library Acquisition

Bennion, Francis A R
Understanding common law legislation: drafting and interpretation
Oxford: Oxford University Press, 2009
L35

SUCCESSION

Disclaimer

Avoidance - Fraudulent disclaimer - Judgment previously obtained – Disclaimers of interest in estate executed by defendants – Plaintiff seeking declarations that disclaimers of interest in estate void – Remedial constructive trust sought in alternative – Stop order granted *ex parte* in original proceedings – *Locus standi* - Whether disclaimers valid - Whether disclaimers made with intent to delay, hinder or defraud plaintiff – Whether stop order should have been granted *ex parte* - *Re Scott (deceased)* [1975] 2 All ER 1033, *Gleeson v Feehan* [1997] 1 ILRM 522, *McQuillan v Maguire* [1996] 1 ILRM 394, *Holbird v Anderson* (1793) 5 TR 235, *Alton v Harrison* (1869) LR 4 Ch 622, *Mallott v Wilson* [1903] 2 Ch 494, *Re Stratton's Deed of Disclaimer, Stratton v IRC* [1957] 2 All ER 594, *Townson v Tickell* (1819) 3 B & Ald 31, *Re Paradise Motor Company Ltd* [1968] 1 WLR 1125, *Gregg v Bromley* [1912] 3 KB 474, *Re Parsons; Parsons v AG* [1942] 2 All ER 496, *In Re Moroney* (1887) 21 LR Ir 27 considered; *Rose v Greer* [1945] IR 503 distinguished - Rules of the Superior Courts 1986 (SI 15/1986), O 46, r 14, O 84, r 23 & O15, r 37 – Succession Act 1965 (No 27), ss 10, 13, 67, 68, 69, 70, 71, 72, 72A & 73 - Conveyancing Act (Ireland) 1634 (10 Chas 1, c 3), ss 10 and 14 – Bankruptcy (Ireland) Amendment Act 1872 (35 &36 Vic, c 58), s 21 – Declarations granted (2006/1784P – Laffoy J – 8/12/2008) [2008] IEHC 389
MIBI v Stanbridge

Library Acquisition

Kerridge, Roger
Parry and Kerridge: the law of succession
12th edition
London: Thomson Sweet & Maxwell, 2009
N120

TAXATION

Library Acquisitions

Buckley, Michael
Capital tax acts 2009
Haywards Heath: Tottel Publishing, 2009
M335.C5.Z14

Comyn, Amanda-Jayne
Taxation in the Republic of Ireland 2009
Haywards Heath: Tottel Publishing, 2009
M335.C5

Feeney, Michael
Taxation of companies 2009
13th ed
Haywards Heath: Tottel Publishing, 2009
M337.2.C5

Statutory Instruments

Finance act 2004 (section 91) (deferred surrender to central fund) order 2009
SI 90/2009

Finance (no. 2) act 2008 (commencement of section 37) order 2009
SI 91/2009

TOBACCO

Statutory Instrument

Public health (tobacco) (product information) regulations 2009
SI 123/2009

TORT

Articles

Cox, Neville Dr
Recent developments in the rules relating to workplace stress: the Supreme Court decision in Berber v Dunnes Stores
2008/9 3 (3) QRTL 17

McNicholas, Nicholas
Holiday claims and proving local safety standards: a difference in approach between the Irish and the English courts?
2008/9 3 (3) QRTL 12

Library Acquisitions

Byrne, Raymond
Safety, health and welfare at work law in Ireland
2nd edition
Cork: Nifast, 2009
N198.2.C5

Frost, Martyn
Risk and negligence in wills, estates, and trusts
Oxford: Oxford University Press, 2009
N125.5

TOURISM

Article

McNicholas, Nicholas
Holiday claims and proving local safety standards: a difference in approach between the Irish and the English courts?
2008/9 3 (3) QRTL 12

TRANSPORT

Statutory Instrument

Taxi regulation act 2003 (licensing of dispatch operators) regulations 2009
SI 138/2009

TRUSTS

Library Acquisition

Pettit, Philip H
Equity and the law of trusts
11th ed
Oxford: Oxford University Press, 2009
N210

WATER

Statutory Instruments

Water services act 2007 (commencement) order 2009
SI 139/2009

Water services act 2007 (waste water

BR 4-2009.indd 76 03/07/2009 09:15:54

complaint notice form) regulations 2009
SI 141/2009

WILLS

Library Acquisition

Frost, Martyn
Risk and negligence in wills, estates, and trusts
Oxford: Oxford University Press, 2009
N125.5

AT A GLANCE

COURT RULES

Circuit Court rules (service) 2009
SI 132/2009

Circuit court rules (trial) (No.2) 2009
SI 94/2009

District Court (consumer protection act 2007) rules 2009
SI 106/2009

District Court (criminal justice act 2006) rules 2009
SI 105/2009

District Court (forms) rules 2009
SI 92/2009

ACTS OF THE OIREACHTAS AS AT 23RD JUNE 2009 (30TH DÁIL & 23RD SEANAD)

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

1/2009 Anglo Irish Bank Corporation Act 2009
Signed 21/01/2009

2/2009 Residential Tenancies (Amendment) Act 2009
Signed 28/01/2009

3/2009 Gas (Amendment) Act 2009
Signed 17/02/2009

4/2009 Electoral Amendment Act 2009
Signed 24/02/2009

5/2009 Financial Emergency Measures in the Public Interest Act 2009
Signed 27/02/2009

6/2009 Charities Act 2009
Signed 28/02/2009

7/2009 Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Act 2009
Signed 05/03/2009

8/2009 Legal Services Ombudsman Act 2009
Signed 10/03/2009

9/2009 Electoral (Amendment) (No. 2) Act 2009
Signed 25/03/2009

10/2009 Social Welfare and Pensions Act 2009
Signed 29/04/2009

11/2009 Industrial Development Act 2009
Signed 19/05/2009

BILLS OF THE OIREACHTAS AS AT 23RD JUNE 2009 (30TH DÁIL & 23RD SEANAD)

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

[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.

Adoption Bill 2009
Bill 2/2009
Report Stage – Seanad *(Initiated in Seanad)*

Air Navigation and Transport (Prevention of Extraordinary Rendition) Bill 2008
Bill 59/2008
2nd Stage – Dáil **[pmb]** *Deputy Michael D. Higgins*

Anglo Irish Bank Corporation (No. 2) Bill 2009
Bill 6/2009
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Arbitration Bill 2008
Bill 33/2008
Committee Stage – Dáil

Aviation (Preclearance) Bill 2009
Bill 35/2009
Committee Stage – Seanad *(Initiated in Seanad)*

Broadband Infrastructure Bill 2008
Bill 8/2008
2nd Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Broadcasting Bill 2008
Bill 29/2008
Report and Final Stages– Dáil *(Initiated in Seanad)*

Central Bank and Financial Services Authority of Ireland
(Protection of Debtors) Bill 2009
Bill 20/2009
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Civil Liability (Amendment) Bill 2008
Bill 46/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Civil Liability (Amendment) (No. 2) Bill 2008
Bill 50/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Civil Liability (Good Samaritans and Volunteers) Bill 2009 as initiated
Bill 38/2009
1st Stage – Dáil **[pmb]** *Deputies Billy Timmins and Charles Flanagan*

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 Change Bill 2009
Bill 4/2009
2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

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

Companies (Amendment Bill) 2009
Bill 14/2009
Report and Final Stage - Seanad *(Initiated in Seanad)*

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

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

Corporate Governance (Codes of Practice) Bill 2009
Bill 22/2009
2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

Credit Institutions (Financial Support) (Amendment) Bill 2009
Bill 12/2009
2nd Stage – Seanad **[pmb]** *Senators Paul Coghlan, Maurice Cummins and Frances Fitzgerald*

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

Criminal Justice (Miscellaneous Provisions) Bill 2009
Bill 29/2009
2nd Stage - Dáil

Criminal Justice (Surveillance) Bill 2009
Bill 16/2009
Committee Stage - Dáil

Criminal Justice (Violent Crime Prevention) Bill 2008
Bill 58/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Criminal Law (Admissibility of Evidence) Bill 2008
Bill 39/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Criminal Procedure Bill 2009
Bill 31/2009
Committee Stage – Seanad *(Initiated in Seanad)*

Data Protection (Disclosure) (Amendment) Bill 2008
Bill 47/2008
2nd Stage - Dáil **[pmb]** *Deputy Simon Coveney*

Defamation Bill 2006
Bill 43/2006
Awaiting Committee – Dáil *(Initiated in Seanad)*

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

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

Electoral (Gender Parity) Bill 2009
Bill 10/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Employment Law Compliance Bill 2008
Bill 18/2008
Awaiting Committee – Dáil

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)*

European Parliament (Irish Constituency Members) Bill 2009
Bill 36/2009
2nd Stage – Seanad *(Initiated in Seanad)*

Finance Bill 2009
Bill 24/2009
Committee Stage - Seanad

Financial Emergency Measures in the Public Interest (Reviews of Commercial Rents) Bill 2009
Bill 39/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Financial Measures (Miscellaneous Provisions) Bill 2009
Bill 32/2009
Order for 2nd Stage - Dáil

Financial Services (Deposit Guarantee Scheme) Bill 2009
Bill 23/2009
Committee Stage - Dáil

Fines Bill 2009
Bill 18/2009
Committee Stage - Dáil

Fines Bill 2007
Bill 4/2007
Order for 2nd 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*

Harbours (Amendment) Bill 2008
Bill 42/2008
Committee Stage – Dáil *(Initiated in Seanad)*

Health (Miscellaneous Provisions) Bill 2009
Bill 11/2009
Committee Stage - Dáil

Health Insurance (Miscellaneous Provisions) Bill 2008
Bill 67/2008
Committee Stage - Dáil

Housing (Miscellaneous Provisions) Bill 2008
Bill 41/2008
2nd Stage – Dáil *(Initiated in Seanad)*

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

Human Body Organs and Human Tissue Bill 2008
Bill 43/2008
2nd Stage – Seanad **[pmb]** *Senator Feargal Quinn*

Human Rights Commission (Amendment) Bill 2008
Bill 61/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Immigration, Residence and Protection Bill 2008
Bill 2/2008

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Order for Report – Dáil

Industrial Relations (Protection of Employment) (Amendment) Bill 2009
Bill 7/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

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*

Land and Conveyancing Law Reform Bill 2006
Bill 31/2006
Order for Report – Dáil *(Initiated in Seanad)*

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

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

Local Government (Planning and Development) (Amendment) Bill 2009
Bill 21/2009
2nd Stage – Dáil **[pmb]** *Deputy Martin Ferris*

Local Government (Rates) (Amendment) Bill 2009
Bill 40/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik*

Mental Health (Involuntary Procedures) (Amendment) Bill 2008
Bill 36/2008
2nd Stage – Seanad **[pmb]** *Senators Déirdre de Búrca, David Norris and Dan Boyle*

Merchant Shipping Bill 2009
Bill 25/2009
Committee Stage - Dáil

Ministers and Secretaries (Ministers of State Bill) 2009
Bill 19/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Alan Shatter*

Multi-Unit Developments Bill 2009
Bill 32/2009
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

National Archives (Amendment) Bill 2009
Bill 13/2009
2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

National Cultural Institutions (Amendment) Bill 2008
Bill 66/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Alex White*

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

Nursing Homes Support Scheme Bill 2008
Bill 48/2008
Committee Stage – Seanad

Offences Against the State Acts Repeal Bill 2008
Bill 37/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

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*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
Order for Report – Dáil

Planning and Development (Amendment) Bill 2009
Bill 34/2009
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Planning and Development (Amendment) Bill 2008
Bill 49/2008
2nd Stage – Dáil **[pmb]** *Deputy Joe Costello*

Planning and Development (Enforcement Proceedings) Bill 2008
Bill 63/2008
2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

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

Privacy Bill 2006
Bill 44/2006
Order for Second Stage – Seanad *(Initiated in Seanad)*

Prohibition of Female Genital Mutilation Bill 2009
Bill 30/2009
2nd Stage – Dáil **[pmb]** *Deputy Jan Sullivan*

Property Services (Regulation) Bill 2009
Bill 28/2009
Committee Stage – Seanad *(Initiated in Seanad)*

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

Public Appointments Transparency Bill 2008
Bill 44/2008
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

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

Residential Tenancies (Amendment) (No. 2) Bill 2009
Bill 15/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Sea Fisheries and Maritime Jurisdiction (Fixed Penalty Notice) (Amendment) Bill 2009
Bill 27/2009
2nd Stage – Dáil **[pmb]** *Deputy Jim O'Keffee*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Small Claims (Protection of Small Businesses) Bill 2009
Bill 26/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Spent Convictions Bill 2007
Bill 48/2007
Awaiting Committee – Dáil **[pmb]** *Deputy Barry Andrews*

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Statute Law Revision Bill 2009
Bill 33/2009
Order for 2nd Stage - Dáil

Stem-Cell Research (Protection of Human Embyros) Bill 2008
Bill 60/2008
2nd Stage – Seanad **[pmb]** *Senators Rónán Mullen, Jim Walsh and John Hanafin*

Student Support Bill 2008
Bill 6/2008
Awaiting Committee – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
Order for Report – Dáil

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

Twenty-eighth Amendment of the Constitution Bill 2008
Bill 14/2008
Passed by Dáil Éireann

Twenty-eighth Amendment of the Constitution Bill 2007 (Rights of Child)
Bill 14/2007
Order for 2nd Stage - Dáil

Victims' Rights Bill 2008
Bill 1/2008
2nd Stage – Dáil **[pmb]** *Deputies Alan Shatter and Charles Flanagan*

Vocational Education (Primary Education) Bill 2008
Bill 51/2008
2nd Stage – Dáil **[pmb]** *Deputy Ruairí Quinn*

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

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

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O'Keeffe v. Hickey – An Expansion of vicarious liability?

CONOR FEENEY BL

Introduction

The recent Supreme Court decision in *O'Keeffe v. Hickey*[1] highlights the lack of clarity in relation to the limits of vicarious liability in Irish law and suggests Ireland may soon follow other common law jurisdictions in adopting a broader test.

The proceedings were brought by a woman who was sexually abused by a teacher in the national school she attended in 1973. She obtained judgment in default of defence against the teacher. The plaintiff also sued the State, claiming negligence for failing to put in place appropriate measures and procedures to protect her from the abuse inflicted by her teacher. In addition, the plaintiff claimed that the State was vicariously liable for the actions of the teacher and the school manager, who had failed to take action following a complaint by a mother of another abused child.

The High Court dismissed the plaintiff's claim and she appealed to the Supreme Court on the issue of vicarious liability. While the appeal was ultimately dismissed on the basis that the State could not be vicariously liable as the system of national school education did not create an employer-employee relationship between the State and the teacher or school manager, the Supreme Court judgments reveal very differing views within the court on the wider issue of the test for vicarious liability.[2] As acknowledged by Hardiman J., the analysis of this issue, while not part of the *ratio* of the decision, deserves careful consideration:-

> "There is no doubt… that the organs of government of the State; executive, parliamentary and judicial, will at no remote date be confronted by these arguments again, possibly in very aggravated circumstances. It is therefore important that all who exercise any of the powers of government of the State should consider and reflect upon what has been urged."[3]

The basic common law test

The Supreme Court judgments agree that the traditional test for vicarious liability is the "Salmond test"[4], which provides as follows:

> "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.
>
> But a master… is liable even for the acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them."

Where the judgments of the court in *O'Keeffe* diverge is on the question of whether this test has been expanded in recent times. To answer this question, the judgments look to jurisprudence in other common law jurisdictions, in particular Canada and the United Kingdom.[5]

The Canadian position – *Bazley v. Curry*

In all three judgments in *O'Keeffe,* there is much mention of the Canadian case of *Bazley v. Curry*[6] which involved the sexual abuse of a child in a residential care facility for emotionally disturbed children run by a non-profit organisation. In finding the organisation vicariously liable for the act of its employee, the Supreme Court of Canada adopted a two stage approach to the second branch of the Salmond test. First, the court looked at whether there were precedents which would determine the issue of vicarious liability. Not having found any decisive precedents, the court looked at the matter "in light of broader policy rationales behind strict liability", namely "fair compensation" and "deterrence". McLachlin J. stated:-

> "The fundamental question is whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires."[7]

1 [2008] IESC 72, (Unreported, Supreme Court, 19th December, 2008).

2 Hardiman and Fennelly JJ. gave judgments holding that such a relationship did not exist, with Murray C.J. concurring on this issue. Denham J. concurred with Fennelly J. on the issue. Geoghegan J. dissented, finding that "there was quite sufficient connection between the State and the creation of the risk to render the State liable".

3 At p. 45 of Hardiman J.'s judgment.

4 As first enunciated in Salmond's *The Law of Torts* (1st ed., 1907), p. 83.

5 Reference is also made to Australian jurisprudence, in particular the joint cases of *New South Wales v. Lepore; Samin v. Queensland; Rich v. Queensland* (2003) 212 C.L.R. 511; 195 A.L.R. 412; A.L.J.R. 558. For an excellent analysis of the Canadian, British and Australian jurisprudence, as well the pre-*O'Keeffe* Irish caselaw, see Desmond Ryan, *Making Connections: New Approaches to Vicarious Liability in Comparative Perspective* (2008) 15(1) D.U.L.J. 41.

6 (1999) 174 D.L.R. (4th) 45.

7 At para. 41.

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This passage reflects a shift in theory as regards the basis of the concept of vicarious liability towards the notions of risk creation and enterprise liability. This shift is explored in the following passage from McMahon & Binchy's *Law of Torts*[8]:-

> "Historically speaking this example of strict liability can be traced to earliest times although its modern form in England dates from the end of the seventeenth century. It survived the 'no liability without fault' era, to some extent as an anomaly, but nowadays with the trend towards no-fault concepts it can be sustained by more modern justifications such as risk creation and enterprise liability. In other words, the concept of vicarious liability has dovetailed nicely with the more modern ideas that the person who creates the risk, or the enterprise which benefits from the activity causing the damage, should bear the loss. Such persons or enterprises are in a good position to absorb and distribute the loss by price controls and through proper liability insurance. Liability in these cases should, it is felt, follow the 'deep pocket'."[9]

The UK position – *Lister v. Hesley Hall Ltd.*

There is also much focus in *O'Keeffe* on the United Kingdom case of *Lister v. Hesley Hall Ltd.*[10], in which the warden of a school boarding house sexually abused boys in his care. The House of Lords, relying on *Bazley*, found that there was a sufficient connection between the work the warden was employed to do and the acts of abuse that he had committed to find his employers vicariously liable. The court, however, did not follow *Bazley* as regards the basis for arriving at the close connection test. Rather than focus on the concept of risk creation, Lord Steyn found that the "germ" of the close connection test was, in fact, the Salmond test. That judge went on to seek support in the concepts of fairness and justice, stating that the question was "whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable".[11]

Judgment of Hardiman J.

The shift in theory articulated by McMahon and Binchy is heavily criticised by Hardiman J. in *O'Keeffe*[12], particularly in relation to claims against the State. Hardiman J. makes it clear that he is "not to be taken as agreeing with it, even in the commercial context". He then goes on to reject the notion "that the State, in performing its constitutional duty to provide for free primary education is creating a risk". Furthermore, he does not "consider that the State is to be equated to an 'enterprise' which 'benefits' from the provision of free primary education".

Hardiman J. goes on to cite the case of *Moynihan v. Moynihan*[13], as representing the worst example of this "stretching" of the law to provide for compensation.[14] In that case, a child was injured in her grandmother's house when she pulled a pot of tea down on herself, the tea having been made by the child's aunt who had left the room to answer the phone. The child successfully claimed that her grandmother was vicariously liable for the actions of her aunt. Hardiman J. points out that it is "inescapable that the action was taken in the hope of assessing an insurance policy, perhaps the grandmother's household insurance". While this targeting of the "deep pocket" may be done for the "humane reason of helping an injured party to recover compensation", it has "a very considerable social cost". Hardiman J. warns that, while many might be happy to see this approach leading to compensation for an innocent party from the "public purse or a vast insurance company", it might not be so palatable where the paying party is "an ordinary householder who may not always be insured" or "a charity or benevolent association of some kind".

Given these views, it is hardly surprising that Hardiman J. is far from enthusiastic about the developments in other common law jurisdictions. Hardiman J. finds that the *Bazley* approach is "utterly useless as a predictive tool… a modern version of the 'Chancellor's foot', an old legal metaphor for an uncontrolled highly subjective discretion".[15] He further holds that imposing liability on a blameless employer "because policy considerations of compensation and deterrence may justify the imposition of no fault liability" amounts to "the redressing of one wrong by the creation of another".

Hardiman J. also criticises *Lister* for being "guided by a perceived need to find for the plaintiffs rather than 'any discernible sense of direction'".[16] He finds that the House of Lords confused personal and vicarious liability and that the judgment of Lord Hobhouse indicates that the decision was, in fact, founded on the employers' "non-delegable duty to take all reasonable steps to safeguard" the boys in the boarding house. Indeed, Hardiman J. submits that previous decisions of the Irish and United Kingdom courts finding employers vicariously liable for acts which they have specifically prohibited, and even criminal acts, also suffered from this conflation of vicarious liability with personal liability.

In this regard, he makes reference to the Irish case of *Johnson & Johnson (Ir.) Ltd. v. C.P. Security Ltd*,[17] in which a security firm, which the plaintiff had engaged to protect its property, was held vicariously liable for the theft of the plaintiff's property by one of its security officers, and the United Kingdom case of *Morris v. C.W. Martin & Sons Ltd*,[18] in which a company that had accepted a fur stole for cleaning was vicariously liable when it was stolen by an employee. He finds that the "decisive feature" in *Morris*, rather than being vicarious liability, was, in fact, a finding of "a non-delegable duty in the [employer] as bailee of the item stolen". He further finds that the decision in *Johnson* was founded on a similar

8 (3rd edition, Butterworths, 2000).
9 Para. 43.02
10 [2002] 1 A.C. 215.
11 At para. 28.
12 See pp. 22 and 23 of Hardiman J.'s judgment.
13 [1975] I.R. 192.
14 See pp. 24 to 26 of Hardiman J.'s judgment.
15 At p. 49 of Hardiman J.'s judgment.
16 At p. 51 of Hardiman J.'s judgment.
17 [1985] I.R. 362.
18 [1966] 1 Q.B. 716.

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duty "arising from the fact that the dishonest agent had been specifically employed to guard the premises in question".

As for the close connection test, Hardiman J. cannot see how it arose from "either the common law position… or from the methods usually employed by the common law". He rejects the notion, articulated by Lord Steyn in *Lister*, that the Salmond test was the "germ" of the close connection test:

> "Properly understood, there is no rational connection between [the Salmond test] and the Canadian one of 'close connection', or a ground of vicarious liability, except that the word 'connection' is used in both. But Professor Salmond's 'explanation' as Lord Steyn regards it, requires that the close connection be with acts which the employer has authorised and be such that what is actually done can be regarded as a mode, though an improper and unauthorised one, of doing what the employer has authorised. At the very least, the Canadian Supreme Court wholly dispensed with the second part of this test, requiring that what was in fact done must be a mode of doing what was authorised."[19]

Hardiman J. stresses the potential for a "chilling effect" if the expanded basis of vicarious liability becomes law in this jurisdiction, and laments "the decline in recent decades of the number of people performing voluntary activities on a local community basis".[20] He concludes that the law of vicarious liability is still governed by the Salmond test, and that any expansion of the law should be implemented through legislation and should be clearer and more readily understandable than the close connection test.

Judgment of Fennelly J.

By contrast, Fennelly J., with whom Murray C.J. concurs, adopts *Bazley* and *Lister* as "a development of the common law of vicarious liability" enabling liability to be imposed "on employers for wrongful criminal acts of employees and thus for acts going beyond any theory of authority or of a merely wrongful mode of doing the employer's work".[21] Fennelly J. acknowledges that, while *Bazley* is founded on policy considerations and *Lister* employs the incremental tradition of the common law, they share a common test: "the closeness of the connection between the abuse and the work which the employee was engaged to carry out".[22] He favours the *Lister* reasoning, laying emphasis on "justice, precedent and practicality"[23], but also clearly draws on the notion of enterprise liability:

> "The close-connection test is both well established by authority and practical in its content. It is essentially focussed on the facts of the situation. It does not, in principle, exclude vicarious liability for criminal acts or for acts which are intrinsically of a type which would not be authorised by the employer. The law regards it as fair and just to impose liability on the employer rather than to let the loss fall on the injured party. To do otherwise would be to impose the loss on the entirely innocent party who has engaged the employer to perform the service. The employer is, of course, also innocent, but he has, at least, engaged the dishonest servant and has disappointed the expectations of the person to whom he has undertaken to provide the service."[24]

Fennelly J. adopts a broader interpretation of the Irish and British jurisprudence than Hardiman J., suggesting that there was already a movement, pre-*Lister*, to bring the second part of the Salmond test in line with the close connection test:-

> "The second leg of the Salmond test has served the law well. It asks whether the act complained of is an unauthorised mode, adopted by the servant, of performing the work of the employer. Strict logic might suggest that fraud on the client (as in *Lloyd v Grace, Smith and Co.*[25]) or theft of the customer's goods (as in *Morris v C.W. Martin & Sons Ltd*) could not be so considered. The law adopts a solution which is not strictly logical in this sense. Clearly theft of the customer's property is not, in the ordinary sense, a mode of performing a service for that customer. The law asks, however, whether the act of the servant is 'closely connected' to the employer's work. It says that, where two parties (the cheated customer and the employer of the dishonest servant) are innocent, it is just, when assessing whether the servant was acting within the scope of his employment, that the employer, who employed the dishonest servant, rather than the customer should bear the loss."[26]

As regards, the *Moynihan* decision, Fennelly J. acknowledges, as does Hardiman J., that the court was not invited to overrule it, and opts to express no other opinion on the case, other than to point out that it was "based on highly unusual facts". The courts negative view of this precedent is further evident from the judgment of Geoghegan J. which describes it as "a *sui generis* decision if ever there was one". It should be noted that Geoghegan J., while not analysing the jurisprudence to any great extent, also favours the close connection test, relying on *Bazley* and *Lister*.

Implications of a change in the law

It is clear that there are markedly differing views on the bench on this issue and it is impossible to be certain which way the court will go if and when the issue comes up for decision. However, given that the court in *O'Keeffe* favoured adoption of the close connection test by three to one[27], there would appear to be a very real possibility that this will soon be part

19 At p. 59 of Hardiman J.'s judgment.
20 At p. 71 of Hardiman J.'s judgment.
21 At para. 54 of Fennelly J.'s judgment.
22 At para. 54 of Fennelly J.'s judgment.
23 See para. 50 of Fennelly J.'s judgment.
24 At para. 63 of Fennelly J.'s judgment.
25 [1912] A.C. 716.
26 At para. 41 of Fennelly J.'s judgment.
27 Denham J. did not give a judgment and did not state that she concurred with any of the other judgments on this issue.

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of Irish law. In the area of sexual abuse in residential or educational institutions, the adoption of the close connection test could have enormous implications. While closeness of connection is a rather nebulous concept, and it is difficult to say how it will apply in any particular case, it is safe to say that it would have a broader application across the board than the Salmond test.

If the close connection test is to be adopted in this jurisdiction, it is important that it is properly applied. As set out above, the test asks "whether the wrongful act is sufficiently related to conduct authorised by the employer to justify the imposition of vicarious liability". This involves analysing the services rendered by the employee for the employer, as well as the circumstances of the employment, and asking whether those services and circumstances were of a kind that meant there was an increased risk of the employee committing a wrong of the kind that occurred. In this regard, it is worth noting the following non-exhaustive list of potential factors, provided by McLachlin J. in *Bazley*:-

> "(a) the opportunity that the enterprise afforded the employee to abuse his or her power;
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
> (d) the extent of power conferred on the employee in relation to the victim;
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power."[28]

On the facts of *Bazley*, McLachlin J. found that "the opportunity for intimate private control and the parental relationship and power required by the terms of employment created the special environment that nurtured and brought to fruition [the perpetrator]'s sexual abuse".[29] This can be contrasted with the judgment of the Canadian Supreme Court in *Jacobi v. Griffiths*[30], given on the same day. That case involved a "boys' and girls' club", the primary objective of which was "to provide behaviour guidance and to promote the health, social, educational, vocational and character development of boys and girls".[31] The court distinguished *Bazley* as the abuse in *Jacobi* had been committed at the perpetrator's private residence while he entertained children one-on one outside working hours, something which was not part of the club programme which consisted of group activities in the presence of volunteers and other members.

Similar reasoning was evident in this jurisdiction in *Delahunty v. South Eastern Health Board*[32]. In that case a visitor to an orphanage run by a religious order was sexually assaulted by the housemaster of the orphanage. Having been referred to *Bazley* and *Lister*, O'Higgins J. in the High Court avoided directly answering the question of whether those cases represented the law in Ireland. However, he went on to find that even if they did, given that the assault was on a visitor, as opposed to a resident, "the 'strong connection' argument does not avail the plaintiff in this case… No such relationship as that existing in [Bazley] or even in [*Jacobi*] existed".[33] Fennelly J. in *O'Keeffe* cites this as an "excellent example of practical and balanced application of the test".[34]

Binnie J. in *Jacobi* highlights the trap that a court can fall into if it merely satisfies itself that the employment of the perpetrator provided him with the opportunity, through a number of steps, to commit the wrong:-

> "I accept that 'but for' the opportunity created by Griffiths' employment at the Club, it is unlikely these assaults would have occurred in the way that they did. As pointed out by McLachlin J. in [*Bazley*] (at para. 37), however, the relevant nexus, if it exists, is between the job-related conduct at step one and Griffiths' criminal assault at step eight. It is not enough to postulate a series of steps each of which might not have happened "but for" the previous steps. Where, as here, the chain of events constitutes independent initiatives on the part of the employee for his personal gratification, the ultimate misconduct is too remote from the employer's enterprise to justify 'no fault' liability. Direct liability would attach, of course, if the employer could be found derelict in respect of any of its own responsibilities towards these children. However, this appeal has been argued on the assumption that there is no such fault on the part of the employer."[35]

With the greatest of respect, it is submitted that Geoghegan J., in his dissenting judgment in *O'Keeffe*, may fall into this trap. Geoghegan J. finds that "there was quite sufficient connection between the State and the creation of the risk to render the State liable".[36] Having found that the State was the employer of the teacher, he seems satisfied with merely finding a connection between the employer and the creation of the opportunity for abuse. He does not analyse the specific duties of the teacher's role and the circumstances of his employment in the school. This might be seen as a watered down, "but for"-type test, which will inevitably lead to a finding of vicarious liability once an employment relationship is established.

If the close connection test is to be adopted in this jurisdiction, it is important that the true focus of the test is maintained as, if the court resorts to a simple causative analysis or stretches the limits of the test in an effort to ensure compensation for a deserving plaintiff, the floodgates may open on the scope of vicarious liability. The warnings of Hardiman J. should be borne in mind and the development of the test in other common law jurisdictions should be monitored. ■

28 At para. 41.
29 At para. 58.
30 [1999] 174 D.L.R. (4th) 71.
31 At para. 32.
32 [2003] 4 I.R. 361.
33 At p. 377.
34 At para. 63 of Fennelly J.'s judgment.
35 At para. 81.
36 At p. 30 of Geoghegan J.'s judgment.

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MIBI's Right of recovery: *MIBI v Stanbridge*

Stephen O'Donovan BL

Introduction

The recent High Court decision of Laffoy J. in the case of *Motor Insurers Bureau of Ireland v Stanbridge & Ors.*[1] has raised an important point in relation to the Motor Insurers Bureau of Ireland's (herein after the Bureau) right to recover against co-defendants, particularly in circumstances where those co-defendants have been unjustly enriched at the Bureau's expense. While unjust enrichment is usually positive, where a party obtains a benefit to which they are not entitled, it can also be negative, whereby a party avoids having to pay out when they ought to have been liable. In this case the second and third named defendants had attempted to avoid acquiring assets due to them as part of their inheritance by signing disclaimers with the intent of defeating the Bureau's claim. The Court applied the provisions of the Statute of Fraudulent Conveyances 1634 to the disclaimers in assessing the Bureau's right to recover.

The MIBI

The Bureau was set up by agreement between the Irish Government and the Irish motor insurance companies. The first agreement being in 1955 with subsequent agreements in 1964, 1988 and 2004. It is the function of the Bureau to compensate innocent victims of accidents caused by uninsured and unidentified vehicles. This paper will focus solely on situations of uninsured drivers as was the situation in the instant case.

In most cases, the Bureau calls on the uninsured to sign a 'mandate form' authorising it to deal with the case on their behalf. Where this is done, paragraph D of the form stipulates that the Bureau has a right to recover any sums paid out. In circumstances where the mandate is not signed, where the uninsured does not co-operate with the Bureau and where judgement in default of appearance or of defence is granted, the Bureau can seek to have the benefit of that judgement assigned to it upon settlement of the claim[2]. In most cases the uninsured co-defendant will not be a mark for those damages, however, where the uninsured subsequently comes into funds, the Bureau can, on foot of the assigned judgements, pursue them for any compensation it was obliged to pay out.

This right of recovery allows the Bureau to prevent the unjust enrichment of co-defendants who avoid having to pay compensation to the victims of their actions by virtue of the fact that they have insufficient assets to meet the claim at the time the matter is compromised and settled.

Background to *Motor Insurers Bureau of Ireland v Stanbridge & Ors*

The facts of the case were as follows, Catherine Stanbridge (the deceased) was the wife of the second named defendant and the mother of the first, third and fourth defendants. She suffered serious injuries on 12th April 1991, when in a motor accident while a passenger in a car driven by the second defendant and owned by the third defendant. At the time of the accident, there was no valid insurance in place for the vehicle.

Before her death, proceedings were initiated on her behalf entitled "*Catherine Stanbridge (a person of unsound mind not so found), suing by her sister and next friend, Olive Barry, plaintiff and Austin Stanbridge, Lorraine Stanbridge and the Motor Insurers Bureau of Ireland, defendants*" (Record No. 1993/7354P) for damages for personal injuries as a result of the negligence and breach of duty, including breach of Statutory Duty against the first and second defendants. Neither of these parties entered an appearance to the proceedings and judgement in default of appearance was granted against them by Johnson J. on 27th June 1994. The matter was listed for hearing to assess damages on 7th November 2000 when the deceased's claim was compromised by the Bureau in the amount of £917,000.00 with costs. The Court further provided that:

> "as a term of the settlement between the Plaintiff and the 3rd named Defendant approves of the assignment to the said third named Defendant of the benefit of the Judgments obtained by the Plaintiff herein as against the First and Second named Defendants on 27th day of June, 1994".

Catherine Stanbridge was admitted to wardship on 19th September, 2001 and died intestate on 9th August, 2005. She was survived by her husband and three children. By virtue of the provisions of s.67 of the Succession Act 1965 (the 1965 Act)[3], the second defendant became entitled to two thirds share of her estate with the three children entitled to one ninth share each. The deceased's only asset at her death was the amount standing to her credit in Court, the sum of €1.064 million. Upon hearing of the death, the Bureau, on 25th August 2005, applied for and got an order pursuant to Order 46 rule 14 of the Rules of the Superior Courts[4]

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1 [2008] IEHC 389: unreported, High Court, Laffoy J., 8th December 2008.

2 Clause 3.11 of the 2004 Agreement and Clause 3(8) of the 1988 Agreement.

3 Section 67 of the 1965 Act mandates that where the intestate dies leaving spouse and issue:

> The surviving spouse "shall take" two thirds and the issue, if all in equal degree of relationship to the intestate, the remaining one third in equal shares.

4 Rules of the Superior Courts Order 46 rule 14 provides as follows:

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stopping payment out or other disposition of the funds standing in Court. By disclaimers dated 14th October 2005 both the second and third defendants each disclaimed "all benefit to which I may be entitled on the death intestate" of the deceased. These would have the effect of allowing the first and fourth defendants to inherit one half each of the deceased's estate.

The Bureau brought a motion seeking an order that the balance of the sums paid into Court in the 1993 proceedings be paid out to the Bureau. This motion and the proceedings were heard and dealt with together by Laffoy J.

The Proceedings

The Bureau initiated proceedings seeking to invalidate the disclaimers executed by the second and third defendants disclaiming their share of the deceased's estate upon her death intestate. The primary reliefs sought by the Bureau in those proceedings were declarations (i) that the disclaimers "purportedly" executed by the second defendant and the third defendant were executed with the intention of delaying, hindering, defrauding and defeating the claim, rights and entitlements of the Bureau and (ii) that the purported disclaimers constituted a fraudulent conveyance, disposition or preference, and that the estate of the deceased should be administered as if they did not exist.

Section 10 of the Statute of Fraudulent Conveyances 1634 (the 1634 Act) declares that certain transactions in relation to land and goods and chattels made "to the end, purpose and intent to delay, hinder or defraud creditors and others" as against any person prejudiced shall be "clearly and utterly void, and of none effect". It was the Bureau's position that the disclaimers signed by the second and third defendants were transactions of the type to which section 10 applies and that they were made with intent to defraud the Bureau.

It was the position of the defendants that a person cannot be forced to take an estate against his will and may disclaim or renounce it per the well cited dictum of Abbot C.J. in *Townson v Tickell*.[5] The defendants relied heavily on s. 72A of the 1965 Act in support of their submission that the disclaimers are not void by virtue of s. 10 of the Act of 1634. Section 72A was inserted by s. 6 of the Family Law (Miscellaneous Provisions) Act 1997, and provides that where an disclaimed after the passing of the *Family Law (Miscellaneous Provisions) Act 1997* (otherwise than under section 73 of this Act), the estate or part, as the case may be, shall be distributed in accordance with this Part –

> (a) as if the person disclaiming had died immediately before the death of the intestate, and
> (b) if that person is not the spouse or a direct lineal ancestor of the intestate, as if that person had died without leaving issue".

Laffoy J. was of the opinion that this reliance was misplaced. It was her view that section 72A merely dealt with the consequences of an effective disclaimer in the case of intestacy while laying down where the disclaimed property should go.

In her Judgement, Laffoy J. was satisfied that prior to the execution of the disclaimers each of the second defendant and the third defendant had a benefit or right and each deprived himself or herself of that benefit or right on executing the relevant disclaimer. It was this act, which deprived the creditors of the second defendant and the third defendant of recourse to assets which would otherwise have been available, that brought the disclaimers within section 10.

In finding that while the fraud had not been proved as a fact but that it was the necessary or probable result of the disclaimers. Laffoy J. relied on the decision of the full Court of Appeal in Ireland in *Re. Maroney*[6] in which the issue was whether it was an act of Bankruptcy for a debtor to make a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof. On the interpretation of section 10 of the Act of 1634, Palles C.B. stated:

> "One conveyance, for instance, may be executed with the express intent and object in mind of the party to defeat and delay creditors, and from such an intent, the law presumes the conveyance to be fraudulent, and it does not require or allow such fraud to be deduced as an inference of fact. *In other cases, no such intention actually exists in the mind of the grantor, but the necessary or probable result of his denuding himself of the property included in the conveyance, for the consideration, and under the circumstances actually existing, is to defeat or delay creditors, and in such a case, … the intent is, as a matter of law, assumed from the necessary or probable consequences of the act done;* (my emphasis) and in this case also, the conveyance, in point of law, and without any inference of fact being drawn, is fraudulent within the statute.".[7]

A second ground was raised by the Bureau in relation to there being a remedial constructive trust in the Bureau's favour if the Court found that the disclaimers were not voidable under section 10, however as they were found to be void, the alternative argument did not arise.

Conclusion

As a result of the above decision, the Bureau has established its' right to recover from co-defendants who seek to avoid acquiring assets that will subsequently become due to the Bureau. In applying the Statute of Fraudulent Conveyances to the disclaimers, the High Court has prevented the unjust enrichment of uninsured parties against whom judgements were assigned for the benefit of the Bureau. ■

Any person having any derivative interest (whether by way of assignment or charge or *lien* or otherwise) in any funds or securities standing in Court (or directed to be brought into Court) may apply to the Court for an order (hereinafter called a "stop order") to stay the transfer, sale, payment out or other disposition of the funds or securities without notice to the applicant, and the Court on being satisfied that it is just and equitable to grant the relief sought to the applicant may make a stop order.

5 (1819) 3 B. & Ald. 31

6 (1887) 21 L.R. Ir. 27

7 IBID at page 61

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DNA Profiles and Recent ECHR Caselaw

Sonya Donnelly BL

S. and Marper v the United Kingdom[1] is a recent decision from the European Court of Human Rights which holds that the indefinite retention of DNA samples from persons who remain innocent before the law is an unacceptable invasion of a person's right to privacy.

The first applicant, S, was 11 years old when he was charged with attempted robbery. The second applicant, Michael Marper, was charged with harassment. Both had fingerprint and DNA samples taken. Criminal proceedings against them were terminated by an acquittal and were discontinued respectively. Both applicants asked for their fingerprints and DNA samples to be destroyed but this was refused by the authorities as the information had been stored on the basis of a law authorising its retention without limit of time.

The applicants applied for judicial review of the police decision not to destroy. The House of Lords found that there had been no violation of Article 8 (right to respect for private and family life) of the ECHR. The applicants complained to the ECtHR under articles 8(1) and 14 (prohibition of discrimination) of the ECHR. They considered that the very retention of the material concerning them was in breach of the right to respect for private life, and that the breach was aggravated by the fact that the information was actively being used in criminal investigations. The Government submitted that it was of vital importance that law enforcement agencies took full advantage of available techniques of modern technology and forensic science in the prevention, investigation and detection of crime for the interests of society generally. They considered that the mere retention of fingerprints, DNA profiles and samples for the limited use permitted under the legislation did not fall within the ambit of the right to respect for private life. They emphasised that the permitted extent of the use of the material was clearly and expressly limited by the legislation, the technological processes of DNA profiling and the nature of the DNA profile extracted. Further it stressed the benefits to the criminal justice system were enormous, not only permitting the detection of the guilty but eliminating the innocent and correcting and preventing miscarriages of justice.

The Court held unanimously that the retention constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society. The court concluded that there had been a violation of art.8 in this case and that the retention of DNA and fingerprints was not justifiable under Art 8(2).

In its decision the Court accepted that the retention of fingerprint and DNA information pursued a legitimate purpose, namely the detection, and therefore, prevention of crime. The interests of the individuals concerned and the community as a whole in protecting personal data, including fingerprint and DNA information, could be outweighed by the legitimate interest in the prevention of crime (the court referred to art.9 of the Data Protection Convention). However, the intrinsically private character of this information required the court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned.

The court distinguished between the retention of fingerprints and the retention of cellular samples and DNA profiles in view of the stronger potential for future use of the personal information contained in the latter. Cellular samples contained much sensitive information about an individual, including information about his or her health and a unique genetic code. The court reiterated that, in the context of future usage and storage of this personal information, it was essential to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards.

As regards, more particularly, cellular samples, the court noted that most of the Contracting States allowed these materials to be taken in criminal proceedings only from individuals suspected of having committed offences of a certain minimum gravity. In the great majority of the Contracting States with functioning DNA databases, samples and DNA profiles derived from those samples were required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge. In conclusion, the court found that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, failed to strike a fair balance between the competing public and private interests, and that the respondent State had overstepped any acceptable margin of appreciation in this regard.

In an Irish context the "General Scheme" of the Criminal Justice (Forensic Sampling and Evidence) Bill 2007 aims to establish a DNA database in Ireland and provides for their indefinite retention. In its examination of the General Scheme, the Irish Human Rights Commission has recommended that "removal and destruction of a suspect's sample and profile should occur as soon as practicable once legal proceedings have been discontinued or concluded and the person has been discharged or acquitted". This is in line with recommendations made by the Law Reform Commission. The focus is now on the Government to look to other European states so that it can put forward a scheme for retention that fulfils the basic requirements for proportionality. ■

1 (Application nos. 30562/04 and 30566/04) The Grand Chamber of the European Court of Human Rights (ECtHR), December 4, 2008

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All of our Basques in one exit (*aka* the 2009 Bar Soccer Trip)

Conor Bowman BL

In a shaded square just off a narrow street in an ancient corner of the Old Town in the heart of San Sebastian, lies a dusty bookstore with quirky opening hours, and half-hearted moth-eaten drapes which separate the front of the premises from the sitting room where the last remaining first edition of *The Etiquette of Scrabble* is housed in a glass case. To describe this city as the Holy Grail, for people who play that excellent game, would be to render a savage disservice to the noble art of the Disservice.

But it is here that our story begins. As cannon roared, and the Renaissance ploughed on beneath the hot airborne conveyances of death, members of the Irish Bar first landed on the beaches of this fabulous place. After the ravages of the massacre that had resulted from the dispute about the Rule against Perpetuities on the Midland Circuit, Spain must have seemed like heaven. The first settlers here were the forefathers of the Three Mothers; a trio of sopranos from Drogheda who would go on to represent Ireland at the Eurovision and the Band of the 9th Panzer Division at the Nuremburg trials for *Germany's Got Talent???*

Little wonder then to see the broad smiles on the faces of the locals as the team of 2009 touched down, fresh from the dizzy depths of the European Football Facilitation Championship in Budapest. The rules of that competition outlaw the scoring of goals, so that games are never *won* or *lost* (to use outmoded triumphalist terminology) but rather a mediator arbitrates *a shared outcome of facilitated mutual respect*!!!!

From the unfulfilled swimming pool to the mysterious balconies, the Hotel Costa Vasca is a monument to the success of Spanish architecture in the 14th century. It was to this bastion of unworkable key-cards -just across from where Xavier Alonso went to play-school- that the team bedded down to prepare for the triangular tournament- on a rectangular pitch- which had been organised by circular from the shaded square.

Their supporters too had arrived in numbers. A parade of luggage-luggers lugged luggage into the elevators and unpacked their trunks for the truncated week. This was to be no pukefest of swirling Michelin stars in the porcelain, no trawl through the casinos and nightclubs until one dropped (or slipped) to the floor. No, here were a bunch of comrades on the Camino de SantRonaldo, footsoldiers in the battle, dedicated to the task and to the team. That at least was the theory.

The sad reality was that there were more players on the team bus than there were supporters. When we arrived in Santander for the match, the chronic imbalance in our numbers meant that the team were shown up into the stands while the rest of the party were directed to the dressing room! An intervention by video link from a restaurant in the hills near San Sebastian (two hundred kilometres away and an hour behind) finally resolved the impasse. Two local police cars, which had been sent to the stadium, were able to revert swiftly to their alter ego roles as taxis. The team played tremendously well and in adverse rostering conditions. They were more than well worth supporting!

Off the pitch there was a lot of action too, it seems fair to say. The confusion over room numbers and keys helped enormously. There were unruly Italians to sort out, pianos to be closed, trips into late-night/ early-morning discotheques, generous sharing of resources and of course the by now legendary and obligatory intellectual combat played out on the gritty grid of the Travel-Scrabble board. Years ago, duels would have been fought with shouts of, "*Pistols for two and breakfast for one!*" but of course it's all much more civilised now. Now the weapons are words.

And so, as the glass case gathers dust behind the drapes in the shop in the square off a street in a corner of the Old Town, the summer seeps in as the lawyers fly North for the summer to the land where hurling and judicial review are the national sports. As the melodic echoes of an angel -singing an Otis Redding song- resound down the untarnished streets of San Sebastian, the faint whisper of history can also be heard; telling the world to put the cannons away because the war is over but the future is just beginning. ■

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