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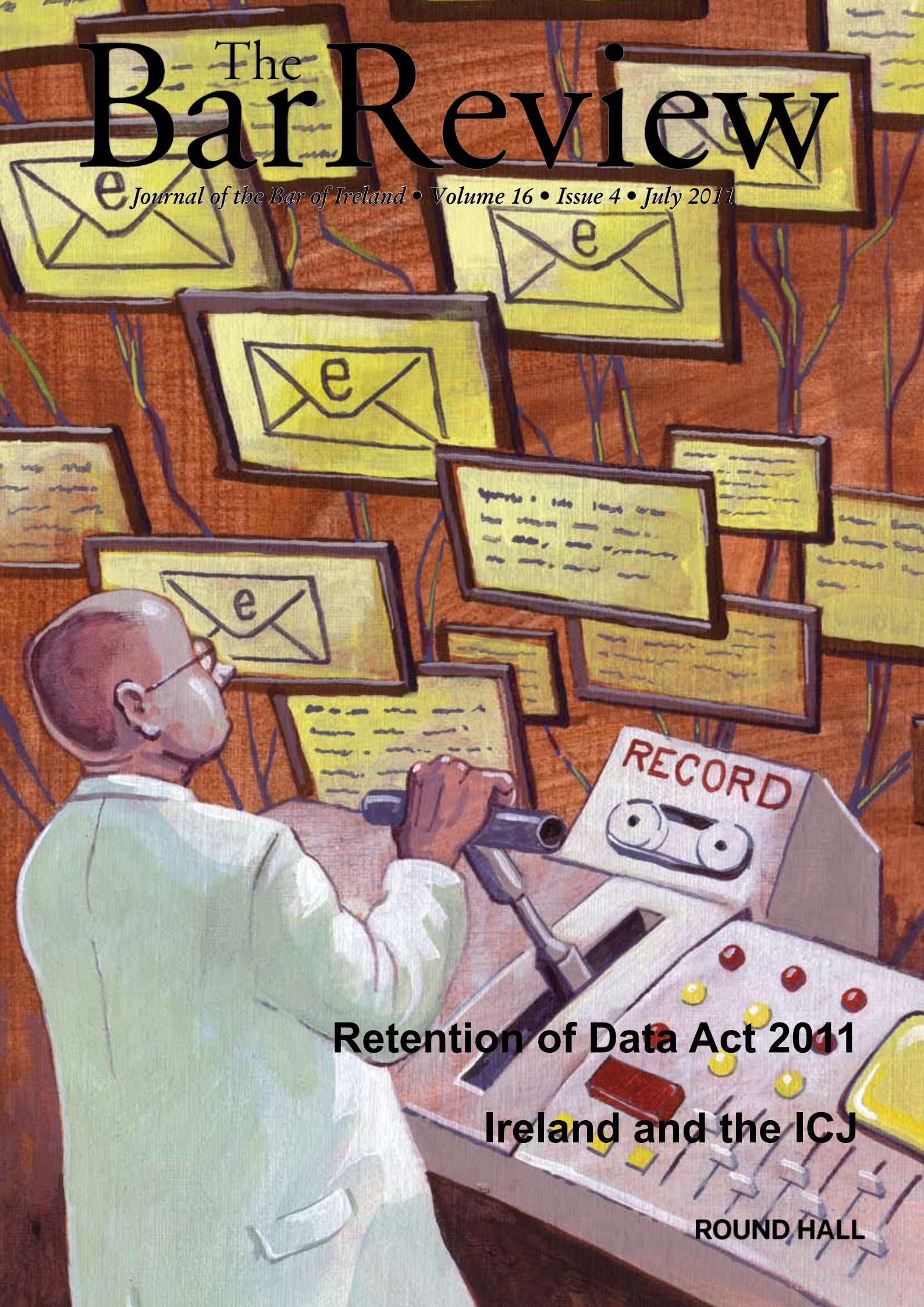

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Ireland and the ICJ

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Ireland and the International Court of Justice

Carl Grainger BL*

It was recently announced that Ireland is to strengthen its ties with the International Court of Justice (ICJ) by accepting the Court's compulsory jurisdiction. This article examines the role of the ICJ, Ireland's involvement with the Court to date and the implications of submitting to compulsory jurisdiction. It also explores the reasons why Ireland has delayed for so long in taking this step.

Introduction

The ICJ, also known as the World Court, is the principle judicial organ of the United Nations.[1] It was established, along with the UN, in 1945 and is based in The Hague. The Court has both an advisory role and a role in settling contentious cases.

On request by an authorised organ of the UN or one of its specialised agencies, the Court may provide a non-binding advisory opinion on a question of international law.[2] To date, the Court has issued 26 advisory opinions on a variety of issues, including territorial disputes and treaty interpretation. Two of the more recent opinions that generated much attention concerned, respectively, the construction by Israel of a wall in the occupied Palestinian territory[3] and Kosovo's unilateral declaration of independence.[4]

The Court's role in contentious cases is to resolve inter-state disputes concerning matters of international law. The Court's judgment in such cases is binding on the parties to the proceedings. Disputes that are essentially political in nature and absent of any real legal character will not be entertained. As with its advisory jurisprudence, the case law of the Court in contentious proceedings has touched upon a multitude of issues. A significant number of cases have concerned territorial and maritime boundaries and it is probably in these types of proceedings that the Court has proved most effective. The ICJ has a small case load, delivering just a handful of decisions each year.

The Court's jurisdiction to determine a contentious case can arise in three ways.[5] First, the parties to a dispute may agree to refer the matter to the Court. Secondly, a treaty which the parties to a dispute have ratified may contain a compromissory clause granting jurisdiction to the ICJ to determine disputes arising under that treaty (for example, Bosnia and Herzegovina successfully relied on such a clause when it brought a case[6] against Serbia for contravening the 1948 Genocide Convention). Thirdly, states may decide to accept the compulsory jurisdiction of the Court by making what is known as an "optional clause declaration".

There are presently 66 states that accept the ICJ's compulsory jurisdiction, accounting for just over one third of the international community. Notable absentees from the list include the United States, France, China, Russia and Israel. A total of 19 out of the 27 member states of the European Union have made declarations and of the pre-enlargement EU-15 group only France, Italy and Ireland have failed to do so. France withdrew from the Court's compulsory jurisdiction in 1974 following the *Nuclear Tests* cases[7] which concerned French nuclear testing in the Pacific. The United States withdrew in 1986 after the Court decided to hear the *Nicaragua* case, in which the United States was ultimately found to have violated international law *inter alia* by arming and supporting anti-government rebels and by mining Nicaragua's harbours.[8]

Ireland's Experience with the Court

Ireland has never been involved in an inter-state dispute before the ICJ but has made submissions in advisory proceedings in four cases. In the two *Nuclear Weapons* cases,[9] the Court was essentially asked to consider whether the use or threat of nuclear weapons was permitted under international law in any circumstances. Ireland's submissions to the Court – which were more or less the same in both cases – outlined its opposition to nuclear weapons and its commitment to working responsibly towards the aim of ultimately abolishing such weapons and putting an end to all nuclear testing. The submissions were brief (running to less than three pages), laden with political rhetoric and short on law.

The only portion of the submissions that came close to asserting a legal opinion was as follows:

* Chairman, Irish Society of International Law. Any views expressed are the author's own.

1 See the 1945 Charter of the United Nations, Chapter XIV.
2 1945 Charter of the United Nations, Article 96.
3 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 131.
4 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] I.C.J. Rep.
5 Statute of the International Court of Justice, Article 36.
6 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] I.C.J. Rep. 91.
7 *Nuclear Tests Case (Australia v France)* [1974] I.C.J. Rep. 253; *Nuclear Tests Case (New Zealand v France)* [1974] I.C.J. Rep. 457.
8 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, [1986] I.C.J. Rep. 14.
9 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] I.C.J. Rep. 66; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226. In the former case, the ICJ declined to determine the merits of the issue on the ground that it lacked jurisdiction.

> "It has been the long-standing position of successive Irish Governments that the use of strategic nuclear weapons would have catastrophic consequences in view of their indiscriminate character and the devastating effects which they would inflict on mankind and on the environment. Though small-scale, tactical nuclear weapons are less indiscriminate in their effects, there is a very serious danger that the use of such weapons could escalate and lead quickly to the use of strategic nuclear weapons and other weapons of mass destruction and indiscriminate effect."[10]

Notwithstanding the forthright tone of this passage, there is no clear legal position that can be deduced from it. On the one hand, the submission could be read as implicitly suggesting that the use of nuclear weapons falls foul of three fundamental rules of the international law of armed conflict.[11] The principle of distinction requires that belligerents distinguish between combatants and civilians. The principle of proportionality requires that any harm to civilians or civilian property resulting from an attack is not excessive in relation to the anticipated military advantage of launching that attack. Moreover, there is a duty to take care in warfare to protect the natural environment against widespread, long-term and severe damage.[12]

On the other hand, the Irish submission acknowledges that small-scale, tactical nuclear weapons are less indiscriminate, which might be read as implying that nuclear weapons are not illegal in all circumstances.

Ireland's submissions in the *Nuclear Weapons* cases are therefore best seen as political statements; it is clear that the Irish Government was happy to sit on the fence as far as the legal issues were concerned. Ultimately, the Court's opinion was that the threat or use of nuclear weapons *per se* was not unlawful, and that while the threat or use of such weapons would generally be contrary to the law of armed conflict, it could not be concluded definitively whether the threat or use of nuclear weapons would necessarily be unlawful in an extreme circumstance of self-defence in which the very survival of a state was at stake. This somewhat indeterminate conclusion perhaps vindicates the Irish position to a certain extent, as it reflects the difficulty in reaching a clear legal conclusion as to the legitimacy of nuclear weapons.

In the *Wall* case,[13] the ICJ was asked to determine the legal consequences arising from the construction of a wall by Israel in the occupied Palestinian territory. In contrast to the approach taken in relation to the *Nuclear Weapons* case, Ireland adopted a very clear legal position. It was submitted that Israel was in breach of its obligations under the law of armed conflict pursuant to the Hague Regulations[14] and the Fourth Geneva Convention[15] because the building of the wall involved the destruction by Israel of real and personal property in the occupied Palestinian territory, which was prohibited in the absence of circumstances rendering such destruction absolutely necessary by military operations.[16] It was further submitted that the route taken by the wall indicated that its purpose was to protect Israeli citizens illegally settled in the occupied territory.[17] Ireland characterised Israel's illegal settlements as a grave breach of the Fourth Geneva Convention,[18] and it was also stated that the construction of the wall itself could arguably amount to a grave breach. This was not without significance, as it effectively amounted to an accusation that Israel had committed a form of war crime.

Ireland further submitted that Israel was in violation of international human rights law, in particular the 1966 International Covenants on civil, political, economic, social and cultural rights. It was stated that the construction of the wall had given rise to restrictions on the right to freedom of movement of Palestinian people and their goods, which had caused serious socio-economic harm including loss or severe limitations on access to land, jobs and markets. Food security and access to medical and educational services was also threatened. Ireland submitted that these restrictions impacted negatively on the right to life, freedom of movement, work, adequate standard of living, health and education.[19]

The ICJ's opinion was to a large extent in line with the Irish position. The Court took the view that the construction of the wall by Israel was contrary to the law of armed conflict and international human rights law. It also concluded that Israel had breached its obligation to respect the right of the Palestinian people to self-determination. However, the Court's opinion fell short of the Irish submission in so far as it did not say that Israel had committed any grave breach of the Geneva Conventions.

The most recent advisory opinion of the ICJ was in the *Kosovo* case. The Court was asked to determine whether Kosovo's unilateral declaration of independence of February 2008 was in accordance with international law. The matter was referred to the Court by a UN General Assembly resolution tabled by Serbia, which firmly opposed the declaration of independence on the basis that it saw Kosovo as part of its own sovereign territory.

Ireland was one of the countries to recognise Kosovo's independence shortly after it had been declared. In its written submissions, Ireland urged the Court to decline to provide the advisory opinion (a curious position, considering the fact that it had abstained on the General Assembly vote requesting the advisory opinion). Ireland submitted that the ICJ should only provide advice if it was necessary for the requesting organ to proceed with its work. It was noted that the status of Kosovo was not an issue before the General Assembly at

10 Written statement by Ireland to the International Court of Justice, 20 September 1994, at para. 2.
11 See the 1977 Protocol Additional to the 1949 Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I).
12 *Ibid.*, at Article 55.
13 *Supra*, note 3.
14 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land.
15 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.
16 See Article 23 of the Hague Regulations and Article 53 of the Fourth Geneva Convention.
17 See Article 49 of the Fourth Geneva Convention.
18 See Article 147.
19 The specific provisions invoked by Ireland were: 1966 International Covenant on Civil and Political Rights, Articles 6 and 12; 1966 International Covenant on Economic, Social and Cultural Rights, Articles 6, 11, 12 and 13.

that moment in time. Moreover, the UN Security Council was actively seised of the matter and that body had not requested an advisory opinion.

In the event that the ICJ did decide to give the advisory opinion, Ireland argued in the first instance that the Court should confine itself to considering the lawfulness of the declaration of independence – *i.e.* the legality of the act of making the declaration – rather than considering whether Kosovo under international law had a right to exist as an independent, sovereign state. To this end, it was submitted that Kosovo's unilateral declaration of independence was not unlawful because there was no rule of law that prohibited such declarations. In the event that the Court decided to look at Kosovo's substantive right to exist as a nation state, Ireland argued that Kosovo's act of unilateral secession from Serbia was a legitimate exercise of self-determination in the context of gross human rights abuses. The latter is a significant statement, as it endorses a right to "remedial secession". This theory – which is somewhat contentious politically-speaking and far from settled as a matter of international law – provides that pursuant to the right to self-determination, in exceptional circumstances, such as where a people have been subjected to egregious human rights violations, there is a right to declare independence unilaterally, and to secede without the consent of the parent state.

In an anticlimactic (but predictable) turn of events, the ICJ decided to take a very restrictive and cautious approach to interpreting the question posed by the General Assembly, focusing on the legality of Kosovo's declaration of independence, avoiding altogether the issue of Kosovo's right to statehood. Unsurprisingly, the Court concluded that there was nothing in international law that prohibited the making of a unilateral declaration of independence.

On the basis of the foregoing analysis, it is clear that the level of Ireland's engagement with the ICJ has increased over time. While the submissions made in relation to the *Nuclear Weapons* cases were somewhat timid from a legal point-of-view, in the *Wall* and *Kosovo* cases, Ireland showed that it was willing to take strong positions on matters of international law and in both of these cases it is pleasing from an Irish perspective that the Court's ruling was largely consistent with the submissions made.

Reasons for Delay

Although Ireland has participated in some of the ICJ's advisory proceedings, it has delayed for a very long time in making an optional clause declaration accepting the Court's compulsory jurisdiction in contentious matters. How can this be explained? In the first instance, it should be recalled that Ireland's membership of the UN was delayed considerably. An application for admission was made in 1946 but the Soviet Union maintained a veto of Irish membership for a period of nine years. The veto in all likelihood was motivated by a number of factors, not least the fact that Ireland did not have diplomatic relations with the Soviet Union.[20] Moreover, Western countries had opposed the admission of the Soviet satellite states of Bulgaria, Hungary and Romania and the Soviet response to this was to veto the membership applications of a number of countries that were perceived to be pro-Western.[21] A deal was eventually struck in 1955 which led to the membership of the satellite states and Ireland was admitted that same year.

Upon acquiring membership of the UN, Ireland automatically became a party to the Statute of the ICJ, but it did not make an optional clause declaration.[22] It is clear that the main reason for Ireland's failure to make a declaration was its constitutional claim to Northern Ireland in Articles 2 and 3 of Bunreacht na hÉireann (these Articles were eventually amended in 1999). Whatever the political motivations were for Articles 2 and 3, the reality was that as a matter of international law the case for disputing British sovereignty over the six counties was a weak one. Signing up to the compulsory jurisdiction of the ICJ would therefore have left Ireland open to potential humiliation if the United Kingdom had decided to bring proceedings challenging the constitutional claim to Northern Ireland. Speaking in the Dáil in 1990, the then Minister for Industry and Commerce, Des O'Malley, observed:

> "It is well known that Ireland withheld submission to the full compulsory jurisdiction of the International Court of Justice in The Hague precisely because the 'claim of right' made in 1937 would have been exposed, to our embarrassment, as an international law nullity."[23]

Interestingly, Saorstát Éireann did make an optional clause declaration in respect of the Permanent Court of International Justice, which was attached to the League of Nations and was the predecessor to the ICJ. The declaration was made in 1929[24] but it was not withdrawn when the new Constitution came into operation in 1937. This was perhaps due to the fact that Ireland was protected from any challenge to Articles 2 and 3 by virtue of the terms of the United Kingdom's own optional clause declaration, which excluded from the Court's compulsory jurisdiction disputes with Commonwealth members. Ireland did not formally leave the Commonwealth until 1949, by which stage the Permanent Court of International Justice had ceased to exist.

Following the revocation of Ireland's claim over Northern Ireland by virtue of the nineteenth amendment to the Constitution, which gave effect to the Good Friday Agreement, the Government said that it was favourably disposed towards accepting the compulsory jurisdiction of the ICJ and that the implications of doing so and the modalities for making the necessary declaration were being reviewed.[25] That process has now come to a head and it is

20 Dorr, "Ireland at the United Nations: 40 Years On", (1996) 7 Irish Studies in International Affairs 41 at p. 42.

21 Venturini, "Italy and the United Nations: Membership, Contribution, and Proposals for Reform", (1996-1997) 20 Hamline L. Rev. 627.

22 1945 Charter of the United Nations, Article 93.

23 403 *Dáil Debates* 2289-2290 (12 December 1990).

24 The declaration was ratified on 11 July 1930: Declaration in Conformity with Article 36 of the Statute of the Permanent Court of International Justice, Irish Treaty Series, No. 8 of 1930.

25 See for example: written answer from Minister for Foreign Affairs David Andrews 501 *Dáil Debates* 675-676 (2 March 1999); written answer from Minister for Foreign Affairs Brian Cowen 586 *Dáil Debates* 1303-1304 (1 June 2004).

intended that a declaration will be lodged with the UN by the end of this year.[26] The Government has stressed that its decision to make a declaration is consonant with the State's commitment under Article 29.2 of the Constitution to the peaceful settlement of international disputes by international courts and tribunals. It is somewhat ironic in this regard that it was the very terms of the 1937 Constitution, specifically Articles 2 and 3, that prevented Ireland from committing itself to this particular international court for so long.

The Implications of an Optional Clause Declaration

Once it has accepted the Court's compulsory jurisdiction, Ireland can be sued by other states that have done likewise. However, it should be borne in mind that even where two countries have made optional clause declarations, it does not necessarily follow that the Court will have jurisdiction to hear any dispute arising between them. This is because a declaration may include reservations, which are designed to limit the capacity of the Court to determine certain disputes. So long as one party to a dispute has reserved a certain matter, the Court cannot adjudicate upon it. Thus, a defendant state can rely on a plaintiff state's reservation even if it has not made the same reservation.[27] In other words, a lowest common denominator rule applies.

The precise wording of Ireland's declaration has yet to be clarified, and will be drawn up on the advice of the Attorney General. It remains to be seen whether any reservations will be made. Reservations are commonplace amongst the various states that have chosen to make an optional declaration. Generally these clauses are aimed at excluding from the Court's jurisdiction disputes that arise within a particular time frame, disputes with particular states, or disputes relating to particular subject matters. An example of the latter is Australia's declaration, which was modified in 2002 to exclude disputes on maritime boundaries. This move was almost certainly designed to rule out a legal challenge from East Timor, which was on the verge of securing its independence at the time.

One particularly controversial exception, which has been included by a number of states in their optional clause declarations, is what is sometimes referred to as a "Connally reservation", named after the Senator who devised such a clause for the United States declaration. Connally reservations purport to exclude from the jurisdiction of the ICJ matters "essentially within the domestic jurisdiction" of the reserving state *as determined by that state*. The validity of this type of reservation is extremely dubious,[28] as indeed is its usefulness, seeing as it could be invoked against the reserving state in the event that the latter sought to vindicate an international law claim against another state that had not made a similar reservation.[29]

Of course, in making an optional clause declaration, Ireland is not altruistically exposing itself to potential litigation before the ICJ. It is also opening up the opportunity to bring cases against other states that have accepted the Court's compulsory jurisdiction. Thus, it can be seen that while an optional clause declaration has the effect of removing a country's armour by exposing it to suit, at the same time it arms a country with a sword by allowing it to sue. As a small, generally law-abiding country, Ireland has much more to gain than to lose by making a declaration. In this regard, it would be disappointing if Ireland were to attach wide-ranging reservations to its declaration. Not only do such reservations undermine the authority of the Court, they can also send out a signal that a state has something to fear because it is not fully compliant with international law in some respect. On a more practical level, it should be borne in mind that by virtue of the lowest common denominator principle, the more extensive the reservations that are made by Ireland, the more limited its ability to bring cases against other states will be.

Ireland remains a constructive and respected member of the international legal community and has a part to play in shaping international law. The ICJ provides an important forum for doing this, particularly in the context of advisory proceedings, in which dozens of states sometimes participate. It is hoped that Ireland will continue the recent trend – evident from its participation in the *Wall* and *Kosovo* cases – of contributing meaningfully to the legal arguments in advisory proceedings. The country's standing before the Court can only be enhanced by the making of an optional clause declaration.

Strengthening ties with the ICJ will also hopefully improve Ireland's prospects of having a judge appointed to the Court in the future. The ICJ is composed of fifteen judges, who are elected for terms of office of nine years by the UN General Assembly and the Security Council. It is somewhat regrettable that there has yet to be an Irish representative on the Court (Cecil Lavery was put forward as a candidate in 1966 but was unsuccessful).

Whatever the positives to be drawn from the decision to accept the Court's compulsory jurisdiction, it should be borne in mind that the ICJ as a judicial institution is far from perfect. Members of the Court are supposed to serve in their personal capacity but there is a marked tendency among certain judges to conduct themselves in accordance with the foreign policy agendas of their countries of origin. The Court has a limited pool of potential litigants, given that only a minority of states have made optional clause declarations and in many cases such declarations are significantly compromised by reservations. The absence of some of the major political powers (in particular the United States, China, Russia and France) from the ICJ's compulsory jurisdiction undermines the institution's credentials to some degree, although by the same token, it is heartening that the Court has shown itself willing to stand up to big players in the past; the *Nicaragua* case was important in this regard, as it led to smaller and less powerful countries developing greater confidence in the Court. ■

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26 "Ireland to accept compulsory jurisdiction of UN court", *Irish Times*, 22 April 2011.

27 Such a situation arose in the *Norwegian Loans* case [1957] I.C.J. Rep. 9.

28 See for example: Preuss, "The International Court of Justice, the Senate and Matters of Domestic Jurisdiction", (1946) 40 A.J.I.L. 720; Henkin, "The Connally Reservation Revisited and, Hopefully, Contained", (1971) 65 A.J.I.L. 374.

29 See for example: Goldie, "The Connally Reservation: A Shield for an Adversary", (1962) 9 UCLA L. Rev. 277.

Cured Alhambra
The Bar Soccer Club trip to Granada (no, not the TV station)

Conor Bowman BL

There are no exceptions to the rule that everyone believes himself to be an exception to the rule. If you look like your passport photograph, then you're probably too ill to travel. Granada wasn't going anywhere and so we had to go there if we wanted to visit and so we did. When we landed in Malaga, the weather was the kind of degree value that in Ireland would only be an angle. We struggled onto the bus and began our scenic trip inland past the unanswered questions about the Spanish Civil War (such as, "Who were the *actual* good guys?") and on to the majestic foyer and somewhat less majestic rooms of the Hotel Carmen in downtown Granada.

Okay, so they're the World Cup holders, the current European Champions, and the recent victors in the latest Champions League, but who wants to win by cheating? The Granada Bar is who. Wait till you hear this; they had a man sent off in the first half but still started the second half and finished the match with eleven players!! Even someone with as robust a surprise threshold as myself was stunned by the neck of those lawyers. To be fair, it *is* more of a hooky JR point, rather than a cast-iron appeal, because the score was probably a fair reflection of the game itself, but there's no point really in being Irish if you don't have someone to be Irish *at*, is there? The home team had the added advantages of searing heat and a wonky sprinkler system. Our lads played their socks off, but it was just one of those days. I think we would still have had to pay for our own food and drinks (at the "dinner" (see: School food) our hosts hosted for us in their equivalent of the King's Inns) even had our team won!!

There was much to enjoy in Granada apart from the soccer, in fact pretty much everything bar the soccer *was* enjoyable. There is a quaint Andalucian custom that plays out upon the emptying of nightclubs at 6am; one lucky dancer is chosen at random to come to the defence of a homeless man who is being hassled by three local latchicos. This elaborate ballet ends with the Good Samaritan being bitten on the rear end by a bad dog (also possibly homeless). This early morning ritual is the Spanish equivalent of our own tradition at Newgrange whereby the sun is welcomed as it rises, also shining out of somewhere unusual. (As last year in Rimini, local hospitals play a central role in these goings-on.)

The swimming pool on the roof was filled by special permission (by our Chairman) and much tanning and imbibing took place within view of the fabulous sight of snow in June on top of the Sierra Nevada. Guided tours of the city by night were provided by off-duty local authority workers in dumptrucks, while certain of the bars in town refused entry to anyone who looked even remotely like a dog. Who was the man who went caravan-spotting in the tapas bar? Why wouldn't the lyricist of the Cat Song fess up? Why were the two CIA operatives on honeymoon in our hotel enquiring about Moneygall and the possible appointment of one of our members to the District Court? Who was the person who had the handwritten list of everyone's room number? Granada provided many more answers than questions.

And finally, that jewel in the cradle of Andalucia, the Alhambra. On a terraced café, in the shadow of that very place, the following conversation was overheard between an American father and his daughter who was studying locally.

> "Dad, you and Mom have got to go see the Alhambra."
>
> "Sure, Honey."
>
> "I mean, Dad, it's great, you see.."
>
> "Hey, Sugar, I *know* what the Alhambra is." (Turning to spouse to share enlightenment) "It's like this motel and restaurant chain, they've got one in Toledo and they're building another one in Miami right beside that Mazda dealership."
>
> (Daughter, doing her best) "Well it's a bit different here, Dad, it's like a *castle* thing."
>
> "Sure, Honey, I guess they're themed differently everywhere." ■

The Liability of online publishers for archived materials

Ted Harding BL

Introduction

The threat of exposure to defamation actions into perpetuity faced by publishers having online archives is one of the most contentious subjects in contemporary communications. Plaintiffs asserting that their reputations have been damaged due to online publication may seek redress in a range of jurisdictions. As archived material may be viewed and downloaded anywhere in the world, it is essential to examine the implications for Irish publishers.

The Defamation Act 2009 in context

The Defamation Act 2009 ("the Defamation Act") introduced highly significant changes to the law. This article examines a range of issues, including those arising from the abolition in Ireland of the multiple publication rule at common law[1].

Under the old rule, deriving from the nineteenth century English decision in *Duke of Brunswick v Harmer*[2], each individual publication of an original defamation gave rise to a new cause of action. While the law in England and Wales provides for a one-year limitation period after publication[3], for material remaining on the internet, each time a third party sees the publication, the one-year limitation period recommences. A fresh defamation would be deemed to have occurred each time a person accessed an online archive containing a defamatory statement.

With the enactment of the Defamation Act, archivists in Ireland have been granted considerable protection, as a plaintiff has one cause of action in respect of a multiple publication. This, however, is subject to limited judicial discretion to grant leave to bring further actions.

Section 11 of the Defamation Act 2009, states:

> "11. (1) Subject to *Subsection (2)*, a person has one cause of action only in respect of a multiple publication. (Emphasis added)
>
> (2) A Court may grant leave to a person to bring more than one defamation action in respect of a multiple publication where it considers that the interests of justice so require. (Emphasis added)
>
> (3) In this section "multiple publication" means publication by a person of the same defamatory statement to 2 or more persons (other than the person in respect of whom the statement is made) whether contemporaneously or not."

Section 11 seems to address, primarily, the simultaneous or consecutive publication of exactly the "same" statement to two or more persons, rather than the publication of statements having the similar effect.

Essentially, sub-section 2 enables the Court to avoid the prospect of anomalous results flowing from the provisions of Section 11 (1).

Section 38 (1) amends Section 11 of the Statute of Limitations, 1957. It provides that a defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of one year, or, such longer period as the court may direct *not exceeding 2 years*, from the date on which the cause of action accrued'. The amendment then goes on to state that the Court shall not give such a direction unless it is satisfied that it is required in the interests of justice or that the prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that the defendant would suffer if the direction were given. The court shall, in deciding whether to give such a direction, have regard to the failure to bring the action within the one year period and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.

Section 38 also amends the 1957 Act to provide that for the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened through that medium. (Emphasis added)

In order to analyse the provisions of the Defamation Act and their potential impact on internet publishers, important issues must first be examined.

Responsible journalism

In *Reynolds v Times Newspapers*[4] the English House of Lords reassessed the balance between protection of the individual's reputation, versus media freedom. The court set out a non-exhaustive list of ten indicia to be considered when deciding whether a publisher had a general duty to publish, even if the information turned out to be false.

In *Jameel v Wall Street Journal Europe SPRL (No 3)*[5] the House of Lords ruled that the so-called *Reynolds* qualified

1 Recommended at par. 52 of the Report of the Legal Advisory Group on Defamation, 2003

2 (1849) 14 QB 185. Recently upheld in the context of internet publications in *Berezovsky v Michaels* [2000] 1 W.L.R. 1004; and in *Godfrey v Demon Internet Ltd.* [2001] QB 201

3 Limitation Act 1980, S 4A (UK)

4 [2001] 2 A.C. 127 (HL)

5 [2006] UKHL 44; [2007] 1 AC 359

privilege was focused upon providing a proper degree of protection for responsible journalism when matters of public concern were reported. Hoffman LJ reduced the test in *Reynolds* to three essential questions:

- Was the subject matter of the article as a whole in the public interest?
- If so, was it justifiable to include the particular defamatory allegation about the claimant?
- If so, were the steps taken to gather and publish the information responsible and fair?[6]

The rule in *Duke of Brunswick*, the *Loutchansky* decision and the impact on internet publication

The rule in *Duke of Brunswick* raises particular problems for publishers with electronic online archives. In the case, a back issue of a newspaper published seventeen years earlier was held to be a separate publication, actionable in its own right. The decision remains highly controversial, as the Duke had ordered one of his servants to obtain a copy of an edition of the *Weekly Dispatch* from Harmer, its publisher. Search engines carry out similar exercises many thousands of times per day. The Duke sued on the basis of publication of the defamatory material to his servant. It was held that the limitation period commenced from the date of sale of the individual copy and *not* the date on which the *Dispatch* was originally printed and placed in circulation.

Regarding archived material, the rule was upheld in *Loutchansky v Times Newspapers*[7]. Deriving from *Loutchansky*, in any attempt to rely on *Reynolds* qualified privilege, the publication must either be taken down when the complaint is received, or an appropriate warning attached to the material available online.

Arising from the decision, *The Times* brought an application before the European Court of Human Rights ("the ECtHR"). The application was dismissed in March 2009. The decision turned on the question of proportionality and the implications of the multiple publication rule. It was held that the rule and the consequent absence of an effective limitation period for defamatory material contained in online archives did not constitute a disproportionate interference with the newspaper's freedom of expression[8].

It is regrettable that the ECtHR appeared not to consider the wider ramifications of the issues raised in *Times* – specifically, the chilling effect of the multiple publication rule in the modern communications market and its negative impact on the maintenance of archives.

Lukowiak v Unidad Editorial SA[9] is another highly significant decision in respect of internet publication. The claimant served in the Falklands war for Britain. He complained that an allegation was published in the newspaper *El Mundo* that he was a 'self-confessed war criminal who had shot an Argentinian soldier after he had surrendered'[10]. In the English High Court, the claimant sought to strike out a defence of qualified privilege on the grounds that it lacked any realistic prospect of success. The application was refused, the court determining that publication of the article was in the public interest. But, crucially, Eady J ruled out from the protection of qualified privilege, the copy of the article remaining on the defendant's website *after* the complaint was received.

The day after the article was published (the 7th of January, 1999), the President of Argentina gave an assurance that no attempt would be made to extradite British soldiers for supposed war crimes. Eady J considered:

> ... whether the continuing availability of the words complained of, through the website, could itself attract the defence of qualified privilege... [counsel for the complainant] submitted that there was no arguable case for protecting 'continuing publication on the website', and ... the Defendant has for some time known that the book does not assert that Mr. Lukowiak killed a soldier who had surrendered...[11]

Applying the *Reynolds* indicia, and the principles of qualified privilege generally, the court declined to hold that the *later* website communications following receipt of the complaint (whenever that occurred), would be protected.

Flood and *Budu*

Two recent decisions of the courts of England and Wales have very important implications for publishers with online archives, whether they are based in Ireland, or not. The cases are *Flood v Times Newspapers Ltd.*[12] and *Budu v BBC*[13]. Following *Flood,* website owners must keep the content of their website monitored after initial publication of material. Where new evidence emerges and impacts on the original publication, site owners ought to consider amending the content. *Flood* also highlights the interaction between qualified privilege, the principles of responsible journalism and online publishing. The case also gives clear warning to publishers concerning liability where circumstances change.

Flood was the first time a national newspaper succeeded in pleading a *Reynolds* defence. The claimant was a detective sergeant with the Extradition Service of the Metropolitan Police in London. On the 2nd of June, 2006, *The Times* published an article referring to Flood under the headline, "Detective accused of taking bribes from Russian exiles". The article was also published on its website and there it remained.

An investigation into the allegations against Flood found there was no evidence to support them. Later, the defendant admitted its article was defamatory, but it did not report the outcome of the investigation.

In May 2007, the plaintiff sued for libel regarding the print and website publications, before the results of the investigation were known to him, or to the defendant. In its defence, the defendant pleaded qualified privilege regarding the print *and* the website publications. It claimed that, in the circumstances of the case, publication was in the public interest and its reporters acted responsibly.

6 *Jameel* (n 5) par. 53
7 [2002] QB 783
8 [2009] ECHR 451
9 [2001] EMLR 46
10 *Lukowiak* (n 9) par. 17
11 *Lukowiak* (n 9), par. 68
12 [2009] EWHC 2375 (QB), [2010] EWCA Civ 804
13 [2010] EWHC 616 (QB)

In the High Court, Tugendhat J upheld the defence of qualified privilege concerning the original publication on the 2nd of June, 2006. Publication had taken place in pursuit of a legitimate aim and the story related to a matter of "... high public interest"[14]. The court made an important distinction concerning the internet publication. Tugendhat J held that the defence of qualified privilege succeeded only regarding web publications up to the 5th of September, 2007[15]. The defence failed concerning the continued publications following publication of the results of the investigation into the plaintiff. The Court held:

> "The failure to remove the article from the website, or to attach … a suitable qualification, cannot possibly be described as responsible journalism. It is not in the public interest that there should continue to be recorded on the internet the questions as to the Claimant's honesty which were raised in 2006, and it is not fair to him. It is not in the public interest …"[16]

The decision was appealed to the Court of Appeal, which delivered judgment on the 13th of July, 2010[17]. The court allowed a cross-appeal of the claimant in respect of the ruling that the Times was entitled to rely on the *Reynolds* qualified privilege defence. The court also ruled that *Reynolds* privilege did not apply to publication of the article at all. *The Times'* appeal against Tugendhat J's finding that the privilege had been lost regarding the continued online publication in its archive was dismissed.

Resulting from the decision, the *Reynolds* defence may be only theoretically available. The defendant has appealed to the Supreme Court, but it is understood that the issues relating to internet archives are not among those to be considered.

It is submitted that Neuberger MR (who delivered the lead judgment of the court) made very significant statements relating to the archiving of materials. As to whether publication on *The Times*' website of the original article after September 2007 attracted privilege, Neuberger MR considered Tugendhat J's finding on the matter and stated:

> "...that conclusion... was plainly right and ... consistent with the decisions ... in *Loutchansky* ... and ...of the European Court of Human Rights in *Times Newspapers Ltd. v UK (Nos 1 and 2)*... If the original publication of the allegations made against DS Flood ... on the website had been, as the Judge thought, responsible journalism, once the Report's conclusions were available, any responsible journalist would appreciate ... speedy withdrawal or modification [was required]. Despite this, nothing was done."[18]

Publishers seeking to rely on *Reynolds* privilege (and, in the Irish context, the Section 26 'fair and reasonable publication' defence in the Defamation Act) will find it very difficult to meet the standard set in *Flood*. In addition, the judgment represents a clear statement of the law as to the obligations placed on a publisher even where the *Reynolds* privilege applies *but* where further relevant information emerges *after* publication of the original article.

It is submitted that were a case with facts similar to those in *Flood* to come before the Irish Courts, regard might only be had to the factors relevant at the date of the original publication and not to those emerging subsequently. Nevertheless, in such circumstances, the court might exercise its power, conferred by Section 11 (2) of the Act, to grant the plaintiff leave to bring more than one action arising from a multiple publication, where the interests of justice required. Where an Irish publisher is reluctant (on freedom of expression grounds, or otherwise) to remove material when a complaint is made, prudence requires that a qualification should be applied to the content.

Publishers based in Ireland are likely to face a dilemma: it would be unwise to refuse a request to take down archive copies of allegedly defamatory material, yet such "requests" may become a twenty-first century proxy for the "gagging writ", used to intimidate news organisations by those determined on reputation refurbishment.

The decision in *Budu*

The product of a Google search was one of the issues in *Budu v BBC*[19]. The BBC sought to strike out claims for libel. It had published three articles on a regional section of its website. The reports concerned the decision of a local police force to withdraw a job offer previously made to the claimant, due to subsequent discoveries about his immigration status. The claimant was not named in the first article, only in the second and third. The articles were archived and available to those carrying out an archive search. Four years later, the claimant sued for libel in respect of the archived materials and a Google 'snippet', following an online search. (His delay would statute-bar the action under current Irish law.)

The claimant alleged that the first article meant there were reasonable grounds for suspecting that he was an illegal immigrant and had applied for a management post, while knowing he was not entitled to work. He pleaded that the other two articles and the Google snippet meant that he had failed police security vetting. Shortly after the service of the proceedings, the BBC attached notices to the articles, consistent with its interpretation of obligations under *Loutchansky*.

The court struck out the claims. It held that the claimant had no realistic prospect of successfully establishing that there existed even one reader who, were he to read the first article on its own, would have understood it to refer to the claimant. The court held it was essential to read the first article in the context of the second or third article, or even both. Reading the articles together, the meaning attributed by the claimant was not sustainable. The court also held that as the second article was incapable of bearing a defamatory meaning, the BBC could not be liable for its "republication" on Google.

14 *Flood* (n 12), par. 216
15 12 ibid, par. 260
16 12 ibid, par. 249
17 [2010] EWCA Civ 804
18 Flood (n 12) par. 78
19 *Budu* (n 13)

Application of Defamation Act 2009 reforms

Having examined the decisions in *Loutchansky, Lukowiak, Flood and Budu*, it is necessary to analyse how they may be of particular relevance in the context of the Defamation Act 2009.

Section 11 (1) of the Act provides that a person has one cause of action only in respect of multiple publication. Pursuant to Section 11 (2), a court may grant leave to a person to bring more than one defamation action in respect of a multiple publication, where it considers that the interests of justice so require. The discretion in regard to granting an application made pursuant to Section 11(2) is constrained by the provisions of Section 38 (1), which, as previously referred to, amends Section 11 of the Statute of Limitations, 1957. A defamation action shall not be brought after the expiration of –

> (i) one year, or
> (ii) such longer period as the court may direct not exceeding 2 years,
>
> from the date on which the cause of action accrued.

It is submitted that Section 11(2) may be used to address egregious situations where a defendant has refused to take material down from a website. A correction order, pursuant to Section 30 of the Defamation Act, might be an alternative remedy. Where there is a finding that the statement grounding a defamation action was defamatory and the defendant has no defence, the court may make an order directing the defendant to publish a correction.

Alternatively, a declaratory order that a statement is false and defamatory, pursuant to Section 28, might be appropriate, if a correction or apology had been sought and refused.

The effect of changes in circumstances may have a very significant impact on the availability of defences to publishers. It is submitted that it may cease to be 'fair and reasonable' (in the words of Section 26 (1) of the Defamation Act) to leave an archived news story or other article available on the internet once new information emerges after the material was 'first capable of being viewed or listened to through that medium' (in the words of Section 11 (3B) of the Statute of Limitations).

Assuming that the approach of Section 11 is to be interpreted as conforming with that in Section 11 (3B) of the Statute of Limitations (to avoid contradictory outcomes), the defendant's liability may be judged solely by reference to the conditions that pertained when the first act contributing to the multiple publication took place. However, *Flood* is likely to be persuasive if raised in argument before the Irish Courts where a change in the relevant circumstances over a specified period impacts on archived material.

In that regard, section 11 (2) assumes significance. Leave may be given to take a separate action concerning part of a multiple publication that may no longer be privileged. Publication of a news article may lead a reader, with access to the publisher's archive (or to that of another publisher), to search previously-published articles relating to a person or persons mentioned in the most recent publication. Actions against publishers based on innuendo and identification may ensue. A Court might be asked to exercise its discretion under Section 11 (2).

The defence of 'fair and reasonable publication on a matter of public interest' under Section 26 of the Defamation Act enshrines in statute a defence similar to – through not precisely identical to – that promulgated by the House of Lords in *Reynolds*.

In light of *Flood*, those who seek to rely on the statutory defence of fair and reasonable publication on a matter of public interest must address any event subsequent to the original (archived) publication that changes the relevant circumstances, especially if it vindicates the plaintiff.

Conclusions

Despite the reforms contained in the Defamation Act, the issue of non-contemporaneous multiple publication, where circumstances may have changed over the relevant period, remains highly problematical. Based on the latest caselaw, website owners must keep the content of the site monitored after initial publication of material. Where new evidence emerges and impacts on the original publication, website owners ought to consider amending the content on the website archive and / or appending appropriate warning notices, especially where a complainant has been vindicated by events. Urgent clarification is required as to whether an organisation, having been made aware of a potential defamation, is obliged to review all archives on the internet where a third party may have placed the original material, in order to append warning notices. In addition, the notion that a publisher would be required, periodically, to conduct a generalised review and "update" of its archives borders on the oppressive. Where a complaint has been made, a *Loutchansky*-type notice appended to the material should be sufficient.

The reality of a twenty-four-hour, international, rolling-news market, populated by many diverse publishers, demands a reassessment of authorities relating to defamation and freedom of expression dating from a radically different communications era. While the individual's right to his reputation must be vindicated, it ought not to be at the cost of fettering and curtailing archives. Curbing the legitimate dissemination of information represents a fundamental assault on freedom of expression and the free flow of ideas. ■

Legal The Bar Review Update

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Rooney v Minister for Agriculture

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Article

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'Voiceless victims: suffering under lenient punitive legislation in Ireland'
2011 (8) ILT 103

Library Acquisition

Sandys-Winsch, Godfrey
The dog law handbook
2nd ed
London: Sweet & Maxwell, 2011
N186.8

ARBITRATION

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NAMA and arbitration proceedings
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Investment treaty arbitration: a comparison with international commercial arbitration
2010 A & ADR R 276

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Articles

Byrne, Hugh
NAMA – areas of concern for practitioners
2011 (1) CP & P 11

Byrne, Hugh
NAMA and arbitration proceedings
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Harding, Ted
Run for your wife? The truth about NAMA asset transfers
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Home loan repossessions: powers and obligations
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CHILDREN

Library Acquisition

Hershman and McFarlane children act handbook 2011/12
2011/2012 edition
Bristol: Jordan Publishing Limited, 2011
N176

Statutory Instrument

Protection of children (Hague Convention) act 2000 (section 15) order 2010
SI 682/2010

CITIZENSHIP

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Citizenship: the Court of Justice decision in Zambrano
16(2) 2011 BR 43

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Library Acquisition

School of Law Trinity College
The civil partnership and certain rights and obligations of cohabitants act 2010
Dublin: Trinity College, 2011
N174.1.C5

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reg 39 – Council Directive 85/611/EEC – Directions as to further prosecution of claim given (2009/2938, 2009/3097 & 2029/3098S – Clarke J – 10/1/2011) [2011] IEHC 6
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Re Stainless Pipeline Supplies Ltd: Tyner v Lafferty

Article

McCarthy, Gary
Examinerships in hard times
16 (3) 2011 BR 62

Library Acquisition

Loos, Alexander
Directors' liability: a worldwide review
2nd ed.
London: Kluwer Law International, 2010
N264.Z45

Statutory Instrument

Rules of the Superior Courts (examiner) 2011
SI 2/2011

COMPETITION LAW

Association of undertakings

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Hemat v Medical Council

Article

Power, Vincent
Competitive streak
2011 (April) GILS 24

CONFLICT OF LAWS

Library Acquisition

Calliess, Gralf-Peter
Rome regulations: commentary on the European rules of the conflict of laws
The Netherlands: Kluwer Law International, 2011
C2000.E95

CONSTITUTIONAL LAW

Habeas corpus

Access to courts – State's duty to rehabilitate long term prisoners – Delay in delivery to High Court of article 40 application – Whether duty to rehabilitate long term prisoners – Whether adequate policies in place to rehabilitate long term prisoners – Whether Prison Service at fault in delay in delivery to High Court of article 40 application – Article 40 application misconstrued – Constitution of Ireland 1937, article 40 – Article 40 application refused; leave to seek judicial review; Attorney General's scheme certificate recommended; direction that explanation be given of delay in delivery to High Court of art 40 application (2010/1045JR – Clarke J – 30/7/2010) [2010] IEHC 333
Bowes and O'Driscoll v Governor of Mountjoy Prison and Minister for Justice

Jurisdiction

Legislation – Personal rights – Damages – Unconstitutionality of Act – Liability of State – Transcendent considerations – Common good – Importance of concrete factual context – Statute of limitations – Action re breach of personal constitutional rights – Access to courts – Jurisdiction of courts to order redress against State for breach of constitutional rights where Act found to be unconstitutional – Difficulties re 'unscrambling the egg' of acts done under legislation later found to be unconstitutional – Factors re imposing liability upon State – Constitutional invalidity of s 260 Mental Treatment Act 1945 – Leave of High Court required to bring proceedings – Whether Plaintiff would have succeeded in actions if had been granted leave to bring proceedings under s 260 – *Blehein v Minister for Health* [2004] IEHC 374, [2008] IESC 40, [2004] 3 IR 610, [2009] 1 IR 275, *Heaney v Ireland* [1994] 3 IR 593, *Murphy v Attorney General* [1982] IR 241, *An Blascaod Mór Teo v Commissioners of Public Works (No 4)* [2000] 3 IR 565, *Redmond v Minister for Environment (No 2)* [2004] IEHC 24, [2006] 3 IR 1, *DK v Crowley* [2002] 2 IR 74, *McDonnell v Ireland* [1998] 1 IR 134, *Re Haughey* [1971] IR 217, *An Blascaod Mór Teo v Commissioners of Public Works (No 3)* [2000] 1 IR 6, *Meskell v Coras Iompair Éireann* [1973] IR 121, *Pine Valley Developments Ltd v Minister for Environment* [1987] IR 23, *Byrne v Ireland* [1972] IR 241, *Redmond v Minister for Environment (No 1)* [2001] 4 IR 61, *TD v Minister for Education* [2001] 4 IR 259, *King v Minister for Environment* [2006] IESC 61, [2007] 1 IR 296, *Cox v Ireland* [1992] IR 53, *Re Philip Clarke* [1950] IR 235, *Croke v Smith (No 2)* [1998] 1 IR 101, *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88, *O'Dowd v North Western Health Board* [1983] ILRM 186, *Murphy v Green* [1990] 2 IR 566, *Blehein v Murphy (No 2)* [2000] 3 IR 359, *Blehein v Murphy* [2000] 2 IR 231, [2000] 2 ILRM 481, and *Kearney v Minister for Justice* [1986] IR 116 considered; *Keating v Crowley* [2010] IESC 29, (Unrep, SC, 12/5/2010) applied – Mental Treatment Act 1945 s 260 [Act repealed by Mental Health Act 2001] – Mental Health Act 2001, s 73 – Statute of Limitations 1957 (No 6), s 11 (2), as amended by Statute of Limitations (Amendment) Act 1991, (No 18), s 3 – Constitution of Ireland 1937, arts 6, 34, and 40 – Determination postponed pending consideration of application of Statute of Limitations (2002/9652P – Laffoy J – 24/8/2010) [2010] IEHC 329
Blehein v Minister for Health and Children, Ireland and Attorney General

Locus standi

Jus tertii – Benefit to applicant – Whether applicant entitled to question adequacy of scheme where not making application under it – Legal aid – Legal aid entitlement – Attorney General's Scheme – Adequacy of scheme – Whether scheme inadequate – Whether applicant's right to representation infringed – Proportionality – Right to effective remedy – Infringement of right – Whether law in question infringes right – Whether infringement proportionate to objective to be achieved – *O'Sullivan v Irish Prison Service* [2010] IEHC 301, (Unrep, McKechnie J, 25/5/10) followed; *Blehein v Minister for Health and Children* [2008] IESC 40, [2009] 1 IR 275 distinguished – Criminal Justice (Legal Aid) Act 1962 (No 12) – European Convention of Human Rights Act 2003 (No 20), s 5European Arrest Warrant Act 2003 (No. 45), s. 16(12) – Criminal Justice (Miscellaneous Provisions) Act 2009 (No. 28), s. 12(f) – Council Framework Decision (2002/584/JHA), article 11(2) – Constitution of Ireland 1937, Articles 34.4.4° – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, article 13 – European Union Charter on Fundamental Rights, article 47 – Treaty on European Union, article 19.1- Claim dismissed (2010/816SS – McKechnie J – 27/7/2010) [2010] IEHC 324
McDermott v Governor of Cloverhill Prison

Personal rights

Breach – Damages – Unconstitutional act – *Bona fide* exercise of judicial power subsequently found unconstitutional – Appropriate remedy for breach of constitutional rights – Whether court has jurisdiction to award damages for

breach of constitutional rights – *McDonnell v Ireland* [1998] 1 IR 134 followed– Appeal dismissed (356/2005 – SC – 12/5/2010) [2010] IESC 29
Keating v Judge Crowley

Personal rights

Privacy – Company – Business transactions – Right to marry – Right to communicate – Right to travel – Whether corporate body having personal rights – Whether narrower than rights of natural persons – *Caldwell v Mahon* [2006] IEHC 86, [2007] 3 IR 542 and *Copland v UK* (App. 62617/00) (Unrep, ECHR, 3/4/2007) followed – Constitution of Ireland, 1937, Article 40 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1951, articles 8 and 12 – Plaintiff granted *locus standi* -(2006/3785P – McKechnie J – 5/5/2010) [2010] IEHC 221
Digital Rights Ireland Ltd v Minister for Communications

Personal rights

Privacy – Freedom of expression – Press – Balance of rights – Whether performance of public function could give rise to legitimate expectation of privacy – Whether publication of photographs taken in public place amounted to breach of privacy – Whether party who had sought publicity entitled to claim privacy – Defamation – Libel – Press – Reported speech – Use of word "whore" – Vulgar abuse – Context – Whether use of word "whore" defamatory -*M v Drury* [1994] 2 IR 8 approved; *Von Hannover v Germany* [2004] ECHR 294 and *Campbell v MGN Ltd.* [2004] 2 AC 457 distinguished; *Hosking v Runting* [2005] 1 NZLR 1, *Woodward v Hutchins* [1977] 1 WLR 760 and *Lennon v News Group Newspapers Ltd* [1978] FSR 573 approved – Constitution of Ireland, 1937, Articles 40.3 and 40.6 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Articles 8 and 10 – Claim dismissed (2006/4257P – Kearns P – 8/10/2010) [2w010] IEHC 349
Hickey v Sunday Newspapers Ltd

Personal rights

Unborn – Nature of such rights – Deportation order – Revocation – Birth of child imminent – Whether deportation of parent infringing right of unborn – Whether application for revocation of deportation order imposes obligations to consider constitutional rights of unborn infant of proposed deportee – Whether distinction between protection afforded to personal rights of unborn child and child when born – *G v An Bord Uchtála* [1980] IR 32, *McGee v Attorney General* [1974] IR 284, *Finn v Attorney General* [1983] IR 541 considered; *Fajujonu v Minister for Justice* [1990] 2 IR 151, *AO & DL v Minister for Justice* [2003] 1 IR 1 and *OE v Minister for Justice* [2008] 3 I.R. 760 distinguished; *Oguekwe v Minister for Justice* [2008] 3 IR 795 applied; *Monk v Warbey* [1935] 1 KB 75, *Close v Steel Company of Wales Ltd* [1962] AC 367 and *Burton v Islington Health Authority* [1993] QB 204 considered – Refugee Act 1996 (No 17), ss 5 and 13 – Immigration Act 1999 (No 22), s 3(11) – European Convention on Human Rights and Fundamental Freedoms, article 8 –Constitution of Ireland 1937, Articles 40, 41 and 42° – Constitution of Ireland 1937, Article 40.3 – Relief refused (2009/201JR – Cooke J – 17/12/2009) [2009] IEHC 598
U (H) v Minister for Justice

Statute

Validity – Liberty – *Habeas corpus* – Onus of proof – Presumption of constitutionality – Right to appeal – Access to courts – Right to effective remedy – Exceptions and restrictions – Restrictions on appeal – Point of law of exceptional public importance – Requirement of leave of court and certification of point of law – Whether restriction constitutional or conventional – Whether threshold insurmountable – Whether high threshold unconstitutional interference with right to appeal – Whether threshold of exceptional public importance too high in case of personal liberty – *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* [1991] HCA 43, 173 CLR 194, *Arklow Holidays Ltd v An Bord Pleanála* [2008] IEHC 2, (Unrep, Clarke J, 11/1/2008), *Minister for Justice v Altaravicius* [2006] IESC 23, [2006] 3 IR 148, *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 669, *In re the Employment Equality Bill 1996* [1997] 2 IR 321, *Horgan v An Taoiseach* [2003] 2 I.R. 468, *Kenny v Trinity College* [2007] IESC 42, [2008] 2 IR 40, *EPI v Minister for Justice* [2008] IEHC 432, [2009] 2 IR 254, *Crilly v T & J Farrington Ltd* [2001] 3 IR 251, *Howard v Commissioner of Public Works* [1994] 1 IR 101, *Controller of Patents, Designs & Trademarks v Ireland* [2001] 4 IR 229, *Ex-parte McCardle* 74 US (7 Wall.) 506 (1868), *Cockle v Isaksen* [1957] HCA 85, (1957) 99 CLR 155 considered – European Arrest Warrant Act 2003 (No 45), s 16(12) – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28), s 12(f) – Council Framework Decision (2002/584/JHA) – Illegal Immigrants (Trafficking) Act 2000 (No. 29) Constitution of Ireland 1937, Articles 34.4.3°, 40.1 and 40.3 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, articles 6(1), 13 and 14 – European Union Charter on Fundamental Rights, article 47 – Treaty on European Union, articles 19.1 and 35(2) – Claim dismissed (2010/323SS – McKechnie J – 25/5/2010) [2010] IEHC 301
O'Sullivan v Irish Prison Service

CONTRACT

Breach

Loan – Commercial transaction – Arrears – Demand for repayment – Evidence – Lay litigant – Witness statements – 'Unless' order – Defendant precluded from tendering evidence at trial unless witness statements delivered – Witness statements not delivered – Principles to be applied by court where litigant representing himself – Whether agreement that plaintiff would not demand repayment of loan if certain steps taken by defendants – Whether plaintiff estopped from seeking repayment of loan – Whether agreement to create contingency fund to meet shortfall between net rent and interest – Whether receiver wrongfully appointed over properties – Whether actions of receiver wrongful – Whether mortgage deed properly executed – Whether surcharge interest properly added to defendants' account – Claim allowed (2009/5503S – Clarke J – 10/1/2011) [2011] IEHC 7
ACC Bank PLC v Kelly

Library Acquisition

McMeel, Gerard
The construction of contracts: interpretation, implication, and rectification
2nd ed
Oxford: Oxford University Press, 2011
N10

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Articles

Holman, Samantha
Resale right derogation, extension to estates by 2012?
2011 1 IIPLQ 102

Kelly, Gerard
Three strikes is ruled out: the decision in EMI Records (Ireland) Ltd and others v. UPC Communications Ireland Ltd (2010)
2011 1 IIPLQ 63

Nowlan, Jessica
The importance of copyright in film
2011 1 IIPLQ 96

CORONERS

Inquest

Fair procedures – Refusal to adjourn inquest – Next of kin – Power to inquire into circumstances of death – How deceased died – Duty to carry out full and sufficient inquiry – Whether coroner acted in unreasonable and unfair manner in refusing adjournment – Coroners Act 1962 (No 9), s 30 – *Certiorari* granted (2008/991JR – Kearns J – 20/5/2010) [2010] IEHC 168
Lawlor v Geraghty

Library Acquisition

Cooper, John
Inquests
Oxford: Hart Publishing, 2011
L254

COSTS

Articles

Fox, Julia
Order 56A and the cost implications of refusal to engage in ADR
16(2) 2011 BR 22

Mansfield, Barry
The cost implications for refusing to avail of ADR in civil litigation in the Superior Courts
2011 (18) 1 CLP 8

Quinn, Michelle
Mediation – the answer to legal costs critics
2011 (May) GILS 20

CRIMINAL LAW

Appeal

Additional evidence – Admissibility of evidence at trial – Hearsay – Whether statement of applicant's son admissible at trial – *Reg v Sharp (Colin)* [1988] 1 WLR 7; *R v Lawless and Lawson* [2003] EWCA Crim 271, (Unrep, CA, 13/2/2003); *Reg v Blastland* [1986] 1 AC 41 approved – *People (DPP) v Redmond* [2004] IECCA 22, (Unrep, CCA, 28/7/2004); *People (DPP) v Willoughby* [2005] IECCA 4 (Unrep, CCA, 18/2/2005) considered – Courts of Justice Act 1924 (No 10), s 33 – Misuse of Drugs Act 1977 (No 12), ss 15A, 27 – Criminal Justice (Miscellaneous Provisions) Act 1997 (No 4) – Application refused (272/2008 – CCA – 29/10/2010) [2010] IECCA 100
People (DPP) v Gartland

Appeal

Additional evidence – Bias – Test to establish bias – Whether additional evidence would have materially affected decision at trial – *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412 applied – *People (DPP) v Willoughby* [2005] IECCA 4 (Unrep, CCA, 18/2/2005) approved – Application refused (69/2009 CJA – CCA – 12/7/2010) [2010] IECCA 88
People (DPP) v Buck

Appeal

Miscarriage of justice – Newly discovered facts – Duty of disclosure – Non-disclosure of evidential material – Applicant convicted on circumstantial evidence – Undisclosed prior inconsistent statement by main witness – Statement inconsistent with prosecution case – Dramatically contrasting statements – Account given at trial placing applicant at scene – Delay in bringing appeal – Whether statements were undisclosed – Whether conviction unsafe – Whether miscarriage of justice may have occurred – Whether new material might have raised reasonable doubt in minds of jury – Whether possible to assess conflicting accounts of events long passed – Whether failure to disclose was a matter of significance – Whether conviction should be quashed – *People (DPP) v Gannon* [1997] 1 IR 40; *People (DPP) v Meleady* [1995] 2 IR 517; *People (DPP) v McCarthy* [2007] IECCA 64, [2008] 3 IR 1; *People (DPP) v Special Criminal Court* [1999] 1 IR 60 followed – *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guana Company* [1882] 11 QBD 55 considered– Criminal Procedure Act 1993 (No 40), ss 2 and 3 –Conviction quashed (001/2000 – CCA – 22/11/2010) [2010] IECCA 105
People (DPP) v Conmey

Appeal

Miscarriage of justice – Newly discovered facts – Non-disclosure – Credibility of prosecution witnesses – Suspect Antecedent History Form – Relevance – Finality of answers on collateral matter – Public interest – Whether conviction unsafe or unsatisfactory – Whether miscarriage of justice may have occurred – Whether new material might have raised reasonable doubt in minds of the jury – Whether failure to disclose significant – Whether witnesses were State informers with paramilitary connections – Whether witness should have been cross-examined as to credibility – Whether forms had any evidential effect – Whether too remote to meet criteria for significant newly discovered facts – *People (DPP) v Meleady* [1995] 2 IR 517; *People (DPP) v Gannon* [1997] 1 IR 40 and *People (DPP) v McCarthy* [2007] IECCA 64, [2008] 3 IR 1 followed – *Attorney General v Hitchcock* (1847) 1 EXCH 91; *R v Bourke* (1858) 8 Cox CC 2 considered – Criminal Procedure Act 1993 (No 40), ss 2 and 3 – Application dismissed (2008/27CPA – CCA – 22/11/2010) [2010] IECCA 106
People (DPP) v Nevin

Appeal

Point of law – Arise from decision of Court of Criminal Appeal – Contention law in relation to addressing issue of absent witness at trial unclear – Contention law in respect of procedure to be followed upon adverse ruling of trial judge unclear – Approach to addressing issue of absent witness – Whether statement made at trial ruling – Whether points arose from decision of Court of Criminal Appeal – Whether points of exceptional public importance – Whether desirable in public interest to appeal – *DPP v Higgins* (Unrep, SC, 22/11/1985); *Director of Public Prosecutions v Littlejohn* [1978] ILRM 147 applied; *People (DPP) v O'Regan* [2006] IECCA 82, (Unrep, CCA, 16/6/2006); *People (DPP) v Kenny* [2004] IECCA 2, (Unrep, CCA, 5/2/2004); *DPP v Kelly* (Unrep, CCA, 11/7/1996) approved; *The People v Madden* [1977] 1 IR 336; *People (DPP) v Cronin (No 2)* [2006] IESC 9, [2006] 4 IR 329 considered – Courts of Justice Act 1924 (No 10), s 24 – Criminal Justice Act 2006 (No 26), s 2 – Application refused (106/2007 – CCA – 18/10/2010) [2010] IECCA 102
People (DPP) v Griffin

Appeal

Suspended sentence – Subsequent conviction – Remand to court which imposed suspended sentence – Application to state case refused pending disposition of suspended sentence issue – Presumption of innocence – Meaning of "determination" – Whether respondent should have stated case by way of appeal – Whether one may appeal by case stated against conviction only – Whether possible to appeal conviction before sentence imposed – Whether one may limit appeal to appeal against conviction only – *State (Aherne) v Cotter* [1982] 1 IR 188; *People (DPP)v Burke* [2007] IEHC 121, [2007] 2 ILRM 371 and *Harvey v Leonard* [2008] IEHC 209, (Unrep, Hedigan J, 3/7/2008) considered – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 4 – Criminal Justice Act 2006 (No 26), s 99 – Criminal Justice Act 2007 (No 29), s 60 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28) – Summary Jurisdiction Act 1857, s 2 – Courts (Supplemental Provisions) Act 1961 (No 39), s 51 – Courts of Justice Act 1928 (No 15), s 18(1) – Relief refused (2009/616JR – McCarthy J – 11/5/2010) [2010] IEHC 391
Muntean v Hamill

Drunk driving

Evidence – Presumption – Breath sample – Lion Intoxilyser machine – Presumption that reading is correct – Right to disclosure and inspection – Fair procedures – Cross examination – Failure to contradict evidence – Burden of proof – Basis of inspection – Whether respondent should have allowed forensic scientist appointed by applicant to examine machine – Whether right to disclosure unlimited – Whether breach of fair procedures – *Morgan v Collins* [2010] IEHC 65, (Unrep, O'Neill J, 19/3/2010) followed – *People (DPP) v Browne* [2008] IEHC 391, (Unrep, McMahon J, 9/12/2008); *People (DPP) v Smyth* [2010] IECCA 34 (Unrep, CCA, 18/5/2010) and *McGonnell v DPP* [2007] IESC 64, [2007] 1 IR 400 considered – Road Traffic Act 1994 (No 7), s 21(1) – Road Traffic Act 2006 (No 23) – Application refused (2009/614JR – Charleton J – 11/11/2010) [2010] IEHC 381
Oates v Browne

Evidence

Corroboration –Internal inconsistencies – Counts covering lengthy time periods – Inconsistency of jury verdicts – Unsigned statement given to jury – Principles relating to time periods in counts – Test to establish whether evidence capable of amounting to corroboration – Jurisdiction of trial judge to decide whether or not to give corroboration warning – Whether permissible for counts to cover period of about one year – Whether inconsistencies rendered verdict unsafe – Whether corroborative evidence at trial – Whether judge erred in failing to give corroboration warning – Whether document handed to jury prejudicial – *People (DPP) v F(E)* (Unrep, SC, 24/2/1994) applied; *People (DPP) v M(JE)* (Unrep, CCA, 1/2/2000); *Rex v Baskerville* [1916] 2 KB 658; *The People (Director of Public Prosecutions) v PC* [2002] 2 IR 285 approved; *People (DPP) v Maughan* [1995] 1 IR 304; *People (DPP) v Sweeney* (Unrep, CCA, 16/5/2007) distinguished – Criminal Law (Amendment) Act 1990 (No 32), ss. 4

7 – Application refused (316/2009 – CCA – 13/10/2010) [2010] IECCA 94
People (DPP) v Farrell

Evidence

Failure to prove – Proper form – Whether retrial appropriate – *The Emergency Powers Bill 1976* [1977] 1 IR 159 applied; *People (Attorney General) v Griffin* [1974] 1 IR 416 distinguished – Dangerous Drugs (Raw Opium, Coca Leaves and Indian Hemp) Regulations 1937 (SI 64/1937) – Application treated as appeal; appeal allowed; retrial ordered (297/2008 CJA – CCA – 19/7/2010) [2010] IECCA 82
People (DPP) v Mackin (No 2)

Evidence

Judicial notice – Regulation – Proof of regulation – Essential proofs – Sufficient definition of charge – Evidence – Proof of offence – Offence created by regulation –Need for certainty re precise ingredients of offence and date of creation of offence – Possession of controlled drug for purpose of sale or supply – Whether this offence created by regulation – Whether proof of regulation essential proof where offence created by regulation – Whether District Court Judge entitled to take judicial notice of regulation where offence created by said regulation – *DPP v Collins* [1981] ILRM 447, *DPP v Cleary* [2005] IECCA 51, [2005] 2 IR 189, and *King v Attorney General* [1981] IR 233 applied; *State (Taylor) v Circuit Judge of Wicklow* [1951] IR 311 approved; *Attorney General v Parke* [2004] IESC 100, (Unrep, SC, 6/12/2004) distinguished; *People (Attorney General) v Kennedy* [1946] IR 517, *People (Attorney General) v Griffin* [1974] IR 416, *Buckley v Kirby* [2000] 3 IR 431, *R (Martin) v Mahony* [1910] 2 IR 695, *Grodzicka v Judge Ní Chondúin and DPP* [2009] IEHC 475, (Unrep, Dunne J, 30/10/2009), *Farrelly v Devally* [1998] 4 IR 76, *Anisminic Ltd v Foreign Compensation Commission and anor* [1969] 2 AC 147, *State (Cork County Council) v Judge Fawsitt* (Unrep, McMahon J, 13/3/1981), *Harte v Labour Court* [1996] 2 IR 171, *Roche v District Judge Martin* [1993] ILRM 651, *Lennon v Judge Clifford* [1996] 2 IR 590, *People (DPP) v Murray* [2005] IECCA 31, (Unrep, CCA, 10/3/2005), *Attorney General v Cunningham* [1932] IR 28, and *People (Attorney General) v Edge* [1943] IR 115 considered – Documentary Evidence Act 1925 (No 24), s 4(1) – Misuse of Drugs Act 1977 (No), ss 5, 15, and 27 (as amended by Misuse of Drugs Act 1984 (No 18), s 6 – Misuse of Drugs Regulations 1988 (SI 328/1988) – Misuse of Drugs (Amendment) Regulations 1993 (SI 324/1993) – Constitution of Ireland 1937, arts 15.5 and 38 – Application granted (2009/1049JR – MacMenamin J – 14/7/2010) [2010] IEHC 336
Kelly v Judge Dempsey and DPP

Evidence

Proof – Evidence on commission – Failure of proof by prosecution – Appeal – Trial within state – Evidence taken on commission in Northern Ireland – Whether conviction should be quashed – Proviso – Whether retrial should be ordered – Jurisdiction of Court of Criminal Appeal – *The Criminal Law Jurisdiction Bill, 1975* [1977] IR 129 followed; *People (AG) v McGlynn* [1967] IR 232 and *de Rossa v Independent Newspapers plc* [1999] 4 IR 432 considered – Courts of Justice Act 1928 (No 15), s 5 – Criminal Law (Jurisdiction) Act 1976 (No 14), s 11(3) – (297/2008 – CCA – 19/7/2010) [2010] IECCA 81
People (DPP) v Mackin

Harassment

Protracted period of time – Direction not to consider counts and events listed in counts as cumulative – Media coverage – Internal inconsistencies – Recital of evidence by trial judge – Principle regarding recital of evidence – Effect of failure to raise requisition – Whether trial in accordance with law – *People (DPP) v Cronin (No 2)* [2006] IESC 9, [2006] 4 IR 329 considered – Non-Fatal Offences Against the Person Act 1997 (No 26), s 10 – Application refused (283/2009 – CCA – 15/10/2010) [2010] IECCA 98
People (DPP) v Quirke

Multiple trials

Sexual offences – Discharge of juries – Inadmissible and prejudicial evidence given by complainant – Whether fourth trial per se prohibited – Whether fourth trial abuse of process – Whether fourth trial breach of right to fair trial — Role of Director of Public Prosecutions – *DS v Judges of the Cork Circuit Court* [2008] IESC 37, [2008] 4 IR 379 and *McNulty v Director of Public Prosecutions* [2009] IESC 12, [2009] 3 IR 572 considered – Constitution of Ireland 1937, Articles 38.1 and 40.4.1° – Applicant's appeal dismissed (203 & 204/2004 – SC – 25/1/2011) [2011] IESC 2
P (A) v Director of Public Prosecutions

Practice & procedure

Return for trial – District Court slip rule – Omission of charge sheet from return for trial order – Amendment of return for trial order under slip rule – Meaning of "next sitting" – Whether District Court *functus officio* once return for trial order made – Whether use of slip rule appropriate to amend such defect – *DPP v Reilly* [2008] IEHC 419, (Unrep, Cooke J, 19/12/ 2008), *The State (O'Flaherty) v O'Floinn* [1954] IR 295, and *G McG v DW (No 2) (Joinder of Attorney General)* [2000] 4 IR 1 considered; *Belville Holdings Ltd v Revenue Commissioners* [1994] 1 ILRM 29, *Ainsworth v Wilding* [1896] 1 Ch 673, *In re Swire* (1885) 30 Ch D 239 followed; *Creaven v Criminal Assets Bureau* [2004] IEHC 26, [2004] IESC 92, [2004] 4 IR 434 distinguished; *Reg (M'Evoy) v Corporation of Dublin* (1878) 2 LR Ir 371 and *Byrne v Grey* [1988] IR 31 considered – Criminal Procedure Act 1967 (No 12), s 4(A), Criminal Justice Act 1999 (No 10), s 9 – District Court Rules 1997 (SI 93/1997), O 12, r 17 – Relief refused (2009/1259JR – McMahon J – 7/7/10) [2010] IEHC 266
Dorn v District Judge Reilly

Practice and procedure

Trial – Sending forward on signed plea – Subsequent preferment of more serious charge – Abuse of process – Trial in due course of law – *Autrefois convict* and estoppel not pursued – Sent forward on signed plea to s 3 assault causing harm charge – Subsequent preferment of s 4 causing serious harm charge – Whether failure of prosecution to tell accused that DPP was reserving position re s 4 charge at time prosecution accepted signed plea was abuse of process – Whether such failure would warrant restraint of prosecution on s 4 charge – Clumsiness and lack of forethought but no abuse of process – *People (DPP) v Finnamore* [2008] IECCA 99, [2009] 1 IR 153, *Richards v The Queen* [1993] AC 217, *Connelly v DPP* [1964] AC 1254, *State (Brien) v Kelly* [1970] IR 69, and *Carlin v DPP* [2010] IESC 14, (Unrep, SC, 16/3/2010) considered; *Eviston v DPP* [2002] 3 IR 260 distinguished – Criminal Procedure Act 1967 (No 12), s 13 (as substituted by s 10(3) Criminal Justice Act 1999 (No 10)) – Criminal Law Act 1997 (No 14), s 10(5) – Non-Fatal Offences against the Person Act 1997 (No 26), ss 3 and 4 – Constitution of Ireland 1937, article 38 – Application refused (214/2009 – SC – 27/7/2010) [2010] IESC 46
Higgins v DPP

Publicity

Fair trial – Publication of article during trial – Reports of witness intimidation – Whether real or serious risk of unfair trial established – Whether charge to jury sufficient in the particular circumstances of case – Whether real risk jury would associate article with trial – Whether prejudice to accused – Appeal allowed; retrial ordered (265/2008 – CCA – 29/7/2010) [2010] IECCA 87
People (DPP) v Duff

Road traffic offence

Failure to produce – Failure by garda to specify power – Failure by accused to provide certificate of insurance – Whether garda making demand for certificate of insurance must specify power to make demand – Whether garda must inform accused of consequences of failing to comply with requirement – Road Traffic Act 1961 (No 24), ss 56 and 69 – Case stated answered (2010/757SS – Charleton J – 2/11/2010) [2010] IEHC 379
DPP (Garda Lanigan) v Freeman

Search warrant

Signatory – Heading on warrant – Error – Warrant signed by peace commissioner headed District Court – Failure to delete notation describing signatory as District Court judge – Principles in relation to search warrants – Whether trial judge erred in finding error on face of warrant fundamental – *Simple Imports Ltd v Revenue Commissioners* [2000] 2 IR 243; *People (DPP) v Balfe* [1998] 4 IR 50 considered; *People (DPP) v Edgeworth* [2001] 2 IR 131; *Director of Public Prosecutions v Dunne* [1994] 2 IR 537 distinguished – Criminal Procedure Act 1967 (No 12), s 4E – Misuse of Drugs Act 1977 (No 12), s 26 – Misuse of Drugs Act 1984

(No 18) – Criminal Justice Act 1999 (No 10) – Application refused; Circuit Court order affirmed (263PX/09 – CCA – 12/10/2010) [2010] IECCA 89
People (DPP) v McCarthy

Sentence

Assault occasioning harm –Gravity of assault – Aggravating factors – Use of knife – Victim punched in face – No premeditation in relation to knife – Minor injuries – Upset and trauma – Large number of previous convictions – Whether error in principle – Whether sentencing judge took account of all relevant matters – Whether judge took account of relationship of applicant with son – Sentence of 2 years – Application dismissed (271/09 – CCA – 18/11/2010) [2010] IEHC 112
People (DPP) v Nagle

Sentence

Child – Detention – Combined detention and supervision – Totality of sentence – 4 year sentence imposed – Robbery of licensed premises – Violent assaults on staff – Production of knife – Previous offences – Best interests of child and victim – Protection of society – Unsuitability for probation – Person of potential – Conditions imposed – Whether 4 year sentence was excessive – Whether judge should have considered alternative of deferring sentence – Children Act 2001 (No 24), ss 96 and 151 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 – Criminal Justice Act 2006 (No 26), s 136 – Sentenced substituted (298/09 – CCA – 18/11/2010) [2010] IECCA 113
People (DPP) v Hand

Sentence

Drugs – Error in principle – Taking other offences into account –Immediate custodial sentence – Special circumstances – Good character – First offence – Partly suspended sentence – Low end of scale – Whether error in failing to suspend entire sentence – Whether matters erroneously taken into account – Whether alternatives such as community care programme should have been provided – *State (DPP) v Barrett* (Unrep, CCA, 19/5/2003) followed – Misuse of Drugs Act 1977 (No 12), s 15 – Sentence varied (160/2010 – CCA – 18/10/2010) [2010] IECCA 104
People (DPP) v Gaffney

Sentence

Drugs – Mandatory minimum sentence – Quantity of drugs – Heroin worth €3 million – Mitigating factors – Early guilty plea – No previous convictions – Lower end of chain – Genuine remorse – Mental health problems – Whether correct in imposing sentence of 10 years without suspending any part of it – Whether cooperation fell short of material assistance – Whether court overlooked material assistance – Misuse of Drugs Act 1977 (No 12), s 15A – Sentence varied (177/09 – CCA – 18/11/2010) [2010] IECCA 109
People (DPP) v Hynes

Sentence

Drugs – Mitigating circumstances – Sentences for other connected parties – Discretion to backdate – Whether sentences unduly severe – Whether sentence should have been backdated to date applicant went into custody – Whether error in principle – Whether disparity in sentence – Whether exceptional circumstances – Whether equal circumstance to other parties – Misuse of Drugs Act 1977 (No 12), s 15A – Sentence backdated; appeal dismissed (12 & 150/2006 – CCA – 18/10/2010) [2010] IECCA 107
People (DPP) v Tanner

Sentence

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Manslaughter – Extreme wanton sustained deliberate violence – Remorse – Previous convictions – Propensity to engage in unprovoked violence –Whether judge was entitled to impose 14 year sentence – Whether judge should have expressed scepticism on question of remorse – Whether judge should have expressed suspicion as to reason applicant went to house – Application dismissed (216/09 – CCA – 18/11/2010) [2010] IECCA 108
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Sentence

Rehabilitation – Violence against property – Deliberate damage to vehicles – Monetary motive – Great loss to small business man – Other offences committed between that offence and sentencing – Sentence of 3 years – Whether any rehabilitation built into sentence – Whether more socially useful to suspend final year – Sentenced substituted (188/09 – CCA – 18/11/2010) [2010] IECCA 111
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Sentence

Undue leniency – Assault causing harm – Whether trial judge took into account all material circumstances – Whether sentence imposed unduly lenient – Road Traffic Act 1961 (No 24) – Misuse of Drugs Act 1977 (No 12), s 3 – Criminal Justice Act 1993 (No 6), s 2 – Criminal Justice (Public Order) Act 1994 (No 2), ss 4, 6 & 8 – Non-fatal Offences Against the Person Act 1997 (No 26), ss 3 & 4 – Application refused
(211/2009 CJA – CCA – 14/10/2010) [2010] IECCA 96
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Klier v Governor of Cloverhill

Articles

Byrne, John P
Vehicle "clocking": does the Beere case represent a new approach to consumer-related frauds
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Doyle, David M
"The guilty sexual predator" and the "innocent comely maiden". Gender, paternalism and the pregnancy factor
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The treatment of child suspects in Garda Síochána stations
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'Voiceless victims: suffering under lenient punitive legislation in Ireland'
2011 (8) ILT 103

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The lengthening arms of bribery law
2011 (18) 5 CLP 104

Whelan, Grainne
Dangerous driving causing death: an evaluation of sentencing in the Court of Criminal Appeal in the People (Director of Public Prosecutions) v. James O'Reilly
2011 (1) IRTL 39

Robinson, Dara
Suspects' solicitors should be at garda interrogation
2011 (May) GILS 18

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Right of access to a solicitor in garda custody
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New look drug treatment court offers hope for the future
16(2) 2011 BR 26

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District Court (criminal law (insanity) act 2010) rules 2011
SI 154/2011

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Farrell v Dublin Bus/Bus Átha Cliath

Articles

Barr, Anthony
Damages in fatal injury actions – selected issues
16(2) 2011 BR 36

Carey, Gearoid
Damage to property and the measure of damages
2011 (4) ILT 46

Cazabon, Sarah
Damages
2011 (1) ILT 9

DEFAMATION

Article

Holland, Marie
Internet intermediaries and the law
16 (3) 2011 BR 60

Library Acquisition

School of Law, Trinity College
Defamation and privacy law
Dublin: Trinity College, 2011
N38.2.C5

DISCOVERY

Article

Harbison, Andrew
"Documents": how to get out alive in e-discovery
2011 (1) CP & P 35

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Interlocutory relief

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Burke v Independent Colleges Ltd

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de Búrca v An tAire Iompair

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Dublin City Council v TEEU

Articles

Corbett, Val
Victimisation and the employment equality acts – trends in recent case law
2010 (4) ELJI 33

Cox, Neville
Burke v. Independent Colleges – employment injunctions revisited
2010 (4) ELRI 3

Finlay, Hon. Chief Justice, Thomas A
Protective measures for pregnant workers in the workplace
2011 (2) IELJ 36

Grogan, Richard
Lay-off my case
2011 (January/February) GLSI 32

Grogan, Richard
There is no right to payment of wages during lay-off – the fallacy exposed
2011 (1) IELJ 8

Kelleher, Mary
It's a fix – a review of the restrictions on the renewal of fixed-term contracts in the public sector
2011 (2) IELJ 49

MacMaolain, Caoimhin
Placing limitations on acceptable acts of ageism: the significance of the decision in Anderson
2010 (3) ELRI 69

Library Acquisitions

Moffatt, Jane
Law Society of Ireland
Employment law
3rd ed
Oxford: Oxford University Press, 2011
N192.C5

Thomson Round Hall
Round Hall employment law conference 2011 papers
Dublin: Thomson Round Hall, 2011
N192.C5

Statutory Instrument

Employment regulation order (retail grocery and Allied Trades Joint Labour Committee) 2011
SI 213/2011

EQUITY & TRUSTS

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Headstart Global Fund Ltd v Citco Bank Nederland NV, Nexus Management Pty Ltd, and RMF Market Neutral Strategies (Master) Ltd

EVIDENCE

Articles

Glynn, Brendan
Admissibility of background evidence
2011 (9) ILT 126

Glynn, Brendan
The extent of the duty of An Garda Síochána to preserve evidence
2011 (8) ILT 109

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Digital Rights Ireland Ltd v Minister for Communications

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– Council Regulation (EC) 820/97 – Council Regulation (EC) 1760/2000 – Relief refused (2007/322JR – McKechnie J – 18/6/2010) [2010] IEHC 325
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European arrest warrant

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European arrest warrant

Family rights – Proportionality – Nature and seriousness of offence – Fraud – Minimum gravity offence – Delay between offence and issue of warrants – Age of children – Fair procedures – Prejudice – Whether family rights would be unjustifiably interfered with – Whether surrender necessary in democratic society and proportionate to legitimate aimed pursued – Whether surrender prohibited by s 37 provisions – Whether delay sufficient to bar surrender – *Minister for Justice, Equality and Law Reform v Gheorghe* [2009] IESC 76, (Unrep, SC, 18/11/2009) considered; *Minister for Justice, Equality and Law Reform v Gorman* [2010] IEHC 210, (Unrep, Peart J, 22/4/2010) and *Khan v United Kingdom* (2010) 50 EHRR 47 distinguished – European Arrest Warrant Act 2003 (No 45), ss 13 and 37 – Constitution of Ireland 1937, art 41 – European Convention on Human Rights, art 8 – Framework decision, art 2.2 – Order for surrender made (2009/145 & 146EXT – Peart J – 14/10/2010) [2010] IEHC 402
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European arrest warrant

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Child abduction

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Child abduction

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Orders Act 1991 (No 6) – Hague Convention on the Civil Aspects of International Child Abduction 1980, article 13 – Return of child ordered (2010/5HLC – MacMenamin J – 13/7/2010) [2010] IEHC 424
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Divorce

Appeal – Property adjustment – Family home – Minimum sale price of family home stipulated by court for lump sum for wife – Multiplicity of applications to court by wife delayed sale – Sale completed for vastly reduced price – Fault for shortfall lies with wife – Shortfall of €170,000 between stipulated minimum price and ultimate sale price – Whether lump sum figure awarded to be reduced *pro rata* – Whether consequence of wife's own conduct was to diminish value of available assets– Order that lump sum be paid into court to prevent further dissipation of assets (2010/11CAF – MacMenamin J – 29/7/2010) [2010] IEHC 425
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J Marques v Judge Brophy, Judge Fulham, the Attorney General, and A Marques

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McK (F) v L (O)

Articles

Butler, Kellie
Case stated: maintenance: McK v L
2011 FLJ 17

Butler, Kellie
Article 267 preliminary ruling: custody rights: J. McB v L.E.
2011 FLJ 15

Egan, Anne
Are fathers discriminated against in Irish family law? An empirical study
2011 (2) IJFL 38

Fitzgerald, Ann
Divorce in a cold climate
16 (3) 2011 BR 55

Halim, Rubina
Divorce under English and Islamic law
2011 (9) ILT 123

Hogan, Claire
Section 47 reports in family law proceedings: purpose, evidential weight and proposals for reform
2011 (2) IJFL 27

Library Acquisitions

Bond, Abigail
Care proceedings and learning disabled parents: a handbook for family lawyers
Bristol: Jordan Publishing Limited, 2011
N176.42

Greensmith, Andrew
Resolution family disputes handbook
London: The Law Society, 2010
N173.11

Parkinson, Lisa
Family mediation: appropriate dispute resolution in a new family justice system
2nd edition
Bristol: Jordan Publishing Limited, 2011
N173.11

Shannon, Geoffrey
Law Society of Ireland
Family law
4th ed
Oxford: Oxford University Press, 2011
N170.C5

Ward, Paul
Family law in Ireland
Netherlands: Kluwer Law International, 2010
N170.C5

Wilson, The Right Hon Lord Justice
The family court practice 2011
Bristol: Family Law, 2011
N170.Z71

FINANCIAL SERVICES

Article

McGrath, Noel
Control and the financial collateral directive
2011 (18) 1 CLP 3

FISHERIES

Statutory Instruments

Mussel seed (opening of fisheries) regulations 2011
SI 204/2011

Safety of fishing vessels regulations 2007 (revocation) regulations 2011
SI 53/2011

Sea-fisheries (control on fishing for clams in Waterford Estuary) regulations 20111
SI 221/2011

Sea-fisheries (quotas) regulations 2011
SI 68/2011

Sea-fisheries (recording of fish) regulations 2011
REG/2807-83, REG/2847-93, REG/409-2009, REG/1224-2009)
SI 8/2011

GARDA SÍOCHÁNA

Compensation

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Looby v Minister for Justice

Article

Glynn, Brendan
The extent of the duty of an Garda Síochána to preserve evidence
2011 (8) ILT 109

HEALTH

Statutory Instruments

Health and children (alteration of name of department and title of minister) order 2011
SI 219/2011

Health and social care professionals act 2005 (commencement) (no. 2) order 2011
SI 252/2011

Health professionals (reduction of payments to optometrists for certain services) regulations 2011
SI 261/2011

HOUSING

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Housing authority – Anti–social behaviour – Application to succeed to tenancy – Whether actions of respondent amenable to judicial review – Whether respondent obliged to give applicant opportunity to be heard prior to removing him from property – Whether conviction constituted anti–social behaviour – *Hunt v Dublin City Council* [2004] IESC 80 (Unrep, *ex tempore,* SC, 13/5/2004) distinguished; *McCann v UK* (2008) 47 EHRR 40, *Buckley v UK* (1997) 23 EHRR 101, *Chapman v UK* (2001) 33 EHRR 18 and *Connors v UK* (2004) 40 EHRR 189 considered – Local Government (Dublin) Act 1993 (No 31) – Housing (Miscellaneous Provisions) Act 1997 (No 21), ss 1 (1), 15 and 20 – European Convention on Human Rights, article 8 – Declaration granted (2008/1348JR – O'Neill J – 19/3/2010) [2010] IEHC 67
Neville v South Dublin County Council

Article

Ralston, Gavin
Part V and the provision of social and affordable housing: time to reconsider
2010 LGR 94

Statutory Instrument

Social housing allocation regulations 2011
SI 198/2011

HUMAN RIGHTS

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Murphy, Colin
Gentle champion: Gareth Pierce
2011 (April) GILS 20

Murphy, Colin
Jim'll fix it
2011 (January/February) GLSI 24

Murphy, Colin
It's a long, long way...
2011 (May) GILS 26

Wallace, Stuart
Tackling Jarndyce and Jarndyce: delay, McFarlane v Ireland and the European Court of Human Rights – part I
2011 ICLJ 30

IMMIGRATION

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(L) VCB (No 2) v Refugee Appeals Tribunal

Asylum

Appeal – Revocation of status – Material particular – Whether false or misleading – Non disclosure of UK asylum application – Whether court must be satisfied that false or misleading information decisive to grant of application for asylum – Refugee Act 1996 (No 17), s 21 – European Communities (Eligibility for Protection) Regulations (SI 518/2006) – Appeal refused; decision to revoke asylum status confirmed (2010/89MCA – Cooke J – 12/1/2010) [2010] IEHC 436
Gashi v Minister for Justice, Equality and Law Reform

Asylum

Credibility – Distinction between documented and undocumented tribal people – Whether Tribunal entitled to conclude that applicant had been untruthful – Whether credibility finding legitimate – Whether adequate reasons

provided by Tribunal – *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005), *IR v Refugee Appeals Tribunal* [2009] IEHC 510, (Unrep, Cooke J, 26/11/2009) and *MMF and LL v Refugee Appeals Tribunal* [2010] IEHC 134, (Unrep, Clark J, 19/3/2010) followed; *NM v Minister for Justice* [2008] IEHC 130, (Unrep, McGovern J, 7/5/2008) considered; *JBR v Refugee Appeals Tribunal* [2007] IEHC 288, (Unrep, Peart J, 31/7/2007) approved – Illegal Immigrants (Trafficking) Act 2000 (No 29) – Leave to apply for judicial review refused (2008/940JR – Abbott J – 22/9/2010) [2010] IEHC 332
AHAAA [Kuwait] v Minister for Justice Equality and Law Reform

Asylum

Credibility – Persecution – Country of origin information — Whether entirety of country of origin documentation considered when arriving at adverse conclusions as to credibility – Whether credibility finding irrational, inconsistent or illogical – Whether clear and manifest error – *Tabi v Minister for Justice, Equality and Law Reform* (Unrep, Peart J, 27/7/2007) followed – *SC v Minister for Justice* (Unreported, Kelly J, 26th July, 2000)); *K. v Refugee Appeals Tribunal* [2004] IEHC 240, [2004] 2 ILRM 550 and *AMT v Refugee Appeals Tribunal* [2004] IEHC 219, [2004] 2 IR 607 considered – Leave granted (2008/919JR – Irvine J – 19/10/2009) [2010] IEHC 405
Idrees v Refugee Appeals Tribunal

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Delay – Judicial review – Leave – Extension of time for leave to apply for judicial review of refusal of refugee application – 6 day delay – Apportionment of blame for delay – Whether whole delay explained – Whether relevant parties put on notice of application – Fair procedures – Strength of substantive case – *CS and ors v Minister for Justice, Equality and Law Reform and ors* [2004] IESC 44, [2005] 1 IR 343 distinguished; *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, and *A and anor v Refugee Appeals Tribunal and ors* [2007] IEHC 290, (Unrep, Peart J, 27/7/2007) considered; *Dekra Éireann Teoranta v Minister for Environment and ors* [2003] 2 IR 270 and *GK v Minister for Justice, Equality and Law Reform* [2002] 2 IR 418 followed; *A v Refugee Applications Commissioner and ors* [2008] IEHC 431, (Unrep,Hedigan J, 18/12/2008) approved – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Application for extension of time for leave to apply for judicial review refused (2008/580JR – Abbott J – 21/9/2010) [2010] IEHC 331
MBO v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform

Asylum

Stateless person – Judicial review – 'Refugee' – Applicant found by respondent to be stateless – Whether respondent failed to consider 'primary claim' that applicant was of Bhutanese nationality and had been expelled from Bhutan for reasons constituting persecution on grounds of ethnic origin – Refugee Act 1996 (No 17), ss 2 & 13 – Application refused (2007/1309JR – Cooke J – 3/12/2010) [2010] IEHC 438
K (TB) v Refugee Appeals Tribunal

Deportation

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S (F) v Minister for Justice, Equality and Law Reform

Deportation

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D (OS) v Minister for Justice, Equality and Law Reform

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F (ISO) v Minister for Justice, Equality and Law Reform

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Injunction – Interlocutory injunction – Application to restrain deportation – Qualifying family member – Daughter of spouse of EU citizen – Whether applicant lawfully in State as qualifying family member despite failure to make formal substantial application for residency – Whether right to reside derives directly from Directive – Whether deportation unlawful as respondent had wrongly rejected claim to entitlement to reside as qualifying family member – Whether applicant required to make formal substantial application for residency in order to reside in State as qualifying family member – Whether arguable case – Immigration Act 1999 (No 22), s 3 – European Communities (Free Movement of Persons) Regulations 2006 (SI 226/2006) – Council Directive 2004/38/EC – Relief refused (2010/538JR – Cooke J – 10/11/2010) [2010] IEHC 406
Adedoja v Minister for Justice, Equality and Law Reform

Deportation

Interlocutory injunction – Family rights –Unsuccessful asylum application – Judicial review application pending – Irish citizen family members –Adequacy of first respondent's appreciation of Irish applicants' interests, welfare and rights – Custody of children – Balance of convenience – Adequacy of damages – Whether substantial ground – Whether deportation order valid – Whether fair issue to be tried – Whether deportation exposes applicants to risk of irreversible harm – *Campus Oil v Minister for Industry and Commerce (No 2)* [1983] IR 88 applied – European

Convention on Human Rights, arts 3, 8 and 13 – Relief refused (2010/734JR – Cooke J – 9/11/2010) [2010] IEHC 392
O (OA) v Minister for Justice, Equality and Law Reform

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U (H) v Minister for Justice

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Asylum – Judicial review – Outside time limit – Extension – Whether good and sufficient reason to extend time – Court entitled to and must have regard to general merits of application – 'Substantial grounds' – Whether substantial grounds for contending that respondent erred in law in concluding that discrimination in Croatia did not amount to 'persecution' – Whether substantial grounds for contending that respondent failed to have any or any proper regard to, and failed to offer any reason for distinguishing, three previous decisions of the respondent – Whether substantial grounds for concluding that respondent made errors of fact so material to its conclusions as to render its decision invalid or unsatisfactory – *(A)J v Refugee Appeals Tribunal* [2008] IEHC 310 (Unrep, Hedigan J, 15/10/2008); *PPA v Refugee Appeals Tribunal* [2006] IESC 53, [2007] 4 IR 94; *T(G) v Minister for Justice, Equality and Law Reform* [2007] IEHC 287 (Unrep, Peart J, 27/7/2007) considered – Refugee Act 1996 (No 17), s 2 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Time extended and leave granted (2008/1101JR – Herbert J – 7/12/2010) [2010] IEHC 439
V (G) v Refugee Appeals Tribunal

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Judicial review – Delay – Extension of time – Three days outside time limit – Application for leave to apply – Whether reasonable explanation for lapse of time – Country of origin information – Additional information not brought to attention of respondents – Whether legal duty on first respondent to obtain, refer to or permit applicant to make submission on additional country of origin information after date of hearing but before making of decision – Whether first respondent failed to consider UNHCR paper – Whether first respondent failed to provide reasons for not applying UNHCR paper – *FAA v Refugee Appeals Tribunal* [2008] IEHC 220 (Unrep, Birmingham J, 24/6/2008) and *MMA v Refugee Appeals Tribunal* [2009] IEHC 217 (Unrep, Clark J, 12/5/2009) distinguished – *Jansusi v Home Secretary* [2006] 2 AC 46; *AH (Sudan) v Home Secretary* [2008] 1 AC 678 considered – European Communities (Eligibility for Protection) Regulations 2006 (SI518/2006), reg 5 – Council Directive 2005/85/EC – Leave granted (2008/1039JR – MacMenamin J – 25/11/2010) [2010] IEHC 435
A (A) v Refugee Appeals Tribunal

Articles

Dewhurst, Elaine
The immigration, residence and protection bill 2010 and defining the irregular immigrant in Irish law
2011 (5) ILT 69

Handoll, John
Pandora's box
2011 (May) GILS 30

INFORMATION TECHNOLOGY

Articles

Gibbons, Glen
The use and abuse of the IEDR process: protecting trade marks online
2011 1 IIPLQ 87

Holland, Marie
Internet intermediaries and the law
16 (3) 2011 BR 60

INSURANCE

Contract

Financial Services Ombudsman – Appeal of decision to High Court– Critical illness cover – Absence from work due to serious back injury – Whether injury covered by critical illness cover policy –Whether delay in processing of claim payment under policy – Lapsed policy due to non payment of premiums – Whether appellant given fair warning by terms of policy that policy would lapse if payments were not maintained even after triggering event of injury – Whether Ombudsman failed to consider all circumstances of appellant's written claim – Whether policy term was unreasonable, unjust, oppressive or improperly discriminatory in its application to appellant – Whether Financial Services Ombudsman failed to have regard to material considerations of appellant's complaint – Whether decision reached was vitiated by serious and significant errors – Whether statutory appeal or separate judicial review proceedings appropriate – *Square Capital Ltd v Financial Services Ombudsman* [2009] IEHC 467 (Unrep, McMahon J, 27/8/2009); *Dunne v Minister for Fisheries and Forest* [1984] IR 230; *Teahan v Minister for Communications (No 1)* [2008] IEHC 194 (Unrep, Laffoy J. 18/6/2008) and *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323 (Unrep, Finnegan J, 1/11/2006 considered – Central Bank Act 1942 (No 22), ss 57BK(4), 57CI(2), 57CL- Central Bank and Financial Services Authority of Ireland Act 2004 (No 21) – Part appeal allowed and remitted (2010/93MCA – Hogan J – 1/11/2010) [2010] IEHC 407
Koczan v Financial Services Ombudsman

Policy

Appeal against award – Joint policy – Cancellation – Notification to one party – Records – Mediation – Reasons – Function of Financial Services Ombudsman – Whether policy cancelled – Whether parties notified of cancellation – Whether error of law in making award in relation to cancelled policy – Whether appellant should have retained records – Whether notice parties obliged to check bank accounts – Whether respondent acted *ultra vires* – Whether decision vitiated by serious and significant error – Whether respondent required to offer mediation – *Quinn Direct v Financial Services Ombudsman* [2007] IEHC 323 (Unrep, Finlay Geoghegan J, 4/10/2007); *Ulster Bank v Financial Services Ombudsman* [2006] IEHC 323, (Unrep, Finnegan P, 1/11/2006); *Hayes v Financial Services Ombudsman* (*ex temp*, HC, MacMenamin J, 3/11/2008); *Orange v Director of Telecommunications Regulator* [2000] 4 IR 159; *Henry Derry and sons v Minister for Social Welfare* [1998] 1 IR 34; *ACT Shipping v Minister for the Marine* [1995] 3 IR 406; *Square Capitol v Financial Services Ombudsman* [2009] IEHC 407, (Unrep, McMahon J, 27/8/2009); *J & E Davy v Financial Services Ombudsman* [2008] IEHC 256, (Unrep, Charleton J, 30/7/2008) considered – Central Bank Act 1942 (No 22), ss 57BB, 57BJ, 57BK, 57CI, 57CL and 57CM – Companies Act 1990 (No 33), s 202(9) – Central Bank and Financial Services Authority of Ireland Act 2004 (No 21)

– Application denied (2009/13MCA – Hanna J – 28/7/2010) [2010] IEHC 384
Caledonian Life v Financial Services Ombudsman

Article

Rowe, David
Ensure you're insured
2011 (March) GILS 22

INTELLECTUAL PROPERTY

Library Acquisition

Wadlow, Christopher Michael
The law of passing-off: unfair competition by misrepresentation
4th ed
London: Sweet & Maxwell, 2011
N112

INTOXICATING LIQUOR

Statutory Instrument

District Court (intoxicating liquor) rules 2011
SI 1/2011

JUDICIAL REVIEW

Delay

Extension of time – Challenge to findings and rulings of tribunal – Challenge to findings in two interim reports of tribunal – Whether good reason for extension of time to challenge earlier report – Whether challenge to findings in later report brought promptly – *O'Brien v Moriarty* [2005] IESC 32, [2006] 2 IR 221 and *O'Donnell v Corporation of Dun Laoghaire* [1991] ILRM 301 followed; *O'Reilly v Mackman* [1983] 2 AC 237 not followed- Plaintiffs' appeal allowed (119/2006 – SC – 21/4/2010) [2010] IESC 21
Murphy v Judge Mahon

Article

More O'Ferrall, Sophie
Thomson Reuters Round Hall Judicial Review Conference
16(1) 2011 BR 7

JURIES

Article

Farrell, Michael
Sign of the times: no practical difficulty in allowing deaf jurors
2011 (April) GILS 16

JURISPRUDENCE

Library Acquisitions

Finnis, John
Natural law and natural rights
2nd ed
Oxford: Oxford University Press, 2011
A41

Hawkins, Keith
The uses of discretion
Oxford: Clarendon Press, 1992
A10

Keating, Albert
Jurisprudence
Dublin: Round Hall, 2011
A10.C5

LANDLORD & TENANT

Lease

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Meagher v Luke J Healy Pharmacy Ltd

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Murphy, Colin
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2011 (May) GILS 26

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Higgins, Noelle
The first annual national moot court competition – an appraisal
2011 (8) ILT 112

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Objective bias – Conflict of interest – Tribunal – Counsel's prior connection to proceedings – Natural justice – Fair procedures – Reasonable person – Whether reasonable apprehension of unfair hearing – Whether exceptional circumstances – *Kenny v Trinity College Dublin* [2007] IESC 42, [2008] 2 IR 40 applied; *Dublin Well Woman Centre Ltd v Ireland* [1995] 1 ILRM 408, *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912, *R v Smith (Winston)* (1975) 61 Crim App R 128 and *R v Batt (Peter James)* [1996] Crim LR 910 considered – Relief refused (2010/1371 & 1367JR – Hedigan J – 29/10/2010) [2010] IEHC 388
O'Brien v Moriarty Tribunal

Library Acquisition

Carew, Sarah
The devil's handbook
Dublin: Round Hall, 2011
L86.C5

LIMITATION OF ACTIONS

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Forde, Fiona
Time keeps on slipping
2011 (April) GILS 32

LOCAL GOVERNMENT

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Executive function – Role of elected members – Resolution of County Council requiring county manager to carry out particular executive function of local authority – Whether county manager obliged to carry out resolution – Whether consideration of legality of resolution required –*Miley v Flood* [2001] 2 IR 50 approved; *Wicklow County Council v Wicklow County Manager* (Unrep, O'Caoimh J, 26/2/2003) not followed; *Aiden Shipping Ltd v Interbulk Ltd* [1986] AC 965, *Murphy v Young's Brewery* [1997] 1 WLR 1591 and *Forest Pty Ltd v Keen Bay Ltd* (1991) 4 ACSR 107 considered – County Management Act 1940 (No 12), s 17 – City and County Management (Amendment) Act 1955 (No 12), s 4 – Appeal allowed in part (268, 270 & 271/2003, 509/2004, 24/2005 & 313/2009 – SC – 30/7/2010) [2010] IESC 49
Cullen v Wicklow County Manager

MEDIATION

Articles

Holohan, Bill
The European directive on mediation
2010 A & ADR R 298

Quinn, Michelle
Mediation – the answer to legal costs critics
2011 (May) GILS 20

Library Acquisition

Parkinson, Lisa
Family mediation: appropriate dispute resolution in a new family justice system
2nd edition
Bristol: Jordan Publishing Limited, 2011
N173.11

MEDICAL LAW

Articles

Gomez, David
The special status of the human embryo in the regulation of assisted conception and research in the United Kingdom
17 (2011) MLJ 6

McMahon, Aisling
The legal status of embryos in vitro in Ireland – a "precarious" position
17 (2011) MLJ 33

O'Hanlon, Bronagh
Alternative family forms and surrogacy
2011 FLJ 19

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Medical negligence

Duty of care – Standard of care – Doctor and hospital – Suicide after discharge from accident and emergency room – Whether general and approved practice – Whether deviation – Whether lack of ordinary care – Whether failure to reach differential diagnosis of clinical depression at first assessment affected patient's management and treatment plan – Whether doctor's failure to reach differential diagnosis of depression amounted to breach of standard of care to be expected from doctor of same rank in medical profession at that time – Whether doctor failed to carry out proper suicide risk assessment – Whether failure to actively persuade patient to accept admission amounted to breach of standard of care – *Dunne (an inf) v National Maternity Hospital* [1989] 1 IR 91 followed – *Kelly v Board of Governors St Laurence's Hospital* [1988] 1 IR 402; *Armstrong v Eastern Health Board* (Unrep, Egan J, 5/10/1990) and *Healy v North Western Health Board* (Unrep, Flood J, 31/1/1996) considered – Action dismissed (2008/9395P – O'Neill J – 27/10/2010 [2010] IEHC 410
Orpen v Health Service Executive

Articles

Hamilton, Leigh
Can patients who are rendered infertile by cancer treatment sue their doctors?
17 (2011) MLJ 25

Ryan, Des
"Loss of chance" in medical negligence rejected in Australia: implication for Irish tort law
2010/11 4 (1) QRTL 1

MENTAL HEALTH

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Lawfulness – Treatment and conditions of detention – Whether inadequate – Transfer to Central Mental Hospital authorised by mental health tribunal – Delay in implementation of transfer – Whether continued detention in approved centre constituted torture, inhuman or degrading treatment – *DH (a minor) v Ireland* (Unrep, Kelly J, 23/5/2000) and *R v North West Lancashire Health Authority Ex p A* [2000] 1 WLR 977 followed; *Herczegfalvy v Austria* (1993) 15 EHRR 437, *Ukhan v Ukraine* (App. 30628/02) [2008] ECHR 1736 and *Grori v. Albania* (App. 25336/04) [2009] ECHR 1076 considered – Mental Health Act 2001 (No 25), ss 3 and 21 – Constitution of Ireland 1937, Article 40.3 – European Convention on Human Rights 1950, articles 3 and 8 – Relief refused (2010/589JR – Charleton J – 2/11/2010) [2010] IEHC 378
T (E) (Maria) v Clinical Director Central Mental Hospital

MORTGAGES

Article

O'Sullivan, Cian
Lend me arrears
2011 (January/February) GLSI 28

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Extent – Child – Bus passenger – Alighting – Driver of bus transporting children – Whether duty of care to stop bus off roadway – Whether duty of care confined to when child on bus or getting off or extended to period after child had left bus – Whether duty of care required driver to give advice or warnings to plaintiff as to how and when to cross roadway in safety- Whether duty of care to flash lights or sound horn to warn oncoming traffic of presence of plaintiff on roadway – Whether driver negligent – *Mulcahy (a minor) v Lynch (Unrep, SC, 25/3/1993)* followed – Claim for indemnity dismissed (2006/1969P – O'Neill J – 3/11/2010) [2010] IEHC 409
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Duty of care

Victim of crime – Infringement of constitutional right – Cause of action – Breach of duty by member of gardaí charged with carrying out public function – Liability to suit of An Garda Síochána – Whether requirement of *male fides* in performance of duties and functions – Time limit – Date of knowledge –Whether claim statute barred – *Osbourne v Minister for Justice* [2006] IEHC 117, [2009] 3 IR 89; *Kennedy v Law Society (No 4)* [2005] 3 IR 228; *W v Ireland (No 2)* [1997] 2 IR 141; *McDonnell v Ireland* [1998] 1 IR 134 and *Keating v Judge Crowley* [2010] IESC 29 (Unrep, SC, 12/5/2010) considered – Action dismissed (2006/2304P – Kearns P – 10/12/2010) [2010] IEHC 430
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Professional negligence

Solicitor – Conveyancing – Duty of care – Purchase of restaurant – Status of restaurant under food hygiene regulations – Pre–contract requisitions – Post–contract requisitions – Whether food hygiene issues proper matters for pre–contract requisitions – Whether negligence in failure to conduct inquiries into food hygiene status of restaurant – Whether causal link between inaction of solicitor and adverse consequences for plaintiffs – Proper approach to assessment of damages – "No transaction" – Measure of damages – *Joyce v Bowman Law Ltd* [2010] EWHC (Ch) 251, (Unrep, English HC, Vos J, 18/2/2010) and *Philp v Ryan* [2004] IESC 105, [2004] 4 IR 241 considered – Plaintiffs awarded damages (2004/1`8539P – Clarke J – 16/7/2010) [2010] IEHC 313
Kelleher v O'Connor

Library Acquisition

School of Law, Trinity College
Tort litigation 2011: all the recent developments
Dublin: School of Law, Trinity College, 2011
N30.C5

NURSING LAW

Library Acquisition

Van Dokkum, Neil
Nursing law for students in Ireland
2nd ed
Dublin: Gill & Macmillan Ltd., 2011
N185.C5

PATENTS & TRADE MARKS

Trade mark

Registration – Characterisation of use – Use in relation to goods – Ingredient – Whether use of registered trade mark amounted to genuine use – Meaning of requirement of genuine use in relation to the goods for which trade mark is registered – Purpose of registration – Whether trade mark registered in bad faith – Meaning of bad faith in context – *Ansul BV v Ajax Brandbeveiliging BC (Case C-40/01)* [2003] ECR I-2439, *Sunrider Corporation v Office for Harmonisation in the Internal Market (OHIM) (Case C-416/04)* [2006] ECR I-4237 and *La Mer Technology Inc v Laboratoires Goemar SA (Case C-259/02)* [2004] ECR I-1159 followed – Council Directive 89/104/EEC – Trade Marks Act 1996 (No 6), ss 8(1)(c) and 51(1)(a) – Trade Marks Rules 1996 (SI 199/1996) – Plaintiff's appeal allowed (141/2007 – SC – 19/5/2010) [2010] IESC 36
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Articles

Duffy, Fiona
Seed money
2011 (May) GILS 38

Gibbons, Glen
The use and abuse of the IEDR process: protecting trade marks online
2011 1 IIPLQ 87

O'Gara, Eimear
Goods in transit: is Europe a safe harbour for counterfeiters?
2011 1 IIPLQ 81

PLANNING & ENVIRONMENTAL LAW

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Tristor Ltd v Minister for the Environment, Heritage and Local Government

Injunction

Unauthorised development – Intensification – Use of lands as quarry – Application to restrain use of land as quarry – Whether use amounts to unauthorised development – Whether onus of establishing application on applicant – Whether material change of use – Whether present use as quarry unauthorised by reason of intensification – Statutory obligation to bring application for injunction to restrain use as quarry within seven years from date of commencement of development – Effect of break in continuity of unauthorised use – Whether application time barred – Discretionary nature of relief – Whether respondent had *bona fide* belief that use of land was authorised – Whether hardship to respondent or third parties if order granted – *Morris v Garvey* [1983] IR 319 followed – *Dublin County Council South v Myles Balfe Ltd* (Unrep, Costello J, 3/11/1995); *Kildare County Council v Goode* (Unrep, Morris J, 13/6/1997); *Prossor v Minister for Housing and Local Government* [1968] 67 LGR 109; *Cavan County Council v Eircell Ltd* (Unrep, Geoghegan, 10/3/1999); *Altara Developments Ltd & Crossan v Ventola Ltd* (Unrep, O'Sullivan J, 6/10/2005); *Grimes v Punchestown Developments Co Ltd* [2002] 4 IR 515 and *Leen v Aer Rianta cpt* [2003] 4 IR 394 considered – Planning and Development Act 2000 (No 30), ss 160 – Application to restrain use of lands as quarry granted (2008/20MCA – Irvine J – 7/10/2010) [2010] IEHC 404
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Judicial review

Error of law on face of record – Unauthorised development – Regard to previous decisions – Withdrawal of application – Requirements for leave – Substantial grounds – Substantial interest – Late challenge to validity of permission – Time limits – Power to quash administrative determination – *Certiorari* – Decision allowing notice party to rebuild petrol station – Whether planning permission valid – Whether grant issued without relevant statutory basis – Whether respondent erred in law and fact – Whether respondent failed to properly investigate planning history – Whether respondent went against own statutory declaration – Whether respondent considered all documentation – Whether respondent had regard to irrelevant considerations – Whether decision irrational and unreasonable – Whether substantial grounds and substantial interest – *De Burca v Wicklow County Manager* [2009] IEHC 54, (Unrep, Hedigan J, 4/2/2009); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Killeen v DPP* [1997] 3 IR 218; *Irish Hardware Association v South Dublin County Council* (Unrep, Butler J, 19/7/2000); *State (Kenny and Hussey) v An Bord Pleanála* (Unrep, Carroll J, 23/2/1984; SC, 20/12/1984); *Grealish v An Bord Pleanála* [2005] IEHC 24, [2006] 1 ILRM 140; *In re Green Dale Building Co* [1977] IR 256; *Ashbourne Holding Ltd v An Bord Pleanála* [2003] 2 IR 114; *Mulcreevy v Minister for Environment* [2004] IESC 5, [2004] 1 IR 72; *McNamara v An Bord Pleanála* [1995] 2 ILRM 125; *Harding v Cork County Council* [2008] 4 IR 318; *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Kenny v An Bord Pleanála* [2001] 1 IR 565; *O'Brien v Dun Laoghaire Rathdown County Council* [2006] IEHC 177, (Unrep, Ó Néill J, 1/6/2006); *White v Dublin City Council* [2004] 1 IR 545; *KSK Enterprises Ltd v An Bord Pleanála* [1994] 2 IR 128; *Square Meals v Dunstable Corporation* [1974] 1 WLR 59; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *The State (Cussen) v Brennan* [1981] IR 181; *Harrington v An Bord Pleanála* [2005] IEHC 344, [2006] 1 IR 388; *Cumann Tomas Dáibhis v South Dublin County Council* [2007] IEHC 118, (Unrep, Peart J, 14/6/2007); *Lancefort Ltd v An Bord Pleanála (No 2)* [1999] 2 IR 270; *The State (Holland) v Kennedy* [1977] IR 193; *State (Holland) v Kennedy* [1977] IR 193; *Harte v Labour Court* [1996] 2 IR 171; *R v Northumberland Compensation Appeal Tribunal ex parte Shaw* [1952] 1 KB 338; *Ryan v Compensation Tribunal* (Unrep, Costello J, 15.11.1996); *Bannon v EAT* [1993] 1 IR 500; *The State (Abenglen Properties Ltd) v Corporation of Dublin* [1984] IR 381; *In re Doherty* [1988] NI 14 and *Athlone Woollen Mills Co Ltd v Athlone Urban District Council* [1950] IR 1 considered – Local Government (Planning and Development) Act 1992 (No 14), ss 16 and 19 – Planning and Development Act 2000 (No 30), ss 2, 38, 50 and 50A – Planning and Development (Strategic Infrastructure) Act 2006 (No 27), ss 13 and 21 – Local Government (Planning and Development) Act 1963 (No 20), s 82(3A) – Planning and Development Regulations 2001 (SI 600/2001), reg 29– Relief granted (2009/534JR – McKechnie J – 18/5/2010) [2010] IEHC 395
Mone v An Bord Pleanála

Judicial review

Leave – Extension of time – *Ex parte* application- Whether applicant entitled to proceed *ex parte* with application for extension of time for leave to apply – Whether applicant entitled to proceed *ex parte* with application for leave to apply – *Coll v Donegal County Council* [2005] IEHC 231 (Unrep, Peart J, 7/7/2005) considered – Planning and Development Act 2000 (No 30), ss 42, 50 & 50A – Application refused and matter adjourned (2011/1JR – Edwards J – 4/1/2011) [2011] IEHC 3
Collins v Galway County Council

Planning permission

Grant – Notices – Validity – Appeal – Whether respondent had jurisdiction to inquire into validity of steps taken in planning application before local authority – Discretionary nature of relief – Planning and Development (Strategic Infrastructure) Act 2000 (No 30), ss 50, 127 – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 considered – Relief refused (2010/1JR – Charleton J – 8/12/2010) [2010] IEHC 431
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Planning permission

Retention planning permission – Quarry – Exemption – Whether quarry unauthorised – When quarrying first commenced – Whether quarry benefited from exemption – Whether determination of an Bord Pleanála *ultra vires* – Rational – Fairness – *Audi alteram partem* – Relevance of planning status of quarry – Test for irrationality – Failure to have regard to registration of quarry – Council's determination of pre-1964 status – Reasons – Whether Board obliged to take into account legal status of underlying development – Whether fact quarry registered determination that quarry had pre 1964 user – *State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 642; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *Meadows v Minister for Justice* [2010] IESC 3, (Unrep, SC, 21/1/2010); *Quinlan v Bord Pleanala* [2009] IEHC 228, (Unrep, Dunne J,

13/5/2009) and *Westwood Club Ltd v An Bord Pleanála* [2010] IEHC 16, (Unrep, Hedigan J, 26/1/2010) applied – *R v Chief Constable of North Wales XP Evans* [1982] I WLR 1155; *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34; *Commission v Ireland (Case C-215/06)* [2008] ECR 4911; *Evans v An Board Pleanala* (Unrep, Kearns J, 7/11/2003) and *McDowell v Roscommon County Council* [2004] IEHC 396, (Unrep, Finnegan P, 21/12/2004) considered – Planning and Development Act 2000 (No 3), ss 4(1)(h), 34(2), 137, 146 and 261-Planning and Development Regulations 2001 (SI 600/2001), art 9 – Judicial review refused (2008/1020JR – Hedigan J – 23/11/2010) [2010] IEHC 428
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Planning permission

Retention planning permission – Quarry – Use – Intensification – Use of quarry prior to 1964 – Permission – Whether authorised development – Proportionate use – Whether intensification of use amounted to change of use – Whether prior unlawful use of land must be disregarded – Whether registration of quarry established pre 1964 use – Whether lawful use established – Change of use through intensification – *Commission v Ireland (Case C- 215/06)* [2008] ECR 4911; *Haarlemmerliede en Spaarnwoude v Gedeputeerde Staten Van Noord-Holland (Case C-81/96)* [1998] ECR I-3925; *Stadt Papenburg v Bundesrepublik Deutschland (C-226/08)* (Unrep, ECJ, 14/1/2010); *Galway County Council v Lackagh Rock* [1985] IR 120; *Weston Ltd v An Bord Pleanála* [2010] IEHC 255, (Unrep, Charleton J, 1/7/2010); *O'Reilly v Galway County Council* [2010] IEHC 97, (Unrep, Charleton J, 26/3/2010) and *Waterford County Council v John A Wood Limited* [1999] 1 IR 556 considered – *Pierson v Keegan Quarries Limited* [2009] IEHC 550, (Unrep, Irvine J, 8/12/2009) approved – Council Directive 85/337/EEC – Council Directive 92/43/EEC – Planning and Development Act 2000 (No 3), s 34(10) and 261 – *Certiorari* granted; planning permission quashed (2009/941 JR – Charleton J – 25/11/2010) [2010] IEHC 415
An Táisce v An Bord Pleanála

Unauthorised development

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Articles

Byrne, Mema
Section 261: bringing historic quarries within the planning regime
2010 LGR 102

Ralston, Gavin
Part V and the provision of social and affordable housing: time to reconsider
2010 LGR 94

Statutory Instrument

Planning and development (strategic environmental assessment) (amendment) regulations 2011
SI 201/2011

PRACTICE & PROCEDURE

Abuse of process

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Talbot v McCann Fitzgerald

Abuse of process

Res judicata – Discretion of court – Split trial – Specific performance – Damages –Reactivating claim – Material difference between *res judicata* and abuse of process – Amendment of order of court where formal order ought to have included reference to matters not included in written order court when perfected – Damages for delay part of original act capable of being pursued at later stage – *Henderson v Henderson* (1843) 3 Hare 100 considered; *AA v Medical Council* [2003] 4 IR 302; *Ainsworth v Wilding* [1896] 1 Ch 673 and *Bula Ltd v Crowley* (Unrep, SC, 11/4/2003) followed – *Ford-Hunt v Raghir Singh* [1973] 1 WLR 738 considered – Held not to be abuse of process (2005/1657P – Clarke J – 1/6/2010) [2010] IEHC 216
Mount Kennett Investment Co v O'Meara

Access to courts

Appeal from Circuit Court – Judgment for failure to deliver defence – Error by solicitor – Defendant unrepresented at hearing – Discretion of court to allow defendant to defend case on its merits – Counsel for defendant seriously ill during relevant time – Prejudice – Whether discretion should be exercised in defendant's favour – Whether case unanswerable – Whether plaintiff would suffered irremediable prejudice – *Buckley v Attorney General* [1950] IR 67 followed; *Gilroy v Flynn* [2004] IESC 98, (Unrep, SC, 3/12/2004) and *McFarlane v Ireland* (App No 31333/06, Unrep, ECHR, 10/9/2010) – Constitution of Ireland 1937, art 34.1 – European Convention on Human Rights, art 6 – Appeal allowed (2010/84CA – Hogan J – 22/10/2010) [2010] IEHC 387
O'Connor v Panda Waste Services

Appeal

Notice of appeal – Amendment – Discretion to allow amendment to notice of appeal – Estoppel – Concessions in trial sought to be raised – Whether Supreme Court may consider arguments not raised in High Court – Whether appeal disclosed justiciable grounds – Rules of the Superior Courts 1986 (SI 15/1986), O 58, r 6 – Appeal dismissed (356/2005 – SC – 12/5/2010) [2010] IESC 29
Keating v Judge Crowley

Costs

Joinder of parties – Interest in proceedings – Initiation of proceedings – Responsibility for costs – Whether order for costs should be made – Whether parties properly joined in proceedings – Whether court entitled to join parties to proceedings for purpose of costs order – Whether parties commenced proceedings in name of another legal entity – Whether possible to fix non party with costs – *McIlwraith v Judge Fawsitt* [1990] 1 IR 343 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 15, r 13 – Notice party's appeal against costs order allowed (268, 270 & 271/2003, 509/2004, 24/2005 & 313/2009 – SC – 30/7/2010) [2010] IESC 49
Cullen v Wicklow County Manager

Costs

Wasted costs order – Solicitors –Whether costs incurred unnecessarily – Whether conduct

of solicitor "improper or unreasonable" – Whether solicitor in breach of duty to court – *Kennedy v Killeen Corrugated Products Ltd* [2006] IEHC 385 [2007] 2 IR 561 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 7 – Wasted costs awarded against plaintiffs' solicitors – (2008/185JR – Cooke J – 29/4/2010) [2010] IEHC 176
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Discovery

Judicial review – Scope of discovery – Whether ordinary discovery rules apply in judicial review applications – Circumstances where discovery necessary in judicial review proceedings – General non specific and unsubstantiated allegations of bad faith and bias in statement of grounds – Relevance of documents – Necessity for discovery – Relevance of pleadings to discovery – Whether tests of relevance and necessity satisfied – Parameters of case as pleaded – Whether range of documents which are relevant and necessary in judicial review matters inevitably limited – *PJ Carroll & Co Ltd v Minister for Health and Children (No 2)* [2006] IESC 36, [2006] 3 IR 431; *Framus Ltd v CRH plc* [2004] 2 IR 20 and *Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland* [2003] 3 IR 528 applied ; *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650 not followed; *R v Health Secretary, ex p Hackney LBC* (Unrep, July 29, 1994) approved – Rules of the Superior Courts 1986 (SI 15), O 84, r 25(1) – Discovery refused (2010/750JR – Hogan J – 8/11/2010 – [2010] IEHC 420
Evans v University College Cork

Dismissal of proceedings

Inherent jurisdiction – Inordinate and inexcusable delay – Commencement and prosecution of proceedings – Chronology of events – Periods of delay – Whether inordinate and inexcusable delay – Onus of proof – Discretion – Balance of justice – Whether unjust to require defendants to defend action – Whether delay inexcusable – Balance of justice – Prejudice – Deaths of two purported witnesses – *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 *; Keogh v Wyeth Laboratories Inc & John Wyeth & Brother Ltd* 2005 IESC 46, [2006] 1 IR 34; *Gilroy v Flynn* 2004 IESC 98, [2005] 1 ILRM 290; *Toal v Duignan (No 1)* [1991] ILRM 135; *Toal v Duignan (No 2)* [1991] ILRM 140 and *McBrearty v North Western Health Board* [2010] IESC 27, (Unrep, SC, 10/5/2010) considered – Appeal dismissed; early trial ordered (286/2007 – SC – 27/10/2010) [2010] IESC 52
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In camera proceedings

Confidentiality — Information provided to Residential Institutions Redress Board – Prohibition from disclosure of information – Statutory confidentiality requirement – Exclusion of operation of prohibition — Whether Circuit Family Court within statutory exclusion – Whether applicant entitled to details of award to respondent by Residential Institutions Redress Board – *MB v Commission to Inquire into Child Abuse* [2007] IEHC 376 [2008] 3 IR 541, *Ashburton (Lord) v Pape* [1913] 2 Ch 469, *Wagstaff v Wagstaff* [1992] 1 FLR 333 and *C v C.* [1995] 2 FLR 171 distinguished – Courts of Justice Act 1947 (No 20), s. 16 – Residential Institutions Redress Act 2002 (No 13), s 28 – Commission to Inquire into Child Abuse (Amendment) Act 2005 (No 17), s 34 – Questions answered (116/2010 – SC – 28/10/2010) [2010] IESC 51
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Limitation of actions

Personal injuries – Personal Injuries Assessment Board – Relevant date – Date on which document issued – Relevant date was date when seal of Board was affixed to document – Documents said to be properly issued when directed towards appropriate recipient – *Figeuredo v McKiernan* [2008] IEHC 368, (Unrep, Dunne J, 26/11/2008) considered – Personal Injuries Assessment Board Rules 2004 (SI 219/2004), r 3(3) – Personal Injuries Assessment Board Act 2003 (No 46) ss14, 50 and 79 – Dismissal of proceedings refused (2008/9933P – Clarke J – 23/6/2010) [2010] IEHC 274
Fogarty v McKeogh Brothers (Ballina) Ltd

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Sufficient interest – *Actio popularis* – Personal rights – Privacy – Business dealings – Whether *bona fide* interest – Whether "common" interest in subject matter – Whether standing for non-natural entity to assert personal rights – Whether company can assert right to privacy, family life, travel and communication – Whether standing issue determined as preliminary issue – *Cahill v Sutton* [1980] IR 269, *SPUC v Coogan* [1989] IR 735, *Irish Penal Reform Trust Ltd v Governor of Mountjoy Prison* [2005] IEHC 305, (Unrep, Gilligan J, 2/9/2005), *Crotty v An Taoiseach* [1987] IR 713, *Lancefort Ltd v An Bord Pleanála (No 2)* [1999] 2 IR 270 and *R v Secretary of State for Transport, ex parte Factortame* (Case C-213/89) [1990] ECR I-2433 followed; *Construction Industry Federation v Dublin City Council* [2004] IEHC 37, [2005] IESC 16, [2005] 2 IR 496 distinguished – Criminal Justice (Terrorist Offences) Act 2005 (No 2), s 63(1) – Constitution of Ireland, 1937, Articles 40.3.1°, 40.3.2° and 40.6.1° – Council Directive 2006/24/EC – European Convention for the Protection of Human Rights and Fundamental Freedoms 1951, articles 8 and 12 – Plaintiff granted *locus standi* (2006/3785P – McKechnie J – 5/5/2010) [2010] IEHC 221
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Security for costs

Criteria in determining application – Delay – Whether "special circumstances" exist – Whether European element special circumstance – *Lancefort Ltd v An Bord Pleanála* [1998] 2 IR 511, *Village Residents Association Ltd v An Bord Pleanála (No 2)* [2000] 4 IR 321, *Peppard and Co Ltd v Bogoff* [1962] IR 180 and *Dublin Int Arena v Waterworld Ltd* [2007] IESC 48, [2008] 1 ILRM 496 applied – Companies Act 1963 (No 33), s 390 – Security for costs refused (2006/3785P – McKechnie J – 5/5/2010) [2010] IEHC 221
Digital Rights Ireland Ltd v Minister for Communications

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Want of prosecution – Delay – Inordinate and inexcusable delay – Personal injuries claim – Fifteen years since accident – Inherent jurisdiction of the court – Balance of justice – Inaction of defendant – Default by both parties – Whether delay inordinate and inexcusable – Whether proceedings should be dismissed – Whether fair adjudication can take place in spite of delay – *Rainsfort v Limerick Corporation* [1995] 2 ILRM 561; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Stephens v Paul Flynn Ltd* [2005] IEHC 148, (Unrep, HC, Clarke J, 28/4/2005); *Anglo Irish Beef Processors v Montgomery* [2002] 3 IR 510; *Rogers v Michelin Tyre plc* [2005] IEHC 294, (Unrep, Clarke J, 28/6/2005); *Gilroy v Flynn* [2005] 1 ILRM 290; *Wolfe v Wolfe* [2006] IEHC 106, (Unrep, Finlay Geoghegan J, 15/3/2006) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 122, r 11 – Application dismissed (1996/10721P – Charleton J – 23/11/2010) [2010] IEHC 396
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Summary judgment

Leave to defend – Principles to be applied – *Bona fide* defence – Whether facts such as to arguably give rise to defence – Whether limited framework of motion for summary judgment involved real risk of injustice – Matter of fact – *ADM v Arman Retail Ltd* [2006] IEHC 309 (Unrep, Clarke J, 12/7/2006) followed – Summary judgment granted (2009/2353S – Hedigan J – 12/7/2010) [2010] IEHC 432
ADM Londis plc v Gibson

Summary summons

Building contract – Summary judgment – Adjournment of proceedings for plenary hearing – Dispute between defendant and third party – Whether defendant's suit against engineer justification to adjourn claim for plenary hearing – Whether arguments based on compassion or sympathy such to override rights of parties to contract – Part of claim reliant on factual dispute adjourned to plenary hearing with judgment for €178, 996.17 against defendant together with contractual interest of €24, 335.03; enforcement of judgment stayed for five months (2009/1980S – Hogan J – 29/11/2010) [2010] IEHC 429
Michael Feeney Contractors & Civil Engineering Ltd v Murray

Summons

Renewal – Set aside – Application to set aside renewal – Failure to serve summons while in force – Order for renewal made by High Court –Test applicable to application to renew summons – Good reason – Balance of justice – Balance of hardship – Absence of expert report – Statute of Limitations – Prejudice –Whether plaintiff advanced good reason

to renew summons – Whether absence of expert report constituted good reason to renew summons – Whether stricter approach to delay applicable to renewal of summons – Whether prevention of defendant availing of statute of limitations constituted good reason to renew summons – *Chambers v Kenefick* [2005] IEHC 402, [2007] 3 IR 526 and *Roche v Clayton* [1998] 1 IR 596 applied; *Bingham v Crowley* [2008] IEHC 453, (Unrep, Feeney J, 17/12/2008), *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290, *Stephens v Paul Flynn Ltd.* [2005] IEHC 148, (Unrep, Clarke J, 28/4/2005); [2008] IESC 4, [2008] 4 IR 31, *Allergan Pharmaceuticals (Ireland) Ltd v Noel Deane Roofing and Cladding Ltd* [2006] IEHC 215, [2009] 4 IR 438 and *Baulk v Irish National Insurance Company Ltd* [1969] IR 66 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 8, rr 1 and 2 – Renewal set aside (2004/313P – Clarke J – 21/1/2010) [2010] IEHC 8
Moloney v Lacey Building and Civil Engineering Ltd

Articles

Gunning, Paul G.
Fixing recognisances and notice of appeal in the District Court: gilding the lily?
2011 ICLJ 15

Harbison, Andrew
"Documents": how to get out alive in e-discovery
2011 (1) CP & P 35

Statutory Instruments

District Court (intoxicating liquor) rules 2011
SI 1/2011

Rules of the Superior Courts (examiner) 2011
SI 2/2011

PRISONS

Assault

Negligence – Award – Appeal – Duty of care – Whether attack on plaintiff result of lack of care by prison authorities – System of control to prevent entry of dangerous knives into prison – Whether prison authorities could not reasonably have been expected to have been in position to prevent attack – Whether earlier intervention would have lessened extent of injuries suffered – Expert evidence given following conclusion of evidence – Conflicts in evidence – Whether High Court decision did not correctly address the issues – *Murray v Ireland* [1985] IR 532; *Muldoon v Ireland* [1988] ILRM 367; *Bates v Minister for Justice* [1998] 2 IR 81 and *Ellis v Home Office* [1953] 2 QB 135 considered – Appeal and cross appeal allowed; case remitted to High Court for further hearing (230/2009 – SC – 27/10/2010) [2010] IESC 50
Creighton v Ireland

PROFESSIONAL NEGLIGENCE

Articles

Craven, Ciaran
Solicitors' negligence and breach of undertakings: duty and sanction
2010/11 4 (1) QRTL 12

Dorgan, Tadhg
Fruitless searching – Kelleher and beyond
2011 (1) CP & P 25

Rowe, David
Ensure you're insured
2011 (March) GILS 22

PROFESSIONS

Disciplinary proceedings

Medical practitioner – Misconduct – Sanction – Appeal – Appropriateness of sanction – Suspension from practice for one year – Period of retraining for three years – Extent of court's jurisdiction to vary sanction imposed – Onus of proof – Test for sanction – Category, gravity, type and severity of penalty – Guidelines from previous sanctions – Consistency of appropriate sanction – Conduct underpinning sanction – Reasoning of Medical Council in arriving at decision – Experience of Medical Council in imposing sanctions – Whether level of sanction justified by material before Medical Council – Whether specific reason for altering sanction presented on appeal – Whether penalty imposed disproportionate – Expertise and experience of Council – Whether rehabilitative measures proposed sensible – *In re M, a Doctor* [1984] IR 479; *Medical Council v Murphy* , (Unrep, Finlay P, 29/6/1994) and *Marinovich v General Medical Council* [2002] UKPC 36 considered – Medical Practitioners Act 2007 (No 25), ss 71, 72 73 & 75 – Appeal dismissed save that one condition changed due to error (2010/434SP – Charleton J – 23/11/2010) [2010] IEHC 414
Hermann v Medical Council

PROPERTY

Registered land

Boundary – Contiguous lands – Ditch – Fence – Property Registration Authority maps – Status of maps – Common law presumption – Whether maps conclusive in case of substantial discrepancy – *Gillespie v Hogg* [1947] Ir Jur Rep 51 followed; *Fisher v Winch* [1939] 1 KB 666 distinguished – Registration of Title Act 1964 (No 16), s 85 – Relief granted (2006/2340P – Laffoy J – 2/3/2010) [2010] IEHC 359
Gannon v Ní Ghruagain

Articles

Carey, Gearoid
Damage to property and the measure of damages
2011 (4) ILT 46

Donnelly, Mary
Home loan repossessions: powers and obligations
2011 (18) 5 CLP 95

Feeney, Conor
Here's mud in your eye
2011 (May) GILS 34

Harding, Ted
Run for your wife? The truth about NAMA asset transfers
16(1) 2011 BR 13

O'Neill, Frank
Ask, and ye shall receive
2011 (March) GILS 34

White, Mark
The land law and conveyancing law reform act 2009 – revolutionary change or a tidying up?
2011 (1) CP & P 4

RATING

Valuation

Valuation tribunal – Liability to rates – Exemption – Rateable valuation of concrete and asphalt manufacturing plant – Whether concrete manufacturing plant a single construction for purposes of rateability – Inducing process of change – Whether installation designed or used primarily to induce process of change in substances contained in it or transmitted through it – Whether installation deemed to be non-rateable plant – Whether determination of respondent erroneous in point of law – Whether identifiable error of law or unsustainable finding of fact – *Caribmolasses Co Ltd v Commissioner of Valuation* [1994] 3 IR 189; *Pfizer Chemical Corporation v Commissioner of Valuation* (Unrep, SC, 7/4/1992); *Mara v Hummingbird Ltd* [1982] ILRM 421; *Henry Denny & Sons (Ireland) v Minister for Social Welfare* [1988] 1 IR 34; *Premier Periclase v Commissioner of Valuation* (Unrep, Kelly J, 24/6/1999) and *Nangles Nurseries Ltd v Commissioner of Valuation* [2008] IEHC 73 (Unrep, MacMenamin J, 24/3/2008) considered – *Beamish and Crawford v Commissioner of Valuation* [1980] ILRM 149 distinguished – Valuation Act 2001 (No 13), s 39, sch 5 – Appeal allowed (2010/264SS & 267SS – Hedigan J – 7/12/2010) [2010] IEHC 434
Kilsaran Concrete v Commissioner of Valuation

ROAD TRAFFIC

Articles

Byrne, John P
Vehicle "clocking": does the Beere case represent a new approach to consumer-related frauds
2011 ICLJ 41

Clarke, Oisin
The road traffic act 2010 – an overview
2011 (1) IRTL 24

Moynihan, Yvonne
An update on the law of drunk driving
16(2) 2011 BR 31

Whelan, Grainne
Dangerous driving causing death: an evaluation of sentencing in the Court of Criminal Appeal in the People (Director of Public Prosecutions) v. James O'Reilly
2011 (1) IRTL 39

Statutory Instruments

Road traffic (construction, equipment and use of vehicles) (amendment) regulations 2011
DIR/1971-320
SI 235/2011

Road traffic (traffic and parking) (amendment) regulations 2011
SI 239/2011

SALE OF GOODS

Article

O'Connor, Colm
Title fight
2011 (April) GILS 36

SALE OF LAND

Contract

Specific performance – Damages – Impossibility – Impecuniosity of purchaser – *Mount Kennett Investment Ltd v O'Meara* (Unrep, Smyth J, 21/11/2007) considered – Damages awarded *in lieu* fo specific performance (2008/8805, 8806 & 8807P – Clarke J – 9/7/2010) [2010] IEHC 272
Aranbel Ltd v Darcy

SOLICITORS

Privilege

Legal professional privilege – Identity of instructing parties – Nature and extent of privilege – Legal advice – Whether identity of client privileged – Whether confidentiality of identity sought at time of instruction – Whether legal advice fully disclosed – Solicitors (Amendment) Act 1994 (No 27), s 68 – Amount of costs ordered reduced (268, 270 & 271/2003, 509/2004, 24/2005 & 313/2009 – SC – 30/7/2010) [2010] IESC 49
Cullen v Wicklow County Manager

Articles

Craven, Ciaran
Solicitors' negligence and breach of undertakings: duty and sanction
2010/11 4 (1) QRTL 12

Hyland, Brian
Synergy symphony
2011 (April) GILS 28

Murphy, Colin
Jim'll fix it
2011 (January/February) GLSI 24

Statutory Instrument

Solicitors acts 1954 to 2008 (apprenticeship and education) (training officer) regulations 2011
SI 46/2011

TAXATION

Proceeds of crime

Forfeiture of proceeds of crime – Principles to be applied – Admissibility of belief evidence – Weight to be attached – Jurisdiction to hear application – Whether relevant property valued in excess of IR£10,000 – Interpretation of word 'value' – Whether market value which property would obtain on open market – Whether negative equity could be taken into account when establishing 'value' of property – Whether property subject matter of proceedings constituted directly or indirectly proceeds of criminal conduct – Evidence required to satisfy court whether property acquired in whole or in part by proceeds of crime – Whether onus shifting to defendant – Whether serious risk of injustice if order made – Family home – Whether granting of order in relation to family home would amount to violation of respondent's human rights – *McK v GWD (Proceeds of crime outside the State)* [2004] 2 IR 470 applied – *Criminal Assets Bureau v JK* (Unrep, Feeney J, *ex temp,* 3/10/2007); *McK v H* (Unrep, Feeney J, *ex temp,* 17/10/2008); Gilligan v Criminal Assets Bureau *[1998] 3 IR 185; Murphy v GM* [2001] 4 IR 113 and *Pullen v Dublin City Council* (Unrep, Irvine J, 12/12/2008) considered – Proceeds of Crime Act 1996 (No. 30), ss 3, 7 and 8 – Orders granted under s. 3 of Proceeds of Crime Act 1996 and receiver appointed to take possession of relevant properties (2007/5CAB – Feeney J – 12/1/2010) [2010] IEHC 12
Criminal Assets Bureau v O'Brien

Library Acquisitions

Dolton, Alan
Tolley's tax cases 2011
35th ed
London: LexisNexis, 2011
M335

Goodman, Aoife
Stamp acts: finance act 2011
12th edition
Dublin: Irish Taxation Institute, 2011
M337.5.C5

Statutory Instruments

Mandatory disclosure of certain transactions regulations 2011
SI 7/2011

Stamp duty (designation of exchanges and markets) (no. 3) regulations 2011
SI 212/2011

Stamp duty (e-stamping of instruments) (amendment) (no. 2) regulations 2011
SI 222/2011

Taxes consolidation act, 1997 (accelerated capital allowances for energy efficient equipment) (amendment) order 2011
SI 199/2011

Taxes (electronic transmission of third party return) (specified provisions and appointed day) order 2011
SI 188/2011

Tax returns and payments (mandatory electronic filing and payment of tax) regulations 2011
SI 223/2011

TORT

Article

Hogan, Rory
How the PIAB act 2003, Civil Liability and Courts act 2004 and the EU directive on ADR fit together to impact on civil and commercial litigation
2010/11 4 (1) QRTL 6

Library Acquisition

School of Law, Trinity College
Tort litigation 2011: all the recent developments
Dublin: School of Law, Trinity College, 2011
N30.C5

TRIBUNAL OF INQUIRY

Costs

Fair procedures – Non-co-operation – Obstruction and hindrance – Effect of order – Whether tribunal has jurisdiction to make finding of obstruction and hindrance – Whether costs ruling based on finding of obstruction and hindrance based on relevant and legitimate considerations – Whether tribunal entitled to have regard to substantive

findings when determining issue of costs – Whether findings of tribunal in breach of fair procedures and natural justice – Whether party to tribunal entitled to notice of possibility of findings of obstruction and hindrance against them – Whether findings reached through reasonable and rational process – Whether failure to disclose relevant material constitutes breach of fair procedures – *In re Haughey* [1971] IR 217, *Maguire v Ardagh* [2002] 1 IR 385, *O'Callaghan v Mahon* [2005] IESC 9, [2006] 2 IR 32, *P & F Sharpe Ltd v Dublin City and County Manager* [1989] IR 701, *Kennedy v Law Society of Ireland (No 3)* [2002] 2 IR 458 and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 followed – Tribunals of Inquiry (Evidence) Act 1921 (11 & 12 Geo V, c 7), s 1(2) – Tribunals of Inquiry (Evidence) (Amendment) Act 1979 (No 3), ss 3 and 6(1) – Tribunals of Inquiry (Evidence) (Amendment) Act 1997 (No. 42), s 3 – Plaintiffs' appeal allowed (119/2006 – SC – 21/4/2010) [2010] IESC 21
Murphy v Judge Mahon

WILLS

Article

Keating, Albert
Undue influence in probate law
2011 (5) ILT 61

Library Acquisition

Waterworth, Michael
Parker's modern wills precedents
7th ed
Haywards Heath: Bloomsbury Professional, 2011
N125

AT A GLANCE

COURT RULES

District Court (criminal law (insanity) act 2010) rules 2011
SI 154/2011

District Court (intoxicating liquor) rules 2011
SI 1/2011

Circuit Court Rules (multi-unit developments act 2011) 2011
SI 153/2011

Rules of the Superior Courts (examiner) 2011
SI 2/2011

European Directives implemented into Irish Law

European communities (authorisation, placing on the market, use and control of Biocidal products) (amendment) (No 2) regulations 2011
Please see S.I for Directives
SI 202/2011

European Communities (Avian Influenza) (control on movement of pet birds) (amendment) regulations 2011
DEC/2010-734
SI 10/2011

European Communities (avian influenza) (precautionary measures) (amendment) regulations 2011
DEC/2010-734
SI 11/2011

European communities (environmental assessment of certain plans and programmes) (amendment) regulations 2011
DIR/2011-42
SI 200/2011

European Communities (foot and mouth disease) (restrictions on imports from Bulgaria) regulations 2011
DEC/2011-8
SI 12/2011

European Communities (inland transport of dangerous goods by road) (ADR miscellaneous provisions) regulations 2010
DIR/2008-68
SI 620/2010

European communities (mediation) regulations 2011
DIR-2008-52
SI 209/2011

European Communities (merchant shipping) (compliance with flag state requirements) regulations 2011
DIR/2009-21
SI 260/2011

European Union (restrictive measures) (Eritrea) regulations 2011
REG/667-2010
SI 237/2011

Road traffic (construction, equipment and use of vehicles) (amendment) regulations 2011
DIR/1971-320
SI 235/2011

Sea-fisheries (recording of fish) regulations 2011
REG/2807-83, REG/2847-93, REG/409-2009, REG/1224-2009)
SI 8/2011

BILLS OF THE OIREACHTAS AS AT 20TH JUNE 2011 (31ST 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.

Advance Healthcare Decisions Bill 2010
Bill 26/2010
Order for 2nd Stage – Seanad **[pmb]** *Senator Liam Twomey (Initiated in Seanad)*

Biological Weapons Bill 2010
Bill 43/2010
Committee Stage – Seanad *(Initiated in Dáil)*

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 (Initiated in Seanad)*

Central Bank and Credit Institutions (Resolution) Bill 2011
Bill 11/2011
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Central Bank and Credit Institutions (Resolution) (No. 2) Bill 2011
Bill 20/2011
1st Stage – Dáil

Child Care (Amendment) Bill 2009
Bill 61/2009
Report Stage – Dáil *(Initiated in Seanad)*

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

Climate Change Response Bill 2010
Bill 60/2010
Passed by Seanad *(Initiated in Seanad)*

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senator Ivana Bacik (Initiated in Seanad)*

Communications Regulation (Postal Services) Bill 2010
Bill 50/2010
2nd Stage – Dáil *(Initiated in Seanad)*

Construction Contracts Bill 2010
Bill 21/2010
2nd Stage – Dáil **[pmb]** *Senator Fergal Quinn (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 (Initiated in Seanad)*

Consumer Protection (Gift Vouchers) Bill 2009
Bill 66/2009
2nd Stage – Seanad **[pmb]** *Senators Brendan Ryan, Alex White, Michael McCarthy, Phil Prendergast, Ivana Bacik and Dominic Hannigan (Initiated in Seanad)*

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

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

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

Criminal Justice Bill 2011
Bill 16/2011
2nd Stage – Dáil

Criminal Justice (Community Service) (Amendment) (No. 2) Bill 2011
Bill 12/2011
2nd Stage – Dáil

Criminal Justice (Female Genital Mutilation) Bill 2011
Bill 7/2011
2nd Stage – Dáil *(Initiated in Seanad Éireann)*

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

Criminal Law (Defence and Dwellings) Bill 2010
Bill 42/2010
Committee Stage – Dáil

Electoral (Amendment) (Political Donations) Bill 2011
Bill 13/2011
2nd Stage – Dáil **]pmb]** *Deputies Dara Calleary, Niall Collins, Barry Cowen, Timmy Dooley, Sean Fleming, Billy Kelleher, Seamus Kirk, Michael P. Kitt, Brian Lenihan, Micheál Martin, Charlie McConalogue, Michael McGrath, John McGuinness, Michael Moynihan, Willie O'Dea, Éamon Ó Cuív, Seán Ó Fearghaíl, Brendan Smith, Robert Troy and John Browne.*

Environmental (Miscellaneous Provisions) Bill 2011
Bill 2/2011
Order for 2nd Stage – Dáil

Female Genital Mutilation Bill 2010
Bill 14/2010
2nd Stage – Seanad **[pmb]** *Senator Ivana Bacik (Initiated in Seanad)*

Finance (No. 2) Bill 2011
Bill 18/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Finance (No. 3) Bill 2011
Bill 18/2011
Order for 2nd Stage – Dáil

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

Immigration, Residence and Protection Bill 2010
Bill 38/2010
Committee Stage – Dáil

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

Jurisdiction of Courts and Enforcement of Judgments (Amendment) Bill 2011
Bill 10/2011
Order for 2nd Stage – Seanad

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
Committee Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik (Initiated in Seanad)*

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

Ministers and Secretaries (Amendment) Bill 2011
Bill 19/2011
2nd Stage – Dáil

Mobile Phone Radiation Warning Bill 2011
Bill 24/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Mark Daly (Initiated in Seanad)*

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

Nurses and Midwives Bill 2010
Bill 16/2010
Report Stage – Dáil

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

Ombudsman (Amendment) Bill 2008
Bill 40/2008
2nd Stage – Seanad *(Passed by Dáil Éireann)*

Patents (Amendment) Bill 2011
Bill 17/2011
Order for 2nd Stage – Dáil

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

Property Services (Regulation) Bill 2009
Bill 28/2009
Committee Stage – Dáil **[pmb]** *Senator Donie Cassidy (Initiated in Seanad)*

Registration of Wills Bill 2011
Bill 22/2011
Order for 2nd Stage – Seanad

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

Social Welfare and Pensions Bill 2011
Bill 23/2011
Committee Stage – Dáil

Spent Convictions Bill 2011
Bill 15/2011
2nd Stage – Dáil **[pmb]** *Deputy Dara Calleary*

Tribunals of Inquiry Bill 2005
Bill 33/2005
Report Stage – Dáil

Twenty-Ninth Amendment of the Constitution (No. 2) Bill 2011
Bill 14/2011

Welfare of Greyhounds Bill 2011
Bill 21/2011
Order for 2nd Stage – Dáil

Whistleblowers Protection Bill 2011
Bill 26/2011
Order for 2nd Stage – Dáil

ACTS OF THE OIREACHTAS 2011

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

1/2011 Bretton Woods Agreements (Amendment) Act 2011
Signed 21/01/2011

2/2011 Multi-Unit Developments Act 2011
Signed 24/01/2011

3/2011 Communications (Retention of Data) Act 2011
Signed 26/01/2011

4/2011 Student Support Act 2011
Signed 02/02/2011

5/2011 Criminal Justice (Public Order) Act 2011
Signed 02/02/2011

6/2011 Finance Act 2011
Signed 06/02/2011

7/2011 Road Traffic Act 2011
Signed 27/04/2011

ABBREVIATIONS

A & ADR R = Arbitration & ADR Review
BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
ELR = Employment Law Review
ELRI = Employment Law Review – Ireland
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
IIPLQ = Irish Intellectual Property Law Quarterly
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

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

The Land and Conveyancing Reform Act 2009

James Burke BL

Introduction

The Land and Conveyancing Reform Act 2009 (referred to as the Act) came into force on the 1st December 2009 with the objective of providing for the reform and modernisation of land and conveyancing law.[1] Part 8 Chapter 1 deals with easements and profit à prendre. A report on the "Acquisition of Easements and Profit à Prendre by Prescription" was produced by the Law Reform Commission in 2002 wherein it stated the law in this area was unnecessarily complicated and it recommended that it should be simplified. The Act has attempted to clarify the law. However, it is arguable that the relevant part of the legislation, as enacted, has inadvertently caused a number of unforeseen complications.

Background

Easements and profit à prendre are acquired rights over another person's land. An Easement or a profit à prendre[2] is acquired in one of four ways by –

i. Statute,
ii. Express Grant or Reservation;
iii. Implied Grant or Reservation;
iv. Presumed Grant or Prescription.

Part 8 of the Act entitled Appurtenant Rights does not deal with i – iii above but deals with easements by prescription[3]. The Law Reform Commission in its report on "The Acquisition of Easements and Profits à Prendre by Prescription" states that "In terms of bad feeling engendered among parties, this is a significant area of the law and we hope that making it clearer and more definite will assist in resolving disputes within a shorter time."[4] Thus the Act abolishes the old methods and introduces a new statutory scheme to deal with easements by prescription. Section 38 (b) provides for a transitional period to phase out the old rules and phase in the new regime.

Easement by Prescription

The Law Reform Commission in that report[5] described an easement as "the method by which the law gives legal recognition to the existence of an easement or profit à prendre where it has, over a long period, been de facto enjoyed, in the same way as if it have been created by a formal grant." Examples given would be rights of way, rights of water, rights of support and right to light.

The Old Rules

Under the old rules, to acquire an easement it was necessary to firstly be a user as of right. This is where the person enjoyed the right without force, without secrecy and without mere permission. Secondly, the use had to be continuous and not intermittent and finally the right claimed had to be capable of being an easement.[6]

The old rules provided for three methods of acquisition of an easement by prescription. These were prescription by common law, prescription under the doctrine of Lost Modern Grant and prescription under the Prescription Act 1832[7]. It was a common feature of the three methods that it was necessary to show a minimum of twenty years continuous use. The Prescription Act 1832 was designed to clarify the position in respect of prescription, however it did not abolish the other two methods. Therefore if an applicant failed under the Prescription Act 1832, then they could revert to the other methods. The Prescription Act 1832 was described as having the "unenviable reputation of being one of the worst drafted Acts on the Statue Book."[8] Instead of reducing the difficulties encountered in this area, it added further complications. However, it has been the rubric under which the majority of easements have been obtained for the last 150 years.

The New Rules

As stated above, the Act attempts to modernise the law in this area and provide one method of obtaining an easement by prescription. The new Act attempts to incorporate the main threads that ran through the old rules in acquiring an easement i.e. dominant and servient tenement and relevant user period. The legislature has retained the basic criteria previously required under the old rules while providing certainty in such areas as tenancies.

Section 33 of the Act defines the "relevant user period" 'as a period of user as of right without interruption by the person claiming to be the dominant owner or owner of profit à prendre in gross –

1 The Preamble of the Land and Conveyancing Law Reform Act 2009.
2 The Law as to acquisition of easements and profits à prendre by prescription is largely similar, so for ease of reference "easement" my be read to include profits à prendre, unless otherwise stated.
3 Part 8 also deals with implied grants
4 P.2
5 The Acquisition of Easements and Profits à Prendre by Prescription defined Prescription, p1.
6 i.e. rights that flow from the basic characteristics of land law
7 Implemented by The Prescription (Ireland) Act 1858
8 Wylie p 413 fn407; the English Law Reform Committee's 14th Report *Acquisition of Easements and Profits by Prescription (1966);*

(a) where the servient owner is not a state authority, for a minimum period of 12 years, or
(b) where the servient owner is a State authority for –
    i. a minimum period of 30 years, or
    ii. where the servient land is foreshore, a minimum period of 60 years.'

In addition, section 33 defines the 'user as of right means use or enjoyment without force, without secrecy and without oral or written consent of the servient owner."

Section 34 abolishes prescription of an easement at common law and under the doctrine of lost modern grant. Section 8 repeals the Prescription Act 1832.

Section 35 (1) states that "An easement or profit à prendre shall be acquired at law by prescription only on registration of a court order under this section." Section 35 (2) requires that the "*relevant user period"* must refer to the period immediately before the commencement of the action. Section 35 (3) gives the court discretion to find that the user is entitled to an easement where the user period is not immediately before the commencement of the action and where the court deems that in all the circumstances it is *'just and equitable'* to grant the right of way.

Section 36 deals with tenancies specifying that if the servient tenement is a tenant, the right of way ends when the tenancy ends, except in certain circumstances. Section 37 allows for the suspension of the user period where the servient owner is incapable of managing their own affairs.

Section 38 is dealt with below.

Section 39 provides for the extinguishment of an easement where there is a 12 year continuous period of non-use of an easement acquired unless the right has been registered in the Registry of Deeds or Land Registry. There is a further requirement that at least 3 years of the period of non-use occurs after the commencement of the Act.

Section 38

The difficulties and possible complications of the Act arise out of section 38 which is the main focus of this article. Section 38 deals with obtaining an easement by prescription only. It is intended to examine the interpretation of section 38, the issues that arise and the consequences flowing from the alternative interpretations.

Section 38 -

> "In relation to any claim to an easement or profit a prendre made after the commencement of this Chapter, sections 34-37 -
> (a) apply to any claim based on a relevant user period notwithstanding that it is alleged that an additional user period occurred before that commencement,
> (b) do not apply to any claim based on a user period under the law applicable prior to the commencement of this Chapter and alleged to have commenced prior to such commencement where the action in which the claim is made is brought within 3 years of such commencement."

In short, the issues centre mainly on the interpretation of section 38 (a) and when the '*relevant user period'* starts accruing to enable a person to obtain an easement by prescription. It is easier to consider subsection (b) first as it comes into consideration when considering subsection (a).

Subsection (b)

Subsection (b) provides that a claim for an easement can be brought under the old rules and subject to the requirement that it is brought by the 1st December 2012. This provision also provides that a person who has completed the "*relevant user period"* [as required under the old rules i.e. 20 years] or a *"relevant user period"*[again under the old rules] which can be completed within 3 years may apply within the transitional period under the old rules e.g. where a person has at least 17 years use on the 1st December 2009 and within the transitional period completes the necessary 20 year minimum use, they can then apply for an easement under the old rules. It should be noted that as it is the old rules that the claim is brought under, then there is no requirement to register the court order as required by s. 35 (1) of the Act. However the Explanatory Memorandum of the Act makes it clear that this transitional period is limited to 3 years, it states that "Once that transitional period has expired, any subsequent claim must rely upon the new provisions in Chapter 1". This brings us on to subsection (a).

Interpretation of subsection (a)

The Explanatory Memorandum, the Law Reform Commission Report on 'Reform and Modernisation of Land Law and Conveyancing Law' and J.C. W. Wylie (a consultative and legislative draftsman to the legislation and author of "Irish Land Law") adopt a literal interpretation of subsection (a). Upon this interpretation, the *"relevant user period"* can only begin to accrue upon the commencement of the Act i.e. the 1st December 2009, so no period accrued prior to the Act is included in calculating the *"relevant user period"*. It appears that this derives from the limitation words used in section 38 (a) of the Act: "notwithstanding that it is alleged that an additional user period occurred before that commencement". It would seem that this approach is predicated on the words "*additional user period"* excluding any period of use prior to the commencement of the Act.

The Explanatory Memorandum supports this contention and provides an example of this interpretation: "Paragraph (a) makes it clear that a claimant after the commencement of Chapter 1 can apply to the court under section 35 as soon as the requisite 12 year user period expires after the commencement however many years of user before that commencement also occurred. Thus a person who commenced user of a potential right of way 5 years before the commencement of Chapter 1 could, under section 35 apply 12 years after that commencement, i.e. after a total of 17 years instead of having to wait the minimum of 20 years which the preceding law would have required."[9]

It is clear from this example that the intention is to reset the clock at the date of the commencement of the Act. Therefore, if a person is seeking to acquire an easement by

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prescription under the new rules, then the earliest that they can apply, upon this interpretation, under the Act is the 1st December 2021, as this is when 12 years of the *"relevant user period"* has accrued.

This interpretation certainly has drawbacks. Firstly, upon this interpretation there is a period from the 1st December 2009 [or 1st December 2012 if you can apply under the old rules pursuant to s. 38 (b)] until the 1st December 2021 during which a person cannot obtain an easement by prescription (referred to as 'the closed window period'). Therefore it will not be possible to obtain an easement during this period.

Where a person has a *de facto* easement under the old rules during 'the closed window' period, upon this interpretation, they are effectively shut out from seeking an order for an easement. Bland describes this period as "an open season for the interference with inchoate rights, regardless of their historic user." [10]

An example of the effects of this open season is where a person acquires 20 years use during 'the closed window period' (for example in 2013) they cannot apply until the 1st December 2021, where they will have had a user period of at least 28 years (8 years longer under the old rules and 16 years longer under the new rules). The Act effectively lengthens instead of shortens the *"relevant user period"* in this type of situation. This is inherently unfair and is in contrast to the objective of the Act.

This interpretation also makes it all the more important for persons who have the necessary user period to apply during the transitional period under the old rules. If they do not apply, then according to this interpretation, the user period is extended by 12 years and they effectively cannot make a claim until 2021. The example given above can easily arise as a person may have use of a *de facto* easement for a long number of years but due to a change in the owner/use of the servient tenement (i.e. the land over which the easement is exercsied) they have not felt the need to apply for a court order or simply did not wish to apply for a court order in the interest of neighbour relations. But due to the change in circumstances, they no longer can apply (because it is during the closed window period) and are left with no remedy. Bland provides some simple examples of these types of scenarios; "a water pipe serving a house for decades is interfered with between 3 and 12 years after the commencement of the Act, the owner of the house accommodated cannot establish a pipe easement. A ditch or other artificial watercourse serving agricultural land for centuries can be blocked during that nine-year period." [11]

Also the *de facto* easement is open to interruption and interference by the landowner. Interruption of a year, as defined by section 33, stops the clock for the *"relevant user period"* which means that a person may find themselves unable to protect the *de facto* easement or have to start all over again. This also adds to the period of use for the *"relevant user period"*. As a consequence of interruption persons will find themselves in many more uncertain situations in respect of their land. Bland gives the example of "A's house has enjoyed the flow of natural light to its window for a 100 years without controversy; A's neighbour, B, builds so as to obstruct the light enjoyed by A's house four years after the commencement. A cannot rely on the former means of prescription as he has not issued proceedings within the three years of the commencement and he cannot rely on the new means as his relevant user period is less than 12 years after commencement."[12] This scenario gives rise to unjust situations.

Secondly this interpretation has implications for purchasers of properties with easements attached. As section 35 (1) requires a court order that provides for the easement by prescription, the statutory declaration of long use which previously sufficed under the old rules, is no longer sufficient. Purchasers are now requesting an order declaring an easement prior to closing the sale. As a person cannot apply for the order during the 'closed window period' under this interpretation, this will affect the closure of sales that are subject to easements by prescription. Also, it should be highlighted that the Act does not provide a simple method of applying for the section 35 order. As it stands, it is necessary to issue a plenary summons in the High Court[13] and an Ordinary Civil Bill in the Circuit Court[14]. There is no simpler method provided for such as an originating motion.

Thirdly, section 35 (3) gives the Court discretion to grant an easement in instances where the *"relevant user period"* is not directly before the commencement of the action. The court can declare an easement where it deems it *"just and equitable"* in the circumstances. Upon first glance, this appears to give the Court discretion where it is *"just and equitable"* but this is only the case where the 12 years use is accrued from the commencement of the Act. Again, this means that the first opportunity to use this section will be in 2021.

Finally many people are not aware of the changes to the law in this area and the impending "closed window period". There has been no notification to the public about this change and so persons may find themselves faced with an interruption and no way of protecting their *de facto* easement.

As a result of this interpretation, the only option that may be available during 'the closed window period' is to seek equitable relief. However equity is not a guaranteed solution due its discretionary nature and to opposing equitable maxims. The maxim "equity will not allow a statute to be used as an instrument of fraud" may be used to protect the *de facto* easement however there are other maxims which can also be used to defeat this equitable claim, for example "those who come to equity must come with clean hands" (i.e. an easement by prescription is by its definition the use of someone else's land without their consent) and "equity follows the law".

Also as equity is a discretionary remedy and as there is no definitive decision presently available on the interpretation of the Act, any party who is in a position to apply during the transitional period should do so. There is certainly a risk involved in not instituting proceedings during the transitional period where one is in a position to qualify under the old rules.

10 Easements (2nd Edition) Chapter 16 page 288
11 Easements (2nd Edition) Chapter 16
12 Easement (2nd Edition) p 287.
13 S.I. 149/2010 of the Rules of the Superior Courts (Land and Conveyancing Reform Act 2009) 2010.
14 S.I. No. 155 of 2010 Circuit Court Rules (Land and Conveyancing Law Reform Act 2009) 2010.

Alternative Interpretation

The alternative interpretation is for the new rules to commence upon the commencement of the Act and to allow any period of use accrued before the commencement of the Act to be included when calculating the *"relevant user period"*. For example, a person who has 12 years of a *"relevant user period"* in 2009 could apply under the new rules. Similarly a person who has 12 years in 2015 could apply under the new rules as there would be no closed window period and no restriction.[15].

Section 38 (a) is open to this alternative interpretation because the definition of "*relevant user period"* does not specify any commencement date in the Act. The sole basis for the interpretation followed by the Explanatory Memorandum, the Law Reform Commission and Wylie appears to be due to the inclusion of the phrase *"additional user period"*. However this *"additional user period"* is not defined under the Act and as the *"relevant user period"* is not given a commencement date, it is arguable that the term *"additional"* is superfluous and unnecessary. The word *"additional", upon their interpretation,* appears to be referring to the user period before the commencement of the Act but this is not stated in the Act, it is only presumed that this is what it means in the absence of any definition. Bland states "The awkward phrase in s. 38 (a) "notwithstanding that it is alleged that an additional user period occurred before the commencement" does not of itself prevent the relevant user period including time prior to commencement"[16]. Therefore the Act does not provide a limitation on when the *"relevant user period"* should commence and so there is nothing in the Act to prevent the courts adopting this interpretation.

This view is supported by Bland as he sees this interpretation as the preferable option. The example of the B obstructing A's right to light is in his view and this author's view, *"manifestly unjust"*. A court need not take into account "*additional"* on the basis that it leads to a *"manifestly unjust"* and *"absurd"* situation and also as there is no justification or public policy for its inclusion.

This alternative interpretation would mean that a person who has had long use (e.g. 30 years) could apply under the new rules immediately or only when the need arises i.e. if they wanted to sell or their *de facto* easement was interfered with. They would not have to apply during the transitional period to protect their rights because of the impending 'closed window period'. Furthermore a vendor of a property that is subject to an easement would be able to apply at any time for a court order pursuant to section 35 (1).

However this interpretation would remove the 'phasing in' of the new shorter period under the Act. The servient tenement (the land over which the easement by prescription is claimed) may be taken by surprise as a result of this shortened period. Although it is arguable that a servient tenement is not taken by surprise because of the very nature of easements require a *"user as of right"* to carry out the use *without force* and *without secrecy*. Thus the servient tenement ought to be aware of the use of their land.

It is arguable that this interpretation would appear to remove the necessity for subsection (b) as there would be no apparent use for a transitional period. This would add further weight to the argument that the first interpretation was intended by the legislature. However on the other hand, it can be argued that the 'phasing out' of the old rules is simply to allow such cases as may have succeeded under the old rules which will not succeed under the new rules. The best example of this is *Orwell Park Management Ltd v Henihan*[17] where Herbert J. declared the Plaintiff entitled to an easement that had not been used between the years 1978 to 1989. This would not succeed under the new rules because of extinguishment where there is 12 years of non-use under section 39.

Conclusion

Part 8 does simplify the criteria for an easement or a profit à prendre and also makes it easier for prospective purchasers to be on notice of what rights their property may be subject to. It makes it easier for prospective claimants to obtain an easement. However this part of the Act does not achieve its aim of reform in modernising easements by prescription at this time. Section 38 (a) casts a shadow over the proper implementation of the new rules. It appears to unnecessarily put a stay on their application until 2021. Instead of reducing the instances of litigation, it increases the requirement for litigation and by the same stroke prevents people obtaining a possible easement for a 12 year (9 in certain instances) period. The dichotomy between the transition from the old rules to the new rules has certainly added greatly to the complexities associated with obtaining such rights. This is not reform. The issues arising out of this initial period up to 2021 will no longer matter once that year is reached. However, that is a long time not to be able to obtain an easement by prescription, especially as section 35 requires an order.

It is the author's view that although the first interpretation seems to reflect the intention of the legislature, the alternative interpretation is to be favoured in light of the consequences flowing from it. This interpretation would certainly provide a simpler and fairer solution. There is a need to address section 38. Otherwise there will be much confusion surrounding its application and the reform intended by Part 8 Chapter 1 of the Act will not be achieved until the year 2021. ■

15 This interpretation is supported by Bland on "Easements".

16 Bland "Easements" (2nd Edition) p. 288;

17 [2004] IEHC 87

Communications (Retention of Data) Act 2011

Ronan Lupton BL*

Introduction

The Communications (Retention of Data) Act 2011 ("the Act") came into force on 26 January 2011. It is intended to give force to the EU Data Retention Directive[1] (the "Directive"), which provides for the retention of certain communications data. It also provides for access to that data for the purposes of the prevention of serious offences, the safeguarding of the security of the State and the saving of human life.

The Directive, as amended has been partially in force since 2006. The terrorist attacks of 11 September 2001 in the United States, along with those in Madrid and London in 2004 and 2005, increased pressure for a harmonised approach to mandated storage of communications data throughout the European Union.

It had been thought that the Directive could be implemented by way of Statutory Instrument, which is the mechanism typically employed for transposing EU Directives. This was due to take place in November 2008. However, this option ran into difficulty with Article 29.4.10° of the Constitution, which has been held to prevent implementation of EU law that may have an impact on Criminal Justice by way of Statutory Instrument.[2] Strictly speaking, the Directive only requires the retention of data and in no way does it mandate the disclosure of retained data.[3] These constitutional difficulties may explain the Attorney General's advice in favour of transposing the Directive by primary rather than secondary legislation.

The purpose of this article is to explain to practitioners the background to the Act, as well as some of the issues that may arise in civil and criminal courts, in investigating, prosecuting and litigating matters pertaining to the converging worlds of telecommunications and the Internet.

Background and Previous Position on Data Storage

Prior to the Act becoming law on 26 January 2011,[4] communications service providers were obliged by law to store telecommunications records for a period of three years. This obligation stemmed from Part 7 of the *Criminal Justice (Terrorist Offences) Act 2005*.[5] The 2005 Act had been enacted on foot of various concerns in relation to subversive activity in Ireland and abroad, including the Omagh bombing of 1998.[6]

Historically, Eircom Limited, the incumbent State telecommunications monopoly, was the only operator with a legal obligation to retain telephone call record data. That obligation stemmed from s. 110 (1) of the Postal and Telecommunications Services Act 1983, which required telecommunications providers to retain telecom traffic data for a three-year period, for the purpose of facilitating requests from An Garda Síochána and from the Defence Forces. [7]

In April 2002, the then Minister for Public Enterprise, Mary O'Rourke issued secret directions intended to circumvent the Data Protection Act 1988 and the Telecoms Privacy Directive,[8] requiring all telecommunications providers to retain all traffic data for a period of three years. [9] This acted to widen the scope of the 1983 Act to new entrant providers in Ireland. The supposed power to make such a direction was also contained in s. 110 of the Postal and Telecommunications Services Act, 1983, which provides that telecom operators may be directed *"to do (or refrain from doing) anything which [the Minister] may specify from time to time as necessary in the national interest"*. In conferring such an apparently

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1 Directive No. 2006/24/EC of the European Parliament and of the Council of 15 March 2006, O.J. No. L105 13.04.2006, p. 54

2 See cases: *Meagher v Minister for Agriculture* [1994] 1 IR 329; *Lawlor v Minister for Agriculture* [1990] 1 IR 356; *Green v Minister of Agriculture* [1990] 2 IR 17; *Maher v Minister for Agriculture* [2001] 2 IR 139; *Browne v Ireland* [2003] Vol. 3 IR 205. Note also s. 3 of the European Communities Act 1972.

3 Note decision of the Cypriot Supreme Court in relation to this dated 1 February 2011 finding the Directive unconstitutional http://www.edri.org/edrigram/number9.3/data-retention-un-lawful-cyprus

4 Act Number 3 of 2011

5 Part 7 Sections 61 – 67 (Section 63 mandating duration and Section 64 regulating disclosure requests).

6 Those events were only recently adjudicated upon in Northern Ireland by Weir J. in the case of *The Queen v Sean Hoey*.[2007] NICC 249 The case dealt primarily with DNA evidence, however both the government and law enforcement agencies were convinced that the warning calls made, and indeed the bombs themselves, may have been detonated by pre-paid mobile telephones, using signals sent over telephone networks.

7 See sections 98 (2A) and 98 (2B) of the Postal and Telecommunications Services Act 1983, as inserted by Section 13 of the Interception of Postal Packets and Telecommunications Messages (regulation) Act 1993

8 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

9 McIntyre: "*Data retention in Ireland: Privacy, policy and proportionality",* Computer Law & Security Report 24 (2008) 326 – 334.

unfettered discretion, s. 110 would appear to be in breach of the Irish Constitution's prohibition on delegation of legislative powers beyond merely *"filling in the details of principles and policies already articulated"* in the parent legislation.[10]

The Data Protection Commissioner at the time challenged the regime of secret directions to achieve the aim of retaining all traffic data. He viewed the secret directions as *ultra vires* and stated that the secret directions were an attempt to usurp the law making powers of the Oireachtas, amounting to a significant restriction on the right to privacy, lacked the character of the law (as required by Article 8 of the European Convention on Human Rights) and were in breach of the provisions of the first Telecommunications Privacy Directive.[11] He also argued that such an invasive law should not be made in a way designed to evade Parliamentary oversight or judicial review.[12]

In January 2005 the admissibility of traffic data, as evidence, was first raised before the Irish courts in *People (DPP) v Murphy.*[13] That decision held that telephone traffic data was admissible in evidence and its use did not violate Article 8 of the European Convention on Human Rights. In reaching this conclusion, however, the Court relied on the purported existence of judicial safeguards and oversight. The court may have erred in this regard, as the legislation in being, and relied upon at that time, lacked the very judicial safeguards and oversight mentioned and further lacked the standards set out in cases such as *Malone v United Kingdom*.[14]

This regime continued until the Criminal Justice (Terrorist Offences) Act 2005 (the "2005 Act"). The Minister for Justice at the time relied upon three arguments in appending the data retention regime to the 2005 Act. His arguments can be summarised as: urgency in light of terrorist activity; fulfilment of Ireland's international obligations; and regularisation of existing law in a more permanent form.[15]

The 2005 Act extended the data retention obligation to all telecommunications service providers that were contacted by the Garda Commissioner in writing. These legislative provisions were introduced despite the existence, transposition and supposed operation of Directive 2002/58/EC[16] (the "ePrivacy Directive"), which sets out obligations concerning the processing of personal data and the protection of privacy in the electronic communications sector. Article 15 of the ePrivacy Directive provides that retention of traffic data for purposes of law enforcement should meet strict conditions, *i.e.* retention in each case should be only for a limited period and only where necessary, appropriate and proportionate in a democratic society.

The recent case of *DPP v Joseph O'Reilly*[17] is an example of a case involving evidence of e-mails, telephone records and mobile telephone triangulation. Despite a significant challenge to the basis of the mobile telephone service providers' operating license in the Court of Criminal Appeal, telephone records and location data were particularly important in prosecuting that case (which ultimately resulted in the conviction of the accused).

Widening the Net to the Net

Unlike any previous Act, the 2011 Act now includes an obligation to retain data in relation to Internet access, Internet e-mail and Internet telephony (except for the content of such communications). All modes and methods of communication over the Internet are broadly captured for the purpose of retention, and retained data can be the subject of an access request from designated authorities.

A notable aspect of the EU Directive is that an *"offence"* is defined therein as a crime punishable by imprisonment for a period of at least 6 months.

The Directive could have widened the scope of serious offences in Ireland to include minor scheduled offences, such as Section 9 of the 1997 Non-Fatal Offences Against the Person Act (which deals with harassment and has a relatively low toll of threshold for law enforcement purposes). However, a *"serious offence"*, for the purposes of the Act, means an offence punishable by imprisonment for a term of 5 years or more.[18]

Service providers have raised valid concerns that the Act may give rise to vast volumes of data disclosure requests in relation to the investigation of less serious crimes. Thus, for example, obtaining communications data in connection with environmental or regulatory prosecutions could have reduced the legislative intention of the Act.

The Act for the first time provides for the retention and storage of *"unsuccessful call attempts"* which is defined in s. 1 as "a communication where a telephone call or an Internet telephony call has been successfully connected but not answered or there has been a network management intervention." A *"network management intervention"* presumably includes attempted calls resulting in no actual connection.

In a change to the previous position, the Revenue Commissioners now also have access to retained data, pursuant to the various prevention of corruption and revenue acts. A new revenue offence, of possessing or using computer tools for the purpose of evading tax, has recently been created.[19] This would appear to cover a wide range of software and hardware, including encryption and stenography software and secure deletion tools. It is clear that the Act will more readily facilitate the Revenue Commissioners in the investigation of revenue offences.

Under the terms of the Act, internet service providers now have a new obligation to retain internet traffic data for a period of 12 months, with a one year reduction in the previously mandated three year telecommunications data retention period.

10 Hogan and Whyte, Kelly: *The Irish Constitution* (4th ed., 2003) at 248, summarising the jurisprudential development starting with *Cityview Press v AnCo* [1980] IR 381.

11 Lillington, *"Court threat for State over data privacy"*, The Irish Times, 26 May 2003.

12 Lillington, *"Secret data traffic direction may break law"*, The Irish Times, 30 March 2003.

13 [2005] IECCA 1.

14 (1985) EHRR 14.

15 179 Seanad Debates, 3 February 2005.

16 SI 535/2003 European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003

17 [2009] IECCA 18

18 An offence listed in Schedule 1 is also deemed to be a serious offence. See footnote 44

19 Section 1078(2) of the Taxes Consolidation Act 1997, also referred to as the Principal Act as amended in subsection by s. 71 (2) of the Finance Act 2011

Summary of the Statutory Scheme

Non Application of the Act

The Act does not apply to the content of communications transmitted by means of fixed network telephony, mobile telephony, Internet Access, Internet email or Internet telephony.[20]

Obligation to retain data

The obligation to retain data[21] under the Act is set out fully.[22] The Act states that the data referred to in *Part 1* of *Schedule 2* for fixed and mobile telephony data is to be retained for a period of two years and the data referred to in *Part 2* of *Schedule 2* for Internet data is to be retained for a period of one year.[23]

Further to the general obligation to retain data, there is also a "saver" provision that relates to retained data that has been subject to a valid data restoration request under the 2005 Act. This means that the relevant data is still legally subject to retention for a period of three years under the 2005 Act.[24] The 2005 Act also mandates that the relevant data be retained in such a way that they may be disclosed pursuant to a disclosure request, without "undue delay".[25]

A new provision is the retention requirement in relation to unsuccessful fixed and mobile telephony and data communication attempts.[26] The Act does not require service providers to retain aggregated data that has been made anonymous, or data relating to unconnected calls.[27] Aggregated data means data that cannot be related to individual subscribers or users.[28]

Data security

Section 4 of the Act sets out that service providers must have in place, or implement, measures that ensure that data retained shall be of the same quality and subject to the same security and protection as those data relating to the publicly available electronic communications service or to the public communications network,[29] whichever is most appropriate in the case of the service provider.

The Act requires that the data be subject to appropriate technical and organisational measures to protect it against accidental or unlawful destruction, accidental loss or alteration, or unauthorized or unlawful storage, processing, access or disclosure.[30] Measures to ensure that only authorised personnel have access to retained data are likewise required.[31]

20 Section 2
21 Section 3
22 Section 3 (1)
23 Service providers can delete the retained data within one month of the expiry of the maximum retention period for both telecommunications and Internet data.
24 Section 3 (2)
25 Section 3 (3) – No effort has been made to define "delay" or "undue delay".
26 Section 3 (4)
27 Section 3 (5)
28 Section 3 (6)
29 Section 4 (1)(a). For legal definitions, see Directive 2002/21/EC, O.J. No. L 108, 24.4.2002, p. 33
30 Section 4 (1)(b)
31 Section 4(1)(c)

The Act also provides that with the exception of data that has been accessed and preserved, data shall be destroyed by the service provider after two years and one month in the case of fixed and mobile telephony data.[32] In the case of Internet data, that data may be destroyed after a period of one year and one month.[33] Further to the Directive, the Data Protection Commissioner is the designated national supervisory authority for the purposes of the Act.[34]

Access to data

Service providers have an obligation not to access data retained in accordance with Section 3, save in the following circumstances:[35] at the request or with the consent of a person or persons to whom the data relates;[36] upon receipt of a data disclosure request from one of the relevant state agencies for the purposes of complying with that request;[37] in accordance with a court order;[38] or as may be authorised by the Data Protection Commissioner.[39]

Disclosure request

Section 6 provides that data disclosure requests may be made by any of three State agencies, namely: An Garda Síochána; the Permanent Defence Force; or the Office of Revenue Commissioners (the "State agencies"). A request signed by An Garda Síochána must be made by an officer not below the rank of chief superintendent.[40] The requestor must be satisfied that the data is required for: the prevention, detection, investigation or prosecution of a serious offence[41]; the safeguarding of the security of the State; or the saving of life. A request by the Permanent Defence Force must be made by an officer not below the rank of colonel.[42] The request must be for the purpose of safeguarding the security of the State. A request by the Office of Revenue Commissioners must be made by an officer not below the rank of Principal Officer,[43] and must be for the purpose of prevention, detection, investigation or prosecution of a Revenue Offence[44].

Processing for other purpose

The Act makes clear that data retained and requested under that Act, that has been or may be subject to a data disclosure

32 Section 4 (1)(d)(i)
33 Section 4(1)(d)(ii)
34 Section 4(2)
35 Section 5
36 Section 5 (a)
37 Section. 5 (b)
38 Section 5(c)
39 Section 5 (d)
40 Section 6 (1)
41 Section 1 provides that *"serious offence"*, for the purposes of the Act, *"means an offence punishable by imprisonment for a terms of 5 years or more, and an offence* listed *in Schedule 1 is deemed to be a serious offence."*
42 Section 6 (2)
43 Section 6 (3)
44 Section 1 provides that for this purpose *"revenue offence" "means an offence under any of the following provisions that is a serious offence"*: Section 186 of the Customer Consolidation Act 1876; Section 1078 of the Taxes Consolidation Act 1997; Section 102 of the Finance Act 1999; Section 119 of the Finance Act 2001; Section 79 of the Finance Act 2003 (Inserted by section 62 of the Finance Act 2005); and Section 78 of the Finance Act 2005.

request, can be processed for other purposes, in accordance with the law.[45]

Statistics

The Act provides that the State agencies shall prepare and submit a report to the Minister with supervision of the State Agency relating to full statistical analysis of disclosure requests, within a relevant period[46] of time[47] (the "Relevant period"). The Minister for Justice shall review the reports and receive relevant reports and comments from the Ministers for Defence and Finance before preparing and submitting a State report that consolidates those reports to the European Union.[48]

Complaints procedure

The complaints procedure provided for in the Act[49] deals with contraventions of Section 6 (concerning disclosure requests). A contravention of s. 6 does not, in itself, render the disclosure request invalid or constitute a cause of action at the suit of the person affected by the disclosure request. Any such contravention that is independently investigated and validated may, or may not, result in a cause of action for the infringement of a constitutional right. A person who believes that data related to them has been accessed following a disclosure request may apply to the Referee[50] for an investigation into the matter. The Referee must assess the veracity of the application (other than one appearing to him to be frivolous or vexatious),[51] and shall then investigate whether a disclosure request was made as alleged in the application, and if so, whether any contravention of the provisions Section 6 has occurred.[52]

The Referee, on concluding the investigation and making a positive finding of a contravention of Section 6, shall notify the complainant in writing of such conclusion and make a report of the findings for submission to the Taoiseach.[53] The Referee may, as he or she thinks fit, direct the State agency in question to destroy the relevant data and any copies of that data and recommend that a payment be made to the complainant by way of compensation, of such sum as may be specified in the order.[54] The Minister shall implement any such recommendation made by the Referee.[55]

Duties of the designated judge

The 2011 Act states that the President of the High Court, in conjunction with the Minister for Justice, can invite a person who is a judge of the High Court, to undertake the duties outlined in the Act. If the invitation is accepted, the Government shall designate the judge for the purposes of the Act. Such duties include: keeping under review the operation of the Act; ascertaining whether the Garda Síochána; the Permanent Defence Force; and the Revenue Commissioners are complying with its provisions, and to include in his report to the Taoiseach such matters relating to the Act as the designated judge considers appropriate.[56]

It is the Hon. Mr Justice Iarfhlaith O'Neill who has been the presiding judge for the purposes of the 2005 Act. Mr Justice O'Neill has found, and reported,[57] breaches by members of An Garda Síochána of the 2005 Act during the previous annual reporting period.[58]

The designated judge has the power to investigate *"any case in which a disclosure request is made"* and may also *"access and request any official documents or records relating to the request."*[59] The Act also allows for the designated judge to communicate with the Taoiseach, Minister for Justice or Data Protection Commissioner[60] in relation to any disclosure requests.

It should also be noted that the Act contains a requirement (apparently unqualified) for persons to disclose to the designated judge information in their possession relating to disclosure requests. Thus: "Any person who was concerned in, or has information relevant to, the preparation or making of a disclosure request shall give the designated judge, on his or her request, such information relating to the request as is in the person's possession."[61] The consequences of a breach of this requirement are somewhat unclear. The Act does not make such a breach a criminal offence. Furthermore, the status of any statements made by a person in compliance with this requirement, in any subsequent criminal proceedings, is not entirely clear. It may well be that they would be inadmissible, if derived under compulsion.[62]

Legislative Challenge - Protection of Privacy and Proportionality

McKechnie J. in the case of *Digital Rights Ireland Limited v Minister for Communications & Ors,*[63] determined the plaintiff (a limited company) to have *locus standi* challenging the validity of the Directive under Community law, as well as the various historical legislative instruments, including the various historical Acts concerning the subject of the retention and restoration of communications data. In determining the plaintiff to have *locus standi*, McKechnie J. did so with reference to the principle of *actio popularis.*

McKechnie J. considered the following: the sincerity of the plaintiff; the seriousness of the plaintiff as a litigant, rather than any potential vexatious litigation; that the case raised important constitutional questions; the impugned

45 Section 8
46 Section 9 (11) (a) (b) the phrase "relevant period' means – *"the period beginning on the day on which this Act commences and ending on the 31 December next following that day, and each successive 12 month period".*
47 Section 9 (1)(2)(3)
48 Section 9 (6)(7)(8)
49 Section 10 of the Act.
50 Section 10 (2). The Referee in question is defined in s 1. to mean the holder of the office of Complaints Referee the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.
51 Excluding frivolous and vexations applications; see s. 10(3).
52 Section 10(3)
53 Section 10(4)
54 Section 10(5)
55 Section 10(6)
56 Section 12(1)
57 http://www.scribd.com/doc/49538701/Interception-and-Data-Retention-in-Ireland-Judicial-Report
58 http://www.tjmcintyre.com/2011/02/judges-report-reveals-allegations-that.html
59 Section 12(2)
60 Data Protection Acts 1988 and 2003.
61 Section 12(3)
62 *Re National Irish Bank Ltd (No. 1)* [1999] 3 IR 145; *Dunnes Stores Ireland Company v Ryan* [2002] 2 IR 60
63 [2010] IEHC 221 dated 5th May 2010

provisions affect almost all of the population; it would be an effective way to bring the action, given that individual owners of mobile phones would be unlikely to litigate the matter; the plaintiff had a right of access to the Court; and that the Court has a duty to uphold the Constitution and ensure that suspect actions are scrutinised and the public good protected.

This decision should be noted for a number of reasons, but two are particularly pertinent. First, it is an example of a body corporate successfully being granted *locus standi* to litigate an action seeking to vindicate a right which is inherently a *human* right (being the right to privacy); and second, the case seeks to challenge in the ECJ the very Directive that provides the backdrop to the 2011 Act.

Notably, this is not the first time in Ireland that a company or association has been allowed to take an action in order to vindicate an apparently inherently *human* right (as opposed to (say) property rights, which might more readily be attributed to a company[64]).

Preliminary Reference Leave – TFEU 267 (Formerly TEC 234)

McKechnie J. referred certain questions to the European Court of Justice under the preliminary reference procedure TFEU Article 267 (formerly TEC 234). The High Court noted that the plaintiff also sought to bring its application pursuant to Article 267(3), which states:

> "Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice" (*emphasis added)*

The plaintiff argued that where a question of the validity of Community law is raised, the national court must make a reference, since there is no effective judicial remedy under national law because a national judge may not declare a Community instrument invalid.[65]

The Brussels Factor

The Government and the Minister for Justice,[66] at the time of the Council decision on the Directive 2006/24/EC, (correctly, it is submitted) opted to litigate the issue of the proper EU pillar placement for such a Directive.[67] The Irish challenge and associated question was whether the Directive was correctly placed within the European framework as an Internal Market matter pursuant to Article 95 TEU.

Ireland contended that the Directive's *'centre of gravity'* did not concern the functioning of the internal market, but rather the investigation, detection and prosecution of crime. For this reason, it argued, measures of the kind set out in the Directive ought to have been adopted on the basis of the articles of the EU Treaty relating to police and judicial cooperation in criminal matters.

The European Court of Justice ruled against the Irish government on the issue in *Ireland v. European Parliament and Council of the European Union* (Case C-301/06), in a judgment delivered on the 10th February 2009.

The Court found that Directive 2006/24/EC was properly enacted under Article 95 TEU, since it was apparent that differences between national rules adopted for the retention of data were liable to have a foreseeable direct impact on the functioning of the internal market, which would become more serious over time. Further, the provisions of the Directive are essentially limited to the activities of service providers and do not govern access to data, or its use by police or judicial authorities. However, the Court of Justice expressly stated that the action related solely to the choice of legal basis for the Directive, and "*not to any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy*".[68]

On 26 November 2009, infringement proceedings were brought against Ireland in *Commission of the European Communities v Ireland.*[69] Ireland was found to have failed in its obligation to transpose the Directive on time, and this resulted in a negative ruling and a costs order against Ireland.

Difficulties with the Act

The Act fails to allow for the making of regulations that may assist service providers and the State agencies, in developing what is likely to be a challenging set of restoration and disclosure procedures. The Act is also silent on the definition of "*undue delay",* and fails to specify what retention obligations must flow from validly restored data. For example, it does not specify how the service provider or State agency should treat restored data, whether it should be stored indefinitely and, if so, in what form.

The communications industry trade associations have met with representatives of the State agencies to construct a Memorandum of Understanding ("MOU") in relation to the storage of and access to communications data. The MOU is not legally binding on signatories, but sets out guidelines, which seek to describe how Sections 5 and 6 of the Act might be complied with. It is hoped that the MOU will ensure that access to data and disclosure requests can be facilitated without undue cost and delay.

Civil Litigation: Non-Party Discovery and Court Orders

Practitioners should note that, in addition to the relatively new Statutory Instrument 93 of 2009[70] dealing with electronic discovery, Kelly J. in the case of the case of *EMI v Eircom*

64 *Iarnrod Éireann v Ireland* [1996] 3 IR 321. See generally, A. O'Neill, *The Constitutional Rights of Companies* (Dublin, Thomson Round Hall, 2007). Such an action can be seen in the cases of *S.P.U.C. v. Coogan* [1989] 1 IR 734 also referring to the Supreme Court decision *in A.G. (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] IR 593. Both cases involve the vindication of the rights of the unborn child. The rehearsal of the law relating to *locus standi* and *actio popularis* is useful for future cases in this area.

65 *Foto-Frost v. Hamptzollant Lübeck-Ost* (Case 314/85) [1987] ECR 4199

66 The Minister at the time was Mr. Michael McDowell, SC.

67 Slovakia agreeing with this interpretation and voting against the Directive.

68 *Ireland v. European Parliament and Council of the European Union* (Case C-301/06) para. 5.

69 Case C-202/09

70 S.I. No. 93 of 2009: Rules of the Superior Courts (Discovery) 2009, which deal with discovery of electronically stored data.

Limited[71] made a number of Orders whereby the plaintiff in that action, compelled the defendant, as an Internet service provider, to disclose the names of its infringing customers. The plaintiff made the case successfully that their copyright had been infringed, and cited a series of IP addresses of the responsible subscribers.

The judgment of Kelly J. declares that where unknown persons have committed a wrongful activity, an order may be made requiring a defendant to identify such persons for the purposes of legal action.

The applicant relied upon the case of *Norwich Pharmacal v. Custom and Excise*,[72] where the House of Lords, in a different context, established the right of a person who claimed that a civil wrong had been perpetrated to obtain a court order against a party holding information that would enable the identification of the wrongdoer.

In the Federal Court of Appeal in Canada case of *B.M.G. Canada Inc v. Doe*,[73] Sexton J., speaking for the Court, said at paragraphs 40 to 42:-

> "….. in my view in cases where plaintiffs show that they have a bona fide claim that unknown persons are infringing their copyright, they have a right to have the identity revealed for the purpose of bringing action. However, caution must be exercised by the courts in ordering such disclosure to make sure that privacy rights are invaded in the most minimal way."

The judgments of Kelly J. and Sexton J. uphold the basic principle established in the *Norwich Pharmacal* case that where a person, perhaps without fault, becomes entangled in the tortious acts of others in a way that facilitates the others' wrongdoing, while no personal liability may be incurred, that person has a duty to assist by disclosure of the identity of the wrongdoer(s). *Norwich Pharmacal* orders are therefore clearly established as an alternative to injunctive relief and other perhaps more costly or onerous reliefs.

While the Act does not purport to be solely intended to resolve civil litigation, it is obvious that it will assist practitioners and litigants when trying to resolve matters in dispute.

The costs of non-party discovery are always borne by the applicant, as opposed to the non-party who may be the subject of a court order.[74] It is also likely that applications under Section 8(b) or (e) of the Data Protection Act, 1988, in order to establish subscriber, payment or transaction details linked to a given telephone number or Internet address may become more frequent.

Conclusion

The Act, in its current form, poses significant cost burdens and efficiency challenges on both the State agencies and service providers. Each will now have to act with a strong sense of urgency in dealing with data restoration requests. There may also be technical challenges to consider, given the Act's silence on standards or procedures to mandate the delivery of data in a timely, secure and proportionate manner.

It remains to be seen whether the State has the requisite resources to meet the time limits mandated by the Act, particularly in the context of more complex criminal and revenue cases. It should be noted that despite the obvious conflicts with Data Protection legislation, in terms of record deletion and data control, service providers must comply with the Act in terms of data security, pursuant to Section 3. Section 4 states that records shall be destroyed and should only be retained after the expiration of one month from the maximum upper retention period.[75] The question must also be asked: for how long must legally accessed records be retained and under what form of supervision? The Act is silent on the issue – no guidance is provided.

The *Digital Rights Ireland Limited v Minister for Communications & Ors* case, when referred to the ECJ, may well lead to a full review of the validity of the Directive, previous Acts' and the 2011 Act. Practitioners should note that speed, diligence and precision[76] will now be required in all instances where records are required, and requests will now be subject to time limits set out in the Act. ■

71 [2005] 4 IR 148
72 [1974] AC 133
73 [2005] FCA 193
74 Rules of the Superior Courts, Order 31, rule 29
75 Telecommunications records: 2 years and 1 month; Internet records: 1 year and 2 month.
76 *Dome Telecom v Eircom Limited* [2008] 2 IR 726

Announcement: New Director of Round Hall – Thomson Reuters

Catherine Dolan has been appointed as Managing Director of Round Hall. Catherine has worked with Round Hall for over 10 years as Commercial Manager and has a long track record in the commissioning of new titles and relationship management. Round Hall is the largest provider of legal information in Ireland and is part of Thomson Reuters, the world's leading source of intelligent information for legal practitioners and business. Catherine looks forward to continuing the positive relationship with The Bar Council of Ireland and individual members of The Law Library. Round Hall publishes *The Bar Review* and *The Bar Council of Ireland Yearbook and Diary* in association with The Bar Council of Ireland.

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