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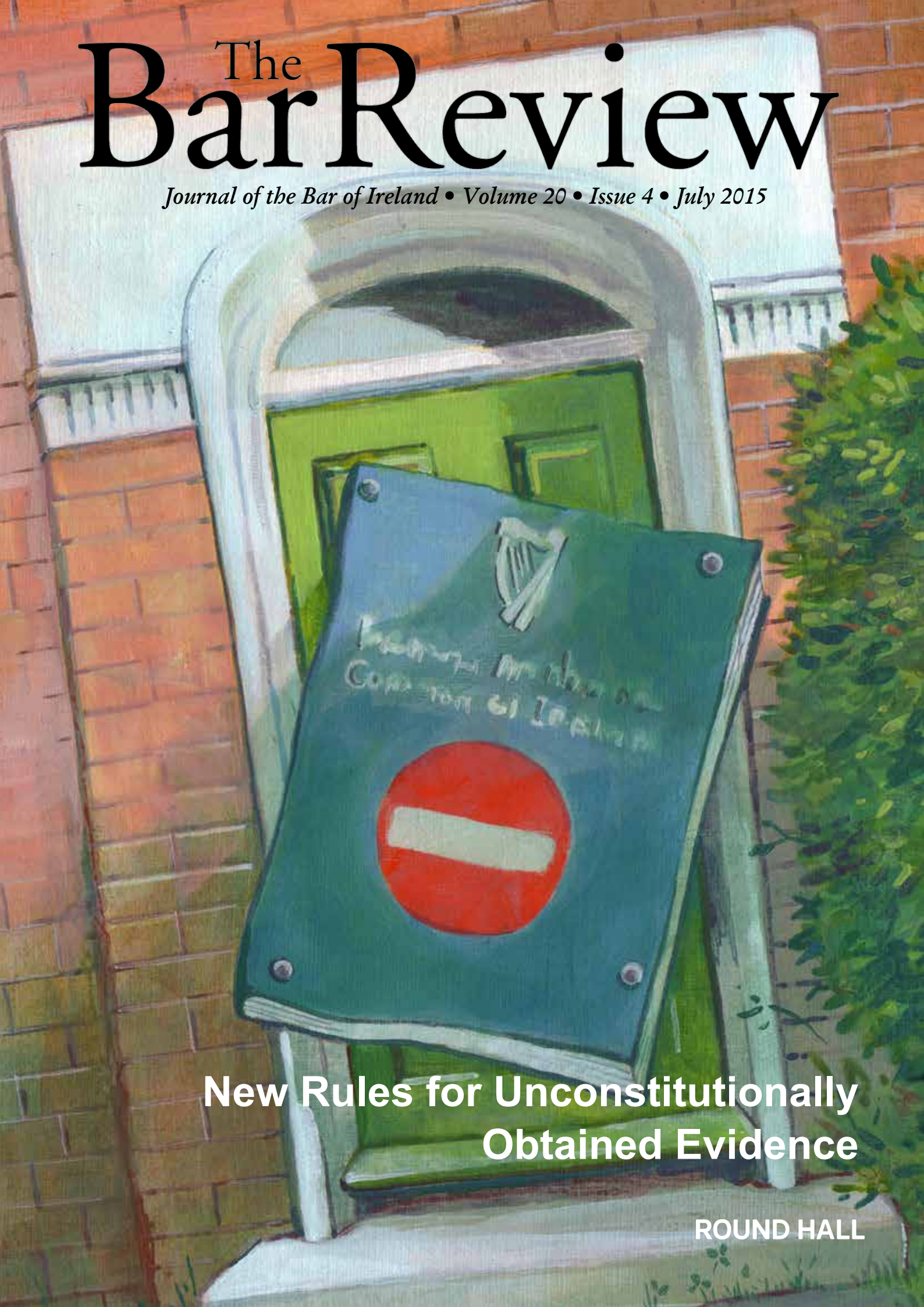

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Patrick Ambrose

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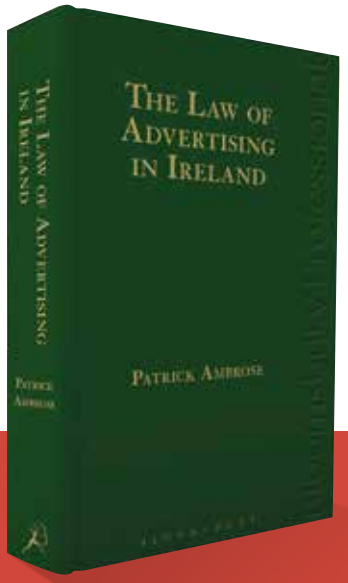

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Principles of Irish Constitutional Equality Law: Recent Developments

Dr. Elaine Dewhurst*

Article 40.1 has been recognised as a "vital and essential component of the constitutional order"[1] and there has been a slight increase in the number of cases invoking the equality guarantee[2] in recent years, although this seems to have slowed in 2014[3]. Recent jurisprudence before the superior courts suggests it is becoming easier to invoke the equality guarantee protected by Article 40.1 and that the courts have found more practical ways of remedying breaches. However, traditional doctrine, such as the need for a comparator and the justificatory possibilities, ensures that the equality guarantee still remains one of the more elusive constitutional guarantees. Many interesting insights into the shifting treatment of Article 40.1 by the superior courts can be gleaned from the decisions of the cases in 2014. This article will review these developments in four stages: the engagement of Article 40.1, the interference with Article 40.1 and justifying a difference in treatment under Article 40.1, as well as an examination of the remedies available in equality cases.

Equality in 2014: The Lessons

Engaging Article 40.1

The expansive interpretation given by the courts in recent years to the engagement of Article 40.1 has continued in 2014 and has widened the potential scope for the invocation of the equality guarantee. The superior courts have moved the equality guarantee from a situation in *Quinn*[4] where discrimination on the basis of a person's trade and employment was not considered to engage Article 40.1 and the equality guarantee was considered to be greatly "emasculated"[5], to one where there is now a general acceptance that there is a wide variety of circumstances involving "human beings in society" which may fall under the protection of Article 40.1.[6]

Historically, Article 40.1 applies only to human persons (this certainly has not changed) and comes into play only where the individual is discriminated against on the basis of certain "essential attributes" (referred to as the "basis approach") or where the "essential attributes" of the human person are affected in a given context (referred to as the "contextual approach"). Essential attributes have been held to include race, religion, sex, language, political opinion, marital status, wealth, pregnancy and age. While many of the cases in 2014 indicate a continuance of this basis approach (e.g. in *M.R. and D.R.*[7] reference was made to gender discrimination, disability discrimination and, unusually, birth status[8]), other cases do not obviously entail essential attributes of the human person. This continues a trend in recent years and attempts have been made by academics and the judiciary to tie these cases into either the contextual or basis approach.[9] However, it is submitted, with respect, that this is an artificial exercise, as it appears that there is little to tie many of the more recent cases together other than the fact that the cases involve an individual being treated differently by the State on the basis of some irrelevant characteristic, not necessarily related to their essential attributes as human persons. For example, in *Murphy*[10] the case involved discrimination on the basis of the fact the plaintiff had no access to a jury trial in the Special Criminal Court, whereas others charged with the same offence would have access to a jury trial. In *McCabe*[11], once again in the criminal context, the plaintiff argued that he was discriminated against on the grounds that he had no access to an appeal and in *McInerney*[12], the plaintiff sought to tie a discrimination claim to the arbitrary and unclear nature of the offence he was charged with.

Therefore, it comes as a great relief that the Supreme

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1 *Murphy v Ireland and Others* [2014] IESC 19 at para 33 (per O' Donnell J).

2 In 2012, there were 5 substantial invocations of the equality guarantee. In 2013, that rose to 8 but this fell to just 4 in 2014.

3 There were only 4 cases in 2014: *M.R. and D.R. and Others v An t-Ard-Chláraitheoir and Others* [2014] IESC 60; *Murphy v Ireland and Others* [2014] IESC 19; *McInerney v Director of Public Prosecutions and Others; Curtis v Director of Public Prosecutions and Others* [2014] IEHC 181 and *McCabe v Attorney General and Another* [2014] IEHC 345.

4 *Quinn's Supermarket v. Attorney General* [1972] 1 IR 1.This was reaffirmed by the Supreme Court in *Abbey Films v. Attorney General* [1981] IR 158 at p. 172 (per Kenny J.)

5 Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (Dublin: Butterworths , 4th ed., 2003) at p. 1342; See Doyle, "The Human Personality Doctrine in Constitutional Equality Law" (2001) 9 ISLR 101; See also Whyte "A Comment on the Constitutional Review Group's Proposals on Equality" in Byrne and Duncan (Dublin: Irish Centre for European Law, 1997) at pp. 100-104; and O' Dowd "The Principles of Equality in Irish Constitutional and Administrative Law" (1999) 11 *European Review of Public Law* 769 at pp. 808-823.

6 See the dicta of Barrington J in *Brennan v Attorney General* [1983] ILRM 449.

7 *M.R. and D.R. and Others v An t-Ard-Chláraitheoir and Others* [2014] IESC 60.

8 The applicants claimed that children born via surrogacy arrangements did not have their best interests considered, whereas this was not the case in relation to children born via non-surrogacy arrangements.

9 Barrington J in *Brennan*, supra n. 21and E. Dewhurst, supra n.3.

10 *Murphy v Ireland and Others* [2014] IESC 19.

11 *McCabe v Attorney General and Another* [2014] IEHC 345.

12 *McInerney v Director of Public Prosecutions and Others; Curtis v Director of Public Prosecutions and Others* [2014] IEHC 181.

Court has finally tackled this problematic and potentially emasculating feature of Article 40.1 and clarified the law in this area. O'Donnell J. in *Murphy* specifically highlighted the "problematic"[13] nature of the "essential attributes" doctrine and the fact that rigid adherence to such a strict formula might rob the guarantee of equality of "much, if not all, of its content".[14] He argued that the correct interpretation of the "essential attributes" doctrine is twofold: it can refer to (a) "those immutable characteristics of human beings" (this would include race, sex, age or other status) or (b) "choices made in relation to their status, which are central to their identity and sense of self and which on occasions have given rise, whether in Ireland or elsewhere, to prejudice, discrimination or stereotyping"[15]. This definition effectively endorses the "basis approach" in Irish constitutional jurisprudence. However, O' Donnell J admitted that the difficulty for the plaintiff in *Murphy* was that "no discrimination on such grounds [existed], or [was] alleged, in this case"[16]. Despite this, O' Donnell J did not consider this to be determinative. He held that Article 40.1 was expressed in general terms and "accordingly it may be that significant differentiations between citizens, although not based on any of the grounds set out above, may still fall foul of the provision if they cannot be justified"[17]. The Supreme Court, therefore, effectively sanctioned a very wide expansive interpretation of Article 40.1 as applying to any situation in which persons are similarly situated but differently treated.

A similar approach was also adopted by Hogan J in *McCabe* (although not as explicitly as in *Murphy)*, who held that the "equal treatment of similarly situated persons within the criminal justice system is at the heart of the concept of equality before the law which, as the language of that provision makes clear, is one of the fundamental objectives of Article 40.1"[18]. Therefore, it would appear that while the "essential attributes" doctrine is still alive and well, it is not the only ground upon which an equality claim under Article 40.1 can be based and that a more expansive reading of Article 40.1 will allow applicants to ground a claim where they are similarly situated but treated differently, particularly in the criminal context where rights to liberty may also be in jeopardy.

Interference with Article 40.1

In order to determine whether there is a breach of the equality guarantee, there must be some difference in treatment which amounts to an interference with Article 40.1.[19] The 2014 cases firmly establish that the use of a comparator is still an essential aspect of establishing a difference in treatment.[20]

In order to establish discriminatory treatment, the applicant must demonstrate that they have been treated differently to a comparator. Usually, this involves pointing to either a real or hypothetical person who is similarly situated but who does not have the particular characteristic of the applicant and who is treated differently as a result. So, for example, in *MR and DR,* it was argued that genetic mothers were treated differently to genetic fathers (sex discrimination), genetic mothers with reproductive disabilities were treated differently to other genetic mothers with no such disability (disability discrimination) and children born in non-surrogacy arrangements were treated differently to children born in surrogacy arrangements (birth status discrimination). As in this case, the application of the comparator doctrine is normally straightforward. However, there are cases where the application of the doctrine is not so easily determined and, in recent years, this has proved fatal in some cases.[21]

In choosing a comparator, the Supreme Court in *MR and DR*, held that it was essential to "focus very clearly on the context in which the comparison is made"[22], to ensure not only that a person "can be said to be similar or even the same in some respect" but also that they are "the same for the purposes in respect of which the comparison is made".[23] As an example of what they meant by this, O' Donnell J turned to the issue of age and noted that a "person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement"[24]. It is, therefore, essential to consider not only the fact that two individuals are similar, but the fact that they are similar for the purposes of which the comparison is made. It is this latter aspect which has proved fatal for applicants in many cases.

The *Murphy* case is a useful example of the potential difficulty of choosing an incorrect comparator. The applicant in that case claimed that he was being treated differently to persons who did have a right to a trial by jury because they were not to be tried in the Special Criminal Court. The applicant claimed that the correct comparator was a person tried with the same offence who would have a right to a trial by jury. However, O'Donnell J in the Supreme Court was not convinced that the applicant was similarly situated to persons tried with the same offence. The applicant, he concluded, was not only different but "legally distinct" from those other persons in that the applicant was a person about whom a public officer had determined that the ordinary courts were inadequate to secure the administration of justice and the difference in treatment was precisely related to this difference.[25] Therefore, as the applicant could not point to a suitable comparator who was treated differently, there was no case for the respondent to answer.

Therefore, the choice of comparator is essential for a successful equality claim. Arguably, the widening of the grounds upon which Article 40.1 has been engaged has made it more difficult to secure an appropriate comparator in many cases and the comparator doctrine can be used as an effective gatekeeper against unmeritorious claims.

13 *Murphy*, at para 34 (per O' Donnell J).
14 *Murphy*, at para 34 (per O' Donnell J).
15 *Murphy*, at para 34 (per O' Donnell J).
16 *Murphy*, at para 34 (per O' Donnell J).
17 *Murphy*, at para 35 (per O' Donnell J).
18 *McCabe*, at para 15 (per Hogan J).
19 See for example, *Dillane v. Ireland* [1980] ILRM 167; *G v. District Judge Murphy and Ors* [2011] IEHC 445.
20 *Breathnach v. Ireland* [2001] 3 IR 230 (comparison between prisoners), *JW v. JW* [1993] 2 IR 477 (married and unmarried women), *Foy v. An t-Ard Chlaraitheoir & Ors* [2002] IEHC 116 (comparison between transgender persons), *de Burca v. Attorney General* [1976] IR 38 (comparison between men and women).
21 See. E. Dewhurst, supra n.3.
22 *MR and DR*, at para 36 (per O' Donnell J).
23 *MR and DR*, at para 36 (per O' Donnell J).
24 *MR and DR*, at para 36 (per O' Donnell J).
25 *Murphy*, at para 35 (per O' Donnell J).

Legitimate Justification and Proportionality

In all cases where a difference in treatment is established, the respondent will be required to justify that difference in treatment on the basis of a "difference in capacity, physical or moral, or a difference in social function"[26] or to prove that the difference in treatment serves a particular constitutional purpose. The difference in treatment must also be proportionate to the aim sought to be achieved, with proportionality usually defined as:— "(a) be[ing] rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair[ing] the right as little as possible, and (c) be[ing] such that their effects on rights are proportional to the objective".[27]

Where there is no justification or the measure is disproportionate, the applicant will be successful in their claim. The recent case of *McCabe* is an illuminating example of a case in which there was no justification for the difference in treatment experienced by the applicant. Equally, the case of *McInerney* establishes that any justification will not be legitimate unless it is also proportionate. Hogan J concluded, in that case, that the legislative provisions in issue (relating to the offence of offending modesty) were "hopelessly and irremediably vague", lacking "any clear principles and policies in relation to the scope of what conduct is prohibited" and intrinsically lending "themselves to arbitrary and inconsistent application"[28]. The offences, therefore, offended *inter alia* the equality guarantee.

The only case where a justification was raised and substantially considered was in the case of *MR and DR*. In this case, the Supreme Court accepted that there were axiomatic differences between motherhood and fatherhood which justified the different treatment of genetic mothers and genetic fathers.[29] The argument raised in the High Court by the applicant was that in the case of *S v S*[30] the irrebuttable presumption of fatherhood was found to be unconstitutional and that the irrebuttable presumption of motherhood imposed by the birth registration system should also, on grounds of sex equality, also be unconstitutional.[31] O' Donnell J. held that while there was some "superficial attraction"[32] in this argument it did not take into account the fundamental difference between men and women in relation to reproduction, essentially a justification based on physical capacity. While men had a limited and indivisible role in reproduction, women had a more complex and divisible role which justified the difference in treatment by the legislative regime.[33] McMenamin J preferred to focus on a constitutional purpose justification, that of the "legitimate constitutional and legal purpose, that is, the clear identification of parents who, *inter alia*, owe legal duties to children"[34] and the importance of maintaining a simple and clear birth registration system.

Overall, the Supreme Court considered that the existing legal position was justified in that it was proportionate to have a registration system which recognised the birth mother as mother, "at least, initially"[35]. However, O' Donnell J did go on to say that the continuing registration of the birth mother might raise "serious constitutional issues" if this position were to be maintained after the birth of the child[36]. O' Donnell J noted that from "a human point of view it is completely wrong that a system, having failed to regulate in any way the process of assisted reproduction, and which accordingly permits children to be born, nevertheless fails to provide any system which acknowledges the existence of a genetic mother not merely for the purpose of registration, but also in the realities of life including not just important financial issues such as inheritance and taxation, but also the many important details of family and personal life which the Constitution recognises as vital to the human person"[37]. Therefore, on the narrow issue of birth registration, there was no unconstitutionality but the decision was limited to this question of "immediate registration of birth"[38].

Another interesting factor raised in the Supreme Court decision of *MR and DR* was recognition that there were different levels of scrutiny to be placed on certain types of discriminatory treatment and that the scrutiny would be much closer in cases where there was a differentiation based on certain characteristics such as "race, religion or nationality"[39], although this did not mean that justifications could never exist, as was proven in the case of *MR and DR* itself. This does provide some relief to applicants from the rather onerous burden of proving unconstitutionality in cases where some essential characteristic such as sex, race or age is in issue.

Remedying a Breach of Article 40.1

Remedies in constitutional cases regularly involve invalidation of legislation or common law principles. However, invalidation is not always appropriate, particularly in cases involving under-inclusive legislative classification. The superior courts have been creative in developing a new way of dealing with these types of cases, in order to ensure an effective remedy for the applicant. In 2013, in the case of *Byrne*, Hogan J held that the courts can grant a declaration to remedy a case of under-inclusive classification[40]. Under-inclusive classification cases arise where legislation confers a benefit on a particular group of persons to the exclusion of all others. If an excluded person successfully argues that such treatment is discriminatory, the court may decide to strike down the legislation, however, this does not provide a remedy for the individual complainant (who seeks access to the conferred benefit) and removes the benefit from those already receiving it. If the court decides to extend the right to the previously excluded class of persons, this has the potential to be viewed as judicial law-making and could infringe the separation of powers. Another alternative is for the court to declare that the issue is one purely for the legislature, but again this provides no remedy for the individual complainant.

26 Artcle 40.1.
27 *Heaney v. Ireland* [1994] 3 IR 593 at p. 607 (per Costello J.).
28 *McCabe*, at paras 57 and 65 (per Hogan J).
29 *MR and DR*, at para 25 (per Denham CJ).
30 *S.v S*. [1983] I.R. 68.
31 *MR and DR*, at para 35 (per O'Donnell J).
32 *MR and DR*, at para 35 (per O'Donnell J).
33 *MR and DR*, at para 37 (per O'Donnell J).
34 *MR and DR*, at para 65 (per McMenamin J).
35 *MR and DR*, at para 35 (per O'Donnell J).
36 *MR and DR*, at para 38 (per O'Donnell J).
37 *MR and DR*, at para 38 (per O'Donnell J).
38 *MR and DR*, at para 38 (per O'Donnell J).
39 *MR and DR*, at para 63 (per McMenamin J).
40 *Byrne (a minor) v Director of Oberstown School* [2013] IEHC 562.

The new approach of Hogan J in *Byrne* was also applied in the more recent case of *McCabe* which also involved a case of under-inclusive classification. In *McCabe*, the legislation in issue did not provide for a right of appeal against the re-activation of a sentence for a summary offence in the case of the applicant. Hogan J. had three choices: (a) strike down the legislation (but this ran the risk of removing the right of appeal for all persons resulting in a "Samson-like collapsing of the legislative pillars which gave rise to the unconstitutionality in the first instance."[41]), (b) extend the legislation to include a right of appeal for the plaintiff (but this ran the risk of delving into judicial law-making) or (c) find an alternative remedy for the applicant. Hogan J chose the latter option and following recent precedent[42] granted a declaration to the plaintiff to mitigate the effect of the inequality. This was achieved by declaring that as long as the inequality subsisted, it would be unconstitutional to give effect to the re-activated sentence.[43]

This essentially means that in cases of under-inclusive classification where the applicant is denied a benefit granted to others, the courts can now declare that enforcing the existing *status quo* upon the applicant would be unconstitutional. These recent cases ensure a tangible benefit for applicants in such circumstances and secure the effectiveness of Article 40.1.

Conclusion

In recent years, there has been a marked rationalisation of many of the principles surrounding the scope and interpretation of Article 40.1. The equality guarantee is now much simpler to engage as it is no longer hampered by the rather cumbersome "essential attributes" doctrine. This may explain the increase in the invocation of Article 40.1 before the courts. It may also explain the development of other aspects of the case law surrounding the equality guarantee. This article has pointed out that in relation to determining an interference with Article 40.1 the comparator doctrine has come into sharp focus in many cases and the failure to point to a suitable comparator will prove fatal for any case. The widening of the scope and application of Article 40.1 ostensibly (and evident in the case law in 2014) will make it harder for many applicants to point to a suitable comparator who is similarly situated, yet treated differently.

As for justifications, there have been very few developments and the law, fortunately, remains relatively clear. More recently in *MR and DR* there was a recognition by the Supreme Court that justifying particular forms of discrimination (such as sex, race or religion) would be more difficult and subjected to stricter scrutiny by the courts. This may, once again, be linked to the expanding scope of Article 40.1 and the need to differentiate between more pernicious forms of discrimination (such as sex or disability) from those which are not based on the essential attributes of the human person. Similar sentiments could be expressed about the move towards declaratory relief in cases of under-inclusive classification cases which has proven to be particularly fruitful for applicants in cases that would not normally fall under the scope of Article 40.1. Overall, it can be said that the rationalisation of Article 40.1 has been significantly positive for applicants, albeit that it may have led to tighter rules in relation to other aspects of the doctrine. It is hoped that future case law will continue this positive move towards further rationalisation and clarity and that the "vital and essential"[44] equality guarantee will continue to provide effective protection against arbitrary discrimination for many years to come. ■

41 *McCabe*, at para 39 (per Hogan J). See also *BG v. Ireland (No.2)* [2011] IEHC 445.

42 See Byrne; *Carmody v Minister for Justice* [2009] IESC 71 and *District Justice MacMenamin v Ireland* [1996] 3 IR 100.

43 *McCabe*, at para 45 (per Hogan J).

44 *Murphy*, at para 33 (per O' Donnell J).

Corporal punishment in Ireland and the European Committee on Social Rights

Dr. Mel Cousins

Introduction

This note examines the recent decision of the European Committee on Social Rights (ECSR) which found that that Irish law was in breach of Art. 17 of the European Social Charter as it does not prohibit and penalise all forms of violence against children within the family, in certain types of care or certain types of pre-school settings.[1] While the Committee's decision received considerable media attention in Ireland, the European Social Charter (ESC) is not, of course, binding in Irish law and the legal implications of the decision appear rather limited.[2]

Corporal punishment within the family

Within the family setting, some element of corporal punishment is still lawful as the common law defence of 'reasonable chastisement' remains in place. This was described by Chief Justice Cockburn as follows:

> "… a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him), may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter."[3]

However, in *A. v. United Kingdom*[4] the European Court of Human Rights ruled that the then interpretation of the defence of reasonable chastisement was in breach of Article 3 of the European Convention on Human Rights. Article 3 provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' In that case, a step-father has beaten his nine year old stepson with a garden cane on several occasions causing bruising. He has been charged with assault occasioning actually bodily harm but had been acquitted on the basis that this involved 'reasonable' correction.

The Court of Human Rights recalled that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 and found that the treatment in this case reached the level of severity prohibited by Article 3. The Court held that Article 3 required States to take measures to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. The Court held that

> "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity."[5]

The Court ruled that English law including the defence of 'reasonable chastisement' (as interpreted in this case)

> "did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3."[6]

Subsequently the English Court of Appeal gave guidance to the criminal courts on the implications of this ruling.[7] In that case, the trial judge raised a question as to whether and, if so, how the scope or definition of the defence of reasonable chastisement needed to be modified having regard to the Human Rights Act 1998 and decisions of the European Court of Human Rights in cases such as *A. v. United Kingdom*. The Court of Appeal ruled that

> "the [trial] judge should direct the jury that, when they are considering the reasonableness or otherwise of the chastisement, they must consider the nature and context of the defendant's behaviour, its duration, its physical and mental consequences in relation to the child, the age and personal characteristics of the

1 *Association for the Protection of All Children (APPROACH) Ltd. v. Ireland*, Complaint No. 93/2013, 27 May 2015.
2 See, for example, Irish Times, 27 May 2015.
3 *R. v. Hopley (1860) 2 F. & F. 202 at 206*. There is nothing to suggest that this does not also describe the position in Ireland. See on this defence, Claire Hamilton, 'Child Abuse, the United Nations Convention on the Rights of the Child and the Criminal Law', *Irish Law Times* 2005, 23, 90-96.
4 (1998) 27 E.H.R.R. 611.
5 Ibid at [22].
6 At [24]. Indeed, the UK Government accepted that the law failed to provide adequate protection to children.
7 *R v H (Assault of Child: Reasonable Chastisement)* [2001] EWCA Crim 1024; [2002] 1 Cr. App. R. 7.

> child and the reasons given by the defendant for administering punishment."[8]

The Court derived a number of propositions from the European case law:

> "First, for punishment to be degrading and in breach of Article 3 it must attain a particular level of severity. Secondly, the degree of severity is to be judged according to the facts of each case, in particular, the nature and context of the punishment. Thirdly, … not every case of corporal punishment will necessarily involve a breach of Article 3."[9]

There does not seem to be any analogous ruing in Irish law but it is clear that a similar approach would apply. The European Convention on Human Rights is given force in Irish law by the European Convention on Human Rights Act, 2003. Section 2(1) of the Act provides that:

> "In interpreting and applying any statutory provision *or rule of law*, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."[10]

In addition, section 4 provides that a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by any declaration, decision, advisory opinion or judgment of the European Court of Human Rights. The Irish courts have adopted a limited approach to the incorporation of the Convention into Irish law and the Supreme Court has emphasised that the 2003 Act does *not* give direct effect to the ECHR in Irish law and that section 2 is an *interpretative* provision only.[11] However, as the English court of appeal pointed out in *R v. H.*, the common law is 'evolutionary' and it would seem that an Irish court interpreting the common law defence of 'reasonable chastisement' should do so in line with the ECHR as interpreted in *A.* and similar rulings.[12]

Corporal punishment in other settings

Section 24 of the Non-Fatal Offences Against the Person Act 1997 abolished the rule of law under which teachers were immune from criminal liability in respect of physical chastisement.[13] Section 201 of the Children Act, 2001 prohibits 'corporal punishment or any other form of physical violence' in children detention schools. Similarly the Child Care (Special Care) Regulations 2004 prohibits corporal punishment for children within its remit.[14] Finally, the Child Care (Pre-School Services) (No 2) Regulations 2006 provides that

> "A person carrying on a pre-school service shall ensure that no corporal punishment is inflicted on a pre-school child attending the service."[15]

However, as discussed in the decision of the European Committee of Social Rights (see below), there is no legislative prohibition on corporal punishment in a number of other settings, such as children in foster care.

The European Social Charter[16]

The European Social Charter is a Council of Europe treaty which guarantees social and economic human rights. It was adopted in 1961 and revised in 1996. The role of the European Committee of Social Rights is to judge whether States are in conformity in law and in practice with the provisions of the Charter. The ECSR operates by way of both a 'reporting procedure' (where the Committee examines national reports and decides whether or not the countries concerned are in conformity with the Charter) and by way of a 'complaints procedure' (where the Committee considers specific complaints by organisations authorised to bring such complaints).

This is not the first occasion on which the European Committee of Social Rights has ruled against Ireland in relation to corporal punishment. Indeed, in 2004, the Committee ruled as follows:

> "… the corporal punishment of children within the home is permitted in Ireland by virtue of the existence of the common law defence of reasonable chastisement. Although the criminal law will protect children from very serious violence within the home, it remains the fact that certain forms of violence are permitted. The Committee therefore holds that the situation is in violation of Art.17 of the Revised Charter.
>
> As regards the situation of children in foster care, residential care and certain childminding settings, the Committee takes note of the fact that there exist guidelines, standards, registration schemes and inspections. However it notes that these do not have the force of law and do not alter the existence of the common law defence which remains prima facie applicable. It therefore finds that children in these situations are not adequately protected against corporal punishment. It therefore holds that the

8 At [32].
9 At [33] citing Tyrer v. United Kingdom (1978) 2 E.H.R.R. 1; *Y v. United Kingdom* (1992) 17 E.H.R.R. 238 and *Costello-Roberts v. United Kingdom (1995)* 19 E.H.R.R. 112.
10 Emphasis added.
11 *McD. V. L.*, [2009] IESC 81. See also *Donegan v Dublin City Council & Dublin City Council v Gallagher* [2012] IESC 18.
12 *R v. H* [2001] EWCA Crim 1024 at [35].
13 Perhaps strangely the term 'teachers' is not defined in the Act. On the scope of teachers' authority (pre-1997) see Law Reform Commission, Report *on Non-Fatal Offences against the Person*, 1994, at [1.79]-[1.80]. The Commission recommended that the law should be clarified so as to remove any existing immunity of teachers from criminal prosecution for assaults on children which was done in the 1997 Act.
14 Article 15(2) of the 2004 Regulations.
15 Article 9(1) of the 2006 Regulations.
16 The revised Charter has been both signed and ratified by Ireland but not implemented in national law.

situation constitutes a breach of Art.17 of the Revised Charter."[17]

It is not immediately obvious that this decision had any major impact on Irish law or policy.[18] In the recent complaint, the Association for the Protection of All Children (APPROACH) argued that Ireland is in violation of Article 17 of the Revised European Social Charter as there is still no explicit and effective prohibition of all corporal punishment of children in the family, schools and other settings.

Article 17 (which is titled 'The right of children and young persons to social, legal and economic protection') provides (in relevant part) that

> "With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:
>
> 1 a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
>
> b. to protect children and young persons against negligence, violence or exploitation;
>
> c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support; …".

Article 17 does not specifically refer to corporal punishment but in 2001 the Committee concluded that Article 17 required 'a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere'.[19] This formed the basis for its 2004 decision that Ireland was in breach of Article 17. Ireland had also been found to be in breach of Article 17 under the reporting procedure by way of which the Committee monitors the implementation of the Charter (most recently in Conclusions 2011).

Little has changed by the time of the more recent decision. APPROACH argued that the Government had taken insufficient action to remedy the violation of Article 17 and that the continued existence of the common law defence of reasonable chastisement allowed parents and other carers to continue to inflict corporal punishment on children in violation of Article 17. In particular, APPROACH highlighted the fact, although there are national guidelines, there is no legislative prohibition of corporal punishment for children placed in foster care, children in child residential centres and children cared for by child-minders excluded from the Child Care (Pre-School Services) Regulations. APPROACH also pointed out that research indicated that 25.1% of parents used physical punishment on their children in the past year.[20]

The Government highlighted the fact that Section 246 of Children Act 2001 and Section 176 of the Criminal Justice Act 2006 create offences of cruelty to and reckless endangerment of children, in addition to the specific prohibitions on corporal punishment in specific settings.

The Committee noted

> "a wide consensus at both the European and international level among human rights bodies that the corporal punishment of children should be expressly and comprehensively prohibited in law".

It referred to its most recent interpretation of Article 17 of the Charter as regards the corporal punishment of children

> "To comply with Article 17, states' domestic law must prohibit and penalize all forms of violence against children that is acts or behaviour likely to affect the physical integrity, dignity, development or psychological well-being of children.
>
> The relevant provisions must be sufficiently clear, binding and precise, so as to preclude the courts from refusing to apply them to violence against children.
>
> Moreover, states must act with due diligence to ensure that such violence is eliminated in practice."[21]

It noted that, as regards the protection of children from corporal punishment within the family, there have been no developments in Ireland since its previous (2004) decision. As regards children in foster care or residential care, the Committee found there was no general statutory prohibition on corporal punishment and the Government had not referred to any decisions of the domestic courts which would indicate that they would restrict the common law defence of reasonable chastisement. In addition, in the case of pre-school care, there were significant exemptions to the Regulations which prohibited such punishment.[22]

17 *World Organisation against Torture (OMCT) v Ireland*, (2006) 43 E.H.R.R. SE12 at [65]-[66].

18 For a discussion of the situation at the time of that ruling see R. Arthur, 'Ending Corporal Punishment of Irish Children: Complying with Ireland's International Law Obligations', *Irish Journal of Family Law* 2005, 4, 8-11.

19 General Introduction to Conclusions XV-2 at pp. 26-29 (Vol.1, 2001). In the *OMCT* decision the Government had complained that that Art.17 of the Revised Charter was never intended to prohibit all forms of corporal punishment and that it was inappropriate for the Committee to interpret it as doing so, that the Committee erred in having regard to other international human rights treaties (in particular the UN Convention on the Rights of the Child), the jurisprudence of other international human rights bodies and developments in the domestic legal systems of other states parties. The Committee shortly rejected these points holding that it fell to it to give a legal interpretation of the provisions of the Charter and to rule on whether states are in conformity with the Charter (*OMCT* at [59]).

20 Halpenny, A.M., Nixon, E & Watson, D; *Parenting Styles and Discipline: Parent's and Children Perspectives: Summary Report*. Office of the Minister for Children and Youth Affairs, 2010. A 2014 survey by the Irish Society for the Prevention of Cruelly to Children and Children's Rights Alliance found that 41% of parents ever slapped their children though only 1% said they did so 'often'.

21 *World Organisation against Torture (OMCT) v. Portugal*, Complaint No. 34/2006, 5 December 2006.

22 APPROACH at [51]-[52]. Childminders who are caring for the

The Committee concluded that Irish law did not

> "prohibit and penalise all forms of violence against children within the family, in certain types of care or certain types of pre-school settings, that is acts or behaviour likely to affect their physical integrity, dignity, development or psychological development or wellbeing."[23]

It noted that it had repeatedly found the situation to be in violation of Article 17 under the reporting procedure (Conclusions 2003, 2005 and 2011). It therefore concluded that there is a violation of Article 17§1 of the Charter.

The status of the European Social Charter in Irish law

The Irish legal system adopts a 'dualist' approach in terms of international conventions. In other words, such conventions do not form part of national law unless and until they have been incorporated into national law.[24] This applied to the European Convention on Human Rights until it was (in a certain way) incorporated into national law in the European Convention on Human Rights Act of 2003. Thus, other international conventions ratified by Ireland (such as, for example, the European Social Charter or the UN Convention on the Rights of the Child) are not binding in Irish law. At best, such agreements may be taken into account as an aid to interpretation if and when there is an ambiguity in the Irish law, e.g. where the law is reasonably capable of more than one meaning. Therefore, even if the Irish provision happens to be in breach of agreements such as the ESC, this has no legal effect in Irish law. Similarly, the conclusions and decisions of the ECSR do not constitute a legally binding decision.[25]

However, it is arguable that, in a limited way, such agreements might be incorporated into Irish law by way of the European Convention on Human Rights. In *Demir v Turkey* the Grand Chamber of the European Court of Human Rights stated that

> "The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values."[26]

In *Demir,* this meant that the Court had regard to the European Social Charter (even though the specific provisions had not been ratified by Turkey).[27]

Under the ECHR, it is arguable that Article 17 of the European Social Charter might be taken into account in the application of Articles 3 and/or 8 (respect for private and family life) of the Convention. This approach has been applied by the Irish courts in relation to the UN Convention on the Rights of the Child (Art 3 of which requires the best interests of the child must be a primary consideration in all actions concerning children) in the context of deportation/extradition proceedings.[28] In *Minister for Justice and Equality v. R.P.T.*, Edwards J. stated that

> "… in any case in which the Article 8 rights of a child are engaged, the best interests of a child will fall for consideration and that it is important that due regard be had to them in the balancing exercise that must be conducted."[29]

However, he went on to say that it was not intended to indicate that 'any specific weight should be attributed' to these interests which must be done on a case specific basis.

The issue has yet to be considered by the Irish courts in any detail in relation to the provisions of the ESC and the Supreme Court has taken a very restrictive approach to the incorporation of the ECHR into Irish law.[30] Overall, it would be very surprising if the Irish courts were to interpret Article 3 of the ECHR in the light of the ESC so as to require a legal prohibition on all forms of corporal punishment where the European Court of Human Rights has specifically not (yet) come to that conclusion (as in the *A.* case). Thus it seems likely that any effect of the recent decision of the ESC will be in the field of moral suasion rather than law.

Conclusion

There has been considerable national criticism of the failure of the Irish state to ban corporal punishment and the European Social Rights has now twice ruled against Ireland in relation to complaints on this issue (and has also come to the same conclusion under the reporting procedure). However, there have been relatively few changes in the law in the period from the first such ruling in 2004 to the most recent decision in 2015.

This note has pointed out that the decisions of the ESC are not legally binding and that while the ESC might be taken into account in interpreting the provisions of the ECHR, it is (very) unlikely that the Irish courts would consider it appropriate to follow the approach of the ESC on corporal punishment when the European Court on Human Rights

children of relatives, children of the same family or not more than three children of different families are outside the Regulations.

23 At [53].

24 Article 29.6 of the Irish Constitution states that 'No international agreement shall be part of the domestic law save as may be determined by the Oireachtas'. See *Kavanagh v. Governor of Mountjoy Prison* [2002] IESC 13.

25 As the High Court ruled in relation to the views of the Human Rights Committee which performs a somewhat analogous function under the International Covenant on Civil and Political Rights: *Kavanagh v. Governor of Mountjoy Prison* [2001] IEHC 77 at [12]. See also the discussion of the Supreme Court in this case: [2002] IESC 77 at [36] and [42].

26 *Demir and Baykara v. Turkey*, 34503/97,12 November 2008 (2008) 48 EHRR 1272. See also *Opuz v Turkey* (2010) 50 EHRR 28.

27 See also *Weller v Hungary*, 44399/05, 31 March 2009 in which Judge Tulkens (in a 'concurring' judgement) suggested that Article 14 should be construed in the light of Article 12.4 of the European Social Charter, which provides that domestic law cannot reserve social security rights to their own nationals (although this was strictly *obiter*).

28 *Minister for Justice and Equality v. T.E.* [2013] IEHC 323. See the discussion in *Dos Santos -v- Minister for Justice* [2013] IEHC 237.

29 [2013] IEHC 54.

30 *McD. v L.*, [2009] IESC 81. In that case the Court stated that the national courts should not go beyond what had been established by the ECtHR (at [99]-[102]).

has yet to do so. Of course, this is not an argument for the *status quo*.

The immediate response to the ESC decision has been to promise regulations to outlaw corporal punishment in foster care and residential care. However, in relation to corporal punishment in a family setting, the Minister for Children, James Reilly TD, stated that

> "The established position has been that to remove the common law defence would, in principle, expose the family extensively to the intrusion of the criminal law. However, my Department has commenced work, including consultation with the Department of Justice and Equality, on examining the possibility within the Irish legal framework for removing the common law defence."[31]

This does not sound very different to similar commitments given after the 2004 decision. One starting point might be to clarify the current status of the 'reasonable chastisement' defence. As outlined above, the previous (broad) approach to this defence has been significantly narrowed by the rulings of the European Court of Human Rights but it is very difficult to point to any clear acknowledgement of this in Irish law.[32] However, one point of agreement is that – in addition to legal change – considerable information and policy work is required to reduce the level of corporal punishment in Irish society. ■

31 *Dáil Éireann Debate*, Wednesday, 27 May 2015. Perhaps ironically, a 2014 survey by the Irish Society for the Prevention of cruelty to Children and Children's Rights Alliance found that 62% of adults surveyed believed that it is currently illegal to slap a child. Fifty seven percent of those surveyed supported a ban.

32 See also the position in Canada where the Canadian Supreme Court upheld the compatibility with the Canadian Charter of Rights of a provision allowing the use of reasonable force by parents and teachers by way of correction of a child or pupil by giving it a narrow reading: *Canadian Foundation for Children, Youth and the Law v Canada*, 2004 SCC 4.

Admissibility of unconstitutionally obtained evidence after *DPP v JC*

Cecilia Ní Choileáin BL and Anna Bazarchina BL*

Introduction

In April of this year, the Supreme Court, by a majority of 4:3, overruled the landmark decision in *DPP v Kenny* ("Kenny")[1]. The proceedings in *DPP v JC*[2] came before the Court by way of the "with prejudice" appeal procedure set out in s. 23 of the Criminal Procedure Act 2010 ("the 2010 Act")[3] The result of the decision is that the exclusionary rule in *Kenny,* a major part of the Irish legal landscape for the past quarter of a century, will be replaced by a new test aimed at achieving a more balanced approach to the competing constitutional rights of an accused person and those of the wider public.

Written judgments were delivered by Clarke, O'Donnell, and MacMenamin JJ for the majority, with whom Denham CJ agreed. Written judgments were also handed down by all three dissenting judges, Murray, Hardiman, and McKechnie JJ.

The judgments reveal a deep division between the majority and those in dissent. The judgment of Hardiman J is scathing of the Court's departure from what he describes as 'one of the monuments of the constitutional jurisprudence of independent Ireland'. The minority judges were also critical of the means by which the appellant sought to achieve the aim of securing a reversal of *Kenny*.

The ruling centres on two issues, namely the mechanism under s. 23 of the 2010 Act which provides for what are referred to as "with prejudice" appeals and secondly, the legal status of the decision in *Kenny*.

Background to Appeal

The respondent was arrested at his dwelling where members of An Garda Síochána were conducting a search pursuant to a warrant issued under s. 29 of the *Offences Against the State Act 1939*.[4] In the course of his detention, the respondent made several inculpatory statements which ultimately led to his being charged with two offences of robbery, one of attempted robbery, and three offences of possession of a firearm.

After pleading not guilty to all charges an issue arose, by way of *voir dire*, as to the lawfulness of the respondent's arrest. In essence, the issue was that search warrant authorising the search of the respondent's dwelling was invalid as a consequence of the decision of the Supreme Court in *Damache v Director of Public Prosecutions*.[5]

Accordingly, pursuant to *Kenny,* an application was made to the trial judge to exclude the admissions made by the respondent whilst in custody. Having concluded that there had been a breach of the respondent's constitutional rights and that there were no extraordinary excusing circumstances which would permit the evidence to be admitted, the trial judge directed the jury to acquit the respondent on all charges.

Main Issues

This case centred around two issues. These were, firstly, the question of whether the procedure for "with prejudice" appeals in s. 23 of the 2010 Act permitted the appeal. This, in turn, hinged on whether the trial judge could be said to have "erred" in law within the meaning of s. 23 by excluding "compelling" evidence in accordance with a precedent that was binding upon her.

The second issue was whether the ruling in *Kenny* was wrong in law and if it was not, what test ought to apply to determine the admissibility of evidence obtained in breach of constitutional rights.

Section 23 of the 2010 Act provides a statutory exception to the general rule against double jeopardy, by permitting a form of appeal to be taken against an acquittal, in specified circumstances and on certain conditions. The circumstances in which an appeal may be brought under this provision are set out in s. 23(3) and are, namely, the erroneous exclusion of compelling evidence by the trial judge or the directing of an acquittal where the evidence adduced might reasonably have led to conviction. The section also provides for a retrial following the quashing of an acquittal if the court is satisfied that either of the circumstances giving rise to the appeal have been met and that the interests of justice require the holding of a retrial. In determining whether to order a retrial, the court must have regard to certain factors which are set out in s. 23(12) of the 2010 Act. An alternative means of review is provided by s. 34 of the *Criminal Procedure Act 1967* (as amended) pursuant to which a question of law may be referred to the Supreme Court without prejudice to the acquittal[6].

Summary of Judgments

The dissenting judgment of Murray J focused mainly on the

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1 [1990] 2 IR 110.
2 [2015] I.E.S.C. 31.
3 Section 23 of the Criminal Procedure Act 2010 as amended by the Court of Appeal Act 2014. An appeal under s. 23 may also be brought to the Court of Appeal. Ironically, the Court of Appeal would have been bound by Kenny had these proceedings been brought before that court.
4 The arrest was carried out pursuant to s. 30 of the Offences Against the State Act 1939.
5 [2012] I.E.S.C. 11.
6 As substituted by s. 21 of the Criminal Justice Act 2006.

interpretation and scope of s. 23. In essence, Murray J held that a trial judge who was bound in law to follow a binding judgment of a superior court and who did follow it, could not be said to have acted erroneously in so doing. That being the case, Murray J did not deem it necessary to determine any further issues arising. Murray J also compared s. 23 of the 2010 Act with s. 34 of the 1967 Act and expressed the view that the latter provision would have been a more appropriate means of conducting the appeal, stating that: 'However attractive it may appear to the Court to embark on a review of the balance struck between competing rights in The People v. Kenny under s. 23, I feel that in doing so in this case the Court has been unable to resist plucking this tempting fruit from the wrong tree.'

Hardiman and McKechnie JJ also held that this appeal was predicated on there being an erroneous ruling of the trial judge. Neither accepted that such an error had been made since the trial judge could not have lawfully acted in any other way and consequently, there was no jurisdiction under s. 23 to entertain the appeal by the DPP.

McKechnie J, also examined the scope of s.23 in depth, analysed the ruling in *Kenny* and considered international caselaw but remained unconvinced that the exclusionary rule as set out in *Kenny* ought to be disturbed. McKechnie J also addressed the question of when a court could overrule its own previous decisions noting that this could be done only where there were "compelling reasons in exceptional cases". McKechnie J held that unless some "objective, justifiable basis" could be put before the Court demonstrating that *Kenny* had been wrongly decided, the Court should not overturn it. On this point, McKechnie J expressed concern that the DPP had made a number of assertions regarding the detrimental effect of *Kenny* but had advanced no empirical evidence in support of the claims, stating that: "In my view, it is only where such evidence is available that one could objectively suggest that society might possibly be paying an unjustifiable price for its operation".

The judgment by Hardiman J is highly critical of the decision of the majority and is apprehensive as to the long-term repercussions of the Court's ruling in *JC*. Hardiman is also sharply critical of the means by which the DPP has sought to overrule *Kenny*, stating that: 'The State is, in my opinion, misusing and abusing the limited right of appeal granted in 2010 for a purpose for which it was not intended and for which it is not in any way apt. If the law is to be changed, that is the role of the legislature or of the People.'

Hardiman J stated that no error is committed by a trial judge who applies the law as she is bound to and, in that regard, concurs with Murray and McKechnie JJ in holding that the appeal could not be entertained under s. 23 of the 2010 Act.

In the course of his judgment, Hardiman J set out a list of cases involving misconduct by the Gardaí ranging from the findings of the Morris Tribunal in relation to certain Gardaí in Donegal to the more recent situations involving the manner in which An Garda Síochána, as an organisation, conducted themselves in relation to garda whistleblower, Detective Sargeant Maurice McCabe. Particular emphasis was placed on the case of Frank Shortt whose treatment at the hands of the Gardaí and the State ultimately resulted in a finding that he had been the victim of a miscarriage of justice. Hardiman J listed these cases to highlight the dangers of unaccountability which he fears will become more prevalent given the inclusion of "inadvertence" in the new test set out in the judgment of Clarke J. According to Hardiman J:

> "If the ordinary citizen were provided with a defence of "I didn't mean it" or "I didn't know it was against the law", then many parts of the law would become completely unenforceable. I believe that the application of this rule to the force publique has the effect of exalting that group and conferring a status of virtual, practical, unaccountability upon it. I deeply regret that this is being done."

Noting that this case is the first attempt under the 2010 Act to achieve a retrial on foot of an acquittal, Hardiman J discusses the issue of double jeopardy and sets out the historical and legal background to the principle that a person should not be tried more than once for the same offence.

O'Donnell J embarked on a detailed examination of the application of the exclusionary rule in other common law jurisdictions, concluding that the rule as applied in Ireland "represents a near absolute exclusion which is the most extreme position adopted in the common law world." O'Donnell J also looked at the development of the Irish caselaw as well as academic commentary and asks whether Bunreacht na hÉireann, and in particular, Article 40.3.2 imposes an obligation to have a near absolute rule in place. According to O'Donnell J, if this issue is viewed solely from the perspective of the vindication of rights which are breached, then the exclusion of evidence would appear to be appropriate. However, O'Donnell J takes the view that this is not the correct question to ask and states that a trial is the administration of justice and viewed that way, anything that impairs the "truth finding function" of the administration of justice, in this case the exclusion of cogent and compelling evidence, may cause the administration of justice to be brought into disrepute. For O'Donnell J an absolute or near absolute rule of exclusion is not supported by authority or by any constitutional justification. On that basis, "the challenge is to identify some dividing line between these two extremes and which gives clear guidance to courts…"

MacMenamin J agrees with the judgments of O'Donnell and Clarke JJ on the issue of *Kenny*. His judgment focuses largely on s. 23 which he acknowledges is "infelicitously drafted" and problematic in that a determination as to whether evidence is "compelling" for the purposes of s. 23(14) is a matter more suited to a trial court than an appellate court. MacMenamin J also contrasts s. 23 of the 2010 Act and s. 34 of the 1967 Act opining that "the Oireachtas does not legislate in vain" and must have intended to confer a power to review binding decisions. In the context of s. 23, MacMenamin J held that the word "compelling" must be given a broad and purposive interpretation and is to be understood as meaning "mistaken". That being the case, a lower court could be said to have acted erroneously, *albeit* in good faith, if *Kenny* was held to have been wrongly decided. MacMenamin J held that the rule in *Kenny* is disproportionate and questions whether it provides an appropriate balance between the various constitutional interests upon which it

Continued on p.85, after the Legal Update

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Central Bank (Mortgage Interest Rates) Bill 2015
Bill 49/2015 [pmb] Pearse Doherty

Central Bank (Variable Rate Mortgages) Bill 2015
Bill 54/2015 [pmb] Michael McGrath

Communications Regulation (Postal Services) (Amendment) Bill 2015
Bill 46/2015

Comptroller and Auditor General (Amendment) Bill 2015
Bill 50/2015 [pmb] Catherine Murphy

Curragh of Kildare Bill 2015
Bill 56/2015 [pmb] Sean Ó Fearghail

Disability (Amendment) Bill 2015
Bill 58/2015 [pmb] Mattie McGrath

Dublin Docklands Development Authority (Dissolution) Bill 2015
Bill 45/2015

Employment Equality (Amendment) Bill 2015
Bill 55/2015 [pmb] Ruth Coppinger, Joe Higgins and Paul Murphy.

Fiscal Responsibility (Amendment) Bill 2015
Bill 53/2015 [pmb] Michael McGrath

Industrial Relations (Amendment) Bill 2015
Bill 44/2015

Management Fees (Local Property Tax) Relief Bill 2015
Bill 60/2015 [pmb] Sean Fleming

National Cultural Institutions (National Concert Hall) Bill 2015
Bill 52/2015

Parental Leave (Amendment) Bill 2015
Bill 61/2015 [pmb] Peadar Tóbin

Urban Regeneration and Housing Bill 2015
Bill 51/2015

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http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

impacts. MacMenamin J also expressed reservations as to the power to order a retrial under s. 23(12).

New test by Clarke J

In his judgment, Clarke J. sets out the procedure for "with prejudice" appeals under s. 23 and acknowledges that a person cannot be put in peril of an appeal against acquittal and a retrial unless this is permitted by law. Accordingly, the question was whether s.23 could be construed in such a way as to permit this. Clarke J began by assuming for the sake of argument that *Kenny* had been wrongly decided. From that, it follows that the exclusion of evidence based on *Kenny* may be wrong. On the assumption that *Kenny* was wrong and that applying a new test, the evidence should have been admitted, Clarke J took the view that the decision to exclude was wrong. Clarke J accepts that a reappraisal of *Kenny* could potentially have retrospective effect but that: "[t]he consequence of a reappraisal of the caselaw in respect of the law of evidence is, in my view, whilst important, potentially less significant than a similar reappraisal of substantive law."

Clarke J distinguished this type of case from one involving "penal legislation" in which the retrospectivity could fall foul of the constitutional prohibition on the enactment of retroactive penal legislation. In the instant case, the only effect of that retrospectivity would be to permit an existing offence to be proved.

According to Clarke J no question of double jeopardy arises in circumstances where a potential for an appeal exists and on this point, is in disagreement with Hardiman J. Clarke J identifies two important, and to some extent, competing principles which require a balanced approach. In the first instance, society and victims of crime have a right to have offences prosecuted. The rule in *Kenny* is not concerned with the probative value of evidence but rather with the question of whether it ought to be excluded solely by reference to the way it was obtained. On the other hand, there is significant constitutional value attached to the need to ensure that the agents of the State, referred to throughout by Hardiman J as the *"force publique"*, operate within the limits imposed on them by law. Clarke J notes that "it follows that there should be consequences and indeed significant consequences where those rules are broken."

The question then arises as to whether these "significant consequences" should ever or always result in the exclusion of evidence with the inherent risk that a guilty person will be acquitted.

This was the crux of the question in both *The People (AG) v O'Brien*[7] and in *Kenny.* Clarke J describes the rules set down in both cases as being on a spectrum with *O'Brien* located at one extreme and *Kenny* at the other. Both versions of the rule sought the exclusion of evidence obtained as a result of a deliberate and conscious breach of constitutional rights unless extraordinary circumstances warranted the inclusion of the evidence. The difference between both was the meaning ascribed to the term "deliberate and conscious". In *O'Brien,* the term referred to knowledge on the part of the Gardaí that a constitutional right was being breached. The term was given a different meaning in *Kenny* which held that evidence had to be excluded if it had been obtained as a result of unconstitutionality even if Gardaí were not aware that they were breaching rights. The focus in *Kenny* was on the act(s) of the Gardaí and not the knowledge that the act(s) amounted to a breach of constitutional rights. According to Clarke J, *O'Brien* didn't go far enough but *Kenny* went too far stating that: "neither position properly balances the legitimate competing rights involved." The difficulty with formulating a new test is finding out precisely where the balance should lie in order to ensure that the test is capable of consistent application.

The test set out by Clarke J which replaces the rule in *Kenny* may be summarised as follows:

1. The onus is on the prosecution to establish the admissibility of all evidence. This test applies only to objections relating to the circumstances in which the evidence was obtained and not to the integrity or probative value of the evidence.
2. Where an objection to the admissibility of evidence is raised, the prosecution remains under the onus of establishing that:
   a. the evidence was not obtained as a result of a breach of constitutional rights, or
   b. if it the evidence was obtained unconstitutionally, that it is nonetheless appropriate for the court to admit it.

   The prosecution must establish the basis on which the evidence should be admitted and it must also establish any facts necessary to justify this basis.
3. The prosecution must establish the above matters beyond reasonable doubt.
4. Evidence obtained as a result of a deliberate and conscious breach of constitutional rights should be excluded unless any of the exceptional circumstances considered in the existing jurisprudence apply. The term "deliberate and conscious" refers to knowledge of the unconstitutionality involved in gathering the evidence. It does not refer to the nature of the acts themselves. The assessment of whether evidence was obtained in breach of constitutional rights requires an analysis of the conduct of the personnel directly involved in the gathering of evidence and to any other senior official who was involved in the decision.
5. Where evidence is obtained in circumstances of unconstitutionality but where the prosecution establishes that it was not as a result of a deliberate and conscious breach a presumption against admission arises. The evidence should be admitted where the prosecution establishes that the breach was due to inadvertence or that it derives from subsequent legal developments.
6. Evidence which is obtained in circumstances where it could not have been constitutionally obtained should not be admitted even if those who gathered it were unaware due to inadvertence of the absence of authority.

7 [1965] I.R. 142.

Conclusion

The judgments in *JC* suggest an ideological division in the Supreme Court. The majority were of the view that *Kenny* tipped the balance too far away from society's right to have compelling evidence admitted, by imposing what they consider to be a near-absolute exclusionary rule without parallel in the common law world. Hardiman J in his leading dissenting judgment declined to overrule *Kenny* on the basis that to do so would remove a vital protection for the rights of the individual.

Although the Court was divided on the question of whether s. 23 permitted what was, in essence, a challenge, however unorthodox, to *Kenny*, a number of the judgments on both sides reveal misgivings about the operation of the section.

The most significant aspect of the "new" rule is that inadvertence leading to a breach of constitutional rights will not result in the exclusion of evidence. This stands in contrast with cases of recklessness or gross negligence where a rebuttable presumption of exclusion applies. No guidance is given as to how the prosecution is to discharge the onus of establishing inadvertence, bearing in mind that the requirement to do so extends beyond the garda directly involved.

The impact of the decision in *JC* will undoubtedly be far-reaching. The question of whether it will achieve its aim of bringing balance into the rules of evidence, as hoped for by the majority of the Supreme Court or, instead, realise the fears of some of the minority will take time to be answered. The final remaining issue to be decided in *JC* was whether a retrial should be ordered pursuant to s. 23 of the 2010 Act. On 22nd April, the Supreme Court, in a unanimous decision, held that it would not be in the interests of justice to order a retrial and consequently, affirmed the acquittal. ■

Passing Off: An Uncertain Remedy

Peter Charleton and Sinéad Reilly*

This is Part 1 of a three part article dealing with the topic of passing off. Parts 2 and 3 will appear in future editions of the Bar Review.

Part 1[1]

Introduction

Passing off as a weapon for the protection of intellectual property originated in England but has now penetrated to all the common law countries. Despite the close regulation of such vague concepts as trade descriptions by legislation in all those jurisdictions and despite trade mark protection being the primary remedy for firms who have branded their products, thereby achieving penetration and sustainability in the market-place, the tort subsists in a sweeper role, available to those who have achieved goodwill through hard work and expense and who do not wish to see it filched by avaricious competitors. As such, the tort is likely to persist. Its parameters are, however, uncertain. How is it different to trade mark protection; what are its elements; does it require proof of deception; how far into un-competing realms can it be pushed; why does it attract the equitable remedy of an account of profits, as the choice of a winning plaintiff instead of damages; and how is such an account to be approached? These are among the questions that can only be touched on in this paper. Certain answers are so far from the law of passing off in that a simple perusal of the case law will show that judicial decisions proliferate to a degree that belies the importance of the remedy: in other words, in all but the simplest cases there is always something to be argued about and invariably a point that will rack the judicial mind and, at the least, tempt the will to overrule on appeal.

History

Passing off was first recognised in England during the reign of Elizabeth I; *Southern v How* (1617) 79 ER 400. For hundreds of years it was regarded as a subspecies of the tort of deceit: requiring proof of an actual lie and an intention to injure. Scholars might see the development of the tort into the, quite amorphous, modern shape it has assumed as instructive of how growth occurs through judicial decision-making. The requirement for an intention to deceive was gradually dissolved from the definition of the tort through the interaction of separate courts of law and equity. Of course, if a competitor was decking up his goods to look like yours, whether by design (amounting to deceit) or by accident (denoting a lack of intention), the plaintiff was not to be comforted in losing the goodwill that he had acquired in the marketplace through such a fine distinction. Besides, as in criminal law, if a defendant does not confess, the inference is the only weapon whereby deceit may be proved: something that is far from easy. Hence, if the remedy was to be damages in a court of law, the plaintiff was required to prove deceit;

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but if instead he resorted to a court of equity and sought an injunction to remove the goods from the marketplace or to alter their description or name, then fairness required that only a tendency to confound the purchaser was necessary. As early as 1838 it was decided that an injunction could restrain passing off irrespective of whether the competitor was shown through his actions to have intended to deceive the buying public into purchasing his goods as that of the plaintiff: *Millington v Fox* (1838) 40 ER 956. This cross-fertilisation of law and equity, still by that stage in separate courts, though in Ireland and in England in the same building, led to a further peculiar result. The equitable nature of the remedy sought fused the tort of passing off into an amalgam akin to trusteeship actions: an account of profit or loss was available to the plaintiff once he proved that the buying public was likely to be deceived. Any other tort action entitles you to damages; passing off entitles you to choose between proving the damage which you have suffered, in consequence of what might be called the earliest species of unfair competition law, and taking all the profits which your competitor has garnered through decking up his goods to look like yours.

Ultimately, the tort has become one of such intense flexibility that it really has become almost a matter of guesswork as to whether to apply. Our approach to this matter would tend to be evidence-based. In every passing off action you get your pound of butter, your watch, your mobile phone and you take that as a very non-scientific control; then you get the rival pound of butter, the competing watch, the displacing mobile phone and you put them side by side. What is the result? Well, if one looks like the other, then in terms of legal practice, as opposed to legal theory, the plaintiff is well on his way. Almost always, it is a case of the new boy on the block cashing in on the long reputation for hard work of the established business. Why does it continue to exist? John Fleming supplies the following answer:

> "By freeing the tort from any requirement of actual damage and intention to injure, the law created an effective instrument of economic regulation, in response to an undoubted need for stronger legal weapons to combat commercial misrepresentations. Even so, its purpose is primarily to protect the plaintiff's proprietary interest in his goodwill in a manner similar to intellectual property law, rather than to champion the consumer. Thus it is irrelevant that the defendant's goods were actually cheaper or of superior quality, or that this competition (however unfair to the plaintiff) otherwise enured for the benefit of the public."[1]

Its closest sibling is in trademarks. A brief description of the regulation of trademarks within the European Union with an illustration of some case law is therefore appropriate.

EU Trade Marks Directive

Attempts to harmonise, or at least to partially harmonise, trade mark laws across the EU began in the 1980s. Council Directive 89/104/EEC of 21 December 1988, later codified as Directive 2008/95/EC, was the result.[2] A Regulation establishing a Community Trade Mark with EU-wide effect soon followed.[3] This is, in most important respects, the same as the Directive. Both the Directive and the Regulation are under review, with draft legislation before the EU parliament proposing amendments to modernise and improve EU trade mark law.[4]

Divergent national laws with the potential to impede the free movement of goods and the freedom to provide services were the reasons some level of harmonisation was deemed necessary. On a scale of harmonisation, the approach adopted by the Directive was at the lower end: it approximated only those national laws which most directly affected the functioning of the internal market. The general conditions for obtaining and continuing to hold a registered trade mark have been harmonised. But much is left to the discretion of the member states, such as, for example the procedural rules concerning the registration, revocation and invalidity of registered trademarks and the effect of revocation or invalidity. Further, certain grounds for refusing to register or invalidate a trade mark are optional.[5]

A trader in the EU might register his trade mark at national level, at Community level, or he might do both. If he registers it in Ireland, for example, by making an application to the Irish Patents Office, he will have rights in relation to that mark in Ireland. If he registers it as a Community Trade Mark, by means of a single application to the Office for Harmonization in the Internal Market (the OHIM) in Alicante in Spain, he will get a single trade mark that operates throughout the EU. If he applies for both, he will be comfortably protected. He might, of course, also look at international protection, in which case he will be directing his application to the International Bureau of the World Intellectual Property Organisation (WIPO) in Geneva, though this will not give him an 'international mark' as such.

Only a mark which consists of a 'sign' may be registered. The sign must be one that is capable of being represented graphically, and capable of distinguishing the goods or services of one undertaking from those of other undertakings.

1 Sappideen and Vines, *Fleming's The Law of Torts* (Sydney, 2011) (10th ed) at para 30.270, citing *Standard Brands v Smidler* 151 F 2d 34 (2 Cir 1945).

2 Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version), O.J. L299/25, 8.11.2008.

3 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community Trade Mark [1994] O.J. L011/1, 14.1.1994, as amended. There is a proposal to rename the Community Trade Mark, or the CTM as it is known, as a European Trade Mark or European Union Trade Mark: Proposal for a Regulation amending Council Regulation (EC) No 207/2009 on the Community Trade Mark (March 2013) COM (2013) 161 FINAL.

4 European Commission, Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No. 207/2009 on the Community Trade Mark (March 2013) COM (2013) 161 final, 2013/0088 (COD); European Commission, Proposal for a Directive of the European Parliament and of the Council to Approximate the Laws of Member States relating to Trade Marks (Recast) (2013) COM(2013) 162 final. On 21 April 2015, the European Council and Parliament reached provisional political agreement on the trade mark reform package. See press release: http://europa.eu/rapid/press-release_IP-15-4823_en.htm?locale=en

5 See generally the recitals to Directive 2008/95/EC.

The concept of a 'sign' is broad: a non-exhaustive list of the types of signs that may be protected as trade marks includes words, including personal names, designs, letters, numerals, the shape of goods or of their packaging.[6] Registration may be refused on certain 'absolute' grounds, such as where the mark is devoid of any distinctive character or is descriptive or generic, save where it has acquired distinctiveness through use.[7] The mark's relationship with earlier marks may also prevent registration.[8]

Registration confers on the owner certain exclusive rights to 'use' the registered trade mark in relation to specified commercial activities.[9] Different modes of infringement are prohibited. In double identity cases, use, in the course of trade, of a sign which is identical to the registered trade mark in relation to identical goods or services is an infringement (Article 5(1)(a)). There is no need to prove a likelihood of confusion in such cases; this is presumed. In similarity cases, a 'likelihood of confusion' requirement applies. The owner can prevent use, in the course of trade, of an identical sign in relation to similar goods or services, or a similar sign in relation to identical goods or services, where there is a likelihood of confusion on the part of the public (Article 5(1)(b)). The EU Court of Justice has considered how to assess a likelihood of confusion in a number of important decisions. Kitchin LJ in *Specsavers Intl v Asda Stores Ltd* [2012] EWCA Civ 24 summarised the key principles. Here they are summarised further: the courts look at the question globally through the eyes of the average reasonably observant consumer who cannot directly compare the sign and the trade mark; the question is one of overall impression and not just the dominant elements; the visual, aural and conceptual similarities are assessed; lesser similarity of the sign and the mark may be offset by greater similarity between the goods or services and vice versa.[10] In the third scenario, where the registered trade mark has a reputation, but there is no similarity in terms of the goods or services concerned, member states have an option. They can prohibit use, in the course of trade, of an identical or similar sign for goods or services which are not similar where the registered trade mark has a reputation in the member state and use of the sign without due cause would take unfair advantage of the reputation of the trade mark or its distinctive character or be detrimental to it (Article 5(1)(c)). Irish and British legislation makes provision for this.[11] A few further points to note here: liability for trade mark infringement is strict–there is no requirement to show knowledge or intention on the part of the alleged wrongdoer; moreover, in contrast to passing off, there is no need to demonstrate damage.

The EU Court of Justice has approached the question of infringement by reference to the function of trade marks. In 2002, in *Arsenal Football Club plc v Reed*, the Court said that a trade mark owner can only prevent a third party using a sign which affects or is liable to affect the function of the trade mark, in particular its essential function as an indicator of origin.[12] Recital 11 to the Directive makes specific reference to this function. The case law is also shaped by other apparent trade mark functions not expressly mentioned in the Directive, though only the indicator of origin function is regarded as an essential function, a trade mark is always supposed to fulfil this function. The Court has held that the difference between the essential function and the other functions does not justify excluding from the scope of the Directive acts which adversely affect those functions.[13] There is 'the quality function' (the trade mark tells customers and potential customers that articles bearing the mark are all of the same quality);[14] 'the advertising function' (the trade mark conveys a particular image to the average consumer of the goods or services);[15] 'the investment function' (the trade mark may be used to acquire or preserve a reputation capable of attracting customers and retaining their loyalty);[16] and 'the communications function' (the trade mark provides consumers with various kinds of information on the goods or services).[17] This 'functions' approach has been criticised.[18] Some have complained that the concepts are incomprehensible or vague and ill-defined, others point to the apparent lack of any legislative basis for this approach. Proposals for reform suggested that the Directive should clarify that the only function implicated by the double identity or confusing similarity notions is the 'origin' function, but this proposal seems to have been dropped.[19]

A trade mark owner's rights are not without limit. A person facing allegations of infringement might seek to challenge the registration of the mark, leaving the owner vulnerable to a declaration of invalidity,[20] or seek its revocation on grounds of non-use or improper use.[21] Certain defences are also available. There is no infringement

6 Article 2 of Directive 2008/95/EC.
7 Article 3 of Directive 2008/95/EC.
8 Article 4 of Directive 2008/95/EC.
9 Article 5 of Directive 2008/95/EC.
10 See *Bayerische Moteren Werke AG v Ronayne t/a BMWCare* [2013] IEHC 612, (Unreported, High Court, Ryan J., 19 December 2013).
11 As to Ireland, see the Trade Marks Act 1996, section 14(3); and as to Britain, see the Trade Marks Act 1994, section 10(3).
12 [2003] Ch 454, at para 51 of the EU Court's judgment.
13 *Interflora Inc v Marks & Spencer* Case C-323/09 [2011] ECR I-8625.
14 *SA-CNL SUCAL v HAG*, Case C-10/89 [1990] ECR I.-3752; *Parfums Christian Dior SA v Evora BV*, Case C-337/95 [1997] ECR I-6013; and *Copad SA v Christian Dior Couture SA,* Case C-59/08 [2009] ECR I-3421.
15 *Louis Vuitton v Google France*, Cases C-236/08-238/08 [2010] ECR I-2417.
16 *Interflora Inc v Marks & Spencer* Case C-323/09 [2011] ECR I-8625.
17 *L'Oreal SA & Ors v Bellure NV & Ors*, Case C-487/07 [2009] ECR I-5185.
18 See generally Bentley and Sherman, *Intellectual Property Law*, (Oxford University Press, 2014) (4th ed) at pp 1051 to 1058.
19 See COM(2013) 162 final. The Commission had originally proposed that, in cases of double identity, the trade mark owner should only be able to prevent use where the use would affect or be liable to affect the function of the trade mark to guarantee to consumers the origin of the goods or services. At page 6 of the Proposal, the EU Commission stated: "*In the interest of legal certainty and consistency, it is clarified that in cases of both double identity under Article 5(1)(a) and similarity under Article 5(1)(b) it is only the origin function which matters."* However, when the Proposal came before the EU Parliament in February 2014, this additional requirement was deleted.
20 Articles 3 and 4 of Directive 2008/95/EC. Marks vulnerable to a challenge to registration can be grouped into three categories: (i) marks which do not satisfy the definition of a trade mark; (ii) marks which are non-distinctive, descriptive and generic; and (iii) marks which are contrary to public policy or morality, or which are likely to deceive the public, which are prohibited by law or in respect of which registration was applied for in bad faith.
21 Article 12 of Directive 2008/95/EC.

where use of the registered mark is necessary to indicate the intended purpose of a product or service, provided such use is in accordance with honest practices in industrial and commercial matters.[22] This defence was successfully pleaded in *BMW v Deenik. (Case C-63/97).*[23] There the defendant ran a garage that specialised in the repair of BMW cars, though he was not an official BMW dealer. BMW claimed that the defendant, by stating that he specialised in the repair of BMWs, was infringing the BMW trade mark. However, the EU Court of Justice held that the defence applied: the defendant could not tell the public that he repaired BMWs without using the BMW mark. A similar claim, also involving BMW, presented itself before the Irish High Court in 2013, but with different results: *BMW v Ronayne t/a BMWCare*.[24] The defendant in this case traded under the name BMWCare. This, the Irish High Court said, was a step too far: the defence does not permit someone to create a business out of another's name and trade mark. The name BMWCare also supposed a commercial connection with BMW, which the Court said was misleading to consumers and damaging to BMW. The defendant pointed to language on his website which indicated he was "*independent*" and "*beholden to no one*", but the Court thought that these so-called disclaimers were "*hopelessly inadequate*". The Court concluded that the defendant's use of BMW was without due cause and took unfair advantage of, and was detrimental to, the distinctive character of the BMW trade mark and its reputation, contrary to Article 5(1)(c) of the Directive.

Passing Off: Elements of the tort

While often pleaded together, trade mark law and passing off are distinct causes of action: success in one does not guarantee success in the other. Trade mark law confers exclusive rights on the owner of a registered mark; passing off protects a trader's right to the goodwill he has earned and established. At its core is the principle that nobody has the right to represent his goods as the goods of somebody else.[25] Passing off, in the traditional sense, occurs where Trader B says or does something which incorrectly suggests that his goods or services are those of Trader A, i.e. there is a misrepresentation as to origin. But the tort has moved beyond this classic case: it "now extends beyond the sale of goods to cover services, beyond pretences concerning the origin of goods to cover pretences concerning their quality, and beyond simple pretences that the goods are those of another trader to cover pretences that the goods have been licensed by another trader."[26] Actionable practices include not only selling, but also leasing, buying merchandise under a deceptive name, supplying a competitor with the means to pass off your goods under a false description, applying a process whereby people believe that what they are purchasing is that of the plaintiff when it is that of the defendant.[27]

Various formulations of the tort have been put forward, but these are not to be regarded as comprehensive definitions: the law of passing off contains sufficient nooks and crannies to make it difficult to formulate any satisfactory definition in the short form.[28] But these formulations serve to emphasise its salient features, even if the differences in terminology can at times prove troublesome. The leading modern statement is that of Lord Diplock in the *Advocaat* case, *Erven Warnick v Townend*,[29] but Lord Oliver of Alymerton in *Reckitt & Colman v Borden* ("the Jif Lemon case") broke this down into three elements: the classical trinity of goodwill, misrepresentation and damage.[30] The "cement" of these three elements is customer reliance.[31] A plaintiff:

> "… must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the plaintiff. .. Thirdly, he must demonstrate that he suffers or, in a *quia timet* action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.[32]"

The essence of the tort is, therefore, a misrepresentation made by the defendant which is calculated to cause damage to the business or goodwill of the plaintiff. No element of the trilogy is determinative: each must be established.

22 Article 6 of Directive 2008/95/EC.

23 *BMW v Deenik* ECR-I 905. Compare with *Porsche v Van Den Berg*, judgment of 15 January 2013, Hague Appeal Court and *Toyota v Tabari*, 610 F.3d 1171, US Court of Appeals, Ninth Circuit, 8 July 2010.

24 [2013] IEHC 612, (Unreported, High Court, Ryan J., 19 December 2013).

25 *Reddaway v Banham* [1896] AC 199 at 204, per Lord Halsbury; see also *Perry v Truefitt* (1842) 6 Beav 66, 49 ER 749, where Lord Langdale MR stated: "*A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters or other indicia, by which he may induce purchasers to believe, that the goods which he is selling are the manufacture of another person.*"

26 Bentley and Sherman, *Intellectual Property Law*, fn 19 above, at p 827. See also Fleming's, *The Law of Torts*, fn 2 above, at para 30.280: "*Today, any misrepresentation in the course of trade to prospective customers or consumers of the defendant's goods or services, prejudicial to the plaintiff's goodwill, constitutes an actionable wrong in the absence of any exceptional competing policy.*".

27 Fleming's, *The Law of Torts*, fn 1 above, at para 30.280.

28 *ConAgra v McCain Foods (Australia) Pty* (1992) 23 IPR 193 (FCA), 247, per Gummow J.

29 *Erven Warnink BV & Anor v J Townend & Sons (Hull) Ltd & Anor (No 1)* [1979] AC 731 at 742.

30 [1990] 1 WLR 491, 499.

31 Clerk & Lindsell on Torts, (London, 2014) (21st ed) at para 26-02.

32 *Reckitt & Colman v Borden* [1990] 1 WLR 491. Approved in Ireland in *Miss World Limited v Miss Ireland* [2004] 2 IR 394; and *Jacobs Fruitfield Food Group Ltd & Anor v United Biscuits (UK) Ltd* [2007] IEHC 368, (Unreported, High Court, Clarke J, 12 October 2007).

Goodwill: the tort is a remedy for the invasion of a right of property, the property protected being, not the mark, name or get-up improperly used, but the goodwill likely to be injured by the misrepresentation.[33] That may arise from a brand name, features of labelling or packaging, or descriptive material. What must be shown therefore is that customers or prospective customers of Trader A recognise the name, mark or other indicium as distinctive of Trader A. This does not mean that the name or mark or whatever is said to attract goodwill must be particularly eye-catching or novel. Conversely, if the name or mark or whatever does not distinguish the trader's good from those of actual or potential rivals, then however remarkable it may be, it will not be distinctive in the legal sense.[34]

Damage: proof that Trader B's misrepresentation is such as to be likely to cause substantial damage to Trader A's goodwill is crucial. The damage may be the loss of existing trade and profits; loss of potential trade and profits; or more recently, damage to reputation or dilution, akin to the tort of injurious falsehood but not sharing the precise elements of that tort.[35] Trader A does not have to prove actual damage; a likelihood of damage is sufficient. Wadlow notes that in practice, damage tends to be assumed.[36] This is particularly so in the traditional passing off type case: a misrepresentation by Trader B that his goods or services are those of Trader A is seen as intrinsically likely to damage Trader A where their fields of business are reasonably close. Though there is no longer a requirement that traders share a common field of activity, it remains relevant in terms of establishing both goodwill (the goodwill of Trader A in the mark or whatever may not extend to the field in which Trader B is using the mark) and damages (where the fields of activity are unrelated, it may be that there is no real or tangible risk that Trader A will suffer damage).[37] The element of damage may require a more rigorous examination in cases on the borderline of what would traditionally have been regarded as passing off.[38] In such cases, the likelihood of damage provides an acid test to distinguish those misrepresentations which amount to passing off from those of which the plaintiff cannot complain. Notwithstanding that damage may be inferred in certain cases, it remains an essential requirement in its own right.

Misrepresentation: the essence of the tort is a misrepresentation. It may be express, as where there is a statement that the defendant's goods are made by the plaintiff, or it may be implied, as where the defendant manufactures or packages his goods to look like the plaintiff's. In either case, it must be likely to influence the actions of the persons to whom it is made. Trader A must demonstrate a misrepresentation on the part of by Trader B which leads or is likely to lead the public to believe that his goods or services are those of Trader A or that they share a common manufacturer or that there is some other economic arrangement in place. Precision in the choice of language would be helpful here: the words 'misrepresentation', 'deception' and 'confusion' are used somewhat loosely. What must be shown is a misrepresentation. This misrepresentation must be one which is 'calculated' to injure the business or goodwill of the plaintiff. 'Calculated' in this sense means 'likely' or 'reasonably foreseeably', but it no longer requires deliberate deceit.[39] If we replace 'misrepresentation' with 'deception', something which is common-place in the case law, most likely due to the roots of passing off in the tort of deceit, what must be shown is a deception which is calculated to injure. Immediately one's mind wanders to notions of intention and fraud and malice. But the language is itself deceptive; the tort no longer requires proof of *mens rea* and indeed it is unique amongst the economic torts in this respect.[40] The plaintiff does not need to show that the misrepresentation, or the deception, was conscious, deliberate, intentional or fraudulent; though proof of such may have evidential value.[41] Where there is proof of an intention on the part of the defendant to deceive, the courts are likely to infer that he achieved his objective.[42] In *Harrods Ltd v Harrodian School Ltd,* Millet LJ put it thus:

> "Deception is the gist of the tort of passing off, but it is not necessary for a plaintiff to establish that the defendant consciously intended to deceive the public if that is the probable result of his conduct. Nevertheless, the question why the defendant chose to adopt a particular name or get up is always highly relevant. It is "a question which falls to be asked and answered": see *Sodastream Ltd v Thorn Cascade Co*

33 As to the definition of 'goodwill', see *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 233, HL, per Lord Macnaghten.

34 Wadlow, *The Law of Passing Off*, (London, 2011) (4th ed) at para 8-145. See also *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] 1 WLR 193, 200 where Lord Scarman stated that the misrepresentation could involve descriptive material "*such as slogans or visual images, which radio, television or newspaper advertising campaigns can lead the market to associate with the plaintiff's product, provided always that such descriptive material has become part of the goodwill of the product."* The test is whether "*the product has derived from the advertising a distinctive character which the market recognises."*

35 As to injurious falsehood generally, see *Fleming's the Law of Torts*, fn 2 above, at paras 30.230 to 30.260.

36 Wadlow, fn 35 above, at para 4-024. The *'Elderflower Champagne'* case, *Taittinger SA v Allbev Ltd*, is one of the few cases where the plaintiff failed at first instance as it was unable to establish any likelihood of damage. However, the first instance decision was overturned on appeal: [1994] 4 All E.R. 75.

37 As to the old requirement for a common field of activity, see Phillips and Coleman, "Passing Off and the Common Field of Activity", (1985) 101 LQR 242.

38 Wadlow, fn 35 above, at para 4-024.

39 In the *Advocaat* case, Lord Diplock referred to the misrepresentation being "*calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence*)".

40 Wadlow, fn 35 above, at para 5-051: "*In this respect passing-off is unique among the common law economic torts, all of which otherwise require a mental element varying from negligence, through malice, to malevolence in the sense of a deliberate intention to injure coupled with an improper motive."*

41 One possible exception to the rule that the defendant's state of mind is irrelevant is that a trader may be liable for passing-off by supplying another trader with goods which are not inherently deceptive, knowing or intending that they would be used in a deceptive manner (instruments of deception). This is discussed below.

42 *Slazenger v Feltham* (1889) 6 RPC 531. This does not necessarily follow as a matter of logic: an intention to deceive is not conclusive that deception is in fact likely to occur. In *Parker Knoll v Knoll International* [1962] RPC 265, Lord Devlin questioned the basis for the rule: *"It is not easy to see why the defendant's own estimate of the effect of his representation should be worth more than anybody else's." It seems probable that the rule is steeped in history rather than in logic."*

> *Ltd* [1982] RPC 459 at page 466 per Kerr LJ. If it is shown that the defendant deliberately sought to take the benefit of the plaintiff's goodwill for himself, the court will not be astute to say that he cannot succeed in doing that which he is straining every nerve to do": see *Slazenger & Sons v Feltham & Co* (1889) 6 RPC 531 at page 538 per Lindley LJ."[43]

Innocence, then, is no defence. What matters is whether, objectively, the defendant's misrepresentation, or deception, misled or was likely to mislead consumers as to the origin of his goods or services or cause them to assume that the defendant was in some way connected or associated with the plaintiff. The focus is on the likely consequences of the defendant's actions and the effect that they have on the public, not the defendant's state of mind. Alternatively, the question for the judge is whether the deception is likely to be really damaging to the plaintiff's goodwill or divert trade from him.[44] This is where the concept of the likelihood of confusion creeps in. Though strictly a trade mark concept, reference to the concept of confusion is possibly due to the fact that passing off claims are often tagged on to trade mark infringement claims.[45] But the essence of the tort is deception, not confusion:[46] confusion alone cannot ground a passing off claim, though it may be sufficient where the allegation is of trade mark infringement.[47] It has come to be supposed that proof of confusion is in some sense an acceptable substitute for proof of deception. This is not so. As Wadlow notes, deception pre-supposes the existence of a misrepresentation, confusion does not.[48] The absence of evidence of actual confusion is not decisive. Indeed all that proof of actual confusion may show is that people make assumptions, jump to unjustified conclusions, and put two and two together to make five.[49] In *Reed Executive plc v Reed Business Information Ltd*, Jacob LJ drew a distinction between assumption and mere wondering: "once the position strays into misleading a substantial number of people (going from 'I wonder if there is a connection' to 'I assume there is a connection') there will be passing off."[50] That said, evidence of "the spontaneous reactions of members of the relevant public" is very useful in practice.[51]

The notional customer for the goods or services in question is the equivalent of the team skilled in the art of patent law. In some cases this notional customer will be discerning, as in the case of potential customers wishing to borrow a fortune from a bank.[52] Supermarket shoppers on the other hand might be regarded as careless and uninterested. Trial courts will not take account of the notional customer who does not care one way or another. It is not essential to show that all members of the relevant class of persons are likely to be deceived or misled, but merely that a majority or a substantial portion is likely to be.[53] As to what a 'substantial' number is, the question remains open, but Charleton J in his decision in *McCambridge Ltd v Joseph Brennan Bakeries* (discussed in a later part of this article) suggested that in "applying that test it is incumbent on courts to recognise the business reality of margins and how the loss of more than a trivial section of customers can precipitate an enterprise from profit to loss."[54]

Part 2 of this article, in the next edition of the Bar Review, will focus in more detail on some of the case law dealing with the tort of passing off. ■

43 [1996] RPC 697 at 706.

44 In *Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* [2007] RPC 5, Jacob LJ stated that "*a more complete test would be whether what is said to be deception rather than mere confusion is really likely to be damaging to the claimant's goodwill or divert trade from him. I emphasise the word "really."*

45 This was noted by Hacon J in his first instance decision in *Moroccanoil Israel Ltd v Aldi Stores Ltd* [2014] EWHC 1686 (IPEC) (discussed in detail below), where he stated: "*The problem is that the law reports are full of cases in which misrepresentation is discussed in terms of whether or not there was a likelihood of 'confusion' on the part of the public. This is not surprising… Allegations of trade mark infringement and passing off are commonly argued in the same action and often the evidence and the arguments on statutory confusion in the trade mark sense get to double up as the central part of the debate about misrepresentation in the context of passing off. The two concepts are not identical but there is overlap. Even where trade mark infringement is not in issue, force of habit can often lead to the word 'confusion' being used when discussing the key elements of misrepresentation."*

46 *Fine & Country Ltd v Okotoks Ltd* [2013] EWCA Civ 672 at para 55, per Lewison LJ: "… *the essence of the action is not confusion, but misrepresentation.*"; and *Barnsley Brewery Company Ltd v RBNB* [1997] FSR 462 at 467, per Robert Walker J: "*If there is no deception, mere confusion or the likelihood of confusion is not sufficient to give a cause of action."*

47 *Marengo v Daily Sketch* [1992] FSR 1, per Lord Greene MR: "*No one is entitled to be protected against confusion as such. Confusion may result from the collision of two independent rights or liberties and where that is the case neither party can complain; they must put up with the results of confusion as one of the misfortunes which occur in life. The protection to which a man is entitled is protection against passing-off which is quite a different thing from mere confusion."*

48 Wadlow, fn 35 above, at para 1-030.

49 *Premier Luggage & Bags Ltd v Premier Co (UK) Ltd* [2002] EWCA Civ 387, per Chadwick LJ.

50 [2004] RPC 40 at para. 111; Jacob LJ made similar comments in *Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* [2007] RPC 5.

51 *Interflora Inc v Marks & Spencer plc* [2012] EWCA Civ 1501 (a trade mark case).

52 *HFC Bank plc v Midland Bank plc* [2000] FSR 176.

53 *Kark (Norman) Publications Limited* [1962] 1 WLR 380, per Lord Wilberforce: "*It is enough to show that a substantial number of persons likely to become purchasers of the goods are liable to be deceived*"; and *Jacob Fruitfield Food Group Ltd & Anor v United Biscuits (UK) Ltd* [2007] IEHC 368, (Unreported, High Court, Clarke J, 12 October 2007) per Clarke J: "*The standard by reference to which the existence of goodwill needs to be judged (and, it follows, by reference to which the risk of confusion also needs to be determined) is that applied by any significant number of potential customers for the products concerned."*

54 [2014] IEHC 269, (Unreported, High Court, Charleton J, 27 May 2014).

Magna Carta – Liberties, Customs and the Free Flow of Trade

Lord Dyson, Master of the Rolls*

Introduction

It is a real pleasure to have been asked to give the keynote address at this 4th annual British Irish Commercial Law Forum on the theme of the Magna Carta. As you may know, I am chairman of the Magna Carta Trust; a position held by all Masters of the Rolls since the Trust was established in 1956. You can imagine that my term of office as chairman has been rather busier than that of my illustrious predecessors.[1]

One of the aims of the Trust is to 'perpetuate the principles of Magna Carta'[2] Magna Carta is a curious hotch-potch of a document. Many of its provisions cannot by any stretch of the imagination be described as principles. They include detailed measures of an intensely practical nature which reflect the economic and social conditions of the early 13th century. Some of them were aimed at resolving grievances that King John's barons had at the time; grievances that were not only directed at him but were a reaction to Angevin rule.

For example, the Charter required him to remove a number of his more troublesome supporters from office. Chapter 50 provided: "We will entirely remove from our bailiwicks the relations of Gerard de Atheyes, so that for the future they will have no bailiwick in England; we will also remove Engelard de Cygony, Andrew, Peters and Gyon, from the Chan-cery; Gyon de Cygony, Geoffrey de Martyn and his brothers; Philip Mark and his brothers and his nephew, Geoffrey, and their whole retinue". Quite a putsch.

But it is undeniable that Magna Carta does contain a numbers of chapters which we would recognise as setting out important principles which have real relevance today. They are the reason why it has been grandiloquently been claimed that Magna Carta is the inspiration for democracy; and why thousands of people from all over the World planned to congregate in a field at Runnymede on 15th June to commemorate the 800th anniversary of the sealing of the Charter. I have in mind, in particular, the famous chapter 40 "To none will we sell, to none will we deny, or delay, the right of justice". Words of captivating brevity. And chapter 20: "A freeman shall not be amerced for a small fault but after the manner of the fault; and for a great crime according to the heinousmess of it" (an early assertion of the principle of proportionality). I also have in mind other provisions concerning access to justice and due process of law and the right to fair trial as well as the requirement that justice should be dispensed from a fixed place[3], that it should be local[4]; and that judges should know the law, which often meant local law[5]–an early instance of subsidiarity, perhaps. And that only judges should sit in judgment[6]. The Charter was not, however, the source of trial by jury or the great writ of habeas corpus.

The Magna Carta and Free Trade

Its opening provision guaranteed the rights and liberties of the English Church[7], although it did not specify what they were. Plenty of room for manoeuvre there, and work for lawyers. And it provided a series of significant guarantees concerning trade and commerce. While it was neither the first nor the last instrument to do so, it established uniform weights and measures.[8] England at the time was developing economically. Successful trade depends, to a large extent, on traders understanding and being in agreement as to what they are selling and buying. It would be a recipe for chaos if a seller took a length to mean 45 inches when the purchaser understood it to mean 37 inches.[9] A thriving mercantile economy, much of which involved trading in a variety of types of cloth, needed a uniform approach.

So Magna Carta standardised the basis of trade. It sought to secure the free flow of trade. It required the removal of all fish-weirs from rivers across England[10]. Bad for fisherman, but good for traders. Fish-weirs led to rivers silting up. Consequently they became less and less navigable. They clogged up important trade arteries. Their removal was needed to increase free trade.

Free movement of goods is not however sufficient for a thriving economy. There has also to be free movement of merchants. Thus chapter 41 provided "All merchants shall

* This paper was delivered by The Right Honourable Lord John Anthony Dyson, Master of the Rolls as a keynote address at the 4th annual British Irish Commercial Law Forum in the Honorable Society of King's Inns in April 2015. The Honourable Mr Justice Seán Ryan, President of the Court of Appeal, welcomed Lord Dyson on his first visit to Ireland.

The theme of this year's forum was "800 Years of Magna Carta: the Commercial Rule of Law in the 21st century." The forum was hosted by the British Irish Commercial Bar Association (BICBA) in conjunction with the Commercial Litigation Association of Ireland (CLAI) and the Northern Circuit Commercial Bar Association (NCCBA).

1 I wish to thank John Sorabji for all his help in preparing this lecture. The title is inspired by A. E Dick Howard's excellent reference guide to Magna Carta, '*Magna Carta – Text and Commentary* (University of Virginia Press) (1998) at 19.

2 See <http://magnacarta800th.com/magna-carta-today/the-magna-carta-trust/>

3 Magna Carta 1215 chapter 17.

4 Magna Carta 1215 chapter 19.

5 J. C. Holt ibid. 63.

6 Magna Carta 1215 chapters 24 and 45.

7 Magna Carta 1215, chapter 1.

8 Magna Carta 1215, chapter 35.

9 I. Judge & A. Arlidge, *Magna Carta Uncovered*, (2014) (Hart) at 88.

10 Magna Carta 1215, chapter 33.

have safe and secure conduct, to go out of, and to come into England, and to stay there, and to pass as well by land as by water, for buying and selling by the ancient and allowed customs without any evil tolls; except in time of war, or when they are of any nation at war with us". What better evocation of the idea of free trade? An early embodiment of the ideals which informed what is now known as the European Union.

Encouraging the free movement of goods and tradesmen is one thing. But trade and investment do not simply depend on an ability to trade. If they are to flourish, it is imperative that property rights of traders and investors are protected by the law. The parties to the Charter well understood this. A trader or investor has little incentive to engage in trade or to invest if they are at risk of arbitrary dispossession of their property interests. Such dispossession was not uncommon. King John routinely stripped his subjects of their property in order to fund his military adventures.[11] An object of the Charter was to put a stop to this. It provided at chapter 39 that "no freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the laws of the land".[12] This was an early foreshadowing of Locke's theory of government and the 14th amendment of the US Constitution.

So the Charter made provisions to ease trade and secure property rights. It also affirmed that the City of London and all other 'cities, boroughs, towns and ports shall have their liberties and free customs.'[13] Commercial centres needed to be supported. The exact nature and extent of the liberties and free customs was not defined. It is right to note, however, that more than seventy charters had been issued to individual towns and cities. Magna Carta was declaratory of their continuing effect, as well as of the right of the City of London to be both self-governing and to continue to appoint its Lord Mayor.

The importance of Magna Carta today

So much for the Charter itself. What is its relevance for commerce and the rule of law today?

In a recent lecture in which he stripped away a number of what might be called the myths in which the Charter has become enveloped, Lord Sumption concluded with this warning:

> 'We are frighteningly ignorant of the past, in large measure because we no longer look to it as a source of inspiration. We are all revolutionaries now, controlling our own fate. So when we commemorate Magna Carta, perhaps the first question that we should ask ourselves is this: do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not.'[14]

Not for him Sir Anthony Eden's view that the road to 1215 'marked the road to individual freedom, to Parliamentary democracy and to the supremacy of the law.'[15]

The Magna Carta and the Rule of Law

It may be that nobody directly bases their belief in democracy or the rule of law on the document that was sealed at Runnymede 800 years ago. But it cannot be denied that the Charter does set out a number of principles which, however rudimentary the form in which they were expressed, are now taken for granted as being central to a modern liberal democracy. It is right that, from a historical point of view, we should locate the Charter in the social and economic conditions of the 13th century and acknowledge that it reflects the values and mores of that time. But it is an inescapable fact that the Charter principles to which I have referred have been influential in the development of modern democratic systems. This is not the place to trace the chequered history of these principles. Suffice it to say that the Charter endured for no more than ten weeks, before the Pope annulled it at John's request. It was brought back to life by William Marshall on John's death. Thereafter, it languished until, as Lord Sumption explains in a little detail, it was resurrected with enthusiasm by Edward Coke in the 17th century.

John Adams, the second President of the United States, said that 'Democracy never lasts long. It soon wastes, exhausts and murders itself.'[16] He believed that in democracies, as in other forms of government, individuals were prey to the same flaws of, as he put it, 'fraud, violence and cruelty.' The strength of any democracy lies in the robustness of its institutions of governance and in public confidence in them. Weaken either and democracy is weakened.

Access to Justice

One of the great strengths of the UK and States which enjoy similar democratic systems has been their commitment to systems of justice. It is no good having wonderful laws if the state does not provide a fair and effective system of justice to enable individuals to vindicate their rights by reference to those laws. Everyone should have equal access to justice. And I do not simply mean formal equality of access in the sense that 'The doors of the Ritz are open to all.' I mean, of course, practical and effective equality. This includes that the courts, legal advice and representation are available to all those who require it. This an essential aspect of democratic participation in society. It is because it is the means by which the law (these days largely the creation of elected Parliaments) is given life. It is also the means by which aggrieved citizens

11 J. C. Holt, ibid. at 192.

12 Magna Carta 1215, chapter 39, and also see chapter 9 on debtor-creditor relations.

13 Magna Carta 1215, chapter 13. And see chapters 33, 35 and 41 – 42.

14 J. Sumption, *Magna Carta – Then and Now*, (British Library lecture) (9 March 2015) at 18 <https://www.supremecourt.uk/docs/speech-150309.pdf>.

15 The Rt Hon Sir Anthony Eden MP, Prime Minister, letter to the Magna Carta Trust (October 1956) <http://magnacarta800th.com/magna-carta-today/the-magna-carta-trust/>.

16 J. Adams, *Letter to John Taylor of Carolina*, in G. W. Covey (ed), *The Political Writings of John Adams* (Washington) (2000) at 406.

can hold public authorities to account by judicial review in the courts.

Free and fair elections are, rightly, understood to be the central mechanism by which democracy is nurtured and sustained. Equal and effective access to the justice system is another, and equally important, mechanism. At the present time, the justice systems in many democratic societies are under strain. Budgetary constraints are having a serious effect. Governments are strapped for cash and have to make hard political choices. These tend to be driven by their assessment of what the electorate regards as important. Sadly for those to whom the maintaining of high standards of justice is of paramount importance, expenditure on justice systems is not seen as a high priority by those in power. In a number of jurisdictions there has been a marked shift away from state-funded legal aid for civil and family justice. This has been particularly controversial in England and Wales. This shift has, to a certain degree, been mirrored by a liberalisation in other funding methods, such as the introduction of various forms of contingency fee funding and the growth of third party funding.

The merits of the public and private funding civil justice are issues for another day. However, if we are to continue to maintain access to the courts, our funding methods must be effective and affordable. If they are not, and individuals and small and medium-sized enterprises are unable to gain access to our courts, we will surrender our commitment to equality before the law and we will diminish our democracies, and their ability to develop their economies. A small or medium-sized business that is unable to enforce its debts, or to keep its trading partners to their bargains through litigation or the threat of litigation is one that will not long thrive or even survive. Diminution of funding is a modern analogue to the barriers to trade that Magna Carta sought to blow away.

Litigation Costs

Necessarily linked to litigation funding is the cost of litigation. By this, I mean to refer to both court fees and lawyers' costs. If either is too high, they inhibit access to the justice system. The individual litigant who wishes to have recourse to the courts in order to vindicate his private law rights or to hold a public authority to account by judicial review proceedings may not be able to do so. This is potentially very serious. Judicial review is a valuable means of holding public authorities to account. To curtail the ability of a citizen to seek judicial review of a decision is no doubt good for the decision-maker. For public authorities, judicial review is it best an irritant and at worst a road block to the journey it wishes to make. But the denial of judicial review is bad for the rule of law. If citizens cannot afford to have their disputes resolved by the courts, that too is bad for the rule of law. The spectre of self-help and disorder is not fanciful.

From a commercial perspective, if litigation costs are high and a dispute cannot be settled consensually, businesses must divert resources from commercially beneficial activity, such as investing in new products and developing new markets, to litigation. This may be welcome to the legal profession; but it is of little benefit to the overall economy. Excessive litigation costs silt up the arteries of trade and access to justice as effectively as the fish-weirs that were removed by Magna Carta were a barrier to river traffic in the 13th century.

The guarantee of due process vouchsafed by Magna Carta was predicated on the barons' complaint about John's resort to arbitrary justice. They wanted justice before the court of barons – their peers – which had been enjoyed before John decided to use the law as a means of increasing his finances. The barons have been portrayed as heroes. But that has not always the case. As Jeremy Bentham noted in his discussion about the laws which prohibited champerty and maintenance, 'a man [could] buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench.'[17]

Inequality of Arms

The days of barons or anybody else stalking into court, sword in hand, are long gone. But Bentham's colourful image illustrates brilliantly what we now call "inequality of arms". These days, inequality is usually demonstrated by a lack of availability of equal resources to opposing parties. It is often manifested by an imbalance between defendants and prosecuting authorities in the criminal law context; and between claimants and public authorities in the public law context. In the case of private law disputes, there can be a serious imbalance between the resources available to an individual of modest means and those available to a wealthy individual or a large corporation. The rule of law requires that a justice system is open to all; and that all who come before the courts are treated equally. Justice should not be at the beck and call of the highest bidder, contrary to King John's view.

I recognise that the provision of an effective justice system is expensive. In England and Wales, as in many liberal democratic systems, the courts are under huge pressure to cut costs and improve efficiency. I accept that, in our system at least, there is scope for improvement without sacrificing access to justice. Lawyers are said to be conservative and resistant to change. There may be some force in that assessment. But in my country at least, the judges are co-operating in the reforms that are in train. There have been major changes in the processes of criminal, civil and family justice. These are reforms which would have been unthinkable when I entered the legal profession in the late 1960s. And there is much more to come. Perhaps the most fundamental change that now needs to be made is to modernise our IT systems. We have not yet realised the benefits that the IT revolution can bring to our system of justice, a revolution, which if carried through effectively, will increase the speed and efficiency of litigation and reduce costs. I hope, for example, that before long, all documents will be filed and managed electronically; and that the majority of procedural applications will be dealt with electronically. The days when court buildings are bursting with paper files on the floor or stored on long shelves or in large cupboards are, I hope, numbered.

On-line Dispute Resolution

We are also exploring the possibility of a scheme for on-line

17 Bentham (1843) Vol. 3, *A Defence of Usury*, Letter XII at 19.

dispute resolution. This is an exciting project which I am confident will get off the ground before long. We shall have to work out the details of how it will operate and, in particular, to what kinds of case it will apply. I can also see no practical reason why, assuming the court has jurisdiction, it should not be possible for hearings to take place across continents via the Internet, bringing litigants from one continent into the same court as litigants from another continent. Changes are taking place at great speed. The main impetus is the need to improve efficiency and reduce cost. In principle, that is a good thing. We need, however, to be vigilant to ensure that this rush to change, increased efficiency and saving of cost does not undermine access to justice. There is no reason in principle why it should have that effect. But we need to take care to protect an ideal that owes not a little to Magna Carta and which is fundamental to the rule of law. It hardly needs to be said that the rule of law is one of the hallmarks of our cherished democratic societies.

Conclusion

It took hundreds of years to move from Runnymede to liberal democracy and to secure firmly the commitment to the rule of law. If we are to maintain that commitment, we need to recognise that it cannot be taken for granted. We must be vigilant to ensure that we maintain an effective, accessible system of justice. It is essential to the promotion of confident economic activity that parties are able to make bargains in the knowledge that their disputes will be resolved in a court of law by independent judges in accordance with the law of the land and that the judgments that they obtain from the courts will be enforced by the state. Without such a system, there is chaos and trade becomes difficult, if not impossible. Our system is not perfect. Indeed, the recent cuts in resources which have been introduced in England and Wales (and other jurisdictions too) as a result of the economic downturn have put our system under enormous strain. The political reality, however, is that there are fewer votes in Justice than, for example, in Health and Housing. But we still enjoy a system which is the envy of most countries in the world. It is precious and we should value it. We should certainly do all we can to protect it. ■

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Presentation of Draft Legislation to Ana Liffey Drug Project

On Wednesday 21st May 2015, the Legislative Drafting Committee of the Voluntary Assistance Scheme presented a draft of The Health (Injecting Centres) Bill 2015 to Ana Liffey Drug Project. Ana Liffey is a national addiction service working with all people affected by substance use and organisations that assist them. The handover was attended by Minister of State Aodhán O Ríordáin TD (who has responsibility for drugs strategy) along with members of the media at a Bar Council hosted press conference.

In early 2014, Tony Duffin, Director of Ana Liffey asked VAS if it would be possible to draft legislation that would allow for the implementation of Medically Supervised Injection Centres. Ana Liffey were aware that such centres were operating well in other jurisdictions and felt it would make a significant impact on the problem of drug consumption in inner city Dublin. The introduction of such centres has been part of Ana Liffey's strategic plan for some years. While VAS maintains a neutral stance regarding the policy objectives of any of the groups we work with, VAS accepts requests from organisations with *bona fide* aims who would not otherwise have a means of accessing specialised legal services. A committee was formed with expertise in legislative drafting, licencing law, criminal law and medical law. It was chaired by Emily Egan SC who was joined by Bernard Condon SC, Rebecca Broderick BL, Rebecca Graydon BL, Marcus Keane BL and Brendan Savage BL. Marcus Keane BL had previously worked for Ana Liffey Drug Project and had prepared an extensive background opinion on the issue.

The committee met at regular intervals over the past year, and divided up the various aspects of the necessary research and drafting. All efforts were integrated at each subsequent meeting until a bill was created. Given the sole trader

nature of our work, it was a unique experience for a team of barristers to work towards a singular piece of drafting. The task required an examination of exemptions from prosecution of criminal offences and issues around medical regulatory law and licencing which would ultimately provide the Minister for Health with the power to grant licences for Medically Supervised Injection Centres. If, as a matter of legislative policy, the bill is to be implemented, the committee have ensured that it is legally sound. The work involved was extensive and the committee is to be commended for its skill, diligence and dedication.

At the handover ceremony, Minister O Ríordáin spoke very positively about the legislation and the idea that radical steps needed to be taken to address the problems of drug consumption. Tony Duffin described how the centres have worked in Sydney and his experience of a recent visit there. He said that these proposals would reduce the risks to drug addicts and would provide them with other options away from public spaces. The handover received significant media coverage and portrayed the volunteering efforts of barristers in a very positive light. Minister O Ríordáin subsequently made reference to the bill and the work of VAS in the Oireachtas.

The Health (Injecting Centres) Bill 2015 was the first complete piece of legislation produced by the Voluntary Assistance Scheme. It represents another example of how barristers, operating through VAS, can assist voluntary organisations who are committed to the assistance of others.

VAS remains committed to accepting such similar requests for legislative drafting from charities and we hope to make it a consistent feature of our work. If you have experience in legislative drafting and would like to get involved in future projects, please get in touch with VAS at *vas@lawlibrary.ie.* ■

Pictured at the handover ceremony are: (From left to right) Paul McGarry SC, Emily Egan SC, Minister of State Aodhan O Riordain TD and Tony Duffin, Director of Ana Liffey Drug Project.

Pictured at the press conference are: Tony Duffin, Director of Ana Liffey Drug Project and Minister of State Aodhan O Riordain TD

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Brian Conroy, BL, LLB (Ling. Fr.), LLM (Cantab.), AITI is a practising barrister. He is also a qualified tax consultant and a member of the Irish Society of Insolvency Practitioners.

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