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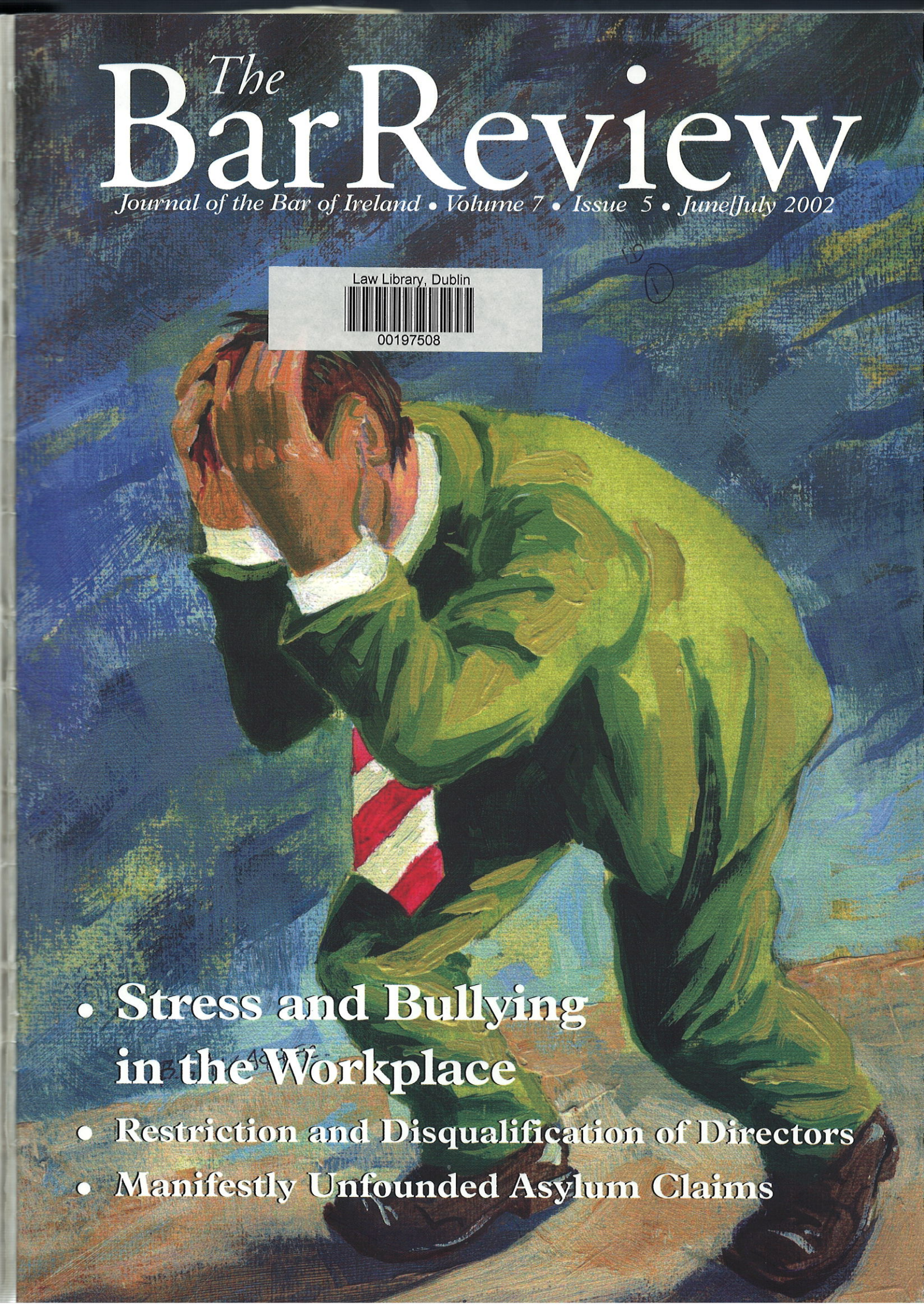

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THE SEPARATION OF POWERS PARLIAMENTARY INQUIRIES

The Irish Constitution is based on the formal separation of powers. This is a theoretical construct which can often prove difficult to sustain in practice, especially at the extreme points in the range of activities where the powers of one branch of government border those of another. Observers of constitutional conflict have therefore often stated that the separation of powers in any Constitution can only truly work when each branch of government exercises its allotted powers at the extremes with restraint. If they fail to do so, the system upon which such powers are based may not be capable of providing a coherent or satisfactory resolution to the resulting conflict between the executive, judicial or legislative powers, as the case may be. In circumstances where, as in Ireland, the courts are called upon to resolve such conflicts, there is the additional risk that their decisions may be interpreted as too jealously guarding the judicial power of inquiry or, alternatively, as undermining the entitlement of citizens to have serious issues affecting their livelihood tried and determined before courts of law.

From this perspective, it could perhaps be said that the recent case of Maguire & Others v Ardagh & Others, concerning the inquiry before a sub-Committee of a joint Oireachtas Committee arising out of the Abbeylara incident, should not have come before the Courts at all. To many lawyers, the Sub-Committee's inquiry proposed to trespass directly on matters normally associated with a homicide trial, by reference to inherent parliamentary powers which were understood to have been abandoned and discredited even by 1921 and to have been expressly disavowed as part of our Constitution by the Supreme Court in its judgment in Haughey v Moriarty. That understanding has now been emphatically confirmed in the judgments of the full Supreme Court in the Abbeylara case. To many members of the public, however, the Abbeylara inquiry was seeking to do no more than cast light on matters of grave public concern. It followed other recent parliamentary inquiries including the DIRT Inquiry which were perceived to be democratic, efficient and successful; and the decisions of the High Court and Supreme Court were seen, in consequence, as an attack on the representative mandate of politicians to inquire into matters of public concern.

It is not possible in a few words to do justice to the full range of important constitutional issues canvassed in the Abbeylara judgments, or indeed to fully predict the consequences of the decision for existing and future parliamentary inquiries. At the same time, there are a number of principles which emerge from the judgments of the Supreme Court, and from the modified declarations granted by the Supreme Court in substitution for those of the Divisional High Court, which it is appropriate to note.

* First, there can be no legal objection to the power of Oireachtas Committees to hear evidence bearing on matters of public concern relevant to their legislative function.
* Secondly, whereas Oireachtas Committees have no inherent power to make findings of fact or conclusions adverse to a person or likely to impugn his or her good name or livelihood, the Supreme Court judgments appear to allow for the possibility of implied criticisms of individuals arising from findings of general shortcomings which it is appropriate to address by way of legislation.
* Thirdly, to the extent that Oireachtas Committees have been or may be conferred in the future with express statutory powers to make findings of fact or to draw conclusions adverse to individuals, these powers will very often carry with them a duty to allow for an unhampered opportunity to cross-examine witnesses. This obligation may not always be compatible with an objective of speedy inquiry or with the time and resources available to such Committees, and in practice this consideration may tell against resort to such express powers.

On any view, it follows that the power of Oireachtas Committees to inquire into misfeasance in matters of public administration involving specific individuals must now be regarded as limited. While one might regret that this results in an asymmetric separation of powers, whereby the executive can establish tribunals of inquiry (or exercise ordinary executive powers of inquiry such as Garda investigations) but the Oireachtas has no equivalent power of independent inquiry, it is also the case that the powers of such tribunals are presently required by statute to be approved by resolutions of the Oireachtas. Ultimately, the balance is tipped by the vital constitutional role of the Courts, as opposed to the Oireachtas, in protecting individual rights against unjust attack, a role which is deemed to be better reflected in the powers and duties of tribunals of inquiry than in the more informal procedures of Oireachtas Committees. The main consequence, in the long term, may not be that the Oireachtas will be limited in the choice of policy matters for inquiry or that it will be forced to tread more carefully in those inquiries, but that its Committees may focus more on the legislative goal of their work rather than their capacity to capture the public imagination. If that is the balance achieved, it will be consistent with the restraint appropriate to a proper balance of powers in the Irish Constitution.

RESTRICTION DISQUALIFICATION OF DIRECTORS

Brian Kennedy BL *provides an overview of the application of section 150 and section 160 of the Companies Act 1990 having particular regard to case law and to the changes which will result from the Company Law Enforcement Act 2001.**

Introduction

Under Irish law, there are no set qualifications required to become a director. Caselaw from the late nineteenth and early twentieth centuries suggests that the senile, the illiterate and the innumerate are all eligible to serve as directors.[1] Furthermore, there is no minimum age requirement to serve as a director: according to the Registrar of Companies, in a small number of Irish companies the directors are under six years old.[2]

In such circumstances, it is hardly surprising that legislation has been enacted to protect the public from dishonest and incompetent directors. Initially, legislation provided for the disqualification of directors.[3] The Companies Act 1990 provided a step forward in this regard. Section 160 of the Act expanded the grounds on which directors could be disqualified. More significantly, section 150 introduced a procedure for the restriction of directors: where a company goes into insolvent liquidation, each director will be restricted as to the type of company in which he can become involved unless he can prove to the court that he falls within an exception, most usually that he acted honestly and responsibly.

The stated aim of the restriction procedure, which was proposed by the British Cork Committee on Insolvency Law and Practice but was never introduced in that jurisdiction, was to prevent "the Phoenix syndrome", whereby the principals of a company which became insolvent might set up another one involved in the same or similar business, trade on the first company's goodwill and/or attempt to obtain its assets at an undervalue. Its application, however, was not limited to such circumstances. At the time of the entry into force of the 1990 Act, some commentators considered that the restriction procedure, coupled with the reckless trading provisions, would have a drastic impact on directors and that, in particular, experienced businesspeople would become less willing to lend their expertise as directors to newly established companies.

To date, however, the changes introduced by the 1990 Act have not had such a dramatic effect. Undoubtedly, the principal reason for this is that while section 150 was mandatory in its terms, the section did not require any party (such as a liquidator) to bring such an application. While this problem was dealt with in court liquidations by the High Court directing the liquidator to bring a restriction application, in the vast majority of voluntary liquidations no such application was brought.

This position has been altered by the enactment of the Company Law Enforcement Act 2001. Under section 56 of this Act, a liquidator will be required to report to the Director of Corporate Enforcement ("the Director") within six months of his appointment or the commencement of the legislation and will subsequently be required to apply to the High Court for a section 150 order unless he has been relieved by the Director of the obligation to make the application.

The significance of this change for practitioners can be gauged from the fact that there are approximately 400 new insolvent liquidations each year and that to date very few of these have led to restriction applications. The Director has recently published a consultation paper on his liquidation related functions in which he sets out his initial views on how he plans to implement and manage the report and restriction procedure.[4]

Restriction of Directors

(i) Scope of Restriction Provisions

The scope of application of the restriction provisions is set out in section 149 of the 1990 Act. It first provides that restriction provisions apply to insolvent companies. Insolvency can be established either by proving it to the court at the commencement of the winding-up or during its course, or alternatively by the liquidator so certifying during the winding up.

In *Carway v. Attorney General*,[5] it was asserted that the certification procedure was unconstitutional in that it provided for an irrebuttable presumption of insolvency which precluded a director from disputing the correctness of the certificate and that the company's inability to pay its debts was part of the

justiciable controversy which could not be resolved by the liquidator or removed from the jurisdiction of the courts. The High Court (Carroll J.) held that there was nothing in the language of section 149 which made the certificate irrebuttable: it was merely a procedural preliminary step to the court's jurisdiction to proceed under a restriction application, and there was nothing which would prevent a director from raising any issue in relation to the insolvency of the company.

Section 154 of the 1990 Act provides that a restriction application can be brought once a receiver of the property of the company is appointed. Furthermore, under section 251 of the 1990 Act, where a company is insolvent but is not being wound up due to insufficiency of assets, an application can also be brought.

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The restriction provisions apply to any person who was a director of an insolvent company at the date of or within twelve months of the commencement of its winding up.

In *Carway v. A-G*, the High Court held that for Chapter I to apply, the company must only be insolvent at some stage of the insolvency procedure, even if eventually the outcome of the liquidation were beneficial.

The provisions also apply to shadow directors of a company. Section 27 of the 1990 Act defines a shadow director as a person in accordance with whose directions or instructions the directors of the company are accustomed to act, unless they are accustomed so to act by reason only that they do so on advice given by a shadow director in a professional capacity.

In at least two recorded decisions, restrictions have been imposed on shadow directors. In *Re Vehicle Imports Ltd*,[6] the fact that a director signed blank cheques to be filled in by another individual who allegedly controlled 75% of the business was sufficient to determine that that individual was a shadow director. In *Re Gasco Ltd*,[7] an individual who was never the a director but was a 50% and possibly a 100% shareholder beneficially and who effectively ran the company on his own following the departure of the named directors of the company was held to be a shadow director.

(ii) Section 150

Section 150(1) provides:

> "The court shall, unless it is satisfied as to any of the matters specified in subsection (2), declare that a person to whom this Chapter applies shall not, for a period of five years, be appointed or act in any way, whether directly or indirectly, as a director or secretary or be concerned or take part in the promotion or formation of any company unless it meets the requirements set out in subsection (3)...."

Section 150(1) is mandatory in its terms: unless satisfied otherwise, the court shall impose a restriction. This has a number of effects. In the first place, the onus is on a director seeking to avoid restriction to prove that he acted honestly and responsibly or that the matter falls within one of the other exceptions contained in sub-section (2). Furthermore, in *Duignan v. Carway (No. 2)*,[8] it was emphasised that a liquidator cannot settle section 150 proceedings, or even undertake as part of an overall settlement of proceedings (e.g. for reckless trading) not to pursue the section 150 proceedings. As McCracken J. stated: "Section 150 raises an issue between the directors and the courts and not between the directors and the liquidator."[9]

The matters as to which a director must satisfy the court in order to avoid a restriction order being imposed, which are set out at section150(2), are as follows:

"(a) that the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company and that there is no other reason why it would be just and equitable that he should be subject to the restrictions imposed by this section, or

(b) subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a financial institution in connection with the giving of credit facilities to the company by such institution, provided that the institution in question has not obtained from any director of the company a personal or individual guarantee of repayment to it of the loans or other forms of credit advanced to the company, or

(c) subject to paragraph (a), that the person concerned was a director of the company solely by reason of his nomination as such by a venture capital company in connection with the purchase of, or subscription for, shares by it in the first-mentioned company."

It will be noted that paragraphs (2)(b) and (c) of section 150 are expressly stated to be subject to paragraph (a). In *Re Cavan Crystal Group Ltd*[10] it was argued that this meant that it was necessary for a director to show that he had acted both honestly and responsibly even if appointed by a financial institution or venture capital company. Murphy J., while stating that it was unnecessary to base his decision on any interpretation of subsection (2), considered that such a construction would render paragraphs (b) and (c) meaningless and that the legislature intended that a person falling within paragraph (b) or (c) would not have to establish that he had acted honestly and responsibly.

As amended by section 41(1) of the 2001 Act, the requirements with which a company must comply for a restricted person to be a director, which are set out in section

150(3), are the following:

(a) the nominal value of the allotted share capital of the company shall-
  (i) in the case of a public limited company, be at least £250,000,
  (ii) in the case of any other company, be at least £50,000,
(b) each allotted share to an aggregate amount not less than the amount referred to in subparagraph (i) or (ii) of paragraph (a), as the case may be, shall be fully paid up, including the whole of any premium thereon, and
(c) each such allotted share and the whole of any premium thereon shall be paid for in cash.

Further restrictions are imposed on such a company. It cannot make use of the machinery under section 60 of the 1963 Act for the provision of financial assistance for the purchase of its own shares ; it is subject to the same restrictions under the Companies (Amendment) Act 1983 as public limited companies in making allotments of shares other than for cash ; and various exceptions to the general prohibition on the making of loans and similar transactions to directors contained in sections 32-37 of the 1990 Act do not apply.

Section 150 is enforced via section 161, which makes it an offence for a restricted director to act in breach of section 150, and via section 163(3), which provides that such a director may be made personally liable for debts of the restricted company if it goes into insolvent liquidation in circumstances where the restriction provisions have not been respected. The officers of a restricted company who permit or acquiesce in a restricted director's involvement can also be made criminally liable in certain circumstances under section 164(1) and may even be held personally liable under section 165 for the company's debts in certain circumstances.

(iii) Procedure

Form of Proceedings

In contrast to section 160, no specific reference is made in the Rules of the Superior Courts 1986, as amended, to section 150. The general practice is to bring restriction applications by way of notice of motion. In *Duignan v. Carway (No. 2)*, it was argued that there was no provision for so doing and that, accordingly, it was necessary to bring the application by way of plenary summons pursuant to RSC Ord. 1, rule 1.[11] McCracken J. noted the apparent absence of section 150 from the Rules, which he considered to be a strange omission which should possibly be rectified. He declined to make any finding on the point, on the basis that the respondents had accepted the notice of motion procedure and could not at a late stage be heard to raise a procedural objection.

In any event, having regard to RSC Ord. 74, rule 136, as inserted by Article 2(3) of S.I. 278/1991, it would appear that the notice of motion procedure is the appropriate one. Rule 136 specifically states that in any winding up, an application under any section of the Companies Acts not expressly provided for shall, in the case of a winding up by the court, be made by motion on notice and, in the case of a voluntary winding up, by originating notice of motion. RSC Order 75B, rule 7 further provides that every application brought under the Companies Act 1990 should be grounded on affidavit of the party hearing the application and should be heard and determined on affidavit unless the court orders otherwise.

A further lacuna in the Rules relates to directors who are resident outside the State. The circumstances in which service outside of jurisdiction is possible, which are set out in Order 11, do not appear to encompass a section 150 application. Wheras the general practice adopted by the High Court to overcome this hurdle appears to be to direct an applicant to send the relevant documents to the non-resident director and to explain the nature of the procedure to the director, in particular the fact that once the applicant has established that the company was insolvent and that the respondent was a director, it is necessary for the director to establish that he falls within one of the exceptions in order to avoid restrictions.

Costs

The issue of costs in a section 150 application is often contentious, in particular where a liquidator does not have ample funds. While on certain occasions the High Court has awarded costs to the liquidator, even if unsuccessful, in a number of recorded decisions[12] where the restriction application has been unsuccessful, the court has ordered that each party bear its own costs. Furthermore, costs are generally measured with the result that the liquidator does not recover his full expenditure. There was no reference to costs in the legislation as enacted. Section 150(4B), however, was inserted by section 41 of the 2001 Act. It provides that the court, on hearing a section 150 application:

> "may order that the directors against whom the declaration is made shall bear the costs of the application and any costs incurred by the applicant in investigating the matter."

This suggests that it is intended that the court would not have the power to make an order for costs in relation to such directors against whom no declaration is made. It remains to be seen to what extent courts will consider their general discretion in relation to costs to be fettered by this amendment. In successful applications, the provision that the director can be required to pay any costs incurred by the applicant in investigating the matter could result in a substantial liability for the director. It may, however, prove difficult to establish that costs were incurred by a liquidator in investigating the section 150 application, as opposed to the exercise of his general functions.

Delay

The question of delay in section 150 proceedings was considered in *Duignan v. Carway (No. 1)*.[13] Here, a section 150 motion was re-entered some five years after it had initially been issued. In the meantime, the respondents had taken an unsuccessful constitutional challenge to the certification procedure[14] and the liquidator had subsequently taken proceedings seeking damages against the respondents. The proceedings were re-entered less than a year after the implementation of the settlement. The respondents asserted that the proceedings should be struck out on grounds of delay.

The High Court held that it was reasonable for the liquidator to delay with the section 150 application during the period when the damages claim was being processed, on the basis that if the directors had successfully defended those proceedings, they would probably have succeeded also in resisting the section 150 application. This aspect was not appealed by the respondents to the Supreme Court. The High Court further held that the delay between the conclusion of the proceedings and the re-entry of the motion was inordinate and inexcusable but dismissed the directors' application on the basis that the

public interest in seeing that unsuitable persons should not be directors of companies outweighed the general prejudice suffered by the directors.

The decision was affirmed by the Supreme Court. It considered that there was a public interest represented by section 150 but that excessive delay might render it unjust to permit a liquidator to proceed with his application. While the impact of this decision will be limited once section 56 of the 2001 Act, requiring liquidators to bring an application for restriction within a limited time period unless absolved, comes into effect, one may see delay arguments being invoked frequently, in particular if liquidators of companies which have been in the liquidation process for a significant period of time are required by the Director to bring restriction applications.

Locus Standi

The parties entitled to bring a restriction application were not detailed in the text of section 150 as originally enacted. This lacuna can probably be explained by the fact that, as initiated, the Companies Bill 1987 envisaged that a restriction would automatically be placed on a director of an insolvent company. The question of *locus standi* was considered in *Re Steamline Ltd*,[15] where a creditor sought to bring such an application.

Shanley J considered that section 150 should be given a purposive construction and that it should be construed in such a way as to promote, rather than restrict, the remedy. He considered that the persons authorised under section 160(4)(b) to bring an application for a disqualification order were broadly the same category of persons who would have an interest in seeking a restriction order. Accordingly, he held that the court should construe section 150 applications as being capable of being brought by those who could bring a disqualification application, which included creditors.

Subsequently, however, section 150(4A) has been inserted by section 41(1)(c) of the Company Law Enforcement Act 2001. It provides that an application for a restriction order may be made by the Director, a liquidator or a receiver. The insertion into section 150 of specific parties empowered to make an application for a restriction order suggests that the approach followed by the late Shanley J. in *Steamline* is no longer appropriate and that creditors are no longer entitled to bring such applications. In any event once liquidators are required to bring restriction applications unless absolved, it is less likely that creditors will seek to do so.

Access to Books and Records

In *Carway v. A-G*, the High Court held that a director who needed access to the books of the company to prepare his answer to a section 150 application could always apply to the court if obstructed by the liquidator.

(iv) Honestly and Responsibly

Relevant Time Period

The main ground on which a director can avoid restriction is by proving that he acted honestly and responsibly. In evaluating whether a director has so acted, a preliminary matter to consider is the time period which should be focussed on. In *Re Gasco Ltd*, McCracken J, noting that no restrictions could attach to somebody who ceased to be a director of the company more than twelve months before the winding-up, considered that this indicated that the primary aim of section 150 was to deal with directors who had behaved irresponsibly or dishonestly during the last twelve months of the life of the company and that the actions of a director subject to section 150 should be looked at primarily in the light of his actions during that period. He considered this approach to have a practical logic, as section 150 was presumably intended to focus attention on the behaviour of the directors in the period leading up to the winding up, and to ensure that they dealt responsibly with creditors when the company was in difficulties.

In *Re Squash Ireland Ltd*,[16] however, the Supreme Court took a different view. McGuinness J., delivering the only judgment of the court, stated that she considered that the court should look at the entire tenure of the director and not simply at the few months in the run up to liquidation. It is significant to note that on the facts of the cases, the approach taken by the court favoured the directors in each case, which is perhaps indicative of a general trend in section 150 applications to favour the director where there is any uncertainty.

Acting Dishonestly

To date, there have been few cases in which a finding of dishonesty has been made against a director. One such case was *Re Outdoor Advertising Services Ltd.*[17] Here, during the period leading up to its insolvency the company made payments to non-creditors which benefited its directors. Costello P held that the directors had not acted honestly as they had consciously and deliberately sought to benefit themselves at the expense of the company's creditors.

Acting Responsibly

In contrast, the question as to whether a director had acted responsibly has been at the heart of many of the recorded decisions under section 150. In *Re Squash (Ireland) Ltd*, the only Supreme Court decision considering the section, McGuinness J emphasised that the question as to whether the directors had acted responsibly was one which must be judged by an objective standard. She continued (at p.6):

> "In the case of all companies which have become insolvent it is likely that some criticisms of the directors may be made. Commercial errors may have occurred; misjudgements may well have been made; but to categorise conduct as irresponsible I feel that one must go further than this."

McGuinness J adopted the five criteria set out by Shanley J in *La Moselle Clothing Ltd v Souhali*[18] to be examined to determine whether a director acted responsibly. These are:

(i) the extent to which a director has complied with the obligations imposed by the Companies Acts;
(ii) the extent to which the director's conduct could be regarded as so incompetent as to amount to irresponsibility;
(iii) the extent of the director's responsibility for the insolvency of the company;
(iv) the extent of the director's responsibility for the net deficiency in the assets of the company disclosed at the date of the winding-up or thereafter; and
(v) the extent to which the director displayed "a lack of commercial probity or want of proper standards".

In *Re Squash Ireland Ltd*, McGuinness . quoted a passage from the judgment of Browne-Wilkinson V.-C. in *Re Lo-Line Ltd*,[19] which had also been quoted by Shanley J in *La Moselle*. *Re Lo-Line Ltd* concerned an application under the English Company

Directors Disqualification Act 1986 to disqualify a director on the basis that he was unfit to be a director. In considering the issue, Browne Wilkinson V.C. stated (at pp.485-6):

> "What is the proper approach to deciding whether someone is unfit to be a director? The approach adopted in all the cases to which I have been referred is broadly the same. The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past record as directors of insolvent companies has shown them to be a danger to creditors and others.... Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

In *La Moselle*, Shanley J restricted a director who had traded at a time when he knew the companies were insolvent and had used money due to creditors to finance his trading activities and his travel. His travel had involved trips, in one year alone when he knew the company was insolvent, to Bangkok, Ho Chi Minh City, Hanoi, Hong Kong, Seoul, Taiwan, San Francisco, Shanghai, Boston, Jamaica, Paris, New York, London and San Tropez. There was no evidence of any sales or purchases for the companies, which were involved in the clothing business, resulting from these trips. In addition to the cost of these trips, he drew significant funds from the companies: for example over £100,000 in one year at a time where cashflow was negative. Debts of associated companies were discharged without any apparent reason or justification. What Shanley J described as a "cavalier" approach had been taken to the books and records of one of the companies. The director had filed an inaccurate statement of affairs.

Books and Records

The maintenance of books and records is one of the main issues looked at by the courts in considering responsibility. In *Re Costello Doors Ltd*,[20] Murphy J stated that the maintenance of proper books and records, in such a form so as to enable directors to make reasonable commercial decisions, and the employment of appropriate experts went a long way towards proving that a director had acted reasonably. The fact that there had been a failure to fully comply with the statutory requirement to write up books was not considered by him to be irresponsible in the circumstances. He also suggested that where a director was a substantial investor in a company and had lost money, it was less likely that he would be restricted.

In *Re Gasco Ltd*, McCracken J emphasised the importance of keeping proper books and records in respect of the last few months of a company in serious financial difficulties, if only for the purpose of collecting in as many debts as possible.

Responsibility in Context of Delegation

In *Re Vehicle Imports Ltd*, Murphy J considered the responsibilities of a director where delegation takes place. Referring to the decision of the English Court of Appeal in *Barings*,[21] he accepted that a degree of delegation was almost always essential if a company's business was to be carried out efficiently and that there was a clear public interest in delegation. However, once delegation had taken place, a director still retained a residual duty of supervision and control and had a duty to acquire a sufficient knowledge and understanding of the company's business to enable him to discharge his duties. Murphy J considered it appropriate to restrict a director notwithstanding the fact that he had attempted to delegate the responsibility for the maintenance of books and records.

In *Re Gasco Ltd*, McCracken J stated that when considering the application of section 150 to individual directors, regard must be had to the area of management in the company for which that director was personally responsible. This did not mean that he could disclaim responsibility altogether on the basis that financial matters, for example, were the responsibility of another director, but nevertheless a matter to be considered was whether his reliance on the actions of another director was itself responsible. A director who relied on his co-directors "with an optimism that was certainly not justified, but which perhaps was understandable" was held to have acted honestly and responsibly.

Directors with Limited Involvement

Restrictions can be imposed on directors notwithstanding their limited involvement in a company. In *Re Costello Doors Ltd*, Murphy ., echoing the dictum of Carroll J in *Re Hunting Lodges*,[22] stated that he did not accept that anybody who agreed to act as a director of a company could be excused from acting responsibly merely because he or she was a friend, relative or spouse of the proprietor of the company and accepted the office to facilitate the proprietor without being prepared to involve himself or herself in any aspect of the management of the company.

However, courts have in practice been more lenient to those who become directors in such circumstances. In *Re Vehicle Imports Ltd*, Murphy . declined to make a restriction order against a director who was the wife of the principal director, who had taken no part in the management of the company or in relation to the maintenance of the company's records. While he emphasised that non-executive directors have duties, he noted that the wife had opposed the increased borrowing of the company. The liquidator of the company had, however, received no books of account or other company records. In such circumstances, in particular as the court pointed out that the responsibility to keep books is a joint and separate liability on each of the directors, it is arguable that the court was unduly lenient.

Similarly, in *Re Ford Security Ltd*, a director had been appointed to a company because at the time she was in a personal relationship with the other director. When that relationship ceased, her involvement in the company ceased. She did not, however, resign as a director. The company went into liquidation in the following year. Laffoy J did not impose a restriction order, on the basis that she had no involvement in the final year of the company's existence. While she had not filed a statement of affairs, no serious issue had been taken on this by the liquidator.

(v) "Just and Equitable"

In *La Moselle*, Shanley J noted that acting "honestly and responsibly" related to the conduct of the affairs of the company and arguably bore no relation to any period after the commencement of the winding-up or receivership of a particular company where the director may not be involved any further in the conduct of the affairs of the company. He noted, however, that a director seeking to prevent a restriction order was also obliged to satisfy the court that there was no other reason why it would be just and equitable to restrict him. He

considered that this allowed the court to take into account any relevant conduct of the director after the commencement of the winding-up, for example any failure to co-operate with the liquidator.

The importance of co-operation with the liquidator is best illustrated by Carroll J's judgment in *Re Dunleckney Ltd.*[23] Here, the company had been wound up in October 1991, only two months after Part VII of the 1990 Act came into operation. Carroll J considered that she was precluded from taking into account actions of the director prior to the date when Part VII came into operation as it did not have any retrospective effect. While the director in question did not act at all in relation to the affairs of the company after section 150 came into operation, she noted that he had failed to file a statement of affairs, as required by statute, and had failed to give any explanation for this failure. She considered this failure, of itself, to be sufficient to justify the imposition of the restriction.

(vi) Relief from Restriction: Section 152

Section 152 of the 1990 Act provides that a person who has been restricted under section 150 may, within twelve months of the making of the order, apply to the High Court for relief, in whole or in part, against the restrictions. The court may, if it deems it just and equitable, grant such relief on whatever terms and conditions it sees fit.

A director so applying must give a liquidator at least fourteen days' notice of his intention to make the application. On receipt of this notice, the liquidator must notify any creditors or contributories of the application.

Robinson v. Forrest[24] is the only recorded case considering section 152. The apparent infrequency with which the section is used may stem from the fact that the application for relief must be made within one year of the making of the original order. This limitation appears to be slightly anomalous: if any limitation were to be placed on the time at which such an application were made, it would seem more appropriate to preclude a party from bringing a section 152 application in the first part of the restriction period, rather than to require him to do so.

In *Robinson v. Forrest*, the applicant had paid a sum of over £200,000 to reduce the company's liabilities to its creditors. He had also started another company which was trading successfully and which employed a number of other people. The application was, however, resisted by the Revenue Commissioners. They argued that as a matter of policy, any restrictions imposed on a director should operate for a minimum period of two and a half years and that all of the debts of the company should be discharged before any relief was granted. It is perhaps difficult to reconcile the first point with the requirement that the application be brought within twelve months.

Laffoy J granted the relief sought. She considered that the case was an exceptional one, which fell to be determined on its own peculiar facts. She noted that the application arose following the compromise of substantive proceedings before the late Shanley J and that Shanley J, who had knowledge of the issues of law and fact arising, had seen fit to put a stay on the order under section 150 for six months and to entertain the section 152 application within that six month period. She also considered that the applicant had learnt an expensive lesson from his involvement with the company and that, accordingly, the deterrent value of the restriction would not be undermined if the restriction were lifted.

Laffoy J also held that as a matter of practice, in all section152 applications the liquidator should personally swear an affidavit that he has notified all creditors and contributories of the company known to him of the receipt of the section 152 application and of its return date.

(vii) Role of the Director of Corporate Enforcement

As previously stated, section 56 of the 2001 Act introduces a requirement on the liquidator of an insolvent company to report to the Director of Corporate Enforcement. It provides:

"(1) A liquidator of an insolvent company shall, within six months after his or her appointment or the commencement of this section, whichever is the later, and at intervals as required by the Director thereafter, provide to the Director a report in the prescribed form.

(2) A liquidator of an insolvent company shall, not earlier than three months nor later than five months (or such later time as the court may allow and advises the Director) after the date on which he or she has provided to the Director a report under subsection (1), apply to the court for the restriction under section 150 of the Act of 1990 of each of the directors of the company, unless the Director has relieved the liquidator of the obligation to make such an application.

(3) A liquidator who fails to comply with subsection (1) or (2) is guilty of an offence."

The Director has published a consultation paper on his liquidation related functions, which focuses in particular on section 56. Having regard to the amount of insolvent liquidations currently in being (approx. 2,000) and to the fact that approximately 400 new insolvent liquidations are initiated every year, the Director has proposed that section 56 be commenced on a phased basis. On 1 June 2002 the section would apply to all new liquidations and to all ongoing liquidations where the liquidator was appointed from 1 July 2001 onwards. Provisionally the section would be extended on the 1 December 2002, to include ongoing liquidations commenced between 1 July 2000 and 30 June 2001 and further extended on the 1 June 2003 to cover ongoing liquidations commenced between 1 July 1998 and 30 June 2000. The consultation paper emphasises that it will be necessary to obtain practical experience in examining such reports before ascertaining whether such a workload is manageable.

A liquidation is considered by the Director to be ongoing unless, in the case of a court liquidation, the court has made final orders in relation to the company or, in the case of a creditors' voluntary liquidation, final meetings of creditors and members have taken place.

It should be noted that under section 56, a liquidator is required to submit a report even where the restriction application has already been made and is, in theory, required to make a section 150 application after submission of each report, although in practice the Director will only require one such application.

The liquidator must wait at least three months after the submission of his report before proceeding with a section 150

application. During this period, it is envisaged that the Director will evaluate the report and take a decision on whether a restriction application is required. The liquidator must, however, apply for a restriction order within five months of the submission of the report, unless he is relieved by the Director, although the High Court may allow additional time for the making of the application.

The consultation paper makes it clear that where there are insufficient funds in a liquidation, the Director will not subsidise the liquidator's costs. Accordingly, the liquidator required to bring an application will have to hope that it is successful and that the High Court will make an order under section 150(4B) requiring the restricted person to bear the costs of the application and the liquidator's costs of investigation.

According to the Director, the purpose of the section 56 report is to distinguish circumstances of honest and responsible business failure from those where the directors knew or ought to have known that the company was insolvent or otherwise conducted the affairs of the company contrary to interests of its creditors. The draft report form which is exhibited to the consultation paper is in seven sections which are: liquidator details; company details; company directors/shadow directors; statement of affairs, accounts and report to creditors; proceedings; final report and valuation of report.

The details sought include a statement of the company's financial position, a commentary on the likely outcome of the liquidation and details of the creditors. The report will focus on the company directors and their running of the company, with a special focus on the indicators of improper conduct by one or more of the directors.

On receipt of the section 56 report, it may be evident that substantial further work is required on the part of the liquidator, before he is in a position to make a section 150 application. The consultation paper states that the Director will consider a *bona fide* request from a liquidator to be exempted from section 56 to be afforded additional time to conclude his examination of the conduct of the company directors and, in appropriate cases, to prepare properly for a restriction application. In many cases, a period of longer than six months would be required to enable a liquidator to form a view of the directors' conduct, in particular where, for example, a shadow director is involved.

The additional time period is to be welcomed, in particular in complex liquidations. However, it would be preferable if a liquidator were to be given the facility to postpone the making of the section 150 application if he required the co-operation of the directors for the conduct of the liquidation (for example, in relation to actions against debtors). Naturally, it would be necessary that any postponement would not be for an unduly long period, having regard to the *Duignan v. Carway (No. 1)* judgment.

Once he receives the report, it is possible that the Director's staff will make contact with the liquidator to clarify matters in the report. The Director intends that he will advise a liquidator of whether he is to be relieved of his obligation to apply for a restriction within four months and, in 90% of the cases, within three months. Only time will tell whether these time limits are over-ambitious but they seem to be rather short.

The consultation paper lists various circumstances where the liquidator is unlikely to be relieved of his obligations. These include:

(i) a suspected breach of the Companies Acts, including any failure to keep proper books of account;
(ii) where the director has placed his own interests ahead of that of the company, for example by discharging debts which he had personally guaranteed;
(iii) where the director has misapplied company property;
(iv) where the company has continued trading when it was insolvent and the director knew or ought to have known this;
(v) where there is evidence of "Phoenix syndrome" practices;
(vi) where the director has failed to co-operate with the liquidator.

The Director will also be unlikely to grant relief where there is not unequivocal evidence that the directors of the company have acted honestly and responsibly. He will consider relieving liquidators of the obligation to apply where the liquidator makes a clear and unambiguous statement, justified by reliable evidence, to the effect that the director has acted honestly and responsibly. It is not clear from the consultation paper whether the Director will *require* such a statement before relieving a liquidator of his obligation. While the draft report form asks the liquidator whether the directors acted honestly and responsibly, it is likely that in a significant portion of cases, a liquidator will not be in a position to give an unequivocal answer.

The Director considers that he is under no obligation to accept the liquidator's opinion or to be represented in court if he does not accept it. He considers that he may have cause to address the court on the merits of the restriction application in a minority of cases, such as where he is in possession of information relating to the director which did not form part of the section 56 report, where he wishes to endorse the liquidator's submissions in an important case or where he considers that orders additional to restriction may be warranted. To cover such situations, the Director is considering that he be made a notice party to all proceedings initiated pursuant to a section 56 report.

It is certainly arguable that it would be preferable if the Director were to take over the obligation of bringing the section 150 application, in particular as any additional costs which are not met by the director will eventually be borne indirectly by the creditors of the company, who will have already suffered as a result of the liquidation. In this regard, the views of the Company Law Review Group as to whether a state funded public interest liquidation service should be established, an issue which the Group will consider in its second report, are awaited with interest.

Disqualification of Directors

Section 160(1) of the 1990 Act provides for automatic disqualification from acting as an auditor, director, other officer, receiver, liquidator or examiner, where a person is convicted on indictment of any indictable offence in relation to a company or involving fraud or dishonesty, for a period of five years or such other period as the court may order.

Section 160(2) gives the court a discretion to disqualify a person where it is satisfied that:

(a) the person, while acting as a promoter, officer, auditor, receiver, liquidator or examiner of a company, has been guilty of any fraud in relation to the company;

(b) such person has been guilty of breach of duty;
(c) the person has been made liable for reckless trading;
(d) the conduct of the person while acting as a promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company;
(e) in consequence of an inspectors' report, the conduct of any person makes him unfit to be concerned in the management of a company;
(f) a person has been persistently in default in relation to any provision of the Companies Acts relating to the filing or delivery of documents.

In relation to the latter, the fact that a person has been persistently in default may be conclusively proved by showing that in the preceding five years, he has been guilty of at least three defaults (i.e. has been convicted or has had a default order made against him).

As with restriction, there are extensive criminal and civil consequences where a director acts in breach of a disqualification order. A person so acting is guilty of an offence under section 161. The existing disqualification order is to be extended for ten years or such other period as the court orders. On the civil side, a company is entitled to recover any remuneration or other consideration paid to the director. The director may also be made personally liable for the company's debts in certain circumstances.

Test for Disqualification

In *Business Communications v Baxter,*[25] Murphy J considered that section 160(2)(d) perhaps typified the grounds for disqualification, namely that a person's conduct made him unfit to be concerned in the management of a company. He stated that it was the comprehensive nature of a disqualification order which was seen as constituting an appropriately severe sentence for conduct manifestly more blameworthy than merely failing to exercise an appropriate degree of responsibility in relation to an insolvent company in liquidation, of which the person was a director. This statement was adopted by the High Court (Smyth J) in *Re CB Readymix Ltd.*[26]

In *Re Newcastle Timber Ltd*[27] McCracken J considered the distinction between restriction and disqualification. The company in question had failed to make companies office returns, had traded while insolvent for some four years and, after it ceased to trade, had paid off trade creditors in priority to the Revenue. McCracken J considered that two questions were appropriate, having regard to the wording of section 160(2): first, whether the actions of the directors were a breach of duty or made them unfit to be concerned in the management of the company and secondly whether, if so, he should exercise his discretion by making an order.

McCracken J referred to the *Lo-Line Motors Ltd* case (which made reference to the conduct displaying a lack of commercial probity), which he considered to set out the appropriate approach in both section 150 and section 160 cases. He had little doubt that the directors had acted incompetently and irresponsibly. However, he was not satisfied that the directors were so much in breach of their duties that they were unfit to be concerned of the management of a company, particularly in view of the undoubted discretion which he had. He was also influenced by the fact that one of the directors had subsequently been intimately concerned in the management of another company, which appeared to be trading successfully and was complying with its Revenue obligations. However, he considered the irresponsibility to be sufficient as to merit restriction, having regard in particular to the fact that the company traded insolvently for four years.

In *CB Readymix Ltd.* the High Court and on appeal the Supreme Court saw fit to disqualify a liquidator who had failed to act in an impartial manner, had destroyed the books and records of the company and had failed to act in the interests of the creditors, in particular the Revenue. The liquidator, who had never in fact been validly appointed, had engaged in what he styled a battle with the Revenue authorities which he considered necessary to preserve the employment of the employees of the company. Smyth J considered that the respondent's conduct indicated that he could not be trusted to act as a liquidator, receiver or examiner in such a way as not to be a risk to creditors. Both the High Court and Supreme Court quoted Browne Wilkinson V-C's statement in *Lo-Line Motors Ltd* with approval, the Supreme Court stating that it was a correct statement of the law and represented a proper approach to the application and interpretation of section 160.

In addition to disqualifying the respondent from acting as a liquidator, receiver or examiner, Smyth J allowed him to act as an auditor, director or secretary of a company only on conditions: that he have any necessary professional qualifications, that he should not have possession of books and records and that the companies in question provide for a board of directors of at least three people. This conditional order was upheld by the Supreme Court by reference to section 160(8) which allows a court to grant relief to a person subject to a disqualification order in whole or in part.

It is significant that Browne Wilkinson V-C's statement in *Lo-Line Motors Ltd*, which is employed in England when considering whether a director's conduct is such that he should be disqualified, is employed in this jurisdiction in order to consider whether a director should be restricted and whether a director should be disqualified. While McCracken J distinguished between the two sanctions in *Re Newcastle Timber Ltd*, it is arguable that an adequate distinction is not made between the two sanctions and that, accordingly, the sanction of restriction is applied in many cases in this jurisdiction where disqualification might be more appropriate. For example, it would seem that the various wrongdoings of the director in the *La Moselle* case were of such cumulative gravity so as to make him unfit to be a director.

"It is arguable that Irish legislation is at the same time both too lenient and too strict on directors. On the one hand, the fact that an honest director may subsequently have to justify his actions before the High Court in order to avoid restriction could lead him to act in an unduly defensive fashion, thereby discouraging genuine entrepreneurship and risk-taking. On the other hand, the more limited sanction of restriction has been imposed on certain directors who would seen to have been unfit to hold office."

There are numerous examples of English directors being disqualified for unfitness for the sort of conduct which would lead their Irish equivalent to be at most restricted: for example, non-executive directors who were totally inactive and failed to carry out the functions expected of them have been disqualified in England.[28] Similarly, English directors have been disqualified for persistent breaches of statutory obligations, such as the failure to submit annual accounts.[29] Statistically, it would appear that more people are disqualified annually per head of population in the U.K. than are restricted in this jurisdiction.[30]

Period of Disqualification

Under section 160(2), the court has the power to make a disqualification order against a person "for such period as it sees fit." In *CB Readymix* the High Court made use of the scales suggested by the English Court of Appeal in *Re Sevenoaks Stationers (Retail) Ltd.*[31] The analogous English provisions considered in that case allow for a minimum period of disqualification of two years and a maximum period of fifteen years. The Court of Appeal endorsed the division of the potential fifteen year disqualification period into three brackets:

(i) the top bracket (over 10 years) should be reserved for particularly serious cases. These may include cases where a director who already had one period of disqualification imposed on him fell to be disqualified yet again.
(ii) the minimum bracket (2 to 5 years) should be applied where, although disqualification was mandatory, the case was, relatively, not very serious.
(iii) the middle bracket (6 to 10 years) should apply for serious cases which do not merit the top bracket.

Conclusion

In conclusion, it is likely that in the coming years there will be an increase in the number of restriction applications brought before the courts. Perhaps the biggest imponderable at this stage is the proportion of cases in which the Director will absolve liquidators from bringing a section 150 application.

It is arguable that Irish legislation is at the same time both too lenient and too strict on directors. On the one hand, the fact that an honest director may subsequently have to justify his actions before the High Court in order to avoid restriction could lead him to act in an unduly defensive fashion, thereby discouraging genuine entrepreneurship and risk-taking. On the other hand, the more limited sanction of restriction has been imposed on certain directors who would seem to have been unfit to hold office. It is ironic that while restriction was introduced to combat the "Phoenix syndrome", individuals engaging in that practice would generally seem to be unfit to be directors and hence merit disqualification.

Perhaps a shift to the UK system, where disqualification is the only sanction but is imposed on unfit directors in a more systematic fashion, would benefit our business culture.●

* This article is based upon the author's contribution to the Bar Council Conference on Company Law Enforcement, 27 April 2002

1. See Forde, *Company Law*, (3rd ed., 1999) at p.144
2. See Company Law Review Group, First Report, 2001, Chapter 11
3. E.g., s.184, Companies Act, 1963
4. "The Liquidation-Related Functions of the Director of Corporate Enforcement", Office of the Director of Corporate Enforcement Consultation Paper C/2002/3.
5. [1996] 3 IR 300
6. High Court, Murphy J., unreported, 23 November 2000
7. High Court, McCracken J., unreported, 5 February 2001
8. High Court, McCracken J., unreported, 23 January 2002
9. At page 3 of the judgment.
10. High Court, Murphy J., unreported, 26 April, 1996
11. Which provides that save as is otherwise provided in the Rules, proceedings should be instituted by summons
12. See, for example, *Re Cavan Crystal Group Ltd.*, *Re Ford Services Ltd.* (High Court, Laffoy J., unreported, 24 February, 2000)
13. High Court, O'Donovan J., unreported, 27 July, 2000; Supreme Court, unreported, 31 July, 2001
14. *Carway v. A.G.*, referred to *supra.*
15. [2001] 1 IR 103
16. Supreme Court, unreported, 8 February, 2001
17. High Court, Costello P, unreported, 28 January. 1997
18. [1998] 2 ILRM 345
19. [1988] Ch 477
20. High Court, Murphy J., unreported, 21 July 1995
21. *Re Barings plc; Secretary of State for Trade & Industry v. Baker* [1999] 1 BCLC 433
22. [1985] ILRM 75
23. High Court, Carroll J., unreported, 18 February 1999
24. [1999] 1 IR 426
25. High Court, Murphy J, unreported, 21 July, 1995
26. High Court, Smyth J, unreported, 20 July 2001; Supreme Court, unreported, 1 March 2002
27. High Court, McCracken J., unreported, 16 October 2001
28. see *Re Kaytech International Plc* [1999] 2 BCLC 351; *Re Galeforce Pleating Co Ltd* [1999] 2 BCLC 704
29. see, for example, *Secretary of State for Trade and Industry v. Ettinger* [1993] BCLC 896
30. As of 31st December 2000, 113 people were restricted and 4 disqualified in this jurisdiction (Department of Enterprise, Trade and Employment Companies Report 2000). In contrast, in the U.K. in the year ending 31st March 1999 alone, 1,489 people were disqualified.
31. [1991] Ch 164

HUMAN RIGHTS COMMISSIONS: NORTH & SOUTH COMPARED

Mary Johnson, of the Office of the Attorney General, undertakes a brief comparative analysis of the powers and of the work to date of the human rights commissions respectively established by the Human Rights Commission Act 2001 and the Northern Ireland Act 1998.*

As part of the Belfast (Good Friday) Agreement the Governments of the United Kingdom and Ireland made a number of significant commitments to the protection of human rights. Under the section entitled 'Rights, Safeguards and Equality of Opportunity' the parties affirmed their commitment to "the mutual respect, the civil rights and the religious liberties of everyone in the community."[1] Among other obligations, the British Government agreed to complete the incorporation into Northern Ireland law of the European Convention on Human Rights[2] and to establish a Northern Ireland Human Rights Commission ("the NIHRC").[3] The Irish Government committed itself to taking comparable steps that would "ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland."[4]

Consequently two statutes proposing to establish a Human Rights Commission, one in Northern Ireland and the other in this jurisdiction, owe their existence to the Belfast (Good Friday) Agreement. The Northern Ireland Act 1998[5] makes provision for the NIHRC which was officially launched on 1 March 1999. Progress in this jurisdiction has been conspicuously slower. The Human Rights Commission Act 2000[6] provided for the establishment of the Human Rights Commission ("the Commission"). However, owing to controversy surrounding the manner in which initial members of the Commission were appointed, that Act was subsequently amended by the Human Rights Commission (Amendment) Act 2001 whose sole purpose was to increase both the number of members of the Commission[7] and the corresponding ratio of men to women.[8] While Mr. Justice Donal Barrington[9] was appointed president-designate in July 2000, the Commission is not yet operational. In this respect developments in this State considerably lag behind what has been achieved to date by the NIHRC. Nevertheless, as Ireland is about to join the ranks of states such as France, Canada, Australia, New Zealand, Indonesia, South Africa and Sri Lanka (all of whom have Human Rights Commissions), it might be instructive to review the powers conferred on the Commission, particularly as they compare to those of the NIHRC.

In general terms, the Act of 1998 and the Act of 2000 contain broadly similar provisions. This is especially the case in relation to those sections[9] that define the functions of the respective Commissions as, *inter alia*, keeping "under review the adequacy and effectiveness....of law and practice...relating to the protection of human rights." This wording is drawn directly from the text of the Agreement.[10] The Act of 1998 uniquely makes express reference[11] to providing "advice of the kind referred to in paragraph 4 of the Human Rights section of the Belfast Agreement." This section invites the NIHRC to "consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience." The Human Rights Act 1998, which incorporated the Convention into the law of all parts of the United Kingdom, was commenced on 2 October 2000. Again, the pace of progress has been markedly slower in this jurisdiction : the European Convention on Human Rights Bill 2001 which proposes to give domestic effect to the Convention (subject to the Constitution) was referred by the Dail to Select Committee on 14 June 2001 where it still remains. The Bill will now take its place in the queue already forming for the next administration's legislative programme.

Additionally, each Commission[12] is empowered to participate in the joint committee expressly contemplated by paragraph 10 of the Human Rights section of the Good Friday Agreement. This paragraph envisages "a joint committee of representatives of the two Commissions as a forum for consideration of human rights issues on the island of Ireland" and "the possibility of

establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland."

Both statutes include standard provisions in relation to the relevant Commission itself; staff, accounts, audits and annual reports. Each Commission is required to make recommendations for improving its effectiveness and that of the functions conferred on it within two years of its establishment.[13]

Both Commissions are empowered to conduct investigations[14] or enquiries[15] for the purpose of performing the functions conferred on them. In this regard the Act of 2000 contains more detailed provisions with the result that the Commission may well prove to have sharper teeth than its Northern equivalent. For example, the Commission has power to compel the attendance of witnesses and the production of documents,[16] and failure to attend or to furnish the required information may result in an application for a Circuit Court order requiring that the person in question comply[17] or may result in prosecution for a criminal offence.[18] The inclusion of such enforcement measures not only ensures that the legislation complies fully with the Paris Principles[19] but also lends the work of the Commission an authority and credibility beyond the merely aspirational.

Virtually identical provisions[20] enable the two Commissions to grant assistance in the form of legal advice, legal representation or other appropriate assistance. One significant innovation of the Act of 2000 is the function contained in section 8(h) which expressly empowers the Commission to apply for liberty to appear as *amicus curiae* in proceedings before the High Court or the Supreme Court. No similar provision was included in relation to the NIHRC with the result that, when the NIHRC attempted to intervene in the Omagh bomb inquest, the coroner refused to recognise its *locus standi*. Judicial review of this refusal was unsuccessful both at first instance and in the Court of Appeal. That decision was made notwithstanding the intervention of the Northern Ireland Office to the effect that it had always been the intention of government to give the NIHRC the status denied it by the coroner. This matter was heard by the House of Lords on 11 March 2002 when judgment was reserved.

The NIHRC Annual Report 1999-2000 details work in (among others) the areas of education, casework, legislation and a Bill of Rights for Northern Ireland. At this stage one can only speculate that the priorities of the Irish Commission might include the areas of the criminal justice system, civil legal aid, refugees and asylum seekers, prisoners and mental health detention together with the burgeoning area of social and economic rights. It remains to be seen whether the effective exercise by the Irish Commission of its powers can yet compensate for the unusual delay of over three years in its establishment.●

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1. Paragraph 1 of the Human Rights section of the Belfast (Good Friday) Agreement.
2. Paragraph 2 of the Human Rights section.
3. Paragraph 5 of the Human Rights section.
4. Paragraph 9 of the Human Rights section.
5. In particular s.s 69, 70 and Schedule 7.
6. No. 9 of 2000.
7. S. 1(a) of No. 35 of 2001.
8. S. 1(b) of No. 35 of 2001.
9. Mr. Justice Barrington resigned on health grounds in April 2002. In the almost two years during which he presided over the commission no establishment day was appointed by the Minister for Justice, Equality and Law Reform.
10. S. 69(1) of Act of 1998 and s.8(a) of the Act of 2000.
11. Paragraph 5 of the Human Rights section.
12. S. 69(7).
13. S. 69(10) of Act of 1998 and s.8(i) of the Act of 2000,
14. S. 69(2) of Act of 1998 and s. 24 of Act of 2000.
15. S. 69(8) of Act of 1998.
16. S. 9(1) of Act of 2000.
17. S. 9(6) of Act of 2000.
18. S. 9(10) of Act of 2000.
19. S. 9(17) of Act of 2000,
20. The Paris Principles derive from the First International Workshop on National Institutions for the Promotion and Protection of Human Rights, organised by the UN's Commission on Human Rights in Paris in October 1991 and subsequently endorsed by the UN's Commission on Human Rights and the UN's General Assembly. They encapsulate the characteristics that the UN considers necessary for the effective discharge of the functions of national institutions for the protection of human rights.
21. S. 70 of Act of 1998 and s. 10 of Act of 2000.

THE LAW OF WORKPLACE STRESS, BULLYING AND HARASSMENT

In the Concluding part of a two part article,
Wesley Farrell, B.C.L., A.C.I.Arb., B.L. *examines the comparative case law on the common law duty of care owed by employers to employees to avoid injury from bullying and other forms of extreme stress.*

Development of Stress at Work Case Law (continued)

In the first English case of importance regarding work-related stress, *Johnstone v Bloomsbury Health Authority*,[1] a doctor who was a senior house officer sought a declaration that he could not be required to work for so many hours in excess of his standard working week as would foreseeably injure his health. He alleged that he had been required to work intolerable hours with such deprivation of sleep that his health had been damaged and the safety of his patients put at risk and that he suffered from stress and depression, had been physically sick from exhaustion and had felt suicidal. His contract of employment required him to work forty hours per week and be available for overtime of a further forty-eight hours per week on average. An application was made by the health authority to strike out the claim on the basis that it disclosed no cause of action. The Court of Appeal held that if the pleaded facts were established, the health authority could not require the plaintiff to work so much overtime in any week that his health might reasonably foreseeably be damaged. The case subsequently settled.

In the case of *Petch v Customs and Excise Commissioners*,[2] Mr. Petch who was an assistant secretary in the Civil Service claimed damages for negligence from his employer for causing him to have a mental breakdown in October 1974 because of his working conditions and in particular stress caused by overwork. Following the breakdown he took sick leave and returned to work in January 1975. In June 1975 he was transferred to another department. He was ill again from the end of 1983 and was retired from the Civil Service on medical grounds in January 1986. The Court of Appeal found against Mr. Petch and found that the Defendant's senior management were not negligent as they were not aware, or ought not to have been aware, that in 1974 the Plaintiff was showing signs of an impending breakdown or that his workload carried a real risk of breakdown. It held that the employer had not acted negligently following his return to work; it had made efforts to persuade him to take sick leave and had transferred him to a less stressful job.In *Walker v Northumberland County Council*[3] the plaintiff was a social services officer who was responsible for managing four teams of social services fieldworkers who dealt mainly with childcare. He suffered a nervous breakdown in 1986 because of the stress and pressures of overwork. He was off work for three months and before he returned he requested that the burden of work be decreased. In contrast to his request, when he returned to work he had to deal with the backlog of cases which had built up during his absence in addition to the increasing number of pending childcare cases. Six months later he suffered a second mental breakdown and had to cease working permanently. In February 1988 his employer dismissed him on the grounds of permanent ill health.

Mr Walker claimed that his employer had breached its duty of care to provide him with a safe system of work in that it had failed to take reasonable steps to avoid exposing him to a health-endangering workload which had caused him to suffer two mental breakdowns. Again, as in previous cases, reasonable foreseeability was in issue. Colman J said :

> "It is clear that an employer has a duty to provide his employee with a reasonably safe system of work and to take reasonable steps to protect him from risks which are reasonably foreseeable. Whereas the law on the extent of this duty has developed almost exclusively in cases involving physical injury to the [employee], as distinct from injury to his mental health, there is not logical reason why risk of psychiatric damage should be excluded from the scope of an employer's duty of care...."[4]

Colman J held that prior to the first nervous breakdown it was not reasonably foreseeable that the plaintiff's workload would give rise to a material risk of mental illness. However, Colman J further held that following the first nervous breakdown, the employer should have reasonably foreseen

that if Mr Walker's workload was not decreased there was a risk that he would suffer another nervous breakdown which would probably end his career as area manager. Therefore the local authority was liable in negligence for the second nervous breakdown as it had failed in its duty of care not to cause Mr Walker psychiatric damage by reason of the volume of work he was required to perform.

In another case, *Cross v Highlands and Islands Enterprise*,[5] which has been described as a 'breakthrough decision on stress at work from the Outer Court of Session',[6] Lord MacFayden stated :

> "It seems to me that the common law duty of an employer to take reasonable care for his employee's safety and heath, and to provide and maintain for him a safe system of working, ought to extend to include a duty to take reasonable care not to subject the employee to working conditions that are reasonably foreseeably likely to cause him psychiatric injury or illness. *Walker* is an instance of the acceptance of that view by the court, but it cannot be regarded as conclusive because the issue of principle does not appear to have been argued, and the defence appears to have concentrated instead on foreseeablity as a matter of fact in the circumstances of the case.... If the starting point is instead the broad duty to avoid causing reasonably foreseeable harm generally, foreseeable psychiatric harm and foreseeable physical harm can be seen as two subcategories of the general category of foreseeable harm and, in that event, it seems to me to be reasonable to ask if there is any logical reason for treating the subcategories differently from each other.... The duties owed by an employer to his employee are examples of the duties which arise from the neighbourhood principle enunciated in *Donoghue v Stevenson* [1932] SC (HL) 32. As Lord Atkin said in *Donoghue* (at 44):
>
> > 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.'
>
> I am therefore of opinion that Colman J was justified in approaching the matter in the way in which he did. There may, of course, exist a sound reason for treating the risk of psychiatric injury differently from the risk of physical injury. But unless there is such sound reason, *it is in my view right in principle to treat the risk of psychiatric injury in the same way as the risk of physical injury.*"[7] (Emphasis added)

This decision unequivocally holds that the duty on an employer to take reasonable care for an employee's safety and health, and to provide and maintain a safe system of working, includes a duty not to subject the employee to working conditions which are reasonably foreseeably likely to cause him psychiatric illness or injury.[8]

Lord MacFayden also rejects the argument that liability in respect of psychiatric injury can only arise where the injury takes the form of nervous shock, that is, a sudden assault on the nervous system such as produced by disasters or accidents. Lord MacFayden states :

> "If that submission were sound, it would mean that an employer who knew without doubt that the working conditions in which he required an employee to operate were so stressful that it was objectively likely that, over time, the employee would succumb to psychiatric illness, and who nevertheless continued to subject his employee to those conditions despite growing signs that he was developing such psychiatric illness, would incur no liability for the loss and damage suffered by the employee as a result of developing the psychiatric illness. That would, in my opinion, be a quite unacceptable position for the law to adopt."

The case concerned Mr Cross, a senior training manager, who suffered from anxiety or work-related stress which included feelings of inability to cope with his job, anxiety about the future, difficulty in concentrating and sleep disturbance. He attributed this anxiety to work-related problems which included too great a workload, lack of assistance and inadequate availability of secretarial help. In April 1993 he went to his doctor who certified him unfit for work for a month due to stress. In May 1993, he was signed off for a further month. He was certified fit to return to work in June 1993. When he returned his workload was lightened and he was allocated work of a more operational or procedural nature, rather than work which called for investigation and the preparation of reports. In August 1993 Mr Cross committed suicide and his family sought damages on the grounds that his suicide was caused by work-related stress.

The Court held that the employer was not in breach of its duty to take reasonable care not to expose Mr Cross to working conditions which were reasonably foreseeably likely to subject him to such stress as to be likely to cause him psychiatric injury. It also held that following Mr Cross's return to work the employer exercised reasonable care by reducing his workload. Lord MacFayden held that it was not established at that time, 1993, that a reasonable employer would carry out a risk assessment in relation to the risk of psychiatric harm, either in general or in the particular context of an employee returning to work after illness. Since there have been many publications and guidelines on stress at work since that time such as the HSE's guidelines which emphasise that "stress should be treated like any other health hazard", it is 'strongly arguable that today a reasonable employer would carry out assessments of the risk of injury to their employees of stress at work'.[9]

In the case of *Fraser v The State Hospital Board for Scotland*,[10] Lord Carloway in the Outer House of the Scottish Court of Session reached the same conclusion as Lord MacFayden in *Cross v. Highlands and Islands Enterprise* :

> "It was [the employer's] duty to take reasonable care for the safety of their employees, including the [plaintiff], and to avoid exposing them to unnecessary risk of injury....There is, in short, no reason why the general principle relative to the avoidance of the risk of injury should become restricted to physical injury."

In that case Mr Fraser, who was a staff nurse in a hospital which held criminal offenders, sought compensation for work-related stress injuries caused by the way he was treated by his employer because of his suspension from a Ward, disciplinary procedures, renewed accusations and the infliction of a regime on him which included the restriction of his use of keys which was a special responsibility. Lord Carloway refused him relief on the grounds that his stress injuries were not foreseeable.

In *Garrett v London Borough of Camden*[11] Mr Garrett's appeal was dismissed and the Court of Appeal held that the law had

been applied correctly in that there was nothing to indicate that Mr Garrett was particularly vulnerable to stress and that therefore the risk of injury to Mr Garrett's mental health had not been foreseeable.

In the recent case of *Sutherland v Hatton; Somerset County Council v Barber; Sandwell Metropolitan Borough Council v Jones; Baker Refractories Ltd v Bishop*[12] Hale LJ in the Court of Appeal gave a comprehensive and instructive judgment relating to stress at work and then applied that law to four appeals from different County Courts which were heard together. Hale LJ stated :

> "This type of case has been described as the 'next growth area' in claims for psychiatric illness.... This growth is due to developing understanding in two distinct but inter-related areas of knowledge [psychiatric ill-health and occupational stress]."[13]

Hale J held that claims for psychiatric injury fall into four different categories:

"(1) tortious claims by primary victims: usually those within the foreseeable scope of physical injury, for example, the road accident victim in *Page v Smith* [1996] AC 155; some primary victims may not be at risk of physical harm, but at risk of foreseeable psychiatric harm because the circumstances are akin to those of primary victims in contract (see (3) below);

(2) tortious claims by secondary victims: those outside that zone who suffer as a result of harm to others, for example, the witnesses of the Hillsborough disaster in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310;

(3) contractual claims by primary victims: where the harm is the reasonably foreseeable product of specific breaches of a contractual duty of care towards a victim whose identity is known in advance, for example, the solicitors' clients in *Cook v Swinfen* [1967] 1 WLR 457, CA, *McLoughlin v Grovers* [2001] EWCA Civ 1743, or the employees in *Petch v Commissioners of Customs and Excise* [1993] ICR 789, *Walker v Northumberland County Council* [1995] 1 All ER 737, *Garrett v London Borough of Camden* [2001] EWCA Civ 395, and in all the cases before us;

(4) contractual claims by secondary victims: where the harm is suffered as a result of harm to others, in the same way as secondary victims in tort, but there is also a contractual relationship with the defendant, as with the police officers in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455."[14]

The Court of Appeal sets out sixteen practical propositions for the guidance of courts concerned with this type of claim which can be divided into five categories: Duty, Foreseeability, Breach of Duty, Causation, Apportionment and Quantification.

Duty

(1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do. The ordinary principles of employer's liability apply.

Foreseeability

(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors).

(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.

(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.

(5) Factors likely to be relevant in answering the threshold question include:

(a) The nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department?

(b) Signs from the employee of impending harm to health. Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?

(6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisers.

(7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.

Breach of Duty

(8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.

(9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of

other employees and the need to treat them fairly, for example, in any redistribution of duties.

(10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this.

(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.

(12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.

(13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care.

Causation

(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.

Apportionment and Quantification

(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.

(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event."[15]

Turning to the particular facts of the four appeals, Mrs Hatton claimed injuries arising from stress at work as a teacher. Her award of £90,765.83 was overturned in the Court of Appeal as it held that :

> "Her workload and her pattern of absence taken together could not amount to a sufficiently clear indication that she was likely to suffer from psychiatric injury as a result of stress at work such as to trigger a duty to do more than was in fact done.... Hence the claim must fail at the first threshold of foreseeability."[16]

Mr Barber also claimed injuries arising from stress at work as a teacher. His award of £101,041.59 was overturned by the Court of Appeal as it held that :

> "This was a classic case in which it is essential to consider at what point the school's duty to take some action was triggered, what that action should have been, and whether it would have done some good.... But in our view the evidence, taken at its highest, does not sustain a finding that they were in breach of their duty of care towards him."[17]

Mr Bishop claimed injuries arising from stress at work as a result of new shift patterns and a requirement to carry out a greater number of tasks in relation to mixer cleaning and graphite blowing. His award of £7,000 was overturned by the Court of Appeal as it held that :

> "There was nothing unusual, excessive or unreasonable about the demands which were being placed upon Mr Bishop by his work.... The employer could not be in breach of duty for failing to dismiss an employee who wanted to continue and master the job despite the advice given to him by his own doctor"[18]

Mrs Jones was an administrative assistant at a local authority training centre who claimed for work-related stress injuries. The personnel officer stated that they knew that it was a gamble to expect one person to do the work of two to three. The Court of Appeal affirmed the award of £157,541 and stated :

> "This was not a case like Mr Barber's where everyone was over-worked and under pressure, but one where the job itself made unreasonable demands upon an employee in a comparatively junior grade, and the management response to her complaints was itself unreasonable.... Unlike the other cases before us, this was one such as was envisaged by Lord Slynn in Waters v Commissioner of Police of the Metropolis [2000] 4 All ER 934, at 938c, where the employer knew that the employee was being badly treated by another employee and could have done something to prevent it."[19]

The attitude of the Court of Appeal in relation to the appropriate quantum of damages in cases concerning work-related stress injuries is uncertain :

> "There was no challenge to the quantification of damages in this case. We have not therefore been able to consider whether any of the matters discussed earlier in this judgment might have led to any modification of the award. Our conclusion on liability should not be taken as any indication of our view on the appropriate measure of damages in this or any other such case."[20]

Stress at Work Caselaw in Ireland

In Ireland, case law on the subject of work-related stress injuries has developed since 1987 with the Supreme Court decision of *Sullivan v. The Southern Health Board.*[21] The plaintiff was a medical consultant employed by the defendant and claimed that he was overworked because there was not another permanent medical consultant working with him as there had been when he began his employment. It was held that the plaintiff was entitled to be compensated "for the stress and anxiety caused to him in both his professional and domestic life by the persistent failure of the Board to remedy his legitimate complaints."[22]

Bullying, intimidation and harassment were alleged by an employee, who was head of security, in the Labour Court case of *Saehan Media Ireland Ltd. v. A Worker.*[23] The reference was pursuant to section 20(1) of the Industrial Relations Act 1969 where there is an investigation of a dispute by the Labour Court at the request of the parties. The Labour Court held that the incidents in themselves did not amount to bullying as that term is generally understood. However, it held that the claimant was suffering from work-related stress and that even though details of what was considered to be the cause of this condition were brought to the attention of the employer through the appropriate procedure, it failed to respond adequately to those complaints. The Court stated that '[w]ork related stress is

recognised as a health and safety issue and employers have an obligation to deal with instances of its occurrence which are brought to their attention."[24] Compensation in the sum of £500 was recommended as the company's failure to respond to the complaints may have exacerbated the employee's condition.

In the case of *Curran v. Cadbury (Ireland) Ltd*,[25]which concerned nervous shock, the statement of McMahon J with regard to *Walker v. Northumberland County Council* is of note in accepting that '[t]here is no reason to suspect that our courts would not follow this line of authority if it came before the courts in this jurisdiction.'[26]

In *McGrath v Minister for Justice and the Attorney General*,[27] Mr McGrath, a member of the Garda Siochana, was awarded compensation by Morris J which included compensation of £40,000 for the stress and anxiety and general disruption to his enjoyment of life. This stress occurred following his suspension on grounds that he was accused of criminal embezzlement, of which he was found not guilty, because the suspension continued for a time period which was longer than that within which it would have been reasonably practicable to have held a full hearing into the suspension.

In *Kerwin v. Aughinish Alumina*,[28] O'Neill J. awarded the plaintiff, who was a welder, compensation of which £50,000 was for stress and health problems he had suffered as a result of intimidation which centred around his supervisors. The case of *Quinn v Servier Laboratories (Ireland) Ltd*,[29], which concerned a claim for work-related stress injuries, is reported to have settled without an admission of liability in 1999 for a sum in the region of £200,000. The plaintiff was a salesman who had suffered two nervous breakdowns in 1994 due to work overload.

Another case which settled was that of *McGlade v County Mayo Radio Ltd* trading as Mid West Radio[30] in which a former radio station manager had claimed that he was bullied, harassed and intimidated by the station's chief executive.

Further United Kingdom Awards and Settlements

In *Ingram v Worcester County Council*,[31] the complainant who was a warden at a travellers site had to retire on grounds of ill health brought on by stress because he was given responsibility for other sites which had a history of problems. He was abused and subjected to violent behaviour which caused his stress. His employer had failed to give him the support he needed to do his job and therefore had to pay him £203,000 compensation.

In *Lancaster v Birmingham City Council*[32] the plaintiff's job position was changed and she was not given training with the result that she suffered work-related stress injury. She had worked in a clerical post and when that post was abolished in 1993 she was redeployed as a housing officer. She arrived at work at 8am and had paperwork from the night before. From 8.30am she received phonecalls every four to five minutes and had no assistant to answer them. The front desk opened at 9.00am where there would be a queue of disgruntled tenants. She made repeated requests for training and administrative support to no avail. Eventually she found the stress unbearable and suffered two lengthy periods of illness before being retired on ill-health grounds in 1997. The employer admitted liability and the court awarded her £67,000 in damages to compensate her for pain, suffering and future loss of earnings.

In *Lambert v Liverpool City Council*[33] the claimant had been a team leader with his employer and had three significant absences from work due to work-related stress arising from overwork and was finally retired on grounds of ill-health. The case was apparently settled for £92,000.

In *McLeod v Test Valley Borough Council*,[34] Mr McLeod alleged harassment and bullying by his manager resulting in stress causing a nervous breakdown, chronic depression and a persistent delusional disorder. The case reportedly settled for £200,000.

In *Maryniak v Thomas Cook Ltd*[35] the plaintiff who was a branch manager was subjected to changes in work practice which he was reluctant to accept. He was criticised, subjected to a disciplinary hearing and demoted. He suffered from depression and alleged that his employer had operated a policy to destroy him or his career. He was dismissed in 1995. The plaintiff's claim failed as he had a vulnerable personality and there was nothing which could have suggested to his employer that he was suffering from a work-related or stress-induced psychiatric illness.

In the case of *North v Lloyds TSB*[36] Mr North, a financial advisor, alleged that he had suffered a nervous breakdown requiring psychiatric treatment because of intolerable demands at work including increased managerial and administrative duties. He complained but no support was given. The case settled without admission of liability for £100,000.

In the case of *C v A Local Authority*,[37] C, a deputy manager of a residential home for the elderly complained about the way it was run. The manager then resigned and C was left to run it. She finished work at 2am and started work at 7am. External inspectors recommended that a permanent, experienced manager should have been appointed, which was not complied with. C resigned on grounds of ill health after four years and received £140,000 compensation for workplace stress.

In *Cowley v Mersey Regional Ambulance Service NHS Trust*,[38] Mr Cowley, who was Deputy Director of Operations suffered severe agitated depression as a result of excessive stress and workload. After a five month absence, he returned to work and developed a second major depression as a result of further stress and harassment. The court held that the employer was liable but that Mr Cowley would have suffered from depression in any event which was determined at six months after the second incident. Mr Cowley was awarded £15,000 in general damages, £82,554 in loss of earnings and £6,000 for loss of pension.

In *Rorrison v West Lothian College*[39] Ms Rorrison, who was a welfare nurse at an education college, suffered a nervous breakdown which included severe anxiety and depression, panic attacks, loss of confidence and loss of self esteem as a result of the conduct of her colleagues. Her claim failed as there was nothing to establish that she was under a risk of suffering a psychiatric disorder.

In *Williams v Outline Design Ltd*[40] Mr Williams was an upholsterer of thirty years standing with the Defendant and had worked in a team during that period. In 1993 all his colleagues took voluntary redundancy and he stayed on, on

the understanding that he would work alone. He alleged that this made him feel rejected and isolated and that he experienced stress and his employers knew of this. He said that on this basis that they should have placed him in a team and as they did not he claimed compensation for the resultant stress. It was held that such work-related stress was not reasonably foreseeable and his claim failed.

In the case of *Benson*[41] a teacher claimed for work related stress as a result of her employer not dealing with her complaints concerning an intolerable workload. The reported settlement was £47,000.

In *Ratcliffe v. Dyfed County Council*[42] the plaintiff who was a teacher claimed he had been bullied for some time by the head teacher and as a result had suffered a nervous breakdown. The case settled for £100,000.

In *Pepper v A Local Authority*,[43] Ms Pepper, a deputy head teacher, was falsely accused tricking her employer over her salary and of gross misconduct and was dismissed. She was awarded £15,000 for unfair dismissal by the employment tribunal and her action for negligence was reportedly settled for £120,000 plus £65,000 legal costs.

In *Howell v Newport County Borough Council*,[44] a teacher suffered two mental breakdowns as a result of the stress of teaching pupils with special educational needs. She suffered her first mental breakdown after trying to cope with 11 pupils with learning or behavioural difficulties and a disturbed boy who had been expelled from two other schools. Her condition deteriorated further after she was entrusted with two Ethiopian refugee children, one of whom was mentally ill, to teach them English in her spare time. Since leaving teaching, she had been unable to work effectively. The Council admitted liability and the case settled for £254,000.

In *A v. Shropshire County Council*[45] the plaintiff, who was again a teacher, suffered a nervous breakdown as a result of the introduction of a new disciplinary code by a new head teacher which many teachers did not agree with because it made the teaching environment worse. The plaintiff exhibited clear signs of deteriorating health over a long period and no appropriate intervention was made available to him. The case settled for £300,000.

The Employer's Awareness of Exposure to Stress

If an employer becomes aware that an employee might be exposed to work-related stress, it may be advisable that the employee be relieved of his or her duties on full salary and that the advice and assistance of health professionals be obtained. A suspension on full pay has been found to be perfectly acceptable in comparable circumstances so that an employer can investigate the matter and carry out its duty to take reasonable care for an employee's health and safety. In *Nolan v. Ryans Hotels plc trading as The Gresham Hotel*,[46] the employer had a suspicion that the employee had an allergy and suspended her on full pay to investigate the matter. The EAT determined that :

"(1) Once the employer became aware that the work an employee is required to do could damage the employee's health the employer had a responsibility to investigate the matter before exposing the employee to risk.

(2) The employer acted in a proper manner in investigating the matter."[47]

Women Lawyers Association Launch

The Irish Women Lawyers Association was successfully launched on Friday 7th June by Judge Maureen Harding Clark. Speakers included the Minister for Justice, Equality and Law Reform, Michael McDowell SC and the Attorney General, Rory Brady SC.

The aims of the organisation include the promotion of the wider participation of women in the development of law and justice for all, and to provide a professional and social network for women lawyers.

The Association comprises judges, senior counsel, barristers, solicitors, academics and those involved in Government and the administration of the Courts.

For further details and to enrol,
please contact Pauline Walley,
Tel: (01) 817 4996

Footnotes PTO

1. [1991] 2 All ER 293
2. (1993) ICR 789
3. [1995] 1 All ER 737
4. [1995] All ER 737
5. (2001) IRLR 336
6. (2001) IRLR Highlights: June 2001
7. (2001) IRLR 336 at paragraph 60
8. (2001) IRLR Highlights: June 2001
9. (2001) IRLR Highlights: June 2001
10. (2000) ScotCS 191 (11th July 2000)
11. Court of Appeal, (Tuckey, Simon Brown & Mance LJJ), 16 March 2001 [2001] EWCA Civ 395
12. Court of Appeal, (Brooke, Hale & Kay LJJ), 5 February 2002 [2002] EWCA Civ 76
13. *Sutherland v Hatton; Somerset County Council v Barber; Sandwell Metropolitan Borough Council v Jones; Baker Refractories Ltd v Bishop*, Court of Appeal, 5 February 2002 [2002] EWCA Civ 76, paragraph 3
14. Ibid paragraph 21
15. Ibid paragraph 43
16. Ibid paragraph 48
17. Ibid paragraphs 57, 59
18. Ibid paragraphs 72, 73
19. Ibid paragraphs 63, 66
20. Ibid paragraph 67
21. [1997] 3 IR 123
22. Ibid at 136
23. *Saehan Media Ireland Ltd v. A Worker* (1999) ELR 41
24. Ibid at 44
25. [2000] 2 IRLM 343
26. Ibid at 349
27. (2000) ELR 15
28. High Court 2000 (O'Neill J.) [Health and Safety Review December 2000 page 1]
29. Irish Times, 28 April 1999
30. Health and Safety Review, January/February 2000, page 14
31. Health and Safety Review, March 2000, page 26
32. (1999) English County Court
33. November 1998
34. QBD, 11th January 2000; The Lawyer, 6th March 2000
35. (1999) July CL 358, County Court
36. Health and Safety Review 8 February 2002 page 4
37. Health and Safety Review 12th October 2001 page 1
38. Liverpool County Court, 1st February 2001
39. 2000 SCLR 245
40. (1999) Newport County Court, 8th August 1999
41. Health and Safety Review 12th October 2001 page 2
42. (1998) English High Court
43. Health and Safety Review 12th October 2001 page 1
44. The Times 5th December 2000
45. (2000) English High Court
46. 1999 ELR 214
47. Ibid at 215
48. Op.cit., note 12 above.

CASSIDY ON THE LICENSING ACTS.

(Second Edition)
Round Hall Sweet & Maxwell (2001),
looseleaf €500 to include CD ROM; €375 for text alone; €375 for CD ROM alone

In the five years since the publication of the Licensing Acts 1833 - 1995, Constance Cassidy's, magnum opus has become an indispensible reference point for all practitioners, solicitors and barristers alike who venture into the labyrinthine complexities of the Licensing Code. The books strengths in particular is the clear concise manner in which each chapter is laid out and the additional materials provided in the appendices to include a substantial volume of precedents, a convenient compilation of the most relevant licensing statutes covering that period and a precise summary of all offences under the Licensing Acts, The Registration of Clubs Act, The Public Dance Halls Act and The Public Health Acts (Amendment) Act, 1890 together with the attendant penalties, endorsements and forfeiture provisions.

Given the developments in Licensing Laws over the last five years and the introduction of the Equal Status Act in 2000 which has had a profound effect on the right of a publican to refuse service, a second edition of this book was eagerly anticipated and is most welcome.

This new edition, although with a slightly different title, follows the same format as the earlier book but it is produced in loose leaf form which makes it more suitable for updating but is cumbersome and difficult to access.

The second edition reflects the changes brought about by reason of the Intoxicating Liquor Act, 1999, The Intoxicating Liquor Act, 2000 and The Licensing (Combating Drugs Abuse) Act, 1997. Chapter by chapter the original book has been updated to reflect these changes. Of particular interests are chapters 24 - 27 which deal with the new offences created pursuant to Part 3 of the Intoxicating Liquor Act, 2000 relating to under-age persons and to the provisions of the Licensing (Combatting Drugs Abuse) Act, 1997 which deals with drug related offences in both licensed and unlicensed premises. Both of these Acts introduced new types of penalties, the Temporary Closure Order for Under Age Offences and the Temporary and Permanent Disqualification Orders for persons and premises for drug related offences. Section 27 is an entirely new chapter and it deals with the circumstances pursuant to which a Public Dance Licence or a Music and Singing Licence may be revoked and the ensuing statutory consequences, which as stated by the author, are "draconian".

Chapter 31 deals exclusively with the provisions of the Equal Status Act, 2000 insofar as they affect publicans as "service providers". It also provides a very helpful view as to the impact which the provisions of this Act has on what has been traditionally "the right" of a publican who refused to served persons attending on the premises.

The chapter on practice and procedure, chapter 17, has been updated in accordance with the above new legislation and to reflect the amendments to the District Court Rules introduced in 1997 and to the amendments to the Circuit Court Rules introduced in 2001. The relevant excerpts of the District Court Rules and the Circuit Court Rules are provided for in appendix D.

The changes in the granting of new licences, upgrading of existing Intoxicating Liquor Licences provided for in the Intoxicating Liquor Act, 2000 are dealt with under Parts 111 and IV of the book. The author draws the practitioners' attention to the inconsistency in the 2000 Act between the definition of "Full Licence" provided for in Section 2 of the Act and the provisions in the Act dealing with the upgrading of a licence granted pursuant to Section 2 (2) of the Licensing (Ireland) Act, 1902 to a "Full Licence".

In summary, the second edition will, like its forerunner, continue to be an indispensible reference point for all practitioners in the field.

Carol O' Kennedy B.L.
6th June, 2002.

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 7, Issue 5

A directory of legislation, articles and written judgments received in the Law Library from the 11th March 2002 to the 22nd April 2002.

Edited by Desmond Mulhere, Law Library, Four Courts.

Judgment information supplied by First Law's legal current awareness service, which is updated every working day. (Contact: bartdaly@www.firstlaw.ie)

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SI 42/2002

Local government act, 2001 (commencement) order, 2002
SI 65/2002

Local government act, 2001 (meetings) regulations, 2002
SI 66/2002

Referendum commission (establishment) order, 2002
SI 33/2002

Seanad electoral (panel members) (prescribed forms) (amendment) regulations, 2002
SI 68/2002

Seanad electoral (university members) (prescribed matters) (amendment) regulations, 2002
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"What price the right to remain?" - an enquiry into the use of safe havens as a means of affording protection to people forced to leave their homes as a result of persecution in the context of intra-state war
Wills, Siobhan
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Animal remedies (amendment) regulations 2002
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CHRIS MULLANE

For those who knew Chris Mullane some of the warmth went out of life on learning that he had died on Monday of Easter week. Chris was special, a truly good person, who gave generously and was, in turn, much loved by his many friends and colleagues. For those who did not know him, how does one describe the remarkable spirit of this man?

Having studied legal science in Trinity from 1972 until 1976, Chris entered the Library in 1977. He was fortunate to devil with the late Frank Spain. Not surprisingly it was not long before a bond of affection grew up between the two, Frank looking on Chris as something of the wayward younger brother. Later, when Frank was a judge and Chris appeared before him for an unsuccessful defendant, Frank delighted in truncating the proceedings, and discomfiting Chris, by asking counsel for the plaintiff in his characteristic nonchalant manner: "Tell me, how much can I give this man?" Frank's delight was of course matched only by that of Chris in later telling the story in the coffee room.

Chris loved the battle of the case well and fairly fought. He was completely committed to his clients: nobody, for whom Chris was briefed, was short-changed. He was also, in the best traditions of the profession, a great believer in fairness and proper conduct, but not in a pedantic or priggish sense. A barrister's job was to do his utmost to make the case, but this was always to be done within the rules of etiquette and the constraints of fair play. Unfair or sharp practice, particularly on the part of a colleague, was for Chris utterly reprehensible.

Although probably best known by his colleagues as a personal injury lawyer, Chris was also a talented conveyancer. One of his proudest moments came when, as a young junior appearing in the Supreme Court in *In re Barrett Apartments Ltd* [1985] IR 350, he was asked by the Chief Justice whether he wished to follow on. Unlike most juniors, Chris accepted the invitation and made a substantial contribution to the argument. Perhaps the involvement in conveyancing came from Chris' great love of books; but, be that as it may, his love of the fray, and people, led him more often than not into the courtroom and away from the solitude of life as a property lawyer.

Whatever law he practised, Chris had an intense pride in his profession. "We are the elite", he would say, but not in a snobbish or complacent way. For Chris it was a privilege to be a barrister, but along with that privilege there was a corresponding duty to maintain the highest standards of integrity and competence.

Outstanding as he was as a barrister, Chris will not, one suspects, be remembered for particular forensic triumphs; instead he will be remembered by many, many members of the Library for his humour and countless acts of kindness. Colleagues who shared his eclectic musical tastes might any day find in their pigeonholes a tape of the work of some obscure country and western artist which Chris had himself recorded and wanted to share; nobody ever bought and gave away more books; and who, among us, will forget the constant supply of toffees, available for all, friends and strangers alike?

Or the jokes? Of these there was an endless supply. The best were those whose delivery required some acting ability. While he could be deadpan, Chris never failed to rise to the occasion when a joke required mimicry or gesticulation. Embellishment was no problem either. How many jokes and stories were vastly improved, having received the Mullane treatment!

Most extraordinary of all was the fact that these qualities persisted in Chris through four years of appalling ill-health. Despite a heart attack and two operations on his brain, he never complained about his lot. He carried on, coming into the Library, doing his paperwork, and appearing in court; and, fortunately for his colleagues, just being there and being Chris.

In the evenings he made the trek home to his beloved family in Blackrock. There his wife Oonagh, son Alex, and daughters Laoise and Martha, supported him throughout.

Chris' humour and courage will not be forgotten. He was a good colleague and a loving husband and father. His capacity for friendship was unparalleled: he simply loved people. Of them all, Chris would have thought in the words of the poet:

"Out to the undiscovered ends,
There's nothing worth the air of winning,
But laughter and the love of friends."

M. de B.

WORKPLACE BULLYING:

INTERNAL INVESTIGATIONS AND FAIR PROCEDURES

Murray Smith BL

Introduction

This article is an overview of the law governing what should happen when an employee has made a complaint of work-related bullying or harassment to an employer in good faith, and when that employer, to ascertain the truthfulness of the complaint, has ordered that an internal investigation be carried out.[1] To ensure that the decision reached by this investigation is a fair one, as regards the rights both of the complainant and the respondent, such an investigation will need to observe fair procedures.

Many employers already have policies dealing with bullying or harassment that are guides on how to ensure that such investigations comply with such procedures, and are part of the employee's contract of employment. It was officially recommended that employers have such policies;[2] and three codes of practice were recently launched to promote this.[3] Because failure to adhere to the provisions of such a policy can permit a complainant or respondent to seek legal redress on the grounds of a violation of fair procedures, adherence to them is vital.

What are 'fair procedures'?

They are the rules and procedures which must be followed by all persons and bodies making decisions affecting the individual and which are fair and seen to be fair.[4] They have been implied by the courts as comprising one of the personal rights of the citizen guaranteed in Article 40.3, particularly the right to one's good name. That Article states:

1 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

There has been much debate on this term, and on the related terms of 'natural justice' and 'constitutional justice'. There are two fundamental rules of what is called 'natural justice': *nemo iudex in causa sua*, no one can be a judge in his own cause; and *audi alteram partem*, to hear the other side. The term 'constitutional justice' first emerged in the judgement of Walsh J. in the Supreme Court case of *David McDonald v Bord na gCon*[5] when he said *obiter* that:

> 'In the context of the Constitution natural justice might be more appropriately termed constitutional justice and must be understood to import more than the two well established principles that no man shall be judge in his own cause and *audi alteram partem*.'[6]

It appears that the constitutional right to 'fair procedures' is the same as the right of 'constitutional justice', and that they have subsumed the pre-Constitutional rules of natural justice mentioned previously and rooted them in Article 40.3.2,[7] as well as including further guarantees and protections for the citizen.[8] In this article, therefore, the term 'fair procedures' refers in the context of internal investigations to the two rules of natural justice, as underpinned by their constitutional foundations.

At its most general, the gaurantee of fair procedures, as stated by Chief Justice Cearbhal Ó Dálaigh in the landmark Supreme Court of *In re Haughey*,[9] means that 'a person whose conduct is impugned as part of the subject matter of the inquiry must be afforded reasonable means of defending himself'. Earlier the Chief Justice had set out these means as including:

a. that he should be furnished with a copy of the evidence which reflected on his good name;
b. that he should be allowed to cross-examine, by counsel, his accuser or accusers;
c. that he should be allowed to give rebutting evidence; and
d. that he should be permitted to address, again by counsel, the Committee [of Public Accounts] in his own defence.

In so holding the Supreme Court characterised Article 40.3 in this context as:

> '... a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40.3 are not political shibboleths but provide a positive protection for the citizen and his good name.'

Application of fair procedures to employment law

The *Haughey* judgement was first applied in an employment law context in the case of *Glover v BLN Ltd.*[10] The plaintiff was dismissed by his employers, the defendants, who alleged serious misconduct on his part. He sued them for wrongful dismissal, and the Supreme Court eventually found in his favour. Walsh J spoke for the court when he held that:

"It was necessarily an implied term of the contract that this inquiry [into the plaintiff's alleged misconduct] should be fairly conducted. It is not, in my opinion, necessary to discuss the full effect of this Article [40.3] in the realm of private or indeed of public law. It is sufficient to say that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures....The plaintiff was neither told of the charges against him nor was he given any opportunity of dealing with them before the board of directors arrived at its decision to dismiss him. In my view this procedure was a breach of the implied term of the contract that the procedure should be fair, as it cannot be disputed, in the light of so much authority on the point that failure to allow a person to meet the charges against him and to afford him an adequate opportunity of answering them is a violation of an obligation to proceed fairly."[11]

There was an argument as to whether this implied right to fair procedures only applied to the 'office-holder' category of employee; but it was later made clear, also by Walsh ., in the case of *Gunn v B.C.N.E.D.*[12] that the principles of natural or constitutional justice were applicable 'without regard to the status of the person entitled to benefit from them'.[13] A later Supreme Court case extended the right to fair procedures to someone under a contract for services.[14]

Nemo Iudex In Causa Sua

This rule is not only intended as a safeguard against bias; it is also intended as a safeguard against perceived bias, the person or body making the decision not being allowed to have any personal (including pecuniary) interest that might be affected by the decision.[15] Such a rule is not as often invoked in the area of employment law as in others because of the exception of what is called the rule of necessity. A person otherwise disqualified under the above rule can be held as competent and qualified to adjudicate if no other duly qualified person or tribunal is available.

The Supreme Court in the leading case of *Mooney v An Post*[16] upheld such a rule. The plaintiff was employed by the defendant as a postman. The defendant and An Garda Síochána investigated allegations against the plaintiff of alleged tampering, mutilating and non-delivery of postal packets. Criminal charges were brought against Mr. Mooney, who was found not guilty. After this, he and his employer, both with legal advisors, engaged in a prolonged correspondence. The defendant gave information, including witness statements; and the plaintiff had the book of evidence prepared for the criminal trial. While he denied the allegations, he did not respond other than to demand that an inquiry be convened and presided over by an independent chairman, with the facility to cross-examine witnesses.

"The defendant refused this, but offered to meet with the plaintiff to discuss the matter, an offer not taken up. The latter was dismissed, and brought proceedings for unfair dismissal and injunctive relief, which were consolidated. The Supreme Court judgement, given by Barrington J., is interesting, in the reasons given for rejecting the plaintiff's case. That judge said as follows:

"The terms natural and constitutional justice are broad terms and what the justice of a particular case will require will vary with the circumstances of the case. Indeed two of the best known precepts of natural and constitutional justice may not be applicable in certain cases. As the learned trial judge [Keane J. in the High Court] has pointed out the principal of *nemo iudex in sua causa* seldom applies in relation to a contract of employment where the employer judges the issue and is an interested party. Likewise it is difficult to apply to a contract of employment the principal of *audi alteram partem* which implies the existence of an independent judge who listens first to one side and then to another."[17]

He said that because the plaintiff was in a position of trust, and the defendants received complaints regarding the integrity of the postal service and the honesty of the plaintiff, they expected the former to give a candid response, particularly as he had been acquitted of the criminal charges. Under the circumstances, they were 'entitled to receive a proper explanation from the plaintiff' which they did not receive.[18]

While this case upheld the rule of necessity, which could certainly be invoked by small organisations, other cases have rejected it in cases where there are larger organisations which could apply the *nemo judex* rule by having different people investigate the complaint and decide on any penalties to be imposed.

As examples of other cases, there are *Louis Heneghan v The Western Regional Fisheries Board*,[19] *Patrick O'Neill v Beaumont Hospital Board*,[20] and *Charlton v H.H. The Aga Khan's Studs Society Civile*.[21] In *Heneghan*, Carrol J in the High Court granted a declaration that Mr. Heneghan's dismissal by the regional manager, a person with whom a dispute had arisen, was void on one of two grounds. The second ground related to a lack of natural justice. While Mr. Heneghan did get notice of the grounds alleged against him and an opportunity to make representations, there was no regard for the principle of *nemo iudex*. The judge held that:

"In my opinion it was highly objectionable that Mr. Kennedy [the regional manager] who was the prime mover in the dismissal process, one of the main reasons for which was the element of professional antagonism and whose version of the facts was challenged by Mr. Heneghan, should decide the whole question. Assuming for the purpose of deciding this point that Mr. Kennedy had been delegated power to dismiss (which is doubtful), he should have disqualified himself and referred the matter back to the Board to decide in another way."[22]

Later, she said that the regional manager had been 'witness, prosecutor, judge, jury and appeal court'.[23] In *O'Neill*, the plaintiff was appointed as a consultant paediatric neurosurgeon for a probationary period. At the end of that period, the hospital board had to certify that the plaintiff's service was satisfactory or unsatisfactory. The hospital's chief executive certified that the latter's service had been unsatisfactory; and the board proceeded to hold an inquiry with a view to granting or withholding a certificate. The plaintiff's case ended up in the Supreme Court, which granted an injunction restraining the chairman and two other named members of the board from taking part in any of its meetings regarding the plaintiff's certification. Finlay CJ, speaking for the court, upheld the plaintiff's case that, as the three had made pre-judgements

regarding his case, he had good grounds for fearing that he would not get an independent hearing from them.

In *Charlton*, the plaintiff, an employee of the defendant, was granted an interlocutory injunction by Laffoy J in the High Court, restraining the latter from prosecuting an inquiry into her alleged misconduct pending the trial of the action. One of the reasons for granting the injunction was that a person who was alleged by the plaintiff to have been at least complicit in the activities he intended to inquire into would carry out the enquiry. She alleged that he was therefore not the appropriate person to carry out the inquiry, that there was a real risk of bias on his part, and that it would be crucial to the employee's defence that she be in a position to examine or cross-examine this person. Laffoy J granted the injunction mentioned on the ground that there was a fair issue to be tried in terms of whether that person should step aside and let another person conduct the inquiry.

Audi Alteram Partem

Unlike the *nemo iudex* rule, the courts have insisted upon adherence to this rule more often. In *Mooney*, Barrington J held, after considering the Supreme Court's previous judgments in *Glover and Gunn*, that the minimum the plaintiff was entitled to was 'to be informed of the charge against him and to be given an opportunity to answer it and to make submissions'.[24] For the purpose of this article, I shall look at the rule as divided into these two sub-rules.

Entitlement to be informed of charges

Adherence to this has been insisted upon by the courts, to the extent that the respondent to any complaint must be told of the charges against him and of any other information upon which the decision maker will base his decision. This applies even if the consequences of a decision against the respondent is not dismissal, but may adversely impact on his good name.

In *Georgopoulus v Beaumont Hospital Board*,[25] the Supreme Court accepted a submission that the Irish courts have accepted that a breach of fair procedures occurs 'when a decision-maker acts on the basis of information which has been obtained outside of the hearing and which is not disclosed to the party adversely affected', although holding that it did not apply in this particular case, as it related to legal advice only.[26]

This case was followed by the High Court in *Cassidy v Shannon Castle Banquets & Heritage Ltd.*[27] The plaintiff was dismissed for gross misconduct after a fellow employee made allegations of sexual harassment. Budd J held against the employers' decision, saying that they had failed to comply with the rules of natural and constitutional justice. Regarding the *alteram partem* rule, he held that the actual manuscript of the interviews of the complainant was not furnished, not even an amalgamated and amended version with additional complaints and matters added'.

Also, the decision maker acted 'on the basis of information which had not been disclosed to the plaintiff', which was a medical report and the statements of two people.

Georgopoulus and *Cassidy*, among other cases, were looked at by Finnegan J. of the High Court in the case of *Patrick Donner v Garda Síochána Complaints Board and another*.[28] It dealt with the handling by the Board and the Garda Commissioner regarding a complaint by a citizen against a Garda, who sought to amend the grounds of his judicial review application. The judge held that, 'the penalties fall short of dismissal, being limited to advice, admonition or warning, but may nevertheless have serious consequences for the applicant in terms of his future good name and his career within the Garda Síochána'. Because the applicant did not have knowledge of two statements in his complaint, he was 'at a serious disadvantage' in responding to the complaint. In order to comply with the rules of natural justice, 'the text of the complaint or an accurate statement thereof and such material ought to have been made available to the applicant and an opportunity afforded to him to respond' to the Board or the Commissioner.

Opportunity to answer charges and make submissions

There is a lot of case law regarding how charges should be answered and how submissions should be made. Does the respondent have the right to meet the investigating person or body in person? If so, can he also insist upon the presence of the complainant and any witnesses, and to be allowed to cross-examine them in person or by counsel?

The courts have insisted in their judgments that this depends on the nature of the case, each being judged on its own merits. It appears, however, that courts will be more inclined to insist on more formality in at least two circumstances. First, in the case of more serious allegations against the respondent, which if upheld would lead to his good name being affected; and second, where the facts in the case are more in dispute.

A good example of a court ruling in favour of a very formal hearing, due to the gravity of the charges against the respondent, is *Flanagan v UCD*,[29] where a student charged with plagiarism of an essay challenged the process the college used to deal with this charge. Finding in her favour, Barron J in the High Court imposed very high standards on the college for the following reason:

> "The present case is one in which the effect of an adverse decision would have far-reaching consequences for the applicant. Clearly, the charge of plagiarism is a charge of cheating and as such the most serious academic breach of discipline possible. It is also criminal in its nature. In my view, the procedures must approach those of a court hearing. The applicant should have received in writing details of the precise charge being made and the basic facts alleged to constitute the alleged offence. She should equally have been allowed to be represented by someone of her choice, and should have been informed in sufficient time to enable her to prepare her defence of such right and any such rights given to her by the rules governing the procedure of the disciplinary tribunal. At the hearing itself, she should have been able to hear the evidence against her, to challenge that evidence on cross-examination, and to present her own evidence."[30]

A case that ended up in the Supreme Court, again due to the seriousness of the charges against the respondent, was *Gallagher v The Revenue Commissioners*.[31] A Customs and Excise Officer was dismissed due to allegations that he had deliberately undervalued vehicles, ensuring that the State lost revenue. He sought judicial review of the inquiry into his alleged misconduct, the Supreme Court finding in his favour. The Court held that the decision by the second named respondent refusing the applicant an opportunity to hear and

cross-examine witnesses as to the value of the vehicles 'was contrary to the requirements of natural justice and fair procedures'.[32]
The Chief Justice went on to say:

> "So far as the applicant/ respondent is concerned, this was a most serious case, the charges against him were substantial, and in view of the fact that the valuation of the vehicles, the subject matter of the charges, was essential to the establishment of the charges, the action of the second named respondent/appellant in failing to require direct evidence of such vehicles, thereby depriving the applicant/respondent of the opportunity of challenging such evidence in cross-examination, amounted, in the particular circumstances of the case, to a deprivation of his right to fair procedures."

Yet another case decided in favour of an oral hearing, due to the importance of the issue to the plaintiff and the disputed facts, was *Galvin v Chief Appeals Officer*.[33] The plaintiff sought judicial review in the High Court of an appeal against a decision not to award him a contributory old age pension. Costello . ruled in his favour, saying that the appeal should be reheard by way of an oral hearing. The statute governing the appeals process gave discretion to the appeals officer to hold an oral hearing. The judge held that:

> "The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested."[34]

There was 'an important right...in issue'. Without an oral hearing, it would 'be extremely difficult if not impossible to arrive at a true judgement on the issues which arose in the case'. He concluded that 'the conflict between the parties cannot be properly resolved in the absence of oral testimony'.[35]

By contrast, in *Mooney*, in rejecting the plaintiff's claim for an oral hearing before an independent arbitrator and to cross-examine by counsel those prepared to give evidence against him, Barrington J held that he had 'raised no issue of fact which needed to be referred to a civil tribunal'.[36]

In a somewhat similar vein was *Sheriff v Corrigan*.[37] The applicant was a prison officer who called a colleague a 'scab' in official correspondence, and apologised only after two years. This led to his demotion and transfer. Carney J in the High Court held that there was

> "... no hard and fast rules as to when dictates of fairness require the holding of an oral hearing. In the present case the essential facts were clear from the beginning and were not in dispute. There was no matter of contested fact between the parties which required the holding of an oral hearing and the applicant did not request the same. Neither did the applicant seek to involve his trade union in the matter and accordingly there was not any refusal to deal with the applicant's trade union. Nor was he denied access to legal advice or representation."[38]

The case of *Maher v Irish Permanent Plc. (No. 1)*[39] illustrates the fact that courts have insisted that the investigating person or body, in conducting the hearing, should be even-handed as between the parties. The plaintiff was accused of sexual harassment. He was granted an order by Laffoy J in the High Court restraining the defendant from taking any further steps to end his employment save in accordance with its disciplinary procedure and the principles of natural justice. His application was due to the fact that it had not been made clear to him on the morning of the hearing regarding the charges that he would be allowed legal representation. This was too late, as the defendant had been notified two days earlier that staff members would be represented by a solicitor and counsel at the hearing. As a result, the plaintiff and his legal representative were absent at the hearing, which was one-sided and did not produce a fair result.

Despite this, if an oral hearing is agreed on, an exception to the even-handed rule may be made in the case of a complainant employee who is vulnerable and does not feel able to confront the respondent. The employer may be justified in refusing to allow such a confrontation to take place. The judgment of Shanley J in *A Worker v A Hospital*[40] illustrates this point . In the case, the plaintiff, an employee of the defendant, was accused by a patient of sexual abuse. A committee of the Board of the defendant was set up to investigate. The plaintiff was given representation by solicitors and counsel; he was given access to all statements, correspondence and medical reports; but the complainant, the only other witness to the alleged incidents apart from the plaintiff, could not be confronted by the plaintiff or his representatives, as it would be distressing to her and worsen her mental state.

Following a challenge before the High Court, Shanley J held in favour of this refusal by the employers to have the complainant examined and cross-examined. In so concluding he stated that there was evidence that such a confrontation 'may seriously damage her mental health and I have to balance the evidence against any risk that injustice would be done to the plaintiff.'[41]

He held that any potential injustice to the respondent could be avoided 'by directing that a further validation exercise be performed by a psychologist or psychiatrist nominated by the plaintiff's legal representatives'. Such an examination would require to be agreed to by the complainant's doctor and to take place in his or her presence.[42]

It thus appears that the more serious the allegations and the more disputed the facts, the courts will be more inclined to a more formal hearing. Each case, however, will be judged on its own merits. The courts have held that whatever the type of hearing, the investigating person or body should act in an even handed-manner, with possible exceptions such as in *A Worker*.

Standard of proof

Regarding the standard of proof to be used by investigators in deciding on the validity of complaints of workplace bullying or harassment, it is the civil standard of the balance of probabilities, the degree of probability depending on the seriousness of the complaints. In *Mooney*, Barrington J held that the plaintiff's disputed dismissal proceedings were civil not criminal in nature.[43] That court looked into the matter in more detail in *Georgopoulus*, where it upheld that the standard of proof used in the investigation that decided to dismiss the plaintiff was the civil standard. Hamilton CJ said:

> "It is true that the complaints against the plaintiff involved charges of great seriousness and with serious implications for the plaintiff's reputation. It does not, however, require

that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on 'the balance of probabilities' bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."[44]

Suspension

The leading case on how suspension should be properly used by employers is *Margaret Deegan and Others v The Minister for Finance*.[45] Three civil servants were suspended under the provisions of a statute, on a part of their regular salary, pending investigation into alleged financial irregularities. The three sued their employer, the case ending up before the Supreme Court, which found in favour of the latter. Keane CJ, who gave the Court's judgement, said:

> "It is clear that the suspension of a person from their employment for a specified period because of irregularities or misconduct on his or her part can constitute a form of disciplinary action which would entitle the person affected to be afforded natural justice or fair procedures before the decision to suspend him or her is taken. The consequence of such suspension can be extremely serious for the person concerned, involving not merely the right to earn a living but also the right to have their good name protected."[46]

He looked at the judgement of Denning MR. in the English case of *Lewis v Heffer*,[47] and approved of his distinction between suspension as a disciplinary sanction, where the person was entitled to natural justice and fair procedures before the decision to suspend was taken, and suspension as a holding operation, pending inquiries, where natural justice and fair procedures did not apply. The distinction drawn by Denning MR in that case 'accords both with the general approach of the law and common sense'.[48]

While the three were not suspended on full pay, the Court was satisfied that their suspension was of the second category. Natural justice and fair procedures did apply, because the statute under which they had been suspended allowed them to make representations to have the suspension ended. The Chief Justice said that he was satisfied that each applicant 'was aware of the nature' of the alleged irregularities which led to their suspension. Also, they were not 'precluded from making such representations as they thought fit to the suspending authority' to end their suspension.[49]

In short, a person against whom allegations of bullying are made may be suspended with pay if it is a holding operation pending an investigation; if he is suspended as a punishment, including without pay, it needs to be done after fair procedures have been applied.

In *Deegan*, while the three were suspended as a holding operation, but not on full pay, this was permissible, as it was allowed for by statute. This was wholly consistent with section 5 of the Payment of Wages Act, 1991, which says that deductions from wages, or payment by an employee, are only valid if:

1. Made under statute or any instrument made under statute.
2. Authorised to be made under a term of the employee's contract of employment, which must have been in force at the time of the deduction or payment, or
3. The employee has given his advance written consent.

Deegan gives us an example of the first exception; the second can include the punishment of suspension without pay, in whole or in part, specified in the employee's contract, or in an anti-bullying or harassment policy deemed to be part of the contract.

An example of an employer getting it wrong, in terms of confusing the two types of suspension, can be seen in the case of *Deborah Timmons v Oglesby & Butler Ltd.*[50] An employee made a remark to a fellow employee. Their employers, who considered that the remark amounted to intimidation of the latter, interviewed the former; he replied that the remark had been made in jest. He was suspended without pay and after another meeting was dismissed. The Employment Appeals Tribunal held that his dismissal was unfair, and characterised the manner in which he was suspended without pay as unusual. Normally when an investigation is continuing an employee is suspended with pay. Unpaid suspension is a disciplinary action in itself, and was so recognised in the respondent's work rules. The respondent in fact took two disciplinary actions against the claimant.[51]

Another example can be found in the more recent case of *Catherine McNamara v South Western Area Health Board.*[52] Dr. McNamara was a consultant orthodontist attached to a hospital under the Board's administrative control. In 1999, the Board suspended her because she refused to operate an orthodontic service that she considered to be unsafe for patients. After negotiations, her suspension was lifted in January 2000; but the same difficulties between her and the Board arose again later due to a heavy caseload and a dispute on how to deal with the burden of her work.

The Chief Executive Officer of the Board suspended her without pay under section 22 of the Health Act 1970 for alleged misconduct, That section authorises the CEO of a health board, after consultation, to suspend an officer of the board where it is suspected that such officer 'misconducted himself in relation to his office or is otherwise

"Many employers already have policies dealing with bullying or harassment that are guides on how to ensure that such investigations comply with such procedures, and are part of the employee's contract of employment. It was officially recommended that employers have such policies; and three codes of practice were recently launched to promote this. Because failure to adhere to the provisions of such a policy can permit a complainant or respondent to seek legal redress on the grounds of a violation of fair procedures, adherence to them is vital."

unfit to hold office', while the alleged misconduct or unfitness in inquired into.[53]

Dr. McNamara sought judicial review of the Board's action in the High Court, alleging that she was denied fair procedures in and around the making of that decision. Kearns J. held in her favour, and ruled that she was entitled to fair procedures. He accepted her counsel's argument that the existence of statutory procedures for suspending an employee did not absolve the Board 'from the obligation to discharge those responsibilities, at every stage in the process, in a fair, responsible and reasonable manner'. An allegation of misconduct against a senior consultant was 'a serious matter'.

In so holding, Kearns J indicated that the question of whether a suspension involves fair procedures hinges on 'the gravity of the reasons for the suspension, the implications for the person concerned and the likely adverse consequences following suspension.'[54] The judge held that there could be 'decisions with adverse implications for the person affected thereby which nonetheless fall short of infringing their legal rights'.

By way of example Kearns J quoted Hederman J in the Supreme Court decision of *Murtagh v St. Emer's School*,[55] where a pupil was suspended by a national school's board of management for three days for having insulted a teacher. His parents failed in their quest to seek judicial review of the decision to suspend. Hederman J stated that in the court's judgment this suspension was not a matter for judicial review:

> "It is not an adjudication on or determination of any rights, or the imposing of any liability. It is simply the application of ordinary disciplinary procedures inherent in the school authorities and granted to them by the parents who have entrusted the pupil to the school."[56]

Kearns J held that the situation in *Murtagh* was 'in total contrast' to that of Dr. McNamara. In her case, the suspension was 'open-ended' and 'non-specific in duration'. A suspension of a senior consultant without pay 'must be seen as more than the mere "holding operation"' contended for by the Board's counsel; it was :

> ".. a sanction, and a severe one at that, which can only have damaging implications for any professional person in the applicant's position. This is even more so the case where the suspension is a second suspension, suggesting as it must that events are inexorably moving towards the possible removal of the applicant."[57]

The suggestion of misconduct convinced the judge that the CEO should 'at least have before him some statement of the applicant's position on the matters in issue' before proceeding to suspend. At the time he formed his opinion, the CEO did not have before him the detailed 13-page report furnished by Dr. McNamara, setting out her difficulties with the service as she saw them.[58] It appears that the judge was influenced by a Supreme Court judgment cited by counsel for Dr. McNamara, *Ann Ó Ceallaigh v An Bord Altranais*,[59] in which Geoghegan J. said:

> "If a professional body is invested with the power of receiving complaints relating to a member of that profession and deciding whether an inquiry should be put in motion, the outcome of which mighty lead to the person complained about being no longer able to practice his or her profession, that body cannot be said to be exercising its power lawfully and fairly without the person complained about being informed of the complaint and the board having sight of any response to such complaint."[60]

The judgment in *McNamara* has to be looked at carefully in the light of its particular facts: the dispute between the two parties over the operation of the orthodontic service; Dr. McNamara's previous suspension as a result of that dispute; the contested suspension being open-ended and non-specific in duration; and the particular position being held by Dr. McNamara as a professional person. Therefore, it was held that the suspension was intended to be a form of punishment, regardless of the legal forms observed and that such punishment had been decided upon without fair procedures being carried out.

All these cases have shown that, while suspension can be used as a punishment or as a holding operation pending the outcome of an investigation, fair procedures have to be followed before suspension, and any combination of suspension and deprivation without pay in whole or in part needs to be based on law, contract, or prior written consent.

Conclusion

In concluding, it is important to emphasise what employers, employees and those representing both categories, but particularly the former, need to know: that there is an implied condition in every contract of employment that complaints of bullying or harassment in the workplace or arising out of the employment relationship made by employees in good faith need to be investigated according to fair procedures.

The particular procedures to be followed may vary according to the gravity of the charge and the circumstances in dispute. Anti-bullying or anti-harassment policies have to be seen as guides to help ensure that these fair procedures are adhered to, and it follows that those employers who disregard the provisions of such policies do so at their own risk.●

"If an oral hearing is agreed on, an exception to the even-handed rule may be made in the case of a complainant employee who is vulnerable and does not feel able to confront the respondent. The employer may be justified in refusing to allow such a confrontation to take place...Any potential injustice to the respondent could be avoided by directing that a further validation exercise be performed by a psychologist or psychiatrist nominated by the plaintiff's legal representatives. Such an examination would require to be agreed to by the complainant's doctor and should take place in his or her presence."

1 Most of the information in this article was presented by the author at an IMPACT/ East Coast Area Health Board seminar held in the Glenview Hotel on Tuesday 9 April 2002.

2 *Dignity at Work: The Challenge of Workplace Bullying: Report of the Task Force on the Prevention of Workplace Bullying*, (Dublin: Stationary Office, 2001), pp. 57-8.

3 The three codes of practice are: Industrial Relations Act, 1990 (Code of Practice detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order, 2002 (S.I. No. 17 of 2002); Employment Equality Act, 1998 (Code of Practice) (Harassment) Order, 2002 (S.I. No. 78 of 2002); *Code of Practice on the Prevention of Workplace Bullying* (Dublin: Health and Safety Authority, 2002). They were respectively issued under the following sections of statutes: s. 42 of the Industrial Relations Act, 1990; s. 56 of the Employment Equality Act, 1998; and s. 30 of the Safety, Health and Welfare at Work Act, 1998. *The Report of the Task Force on the Prevention of Workplace Bullying*, p. 59, had recommended that these codes be produced; and all three were launched on Wednesday 27 March 2002. (Personal knowledge; The Irish Times, Thursday 28 March 2002; Irish Independent, ditto.)

4 Henry Murdoch, *Dictionary of Irish Law*, Third edition (Dublin: Topaz Publications, 2000), p. 319.

5 [1965] I.R., 217.

6 Ibid., p. 242.

7 The comments of the late McCarthy J. in the Supreme Court are of interest. In *The State (Fury) v The Minister for Defence* [1988] I.L.R.M., 89 at 99, he said: 'this case is a claim by a citizen of Ireland that the State should render him constitutional justice, which subsumed and assimilates natural justice, as it is called....In my view the two principles of natural justice as they pre-existed the Constitution are now part of the human rights guaranteed by the Constitution'. Later, in *Goodman International v Mr. Justice Hamilton* [1992] I.L.R.M., 146 at 185, he said: 'The prescripts of natural justice - to hear the other side and not to be a judge in one's own cause - have, themselves, been subsumed by the constitutional right to fair procedures'.

8 Gerard Hogan and Gerry White, J.M. Kelly, *The Irish Constitution*, Third edition (Dublin: London: Butterworths, 1994), pp. 358-9; David Morgan and Gerard Hogan, *Administrative Law in Ireland*, Third edition (Dublin: Round Hall Sweet & Maxwell, 1998), pp. 501-3.

9 [1971] I.R., 217.

10 [1973] I.R., 388.

11 Ibid., pp. 425-6.

12 [1990] 2 I.R., 168.

13 Ibid., p. 181.

14 *Sean Tierney v An Post* [1999] E.L.R., 293.

15 See Griffin J. in *Connolly v McConnell* [1983] IR, 172 at 179.

16 [1998] E.L.R., 238.

17 Ibid., p. 247. For the High Court judgement of Keane J. see [1994] E.L.R. 103.

18 [1998] E.L.R., 249.

19 [1986] I.L.R.M., 225.

20 [1990] I.L.R.M., 419.

21 [1999] E.L.R., 136.

22 [1986] I.L.R.M., 228.

23 Ibid., p. 229.

24 [1998] E.L.R., 248.

25 [1998] 3 I.R., 132.

26 Ibid., p. 154. (Hamilton CJ.)

27 Unreported, 30th July 1999, High Court, Budd J.

28 14th August 2000, *Irish Times Law Reports*.

29 [1988] I.L.R.M., 469.

30 Ibid., pp. 475-6.

31 [1995] E.L.R., 108.

32 Ibid., p. 123 (Hamilton CJ.)

33 [1997] 3 I.R., 240.

34 Ibid., p. 251.

35 Ibid., p. 253.

36 [1998] E.L.R., 249.

37 [1999] E.L.R., 146.

38 Ibid., p. 154.

39 [1998] E.L.R., 77.

40 [1997] E.L.R., 214.

41 Ibid., p. 217.

42 Ibid., p. 218.

43 [1998] E.L.R., 249.

44 [1998] 3 I.R., 150.

45 [2000] E.L.R., 190.

46 Ibid., p. 198.

47 [1978] 3 AER, 354.

48 [2000] E.L.R., 199.

49 Ibid., p. 205.

50 [1999] E.L.R., 119.

51 Ibid., p. 120.

52 [2001] E.L.R., 317.

53 s.22 (1), Health Act, 1970. Section 22 (5) says that any officer so suspended must be suspended without pay.

54 [2001] E.L.R., 328.

55 [1991] 1 I.R., 482.

56 Ibid., p. 488.

57 [2001] E.L.R., 328-9.

58 Ibid., p. 329.

59 [2000] 4 I.R., 54.

60 Ibid., pp. 132-3.

REFORM OF THE IN CAMERA RULE - A SENSITIVE BALANCING ACT

Rosemary Horgan[+], *Geoffrey Shannon*[*] *and Brian Gallagher*[°]

Introduction

In general Irish law is committed to open justice. This principle is guaranteed by the Constitution. Article 34(1) of the Constitution states:

> "Justice shall be administered in courts established by law by judges, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

The importance of publicity in a democratic society was emphasised in the case of *Irish Times Limited v. Murphy*[1] where in a unanimous decision the Supreme Court upheld the right of the media to report the details of a major drugs trial. The Chief Justice noted that

> "Justice is best served in an open court where the judicial process can be scrutinised. In a democratic society, justice must not only be done but must be seen to be done. Only in this way can respect for the rule of law and public confidence in the administration of justice, so essential to the workings of a democratic society, be maintained." [2]

Matrimonial law cases

By way of exception to this general principle, however, family law cases and cases involving children are amongst the categories of cases which may by law be shielded from such public and media scrutiny. In general, the public and the media are not admitted to family proceedings. The Courts (Supplemental Provisions) Act 1961 provides that justice may be administered otherwise than in public in specified circumstances. Section 45(1) of the 1961 Act states:

"Justice may be administered otherwise than in public in any of the following cases:

(a) applications of an urgent nature for relief by way of habeas corpus, bail, prohibition or injunction;
(b) matrimonial causes and matters;
(c) lunacy and minor matters;
(d) proceedings involving the disclosure of a secret manufacturing process."

The discretion to hear cases 'otherwise than in public' was tested by the Courts in the case of In *Re R Limited.*[3] Walsh J stated that "the Constitution of 1937 removed any judicial discretion to have proceedings heard other than in public save where expressly conferred by statute." The Supreme Court held that unless the matter came under the statutory exception to the general principle of open justice, the Courts had no discretion to hear a case in camera. Where a statute provided discretion to hear a case in camera, the Courts in exercising such statutory discretion, must keep in mind the overarching duty to do justice, and the general principle that justice is best administered in public. It should be noted that Walsh J in In *Re R Limited,* considering Section 45(1) of the 1961 Act, stated that it was "in addition to any other cases prescribed by Acts of the Oireachtas."

There are undoubtedly situations where a public hearing of all or part of the proceedings would militate against doing justice. The family is afforded a protected Constitutional status. Moreover, the right to the protection of, and strict adherence to, the application of the in camera rule has become the sacred cow of the family law system in Ireland. Individual family law statutes provide that the 'in camera rule' is mandatory in most family law matters.[4] Curiously however, the 'in camera rule' is not mandatory in private law children cases, although the courts are very eager to uphold the privacy of minors as permitted by the 1961 legislation.[5]

"Ireland now has a complex and sophisticated matrimonial law regime with a very wide degree of judicial discretion. Separation and divorce are life events for many couples and their children. The manner in which judicial discretion is exercised within that regime is of vital importance to society... Does the in camera rule in matrimonial and minor matters protect children and the litigants from the unwelcome glare of prurient publicity or protect a dark spot in the judicial process?"

Reporting

Not only are the cases heard behind closed doors, albeit with the parties to many other similar cases waiting, in the public eye, to be heard outside those doors, but the cases are generally not reported in the press. The Child Care Act 1991 specifically prohibits the publication or broadcast of any matter that would serve to identify a child who is the subject of care proceedings.[6] General and specific restrictions concerning the publication of reports of judicial proceedings are contained in the Censorship of Publications Act 1929.[7] This latter Act was amended by the Family Law (Divorce) Act 1996 to remove an anomalous provision permitting the reporting of identifying information of the litigants in family law proceedings. The 1929 Act still authorises the publication of law reports, however[8] as a matter of practice identifying information is removed from law reports. The Law Reform Commission in its Consultation Paper on Family Courts[9] noted that this was a matter of convention rather than law. There have been many instances where persons involved in in camera proceedings which were reported in general terms, still felt that they were in fact identified by the details contained in the reported and unreported judgments.

Breaches of the rule by litigants or the media are treated seriously. This is not to say however that the facts of cases heard 'in camera' are never published. The facts are indeed often published, but in a manner which does not identify parties. Even in cases where the Court specifically permits the publication of the details of cases heard 'in camera' it does so in a manner, which respects the privacy of the litigants. For example, Laffoy J in *In the Matter of an Inquiry Pursuant to Article 40.4.2 of the Constitution and In the Matter of Baby A, an infant. Eastern Health Board v E., A. and A*[10] permitted the publication of some details which were set out in an edited version of an approved judgment in a case involving the attempted private adoption of a baby by the proprietor of an agency which ran a crisis pregnancy counselling service. Such adoptions were rendered unlawful by amendment to the adoption legislation in 1998 and Laffoy J felt that the evidence and information contained in the approved judgment should be made public because the issues involved were truly in the public interest. She also ordered however, that there was to be no more extensive publication than that, without the leave of the court. Notwithstanding that order, Independent Newspapers Limited, published the name of the agency involved. Consequently, The Irish Times, RTE and other representatives of the media applied for permission to publish the identity of the proprietor of the agency and his wife. They also sought to publish the name of the doctor and barrister who were involved as witnesses in the case and to whom reference was made in the judgment. The application came before McGuinness J[11], who decided that having regard to the circumstances, it was in the public interest to allow the publication of the name of the agency but refused permission to publish the names of other persons involved. She pragmatically noted that it being in the nature of media coverage and the competition between the various branches of the media that efforts would be made to interview these individuals or efforts could be made to photograph them or members of their families. Even in the case of the print media there could be inadvertent disclosure, which could ultimately lead to the identification of the children and mothers involved. The danger of live coverage in television and radio could also result in more information coming into the public domain than had been ordained by the court. The issue was one of public curiosity rather than public interest in the real sense. The purpose of the 'in camera hearing' was to protect the interest of the welfare of the children and by extension of their mothers. In balancing the interaction of Constitutional rights it was not always possible to achieve a harmonious result. In the hierarchy of rights which then fall to be considered, the privacy rights and the welfare of children in 'in camera' proceedings will normally come ahead of the right to freedom of expression and the right to have justice done in public. Clearly, however, in exceptional circumstances as for example in child abduction matters, the Court may allow the publication of identifying information about a child. Nonetheless, the normal rule is that information which in any way identifies a child the subject matter of 'in camera' proceedings is treated as a contempt of court [12].

Unresolved questions and the in camera rule

Two ancillary questions remain unclear however. Firstly whether the in camera rule also cloaks all documents, records and information introduced into such proceedings and secondly, the question of whether the matter of professional misconduct or incompetence can be investigated in subsequent proceedings. The answer to these questions is not clear. Carney J in the case of *The People (DPP) v. WM*[13] took the view that the in camera nature of the proceedings under the Punishment of Incest Act 1908 meant that the Court was precluded from giving the Eastern Health Board information necessary to institute civil proceedings to protect children who might be at risk and in need of care and protection by virtue of the conviction of the accused.

Barr J in the case of *Eastern Health Board v. Fitness to Practice Committee of the Medical Council*[14] adopted a more nuanced approach and opined that even a mandatory imperative contained in family law legislation did not prevent the Court from exercising a discretion to permit disclosure of protected information in circumstances where justice requires that disclosure be made. Although McGuinness J[15] found the analysis of the issues outlined in the latter case to be both impressive and convincing, the case was not followed by Murphy J in the later case of *R.M v D.M.*[16] While Murphy J cited Barr J and his view that "there is no absolute

embargo on disclosure of evidence in all circumstances", he concluded that section 34 of the Judicial Separation and Family Law Reform Act 1989 "made privacy mandatory in relation to all such proceedings."

Documents, records and the in camera rule

Morris J in *Tesco Ireland Limited v. McGrath & Anor*[17] determined that matrimonial proceedings and, perhaps, any orders made in those proceedings could not be produced to solicitors for the purchasers in a conveyancing transaction in order to establish that the conveyance was not a disposal for the purpose of defeating a claim to relief as defined by section 35 of the Family Law Act 1995 and section 37 of the Family Law (Divorce) Act 1996. He acknowledged that Budd J in the case of *S. (P.S.) v Independent Newspapers (Ireland) Limited*[18] referred to 'an established practice at common law recognised in England and in this jurisdiction' which permitted the dissemination of material from an in camera hearing. Such dissemination was discretionary where it was in the interests of justice to do so, and where due and proper consideration had been given to the interests of the person or persons intended to be protected by the conduct of the proceedings in camera. He acknowledged that in given circumstances, a crucial public interest such as the prosecution of a crime or the protection of vulnerable children could outweigh the importance of the in camera rule. That said, however, Morris J saw nothing in the conveyancing case which would indicate that the interests of justice, or a crucial public interest out-weighed the 'in camera' status in the case. It would seem therefore that it remains for the Supreme Court to determine the circumstances in which the dissemination of in camera material will be permitted, whether the in camera rule is mandatory or discretionary.

It has to be said, however, that a strict interpretation of the judgment of Morris P in *Tesco Ireland Limited v. McGrath & Anor*[19] would lead to the extraordinary situation that certain orders which must come into the public arena, such as property adjustment orders, which must be registered in the (public) Registry of Deeds, cannot be exhibited in Family Law Declarations in conveyancing transactions. Similar orders would, for example, be those dispensing with the consent of a spouse for the sale of a family home. Clearly these would have to be produced to purchasers of that property. There are many other orders in family law proceedings which by statutory authority, or simple necessity, reach the public eye. It is unlikely that Morris P intended his judgment to be construed so strictly.

The approach adopted by Morris P was followed by Murphy J in the later case of *R.M v D.M.*[20] Murphy J concluded that there was an absolute embargo on the production of information which derived from, or was introduced in, proceedings protected by a mandatory in camera requirement such as section 34 of the Judicial Separation and Family Law Reform Act 1989.

European Convention on Human Rights

Of special significance in discussing the in camera rule are the relevant provisions of the European Convention on Human Rights and Fundamental Freedoms, the incorporation of which into Irish law is to be by way of statute. In *Werner v. Austria*[21] the European Court of Human Rights stated that "the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6", save where there is "a pressing social need" and the reasons advanced for the restriction are "relevant and sufficient". The right to a public hearing mirrors, of course, the explicit obligations under Article 6 of the Convention, but it is also a right that arises under the guarantee of freedom of expression enshrined in Article 10 of the Convention.

The recent decision of the European Court of Human Rights in *B. and P. v The United Kingdom*[22] states that a rigid interpretation of a mandatory 'in camera' rule may be in breach of the European Convention on Human Rights if it is disproportionate. This case related to two fathers who wanted their residence applications concerning their sons to be heard in public, with a public pronouncement of the judgment. They pleaded breach of Articles 6 and 10 of the Convention. The Court noted the existence of a judicial discretion in English domestic law to hear Children Act proceedings in public, if merited by the special features of the case. As both cases were routine and 'run of the mill' in their nature the hearings in camera did not give rise to a violation of Article 6.1 of the European Convention on Human Rights. Neither was there a breach of Article 10 that the fathers could not share information revealed in the cases with others, as the restrictions imposed were to protect the rights of others, to prevent the disclosure of information received in confidence and to maintain the authority of the judiciary. The restriction of disclosure was proportionate to these aims.

Reform

Ireland now has a complex and sophisticated matrimonial law regime with a very wide degree of judicial discretion. Separation and divorce are life events for many couples and their children. The manner in which judicial discretion is exercised within that regime is of vital importance to society. Indeed, society is now far more open than it was ten or twenty years ago. Does the in camera rule in matrimonial and minor matters protect children and the litigants from the unwelcome glare of prurient publicity or protect a dark spot in the judicial process?

Supporters of the privacy rule argue that it gives the widest possible protection and assistance to the family and children's rights within the family. Victims of domestic violence would be inhibited in seeking protection if they had to run the gauntlet of publicity in seeking a remedy from the courts. Publicity and the threat of publicity could affect the dynamics of some disputes and be used as a tactic in negotiations to the detriment of the vulnerable party and the children of the marriage. This may inhibit access to justice as well as justice as between the parties to the litigation. The dangers of misinformation and inaccurate and unfair reporting would outweigh the benefits of permitting the publication of identifying information.[23] The Joint Committee on Marriage Breakdown in its 1985 report noted this danger:

> "The reason why family law proceedings are dealt with in private is that frequently evidence in the case refers to personal and intimate aspects of the parties' lifestyles and if such matters were dealt with in open Court many who have a just cause of action may be deterred from proceeding further."[24]

Critics of the privacy rule argue that it prevents public scrutiny of the family law process and prevents proper and healthy discussion on political and moral issues, which are of seminal importance to society. In this regard the observations of the Joint Committee on Marriage Breakdown in its 1985 report should be noted:

> "Public scrutiny is the natural enemy of arbitrariness and injustice in a legal system. Our courts, while hearing family cases, have operated without this salutary check. When

> decisions are made in private, members of the general public can often misunderstand what takes place in the court. This can diminish confidence in the fairness of the administration of justice in this particular field."[25]

The Law Reform Commission in its Consultation Paper on the Family Courts adopts a similar approach:

> "It is increasingly recognised that the absence of any opportunities for external scrutiny of family proceedings, even if it does not in fact affect the quality and consistency of judicial behaviour, creates an unhealthy atmosphere in which anecdote, rumour and myth inform the public's understanding of what goes on in the family court."[26]

The perceived unequal struggle of fathers to maintain custody or contact with their children post separation or divorce is seen by some as compounded by the unfairness surrounding the hearing of such cases in private. Other groups make similar arguments in relation to the perceived plight of custodial mothers forced to work outside the home, or forsed to rely on the state for support in the wake of separation and divorce. Whilst 'public policy' may be 'a very unruly horse'[27], the development of 'public policy' on such personal and nuanced family law issues is clearly impeded, if not rendered impossible, by the lack of informed debate. On the other hand, one must ask whether the blanket removal of the privacy rule from these cases would in fact improve the level of debate, or merely cloud the issues further.

The Court Services Annual Report 2000 provides a very welcome glimpse into the operation of the Courts, however the statistics furnished fall far short of the detail needed to engage in any but the most basic analysis. In an in camera system which is an exception to the general rule of 'open justice', a much more detailed analysis of the case statistics is surely merited and necessary. The significant element of 'judicial discretion' in the area of family law and the absence of reasoned judgments explaining the exercise of that discretion can result in the lack of public confidence in the system. The absence of strict formality and relaxation of the rules of evidence can also lead an unsuccessful litigant to feel hard done by. The fact that the 'best interests of the child' test is applied over the rights or wrongs of the parties in dispute can be lost on a litigant rooted in the adversarial system.

The common response of a disappointed party to family law litigation is a desire to shine the light of public opinion on the Court and Court process and on the other parent or Health Board. Reform of this area will require walking a very measured and narrow path with sensitivity to the arguments on both sides of the debate and with careful regard to the constitutional and Convention rights of all the parties involved.●

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1 [1998] 2 I.L.R.M 161.

2 Ibid., at 170.

3 [1989] ILRM 757.

4 See Section 34 of the Judicial Separation and Family Law Reform Act, 1989, Section 38(5) of the Family Law (Divorce) Act 1996, Section 25(1) & (2) of The Family Law (Maintenance of Spouses and Children) Act 1976, Section 29 of the Child Care Act 1991, Section 38(6) of the Family Law Act 1995, and Section 16(1) of the Domestic Violence Act 1996. There is no mandatory provision in the Guardianship of Infants Act 1964-1997 or Family Home Protection Act 1976. That said, the discretionary provision of Section 45 of the 1961 Act applies to such applications.

5 See *R.M v D.M. & Ors* [2000] 3 I.R 373 which distinguished the decision of Laffoy J. in *M.P. v. A.P.* (Practice: in camera) [1996] 1 I.R 144 and the decision of Barr J in *Eastern Health Board v. Fitness to Practice Committee* [1998] 3 I.R. 399 on the basis that the former related to matrimonial proceedings which are by statute subject to mandatory in camera practice, and the latter case where the rule was not mandatory but motivated by the need to provide protection for minors from harmful publicity. In this category of case the paramount consideration is to do justice. See also *Attorney General v. X and Another* [1992] 1 IR 1 where it was determined that the interests of justice and the dominant welfare of the first named defendant, in particular, required that the proceedings should be heard in camera.

6 Section 31 Child Care Act 1991.

7 See Section 14(1) and (2).

8 Section 14(3).

9 Law Reform Commission Consultation Paper on Family Courts 1994, p.100, para 4.81.

10 [2000] I.R. 430.

11 [2000] I.R. 451.

12 See *Maguire v. Drury* [1995] 1 I.L.R.M. 108 where O'Hanlon J. required the deletion from an article of all material taken from the hearing of Judicial Separation proceedings but otherwise permitted the publication of a newspaper article on the question generally.

13 [1995] 1. I.R. 226.

14 [1998] I E.H.C. 210; [1998] 3 IR 399.

15 *In the Matter of an Inquiry Pursuant to Article 40.4.2 of the Constitution and In the Matter of Baby A, Infant. Eastern Health Board, Applicant v. E., A. and A Respondents (No. 2)* at page 454

16 [2000] 3 I.R. 373.

17 Unreported (HC) 14th June, 1999 [1998 No. 526SP].

18 Unreported (HC) Budd J., 22nd May 1995.

19 Unreported (HC) 14th June, 1999 [1998 No. 526SP].

20 [2000] 3 I.R. 373.

21 Judgment of 24 November 1997.

22 Application nos. 36337 and 35974/97, judgment 27/07/2001.

23 See the Report of the Joint Committee on Marriage Breakdown (March 1985). See also the Submission by the National Women's Justice Coalition to the Attorney General's Department in relation to the Report on Publicity in Family Law Cases: Proposals for Amendments to the Family Law Act-Section 121. [Submission dated 8 August 1997] at http://www/nwjc.org.au/publicity.html.

24 Ibid.

25 Ibid at page 110.

26 Law Reform Commission Consultation Paper on Family Courts 1994, para 7.09.

27 *Richardson v Mellish* (1824) 2 Bing 229; 130 E.R. 294.

THE IN CAMERA RULE IN FAMILY LAW PROCEEDINGS

QUESTIONNAIRE

GENERAL

1. How aware are you of the legal implications of the In Camera Rule in relation to Family Law proceedings?
   Aware ❑ Reasonably aware ❑ Not aware ❑

2. Are your clients advised with regard to the implications of the In Camera Rule?
   Always ❑ Sometimes ❑ Never ❑

3. Are clients concerned about the privacy of their Family Law Proceedings as a main issue?
   Frequently ❑ Sometimes ❑ No ❑

4. Are clients critical of some aspects of the In Camera Rule?
   Frequently. ❑ Sometimes ❑ No. ❑

5. Do issues of breach of the In Camera Rule arise in the general context of correspondence in relation to Family Law proceedings?
   Frequently. ❑ Sometimes ❑ No ❑

6. Have you ever sought leave of the Court to release documents from an In Camera Family Law hearing;
   (a) for the purposes of a Criminal Law prosecution? ❑
   (b) for the purposes of a referral to a professional enquiry? ❑
   (c) for referral to the Revenue Commissioners? ❑
   (d) for referral to a Health Board in connection with an allegation of Child Sexual Abuse? ❑

7. What practical difficulties have arisen for you as a legal practitioner in relation to the In Camera Rule in matters of;
   (a) Conveyancing

   (b) Probate

   (c) Tax

   (d) Other

8. Is leave of the Court generally sought in respect of the provision of Extract Family Law Court Orders made by the Court?
   Frequently. ❑ Sometimes ❑ Never ❑

9. Do you feel that there is a need for change in the In Camera Rule as currently interpreted in Family Law cases?
   Total change ❑ Limited changed ❑ No change ❑

10. What is your view on the presence of a Court recorder in Court for the purposes of reporting Family Law cases but preserving the anonymity of the parties involved?
    Should always be available ❑
    On a pilot project ❑
    Should never be available ❑

11. Do you, as a practitioner fully understand the publication restrictions arising from the current interpretation of the In Camera Rule?
    Yes. ❑ Generally. ❑ No ❑

12. Please provide any personal comments on;
    (a) the desirability or otherwise of reform in this area

    (b) discriminatory elements of existing Law

    (c) any general personal comments in relation to this issue

Please return questionnaire enclosed with the current issue of the Bar Review to Geoffrey Shannon, Law Reform Committee, Law Society of Ireland, Blackhall Place, Dublin 7.

MANIFESTLY UNFOUNDED PROCEDURES & THE FEAR OF PERSECUTION

Sunniva McDonagh BL is a member of the Refugee Appeals Tribunal. This article is written in a personal capacity.

The provisions for the hearing of applications for asylum are set out in the Refugee Act 1996 (as amended). A certain category of applications for refugee status may be deemed to be "*manifestly unfounded applications*" under Section 12 of the Act. This article deals with the scope of Section 12(4)(c), one of the provisions which is commonly invoked where applications are deemed manifestly unfounded.

The UNHCR Executive Committee has acknowledged that there are a limited category of asylum claims that can be processed through accelerated determination procedures, defining such cases as those which are "so obviously without foundation as not to merit full examination at every level of the procedure."[1] These are the applications which the manifestly unfounded procedures are designed to address.

An applicant whose application is refused on substantive grounds has the right of appeal by way of oral hearing to the Refugee Appeals Tribunal. In *Z v The Minister for Justice Equality and Law Reform*,[2] the Supreme Court held that an applicant whose case is deemed manifestly unfounded does not have the right on appeal to an oral hearing before the Tribunal. Such an appeal is dealt with by the Tribunal on the papers only. The precise nature of this appeal on the papers has not been conclusively pronounced on by the Courts. However, there appear to be very cogent reasons for holding that the appeal should be in the nature of a *de novo* consideration of the matter. Important among these reasons is the fact, probably unique to refugee law, that the test to be applied in the determination of refugee status is a forward looking one: Thus if a limited review of a decision at first instance, such as a judicial review, were carried out, a conclusion could be reached that the original decision should be upheld, yet due to a change of government or the passing of a particular law in the applicant's country of origin since the first hearing, the applicant would qualify for refugee status if the case were being considered *de novo*.

The documents considered by the Tribunal in an appeal from a manifestly unfounded application are:

- A Questionnaire comprising 84 questions filled out by the applicant;
- Notes of an interview conducted with the applicant by an official from the Refugee Application Commissioner's Office.
- Two reports compiled under the Refugee Act 1996. The Section 11 report is a report of the person who interviewed the applicant. The Section 13 report is a further report of investigations carried out by the Commissioner. The Act appears to envisage that the first report is compiled by the interviewer, the second report by somebody else who will consider the first report and any investigations carried out (perhaps forensic reports which are relevant to credibility such as whether the applicant has ever clamed asylum in his own name or indeed under a false name). The High Court has commented *obiter*, to the surprise of many practitioners, that the same person may make both reports.[3] Furthermore, although those reports are generally provided and furnished to the Tribunal, it is noted that under Section 12(1) the Commissioner may at any time following the receipt of an application come to the conclusion that the application is manifestly unfounded (e.g. prior to interview).
- The Applicant's notice of appeal.

An application is manifestly unfounded under Section 12(4)(c) if it is an application:-

> "In relation to which the Commissioner is satisfied that the applicant's reason for leaving or not returning to his or her country of nationality does not relate to a fear of persecution."

This definition should be contrasted with that of a refugee contained in Section 2 of the Refugee Act 1996:-

> "A refugee means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country .." (emphasis added)

The plain language of Section 12(4)(c) would suggest that the

only issue to which the Tribunal must direct its attention is whether or not there is manifestly no fear of persecution set out in the application. Sometimes persons claim asylum who do not have grounds for fearing persecution and it is not without precedent that applicants are refreshingly candid as to why they came to Ireland and express reasons such as "I did not like my own country" or "I was hoping to get a good job in Ireland". Where this is the only ground put forward by an applicant, it seems not unreasonable that the application should be deemed to be manifestly unfounded. In such circumstances it is not unreasonable that the full procedures envisaged under the Refugee Act, including the full right of an oral appeal to the Tribunal, should be bypassed.

This is in contrast to the considerations appropriate to a substantive hearing on whether an applicant qualifies for refugee status. There the task of the Tribunal includes considering whether the fear is well founded and, if it is, whether it is for a Convention reason. In considering whether a fear is well founded it is necessary to consider the subjective state of mind of the applicant and the objective situation in his country.[4] Thus it may be necessary to consider the credibility of the applicant and/or whether he would have been safe in another part of his country ("the internal flight alternative"). In considering whether the persecution is for a Convention reason, it may be necessary to consider, for example, whether a refusal to give in to the demands of an organised criminal gang could amount to an imputed political opinion in a country where the authorities tolerate or benefit from such activities or whether the applicant belongs to a social group comprising persons who are discriminated against by reason of their characteristics. These are essentially questions of law which, in the absence of assistance from the Superior Courts in the interpretation of these Convention reasons, should not be decided against an applicant under accelerated procedures.

The manifestly unfounded procedures under the Act have been criticised. Indeed, some commentators have called for their abolition. It is outside the scope of this article to deal with criticisms made in relation to each and every sub-article of section 12(4). However, criticisms of Section 12(4)(c) would appear to assume a construction of the subsection which is not warranted. Furthermore this unwarranted construction appears to have been endorsed by the Supreme Court.

This construction assumes that the decision maker can inquire into whether the fear of the persecution is well founded, including making an evaluation of the credibility of the Applicant. For example, the Refugee Protection Policy Group, in their Position Paper Number 3 of July 2000, stated in relation to the subsection:-

> "This standard merely requires the 'satisfaction' of the commissioner that an applicant does not possess a well founded fear of persecution. It therefore affects a much greater range of claims than those intended under the criteria adopted by the European Council of Ministers, whereby claims are only considered 'manifestly unfounded' when they 'totally lack substance' or when there be 'no circumstantial evidence or personal details' to support their case.
>
> Because the scope of the criteria for 'manifestly unfounded' procedures is so wide, cases which require assessments of an asylum seeker's credibility are rendered 'manifestly unfounded' in contradiction to international standards. The UNHCR has established that accelerated procedures, which would include those such as the Irish procedures for 'manifestly unfounded' claims, should not be used where the case presented requires 'determination of the credibility of the asylum seeker's claim or evidence. UNHCR 'believes that issues of credibility are so complex that they may more appropriately be dealt with under the normal asylum procedure."

The above policy statement appears to conflate a "fear of persecution" with a "well founded fear of persecution". This conflation leads the policy group to conclude that the Irish "manifestly unfounded" procedures are in contradiction to international standards. However, as stated above, once a fear of persecution (such as allegations of past torture or ill treatment) is established by the decision maker, it is submitted that the application is not manifestly unfounded.

If Section 12(4)(c) were interpreted as suggested by the RPPG, it is difficult to see what meaningful function an appeal could have. For example, supposing an applicant states in his Questionnaire and/or at Interview that he was tortured but the decision maker holds that his case is manifestly unfounded pursuant to Section 12(4)(c). Since the appeal is on the papers only, the Tribunal, who has not interviewed the applicant nor had the benefit of his testimony in an oral appeal, is ill equipped to re-examine the issue of credibility. In any appeals process, the court of appeal is reluctant to interfere with any finding of credibility in relation to a witness. Consequently, faced with only a written allegation that the applicant has been tortured and the negative decision of a deciding officer into the credibility of such a finding, the Tribunal cannot realistically assess the issue of credibility. The applicant is in fact denied any effective appeal.

The UNHCR position in relation to credibility is one that should be accepted as embodying best international practice. However, surely it must also be the position that the issue of credibility is not raised by the express provisions of Section 12(4)(c). It is the interpretation which has been given to this provision which sets up a false dichotomy between Irish refugee law and the best international standards.

Unfortunately this false dichotomy has not been resolved in *Z v The Minister for Justice, Equality and Law Reform*. That decision dealt with the procedures in being prior to the enactment of the Refugee Act 1996. Those procedures, known

"Manifestly unfounded procedures are justified having regard to the fact that applications for asylum status are made which are clearly unfounded. However, to interpret these procedures in such a manner as to not afford any realistic right of appeal from a negative determination of credibility on a determination that an internal flight option was available to an applicant, restricts an applicant's rights in a manner which does not appear to have been intended by the framers of the legislation or the UNHCR."

as the Hope Hanlan Procedures, also allowed for determination of some applications as "manifestly unfounded". Paragraphs 14(a), (b) and (c) of the Hope Hanlan Procedures correspond respectively to Section 12(4)(a), (b) and (c) of the Refugee Act 1996.

The facts as recited in the Supreme Court judgment were *inter alia* as follows. The appellant was a 53 year old Russian national who stated that he was ethnically a Jew, since his mother was Jewish. He claimed that in October 1996, when in the military, he was sent by the military authorities in Russia to Chechnya to work on the restoration of an oil pipeline there. He was wounded during an attack by Chechnyan paramilitaries and was subsequently kidnapped by Chechnyans and held captive for a period of a year. He stated that the Russian authorities made no attempt either to free him or ransom him. He claimed that the Russian authorities brought criminal charges against him for surrendering his weapons to the paramilitaries and for disobeying his superiors' orders, among other matters. However, in another part of the questionnaire he appeared to state that there was an amnesty present in regard to those offences. He claimed that in November 1997, he ransomed himself by giving all his property, including his apartment in Leningrad, his summer house in Repino and two cars to the Chechnyan paramilitaries. He still owed them $5,000 and is afraid to return to Russia on this account. He also stated that during his lifetime in the USSR he was repeatedly subjected to humiliation on the part of his compatriots because of his Jewish origins. His application was deemed to be "manifestly unfounded" on the grounds set out in paragraph 14(a) to 14(c) of the Hope Hanlan Procedures.

The judgment of the Supreme Court was given by McGuinness J The Supreme Court held that it was appropriate to have regard to the provisions of the Handbook on Procedures and Criteria for Determining Refugee Status published by UNHCR. The respondent objected to this on the grounds that it was published before the accelerated procedures for manifestly unfounded applications came into being. However, the Court felt that the Handbook was relevant and referred to paragraphs 37 to 42 under the heading "Well founded fear of being persecuted".

McGuinness J summarised the relevant issue as follows:-

> "The question for the assessor and for the first named respondent was whether the applicant had a well founded fear for convention reasons of returning to his own country. Therefore the essential matter to be investigated was why Mr. Z left Russia and why he feared to return there. ...To an extent his difficulties in Chechnya may be ascribed to the fortunes of war rather than to persecution, or to a failure of protection by his own State. Again, he gave no account of seeking the protection of the authorities from the Chechnyan paramilitaries once he had escaped from their clutches."

It is submitted that the Learned Judge was incorrect in the question she posed to be answered by the decision maker. The correct question for the decision makers was whether he or she was satisfied that Mr. Z's reason for leaving Russia did not relate to a fear of persecution.

McGuinness J felt it relevant that Mr. Z had given no account of seeking the protection of the Russian authorities from the Chechnyan paramilitaries. The question of State protection arises only when one is considering whether the fear of persecution is well founded. By considering this question, the Court gave further evidence of its belief that in applying paragraph 14(c) one is entitled to make a substantive determination in relation to whether a fear of persecution is well founded and whether such persecution is for a Convention reason.

Paragraph 14(a) of the Hope Hanlan Procedures provides that an application is manifestly unfounded if "the applicant's application did not show on its face any grounds for the contention that the applicant was a refugee". McGuinness J declined to uphold the decision under paragraph 14(a) stating that it was difficult to accept that the decision was reasonable on that ground. However, the Judge went on to say that as far as paragraphs 14(b) and 14(c) were concerned, it appeared that there was sufficient material, or lack of material, before the decision makers to render the decisions reasonable and therefore *intra vires*. Paragraph 14(c) is in identical terms to Section 12(4)(c).

The decision of the Supreme Court with regard to paragraph 14(c) is all the more surprising since the Court found that it was unreasonable for decision makers to determine the case under paragraph 14(a), namely, that the application did not show on its face grounds for believing that the applicant was a refugee. Perhaps the only way the two findings could be reconciled is to suggest that although there were grounds on the face of the application for contending the applicant was a refugee, these grounds were disbelieved. However this interpretation would involve a finding in relation to credibility which, the UNHCR suggests, is outside the scope of the procedures.

Manifestly unfounded procedures are justified having regard to the fact that applications for asylum status are made which are clearly unfounded. However, to interpret these procedures in such a manner as to not afford any realistic right of appeal from a negative determination of credibility on a determination that an internal flight option was available to an applicant, restricts an applicant's rights in a manner which does not appear to have been intended by the framers of the legislation or the UNHCR. It is hoped that if a case involving an interpretation of Section 12(4)(c) comes before the Courts, the interpretation given to paragraph 14(c) in Z *v The Minister for Justice Equality and Law Reform* will not be invoked as a precedent.●

1. UNHCR ExCom Conclusion No. 30, 1983
2. Supreme Court, 1 March 2002
3. Smyth J. in *T. v. The Minister for Justice, Equality and Law Reform* (High Court, Unreported, 31 October 2001.
4. See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraphs 37 to 42, approved by the Supreme Court in *Z v The Minister for Justice Equality and Law Reform.*

Z V MINISTER FOR JUSTICE EQUALITY LAW REFORM

Siobhán Stack BL critically appraises the decision of the Supreme Court in Z v Minister of Justice Equality & Law Reform, decided on 1 March 2002.

Introduction

The decision in *Z. v. Minister for Justice*[1] was essentially limited, as far as the question of procedures was concerned, to a consideration of whether the absence of an oral hearing on appeal from a recommendation that an asylum application was manifestly unfounded was consistent with natural and constitutional justice. However, the decision is as interesting for its consideration of the procedures employed at first instance, as for its brief decision on this ground of appeal.

Background

The applicant in *Z.* applied for asylum on his arrival in Ireland on 18 October 1999. This was before the commencement of the Refugee Act 1996, and therefore the application was dealt with in accordance with the Hope Hanlan procedures. The applicant filled in the standard Questionnaire, and was interviewed by an official of the Department of Justice, Equality and Law Reform. That same official subsequently drew up an assessment of the applicant's case under paragraph 10 of the Hope Hanlan procedures, and made a recommendation that the application should be regarded as manifestly unfounded. This recommendation was accepted and was later upheld on appeal.

The Hope Hanlan procedures which were at issue in *Z.* do not differ materially from the procedures under the Refugee Act 1996, which have been applied to asylum applications since 20 November 2000. Broadly speaking, the current first instance procedures under the Refugee Act 1996 provide for an interview by an authorised officer of the Refugee Applications Commissioner,[2] with an opportunity to make representations within seven days, followed by critical appraisal and review in the form of the section 13 report,[3] and a recommendation to the Commissioner.[4] There is no provision for an oral hearing as such, where oral submissions could be made by the applicant and where an applicant could reply to supplementary questions from his representative so as to explain any apparent inconsistencies in his evidence. This procedure may be interrupted, either prior to interview[5] or after the interview[6] by the formation of the opinion by the Commissioner that the application is manifestly unfounded on one of the grounds set out in section 12(4).

The effect of a decision to regard the application as manifestly unfounded is that the application is thereby transferred into an accelerated procedure. The salient feature of this procedure is that there is no full appeal against the initial decision, which is conducted on the papers only.[7] In addition, the only matter at issue is whether the application is manifestly unfounded, and the substantive elements of the applicant's claim are not examined.[8] For example, if the application has been deemed to be manifestly unfounded on the basis that the applicant has deliberately failed to reveal that he or she had lodged a prior application for asylum in another country,[9] then the appeal would be confined to the issues of whether the applicant had lodged such an application, whether he or she had failed to reveal it, and whether that failure was deliberate.

The appeal to the Supreme Court in *Z. v. Minister for Justice* focused on the reasonableness of the findings in relation to that applicant, and on whether the absence of an oral hearing on appeal was a breach of the applicant's undoubted constitutional right to natural and constitutional justice. The purpose of this article is to examine the Court's findings in relation to the latter ground, and to offer some thoughts on how it bears on the procedural rights of applicants at first instance, as well as considering whether the right to an oral hearing on appeal in the substantive procedures has been affected.

The Decision in Z

While it is well-established that an oral hearing is not an inevitable requirement of natural and constitutional justice, this only being required where the nature of the decision warrants it,[10] the High Court originally granted leave in Z[11] on the ground that the absence of the oral hearing on appeal was a breach of the requirements of natural and constitutional justice. In doing so, the High Court was influenced by the very serious consequences for an applicant, a factor which traditionally weighs in favour of the courts declaring that natural and constitutional justice require an oral hearing.

However, judicial review itself was refused on the basis that "the applicant for refugee status has the opportunity pre-determination to present his case at interview and the decision is made by a superior official[12] on the basis of the record of the interview and the report of the interview"[13] and the American case of *Goldberg v. Kelly*,[14] which had been instrumental in persuading the Court to grant leave in the first place, was distinguished on that basis. The *ratio* of that case, as cited by the High Court on the hearing of the application for judicial review, is worth quoting:-

> "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second hand through his case worker. Written submissions are an

> unrealistic option for most recipients who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentation; they do not permit the recipient to mould his argument to the issues."

The key distinction drawn between the Hope Hanlan procedures and the procedures in question in *Goldberg v. Kelly* was that the former incorporated an oral element, in the form of an interview, whereas the latter did not. In all other respects, the concerns expressed in *Goldberg v. Kelly* seem apposite to the situation of an applicant for asylum. The capacities and circumstances of an asylum seeker are akin to those of a welfare recipient. He may not have the educational or linguistic capacity to put forward his case in writing. The decision of the High Court in *Z* therefore rests on an acceptance of the adequacy of the interview in lieu of an oral hearing.

In the Supreme Court, counsel for the applicant stressed the need for an opportunity both to cross-examine witnesses and also to expand orally on the material dealt with in the questionnaire and the interview.[15] Emphasis was also laid on the fact that the applicant had not had the benefit of legal advice either when filling in the questionnaire or when attending the interview. In practice, applicants are entitled to have their legal representative attend at interview, but the legal representative may not intervene or ask questions, their only role being to make submissions at the conclusion of the interview. However, the Court endorsed the decision of the High Court, stating that "[h]ere there has already been an oral hearing at first instance."[16]

Implications of Z

The necessity for an interview at first instance

Because both the High and Supreme Court decisions were based on the fact that there had already been an oral hearing[17] at first instance, an inevitable conclusion that must be drawn is that some form of oral hearing is necessary in considering an application for asylum. Therefore, it seems that the Refugee Applications Commissioner could not make a finding that an application was manifestly unfounded without an interview, i.e., on the basis of the Questionnaire only. This reflects the procedures established by the Refugee Act 1996, which provide for an interview even if the Commissioner forms a preliminary view on the basis of the Questionnaire that the application is manifestly unfounded.[18] In any event, it would be surprising if a finding of credibility which is required in the substantive procedures, or a finding of lack of reasonable cause or bad faith, which are contemplated by section 12, could be made without a face-to-face meeting between decision-maker and applicant.

Provision of an oral hearing on appeal in the substantive procedures

The implications of *Z.* for the current oral hearing on appeal in the substantive procedures are less clear. On the one hand, the reference by the Supreme Court to the absence of any requirement in the Handbook of an oral hearing on appeal, suggests that an oral hearing is not required even on appeal from a recommendation under section 13, as the *Handbook* sets no requirements in relation to appeal procedures. However, there was significant emphasis in *Z.* on the need for accelerated procedures as a matter of public policy.[19] This would tend to support a view that the particular public policy involved in providing for accelerated procedures was the basis for the decision, and that a full oral hearing will continue to be required as a matter of natural and constitutional justice in the substantive procedures. In addition, a full assessment of credibility, as is usually required in the substantive procedures, probably requires an oral hearing. Otherwise, it is difficult to see how the Tribunal could properly discharge its appellate function.

The onus on the applicant at interview

There was of course no direct examination of the procedures at first instance, as the grounds related only to the procedures on appeal. However, if an applicant is denied a full oral hearing at first instance on the basis that an interview is sufficient, the quality of that interview becomes central to the fairness of the procedures which he is afforded. In this respect, the comments of the Supreme Court on the manner in which the first instance procedures were actually applied in *Z.*[20] are quite enlightening. The Court was of the view that the interview placed too much attention on the time spent by the applicant in South Africa before coming to Ireland, and on his reasons for leaving there, rather than on his reason for leaving his country of nationality, Russia. However, the applicant derived no benefit from this criticism. In response to further criticisms to the effect that the interviewer failed in her duty because she did not bring out further information in regard to the question of the applicant's Jewish background or his membership of the Communist party, the Supreme Court stated that the burden of proof of establishing refugee status, particularly as the matters particular to the applicant's case, was on the applicant and that it was fully open to the applicant to state his case whether at his interview, by additional submission after his interview, or in submissions at the time of his appeal.[21]

It is clear from the Supreme Court decision that it is up to an applicant to provide detailed evidence of his or her refugee status, and that if the questions posed at interview fail to adequately bring out all aspects of the claim, or of the factual bases for it, applicants must enlarge on their replies at interview in the form of written representations immediately afterwards. Section 11(3) of the Refugee Act 1996[22] provides for a right to make representations within seven working days of the conduct of the interview, and the Supreme Court decision seems to view this as an opportunity to submit further evidence rather than mere submissions.[23] This is consistent with the view taken by the Supreme Court of what the procedures at first instance are designed to achieve, *i.e.*, that a full opportunity to state his case must be afforded to the applicant.

A telling example of the onus on the applicant is provided in *Z* itself, where the applicant's claim had emerged at interview as being primarily based on his difficulties with paramilitaries in Chechnya. This would constitute persecution by non-State agents, and would therefore require evidence that the State was unwilling or unable to protect the applicant. This in turn requires an applicant to give an account of his efforts to seek protection from the State authorities, or at least to provide cogent reasons why no such efforts were made. The Supreme Court clearly expected the applicant to give such evidence. This places a very heavy onus on applicants, who are frequently unrepresented during the first instance procedures, to cover all points of the legal definition of "refugee" in the interview, by volunteering the information at the end of the interview if necessary. On this specific point, it should be noted that the question of defining "persecution" to include persecution by non-State agents was not clarified as a matter of Irish law until the first High Court decision in *Z* itself.[24]

The availability of legal advice and representation is therefore central to protection of the rights of the individual applicant. However, submissions on the part of the applicant in *Z* to the effect that he was not legally represented while completing the Questionnaire or at the interview did not persuade the Supreme Court to lower their expectations of an applicant.

Country of origin information

The argument was made in *Z* that the examiner ought to have made a more searching review of the country of origin information. This issue became sidelined on the facts in *Z* as the case turned on the applicant's failure to provide any evidence of persecution which had been suffered by him, rather than the plausibility of his story in light of the country of origin information. The judgment is more ambiguous on the subject of the onus which lies on an applicant to provide a full picture of conditions in his country of origin. It would appear to be difficult to give any interpretation to the idea of a shared burden of proof other than that the examiner is obliged to provide a comprehensive and non-selective account of conditions in the country of origin. The Supreme Court in *Z* was apparently satisfied with the efforts made by the authorised officer in the case before it.[25] However, even if an applicant could point to a failure to discharge this duty, this would probably constitute grounds for appeal rather than for judicial review.

Relevance of the Handbook

The Supreme Court confirmed the relevance of the *Handbook on Procedures and Criteria for Determining Refugee Status*[26] as a guide for the determination of asylum applications, and also as an indication of the requirements of natural and constitutional justice in this context. This endorses the approach of the High Court, which had previously accepted the *Handbook* as illustrating the correct approach to the investigation of asylum claims.[27] In fact, it was assumed in *Z v. Minister for Justice (No. 2)* that the procedures set out in the Handbook would be followed at interview, thereby guaranteeing the adequacy of the interview of the purposes of fair procedures.[28] It remains to be seen whether the courts would be willing to judicially review for breaches of the guidelines in the *Handbook*. Many of the matters covered by it, such as the obligation to give an applicant the benefit of the doubt, would appear to be matters within the discretion of the decision-maker, and subject to review only on the basis of "reasonableness" as defined in *O'Keeffe v. An Bord Pleanála*.[29] Other matters, such as the obligation to afford an opportunity to the applicant to clarify inconsistencies and contradictions,[30] might, on appropriate facts, give rise to judicial review by the High Court.

Conclusion

The *ratio* of *Z*, insofar as it deals with procedural rights, is merely to uphold the general procedures which do not provide for an oral hearing on appeal from a finding that an application is manifestly unfounded. However, the reasoning discloses that the interview procedure at first instance is crucial to the fairness of the proceedings. And while the decision in *Z* provides no comprehensive review of current practices and procedures at first instance, it clearly envisages both that the guidelines in the U.N. Handbook will be observed, and that the right to make 'representations' should include a right to tender further factual evidence. There is no doubt, however, that there is a very heavy onus on applicants, even if they are unrepresented, to ensure that their replies at interview are sufficiently comprehensive to avoid a determination that their application is manifestly unfounded, and to bring themselves within the definition of "refugee" contained in section 2 of the Refugee Act 1996.●

1 (Unreported, Supreme Court, 1st March, 2002)
2 Section 11 (2).
3 Section 13 (1).
4 This is contained in the report under section 13 (1).
5 Section 12 (1) (a).
6 Section 12 (1) (b).
7 See paragraph 13 (a) of the Hope Hanlan procedures. Similarly, section 16 (3) of the Refugee Act, 1996, provides for an option for the applicant to request an oral hearing in an appeal against a recommendation under section 13, but not in the case of an appeal against a recommendation under section 12.
8 A discussion of the powers of the Commissioner and the Tribunal under section 12 is not within the scope of this article. See McDonagh, "Manifestly unfounded procedures and fear of persecution." (2002) 7 *Bar Review 284* to the effect that the Supreme Court in Z. endorsed an erroneous interpretation of section 12 (4) (c), the ground upon which the applicant in Z. was deemed to be manifestly unfounded.
9 See paragraph 14 (g) of the Hope Hanlan procedures and section 12 (4) (g) of the Refugee Act, 1996.
10 See de Blacam, *Judicial Review* at pp. 127-8 and Hogan and Morgan at pp. 556-560 for discussion of the authorities on this point.
11 Unreported, High Court, Finnegan J., 29 March 2001.
12 The practice of having someone other than the interviewer make the decision has now altered, the function of interviewer and adjudicator now being discharged by the same person, and this new practice has been endorsed by the High Court: see *T. v. Minister for Justice* (Unreported, 31st October, 2001).
13 At p. 7 of the judgment.
14 397 US 254.
15 See p. 22 of the judgment.
16 See p. 36 of the judgment.
17 The High Court decision refers to the first instance procedures somewhat more accurately as an "oral procedure."
18 See section 12 (1) (a).
19 See Finnegan J. (as he then was) in *Z. v. Minister for Justice* (17 July 2001) at pp. 8-9, where he refers to the need for accelerated procedures in the case of manifestly unfounded claims was one of the reasons why it was held that an oral hearing on appeal was not necessary.
20 See p. 32 of the judgment.
21 See p. 32 of the judgment.
22 This provision is the successor to paragraph 9 of the Hanlan procedures, which provided for an entitlement in the applicant or his representative to make written representations within five working days of the interview.
23 *ibid.*
24 See *Z. v. Minister for Justice* (Unreported, High Court, Finnegan J., 29 March 2001)
25 See p. 33 of the judgment.
26 UNHCR, (Geneva, 1979)
27 See *C. v. Minister for Justice* (Unreported, Kelly J., 26 July 2000) and *Z. v. Minister for Justice (No. 1)* (Unreported, Finnegan J., 29 March 2001).
28 (Unreported, Finnegan J., 17 July 2001) at pp. 9-13.
29 [1993] 1 I.R. 39.
30 Paragraph 199 of the Handbook. See also Goodwin-Gill, "The Refugee and International Law" (Oxford, 1996), at p. 349, approved by Kelly J. in *C. v. Minister for Justice* (Unreported, High Court, 26 July 2000) at p. 12.

THE EUROPEAN COURT OF JUSTICE AND DOMESTIC TAX LEGISLATION

Patrick Hunt SC considers recent developments bearing on the susceptibility of domestic laws to scrutiny under European law and particularly having regard to principles of non-discrimination.

Outside the field of direct taxes with a notably European element, namely Value Added Taxes, or those that are subject to the rules of free movement under European Community law, namely capital duties and customs duties, the governments of EU Member States have up until recently tended to think of direct taxes as reserved to them and free from interference from the Commission or from the European Court of Justice. The so-called Bachmann doctrine as enunciated in the case of *Bachmann v. Belgium*[1] indicated that as Community law then stood (in 1993/94) it was difficult to use the anti-discrimination provisions of Community law to bring about conformity or convergence of domestic tax systems because of the need and the right of each Member State to ensure the cohesion internally of their tax system.

However, in the same year, the European Court of Justice ruled in the case of *Halliburton Services B.V. v. Stattssecretarias Financien*[2] that tax laws which discriminated on grounds of nationality were precluded under Article 52 of the EC Treaty which provides as follows:

> "Restriction on the free of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies branches of subsidiaries by nationals of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self employed persons and to set up and manage undertakings in particular companies or firms within the meaning of the Second Paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected."

Indeed this approach had been outlined much earlier in 1984 in the case of *EC Commission v. France.*[3]

The principle of non-discrimination has assumed a greater prominence in recent decisions of the European Court of Justice, including *R v. IRC ex p. Commerzbank*,[4] *ICI v. Colmer*[5] and *Safir v Stattemyndigheten.*[6] More recently in the joined cases of *Metallgesellschaft Ltd and Hoechst v. IRC*,[7] the Court went on to award damages by way of the award of interest on tax which was improperly collected.

The *Metallgesellschaft* and *Hoechst* cases concerned Advance Corporation Tax, which has by now been abolished both in Ireland and in the UK, but the willingness of the European Court of Justice to award damages in the form of interest or otherwise will focus the minds of domestic legislatures in relation to the implications of Article 52 of the Treaty and possible breaches thereof. In the *Commerzbank* case it was held that where a non-resident company was deprived of the right to a repayment supplement (under Article XV of the US/UK double tax treaty) on overpaid tax to which resident companies were always entitled, it was placed at a disadvantage by comparison with the latter. As such there was unequal treatment even though there was an exemption from the tax which gave rise to a refund available to non-resident companies. This could not justify a rule of a general nature, withholding the benefit of a repayment supplement to non-UK companies established elsewhere in the EU, and the rule was accordingly found to be discriminatory in a manner contrary to Articles 52 and 58 of the Treaty (the latter treating companies or firms in the same way for the purposes of the Treaty as natural persons) and the complainant should be compensated by damages.

Here the Court built on the decision in *EC Commission v. France*[8] wherein the disentitlement of a foreign resident company to reclaim tax credits was held to be discriminatory and contrary to Articles 52 and 58 of the EC Treaty.

In the case of *PH Asscher v Stattssecretarias Financien*[9] the European Court of Justice was concerned with a Dutch national who was paying tax and social insurance in Belgium on a contract of employment he entered into there but was also being subject to tax in Netherlands, which tax would not have applied to a non-Dutch national. The Court and the Advocate-General in the case pointed out that under Community law direct taxation does not as such come within the purview of the Community.

Article 99 of the Treaty explicitly gives the Council powers of harmonisation in the field of indirect taxation only. Laws relating to direct taxation may be harmonised under Article 100 of the Treaty by the Member States acting unanimously where they directly affect the establishment or functioning of the Common Market. Nevertheless, as the Court had noted in the *Asscher* case:

"The power retained by the Member States... must be exercised consistently with Community law.

In the field of direct taxation therefore they may not adopt measures which would have the effect of unjustifiably impeding freedom of movement for employed persons (Article 48) of the Treaty (see Biehl v. *Administration des Contributions* [1991] ECR 1779) or for persons carrying on a self employed activity (Article 52) (EC *Commission v. France* [1986] ECR 273).

...the rules regarding equal treatment prohibit not only overt discrimination by reason of nationality or, in the case of a company, its seat, but also covert forms of discrimination which by application of other criteria of differentiation, leads in fact to the same result (*Sotgiu v. Deutche Bundespost* [1974] ECR 153)."

The Court went on to point out that, in the case of a tax advantage, which is not available to a non-resident, a difference in treatment as between the two categories of taxpayer may constitute discrimination within the meaning of the Treaty where there is no objective difference between the situation of the two such as to justify different treatments in that regard.

If a Member States refuses tax benefits linked to the taking into account of personal and family circumstances to a taxpayer who works but does not reside in its territory whilst granting them to resident taxpayers, the Court has held that there is discrimination where the non-resident receives all or almost of his worldwide income in that State since the income received in the State in which he resides is insufficient to allow his personal and family circumstances to be taken into account.

The European Court of Justice ruled that a Member State is not entitled to use tax measures in reality to make up for the fact that the taxpayer is not insured with and does not pay contributions to its social security scheme. Article 52 of the Treaty had to be interpreted as precluding one Member State from applying to a national of a Member State who pursues an activity as a self-employed person within its territory, and at the same time pursues another activity as self-employed person in another Member States, in which he resides, a higher rate of income tax than that applicable to residents pursuing the same activity where there is no objective difference between the situation of such taxpayers, and that of taxpayers who are resident, to justify the difference in treatment.

What about the Irish position on cross-border working and living arrangements and domestic Irish tax ? In one recent Irish case on this topic, *Fennessy (Inspector of Taxes) v. McConnellogue*,[10] concerning taxation of a Northern Ireland resident in respect of income arising in the State, which income was assessable only in the State under the terms of the Ireland /UK double tax treaty, European law was not canvassed at all, and the entitlement to joint assessment of the taxpayer and his wife in Ireland was denied. There would appear to be scope under the Asscher case to look again at this area.

General Approach of the European Court of Justice

Essentially, therefore, in looking at an Article 52 complaint, the Court first establishes as a matter of fact whether there is discrimination as and between persons or companies established in different Member States and then, if so, assesses whether there is any objective justification for this.

Having identified some objective justification it would appear that the issue of proportionality must then be considered. In a recent decision of the English Court of Appeal, R *(on the application of Professional Contractors Group Ltd and others) v. Inland Revenue Commissioners*,[11] the Court considered an Inland Revenue press release (IR 35) outlining changes to the way in which individuals also provided services to clients through "service companies" were taxed. This effectively deemed for national insurance purposes certain monies received by particular service companies as being in the nature of a salary and confined deductibility for expenses (except for 5%) to those that were wholly, exclusively and necessarily employed.

Robin Walker L.J. in rejecting a Community law challenge stated:

"If the IR35 legislation had to be justified an essential part of the process of justification would be for the Revenue to show that its terms were appropriate and necessary to achieve its objectives; that whenever there was a choice between different measures which might be appropriate the least onerous had been chosen; and the burdens imposed by the measure were not disproportionate to the aims pursued."

In Ireland we are familiar with the proportionality doctrine first adverted to in *Heaney v Ireland*[12] and employed in the field of taxation in a constitutional law case, *Daly v. The Revenue Commissioners*[13] to strike down the system of professional services withholding tax introduced by Section 26 of the Finance Act 1990. Costello P. held that the means chosen to achieve the legislative objective were not proportional having regard to the necessary impact on constitutional rights.

In the *Professional Contractors* case it was not necessary to make a finding on this point as the case had been decided against the taxpayer on the grounds that the proposals were neutral vis a vis nationals of different States but Robin Walker L.J. did express a tentative view that IR35 may have failed the proportionality test.

This may point to a new fertile ground of challenge. At this point then it may be necessary to return to the Bachmann doctrine. In the *Metallgesellschaft* case Advocate-General Fennelly neatly summarised the current thinking on the Bachmann doctrine:

"The cases on fiscal cohesion have arisen in the context of all of the EC treaty freedoms: Bachmann's and Asscher's cases concerned the free movement of persons; the Imperial Chemical Industries case and Baar's case concerned the freedom of establishment; the Eurowings case concerned a recipient of services; while Verkooijen's case concerned the free movement of capital. In all cases, save Bachmann's case, the Court held that the national rules in question could not be justified by any notion of fiscal cohesion.

....It would seem that the true scope for fiscal cohesion as a justification for the differential treatment of non-residents would concern only situations in which there is a real and substantial risk, that extending equal treatment would facilitate tax evasion in both the host Member State and the Member State of residence of the claimant non-resident taxpayer....

For the defence to succeed there must be a direct and, from the point of view of the application of the particular tax in question, fundamental organic link between the application of that tax and the exemption or relief therefrom, which, though made available to the resident taxpayer, is denied to his non-resident counterpart". (emphasis added)

Impact of anti-discrimination provisions on domestic law makers

Tax authorities in various countries have recently reviewed local laws motivated purely by perceived difficulties with Brussels in relation to anti-discrimination.

In Ireland certain amendments to stamp duty law were introduced by Sections 80(10) and 119(8) of the Stamp Duty Consolidation Act 1999 (in the Finance Act 1999 and the Finance Act 2001 respectively) in order to allow relief on reconstructions/amalgamations of companies to companies notwithstanding that they were not Irish provided that they were incorporated in another Member State, either as target or acquiring companies.

The legislation was necessary as a result of decisions such as *ICI v. Colmer*[14] wherein it was held that group relief could not be denied by UK domestic law to groups where one or other of the group companies was incorporated in a Member State other than the UK.

Domestic Irish provisions which might be scrutinised

These developments in European law could well have an impact on several domestic taxes in Ireland, including the following :

(i) Rents to non-residents (withholding)

Section 1041 TCA 1997 applies a withholding obligation under Section 1034 at source for payments of rent to non-residents. This does not include a saver for residents of other EU countries.

However such discrimination might be objectively justified and it would be possible for the Irish Government to cite the purpose of legislation as being the prevention of tax avoidance. This was not accepted in the *ICI v. Colmer* case but different considerations applied to the group relief provisions under consideration there which were not necessarily designed to prevent tax avoidance in the manner it would appear that Section 1041 may have been.

However Advocate-General Fennelly's pre-condition that there be a real and substantial risk that equal treatment would facilitate tax avoidance both in Ireland and the other EU Member State is a high hurdle.

(ii) Treatment of UK Source Income/Gains for non-Irish domiciled residents

Insofar as the remittance basis is available to non-Irish / non-UK source income within the EU, it is not available in respect of UK income which is taxed on an "as arising" basis under Section 73 TCA 1997.

This procedure parallels the procedure in the UK in respect of Irish source income.

It follows from this decision perhaps that the mutuality of the Irish/UK situation and the existence of a Treaty might save the arrangement as regards taxation on an "as arising basis" consistent with the provisions of Article 52 or 58 as interpreted by the ECJ.

It is notable that the special (and unfavourable) treatment in Ireland respect of the UK as against other Member States is also evident in liability to the taxation of capital gains tax pursuant to Section 29(4) of the Taxes Consolidation Act, 1997 and the foreign earnings deduction under Section 823(2A) TCA 1997.

(iii) Reinvestment relief for individuals

Section 591 TCA 1997 enables individuals disposing of certain shareholdings and reinvesting in certain other shares in an Irish incorporated company to obtain relief but this is not extended to investments in companies incorporated in other member states. This seems at first blush to be discriminatory as it is contrary to the principle of freedom of movement of capital and not justifiable on the basis of cohesion of the tax system, in that replacement shares in a company incorporated in another Member State could still remain within the Irish tax net if such a company were resident since in accordance with the general Irish rule re corporate residence *(place of central management and control)* as amended by the provisions of Section 23A Taxes Consolidation Act, 1997 place of incorporation is not necessarily determinative of residence.

An objective justification, based of prevention of tax leakage from the Irish system, which justification has been successful elsewhere in excusing exit charges, seems questionable in this context.

(iv) Withholding Tax Capital Gains Tax under Section 980 TCA 1997

The Revenue are only obliged to issue certificates under subsection 8 to persons who are resident in the State. This may be objectively justifiable on grounds of prevention of tax avoidance.

Discrimination which goes the other way

It might be interesting to note also that certain of the discrimination in the Irish tax code is in favour of non-residents and these provisions include section 236 TCA 1997 (deposit income/retention tax) ; section 35(1)(a) and section 63 TCA (encashment tax on dividends) ; section 739(d) (exit tax on investment undertakings) ; and section 246(3)(c) TCA (withholding tax on interest).

Could the EU conceivably be interested in these type of provisions? It may be that there is a "sufficient fundamental organic link between the application and the exemption" in Advocate-General Fennelly's phrase to justify discrimination, objectively, under the fiscal cohesion principle in relation to these apparent instances of discrimination against Irish nationals.

At all events, there is no doubt that there will be further developments in this area and that the trend towards convergence will lead the European Court of Justice towards more frequent invocation of the non-discrimination provisions in the area of direct taxation in member States.●

1. [1994] STC 855
2. [1994] STC 655
3. [1986] ECR 273
4. [1993] STC 605
5. [1998] STC 874
6. [1998] STC 1043
7. [2001] AER (EC) 496
8. [1986] ECR 273
9. [1996] STC 1025
10. [1995] 1 IR 500
11. [2002] STC 165
12. [1994] 2 ILRM 420
13. [1996] ILRM 122
14. [1998] STC 874

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