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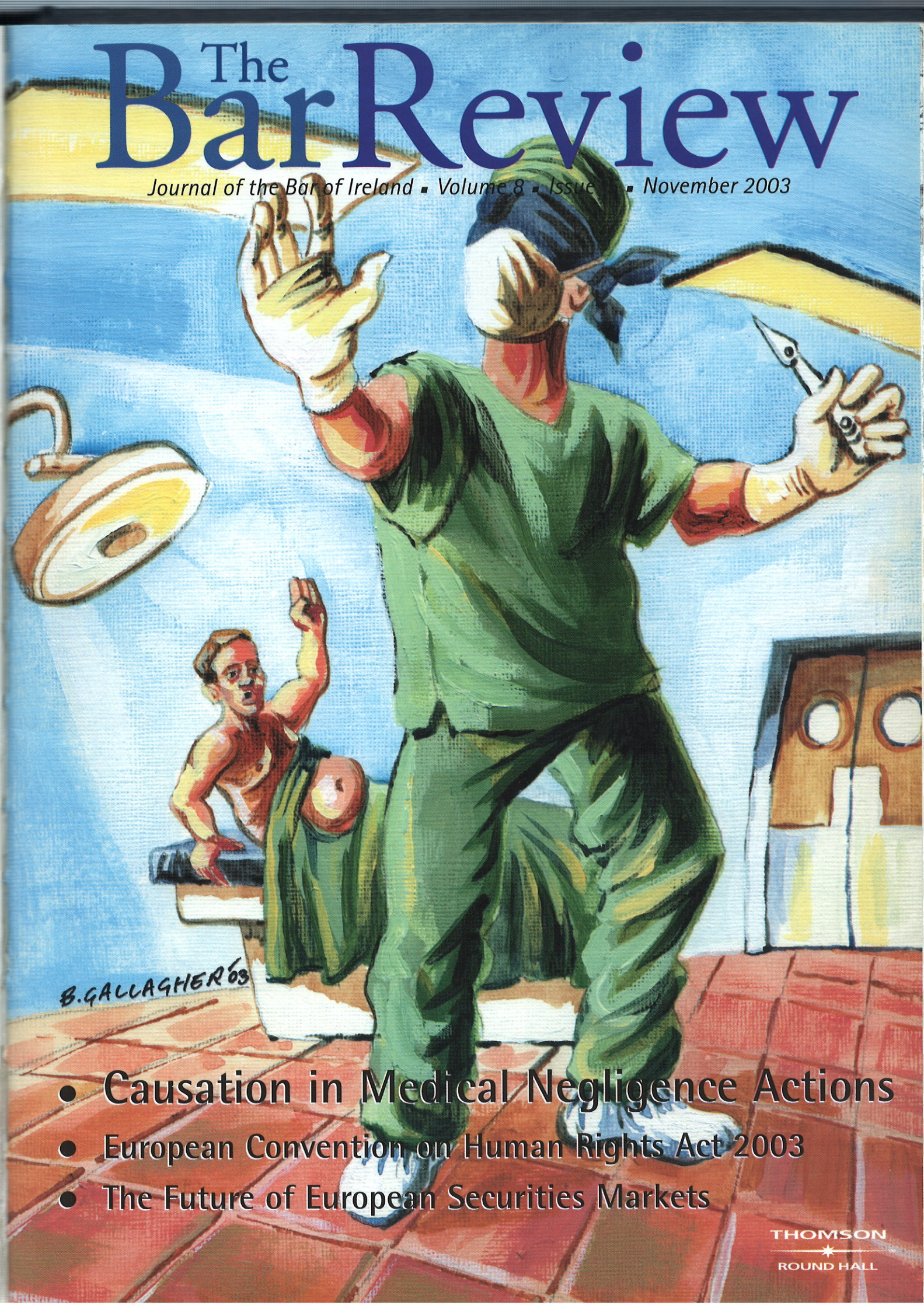

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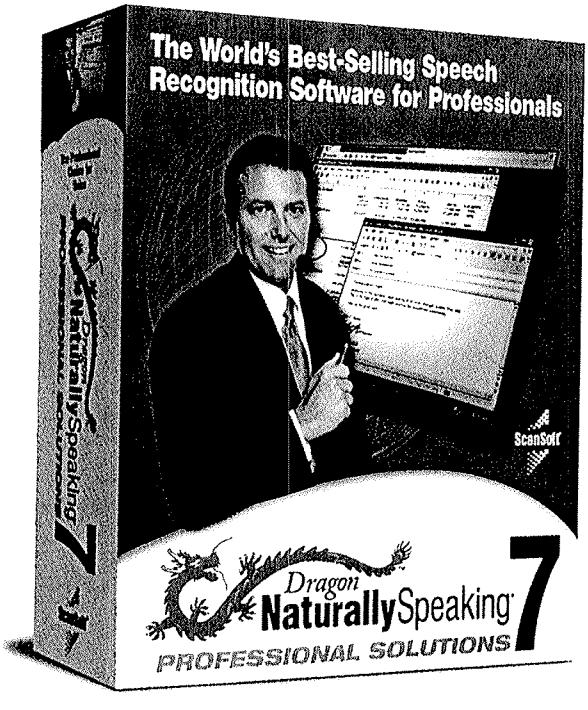

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The Commission to Inquire into Child Abuse

Much has been said and much has been written since Mrs Justice Laffoy announced her intention to resign from the Commission established to investigate child abuse. From the press coverage surrounding the announcement, it would appear that the problems besetting this form of inquiry have been in some manner unexpected or are in some way due to the dilatory and unreasonable behaviour of lawyers. Yet from the very beginning in 1999, when the then government announced its intention to set up the Commission, it should have been self evident to the political leadership in this country that whatever form this investigation would take, stretching for a period of over 60 years, it would be fraught with legal difficulties and evidential problems. It was also self-evident that given the number of children that had passed through state institutions, there would be a substantial number of complainants before the Commission. In a nutshell, it was clear from the start that if the Commission was to satisfy the survivors' desire for attribution of blame and healing, while yet preserving the constitutional rights of alleged abusers, such a process would be a costly and lengthy affair involving all the constitutional checks and balances afforded by our legal system.

When the legislature set up the Commission on a statutory basis in May of 2000, it was essentially implementing the recommendations contained in two reports from the Commission, regarding its functions, powers and procedures. At that time, the potential for a hefty legal bill was evident. Given the experiences of the last 15 years with various tribunals such as the Beef Tribunal and the Flood Tribunal, it was clear that such inquiries can drag on for years, cost several millions, can achieve much in bringing hitherto unknown information in to the public domain and yet can frequently disappoint if the findings are anything other than clear-cut or definitive. Yet, the legislature forged ahead and set up the Commission with all the powers of a tribunal so it could fulfil its investigative remit, while also containing other features designed to achieve healing for survivors of abuse. It was some time later before the Redress Board was established to compensate the victims of abuse in institutions. At present, these two separate bodies function independently although there is an obvious overlap in the tasks performed.

One key problem in this jurisdiction is the knee-jerk manner in which successive governments have used the tribunal mechanism as a manner of hiving off matters of grave controversy from the political domain. This performs the neat trick of transforming a political issue into a legal one and it postpones hard decision-making for a number of years so that the public outrage that gave rise to the controversy has by and large been defused when the ultimate fact-finding process is concluded. However, the interests of the public at large would be better served if each political decision to set up an inquiry was informed by an in-depth analysis of what is desired to be achieved and the ultimate cost of achieving those objectives. Instead, in this country, a tribunal is established, there is little political debate on the cost and years later, acres of newsprint are dedicated to "tribunal millionaires" and the manner in which inquiries have become bogged down in legal challenges.

For many survivors of abuse, an attribution of blame and a feeling of closure may be the ultimate aim. For others, financial compensation may be more important. Making findings of fact against alleged abusers is a costly legal procedure as each alleged abuser is entitled to legal representation and to many of the protections to which they would be entitled in a criminal trial. On the other hand, the awarding of compensation to a victim without a public finding against named abusers may ultimately be a much less costly procedure, as such a hearing can often be conducted without the need for constitutional protection for alleged abusers. However, such a compensation hearing may not satisfy some victims' desire for an attribution of blame.

At a time when the government has made it clear that it is not willing to write a blank cheque to fund an open-ended, lengthy inquiry into child abuse, then it is incumbent on our political leaders to make a definitive political decision about the future of the Commission and its interaction, if any, with the Redress Board. It is also incumbent on them to explain the ramifications of that decision to the victims of abuse. The government has already flirted with the notion of "sampling" where only a sample of cases would be heard by the Commission. This has already attracted criticism from victims who fear they would lose their right to be heard. It is also likely to attract the ire of religious orders who will object to any general inferences being drawn from sample allegations.

The task facing Sean Ryan, SC, who is now undertaking a review of the work of the Commission, is a mammoth one. He faces the challenge of devising a cost-effective mechanism of inquiry that will satisfy the victims desire for apportionment of blame and yet will not fall foul of time-consuming legal challenges from alleged abusers. It seems the government has already decided that a full-blown inquiry along the lines already envisaged at the Commission will be too expensive. Therefore, the ultimate decision on how to proceed has become a political decision and not a legal one. Any procedure chosen will inevitably have shortcomings but it is better that these shortcomings are identified and acknowledged at this stage. It is better that expectations be tempered now rather than in a few years time when a final report is delivered.

It is crucial then that before any new procedure is adopted, our political leaders make it clear that the system that is chosen is shaped by the political imperative of reducing legal costs at a time of economic downturn. The government should also make it clear that given that some of the incidents of alleged abuse stretch back to the 1930s and given that many of the accused are dead or untraceable, it is likely that the ultimate findings of the Commission may in some cases be inconclusive. Given the fact that many criminal prosecutions and civil claims involving institutions have already failed due to the lapse of time, delay, or lack of evidence, it is also worth acknowledging that this inquiry may not fully achieve some survivors' desire to name and shame abusers. It will not be a panacea for all the wrongs of the past.

Over four years have elapsed since the Taoiseach first indicated his intention to set up the Commission to Inquire into Child Abuse. The government should think long and hard before it decides where to go from here.

Practice and Procedure under the European Convention on Human Rights Act 2003

Anthony Lowry BL

The recently enacted European Convention on Human Rights Act 2003 ushers in a new era in the protection of fundamental rights under the Irish legal order. The decision to incorporate the Convention as part of our domestic law was primarily based upon our legal obligation to protect human rights in a manner equivalent to the United Kingdom, pursuant to Article 6.9 of the Good Friday Agreement[1]. Although a great deal of political and academic debate has surrounded the chosen method of incorporation[2], the purpose of this article is to provide guidance as to how the 2003 Act will operate in practice.

The Act, in total, comprises a modest nine sections and will come into effect not later then January 1, 2004. Despite, or perhaps because of, its brevity, the mechanism introduced by the legislation is somewhat complex and ambiguous in numerous respects. The Government chose to adopt the 'interpretative' method of incorporation in broadly similar terms to the United Kingdom's Human Rights Act 1998[3]. However, there are a number of crucial distinctions under the Irish regime and caution should be exercised in relying upon the law relating to the UK Act in this jurisdiction[4].

In general, the 2003 Act imposes a duty, pursuant to section 3(1), on 'organs of the state' to act in a manner compatible with the Convention, unless that body is acting pursuant to statute or a rule of law. Section 2(1) imposes an obligation on the courts to interpret all legislation and rules of law, *insofar as is possible*, in a manner compatible with the 'convention provisions'[5]. In the event that no "convention compatible" interpretation of the rule of law or statutory provision is possible, the Irish legal rule will prevail against the ECHR and the organ of the state will no longer be under a duty to comply with the Convention. In such a case, the only avenue of redress open against the relevant organ of the state will be to seek a declaration of incompatibility with the ECHR pursuant to section 5(1) of the Act.

An understanding of this system is impossible without a practical illustration. Let us take, as an example, a situation where a local health authority has taken a child into care pursuant to a hypothetical statutory provision, s.1. The parent of the child, the subject of the order, objects to the health authority's decision on the basis that it infringes their rights to protection of family life under Articles 8 and 9 of the Convention. The correct course of action for the aggrieved parent will be to seek an injunction preventing enforcement of the authority's care order on the grounds that s.1 must, in accordance with section 2(1) of the 2003 Act, be interpreted in a manner compatible with the State's obligations under th Convention. In particular, the basis of the parent's claim will be that s. imposes an implied duty upon the authority, when making its decision t take a child into care, to act in a manner compatible with the rights o parents under the ECHR. If the court agrees that there has been a infringement of the Convention and finds, as a matter of statutor interpretation, that such an interpretation of s.1 is possible, an injunctio can be granted, pursuant to section 3(1) of the 2003 Act. This is because th authority has acted *ultra vires* its powers under s.1 by failing to comply wit the implied term that it will act in a manner compatible with the parent' convention rights. Since s.1 can be interpreted in a manner compatible witl the ECHR, then it is no longer open to the authority to claim that is no under a duty to comply with the Convention.

By contrast, if the courts find that the parent's convention rights have bee infringed by the authority but hold that, as a matter of statutor interpretation, it is not possible to interpret s.1 as containing such a implied term, the injunction will be refused. This is because the healtl authority has acted pursuant to statute, s.1, and, therefore, is exempt, unde section 3(1) of the 2003 Act, from the duty to act in a manner compatibl with the Convention. In such a case, the parent would only be entitled to declaration that s.1 is incompatible with the Convention pursuant to sectio 5(1) of the 2003 Act. This is significant since, as is explained below, th remedies afforded under this latter provision are far less advantageous t the parent than those available under Section 3 of the Act.

The reason for adopting this complex approach was due to a mixture o policy and constitutional considerations. The Government believed tha giving the Convention the force of law within this jurisdiction would b unconstitutional. In general, it was felt that tying the Irish courts to th decisions of an external court of law would interfere with the independenc of the judiciary[6]. In addition, the Government was of the view that th legislative power of the state would be fettered if the Houses of th Oireachtas were bound, in the future, to comply with the Convention[7]. Finally, the Government believed that it would not be possible to reproduc constitutional protections by the creation of a *de facto* Constitutio through direct incorporation of the Convention[8]. While a detaile examination of these views lies outside the scope of this article, it is to b noted that these arguments form the basis of many important polic decisions adopted in the drafting of the legislation.

1. See Hogan, "The Belfast Agreement and the Future Incorporation of the European Convention on Human Rights in the Republic of Ireland", (1999) Bar Review 205
2. See, for example, Murphy and Wills, The European Convention on Human Rights and Irish Incorporation, adopting a minimalist approach" Part 1 (2001) 6(9) Bar Review 41 and Part 2 (2001) 7(1) Bar Review 541
3. For a general discussion of the Human Rights Act 1998, see Ewing, "The Human Rights Act and Parliamentary Democracy", Vol. 62, January 1999, Modern Law Review 79.
4. For example, the 2003 Act incorporated Article 13 of the Convention whereas the UK Act did not.
5. The Act does not incorporate all the Convention rights but limits incorporation to the Convention Provisions as defined including Articles 1 to 14 ECHR and Protocol 1. References to Convention Rights will hereinafter refer to those 'Convention Provisions'.
6. See Minister McDowell, Select Committee on Justice, Equality, Defence and Womens' Rights, 18th February 2003, at 130
7. See Minister McDowell, Select Committee on Justice, Equality, Defence and Womens' Rights, 5th March 2003, at 194
8. See Minister McDowell, Select Committee on Justice, Equality, Defence and Womens' Rights, 19th February 2003, at 171

The provisions of the 2003 Act contain a hidden complexity that requires careful scrutiny. Section 2(1) of the Act states that:

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

Unlike the corresponding UK provision, this new canon of interpretation applies to both the common law and to statute[9]. The inclusion of the phrase 'subject to the rules of law relating to such an interpretation and application' appears to render this interpretative obligation subject to the existing body of domestic law. As a result, the incorporation of the Convention may not have as dramatic an effect in this jurisdiction as it has had in the UK, where no comparable limitation applies[10].

The duty is expressed in mandatory terms and applies to legislation and rules of law whenever enacted[11]. While there is no stated limitation on the courts that are subject to this duty, the fact that certain important remedies are restricted to the Circuit Court and/or the High Court[12] may limit the judicial venues where the interpretative duty applies in practice. The obligation is expressed in normative terms and, therefore, could potentially apply in proceedings between two private parties, where this is required as a matter of Convention law[13].

The operation of the interpretative obligation in the construction of statutes requires further elucidation from the superior courts. In terms of legislation, it would appear that, in cases where the meaning of a statute is unclear, the courts are now obliged to take into consideration compatibility of the statutory provision with the Convention. Clearly, in a situation where two interpretations of a statutory provision are equally possible, one compatible with the ECHR and the other not, the interpretation that complies with the Convention should prevail. Outside this narrow set of circumstances, the influence of the Convention will depend entirely upon the weight attached by the courts to the interpretative duty[14]. As mentioned above, the fact that the obligation appears to be subject to existing canons of statutory interpretation arguably reduces the possibility that the 2003 Act will radically overhaul existing rules of construction.

In respect of the common law, the potential influence of the Convention upon the development of common law doctrines is multifarious and impossible to fully predict. However, one could summarize the effect of the 2003 Act as creating a strong public policy imperative that the common law now complies with the ECHR. For example, in the recent Supreme Court decision in *Fletcher v. Office of Public Works*[15], the Court held that certain public policy considerations militated against the imposition of a duty of care under the law of negligence in cases where psychiatric damage arose from an unreasonable apprehension of physical harm arising from exposure to asbestos[16]. Following the enactment of the European Convention on Human Rights Act 2003, those public policy considerations will now include the imperative that the rule of law concerned complies with the Convention's provisions. Of course, in order for this imperative to apply at all, the imposition of a duty of care must first be necessary as a matter of Convention law[17].

The duty to act in a manner compatible with the Convention, under section 3(1) of the 2003 Act is confined to 'organs of the state' as defined by section 1(1) of the Act. This definition provides that:

> " 'organ of the State' includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a committee of either such House or a joint committee of both such Houses or a court) which is established by law through which any of the legislative, executive or judicial powers of the State are exercised."

The exclusion of the Houses of the Oireachtas and the Courts was considered necessary as a matter of Irish constitutional law. The definition of an 'organ of the state' follows along traditional judicial review lines applying the duty both to bodies established by statute and to those bodies that exercise public functions however established[18]. The scope of this definition may well cause considerable difficulties for practitioners and academics alike[19]. Nonetheless, the focus upon the nature rather than the source of the power being exercised may be taken as indicating that a broad interpretation of the judicial review rules should be taken[20].

In addition to this general duty, section 3(2) of the 2003 Act provides that an individual:

> "who has suffered injury, loss or damage as a result of a contravention of sub-section 1 may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to [the limit of its jurisdiction], in the Circuit Court) and the court may award to the person such damages (if any) as it considers appropriate."

The express provision of a right to recover damages was not intended to limit the remedies available to litigants pursuant to section 3(1) of the Act of 2003[21]. Therefore, equitable and other forms of relief should be available to those parties seeking to enforce the section 3(1) duty[22].

Although the use of the phrase 'if no other remedy in damages is available' has been interpreted by one commentator as literally requiring the litigant to exhaust all other possible avenues of redress before they are entitled to initiate proceedings on the basis of section 3(2)[23], the better view is that the sub-section was intended to perform a residual function, complementing existing remedies rather than supplanting them. Indeed, the inclusion of the phrase 'institute proceedings' may have been designed to limit the damages remedy to cases started in the Circuit Court or High Court rather than requiring litigants to exhaust all other remedies before initiating proceedings to avail of the damages remedy. Under the former interpretation, it appears arguable that a claim under section 3(2) could form an alternate basis for relief within a larger set of proceedings, where the availability of damages on other grounds is also assessed. Nevertheless, the lack of clarity and general imprecision of the terminology and drafting of this sub-section are singularly unhelpful in attempting to construe the effect of the provision.

9. See Section 3(1) of the Human Rights Act 1998
10. See Bennion, "What interpretation is 'possible' under Section 3(1) of the Human Rights Act 1998?" (2000) PL 77 arguing that the 1998 Act broadens the circumstances where a strained interpretation may be places on a legislative measure.
11. See Section 2(2) of the 2003 Act
12. See the right to damages under Section 3(2) of the 2003 Act
13. See Buxton, "The Human Rights Act and Private Law", 2000 116 LQR 48 and Beyleveld and Pattinson, "Horizontal Applicability and Horizontal Effect", 2000 118 LQR 623.
14. For a consideration of the potential impact of the UK Act, see Bennion, note 10 above, and Gearty, "Parliamentary Democracy and Human Rights" (2002) 118 LQR 248
15. [2003] 2 ILRM 94
16. See also *Glencar Explorations Plc v. Mayo County Council* [2002] 1 ILRM 481
17. See *Osman v. United Kingdom*, App. 23452/94, (2000) 29 EHRR 245. See also, Keating and Lowry, Liability for Negligently Inflicted Psychiatric Damage and the Aftermath Doctrine ISLR 10 (2002)
18. See generally Hogan and Morgan Administrative Law in Ireland, 3rd Ed, 771-777
19. See Oliver, "Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act", (2000) PL 476
20. See, for example, Denham J's opinion in *Geoghegan v. Institute of Chartered Accountants* [1995] 3 IR 86
21. See Minister McDowell, Select Committee on Justice, Equality and Womens' Rights, 5th March 2003, at 223
22. The Minister's opinion is, of course, not binding on the courts, see *Crilly v. T & J Farrington Ltd* [2001] 3 IR 251
23. Moher, "One step forward Two steps back", 2002 Law Society Gazette 12

There is a limitation period of one year from the date of contravention of the right within which actions under section 3 (1) must be taken,[24] although the court has a discretion to extend this limitation period where "it considers it appropriate to do so in the interests of justice"[25].

The quantum of damages available under section 3(2) is to be assessed in accordance with the ordinary principles applicable to Irish compensatory damages[26] and, in this regard, the Act significantly increases the potential monetary value of a claim brought pursuant to the Convention[27]. This matter is discussed in more detail below.

While section 3(1) of the 2003 Act gives the ECHR vertical direct effect within the Irish legal order, it must be remembered that the powers of public authorities must, have some foundation in a statute or Irish rule of law. [28]. The duty of the organ of state will apply where the Court believes that it is possible to interpret the underlying legislative provision or rule of law in accordance with the Convention, pursuant to section 2(1). Where the Court finds that no such interpretation compatible with the Convention is possible, the 'organ of the state' will no longer be subject to the section 3(1) duty and will be obliged to give effect to the legal rule notwithstanding the fact that in so doing a litigant's Convention rights will be infringed. In such a case, the only avenue of redress open to an aggrieved litigant will be under section 5(1) of the 2003 Act, which states:

> "In any proceedings, the High Court, or Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."

In contrast to the remedy under section 3(2), a declaration of incompatibility must be sought, at first instance in the High Court. The court may order the declaration at its own instigation or following the making of an application for an order by a litigant. In the latter case, the applicant must put the Attorney General and the Irish Human Rights Commission on notice of the proceedings[29].

The provision includes the phrase 'where no other legal remedy is adequate and available' to ensure that the courts examine the validity of the relevant legislation or rule of law with the Constitution prior to making a declaration that the material rule of law or legislative provision is incompatible with the Convention[30]. In fact, the only situation in which a declaration of incompatibility can be granted at all is where the Constitution affords less protection to fundamental rights than the Convention provisions.

The obligation to challenge the validity of the legal rule under the terms of the Constitution before an applicant is entitled to a declaration of incompatibility means that litigants who initiate their claims in the Circuit Court will, if they fail in that court, be obliged to institute fresh proceedings before the High Court in order to seek a declaration of incompatibility. This compartmentalization of the procedures applicable under section 3 and section 5 is regrettable, given the fact that the two remedies appear to be complementary. This complementary nature stems from the fact that the declaration of incompatibility remedy is only available where no "convention compatible" interpretation of the rule is possible.

The courts, upon granting a declaration of incompatibility, have no power to grant damages or any other remedies[31]. The only immediate practical consequence of granting such a declaration lies in the fact that the Act imposes a duty upon the Taoiseach to lay a copy of the order containing the declaration of incompatibility before each House of the Oireachtas within 21 days of the order being made[32]. The limited practical consequences of a declaration of incompatibility may be viewed as detracting from the effectiveness of the procedure as a whole.

The decision to exclude an automatic right to damages under section 5 stemmed from the perceived threat such a right posed to the separation of powers doctrine in general and legislative sovereignty in particular[33]. Nevertheless, the Act does provide a discretionary avenue of redress under section 5(4):

> "Where
>
> (a) a declaration of incompatibility is made,
>
> (b) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and
>
> (c) the Government, in their discretion, consider that it may be appropriate to make an *ex gratia* payment in compensation to that party ("a payment"),
>
> the Government may request an advisor appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such an amount as they consider appropriate in the circumstances."

This discretionary right to damages is intended to provide litigants with an alternative remedy, obviating the need to take their case to the European Court of Human Rights. However, if the government refuses, in their discretion, to make an *ex gratia* payment, an aggrieved litigant would still retain the right to take their case to the Strasbourg Court.

A further distinction between the damages remedy under section 3(2) and the discretionary right to damages under section 5(4) is that the quantum of the latter falls to be assessed in accordance with the principles and practice of the European Court of Human Rights when awarding 'just satisfaction' under Article 41 of the Convention[34]. In practical terms this means that the ex gratia payment is likely to be significantly lower than an award of damages pursuant to section 3(2).

The decision to adopt the interpretative model of incorporation of the Convention has created a complex system for the protection of Convention provisions within the Irish legal order. The potential impact of this statutory scheme will depend upon two factors. Firstly, as discussed above, the decision to retain the Constitution as the primary source of fundamental rights in this jurisdiction means that the impact of the Convention will be dependent upon the extent to which the ECHR offers greater protection for human rights than the Constitution. Secondly, the practical influence of the Convention in the construction of statutes and 'rules of law' will depend upon the weight the courts attach to the interpretative obligation imposed by section 2(1) of the 2003 Act. ●

24. Section 3.5(a) European Convention on Human Rights Act 2003.
25. Section 3.5(b) European Convention on Human Rights Act 2003.
26. See Minister McDowell, Select Committee on Justice, Equality, Defence and Womens' Rights, 5th March 2003, at 223
27. *Ibid*
28. See Hogan and Morgan, *op cit.*, at 8-10
29. Section 6(1) of the 2003 Act, the Attorney General is entitled to appear in the proceedings under Section 6(2).
30. See Minister McDowell, Select Committee on Justice, Equality, Defence and Womens' Rights, 12th March 2003, at 216
31. Section 5(2) of the 2003 Act
32. Section 5(3) of the 2003 Act
33. See Minister McDowell, Select Committee on Justice, Equality, Defence and Womens' Rights, 5th March 2003, at 194
34. See Section 5(5) of the 2003 Act

Bar Tennis Tournament

Pictured at the Bar Tennis Tournament in July are the winning doubles team Patrick Dillon Malone and Nap Keeling with the Hon. Mr Justice Richard Johnson. *(Photo; James Kelly)*

New Plain English Guide to Legal System.

The National Adult Literacy Agency has launched a new publication titled "A Plain English Guide to Legal Terms." The book is part of a national campaign to make the legal system more accessible. It is intended to help non-lawyers understand legal phrases and to give people involved in the legal and justice system guidance in explaining the legal phrases used by them.

Annual Midland Circuit BCC Trophy

Pictured at the BCC Trophy Annual game are the members of the Midland Circuit soccer team, that defeated Athlone solicitors by 5-4. Back, left to right, John Hayden, Martin Walsh, Padraic Hogan, Donal Keane, and Gerard Groarke. Front, left to right, Des Dockery, Damien Higgins, Jonathan Shortt (Bainnisteoir), Ronan Mugan, Conor Gallagher, Stephen Byrne (captain) and Stephen Groarke.

(Photo: Kathleen Henry)

Irish Women Lawyers Association AGM and Seminar.

The I.W.L.A. AGM and seminar on "Women in Law in Europe" will be held on Saturday 22nd Nov., 2003 at the Law Society in Blackhall Place from 10.00 a.m - 1.00 p.m. Entrance is free to members, €30 for non members and €10 for students, devils, apprentices, and those under 5 years practice.

To register, please contact: (By post) I.W.L.A., Room 3.21 Law Library, Distillery Building. (By fax) 01 8174901, marked for the attention of I.W.L.A. (By phone) 01 8174996.

FLAC New Office

The Hon. Mrs Justice Catherine McGuinness presided over the official opening of FLAC's new head office on Dorset St., Dublin. Also pictured are Peter Ward BL (FLAC Council member) and Siobhan Phelan BL (Chairperson FLAC). To mark this juncture in FLAC's 34 year history, a publication called "Access to Justice - The History of the Free Legal Advice Centres 1969-2003" was also launched. FLAC now has 21 centres in Dublin and a further 34 centres nationwide.

Historical Exhibition

Pictured at the opening of the Bar Council exhibit on Barristers' Contribution to Political and Public Life held in the Distillery Building are Conor Maguire SC, Chairman of the Bar Council and Gerry Carroll, Director Bar Council.

(Photo: A.P. Quinn)

Zimbabwe Supreme Court Rules Detention of Judge Ilegal.

The Supreme Court of Zimbabwe has ruled that the arrest and imprisonment of High Court Judge Benjamin Paradza earlier this year was unconstitutional. Prior to his arrest and imprisonment, Judge Paradza had handed down a number of orders adverse to the Zimbabwean government and is the second High Court Judge to be arrested and charged with seeking to interfere with the course of justice.

The Forum for Barristers and Advocates - a specialist body of members Bars of the International Bar Association, including the Irish Bar, has played a major role in supporting the efforts of the South African Bar in combatting the problems of government interference in the administration of justice in Zimbabwe and lent its support to the defence to Judge Paradza.

After hearing legal argument, the Zimbabwean Supreme Court issuec an order on Sept. 16 declaring that the arrest, imprisonment anc remand of Judge Paradza was unconstitutional and ordered the State to pay the judge's costs. Judge Paradza has indicated he will seek damages for wrongful arrest and imprisonment.

Issues of Causation in Recent Medical Negligence Litigation

John Healy BL[1]

The Causation Requirement

To succeed in a medical negligence action, the plaintiff must do more than prove that the defendant acted negligently through failing to exercise the standard of care appropriate to the circumstances of the case. He must further prove that the defendant's negligence *caused* his injury or loss. Causation is a core proof of negligence, and it is designed to justify the award of compensation - in other words, compensation is justified not by the fact that the defendant acted negligently, but by the fact that the defendant's negligence caused the plaintiff's injuries.

Proof of causation is particularly problematic in cases alleging iatrogenic or doctor-caused injury, since these are inherently cases of multiple causation requiring the court to consider at least whether the injury was the result of the doctor's breach of duty, or/and the pathogenesis of the disease or condition with which the patient first presented. The complexities for proof of factual causation multiply further according to the number of different breaches of duty pleaded and the number of medical personnel on whom blame is sought to be pinned. Recent cases such as *Collins v. Mid Western Health Board*[2] - where it was pleaded that there was a failure on the part of a general practitioner to adequately diagnose, failure on the part of a casualty officer to adequately examine and failure on the part of a hospital adequately to treat - illustrate the potential difficulties associated with multiple causes, whether acting consecutively or cumulatively, in a case. Collins was ultimately decided without reference to causation rules, and this has been the practice of the Irish courts for some time, in marked contrast to English law, which has generated a number of principles sophisticated enough to accommodate the vagaries of multiple causation cases. A recent decision by Johnson J. in *Carroll v. Lynch*[3] quietly reflects many of the controversies which flared in the English courts and jurisprudence for years, and which, it is hoped, may encourage fresh judicial approaches to the association between causation and damages. It is the task of this article to examine this and other recent cases of medical negligence in which issues of causation, onus, and proof have emerged.

The Conventional 'But For' Test

The test of factual causation conventionally favoured by the common law courts is the 'but for' test - that *but for the defendant's negligence, the plaintiff would not have suffered his injuries or loss.* This requires the plaintiff to prove that the defendant's negligence was the *sine qua non* or condition precedent without which injury would not have occurred. The case of *Barnett v. Chelsea & Kensington H.M.C.*[4] aptly illustrates the premise and usefulness of the test in cases of single or few causes. The action arose from the death of a patient who had attended at the defendant's casualty department on a new year's morning complaining of stomach cramps and vomiting before dying some hours later from arsenic poisoning. Despite the unremarkable nature of the deceased's symptoms, the plaintiff succeeded in establishing that the casualty officer had negligently failed to make a thorough examination of the patient. Critically, however, the plaintiff could not establish that the defendants' negligence was the true factual cause of the patient's death, since by the time of his arrival at the hospital, nothing could have been done to arrest the progress of the poison through his body.

The 'but for' test was appropriately applied by the High Court and Supreme Court recently in *Purdy v. Linehan.*[5] This was an appeal against the High Court's rejection of part of the claim brought by a mother on behalf of her child, who had been born in the National Maternity Hospital 24 years earlier suffering from cerebral palsy, which, it was alleged, was caused by the defendants' negligence. The patient had been diagnosed with placenta praevia prior to the birth - a condition resulting in the implantation of the placenta in the bottom part of the uterus adjacent to or over the cervix, which can result in significant haemorrhaging during the later weeks of pregnancy and a reduction in contact and oxygen transfer between mother and foetus. The allegation of negligence centred on the obstetrician's delay in organising a cross-match of the patient's blood to ensure that appropriate blood would be available in the event a transfusion became necessary during Caesarean section, and the obstetrician's decision to

1. Adapted from a paper presented at the "Suing Doctors, Hospitals and Other Health Care Providers: New Directions in the Law" conference held at Trinity College Dublin, 4th October 2003.
2. [2000] 2 I.R. 154.
3. High Court, 16th May 2002.
4. [1969] 1 All E.R. 1068.
5. Supreme Court, 5th February 2003.

perform the caesarean section later in the evening, rather than immediately after the diagnosis of placenta praevia was made. An issue arose as to whether the injury had occurred before it had become appropriate to perform the caesarean section, or whether instead the injury was more probably suffered during the final twenty minutes prior to delivery. The issue was critical to the case since it affected proof of causation - that 'but for' the defendants' failure to perform a caesarean section at an earlier stage with cross-matched blood available on stand-by, cerebral palsy would not have resulted. The Supreme Court rejected the plaintiff's appeal, and upheld the finding of Johnson J. that the injury more probably occurred in the last half hour prior to delivery.

Cases of Multiple Causation and the *Bonnington*-McGhee Principles

In straightforward cases - as in *Barnett* and *Purdy*, where the evidence isolates or reduces the potential causes - the 'but for' test is generally considered to function appropriately within the framework of negligence law. It is peculiarly crude and unjust, however, in cases where a number of different causes, amongst them the defendant's negligence, are agreed to have caused or contributed to the plaintiff's injuries, whether acting together in a cumulative sense or separately in a sequence.

For such cases, an alternative test of causation was developed by the English courts in a series of cases which culminated in the landmark decision in *McGhee v. National Coal Board*.[6] This was a case where the plaintiff could establish that his respiratory injury was caused by exposure to silica dust at work from two possible sources, only one of which derived from the defendant's breach of duty - but critically he could not establish the *extent* to which the dust from either source was responsible, acting singly or in combination with the other source, for his resulting condition. In these circumstances, the House of Lords ruled that where a plaintiff can not prove that *but for* the defendant's breach of duty the plaintiff would not have sustained his injury, but where he can establish that the defendant breached a duty of care owed to him which *materially increased the risk* of injury, an inference (rather than full proof) of causation is established in the case, and it then falls to the defence to rebut that inference. The decision was all the more significant in the light of an earlier ruling by Lord Reid in *Bonnington Castings v. Wardlaw*,[7] that a contribution is material when it is not minimal. The *McGhee* principle propounded by Lord Wilberforce has courted considerable controversy over the years, since it reduced the standard of proof of causation which the plaintiff must initially meet, and appeared to introduce 'loss of chance' logic into torts law by which a plaintiff may succeed where he establishes that the defendant reduced the plaintiff's chance of avoiding injury (being another way of saying that the defendant materially contributed to the injury).

The *McGhee* principle survived a bruising in the case of *Hotson v. East Berkshire H.A.*,[8] where the Court of Appeal attempted to incorporate elements of loss of chance doctrine into conventional causation laws. In *Wilsher v. Essex A.H.A.*,[9] the House of Lords sought to clip the wings of *McGhee* by emphasising that, as a general rule, where there are multiple possible causes of an injury, of which the defendant's negligence is but one, the combination of breach of duty and injury does not give rise to a presumption of causation in the plaintiff's favour. Lord Bridge interpreted *McGhee* to rest on a 'common sense' inference arising from evidence of cumulative causes showing that the defendant's fault not merely increased the risk of injury but contributed an effect which formed an inextricable part of the ultimate injury. Once this inference could be drawn, the plaintiff had satisfied the orthodox test that on the balance of probabilities the defendant caused a portion of the injuries.

In the words of Sopinka J. in *Farrell v. Snell*,[10] courts have vacillated between following Lord Wilberforce's early reversal of onus in *McGhee* or the subsequent inference interpretation of *McGhee* favoured by the House of Lords in *Wilsher*. The judge expressed the view that it makes no practical difference which line is chosen, since once the plaintiff establishes a breach of duty, the creation of a risk, and the occurrence of injury within the zone of that risk, he may be held to have established a *prima facie* case or inference of causation.

A conservative approach to causation rules undoubtedly reflects an unspoken reluctance to open the floodgates further to medical malpractice actions.[11] Yet since *McGhee* was approved in Wilsher, proof that the defendant materially increased the risk of injury to the plaintiff may in certain circumstances raise an inference of causation under English law. Lord Bridge did not limit *McGhee* to instances where the defendant fails in breach of duty to take specific precautions to avoid a risk, or to cases where medical knowledge cannot precisely explain the causes of a particular medical injury. The Court of Appeal affirmed the *McGhee/Bonnington* development in *Page v. Smith*,[12] at least for cases of multiple causation with troublesome evidential gaps, "in which other causes could have played a part in the causation of the plaintiff's exacerbated symptoms".[13] Referring to *McGhee* as "difficult', Bingham M.R. showed great reluctance to be drawn into a loss of chance discourse (as the Court of Appeal had ventured earlier in *Hotson*).

It is at this juncture appropriate to explain the doctrine of loss of chance, which emerged in England in a number of medical negligence cases after *McGhee*, prior to its eventual decisive rejection by the House of Lords in *Hotson*.

6. [1973] 1 W.L.R. 1.
7. [1956] 1 All E.R. 615.
8. [1987] 1 All E.R. 210 (C.A.); [1987] 1 A.C. 750 (H.L.).
9. [1988] 1 All E.R. 871.
10. 72 D.L.R. (4th) 289 at 299 (1990).
11. Boon, "Causation and the Increase of Risk" 51 Modern Law Review 508 at 513 (1988).
12. [1995] 2 W.L.R. 644; [1996] 1 W.L.R. 855.
13. *Ibid.* at 858 (emphasis added).

Loss of Chance Doctrine

Under conventional principles of negligence law, when the plaintiff establishes causation, the defendant is liable for all ensuing injury or loss so long as it is reasonably foreseeable. Even where the defendant's causative contribution to injury is much less than 100%, the common law assesses compensation on the basis that the defendant is wholly responsible for the injuries. In other words, liability is not normally discounted to reflect the approximate degree by which the defendant causatively contributed to injury.

Loss of chance, or 'la perte d'une chance' from the French civil law, operates differently. It permits a plaintiff to sue for the loss of the chance of avoiding the injury in question, rather than merely for the injury itself; the loss of chance is the injury which grounds the plaintiff's cause of action. It enables a plaintiff to recover damages where he proves that the defendant has caused or increased the chance of the injurious outcome, or has decreased the chance of avoiding that outcome, whether or not the defendant's contribution to the outcome was less than 50%. Similar to the *McGhee* principle, it enables the court to award damages to the plaintiff notwithstanding that he has not proved that the defendant's contribution was the major or contingent cause in the 'but for' sense. The other major innovation of loss of chance is that it operates a form of *discounted liability*, whereby the defendant is required to pay compensation only to the degree by which he has been found to have caused or contributed to the injury.

Loss of chance found favour in some US states, and in a few decisions in England prior to its rejection by the House of Lords in *Hotson*. In *Clark v. MacLennon*,[14] Peter Pain J. invoked the decision in McGhee, but went one step further in allowing recovery for the loss of a one in three chance of a successful outcome; the learned judge then proceeded to assess damages according to the degree (33%) to which the operation might have succeeded for the plaintiff. In *Herskovits v. Group Health Cooperative*,[15] the defendant's negligent diagnosis reduced the plaintiff's chances of survival from lung cancer by an approximated 14%. The Supreme Court of Washington deemed this a proximate cause of the plaintiff's injuries, and allowed recovery for loss directly caused by a premature death. In *Sutton v. Population Services Family Planning Programme*,[16] the plaintiff's cancer was again detected at a negligently late stage in circumstances where the cancer would ultimately have caused the plaintiff's death, though onset would have been delayed by approximately four years. The trial judge awarded damages for the loss of those four years.

In *Carroll v. Lynch* (2002),[17] Johnson J. applied loss of chance methodology to reduce damages to reflect the degree by which the defendant was assessed to have caused the plaintiff's injuries. In doing so Johnson J. invoked the following passage from White's *Civil Liability for Industrial Accidents*,[18] wherein the author sought to summarise how the law ought to determine recovery for injuries to which the defendant, in breach of duty, contributed:

> "Where the defendant has voluntarily assumed a status *vis-a-vis* the plaintiff which results in a duty of care and that duty is breached by the defendant with the result that a material risk that injury will result to the plaintiff is created, or an existing risk of injury materially increased, and that injury in fact occurs (being damage which the duty was intended to guard against), and the existence and extent of the contribution made by that breach of duty is capable of being expressed as the loss of a particular chance of avoiding that injury, then the defendant's breach of duty is deemed to be causally connected to that lost chance of avoiding that injury and the plaintiff is entitled to recover damages based on a valuation of that lost chance."

Johnson J. concluded on the evidence that the defendant was negligent in positioning the second port through the plaintiff's breast during the course of a blebectomy by way of video assisted thoracic surgery. Experts for the plaintiff condemned this aspect of the operation, and testified that the mistake had caused the failure of that procedure and the necessity to revert to an older, less effective method, the open thoracotomy, which in turn brought about the plaintiff's injuries. Johnson J. found on the evidence that had the port not been placed in that position, on the balance of probabilities of 85% at least, there would have been no need to switch over to the open thoracotomy. Johnson J. then awarded £245,683.26 (€311,953.39) damages, being 85% of the damages otherwise due.

The approach adopted in *Carroll* to causation and damages has been championed by numerous jurists in England, chiefly on the basis that it leads to fairer, more proportionate damages.[19] The prospect that a loss of chance model might encourage claims for future uncrystallised injury was one reason why the House of Lords nipped this emerging innovation in the bud when resolving *Hotson* - described at the time as striking for its "analytic poverty and legal cowardice".[20] It is of note that the Supreme Court confirmed recently the traditional rule of negligence law that recovery does not lie for injury which has not yet materialised, however inevitable it may be that injury (or indeed death) will in the future befall the plaintiff.[21] The version of loss of chance doctrine favoured by White and applied by Johnson J. in *Carroll* does not, however, purport to permit recovery for un-materialised physical injury, and on balance therefore it constitutes a graft of one aspect of loss of chance doctrine upon the *McGhee* principle. Its incorporation into Irish negligence law, however, would amount to a fundamental realignment of the core principles and policies of negligence law, and raises matters of certain controversy.

In rejecting a comparable attempt in *Hotson* to forge an association between causative contribution and damages, the House of Lords expressed the view that where a plaintiff has proved that the defendant materially contributed to his injury, no principle can justify a reduction in damages proportionate to the degree by which the defendant caused the injury.[22] The House also objected to the use to which loss of chance principle puts statistics and empirical probability. It was considered that statistics tell us what tends to occur but not what occurred in the instant case: in other words, the court favoured

14. [1983] 1 All E.R. 416.
15. 664 P. 2d 474 (1983).
16. (1981) The Times, 7th November 1981.
17. High Court, 16th May 2002.
18. Vol. 1 Dublin: Oak Tree Press, 1993, at p. 111.
19. Stapleton, "The Gist of Negligence, Part 2: The Relationship Between 'Damage' and Causation" (1988) 104 Law Quarterly Review 389; Reece, "Losses of Chance in the Law" (1996) 59 Modern Law Review 188.
20. Foster, "A plea for a lost chance: Hotson revisited" (1995) New Law Journal 228 at 229.
21. *Fletcher v. Commissioners of Public Works* [2003] 2 I.L.R.M. 94: in the context of an unsuccessful attempt to recover for psychiatric injury sustained following an 'irrational' fear of contracting respiratory illness arising from exposure to asbestos at work.
22. *Hotson v. East Berkshire A.H.A.* [1987] 1 A.C. 750 at 782 (H.L.).

assessment by personal chance rather than *statistical* chance. The House refused to explore the nature of many cases of medical injury, wherein because of the defendant's negligence (for instance, misdiagnosis) it is epistemologically impossible to determine whether the patient would have fallen within one statistical category over the other. The orthodox approach to causation in torts rests upon a misconception that the law must continue to require that a plaintiff prove by direct evidence what he sometimes cannot, namely that he would have been one of the number of patients who would have benefited from the treatment. In this sense, the torts system has adhered to a preference for proof of causation by *particularist* evidence from the mouths of witnesses, of a direct, anecdotal, and non-statistical character. Indeed, the balance of probabilities standard is intended to facilitate this impressionistic evaluation of evidence, which encourages a lack of transparency and clarity in the conclusion of support for one proposition over another. By contrast, scientific epistemology some time ago abandoned the comparatively simple Newtonian belief in physical cause and effect, preferring instead to employ hypothesis, inductive testing, and probabilistic assessments.[23] Loss of chance doctrine reflects these advances, giving greater effect, in terms of proof and distribution of liability, to a probabilistic assessment of each agent's contribution to injury on the basis of known statistical information. It may well be the case that the probabilistic assessment is the only tenable one to apply in medical negligence cases. The precise pathogenesis of many diseases is unknown. Many disease processes culminate in unsuccessful outcomes despite the best medical treatment, so that "the best any patient can achieve is to show that he lost the opportunity of being cured."[24]

Ironically, the common law tends to avoid minute scientific enquiries, despite giving free reign - particularly in medical negligence cases - to expert views expressed through the discourse of modern science. The inevitable reluctance of scientific experts to make precise conclusions must in many cases have caused the court to feel that the plaintiff has failed to prove his case - a fact recognised by Sopinka J. in *Farrell v. Snell*, where he asserted that, on the contrary, the courts' "power to draw the inference ... [is] not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of unanimity as to the respective likelihood of the potential causes ... or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs."[25] In the learned judge's opinion, if Lord Wilberforce had recognised this in *McGhee*, he would not have perceived the evidential gap he did, nor would he have felt it necessary to reverse the onus of proof. What this leaves us with is a system that permits, but does not actively encourage scientific or statistical analysis of causation. Expert witnesses are allowed to formulate their weighty opinions in terms that exploit the multi-shaded minutia of science in the context of proof by a preponderance of probability. What results is instinctive guess-work, a wholly inexact and unempirical process that in many cases turns on the credibility and demeanour of court-room witnesses. By contrast, statistics are "derived systematically from our previous experience of similar cases", and they "provide us with a very accurate probability-weighting for each candidate" or potential cause.[26]

Distinction between Proof of Causation and *Res Ipsa Loquitur*

Though the *res ipsa loquitur* maxim operates similarly in civil hearings to the inference generated by the *McGhee* principle, there are significant differences between the two which bear upon the burden of proof and the scope of rebuttal required of the defence. The *McGhee* principle potentially operates to reduce the standard of proof of causation which the plaintiff is required initially to discharge - requiring not proof on a 'but for' basis, but in terms instead of the defendant's material contribution to injury - with the effect that a burden of disproof of causation passes to the defendant, on pain of an adverse verdict. In cases to which the *McGhee* principle applies - namely, cases with striking evidential gaps arising from a multiplicity of causes, amongst them the defendant's certain breach of duty - the inference is typically difficult to rebut, and causation is usually established. A similar dynamic occurs where *res ipsa loquitur* is deemed to apply in a case, in the sense that the maxim tends to arise in cases with pronounced evidential deficits, and in the sense that it gives rise to an early inference in favour of the plaintiff which the defendant is required to rebut to avoid an adverse verdict (though as the courts have explained on numerous occasions, in neither event is the court obliged to accept the unrebutted inference at the end of the day). The fundamental difference between the inferences generated by these devices is that the *McGhee* principle raises an early inference of proof of causation whilst *res ipsa loquitur* raises an early inference that the defendant failed to exercise reasonable care or skill. The distinction is crucial, particularly in cases of unbridgeable evidential gaps wherein precise proof or rebuttal of cause may be unsustainable: in other words, in cases where the verdict is likely to depend on where the onus is deemed to lie. Yet the distinction between the *res ipsa loquitur* inference of the defendant's negligence on the one hand and proof of causation on the other has rarely been clear in torts law. The source of the confusion may indeed stem from the wording used in the (presumptively) classic statement of the maxim by Erle C.J. in *Scott v. London and St. Katherine Docks Co.*, that where the plaintiff establishes that the context in which the injury occurred was "under the management of the defendant or his servants, and the accident [was] such as in the ordinary course of things does not happen if those who have the management use proper care ... it affords reasonable evidence, *in the absence of explanation by the defendants, that the accident arose from* want of care."[27]

The Supreme Court highlighted the distinction between *res ipsa loquitur* and proof of causation in *Lindsay v. Mid Western Health Board*,[28] a case where an 8-year old girl underwent a regular operation to remove an appendix in the course of which she entered a deep coma. The Supreme Court identified that the effect of *res ipsa loquitur* in the case was to require the defendant to show that he had exercised all reasonable care and therefore that he had not been negligent. To go further and require the defendant to establish how the accident occurred, or who caused the plaintiff's injuries, would be unjust, as there may be many cases where no satisfactory explanation for accidental injury exists. Since the defendants had displaced the early

23. Brennan, "Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation" 73 Cornell Law Review 469 (1987-88).
24. Scott, "Causation in Medico-Legal Practice: A Doctor's Approach to the 'Lost Opportunity' Cases" (1992) 55 Modern Law Review 521 at 521.
25. *Farrell v. Snell*, supra at 299, citing *Sentilles v. Inter-Caribbean Shipping Corp* 361 U.S. 107 at 109-10 (1959).
26. Stauch, "Causation, Risk, and Loss of Chance in Medical Negligence" (1997) 17 Oxford Journal of Legal Studies 205 at 219.
27. (1865) 3 H .&t C. 596 at 601.
28. [1993] I.L.R.M. 550.

inference of their negligence by tendering expert evidence to show that the anaesthetic procedure had been performed competently, the burden of proof had passed back to the plaintiff to prove the defendant's negligence. This the plaintiff had failed to do upon the evidence tendered in the trial court, and on this basis the defendant's appeal against judgment succeeded.

Despite the clarity and logic of O'Flaherty J.'s judgment in *Lindsay*, subsequent decisions have appeared to blur the distinction, and it is of note that one such instance arose not long after *Lindsay* in a judgment by Blayney J. with which O'Flaherty J. himself concurred, in *Merriman v. Greenhills Foods Ltd.* and *Casey*.[29] Blayney J. found: "The explanation offered [by the defendants] did not go far enough. It did not explain why the leaf of the spring broke. ... In the instant case the facts bearing on causation and on the care exercised by the defendant, are unknown to the plaintiff and are or ought to be known by the defendant. ... I am satisfied that to enable justice to be done the doctrine should be applied so as to prove that they were not negligent."

A recent High Court decision in *Quinn v. South Eastern Health Board*[30] similarly appears to have required the defendant to rebut more than may have been envisaged in *Lindsay*. The patient had been advised at the age of 14 years to undergo an appendicectomy, and emerged from the operation suffering significant post-operative complications (in particular, meralgia parasthetica) which remedial surgery had only exasperated. The court accepted that in the majority of cases of meralgia parasthetica, it is not possible to establish the cause, although when a cause is found it is usually compression of a nerve through or under the inguinal ligament during an operation. O'Caoimh J. found that since meralgia parasthetica is "not something that results in the ordinary course of things if those who have the management exercise reasonable care", the *res ipsa loquitur* maxim arose in the case. Since the defendants had failed to "give an explanation how what should have been a benign procedure ended up causing the condition of meralgia parasthetica," the inference of negligence enabled by the maxim prevailed, and negligence was proved with respect to this operation. In effect, this decision required the defence to go further than rebut the inference that the procedure had not been carried out with reasonable care and skill, and in fact required it to rebut an inference that the surgeon had caused the injuries. The court finally found the defendant to have been negligent in: (1) performing the appendicectomy (following the application of *res ipsa loquitur*); (2) recommending remedial surgery too soon; and (3) failing to discuss the risks and benefits associated with the choice of remedial surgery over conservative treatment.

By contrast, in a non-medical context in *Cosgrove v. E.S.B.*,[31] the High Court highlighted the fundamental distinction between *res ipsa loquitur* and proof of causation. The plaintiff, an agricultural contractor, sued for injuries suffered when his silage harvester came into contact with one of the defendant's electricity lines. Murphy J. reiterated the principle that the *res ipsa* maxim, as interpreted in *Lindsay*, does not require the defendant to prove what caused the injuries - in other words, it does not pass the burden of proof on causation from plaintiff to defendant. It passes the burden of proof only on the issue of whether or not the defendant exercised reasonable care and skill. An inference arises that the defendant acted unreasonably, which it falls upon him to rebut; the defendant is not required further to establish what or who caused the injury.

The answer to the apparent inconsistencies in the above decisions may perhaps be reconciled in future cases by recourse to Henchy J.'s *dicta* in *Hanrahan v. Merck, Sharpe and Dohme Ltd.*[32] - at the time much doubted,[33] but recently approved by the Supreme Court in *Rothwell v. M.I.B.I.*[34] They have endured as an accurate and elegant restatement of the implicit rationale of the *res ipsa* maxim, and may now provide a principled basis for its application in Ireland. They are thus worth repeating:

> "The ordinary rule is that a person who alleges a particular tort must, in order to succeed, prove (save where there are admissions) all the necessary ingredients of that tort and it is not for the defendant to disprove anything. Such exceptions as have been allowed to that general rule seem to be confined to cases where a particular element of the tort lies, or is deemed to lie, pre-eminently within the defendant's knowledge, in which case the onus of proof as to that matter passes to the defendant. Thus, in the tort of negligence, where damage has been caused to the plaintiff in circumstances in which such damage would not usually be caused without negligence on the part of the defendant, the rule of *res ipsa loquitur* will allow the act relied on to be evidence of negligence in the absence of proof by the defendant that it occurred without want of due care on his part. The rationale behind the shifting of the onus of proof to the defendant in such cases would appear to lie in the fact that it would be palpably unfair to require a plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendant's capacity of proof."

Although inequality of access to proof and fairness to the plaintiff were not expressly contained in original formulations of the maxim, case-law since has consistently implied them by limiting the maxim to cases with evidential gaps, and precluding its application in cases where there are a number of possible explanations for the accident. In *Rothwell*, Hardiman J. specifically approved Henchy J.'s view that the maxim requires "not merely that a matter in respect of which the onus is to shift is within the exclusive knowledge of the defendant, but also that it is 'peculiarly within the range of the defendant's capacity of proof'."[35] This was a case taken against the Motor Insurers' Bureau of Ireland seeking compensation for injuries in an accident on the road when the plaintiff's car skidded on an oil spill. The M.I.B.I. is bound by agreement with the Minister to compensate road traffic casualties where the driver who negligently caused an accident is untraced or unidentified. The plaintiff was unable to prove that the oil spill had been left by a negligent driver with no defence - thus his case

29. [1996] I.R. 73.
30. High Court, 22nd March 2002.
31. [2003] 1 I.L.R.M. 544.
32. [1988] I.L.R.M. 629.
33. McMahon and Binchy, La Author of Medical Negligence: Common Law Perspectives London: Sweet & Maxwell, 1999, and forthcoming Irish Laws of Evidence Dublin: Thomson Sweet & Maxwell, 2004. w of Torts 2nd ed., Dublin: Butterworths, 1990, at pp. 142-44 and 3rd ed., 2000, at pp. 199-201; O'Shea v. Tilman Anhold and Horse Holiday Farm Ltd. Supreme Court, 23rd October 1996, per Keane J.
34. [2003] I.L.R.M. 521.
35. ibid. at 528-9.

depended on the application of *res ipsa loquitur* to invoke an inference that the spill had been left by a negligent driver with no defence. The court found the maxim not to apply in a case of this nature where it could not be said that knowledge of the source of the oil spill was a matter peculiarly within the knowledge of the defendant.

It is difficult to assess whether Hardiman J.'s ringing endorsement of Henchy J.'s dicta will effect significant change in the operation of *res ipsa loquitur* in Ireland, since disparity of knowledge had been implicit in the case-law on the maxim to date. For instance, in *Lindsay v. Mid-Western Health Board*, O'Flaherty J. had observed: "Disparity between the situation of the respective parties is crucial" to *res ipsa loquitur*. Stephens had written: "In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved, which may be possessed by the parties respectively."[36]

In the past, *res ipsa loquitur* has been employed in the medical context as an evidential device to 'loosen the defendant's tongue' - in one case to penetrate a 'conspiracy of silence' amongst the defence and its medical experts in understanding how the plaintiff came to suffer an external shoulder injury during an appendectomy.[37] The application of the maxim to medical negligence cases has often been queried, however, and up till very recently, the Irish courts frequently expressed the view that it was inappropriate to apply the maxim in this context on the basis that "medicine is recognized as an inexact science from the practice of which serious complications can arise that cannot, without proof of some negligent act, be charged to the physician."[38] The emphasis on inequality of access to proof highlighted in *Rothwell* is reasonably likely to make *res ipsa loquitur* more applicable in medical negligence cases, however - in so far as, typically these are cases with a demonstrable disparity of information between the parties: the defendant doctor is more likely to possess peculiar knowledge of the treatment which gave rise to the plaintiff's injuries. This has been acknowledged on numerous occasions abroad. In *Snell v. Farrell*,[39] for instance, the Supreme Court of Canada justified its application in the medical context on the basis that often the details of the medical accident are known only to the defendant doctor.

Disclosure of Information at the Pre-Treatment Stage and Informed Consent

For medical disclosure actions, the plaintiff must establish both injury causation (that an undisclosed risk has materialised and caused him injury) and decisional causation (that if the doctor had disclosed the necessary information, the plaintiff would have chosen to forego the recommended treatment on the occasion in question). In the bulk of disclosure cases, injury causation does not raise special concerns, as negligence law requires preliminary proof of physical injury, and traditionally recognises independent recovery for mental injury and pure economic loss only in restricted circumstances. The view that decisional causation must be established by reference to whether or not the plaintiff, duly informed of the appropriate risk, would have opted to undergo the treatment on the occasion in question was rightly stated by the Australian High Court in *Chappel v. Hart*,[40] and it is entirely consistent with informed consent claims where the plaintiff has not alleged or proven that the doctor was negligent in performing the operation: in other words, such claims assume that the plaintiff has been statistically unlucky, and they necessitate the view that he would not have been similarly unlucky had the operation proceeded on another occasion in the future.

Proof of decisional causation is more complicated from the standpoint of proof and testimony. The court is asked to determine one way or the other whether the plaintiff would have decided at the time to undergo the recommended treatment having been given information which it was the doctor's duty to disclose to him. This requires an answer to a hypothetical question, centring on a point in the past incapable of being revisited. The answer is by this stage critical to the outcome of the action. Yet the courts have differed significantly between and within jurisdictions on the formulation and application of the appropriate principles. Chief amongst their problems is the extent to which the court should accept at face-value the subjective claims made in hindsight by an injured and aggrieved patient.

US decisions prior to *Canterbury v. Spence*[41] had adopted battery as the cause of action for non-disclosure, and in keeping with orthodox battery analysis, the plaintiff's subjective testimony tended to be accepted.[42] Many commentators presumed that a subjective test would equally apply once negligence was adopted as the appropriate cause of action for informed consent. Anything less, it was felt, would negate the pledge to protect a patient's right to self-determination underpinned by the evolving doctrine, rendering the action worthless. However, the *Canterbury* court opted for an objective assessment of whether or not the negligent non-disclosure caused the plaintiff to submit to treatment he would otherwise have foregone. Robinson J. reasoned that this was necessary to guard physicians from "the patient's hindsight and bitterness", and the court from having to accept a speculative answer to a hypothetical question, subjectively expressed by the patient-witness and prejudiced by the actual occurrence of the undisclosed risk.[43] The rationale for this objective assessment was elaborated on by the Supreme Court of California in its influential decision in *Cobbs v. Grant*:[44]

> "The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial, the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment."

The objective test of causation has elicited stern criticism from the many proponents of informed consent doctrine, which, it is argued, pledges to protect the right of each patient to make his own healthcare

36. Stephens Digest, Evidence Act 1896, as cited in *Cummings v. City of Vancouver* (1911) 1 W.W.R. 31 at 34.
37. *Ybarra v. Spangard* 25 Cal. 2d 486, 154 P. 2d 687 (1944).
38. *Wilkinson v. Vesey* 295 A. 2d 676 at 691, per Kelleher J. (1972). A similar view was expressed in *Barrett v. Southern Health Board* High Court, 5th December 1988; *Duffy v. North Eastern Health Board* High Court, 3rd November 1988; and *Russell v. Walsh* High Court, 3rd April 1995.
39. (1990) 72 D.L.R. (4th) 289 at 300.
40. [1998] H.C.A. 55.
41. (1972) 464 F. 2d 772.
42. Eg, *Shetter v. Rochelle* 409 P. 2d 74 (1965).
43. (1972) 464 F. 2d 772 at 790.
44. (1972) 502 P. 2d 1 at 11-12.

decisions, whether rational or not. Under an objective causation test, the plaintiff is compelled to prove that the reasonable patient duly informed would not have undergone the recommended treatment. The idiosyncratic patient, thus, is afforded no *post hoc* protection. Under this approach, the plaintiff patient would find it difficult if not impossible to rebut the assumption that reasonable people do not refuse operations and procedures which have been recommended by their doctors. Therefore, under a purely objective assessment, the sheer fact of the doctor's medical recommendation sometimes determines cause-in-fact against the plaintiff.

In response to these conceptual and practical difficulties, *Reibl v. Hughes*[45] advocated a hybrid test of causation which instead assesses the reasonable person in the patient's position. This is essentially a 'subjectified objective' test. That it was intended to be dominantly objective is clear from the court's qualification that "the patient's particular concerns must be reasonably based". These, the court felt, might include financial considerations such as the impairment of one's ability to work, or the loss of work-related entitlements. Laskin C.J.C. attempted to assuage objections that might reasonably be leveled against this objectification, and insisted that it would not leave the question of causation in the hands only of doctors: "Merely because medical science establishes the reasonableness of a recommended operation does not mean that a reasonable person in the patient's position would necessarily agree to it, if proper disclosure had been made of the risks attendant upon it, balanced by those against it." Notwithstanding Chief Justice Laskin's cautions, causation has proved to be a substantial stumbling block for Canadian plaintiffs in the wake of *Reibl v. Hughes*, and ironically the impediment seems to be the sheer fact that the treatment was medically recommended.[46] Some courts have devoted the causation analysis entirely to objective criteria, chiefly the pros and cons of the treatment, and the extent to which in medical terms, the treatment was necessary or simply prudent.[47] Other courts have consciously considered a number of personal factors by way of modification of its objective assessment. In two cases, this notably worked to the plaintiff's disadvantage. In *Zimmer v. Ringrose*,[48] the Alberta Court of Appeal was influenced by evidence that the plaintiff had been anxious to avoid hospitalisation so that she could take care of her new born baby at home, and that the procedure recommended by the doctor was the only one which would have enabled her to do so. Similarly, in *Mang v. Moscovitz*,[49] the court decided that the following subjective factors disproved the plaintiff's claims at the causation stage: she had been determined to have an abortion as soon as possible; in doing so, she had ignored a threat of divorce by her husband, and had gone against the advice of her doctor; further, she had wished to return to work as soon as possible, and was determined to complete the abortion by the time her brother returned from Hong Kong.

The hybrid test was approved in Ireland in the most recent analysis of medical non-disclosure, in *Geoghegan v Harris*.[50] Noting the disadvantages of adopting either a wholly objective or a wholly subjective approach, Kearns J. ultimately approved the model advanced by the Supreme Court of Canada in *Reibl v. Hughes*, by which the court assesses the likely response of a reasonable patient invested with the subjective concerns of the plaintiff, to the extent there are credible and reliable indicators of same (including as the case may be, age, symptoms, diagnosis, family and financial circumstances, targets for the future, past attitude towards surgery and medical treatment, etc). In *Geoghegan*, as in the Canadian decisions referred to above, the subjective aspect of the test worked against the plaintiff, ultimately defeating his claim (despite having established that the defendant had breached his duty to disclose in the circumstances of the case). The evidence in *Geoghegan v. Harris* strongly suggested that the plaintiff had been very eager to rectify his dental deformity, having neglected it for years, and showed that he had had to be prompted to read pre-operative information and to attend his consultation appointments. It was thus unlikely that he would have chosen to forego the operation when appraised of the remote risk of permanent neuropathic pain (being a one in thousands risk, according to the experts in the case). Having successfully established that the defendant breached his duty to disclose pertinent information, Mr. Geoghegan's case, like many others, fell at the causation hurdle.

More recently in *Callaghan v. Gleeson and Lavelle*,[51] Johnson J. found on the evidence that despite the plaintiff's testimonial assertions to the contrary, she would have pressed ahead with her request to undergo hip replacement surgery notwithstanding knowledge of the "very small percentage possibility" of incurring a 'dropped foot' post-operatively. In so deciding, the learned judge was influenced by the fact that she had not been dissuaded from this course when informed of risks of a more serious nature, and that for personal reasons, she had been eager to rectify her deteriorating mobility. Once again, the decision demonstrates that proof of decisional causation is in practice the Achilles' heel of the informed consent action. ●

John Healy is the author of Medical Negligence: Common Law Perspectives London: Sweet & Maxwell, 1999, and the forthcoming Irish Laws of Evidence Dublin: Thomson Sweet & Maxwell, 2004.

45. (1980) 114 D.L.R. (3d) 1.
46. See Osborne, "Causation and the Emerging Canadian Doctrine of Informed Consent to Medical Treatment" 33 C.C.L.T. 131; and Dugdale, "Diverse Reports: Canadian Professional Negligence Cases" (1984) 2 Professional Negligence 108.
47. Eg, *Bickford v Stiles* 128 D.L.R. (3d) 516 (1981) and *Videto v. Kennedy* 31 C.C.L.T. 66 (1984).
48. 124 D.L.R. (3d) 215 (1981).
49. 37 A.R. 221 (1982).
50. [2000] 3 I.R. 536.
51. High Court, 19th July 2002

The Motor Insurers' Bureau of Ireland and Co-Defendants Recent Case law

William Abrahamson BL

Under a 1988 agreement with the Minister for the Environment, the Motor Insurers' Bureau of Ireland ("the M.I.B.I.") accepts liability in certain circumstances, for damage and personal injury caused by uninsured, unidentified or untraced motorists. Clause 2 of the agreement sets out three ways in which a person claiming compensation may seek to enforce the provisions of the agreement:

> "1. making a claim to M.I.B.I. for compensation which may be settled with or without admission of liability, or
> 2. citing as co-defendants, M.I.B.I. in any proceedings against the owner or user of the vehicle giving rise to the claim except where the owner and user of the vehicle remain unidentified or untraced, or
> 3. citing M.I.B.I. as sole defendant where the claimant is seeking a court order for the performance of the Agreement by M.I.B.I. ...".

In the recent case of *Hyland v. M.I.B.I. and Dun Laoghaire Rathdown County Council*[1], the Circuit Court had to consider a preliminary objection by the M.I.B.I. that it could not be named as a co-defendant where the owner and user of the vehicle giving rise to the claim remained unidentified and untraced. The case concerned a road accident, where the driver allegedly responsible was unidentified. The plaintiff sued both the M.I.B.I., in respect of that driver, and Dun Laoghaire Rathdown County Council, in respect of the state of the roadway.

A number of decisions dealing with the interpretation of clause 2 of the agreement were opened to the court. These included *Devereux v. Minister for Finance and M.I.B.I.*[2] and *Kavanagh v. Reilly* and *M.I.B.I.*[3] In the former case, the plaintiff claimed to have suffered personal injuries when the vehicle in which he was a passenger (the property of the first named defendant), stopped suddenly to avoid another, unidentified motorist. O'Sullivan J. held as follows:

> "Clause 2.2 applies only where the owner and user of the vehicle remain identified and traced. In this case, the Bureau must be cited as a sole defendant under clause 2.3, therefore the proceedings are misconceived. In the circumstances I will make an order dismissing the proceedings against the [M.I.B.I.] ...".

In the latter case, where the M.I.B.I. was again sued as a co-defendant together with another motorist, Morris J. stated as follows:

> "In my view the court should not interfere with the provisions of the agreement which have been set forth between the Minister and the Bureau, or put an inappropriate burden on the Bureau in relation to its responsibility under the agreement. The agreement has been worked out carefully between the parties and there is, in my view, a logic and good business sense behind the provisions of the agreement. In these circumstances I believe it is correct and proper that the plaintiff should conform with it and I would therefore strike out the proceedings ..."

The plaintiff in *Hyland* did not dispute the correctness of these decisions. Rather, he sought to distinguish them on the basis that they were concerned with cases where the co-defendant other than the M.I.B.I. was another driver. The plaintiff argued that the 1988 agreement was concerned solely with motorists and existed only because of the requirement for compulsory motor insurance. As such clause 2.2 could not apply to a defendant at risk of liability for some reason other than through the driving of a motor vehicle, such as the local authority in *Hyland*. However, the M.I.B.I. argued that the agreement was clear on its face. Clause 2.2 prohibited joining a co-defendant where the driver of the vehicle in respect of which the M.I.B.I. was joined, was unidentified or untraced. This applied to all co-defendants, whether motorists or otherwise. The so-called "1% rule" meant that a plaintiff could recover full damages from a defendant against whom any degree of liability could be proved. The M.I.B.I. was a defendant of last resort and, accordingly, could not be sued in any circumstances where damages for the injury suffered could be recovered elsewhere.

1. Circuit Court, Judge McMahon, 29th July 2003.
2. High Court, unreported, *ex tempore*, O'Sullivan J., 10 February 1998. See Jones, Bar Review, July 1998, p. 450.
3. High Court, unreported, *ex tempore*, Morris J., 14 October 1996. See Jones, op. cit.

Judge McMahon rejected the plaintiff's argument and struck out the proceedings against the M.I.B.I. He considered the decision of the Supreme Court in *Bowes v. M.I.B.I.*[4], where Murphy J. set out the history of the 1988 agreement. In relation to the nature of the M.I.B.I.'s liability, he held as follows:

> "It is important to remember that the liability of the M.I.B.I. is based on the Bureau's voluntary submission to the regime established under the 1988 agreement. The M.I.B.I. is not liable *prima facie* because it is at fault, which is the normal requirement of civil liability. Nor is it vicariously liable for the wrongs of the driver. Nor is its liability imposed by statute. The M.I.B.I. is not causally connected except by the 1988 agreement, which was freely negotiated with the Minister for the Environment. In subjecting itself to this regime, the M.I.B.I. was free to stipulate the conditions of its liability. ... The M.I.B.I.'s liability is something different from usual civil liability. The agreement should, therefore, generally be construed narrowly in favour of the M.I.B.I. as a starting out point."

As to the question facing the court in *Hyland*, Judge McMahon stated:

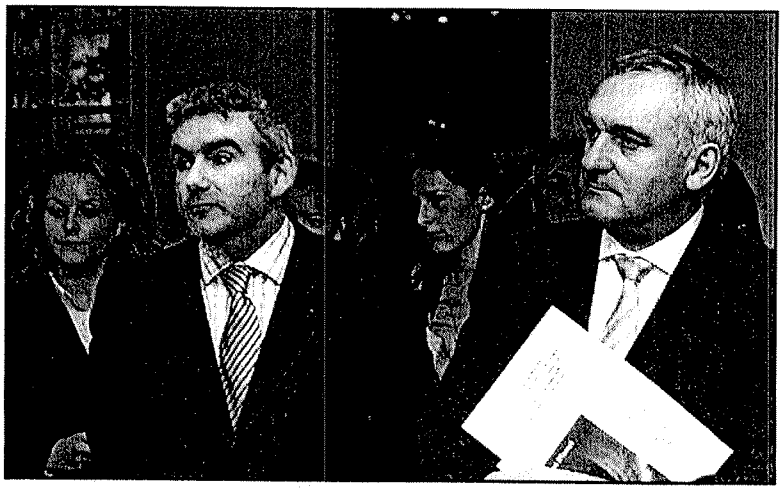
> "The truth of the situation is that there is a procedural deficit in the 1988 agreement, where facts such as those in the instant case come up for resolution. Clause 2 does not contemplate a situation where the co-defendant is not a driver. This causes a problem. The plaintiff says that the court should fill the vacuum. It is reasonable to join the M.I.B.I. as a co-defendant because this is the most neat and economical way to process the claim. Otherwise, the plaintiff must proceed against the local authority first and bear the costs of that claim if he is unsuccessful, even if he subsequently sues the M.I.B.I. successfully.
>
> I disagree with this proposed solution ... The scope of the M.I.B.I.'s liability is to be found in the 1988 agreement. The M.I.B.I. agreed to nothing else. To accept the plaintiff's argument would be to impose on the M.I.B.I. a liability to which it never originally consented. This would place an unfair expense upon the M.I.B.I. If the plaintiff should be successful against the local authority, the M.I.B.I. might have to pay costs, although unnecessarily involved in the litigation."

This decision has clarified the appropriate procedure to be followed by a plaintiff injured by an unidentified or untraced driver. In such circumstances, the M.I.B.I. cannot be joined as a co-defendant. This is so, whether or not the other defendant is a motorist. If the plaintiff may be able to recover damages for the injuries suffered from another source - either from another driver or from some other party, such as a local authority - he should sue that other party first. The M.I.B.I. should be sued in the first instance in respect of an unidentified or untraced driver only where there is no other potential defendant. Readers may wish to note, however, the provisions of s. 11 of the Civil Liability Act, 1961 and the definition of concurrent wrongdoer contained therein. It is submitted that it might still be open to a plaintiff to sue as co-defendants both the M.I.B.I. and some other party where each is responsible for discreet damage or injuries, separately pleaded. In such circumstances, the "1% rule" could, arguably, not apply and, accordingly, the co-defendant could not be liable for the damage caused by the unidentified or untraced driver. This distinction has yet to be considered by the courts.

Finally, it is worth noting that, although Judge McMahon applied strictly the terms of the 1988 agreement in the M.I.B.I.'s favour, he expressed concern with the level of ambiguity in the agreement. The learned judge noted that the 1988 agreement constituted an amendment of the pre-existing one, rather than a full-scale re-negotiation and re-drafting. It is, he said, "an unhappy document, which should be replaced".●

4 [2000] 2 I.R. 79.

Book Launch



Pictured at the Launch of "Who'd Want to be a Company Director? A Guide to the Enforcement of Irish Company Law." are the author Mark O'Connell, B.L. with An Taoiseach, Bertie Ahern, T. D. The book is published by First Law and retails at €25

Competition in the Cab-rank and the Challenge to the Independent Bar

Part II

John D. Cooke*

This is the second part of a two part article which examines the role of the Independent Bar. Part I analysed the impact of the recent European Court of Justice decision in the *Wouters* case on the formation of multi-disciplinary practices in Europe. Part II will now look in more detail at the rationale behind the division of the legal profession in Ireland. It will also examine some fundamental shortcomings in the recent Indecon report in its analysis of price competition and barriers to entry in the legal profession.

Public Perception of Legal Services

The announcement in May 2002, that the Competition Authority had appointed consultants to look into anti-competitive practices in a number of professions including both branches of the legal profession, received a considerable amount of publicity in the media. Interestingly, when the commentators sought to explain the type of anti-competitive practice that would be looked at, the examples given were almost exclusively devoted to the legal profession. Of course, those old chestnuts reappeared: the distinction between solicitor and barrister; the distinction between senior and junior counsel. Other examples were more far-fetched and betrayed some startling misconceptions of the reality of legal practice. Some journalists, for example, claimed that there had been widespread criticism of the fact that in-house lawyers in commercial or state companies cannot themselves brief barristers but must go through an outside legal firm.[1] Some also questioned why a barrister who also qualified as a solicitor had to be disbarred to practise as one.

Some pointed out that there was concern amongst the general public that the Bar effectively obstructed solicitors from representing people directly in court and that there had been no enthusiasm for the situation in which a solicitor appears jointly with the barrister. So far as I know, there was never in my time at the Bar any rule which precluded a barrister appearing alongside a solicitor for a client. Indeed, one of the last briefs I held as a barrister was to attend in the District Court in the course of a case being conducted by a solicitor to make a submission of an issue of Community law and to cross-examine an expert witness on the other side.

Rationale of Two Branches

It is therefore clear from the way in which the profession is apparently perceived by even informed commentators that the existence of two branches and the supposedly restrictive practices which sustain them is taken as being something which those two professions have chosen or imposed in defiance of the public interest. But what is not often appreciated, I think, is that the division of the profession between solicitors and barristers in the common law countries owes its origin and rationale to the very nature of that legal system. In fact the limited use both of "mixed doubles" and the solicitor's right to audience is attributable to the inherent nature of the way in which justice is administered in Ireland. From an historical point of view there was originally only the Bar. The attorneys who were employed by members of the Bar gradually evolved into a separate branch of the legal profession precisely because of the distinct demand for certain types of legal services as society evolved during the course of the industrial revolution and it became apparent that the Bar, because of its specialisation in advocacy, was unable to meet the needs for more direct legal advice and quasi commercial guidance that began to emerge during the 19th century.

Secondly, from a practical point of view, the common law system of litigation with its emphasis upon direct proof by witnesses of all essential facts and the oral exposition of legal argument, effectively requires that the presentation of cases in court be a specialised activity. That is why even in those common law jurisdictions where the two branches of the profession have been amalgamated, a distinct advocacy bar continues to emerge. An effective trial law Bar has evolved in the United States and a similar trend can be seen in Australia. Where, as in Western Australia, there is a unified profession

*Judge of the Court of First Instance of the E.C. The views expressed are entirely personal.

1. For a large part of my 30 years at the Bar I had the privilege of acting regularly on the direct instructions of the law agents of various banks and the legal departments of insurance companies and finance houses, not to mention a variety of state companies.

some law firms give an entire floor over to "litigation counsel". These are partners and associates in the firm who effectively operate as barristers. They have no direct dealings with clients. They are brought into cases by other partners or associates in the same firm whenever advocacy is required. It is a separate Bar in all but name but it is considered necessary if the firm is to maintain the same level of litigation expertise as they would face at federal level when opposite leading silks from New South Wales.

The position in the continental Bars, on the other hand, is radically different. There, the procedure is predominantly written, especially for civil litigation. The written pleadings contain not only the basic allegations of fact and the legal argument but involve lodging the appropriate written evidence by way of supporting proof. The oral hearing is designed primarily to enable the court to clarify the points which it feels necessary to resolve in order, as it is often said, to find the "solution to the case".

Moreover, the structure and organisation of the legal system has important economic implications in a relatively small economy where, outside the main cities, a very high proportion of practices are single practitioner firms. It may well be economically viable for a solicitor to be away from his office for a day if he is handling the affairs of several clients in a series of applications or defences in the District Court. The commercial considerations are different, however, if it is a question of hanging around in the Circuit Court or the High Court waiting to be heard in a single action, when the alternative of briefing a barrister is available.

In these circumstances, therefore, one would expect the enquiring economist to ask himself first, whether or not this organisation of services represents, perhaps, evidence of an efficient allocation of resources before assuming that it must be the result of restrictive behaviour. Indeed, one important aspect of the organisation of the legal system in Ireland which has never, to my knowledge, been subject to economic evaluation and which is barely mentioned in the Indecon Report, is that of the Bar on circuit. What is the economic value and the social significance of the fact that an important part of a profession makes specialist advocacy and advice available in venues outside the main cities? The barrister goes on circuit at his own expense and bears that cost if he returns un-briefed. If, as Indecon suggests, 'restrictions on organisational form' are anti-competitive, would the circuit system survive if barristers were encouraged to form firms amongst themselves and were free to be employees and/or partners of solicitors? It seems unlikely. Barristers go on circuit because they are sole practitioners and available to be briefed by any solicitor in the circuit venue. Once that status changes, the barrister becomes the solicitor's competitor.

The existence of an independent Bar is not, *prima facie*, the manifestation of a restrictive practice. It is an indication of the way in which the legal profession adapts itself to the most efficient method of making legal services available, just as it did in the 19th century when solicitors emerged as a separate branch. It owes its existence primarily to the way in which the common law legal system is structured and the principles upon which its concept of a trial rests. Of course, the two branch system is not inherently necessary. You can abolish the division, but in so doing, you alter in an important way the quality of the administration of justice. This would change the nature of the relationship between the litigant and his advocate and would also change the nature of the relationship of the court to the public.

From the point of view of the Bar, there may be no imminent danger that an examination of restrictive practices under competition rules would lead to a call for outright merger. The greater danger may be that if consolidation gets under way amongst the major solicitors' firms in this jurisdiction and they become increasingly aggressive in pursuing earnings growth, they will come under pressure to maximise the return from all activities, including litigation and, particularly, highly paid commercial litigation. If the Indecon recommendations on "organisational form" and employed barristers were implemented, it is not inconceivable that a situation would arise in which one or more large law firms would make attractive partnership offers to leading practitioners at the Bar to head up expanded commercial litigation departments, while for reasons of prestige and precedence asking them to retain their standing as counsel.

Paragraph 5.166 of the Indecon Report dismisses the issue of risk of concentration in its proposals: "Given the fragmented nature of the profession at present, it would take a considerable amount of consolidation to make the market structure even moderately concentrated." This, I think, is simplistic. The market is only fragmented in that is made up of 1,400 sole practitioners. But within that number there are just over 200 silks and within the Bar as a whole, there are areas of important expertise (tax, local government, defamation, European Community law and so forth), where the numbers of specialists may be less than a dozen. If even a handful of these specialists become employees or partners of solicitors or join multi-disciplinary practices, they are then no longer potentially available, as at present, to the clients of any other firm.

The Essential Values of the Bar

If the status and rules of an independent Bar are to be defended on economic and competition grounds, it is important that the Bar itself be very clear in its collective mind as to what features and rules are essential to its status and what traditional practices may be dispensable. It is true that at least some customary practices of the Bar had very little justification other than the Bar's financial interest and were sustainable only so long as the Bar had a monopoly of a right of audience. The traditional requirement that if a barrister was instructed from outside a circuit, a second brief had to be offered to a member of the circuit is a good example.[2]

It is also important, in my view, that those rules which are considered essential to the independent status of a barrister should be enforced

Continued on page 207

2. Interestingly, a very similar obligation existed in the French Bars until modern times.

Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 8, Issue 5, November 2003

A directory of legislation, articles and written judgments received in the Law Library from the 9th July 2003 up to 8th October 2003.
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(P.S) Copies of the acts/bills can be obtained free from the internet & up to date information can be downloaded from website : www.irlgov.ie

(NB) Must have "adobe" software which can be downloaded free of charge from internet

Abbreviations
BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
FSLJ = Financial Services Law Journal
GLSI = Gazette Society of Ireland
IBL = Irish Business Law
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
IFLR = Irish Family Law Reports
IILR = Irish Insurance Law Review
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

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consistently so that the Bar's case is not weakened. One aspect of practice which has changed in Ireland in recent years has been the involvement of members of the Bar in commercial activities outside their practice. A practising barrister is no longer prohibited from accepting a position as the non-executive director of a public quoted company, nor presumably, from sitting on audit and remuneration committees in the course of that work. The rationale behind that change is understandable. It enhances the standing of the Bar in the commercial area. It is seen as underlining the availability of particular expertise in leading practitioners at the Bar. But quite apart from the impression it could give that the Bar is willing to go down the same road as solicitors, it could be seen as inconsistent with the Bar's insistence on the need to forego direct public access. If it is an essential characteristic of an independent referral Bar that the barrister maintains an arms length distance from his client's commercial interest, should it be permissible for major commercial undertakings to gain direct access by offering a specialist practitioner a place on the board?

It is useful to bear in mind that, insofar as the services of a barrister are an economic activity, there can be competition amongst clients for those services as well as competition amongst barristers in providing them. Under the Code of Conduct, a practising barrister who is a director of a public company is precluded from acting either for or against that company in litigation. He might also, I think, have difficulty acting for or against that company's main competitors, especially in litigation under the Competition Act or the Companies Acts involving appraisal of the market shares or finances of the main players in that sector. But if the cab rank rule - the principle that every member of an independent referral Bar is potentially available to every prospective litigant - is one of the essential features reflecting the public interest, can the Bar of a small economy allow 3 or 4 or 10 or 12 of such companies to foreclose access to a material number of leading practitioners by making those practitioners directors?

Another example is that of the Bar's traditional permission to barristers to accept retainer fees. If, nowadays, a leading libel silk is an economic undertaking, then a retainer from a national newspaper to act only for that paper and not for its competitors or any plaintiff, is an exclusive dealing agreement which potentially falls foul of section 4 of the Competition Act.

It is extremely important for the Bar, if it is to get across this argument as to the essential value in the public interest of the continued existence of an independent referral Bar to our legal system, to distinguish between those rules and practices which are essential to its independent status and those which are in truth traditional perquisites which confer a financial advantage only. It is more important to ensure that the essential rules are enforced in a coherent way and that the Bar does not fall into the trap of compromising its essential values by pursuing what may seem to be a useful benefit at a given moment. This, indeed, is the dichotomy of the Bar Council's evolved role as in part, policeman of the Code of Conduct, but in part also, as the trade association charged with asserting the corporate material interest of the Law Library members.

The Bar's Regulatory Structure

In the light of the *Wouters*' case, the Bar's current position is vulnerable because its professional rules are adopted exclusively by the members themselves with no statutory obligation to pursue any specific public interest. In competition terms, the Bar Council is simply a trade association. The ultimate and original regulatory authority of the Irish Bar is technically the Honourable Society of Kings' Inns. But except for its role of formally admitting to the Bar and disbarment, the benchers of Kings' Inns have for many years delegated their regulatory functions to the Law Library.[3] However, in some common law jurisdictions the Court is the regulatory authority of the Bar and, as such, responsible for discipline and the enforcement of professional rules of conduct.

If the benchers of Kings' Inns, being the judiciary of the superior courts and an equal representation of the practising Bar, were to resume their role as the authority responsible for establishing and enforcing the Code of Conduct for the Irish Bar, then it is at least arguable that it would be regarded as a public body of the kind described in the first of the two approaches of the European Court in the *Wouters* judgment and thus not an association of undertakings for the purpose of the competition rules.

The Competition Authority Review

The current review of legal services by the Competition Authority and more particularly, the debate that will follow any recommendations it may make for reform, is perhaps the first opportunity since the foundation of the State for a considered reflection as to precisely what form of structure and organisation for the provision of legal services in this country best serves the economic conditions, the needs of the administration of justice and the social values of Irish society at the beginning of the 21st century.

Unfortunately, the report furnished to the Competition Authority by Indecon-London Economics is a somewhat disappointing first step in the process. Of course, Indecon's terms of reference were limited to the economic study and analysis of the market for legal services with a view to identifying possible restrictions on competition. The judgment as to whether any particular restrictive practices are justifiable or tolerable, because they may contribute to the quality of the administration of justice or are necessary to some desired aspect of the organisation of the legal system, falls to be made at a later stage.

Nevertheless, if the function of the report is to establish the economic framework for the formulation of competition policy as regards legal services in this jurisdiction, one cannot but have considerable doubts as to whether its findings and analysis are sound.

Although the document is rich in the customary terminology of competition economists; makes apparently impressive use of statistical data; and promises empirical analysis (Section 5.2); on closer examination it appears to be based to an unusually wide degree for such a study, upon opinion and assumption rather than upon analysis by reference to scientific observation and tested factual data as a claim to empirical analysis would suggest.

3. Presumably out of fear of a possible constitutional problem arising out of appeals to the High Court against decisions to disbar for misconduct.

The "Relevant Market"

The "empirical analysis of the market" begins (Section 5.4) as one would expect, with an attempt to identify the product or service market to be examined. In Section 5.1 we are introduced to the "hypothetical monopolist test" and the SSNIP test, although, in fact, no subsequent use is made of either. In Section 5.6, a basic definition is given for the purpose of delineating this service market: "In the common law system a barrister or barrister-at-law is traditionally defined as a lawyer qualified to plead in the higher courts." The introduction of such a "definition" is curious because the very next sentence effectively concedes all solicitors are, since 1971, also lawyers qualified to plead in the higher courts, so that under such a definition "barrister" includes "solicitor".

In fact, as much of the discussion in the report confirms, what is really under examination is the role of the "practising barrister" and the services provided by an independent referral Bar. Thus, a more accurate definition for the purpose of defining the relevant market would be that upon which the Bar's own code of conduct is based, namely, a graduate in the degree of barrister at law who has been admitted by the Chief Justice to a right of audience in the Irish courts and who, as a sole practitioner, holds himself out as available to represent or advise any client upon the instructions of a solicitor.

The purpose of the definition in the report appears to be to enable the relevant market to be defined (Section 5.45) in these terms: "The relevant market therefore comprises the range of services provided by barristers and its geographic scope is the State." The effect, therefore, is to enable barristers in full time employment to come within the definition as "lawyers qualified to plead in the higher courts" and thereby to lay the ground for one of the principal conclusions of the report to the effect that "the prohibition on fully qualified employed barristers competing with practising barristers constitutes a restriction on competition." The implication of this purported analysis of the market is that barristers in full employment are, as matters stand, operators in the same relevant market as members of the Law Library and that only a restrictive practice imposed by the Bar Council prevents them competing in the provision of the relevant services. But the right of audience is determined by the judiciary and not by the Bar Council and an employed barrister enjoys no right of audience because the judiciary do not regard him as fulfilling one of the fundamental conditions upon which the exercise of the right of audience depends, namely the status of "practising" barrister and availability to litigants as such.

It may well be that a case can be made for the economic benefits for allowing employed barristers a right of audience, but if, for the purpose of setting the economic framework for examination of that issue, the relevant market includes the services of both practising barristers and employed barristers, because both are lawyers qualified to plead in the higher courts, then the report's definition of the relevant market is clearly wrong, because it must also necessarily include the services of solicitors, given that there is then complete "supply substitutability" between all three providers of those services according to the report's own criterion (paragraph 5.4).

Price competition

An important part of the study is devoted to an examination of price competition amongst barristers and the principal finding of the "empirical analysis of the market" given at paragraph 5.49 is that: "there is very little evidence of price competition among barristers." This is an important conclusion because it appears to furnish both the cause and the consequence of several of the restrictions which are criticised, including restrictions on entry and on the barrister's ability to advertise.

On closer examination, however, it seems reasonably clear that the consultants' difficulty in finding evidence of price competition was due to their decision not to look at any concrete evidence of pricing as such. The proposition advanced at paragraph 5.31 to the effect that "the absence of price competition is very evident", is given a two-fold basis. First, there is a consultant's own conclusion that price competition ought not to exist because restrictions on entry and the barristers' ability to advertise their services do exist. Secondly, it is said to be "evident" from what people told them in the form of surveys identified at Section 5.20. These are surveys of barristers, solicitors, of insurance companies and a sample of 1,008 members of the public.

Accordingly, the report first proves by "empirical analysis" of the relevant market that there is little or no price competition amongst barristers. This is so because barristers, solicitors, insurers and members of the public said so, and because barristers are relieved of the need or incentive to compete with one another on price since they cannot advertise and have no risk of material numbers of new entrants appearing in the market to undercut them. The removal of the restrictions is then justified by the need to retrieve the cost savings presently lost to the Irish society by current arrangements (paragraph 5.147).

Given the central role played in the report by the analysis of price competition, two aspects of this part of the study are particularly surprising. The first is the use made of the "survey evidence" and the implications drawn from it; the second is the fact that, although passing references are made to the existence of procedures for the taxation of costs, not only does it not appear to have occurred to the consultants that the taxing masters might have been a useful source of real evidence as to pricing behaviour, but there is a total lack of enquiry as to the economic significance such systems might have for pricing activity.

As to the former, much use is made of the "evidence" derived from the surveys. Thus, in Section 5.32: "a significant majority (almost 80%) of barristers believe that limited, very little or virtually no price competition exists amongst members of the profession in Ireland." Now, if 80% of a profession said there was no price competition, then, clearly they are unlikely to be wrong. But that does not appear to be what has happened. According to Table 5.1, there were 1,311 barristers and it appears to be implied that all of them were invited to respond to the survey. 283 did so. A 21% sample rate, could, I suppose, be statistically reliable, but nowhere in the report is any indication given as to what the profile of the 283 responses was. Did it, for example, reflect the 20/80% ratio of senior counsel to junior counsel mentioned in paragraph 5.23? Did it reflect the ratio of, say, practitioners under 5

years' standing? How did the proportion of circuit going practitioners compare with the average at the Bar; how many were over the age of 65? Indeed, the inference to be drawn is that the 283 were simply those who had sufficient interest, concern, or simply time on their hands, to take the trouble to complete the questionnaire.

Accordingly, when it is said (Table 5.6) that 14% of barristers believe there is virtually no price competition, the actual "evidence" is that 40 out of 1,300 barristers held an opinion to that effect.

Similarly, when an attempt is made in Section 5.24 to evaluate the level of demand for barristers' services, it is described as being high, despite the increase in the number of practitioners, on the basis that 93% of the 283 said they had experienced an increase in average annual fee income during 1999-2001. 53% had experienced increases between 10 and 49%. In other words, 141 barristers (53% of 93% of 283) enjoyed such success. (Apart from anything else, the use of 1999-2001 may, in any case, be highly significant, given the buoyancy of the economy and the sudden impact of the demand for barristers' services from the plethora of tribunals.)

But, if this is to be taken as evidence of the level of demand for the relevant services in the profession as a whole, and thus a factor that forms part of the economic assessment of price competition in that market and restrictions on entry to it, it is surely of crucial significance to know to what extent the 283 is made up of recently qualified practitioners. The newly qualified barrister who holds two briefs in the Circuit Court in his first year and four in the second year may well feel there is precious little demand for his services, but he will, nevertheless, have experienced a 100% increase in his fee income.

A similar query must be raised as to the evidential value of the survey of 1,008 members of the public in this context. Who were they and how were they chosen? Were they profiled to reflect the population as a whole by reference to age group, sex, employed or unemployed, users or non-users of legal services? The inference in paragraph 5.28 is that 90% of the respondents had never had contact with a barrister, although this did not deter 52% of them giving an opinion as to the level of price competition in that market.

The Solicitor as Pricing Mechanism

The opinions of solicitors in such a survey, on the other hand, should carry some weight. They at least should have had some experience of negotiating barristers' fees and explaining them to clients. Where solicitors' views are concerned, however, a different point needs to be made. If 95% of solicitors are worried that there is either limited or no price competition amongst barristers (Table 5.6), then, in one sense, they have only themselves to blame. Until relatively recent times, it was a fundamental function and duty of a solicitor, prior to briefing counsel, to make his own assessment of the nature and complexity of the brief; to decide which particular experience or skill in counsel was required and then mark the brief with the fee which he considered appropriate, before approaching counsel. If the particular counsel approached declined the brief for the fee marked, it was the solicitor's duty to assess whether it was in his client's interest to increase the fee or to seek alternative counsel at the original fee. By so acting, the solicitor and his client had the assurance that a fee, so marked and agreed, must necessarily be upheld on taxation.

By the same token, however, it was a fundamental professional duty of a practising barrister not to undertake litigation other than on foot of a brief for which the fee had been marked and paid in advance. The rationale of this obligation lay in the nature of the status of the practising barrister as an independent practitioner whose role as intermediary between the court on the one hand, and the solicitor and his client on the other, required that he had no personal financial interest in the course or outcome of the litigation. The incentive for adherence to the duty lay in the inability of the barrister to enforce recovery of fees.

This previously important facet of the relationship between barrister and solicitor, namely, the skill of the solicitor in judging an appropriate fee on the one hand and the duty of the barrister to avoid his conduct of the case being influenced by his interest in its outcome, appears nowadays to have largely disappeared. Indeed, it is somewhat alarming to read at paragraph 5.39 that 32.1% of barristers told the consultants that "it is not possible to know, and therefore to state, the level of fees in advance due to the fact that circumstances often change in the course of a case". It certainly used to be the rule that no barrister was entitled to accept a brief and refuse to nominate and agree both brief fee and refresher in advance. The purpose of that rule was to protect the client against precisely such unforeseen changes in circumstances and if the case lasted a month instead of a week, he had the assurance his counsel remained committed to it at the agreed fee. On the side of the Bar, I suspect that the obligation ceased to be enforced by the Bar Council under the influence of the "Round Hall" personal injury litigation in the second half of the 20th century. Leading counsel held multiple briefs each day knowing they could fight only one and must either settle the rest or hand them over. No fees were marked until it was known which was which.

The apparent abandonment of this once important feature of the barrister/solicitor relationship and the failure of the Indecon Report to even advert to its existence is important, not only for evaluating its conclusions on price competition, but because it is relevant to its recommendations on direct access to barristers by members of the public. (See paragraph 5.147).

However, as pointed out above, correctly discharged, the traditional role and skill of the instructing solicitor was in itself an instrument of price competition. Furthermore, the evaluation of direct access contained at paragraphs 5.144-148 fails to identify the practical consequences of requiring barristers to accept direct access and then to analyse the likely effects on pricing of such a change. The argument quoted at paragraph 5.143 that direct access involves fundamental change in the nature of the barrister's profession is dismissed in paragraph 5.146 as being merely a matter of administration. Genuine empirical analysis would surely have looked somewhat closer at what is actually involved in preparing a case for trial: tracking down witnesses: interviewing them and taking statements; chasing medical reports; drafting, printing, stamping and lodging court documents, and perhaps funds, in court. All of this and much more is done now by the solicitor for the client and presented to the barrister in the brief. Under direct access, all of that work still has to be done by someone and if it falls to be done by the barrister, with or without assistants and secretaries, what is the likely economic impact? Solicitors handle client funds and an extensive statutory scheme and accounting regime is operated through the Law Society for the protection of the public for that

reason. Under direct access, would that be extended to the Bar? If so, what would be the economic impact on the cost of barristers' services and the Bar Council's supervisory functions? Will there in fact be cost savings? It is asserted, (paragraph 5.147) that for the "well-informed client" the direct access route "might be the lower cost option" but there is no attempt whatsoever made at even a pro forma costing exercise for a standard piece of litigation, such as might have been done by consulting an experienced legal costs accountant.

Taxation as Price Control

The second surprising omission of the Report, both in terms of the pursuit of "empirical evidence" and the identification of the forces influencing price competition in the market, is the failure to consider the influence of the system of the taxation of costs in this market. Passing references are made to the fact that legal costs, including barristers' fees, can be submitted to taxation by a taxing master or a county registrar. (See, for example, paragraphs 5.37 and 5.97, the former suggesting that the consultants were under the impression only fees paid by plaintiffs in personal injury litigation are "limited and controlled by taxation"). It seems, on the face of it, extraordinary that taxing masters and county registrars were not regarded as a likely primary source of first-hand evidence of how pricing operated in the market for legal services. At the very least, one would have thought that the inquisitive economist would have considered whether interviewing a taxing master or a few county registrars might be likely to yield more reliable data and opinion than 1,008 members of the public - almost 50% of whom turned out to be "don't knows". (Table 5.6).

Even more significant, however, is the apparent failure to question whether the very existence of a system for taxing costs may not itself be a factor that causes or contributes to the evident absence of price competition. The terms of reference explicitly included restrictions on competition brought about by legal provisions.

Furthermore, the market in legal services is highly unusual, if not unique, in the presence of such an over-riding statutory price control mechanism. If I pay €30,000, to purchase a new motorcar, I will have certain rights under warranties and consumer legislation. If it transpires to be a dud or defective, I may get some or all of my money back. What I cannot do, however, if I take delivery of a perfectly good car, is have second thoughts about the price I agreed to pay and call upon the Director of Consumer Affairs, or some other statutory officer, to fix a fair price and direct the dealer to give me a refund.

Yet that, in effect, is my entitlement as a purchaser of legal services. Would there be any incentive for price competition between motorcar dealers, if they knew that the prices they agreed with customers were always liable to be re-fixed by a third party? Is it not inevitable that prices for similar models would settle around what is known to be the "going rate" on "taxation"?

As most barristers will, I suspect, confirm, this is in fact one of the main influences on brief fees, especially since the abandonment or reduction of the practice of offering the brief with the fee. When the case is over and the fee is being discussed, the barrister's initial proposal is not infrequently adjusted either up or down, according to the solicitor's experience of the amounts that have recently been fixed on taxation for similar cases.

If the existence of a statutory mechanism, such as taxation, is a factor which plays a major influence on price competition in this particular market, then the Indecon conclusion as to the absence of price competition may well be correct, but not for the reasons that they give. Furthermore, if the taxation of costs is a dominant influence on pricing of legal services and a major cause of diminished or absent price competition, then direct access, advertising and removal of barriers to entry may not alter the situation, unless taxation of costs is also abandoned. It is one thing to promote competition in the cab-rank: it is a radically different matter to abolish the taxi-meter. ●

The Future of European Securities Markets: Rewriting the Investment Services Directive

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A single financial market

A single market in financial services has been under construction since 1985, underlining its importance as a motor for economic growth in the European Union.[1] The European Commission formally adopted a draft proposal to overhaul the existing Investment Services Directive (ISD) in November 2002.[2] Since then, the proposal has been submitted to the European Parliament and the Council of Ministers for examination and a Directive is expected during 2004. Pivotal to the creation of an integrated securities market, the new ISD will transform the way market participants operate on a cross-border basis. However, the proposal has proven to be controversial and has provoked intense debate and lobbying from those involved in the securities industry. This article considers the background to the proposal, including its impact on the structure of the securities market. It will also examine U.S. securities litigation and enforcement proceedings, which show the extent to which the duty of "best execution" of clients orders can be imposed on investment firms. Finally the main provisions of the draft proposal are examined.

The means of achieving a single financial market

The development of a single market in financial services was made a priority for the Commission when it adopted the Financial Services Action Plan (FSAP) in 1999.[3] By enacting a series of legislative measures, the FSAP aims out to create a single wholesale European market, open and secure retail markets, continued financial market stability and the elimination of tax obstacles to market integration by 2005. A cornerstone of the FSAP will be a fundamentally new ISD. To this end, the proposal's broad objectives are the protection of investors, market integrity and the promotion of fair, transparent, efficient and integrated financial markets.

Providing extra impetus to the FSAP, a Lamfalussy Report of February, 2001, concluded that the EU financial market development was being hindered by a plethora of barriers, the main one being the slow and rigid legislative process.[4] A four-level regulatory approach was introduced.

Level 1 involves co-decision: the Commission adopts a formal proposal for Directive/Regulation after a full consultation process; the European Parliament and the Council reach agreement on framework principles and definition of implementing powers regarding the Directive/Regulation.

Level 2 involves a so-called "comitology" procedure; the Commission, after consulting the European Securities Committee (the ESC, comprising of high-level representatives of Member States) requests advice from the European Securities Regulators Committee (CESR, comprising of senior representatives from the national public authorities competent in the field of securities) on technical implementing measures; CESR prepares advice in consultation with market participants, end-users and consumers and submits it to the Commission; the Commission examines the advice and makes a proposal to ESC; The ESC votes on the proposal within a maximum of three months; the Commission adopts the measure.

Level 3 involves co-operation: CESR works on joint interpretation recommendations, consistent guidelines and common standards (in areas not covered by EU legislation) and peer review, and compares regulatory practice among member states to ensure consistent implementation and application.

Level 4 involves enforcement: the Commission checks Member States' compliance with EU legislation; the Commission may take legal action against a member state suspected of breach of community law.

This procedure which essentially distinguishes between high level principles and implementing measures is employed in the proposal for the new ISD and aims to achieve a quicker and more flexible legislative process. These factors are important as there is a sharp contrast between the unprecedented changes in the financial market place and the speed at which legislative initiatives have been developed. Involvement of the CESR ensures greater co-operation between member states regulatory authorities, while level 2 consultation will present additional opportunities for lobbying.

1. "Completing the Internal Market: White Paper from the Commission to the European Council", (Milan, 28-29 June 1985) COM (85)310, June 1985.
2. "Proposal for a Directive on Investment Services and Regulated Markets COM (2002) 625.
3. "Financial Services - Implementing the Framework for Financial Markets: Action Plan", COM (1999) 232.
4. "Final Report of the Committee of Wise Men on the Regulation of European Securities Markets", COM (2001).

The ISD

Vital to the Commission's plan of creating an internal market, the ISD of 1993[5] was passed to liberalise financial services in Europe. As a means of achieving this goal, the ISD borrows the model from the 1989 Second Banking Coordination Directive and much of the internal market legislation,[6] which is the:

> "[E]ssential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the grant of a single authorisation valid throughout the Community and the application of the principle of home Member State supervision."[7]

What this means is that investment firms authorised in a member state are granted a passport to establish branches and to conduct cross-border business in other member states, free from the additional local licensing requirements of the host state. One of the main aims of the ISD has been to place investment firms on an equal footing with credit institutions by incorporating them under this passport system.

The ISD has further permitted investment firms to become members or, to have access to the regulated markets and to the clearing and settlement systems of host Member States, by setting up branches or subsidiaries.

Overall, the Directive has significantly liberalised the EU market for financial services, and is viewed as the legal instrument which seeks to translate Treaty freedoms in respect of investment services, into practice.

Shortcomings of the ISD

The approach of the ISD has been to rely on mutual recognition as opposed to harmonisation of regulatory measures. Under the ISD, host member states are responsible for drawing up common principles in the form of Conduct of Business Rules (CBR) which firms operating in their state must comply with. However, difficulties have arisen due to the ambiguity over the scope and application of these rules.

Article 11(2) provides that the implementation and supervision of CBR is the responsibility of the member state "in which the service is provided." Different tests have been used by member states to determine "where the service is provided"; including where the transaction was initiated or the place of "characteristic performance."[8] It is uncertain when a service can be deemed to have been provided within a Member State, particularly in situations when a broker-dealer in one Member State executes a transaction on an exchange in another Member State on behalf of an investor in a third Member State. As Advocate General Jacobs pointed out to the European Court of Justice in *Alpine Investments BV v Minister Van Financier*:

> '[I]t is not entirely clear from the directive how responsibility is divided between the authorities of the home state and the authorities of the host state. In any event, it may not always be clear in a particular case precisely where a particular service is provided'.[9]

Consequently, various Member States have claimed jurisdiction over the same transaction. For investment firms trading on a cross-border basis, this has resulted in significant costs, as often they adopt the CBR of their home state and of the state "in which the service is provided."

Although CBR are designed to protect retail investors, they have been applied indiscriminately to professional investors. Despite the requirement to distinguish between professional and other investors, there is no consensus of what exactly constitutes a "professional investor."[10] This has resulted in investment firms undertaking the same transaction in various member states being treated differently in relation to CBR.

Furthermore, numerous provisions of the ISD permit host states intervention for protection of the "general good".[11] These regulations have limited the effectiveness of passport rights and have created a significant barrier to the provision of services.

A.14, the concentration rule, gives member states the option of requiring transactions to be executed on a regulated market, provided that the investor is established in that state, the investment firm carries out the transactions through an establishment, a branch or under the freedom to provide services and the transaction involves an instrument dealt on a regulated market in that state. Some member states have elected not to use this option and have left responsibility to the investment firm to determine how best to secure "best execution" for its clients. Not only has this resulted in differing order- execution methodologies but has also hindered competition between order-execution platforms.

The Annex of the ISD, lists specific "core investment services" (including acting as a broker or agent, dealing, portfolio management and underwriting) in relation to types of instrument (including transferable securities, financial futures, and interest-rate, currency and equity swaps). Services termed "non-core," including giving investment advice and safe custody, may only be provided as ancillary to core services. The problem is that the passport right under the ISD fails to adequately cover the full range of investor-oriented services, while national member states have adopted different approaches to regulating core investment services.

5. Investment Services Directive (93/22/EEC).
6. Second Banking Directive 89/646/EEC and, for example, the UCITS directive 85/611/EEC.
7. *op.cit.*, n.5 recital 3.
8. "The Application of Conduct of Business Rules under the Investment Services Directive (93/22EEC)" COM (2000).
9. Paragraph 19, Opinion of Advocate General Jacobs in *Alpine Investments BV v Minister Van Financien* (Case C-384/93) [1995] All ER (EC) 543, at 549.
10. Directive (93/22EEC) A11: "Member States shall draw up rules of conduct ... [s]uch rules must be applied in such a way as to take account of the professional nature of the person for whom the service is provided."
11. *Ibid.*, A13, A17(4), 18(2) and 19(6).

The transparency requirements under A21 (which seek to provide investors with transparent price information regarding the trading of their securities) are heavily qualified; A21(2) permits competent authorities "to suspend publication where that proves to be justified by exceptional transactions", in cases of "highly illiquid stocks", and in "transactions concerning bonds and other forms of securitised debt". Thus, A21 is of limited use in achieving the Commission's objective of a high level of transparency.

Market architecture

Market architecture refers to the rules governing how a trading system delivers the three functions of data dissemination, order routing, and order execution.[12] The proposal is a direct response to the unprecedented evolution of financial markets since the ISD was implemented. Set against the transformed securities landscape which is characterised by inter-exchange competition; competition from alternative trading systems and increased internal execution of client orders within investment firms, the principles behind the ISD are ineffective to contribute to future market developments.

One of the most visible signs of change in markets is the trend towards the demutualisation of stock exchanges. Two factors are driving demutualisation: increased global competition and technological advances.[13] The process of demutualisation converts exchanges from non-profit, member-owned organisations to for-profit, investor-owned corporations. In Ireland, the Stock Exchange is structured as a company limited by guarantee and has a board of twelve directors, comprised of an independent chairman, four co-opted directors representative of wider market interests, and seven directors elected by member firms.[14] The London Stock Exchange has gone one step further and removed all restrictions on the trading of its shares by becoming a listed company.[15] Other examples of exchanges are Euronext and the Deutsche Borse AG. They cover both cash and derivative products and offer a full range of services, from pre-trade market information, to post-trade clearing and settlement, in several national markets. In this new environment, exchanges are run as efficient business enterprises facing heightened competition which is resulting in mergers and alliances.[16]

For market participants, competition has resulted in price decreases, improved services and innovation. From a regulatory perspective, the main issues which have come to the fore are how to best protect investors while creating the foundations for a competitive and innovative trading infrastructure.

Alternative Trading Systems

Developments in technology have also created Alternative Trading Systems (ATS)/Electronic Communications Networks (ECNs) offering different ways of trading securities by permitting order -matching an trade-execution outside of stock exchanges.[17] For market participant ATS/ECNs can reduce transaction costs and create new pools c liquidity for securities. There are also indirect benefits to the wide market as ATS/ECNs exert competitive pressure on existing exchange which in turn leads to market efficiency.

The largest ATS is Instinet, which is a screen based computer networ for trading equities. Two types of information are displayed on th screen: that coming from public external sources and prices and quote generated by the system itself. The raw data is consolidated and bid an offers are ranked according to price priority. Each security has its ow internal order book which consists of live and expired orders ranked b price and time.[18]

Other types of ATS/ECNs are crossing networks which offer period matching of buy and sell orders at prices determined in the mai market; and closed order books where prices are determined within th system itself and orders are crossed at that price. The emergence c these ATS/ECNs with distinct market architecture is a result c different preferences required by different traders.[19]

For regulators, this new trading infrastructure challenges the existin regulatory framework based on investment firms and regulate markets. Again, the focus is on ensuring the protection of investor market integrity and financial stability.

Challenges to market architecture: fragmentation internalisation and best execution[20]

(i) Fragmentation

Both inter-exchange competition, and competition between exchange and other types of order-execution venues can contribute t fragmentation. Fragmentation can be detrimental to liquidity an efficient price formation. The former is a measure of the extent t which market participants can rapidly execute large-volum transactions with a small impact on prices. The latter is the extent an accuracy with which information about quotes and trades is publ disseminated, so that it can be incorporated into share prices.

(ii) Internalisation

Internalisation is the execution of clients orders in-house by a investment firm, either by crossing one client order against another executing against the proprietary position of broker-dealer Theoretically, internalisation may cause inefficient price discove because it prevents orders from competing against each other on single order book. Such fragmentation may also lead to larger bid-a spreads and greater price volatility.

12. The following is builds on Lee, R, *The Capital Markets that Benefit Investors, A Survey of the Evidence on Fragmentation, Internalisation and Market Transparency* (Oxford Finance Group, 2002).
13. Aggarwal, R, "Demutualisation and Corporate Governance of Stock Exchanges" Journal of Applied Corporate Finance (2002) Vol. 15 No.1 105.
14. www.ise.ie
15. see Levian, M Competition, Fragmentation and Transparency, Providing the Regulatory Framework for Fair, Efficient and Dynamic European Securities Markets (Centre for European Policy Studies, 2003) 23-32.
16. The exchanges of Amsterdam, Brussels and Paris merged to form Euronext N.V., a holding company incorporated under Dutch law. Euronext expanded in 2002 with the acquisition of LIFFE, a London-based derivatives exchange and the merger with the Portuguese exchange BVLP. Recently HEX plc and OM AB have announced a merger in order to create an integrated Nordic and Baltic market for listing, clearing, settlement and depository securities. This will also strengthe business relationships with EDX London, Eurex and the NOREX Alliance.
17. See FESCO "The Regulation of Alternative Trading Systems in Europe" (2000) Schwarz- Schilling and Warrensburg "Regulating Competition Between Stock Exchanges" (2002) and Collins "Regulation of Alternative Trading Systems: Evolving Regulatory Models and Prospects for Increased Regulatory Coordination and Convergence" (2002) Law and Policy In International Business Vol.33 43
18. Domowitz and Lee "The Legal Basis for Stock Exchanges: The Classification and Regulation of Automated Trading Systems" (1998) Pennsylvania State University
19. *op.cit.*, n.12 at 5.
20. *Ibid.*, generally and *op.cit.*, 15.

Another problem is that internalisation may divert "uninformed", low risk trades away from a primary exchange, leaving only the more "informed" and higher risk orders on the primary exchange. This "cream skimming" may lead dealers on primary markets to set wider spreads in order to protect themselves from investors with better information.

For investors, there is the risk of conflicts of interest. Investment firms may execute clients orders internally to avoid paying exchange fees or to further their own proprietary trading interests.

(iii) Best execution[21]

The duty of best execution derives from the common law agency principles and fiduciary obligations of loyalty and reasonable care that an agent owes to his principal. However, the existence of multiple trading venues, and the differing preferences of investors, has led to uncertainty as to what best execution is. In the current market environment, best execution can be described as a number of factors which, depending on the different emphasis of traders, can encompass price, liquidity, accessibility, speedier execution, or overall trading costs. For example, the dominant preference for retail investors may be the price of the execution, whereas for institutional investors, anonymity and liquidity may be prime concerns.

With fragmentation, trading knowledge becomes more widely dispersed, adding to the difficulty of achieving best execution. In the light of these changes, it has become important to clarify and re-define the nature of best execution.[22]

Lessons from the U.S. -- price transparency[23]

Comparisons with America are worthwhile, as key trends in financial regulation emanate from US financial markets. The American National Market System (NMS) was mandated in 1975 under Section 11A of the Securities Exchange Act 1934 (1934 Act) to consolidate quotes from the major exchanges and regional exchanges into a National Best Bid and Offer (NBBO), and to consolidate trades with volumes onto a tape. The NMS includes:

* The Intermarket Trading System (ITS) links major trading venues to each other. The ITS links nine American markets and is itself linked to the NASD's Computer-Assisted Execution System (CAES). These links permit trading across different trading venues by allowing a broker-dealer in one market centre to send an order to another market that is trading the same security. Rule (11 Ac 1-2) requires those (e.g. vendors, broker-dealers) providing broker-dealers and investors with market information from a single market in a security to provide information from all other markets as well. These measures attempt to protect investors from pricing disparities, i.e different prices in different markets for the same security.

* Transaction Reporting Rule (11 Aa 3-1) requires trading venues to report transactions and last sale information to their self-regulatory organisations (SROs) who in turn file with the Securities and Exchange Commission (the "SEC") a transaction reporting plan for equity securities listed on a national securities exchange or, included in the National Market tier of Nasdaq.

* Quote Rule (11 Ac 1-1) releases available bids, offers and quotation sizes for exchange-listed equities to information vendors. It also obliges a dealer or market maker to execute an order in any amount up to the published quote size.

* Display of customer limit order rule (11 Ac 1-4) require over the counter market-makers and exchange specialists to display certain customer limit orders for covered securities. By setting the limit at which an investor will buy and sell a security at a specified price or better, enables investors to compete for better prices than the market is offering.

Best execution -- a catalyst for litigation ?

The U.S. Securites and Exchange Commission has carefully avoided giving a precise definition of best execution. It fears that a specific definition would be detrimental to innovation or to more advantageous trading strategies. As mentioned, the relationship between broker-dealer/investment advisor and client is one of principal-agent; this forms the starting point for assessing the duty of best execution. These fiduciary obligations include: (1) the duty to recommend a stock only after studying it sufficiently to become informed as to its nature, price and financial prognosis; (2) the duty to carry out the customer's orders promptly in a manner best suited to serve the customer's interests; (3) the duty to inform the customer of the risks involved in purchasing or selling a particular security; (4) the duty to refrain from self-dealing; (5) the duty to disclose any personal interest the broker may have in a particular recommended security; (6) the duty not to misrepresent any fact material to the transaction; and (7) the duty to transact business only after receiving prior authorisation from the customer.[24]

21. See generally European Asset Management Association, *Best Execution, Executing Transactions on Securities Markets on Behalf of Investors, A Collection of Essays* (Heronsgate, 2002) and FSA "Best Execution" (2002) Consultation paper 154 and Hallam and Idelson "Breaking the Barriers", A Technological Study of the Obstacle to Pan-European Best Execution in Equities" (2003) Tradeserver and Levitt "Best Execution: Promise of Integrity, Guardian of Competition" SEC speech Securities Industry Association, Florida (1999).

22. Bresiger "Regulator Looks Again at Best Execution" (2002) Trades 25 and Flaherty "Best Execution" (2000) Equities 12 and Nazareth "Market Structure:2000 and Beyond" SEC Speeches.

23. *op.cit.*, n. 15 at 68-69 and Levitt " Best Execution, Price Transparency, and Linkages: Protecting the Investor Interest" (2000) Washington University Law Journal Vol.78 513.

24. See *Leib v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 461 F. Supp. 951 (E.D. Mich. 1978), Add, 647 F.2d 165 (6th Cir. 1981) and *Robinson v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 337 F. Supp. 107 (N.D. Ala. 1971), aff'd, 453 F.2d 417 (5th Cir. 1972).

Enforcement proceedings brought by the SEC against broker-dealers and investment advisers have largely concerned conflicts of interest which have adversely effected the duty of best execution for clients.

The *Shawmutt* Cases involved arrangements between advisers and broker-dealers, where commissions and mark-ups and mark-downs were used to compensate the broker-dealers for the referrals. The investment advisers failed to make full disclosure and to seek best execution. Two traders had also violated record-keeping requirements by altering trade tickets to make it appear that the executing dealer had provided the best quote on the trades by crossing out better quotes provided by broker-dealers other than the referring broker-dealer.[25]

In *Re Mark A. Bailey & Co*, it was alleged that Bailey had executed transactions for its clients through a broker-dealer that had referred those clients to Bailey and through which the clients had directed the adviser to execute transactions.[26] Bailey failed to disclose to its clients that:

- it did not attempt to negotiate commissions.
- in batch transactions, it would have been in the clients interest to negotiate brokerage commissions.
- the firm did not negotiate volume commission discounts on the batch transactions with the broker.
- clients were paying higher commission by directing the firm to use the broker.
- they were not obtaining best execution in certain transactions.

In *Re Portfolio Advisory Services LLC (PAS,)* PAS entered into arrangements with registered representatives to direct commissions to those representatives in return for their referring investors to a hedge fund arranged by PAS. Over the counter trades were executed with a market maker that displayed the best price at the time of the order, and when execution was confirmed, the adviser would report the trade to the fund's prime broker and instruct that broker to add on a 5-cents per share commission on the trades, even though the referring broker's firm had no role in executing the trade. The SEC found that PAS had violated securities anti-fraud provisions and disclosure rules. In settling the action, PAS was censured, ordered to cease and desist, and paid a penalty of $50,000.[27]

Best-execution and ATS/ECNs

The SEC has expressly stated that as part of a broker-dealers fiduciary duty, there is an obligation to obtain best execution for its clients. It has also articulated this duty in terms of the "shingle" theory -- a relationship of trust, confidence and agency.

However an absence of a precise definition and technological advances have spurred litigation in the U.S. In *Newton v Merrill Lynch*,[28] the plaintiffs alleged that the defendant routinely, and improperly, executed orders at the NBBO when they knew that better prices were available through alternative quotations systems (i.e. Instinet, Island, Bloomberg Tradebook, REDIBook, and Archipelago). The defendants argued that execution at the NBBO was the industry practice. The District Court granted summary judgment for the defendants, which was upheld by a Third Circuit Court of Appeals panel that concluded that the nature of the best execution duty was too ambiguous to be legally enforceable.[29] On review, an *en banc* decision of the Third Circuit acknowledged the enforceability of the best execution duty and said that broker-dealers had a duty periodically to "examine their practices in light of market and technology changes and to modify those practices if necessary to enable their clients to obtain the best reasonably available prices."[30] It concluded by stating that broker-dealers may be required to try to obtain executions at prices better than the displayed NBBO quotations, if superior prices are known and reasonably obtainable.[31]

In the *Geman* case, a broker executed orders for its client as principal. The firm entered into these trades at the prevailing NBBO. At the same time the firm offset the transactions with a market intermediary at prices better than the NBBO. The firm kept the difference between the two prices without informing its client. In an opinion, the SEC reiterated the principles of the *Merrill Lynch* case, that failure to satisfy the duty of best execution can constitute fraud because a broker-dealer, in accepting an order from a customer, implicitly represents that it will execute it in a manner that maximizes the customer's economic benefit. It also said that best execution obligations may go beyond simple execution at the NBBO, if the broker has reason to believe he could obtain a better price.[32]

In both cases, the NBBO has proven important in determining whether the duty of best execution has been observed by brokers when acting as fiduciaries for their clients. However the decisions fall short of prescribing a rigid assessment or precise definition of best execution.

Proceedings in relation to best execution have resulted in uncertain legal rules as the *Richardt-Alyn* case illustrates. This involved *Richardt-Alyn* -a stock exchange specialist firm, which confirmed orders for retail and broker-dealer customers at the NBBO price. The firm entered orders for its own account with a ECNs and obtained executions at better prices than the NBBO. It failed to disclose the trading profits to its customers. An SEC Alternative Law Judge held that this practice violated the duty of best execution owed to retail customer orders. The orders from broker-dealers were not fraudulent as a broker-dealer

25. *In re Fleet Investment Advisers, Inc.* (as Successor to Shawmut Investment Advisers, Inc.), Investment Advisers Act Rel. No. 1821 (Sept. 9, 1999); In re *Michalski*, Investment Advisers Act Rel.No. 1822 (Sept.9, 1999); *In re Rothmeier, Investment Advisers Act* Rel. No. 1823 (Sept. 9, 1999).
26. In re *Mark Bailey & Co.*, Investment Advisers Act Rel. No. 1105 (Feb. 24, 1988).
27. *In re Portfolio Advisory Services LLC*, Advisers Act Release No. 2038 (June 20, 2002).
28. 911 F. Supp. 754 (D.N.J. 1995).
29. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 115 F.3d 1127, (3d Cir. June 19, 1997), rehearing en banc granted, opinion vacated (July 30, 1997).
30. Newton, 135 F.3d at 271.
31. *Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 135 F.3d 266 (3d Cir.) (*en banc*), cert. denied sub. nom, Merrill Lynch, Pierce, *Fenner & Smith Inc. v. Kravitz*, 525 U.S. 811 (1998). On remand, the District Court denied plaintiffs' motion for certification as a class action based, in part, on disparities between the ability of various plaintiffs to prove damages. 1999WL1425367 (D. Ct. N.J. Nov. 8, 1999).
32. *In re Marc N Geman*, Opinion SEC No. 3-9032 (2001).

dealing with other broker-dealers does not owe the same level of best execution obligation as that owed to retail customers. On appeal, the SEC did not address the scope of the duty of care that broker-dealers owe to other broker-dealers. It was concluded that the firm violated the anti-fraud provisions of the Securities Act of 1933.

In the words of the SEC:

> "The Antifraud provisions are incorporated in the duty of best execution insofar as they apply to the obligations of broker-dealers to their customers in respect to prices and other aspects of executing trades. The Commission has variously articulated this duty in terms of the "shingle" theory, a relationship of trust and confidence, and agency. The Commission has stated that the duty of best execution must evolve as changes occur in the market that give rise to improved executions for customer orders, including opportunities to trade at more advantageous prices. Indeed, in 1998, in *Newton v. Merrill Lynch*, the court held that a broker-dealer's execution of a customer trade at the NBBO when a better price was readily available breaches the duty of best execution and constitutes a material misrepresentation in violation of the Antifraud provisions".[33]

In order to provide guidance for broker-dealers, the SEC has implemented Rules 11AC1-5 and 11AC1-6 (Rules 5 and 6). Rule 5 requires "market centres" (exchanges, market makers, specialists and ECNs) to record monthly reports, for different categories of order size, the number of executions occurring (1) at a price better than the prevailing best bid (or offer), (2) at the best bid (or offer) and (3) at a price outside the best bid and offer. To "facilitate comparisons across market centers," Rule 5 adopts certain basic measures of execution quality, including: (1) spread; (2) rate of price improvement/disimprovement; (3) fill rates; and (4) speed of execution.[34]

Under Rule 11Ac1-6 of the Securities Exchange Act of 1934, all broker/dealers (including introducing firms) that route customer orders in equity and option securities are required to make publicly available quarterly reports that, among other things, identify the venues to which customer orders are routed for execution.

Best-execution -- the implications for European markets

The nature and scope of best execution remains ambiguous. This is largely because it is a constantly evolving concept. The U.S. approach is: it is difficult to define but one knows it when one sees it. For investment firms, this requires conforming customer order practices with changes in technology and markets. Difficulties arise for broker-dealers/investment advisors because of different client orders which are difficult to satisfy in a market place that is increasingly fragmented. It is clear that the entry or routing of an order to a specific system or market is not a guarantee that a firm has obtained best execution for a customer order, nor is the failure to route an order to a specific system or market necessarily a violation of best execution. Without a satisfactory definition or standard procedure for evaluating executions, there will be uncertainty as to whether the duty has been met, which in turn could lead to an increase in litigation and enforcement actions.

The ISD proposal -- home and host member state responsibilities

Given the shortcomings of the ISD, the proposal replaces its provisions in their entirety. The objective of the provisions is to create a comprehensive framework for investor protection and for the development of an efficient, transparent and integrated trading infrastructure.

The proposal allocates the duty of authorisation of investment firms to the home member state. Authorisation will specify the investment service which the investment firm will be licensed to provide. Passport rights will now extend to ancillary services instead of non-core activities and an investment firm authorised in its home state will in accordance with the principle of mutual recognition be able to carry out business in the European community by what ever means it deems appropriate.[35] Again in keeping with the old ISD, the differentiating factor between investment services and ancillary services is the unavailability of authorisation for the sole provision of the latter. The scope of the ISD has been expanded to include investment advice, financial analysis and commodity derivatives.

The policies and procedures, which ensure compliance when investment firms conduct business with and on behalf of clients, are set out to be the responsibility of the home member state.[36] For investment firms providing investment services to clients on a cross-border basis, the home state under A.18.11 will again govern the conduct of business obligations that the firm must comply with in accordance with the best interests of its clients. If the firm operates through a branch, the competent authority of the member state in which the branch is located will supervise the Conduct of Business Rules (CBR).[37]

Effectively, the proposal follows the "country of origin" principle.[38] The host member state will assume powers over CBR provided by branches of investment firms because it is better placed to detect and intervene in respect of infringements of rules governing firm-client transactions. These changes will be more advantageous to smaller firms who can market their services across Europe while only having to comply with one set of CBR and their home country supervisory authority. But for larger investment firms expanding by setting up branches, they will need to abide by the rules of various member states in which they are established.

33. *In re Richardt-Alyn & Co., In re Richard B. Feinberg,* and *In re Alan S. Feinberg,* Initial Decision Release No. 151 (Sept. 30, 1999).
34. NASD "NASD Notice to Members 01-22" (2001).
35. *op.cit* n.2 Recital 15, 16. A.56.
36. *Ibid.*, A. 12.
37. *ibid.*, A.18.12.
38. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

Transparency

The proposal aims to ensure that there is a high quality of execution of investor orders by extending the regime to cover the execution of all transactions irrespective of the trading methods used. To this end, the proposal places similar pre-trade and post-trade transparency requirements on regulated markets and MTFs (defined below). Investment firms who conduct transactions internally are obliged to route client-limit orders to regulated markets or to MTFs and to publicly disclose their bid and offer quotes.

(i) Regulated markets and MTFs

MTFs is a real innovation of the proposal and is defined as a multilateral system which brings together, in the system, multiple third-party buying and selling interests in financial instruments in accordance with non-discretionary rules, that results in a contract. ATS refers to systems which primarily deal in equities, compete with exchanges for order flow and focus on active retail investors. MTFs main focus is the over the counter (OTC) market for institutional investors. This market is larger than the regulated markets for equities. Regulators are concerned about risk management and the potential for systemic risk and are looking to increase the transparency and the supervision of OTC transactions. Consequently the definition MTFs is closely aligned to that of regulated markets since both will carry out similar functions. However MTFs will not have to comply with listing procedures and will be able to trade any financial instrument. This will allow for tailored services for one-off transactions and instruments.[39] With regard to transparency, MTFs and regulated markets are required to make available to the public on "reasonable commercial terms" and on a continuous basis during normal trading hours, pre-trade information on current bid and offer prices in respect of advertised shares admitted to trading on a regulated market. Exemptions are contemplated for large scale transactions (A.27 and A.41).

In relation to post-trade transparency, MTFs and regulated markets will have to make available to the public on a "reasonable commercial basis", as close to real-time as possible the price, volume and time of the transactions executed (A.28 and A.42). The aim of this high level of transparency is to allow for better competition between different trading venues and for efficient price formation.

(ii) Investment firms

By extending the transparency requirements to investment firms, the objective is to more effectively link fragmented liquidity pools. A.20.4 provides for client limit orders which cannot be executed under prevailing market conditions, to be made public "in a manner which is easily accessible to other market participants". Clients will have the option of instructing investments firms not to disclose this information or waivers may be obtained for large transactions.

A.25 obliges investment firms authorised to deal on their own account to make public, bid and offer prices for transactions in shares, customarily undertaken by retail investors, which are admitted to trading on a regulated market and for which there is a liquid market. There will be a further requirement to trade with other investment firms and eligible counterparties at the advertised prices, except when there are "legitimate commercial considerations". This obligation will not apply to firms which are not an important provider of liquidity for the share(s) in question on a regular or continuous basis.

The proposal also requires the disclosure of post-trade volume and price and time of transactions concluded outside the rules and systems of a regulated market or MTF. A.26 obliges investment firms who deal, either on their own account or on behalf of clients to make publicly available information regarding the transactions concluded. This information shall be made public on a "reasonable commercial basis, and in a manner which is easily accessible to other market participants".

Mandatory pre- order publication has been criticised because it may adversely affect innovation and diversity. It is argued that order execution methods would be almost identical, providing a limited range of services at uniform prices. Large traders who want to avoid signalling their trade to the market often conduct trade off-market, but with pre-trade transparency, they could be discouraged from block trading, which would reduce liquidity.

It is also claimed that market forces should be sufficient to protect investors instead of having to resort to pre-trade transparency rules. The argument is that good execution attracts order flows and increases liquidity in markets. For investment firms (the arguments runs), competitive incentives can be reinforced by means of best execution rules and post-trade disclosure. Clients could also benefit from lower off-market transactional costs being passed on to them. Thus it is argued that the market should determine how investors' needs can be best satisfied and how market structure should be defined.[40]

The Securities Industry Association has further criticised A.25 and A.20.4:

> "[T]he U.S. SEC rules that serve as the basis for the proposed Article 25 are inextricably linked to the information and trading infrastructure in the United States, as that infrastructure has developed over the past 25 years, and cannot simply be transplanted into the very different European markets. By attempting to do so, the Commission has designed a regulatory approach that is impractical and, in fact, runs counter to the objectives of ISD revision, which would be better served by a properly formulated and administered best execution standard".[41]

Investor protection

A.19 describes best execution as obtaining "the best possible result in terms of price, costs, speed and likelihood of execution, taking into account the time, size and nature of customer orders, and any specific instructions from the client". Investment firms will be required to implement demonstrable methods for facilitating execution of client orders on terms that are most favourable to the client. Assessment of this duty by competent authorities is to be based on "conditions prevailing in the marketplace to which the investment firm can reasonably be expected to have access". It is arguable that this rule is very far-reaching - involving the duty to obtain " the best possible result" for "price, costs, speed and likelihood of execution" in markets where the firm can "reasonably be expected to have access" to. This

39. See Goldfinger, "ISD Directive Debate About the Trading Venue Diversity: The Tree and the Forest" (2003) FESE 25.
40. Britton "Investment Services Directive - creating a single European market?" Speech to EU Strategy and Directives For Investment Business, Westminster and City Conference, Claridge's, October 1, 2002 London.
41. SIA "SIA: Revised ISD Still Needs More EC Revision" Securities Industry News, 4/7/2003, Vol. 15 Issue 14, 3.

may require investment firms to examine every execution venue and incur the risk of the market moving against the client.

U.S. litigation in the area of best execution has made clear that investment firms should be aware that technological developments and changes to market structure are significant factors that must be considered when assessing best execution. Accordingly investment firms will be required to review, on a regular basis, their procedures for obtaining the best possible result for their clients and, where necessary, to adapt them so as to obtain access to the execution venues which, on a consistent basis, offer the most favourable terms of execution available in the marketplace.

Further action will be taken by the Commission by adopting implementing measures concerning:

> "(a) the factors that may be taken into account for determining best execution or the calculation of best net price prevailing in the marketplace for the size and type of order and type of client;
>
> (b) the procedures which, taking into account the scale of operations of different investment firms, may be considered as constituting reasonable and effective methods of obtaining access to the execution venues which offer the most favourable terms of execution in the marketplace."

The proposal introduces client order handling rules as a further means of protecting investors from any anomalies that may result from investment firms executing client orders in-house. A.20 stipulates for the fair and expeditious execution of orders, relative to other orders and trading interests of the investment firm. This attempts to prevent clients' interests from being adversely affected by any conflicts of interest.

A.16 will require investment firms to take all reasonable steps to identify conflicts of interests and maintain and operate effective organisational and administrative arrangements, or to manage conflicts in order to prevent adverse affects to their clients interests. Where a firm is unable to avoid conflicts of interest, it will be required to make a full disclosure to the client. Implementing measures are expected to:

> (a) define the steps that investment firms might reasonably be expected to take to identify, prevent, manage and/or disclose conflicts of interest; and
>
> (b) address conflicts that arise from any inducement or self-interest which may compromise the quality or fairness of a related investment service performed on behalf of or provided to a client.

The express consent of clients must be sought before investment firms will be able to execute transactions internally. It is envisaged that consent can be either in the form of a general agreement (renewable annually and documented separately) or in respect of individual transactions. It has been noted that this raises practical issues of business administration, of operational procedures and of the risk of failing to get consent. All of this will clearly be cumbersome and unattractive for many firms.

A.18.4 requires investment firms to check clients' "knowledge and experience of the investment field, its investment objectives and financial situation so as to enable the investment firm to determine the investment services and financial instruments suitable for that client." This would have the effect of forcing brokers to check that all customers know what they are doing before each transaction. There is a fear that execution-only broking, which provides a cost efficient way for small investors to trade would be forced out of business. There is also concern for investment managers as an increasing number of consumers buy investment funds on a non-advisory basis from a fund promoter, a discount broker or a fund supermarket. It is has been put forward by industry members that other than account-opening checks, there is no need for a suitability test in these circumstances, which would increase the costs of trading for investors and restrict their choice of services. Consequently, it is has been recently proposed by the European Parliament that amendments will limit the suitabililty test to cases where clients are receiving investment advice.

Retail and professional clients

A.22 proposes to exempt "eligible counterparties" from the heavier regulatory burdens of CBR, best execution and client order handling. Investment firms, credit institutions, insurance companies and financial intermediaries can agree to be treated as an "eligible counter party." This concept recognises the distinction between professional and retail investors. The proposal further defines a professional client:

> "[A]s a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs, in accordance with the criteria and procedures laid down in Annex II."[42]

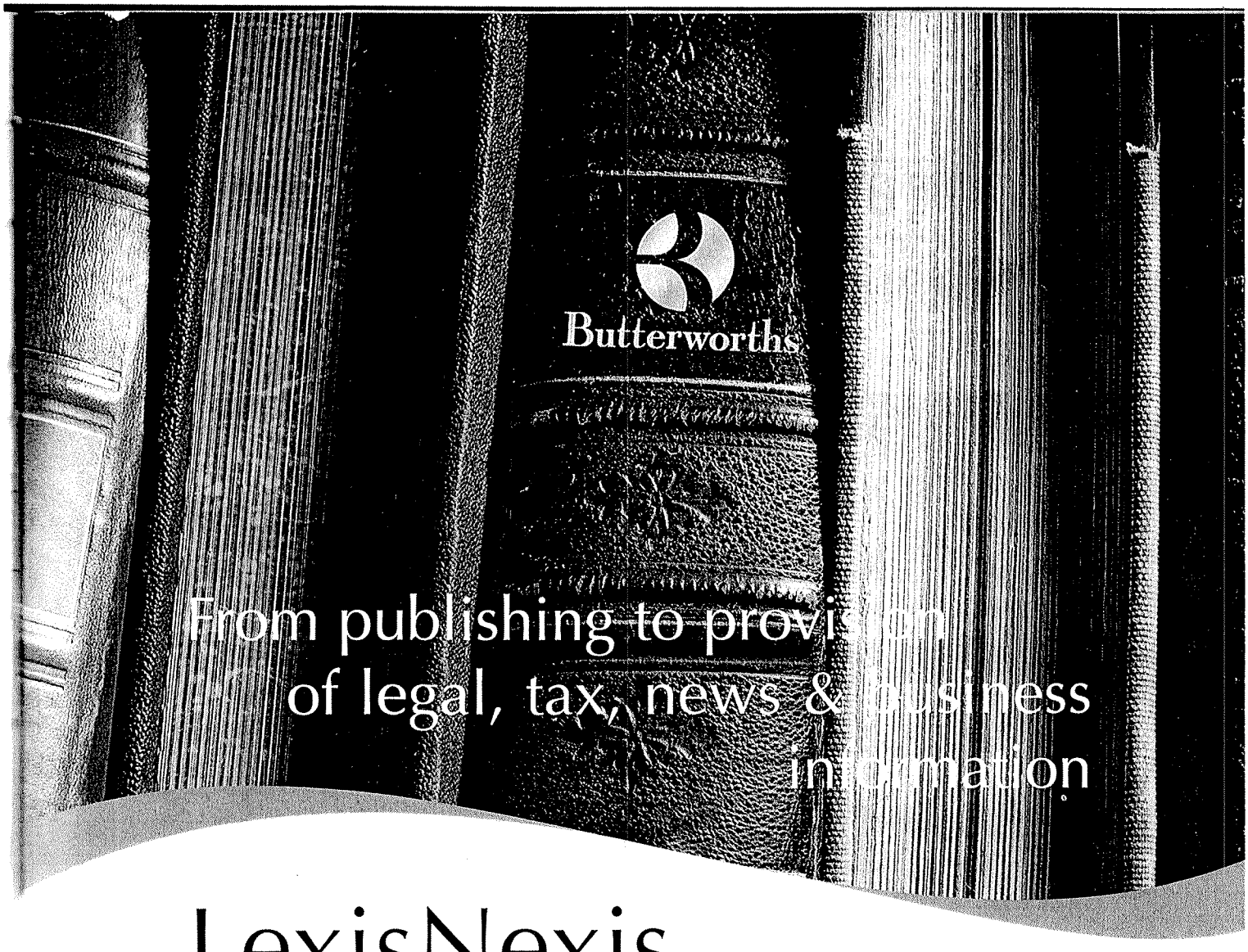
The distinction between professional and retail investors seems to be based on experience, knowledge and expertise. In this case, it is appropriate not to over burden firms servicing "eligible counterparties" by having them comply with the CBR which are geared towards retail investors. Also, given professional investors' knowledge and expertise they should not have to provide investment firms with prior consent when orders are being executed internally. Likewise it is not expected that the same best execution duties would apply to retail and institutional clients. However, the proposal excludes the best execution duty entirely, as opposed to modifying it, in relation to professionals and it is not exactly certain what level of service is to be expected when firms act in an agency capacity for institutional investors. Thus there may be some uncertainty in relation to the scope of the relationship as the U.S. case of *Richardt-Alyn* has demonstrated.

Concluding remarks

A well designed ISD is important if it is to serve as the cornerstone of an integrated securities markets. The proposal is much more detailed and complex then the existing ISD. The aim of level one is to develop clear framework principles that remain flexible so that they are not overtaken by time. The problem is reconciling the conflicting interests that the proposal has presented. At level two, difficult choices will have to be made with regard to the degree of harmonisation of technical measures. An integrated market requires a high degree of harmonisation of laws, though legislation also needs to take account of differing local market conditions. However, granting member states discretion in relation to certain rules may lead to protectionist measures and barriers to integration. The difficulty here lies in determining exactly what the appropriate balance should be.

Debate on the proposal has mainly focused on pre-trade transparency. However, U.S. financial markets have shown how contentious the concept of best execution is. With the potential now in Europe for a plethora of litigation regarding the definition of "best execution", it will become increasingly important for an investment firm to show in an objective manner that it is achieving best execution for its clients. ●

42. A.3.1.8 proposal.



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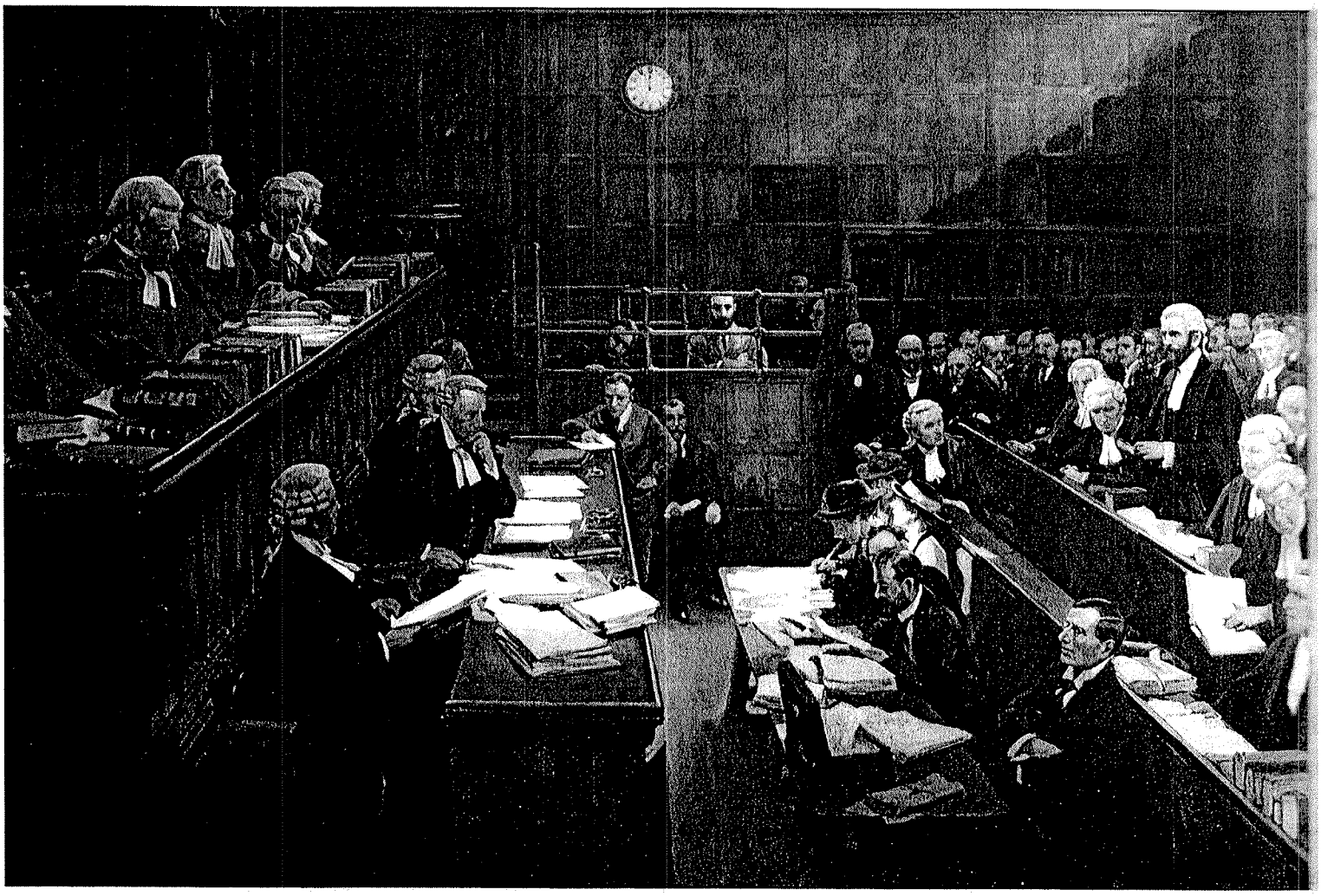
The Appeal of Roger Casement

Historic Painting Returns to King's Inns

John McGuiggan BL



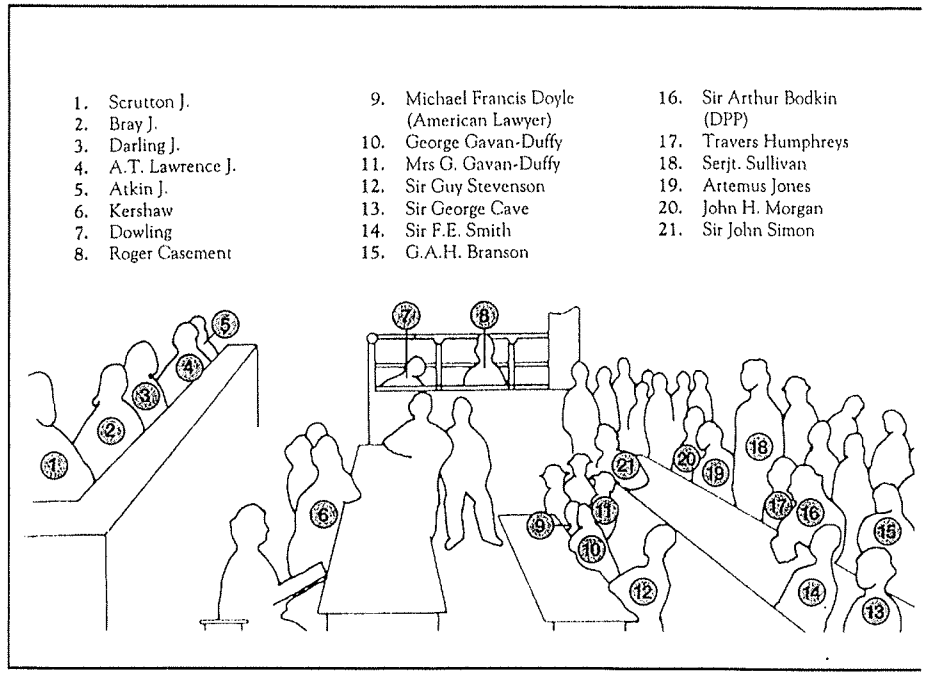
The painting of the Roger Casement appeal, which is usually displayed in King's Inns, was placed on exhibit in the National Portrait Gallery in London over the Summer. It has now been beautifully cleaned and re-hung at the entrance to the King's Inns dining room, together with an explanatory key and a description of the painting, courtesy of the Portrait Gallery. It will be officially unveiled by the President of Ireland in January. On the occasion of its return to Dublin, John McGuiggan BL recounts the story behind this historic Irish painting.

The canvas is huge: ten feet by seven feet. It hangs at the foot of Gandon's great marble staircase in the King's Inns, where it dominates the descent of the Benchers as they proceed to dine. It is a lawyers painting. It knows of wigs and of books, of procedure and of precedent. It captures the life of the law and it belongs there, as if it had been painted to be placed precisely where it now hangs.

The scene presents a unique social and legal record of immense historical importance. A Dublin barrister in an English Court, pleading for the life of an eminent British diplomat turned Irish revolutionary -- the traitor in the dock. This is a real history painting, captured by the artist's own hand as he sits in the jury box, paints beside him, sketching, drawing, measuring the scene and listening intently to this dramatic moment in the long conflict between England's laws and Ireland's destiny. [1]

1. Sir John Lavery (1856-1941) Belfast born, trained in Scotland. Before this event, he had no particular interest in Irish subjects. Later, much encouraged by his wife, Lady Lavery, he went on to complete many Irish subjects, including paintings such as the *Requiem Mass for Michael Collins*, and portraits of amongst others, *Cardinal Logue, De Valera, Cosgrave and O'Higgins*..

The date is the 17th July, 1916 and it is Roger Casement's appeal against conviction for high treason and sentence of death. The five scarlet robed judges of the Court of Criminal Appeal[2] sit impassively, in the same courtroom in which the death sentence had been pronounced, just nineteen days earlier. Now they listen and consider the arguments upon which Casement's very life depends. Casement, stripped of his knighthood, his honours and his decorations, appears a plain Irish felon.



Most eyes in the court are drawn towards the presiding judge, Darling J. Stern, straight-backed, he commands his courtroom. The painting flatters him. It catches him in handsome and noble profile. And so it should. For it was he who commissioned the artist, Sir John Lavery, to paint the scene.[3] They were old friends, Darling and Lavery. A few years earlier in 1907, Lavery had completed a formal portrait of Darling showing him in full judicial robes and wearing the black cap pronouncing death. It was a portrait considered by many in the profession to be in poor taste. It confirmed Darling's reputation for vanity and it now hangs in the Inner Temple, London.

There is little doubt that Darling's decision to commission this massive canvas was in part influenced by his vanity. This was, after all, one of the most important state trials of the 20th century and likely to be one of the outstanding moments of English legal history. This was Darling's bid for legal immortality. A great moment in history, a great trial, a great artist and a great judge!

On his feet addressing the court stands Serjeant Sullivan KC of the Irish Bar. (fig 18 in the key) He was not the first choice of counsel for Casement. His solicitor, George Gavan Duffy (fig 10 in the key) had initially sought the services of an English Kings Counsel but no one would take the case.[4] Defending a traitor in the middle of a patriotic war in which the legal profession had fielded many officers trained by its own Inns of Court officer training corps, was considered by many to be too damaging to an English legal career. So he turned instead to the Irish Bar, to his brother in law, Sullivan. Gavan Duffy was married to Sullivan's sister Margaret, who also assisted in the trial and appears in the painting at figure 11 in the key.

The office of Serjeant meant that Sullivan was a member of a superior order of barristers from whose ranks were chosen the common law judges. Their only distinguishing mark was a small patch of black silk set into the top of the wig. They were Crown law officers and could not, in the normal course of events, take a brief against the Crown. But Sullivan was encouraged by Chief Baron Palles to accept the brief. And he did. But without any great enthusiasm. In the event, he was paid stg£530 for the trial, which lasted four days, and a further fee for the three days of the appeal.[5] The money was raised through private donations from, amongst others, Sir Arthur Conan Doyle and the Quaker William Cadbury. Large sums also came from America, raised in New York by the great Irish revolutionary John Devoy of Clan Na Gael,[6] and brought over to England by a U.S. lawyer, Francis Doyle (fig 9 in the key), who was, somewhat unusually, granted permission to assist the defence team.[7] Montgomery Hyde, in his important book of this trial, records that the German Secret Service subsequently reimbursed this money to John Devoy.

George Gavan Duffy first met his client in a traitor's cell in the Tower of London. He had been asked to take the case by Casement's devoted cousin, Gertrude Bannister, who had been introduced to him by Alice Stopford Green. Gertrude was an English primary school teacher and as the price of helping her traitor cousin, she was summarily dismissed from her post -- one week's notice after thirteen years of loyal service. She attended faithfully each day of the trial and appeal.[8] She has not been identified in the painting, but it is probable that she is the lady in the hat at the very end of the solicitors' bench, directly beneath the dock in which Casement sits.

Gavan Duffy was at this time a partner in an English firm of solicitors. He too lost his post for taking on the case. His partners would not, at the height of the Great War, stomach the thought of the firm representing a traitor and he was given the choice of staying with the firm or representing the traitor.[9] To his eternal glory, both as an

2. From left to right, Scrutton J., Bray J., Darling J., A.T. Lawrence J., Atkin J.
3. Sir John Lavery, *The Life of a Painter* (London 1940)
4. H. Montgomery Hyde, *Famous Trials 9* - (Penguin 1964) - The case was offered to Tim Healy KC MP, Sir John Simon KC and Mr. Gordon Hewart KC, all of whom declined the brief.
5. H. Montgomery Hyde, (as note 4)
6. Devoy later turned against Casement, in his memoirs he accused him of "taking no notice whatsoever of decisions or instructions, of pursuing his own dreams, of being fixated on the idea that he was a wonderful leader of men, of being incapable of keeping counsel, of telling everything to every fellow who called on him, of wearing out his welcome by the Germans and of betraying his own and the movements secrets by his indiscretions" Golway T: *Irish Rebel: A Biography of John Devoy*. First St. Martin's Griffin Edition. March
7. Michael Francis Doyle - A Philadelphia Democrat, he later served as a judge of the Hague Court of International Arbitration. He died in 1960. Montgomery Hyde dedicated his 1964 Trial book to his memory.
8. H. Montgomery Hyde. (as note 4)
9. *Ibid.*

Irishman and as a lawyer, he did not hesitate to help his client and take on the case. He was in fact English born and English educated - at the Catholic public school of Stonyhurst. But he was of an Irish family rich in republican politics: his father, Charles Gavan Duffy had been a founder member and editor of *The Nation*, and a leader of the Tenant League who had been tried, along with Daniel O'Connell, for sedition; he had also participated in the 1848 Ballingarry rising; eventfully he had left Ireland and emigrated to Australia where, as Sir Charles Gavan Duffy, he became Governor General of Victoria, while his other son, Frank Gavan Duffy, also a lawyer, rose to become Chief Justice of the High Court of Australia[10]. George Gavan Duffy, after the Casement trial, went on to his own distinguished political and legal career. He was elected as a Sinn Fein MP and De Valera appointed him to the Treaty negotiations along with Collins, Griffith, Barton and Duggan. Later, after a spell as Minister of Foreign Affairs, he resigned his seat over the refusal to treat captured Republicans as prisoners of war. He returned to the law, transferred to the Bar and rose, in emulation of his Australian brother, to become President of the High Court of Ireland.

Serjeant Sullivan was a KC of the Irish Bar. But his patent of silk was not valid before the English Courts. There, he was but a junior of sixteen years standing, and for this reason he addresses the court from the junior benches. At the trial, in the same court, Sullivan had delivered an eloquent and powerful summing up to the jury. He had sought to argue that Nationalist Ireland had been engaged in arming itself solely to defeat threats to Home Rule emanating from the already heavily armed Unionist Ulster volunteers. It is a stirring speech and makes much of the limited material available to him. In fact a bit too much. He was interrupted in his delivery by both the prosecution and the Bench who protested that he was introducing arguments not supported by any material evidence given throughout the trial. Obliged to apologise, he lost the thread of his argument and in attempting to resume was unable to do so. He swayed unsteadily on his feet and finally collapsed into his seat, saying, " My Lords, I cannot go on...." The trial was immediately adjourned. The next day he remained quite unwell and it was left to Artemus Jones[11] (fig. 19 in the key), his Welsh junior, to complete the summing up. The prisoner was not impressed![12] But Sullivan, as we can see, was fully recovered for the Appeal. Subsequently, Sullivan left Ireland and transferred to the English Bar taking his thirteen children to England.

Legal argument in the appeal centred upon an interpretation of the 1351 Treason Act of Edward III[13]. The act required that the treason envisaged should occur "...within the realme...". Sullivan advanced the argument that as Casement's alleged treason had occurred in Germany - where he had attempted to recruit an Irish Brigade from amongst captured prisoners of war - it should therefore follow that as his acts were "without the realme" the statute should not apply. The original of the 1351 Act was a handwritten parchment in Norman French, written at the time (as Casement pointed out in his speech from the dock) when Edward was King of England and of France but not of Ireland.[14] Sullivan's case depended, *inter alia*, upon the interpretation of commas in the original text. Judges Darling and Atkin (figures 3 and 5 in the key), had visited the public records office and had examined the original of the statute with a magnifying glass[15]. It was their view that the commas were in fact ancient marks made from the folding of the parchment. Although this was not the only, or indeed the main reason, for refusing the appeal[16], this story gave credence to the claim that Casement was hanged for the want of a comma.[17] After three days, the judges, without calling on the prosecution to reply to Sullivan's submissions, dismissed the appeal.[18] What should have followed was an appeal, on a point of law, to the House of Lords. But such an appeal required the *fiat* of the Attorney General. He refused to give it, saying that between the trial and the appeal, eight of the most eminent judges in England had considered the arguments and that this was enough[19]

The Attorney General whose *fiat* was required was also the chief prosecution counsel! Attorney General F.E. Smith[20] (figure 14 in the key), was so staunchly Unionist that he was known as Edward Carson's galloper. He had once called on the young men of England to rise up against the House of Commons should they ever pass Home Rule into law.[21] Yet here he is: Attorney General and prosecutor, later to become, as Lord Birkenhead, Lord Chancellor of England. His refusal to allow an appeal caused consternation in Casement's legal team. Their constitutional law expert, Brigadier, Professor John H. Morgan[22] (fig 20 in the key), an English lawyer unafraid to represent a "traitor" despite holding military rank in the King's Army, sought the advice of the great legal scholar, Sir William Holdsworth, on whether a point of law existed. Holdsworth agreed that such a point of law did indeed exist and further agreed its importance. It is said that upon hearing the great scholar's opinion, F.E. Smith remarked,

10. G.M. *Goulding, George Gavan Duffy,* A Legal Biography (Dublin 1982)
11. The name of Artemus Jones lives on in the leading libel case of *Hulton v Jones* (1909)2 KB 444, where Jones sued the Daily Express for a Travel article which referred to an imaginary person, the writer believing nobody could possibly be called Artemus Jones, and suggested this imaginary person was holidaying in France with a woman who was not his wife.
12. Casement had at one time considered representing himself. He had also been attracted by a defence written for him by George Bernard Shaw, which advocated that he should refuse to recognise the Court and claim to be an Irishman captured in a fair attempt to free his country.
13. *R v Casement* [1917] 1 KB 98.
14. H. Montgomery Hyde. (as note 4) page 117
15. *Ibid* page 131
16. *R v Casement* [1917] 1 KB 98. Darling was of the view that Sullivan's argument was defeated by precedent, acceding to the argument, he said, would mean "..we should be bound to disregard the opinions of Lord Coke, of Sir Matthew Hale and of Serjeant Hawkins, all great names in the law and persons whose opinions have long been followed upon many questions of extreme difficulty..." He quoted Chief Justice Dallas on the weight of Hale's legal learning saying "..that what was not known by him, was not known by any other person who preceded or followed him and, that what he knew, he knew better than any other person who preceded or followed him.."
17. Casement later wrote to his friend Dick Morton that he felt the rejection of the defence argument was as if "to hang a man's life upon a comma, and throttle him with a semi-colon". H.Mongomery Hyde page 147
18. *R v Casement* [1917] 1 KB 98.
19. In addition to the five judges of the appeal court, there were also three trial judges, namely the Lord Chief Justice Viscount Reading (Sir Rufus Isaacs), Mr. Justice Avory and Mr. Justice Horridge.
20. F.E. Smith K.C., Attorney General and later, as Lord Birkenhead, Lord Chancellor of England.
21. This speech was characterised by Winston Churchill as being "...committed to naked revolution, a policy of armed violence and utter defiance of lawfully constituted authority" Camp - *The Glittering Prizes* London 1960
22. Morgan was Professor of Law at London University and Reader in Constitutional Law at the Inns of Court. He was an old friend of Casement and gave his services without remuneration. In the Second World War he acted as constitutional law advisor to Winston Churchill.

"I am well acquainted with the legal attainments of Sir William Holdsworth. He was, after all, runner up to me in the Vinerian prize when we were at Oxford"[23]

F.E. Smith was not the only Unionist friend of Carson involved in the trial. Darling, the presiding judge, was also a close colleague and supporter of the Unionist leader. Indeed it had been Darling, who as a KC had invited Carson to join his chambers at the time Carson transferred from the Irish to the English Bar. He thought Carson was unlike most other Irishmen because he was "...incapable of talking balderdash." [24]

With the appeal dismissed and a further appeal to the House of Lords closed off, Casement was now doomed and he knew it. He had already told Artemus Jones, his junior counsel (fig 19 in the key), that he "should be glad to die a thousand times for the name of Ireland".[25] Now, only appeals for clemency could save him. To defeat such a possibility, Casement's infamous black diaries were now deployed to destroy his considerable personal and international reputation as a humanitarian and to dissuade his many supporters from signing clemency petitions.[26] It was a strategy that was darkly successful. It confirmed his fate but it also completely undermined any integrity that the trial might have enjoyed and made this painting an unacceptable tribute to a flawed and disgraceful episode in English legal history. The diaries are now accepted as completely authentic, it was the use to which the British put them that was and remains corrupt.[27] Casement walked to the scaffold at Pentonville prison on the 3rd August, 1916.

Although commissioned by Darling, the picture was left on Lavery's hands. In his will, he bequeathed it to the National Portrait Gallery in London with the Royal Courts of Justice and the National Gallery of Ireland as residuary legatees. When the National Gallery declined the bequest, the Lord Chancellor's department accepted it for the Royal Courts; but the Lord Chief Justice did not want it hung in public view and it became a bit of an embarrassment.[28] Eventually the painting was hung in Room 472 of the Criminal Appeals Office of the Royal Courts of Justice, away from the public and viewed only by the few office staff that worked there. In 1950, the King's Inns Benchers, through the good offices of Serjeant Sullivan, now retired from the English Bar and appointed an Honorary Bencher of the Kings, sought to purchase the painting. The request prompted a revealing exchange of correspondence between the then English Lord Chancellor and the English Lord Chief Justice. The Lord Chancellor wrote that "we can adopt the suggestion of lending it to the King's Inns on indefinite loan, which means we can forget to ask for its return." He also wrote to Sullivan saying the loan was repayable on demand but adding that "any such demand is unlikely to be hurried."[29]

So there it hangs, still owned by the British, designed in vanity as a tribute to Lord Darling and the English law, but serving instead as an enduring tribute to an Irish patriot. It is a unique and rare document of Irish and indeed, of English legal history. There are other versions of the painting but none so grand as this. The municipal gallery owns a much smaller copy, prepared by Lavery as a study for this canvas; it is usually on loan to the President and hangs most often at Aras an Uachtaran, being one of the President's favourite paintings. That version shows the artist's wife, the beautiful Lady Lavery, seated in the gallery wearing one of her trademark large hats.[30] It is the version referred to in Yeat's poem "On a visit to the municipal Gallery."

Those of us who are privileged to be able to view this painting, so often and at such close quarters, owe a great debt to Sergeant Sullivan.[31] He is generally held not to have handled the trial particularly well, but he performed a great and enduring service by helping to secure, for the King's Inns and for Ireland this unique and rare document of Irish history. ●

23. William Camp, *The Glittering Prizes - A Study of the Earl of Birkenhead*, page 29 (London 1960)
24. Darling's opinion of Carson is quoted in Walker Smith, The Life of Lord Darling (London 1938) page 105
25. Sir Thomas Artemus Jones, Without my Wig, London 1944 page 163
26. The best discussion of this controversy can be found in Dudgeon Roger Casement, The Black Diaries (Belfast Press) 2003.
27. *Ibid.* Chapter 17 of Dudgeon's book completely destroys the various forgery theories.
28. Quite apart from the controversy generated by the diaries and the use that they were put to, there is a convention in the Royal Courts that paintings depicting prisoners or defendants should not be hung in public places.
29. Information found by His Honour Judge Bradbury of Colchester County Court in 1997
30. At one stage Lady Lavery joined her husband in the jury box prompting Casement to ask his cousin Gertrude Bannister, "Have you found out who the beautiful lady was??" Lavery - *The Life of a Painter* -page 190
31. Sullivan was subsequently expelled from the King's Inns as a Bencher for breaching the barrister/client confidentiality rule and disclosing in public private matters that had passed between himself and Casement. In R. MacColl, *Roger Casement*, (London 1956), Sullivan disclosed, for example, that "Casement not only admitted to me that he was a homosexual, but gloried in it saying that many of the great men in history had been of that persuasion. He was proud of it. If the matter came up in court, he wished me to impress on the jury the fact that it was rather a distinguished thing to be."

Book Review

Clinical Practice and the Law

Simon Mills BL

Pictured at the launch of Clinical Practice and the Law are the author, Simon Mills BL and guest of honour Senator Mary Henry.

The book retails at €75 and is published by Lexis Nexis.

Reviewed by Paul Anthony McDermott BL

Authored by one of the few individuals in Ireland who is both a qualified doctor and a practising barrister, this book comes with high expectations. It does not disappoint. As Professor Anthony Clare observes in the foreword "The result is a book that is mandatory reading for all doctors and lawyers, trained and in training". As well as having practical experience in medicine and law, Dr Mills has lectured in the Division of Legal Medicine in University College Dublin and thus is ideally placed to write a book of this importance.

At the outset, Dr Mills expresses his hope that "those approaching law and clinical practice from a legal perspective will gain something of a insight into the way that medicine and the allied clinical arts are practised within a legal framework." The book commences with a discussion of the history of legal medicine and proceeds to give a legal overview of the healthcare system. Given the recent controversy over the Dr Neary affair, the discussion on disciplinary proceedings is particularly topical. The book is practically orientated and covers such essential matters as ethics and confidentiality (including the vexed question of the duty of confidentiality in the occupational health setting), consent to treatment, clinical records and prescribing. The labour lawyer will find the chapter on the practitioner as employer or employee especially informative. The chapter on psychiatry and practice will be of particular interest to practitioners given the increasing reliance on such evidence in civil and criminal trials and it includes a consideration of the new Mental Health legislation.

As well as dealing with mainstream legal issues such as clinical negligence, the book examines a number of important, yet little-written on topics, such as who owns clinical records and their contents and who may access them, and the duty on practitioners to report sexual abuse. It is this breadth of coverage which means that Dr Mills' book will become an essential starting point for anyone writing an opinion on legal medicine.

The chapters on forensic medicine will be of huge assistance to any practitioner who has to interpret a medical report, a report of sexual abuse or a post-mortem report. They will also assist the practitioner who has to cross-examine the authors of such reports.

As anyone who has attempted to write an opinion on this area of the law will know, the law on medicine is to be found in a wide variety of sources and Dr Mills has researched extensively in order to identify them. All of the leading cases are cited and discussed, not only from Ireland but from the U.K. and the Commonwealth. The extract from the Australian Law Reform Commission's checklist for obtaining informed consent is illustrative of the scope of the research that has gone into this book. One of the book's strengths is the clear manner in which it is laid out. It is possible to identify the law in a particular area within a few seconds.

The book is written in an engaging manner and is one of the few law books published in recent years that can be read from cover to cover as well as being used as a research tool. In conclusion, Dr Mills' work will be an invaluable addition to the library of any barrister whose practice requires any knowledge of legal medicine and it deserves the success it will undoubtedly obtain.

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