The Bar Review

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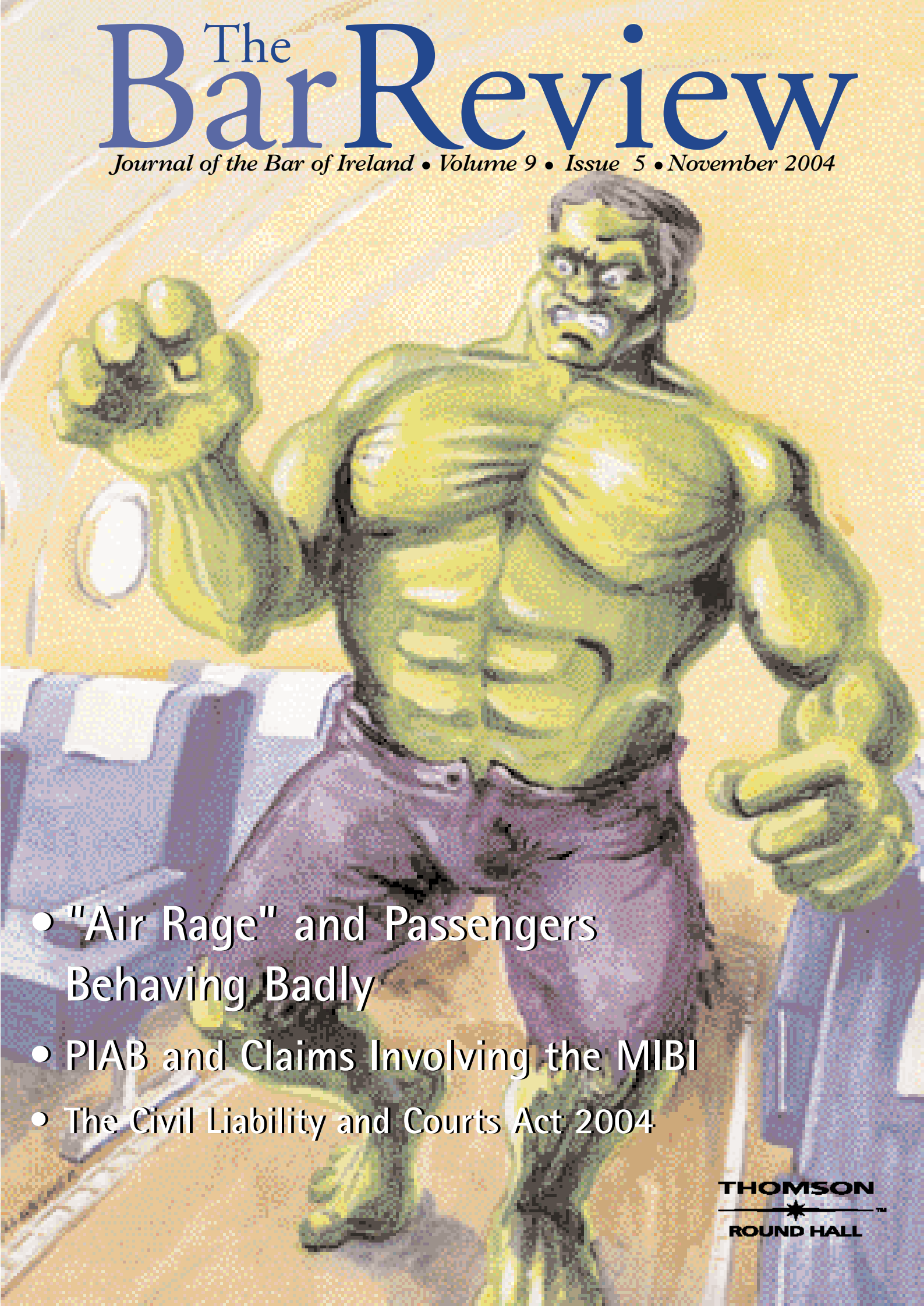

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THOMSON ROUND HALL

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Justice For All

A nation can be judged by the way it treats its weakest members. Now that Ireland has joined the ranks of the richest countries in the world, there is simply no excuse for the fact that basic justice and access to the courts is effectively denied to many. The dearth of civil legal aid in this country has been aired recently in this journal but we return to the topic once again to highlight that the system is in absolute crisis. The Bar Council, the Disability Legal Resource, Threshold, Free Legal Aid Centres, St Vincent de Paul, Ballymun Community Law Centre and the Northside Community Law Centre have now joined together in making a submission to the Minister for Finance and the Minister for Justice, requesting immediate additional funding for the Legal Aid Board so that equal access to justice is ensured for all.

Civil legal aid has only ever been available in this country on a limited basis, effectively confined to family law and refugee cases. The income threshold to qualify for this aid is low, available only to those who have a disposable income of less than €13,000 a year. Even within the limited confines in which it operates, the legal aid board is now so starved of resources that clients at eight centres around the country have to wait nine months or more for an initial appointment to see a solicitor. Although the Legal Aid Board operates a priority system, whereby persons in urgent need of advice are offered a fast-track appointment, in general, three out of four persons are forced to wait the full period.

Ireland was embarrassed into providing a fledgling civil legal aid scheme as a result of the European Court of Human Rights decision in the Airey case some 25 years ago. Notwithstanding the passing of the Civil Legal Aid Act in 1995, successive governments have refused to fund the Legal Aid Board in a manner that would enable it to perform its statutory function. Now in 2004, the State is being sued in two separate cases by reason of the delays in providing legal services. Ms O'Donoghue, from Cork, was forced to wait two years from the date of her application to the Legal Aid Board for an appointment with a solicitor in connection with her judicial separation proceedings. Ms Kavanagh, from Dublin, waited almost 20 months before her application for legal aid was processed and granted. The European Convention on Human Rights Act 2003 requires that all organs of the State must act in a manner compatible with convention. Because of its failure to adequately fund civil legal aid, the government must face up to the very real likelihood that it is in violation of its obligations under the Convention. And on a purely humanitarian level, it is clear that delays in divorce and separation cases can cause serious hardship for parents and children, particularly in cases involving domestic violence or abuse.

As a result of under-funding, the Legal Aid Board reports that the demand for legal services remains high but that the total number of cases in which legal services are provided is decreasing. Yet, it appears there is no plan to make a meaningful increase in State funding. The projected budget for 2005 is €18.5 million, only marginally higher than the €17.9 million allocation for 2004. The Board has already scaled back its services by reducing staff numbers and cutting back on the provision of legal services through private practitioners. Many individuals are now forced to represent themselves in complex District Court maintenance, access and custody matters.

Ironically, a very small increase in government funding could dramatically improve the service provided. For instance, the Legal Aid Board estimates that an additional €4 million would allow it to reduce waiting times by three to four months. Such a delay is still unacceptable, but these figures show that relatively small amounts of extra funding can greatly enhance the operation of the service. To put civil legal aid funding in context, we note that the government has spent over €53 million on e-voting to date, while €15 million was provided to an equestrian centre in Punchestown, Co Kildare.

The freedom to assert one legal rights is the hallmark of a civilized society. That freedom is now illusory for many in this country. We urge the government to rethink its priorities in this regard. ●

FLAC Wins People of the Year Award

On 9th October 2004, three barristers accepted an ESB/Rehab People of the Year Award 2004 on behalf of Free Legal Advice Centres. Peter Ward, Iseult O'Malley and Siobhan Phelan were presented with their awards at Citywest Hotel. It is now 35 years since FLAC was established with the goal of achieving equal access to justice for all. The adjudicating committee said that the contributions of the three lawyers stand out. Three of the four founders were present at the awards ceremony. Mr. David Byrne, EU Commissioner, Mr. Justice Vivian Lavan and Mr Denis McCullough SC. Mr. Ian Candy sent his greetings from Hong Kong.

Attorney General Receives International Arbitration Award

In May, Attorney General Rory Brady SC received the first "American Arbitration Association President's Award for Leadership in Conflict Management" in new York. The award was presented in recognition of his furtherance of justice and due process through the advancement of education, arbitration and mediation. Other international leaders recognized by the American Arbitration Association include former US President Jimmy Carter, former US Senator, George J. Mitchell and former US Attorney General, Janet Reno.

Breakfast Debate on Damages Awards

The Irish Insurance Federation is hosting an open breakfast debate on the amount of damages awarded in personal injury actions in Ireland. The debate will be held in the Westin Hotel, Westmoreland St., Dublin 2 on Wednesday, 8th December commencing at 7.30am sharp (with registration at 7.00am) and concluding at 10.00am. The title of the debate is "Compensation Levels – Are They Fair?" It will be chaired by John Bowman, RTE.

Five speakers will debate the topic from the perspective of a (plaintiff) personal injury lawyer (Thomas Baldwin, Early & Baldwin Solicitors); academic/research (Dr Brian Greenford, University of Limerick); the business community (Brendan Butler, Director, Enterprise, Irish Business and Employers Confederation); insurers (Michael Kemp, Irish Insurance Federation); and an awards adjudicator (Dorothea Dowling, Chair, PIAB).

The format will also involve active audience participation for almost one hour. Early booking is advised, as places are limited. The fee including breakfast is €30. Bookings can be made by contacting the IIF. Ph: 01 676 1820 / Email: lorna.foley@iif.ie.

Personal Injuries Assessment Board and Claims Involving the MIBI

Cathleen Noctor BL and Richard Lyons BL

Jurisdiction of P.I.A.B. in claims involving the M.I.B.I.

Following the enactment of the Personal Injuries Assessment Board Act, 2003 (the Act), the Personal Injuries Assessment Board (P.I.A.B.) was established[1]. On the 22nd July, 2004, P.I.A.B. became operational in relation to:-

> "a civil action by a person against another person arising out of that other's ownership, driving or use of a mechanically propelled vehicle"[2].

A person who would otherwise be entitled to bring a civil action ("a claimant") must make an application to P.I.A.B. for an assessment of his / her claim. A claimant cannot institute civil proceedings unless and until an application is made to P.I.A.B. and civil proceedings cannot be instituted unless authorised by P.I.A.B.[3]

However, Section 3(b) is drafted in narrow terms. It does not appear to contemplate a claim in which a claimant has suffered injuries caused by an unidentified and untraced motorist, in which case a claim may be made against the M.I.B.I. In the same way, it does not seem to envisage a claim by a claimant who has suffered injuries caused by an uninsured motorist, in which case the claimant may seek an order directing the M.I.B.I. to satisfy any judgment[4] that s/he may obtain against the uninsured motorist in the event that the judgment obtained against that uninsured motorist is not satisfied within 28 days. Neither of the foregoing claims arise out of the M.I.B.I.'s "ownership, driving or use" of a motor vehicle[5]. Furthermore, having enumerated the civil actions to which the Act applies[6], Section 4(1) of the Act further defines "civil action" as meaning an action intended to be pursued for the purpose of recovering damages in respect of a wrong for personal injuries *or* personal injuries and material damage[7] (caused by the same wrong) but "does not include:-

> (i) an action intended to be pursued in which, in addition to damages for the foregoing matters, it is bona fide intended, and not for the purpose of circumventing the operation of *section 3*, to claim damages or other relief in respect of any other cause of action"[8].

Proceedings against the M.I.B.I. and an uninsured motorist usually seek a declaration and / or an order directing that a judgment is satisfied by the M.I.B.I. Thus, the combined effect of Section 3(b) and Section 4(1) may reasonably be interpreted as meaning that P.I.A.B. does not have jurisdiction to deal with claims in which a claimant claims damages for personal injury caused by an uninsured motorist or an untraced or unidentified motorist.

Means of enforcing the M.I.B.I. Agreement

The M.I.B.I. entered into a new agreement with the Minister for Transport on the 31st March, 2004 ("the 2004 Agreement"). The 2004 Agreement applies to claims arising on or after the 1st May, 2004[9]. Clause 2 of the 2004 Agreement provides that a claimant for compensation "must seek to enforce [the] Agreement by:-

1. making a claim to MIBI for compensation which may be settled with or without admission of liability, or
2. citing MIBI as co-defendants in any proceedings against the owner and / or[10] 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 MIBI as sole defendant where the claimant is seeking a court order for the performance of the Agreement by MIBI provided the claimant has first applied for compensation to MIBI under clause 2.1 and has either been refused compensation by MIBI or has been offered compensation by MIBI which the claimant considers to be inadequate".

Clause 2 of the 2004 Agreement provides that a claimant "must" seek to enforce its provisions by the one of the three means stated in Clause 2. Its predecessor merely stated that a claimant "may" seek to enforce its provisions by the same means[11].

1. The establishment day was the 13th April, 2004, pursuant to the Personal Injuries Assessment Board Act, 2003 (Establishment Day) Order, 2004 (S.I. 156 of 2004). The Personal Injuries Assessment Board Act, 2003 (Commencement Order), 2004 (S.I. 155 of 2004), commenced Part 1 of the Act (other than Section 3) insofar as Part 1 relates to Part 3 of the Act, Sections 22, 46-48, Part 3, and Sections 79-81 and 83-85 on the 13th April, 2004. The Personal Injuries Assessment Board Act, 2003 (Commencement) (No. 2) Order, 2004 (S.I. 252 of 2004), commenced the remainder of the Act (other than Section 3(b)-(d)) on the 1st June, 2004.
2. Section 3(b) of the Act. Pursuant to the Personal Injuries Assessment Board Act, 2003 (Commencement) (No. 3) Order, 2004 (S.I. 438 of 2004), Section 3(b)-(d) came into operation on the 22nd July, 2004.
3. Section 12(1) of the Act.
4. Section 40 of the Act provides that an order to pay operates as if it was a judgment of a court given for the amount concerned.
5. As opposed to the uninsured or untraced driver's "ownership, driving or use" of a motor vehicle.
6. Section 3 of the Act.
7. The Act does not apply to claim for material damage *simpliciter*.
8. Section 4 of the Act.
9. Clause 14 of the 2004 Agreement.
10. Clause 2(2) of the 1988 Agreement stated "owner or user" as opposed to "owner and / or user".
11. Clause 2(2) of the 1988 Agreement.

Claim for personal injury caused by an unidentified and / or untraced motorist

With respect to the means by which a claimant who seeks damages for injury caused to him by an unidentified and / or untraced motorist, the case law is clear as to how the claimant can proceed against the M.I.B.I. The claimant must sue the M.I.B.I. as sole defendant[12]. Having regard to the provisions of Section 3(b) and 4(1) of the Act, it is submitted that P.I.A.B. has no jurisdiction to deal with claims of this nature and this category of claimant is entitled to institute a civil action in the normal way.

Claim for personal injury caused by an uninsured motorist

In the majority of proceedings in which the M.I.B.I. is named as a co-defendant, it is sued on the basis that the plaintiff has been caused injury by an uninsured motorist. Generally, the M.I.B.I. is sued as a co-defendant to an action in which the claimant seeks damages against the uninsured motorist *and* an order directing the M.I.B.I. to discharge any judgment that the claimant may obtain against the uninsured motorist in the event that such judgment remains unsatisfied after 28 days. Subject to compliance with the provisions of the 2004 Agreement[13], Clause 2.2 of the 2004 Agreement allows a claimant to pursue the M.I.B.I. in this way. Indeed, the use of the word "must" might be interpreted as compelling a claimant to proceed in this way. It is submitted that, where a claimant proceeds by this means, P.I.A.B. does not have jurisdiction in respect of the claim and the claimant has a right to institute civil proceedings in the usual way.

M.I.B.I. – a mandatory defendant?

Clause 2 appears to permit a claimant, who has been injured by an uninsured motorist, to apply to the M.I.B.I. for compensation (Clause 2.1) and, if the claimant is refused compensation or offered inadequate compensation, a claim can then be initiated. In practice, few personal injury claims are settled directly by the M.I.B.I. with a claimant or his solicitor. If proceedings are necessary (which appears inevitable in personal injury claims), it seems clear from Clause 2.2 of the 2004 Agreement that the M.I.B.I. must be named as a co-defendant. Accordingly, it appears that P.I.A.B. does not have jurisdiction to deal with these claims.

Claim to P.I.A.B. against uninsured motorist only

If a claimant applies to P.I.A.B. for compensation for personal injury caused by an uninsured motorist, the Act provides that, upon receipt of a claimant's application, P.I.A.B. shall serve a notice on the uninsured motorist / respondent. The uninsured motorist is then given 90 days to respond and indicate whether or not s/he consents to an assessment being made of the claim[14]. Having regard to the history of non-participation by uninsured motorists in legal proceedings against them, it is more likely than not that an uninsured motorist will not respond and will therefore be deemed to consent to an assessment being made of the claim[15]. If P.I.A.B. makes an assessment and the uninsured motorist fails to state his/her attitude to an assessment within 21 days, the uninsured motorist is deemed to have accepted it[16]. In this eventuality, and assuming that the claimant accepts the assessment, the assessment binds the uninsured motorist at the end of the 21-day period[17]. Within one month of the assessment becoming binding, P.I.A.B. must issue an "order to pay" to the uninsured motorist stating that s/he is liable to pay the claimant the amount of damages specified therein[18]. The order to pay operates as if it was a judgment of a court[19]. Accordingly, if an uninsured motorist does not satisfy the order to pay within 28 days of its being served on him / her, the M.I.B.I. would, subject to the other provisions of the 2004 Agreement being satisfied, be liable to satisfy the order to pay.

The Act does not appear to envisage the M.I.B.I. having any involvement in a claim of this nature. Furthermore, unless P.I.A.B. intends to utilise Section 86 of the Act to forward information to the M.I.B.I. for the purpose of any "central database" maintained by the M.I.B.I., the Act does not appear to authorise P.I.A.B. to notify the M.I.B.I. that it has received a claim that may ultimately affect it. The effect of the foregoing seems to be that, assuming compliance with the provisions of the 2004 Agreement, where a claimant obtains an order to pay against an uninsured motorist and it remains unsatisfied 28 days thereafter, the claimant may look to the M.I.B.I. for satisfaction of the order and sue for enforcement if the M.I.B.I. refuses to satisfy it.

Mandate

If the uninsured motorist has signed a mandate that authorises the M.I.B.I. to take over and conduct the defence of any claim arising out of an accident involving that uninsured motorist, the Act does not envisage P.I.A.B. corresponding with the M.I.B.I. on behalf of the uninsured motorist.

European Dimension

Finally, the position of a claimant who is unaware of the terms of the 2004 Agreement or who is ignorant of the existence of the M.I.B.I. and its role with respect to claims against uninsured motorists is worthy of comment. The Act does not appear to make any provision for advising a claimant about any alternative means by which such a claimant might obtain relief, for example by making a compensation claim to the M.I.B.I. A claimant who obtains an order to pay from P.I.A.B. against an uninsured motorist may subsequently discover that the M.I.B.I. is generally liable to discharge a judgment against and unsatisfied by an uninsured motorist. However, such a claimant is likely to find that the M.I.B.I. will refuse to satisfy the order to pay because of the claimant's failure to comply with the conditions precedent of the 2004 Agreement. This would render P.I.A.B.'s order to pay valueless. In this regard, the

12. Clause 2.2 of the 2004 Agreement and Clause 2(2) of the 1988 Agreement. See also *Kavanagh v. Reilly and M.I.B.I.*, Unreported, High Court, *ex tempore*, Morris P., 14th June, 1996, and *Devereux v. Minister for Finance and M.I.B.I.*, Unreported, High Court, *ex tempore*, O'Sullivan J., 10th February, 1998 (see Counsel's Note, Morgan Jones B.L., Bar Review, Volume 3, Issue 9, p. 450 (July, 1998)); and *Feeney v. Dwane and O'Connor and Feeney v. M.I.B.I.*, Unreported, High Court, *ex tempore*, Johnson J., 30th July, 1999; *Bowes v. M.I.B.I. and Harte v. M.I.B.I.* [2000] 2 I.R. 79; and *Riordan v. M.I.B.I.* Unreported, Circuit Court, Smyth J., 24th January, 2001 and 1st February, 2001.
13. For example, the conditions precedent prescribed by Clause 4.
14. Section 13 of the Act.
15. Section 14(1) of the Act.
16. Section 31(2) of the Act.
17. Section 33(1) of the Act.
18. Section 38 of the Act.
19. Section 40 of the Act.

decision of the E.C.J. in *Evans v. The Secretary of State for the Environment, Transport and the Regions and the M.I.B.*[20] is worthy of mention, in particular, its view that it is essential for national law to guarantee that the national authorities will effectively apply in full the Second Directive on Motor Insurance[21], that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights[22].

Conclusion

Given the jurisdictional frailties, perhaps P.I.A.B. and the Minister for Justice should invoke Section 17(1)(v) of the Act and decline to deal with claims involving the M.I.B.I. In advance of publication, P.I.A.B. was asked for its comments on the uncertainty as to its jurisdiction to deal with claims involving the M.I.B.I. P.I.A.B. considers it has jurisdiction to deal such claims. It is submitted, however, that a claimant who wishes to institutes civil proceedings in the courts in a claim involving the M.I.B.I. is entitled to issue proceedings in the normal way.●

Cathleen Noctor and Richard Lyons are the authors of a book on the M.I.B.I. that will be published shortly.

20. Case C-63/01, judgment of the E.C.J. delivered on the 4th December, 2003.
21. Second Council Directive on Motor Insurance of the 30th December, 1983, on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles (84/5/EEC) ("the Second Directive").
22. At paragraph 35 and citing *Commission v. Greece* [1995] E.C.R. I-499, paragraph 9, and *Commission v. Netherlands* [2001] E.C.R. I-3451, paragraph 7.

MIBI - A New Approach to Processing Claims

David Richardson BL

Introduction

A new MIBI agreement was concluded on the 31st March, 2004. It is proposed to set out in this article the main practical differences between this new agreement and the preceding agreement of the 21st December, 1988[1]. Furthermore, the essential criteria that must now be met by a claimant under the new regime will also be discussed.

Clause 14 - Operation of the agreement

The new agreement will only affect claimants involved in accidents that arise on or after the 1st May, 2004. Claims pursuant to accidents before that date will be dealt with under the 1988 agreement.

One should note that the 1988 agreement has been brought to an end by the new agreement, but without prejudice to the continued operation of that agreement in so far as it relates to accidents occurring before the 1st May, 2004[2]. Thus cases concerning accidents which occurred before the 1st May, 2004 will continue to be assessed under the old regime.

Clause 2 - Enforcement of the Agreement

It seems that the means by which one may seek compensation from the MIBI, as set out in Clause 2 of the 2004 agreement, remain identical to the means set out in the old agreement.

The wording has been amended slightly in that the 1988 agreement lists means by which a claimant 'may' seek compensation from the MIBI, whereas the new agreement sets out how the claimant '*must*' seek to enforce the agreement.

Perhaps this merely represents a tightening up of loose language; despite the use of the word '*may*' in the old agreement one cannot envisage any other means that might have been invoked to seek compensation from the MIBI other than those listed in that agreement and therefore the use of the word '*must*' changes nothing.

The notion that the abovementioned amendment represents a tightening up of loose language is further corroborated by the addition in clause 2.2 of '*and/or*', which, in the 1988 agreement, had read simply as 'or'[3]. The need to change the wording to '*and/or*' could, on a strict interpretation, infer that under the old regime, the MIBI could only be cited as co-defendants in proceedings where *either* the owner or user of a vehicle was the other defendant but not where *both* owner and user were joined as defendants. Clearly this is not the case.

Clause 3 - Conditions precedent to the MIBI's liability

Clause 3 of the new agreement lists the matters to be done by the claimant in order for his claim to come within the terms of the agreement and in general it lists the terms which shall be conditions precedent to the MIBI's liability. It is here that some major changes have been introduced.

Clause3.1: Before the issue of Court proceedings that will involve the MIBI, the claimant must have given the MIBI notification of his intention to seek compensation. In other words, it would not suffice to serve pleadings on the MIBI without having first complied with the obligation to give notice of the intention to do so. In this regard, the new agreement does not differ from the 1988 agreement. Where the agreements do differ though is in relation to *how* that notice must be given.

The new agreement sets out that notice may be given by registered post or 'electronic mail as specified in the website *www.mibi.ie*[4]; the 1988 agreement had provided solely for the giving of notice by way of registered post.

The addition of e-mail as a means of notifying the MIBI of intention to seek compensation represents an acceptance of changing business practices and is overall to be welcomed.

It is assumed that it is in light of the introduction of e-mail as a means of notifying the MIBI that the new agreement has recanted from the need to give 'notice in writing' as was required by the 1988 agreement and instead requires only 'prior notice'. Electronic mail is not strictly speaking a form of 'writing' but rather computer data; the removal of the need for written notice reflects this position.

Both agreements specify the time limits within which the above notification must be made. The 1988 agreement provided that the notification, in the case of death or personal injuries, had to be given within three years. The new agreement provides that notification, again in the cases of death or personal injuries, must be given 'within the time limits prescribed in the Statutes of Limitation'.

Having the time limit for personal injuries mirror the time limits in the Statute of Limitations permits a claimant to more readily invoke arguments regarding discoverability of injuries should the claimant for some reason be outside the strict three year limit imposed under the 1988 agreement. Likewise, a minor claimant can now wait until he attains majority rather than having to act within three years.

1. The preceding MIBI agreement is that dated the 21st day of December 1988 which came into force on the 31st day of December 1988 'in respect of claims arising out of the use of a vehicle in a public place on or after that that date' (Clause 13 of the 1988 agreement). Incidents arising before that date were subject to the terms of the 1964 MIBI agreement.
2. Clause 1 of the 2004 agreement entitled 'Determination of the Agreement of 1988'
3. '...citing MIBI as co-defendants in any proceedings against the owner and/or user...'
4. The website, as well as offering information about the MIBI, has an area in which one may process a claim notification. This invites the claimant (or his representatives) to enter information regarding the incident in question. When all details have been entered the details are submitted. An e-mail acknowledgement is assured within four hours and the claimant is advised to retain that as proof of his compliance with the agreement. It is specifically pointed out to the claimant that receipt of that e-mail acknowledgement obviates the need to send notification in writing.

A more cynical view might be that the agreement refers to the Statutes of Limitation, rather than fixed lengths of time, in preparation for the proposed reduction of the time limits within which personal injuries claims will have to be instituted.

The Civil Liability Act, 1961 imposes a two year limit, in some circumstances, where it is proposed to bring proceedings against the estate of a deceased person. This time limit will need to be heeded in circumstances where, for example, an uninsured driver who bears responsibility for the plaintiff's injuries has died; the notification will need to mirror the statutory time limits on bringing proceedings.

The one-year time limit in respect of damage to property is unchanged.

Clause 3.2 is unchanged except that the 2004 agreement clarifies that the MIBI is entitled to sight of a claimant's medical reports where reasonably required. The 1988 version did not specify this.

Clause 3.3 This is a new addition in the 2004 agreement. Here the MIBI confirms its right to interview the claimant in claims that arise from an accident caused or contributed to by an untraced driver.

This right of interview will assist the MIBI to investigate claims that are, by their definition, notoriously difficult to adequately investigate. It is a measure by which it is hoped to reduce fraudulent claims. In this regard, it should be noted that the answers given by the claimant at such an interview, whilst they may be used in the course of any subsequent court hearing related to the MIBI's liability to that claimant, may not be used '*in any circumstance*s in any criminal proceedings'. (Emphasis added). The answers are to be used solely for the purposes of progressing the claimant's claim and cannot be used by anyone other than the MIBI or its servants or agents. The claimant is entitled to have his solicitor present at such interviews. The MIBI will be liable for the 'reasonable costs' of such an interview[5]; it is not clear if this will include legal costs incurred. Certainly clause 4.2 of the 2004 agreement makes it abundantly clear that the MIBI will not be responsible for the costs a claimant may have incurred in order to provide the MIBI with the information it seeks

Clause 3.4 is also new and is also an anti-fraud measure. It simply states that the claimant must co-operate fully with An Garda Siochana or any other authorized person in their investigations of the claim. It does not specify who 'any other authorized person' encompasses but it must be assumed that where an insurance company is appointed to handle a claim, that an official of that company will be covered by the scope of this clause. Furthermore, along the same lines of reasoning, any persons to whom the insurance company contracts work (e.g. motor engineers or private investigators) should also come within the rubric of clause 3.4.

Clause 3.5 is a transcript of the 1988 agreement's clause 3.3; it obliges the claimant to furnish the MIBI with copies of all relevant documents and legal pleadings, statements, etc.

Clause 3.6 largely transposes clause 3.4 of the 1988 agreement but there is a significant addition to that as well.

The clause essentially places on the claimant the duty of establishing whether or not an approved policy of insurance covering the use of any vehicle involved in the accident the subject matter of the claim. The old agreement states that he need only determine if a policy exists which would cover such a vehicle for use in a public place; the 2004 agreement requires him to go further than that and is not confined to use in a *public place* alone. In other words he will need to establish whether or not any form of insurance exists whatsoever.

The claimant, or his legal representatives, must establish if such a policy exists by demanding particulars from the owner or user in accordance with s. 73 of the Road Traffic Act, 1961. Practitioners should note that s.73 of the Act requires that this demand be made in writing and sent by registered post. Theoretically at least, failure to do so may leave the claimant in breach of the agreement.

The clause goes on (and it is this continuation which is the significant addition alluded to above) to impose a cooling off period of sorts. It states that the claimant must wait at least three months before he can declare his attempts to secure the insurance details to be unsuccessful.

One means by which this three month period can be circumvented is for the claimant to present to the MIBI 'written confirmation from [a Garda] or the owner and/or user of the vehicle' which gave rise to the claim; then the notification may take place immediately.

If there is an approved policy in existence, then there is no need to wait for three months to elapse if you are in a position to have a Garda or the owner/user confirm this in writing.

It seems that if no policy exists, then the claimant will have to issue his letters of demand under s. 73 and then wait for three months to pass before he can notify the MIBI.

Clauses 3.7 and 3.8 These are the same as the 1988 clauses 3.5 and 3.6

Clause 3.9 By this clause, the claimant is obliged to give the MIBI at least 28 days notice before he obtains judgment against someone where obtaining that judgment might give rise to an obligation on the part of the MIBI.

This clause ties in with Clause 4.1 of the new agreement, which is not significantly different to Clause 4.1 of the 1988 agreement. Clause 4.1 states that where judgment has been obtained in respect of any liability for damage, injury or death which is required to be covered by a policy of insurance and such judgment is not satisfied in full within 28 days, then the MIBI will pay to the person in whose favour the judgment was given such sum as remains payable (subject of course to the limitations of the agreement). Clause 3.9 obliges the person who is pursuing such a judgment to give the MIBI 28 days *advance* notice rather than seeking satisfaction when judgment has already been obtained, as was the procedure under the old regime.

Clause 3.10 is similar to Clause 3.7 of the 1998 agreement. Both impose on the claimant the duty to take all reasonable steps against any person against whom the claimant might have a remedy. Here the MIBI guarantees a full indemnity as to reasonable costs incurred in taking such steps.

The final arbiter of disputes as to the reasonableness of the steps the MIBI requests the claimant to take is the Minister.

The 1988 agreement referred to the claimant as '*the person bringing the proceedings*'. Such a reference is missing from the 2004 agreement.

Clauses 3.11 and 3.12 These are not materially different to clauses 3.8 and 3.9 of the 1988 agreement.
The remaining sub clauses at clause three are new to the 2004 agreement.

Clause 3.13 imposes a new duty on the claimant. Any accident which gives rise to a claim made to the MIBI must be reported to An Garda Siochana within two days of the event or as soon as the claimant reasonably can.

5. Clause 4.2 of the 2004 agreement

In most instances, the Gardaí will no doubt be informed in any event. The aim of this new sub clause is to deter bogus claims against the MIBI.

Clause 3.14 seems superfluous given the requirements made of the claimant at clause 3.12

Clause 3.15 is a significant addition to the agreement. As discussed above, the claimant clearly has a duty to notify the MIBI of his intention to seek compensation. Clause 3.15 sets out exactly what must be included in that notification. It states that any notification that lacks the requisite information (or does not show good reason as to why it lacks it) shall not be deemed to be duly notified to the MIBI.

Notification by way of the MIBI website requires that the claimant fill in all boxes before he may submit the notification and thus the issue of invalid notification is less likely to arise through that method.

However, notification by way of registered post (the more common method at present at least) has now changed in that it will be deemed invalid if the requisite information has not been supplied. One wonders will the MIBI be so obliging as to inform claimants that their notification has been deemed invalid *before* the expiry of the time limit set out in the agreement at clause 3.1 or is it a matter that will be brought to their attention at a later stage e.g. when the claimant seeks to enforce the agreement.

Practitioners should be cautious regarding this aspect and it might prove prudent to end such letters with a paragraph to the following effect:

> 'Unless we hear to the contrary within the next 10 days it will be assumed that this notification has been deemed valid by your offices'.

The information that clause 3.15 requires to be contained in a notification is:

a) Name, address and PPS no. of claimant
b) Registration number of vehicle alleged to be uninsured and make and model (if known)
c) Garda Station to which the matter was reported
d) Why claimant feels the vehicle was uninsured
e) Steps taken to establish if there was a valid policy of insurance
f) Name and address of owner and/or user of vehicle
g) Date and time and place of accident
h) Description of accident
i) If other vehicles involved, then the registration numbers, makes and models of same
j) Names, addresses and insurance details of other drivers and/or owners involved

'Intention to seek compensation' notification checklist:

a) Notify of intention to seek compensation *before* issuing proceedings
b) Done within time limits as per clause 3.1
c) Registered post letters to user or owner to determine if insurance exists; must wait three month if no success **or** if certified in writing by owner/user/Garda that insurance exists, then sooner than three months
d) Incident reported to Gardaí within **two** days or as soon as claimant reasonably can

Thereafter:

a) Claimant to comply with Garda investigations
b) Claimant to attend interview if MIBI request (where claim arises from untraced driver). Claimant may have solicitor present.
c) Furnish MIBI with material information reasonably required, including medical reports
d) Notice of proceedings (to either insurer or MIBI as the case may be under clause 3.8) *before* issue of proceedings
e) Claimant to take any reasonable steps the MIBI require of him; if dispute regarding reasonableness, then Minister decides

The manner in which pleadings are drafted has also changed due to the introduction of the new agreement, but this is a matter which will postdate the notification procedure and is thus not within the remit of this article.

Clause 4 – Satisfaction of Judgements by MIBI

Clause 4 has not changed significantly compared to the 1988 agreement. It clarifies two aspects related to the costs of claiming compensation from the MIBI. Firstly, as mentioned earlier, at Clause 4.2 it specifies that the MIBI will not be liable for the costs incurred by the claimant in supplying the MIBI with the information it requires (subject to the costs reasonably incurred in attending for interview at the request of the MIBI).

Secondly, clause 4.3 establishes that the MIBI is not to be a 'soft touch' in relation to the legal costs. The legal costs or expenses recoverable against the MIBI will not be higher than those that would be recoverable where the owner or user of the vehicle was covered by an approved policy. Furthermore, the legal costs in excess of what would be payable will not be allowed merely because the MIBI is or may be a defendant or co-defendant to proceedings; simply put - because the MIBI is involved does not entitle the claimant to seek higher legal costs than in other similar cases not involving the MIBI.

Clauses 5 and 6- 'Exclusion of Certain User and Passenger Claims' and 'Unidentified or Untraced Vehicle, Owner or User' respectively: These clauses are the same as the wording in the 1988 agreement.

Clause 7 - Damage to Property This clause also remains the same, bar the conversion of the Irish pound figures to euro figures; the figures have not increased since the 1988 agreement; in fact due to rounding down, they have reduced slightly.

The agreement is signed by the Minister for Transport, who replaces the Minister for the Environment as signatory of the agreement.●

Abolition of Sureties in Respect of Administration Bonds

Brian E. Spierin SC

A decision has been taken to abolish sureties for Administration Bonds effective from September 1st, save where the Court directs there should be sureties.

Section 34(1) of *The Succession Act*, 1965 provides as follows:-

"34

-(1)Every person to whom a Grant of Administration is made shall give a bond (in this section referred to as an Administration Bond) to the President of the High Court to inure for the benefit of the President of the High Court for the time being and, if the High Court, the Probate Officer or (in the case of a grant from a District Probate Registry) the District Probate Registrar so requires, with one or more surety or sureties conditioned for duly collecting, getting in and administering the estate of the deceased".

An Administration Bond is only required in the case where a Grant of Administration is being applied for. An Administration Bond is not required where a Grant of Probate is being applied for, that is where executors are extracting the Grant of Representation. Therefore, where a deceased dies intestate or where a deceased ties testate but for some reason a Grant of Letters of Administration with the will annexed is required, an Administration Bond will be required.

That will continue to be the position.

The Administration Bond is given in a sum, which is at least twice the value of the gross estate. The Administration Bond was required to be backed up by a surety or sureties who would, in effect, guarantee the faithful administration of the estate by the administrator. In many cases the surety was provided by an insurance company but in some situations, such as an application for a grant by an applicant in person, an insurance company would not join in the bond as a surety. In such situations, the applicants for the grant had to provide personal sureties (one or more) and that person had to be worth half the penal sum set out in the bond.

In recent years, given the acceleration in property values, the ability to obtain a bond was becoming more and more difficult.

The number of insurance companies offering to act as surety had contracted to four, from twenty to thirty companies who were providing the service a number of years ago. A near monopoly situation had come into being and the premia being charged for Administration Bonds were very high.

In a number of other common law jurisdictions, such as England and Wales, Northern Ireland, the State of Ontario (Canada), Western Australia, Queensland, South Australia, Victoria and New South Wales, the necessity for a surety or indeed the bond itself, has either been abolished altogether or modified to provide a more flexible system, whereby in some instances a court may direct that a bond and sureties be provided in particular cases. In some jurisdictions, the cases in which a bond or surety is required have been specifically defined, whereas in other jurisdictions the matter has been approached more flexibly.

In order to abolish the requirement for a bond in this jurisdiction, a legislative amendment would be required. Section 34 (1) lays down a mandatory requirement that the bond be provided in all cases. The discretion in relation to the matter relates to sureties only.

Difficulties were encountered in a number of cases in recent times, whereby due to the value of the estate, a surety could not be procured. In such cases, applications were being made to the Probate Judge to have the necessity for a surety dispensed with. The Probate Officer, quite wisely in such cases, felt that given the value of the estate, it would be unwise for her to make the decision to dispense with a surety and therefore referred the matter to the Probate Judge.

The Probate Office initiated a discussion process in relation to the matter and submissions were made to the Probate Judge by the Probate Office and also by a delegation from the Incorporated Law Society.

This discussion group has made a recommendation to the President of the High Court to abolish the requirement of sureties save where on application to the High Court, the court directs that having regard to the circumstances of the particular case, one or more sureties are required.

The following Practice Direction was signed by the President of the High Court in July and came into effect on Sept. 1, 2004:-

> "High Court Practice Direction. Succession Act 1965 s.34(1)
>
> From 1st September, 2004, it shall not be required of a person applying for administration to furnish a surety or sureties in addition to an administration bond unless required to do so by the High Court, the Probate Officer, or in the case of a grant from a District Probate registry, the District Probate Registrar."

Practitioners therefore should note this change in practice. Practitioners should be alive to the abolition of the requirements for sureties but further be aware that when advising, one should consider whether the person being advised should seek to bring an application (or whether an application should be brought in any particular case so that the court can make a direction as to whether sureties are required). Such applications would be brought before the Probate Judge in the non-contentious probate motion list. ●

Office of the Parliamentary Draftsman: A Secret History

Brian Hunt BL[1]

I. Introduction

Today the Office of the Parliamentary Draftsman is now called the Office of the Parliamentary Counsel to the Government. Presently it is comprised of approximately 18 full-time drafters and 4 consultant drafters. The Office is responsible for drafting the 40 to 50 Bills which are enacted each year and are also responsible for many of the 400 to 500 statutory instruments which are made annually.

Owing to the course of history, an examination of the development of the Office of the Parliamentary Draftsman[2] in Ireland, necessitates an examination of the Parliamentary Counsel's Office in England.

II. The Origins of the UK Office

Introduction

In 1860, Henry Thring was appointed to a post which gave him responsibility for preparing Bills under the directions of the Home Secretary. Thring clearly had an appetite for hard work and it is said that he drafted the Representation of the People Act 1867 in just one day. After Thring took up office, the workload and the demands made of him appear to have increased considerably, in fact to such an extent that some departments engaged outside counsel to draft their Bills. Aside from the high costs, this uncoordinated approach gave rise to inconsistencies in legislation. In 1869, these concerns led Mr Lowe, the then Chancellor of the Exchequer to devise an arrangement so as to centralise the drafting of bills.

UK Parliamentary Counsel's Office

Two months after he entered the Cabinet, Lowe along with Gladstone signed undoubtedly the most significant minute from any drafter's point of view - the Parliamentary Counsel's Office was established by a Treasury Minute on 8 February 1869. Henry Thring was appointed as head of the Office with the title of Parliamentary Counsel to the Treasury. He was immediately assigned a permanent assistant - Henry Jenkyns - and a Treasury allowance for such outside legal assistance as he might require. On Thring's departure in 1917, he was replaced by Sir Frederick Liddell, who was then followed by Sir William Graham-Harrison in 1928.

Lord Henry Thring

Thring spent much of his time drafting Irish Bills and it is of no surprise therefore to learn that he was responsible for drafting a number of key Irish Bills, notably, he drafted the Irish Church Bill 1869; Government of Ireland Bill 1886 and also the Irish Land Bill under the personal direction of Gladstone.

Thring's influence over the style of drafting which prevails in many common law countries today cannot be overstated. This is particularly true with regard to Irish legislation - even to the present day. Over the years, Thring gathered instructions, rules and directions and this collected wisdom was initially published in 1877 as a pamphlet, and later as a seminal work in 1902 entitled Practical Legislation[3]. To this day, it represents a very useful guide to the best practice in legislative drafting.

A change in drafting style is said to have begun in 1854, when Thring, in drafting the Merchant Shipping Act, introduced the modern plan of breaking up an Act into parts, and sections into sub-sections.

The Irish Office

As the Office of the Parliamentary Counsel to the Treasury became more fully established, the existing Departmental draftsmen were phased out, and so the Office became fully responsible for drafting all Government Bills, except Irish Bills and Scotch Bills. The responsibility for drafting Scotch Bills lay with the Secretary to the Lord Advocate. Irish Bills were drafted by the draftsman attached to the Irish Office. Though it is difficult to pinpoint the exact timing, it seems that a parliamentary draftsman had been assigned to the Irish Office sometime before 1875. Hugo Marmaduke O'Hanlon became counsel to the Irish Office in 1801, subsequently William Lowndes drafted mainly Irish bills after 1806. Sometime prior to 1866, a Draftsman of Bills was appointed to the Office of Chief Secretary for Ireland. In 1877, William Fitzpatrick Cullinan was appointed as a legislative draftsman at the Irish Office. Appointed in 1908, Sir Francis Greer was the last person to be appointed as Draftsman of Bills to the Irish Office.

III. Origins of the Parliamentary Draftsman's Office

The Onset of Irish Independence

Following the Anglo-Irish Treaty in 1921, Saorstát Eireann was governed by the King. Under Article 51 of the Free State Constitution, the Executive Council was established to "aid and advise the government". On 7 December, 1922, Hugh Kennedy he was appointed as Ireland's Law Officer (ie. first Attorney General) and took up office on 1 March 1923. His "predecessor" was T.W. Brown KC, MP who had been Attorney General for Ireland up until 16 November 1921.

1 Researching a PhD in legislation at Trinity College, Dublin. This article is an abridged version of a paper presented to the British and Irish Legal History Conference, Dublin, 2 - 5 July 2003.

2 Since 1 October 2000, known as the Office of the Parliamentary Counsel to the Government.

3 Published at different times, the work was also published under the title of The Composition and Language of Acts of Parliament.

Despite the fact that Kennedy was anxious to distinguish the new State from Britain, he does not appear to have blindly adopted a sceptical approach towards anything British. Quite the contrary, in fact many aspects of the British system of administration were, and still are, reflected in this State. Of particular interest is the level of co-operation between the Office of the Parliamentary Counsel to the Treasury and the Parliamentary Draftsman in Dublin at that time. Also of significance is the similarity of the format of Irish statutes as compared to British. It is also possible to point to the concordance of British and Irish legislation in many respects.

dail

Establishment of Office of Parliamentary Draftsman

Soon after Independence, Hugh Kennedy's efforts led to the establishment of the office of Parliamentary Draftsman as a division of the Office of the Attorney General. A diligent barrister named Arthur Matheson was appointed as Ireland's first Parliamentary Draftsman. This truly marked the beginning of one of the great Irish adventures of the law, which continues to this day.

Although it is not possible to ascertain the date of his appointment with absolute certainty, Matheson kept a diary for the duration of his appointment and the first entry is dated Friday, 26 January 1923.

Matheson's Diaries

Matheson's diary entries provide a useful insight not only into the extent of his workload, but they also give an indication as to the role of the drafter at that time. For example, he frequently refers to having attended the Dáil and the Seanad. This is in stark contrast to Parliamentary Counsel of today, who rarely, if ever have reason to attend the Houses of the Oireachtas.

The diaries also reveal the considerable influence which Hugh Kennedy had, not only on the development of the Office of the Parliamentary Draftsman, but also on its work. Quite often Matheson received oral instructions directly from Hugh Kennedy to draft particular measures and he appears to have had frequent personal contact with the Attorney. Interestingly, his direct contact with instructing officials appears to have been minimal. He occasionally met departmental officials to discuss particularly complex issues.

Probably the most significant aspect of the diaries is how they reveal the phenomenal workload of Matheson. This is best illustrated by an example; on 20 September 1923 he received verbal instructions from Hugh Kennedy to draft the County Courts (Amendment) Bill. A mere two days later, he handed a draft of the Bill to the Attorney General. Also of note is his diary entry on 5 November 1923 which records that, on that day, he received instructions to draft seven bills and one order.

IV. The Work of the Office

The Work of Arthur Matheson

It is clear form the documentation available, that Hugh Kennedy had a heavy workload and worked very hard. It appears that he often worked late at night at home. This enthusiasm and dedication of Kennedy was equalled by Matheson. Matheson's dedication is probably best illustrated by the fact that he worked for four years before the Minister for Finance finally agreed his salary.[4]

In November 1922, Matheson was joined by one Mr Hearne as Assistant Draftsman, - John J Hearne who later went on to draft Irish Constitution. He began working at the Office of the Parliamentary Draftsman in 1922 and remained there until 1929 when he became legal adviser to the Department of External Affairs. It was in this role that he was instructed by the then Taoiseach, Eamon De Valera, to draft the heads of a new Constitution of Ireland. When the Constitution came into operation in 1937, de Valera is said to have dedicated a copy to Hearne, who went on to become High Commissioner to Canada, and Ambassador to the United States. Shortly after drafting the Constitution, in 1939, Hearne was called to the inner bar in recognition of his work.

During 1923, Arthur Matheson was joined by J. Creed Meredith K.C. who drafted some Bills. The heavy workload of the Office of the Parliamentary Draftsman and the strain on Matheson at that time was best illustrated by Matheson himself when he wrote to Hugh Kennedy to express his unhappiness[5]:

"Hitherto the staff of this office has consisted of myself and one lady clerk-typist ... I am satisfied that my health will not permit me to continue to work at the pressure at which I have had to work during the past six months, and if a complete breakdown is to be avoided, the strain on me must be relieved."

He was clearly angered by the under-resourcing of the Office and he also complained that instructions for drafts were not furnished to the Office in sufficient time.

Achievements of the Office

The role played by the Parliamentary Draftsman's Office at this time was fundamental to the development of the State. The significance of its contribution should not be underestimated, particularly in the light of the mammoth task of establishing a sufficient administrative structures following independence. This was succinctly expressed by Hugh Kennedy himself in 1929, writing after his appointment as Chief Justice:

"The legislation of the seven years contains the more or less complete mechanism of the new State, a new mechanism of local government and poor law administration, the frame of a new judicial system, the structure of a civil service, an army and police force, the legislative foundations for agricultural and other industries, new machinery of land purchase, reforms in the administration of criminal law, and much else besides, going to the foundations legal and constitutional of the daily lives of our citizens and therefore of the daily business of our lawyers."[6]

The true extent of the Office of the Parliamentary Draftsman's contribution to the development of the State is probably best illustrated by reference to some of the Bills which were drafted in the period 1922 to 1929. A surprising 282 statutes were enacted in the period from 1922 to 1928. During this period, laws which went to the very heart of the development of the new State were drafted by the Parliamentary Draftsman. For example, the Electoral Act 1923; the Garda Síochána Act 1924; the Ministers and Secretaries Act 1924; the Courts of Justice Act 1926; and the Provisional Collection of Taxes Act 1927.

4 In a Memo dated 28 July 1922, (UCD Archives P.4-282) Hugh Kennedy wrote (in an effort to correct comments made by Treasury) that his salary had not yet been agreed and that he paid a Clerk out of his own pocket for assistance.

5 Letter from Arthur Matheson to Hugh Kennedy dated 14 September 1923. (UCD Archives P.4-640).

6 Chief Justice Kennedy writing in the Foreword to Hanna, The Statute Law of The Irish Free State 1922 to 1928 (Dublin, 1929) p. vi.

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 9, Issue 5, November 2004

Edited by Desmond Mulhere, Law Library, Four Courts.

A directory of legislation, articles and written judgments received in the Law Library from the 5th July 2004 up to 28th October 2004.

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

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O'Hanlon, Niall
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2004 CLP 164

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Sale of Land
Planning permission - Implied condition - Easement - Promissory estoppel - Conveyancing Act, 1881 - Whether the defendant's refusal to allow the drain for the disposal of sewage to cross the land retained by them as shown on the site layout plan lodged for the purpose of obtaining the outline permission amounted to a derogation from the defendants's grant of the land - Local Government (Planning and Development) Act, 1963 (216/2002 - Supreme Court - 25/2/2004)
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People (DPP) v Scannell

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People (DPP) v Whelan

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People (DPP) v Murphy

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People (DPP) v Kelly

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Two matters certified - Appeal to Supreme Court - Witness protection programme - Admissibility of evidence - Whether corroboration required - Courts of Justice Act 1924, section 29 (71/2001 - Court of Criminal Appeal - 27/1/2004)
People (DPP) v Gilligan

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Whelan v Kirby

Appeal
Offence of endangerment - Whether trial judge erred in failing to withdraw count from jury - Whether no evidence of specific intent - Non-Fatal Offences Against the Person Act 1997, section 13 (155/2002 - Court of Criminal Appeal - 27/5/2004)
People (DPP) v Cagney

Appeal to Supreme Court
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People (DPP) v Campbell

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People (DPP) v Doherty

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Mullins v DPP

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Conviction
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People (DPP) v Murphy

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Human reproduction bill, 2003
2nd stage - Dail

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1st stage - Dail

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Committee- Dail

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1st stage- Dail

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1st stage - Dail

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1st stage - Dail

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2nd stage - Dail

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2nd stage - Dail

Twenty-seventh amendment of the constitution (No.2) bill 2003
1st stage - Dail

Waste management (amendment) bill, 2002
2nd stage- Dail

Waste management (amendment) bill, 2003
1st stage - Dail

Water services bill, 2003
1st stage - Seanad

Whistleblowers protection bill, 1999
Committee - Dail

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
IELJ = Irish Employment 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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The Civil Liability and Courts Act 2004

David Nolan SC

Introduction

The Civil Liability and Courts Act, 2004, has been described as the most significant change in practice and procedure in this jurisdiction since the Act of Judicature.

In one fell statutory swoop, the Minister for Justice significantly altered the Statute of Limitations Act, the Civil Liability Act and the Rules of the Superior Courts by introducing such novel ideas as "mediation conferences", "formal offers", "pre-trial hearings" as well as very significant and far reaching provisions in regard to "fraudulent actions".

As well as altering the manner in which solicitors and counsel approach personal injury actions, it has introduced a number of very significant obligations upon litigants (and consequentially advisors of litigants) as to how court cases are to be commenced and presented in court.

Clearly the most significant change brought about by the Civil Liability and Courts Act, 2004, is the amendment of the Statute of Limitations (Amendment) Act of 1991 to reduce the period in which personal injury actions must be instituted from three years to two years. However, that provision, together with many others, shall not come into operation until the 31st March, 2005.

A significant number of very important provisions have already been brought into operation by the signing of the Civil Liability and Courts Act, 2004 (commencement) Order, S.I. 544 on the 20th September, 2004. This article will deal with the sections that have come into operation and are applicable to personal injury actions already in existence. Those remaining provisions, which will come into effect on the 31st March, 2005, will be dealt with in a forthcoming article.

Interpretations

To those practitioners, who deal with personal injuries on a day to day basis, some of the interpretations contained in the new Act, will need no explanation, while others may raise a smile. Most of the interpretations as set out in section 2 of Act make reference to the "Mother Act" being the Civil Liability Act of 1961. For example a "Defendant", "Third Party", "wrong" and "wrongdoer" have the same meaning as in the 1961 Act. The term "negligence" is for the first time, defined in statute as including:

> "Nuisance and breach of duty (whether the duty exists by virtue of a contract, a provision of statute, and instrument under statute or otherwise)".

The term "pleading" is also defined in relation to personal injuries actions as:

> "A personal injury summons, a defence, a defence and counterclaim to any other document (other than an affidavit or a report prepared by a person who was not a party to that action) that, under Rules of Court, is required to be, or may be served (within such period as is prescribed by those rules) by a party to the action on an other party to that action".

Certain other terms have specific definition set out in the body of the Act including "mediation conference" (see section 15 of the Act) and "personal injury summons" (see section 10 of the Act).

All in all, the interpretation section of the Act does not present many difficulties.

Letter of Claim

Under section 8 of the act, a plaintiff in a personal injury action must serve a notice in writing before the expiration of two months from "*the date of the cause of action or as soon as is practicable thereafter on a wrongdoer or an alleged wrongdoer stating the nature of the wrong alleged to have been committed by him or her*". If a plaintiff fails to write such a letter of claim, within the two month period, or as soon as practicable thereafter, than a court at the hearing may do a number of things. Firstly it may draw an inference from the failure to write such a letter as it appears appropriate or proper, secondly where the interest of justice require, it can make an order that the plaintiff, notwithstanding that he or she may have won his or her action, will not get their costs or alternatively may make an order (if the interests of justice require) deducting certain amounts of the costs as would normally be payable to a plaintiff, as is considered appropriate. The term "*date of the cause of action*" is defined under sub-section 2 as being "*the date of accrual of the cause of action or alternatively the date of knowledge*" as defined under section 2 of the Statute of Limitations (Amendment) Act, of 1991.

As this remove, one can only guess as to what inferences can be drawn from a failure to write a letter within two months from the date of the cause of action. Presumably, if the letter is written a significant period after the date of the cause of action and a legitimate explanation can be offered as to the delay, such as the inability on the part of the plaintiff to determine whom he should sue, then no "inferences" appear to arise. It seems clear, from the wording of the section that a court will first of all have to draw inferences from the failure to write

the letter, within the appropriate time frame, and thereafter consider the interests of justice. It is difficult to imagine that the court could draw any negative inference, in the case of an honest plaintiff. However, only time and litigation will tell. On its face, this provision would seem to be an attempt to fetter the well recognised principle of "costs following the event".

Verifying Affidavit, False Evidence and Fraudulent Claims

There is little doubt that the most significant aspects of the now operational sections of the Act are those provisions which deal with the consequence of false evidence being given or adduced on affidavit or at a trial.

Under section 14, where a plaintiff in a personal injury action "*serves upon a Defendant any pleading containing assertions or allegations or provides further information to a Defendant" the Plaintiff shall swear an affidavit verifying those assertions or allegations or further information*. A verifying affidavit can be requested by a party to the action, notwithstanding that the personal injury action was brought before the commencement of the section. This is therefore an important provision, which can be activated by a simple request from one party to the other.

In the event that such a request is made in an existing action, then the party who has received the request, (whether the plaintiff or the defendant) will be obliged to swear an affidavit verifying the assertions and allegations, and that affidavit shall be lodged in court within 7 days before the date fixed for the trial (see section 14 (4) (b)).

If a person makes a statement in an affidavit under section 14, that is false or misleading in any material respect and he or she knows it to be false or misleading, then they are guilty of an offence. The term "false or misleading in any material respect" is not defined in section 14 but is defined by inference, in sections 25 and 26.

Under 25, where *a person gives or dishonestly causes to be given, or adduces or dishonestly causes to be adduced, evidence in a personal injury action that (a) is false or misleading in any material respect and (b) he or she knows it to be false or misleading, he or she is guilty of an offence*. This section is not limited to plaintiffs. It applies to defendants, and anyone else giving evidence at a trial other than experts. An expert, is defined as being a person who has a special skill or expertise and has been engaged by one of the parties. Indeed it is also an offence, for a person to give, or dishonestly cause to be given, an instruction or information in relation to a personal injury action, to a solicitor or person acting on behalf of the solicitor or expert that (a) is false or misleading in any material respect and (b) he or she knows it to be false or misleading. Accordingly, two new offences have been created, that carry, on summary prosecution, a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, and on indictment, a fine not exceeding €100,000 or imprisonment for a term not exceeding ten years or both. (see section 29). Under Section 26(3), an act is done dishonestly by a person, if he or she does the act with the intention of misleading the court.

Not only are such persons guilty of an offence, but pursuant to Section 26 of the Act, their action (in the event that they are a plaintiff) shall be dismissed.

Clearly, the continued effect of these three sections is very significant. Accordingly practitioners would be well advised to be careful as to how particulars of loss or special damages are drafted. An appropriate warning should be given to parties and witnesses.

One can well imagine a situation where the plaintiff who claims he is unable to work into the future furnishes "Further Particulars of Personal Injury and Special Damages" on an actuarial basis. A defendant can now request that that information be verified by affidavit under section 14. In the event that it transpires that the plaintiff was in fact working, notwithstanding that he claimed he was incapable of work, it is easy to imagine that a defendant will ask a court to apply the provisions of sections 25 and 26.

If dishonesty is found, the court is under a mandatory obligation pursuant to section 26 (1) and (2) to dismiss the action unless, for reasons that the court must state in its decision, the dismissal would result in injustice being done.

It is submitted that this new statutory framework as set out in sections 14, 25 and 26, goes well beyond the Supreme Court's views with regard to dishonesty or exaggeration on the part of a plaintiff as set out in *Vesey v. Dublin Bus* [2001] 4 I.R. 192, *Shelly-Morris v. Dublin Bus* [2003] 1 I.R. 232 and more particularly *O'Connor v. Dublin Bus* (unreported Supreme Court, December 2003).

One awaits with interest the inevitable jurisprudence that will arise from these sections.

Intervention in Personal Injury Actions in the Supreme Court

Under section 21, the Supreme Court, may now invite persons whom its considers appropriate, to make submissions to the court, either in "*relation to any matter concerning liability or damages that it considers to be of exceptional public importance and, if the action belongs to a class of causes of action in which the same or similar matters arise*".

The Supreme Court can either perform this function upon a request from a party or person who is not a party, or on its own volition. If, having requested a party to make a submission, and that person declines the invitation, then that person must inform the court in writing why they are so declining.

It is assumed that the purpose of this section is to allow either the Attorney General or potentially, a representative body, to address the Supreme Court in cases of both exceptional public importance and where the action belongs to a class of causes of action in which the same or similar matters arise. The asbestos/nervous shock claims, as exemplified by the case of *Fletcher v. Commissioners for the Board of Works* [2003] 1 I.R. 465 could be an example of the type of cases where this section might be invoked. Unfortunately, the explanatory memorandum casts no more light upon the thinking behind this section.

The Book of Quantum

"The Book of Quantum" was established by the Personal Injuries Assessment Board Act of 2003. Under section 54 of that act, it is a function of the Personal Injury Board to prepare and publish a document which is known as "the Book of Quantum" containing general guidelines as to the amounts which may be awarded or assessed in respect of specified injuries. It is also a function of the board to collect and analyse data in relation to amounts awarded on foot of, or agreed in settlement of, civil actions to which the Act applies. Indeed assessments made by the board, are in, a circuitous manner made, in reference to the Book of Quantum. Under section 20 (4) of the Personal Injury Assessment Board Act, 2003, an assessment shall be made on the same basis and by reference to the same principles governing the measure of damages in the law of tort and the same enactments as would be applicable in an assessment of damages were proceedings to be brought in relation to the relevant claim concerned. In other words, PIAB must have regard to the measure of damages as if proceedings have been brought in relation to the claim. However, under section 22 (1) of this Act, the court must have regard to the Book of Quantum" in assessing damages in a personal injury action. This is a mandatory requirement. Though, it should be noted that under section 22(2), the court can have regard to other matters other than the book of quantum when assessing damages in a personal injury action.

Section 22 is not mentioned in Section 6 of the Act (referring to retrospective application), and accordingly it would seem that the Book of Quantum is only relevant to actions which are brought after the 20th September 2004 and not actions presently before the courts.

There is an obvious interrelationship between the Book of Quantum, a court award and an assessment made by PIAB. But it is clear from section 22 that it is the intention of the Oireachtas that the judiciary should not be left entirely to their own views in assessing damages in personal injury actions. It remains to be seen whether the Book of Quantum will become, as was envisaged by the promoters of PIAB, the definitive statement of damages in personal injury actions.

Miscellaneous Provisions

There are a number of other important miscellaneous provisions which have come into operation. Under section 19, a court may direct that evidence can be given on affidavit. Parties can, however, cross examine a witness who has given evidence on affidavit.

Under section 30, the Court Services shall establish and maintain a register of personal injury actions which shall include the name and address of the solicitor for each party, the name and occupation of each party to the action and the address at which he or she ordinarily resides as set out in the pleadings. That register is to be made available to those who to the satisfaction of the Court Services, have a sufficient interest in seeking access to it. Presumably, this would include various insurance companies, the Revenue Commissioners or the Department of Social and Family Affairs.

Under section 41, the issue of interest on costs has been dealt with, by the amendment of section 30 of the Court and Court Officers Act of 2002. Prior to the commencement of this section, interest ran on costs from the date of judgement. Now, interest is not payable until the date of an agreement as to costs or in default of agreement, on the date when a certificate of taxation is issued or in the case of Circuit Court actions, the date in which the County Registrar measures the amount of costs. The rate remains that specified in section 26 of the Debtors (Ireland) Act of 1840.

Two other sections are worthy of note. Under section 54, the court may on the application of any party, direct that a person who is intended to be called to give evidence at the trial of the action, shall not attend trial until he or she is called to give evidence. This does not apply to any party to the action or expert witness.
In the event of a court giving such direction under section 45 (1) of the act, then the court may also give directions as to how that witness can be secured so as to ensure that the witness does not communicate with other witnesses or alternatively receive information which might influence him or her when giving evidence. It is submitted that the application of section 54 gives statutory effect to a practice that has already existed.

Finally, and perhaps most importantly from a practitioners perspective, the number of ordinary judges in the High Court, Circuit Court and District Court has been increased.

Conclusion

It is submitted that the limited sections of the Civil Liability and Courts Act 2004, which came into operation on the 20th September 2004, have the potential to significantly alter the commencement and presentation of personal injury actions, and place a significant onus upon practitioners to ensure information furnished by a plaintiff is honestly given and not misleading in any material respect. In the event that false or misleading evidence is given at the trial of the action, a plaintiff faces the prospect that his action can be dismissed.

There is no doubt that litigation will ensue arising out of these provisions.●

"Air Rage" and Passengers Behaving Badly

Joseph Murray BL

Introduction

Disruptive Passenger Syndrome ("DPS"), or what is more commonly known as "air rage" is an increasing phenomenon in air travel. This article analyses the concept of DPS , its causes and the law relating to it. Unruly passenger behaviour is not new and the first reported case was in 1947 involving an intoxicated passenger on a flight from Cuba to Miami, who physically assaulted another passenger . However, it was not until the 1990s that the term "air rage" was coined by the media in response to an increase in such incidents. The first of the two words in the term air rage denotes a sense of place on board an aircraft in flight and the second originates from the latin "*rabia*" and denotes madness, violent action, uncontrollable anger or intense feelings. Air rage is said to exist when these human emotions manifest themselves in anti social behaviour on board an aircraft in flight which:

- interferes with aircrews duties
- interferes with the quiet enjoyment of passengers.
- gives rise to an unsafe flight environment
- may take the form of physical assault.

What is Air Rage

It is not easy to delineate what constitutes "air rage". It may include one or all of the elements mentioned above. Anti social behaviour is its hallmark and threats, verbal abuse, or physical assault on board an aircraft in flight are obvious examples. Other acts or omissions such as furtive use of electronic devices, smoking in the aircraft toilets or failing to follow cabin crew instructions to fasten seat belts, may not amount to "air rage" , but such acts or omissions can nevertheless jeopardise the safety of air flight and could give rise to an "air rage" incident. In some jurisdictions, certain acts which take place on board an aircraft in flight may be an offence, while the same acts may not be an offence in other jurisdictions. However, there is a common understanding internationally as to what constitutes air rage.

International Law

Air rage (DPS) does not necessarily have to have an international element, as it might take place on a domestic flight. However, most incidents happen on international flights. Because of the increase in disruptive passenger problems and in "hijacking" incidents, an international response was required to protect the safety of air passengers and this resulted in two major conventions. These were the Tokyo Convention 1963 on "offences and certain other acts" committed on board an aircraft in flight and the Hague Convention of 1970 for the suppression of unlawful seizure or "hijacking" of aircraft. Both conventions became part of Irish domestic law with the Air Navigation and Transport Act 1973. The Tokyo Convention is the one that concerns us and is in the First Schedule of the Act. The Convention regards the state of registration of the aircraft as the state competent to exercise jurisdiction over incidents in the air. However, this does not exclude any criminal jurisdiction exercised in accordance with national law. The Convention does not define an "air rage" offence but sets down the procedure a captain of an aircraft may follow to deal with the problem.

Irish Law; Air Navigation and Transport Act 1973

The Air Navigation and Transport Act 1973 is the principal act dealing with offences committed on board an aircraft in flight. Rather than the state where the aircraft is registered, Irish law refers to an Irish "controlled aircraft". An Irish controlled aircraft is one which is registered in the State or registered in another state and is for the time being leased to or hired by an operating company in the State. A non Irish controlled aircraft is registered in another contracting state of the Tokyo Convention without the aforementioned connection with Ireland.

(i) Criminal Jurisdiction.

Section 2 of the 1973 Act deals with the application of criminal law to aircraft. Any act or omission which, if taking place in the State would constitute an offence if committed in the State, shall if it takes place on board an "Irish controlled aircraft" in flight, shall constitute that offence and be treated as if the offence took place in the State. An offence committed on board an "Irish" aircraft is deemed to be committed in the State.

"Air rage" is defined for the first time in Irish law.

Until recent years, Irish law did not define any particular "air rage" offence. This changed with the Air Navigation and Transport Act 1998, section 65, which inserted Section 2A into the Air Navigation and Transport Act 1973. Further amendments have been made to the 1973 Act as follows.

- Aviation Regulation Act 2001 (section 50)
- State Airports Act 2004 (section 26)

Section 2A of the Air Navigation and Transport Act 1973 categorises " air rage" offences as follows.

2A (1) Intoxication

> "A person on board an aircraft in flight who is intoxicated to such an extent as to give rise to a reasonable apprehension that he or she is likely to endanger the safety of himself or herself or the safety of others on board the aircraft shall be guilty of an offence."

(2) Behaviour causing annoyance or serious offence to others.

"A person on board an aircraft in flight who, without justification, engages in behaviour that is likely to cause serious offence or annoyance to any person on board the aircraft, at anytime after having been requested by a member of the crew of the aircraft to cease such behaviour, shall be guilty of an offence."

(3) Breach of the peace

"A person on board an aircraft in flight who engages in behaviour of a threatening, abusive or insulting nature whether by word or gesture with intent to cause a breach of the peace or being reckless as to whether a breach of the peace might be occasioned shall be guilty of an offence."

(3) (A) Powers of Garda to arrest.

Where an aircraft lands in the State and a member of the Gardai has reason to believe that there is on board a person who has committed an offence under this section, the Garda may without warrant enter the aircraft and may without warrant arrest such a person he finds on board the aircraft. This subsection was inserted by section 50 of the Air Regulation Act.

Maximum fine €3,000

(4) A person guilty of an offence under section 2(A)

(a) In the case of an offence under subsections 1 and 2 on summary conviction the fine was up to £500. This amount was increased to £1500 under the Air Regulation Act section 50. Again a further increase was effected by the State Airports Act (section 26) and the fine is now up to €3,000.

(b) For an offence under subsection 3 on summary conviction the fine was up to £700 or imprisonment for a term not exceeding 4 months or both. This fine was increased to £1500 under the Air Regulation Act. Again the fine was further increased to €3,000 under the State Airports Act. Custodial sentence remains unchanged.

Air rage can result in more serious offences which may come within the following legislation.

- The Non-Fatal Offences against the Person Act 1997.
- Criminal Law (Rape amendment) Act 1990 in the case of sexual or indecent assault committed on board an aircraft in flight.
- Criminal Damage Act 1991 where damage is caused to airline property.

Power to Restrain Disruptive Persons

The Air Navigation Act 1973, section 3(1) gives the captain in command of an aircraft power to deal with disruptive persons, if he believes that such a person has committed or is about to commit an act which

A. If committed in the state in which the aircraft is registered would constitute an offence under the law of that state

B. Jeopardises

- the safety of the aircraft
- the safety of persons or property on board or
- good order or discipline on board

The captain/commander may take reasonable measures, including restraint of the person concerned

- to protect the safety of the aircraft, persons or property on board
- to maintain good order and discipline
- to enable him to disembark the person
- to deliver the person to the Garda in the State or to the competent authorities outside the State as the case may be, in accordance with the provisions of the act.

For the purposes of the above subsection (1), the captain of the aircraft may (subsection 2)

- order or authorise the assistance of any member of the crew or
- request the assistance of any other person on board the aircraft

Moreover, any member of the crew or any other person on board may, without order, authorisation or request, take reasonable measures, with respect to any other person on board the aircraft, which he or she believes immediately necessary to protect the safety of the aircraft, or of persons or property therein. (subsection 3)

Aircraft.

It is important to understand the legal definition of an aircraft for the purposes of air rage. The Air Navigation and Transport Act 1998 defines "an aircraft" as a machine that can derive support in the atmosphere from the reaction of air, other than the reactions of air against the earths surface. This definition would include conventional fixed wing aircraft, helicopters and airships, but would appear to exclude hovercrafts and rockets.

Incidents of Air Rage

These following incidents of DPS cover a wide spectrum of anti-social and unruly behaviour, that jeopardises the safety of flying. Alcohol consumption is frequently linked to assault and threatening behaviour.

- American Airlines. 19 April, 2004 and 21 April, 2004 *Irish Times*.

Mr Michael McCallion was a passenger on a MyTravel flight from Belfast to Las Palmas. About an hour into the flight, cabin crew were notified that a passenger, Mr McCallion, was drunk and had been drinking alcohol from a lemonade bottle. A female member of the cabin crew was pushed with both hands in the chest when McCallion left his seat to go to the toilet. When requested to go back to his seat he raised his left hand fist closed in a threatening manner. A passenger intervened and asked him to "calm down" .He was persuaded to return to his seat and continued threatening. The captain requested permission to land at Shannon where he was delivered to the Garda. At Tulla District Court in County Clare, the accused pleaded guilty to all three charges.

(a) assault on a cabin supervisor contrary to section 2 of the Non - Fatal Offences Against the Person Act.

(b) engaging in threatening or abusive behaviour with intent to cause a breach of the peace contrary to the Air Navigation and Transport Act .

(c) being intoxicated on board a flight to such an extent as to give rise to a reasonable apprehension that he might endanger the safety of himself or others contrary to the Air Navigation and Transport Act.

Judge Joseph Mangan ordered a three month suspended sentence and imposed a fine of €1,700. In addition, the judge ordered a photograph of Mr McCallion to be sent to the International Civil Aviation Organisation in Montreal.

- American Airlines. *Irish Independent*, 24th April, 2004. *Irish Times* 27 April, 2004

Two male passengers, Guy Sant Arnaud (42) and Warren Clamen (39) pleaded guilty to air rage offences when a London bound aircraft from the United States was forced to divert to Shannon airport. An incident arose when the two passengers were not allowed to use the toilet in the business class section. At Ennis District Court, the two passengers pleaded guilty to assault and also to threatening and abusive behaviour. One pleaded guilty to criminal damage to an overhead oxygen mast. Judge Mangan ordered the men not to fly for 2 years as part of a bond to keep the peace. They were ordered to pay £10,080 each to a named charity, and American Airlines issued the men with a bill for the cost of diverting the flight. In total they had to pay over £50,000. Suspended sentences of six months were imposed and personal details and photographs were sent to the International Civil Aviation Authority.

This case was appealed by way of judicial review to the High Court with regard to questions of jurisdiction. Matters relating to criminal damage and assault were quashed and not opposed by the State. Convictions under section 2A (3) with regard to breach of the peace still stands. Judgement given by Mr Justice Quirke on 1st November 2004.

- My Travel. *Sunday Mail* 10 December, 2003.

An air stewardess, Fiona Weir (35), received €100,000 compensation as a result of injuries she received when attacked by a drunken passenger who smashed a vodka bottle on her head. The incident happened in October 1998 on a flight from UK to Spain. The stewardess brought an action against the airline and claimed that at the time of boarding, she noticed the passenger had drink taken and warned the airline that he should not fly. The airline, My Travel, did not admit liability, yet paid out the compensation in an out of court settlement.

- Vietnam Airlines. 10th June, 2004 (*www.stuff.co.nz*)

Vietnam Airlines has banned a woman, identified as Vo Thi Thu Ngoc from flying with the airline. The incident happened when the passenger was asked repeatedly to stop using a mobile phone on a domestic flight. It is alleged that she hit and threw water over a flight attendant. The incident was reported to the police but no charges were filed. The airline has banned the passenger from flying on their aircraft.

- Nuisance and general anxiety. *www.rte.ie/news* 8 November, 2000.

Two men, Darrell O'Brien and Parick Prendergast, pleaded guilty to a section 2 charge of the Air Navigation Act in that they created a nuisance and caused general anxiety to cabin crew and passenger after being requested to desist from such behaviour. Both men had been drinking on the aircraft and became aggressive when they were refused further drink . In the Dublin District Court, Judge Haughton fined Mr. OBrien €200 and Mr Prendergast €400

- Air Tours. Women cleared of air rage offences 2000, *The Irish Times*.

A number of people were charged with air rage offences involving alcohol on an Airtours flight from Gatwick to Montego Bay, Jamaica . Two of those involved, Angela ODriscoll (39) and Josephine Cooper (19) were acquitted of the charges at Hove Crown Court in East Sussex. The Judge directed the jury to return verdicts of not guilty in respect of the two women as there was insufficient evidence to identify them.

- Delta Airlines. *Irish Times* 18 August, 2004.

Mr. P Genovezos (36) was involved in an air rage incident on a New York to Athens flight. Aircraft was diverted to Shannon airport where the accused was handed over to the Garda. He pleaded guilty at Galway District Court to charges under section 2A of the Air Navigation Act, involving drunkenness, abusive behaviour and a breach of the peace. The accused admitted to the court that while he was not served drink on board the aircraft, he had been drinking before boarding and on the flight, he had been drinking from a bottle laced with vodka. At Galway District Court, Judge Gibbons ordered a fine of €300 and 3 months imprisonment. Recognisance was fixed on the accused's own surety of €4000.

Warsaw/Montreal Conventions and Air Rage.

Can "DPS" be a cause of an "accident" within the meaning of the article 17 of the Warsaw Convention 1929 and the Montreal Convention 1999. If so, then an innocent victim passenger could claim damages against the airline for any injuries arising from such accident. A detailed discussion of what constitutes an accident within these conventions is beyond the scope of this article. An accident is not defined and it is left to the courts of the contracting states to interpret and set the guiding principles on the subject. They indicate that an accident must be

- caused by an unusual or sudden event
- which is external to the passenger
- a risk associated with the operation of the aircraft or flight

The following cases are worth noting:

- *Wallace v Korean Air.* (Shawcross and Beaumont. Tome 1 (2004 edition (vii) 647) March 2004. incident involving sexual assault.

Female passenger awoke to find a neighbouring male passenger (total stranger) interfering with her person under her clothes. The first instance court in the UK held that sexual molestation was not a risk associated with air travel and accordingly not an "accident" within the Warsaw Convention. The Court of Appeal held that it was an accident within the convention because of the close proximity of passengers in economy class and the fact that they were in darkness.

- A similar incident occurred on a Royal Dutch Airline flight.*Morris v KLM* (S/B Air Law, page 647 as above)

A 15 year old girl was indecently assaulted on a flight. She suffered clinical depression as a result and brought an action against the carrier claiming that it was an "accident" within the Warsaw Convention. The English Court of Appeal followed the *Wallace* decision and held that it was an accident. What befell the victim in the instant case was a risk associated with air travel. The finding that the assault was an accident was confirmed by the House of Lords.

In the United States , the courts are reluctant to classify as an 'accident' violent or abusive behaviour by other passengers. Fist fights on board are a good example. In *Price v British Airways* where one passenger punched another passenger, the carrier was held not liable as there was no "accident" within the meaning of the Convention. Fist fights are not risks associated with air travel or the carriers operation of the flight. (S/B page 647)

Causes of Air Rage.

There is no single reason for disruptive passenger syndrome, but there are many contributing factors. Alcohol is high up on the list as the laws of nature have established that alcohol and altitude do not mix.

Set out below are some of the other theories as to what causes this phenomenon.

- No smoking ban may also cause passengers to be disruptive. Some passengers attempt to smoke in aircraft toilets, which is forbidden.
- Stress and frustration caused by long delays could turn a normal individual into a disruptive person with loss of control
- Long haul flights. People confined in cramped and overcrowded conditions may become irritable, when for example they may not have immediate access to toilet facilities.
- A passenger may suffer some form of mental illness or psychological state such as claustrophobia.
- Ego and attitude problems of some passengers. (VIPs having to obey rules)
- Ban on use of mobile phones could lead to an air rage incident
- An aircraft in flight, particularly the wide-bodied long haul type, is a microcosm of humanity. People from all walks of life, backgrounds and cultures are seated together in a pressurised cabin environment for long periods. Cultural conflicts can arise.
- On long flights, passengers sitting in cramped conditions often have the need to stretch and exercise their legs, which may disturb other passengers.

Addressing the problems.

Flight attendants bear the brunt of unruly behaviour. In 1997, the Airline Pilots Association (International) held the first international conference on disruptive passenger behaviour to explore ways of tackling the problems. Solutions have also been proposed by the Irish Airline Pilots Association.

- tough prosecuting and sentencing can be an effective deterrent. Some people are of the opinion that the sanctions do not go far enough.
- photographs and details of offenders sent to International Civil Aviation Organisation.
- security at airports. Ground staff training to identify intoxicated would be passengers and measures to prevent them from boarding the aircraft.
- limiting the amount of alcohol during cabin service.
- training programmes to deal with disruptive passengers and to identify air rage behaviour, no matter how trivial
- reporting of all incidents to airline management.
- a national and international data base to be established for all offenders.

Conclusion

The aviation industry has undergone enormous growth since the Tokyo Convention with more carriers, larger aircraft and ever increasing passenger traffic. This in turn has lead to an increase in disruptive passengers. Given that a large crowd of people are in a confined space on long haul flights, problems emerge and better methods of control must be found. As regards the legal dimension, the Tokyo Convention has well served its purpose, but the time has come for a new international legal instrument to tackle the problems of air rage. All acts that jeopardise the safety of an aircraft in flight should be made offences under international law and specifically codified, and not just left to legislation at national level. Ireland has taken a step forward with the inserted section 2A "air rage" offences in the Air Navigation and Transport Act. However, more needs to be done at an international level ! •

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The Legality of Henry VIII Clauses

Neil Maddox BL

Introduction

Article 15.2.1 of the Irish Constitution guarantees the exclusive law making function of the Oireachtas. While some may believe this guarantee is more honoured in the breach, it would seem to necessarily follow from it that the Executive may not legislate. Practicality allows ministers to pass statutory orders of an 'administrative and regulatory' nature so long as guiding principles and policies have been set down in the parent act. Furthermore, the object of that act must not be to delegate the exclusive law-making function of the Oireachtas to a Minister or administrative agency of the Executive. The purpose of this accommodation is to ensure that matters of great complexity, or which require knowledge peculiarly within the possession of a limited field of experts, need not be considered by the Oireachtas, which by its nature and composition has limited time and resources. By further requiring all such decisions on matters of detail to be taken according to guiding principles and policies laid down in the national Parliament, the courts can make a determination as to whether the administrative decision maker was exercising their power of regulation in accordance with the wishes of the Oireachtas- thus ensuring that the essentials of democratic government are preserved.[1] This article seeks to examine the legality of statutory instruments which, by implication, amend primary legislation. They are commonly referred to as Henry VIII clauses.[2]

After the wide powers of legislation granted to the monarch by the Statute of Proclamations 1539, Henry was regarded as 'the impersonation of executive autocracy'.[3] As the name suggests, Henry VIII clauses are considered illegal as they involve the frustrating of legislative goals by the Executive. Whereas the 'principles and policies' test forbids lawmaking by an administrative body which does not have its origin in guidelines and goals contained in the parent legislation, the rule against Henry VIII clauses would seem to be tainted by more clear-cut unconstitutionality as they, it would seem by definition, frustrate the principles and policies decided on by parliament and contained in the parent act- a clear usurpation of the legislative function. In the recent case of *Mulcreevy v. Minister for the Enviroment*[4] Keane C.J. observed that:

- delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent Act purports to confer such a power, it will be invalid having regard to the provisions of the Constitution.[5]

The above statement represents the high point of judicial hostility to Henry VIII clauses. While previous cases did not discount the possibility of amending legislation being upheld in certain limited circumstances, the Chief Justice has now appeared to discount any such eventuality. However, a closer examination of *Mulcreevey* and the previous jurisprudence in this area suggests that a distinction may still exist in Irish law between two different types of amendments - amendments which alter the form of a statute only and amendments which alter the substance of a statute. All of the cases decided in this jurisdiction have related to the latter type of amendment which is clearly illegal as it alters the intended effect of a statute. In contrast, an amendment as to form is sometimes necessary to carry parliament's wishes into effect and there is an argument that, far from offending the principle laid down in Article 15.2.1, an amendment of this type can help to give it effect.

Case Law

The cases decided on the point in this jurisdiction have been quite straightforward. In *Cooke v. Walsh*[6], the validity of regulations made under the Health Act 1970 was challenged. That act had entitled the infant plaintiff to be in a class of people entitled to free medical care. Taking into account that the plaintiff and others in that class were entitled to compensation for their medical bills pursuant upon claims in tort, the Minister thought it wise to remove that entitlement by regulation.

The court dealt with the constitutional point indirectly as it was able to decide the case on other grounds. The validity of the regulation in question was struck down as being *ultra vires* the regulation making power vested in the Minister by the act of 1970. The court followed the principles laid down in *East Donegal Co-op Livestock Market v. Attorney General*[7] which stated that it must be implied that a regulation making power granted to a minister is intended by the Oireachtas to be used in accordance with the principles of constitutional justice i.e. the court will assume that the regulation making power will be used in a constitutional manner. The passage of such a regulation was clearly at variance with Article 15.2.1. The case

1. *Cityview Press v. AnCo [*1980] I.R. 381; D.G. Morgan, *The Separation of Powers in the Irish Constitution* (Dublin, 1997), pp. 235-245; J. Casey, *Constitutional Law in Ireland* (3rd ed., Dublin, 2001), pp. 223-228; G.W. Hogan and G.F. Whyte, *JM Kelly: The Irish Constitution* (4th ed., Dublin, 2003), pp. 238-248.
2. Morgan, pp. 241-246.
3. H.W.R. Wade and C.E.F. Forsyth, *Administrative Law* (8th ed., Oxford, 2000), pp. 841-843.
4. [2004] 1 I.L.R.M. 419, at pp. 434,435.
5. Ibid.
6. [1984] I.R. 710.
7. [1970] I.R. 317.

could, therefore, be decided on this point and the constitutional validity of the regulation making power was not pronounced on.[8] While the court observed that this was 'in reality, an attempt to amend the two sections by ministerial regulation instead of by appropriate legislation' it did appear to contemplate a situation where the amendment of an act by a secondary measure would be upheld by the courts:

> "[Section 72(2)] is not to be interpreted as permitting by regulation the canceling, repeal or alteration of anything laid down in the Act itself unless such is contemplated by the act...Yet [the regulation], in effect seeks to add new sub-sections to s. 52 and 56 of the Act which exclude, from the benefit of these sections and the statutory entitlement thereby afforded, a category of persons whose exclusion is in no way authorized or contemplated by the Act."[9]

The act did, however, appear to contemplate its own amendment. Section 72 (2) stated that:

> Regulations made under this section may provide for any service under this act being made available to only a particular class of the persons who have eligibility for that service.

This provision was not sufficient to save the amending regulations and it seems that the grant of such a general regulation making power did not, in the view of the court, lead to the conclusion that the act contemplated the amendment or repeal of its express provisions.

Harvey v. Minister of Social Welfare[10] was decided on very similar grounds. Under the Social Welfare Act of 1979, the plaintiff had been entitled to two distinct payments for being both widowed and blind. The minister attempted to prevent one of these payments by regulation. Again, the court could not accept that this was an amendment within the contemplation of the Act:

> "The very terms themselves of Article 38, as inserted, make clear what its effect is and is intended to be, and that is where a women would, but for the Article be entitled to two pensions she shall be entitled to one only...If the effect of Article 38 is to be construed as terminating the widow's non-contributory pension after pensionable age has been reached, then it is a direct breach of section 7 and the express purpose of section 7. If, on the other hand, it is to be taken as abolishing the old age or blind (non-contributory) pension, then it is doing so by reason of the social welfare payment or allowance and is in direct contradiction of the provisions which prevent that occurring. Quite clearly, for the Minister to exercise a power of regulation granted to him by these Acts so as to negative the express intention of the legislature is an unconstitutional use of the power vested in him."[11]

The regulation was made under Section 75 (1) of the Social Welfare Act 1952 which appeared to authorise the exclusion of certain classes of people from multiple payments under the Social Welfare code:

> Regulations may, with respect to cases in which two or more [welfare payments] are payable to a person, provide for adjusting any benefit, pension allowance or assistance as aforesaid (including disallowing payment thereof wholly or partly) that may be payable to such.

Professor Morgan argues that the amendment was indeed in the contemplation of the act, but the court still refused to uphold the validity of the regulation:

> "Thus, the overruling of primary legislation, which was specifically identified, by regulation was exactly what was contemplated by the Oireachtas in the 1952 Act. Nevertheless the Chief Justice had no hesitation in condemning the regulations."[12]

However, this view of the law fails to take account of one of the main canons of constitutional construction which was considered by the court when looking to the intentions of the Oireachtas. The court is obligated to consider that the national Parliament always intended to act in a manner consistent with the dictates of the Constitution.[13] As such, it will be assumed that an unconstitutional delegation of law-making power was not at any time in the contemplation of parliament. Read in isolation, Section 75 of the Social Welfare Act 1952 grants to the minister a wide and unfettered discretion to determine who is entitled or disentitled to social welfare payments. It does not set down any principles and policies (i.e. guidelines) as to how this discretion should be exercised. It does not specifically contemplate a circumstance where such exclusions should be made and it does not specifically contemplate that regulations made under the sub-section may effect a change in the law. Had the court interpreted the subsection as granting to the minister a power of amendment, they would be contradicting the dictate that the minister will always use his wide discretion to act in a constitutional manner. As Finlay C.J. observed, the question of who should be entitled to social welfare payments was a matter of social policy within the exclusive competence of the Oireachtas.[14] As such, the regulations were struck down, not because they amended the parent act, but because such an amending power was not in the contemplation of the Oireachtas since that would demonstrate an intention to illegally delegate the law-making function to the minister and allow him to determine principles and policies which were properly within the competence of Parliament. The regulations amended the act, such an amendment was not contemplated by the act and the Minister was, therefore, acting in an unconstitutional manner. An identical explanation can be given for the decision in *Cook v. Walsh*.

8. This convenient side step of the issue in question has become something of a methodology when dealing with clauses of this sort. This approach has also been rejected as having relevance in relation to the principles and policies test as it would clearly lead to absurdity: per Keane J. in *Laurentiu v. Minister for Justice* [2000] 1 I.L.R.M. 1, at 47. In *Laurentiu* the court observed that the Aliens Act 1935 did not lay down any principles and policies. Therefore, any regulation made under s. 5 was unconstitutional as it involved delegation of policy-making functions to the minister in the absence of any guiding principles and policies in the parent act. If the court used the same approach as they had done in the cases involving Henry VIII clauses it would have required the striking down of every individual regulation made under s.5, but an inability to pronounce on the clear unconstitutionality of that statute. Thus, a separate but interconnected line of jurisprudence has developed with regard to the approach to cases involving the two doctrines. It should be noted, however, that the same rationale attach to both doctrines, Ibid.
9. O'Higgins C.J., at 729.
10. [1990] 2 I.R. 232.
11. Finlay C.J. at pp. 244,245.
12. Morgan, p. 247.
13. Finlay C.J., *supra*, pp. 240,241.
14. Ibid., p. 244.

Amendments Within the Principles of the Statute

Morgan believes that these cases establish that a mere alteration in the text of a statute will be illegal. He does not distinguish between amendments, such as those in *Cooke v. Walsh* and *Harvey* which frustrate the wishes of the legislature by changing the express intent of a piece of legislation, and clauses which have just the opposite effect i.e. they are necessary to give effect to the act and by extension the intentions of parliament. He cites section 16 of the Courts Acts 1991 as an example of a piece of legislation under which it would be impossible to make valid regulations.[15] In section 2 of that act, the monetary limits of the District and Circuit Courts are set at £15,000 and £30,000 respectively. Section 16 provides that the Minister may amend these limits by regulation, but should take into account the changes in the value of money since the promulgation of the act. The fact that there is such a guiding principle to direct the Ministers discretion is not sufficient, in his view, to save the provision in question:

> "...this caution does not meet the point that the provision may be unconstitutional on the ground that it confers power to amend primary legislation by varying the monetary amount fixed in the parent Act. This suggestion seems to stem from the principle, being criticised here, namely that, in the case law decided so far, a Henry VIII clause has been regarded as automatically unconstitutional. For in making such an order, the Government is not laying down a new principle but merely implementing a principle laid down by the Oireachtas, namely that the limits on jurisdiction should be adjusted in line with inflation."[16]

This approach assumes that a regulation altering the monetary limits set down in section 2, although giving effect to a principle laid down by the Oireachtas, is still unconstitutional. In deciding this point, the courts have been obliged to interpret the section of the act which has been amended by regulation. On a narrow literal interpretation of section 2, the government intended that the monetary limits be £15,000 and £30,000 in perpetuity and any alteration to those limits by secondary legislation would clearly be uncontitutional. However, it is well established that the provisions of a piece of legislation can only be properly understood when looking at the act as a whole, so as to give it a harmonious construction.[17] It would seem far more correct to interpret section 2 in light of section 16. This reveals that the intention of the Oireachtas and of section 2 is not that the monetary limits be fixed at £15,000 and £30,000, but that those limits should instead approximate the value of £15,000 and £30,000 at the time of the acts passage in 1991. If we follow this view of the act, it becomes obvious that the categorisation regulations under section 16, which adjust the monetary limits in line with inflation, are amendments in form only and not in substance. They certainly alter the text of the statute, but if the two sections are interpreted harmoniously it becomes clear that the Oireachtas never intended that these rates should remain the same and lays down clear guiding principles and policies for the Minister to use when adjusting those rates. Thus, regulations made validly under section 16 would not contradict the intention of the Oireachtas but would, instead, be necessary to carry it into effect. It would then seem absurd to suggest that such amendments were contrary to Article 15.2.1.

Harvey can also be distinguished from the above situation in two ways. First, there was no guidance in the act which could have directed the minister as to factors to be considered when making regulations. However, The Courts Act 1991 provides that the Minister should have regard to inflation. Secondly, a harmonious interpretation of the legislative machinery would have done nothing to ameliorate the literal truth of the provisions which entitled the plaintiff to double payments. The Court investigated the parent legislation and the social welfare code generally to determine if any provision existed forbidding double payment of welfare. It did not. Indeed, the opposite was the case and the code forbid considering multiple welfare entitlements when performing a means test. Thus, the literal interpretation of the section was the correct one and the court was right to strike down the regulation that purported to alter the effect of that section.

In the recent case of *Mulcreevy*[18], which involved litigation concerning the dispute at Carrickmines Castle, it was clear that the regulations in question certainly altered the parent act, but in seeking an answer as to whether they amended it, looked more to the substantive effect of the regulations rather than examining if they merely effected alterations as to the form of the statute. While Keane C.J. seemed to set down explicitly that primary legislation could not be amended by secondary legislation, he determined the fact of amendment by asking if the regulations altered the intentions of parliament.

The National Monuments Acts 1930 to 1994 contained a statutory scheme whereby any development on a site which had been listed as a national monument required various consents. In this case, the development was not in the interests of archaeology and the developers thereby required the independent consents of the local authority, the Commissioners of Public Works in Ireland and the Arts Minister. The Minister introduced a regulation which vested the powers of the commissioners with the minister. The effect of this was that only two independent consents were now required to validate the development. Keane C.J. focussed on the intentions of parliament and considered whether the regulation did anything to hinder, frustrate or contradict those intentions:

> The Oireachtas had clearly considered it appropriate that the ultimate decision (subject in some cases, such as this, to its possible annulment by the Oireachtas) should be vested in a body other than the two bodies which had jointly authorised the interference initially, i.e. the Environment Minister and the local authority. It is difficult to see on what basis it could be suggested that it envisaged what was in effect a two-pronged consent or approval. The conclusion is almost inescapable, in my view, that the 1996 order purported to amend s. 15 of the 1994 Act by substituting this new statutory regime.[19]

15. Morgan, pp. 248,249.
16. Ibid.
17. See, for example, J. Bell and G. Engle, Cross: *Statutory Interpretation* (3rd ed., London, 1995), pp. 50,51.
18. *Supra.*
19. Ibid., pp. 435,436.

It can be seen from this that the goals, principles and policies contained in the parent statute will be examined closely to determine the question as to whether a statute has been amended in a manner that would violate Article 15.2.1. Would the decision have been different if the substitution of the statutory scheme in question still involved the consent of three independent, albeit different, planning bodies? This would be unlikely to frustrate the goals of the legislature and their remains the possibility that the Supreme Court would uphold such alterations to the act so long as they did nothing to change the express intention of the legislation and did not involve policymaking by the minister.

Meaghar v. Minister for Agriculture[20] lends support to the slightly different notion that ministerial regulations of an 'administrative and regulatory' character may amend prior legislative enactments. This is a case which is further complicated by the adventitious defence i.e. it related to the implementation of European law by ministerial regulation.

The facts concerned the prosecution of offences relating to possession and use of illegal veterinary products on farm animals. Section 10 of The Petty Sessions (Ireland) Act 1851 had set down a six month time limit for the initiation of a prosecution for such offences. Numerous EEC directives on the use of hormones in livestock regulations were enacted in 1988 which, by implication, amended that time limit to two years. The regulations were made under sections 2 and 3 of the European Communities Act 1972. The power of regulation granted in these sections differs from that in the cases considered above: it specifically contemplates that regulations made pursuant to it may amend or repeal prior legislative enactments. Section 3(2) states that:

> Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this act).

The act of 1972 seems to imply that the regulations will give effect to parent legislation decided on in Europe. *Meaghar* further establishes that once the principles and policies of a directive have been decided and are contained in the directive, it may be implemented by ministerial regulation, and not legislation, as the minister is merely giving effect to that which has already been decided.[21] This does not, however, mean that the minister has no choices to make.[22] In Meaghar, the two year time limit set down by the 1988 regulations was not contained in the parent directive which merely dictated that 'adequate time' should be given. Once the governing principles and policies have been set down in the parent directive, any choice (of a subsidiary nature) exercised within that framework has been deemed by the Supreme Court to be of an 'administrative and regulatory' nature and not policy-making. It follows that in some cases where regulations are made pursuant to sections 2 and 3 of the 1972 Act, the minister may have a discretion to implement the measure by regulations which either amend or do not amend prior primary legislation. Thus, it seems the Supreme Court appears to suggest, that in certain limited circumstances the minister may have a discretion as to whether he should amend primary legislation by regulation.

Conclusion

The prohibition on Henry VIII clauses in Irish law stems from the desire to uphold the exclusive law making function of the Oireachtas guaranteed by Article 15.2.1. However, if the Supreme Court extends that prohibition to amending regulations, such as those made pursuant to section 16 of the Courts 1991, which have as their object the carrying into effect of the wishes of the Oireachtas, they would merely hinder the maintenance of that guarantee. The recent decision in Mulcreevy seems to suggest that the courts may uphold such a prohibition and create a doctrine detached from its original objective. While the substance of the decision is undoubtedly correct, the explicit pronouncement on the illegality of amending regulations, presents the danger that the doctrine will be applied strictly and in an unsophisticated manner that ignores the pragmatic attitude that should be adopted when dealing with the preservation of Constitutional guarantees.•

20. [1994] 1 I.L.R.M. 1. See also Hogan and Whyte, pp. 248-251.
21. Denham J., at p. 26.
22. *Maher v. Minister for Agriculture* [2001] 2 I.R. 139, at 233.

"Irish Laws of Evidence"

by John Healy BL
(Thomson, Round Hall, 2004)
Reviewed by Paul Carroll B.L.

The first week of Michaelmas term. Dublin Circuit Criminal Court. *Voir dire* on visual identification. Not once, but twice, opposing counsel leaned across the courtroom and grabbed my review copy of *Irish Laws of Evidence*, and then with much aplomb opened to the court several passages of this new textbook by John Healy. Whilst annoyed at my learned friend's sleight of hand, one could not argue against the clear and concise exposition of law read to the court.

For many years, when practitioners in this jurisdiction were faced with an issue regarding the law of evidence, or sought an appropriate textbook to cite in court, resort was usually made to the English textbooks on the subject. Our neighbouring jurisdiction has produced an abundance of excellent books on this area of law, such as *Phibson on Evidence, Cross on Evidence*, Richard May's *Criminal Evidence*, and *Andrews & Hirst on Criminal Evidence*. Whilst in recent times, we have seen the publication of two Irish textbooks on the subject, neither could said to be in the same league as the aforementioned English heavyweights. Caroline Fennell's excellent and useful book *The Law of Evidence in Ireland* (now in its second edition) would appear to be a text more orientated towards the law student. The same might be said of Evidence by Cannon and Nelligan. Enter the fray Mr. Healy. But, is his work on a par with the English heavyweights? Should his book be part of the essential armour brought to the courtroom battle?

Each chapter of this book opens with a useful list of contents, which aids ease of reference. The text is then set out in numbered paragraphs. There is liberal use of headings and subheadings, which again aids the busy (if not lazy) practitioner to quickly find the required text. Each chapter then closes with an extensive "Further Reading" list. For example, Chapter 13 dealing with "Privilege", ends with an impressive reading list of over 30 articles dealing with this area. In these lists, not only does the author include all the relevant Irish textbooks and journals but he also goes further, and entices us with articles in somewhat exotic publications such as the Oklahoma Law Review. Whilst the latter may not be readily available, these reading lists are invaluable for further research on the given topic, and are a testament to the obvious detailed work that the author has undertaken in the production of this book.

This author deals with the major areas of the law of evidence in a clear and instructive manner. For example, Chapter 6 on Identification Evidence, ably covers this area which continues to be at the heart of a huge number of trials where the controversy is not that the crime was committed, but rather that there has been a mistaken identification of the accused. The chapter on Privilege is a good example of the structured way in which the author has tackled a given topic. This is apparent from the list of contents at the start of the chapter, followed by a detailed and informative exposition of the law, with each distinct privilege packaged into discrete bundles under appropriate heading and sub-headings.
Whilst the text is clearly strong on the key areas of the law of evidence, the author has included many nuggets, which in a lesser textbook may have been omitted. For example, for those of us who lie awake at night wondering what is the difference between the Rule against Hearsay and the Rule against Narrative, solace may be found in the clear exposition at paragraph 2.50.

Interestingly, the author at the end of Chapter 6 on Identification Evidence returns to the issue of the prosecutor's duty to disclose. This area of pre-trial preservation and disclosure of evidence is also dealt with in Chapter 1, under the heading of "Key Concepts and Types of Evidence" and also in Chapter 10, in relation to the importance of the seeking out and preserving evidence in cases where the prosecution rely solely on uncorroborated confessions. Having regard to the regularity over the last few years with which this issue arises and the recent jurisprudence on the issue, one could argue that this area merits a chapter of its own.

Throughout the book, the author refers to the extensive English caselaw on the law of evidence. But importantly he does not throw in references to English caselaw blindly, a sin committed by some Irish textbooks. The author is careful to cite the English caselaw only when appropriate, and takes care throughout to highlight the areas where there is divergence between the jurisdictions.

The appendices of this book contain extracts from some 64 judgments. The extracts span in chronological order the leading cases on evidence, from the likes of *Woolmington v. DPP* (1935) with Viscount Sankey's omnipresent golden thread, up to *Braddish v. DPP* (2001) and the duty to preserve evidence. Whilst undoubtedly of some use to the student and the researcher, I am not convinced that a text of this quality benefits from the inclusion of such extracts. When a particular case that features in the appendices is being discussed in the body of the text, the author by means of the footnotes refers the reader to the appropriate appendix. Surely if a particular quotation of a judgment is germane, it should be included in the text. Further, from the viewpoint of the practitioner, most courts or tribunals would not be satisfied with extracts of judgments being opened to them, and accordingly the full judgment would have to be obtained in any event. There may be a strong argument that when the time approaches for a new edition of this book, that the author considers the publication of a separate companion book of caselaw.

Irish Laws of Evidence is a welcome and useful publication. As a book that provides the ground rules for any hearing before a court or tribunal, I recommend it as a worthwhile purchase to all practitioners.•