The Bar Review

Journal of the Bar of Ireland • Volume 12 • Issue 5 • November 2007

Inside this Issue:

Ethics, Cloning and Bio Medicine

Defamation and the Public Interest

THOMSON
ROUND HALL

The Bar Review

Volume 12, Issue 5, November 2007, ISSN 1339-3426

Contents

The Bar Review is published by Thomson Round Hall in association with The Bar Council of Ireland.

For all subscription queries contact:
Thomson Round Hall
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301 Fax: + 353 1 662 5302
Email: info@roundhall.ie web: www.roundhall.ie

Subscriptions: January 2007 to December 2007—6 issues
Annual Subscription: €195.00
Annual Subscription + Bound Volume Service: €300.00

For all advertising queries contact:
Tom Clark, Direct line: + 44 20 7393 7835 E-Mail: Tom.Clark@thomson.com
Directories Unit. Sweet & Maxwell
Telephone: + 44 20 7393 7000

Cover Illustration: Brian Gallagher T: 497 3389 E: bdgallagher@eircom.net W: www.bdgart.com

THOMSON ROUND HALL

Editorial Correspondence to:

Eilis Brennan BL
The Editor
Bar Review
Law Library
Four Courts
Dublin 7
DX 813154
Telephone: 353-1-817 5505
Fax: 353-1-872 0455
e-mail: eilisebrennan@eircom.net

The Public Interest Defence in Irish Defamation Law: *Leech v Independent Newspapers*

Damian Byrne BL

Introduction

A number of important *ex tempore* rulings were handed down in the course of communications consultant Monica Leech's unsuccessful defamation proceedings against the Irish Independent earlier this year.[1] Most importantly, Mr Justice Peter Charleton brought much-needed clarity to the defence of qualified privilege, or public interest—first developed by the House of Lords in 1999 in *Reynolds v Times Newspapers Ltd*[2]—as it applies in this jurisdiction. The purpose of this article essentially is to draw the significance of this aspect of Charleton J's ruling to the wider attention of practitioners, as no written judgment was handed down.[3] It is not intended as a detailed analysis of this area of defamation law.[4] However, it is necessary to first provide some context by briefly referring to the *Reynolds* case and to the more recent decision of the House of Lords in *Jameel and others v Wall Street Journal Europe Sprl.*[5]

Development of the defence of qualified privilege in defamation

Reynolds v Times Newspapers

In *Reynolds*, the House of Lords extended the traditional categories of qualified privilege to embrace a new defence (*Reynolds* privilege) which is available to the media when they disseminate stories of public interest containing defamatory material. Thus, the appropriate tests, in cases where statements are made on matters of public policy, is whether the public are entitled to know the particular information published, not whether it is true; and whether there has been "responsible" journalism. Lord Nicholls indicated a non-exhaustive list of at least ten factors that should be taken into account to determine whether journalists and editors acted responsibly, including: the seriousness of the allegation; the nature of the information, and the extent to which the subject matter is a matter of public concern; the source of the information; the steps taken to verify the information, the urgency of the matter; whether comment was sought from the claimant or whether the article contained the gist of the claimant's side of the story; and the tone of the article.[6]

However, although heralded at the time as a substantial victory for press freedom, it appears that the *Reynolds* defence was only successfully pleaded on a handful of occasions in the UK in subsequent years.[7]

Jameel and others v Wall Street Journal Europe Sprl

This judgment, delivered in October 2006, represented the first occasion on which the House of Lords had opportunity to revisit and further clarify its decision in *Reynolds*.

The plaintiffs in this case were a prominent Saudi businessman and the trading company of which he was president and general manager. The defendant newspaper published an article asserting that, at the request of US enforcement agencies, the Central Bank of Saudi Arabia was monitoring certain bank accounts to prevent their use for channeling funds to terrorist organisations and it listed, as account holders, the names of a number of individuals and companies, including that of the claimants' trading group. The defendant sough to rely on a defence of qualified privilege which protected responsible journalism when reporting on matters of public concern. The trial judge ruled against the defence, *inter alia*, on the ground that the defendant had failed to obtain the claimants' response to the inclusion of their names prior to the publication. The jury found the libel proved and awarded damages to the claimants. The Court of Appeal dismissed the defendant's appeal.

The House of Lords upheld the appeal, however, ruling that it was a question in each case, depending on the nature and source of the information, whether the publisher had behaved fairly and reasonably in obtaining and publishing the material; that, since the subject matter of the defendant's article was of considerable public importance, and the

1 *Leech v Independent Newspapers (Ireland) Ltd* [2007] IEHC 223.
2 [2001] 2 AC 127.
3 Note, however, that approved transcripts of Charleton J's two core *ex tempore* rulings in the course of the trial are available on courts.ie, as cited at n.1, above. Elsewhere in this article, reliance is necessarily had at times on the unapproved trial transcripts.
4 For an excellent analysis of recent UK case law in this area, see Ray Ryan and Des Ryan, "Defamation: Recent Developments in Relation to the *Reynolds* Case" 2006 (20) ILT 311.
5 [2006] UKHL 44; [2006] 3 WLR 642.
6 *Reynolds, op.cit,* at 205.
7 See Ray Ryan and Des Ryan, *op.cit*, at 314, n.9. They cite the following examples of cases in which the defence was successful: *GKR Karate (UK) Limited v Yorkshire Post Newspapers Limited (No.2)* [2000] EMLR 410; *Al-Fagih v HH Saudi Research & Marketing (UK) Limited* [2002] EMLR 13; and *Roberts v Gable* [2006] EMLR 23.

inclusion of the names a necessary ingredient, and since the article had been written by an experienced and specialised reporter and approved by senior staff who had sought to verify its contents, failure to obtain the complainants' response was an insufficient ground on which to deny the defence; and that, accordingly, the Court of Appeal's decision would be set aside to that extent and the action dismissed.

The Law Lords were critical of the Court of Appeal for denying *Reynolds* privilege in a manner which "subverts the liberalising intention of the *Reynolds* decision."[8] According to Lord Hoffman, "... this case suggests that Reynolds has had little impact upon the way the law is applied at first instance. It is therefore necessary to restate the principles."[9] He goes on to criticise the trial judge (Eady J) for interpreting the law in a manner which effectively failed to take the liberalising intention of *Reynolds* into account:

> "In Reynolds, Lord Nicholls gave his well-known non-exhaustive list of ten matters which should in suitable cases be taken into account. They are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. This is how Eady J treated them. The defence, he said, can be sustained only after "the closest and most rigorous scrutiny" by the application of what he called Lord Nicholls's ten tests." But that, in my opinion, is not what Lord Nicholls meant. As he said in Bonnick, at p 309, the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities."[10]

This key passage of the *Jameel* judgment thus makes clear that it is not essential in every case to satisfy each and every one of Lord Nicholls' criteria in order to meet the test of responsible journalism. An overly-rigid interpretation of these criteria had effectively thwarted the development of greater press freedom in matters of genuine public interest which *Reynolds* was designed to encourage. Baroness Hale added that "[w]e need more such serious journalism in this country and our defamation law should encourage rather than discourage it ... if the public interest defence does not succeed on the known facts of this case, it is hard to see it ever succeeding."[11]

Leech v Independent Newspapers

The background to this case was an RTE Radio 1 "Liveline" broadcast of 16 December 2004, in which a bogus caller proceeded to make lewd remarks about Mrs Leech and the Minister for Transport, Martin Cullen. RTE followed up with two apologies on air and, later, a statement dissociating itself from the comments (and Mrs Leech subsequently reached a financial settlement with RTE itself for its failure to prevent the broadcasting of these comments). The Irish Independent article of the next day reported both the comments which had been broadcast on air (albeit with the use of asterix) and the fact that RTE had issued a number of apologies in respect of them and released the press statement. Counsel for the defendant submitted that the public interest aspect of the article lay in the fact that the national broadcaster had been required to issue apologies in this manner, and that so-called "Reynolds privilege" could therefore be invoked.[12]

Counsel for the plaintiff argued that, in the first instance, it had not yet been established that the plea of *Reynolds* qualified privilege was even available in this jurisdiction. It was argued that, other than remarks made obiter by O'Caoimh J in *Hunter v Duckworth and Company*[13] averting to the existence of *Reynolds* qualified privilege, it had never formed part of the *ratio* of any decision in this jurisdiction.[14]

Thus required to decide at an early stage in the trial on whether a public interest defence existed in this context, Charleton J ruled that it did. Noting that traditional qualified privilege involves a situation where one party has an interest in receiving information and another party has a duty to pass that information to them, the learned trial judge continued:

> "In *Reynolds v Sunday Times Newspapers* [2002] 2 AC 127 HL, that was developed so that an issue arose as to whether there was such a thing as a general interest in the public in favour of them receiving information, albeit incorrect. And it seems to me that, yes, there is. The public have an interest in many matters, as opposed to being interested in matters. Being interested in matters, it seems to me, would refer to matters which are merely titillating or salacious or gossipy. Matters which are of public interest, on the other hand, have to be matters which affect the public in terms of the governance of the country, their safety, their security, their right to judge their public representatives fairly on the basis of real information. This is not an exhaustive list. I could not possibly formulate an exhaustive list, even if I had time to reserve judgment in this case."[15]

Having noted the ten tests set out by Lord Nicholls in Reynolds, Charleton J quoted Lord Nicholls' view that "the list is not exhaustive. The weight to be given to these and to any other relevant factors will vary from case to case."[16]

Significantly, Charleton J went on to consider the *Jameel* decision, and to endorse the more flexible interpretation of Lord Nichols' ten tests which was adopted in *Jameel*:

> "Since that time [i.e. the Reynolds decision], as can happen and certainly has happened in England in relation to other areas of law, it seems that errors have

8 *Jameel, op.cit,* per Lord Bingham at 378.
9 *ibid.*
10 *ibid.* at 384.
11 *ibid.* at 409.
12 *Leech v Independent Newspapers*, High Court, June 26-28, 2007, unapproved transcript, Vol. 2, p 47.
13 Unreported, High Court, July 31, 2003.
14 *Leech,* unapproved transcript, Vol. 2, p 6.
15 [2007] IEHC 223.
16 *ibid.*

been made by people referring to the ten separate indica of the existence of public interest and by indicating that if one or other of them is absent, or if a decision as to fact might go against a newspaper in relation to one or other, that the entire defence is destroyed."[17]

The learned judge then noted that the use of the language of privilege is "not necessarily helpful" in the context of the *Reynolds*-type public interest defence. Whereas traditional qualified privilege can be destroyed upon proof of malice, in the context of a public interest defence, the issue of the presence or absence of malice is effectively subsumed within the "responsible journalism" test.[18] Therefore, he added:

> "I would rule that a public interest defence can arise where the subject matter of a publication, be it an article or radio or television report, considered as a whole, was a matter of public interest ... I would rule as well that there is a professional duty on the part of journalists to both seek out information that is of public interest and to impart it to the public and that while that is a matter of professional skill and training, that it is also a matter of responsibility. And once a public interest is established in terms of the information the subject matter of the article, there is a second test to be met, which is as to whether on the evidence the steps taken to gather and publish the information were responsible and fair. The question may need to be put as to whether a newspaper or a television channel or radio channel, on the evidence behaved fairly and responsibly in gathering and publishing the information. And that may indeed take into account some of the tests set out by Lord Nichols in the *Reynolds* case. In particular No. 8, whether the article contained the gist of the plaintiff's side of the story, and whether the plaintiff was contacted for comment.
>
> I also agree that, as a third aspect of the test, that in considering whether there was fair and responsible conduct that the decision maker - be it the court or the jury ... has to have regard to the practical realities of news gathering. In that regard, I note what Lord Nichols says at paragraph 6 of the tests that he set out, that urgency can be a matter of importance in news reporting, which is, of course, dealing with a perishable commodity."[19]

Charleton J later ruled that while the trial judge is entitled to make an initial ruling as to whether a defence arises on the evidence, it is ultimately a question for the jury to decide: "If this defence were to be put to the court, it would be put to the jury as a matter of fact, and appropriate tests based on the two aspects of *Jameel*, would be put to them."[20] This represents a very significant departure from the English practice, where, although questions of fact relevant to the issue of qualified privilege may be put to the jury, it is ultimately a matter of law for the judge to decide whether the defence has been successfully made out. As was stated in *Reynolds*, "It is well settled that the question whether the occasion of publication is protected by qualified privilege is a question of law to be decided by the judge, but before he can reach that decision it may be necessary for the jury to make findings on any issues of fact in dispute upon which the answer to the question depends."[21]

Rejecting such an approach in this jurisidiction, Charleton J. said:

> "I don't accept that in this country it would be right for me to decide these issues, and to, in effect, overturn the statute, which requires a jury trial of this defamation matter, by making a ruling. I [am], of course…entitled to make a ruling as to whether a defence arises on the evidence that is fit to be considered by the jury."[22]

On the facts of the *Leech* case, however, the learned trial judge was not satisfied that the defendant had made out a defence that could be put to the jury—despite meeting the public interest criteria—as it did not propose to call any evidence from the *Irish Independent*, either from the journalist or editorial staff responsible for the article in question.

On the public interest aspect of the test, he stated:

> "On the argument presented to me, it seems to me that, literally just about, that the test is met, for what happens on the national broadcaster is, in a small country as we are, a matter of importance, the matter in which they deal with their broadcasts is a matter of importance."[23]

However, regarding the second limb of the test, the requirement of fair and responsible journalism, he concluded:

> "If there is actually an issue as to malice transmuted, which I hold that there is, into the second test for public interest privilege of responsible and professional journalism in establishing the *Reynolds* test, then in order to establish it, the reality is that whoever took these decisions, be it the journalist, the editor and the sub-editor, have to be here to establish it. And therefore, in the circumstances of their being

17 *ibid.*

18 *ibid.* Charleton J endorsed the comments in this regard of Lord Hoffman in *Jameel, op.cit,* who stated, at 381:

> "Although Lord Nicholls used the word "privilege", it is clearly not being used in the old sense. It is the material which is privileged, not the occasion on which it is published. There is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under the which the material is privileged."

19 *ibid.*

20 *ibid.*

21 [2001] 2 A.C. at 178.

22 [2007] IEHC 223.

23 *ibid.*

no evidence as to this, the defence of public interest will not be put before the jury."[24]

Conclusion

Charleton J's rulings in the *Leech* case not only confirm, unambiguously, the availability of so-called *Reynolds* privilege in this jurisdiction, but they also endorse the more flexible interpretation of *Reynolds* set out in *Jameel*. The House of Lords in that decision was very concerned with promoting and safeguarding "serious" and responsible journalism and with resurrecting the original liberalising intent of the *Reynolds* judgment, and it is to be hoped that the Irish judiciary continue to follow suit in this regard.

It remains to be seen precisely how the position will be altered again upon the eventual enactment of the Defamation Bill 2006, which proposes a new defence of "fair and reasonable publication" on matters of "public importance".[25] Arguably, the test of "public importance" represents a more rigorous standard than that of "public interest". Nevertheless, it seems reasonable to conclude that judicial interpretation of any new law enacted will continue to be influenced by *Reynolds* and subsequent case law, most notably *Jameel*. Thus, Charleton J's rulings in *Leech* are both a significant and welcome development in Irish defamation law.

24 *ibid*.

25 Section 24.

Ethico Legal Issues in Biomedicine

Ann Power SC

This is the first in a series of three articles dealing with ethical, medical and legal issues surrounding the various stages of life. This first article in the series deals with the beginning of life, the second article will analyse issues surrounding organ donation and retention and the area of medical consent. The third article will deal with ethical issues surrounding the end of life. The second and third articles will be published in later editions of the Bar Review.

Introduction

Most practitioners recall the infamous *Hart-Devlin* debate of the 1960s and the argument about whether the law should be shaped around the intrinsic morality of actions. While the original debate focused upon sex and society, in our own time it is in the area of medical law that similar arguments are canvassed. Since the publication of the human genome sequence in 2001[1], we have glimpsed something of the profound mystery of life that is the human being. Advanced understanding has generated new questions at the interface of medicine and law. Ethico legal issues abound in relation to:

- Assisted conception and reproduction
- Cloning and stem cell research
- Surrogacy and abortion
- Tissue and organ donation and transplantation
- Non consensual medical treatment
- Assisted nutrition and hydration [ANH]
- Euthanasia and assisted suicide; and the
- Retention and use of organs from the dead or cadaver transplants.

In *Human Life and Medical Practice* Professor Ken Mason noted, rightly, that the subjects in question are very emotional and must inevitably be subjectively coloured.[2] However that should not prevent us from examining the subjects as reasonably and as objectively as we can, ensuring that the arguments stand or fall on their own merits irrespective of the traditions which lead us to explore them.

Where consenting adults (in this case patients and health professionals) agree that they would like to bring about the death of a patient, or sell some of their organs, or try highly experimental and dangerous treatment, or abort a foetus, or become pregnant with a non human animal, has the State got the right to intervene? What, if any, is the legitimate public interest in those private activities? Why should the State curtail the freedom of individuals to do whatever they choose provided they harm no one else but themselves?

Ethics

How we approach an answer to these questions depends, to a large extent, upon the ethical tradition that informs our perspective and on our own internal moral compass. Many of us have not articulated the ethical principles that govern and shape our views but our response to those questions concerning the legitimacy of medical law is based upon an ethical perspective that influences how we approach those complex problems.

Ethical debate arises because we are free. Being free, the central question of ethics might be formulated thus: How should human life be lived? Is there a right way to live—one that leads, for the most part, to the flourishing and well being of people? Or are we entirely without guidance or direction as we negotiate our way through the labyrinth of life? Is it all a matter of personal taste?

Classical Philosophy

Classical philosophy posits that there are guidelines which reason can identify to enable us to live well. *Always treat others as you would like to be treated. Do not use people as a means to an end. Do what is good and avoid what is harmful.* It holds that there are certain (limited) rights that are fundamental to every human person and that are non-negotiable regardless of the circumstances. Thus, it is always impermissible to treat a person as a means to an end. It is always wrong to torture a person for the fun of it. No exceptions arise. According to the classical tradition of moral philosophy, human rights are intrinsic to who we are—they come with the territory of being human. The body politic does not grant us rights. It acknowledges them. This "natural law" tradition of moral philosophy has formed the basis of Western civilisation and is the philosophical foundation of our Constitution and of many international Declarations and Conventions on human rights.

The Modern Approach

Much of modern philosophy has abandoned that tradition. It was Rene Descartes (1596-1650), the father of modern philosophy, who inaugurated a subjectivism that took hold of Western consciousness and the implications of his philosophy for ethics were immediate. Descartes asserted one certain

1 *Science: Special Issue* (2001) Vol 291 1145-1344 and *Nature: Special Issue* (2001) Vol 409 745-964

2 *Human Life and Medical Practice* [Edinburgh, Edinburgh University Press, 1988, vii]

truth—the truth of consciousness. "I am a thing that thinks". Ethics, principles of right and wrong, indeed, all of reality emanates from human consciousness. His influence may be seen in some of the modern jurisprudence on the "end of life" cases.

Under Descartes' influence, there came the rise of relativist ideologies such as, utilitarianism, consequentialism and situation ethics. No longer should one do that which is good in itself (as disclosed by reason) but one should do that which brings about the "greatest happiness of the greatest number" or which has the "greatest net benefit" or the "best consequences".[3]

The Beginning of Life

The Status of the Embryo

Whilst most biologists and embryologists would appear to consider that a new and distinct organism begins at fertilisation, the main area of disagreement centres upon whether that new organism constitutes a human being in its earliest stages and is, therefore, entitled to protection at law. "*Philosophers and scientist may continue to debate when human life begins but the law must define what it intends to protect.*"[4] In *MR v TR and Others,* McGovern J. pointed out that it was not for the Courts to decide when human life begins.[5] Rather, in interpreting Article 40.3.3 of the Constitution, the Court had to decide whether the word "unborn" includes embryos *in vitro*. He held that the Constitutional protection afforded to the unborn did not extend to the three frozen embryos which were at the heart of the dispute in that case. He noted that in the absence of any legal rules or regulations in this jurisdiction, embryos outside the womb have "a very precarious existence" Absent agreement on what should happen to them, the likely fate of the embryos was that they would remain in a state of cryo preservation for an indefinite period. That being so, it might be useful to examine how the English legal system has approached and resolved such complex and vexed questions.

The British Approach: The 1990 Act

Opponents of embryo research contend that from the point of fertilisation, a new and usually unique human being comes into existence. They argue that an embryo is not just biological matter but is a human organism in its earliest stage of development and that, as such, it deserves the protection of law. In Britain, the battle against embryo research was hard fought and lost in 1990 with the legitimisation of embryo research in the *Human Fertilisation and Embryology Act, 1990*. Some say it could not have been won without outlawing IVF too. If the embryo must be protected from destruction, then either no surplus embryos should be created or all must be preserved and implanted. If alleviating infertility is sufficient justification for destroying some embryos, surely research to improve other conditions is an equally valid justification. In Britain, the 1990 Act adopted the "Warnock compromise". The embryo up to 14 days "ought to have *special* status".

Ken Mason, the renowned medical lawyer, rejected such a compromise and put it starkly when he said:

> "Either the in vitro embryo of Homo sapiens is a human being with rights that are absolute in themselves, and which only become comparative when they are in conflict with those of human beings in a more developed state, or it is an artefact to be regarded in the same light as any other biological product of the laboratory.[6]"

Given the "precarious existence" of pre-implanted embryos in this jurisdiction, we might ask whether the 14 days "special status" approach is the way to go.

The ambivalent status of the "special" embryos was well illustrated by the media outrage about "orphan embryos" in 1996. The 1990 Act provided that frozen embryos could be preserved for 5 years. At the end of that original 5 year period, unused embryos should be "allowed to perish".[7]

1n 1996, the 5 year term for embryos initially stored under the 1990 Act came to an end. Clinics were often no longer in contact with the gamete donors. The media had a field day expressing outrage at the destruction of thousands of "orphan embryos".[8] The British government responded by providing that under certain conditions, the storage period could be extended from five to ten years.[9] What was all the fuss about?[10] If the imperilled embryos should be regarded as orphaned children, then, firstly, they should not have been created "doomed to die". Secondly, having been created, Brazier argues, arrangements should have been made for their speedy pre-natal adoption. If, on the other hand, the stored embryos were merely useful biological material, they should have been put to good use, either in research or offered to infertile couples to "cure" their infertility. Such use of orphan embryos however, offended the principles governing gamete donation. Where no contact could be established with the parents or, rather, the gamete donors, no "effective consent" could be obtained to donate the embryos for research or pre-natal adoption. Yet if embryos are children, parental interests give way to their welfare. And if embryos are mere materials, why ascribe such rights to their donors?

Saviour Siblings

Continuing confusion about how society regards embryos is illustrated starkly by the "saviour sibling" scenario. Parents with a sick child dying of a genetic disease now have the

3 For an analysis of the methodological injunction to "maximize goods" see Finnis, *Natural Law and Natural Rights* [Oxford: 1980] at 111-118.

4 Report of the Constitution Review Group, July 1996.

5 High Court, McGovern J., *MR v TR* & *Others* [15 November 2006] at page 20

6 Mason, J.K., *Human Life and Medical Practice*, Edinburgh University Press, 1988 at 94.

7 See section 14(5) (c) of the *Human Fertilisation and Embryology Act, 1990*.

8 See, for example, *The Independent*, 2 August 1996 "Day of National Shame".

9 See the *Human Fertilisation and Embryology (Statutory Storage Period for Embryos) Regulations,* 1996 [SI 196 No 375].

10 See Margot Brazier, "Human(s) as Medicine(s)", *First Do No Harm* (Sheila McLean, ed.) Ashgate, 2006 187.

opportunity to create another child whose umbilical cord could contain stem cells offering a cure to his brother or sister. Embryos are created by IVF, and pre-implantation genetic diagnosis [PGD] is used to screen out any embryos that are also affected by the disease. To create a "saviour sibling", tissue typing [Human Leukocyte Antigen Tissue Typing—HLA] is then used to find a compatible match to the sick child.

The legality of PGD with HLA was challenged in the much publicised case of *R (On the application of Quintavalle) v HFEA.*[11] Zain Hashmi suffered from *Beta Thallasaemia*, a genetic disease. Without a bone marrow transplant, he would die within a few years. Having failed to find a compatible donor within their existing family, Zain's mother became pregnant twice in order to find a compatible donor. The first pregnancy was aborted because the foetus had the same genetic deficiency as Zain. The second pregnancy resulted in another sibling for Zain but one that was not a match. His parents sought authority from the HFEA to create an embryo and have it screened not just for PGD but also HLA. Certain activities could be licensed if they appeared to the Authority to be necessary or desirable for the purposes of providing treatment services. Such services included those designed to secure that embryos are in a *suitable condition* to be placed in a woman or to determine whether embryos are suitable for that purpose.[12] The HFEA gave the clinic treating the Hashmis permission to proceed

The applicant, Josephine Quintavalle, challenged the Authority's decision arguing that the phrase "suitable condition" did not extend to selecting embryos that suited specific purposes. The trial judge found in her favour. The Court of Appeal reversed his decision[13] and the House of Lords ultimately endorsed the legality of PGD with HLA to create a "cure", a saviour sibling for Zain.[14]

The Authority's decision in relation to Zain Hashmi contrasted sharply with its original decision in the case of Charlie Whitaker. Charlie suffered from Diamond Blackfan Anamia (DBA). Stem cells from a tissue matched sibling offered Charlie a 25 per cent chance of recovery. DBA is not thought to be a genetic disease. When Charlie's parents asked the HFEA to allow PGD and HLA to create a saviour sibling for Charlie, they were refused. The sibling to be created was not himself at risk of DBA. PGD on potential baby Hashmi was justified to avoid baby Hashmi being born with BT. Potential baby Whitaker faced no such risk. He or she would be purely a means to an end.

The distinction made between Zain Hashmi and Charlie Whitaker was vigorously attacked—so much so that the Authority ultimately changed its mind.[15] The Whitakers obtained treatment and the stem cell transplant appears to have worked. Charlie looks set for recovery. Once again, the question arises: What was the fuss about? If embryos can be manipulated to alleviate infertility or to research the causes of congenital disease, or develop procedures such as PGD, how can the chance to cure a sick child be any less of a justification?

Ethical Issues

Is having a child in order to save an existing child any worse than having a child to save a marriage or to perpetuate one's family name? It is argued that the wrongfulness of creating "saviour siblings" lies not in what is done to the embryo, but what might ensue for the saviour child. He/she will not be value for himself or herself. Fears are voiced that if the transplant of cells for the copy fails, parents will try again with more intrusive and riskier procedures.[16] The infant may be subjected to a bone marrow transplant. The child may be conscripted as a kidney donor. She or he will be no more than a repository of spare parts. Yet the creation of saviour siblings changes little. If a sick child happens to have a born sibling who is a suitable tissue match, no eyebrows are raised when his parents authorise a bone marrow transplant from their healthy child to their dying child. Should any parent go the further step of attempting to use a healthy child as a kidney donor, doctors are unlikely to act on their request. The "saviour sibling" once born is protected in just the same way as is "accidental" sister. Objections to "saviour siblings" must either derive from an absolute objection to the use of embryos, or some more profound discomfort about the deliberate use of humans as medicine.

Reproductive Cloning

Following the victory won by those in favour of embryo research in Britain, there followed a period of relative calm on that particular front. Controversy about reproductive technologies focused more on emerging developments in fertility treatment, such as, the fierce disputes about post menopausal motherhood and PGD. The peace was short lived.

The advent of Cell Nuclear Replacement (CNR) raised new issues in the debate and invigorated those who had a principled objection to any form of embryo research. "Dolly", the miracle sheep, earned her place in human history in leading the way to mammalian, and potentially, human cloning. CNR involves the insertion of the nucleus of an adult cell into an emptied or denucleated ovum or egg cell. The egg cell or newly filled ovum is then subjected to an electrical impulse (kind of kick started with jump leads) and (with luck) that cell begins to divide and develop into an embryo. That embryo is then implanted into a surrogate and the child, if born, would be a genetic replica or twin of the donor who donated the nucleus. Its genome would be identical to that of the nuclear donor.[17]

Given the ability to clone a growing range of mammals, it seems likely that human reproductive cloning would be feasible. The costs may be prohibitive for most of us and the

11 [2003] 2 AER 105
12 See paragraph 1(1)(d) of Schedule II to the 1990 Act.
13 [2003] 3 AER 257, CA
14 [2005] 2 AER 555 HL
15 See *The Times*, 22 July 2004

16 For a fictional account of such a scenario see Picoult, J. *My Sister's Keeper*, London, Hodder & Stoughton, 2005
17 The term "identical twin" is not exact because the clone would not have the same mitochondrial genes as its nuclear donor (because mitochondria come only from the egg), nor would it develop in the same uterine environment as did the donor.

"wastage" is immense. [One estimate indicates that one would need 1,000 human eggs implanted into 50 different women in order to produce a single human cloned offspring.][18] Additionally, the risk to the women bearing the clones and the clones themselves remain significant. Dolly died early in 2003 at the age of 6, half the average life expectancy of a healthy sheep. She died of a progressive lung disease that normally affects older sheep and expressed other signs of accelerated aging, such as, obesity and arthritis. The biological problems associated with reproductive cloning are many but such difficulties may be resolved in time

Therapeutic Cloning: Stem Cell Research

A distinction is often made between reproductive cloning and therapeutic cloning. Therapeutic cloning involves the same CNR procedure but instead of implanting the embryo and permitting it to develop into the twin of the donor, the embryo is used as a source of stem cells for research and therapy. Stem cells are versatile cells in the body which are able both to reproduce themselves and to produce more specialised cells. As such, they are of great potential value in repairing and regenerating damaged cells and tissue. Such stem cells are developed into genetically compatible tissues or organs for those who need them. The difference, therefore, between reproductive and therapeutic cloning lies in the purpose for which the clone is created.

With therapeutic cloning, once an embryo is created by CNR, stem cells can be collected from that embryo. As the individual develops, it is thought that stem cells become more committed to a particular destination in the body. Embryonic stem cells, however, retain their pluripotency. Thus, those cells can then be cultured to grow into diverse kinds of tissue, perhaps, ultimately, whole organs. Tissue so derived from the original donor will be an exact match so the risk of rejection is averted. It is argued that such therapy, if permitted to advance, could ultimately transform the lives of those with Parkinson's Disease, Alzheimer's, Multiple Sclerosis or Spinal Cord Injury. So, were I to succumb to a disease such as Parkinson's, stem cell therapy could utilise my bodily material to create stem cells that are a tailor made medicine for me. Put that way, the process sounds no more controversial than an autologous blood transfusion. And who would object should I arrange to have my own blood collected for use in planned surgery?

Opposition and Support

Legally, there appears to be little support for permitting reproductive cloning though Mason and Laurie suspect that the days of the outright prohibition on reproductive cloning are numbered.[19] Support for legalising therapeutic cloning or stem cell therapy is far more evident. In March 2005, the United Nations voted 84 to 34 (37 abstaining) in favour of a non-binding resolution that banned all forms of human cloning, both therapeutic and reproductive. Most European nations voted against the resolution. The United Kingdom has permitted therapeutic cloning, more usually now referred to as stem cell therapy.[20]

Moral Objections

The objection to the therapeutic cloning of embryos centres on that crucial stage in the process whereby an embryo is created which could, if implanted, develop into a baby. McGovern J. (at page 22 of his judgment in *MR v TR and Others,* cited above) noted that while disagreement concerning the status of embryos is considerable, there seems to be almost complete agreement on the fact that, because of their nature, embryos are deserving of respect. Extracting the stem cell from the embryo destroys the embryo and this destroys its potential for development as a human being. Opponents to embryo research argue that an embryo created by propagation rather than fertilisation is morally indistinguishable from the embryo that results from the fusion of egg and sperm. Is that so? Is there not a difference between an embryo created exclusively by me using only my nucleus and one created by me and another person—in the more traditional way? The advent of CNR raises more questions than it answers. It is a matter for the people through their elected representatives in the Oireachtas to decide what steps should be taken to establish the legal status of embryos *in vitro.* The time to start thinking is now.

Consent

Unless an embryo that is created *in vitro* is immediately transferred to a woman's uterus or "allowed to perish", it will be frozen and stored. With the exception of the High Court decision in *MR v TR and Others*, the legal position relating to the retrieval, storage and use of gametes is unexplored territory in this jurisdiction. So, how should the law respond when the gamete contributors subsequently disagree about the disposal or use of their cryo preserved embryos?

The concept of consent in the British legislative framework for assisted reproduction is central. Consent to the storage and use of one's gametes (that is, sperm and eggs) must be voluntary and fully informed. Under Schedule 3 of the 1990 Act, unlike other much more invasive medical procedures, consent to the creation of an embryo or to the use of one's gametes in the treatment of others *must* be in writing and counselling must have been offered. "Effective consent" means consent that has not been withdrawn.

Consideration of the rules governing consent to the use of gametes first came before the Court of Appeal in the case of *R v Human Fertilisation and Embryology Authority, ex parte Blood.*[21] Mr and Mrs Blood had been trying to start a family. He contracted meningitis and lapsed into a coma. She asked for sperm samples to be collected by electro-ejaculation for use by her at a later date. Her husband died shortly afterwards.

18 Klotzko, 2001 as cited by Gilbert *et al* in *Bioethics and the New Embryology*, Sinauer Associates Inc 2005 at 129.

19 Mason, McCall, Smith & Laurie, *Law and Medical Ethics* (7th ed.), Oxford, OUP, 2006 at 252

20 See *The Human Fertilisation and Embryology (Research Purposes) Regulations 2001*. See also *The Human Reproductive Cloning Act, 2001*

21 [1996] 3 WLR 1176; [1997] 2 WLR 806 (CA)

Mrs Blood wanted to be inseminated with her deceased husband's sperm. The problem was that although she claimed that she and her husband had discussed the posthumous use of his sperm, Mr Blood had not given written consent. Sperm samples had been extracted at Mrs Blood's request while her husband was in a coma. Thus, there was no consent as required under Schedule 3.

Without consent, it would have been unlawful for Mrs Blood to use the sperm for treatment in Britain and the Court of Appeal accepted that their continued storage (absent his consent) was also "technically" an offence. Mrs Blood applied for permission to export the sperm to Belgium where treatment would be lawful but the HFEA refused. She sought judicial review of the decision. At first instance, Sir Stephen Brown decided that the HFEA had acted within its discretion. On appeal, Mrs Blood succeeded. The Court of Appeal took the view that despite the unlawfulness of the sperm retrieval, the HFEA had not taken adequate account of Mrs Blood's right under European law to receive treatment in another Member State.[22] In addition, the Court of Appeal was not satisfied that the public interest was served by refusing Mrs Blood permission to export the sperm for treatment elsewhere in Europe.

Following the decision of the Court of Appeal, the HFEA changed its mind on the grounds that, firstly, there could be no precedent set by this case because sperm should never again be taken without consent and secondly, because it could not establish a sufficiently compelling public policy exception to Mrs Blood's cross border rights. Mrs Blood succeeded in exporting the sperm and following treatment in Belgium she had two children.

What is remarkable about *Blood* is that it demonstrates how quickly the underlying philosophy of the 1990 Act was challenged. It began on the premise that, subject to a system of regulated licences, the supervision of reproductive medicine could, by and large, be left to the specialists to fulfil the desire and longing of infertile couples. It has moved quickly to the concept of a consumer who comes to the reproductive market with the usual range of assumptions about rights and guarantees.

Paternity

Paternity is another issue that is likely to come before the Courts here as it did in Britain. In England, when an embryo is *in utero*, men have no say over whether a woman may lawfully end a pregnancy by abortion. The law characterises the decision to abort as being a medical one and the "father" has no right to obstruct medical discretion in this regard.[23]

Indeed, there are some who argue that once sperm leaves the man's body, whether during intercourse or IVF treatment, he loses the right to control what happens to it. Christine Overall, an avowed feminist says:-

> "Once their sperm has been used to fertilise a woman's ovum, men do not have a right to determine whether a child will be born. Men who want to control their sperm should be careful where they put it, and should pause to think before they provide their sperm for insemination, or for in vitro fertilisation—even with women who are their partners."[24]

However, the law does not quite agree. Consent of both parties remains critical in respect of decisions concerning an embryo *in vitro*. In Britain, once either gamete provider has withdrawn consent to the use or continued storage of an embryo, then it must be "allowed to perish". Whichever partner does not want the embryo to be used in treatment has, effectively, a right of veto. In *Evans v Amicus Health Care Limited and Others,*[25] the Court of Appeal confirmed that this right of veto persists even if the embryos in storage represent the other person's only opportunity to have genetically related children.

Following the discovery that Natalie Evans had ovarian cancer, she and her then partner, Howard Johnson, underwent a cycle of IVF treatment resulting in the storage of six embryos. She was treated, successfully, for cancer and the stored embryos were her only opportunity of having her own baby.

Ms Evans and Mr Johnson had each given the necessary consents to storage and use of their gametes in accordance with Schedule 3 requirements. However, before an embryo transfer had been attempted, their relationship had ended. Mr Johnson wrote to the clinic to notify it of the separation and to state that the embryos could be destroyed. Ms Evans sought an injunction requiring him to restore his consent to the use and storage of the embryos together with a declaration that the "consent" requirements of Schedule 3 of the 1990 Act were incompatible with her Convention rights, particularly, her right to respect for private and family life (Article 8) and the right not be discriminated against in the enjoyment of her Convention rights (Article 14). The judge dismissed her claim and the Court of Appeal dismissed her Appeal.

The Court of Appeal acknowledged that the consent provisions of the Act in this case worked a hardship, probably of an unanticipated kind, but that in itself could not lead the Court to interfere with Parliament's decision to require bilateral consent to implantation. The House of Lords refused permission to appeal and Ms Evans appealed to the European Court of Human Rights.

On the 22nd November, 2006, the European Court of Human Rights held a Grand Chamber hearing in the case of *Evans v. the United Kingdom* (Application no. 6339/05) and into her complaints that requiring Mr Johnson's consent for the continued storage and implantation of the fertilised eggs was a breach of her rights under Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights and the embryos' rights under Article 2 (right to life). Judgment was delivered on the 10th April, 2007 and, by thirteen votes to four, the Grand Chamber held that there has been no

22 EC Treaty, Article 59

23 See for example, *Paton v Trustees of the British Pregnancy Advisory Service* [1979] QB 276; and *C v S* [1988] QB 135

24 "Frozen Embryos and "Father's Rights": Parenthood and Decision Making in the Cryopreservation of Embryos" in Joan Callahan (ed), *Reproduction, Ethics and the Law: Feminist Responses* (Indiana UP Bloomington and Indianapolis 1995) 177-98.

25 [2004] AER 3 at 1025

violation of Articles 8 and 14 of the Convention. It held, unanimously, that there had been no violation of Article 2.

The European Court of Human Rights accepted the Government's submission that respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material, without his or her continuing consent. It accepted that the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what the Court of Appeal described as "entirely incommensurable" interests. In the Court's view, these general interests pursued by the legislation were legitimate and consistent with Article 8.

The dissenting opinion of the Court, however, took the view that the 1990 Act did not provide for the possibility of taking into consideration the very special medical condition affecting the applicant. Because of its absolute nature, the legislation precluded the balancing of the competing interests in this particular case. The dissenting Judges noted that while the majority accepted that a balance has to be struck between the conflicting Article 8 rights of the parties to the IVF treatment, in fact, no such balance was achieved in the circumstances of the present case since the decision upholding J's choice not to become a parent involved an absolute and final elimination of the applicant's decision. According to the dissenting Judges, rendering empty or meaningless a decision of one of the two parties could not be considered as balancing the interests.

The Right of Access to Information

Another question that arises in the context of reproductive technologies is the right of children to information concerning their genetic makeup. In a number of Member States, the right of donors to anonymity has been protected. A recent *Sunday Times* article reported on the influx of Danish sperm into Ireland. Danish law prohibits sperm donor identification, but what about the rights of Irish children (born as a result of AID) to know something of their genetic history.

In Britain, gamete donation was anonymous until April 2005. Children born following anonymous donation could be given access to non-identifying information, such as, the donor's ethnic origin or occupation and donors are encouraged to fill in what was known as a "pen portrait" in which they left a message to be given to any children conceived using their gametes. It was also possible, once they reach the age of 18, for children to ask the HFEA whether they had been born following fertility treatment and if they were related to a prospective spouse.[26] The latter provision is rather odd. It is clearly intended to prevent incestuous sexual relationships but, of course, these could exist outside marriage. It is not possible for a person who knows that she was born following donor insemination to ascertain from the HFEA whether she is genetically related to a non-martial sexual partner, even if she intends having children with him.

For a long time, anonymity was believed to be in the interests of donors, recipients and children. It shielded donors from parental obligations, inheritance claims, and unwanted contact with their offspring and it protected the privacy and security of the recipient family. The assumption was that most donation (especially sperm donation) was contingent upon non-identification and the promise of anonymity was directed towards ensuring adequate stocks of donated gametes.

The purported justification for anonymity has been challenged. The rights of children have become the subject of recent political and judicial comment. Arguably, offspring conceived through donor insemination have been deprived in advance of conception of half of their genetic family. Some contend that children need to know the identity of their biological parents and that the interests of children should take priority over the interests of donors. Nowadays, we have a greater understanding of the importance of knowing about inherited genetic conditions. Children born following anonymous gamete donation are unable to give an accurate family medical history to their doctors and this could compromise their ability to receive optimum health care.

In *R (On the application of Rose) v Secretary of State for Health,* Scott Barker J held that respect for private and family life (as a right under the Convention) requires that everyone should be able to establish details of their identity as individual human beings. He stated:

> "A human being is a human being whatever the circumstances of his conception and an AID child is entitled to establish a picture of his identity as much as anyone else. We live in a much more open society than even 20 years ago. Secrecy nowadays has to be justified where previously it did not.
>
> …
>
> Everyone should be able to establish details as to his identity as a human being. That, to my mind, plainly includes the right to obtain information about a biological parent who will inevitably have contributed to the identity of his child." [27]

The Court in *Rose* found that Article 8 was engaged (though not necessarily breached). Subsequently, Regulations were passed in England in 2004 and came into effect in April 2005. Stocks of anonymously donated sperm could be used, lawfully, until April 2006 but since that date, no sperm can be used in treatment unless the donor is prepared to be identifiable.

A European study of the parents of AID children showed that 78% had decided never to tell their children about their origins for fear of upsetting them or complicating their relationship.[28] Given the high rate of non-disclosure by parents, any right to identifying information may make little difference to the majority of children conceived by AID.

26 *Human Fertilisation and Embryology Act, 1990* section 31(4)(b) and 31(6).

27 [2002] EWHC 1593 (Admin), [2002] 3 FCR 731.

28 Gottlieb *et al*, "Disclosure of Donor Insemination to the Child: The Impact of Swedish legislation on couples' attitudes" (2000) 12 Human Reproduction 2052-6, 2053.

Law Reform Commission Consultation Paper on Consolidation and Reform of the Courts Acts

*Claire Bruton BL**

Introduction

In 2005, the Law Reform Commission embarked on a joint project with the Courts Service and the Department of Justice, Equality and Law Reform with the aim of consolidating into a single Courts Act the existing legislative provisions dealing with the jurisdiction of the courts in Ireland. The initial phase of this project has recently concluded with the publication of the Law Reform Commission's *Consultation Paper on Consolidation and Reform of the Courts Acts*.[1] The Consultation Paper is accompanied by the text of a draft Consolidated Courts Bill on CD Rom which contains 358 sections. This draft Consolidated Courts Bill unites in a single document the existing text of the Courts Acts, including a number of pre-1922 provisions.

This article aims to provide an overview of the Consultation Paper and highlights provisional recommendations made by the Commission.

Overview of the Consultation Paper

The Commission was assisted in the preparation of the Consultation Paper by a Working Group consisting of members of the Courts Service, Department for Justice, Equality and Law Reform, the judiciary, academics and the legal profession.

The aim of the joint project is to consolidate into a single Bill the existing statutory provisions concerning the jurisdiction of each of the permanent courts in Ireland, the Supreme Court, the Court of Criminal Appeal, the High Court, the Circuit Court and the District Court. The Commission concluded that this provided an ideal opportunity to develop a suitable scheme or model for a new Courts Act.

In addition to providing a draft consolidated Courts Bill, the Consultation Paper also identified a number of specific areas related to the jurisdiction of the courts that the Commission regarded as worthy of consideration with a view to possible reform. This article will not concentrate on these in much detail except to outline the areas and give a brief indication of provisional recommendations, if any, made about them.

Consolidation of the Courts Acts

The primary reason for a consolidation of the Courts Acts is the large number of Courts Acts enacted since 1922.[2] During the preparation of the Consultation Paper, the Commission noted that almost 60 Courts Acts have been enacted since that year. Some of these, in particular the Courts (Supplemental Provisions) Act 1961 involved part-consolidation but none completed a full consolidation.[3] In addition, a number of post-1922 Acts carried over provisions concerning the jurisdiction of the pre-1922 courts. Accordingly the Commission identified pre-1922 provisions which still have a resonance to the present courts in order to determine suitable provisions for inclusion in the consolidated Courts Act. The Consultation Paper thus includes a chapter examining the history of the courts, which concludes with a summary of the historical roots of each of the courts in this jurisdiction. For example, the Supreme Court can trace the origins of its appellate jurisdiction to the Court of Appeal in Chancery and its successor, the Court of Appeal of the Supreme Court of Judicature.[4] The chapter analyses the history of each of the courts in this jurisdiction and accordingly identifies precise pre-1922 provisions worthy of inclusion in the consolidated Courts Bill.[5]

The draft Consolidated Courts Bill which accompanies the Consultation Paper presents the text of existing legislation, both pre-1922 and post 1922, dealing with the jurisdiction of the courts. The draft Bill does not re-draft the legislative provisions; rather they are presented in an updated and restated form.

The Commission has provisionally recommended that the relevant sections of the Courts (Establishment and Constitution) Act 1961 which establish the Supreme Court, High Court, Court of Criminal Appeal, Circuit Court and District Court be omitted from the ambit of the Consolidated Courts Act in the interests of certainty.[6] Instead, the Commission provisionally recommends that a provision be included in the new Courts Act which provides for the

* Principal Legal Researcher on the Consultation Paper on Consolidation and Reform of the Courts Acts

1 Law Reform Commission *Consultation Paper on Consolidation and Reform of the Courts Acts* (LRC 46-2007).

2 See the list of these Acts at pp 266-267 of the Consultation Paper

3 It is worth noting that the Department of Justice's 1962 Programme of Law Reform indicated an intention to consolidate all of the legislative provisions, pre-1922 and post-1922, on the jurisdiction of the courts. See Consultation Paper at pp. 31-37.

4 Section 23 of the *Supreme Court of Judicature Act (Ireland) 1877*. See also Consultation Paper at pp 21-42 and pp. 103-4.

5 See pp. 105-108 of the Consultation Paper.

6 See pp. 31-37 of the Consultation Paper.

Continued on p.197

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 12, Issue 5, November 2007

A directory of legislation, articles and acquisitions received in the Law Library from the 21st June 2007 up to 9th October 2007.
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

ADMINISTRATIVE LAW

Articles

Bastarache, Mr Justice, Michel
Two official languages - the Canadian experience
2007 (12) 3 BR 109

Furlong, John
Ireland - the name of the state
2007 ILTR 161

Statutory Instruments

Appointment of special advisers (Taoiseach and Minister of State at the Department of the Taoiseach) order 2007
SI 414/2007

Appointment of special adviser (Minister for Justice, Equality and Law Reform) order 2007
SI 570/2007

Appointment of special adviser (Táiniste and Minister for Finance) Order 2007
SI 550/2007

AGRICULTURE

Statutory Instrument

Diseases of animals act 1966 (restriction on bird shows or other events) no. 2 order 2007
SI 264/2007

ANIMALS

Statutory Instrument

Diseases of animals act 1966 (restriction on bird shows or other events) no. 2 order 2007
SI 264/2007

ARBITRATION

Contract

Bill of lading – Charterparty – Arbitration clause in charterparty – Order staying proceedings sought – Whether charterparty incorporated into bill of lading – *Sweeney v Mulcahy* [1993] ILRM 289 applied – Arbitration Act 1980 (No 7), ss 2 and 5 – Stay refused as charterparty was generated subsequent to bill of lading and could not form part of it (2007/614P – Butler J – 7/3/2007) [2007] IEHC 109
The MV "Sonata"; application of Common Market Fertilizer BV

Articles

Dowling Hussey, Arran & Dunne, Derek
The Irish law of arbitration: an overview
2007 ILTR 137 - part 1
2007 ILTR 155 - part 2
2007 ILTR 168 - part 3
2007 ILTR 185 - part 4

Shanley, Peter
Small claims arbitration scheme
(2007) 2 (1) IBLQ 30

BANKING

Statutory Instrument

Central bank act 1942 (sections 33J and 33K) regulations 2007
SI 294/2007

BANKRUPTCY

Library Acquisitions

Moss, Gabriel
The EC regulation on insolvency proceedings: a commentary and annotated guide
Oxford: Oxford University Press, 2002
W86

Wood, Philip R
Principles of international insolvency, 2nd ed
London: Sweet & Maxwell, 2007
N310

BROADCASTING

Licence

Award of radio licence – Review of specialist decision maker – Curial deference – Licence awarded to former pirate broadcaster – Character of successful applicant – Whether unreasonable to consider experience obtained while broadcasting illegally – Policy to encourage cessation of illegal broadcasting – *Spin Communications Ltd v IRTC* [2001] 4 IR 411 and *White v Dublin City Council* [2004] IESC 35 [2004] 1 IR 545 followed; *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 approved - Radio and Television Act 1988 (No 20), ss 6(2)(a) – Broadcasting Act 2001 (No 4), s 60 – Applicant's appeal dismissed (405/2006 – SC – 6/4/2006) [2006] IESC 24
Scrollside Ltd v Broadcasting Commission of Ireland

BUILDING LAW

Building contract

Specific performance – Application for injunction restraining defendants from building house other than in terms agreed – Application to strike out proceedings – Whether reasonable cause of action disclosed – Whether proceedings frivolous or vexatious – Whether concluded agreement between parties – Whether agreement evidenced by note or memorandum – Whether building contract or contract for sale of land – Whether acts of part performance – Whether *bona fide* question to be tried – Adequacy of damages – Balance of convenience – *Mackie v Wilde (No. 2)* [1998] 2 IR 578, *Supermac's Ireland v Katesan (Naas) Ltd.* [2000] 4 IR 273, *Jodifern Ltd. v Fitzgerald* [2003] 3 IR 321 and *Sun Fat Chan v Osseous Ltd.* [1992] 1 IR 425 applied; *Barry v Buckley* [1981] IR 306 – Statute of Frauds 1695 (7 Will 3, c 12), s 2 – Interlocutory injunction granted (2007/966P – Laffoy J – 14/3/2007) [2007] IEHC 89
Claystone Ltd v Larkin

Article

Munnelly, Micheál
Recent developments in construction law: the newly published contracts for publicly funded construction works.
2007 (12) 3 BR 119

CHILDREN

Statutory Instruments

Child care (amendment) act 2007 (commencement) order 2007
SI 509/2007

Children act 2001 (commencement) (no. 2) order 2007
SI 510/2007

Children act 2001 (commencement) (no. 3) order 2007
SI 524/2007

District Court (children) rules 2007
SI 408/2007

COMMERCIAL COURT

Article

Stauber, Alvin
Commercial courts: a 21st century necessity?
(2007) 1 JSIJ 154

COMMERCIAL LAW

Article

Griffin, Diarmuid
The Irish briber abroad - the bribery of foreign public officials in international business transactions
2007 14 (6) CLP 115

Library Acquisitions

Wood, Philip R
International term loans, bonds, guarantees, legal opinions
2nd ed
London: Sweet & Maxwell, 2007
N300

Wood, Philip R
Project finance, securitisations, subordinated debt
2nd ed
London: Sweet & Maxwell, 2007
N300

Wood, Philip R
Set-off & netting, derivatives, clearing systems
2nd ed
London: Sweet & Maxwell, 2007
N300

COMPANY LAW

Corporate personality

Lifting corporate veil – Whether court should lift veil – Rule in *Foss v Harbottle* – Directors – Director's duties – Fiduciary duty – Whether director owed fiduciary duty to shareholder – Whether plaintiff has standing to seek order for rectification of share register – Whether plaintiff has standing to bring proceedings for oppression - Relief granted to defendants (2006/593P – Finlay Geoghegan J – 16/1/2007) [2007] IEHC 8
Keaney v Sullivan

Directors

Disqualification – Director of bank – Facilitation of tax evasion – Failure to comply with statutory duties – Whether engaged in conduct making him unfit to be concerned in management of company – Function of disqualification – Protection of public – Danger to company's creditors – Appropriate period of disqualification – Factors to be considered – Deterrent element – Gravity of conduct – Mitigating factors – Companies Act 1990 (No 33), s 160 – *In re NIB: Director of Corporate Enforcement v Collery* [2006] IEHC 67 (Unrep, Finlay Geoghegan J, 9/3/2006) considered – Disqualification order in respect of respondent of nine years (2005/71COS – Murphy J – 20/3/2007) [2007] IEHC 102
In re NIB: Director of Corporate Enforcement v Seymour

Directors

Reckless trading – Misfeasance – Proceedings instituted by plenary summons instead of notice of motion –Whether proceedings complied with the Rules – Distinction between nullity and irregularity – Whether prejudice to defendants – Discretion to strike out – *McDonnell v Dun Laoghaire Corporation* [1991] ILRM 301 applied; *Re Prichard (deceased)* [1963] Ch 502 considered; *Meares v Connolly* [1930] IR 333 and *Bank of Ireland v Lady Leesa (Ireland) Ltd* [1992] 1 IR 404 distinguished – Proceedings stayed and time limit set for plaintiff to provide information to defendants (2005/1528P – Smyth J – 27/2/2007) [2007] IEHC 69
Earl v Cremin

Directors

Restriction – Application to lift restriction – Factors which court should have regard to – Conduct of applicant since winding up – Hardship suffered by applicant – Fundamental purpose behind declaration of restriction – Risk to third parties – Impecunious applicant – Whether court should have regard to need or interest of applicant in having restriction lifted – Whether Oireachtas intended that directors could be rehabilitated quickly after declaration of restriction made – Companies Act 1990 (No 33), s 152 – Relief from restriction granted (2005/112Cos – Ó Néill J – 10/12/2006) [2006] IEHC 289
In re Xnet Information Systems Ltd: Higgins v Stafford

Directors

Shadow directors – Restrictions – Application for restriction –Whether body corporate could be shadow director for purposes of application for restriction – Whether foreign body corporate could be shadow director for purposes of application for restriction – Companies Act 1963 (No 33), s 176 – Companies Act 1990 (No 33), ss 27 and 150 – Questions answered in affirmative (2002/139COS – O'Leary J – 16/2/2006) [2006] IEHC 467
In Re Worldport Ltd: Hughes v Worldport Communications Inc

Dissolution

Property – Failure to convey before dissolution – Company trustee for intended grantees – Vesting order – Whether applicants can obtain order vesting property in them as intended grantees – Whether company should be restored to register of companies – Relief granted (2006/218SP – Laffoy J – 24/11/2006) [2006] IEHC 408
In re Heidelstone Co Ltd: Application of Boothman

Insolvency

Unsatisfied judgment – Outstanding statutory annual returns – Enforcement of court order – Whether sequestration against property of directors appropriate – Whether order would be coercive or penal in nature – Failure to serve order with necessary penal endorsement – Whether order wilfully disobeyed – Insufficiency of assets – Examination of persons summoned on oath - Discretionary power – Manner in which respondent company operated – Whether examination would result in benefit – Rules of the Superior Courts 1986 (SI 15/1986), O 1, r 8 and O 42, r 32 – Companies Act 1963 (No 33), ss 245 and 371(1) – Companies Act 1990 (No 33), s 251 – s 251 applied other relief refused (2006/214COS – Laffoy J – 5/2/2007) [2007] IEHC 43
In re Powertech Logistics Ltd: Airscape Ltd v Powertech Logistics Ltd

Receiver

Remuneration – Costs of receivership – Whether receiver entitled to be paid more than 5% of gross amount of monies received – Whether obliged to account for expenses incurred – Costs of enforcing security – Costs paid out in settlement of proceedings against bank – Whether bank entitled to recover monies against company – *Cotterell v Stratton* (1872) 8 Ch App 295; *Re Baldwin's Estate* [1900] 1 IR 15; *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26; *Gomba Holdings UK Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171 and *In re City Car Sales Ltd* [1995] 1 ILRM 221 followed; *Mirror Group Newspapers plc v Maxwell* [1998] BCLC 638 considered - Conveyancing Act 1881 (44 & 45 Vict, c 41), ss 19, 21, 22, 23, 24(6) and (8) – Companies Act 1963 (No 33), ss 285, 316 and 318 - Directions given to receiver (2005/292COS – Laffoy J – 20/10/2006) [2006] IEHC 328
In re Red Sail Frozen Foods Ltd

Library Acquisition

Reece Thomas, Katherine
The law and practice of shareholders' agreements
2nd ed
London: LexisNexis Butterworths, 2007
N263

COMPETITION LAW

Articles

Gallagher, Paul
A response to the Competition Authority's recommendation that the sole trader rule be abolished
12(4) 2007 BR 134
McCarthy, Alan
Don't look or don't use dilemma? A comparative study of legal professional privilege under European and Irish competition law
2006 IJEL 119

CONSTITUTIONAL LAW

Family

Marriage – Judicial separation – Divorce – Personal rights – Maintenance – Statute providing for grant of decree of judicial separation where no fault applicable to either spouse – Whether failure by State to safeguard institution of marriage – Whether failure to safeguard family – Property rights – Whether unjust attack on property rights –Whether personal rights unlimited – Whether court's power to order maintenance appropriate and proportionate – "Proper provision" – Parallels between provisions relating to financial relief under Act of 1989 and Act of 1986 – Statute – Validity – Constitutionality on statute's face – Whether unconstitutionality on statute's face could be contended where statute previously found constitutional – Presumption of constitutionality - *TF v Ireland* [1995] I IR 321; *N v K* [1985] IR 753 and *DT v CT* [2002] 3 IR 334 applied - Judicial Separation and Family Reform Act 1989 (No 6), ss 2(1)(f), 3(1), – Family Law (Maintenance of Spouses and Children) Act 1976 (No11), s 5(1)(a) – Family Law (Divorce) Act 1996 (No33), ss 5, 12 to 21 – Constitution of Ireland 1937, Articles 34, 40.3 and 43 – Plaintiff's claim dismissed (2004/19745P – MacMenamin J – 7/7/2006) [2006] IEHC 275
B (L.) v Ireland

Personal rights

Liberty – *Habeas corpus* – Detention – Attachment and committal – Penal endorsement – Warrant not reflecting intention or order of court – Absence of penal endorsement on copy court order – Constitution of Ireland, Article 40.4 – Consolidated Circuit Court Rules 2001 (SI 510/2001), O 36, r 25 – Release of applicant ordered (2006/850SS - Peart J – 19/7/3006) [2006] IEHC 236
O'G (J) v Governor of Cork Prison

Personal rights

Locus standi– Implied right to conclusion of legal proceedings with reasonable expedition – Whether plaintiff having *locus standi* to raise constitutional issue – Bankruptcy – Plaintiff adjudicated bankrupt – Whether statutory requirement that payment of plaintiff's expenses and preferential debts constitutes live issue of prejudice to his interest – Whether plaintiff able to assert that his interest adversely affected by statutory requirement to discharge expenses and preferential payments as precondition to being discharged from bankruptcy – Bankruptcy Act 1988 (No 27), s 85(4) – Bunreacht na hÉireann, Article 40.3 – *Cahill v Sutton* [1980] IR 269 applied – Claim dismissed (2004/19638P – Laffoy J – 7/3/2007) [2007] IEHC 90
Grace v Ireland

Personal rights

Right to privacy – Right to privacy in family home – Action for damages for breach of constitutional right – Whether breach of constitutional rights – Whether breach justified – *Kennedy v Ireland* [1987] 1 IR587 followed; *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 DLR (4th) 697 considered – Constitution of Ireland 1937, Article 40.3 – Plaintiff awarded damages (2001/131P – Quirke J – 17/2/2007) 2007] IEHC 52
Gray v Minister for Justice

Statute

Validity –Fair procedures – Right to maintain effective defence - Provisions providing for breath testing on suspicion of drunken driving – Absence of opportunity of independent testing – Whether disproportionate interference with fair procedures – *Heaney v Ireland* [1994] 3 IR 593 followed; *DK v Crowley* [2002] 2 IR 744 distinguished - Road Traffic Act 1994 (No 7), ss 13(1), 17 and 21(1) – Constitution of Ireland 1937, Articles 38.1 and 40.3 – Plaintiffs' appeal dismissed (462, 463 & 469/2004 – SC – 28/11/2006) [2006} IESC 64
McGonnell v Attorney General

Articles

Bastarache, Mr Justice, Michel
Two official languages - the Canadian experience
2007 (12) 3 BR 109

Furlong, John
Ireland - the name of the state
2007 ILTR 161

CONSUMER LAW

Article

Slattery, Robbie
Consumer protection bill, 2007
2007 14 (5) CLP 95

CONTRACT

Covenants

Covenant to repair – Lease – Factory floor – Ground heave – Whether lessee was obliged to improve premises beyond state of repair upon demise – Whether occurrence of ground heave imposed liability on lessee under covenant – *Lister v Lane* [1893] 2 QB 212, *Whelan v. Madigan* [1978] ILRM 136, *Chaloner v Broughton* (1865) 11 Ir Jur 112 and *Sotheby v Grundy* [1974] 2 All ER 761 considered – Claim dismissed (1996/6285/P – Ó Néill J – 13/7/2007) [2007] IEHC 95
Údarás na Gaeltachta v Uisce Glan Teoranta

Rescission

Period allowed by rescinding party to reach agreement on terms of rescinded contract – Whether party can rely on rescission if period elapses without agreement – Plaintiff granted declaration (2005/3000P – Laffoy J – 21/12/2006) [2006] IEHC 417
Courtney v McCarthy

Terms

Accord and satisfaction - Duress - Agreement to carry out work – Price not agreed – Different views as to price – Compromised figure reached – Whether plaintiff entitled to amount he claimed he was due – Whether pressure of having to pay wages could constitute duress – *D & C Builders Ltd v Rees* [1965] 2 QB 617 distinguished – Action dismissed and judgment given on counterclaim (2001/247S – Ó Néill J – 13/3/2007) [2007] IEHC 130
Rogers v Iaralco Ltd

Articles

Munnelly, Micheál
Recent developments in construction law: the newly published contracts for publicly funded construction works.
2007 (12) 3 BR 119

Ormond, Brian
Rescission of contracts
(2007) 2 (1) IBLQ 27

COPYRIGHT

Article

Langwallner, David
Originality in copyright law after Feist and CCH Canadian
(2007) 2 (1) IBLQ 16

COSTS

Article

Keating, Albert
The award of costs in probate and administration actions
2007 ILTR 145

COURTS

Jurisdiction

Court of Criminal Appeal – Criminal appeal – Fresh evidence – Application for leave to adduce fresh evidence on appeal – Principles applicable to whether such fresh evidence should be admitted – Tactical decision made by counsel not to call evidence – Whether such decision precludes fresh evidence being adduced at appeal – Application refused (240/2003 – CCA – 27/4/2006) [2006] IECCA 54
People (DPP) v O'Regan

CRIMINAL LAW

Bail

Appeal from conviction of District Court – Conviction recorded but sentence not determined – Applicant refused recognisances – Power to remand in custody after conviction but before sentencing – Whether entitlement to appeal dependent on imposition of sentence – District Court Rules (SI 93/1997), O 101, r 9 – *Deaton v Attorney General* [1963] IR 170 and *Darby v Anderson* [2002] 4 IR 481 considered – Relief granted (2006/927JR - Charleton J – 16/4/2007) [2007] IEHC 121
Burke v DPP

Delay

Complainant delay – Dominion – Right to trial with reasonable expedition –Sexual offence against minor - Whether applicant in position of dominion over complainant – Whether by reason of delay in making complaint applicant has suffered real risk that he will face unfair trial such that trial in respect of alleged offences should be prohibited – Prosecutorial delay – Whether due to applicant's own actions – Whether such as to render fair trial impossible – Constitution of Ireland 1937, Article 38.1 – *PC v DPP* [1999] 2 IR 25 applied – Relief refused (2005/428JR – Dunne J – 28/7/2006) [2006] IEHC 264
M(C) v DPP

Delay

Complainant delay – Right to trial with reasonable expedition –Whether reasonable in all circumstances – Whether satisfactorily explained – Post-complaint delay – Whether such as to render fair trial impossible in light of pre-complaint delay – Application to restrain further prosecution of applicant – Constitution of Ireland 1937, Article 38.1 – *PC v DPP* 1999] 2 IR 25, *PP v DPP* [2000] 1 IR 403 and *T S v DPP* [2005] IESC 25, [2005] 2 IR 595 applied – Relief granted (2005/13JR – Dunne J – 21/3/2007) [2007] IEHC 422
T (P) v DPP

Delay

Prosecutorial delay –Right to fair trial – Right to trial with due expedition – Right to due process – Delay in executing bench warrants – Whether delay inordinate – Whether prejudice to accused – Whether material more than mere delay before court – Balancing of interests – *PM v DPP* [2006] IESC 22, [2006] 2 ILRM 361 and *PM v Malone* [2002] 2 IR 560 applied – Prohibition refused (2006/835JR – Feeney J – 27/7/2006) [2007] IEHC 122
Cormack v DPP

Delay

Prosecutorial delay – Right to expeditious trial - Accused brought to trial two and half years after date of alleged offence – Applicant responsible for majority of delays – Whether applicant discharging onus of proving that breach of constitutional right to expeditious trial – Constitution of Ireland, Article 38.1 – Relief refused (2006/757JR – Ó Néill J - 19/2/2007) [2007] IEHC 94
Murphy v DPP

Delay

Prosecutorial delay – Right to fair trial – Right to trial with due expedition – Right to due process – Delay of almost four years since date of alleged offences – Assault and public order offences - Whether delay excessive and inexcusable – Prohibition granted (2006/877JR – McGovern J – 13/3/2007) [2007] IEHC 88
Flaherty v DPP

Delay

Prosecutorial delay – Right to fair trial – Right to trial with due expedition – Right to due process – Delay of almost four years since date of alleged offences – Assault and public order offences – Whether delay excessive and inexcusable – Prohibition granted (2006/781JR – McGovern J – 13/3/2007) [2007] IEHC 87
Healy v DPP

Delay

Prosecutorial delay – Right to fair trial – Right to trial with due expedition – Right to due process – Delay of over 2 years in preferring charges – Whether culpable in respect of delay by United Kingdom authorities in extraditing applicant – Whether delay excessive and inexcusable – Whether preparation of charges a complex matter - *BF v DPP* [2001] 1 IR 656 applied – Prohibition and injunction restraining prosecution granted (2002/604JR – White J – 28/7/2006) [2007] IEHC 99
Grogan v Judges of the Circuit Criminal Court

Delay

Sexual offence – Fair procedures – Witnesses – Applicant accused of sexual offences – Complainant sole witness – Blackmail of accused by complainant – Application to restrain further prosecution – Whether further prosecution should be restrained – Applicant's appeal allowed (39/2003 – SC – 30/1/2007) [2007] IESC 4
G (M) v DPP

Detention

Drunken driving – Whether constitutional rights protected – Duration of period in custody prior to attendance of doctor to take sample – Whether there was sufficient evidence before respondent to enable him to decide that there was no culpable delay –

People (DPP) v Madden, People (DPP) v McNiece [2003] 2 IR 614 and *DPP v Finn* [2003] 1 IR 372 applied; *DPP v O'Connor* [2005] IEHC 422 (Unrep, Quirke J, 14/12/2005) and *The State (Daly) v Ruane* [1998] ILRM 117 followed – Relief refused (2006/611JR – Charleton J – 15/3/2007) [2007] IEHC 83
O'Neill v Judge McCartan

Detention

Interview – Memorandum of interview – Whether accused should have been given opportunity to put his case in interview – Use of profane language – Whether everything said in interview had to be written down – CCTV recordings – Whether gardaí obliged to keep recordings – Whether matters raised were matters of evidence or could be subject of judicial review – Whether real and serious risk of fair trial – *DC v DPP* [2005] IESC 77, [2005] 4 IR 281, *Z v DPP* [1994] 2 IR 476, *Bowes v DPP* [2003] 2 IR 25, *Dunne v DPP* [2002] 2 IR 305 and *Mitchell v DPP* [2002] 2 IR 396 applied – Prohibition refused (2005/556JR – Charleton J – 17/4/2007) [2007] IEHC 123
McCormack v Judge of the Circuit Court

Evidence

Admissibility – Blood samples –Informed consent – Procured by unlawful means – Court's discretion to exclude – Relevant factors to consider – Trial judge's charge to jury – Whether gardai[7] considered applicant suspect when blood sample was taken – Whether blood samples obtained by way of trick – Whether there was evidence that consent was not informed – Whether trial judge obliged to exclude blood samples – Whether errors in trial judge's charge to jury capable of remedy by way of recharge – Leave to appeal refused (8/2005 – CCA – 28/4/2006) [2006] IECCA 57
People (DPP) v Costigan

Evidence

Duty to seek out and preserve potentially relevant evidence – Motor vehicle destroyed – Fair procedures – Prosecution not relying on evidence of defect in vehicle – Whether real and substantial risk of unfair trial – *Z v DPP* [1994] 2 IR 476, *D v DPP* [1994] 1 ILRM 435, *Braddish v DPP* [2001] 127 and *McFarlane v DPP* [2006] IESC 11, (Unrep, SC, 7/3/2006) applied – Prohibition refused (2006/613/JR – McGovern J – 20/4/2007) [2007] IEHC 124
Perry v Judges of the Circuit Court

Evidence

Duty to seek out and preserve potentially relevant evidence – CCTV footage - Whether evidence of such probative value such that its absence would hinder fair defence of charge – Whether application made promptly – Exercise of discretion by the courts to enlarge time for bringing proceedings – Whether discretion should be exercised in applicant's favour – Relief refused (2006/242JR – Ó Néill J - 19/2/2007) [2007] IEHC 75
Harte v DPP

Evidence

Duty to seek out and preserve potentially relevant evidence – Video evidence – Camera over night club – Fair procedures – Prosecution not relying on evidence of defect in vehicle – Whether real and substantial risk of unfair trial – Whether applicant had established something more than mere theoretical possibility that there was relevant video evidence – *Z v DPP* [1994] 2 IR 476, *D v DPP* [1994] 1 ILRM 435, *Braddish v DPP* [2001] 127, *McFarlane v DPP* [2006] IESC 11, (Unrep, SC, 7/3/2006) and *Scully v DPP* [2005] 1 IR 242 applied – Prohibition refused (2004/393/JR – McGovern J – 20/4/2007) [2007] IEHC 125
Morgan v DPP

Evidence

Forensic samples – Extension of time to retain samples – Right to bodily integrity – Right of People to have offences prosecuted – Discretion – Prejudice – Exceptional circumstances – Whether the first respondent acted judicially – Whether extension of time to retain samples reasonable – *Byrne v Grey* [1988] IR 31 applied - Criminal Justice (Forensic Evidence) Act 1990 (No 34), ss 2 and 4 – Claim dismissed (2006/373JR – Peart J – 15/11/2006) [2006] IEHC 357
McGinley v Judge Michael Reilly

Extradition

European arrest warrant – Bail – Refusal – Filing of notice of appeal – Whether solicitor's undertaking could be given – Whether court precluded from granting bail – Whether court could override statutory provision by virtue of original and inherent jurisdiction – Sui generis nature of process – Obligation on court to engage in process – Obligation of judicial authority to ensure surrender – Statutory interpretation – Safeguards and time limits – Proportionality of legislative provision – European Arrest Warrant Act 2003 (No 45), ss 16(4) and (12) – Council Framework Decision 2002/584/JHA, preamble and arts 1, 6, 12, 15 and 17 - Bail refused (2006/3Ext – Peart J – 24/11/2006) [2006] IEHC 410
Minister for Justice v Draisey

Extradition

European arrest warrant - Constitutionality – Surrender – Order for surrender – Right to liberty – Requirement that person in respect of whom order for surrender made had to be committed to prison, without possibility of bail – Whether legislation constitutional – Whether measure proportionate – Whether legislation differed from that approved by Oireachtas – Whether changes in text gave rise to changes in substance – *State (Gilliland) v Governor Mountjoy* Prison [1987] IR 201, *TD v Minister for Education* [2001] 4 IR 259 and *Curtin v Dáil Éireann* [2006] 1 ILRM 99 considered – European Arrest Warrant Act 2003 (No 45), s 16 – Council Framework Decision (2002/584/JHA) – Constitution of Ireland, Article 29.4 – Order for surrender made and constitutional action dismissed (2006/112EXT, 2006/5448P – Peart J – 24/4/2007) [2007] IEHC 133
Minister for Justice v Iqbal

Extradition

European arrest warrant - Constitutionality – Surrender – Order for surrender – Right to liberty – Right to bodily integrity – Right to life – Natural and constitutional justice – Fair procedures – Corruption – Requirement that person in respect of whom order for surrender made had to be committed to prison, without possibility of bail – Whether legislation constitutional – Whether measure proportionate – Whether respondents' safety and lives would be endangered if they were returned – Whether respondents would get fair trial if returned – Issue of warrant – Whether warrant duly issued – Rule of speciality – Whether surrender would breach rule of speciality – Whether legislation differed from that approved by Oireachtas – Whether changes in text gave rise to changes in substance – *Minister for Justice v Iqbal* [2007] IEHC 133 (Unrep, Peart J, 24/4/2007), *Minister for Justice v Draisey* [2006] IEHC 375 (Unrep, Peart J, 24/11/2006) and *Minister for Justice v Butenas* [2006] IEHC 378 (Unrep, Peart J, 24/11/2006) followed – European Arrest Warrant Act 2003 (No 45)– Orders for surrender made and constitutional challenges dismissed (2006/78EXT, 2006/79EXT, 2006/6123P, 2006/6121P – Peart J – 24/4/2007) [2007] IEHC 132
Minister for Justice v Sulej

Extradition

European arrest warrant – Correspondence of offence – Whether offence for which respondent convicted corresponds to offence known to Irish law – Trial – Applicant seeking to restrain surrender on ground that he was not given guarantee that opportunity of re-trial available after surrender – Whether guarantee of availability of re-trial in form of appeal sufficient to comply with statutory guarantee – Presumption of fair trial – Whether potential lengthy delay in surrender

of respondent breaching guarantee of right to trial with reasonable expedition – Whether order for surrender should be made – European Arrest Warrant Act 2003 (No 45), s 45 – Order for surrender of applicant to requesting state (2006/54EXT – Peart J – 20/2/2007) [2007] IEHC 78
Minister for Justice v Machevicius

Extradition

European arrest warrant – Surrender to issuing state – Surrender post conviction – Meaning of "fled" – Whether European arrest warrant procedure appropriate where conviction predated requesting state's accession to European Union – Whether European arrest warrant procedure appropriate where conviction predated designation of state by Minister for Foreign Affairs – Whether offence specified corresponded to offence under law of State – Whether retrospective effect of European Arrest Warrant Act breached respondent's constitutional rights – Whether trial in absentia in requesting state breached respondent's constitutional rights – European Arrest Warrant Act 2003 (Designated Member States) (No 3) Order 2004 (SI 206/2004) – Extradition Act 1965 (No 17), s 10 – European Arrest Warrant Act 2003 (No 45), ss 3, 4, 5, 10, 16 and 38 – Constitution of Ireland 1937, Articles 38 and 40.3 – Council Framework Decision 2002/584/JHA – European Convention on Human Rights, article 6 – Surrender refused, release ordered (2005/69Ext – Peart J – 12/1/2007) [2007] IEHC 15
Minister for Justice v Tobin

Extradition

European arrest warrant – Trial – Applicant seeking to restrain surrender on ground that he was not given guarantee that opportunity of re-trial available after surrender – Presumption of fair trial – Whether order for surrender should be made – European Arrest Warrant Act 2003 (No 45), s 45 – *Lawlor v Hogan* [1993] ILRM 606 distinguished; *R v Jones* [2003] 1 AC 1 applied – Order for surrender of applicant to requesting state (2006/54EXT – Peart J – 20/2/2007) [2007] IEHC 25
Minister for Justice v R(J)

Extradition

Transitional provisions – Whether Extradition Act 1965 or European Arrest Warrant Act 2003 applied – Whether finding of law in Article 40 inquiry gave rise to issue estoppel in extradition proceedings – Inquisitorial nature of extradition application – Issue estoppel – *Res judicata* – Abuse of process – *AG v Klier* [2005] IEHC 254, [2005] 3 IR 447, *AG v Parke* [2004] IESC 100 (Unrep, SC, 6/12/2004), *AA v Medical Council* [2003] 4 IR 302, *Application of Woods* [1970] IR 154, *Henderson v Henderson* (1843) 3 Hare 100 and *Lynch v Moran* [2006] IESC 31, [2006] 2 ILRM 447 considered - Extradition Act 1965 (No 17), s 29 – European Arrest Warrant Act 2003 (No 45) – Constitution of Ireland, 1937, Article 40 – Respondent committed pending surrender under 1965 Act (2006/47EXT – MacMenamin J – 1/11/2006) [2006] IEHC 325
Attorney General v Abinbola

Murder

Defence – Self defence – Manslaughter – Direction to jury – Whether trial judge prohibited from directing jury to enter verdict of guilty – Whether issue of self defence to be left to jury – Whether limited form of self defence could be put to jury – Whether trial judge could direct jury to consider force used by applicant to be objectively reasonable – Whether amount of force objectively reasonable matter of fact for jury to determine – *People (AG) v Dwyer* [1972] 1 IR 416, *People (DPP) v Davis* [1993] 2 IR 1, *People (DPP) v O'Shea* [1982] IR 384, *R v Wang* [2005] 1 WLR 661, *Woolmington v DPP* [1935] AC 462, *Joshua v The Queen* [1955] AC 121, *Chandler v DPP* [1964] AC 763 and *DPP v Stonehouse* [1978] AC 55 followed -
Appeal allowed, retrial order (244/2005 – CCA – 12/10/2006) [2006] IECCA 128
People (DPP) v Nally

Murder

Defence – Self defence – Reasonable force – Burglar convicted of murder of householder – Burglar raising defence of self defence – Force which may be used by burglar in self defence – Permissable responses to burglary – Force which may be used by householder to repel burglar – Whether householder may kill burglar – Nature of offence of burglary – Whether burlary is act of aggression when premises unoccupied or appearing to be unoccupied – *Semayne's case* (1828) 1 Lewin 184 and *Meads and Belts case* (1604) 5 Co Rep 91a considered - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 12 – Non–Fatal Offences against the Person Act 1997 (No 26), s 18 – Constitution of Ireland 1937, Articles 40.3.1° and 40.3.2° - leave to appeal refused (55/2005 – CCA – 21/12/20060 [2006] IECCA 165
People (DPP) v Barnes

Offence

Summary prosecution – Breach of peace – Whether "breach of peace" contrary to common law an offence known to law – Whether offence of breach of peace could be prosecuted in District Court– Whether breach of peace capable of taking place on private premises – Whether common law power of arrest for breach of the peace abolished by Criminal Justice (Public Order) Act 1994 (No 2) - *AG v Cunningham* [1932] IR 28; *Kelly v O'Sullivan* (1990) 9 ILTR 126 and *McConnell v Chief Constable* [1990] 1 WLR 364 followed – Case stated answered in favour of DPP (2005/1174SS – Murphy J - 17/2/06) [2006] IEHC 319
DPP v Thorpe

Offence

Summary prosecution – Trial on indictment – Minor offence – Offences capable of being tried summarily or on indictment – Test for determining whether offence minor – Duty of District Court Judge to insure non-minor offences tried by jury – Whether District Court judge can reverse previous acceptance of jurisdiction – *The State (McEvitt) v Delap* [1981] IR 125, *The State (Holland) v Kennedy* [1977] IR 193, *The State (Rollinson) v Kelly* [1984] IR 248 and *Melling v Ó Mathghamhna* [1962] IR 1 applied; *The State (O'Hagan) v Delap* [1982] IR 213 and *The State (McDonagh) v Ó hUadhaigh* (Unrep, McMahon J, 9/3/1979) followed - Criminal Justice Act 1951 (No 2), s 2(2) – Criminal Justice (Miscellaneous Provisions) Act 1997 (No 4), s 8 – Non-Fatal Offences Against the Person Act 1997 (No 26), ss 3 and 15 – Constitution of Ireland 1937, Article 38 – Relief refused (2006/208JR – Charleton J – 26/2/2007) [2007] IEHC 44
Reade v Judge Michael Reilly

Procedure

Prosecution of offences – Whether formal complaint necessary precondition to summary prosecution – Case stated – European Convention on Human Rights – Bunreacht na hÉireann, Article 30.3 – *The People (DPP) v Kelleher* [1998] 2 IR 417 and *X v The Netherlands* (ECHR, 26/3/1985) considered – High Court answered that the validity of prosecution did not depend upon prior existence of complaint (2006/1637SS – Charleton J – 14/3/2007) [2007] IEHC 92
DPP (Quigley) v Monaghan

Proceeds of crime

Finality of proceedings – Receiver – Whether court correctly treated application for s. 3 order as interlocutory in nature – Whether defendants' rights to natural and constitutional justice breached – Whether *audi alteram partem* rights breached – Whether defendant permitted to argue point on appeal not advanced at trial – Whether refusal of discovery made in proper exercise of jurisdiction of court – Appointment of receiver – Whether appointment invalid – Whether any equitable reason for

appointment of receiver – Whether evidence adduced sufficient to justify appointment – *Murphy v GM* [2001] 4 IR 113 followed and *F McK v. FC* [2001] 4 IR 521 distinguished - Proceeds of Crime Act 1996 (No 30), ss 3, 7 and 8 – Defendants' appeal dismissed (343/2002 & 97, 245 & 405/2003 – SC – 26/11/2006) [2006] IESC 63
McK (F) v H(T)

Road traffic offences

Drunken driving – Breath testing – Constitutionality of legislation – Absence of opportunity of independent testing – Whether provisions disproportionately infringe guarantee of fair procedures - *Whelan v Kirby* [2004] IESC 17, [2005] 2 IR 30 and *The Employment Equality Bill, 1996* [1997] 2 IR 321 followed – Road Traffic Act 1961 (No 24), s 49 – Road Traffic Act 1994 (No 7), ss 13(1), 17 and 21(1) – Road Traffic Act 2002 (No 12), s 23(1) – Road Traffic Act 2003 (No 37), s 3 – Constitution of Ireland 1937, Article 38.1 and 40.3 - Plaintiffs' appeal dismissed (462, 463 & 469/2004 – SC – 28/11/2006) [2006} IESC 64
McGonnell v Attorney General

Sentencing

Appeal – Whether sentence excessive – Possession of drugs worth in excess of €13,000 – Mandatory minimum sentence – Seven years imprisonment imposed – Whether exceptional circumstances existed – Whether early guilty plea exceptional – Misuse of Drugs Act 1977 (No 12), ss 15A and 27(3B) and (3C) – Criminal Justice Act 1999 (No 10), s 5 – Leave to appeal refused (180/2005 – CCA – 21/12/2006) [2006] IECCA 164
People (DPP) v Dermody

Sentencing

Fair procedures – Fettering judicial descretion – Fixed policy – Judge limiting sentencing options – Objective bias – Fundamental breach of justice in the course of sentencing – *People (DPP) v M* [1994] 3 IR 306, *People (DPP) v Stephen Kelly* [2004] IECCA 14 [2005] 2 IR 321 and *People (DPP) v McCormack* [2000] 4 IR 356 followed; *Orange Communications Ltd v Director of Telecommunications (No 2)* [2000] 4 IR 159 considered; *People (DPP) v WC* [1994] 1 ILRM 321 applied - *Certiorari* granted, matter remitted for rehearing (2005/687JR _ MacMenamin J – 23/1/2006) [2006] IEHC 304
Pudliszewski v Judge Coughlan

Sentencing

Probation bond – Bond expired - Whether Circuit Court having jurisdiction to impose or reactivate suspended sentence on applicant outside period of suspension – Whether sentence can be reactivated outside period of bond – Whether applicant entitled to order prohibiting imposition by Circuit Court of suspended sentence outside period of suspension – *DPP v Traynor* [2005] IEHC 295 (Unrep, Murphy J, 27/7/2005) distinguished – Relief granted (2006/465JR – Dunne J – 5/3/2007) [2007] IEHC 50
McManus v O'Sullivan

Sexual offences

Evidence – Previous sexual history – Re-trial – Evidence revealed at sentencing stage following first conviction – Victim impact report – Application for leave to cross-examine – Statutory test for ruling on application – Impression conveyed by medical evidence – Corroboration – Whether sexual history evidence could have materially affected jury's deliberations – Whether jury would have been satisfied beyond reasonable doubt of guilt of applicant – Criminal Law (Rape) Act 1981 (No 10), ss 1 and 3 – Criminal Law (Rape) (Amendment) Act 1990 (No 32), ss 12 and 13 – Conviction quashed, no retrial ordered (76/2005 – CCA 5/7/2006) [2006] IECCA 99
People (DPP) v K(G)

Articles

Carney, The Hon Mr Justice, Paul
The role of the victim in the Irish criminal justice process
(2007) 1 JSIJ 7

Culley, Alexander Conrad
The third EU money laundering directive: a banker's tight
2006 IJEL 161

Deane, Joan
Balancing the scales in a homicide trial
(2007) 1 JSIJ 18

Griffin, Diarmuid
The Irish briber abroad - the bribery of foreign public officials in international business transactions
2007 14 (6) CLP 115

O'Gara, Deirdre
Protecting young girls from themselves: mistake as to age in Ireland
(1800s - 2006)
2007 ILTR 176

Spencer, Keith
Self defence and defence of the home
2007 17 (2) ICLJ 17

Walsh, Dermot
The Criminal Justice Act 2006: a crushing defeat for due process values?
(2007) 1 JSIJ 44

Library Acquisition

McGillicuddy, Tony
Guidance paper for criminal justice legislation 2006-2007
Dublin: Tony McGillicuddy, 2007
Criminal law and procedure: Ireland
M500.C5

Statutory Instruments

Criminal justice (terrorist offences) act 2005 (section 42(2)) (counter terrorism) (financial sanctions) regulations 2007
REG/2580-2001
SI 410/2007

Criminal justice (terrorist offences) act 2005 (section 42(6)) (counter terrorism) (financial sanctions) regulations 2007
REG/2580-20001
SI 411/2007

District Court (summonses) rules 2007
SI 418/2007

District court (community service) rules 2007
SI 313/2007

District Court (criminal justice act 2006, part 11) rules 2007
SI 314/2007

DAMAGES

Library Acquisition

School of Law, Trinity College
Shortt v Commissioner of an Garda Siochana, Ireland and the Attorney General: implications for legal practitioners
Dublin: Trinity College, 2007
N37.1.C5

EASEMENTS

Right of way

Creation of public right of way – Whether right of way public or otherwise existed – Whether evidence of dedication by landowner and acceptance by public – Whether expenditure of public monies evidence of dedication to public use – Alteration to original right of way – User by members of public – User as local convenience – Whether right of way commenced and terminated at public place – Plaintiff's appeal allowed (2006/24CA – O'Leary J – 19/6/2006) [2006] IEHC 205
Collen v Petters

Library Acquisition

Bickford-Smith, Stephen

Rights of light
2nd ed
Bristol: Jordan Publishing, 2007
N65.11

ELECTRICITY

Statutory Instruments

Electricity regulation act 1999 (single electricity market) regulations
2007
SI 406/2007

Electricity regulation (amendment) (single electricity market) act 2007 (commencement of certain provisions) order 2007
SI 287/2007

EMPLOYMENT

Conditions of employment

Fixed term employee – Civil service – Tenure – Comparator – Whether appropriate comparator – Whether defendant entitled to rely on established civil servant as comparator – Whether defendant acquiring security of tenure enjoyed by her chosen comparator – Whether defendant entitled to same conditions of employment as comparator – Entitlement to participate in competition for vacancies – Whether defendant treated less favourably than comparator – Appeal on point of law from Labour Court – Protection of Employees (Fixed Term Work) Act 2003 (No 29), ss 5, 6, 7, 9 and 10 – *Murgitroyd & Co Ltd v Purdy* [2005] IEHC 159 distinguished – Order finding that labour court did not err in law (2006/163SP – Laffoy J – 22/3/2007) [2007] IEHC 98
Minister for Finance v McArdle

Contract

Illegality – Defrauding Revenue Commissioners – Failure to deduct PAYE and PRSI – Subrogated claim to recover payments – Whether Minister for Trade, Enterprise and Employment entitled to recover sums paid to employees – Whether debarred by illegality – Whether employees actively participated in illegality – *Holman v Johnson* (1775) 1 Cowp 341; *Tinsley v Milligan* [1994] 1 AC 340 and *Hall v Woolston Hall Leisure Ltd* [2001] 1 WLR 225 followed; *Napier v National Business Agency Ltd* [1951] 2 All ER 264 and *Hayden v Sean Quinn Properties Ltd* [1994] ELR 45 distinguished - Minimum Notice and Terms of Employment Act 1973 (No 4), ss 12 and 13 – Unfair Dismissals Act 1977 (No 10), s 8(11) – Protection of Employees (Employers' Insolvency) Act 1984 (No 21), ss 6(2) and 10 – Unfair Dismissals (Amendment) Act 1993 (No 22), s 7(d) – Equal Treatment Directive (76/207/EC) – Directions given to receiver (2005/292COS – Laffoy J – 20/10/2006) [2006] IEHC 328
In re Red Sail Frozen Foods Ltd

Contract

Implied term – Claim for damages – Measure of plaintiff's loss while she remained an employee of the defendant – Whether early termination of plaintiff's secondment and subsequent deprivation of opportunity to earn commission constituted breach of contract – Whether contractual term of mutual trust implied into contract of employment – Whether employer obliged to provide plaintiff with work in addition to obligation to pay salary — Whether damages recoverable for loss of opportunity to gain experience, pursue promotion and advance career caused by employer's failure to provide plaintiff with work - *Turner v Goldsmith* [1891] 1 QB 544 and *Rhodes v Forwood* (1876) 1 App CAS 256 considered; *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20 approved – Plaintiff awarded damages (2002/6893P – Laffoy J – 25/10/2006) [2006] IEHC 380
Cronin v Eircom Ltd

Dismissal

University – Tenure of officers – Statutory interpretation – Fair procedures – *Audi alteram partem* – Extent of obligation – *Fanning v University College Cork* [2005] IEHC 264 (Unrep, Gilligan J, 24/6/2005) distinguished - Universities Act 1997 (No 24), s 25 - Relief granted (2006/3378P – Clarke J – 9/2/2007) [2007] IEHC 20
Cahill v Dublin City University

Labour Court

Appeal – Rates of Pay – Comparators – Whether Labour Court erred in law – Whether correct criteria used by Labour Court – *ESB v Minister for Social Community and Family Affairs* [2006] IEHC 59, (Unrep, Gilligan J, 26/2/2006) considered; *Bates v Model Bakery Ltd* [1993] 1 IR 359 applied - Industrial Relations (Amendment) Act 2001 (No 11), ss 2, 5, 6, 9, 10 and 11 – Industrial Relations (Miscellaneous Provisions) Act 2004 (No 4), s 2 – Appeal dismissed (2005/56SP – Clarke J – 21/6/2006) [2006] IEHC 201
Ashford Castle Ltd v SIPTU

Articles

Callanan, Emma
Mutual trust and confidence in the workplace - a concept or an obligation?
2007 4 ELR 9

Codd, Pauline
Bullying in the workplace and the interlocutory injunction: protections available to "niche employees"
2007 4 ELR 7

Curran, John
Transfer of undertakings and changing sub-contractors - does the directive apply?
(2007) 1 IELJ 15

Ennis, Kiwana
An examination of the law on restraint of trade and discretionary bonus schemes in the light of Finnegan v J & E Davy
(2007) 1 IELJ 9

O'Sullivan, Stephen
The employment injunction revisited and the Ryanair case on industrial relations
(2007) 2 (1) IBLQ 1

Ryan, Ray
Vicarious liability of employers - emerging themes and trends and their potential implications for Irish law
(2007) 1 IELJ 3

Twomey, Shane
Improving employee consultation or a fig leaf for partnership?
2007 4 ELR 2

Library Acquisition

Eardly, John
Annual review of employment law 2006
Dublin: First Law, 2007
N192.C5

Statutory Instruments

Employment regulation order (catering joint labour committee (for areas other than the areas known, until 1st January, 1994, as the County Borough of Dublin and the Borough of Dun Laoghaire), 2007
SI 296/2007

Employment regulation order (contract cleaning (excluding the City and County of Dublin) joint labour committee), 2007
SI 310/2007

Employment regulation order (control cleaning (City and County of Dublin) joint labour committee), 2007
SI 311/2007

Safety, health and welfare at work act 2005 (repeals) (commencement) order
2007
SI 300/2007

Safety, health and welfare at work (general

application) regulations 2007
SI 299/2007

EUROPEAN UNION

Articles

Cahill, Dermot
External relations of the EU and the member states: competence, mixed agreements, international responsibility and effects of international law Ireland national report
2006 IJEL 143

Culley, Alexander Conrad
The third EU money laundering directive: a banker's tight
2006 IJEL 161

Dimas, Stavros
Climate change: the reality, the risks and the response
2006 IJEL 5

Fennelly, Mr Justice, Nial
Preliminary reference procedure: a factual and legal review
2006 IJEL 55

Griffin, Patrick B
Competing social models and the single market in services: has Frankenstein done for his maker?
2006 IJEL 13

Quinn, Andrew
Direct tax rules and the EU fundamental freedoms: origin and scope of the problem; national and community responses and solutions: Ireland national report
2006 IJEL 101

Library Acquisitions

Chalmers, Damian
European Union law: text and materials
Cambridge: Cambridge University Press, 2006
W86

Fahey, Elaine
Practice and procedure in preliminary references to Europe: 30 years of art 234 EC caselaw from the Irish courts
Dublin: First Law, 2007
W93

Moss, Gabriel
The EC regulation on insolvency proceedings: a commentary and annotated guide
Oxford: Oxford University Press, 2002
W86

EQUITY

Promissory estoppel

Suspension of legal right for period of negotiation – Without prejudice negotiation – Whether party estopped from relying on legal relations before period of negotiation after negotiations fail - *Doran v Thompson Ltd* [1978] IR 223, *Webb v Ireland* [1988] IR 353 and *Ryan v Connolly* [2001] 1 IR 627 applied. *Low v Bouverie* [1891] 3 Ch 82, *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 and *Amalgamated Property Co v Texas Bank* [1982] 1 QB 84 followed - Plaintiff granted declaration (2005/3000P – Laffoy J – 21/12/2006) [2006] IEHC 417
Courtney v McCarthy

Remedy

Equitable execution – Appointment of receiver – Jurisdiction to appoint receiver by way of equitable execution – Whether receiver can be appointed by way of equitable execution over proceeds of sale of share where share not sold and no sale contemplated - Order varied (2001/7654P – Laffoy J – 27/10/2006) [2006] IEHC 326
Honniball v Cunningham

Library Acquisition

Delany, Hilary
Equity and the law of trusts in Ireland
4th ed
Dublin: Thomson Round Hall, 2007
N200.C5

EVIDENCE

Hearsay

Proceeds of crime - Admissibility of belief – Reasonableness of grounds for belief – Weight to be attached – Whether property acquired in whole or in part by proceeds of crime – Whether belief evidence sufficient to ground s. 3 order – Whether belief evidence counteracted by evidence adduced on behalf of defendant – Whether defendant in position to provide credible evidence as to provenance of property – Whether appellate court bound by findings of fact made by trial court – *Murphy v GM* [2001] 4 IR 113 approved - Proceeds of Crime Act 1996 (No 30), ss 3 and 8 - Defendants' appeal dismissed (343/2002 & 97, 245 & 405/2003 – SC – 26/11/2006) [2006] IESC 63
McK (F) v H(T)

Privilege

Solicitor and client – Legal professional privilege – Attendance docket – Inadvertent disclosure – Whether privilege lost by inadvertent disclosure of attendance docket – Whether attendance docket provided evidence of abuse of process - *Anderson v Bank of British Columbia* (1876) 2 Ch D 644; *Bolton v Liverpool Corp* (1833) 1 My & K 88; *Gallagher v Stanley* [1998] 2 1R 267; *Holmes v Baddley* (1844) 1 Ph 476; *R v Uljee* [1982] 1 NZLR 561; *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd (No 1)* [1990] IR 469; *Calcraft v Guest* [1898] 1 QB 759; *English & American Insurance Co Ltd v Smith* [1988] FSR 232; *Goddard v Nationwide* [1987] QB 670; *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027; *Lord Ashburton v Pape* [1913] 2 Ch 469; *Bula Ltd v Crowley (No 2)* [1994] 2 IR 54; *Murphy v Kirwan* [1993] 3 IR 501 and *Pizzey v Ford Motor Co Ltd* (TLR, 8/3/93) considered – held plaintiff entitled to privilege (2005/840P – Smyth J - 5/12/06) [2006] IEHC 409
Shell E & P Ltd v McGrath

Library Acquisition

Cross and Tapper on evidence
11th ed
Oxford: Oxford University Press, 2007
M600

Statutory Instrument

Criminal evidence act 1992 (section 13) (commencement) (no. 2) order 2007
SI 572/2007

EXTRADITION

Article

O'Higgins, Michael P
Pink underwear, the European arrest warrant and the law of extradition
2007 (12) 3 BR 91

FISHERIES

Statutory Instruments

Bass fishing conservation bye-law No. 826 of 2007
SI 368/2007

Bass (restriction of sale) regulations 2007
SI 367/2007

Cockle (fisheries management and conservation) regulations 2007
SI 269/2007

Cockle (fisheries management and conservation) regulations 2007
SI 270/2007

Cockle (fisheries management and conservation) (Dundalk Bay) regulations 2007

SI 532/2007
Cockle (fisheries management and conservation) (Tramore Bay) regulations 2007
SI 533/2007

Cockle (fisheries management and conservation) (Waterford Estuary) regulations 2007
SI 531/2007

Fishery harbour centre (An Daingean) order 2007
SI 233/2007

Mussel seed (conservation) (no. 3) regulations 2007
SI 415/2007

Sea-fisheries (first marketing of fish) regulations 2007
SI 260/2007

Sea fisheries (incidental catches of cetaceans in fisheries) regulations,
2007
REG/812-2004
SI 274/2007

Shannon fisheries region (angling) bye-law No. 825, 2007
[SI] Bye-Law 825/2007

FREEDOM OF INFORMATION

Article

Ryall, Aine
Access to information on the environment regulations 2007
2007 IP & ELJ 57

GARDA SÍOCHÁNA

Compensation

Claim by garda for compensation for injuries received in course of duty – Whether compensation should be calculated on same basis as other personal injury cases – Whether detrimental effect on earning power should be considered – *O'Looney v Minister for Public Service* [1986] IR 543 applied – Garda Compensation Acts 1941 to 1945 – Applicant awarded €251,957.31 (2006/124SP – de Valera J – 9/3/2007) [2006] IEHC 106
Sheridan v Minister for Defence

Disciplinary proceedings

Judicial review – Prohibition – Restriction – Sworn inquiry – Delay – Fair procedures Whether applicant failed to seek leave promptly – Whether applicant entitled to documentation in advance of sworn inquiry – Whether applicant entitled to information in relation to other gardaí convicted under statute – Whether applicant entitled to particulars of allegation – Whether allegation of wholly different character to criminal charge on which applicant acquitted – Whether disciplinary proceedings in relation to allegation which had been subject of proceedings in which *nolle prosequi* entered constituted abuse of process – Whether leave granted on ground of delay in advancing disciplinary proceedings – *McGrath v Commissioner of An Garda Síochána* [1990] ILRM 817 considered; *Atanasov v RAT* [2006] IESC 53 (Unrep, SC, 26/7/2006) distinguished – Garda Síochána (Discipline) Regulations 1989 (SI 94/1989) – Constitution of Ireland 1937, Article 38 – Prohibition granted in relation to allegation on which applicant had been acquitted (2005/233/JR – Ó Néill J – 13/3/2007) [2007] IEHC 84
Farrelly v Commissioner of An Garda Síochána

Retirement

Medically unfit for further service – Judicial review – Whether entitled to be furnished with reports and recommendations on which order based – Whether reasonable of respondent to make order based on medical certificate – Whether decision irrational – Whether applicant afforded reasonable opportunity to present her medical case – *O'Brien v Commissioner of An Garda Síochána* (Unrep, Kelly J, 19/8/1996) distinguished – Garda Síochána (Retirement) Regulations 1934 (SR&O 146/1934), reg 6 - Garda Síochána (Retirement) (Amendment) Regulations 2000 (SI 163/2000)– Relief refused (2004/422JR – McGovern J – 21/3/2007) [2007] IEHC 111
Sheridan v Commissioner of An Garda Síochána

HEALTH

Statutory Instruments

Health act 2007 (commencement) (no. 2) order 2007
SI 262/2007

Health information and quality authority (establishment day) order 2007
SI 227/2007

HOUSING

Local authority housing

Judicial review – Decision to defer allocation of accommodation – Natural justice – Fair procedures – Whether applicant afforded opportunity to address matters potentially relied upon in coming to decision – Housing (Miscellaneous Provisions) Act 1997 (No 21), ss 1, 14, 15 – *Certiorari* granted (2003/569JR – White J – 18/6/2006) [2006] IEHC 445
Ward v Galway County Council

Traveller accommodation

Halting site accommodation – Duties and obligations of housing authority – Traveller accommodation programme – *Ward v Dublin South County Council* [1996] 3 IR 195, *University of Limerick v Ryan* (Unrep, Barron J, 21/2/1991), *O'Brien v Wicklow County Council* (Unrep, Costello J, 10/6/1994), *County Meath VEC v Joyce* [1994] 2 ILRM 210 and *Mongan v South Dublin County Council* (Unrep, Barron J, 31/7/1995) followed - Housing Act 1988 (No 28), ss 2, 9 and 13 – Housing (Traveller Accommodation) Act 1998 (No 33), ss 7, 10, 16 and 29 – Relief granted (2005/787JR – MacMenamin J – 29/3/2006) [2006] IEHC 174
O'Reilly v Limerick County Council

Statutory Instrument

Affordable homes partnership (establishment) order, 2005 (amendment) order 2007
SI 293/2007

HUMAN RIGHTS

Articles

de Londras, Fiona
In the shadow of Hamdan v Rumsfeld: habeas corpus rights of Guantanamo Bay detainees
2007 17 (2) ICLJ 8

Manning, Maurice
Utopianism and hard pounding - the quest for human rights and the role of national human rights commissions
2006 IJEL 207

Library Acquisition

Emmerson, Ben
Human rights and criminal justice
2nd ed
London: Sweet & Maxwell, 2007
C200

IMMIGRATION

Asylum

Application for refugee status – Application procedure – Interview – Whether entitled to require interview to be recorded – Whether procedures comply with requirements of natural and constitutional justice – *R (Dirshe) v Secretary of State* [2005] EWCA Civ. 421, [2005] 1 WLR 2685 and *Mapah v Secretary of State for the Home Department* [2003] EWHC

306 (Admin), distinguished - Refugee Act 1996 (No 17), s 11 – Constitution of Ireland, 1937, Article 40.3 – Relief refused (2006/357JR – Feeney J – 14/11/2006) [2006] IEHC 355
H(JR) v Minister for Justice

Asylum

Judicial review - Breach of fair procedures – Whether decision at first instance subsisted after determination of appeal – Whether decision of Commissioner "merged" with decision of Tribunal on appeal – Whether determination of appeal precluded judicial review of first instance decision – Dublin Convention (Implementation) Order 2000 (SI 343/2000), arts 3, 7, 10 and 11 – Refugee Act 1996 (No 17), ss 11, 13, 16 and 17 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5- Council Regulation (EC) 343/2003, art 16 (1) (e) – Leave refused (2005/457JR – Finlay Geoghegan J – 23/2/2007) [2007] IEHC 54
A(NA) v Refugee Applications Commissioner

Deportation

Legality of detention – Contempt of court – Intention to deport – Whether continuing intention lawful pending judicial review proceedings – Immigration Act 1999 (No 22), s 5 – Constitution of Ireland 1937, Article 40.4 – Applicant's appeal dismissed (380/2005 – SC – 9/3/2006) [2006] IEHC 13
A(JO) v Minister for Justice

Deportation

New material – Whether matters presented in application to revoke deportation order must be materially different from those presented or capable of being presented in making of deportation order itself - Leave to apply for judicial review refused (2006/280JR _ MacMenamin J – 12/7/2006) [2006] IEHC 19
A(CR) v Minister for Justice

INFORMATION TECHNOLOGY

Article

Browne, Kate
Sign of the times
2007 (May) GLSI 33

INJUNCTIONS

Interlocutory injunction
Contract – Licence refused due to failure to comply with rules – Appeal to appeal board – Failure to provide report on decision as required under rules – Whether fair case made out – Whether damages adequate remedy – Whether balance of convenience favoured granting injunction – Interlocutory injunction refused (2007/359P – Clarke J – 31/1/2007) [2007] IEHC 67
JRM Sports Ltd v Football Association of Ireland

Articles

Carey, Gearoid
Worldwide mareva injunctions, protections and recent English guidance
2007 3 (1) JCP & P 2

Holland, David
Civil enforcement under waste legislation - a flexible remedy
2007 IP & ELJ 3

Kirwan, Brendan
Remedies for breach of an injunction
2007 3 (1) JCP & P 11

O'Sullivan, Stephen
The employment injunction revisited and the Ryanair case on industrial relations
(2007) 2 (1) IBLQ 1

INTELLECTUAL PROPERTY

Copyright

Reproduction of music in nightclub – Equitable remuneration payable – Interpretation of judgment and order – Motion to speak to minutes – Whether remuneration calculated using full or average admission price – Copyright Act 1963 (No 10), s 17 – Judgment given clarifying that full admission price should be used (2002/350SP – Laffoy J – 23/2/2007) [2007] IEHC 93
Carrickdale Hotel Ltd v Controller of Industrial and Commercial Property

Trade marks

Registration – Refusal to register – Appeal – Likelihood of confusion – Connection in course of trade – Present and definite intention – Inaccurate description of applicant – Test for connection in course of trade between applicant and goods to be covered – Whether retention of quality control sufficient connection in course of trade – Whether use of alpha numeric telephone number corresponding to mark to order goods sufficient connection in course of trade – *Berlei (UK) Ltd v Bali Bra Inc* [1969] 1 WLR 1306; *Smith Hayden & Co Ltd's Application* (1946) 63 RPC 97; *Bank of Ireland v Controller of Patents* (Unrep, Costello J, 31/3/1987); *G E Trade Mark* [1970] RPC 339; *Radiation Trade Mark* (1930) 47 RPC 37; *Aristoc Ltd v Rysta Ltd* [1945] AC 68 ; *Pioneer Electronic Corporation v Registrar of Trade Marks* [1978] RPC 716 and *C & A Modes v C & A (Waterford) Ltd* [1976] IR 198 considered - Trade Marks Act 1963 (No 9), s 2 – Appeal allowed and registration ordered (2006/137SP – O'Sullivan J - 17/10/06) [2006] IEHC 300
Zockoll Group Ltd v Controller of Patents

INTERNATIONAL LAW

Library Acquisition

Federal rules of civil procedure: as amended to May 21, 2007
2007-2008 educational ed
US: Thomson West, 2007
N350.U48

JUDGMENTS

Article

Long, Eimear
A single judgment for the single market - lis pendens in the Brussels I regulation
2007 ILTR 122

JUDICIAL REVIEW

Leave

Application to amend - Claim for order of mandamus and damages – Prison conditions – Whether incidental to principal claim – Whether extended scope of case in respect of which leave granted – Whether issues arose directly from circumstances in which proceedings brought – Leave to rely on additional grounds granted (2006/1557SS – Clarke J – 27/2/2007) [2007] IEHC 101
Kershaw v Governor of Mountjoy Prison

Leave

On notice – Test to be applied – Deportation– Procedure to be observed in application for leave to seek judicial review and injunction restraining deportation when decision sought to be impugned is one under s. 3(11) of the Immigration Act 1999 – Evidential threshold – Appropriate test – Distinction between standard of arguability and that of substantial grounds – Immigration Act 1999 (No 22), s 3 – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 20 - Leave to apply refused (2006/280JR _ MacMenamin J – 12/7/2006) [2006] IEHC 19
A(CR) v Minister for Justice

Ministerial power

Property rights – Ministerial power to grant licence to survey wreck – Refusal of licence – Whether power exercised reasonably – Whether procedure followed – Whether Minister failed to consider property rights of owner – Whether Minister failed to take

relevant factors into account – National Monuments (Amendment) Act 1987 (No.17), ss. 3(3) and 3(5) – Respondents' appeal dismissed (393 & 395/2005 – SC – 27/3/2007) [2007] IESC 10
Bemis v Minister for Arts, Heritage, Gaeltacht and Islands

Remedies

Alternative remedies of appeal and judicial review – Whether adequate remedy lay in appeal – Remittal to District Court – Balance between public interest in prosecuting offence and prejudice to applicant – Whether matter should be remitted to District Court – *McGoldrick v An Bórd Pleanála* [1997] 1 IR 97 applied; *Nevin v Crowley* [2001] 1 IR 113 and *Gilmartin v Murphy* [2001] 2 ILRM 442 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 26(4) *Certiorari* granted, matter remitted for rehearing (2005/687JR - MacMenamin J – 23/1/2006) [2006] IEHC 304
Pudliszewski v Judge Coughlan

Remedies

Delay – Discretion to extend time – Good reason to extend time – Whether political campaigning good reason – Failure to provide explanation or justification barring relief – *de Róiste v Minister for Defence* [2001] IR 190, *The State (Kelly) v District Justice for Bandon* [1947] IR 258 and *The State (Vozza) v District Justice Ó Floinn* [1957] IR 227 considered; *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301 applied - Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21(1) - Declaration granted (2004/137JR – MacMenamin J – 28/2/2006) [2006] IEHC 170
Power v Minister for Social and Family Affairs

Remittal to District Court

Applicant convicted in District Court – Fundamental flaws in sentencing – Conviction quashed – Whether applicant could plead *autrefois* convict – Whether court having discretion to remit matter to District Court for further consideration – Whether matter should be remitted to District Court – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 26(4) – *Sweeney v Brophy* [1993] 2 IR 202 distinguished; *Sheehan v Reilly* [1993] 2 IR 81 considered – Order remitting prosecution to District Court (2007/22JR – Ó Néill J - 16/3/2007) [2007] IEHC 96
Walsh v District Judge Brown

LEGAL PROFESSION

Solicitors

Solicitor/client relationship – Plaintiff instructed defendant to communicate only with plaintiff's solicitor – Defendant copied information directly to plaintiff – Whether such communication interfered with solicitor/client relationship – Whether such communication breached right to privacy – Injunction refused (2006/5050P – Clarke J – 19/1/2007) [2007] IEHC 14
Domican v AXA Insurance Ltd

Solicitors

Solicitor's undertaking - Enforcement of solicitors' undertakings – Conduct of solicitor – Whether performance of undertaking possible – Court's inherent supervisory jurisdiction – *IPLG Ltd v Stuart* (Unrep, Lardner J., 19/3/1992), *Fox v Bannister* [1988] 1 QB 925, *Udall v Capri Lighting Ltd* [1988] 1 QB 907 and *Myers v Elman* [1940] AC 282 followed - Claim dismissed (2006/72SP – Laffoy J – 6/11/2006) [2006] IEHC 337
Bank of Ireland Mortgage Bank v Coleman

Article

Gallagher, Paul
A response to the Competition Authority's recommendation that the sole trader rule be abolished
12(4) 2007 BR 134

LICENSING

Intoxicating liquor

Applicant seeking declaration that premises fit and convenient to be licensed – Whether existing premises of similar character grounds for objection – *Re Cummins* [1964] IR 67 followed - Licensing (Ireland) Act 1833 (3 & 4 Wm 4, c 68,) s 4 – Intoxicating Liquor Act 1960 (No 18), s 15 – Applicant's appeal granted (2005/451CA – Murphy J – 21/12/2005) [2005] IEHC 444
In re Kingston

MEDIATION

Article

Carey, Gearoid
Is "mediation privilege" on the horizon?
2007 14 (5) CLP 102

MEDICAL LAW

Articles

Coveney, Hilary
Assisted reproductive technologies and the status of the embryo
2007 13 1 MLJI 14

McKinnell, Thomas H
The swansea samurai: a case series of three bladed weapon injuries
2007 13 1 MLJI 36

Odunsi, Babafemi
Kano, Tuskegee and ethical guidelines: the need for lawyers and religious leaders as overseers in the foggy temple of medical research
2007 13 1 MLJI 20

Scannell, Barry
Brave new world? The ethics of pre-implantation genetic diagnosisin Ireland
2007 13 1 MLJI 27

Statutory Instruments

Health act 2007 (commencement) (no. 2) order 2007
SI 262/2007

Health information and quality authority (establishment day) order 2007
SI 227/2007

MEDICAL NEGLIGENCE

Article

O'Dea, Eilin
Causation and the "loss of chance" doctrine in medical negligence cases
2007 (12) 3 BR 86

MENTAL HEALTH

Library Acquisition

Kennedy, Harry
The annotated mental health acts
Dublin: Blackhall Publishing, 2007
N155.3.C5

NEGLIGENCE

Duty of care

Vicarious liability – Confidential information – Information leaked to media – Whether duty of care owed by An Garda Síochána regarding disclosure of confidential information – Whether gardaí negligent – Whether leak amounted to tort of misfeasance of public office – *Ward v McMaster* [1988] IR 337 applied; *Hanahoe v. Hussey* [1998] 3 IR 69 followed - Plaintiff awarded damages (2001/131P – Quirke J – 17/2/2007) 2007] IEHC 52
Gray v Minister for Justice

Negligent misstatement

Auctioneer – Special Relationship – Sale of commercial premises – Seller negligently measuring floor space – Claim that decision to purchase made in reliance on negligently published floor measurements – Whether special relationship existing to impose duty of care – Whether plaintiff sufficiently

proximate so as to be reasonably within contemplation of defendant as being likely to be affected by its acts or omissions – Duty of care to prospective purchaser – Whether defendant owed duty of care to ensure that calculation of floor area of property in sale brochure accurate – Whether defendant in breach of duty – Whether presence of waiver within brochure sufficient to exclude defendant from liability – Whether fair and reasonable to allow reliance on waiver – Whether plaintiff guilty of negligence which contributed to loss sustained – Whether plaintiff entitled to recover damages from defendant – *Glencar Explorations plc v Mayo Co Co (No 2)* [2002] 1 IR 84 and *Wildgust v Bank of Ireland* [2006] IESC 19, [2006] 1 IR 570 followed – Damages of €350,000 awarded (2001/15154P – Quirke J - 24/1/07) [2007] IEHC 28
Walsh v Jones Lang LaSalle Ltd

NURSING LAW

Article

Hickey, Geraldine
The power to prescribe - a new departure for nursing practice
2007 13 1 MLJI 7

PENSIONS

Articles

Bennett, Olwyn
Trust law and pensions: the duties owed by pension scheme trustees and the options for reform
(2007) 2 (1) IBLQ 12

Fahy, Peter
Liability of pension scheme advisers - the Irish and common law position
2007 14 (6) CLP 121

Kavanagh, James
Governance for pension schemes - what trustees need to know and do
2007 (May) ITR 52

McGrath, Noel
An aging model? - Trust law and pension governance
2007 ILTR 190

PERSONAL INJURIES

Article

Gilhooly, Stuart
Ain't misbehavin'
2007 (June) GLSI 38

PLANNING & ENVIRONMENTAL LAW

Offences

Failure to comply with enforcement notice – Proof of offence – *Autrefois acquit* – Double jeopardy – Whether breach of enforcement notice constitutes continuing offence – Whether previous acquittal of accused precludes further prosecution in respect of continuing offence – *Corporation of Dublin v Flynn* [1980] IR 357 applied - Statute – Interpretation – Planning and Development Act 2000 (No 30), ss 151, 152, 153, 154, 155, 156 and 157 – Case stated answered in favour of prosecutor (2005/905SS - Charleton J – 19/1/2007) [2007] IEHC 48
Clare County Council v Floyd

Planning permission

Development – Exempted development – Structure – Alteration – Repairs Whether alteration to structure exempted development – Whether external appearance materially affected by alteration – *Cairnduff v O'Connell* [1986] 1 IR 73 applied -
Planning and Development Act 2000 (No 30), ss 4(1)(h) and 160 – Clam dismissed (2005/79MCA – Herbert J – 10/11/2006) [2006] IEHC 356
McCabe v Coras Iompair Eireann

Planning permission

Intensification of use - Quarry – Intensification of activity – Whether material change in use – Planning injunction – *Galway County Council v Lackagh Rock Ltd.* [1985] 1 IR 120 and *Leen v Aer Rianta* [2003] 4 IR 394 followed; *Guildford Rural District Council v Fortescue* [1959] 2 QB, *Patterson v Murphy* [1978] ILRM 85 and *Butler v Dublin Corporation* [1999] IR 565 considered – Planning and Development Act 2000, s 160 – Order granted restraining quarrying activities beyond certain level (2006/47MCA – Murphy J – 20/3/2007) [2007] IEHC 91
Callan v Boyle Quarries Ltd

Planning permission

Judicial review – Grant of permission – Conditions – Conditions drafted by inspector – No record that conditions considered at meeting of respondent – Ground conceded – Discretion to remit matter where *certiorari* granted – Whether matter should be remitted to respondent – *Nevin v Crowley* [2001] 1 IR 113 considered – *Certiorari* granted and matter remitted to respondent (2006/1139JR – Kelly J – 14/3/2007) [2007] IEHC 86
Usk and District Residents Association Ltd v An Bord Pleanála

Articles

Dimas, Stavros
Climate change: the reality, the risks and the response
2006 IJEL 5

Holland, David
Civil enforcement under waste legislation - a flexible remedy
2007 IP & ELJ 3

Robinson, Tessa
Planning and development of halting sites
2007 IP & ELJ 14

Ryall, Aine
Access to information on the environment regulations 2007
2007 IP & ELJ 57

Simons, Garrett
Locus standi, public interest and the EIA directive
2007 IP & ELJ 21

Library Acquisition

Department of the Environment, Heritage and Local Government
Development management: guidelines for planning authorities, June 2007
Dublin: Stationery office, 2007
N96.C5

Statutory Instrument

Waste management (shipments of waste) regulations 2007
REG/1013-2007
SI 419/2007

PRACTICE & PROCEDURE

Amicus curiae

Equality Authority – Statutory power – Whether Equality Authority having statutory power to intervene in judicial proceedings – Whether Equality Authority having statutory power to act as *amicus curiae* – Whether intervention appropriate at trial court level – *Howard v Commissioners of Public Works* (No 1) [1994] 1 IR 101 and *Keane v. An Bord Pleanála (No 2)* [1997] 1 IR 184 applied - Employment Equality Act 1977 (No 16) – Employment Equality Act 1998 (No 21), ss 38, 65, 67, 72 and 85 – Equal Status Act 2000 (No 8), ss 3, 8(3), 23, 39 and 75(1) – European Convention on Human Rights Act 2003 (No 20), s 3 – Equality Act 2004 (No 24), s 3 – Respondents' appeal dismissed (223/2006 – SC – 31/12/2006) [2006] IESC 57
Doherty v South Dublin County Council

Amicus curiae

Joinder – Application to join as co-defendant or notice party – Whether applicant had direct interest – Jehovahs Witness – *Amicus curiae* – Inherent jurisdiction of court – Exercise of jurisdiction – Factors to be considered in appointing *amicus curiae* – *O'Brien v PIAB (No 1)* [2005] 3 IR 328 followed; *BUPA v Health Insurance Authority (No 1)* [2005] IESC 80, [2006] 1 IR201 and *Doherty v South Dublin County Council* [2006] IESC 57, (Unrep, SC, 31/10/2006) considered – Application refused (2006/4427P – Clarke J – 7/12/2006) [2006] IEHC 392
Fitzpatrick v K(F)

Case stated

Time limit – Statutory condition precedent imposing strict time limit for giving notice to respondent of case stated being transmitted to High Court – Whether condition satisfied – Whether High Court had jurisdiction to determine case stated – *DPP v O'Connor* (Unrep, Finlay P, 9/5/1983), *DPP (Murphy) v. Regan* [1993] ILRM 335, *Thompson v Curry* [1970] IR 61 and *Attorney General v Shivnan* [1970] IR 66n
Followed - Rules of the Superior Courts 1962 (SI 72 /1962), O 62, r 5 – Summary Jurisdiction Act 1857 (20 & 21 Vict, c 43), s 2 – Courts (Supplemental Provisions) Act 1961, s 51(1) – Jurisdiction declined (2006/177SS – Budd J – 6/2/2007) [2007] IEHC 46
DPP v Canavan

Costs

Administration action – Adverse litigation – Principles to be applied – Whether costs of parties should be paid out of testamentary estate – Whether defendant liable to pay costs of parties personally – Whether costs could be charged on specifically devised real estate – Order for costs granted (2003/500SP – Herbert J – 14/7/2006) [2006] IEHC 219
In re Markey: O'Connor v Markey

Costs

Taxation – Review – Taxing Master – Duties of Master – Considerations of High Court on review – Work actually done – Examination of sensitive material in file – *Superquinn v Bray Urban District Council* [2001] 1 IR 459 applied; *Boyne v Dublin Bus* [2006] IEHC 209 (Unrep, Gilligan J, 14/6/2006) considered; *Quinn v South Eastern Health Board* [2005] IEHC 399 (Unrep, Peart J, 30/11/2005) approved; *South Coast Shipping Co Ltd v Havant Borough Council* [2002] 3 All ER 779 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 99 r 37(22) – Courts and Court Officers Act 1995 (No 31), s 27(1) and (3) – Motion allowed and instruction fee reduced (2001/16829P – Charleton J - 22/2/2007) [2007] IEHC 61
Mahony v KCR Heating Ltd

Dismissal of action

Delay - Whether delay inordinate and inexcusable – Whether in circumstances of case defendants could avail of issue of delay as reason to dismiss proceedings – Discretion of court – Whether proportionate to dimiss plaintiff's claim because of delay which was essence of claim – Test to be applied – Whether balance of justice favoured continuance of case – Factors to be taken into account in determining whether delay excusable – Inherent jurisdiction of court – Whether countervailing circumstances – Whether defendants' conduct to be scrutinised carefully – Whether contribution to delay important and relevant factor – Whether defendants' contribution to delay prejudiced claim to have proceedings dismissed – *Ó Domhnaill v Merrick* [1984] IR 151, *Toal v Duignan* [1991] ILRM 135 and *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 considered - Plaintiff's appeal allowed (385/2004 – SC - 1/2/2007) [2007] IESC 7
R(J) v Minister for Justice

Judgment

Execution – Charging order – Meaning of "public company" – Constitutionality of rule allowing party to seek charging order ex parte – Whether court can make order charging share in private company – Whether charging order valid where no time limit provided within which debtor should show cause – Interim order – Non-disclosure – Discretion to discharge interim order for non-disclosure – Joinder of notice party – Whether necessary to join company as notice party where charging order made over share in company – Rules of the Supreme Court (Ireland) 1853, O XLVI – Rules of the Superior Courts 1962 (SI 72/1962) – Rules of the Superior Courts 1986 (SI 15/1986), O 46 – Debtors (Ireland) Act 1840 (3 & 4 Vict, c 105), ss 23 and 24 – Common Law Procedure Amendment Act (Ireland) 1853 (16 & 17 Vict, c 113), s 132 – Statute Law Revision Act 1874 (No 2) (37 & 38 Vict, c 96) – Companies Act 1963 (No 33), s 33(1) – Companies (Amendment) Act 1983 (No 13) – Interpretation Act 2005 (No 23), ss 5 and 6 – Order varied (2001/7654P – Laffoy J – 27/10/2006) [2006] IEHC 326
Honniball v Cunningham

Jurisdiction

Appeal from District Court – Order of District Court defective – Application to amend District Court order – Appeal withdrawn – Effect of adjournment for mention – Whether appellate jjurisdiction of Circuit Court invoked – Whether judge had jurisdiction to amend District Court order after appeal withdrawn - *The State (McLoughlin) v Judge Shannon* [1948] IR 439 and *The State (Attorney General) v Judge Connolly* [1948] IR 176 applied - Civil Bill Courts Procedure Amendment Act (Ireland) 1864 (27 & 28 Vict, c 99), s - 49 *Certiorari* granted (2006/430JR – Dunne J – 5/2/2007) [2007] IEHC 12
DPP v Judge Murphy

Limitations

Co-defendants – Claim for indemnity and contribution – Limitation of actions for contribution – Causes of action which survive against estate of deceased person – Whether claim for contribution "proceeding" – *Moynihan v Greensmyth* [1977] IR 55 applied - Civil Liability Act 1961 (No 41), ss 9(2)(b), 30 and 31 – Claim for indemnity dismissed (2000/8232P – Quirke J – 22/11/2006) [2006] IEHC 370
Keane v Western Health Board & Meehan

Limitations

Proceeds of crime – Whether order constituted forfeiture – Application of Statute of Limitations – Whether reliance on Statute of Limitations for first time on appeal permissable – *McK v GWD* [2004] IESC 31, [2004] 2 IR 470 applied - Statute of Limitations 1957 (No 6), s 11(7)(b) – Proceeds of Crime Act 1996 (No 30), s 3 - Defendants' appeal dismissed (343/2002 & 97, 245 & 405/2003 – SC – 26/11/2006) [2006] IESC 63
McK (F) v H(T)

Protective costs order

Criteria for determining application – Whether issues of general public importance raised - *Reg v Lord Chancellor, Ex p CPAG* [1999] 1 WLR 347 and *R (Corner House) v Trade and Industry Secretary* [2005] EWCA Civ 192 [2005] 1 WLR 2600 followed; *Village Residents Association Ltd v An Bord Pleanála (No 2)* [2000] 4 IR 321 approved – Relief refused (2006/240JR – Kelly J – 14/7/2006) [2006] IEHC 243
Friends of the Curragh Environment Ltd v An Bord Pleanála

Special summons

Court's jurisdiction to enforce solicitor's undertaking – Whether application to enforce solicitor's undertaking may be brought by special summons – Rules of the Superior Courts 1986 (SI 15/ 1986), O 3, rr 21 and 22 – Rules of the Superior Courts (No 2) (Amendment to Order 3) 2001 (SI 269/2001) - Claim dismissed (2006/72SP – Laffoy J – 6/11/2006) [2006] IEHC 337

Bank of Ireland Mortgage Bank v Coleman

Statement of claim

Application to strike out statement of claim – Whether allegations of fraud and misrepresentation pleaded with sufficient particularity – Inherent jurisdiction to strike out plaintiff's claim – Whether plaintiff's claim amounts to abuse of process – Whether plaintiff's claim must fail or is unsustainable – Rules of the Superior Courts 1986 (SI 15/1986), O19, rr 5 (2), 27 and 28 – Relief granted (2006/593P – Finlay Geoghegan J – 16/1/2007) [2007] IEHC 8
Keaney v Sullivan

Statutory interpretation

Generalia specialibus non derogant – Where conflict between two sections of same statute – Civil Liability Act 1961 (No 41), ss 9(2)(b) and 31 - Claim for indemnity dismissed (2000/8232P – Quirke J – 22/11/2006) [2006] IEHC 370
Keane v Western Health Board & Meehan

Summary summons

Meaning of "debt or liquidated demand on foot of a contract express or implied" – Whether deletion of clause in contract accepting liability rendered action non-contractual – Whether special summons procedure appropriate – Whether necessary that amount be capable of ascertainment at time contract signed - *Kilgariff v McGrane* (1881) 8 LRIr354, *Lagos v Grunwaldt* [1910] 1 KB 41 and *Stephenson v Weir* (1879) 4 LR Ir 369 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 2 – Plaintiff entitled to proceed by way of summary summons (2004/528SS – Peart J – 18/12/2006) [2006] IEHC 405
MIBI v Hanley

Summons

Renewal – Failure to serve summons while it was in force – Order for renewal made by the High Court – Application to set aside renewal – Whether plaintiff advanced good reason to renew summons – Balance of justice – Prejudice – *Baulk v Irish National Insurance Co Ltd* [1969] IR 66, *McCooey v Minister for Finance* [1971] IR 159, *O'Brien v Fahy* (Unrep, SC, 21/3/1997) and *Roche v Clayton* [1998] 1 IR 596 considered; *Behan v Bank of Ireland* (Unrep, Morris J,14/12/995) not followed -
Rules of the Superior Courts 1986 (SI 15/1986), O 8, r 2 – Renewal of summons affirmed (2002/8864P – Finlay Geoghegan J – 11/11/2005) [2005] IEHC 402
Chambers v Kenefick

Articles

Byrne, Gerald P
Malicious prosecution after Shortt, and malicious use and abuse of civil process
2007 ILTR 127

Long, Eimear
A single judgment for the single market - lis pendens in the Brussels I regulation
2007 ILTR 122

Stauber, Alvin
Commercial courts: a 21st century necessity?
(2007) 1 JSIJ 154

Library Acquisitions

Blackhall's district court rules 1997: updated to 1 January 2007
Dublin: Blackhall Publishing Ltd, 2007
N363.2.C5

Federal rules of civil procedure: as amended to May 21, 2007
2007-2008 educational ed
US: Thomson West, 2007
N350.U48

Statutory Instruments

Circuit Court rules (health) (repayment scheme) act 2006) 2007
SI 446/2007

District Court (children) rules 2007
SI 408/2007

District court (community service) rules 2007
SI 313/2007

District Court (criminal justice act 2006, part 11) rules 2007
SI 314/2007

District Court districts and areas (amendment) and variations of days and hours (Fermoy and Mitchelstown) order, 2007
SI 255/2007

Rules of the Superior Courts (charging orders) 2007
SI 416/2007

Rules of the Superior Courts (jurisdiction, recognition enforcement and service of proceedings) 2007
SI 407/2007

Rules of the Superior Courts (transfer of sentenced persons) 2007
SI 417/2007

PRISONS

Article

O Braonain, Cathal
Stone walls do not a prison make
2007 (June) GLSI 40

Statutory Instruments

Prisons act 1970 (section 7) order 2007
SI 265/2007

Prisons act 2007 (commencement) (no. 2) order 2007
SI 370/2007

Rules of the Superior Courts (transfer of sentenced persons) 2007
SI 417/2007

PRIVACY

Article

Kelleher, Denis
A very private affair
2007 (June) GLSI 24

PRIVILEGE

Articles

Carey, Gearoid
Is "mediation privilege" on the horizon?
2007 14 (5) CLP 102

McCarthy, Alan
Don't look or don't use dilemma? A comparative study of legal professional privilege under European and Irish competition law
2006 IJEL 119

PROBATE

Article

Keating, Albert
The award of costs in probate and administration actions
2007 ILTR 145

PROPERTY

Judgment mortgage

Well charging order – Whether judgment mortgage well charged – Affidavit to register judgment as mortgage – Description of location of property – Last known place of abode – Whether non-compliance of affidavit with strict statutory requirements was fatal to application to have judgment registered as mortgage – *Irish Bank of Commerce v O'Hara* (Unrep, SC, 7/4/1992),

Allied Irish Banks plc v Griffin (Unrep, Denham J, 16/12/1991) and *Ulster Bank Ltd v Crawford* (Unrep, Laffoy J, 20/12/1999) considered – Judgment Mortgage (Ireland) Act 1850 (13 & 14 Vict, c 29), s 6 – Order declaring that judgment mortgage well charged granted (2006/380SP – Dunne J – 28/4/2007) [2007] IEHC 131
Dovebid Netherlands BV v Phelan

Articles

Fitzgerald, Ciara
The beginning of the end for adverse possession?
2007 (Spring) ILR 15

Gore-Grimes, John
This old house
2007 (June) GLSI 28

Mitchell, Frank
A new regime for VAT and property - four reasons why you should care
2007 (May) ITR 73

Twohig, Brendan
Tax implications of adverse possession
2007 (May) ITR 47

Statutory Instrument

Land registration rules 2007
SI 568/2007

ROAD TRAFFIC

Statutory Instruments

District court rules (road traffic) rules 2007
SI 564/2007

Road traffic (components and separate technical units) regulations 2007
SI 375/2007

Road traffic (recognition of foreign driving licences) order 2007
SI 527/2007

Road traffic (special permits for particular vehicles) regulations 2007
SI 283/2007

SENTENCING

Article

Murphy, Gerard
An analysis of sentencing provisions in the Criminal Justice Act 2006
(2007) 1 JSIJ 60

SHIPPING

Salvage

Wreck of '*Lusitania*' – "Archaeological object" – Whether works proposed come within definition of digging or excavation works under statute – National Monuments Act 1930 (No 2), s 26 - Respondents' appeal dismissed (393 & 395/2005 – SC – 27/3/2007) [2007] IESC 10
Bemis v Minister for Arts, Heritage, Gaeltacht and Islands

Library Acquisition

Mercantile marine (tonnage) regulations 2007
SI 369/2007

SOCIAL WELFARE

Benefit

Legitimate expectation – Preconditions for legitimate expection to arise – Non–statutory scheme – Representations made to applicant – Whether legitimate expection to benefit arose – Whether sufficient overriding public interest – Balancing exercise to be carried out between interest of applicant and public interest - *Abrahamson v Law Society of Ireland* [1996] 1 IR 403 applied; *Glencar Exploration plc v Mayo County Council* (No 2) [2002] 1 IR 84 distinguished; *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 followed; *Keogh v Criminal Assets Bureau* [2004] 2 IR 159 applied - Declaration granted (2004/137JR – MacMenamin J – 28/2/2006) [2006] IEHC 170
Power v Minister for Social and Family Affairs

Article

Cousins, Mel
The habitual residence condition in Irish social welfare law
2006 IJEL 187

Statutory Instruments

Social welfare and pensions act 2007 (section 34) (commencement) order 2007
SI 268/2007

Social welfare (consolidated contributions and insurability) (amendment)(modified social insurance) regulations 2007
SI 298/2007

Social welfare (consolidated supplementary welfare allowance) (amendment)(no. 3) regulations 2007
SI 267/2007

Social welfare (consolidated supplementary welfare allowance) regulations 2007
SI 412/2007

SOLICITORS

Article

Daly, Yvonne Marie
Silence and solicitors: lessons learned from England and Wales
2007 17 (2) ICLJ 2

Library Acquisition

Law Society
Solicitors' code of conduct 2007
London: The Law Society, 2007
L87

STATUTORY INTERPRETATION

Library Acquisition

Hunt, Brian
The Irish statute book: a guide to Irish legislation
Dublin: First Law, 2007
L35.C5

SUCCESSION

Library Acquisition

Keating, Albert
Succession law
Dublin: Thomson Round Hall, 2007
N120.C5

TAXATION

Statutory interpretation

Exemption from tax – Strict construction – Whether exemption given in clear and unambiguous terms – Scheme and purpose of statute – Purposive approach – Intention of legislature – General anti–avoidance provisions – Export sales relief – Purpose for which export sales relief introduced – Commercial basis of transaction – Substance of transaction – Result of transaction – Whether tax avoidance transaction – Whether artificial scheme – Relevance of other provisions of Taxes Acts – Whether misuse or abuse of provisions – *McGrath v McDermott* [1988] 1 IR 258 distinguished; *Canada Trustco Mortgage Co v Canada* [2005] 2 S.C.R. 601, *Charles McCann Ltd v Ó Culacháin (Inspector of Taxes)* [1986] IR 196, *Inspector of Taxes v Kiernan* [1981] IR 117 and *Revenue Commissioners v Doorley* [1933] IR 750 followed - Finance Act 1989 (No 10), s.86 - Applicant's appeal allowed (2005/403R – Smyth J - 25/4/2006) [2006] IEHC 143

Revenue Commissioners v O'Flynn

Value added tax

Case stated – Principles to be applied – Whether inferences drawn from primary facts by judge reasonable – Circuit Court Judge stating case for opinion of High Court as to whether correct in determining that applicant not entitled to tax exemption – Whether activities exempt from VAT – Value Added Tax Act 1972 (No 22), 1st sch – *Mara (Inspector of Taxes) v Hummingbird Ltd* [1982] ILRM 421, *Revenue Commissioners v Doorley* [1933] IR 750 and *Bird (Inspector of Taxes) v Martland: Bird (Inspector of Taxes) v. Allen* [1982] STC 603 considered – Question posed replied to in the affirmative (2003/403R – White J – 7/4/2006) [2006] IEHC 446
Denross Ltd v Revenue Commissioners

Articles

Duane, Darragh
Stamp duty - new intermediary relief legislation
2007 (May) ITR 69

Gillanders, Norman
New services from revenue for practitioners and employers
2007 (May) ITR 55

Herlihy, Julie
Setting up a new business - some tax issues
2007 (May) ITR 41

Mitchell, Frank
A new regime for VAT and property - four reasons why you should care
2007 (May) ITR 73

Quinn, Andrew
Direct tax rules and the EU fundamental freedoms: origin and scope of the problem; national and community responses and solutions: Ireland national report
2006 IJEL 101

Sullivan, Barry
The role of the ECJ in fostering tax harmonisation via the back door – has the court gone too far?
2007 (May) ITR 58

Twohig, Brendan
Tax implications of adverse possession
2007 (May) ITR 47

Ward, Dana
The changing tax environment for the UK hedge fund sector - for better or for worse?
2007 (May) ITR 64

Library Acquisition

Butler, Brian
VAT acts 2007
Haywards Heath: Tottel Publishing, 2007
M337.45.C5.Z14

Statutory Instrument

Value-added tax (amendment) regulations 2007
SI 272/2007

TELECOMMUNICATIONS

Statutory Instrument

Wireless telegraphy (fixed satellite earth stations and teleport facility) regulations 2007
SI 295/2007

TORT

Articles

Healy, John
Causation in tort law: the law of chance doctrine
2007 (Spring) ILR 8

Ryan, Ray
Vicarious liability of employers - emerging themes and trends and their potential implications for Irish law
(2007) 1 IELJ 3

Library Acquisitions

Grubb, Andrew
The law of tort
2nd ed
London: LexisNexis Butterworths, 2007
N30

School of Law, Trinity College
Shortt v Commissioner of an Garda Siochana, Ireland and the Attorney General: implications for legal practitioners
Dublin: Trinity College, 2007
N37.1.C5

TRANSPORT

Statutory Instruments

Carriage of dangerous goods by road act 1998 (appointment of competent authorities) order 2007
SI 290/2007

Carriage of dangerous goods by road act 1998 (fees) regulations 2007
SI 291/2007

Carriage of dangerous goods by road regulations 2007
SI 288/2007

European Communities (carriage of dangerous goods by road) (ADR miscellaneous provisions) regulations 2007
SI 289/2007

Taxi regulation act 2003 (small public service vehicles) (amendment) regulations 2007
SI 280/2007

TRIBUNALS

Public hearing

Judicial review – Application to give evidence in private in order to protect privacy of medical problems refused – Right to privacy – Balance of public interests – *Goodman International v Hamilton* [1992] 2 IR 557 and *Meenan v Commission to Inquire into Child Abuse* [2003] 3 IR 283 applied – Tribunals of Inquiry (Evidence) Acts 1921-2002 – European Convention on Human Rights, art 8 – Relief refused (2006/1156JR – Finnegan J – 21/3/2007) [2007] IEHC 107
White v Morris

Terms of reference

Interpretation by tribunal – Investigation into ownership of certain lands – Discretion to proceed to public hearing – Whether decision *ultra vires* – Whether irrational – Whether disproportionate infringement on applicant's right to privacy – Tribunals of Inquiry (Evidence) Act 1921(11 & 12 Geo 5, c 7) – Constitution of Ireland 1937, Article 40.3 – Relief refused (2004/1131JR – Hanna J – 28/6/2006) [2006] IEHC 301
Caldwell v Mahon

Article

Cassidy, Pamela
Hole in my bucket
2007 (June) GLSI 28

WORDS AND PHRASES

"Breach of the peace"

Whether breach of peace power of arrest or offence - Criminal Justice (Public Order) Act 1994 (No 2) - (2005/1174SS – Murphy J - 17/2/06) [2006] IEHC 319
DPP v Thorpe

"Character"

Radio and Television Act 1988 (No 20), s 6(2)(a) - (405/2006 – SC – 6/4/2006) [2006] IESC 24
Scrollside Ltd v Broadcasting Commission of Ireland

"Fled"

European Arrest Warrant Act 2003 (No 45), s 10 - (2005/69Ext – Peart J – 12/1/2007) [2007] IEHC 15
Minister for Justice v Tobin

"Good reason"

Criminal Justice (Forensic Evidence) Act 1990 (No 34), s 4(5) - (2006/373JR – Peart J – 15/11/2006) [2006] IEHC 357
McGinley v Judge Michael Reilly

"in accordance with procedures"

Universities Act 1997 (No 24), s 25 - (2006/3378P – Clarke J – 9/2/2007) [2007] IEHC 20
Cahill v Dublin City University

"tenure"

Whether phrase allows for holding of office at will – *Fanning v University College Cork* [2005] IEHC 264 (Unrep, Gilligan J, 24/6/2005) distinguished - Universities Act 1997 (No 24), s 25 - (2006/3378P – Clarke J – 9/2/2007) [2007] IEHC 20
Cahill v Dublin City University

AT A GLANCE

COURT RULES

Circuit Court rules (general) 2007
SI 312/2007

Circuit Court rules (health) (repayment scheme) act 2006) 2007
SI 446/2007

District Court (children) rules 2007
SI 408/2007

District Court (community service) rules 2007
SI 313/2007

District Court (criminal justice act 2006, part 11) rules 2007
SI 314/2007

District Court (summonses) rules 2007
SI 418/2007

District Court districts and areas (amendment) and variations of days and hours (Fermoy and Mitchelstown) order, 2007
SI 255/2007

District court rules (road traffic) rules 2007
SI 564/2007

Rules of the Superior Courts (jurisdiction, recognition enforcement and service of proceedings) 2007
SI 407/2007

Rules of the Superior Courts (charging orders) 2007
SI 416/2007

Rules of the Superior Courts (transfer of sentenced persons) 2007
SI 417/2007

European directives implemented into Irish Law up to 9th October 2007.

Information compiled by Lorraine Brien, Law Library, Four Courts.

Criminal justice (terrorist offences) act 2005 (section 42(2)) (counter terrorism) (financial sanctions) regulations 2007
REG/2580-2001
SI 410/2007

Criminal justice (terrorist offences) act 2005 (section 42(6)) (counter terrorism) (financial sanctions) regulations 2007
REG/2580-20001
SI 411/2007

European Communities (admissions to listing and miscellaneous provisions) regulations 2007
DIR/2001-34
SI 286/2007

European communities (authorised agencies) (issues of certificates of origin) (amendment) regulations 2007
REG/2454-93
SI 450/2007

European Communities (controls of cash entering or leaving the community) regulations 2007
REG/1889-2005
SI 281/2007

European Communities (eco design requirements for certain energy-using products) regulations 2007
DIR/2005-32
SI 557/2007

European Communities (electronic communications networks and services)(authorisation) (amendment) regulations 2007
DIR/2002-20
SI 372/2007

European Communities (electronic communications networks and services)(access) (amendment) regulations 2007
DIR/2002-19)
SI 373/2007

European communities (electronic communications networks and services)(universal service and users' rights) (amendment) regulations 2007
DIR/2002-22
SI 374/2007

European Communities (electronic communications networks and services)(framework) (amendment) regulations 2007
DIR/2002-21)
SI 271/2007

European communities (food supplements) regulations 2007
DIR/2002-46, DIR/2006-37
SI 506/2007

European Communities (insurance and reinsurance groups supplementary supervision) regulations 2007
DIR/98-78, DIR/2005-68
SI 366/2007

European communities (internal market in natural gas) (BGÉ) (amendment) regulations 2007
DIR/2003-55)
SI 377/2007

European Communities (labelling, presentation and advertising and advertising of foodstuffs) (amendment) regulations 2007
DIR/2006-107, DIR/89-108
SI 376/2007

European communities (life assurance) (amendment) regulations 2007
DIR/2005-68
SI 351/2007

European communities (life assurance) framework (amendment) regulations 2007
DIR/2005-68
SI 352/2007

European communities (mechanically propelled vehicle entry into service) regulations 2007
DIR/98-12
SI 448/2007

European communities (minimum conditions for examining of vegetable species) (amendment) regulations 2007
DIR/2006-127
SI 421/2007

European communities (motor vehicles un-eco type approval) (amendment) regulations 2007
DEC/97-836
SI 449/2007

European communities (non-life insurance) (amendment) regulations 2007
DIR/2005-68
SI 353/2007

European communities (non-life insurance) framework (amendment) regulations 2007
DIR/2005-68
SI 354/2007

European Communities (phytosanitary measures) (brown rot in Egypt) regulations 2007
DEC/2004-4, DEC/2004-836, DEC/2005-840, DEC/2006-749
SI 261/2007

European Communities (protection of plant variety rights) regulations,
2007
REG/2100-94, REG/1768-95
SI 273/2007

European communities (vegetable seed) (amendment) regulations 2007
DIR/2006-124
SI 420/2007

European communities (welfare of calves and pigs) (amendment) regulations
2007
DIR/2001-88, DIR/2001-93
SI 307/2007

Sea fisheries (incidental catches of cetaceans in fisheries) regulations,
2007
REG/812-2004
SI 274/2007

Transparency (directive 2004/109/EC) Regulations 2007
DIR/2004-109
SI 277/2007

Waste management (shipments of waste) regulations 2007
REG/1013-2007
SI 419/2007

BILLS OF THE OIREACHTAS 9/10/2007 [*30TH DAIL & 23RD SEANAD*]

[pmb]: Description: Information compiled by Damien Grenham, Law Library, Four Courts, Dublin 7.

Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dail or Seanad. Other bills are initiated by the Government.

Air navigation and transport (indemnities) bill 2005
1st stage- Seanad

Charities bill 2007
1st stage-Dail

Civil law (miscellaneous provisions) bill 2006
Committee stage – Dail

Civil partnership bill 2004
2nd stage- Seanad **[pmb]** *David Norris*

Climate protection bill 2007
1st stage- Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Control of exports bill 2007
Committee stage-Dail **[pmb]** *Mary O'Rourke (Initiated in Seanad)*

Copyright and related rights (amendment) bill 2007
Committee stage- Seanad **[pmb]** *Mary O'Rourke*

Coroners bill 2007
1st stage- Seanad **[pmb]** *Mary O'Rourke*

Credit union savings protection bill 2007
1st stage- Seanad **[pmb]** *Senators Joe O'Toole, Fergal Quinn, Mary Henry and David Norris*

Criminal justice (mutual assistance) bill 2005
Committee stage – Dail *(Initiated in Seanad)*

Defamation bill 2006
Committee stage – Seanad

Defence (amendment) (No.2) bill 2006
1st stage – Seanad

Defence of life and property bill 2006
2nd stage- Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Electricity regulation (amendment) bill 2003
2nd stage – Seanad

Enforcement of court orders (no.2) bill 2004
1st stage- Seanad **[pmb]** *Senator Brian Hayes*

Ethics in public office (amendment) bill 2007
2nd stage- Seanad **[pmb]** *Mary O'Rourke*

Fines bill 2007
1st stage- Dail

Freedom of information (amendment) (no.2) bill 2003
1st stage – Seanad **[pmb]** *Brendan Ryan*

Genealogy and heraldry bill 2006
1st stage- Seanad **[pmb]** *Senator Brian Hayes*

Housing (stage payments) bill 2006
1st stage- Seanad **[pmb]** *Senator Paul Coughlan*

Immigration, residence and protection bill 2007
1st stage- Seanad

Irish nationality and citizenship (amendment) (an Garda Siochana) bill 2006
2nd stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke.*

Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003
Report – Seanad **[pmb]** *Feargal Quinn*

Land and conveyancing law reform bill 2006
2nd stage- Dail *(Initiated in Seanad)*

Markets in financial instruments and miscellaneous provisions bill 2007
Committee stage- Dail

Mental capacity and guardianship bill 2007
Committee stage- Seanad

National pensions reserve fund (ethical investment) (amendment) bill 2006
2nd stage- Seanad

Nuclear test ban bill 2006
Committee stage – Dail

Offences against the state (amendment) bill 2006
1st stage- Seanad **[pmb]** *Senators Joe o'Toole, David Norris, Mary Henry and Feargal Quinn.*

Official languages (amendment) bill 2005
2nd stage – Seanad **[pmb]** *Senators Joe O'Toole, Michael Brennan and John Minihan.*

Passports bill 2007
1st stage- Dail

Privacy bill 2006
1st stage- Seanad **[pmb]** *Senator Donnie Cassidy*

Tribunals of inquiry bill 2005
1st stage- Dail

Twenty-eighth amendment of the constitution bill 2007
1st stage- Dail

Voluntary health insurance (amendment) bill 2007
Committee stage- Seanad **[pmb]** *Mary O'Rourke*

ACTS OF THE OIREACHTAS 2007

Information compiled by Damien Grenham, Law Library, Four Courts, Dublin 7.

1/2007 Health (Nursing Homes) (Amendment) Act 2007
Signed 19/02/2007

2/2007 Citizens Information Act
Signed 22/02/2007

3/2007 Health Insurance (Amendment) Act 2007
Signed 22/02/2007

4/2007 Courts and Court Officers Act (Amendment) Act 2007
Signed 05/03/2007

5/2007 Electricity Regulation (Amendment) (Single Electricity Market) Act 2007
Signed 05/03/2007

6/2007 Criminal Law (Sexual Offences) (Amendment) Act 2007
Signed 07/03/2007

7/2007 National Oil Reserves Agency Act 2007
Signed 13/03/2007

8/2007 Social welfare and Pensions Act 2007
Signed 30/03/2007

9/2007 Education (Miscellaneous Provisions) Act 2007
Signed 31/03/2007

10/2007 Prisons Act 2007
Signed 31/03/2007

11/2007 Finance Act 2007
Signed 02/04/2007

12/2007 Carbon Fund Act 2007
Signed 07/04/2007

13/2007 Asset Covered Securities (Amendment) Act 2007
Signed 09/04/2007

14/2007 Electoral (Amendment) Act 2007
Signed 10/04/2007

15/2007 Broadcasting (Amendment) Act 2007
Signed 10/04/2007

16/2007 National Development Finance Agency (Amendment) Act 2007
Signed 10/04/2007

17/2007 Foyle and Carlingford Fisheries Act 2007
Signed 10/04/2007

18/2007 European Communities Act 2007
Signed 21/04/2007

19/2007 Consumer Protection Act 2007
Signed 21/04/2007

20/2007 Pharmacy Act 2007
Signed 21/04/2007

21/2007 Building Control Act
Signed 21/04/2007

22/2007 Communications Regulation (Amendment) Act 2007
Signed 21/04/2007

23/2007 Health Act 2007
Signed 21/04/2007

24/2007 Defence (Amendment) Act 2007
Signed 21/04/2007

25/2007 Medical Practitioners Act 2007
Signed 07/05/2007

26/2007 Child Care (Amendment) Act 2007
Signed 08/05/2007

27/2007 Protection of Employment (Exceptional Collective Redundancies And Related Matters) Act 2007
Signed 08/05/2007

28/2007 Statute Law Revision Act 2007
Signed 08/05/2007

29/2007 Criminal Justice Act 2007
Signed 09/05/2007

30/2007 Water Services Act 2007
Signed 14/05/2007

31/2007 Finance (No.2) Act 2007
Signed 09/07/2007

32/2007 Community, Rural and Gaeltacht Affairs (Miscellaneous Provisions) Act 2007
Signed 09/07/2007

33/2007 Ministers and Secretaries (Ministers of State) Act 2007
Signed 09/07/2007

34/2007 Roads Act 2007
Signed 09/07/2007

35/2007 Personal Injuries Assessment Board (Amendment) Act 2007
Signed 11/07/2007

Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Law Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILT = Irish Law Times
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

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

continued from p.176

continuation of each of these courts.[7] Provisions which have this effect are included in the Consultation Paper's draft Consolidated Courts Bill.[8] The Commission hopes that the draft Consolidated Courts Bill will enable and assist those commenting on the Consultation Paper to indicate provisions suitable for inclusion in a final Courts Act.

Devising a Model for a Consolidated Courts Act

The Commission decided that, in the interests of accessibility, it was necessary to devise a structure for the Consolidated Courts Act. The Commission devised the scheme by completing a comparative analysis of similar legislation in a number of jurisdictions.[9] The development of a suitable scheme for a new Courts Act in this jurisdiction also necessitated an examination of the exact type of provisions that are sufficiently connected with the jurisdiction of the courts to merit their inclusion in the Consolidated Courts Act.

Having considered a number of options, the Commission concluded by provisionally recommending that the consolidated Courts Act have a thematic structure. This means that the draft Consolidated Courts Bill consists of individual Parts each dealing with a particular aspect of the jurisdiction of the courts with each court being separately provided for, where applicable, in a division of the Part.[10] For example, Part 6 of the draft Bill attached to the Consultation Paper is concerned with judicial posts and is divided into parts dealing with provisions applicable to all judicial posts, judges of the Superior Courts, High Court judges, judges of the Circuit Court, judges of the District Court, presiding judges and powers of the presiding judges.

In order to decide what provisions are suitable for inclusion in the new Courts Act, the Commission considered its general purpose. The Commission provisionally concluded that it should provide for the allocation of exercise of the judicial power of the State, the administration of justice, constitution and jurisdiction of the courts, allocation of jurisdiction between the courts, management of the courts and judges and officers of the courts.[11] The scheme of the draft Consolidated Courts Bill developed by the Commission contains the following general headings:

- Preliminary and General;
- Constitution of Courts;
- Jurisdiction of the Courts;
- Circuits and Districts;
- Appeals;
- Judicial Posts;
- Officers of the Court;
- Administration of the Courts;
- Procedure;
- Savers and Miscellaneous.

The Consultation Paper discusses in some detail the type of provisions suitable for inclusion in the Courts Act. The Commission noted that in recent years provisions relating to remuneration and salaries of the judiciary have been amended by legislation which is concerned with the remuneration of Oireachtas members as a whole. The Commission provisionally recommended that legislative provisions relating to the salaries, remuneration and pensions of the judiciary be excluded from the ambit of the Consolidated Courts Act.[12] The Commission made a similar recommendation regarding the Judicial Appointment Advisory Board.[13] The Commission also decided that the majority of the Courts Service Act 1998 should be excluded given that its provisions are not sufficiently related to the jurisdiction of the courts.[14] The Commission welcomes submissions on the proposed structure of a consolidated Courts Act devised in the Consultation Paper.

Substantive areas of reform

The Commission also analysed proposals for reform on the jurisdiction of the courts made by other bodies. The Commission selected eight discrete areas for examination in the Consultation Paper. These are:

- the case stated procedure,
- the in camera rule,
- vesting of statutory jurisdiction in statutory bodies and the removal of court jurisdiction in other areas,
- the appeals system in general, including leave to appeal in criminal cases,
- increase in general monetary limits in the civil jurisdiction of the District and Circuit Courts,
- the Rules of Courts Committees,
- criminal procedure: summary trials of indictable offences and the right of election and
- jurisdiction of the courts in criminal matters: the allocation of cases to Circuit Court and Central Criminal Court.

The Commission made a number of provisional recommendations on these issues. These included repealing the form of appeal by way of case stated because the Commission considered that an ordinary appeal is the more appropriate appeal mechanism and that it would be sufficient to retain the consultative case stated. In addition, the Commission recommended that a more general rule be provided which would protect the anonymity of parties to proceedings which are currently outside the *in camera* rule. The Commission adhered to and reiterated the recommendation of the Legal Costs Implementation Advisory Group that the monetary limits of the District and Circuit Courts be increased in line with the Courts and Court Officers Act 2002 (excluding personal injuries claims).

7 See page 38 of the Consultation Paper.
8 See pages 37-38 of the Consultation Paper.
9 In chapter 4 of the Consultation Paper, the Courts Acts of England and Wales, Singapore, New Zealand, Australia and Northern Ireland are examined in detail.
10 See pp 247-8 of the Consultation Paper.
11 See pp 248-9 of the Consultation Paper.
12 See pp 254-9 of the Consultation Paper.
13 At page 259 of the Consultation Paper.
14 See pp 264-5 of the Consultation Paper.

Conclusion

The Commission welcomes submission on any aspect of its Consultation Paper, in particular its provisional recommendations. Any submissions received will be taken into account during the consultation period prior to the publication of its final report which will contain a final Consolidated Courts Act. The date for the receipt of submissions in respect of the Consultation Paper is 30 November 2007 and can be made by email to info@lawreform.ie or by post to Secretary/Head of Administration, The Law Reform Commission, 35-39 Shelbourne Road, Ballsbridge, Dublin 4.

Launch of New Book on Discovery and Disclosure

Pictured at the launch of Discovery and Disclosure *in The Law Library Distillery Building are: L-R: Andrew Fitzpatrick BL; William Abrahamson BL; James Hamilton The DPP; James Dwyer BL; The Hon. Mr Justice Adrian Hardiman, The Supreme Court; and Catherine Dolan, Commercial Manager, Thomson Round Hall.*

The Pupil-Exchange Programme

Inga Ryan, CPD Manager

In June 2007, the Bar Council of Ireland piloted an International Pupil Exchange Programme for barristers. Open to barristers in their first and second years, the programme was devised under the CPD umbrella to increase the legal knowledge of the Bar, and to create bonds and links with our foreign colleagues. It is hoped this will broaden the lines of communication and lead to the sharing of knowledge among jurisdictions.

In June, barristers Sandra Walshe, Rachel McCrossan, Miriam Delahunt and Vivien Barror, traveled to foreign juristictions for a period of three weeks to participate in the programme, whilst the Bar of Ireland hosted two London based barristers. This was an exciting experience for all participants as despite months of preparation, partaking in the pilot was stepping into the unknown.

We devised a programme of activities for our guests that offered insights into the Irish legal system and culture. Inge Clissman SC and Brendan Grehan SC acted as 'masters' and looked after our guests exceptionally well. Irish members who participated have written brief articles giving insights into their experiences. Should Bars from other jurisdictions be willing to participate, we hope to host a similar programme again this year.

The Barcelona Experience

Sandra Walshe BL

My experience of the legal system in Barcelona was rather similar to that of being a devil in the Law Library in the first month to six weeks. I did a lot of observing and following lawyers around. During the three weeks I spent in the office, I was principally involved in criminal law cases although my mentor would normally have practised civil law. I discovered there were some quite glaring differences between the Spanish and Irish legal system.

Firstly, on a general level, prior to ever going to trial each party to an action not only has a lawyer but also a "procurador de los tribunales". We do not have an exact equivalent of the "procurador" here but the nearest would be a commissioner for oaths or notary public although the roles are quite different. A "procurador" has no formal legal training or qualifications but they are involved in all cases. I have to admit that at one level I felt this role was nothing more than a money-printing machine!

The next thing that struck me was the relative informality of the day to day running of the system. The dress code I discovered was very informal with it not being an unusual occurrence for lawyers to turn up for their court appearance in jeans and to just robe up before entering court – robes are hired free of charge on the day as opposed to having personal robes like we do. The judge is generally sitting in court before the parties enter and does not seem to command the same level of respect as an Irish judge as there is no bowing, etc. My colleagues in the firm where I worked couldn't understand why we put so much emphasis on formality here. One area where the system in Barcelona seemed to pip our own is in the organisation of the daily lists. Each hearing is assigned a time for hearing on a particular day, thus there is no need for a call over each morning and no waiting around from around 10am decorating the corridors when other valuable work could be taking place. While the lists in Barcelona may not run exactly on time, they do at least pretty much guarantee that your case will be heard on the assigned date.

Regarding actual legal experience, I was fully integrated in the work within the office. My most surreal and hands on experience was in a domestic violence trial under the penal code where the accused was a British national. I found myself heavily involved in two-way translation at the pre-trial consultation and in witness question preparation based on the evidence of our client, the accused person, which had all been prepared in English. Luckily my mentor also spoke quite good English therefore there was a minimal risk of nuances in language being lost in translation.

Being a civil system, the most important factor in Spanish law is whether a particular action is codified or not. This primarily decides whether an action may be tried through the civil or criminal systems, as, if an action is not codified it is almost impossible to find a cause of action. This differs significantly from this jurisdiction where we may not have statute covering all causes of action and rely instead on the common law.

Having sat in on a number of criminal trials I came away with very mixed views on the Spanish criminal legal system. On one end, I was appalled at the way the defendant is first up in a criminal trial. Not only is he the first witness to take the stand but he is questioned in the first instance by the lawyer representing the "Ministerio Fiscal", the Spanish equivalent of the DPP, as opposed to his own defence counsel. (The "Ministerio Fiscal" is a full time role in the permanent paid employment of the State). This did not sit well with my idea of justice from our constitutional perspective where one is presumed innocent until proven otherwise beyond a reasonable doubt by the prosecution. Further, by going first, a defendant does not know what case he has to answer and is most likely going to show all his cards before the prosecution gets to wheel in their own witnesses to prove its case. In addition, judgment is not handed down on the day in a majority of cases and an accused may have to wait several weeks, or even months, before finding out his fate. This would leave a person who is potentially innocent with serious charges and a possible custodial sentence hanging over them for far longer than is necessary in my opinion. It does

not reconcile easily with the Art 6 ECHR requirement for a fair and speedy trial I would posit. It is also my understanding from the lawyers I spoke to that jury trials are far less common in Spain than they are here. However, I would caution that I only went to trials in the courts of First Instance, the equivalent of our District Courts.

On a more positive note I was very impressed with one particular aspect of the Spanish criminal legal system, that being victim representation during the trial. Previously I would have been a vociferous opponent of a victim being legally represented during a trial. In Spain, a victim is entitled to have their own lawyer present at a criminal trial. This lawyer is not only there to observe proceedings but has full rights to cross examine the accused and can put questions to their own client also. Having seen this in operation I now feel that having a victim's lawyer in court can be useful in assisting the court to see in a clearer context the circumstances in which the crime allegedly occurred. In some ways, rightly or wrongly, the victim's lawyer could act as a method of asking questions the prosecution may forget or omit to address.

In conclusion, I truly believe that availing of the opportunity to go on the Pupil Exchange Programme was one of the most positive experiences of my life to date. I was able to learn more about the legal system in Spain in that short space of time with hands on experience than I could have done sitting for months in a classroom.

The Bar of England and Wales

Rachel McCrossan BL and Miriam Delahunt BL

Each week, we were attached to either a criminal or civil chambers in London. Both of us were lucky to have been exposed to a wide range of civil and criminal proceedings.

On the Monday and Friday of each week, we had activities, such as a visit to Snaresbrook Crown Court, the Royal Courts of Justice and the Old Bailey, a meeting with Geoffrey Vos, Chairman of the Bar Council, a visit to Camberwell Green Magistrates Court to shadow a Crown Prosecution Service barrister, and last but not least, a tour of the Houses of Parliament.

One of the abiding memories that we have of London is the amazing hospitality we received and the social diary that was organised for us - a classical concert and supper in Gray's Inns, a private guest night in Middle Temple, the Legal Charities Garden Party in Lincoln's Inns, the tour of the Inner Temple by fellow countryman Eamon O'Reilly. We were also very honoured to be invited to dinner at the home of Judge Radford and Nadine Radford QC . We were privileged not only to attend a Young Barristers Committee meeting but also to be taken to dinner by the Committee afterwards. We were overwhelmed by the genuine warmth and kindness we received at every quarter.

The Bar of England and Wales' Young Barrister's Committee has been in existence for over 50 years and it is obviously an important vehicle for the promotion of interests of junior members. There isn't a Young Barristers Committee in Ireland and perhaps this is something that should be considered in light of the large numbers of junior barristers joining the profession each year.

Unlike in Ireland, pupils in England receive compulsory payment. It was interesting to see how the progress of pupils in England and Wales was monitored and that a checklist was used to ensure that pupils received a good overview of various aspects of practice.

We found it very interesting to meet Karen Squibb Williams of the Employed Barristers Committee to hear about the role of employed barristers working with the Government, in-house in solicitor's firms and with the Crown Prosecution Service. Karen explained to us that although such barristers are employed, they are still independent and owe their primary responsibility to the principles of the Code of Ethics. Perhaps there is more scope for the existence of an Employed Bar in England and Wales given the much larger population and proportionate number of barristers.

We were privileged to have the experience of marshalling in Snaresbrook Crown Court. Miriam with Judge Zeidmann and Rachel with Recorder Patricia Lees. It was interesting to witness the court process from the point of view of the bench.

Italian Pupil Exchange Programme

Vivien Barror BL

In Italy, there is no distinction in the legal profession between barristers and solicitors, rather there is the single profession of lawyer (*avvocato*) and accordingly they perform broadly the same functions as both solicitors and barristers here. Italian lawyers operate in a legal studio (*studio legale*) and clients have direct access to lawyers. Currently in Italy, there are approximately 200,000 lawyers in a population of 59 million with approximately 20,000 of these practising in Rome, which itself has a population of just over four million inhabitants. A view shared by many lawyers is that there are simply too many lawyers in Italy, in spite of the fact that demand for their services has increased in response to the steady rise in litigation over the last number of years.

On completion of their law degree, students go on to become trainees (*praticanti*) and are admitted to the Trainee Bar (*Albo dei Praticanti*) in their first year. They work in a legal studio for two years and are assigned to a Master-type figure called a *dominus* who acts as their mentor, though not necessarily for the whole two years. During the first year trainees must always be accompanied by their master or by another lawyer and they would rarely appear in court. After the first year, they become 'qualified' trainees (*praticanti abilitati*) and are admitted to the Qualified Trainee Bar (*Albo dei Praticanti Abilitati*) and can appear in cases with a monetary value not greater than €25,000. During those two years they attend hearings and consultations, join interminable queues to lodge documents in court and generally perform the less exciting tasks of their profession. All trainees must attend ten hearings each of civil and criminal law and a further ten hearings of either each semester. They must also complete essays on the various aspects of law they encounter.

On completion of the two years, the trainee is eligible to sit the final *avvocatura* exams which are notoriously difficult and often require more than one attempt. If they are successful, they are admitted to the Bar and are free to practice as fully fledged lawyers, with an audience in every court apart from the Italian equivalent of the Supreme Court

(*Corte della Cassazione*). Only *Cassazionisti* may appear in this court. Italian lawyers either automatically become *Cassazionisti* after 10 years of practice as a lawyer or they may opt to do exams after 5 years in order to acquire that status.

Financially speaking, the situation for trainees very much depends on the legal studio in which they carry out their training. Arrangements vary, with some legal studios offering time in lieu of payment, leaving trainees free to earn money from other pursuits, while others offer varying levels of salary or payment of expenses. However, legal studios are under no obligation to pay their trainees.

Those barristers in their first and second year of practice who are interested in participating in an exchange scheme this year should email cpd@lawlibrary.ie, stating their year of call, for which jurisdiction(s) they would like to be considered, in what foreign languages they are fluent and a brief Resume or CV.

Costs in family law proceedings

Paul Hutchinson BL

Introduction

Legal costs are the elephant in the corner in family law proceedings – the protagonists are acutely aware of the issue, but the law can be opaque as to how the costs burden is ultimately to be distributed. In this regard, a distinction can be drawn between the issue of the level of costs to be levied in family law proceedings and the legal principles governing the issue of who ultimately pays and in what proportion.

There are mixed views as to what application, if any, the general rule in civil proceedings that costs follow the event has in the context of family law. In the English Court of Appeal decision of *Gojkovic v. Gojkovic*[1], Butler-Sloss LJ. considered that the "…starting point…is that costs *prima facie* follow the event…but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court"[2]. It is less clear whether this represents the position in this jurisdiction[3] given that the recent Supreme Court decision of *M.K. v. J.K. (No. 3)(Divorce: currency)*[4] confirms that the impact of legal costs upon parties cannot be distinguished from the concept of "proper provision"[5] insofar as[6]:

> "In the circumstances of family law cases the court must look at the effect of the award of costs on both parties."

Additionally, there is a certain lack of realism involved in attempting to define the successful "event" in family law proceedings to say nothing of the public policy arguments against framing family law proceedings in such starkly adversarial terms. In any event, the question must be posed as to what principles are to be applied by a court in deciding which party bears the burden of legal costs.

The *Calderbank* Rule in England and Wales – "Playing Poker" with Costs

Beyond the starting point highlighted by Butler-Sloss LJ. in *Gojkovic*[7], the courts in England and Wales have demonstrated a willingness to re-distribute the costs burden other than in accordance with the "event" in certain circumstances, of which litigation misconduct is the most prominent. In *P. v. P. (Financial Relief: Non-Disclosure)*[8], Thorpe J. held that[9]:

> "It seems to me that in that case such price as is to be paid by the dishonest litigant is a price in costs, not in reduction of the appropriate share of the available assets."

Conversely, in *M. v. M. (Financial Provision: Party incurring Excessive Costs),*[10] Thorpe J. elaborated on the circumstances where litigation misconduct might, in exceptional circumstances, only equitably be re-balanced in the award of ancillary relief as opposed to the re-distribution of the costs burden[11]:

> "Ordinarily speaking, it seems to me that the manner in which proceedings are misconducted is to be reflected in orders for costs rather than directly in the scale of the awarded sum. However, this seems to me to be the exceptional case where the husband's strategy has been so extreme that it would be inequitable to disregard it. It seems to me that it is appropriate to look at the quantification of the wife's share not of what remains today but of what would remain today had that policy of waste and destruction not been pursued."[12]

Leaving aside the question of financial non-disclosure, the principal example of litigation misconduct occurs where one party unnecessarily extends the litigation process and dissipates the pool of assets accordingly. In the decision of the Court of Appeal in *Calderbank v. Calderbank*[13], Cairns LJ. approved the practice in family litigation of putting a settlement proposal to the other side on a "without prejudice" basis, save in respect of the costs of the proceedings[14]:

> "It is common practice for an offer to be made by one party to another of a certain apportionment. If that is not accepted, no reference is made to that offer in the course of the hearing until it comes to costs, and

1 [1992] Fam 40
2 *Ibid.*, at 57.
3 Shannon, *Divorce: The Changing Landscape of Divorce in Ireland,* (Roundhall Sweet & Maxwell, 2001) at E-192; see also Shannon (Ed.), *Family Law Practitioner*, (Roundall Sweet & Maxwell, 2000) at E-192. Furthermore, McCracken J. in *M.K. v. J.P.K. (No. 3)(Divorce: Currency)* [2006] 1 IR 283 at 291 states that: "In my view, therefore, the general rule does not necessarily apply in family law proceedings".
4 [2006] 1 IR 283.
5 Article 41.3.2° of the Constitution; Section 5(1)(c) of the Family Law (Divorce) Act, 1996; Section 3(2)(a) of the Judicial Separation and Family Law Reform Act, 1989.
6 *Ibid.*, at 291 (*per* McCracken J.).
7 *Supra.*
8 [1994] 2 FLR 381.
9 *Ibid.*, at 392.
10 [1995] 3 FLR 321.
11 *Ibid.*, at 330; see also *Taloulareas v. Tavoulareas* [1998] 2 FLR 418 where Thorpe LJ. approved both statements in the Court of Appeal, *ibid.*, at 426-427.
12 See also: *Young v. Young* [1998] 2 FLR 1131 for a re-statement of the difference in effect of marital misconduct and litigation misconduct on ancillary relief (quantum) and costs respectively.
13 [1976] Fam 93.
14 *Ibid.*, at 106.

then if the court's apportionment is as favourable to the party who made the offer as what was offered, or more favourable to him, then costs will be awarded on the same basis as if there had been a payment in.

I see no reason why some similar practice should not be adopted in relation to such matrimonial proceedings in relation to finances…"

This approach very soon became a standard litigation tactic in family law proceedings in England and Wales where ancillary relief and financial provision were at issue[15]. However, in recent years, the *Calderbank* letter has been criticised for the impossible, "poker-like" position in which it places a recipient who has to judge whether the potentially complex suite of relief being offered to him or her in the *Calderbank* letter corresponds to what will ultimately be awarded by the court of trial[16]. The difficulty here is that the suite of relief available to a court in ancillary relief cases is so varied, and the consequent valuation of a settlement proposal is made extremely difficult because of this (in contrast to the valuation of a personal injury, for example). As such, it was described as "poker" by Holman J. in *H. v. H. (Financial Relief: Costs)*[17] who went on to suggest that the time was "fast approaching"[18] for the practice to be removed altogether. Nicholas Mostyn QC, sitting as a deputy High Court judge in the case of *G.W. v. R.W. (Financial Provision: Departure from Equality)*[19], extended the gambling analogy as follows[20]:

> "…it seems to me that the present system in effect forces the parties to engage in a mandatory form of spread betting. The parties are required to guess the outcome of the case and to take a position. If they have guessed correctly then they win a large amount; if they have not then they lose. But there is one significant difference to a spread bet. With a spread bet the amount the gambler wins or loses is the difference between the result and the position-maker's spread…The orthodox *Calderbank* theory in ancillary relief proceedings is, however, different in that it does not reflect the closeness of the litigant's call. Instead, the mere fact of beating his guess by even a tiny amount entitles the maker of the offer to call for payment of the entirety of his costs from 28 days after the date of his offer. Similarly, if his guess is a fraction less than the result, then the other party can call for all her costs to be paid by the maker of the offer. So it can be seen that vast sums can swing on even the smallest failure to guess accurately. And there is no premium for guessing really well."

The criticism of the *Calderbank* approach was further considered by the Court of Appeal in the decision of *Norris v. Norris*; *Haskins v. Haskins*[21] where Dame Butler-Sloss P. stated that[22]:

> "The difficulties which undoubtedly arise from [the rules relating to costs] set out by Mr Mostyn QC with clarity in his judgment in *GW v. RW (Financial Provision: Departure from Equality)*…now urgently require a rethink and it is time for further amendments to the rules governing awards of costs in ancillary relief cases. The present rules may affect disproportionately the payers in big money cases. The effect of costs is, however, to be felt across all ancillary relief claims. Although I have criticised Mr Mostyn QC for the cavalier way in which he dismissed the Family Proceedings Rules 1991, his approach to the reconsideration of costs requires careful thought, and I agree with the overall direction of his judgment for the future."

The Family Proceedings (Amendment) Rules 2006

As of the 3rd April 2006, the Family Proceedings (Amendment) Rules 2006 altered the English Family Proceedings Rules, 1991 governing the award of costs in ancillary relief proceedings[23]. In brief, the new rules apply to applications for ancillary relief under Section 10 of the Matrimonial Causes Act 1973, and Section 48 of the Civil Partnership Act 2004, and abolish the practice of *Calderbank* letters with a preference for "open offer" letters in their stead.

The amended Rule directs a court to start from the position that in ancillary relief proceedings there should generally be no order as to costs, but with discretion to direct that costs be paid[24]:

> "…at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)"

In this context, "conduct" is given an extremely broad meaning beyond what had traditionally been understood at common law as constituting marital misconduct that might, if sufficiently grave, affect the level of ancillary relief to be awarded by the court[25]. Under the amended Rules, if a

15 See *McDonnell v. McDonnell* [1977] 1 WLR 34; *Young v. Young* [1998] 2 FLR 1131; and *Butcher v. Wolfe and Wolfe* [1999] 1 FLR 334. In the decision of the Court of Appeal in *Butcher*, Mummery LJ. summarised the position as follows (at 340): "A *Calderbank* offer is made for the same reason as a payment into court is made; to encourage a settlement and, failing a settlement, to protect the position on costs of the person making the payment in or the*Calderbank* offer. But a *Calderbank* offer…requires a greater degree of flexibility. The proper approach to a *Calderbank* offer, when it is taken into account on a later argument on costs, is to ask whether the party to whom the offer was made 'ought reasonably to have accepted the proposal in the letter?'"

16 See Lowe & Douglas, *Bromley's Family Law*, (10th Ed.), (Oxford University Press, 2006) at 1056-1058.

17 [1997] 2 FLR 57 at 59.

18 *Ibid.*

19 [2003] 2 FLR 108.

20 *Ibid.*, at 134-135.

21 [2003] 2 FLR 1124.

22 *Ibid.*, at 1134 (amendment by author).

23 See Hodson, "*Calderbanks* Past their Sell-by Date: The New Costs Rules", http://www.familylawweek.co.uk/library.asp?i=1806 (viewed February 19, 2007).

24 Rule 2.71(4)(b) of the amended Family Proceedings Rules 1991.

25 Section 25(2)(g) of the Matrimonial Causes Act 1973.

court determines that an order as to costs is justified under the circumstances of the case, regard must be had to certain listed factors[26] which include:

- The failure by a party to comply with the Family Proceedings Rules, any court order or any relevant practice direction;
- Any open offer made;
- The issue of whether it was reasonable for a party to pursue a particular issue (clearly, "reasonableness" in this context is more subtle than merely whether a party has succeeded on a particular point);
- The manner in which a particular allegation or issue was pursued in fact;
- Any other aspect of a party's conduct which the court considers relevant; and
- The financial implications of a costs order on the individual parties.

Additionally, particular reference is made to whether or not a party has fully disclosed his or her financial assets under the prescribed forms at the outset of the litigation[27]. Clearly then, there is a relatively low "conduct" threshold to be breached before a court will consider making a costs award[28].

In the short term at least, it has been suggested that the new rules may lead to an increase in litigation regarding the situations where it is legitimate for the trial judge to depart from the default position of making no order as to costs[29]. What is clear at this stage is that the practice of sending *Calderbank* letters will now become entirely redundant. Attempts by litigants to reduce their exposure to the costs burden by demonstrating a willingness to settle contentious issues of ancillary relief will inevitably take the form of open offers.

The Irish Position

By contrast to the law and practice relating to costs in England and Wales, the position in this jurisdiction is somewhat less sophisticated[30]. The issue of the distribution of the costs burden is touched upon by a number of the relevant statutes[31] and by a recent Practice Direction in the High Court[32]. With the exception of the Practice Direction, the majority of the relevant statutory schemes, together with the applicable rules of court, provide little more assistance in answering the question of where the costs burden should lie than merely stating that the issue is "at the discretion of the court"[33]. This discretion does not extend, according to the decision of Walsh J. in *M.B. v. R.B.*[34], to distributing the costs burden to non-parties even where "…domestic peace [is] shattered by the intervention of a third party"[35] (speaking in the context of petitions for divorce *a mensa et thoro*).

The otherwise broad, discretionary power may well have its origins in the High Court's power to award costs "as may seem just"[36] under Section 27 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870[37]. The premise upon which the law originally operated was the presumption that, in matrimonial litigation, the wife will have no independent means. The point is well illustrated by comments made in the decision of *Flower v. Flower*[38] where it was concluded that[39]:

> "…unfortunately in the vast majority of cases the wife has no means of her own. She has to find an attorney to take up her case for her, and if she could not obtain from her husband the means of employing him she would be powerless, and however good a cause she might have for taking proceedings, she would be unable to enforce her rights…"

Notwithstanding, it appears from the decision in *Sullivan v. Sullivan*[40] that the law did not prescribe the wife's costs to be subsidised by her husband absolutely *de die in diem*. In this case, Madden J. elected not to follow the rule in *Flower* on the basis that there was "evidence of the existence of unfettered separate property within the control of the Petitioner [wife]"[41], and this ruling was left undisturbed on appeal. Despite this, the decision in *Sullivan* did not disturb the clear policy in favour of awarding costs to the wife in litigation. In *McK. v. McK.*[42], Hanna J. awarded the wife her costs in a nullity suit brought at the suit of the Petitioner

26 Practice Direction (Ancillary Relief: Costs) [2006] 2 FCR 292.
27 Rule 2.61 D (2)(e) of the Family Proceedings Rules 1991 (known as Form E).
28 Hodson, *loc. cit.*
29 See: Sheppard, "Farewell to *Calderbanks*", [2005] Fam Law 933 and Segal, "The *Calderbank* Procedure: New Developments", [2004] Fam Law 107.
30 Shatter, *Shatter's Family Law*, (4th Ed.), (Butterworths, 1997) at 120-122; and Liston, *Family Law Negotiations: An Alternative Approach*, (Thomson Round Hall, 2005) at 322-330.
31 See Duncan & Scully, *Marriage Breakdown in Ireland: Law and Practice*, (Butterworths, 1990) at 492-494.
32 October 6, 2005 (having effect as of November 10, 2005).
33 See: Section 26 of the Family Law (Maintenance of Spouses and Children) Act, 1976; Section 35 of the Judicial Separation and Family Law Reform Act, 1989 Section 19 of the Domestic Violence Act, 1996; and Order 59; rule 34 of the Circuit Court Rules 2001. Section 38(5) of the Family Law (Divorce) Act, 1996 provides that "Section 32 of the Act of 1989 shall apply to proceedings under this Act in the Circuit Family Court and sections 33 to 36 of that Act shall apply to proceedings under this Act in that Court and in the High Court" and, as such, the position is the same in High Court divorce proceedings. See Walls and Bergin, *The Law of Divorce in Ireland*, (Jordan Publishing Ltd., 1997) at 13.10.
34 [1989] 1 IR 412.
35 *Ibid.*, at 420 (amendment by author). Walsh J. pointed out that (*supra.*) "…[a Court] cannot bring before it a co-respondent and order him or her as the case may be to pay damages or costs. This point was emphasized by the Oireachtas in recent years when it abolished the action of criminal conversion."
36 Section 27 of the 1870 Act reads: "The said Court for Matrimonial Causes and Matters, on the hearing of any suit, proceeding, or petition under this Act, and the Court of Appeal in Chancery and the House of Lords, on the hearing of any appeal under this Act, may make such order as to costs as to such Court, Court of Appeal, or House respectively may seem just: Provided always, that there shall be no appeal on the subject of costs only."
37 Duncan & Scully, *op. cit.* at 492.
38 (1873) LR 3 P. & D. 132.
39 *Ibid.*, at 133.
40 [1912] 2 IR 116.
41 *Ibid.*, at 124 (amendment by author).
42 [1936] IR 177.

husband, and applied what he terms the "ordinary practice in divorce cases"[43] on the basis that[44]:

> "… she is still his wife, …she has no private property of her own, [and] that the test must be from the solicitor's point of view, whether he could maintain a suit against the husband for these costs, as having been reasonably incurred."[45]

What has since become clear is that this presumption no longer enjoys weight in Irish law. In the decision of *F. v. L.*[46], Barron J. considered the (then) existing practice and rejected it on the basis that[47]:

> "…times have changed. In particular since the passing of the Married Women's Status Act, 1957, any fetters which may have existed in relation to a married woman's right to own property were removed. In my view the practice of allowing a wife her costs as against her husband in all circumstances is no longer justified. In each individual case, it is the duty of the court to make such order as is just in the circumstances."

There can be little argument against the view that the rule in *Flower* represented an anachronism, however the alteration of the rule leaves Irish law in this area somewhat in the wilderness as regards the guiding principle to be applied. Shatter takes the view that the law does not assist in predicting how the costs burden will ultimately be distributed[48]:

> "The ultimate outcome of an application for costs very much depends not only on the background to proceedings and the decision reached but also on the individual trial judge's perception of the overall matter."

With respect to this view, it is submitted that, whilst distilling concrete legal rules in this area is a difficult task, certain tentative indicators can be deduced:

a) The costs burden is an aspect of "proper provision"

What is beyond any doubt is that the costs burden, and how it will financially affect the spouse(s) who bears it, is an aspect of "proper provision"[49] to be considered by a trial judge prior to the determination of asset division and other ancillary relief in a given case. In her *ex tempore* judgment in *E.P. v. C.P.*[50], McGuinness J. considered it "a tragedy" that:

> "[t]he end result of this unfortunate history is that the considerable pot of capital which was available at the beginning of this case to both parties and for the future of their children is now dissipated either in borrowings or in legal costs."

As such, the costs burden is a liability to be considered as diminishing the total pool of assets available to litigating parties. Furthermore, it is submitted that the effect of this diminution should properly be considered alongside the division of marital assets and other ancillary relief[51]. This point is underlined by the judgment of McCracken J. in the Supreme Court decision of *M.K. v. J.P.K. (No. 3)(Divorce: Currency)*[52] where it was held that[53]:

> "These are family law proceedings in which the court must have regard to the interests of both parties. This is not a case in which damages have been awarded to the applicant for some wrongdoing or injury caused to her by the respondent. In family law cases there is a pool of assets, comprising those of both the respondent and the applicant, which assets are to be used both to make proper provision for both spouses and any dependant members of the family and to pay the costs of both parties."

The default position therefore regarding distribution of the costs burden in family law cases is for the trial judge to refrain from drawing a correlation between costs and blame. Accordingly, in *T.T. v. T.T.*[54], Abbott J. elected to make no Order as to costs in an appeal from the Circuit Court but pointed out that

> "The failure to make such Orders is not intended as an adjudication on the merits of the case rather as an element of compensation to Mr. T."

b) Where one party cannot afford to pay legal costs, the other party may be directed to discharge the costs in their entirety or in appropriate proportions

If legal costs are to be considered a liability to be discharged from the total pool of assets, the remainder of which must comprise "proper provision" for each individual, it logically

43 *Ibid.*, at 221.
44 *Supra.*
45 See also *Bradley v. Bradley* Unreported, High Court (Murnaghan J.), January 11, 1971. Also, in the Court of Appeal decision of *Courtney v. Courtney* [1923] 2 IR 31, Dodd J. held that (at 41): "…the practice still prevails that a husband who succeeds is yet bound to pay his wife's costs. The Matrimonial Judges have endeavoured to modify the stringency of this rule, and in exceptional cases, as where the wife has separate goods, depart from it. The wife here has no separate estate; the money she got was in lieu of alimony, and there are no exceptional circumstances affording grounds for departing from settled practice as to costs."
46 [1991] 1 IR 40.
47 *Ibid.*, at 42.
48 Shatter, *op. cit.* at 121-122.
49 Article 41.3.2° of the Constitution; Section 5(1)(c) of the Family Law (Divorce) Act, 1996; Section 3(2)(a) of the Judicial Separation and Family Law Reform Act, 1989.
50 *E.P. v. C.P.* Unreported, High Court (McGuinness J.), *ex tempore* November 27, 1998.
51 See also: *R.F. v. J.F.* Unreported, Circuit Court (McGuinness J.) August 23, 1995; and *Singer (formerly Sharegin) v. Sharegin* [1984] FLR 114.
52 [2006] 1 IR 283.
53 *Ibid.*, at 291 (*per* McCracken J.).
54 Unreported, High Court (Abbott J.), June 26, 2002,

follows that the financially-stronger party might be called upon to discharge all or a proportion[55] of *both* parties' legal costs. Whilst this may be unpalatable for the indebted party (especially in circumstances where there is no question of assigning blame) it remains an unavoidable fact of family litigation, and a common occurrence[56].

By way of example, in the Circuit Court case of *S.B. v. R.B.*[57], Judge McGuinness was swayed by the fact that the husband was meeting some of his legal costs as a business expense and directed a contribution in favour of the wife, notwithstanding the fact that the wife had already been granted generous ancillary relief:

> "While the wife is getting the lion's share of the proceeds of sale of the family home, she needs to use the vast majority of this to purchase an alternative home for herself and she has no other resource from which to meet legal costs. I am therefore ordering that the husband should pay a contribution of £2,000 towards the wife's costs."

c) Where both parties are equally impecunious, it may be appropriate to make no order as to costs

It follows from both previous propositions that where discharge of the costs burden would "cause unnecessary hardship"[58] on either party, a trial judge should make no order as to costs[59]. In a sense, this can be viewed as an extension of the "equal misery" principle whereby lower standards of living as a result of marital breakdown is acknowledged as inevitable on the basis of an economy of scale[60]. For example, in the Circuit Court decision of *R.S. v. R.S.*[61], Judge McGuinness made no order as to maintenance against the husband and no order as to costs as the means simply did not exist to satisfy such orders.

An interesting corollary of this principle arises where the parties are equally well-off. In such situations, there appears to be no reason why the same approach should not be adopted, and the parties left to discharge their respective legal costs from their own resources. In the alternative, a marital asset may be liquidated to discharge the respective debts. As such, in *J.D. v. P.D.,*[62] Lynch J. made no order as to costs on the basis that there was a capital fund available to meet this end. Similarly, in *D. v. D.*[63] O'Hanlon J. directed that the proceeds from the sale of a particular property were to be used to discharge the parties' respective costs.

d) Litigation conduct can affect where the costs burden lies

Perhaps the most contentious issue in this area is where a party's conduct can have an influence on the ultimate distribution of the costs burden. In this regard, three preliminary points should be made. First, situations where this issue arises are the exception, and not the rule[64]. Second, such situations are distinct from the situations where marital misconduct[65] influences the level of ancillary relief to be awarded[66]. Third, such situations are distinct from cases where contempt of court comes into play.

Put simply, where a party misconducts themselves in the litigation process, they may suffer a costs penalty (*in toto* or in part)[67]. McKechnie J. made the point in *B.D. v. J.D.*[68] that the exigencies of making "proper provision" do not give the litigating parties licence to misconduct themselves with impunity:

> "Given the obligation to make proper provision under the 1995 and 1996 Acts, many parties believe that as a result of this requirement they are in effect financially immune from participating in litigation no matter how lengthy the process may be or how unreasonably they may act. For this to be the situation or even perceived to be the situation, is not in my view in the public interest or in the interest of the administration of justice."

Litigation conduct can take a variety of forms in this context. For example, in *C.O'R. v. M.O'R.*[69], O'Donovan J. in the High Court was unimpressed by the time wastage caused by the wife's pursuit of irrelevant issues, and she suffered a proportionate costs penalty[70]. Similarly, the failure of expert witnesses to attend when expected[71], the unwillingness to consider negotiated settlement[72], the failure to make adequate or honest financial disclosure[73], and a general absence of

55 See *C.O'C. v. E.D.* Unreported, Circuit Court (McGuinness J.), December 14, 1995.

56 See: *H. v. H.* Unreported, High Court (Keane J.), July 25, 1979; *S.W. v. F.W.*, Unreported, Circuit Court (McGuinness J.) November 24, 1994; *M.Y. v. A.Y.* Unreported, High Court (Budd J.), December 11, 1995; *B.J.M. v. C.M.* [1996] 2 IR 574 (at 580); *M.M. v. G.M.* Unreported, High Court (O'Donovan J.), November 25, 1999; and *E.H. v. J.M.* Unreported, High Court (Kinlen J.), April 4, 2000.

57 Unreported, Circuit Court (McGuinness J.), May 10, 1996.

58 *Per* Barron J. in *Keena v. Keena* Unreported, High Court (Barron J.), October 25, 1990.

59 See: *V.S. v. R.S.* Unreported, High Court (Lynch J.), June 10, 1991; and *E.M. v. W.M.* Unreported, Circuit Court (McGuinness J.), October 25, 1994.

60 Shatter, *op. cit.* at 666; see also the decision of the Supreme Court in *R.H. v. N.H.* [1986] ILRM 352.

61 Unreported, Circuit Court (McGuinness J.), December 14, 1995.

62 Unreported, High Court (Lynch J.), August 9, 1994.

63 Unreported, High Court (O'Hanlon J.), December 10, 1982.

64 It is submitted that older authorities from England and Wales to the effect that a court should pose the question "whose conduct gave rise to the litigation?" no longer have any relevance. For comparative purposes, see: *Gooday v. Gooday* [1969] P. 1; and *Povey v. Povey* [1972] Fam 40.

65 *P. v. P. (Financial Relief: Non-Disclosure)* [1994] 2 FLR 381.

66 See: Section 16(2)(i) of the Family Law Act, 1995; Section 20(2)(i) of the Family Law (Divorce) Act, 1996; *Wachtel v. Wachtel* [1973] 2 WLR 366; and *D.T. v. C.T.* [2002] 3 IR 334.

67 See: *E. v. E. (Financial Provision)* [1990] 2 FLR 233; *C. v. C. (Costs: Ancillary Relief)* [2004] 1 FLR 291; and Walls and Bergin, *The Law of Divorce in Ireland*, (Jordan Publishing Ltd., 1997) at 12.6.2.

68 Unreported, High Court (McKechnie J.), May 4, 2005.

69 Unreported, High Court (O'Donovan J.), September 19, 2000.

70 See also: *S.v. B. (Ancillary Relief: Costs)* [2005] 1 FLR 474.

71 *M.McD. v. P.McD.*, Unreported, High Court (MacKenzie J.), April 22, 1986.

72 *R.F. v. J.F.*, Unreported, Circuit Court, (McGuinness J.), August 23, 1995.

73 See Clissmann and Fay, "Financial Non-Disclosure in Judicial Separation and Divorce Cases", (2003) 8(1) *Bar Review* 3.

candour in the conduct of a case[74] have all attracted adverse costs implications for the offending parties. On the issue of lack of candour, Budd J. colourfully describes "a tangled web of deceit" and general sense of "devious dissembling" (meriting an adverse costs award) on the part of the Respondent in the High Court case of *P.O'D. v. J.O'D.*[75].

In this context, Section 25 of the High Court Practice Direction of the 6th October 2005 outlines certain other conduct which might attract an adverse costs order. Section 25 states that, without prejudice to Order 99, a court should take account of and give appropriate weight to:

- Any demand, offer, or counter-offer made by the Applicant or the Respondent in open court or marked "without prejudice save as to costs"; and
- The observance, compliance and implementation of the Practice Direction by the parties.

Interestingly, this puts *Calderbank*-type offers onto something of an official footing in this jurisdiction[76] just as they are falling out of favour in England and Wales. Although the "proper provision" consideration makes it unlikely that such offers will operate as mechanically here as they did in the jurisdiction in which they were devised, the same criticisms can be raised regarding the "poker-like" position in which a recipient is placed.

Finally, it will be interesting to see whether the law develops in this area regarding the choice of court in which judicial separation or divorce proceedings are initiated (i.e. the High Court as opposed to the Circuit Court) in light of the comments of McGuinness J. in the Supreme Court decision of *C.F. v. J.D.F.*[77] or whether an individual's right of access to the courts would prevent an adverse costs consequence[78]:

> "The Oireachtas, in framing our family law statutes, has given a wide ranging and virtually unlimited jurisdiction to the Circuit Court. No doubt this was done in order to enable litigants to avoid the very high costs that are inevitable in a prolonged High Court action…it is difficult to understand why the decision was taken to risk the cost implications of a High Court action in the light of the limited financial resources of this family."

e) A trial judge's view on where the costs burden lies is unlikely to be disturbed on appeal

As with comparative judicial decisions which largely depend on findings of fact, the issue of the distribution of the costs burden in family law proceedings tends to remain undisturbed on appeal[79] following the logic that the trial judge will generally be in the best position to decide the issue (save in circumstances where there are "strong arguments to the contrary"[80]).

Notwithstanding, where there is an error in legal principle by a trial judge, an appellate court will not abdicate responsibility on this basis. For example, in the decision of the Supreme Court in *M.K. v. J.K. (No. 3)(Divorce: currency),*[81] McCracken J. (delivering the unanimous decision of the court) considered the distribution of the costs burden where the Respondent husband successfully appealed the parties' original divorce application to the Supreme Court, whereupon the matter had to be re-heard in the High Court. As such, the costs burden for two High Court actions and two Supreme Court actions ultimately fell to be distributed. It was held that whilst the Supreme Court was traditionally reluctant to interfere with the discretion of a trial judge in the awarding of costs[82]:

> "…it would be unfair and unjust if the respondent had to bear both sets of costs of the first trial out of the assets remaining to him after the provisions to be made for the applicant. In my view, neither party was to blame for the outcome of the first trial. It was successfully appealed by the respondent in that a retrial was ordered, and justice would be served by each party bearing his or her own costs of the first trial."

f) Special costs provisions apply in certain situations

Whilst the above comments relate to generally to maintenance (including maintenance pending suit[83]), domestic violence, judicial separation, divorce and ancillary relief variation cases, certain specific costs rules apply in other types of family law proceedings:

- *Adoption*: The Adoption Act 1988 provides that the health board concerned shall pay the costs of the adopters of the child concerned where an application is made to adopt in lieu of failure of parental duty where such costs are not discharged by another party to proceedings or by a legal aid scheme[84]. There does not appear to be an equivalent provision under the Adoption Act, 1974[85].
- *Guardianship/Custody*: There is provision for orders to be made regarding the costs of any mediation or counselling services at the

74 *A.O'L. v. B.O'L.* Unreported, Circuit Court (McGuinness J.), November 23, 1995.
75 Unreported, High Court (Budd J.), March 31, 2000.
76 In *B.D. v. J.D.* Unreported, High Court, May 4, 2005, McKechnie J. stated that: "…the availability and use of the *Calderbank* procedure…is undeveloped".
77 [2005] 4 IR 154.
78 *Ibid.*, at 173; see Article 40.3; *MacAuley v. Minister for Posts and Telegraphs* [1966] IR 345 *et seq.*
79 See: *M. v. M.* Unreported, High Court (McCracken J.), May 23, 2000; *P.F. v. G.O'M.* Unreported, Supreme Court, November 28, 2000; *R.B. v. A.S.(orse. A.B.)(Nullity: Domicile)* [2002] 2 IR428; and S. v. S. (Financial Provision) [1990] 2 FLR 252.
80 *B.F. v. V.F.* Unreported, High Court (Lynch J.) May 20, 1993.
81 [2006] 1 IR 283.
82 *Ibid.*, at 292.
83 See: *G. v. G. (Maintenance Pending Suit: Costs)* [2003] 2 FLR 71.
84 Section 5 of the Adoption Act, 1988.
85 See *J.B. v. An Bord Uchtála* Unreported, High Court (McGuinness J.), January 15, 1999.

discretion of the court[86]. Beyond this, there is English authority from the Court of Appeal in *Re: T. (Order for Costs)*[87] for the proposition that the reasonableness of the parties can be decisive in guardianship and custody cases.

— *Child abduction*: In addition to the general discretion of a trial judge to award costs in child abduction cases[88], an order regarding costs can include travel expenses and any expenses involved in locating the child[89].
— *Declarations of parentage*: Where the Attorney General is party to declaration of parentage proceedings and costs are incurred, the court may direct that these costs are borne by the other parties to proceedings as it sees just[90].
— *Declarations as to marital status*: Where the Attorney General is party to declaration as to marital status proceedings and costs are incurred, the court may direct that these costs are borne by the other parties to proceedings as it sees just[91].
— *Pension adjustment orders*: Where the trustees of a pension scheme incur costs in compliance with a pension adjustment order (or related direction), the trial judge can order these costs to be borne by either party to proceedings[92].

Conclusions

In light of the above, it is submitted that any argument to the effect that costs in family law proceedings should be distributed without reference to established legal principle is a redundant one. Though admittedly tentative, certain patterns have developed and it would be wrong to dismiss them. The advent of the Family Proceedings (Amendment) Rules 2006 will tend to reduce the persuasiveness of decisions from England and Wales as the new scheme is interpreted and applied into the future (save in respect of the treatment of "open offers").

Notwithstanding, maintaining a degree of structure in the law relating to the distribution of the costs burden in family law proceedings is an important consideration, not least because an element of predictability gives the parties impetus to settle proceedings. Though perhaps trite, the observation of Holman J. in *H. v. H. (Financial Relief: Costs)*[93] reflects a truism[94]:

> "There is only one 'cake' and it is unrealistic to have to divide it on two separate occasions, first substantively and then in relation to costs."

86 Section 29 of the Guardianship of Infants Act, 1964.
87 [2005] EWCA Civ 311.
88 For example, in *A.S. v. E.H. and M.H.* Unreported, High Court (Budd J.), May 8, 1996 and in *W. v. W.* Unreported, High Court (Lardner J.), Februry 19, 1992 respectively no order was made as to costs, whilst in *E. C.-L. v. D.M. (Child Abduction: Costs)* [2005] EWHC 588, Ryder J. in the Family Division held that it was appropriate to make an adverse costs order against the applicant mother who had failed in her application.
89 Section 40(2) of the Child Abduction and Enforcement of Custody Orders Act, 1991.
90 Section 36(2) of the Status of Children Act, 1987.
91 Section 30(2) of the Family Law Act, 1995.
92 Section 12(22)(a) of the Family Law Act, 1995; and Section 17(22)(a) of the Family Law (Divorce) Act, 1996.
93 [1997] 2 FLR 57.
94 *Ibid.*, at 59.