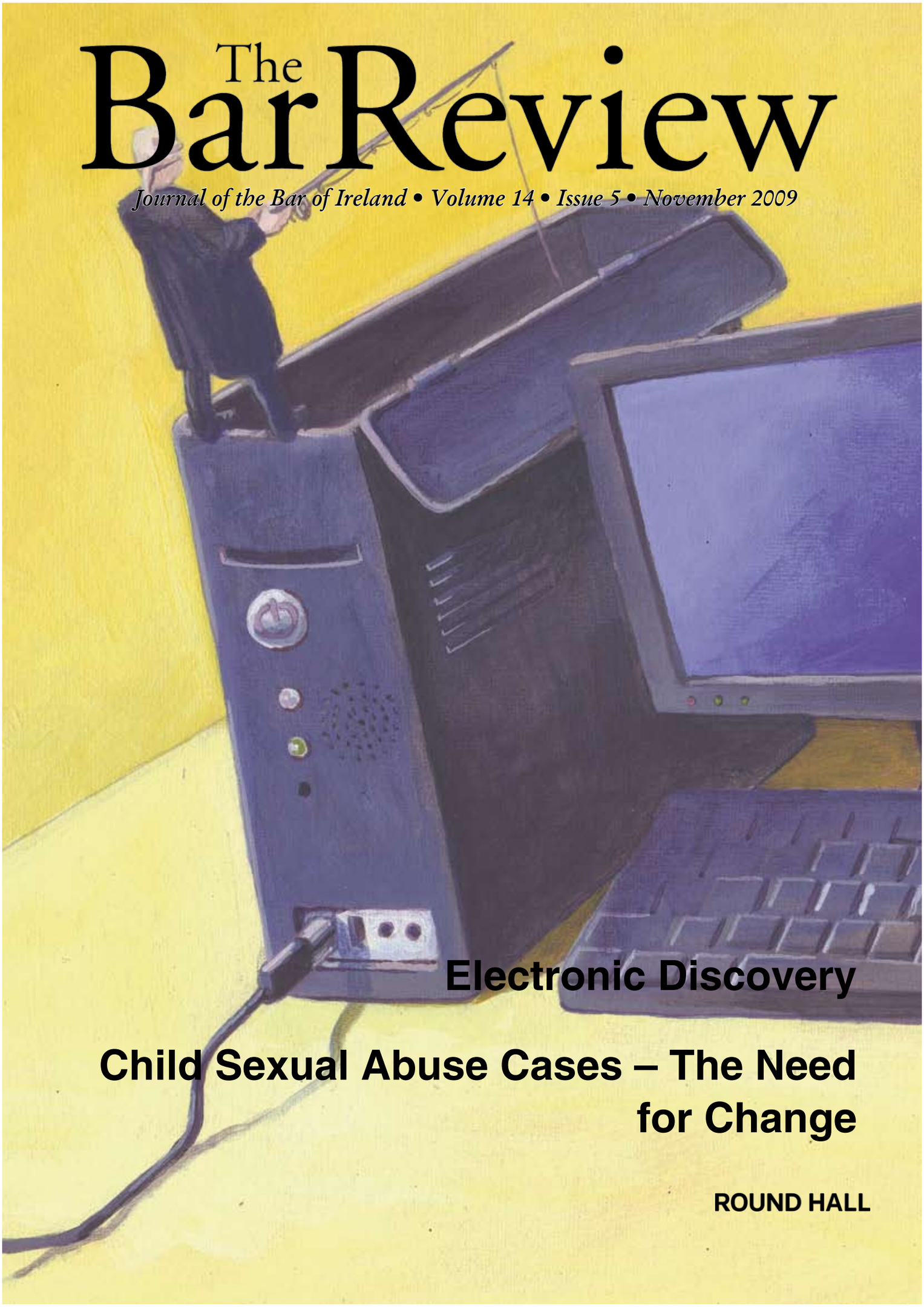
The Bar Review

Journal of the Bar of Ireland • Volume 14 • Issue 5 • November 2009



Electronic Discovery

Child Sexual Abuse Cases – The Need for Change

ROUND HALL

Cover Illustration: Brian Gallagher T: 01 4973389
E: bdgallagher@eircom.net W: www.bdgart.com
Typeset by Gough Typesetting Services, Dublin
shane@goughtypesetting.ie T: 01 8727305

The Bar Review

Volume 14, Issue 5, November 2009, ISSN 1339-3426

Contents

ROUND HALL THOMSON REUTERS

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: eilisebrennan@eircom.net

The Bar Review is published by Round Hall on behalf of The Bar Council of Ireland.

For all subscription queries contact:
Round Hall
Thomson Reuters (Professional)
Ireland Limited
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301
Fax: + 353 1 662 5302
E: info@roundhall.ie
web: www.roundhall.ie

Subscriptions: January 2009 to December 2009—6 issues
Annual Subscription: €240.00 + VAT

For all advertising queries contact:
Sean Duffy,
Direct line: + 44 20 7393 7602
E: sean.duffy@thomsonreuters.com
Directories Unit. Sweet & Maxwell
Telephone: + 44 20 7393 7000

Some Thoughts for New Entrants to the Law Library

Peter Charleton, Judge of the High Court•

John A. Costello used to tell new entrants into the Law Library that there were three rules that must always be followed:

(i) Never refuse a brief.
(ii) Never write a letter to a newspaper.
(iii) Never take a libel action.

I am not so ancient that I ever met the former Taoiseach. I have this at second or third hand. Those times were simpler ones than these. Since I have been asked to give a talk to you about relations between the Bar and the Judiciary, I thought to ask myself what might be important in these days. Whatever it is, I can not encapsulate it into a set of rules. These few thoughts, however, come to mind and I hope to be brief.

Becoming a barrister is a tremendous achievement. You are now professional people. We are at the end of September and the courts are still not back in session. The motto of the King's Inns reads "*nolumus mutari*" – we will not change; and it also means we will not be changed! The vacation times were set hundreds of years ago, and they certainly do not suit people with children at school. September was reserved to emergency sittings only because barristers were bringing in the harvest. None are now. Nonetheless, there is an idea there that professional people were once expected to be privileged through family and land holding. You were once, in effect, a form of nobility. So, as the French say, *noblesse oblige*. Even before the current economic crisis began in September of last year, a growing sense of unease had pervaded thoughtful sections of Irish society. Some years ago, in church, on an occasion when the gospel mentioned St. John the Baptist, our local pastor had been inspired to deliver a sermon themed, "what would St. John the Baptist say if he were around today?" According to him, he would have a message addressed to various sections of society, including professionals and his prophetic insight was, "to those professionals among us he would say: don't be so grasping; give something back to the society from which you take so much".

That's a good rule for anybody and how you do it is up to yourself. I realise, that the journey you are setting out on is a very hard one. There will come a point, however, where you should be able to give something back. That can be done by writing, by involvement with charitable societies, by attempting to act as a voice of reason when national hysteria breaks out, when witch hunts are prepared, or in many other ways. If you are going to be involved in politics, then, certainly the hopes of many would rest with you, particularly that you would be effective, intelligent and decent. Start learning now! For the moment, the only people whose hopes rest with you would be those of the clients whose case you are taking or advising on, and the solicitors who have entrusted you with their work. So, let's turn to that, a safe and practical matter.

A friend of mine, a professional musician, used to suffer terribly from stage fright. There were one or two barristers that I knew who repaired to the men's lavatory to vomit prior to going into court. My musician friend told me that she thought that there was one good remedy for stage fright - a clear conscience. If you know your music, if you have done all the work you possibly can do, if you've really put your back into it, then not so much can go wrong. Preparation is essential to being a good barrister. There is nothing that a judge would appreciate more. Furthermore, they can see it. Sometimes you have to go and get help from people who know about arcane subjects or look them up. Sometimes it is a question of spending extra time with the witness, or of bringing a tape recorder to a consultation. I have been guilty in the past of doing that and indeed sitting in the bath soaking myself, and listening to what the witness was purporting to tell should he be called to the witness box in a criminal trial. Sometimes it can involve doing something as simple as looking up a map of a road traffic accident, or visiting the scene. All of it involves putting order on things. Maybe here I should add two simple things: your client's instructions are like the confession – you can use nothing the client does not authorise; you never gossip. Then, a hard lesson: someone told me recently that in his view the maximum chance of defending the unloosable case or winning the unanswerable case is 80%. Don't sell a client short, but bear in mind that in court lots of things can happen, and you are about to start learning what.

There was once a judge who once interrupted an opening by counsel which, it will have to be said, was a rambling affair, saying "Mr. Snookes, I don't mind what kind of order you put on this case. It could be an order related to the issues or it could even be something as straightforward as chronological order. If I am going to ever understand this case, however, I've got to have some kind of order."

Well, the grumpy old creature was right. The purpose of preparation is to make sense of a case to yourself. This is a lonely task. It takes time because briefs are getting larger. An opening generally makes sense if it is put in chronological order. After all, what happens tomorrow can never influence what happened yesterday. Then, at the end of your chronological narrative you can set out what the issues are. One barrister, whose opening statements are widely admired, generally ends an opening by stating that the court will have the following two or three, or whatever number, of issues to decide. It doesn't really matter what the complexity of the case is, the format is the same. In a road traffic accident there can

• This paper was first delivered at a talk for new entrants to the Law Library

be a single issue as to whether the defendant crashed through a red light. In a copyright case, the issues can be whether the plaintiff has copyright in the work, whether the action complained of constituted an infringement and whether damages should be awarded together with an injunction or simply one or other of these.

Let me go on to another topic. Being a barrister is pressurised work. Imagine the strain of defending someone, for instance, who you actually believe to be innocent? Usually, the public put the question in the other way - how do you defend somebody who you know to be guilty? The fictional character, Rumpole, was once asked the question, "Well Rumpole, how do you feel about defending a blackmailer?" His answer was "glad of the money". Whether you are obtaining damages for someone in respect of a ruined carpet, an accident which had life changing consequences or to enforce contractual rights in a commercial case, an awful lot rests on the shoulders of a barrister. The reality is that it can be a strain. The judge has different strains. She or he has the job of announcing to one party in a case that they have been unsuccessful and that the effectively penal consequences of costs will follow that event. It is easier for a judge to put himself or herself in the shoes of a barrister than it is for a barrister to put himself or herself in the shoes of the judge. We have been there and done your job. You have never done ours. One thing, however, that experience tells me is very much appreciated on both sides is a sense of calm. A case is never improved by shouting or screaming or making faces at the judge or making exasperated noises or generally indulging in what Hamlet, Prince of Denmark, called North by Northwest behaviour. We all know the story of Hamlet and I hope there is no need to explain. Pretending to be mad, infuriated or utterly exasperated with the court with a view to getting your own way is bad enough but just beware that, like Hamlet, if you take it on as a method of conduct, then you may find that the cloak of such behaviour becomes fused into your personality. Instead, what everyone is searching for is calm objectivity. If you really are infuriated, how are you ever going to think of asking the correct question, or making the right submission? If emotion is introduced into a case, then you should be aware that it is like a boomerang and may just as readily return and strike down you or your client, as represent a useful tool for slaying the vicious dragon you believe, or pretend to believe, resides in a cabin guarded by your opposite number.

Just as important for any judge you are appearing before is the sense that you can be trusted. You are obliged, in any case, to take your client's instructions. That is all that you take. You don't invent instructions for him or her, you don't suggest that a particular line of defence may, as a matter of fact, be a good one and you don't make submissions on a basis unproven in evidence or invented out of your head. We all know the difference between right and wrong and I don't believe that I need to elaborate. At the English Bar, years ago, there were a set of rules of conduct and among them was one which said that it was the duty of a barrister to draw to the attention of the court any case, or any piece of legislation, which had a bearing on any argument that counsel was advancing. It follows, therefore, that you don't pluck an *obiter dictum* out of the middle of some lengthy judgment of the House of Lords, or the Supreme Court and present it as a decided principle of law. You don't advance an argument which every textbook says is wrong without saying that the textbooks are there and drawing the attention of the judge to what they say. You do not cite a case as authority knowing that it has been overruled in the intervening time. That is not professional. Some people may say to you that your job is to advance your client's case. Your responsibility is not to be distorted by wishful thinking to the effect that as the other party is represented you have free range to indulge in factual and legal fiction making. You do not. You have a responsibility to the court and, more importantly, to your conscience and to yourself. In cross examination you follow your client's case. You are bound by the hearsay rule. You do not bully. In criminal and civil cases the rules are precisely the same: it is not "twist and shout".

Let's suppose that any of this might happen, what would be the effect? Well, discipline cases against barristers are rarely taken and court cases are so long and so confusing that if anyone were to be tempted as described, then in high probability it would be noticed and then overlooked. Speaking for myself, when people jump up before me and rattle on about misleading conduct, usually lay litigants, I'm more inclined to believe that a mistake has happened due to chaos than to conspiracy. However, one gets very suspicious in relation to some mistakes because, whether in practice, or outside of practice, you'll begin to notice in life that people generally make mistakes that favour themselves. If you turn an honest disposition towards the court and towards the case, then you can be sure you are on the safest ground. The court is aware that people are human and that they can make mistakes and that rudeness can be a result, not of deliberation, but of pressure. There was a politician in America who claimed to have a Christian outlook even within the snake pit of his chosen avocation. He had a sensible rule about all of this - "I forgive my enemies, but I make a note of their names".

Being a judge is isolating. I never have people into my room, except the odd friend, not too odd I hope, for lunch. I'm not entitled to discuss cases with them. Any interaction with the judge takes place through his or her tipstaff. If you want time, you ask the tipstaff, not the judge. I decided that as there is so much talk about cosy cartels among lawyers, and I am one after all, it is impossible to have people in my room, even in the way that the European Court does prior to a hearing, simply to say hello and to ask people how long they will be. Maybe that's unfortunate, but it is a sign of our times and it is maybe more important that a scrupulous sense of detachment and impartiality should be maintained.

People say that the art of cross-examination is difficult. I wonder. What I tend to think about more is whether people have actually studied it. There are a number of good books, among which Wrottesley's *The Art of Cross-examination* will tell you a lot. More importantly, your task is to have ascertained first of all, what your client's instructions are, you may believe them or you may not but you have to put them forward as the truth. To advance those aspects of the case that can show your client's position to be more likely, engaging in irrelevant attacks as to people's character is the introduction of emotion with all the perils attendant on that. Sometimes it is necessary. Courts are used to the idea that people may lie. Bluntly making that assertion, however, usually gets you

nowhere. A calm, thoughtful series of questions relevant to the central issues in the case will get you much further.

You can learn a lot by going and finding other people who are good cross-examiners and watching them. Your time can be usefully used. Once upon a time, when you went on circuit, and in some places even now, you were expected to turn up to every town and to attend in court from the beginning of the day's work right through to the end, robed and sitting in counsel's benches. Imagine how much you would learn if you used your time that way? I'd imagine a tremendous amount. You might find yourself a role model. Doing your first cases is really unnerving. Sometimes calm objectivity can be obtained by saying to yourself, "I am no longer Mary O'Neill, I am, in fact A.B., a very good barrister whose method I have been studying over weeks." Of course, you wouldn't unthinkably be A.B. but if some aspect of his or her style struck you as effective then why not clothe yourself in that mantel? If you find someone who is snorting, shouting, making faces at the judge or groaning openly, as opposed to inwardly (we all do it), then find another A.B.!

After all, what is the ultimate challenge of advocacy? You may say that it is truth. If you imagine that the court is intellectually challenged, and I don't suspect that it usually is, then you are set an even greater challenge than is normal. So, try calmly, methodically and concisely, to convince the stupid judge as to the correctness of your argument. See it as a challenge to be risen to and not as a thorn in your backside. From the point of view of the judge looking down at the advocate presenting a case, if you were to ask him or her what quality is most prized, apart from honesty and good preparation, then I'd say a large majority would say concision.

Now, just a couple of final remarks. I suggest that it is not right to take on too much work. I don't see any point in putting extra strain on yourself in attempting to run from three different courts to three other different courts in one day. I don't think it's fair in this day and age, should you become successful, to be so successful that you literally regard every case as your property. I really think that's wrong. After all, this is a way of earning a living and you have to have, in addition, a genius for private life and an appreciation that while, in the past, some people said that the law is a jealous mistress, that if it is, then it is best respected by ensuring that it does not become an obsession. It is not a religion and the judge is not some kind of relic.

In Scotland, they had a good rule: if the judge passes you in the Senate corridor and is robed, you lift your hat. If a judge passes you on the street, you tip your hat. Here, when a judge passes you in the corridor, you stand and nod by way of a bow to her or him but only when he or she is robed. Please not a low bow. Two years ago, I had to cross the round hall from Court 2 to Court 4 and then go back again. In doing so, a very pretty girl bowed to the waist. I was so embarrassed that, finishing quickly, I climbed the secret staircase to the dome, went around it and down the secret stairs on the other side rather than endure it on the way back. When the judge comes in to court, the judge bows to the court. You may bow back. No other greeting is appropriate. If a judge gives a judgment in your favour, you do not thank him or her or proclaim how learned it is. If you were entitled to do that, would you not be within your rights to publicly blame the stupidity of the judgment or tell the judge what a fool he or she was? A recently retired judge used to say, "I can't accept thanks, because if I accepted that I'd have to accept blame". Then, litigants. As taxpayers, they have as much entitlement to the court as you do. If you want to tell a colleague that a cross-examination was brilliant, or whatever, you do it in the coffee room or the law library. You do not do so in the court building, especially not when the court has finished. People are entitled to their dignity. Sometimes the practice of the law is not just, and it is a bitter thing to know that or to be exposed to comments as well. These things are noticed. It pays to act like a gentleman or a lady. It is a horrible thing to rob anyone of their dignity.

Law is part of the fabric of society. It is there to order our conduct so that the savage aspects of human nature that are so widely represented in violence and in untruth can be circumscribed by rules and by punishment. A friend of mine, now deceased, was an officer in the French Army. He told me, back then, that once you enter, you belong to a different world, one outside family and friends, where your life becomes the military. You live in an isolated compound, you have no contact with former friends and any notion of the army being part of wider society is deliberately frowned upon. As a lawyer, there is a similar danger. The worst possible mistakes that you can make in your career arise out of gathering together around you a bevy of admirers who will fawn at your every manoeuvre. From associating only with lawyers you are not far from imagining that law is a self-justifying discipline that represents itself and is its own justification. It is not. Your best course is to hold on to your friends who are not lawyers and to leave the Law Library well behind when your day's work is done. ■

Le Mot Juste - Managing e-Discovery and Keyword Searches

John Evans BL

Introduction

This article considers Electronic Discovery (e-Discovery) and the use of keyword searches. Case law in Ireland is examined and the impact of S.I. No. 93 of 2009 on Order 31 RSC is discussed. An examination is made of the management of keyword searches in e-Discovery in England and Wales (drawing on the recent *Review of Civil Litigation Costs, Preliminary Report*[1] by Lord Justice Jackson), as well as in the US and Australia.

Ireland

A key question for the purpose of discovery is whether information contained in a computer database can constitute a document. In *Dome Telecom Limited v. Eircom Limited*[2], Geoghegan J examined electronic documents within the context of discovery and the inherent power of the court to adapt to circumstances. He held as follows:

> "It is common knowledge that a vast amount of stored information in the business world which formerly would have been in a documentary form in the traditional sense is now computerised. As a matter of fairness and common sense the courts must adapt themselves to this situation and fashion appropriate analogous orders of discovery."

Geoghegan J approved the English case of *Derby & Co. Ltd. v. Weldon (No. 9)*[3], noting that it had already been cited with approval by the Supreme Court in *Keane v. An Bord Pleanála*[4]. In addressing the issue of a document generated in the course of the retrieval of information from a database, the judge stated:

> " ... it was held by the English High Court that the database of a computer, in so far as it contained information capable of being retrieved and converted into readable form, and whether stored in the computer itself or recorded in backup files was a "document" within the meaning of the relevant English rule of court and that there was, therefore, power to order discovery of what was in that database ..."[5]

Access to another party's computer could not, however, be unrestricted:

> " ... the discretion to order production for inspection and copying would not be exercised so as to give an unrestrictive access to another party's computer and such inspection would be ordered only to the extent that the parties seeking it could satisfy the court that it was necessary for disposing fairly of the cause or matter or for saving costs ..."[6]

Factors to be considered in this regard are:

> " ... evidence as to what information could be made available, how far inspection or copying of the database was necessary or whether the provision of printouts would suffice and what safeguards were required to avoid damage to the database and minimise interference with its everyday use ..."[7]

The court's discretion in ordering discovery of "matters buried in a computer" was to be informed by the notion of what reasonably would have been available under traditional documentary storage, but the other factors mentioned in *Derby* must also be taken into account.[8] Examination of the judgment of Vinelott J in *Derby* reveals that these factors include: the use of expert evidence as to the extent to which the relevant information was available on-line or from back-up systems, archival or history files; the extent to which materials stored in history files could be recovered with or without reprogramming; the extent to which reprogramming and transferring data to the on-line system might damage the history files of the computer; and the extent to which recovery of information and any necessary reprogramming might disrupt the other side's business. [9]

The expert and possibly proprietary nature of the techniques brought to bear in e-Discovery was considered by Clarke J in *Mulcahy v Avoca Capital Holdings*[10]:

> "A court must always, in circumstances such as this, be concerned not to expose experts to any unnecessary exposure of the benefits of their craft, as it were, but it does have to be said that a person who presents themselves as willing to act as an expert in proceedings necessarily exposes their methods to investigation in court ... While a court should not

1 Available in PDF at http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm
2 2 IR 726 (Supreme Court) 5th December, 2007, at 736.
3 [1991] 2 All.E.R. 901.
4 [1997] 1 I.R. 184, at 230.
5 *Ibid.*, at 736 – 737.
6 *Ibid.*
7 *Ibid.*
8 *Ibid.*, at 738.
9 [1991] 2 All.E.R. 901 at 908.
10 [2005] IEHC 136, 14th April, 2005, pp. 14 – 15 of the judgment.

make any directions that would unnecessarily expose the skills of an expert, it nonetheless seems to me that there is a limit to the extent to which those methods can be protected ..."

The Irish cases discussed above predate S.I. No. 93 of 2009 which amended Order 31 of the Superior Courts Rules in relation to discovery, and came into operation on 16th April, 2009. In summary, Order 31 provides that:

- Where a notice of motion for an order directing a party A to make discovery on oath of electronically stored information to a party B, the notice of motion should specify whether B sought the production of any documents in searchable form and if so, whether for that purpose B sought the provision of inspection and searching facilities using any information and communications technology system owned or operated by A.
- If the Court is satisfied that the electronically stored information is held in searchable form it may order that the documents or classes of documents specified be provided electronically in searchable form where this can be done without significant cost to A.
- If the Court is satisfied that the documents can only be searched by B incurring unreasonable expense, it may order A to make available to B inspection and searching facilities using A's own information and communications technology system.
- The Court may make orders to ensure that documents, discovery of which has not been ordered, are not accessed or accessible, and otherwise to secure the information and communications technology system concerned. This may take the form of a provision that the inspection and searching of documents shall be undertaken by an independent expert or person agreed between the parties, or appointed by the Court. The party B seeking the order shall indemnify such independent expert or person in respect of all fees and expenses reasonably incurred by him, and the fees and expenses so indemnified shall form part of the costs.
- The Court shall not make an order unless: applicant B had previously applied by letter in writing requesting that discovery be made voluntarily, specifying whether the applicant sought the production of any documents in searchable form and if so, whether for that purpose the applicant sought the provision of inspection and searching facilities using any information and communications technology system owned or operated by A, the party requested; a reasonable period of time for such discovery has been allowed; and A has failed, refused or neglected to make such discovery or has ignored such request.
- Any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the Court for an order varying the terms of the discovery order or agreement. The Court may vary the terms of such order or agreement where it is satisfied that further discovery is necessary for disposing fairly of the case or for saving costs, or the discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery.

With regard to the scope of S.I. No. 93 of 2009, the words of Geoghegan J in *Dome Telecom* might be noted:

> "The rules of court are important and adherence to them is important but if an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure and even if there was a rule applicable, the court is not necessarily hidebound by it."[11]

England and Wales

A useful document in this context is the two volume *Review of Civil Litigation Costs, Preliminary Report*[12] by Lord Justice Jackson, May, 2009, which includes consideration of the disclosure of electronic documents.

Something might first be said about the Discovery/Disclosure issue in England and Wales. The move away from Discovery to Disclosure in England and Wales came about following recommendations by Lord Woolf MR in "Access to Justice" in July, 1996[13]. CPR Part 31[14] and the relevant Practice Direction[15] limited the effects of *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co*[16] upon the discovery process. [17] A new two stage disclosure process was introduced: standard disclosure and specific disclosure.[18] Standard disclosure was narrower than the pre-1999 "discovery" obligation. Discovery included not only documents which supported or were adverse to any party's case, but also any documents which had an indirect bearing on the issues in that they could lead to a "train of inquiry" that could produce relevant information (*Peruvian Guano*). Further, standard disclosure does not include "relevant" documents – these are documents that are relevant to the issues in the proceedings but that do not obviously support or undermine either side's case.

Lord Justice Jackson's report[19], however, indicates that in England and Wales, parties continue to disclose a broader category of documents than the CPR requires. Reasons for

11 2 IR 726, at 736.
12 Available in PDF at http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm
13 Available at http://www.dca.gov.uk/civil/final/index.htm
14 http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part31.htm
15 http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part31.htm
16 (1882) 11 Q.B.D. 55.
17 See the discussion of how *Peruvian Guano* has been limited in England and Wales, and Ireland, in Roderick Bourke, "*Electronic Discovery – Taming the Beast*" Bar Review, February, 2008, 9 – 12.
18 CPR, r.31.5(1), r.31.6, r.31.12. See Paul Matthews and Hodge Malek, *Disclosure* 3rd ed. (London: Sweet & Maxwell, 2007), pp. 126-129.
19 *Review of Civil Litigation Costs, Preliminary Report* pp. 390-391.

this are said to include a desire to (a) avoid being subject to specific disclosure applications; (b) avoid having to repeat the disclosure process if the case being met or run is amended slightly; (c) avoid judicial criticism for not having disclosed documents sooner; (d) avoid difficulties in assessing whether a document assists the other party's case (in circumstances where it is unclear from the pleadings); and (e) enable the disclosure process to be completed by more junior staff (which is consequently cheaper).

Lord Woolf's reforms were aimed at limiting the scope and consequently the costs of disclosure. However, costs appear to have spiralled over the last ten years. Lord Jackson identifies the growth of electronic communications as a cause. Parties do not enter into meaningful dialogue at an early enough stage and a large amount of costs can be wasted if not enough forethought is applied to the disclosure exercise. Also, in some cases, there is a lack of adequate and continuous case management by an informed master/judge.

The Practice Direction to Part 31 of Civil Procedure Rules (CPR) in England and Wales deals with electronic documents[20]. The term "document" extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and those that have been 'deleted' but are retrievable. It also extends to the metadata associated with electronic documents such as CAM date stamps (C = Create, A = Access, M = Modified).

The CPR states that the parties should communicate and co-operate in the area of electronic disclosure. Case Management Conferences (CMCs) play a large role here. Before the first CMC, the parties should discuss any issues that may arise regarding searches for and the preservation of electronic documents. Information may be shared about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies. The parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection. If there is disagreement, the matter should be dealt with by the judge at the CMC.

Difficulties may arise with documents in electronic form, namely that they are voluminous, possibly widely scattered and on the grounds that it may not be easy to search for disclosable material. It is accepted that these features may affect the notion of the "reasonableness" of a search.[21]

Factors that may be relevant in England and Wales in deciding the reasonableness of a search for electronic documents include the number of documents involved, the nature and complexity of proceedings; the ease and expense of retrieval, the location of relevant electronic documents, the likelihood of locating relevant data, the likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection; and the significance of any document which is likely to be located during the search.

It may be reasonable to search some or all of the parties' electronic storage systems. In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches (agreed as far as possible between the parties) even where a full review of the documents would be unreasonable.

It seems clear that the steps set out above have not become widespread practices in England and Wales because parties are unaware of them or are apprehensive of electronic disclosure or its cost. A KPMG survey[22] published in 2007 revealed that only 17% of lawyers believed that the CPR had had a positive impact on litigation; 43% believed they had not had a positive impact; 56% believed the Rules had led to increased costs of litigation; and 48% believed that Judges and Masters were ill equipped to make effective electronic disclosure case management decisions. Amongst those litigators heavily involved in e-Disclosure matters, this last figure rose to 71%, Despite encouragement in the CPR that both sides to a dispute should co-operate on e-Disclosure, 39% admitted that they had never met their opponent to discuss it. Of those who had met, 29% did not meet until, at or after the Case Management Conference (CMC).

A new practice direction is being prepared by a working party[23] and a proposal has been made that there should be an e-Disclosure questionnaire. This would provide information to assist the parties to identify the scope of the disclosure of electronically stored information required in the action; and to discuss and agree with each other the extent of a "reasonable search" under CPR rule 31.7 and to discuss and agree the format in which disclosure should be given to the other parties. This questionnaire should also give the court sufficient information about the parties' electronic storage systems in the event that an application has to be made to the court on disclosure. The questionnaire is to be signed by a solicitor, client representative or IT consultant and the person signing the questionnaire should attend each CMC at which electronic disclosure is likely to be considered.

The issue of the reasonableness of a search and the use of keywords was considered in the important case of *Digicel (St Lucia) Ltd and Ors v Cable & Wireless plc and Ors*[24]. Digicel (St Lucia) is one of Denis O'Brien's Digicell Group[25]. The claimants applied for an order that the defendants restore relevant back-up tapes for the purpose of searching for the e-mail accounts of certain former employees, and an order that the defendants carry out a further search across those documents by reference to a set of additional keywords/phrases as identified by the claimants. Issues arose whether the defendants had carried out a 'reasonable search' for electronic documents. The defendants submitted that the

20 http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part31.htm

21 This might be compared with the emphasis on unreasonableness in the Irish SCR Order 31 Rule 12(11)(ii) as a ground for seeking variation of a court order: "the discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery".

22 http://www.scl.org/site.aspx?i=ne9204

23 *Review of Civil Litigation Costs, Preliminary Report* Volume 2, p. 375. The working party is chaired by Master Whitaker, Senior Master of the Queen's Bench Division, Royal Courts of Justice.

24 [2009] 2 All ER 1094, 16th -18th September, 23rd October, 2008, per Morgan J.

25 http://www.digicelstlucia.com/en/about/board

question of what was 'a reasonable search' had to be decided in the first instance by the solicitor in charge of the disclosure process; alternatively, the court should adopt the approach of an appellate court reviewing an exercise of discretion. CPR PD 31, para 2A.4 provided that the factors that might be relevant in deciding the reasonableness of a search for electronic documents included (but were not limited to) the following: (a) the number of documents involved; (b) the nature and complexity of the proceedings; and (c) the ease and expense of retrieval of any particular document. Paragraph 2A.5 provided that it might be reasonable to search electronic storage systems and in some circumstances to search for electronic documents by means of keyword searches and that those searches were to be agreed as far as possible between the parties.

Morgan J set out the tasks before the court[26]:

> "The decision as to what was a reasonable search rested in the first instance with the solicitor in charge of the disclosure exercise.
>
> Some parts at least of the process ought to be discussed with the opposing solicitor with a view to achieving agreement so as to eliminate, or at any rate reduce, the risk of later dispute.
>
> The first question for the court was what should have been done in the first place by way of a reasonable search. If the court reached the conclusion that more should have been done in the first place then it would conclude that a party had failed to carry out a reasonable search.
>
> It had to be possible for a court to reach a conclusion in a particular case that the required search which should have been carried out in the first instance would, if carried out at a second stage, be disproportionate as regards cost and the likelihood of revealing anything worthwhile.
>
> Moreover, the court had to judge what the defendants had done rather than assess what the claimants had done in relation to e-disclosure, and the mere fact that the claimants had done more than the defendants did not of itself lead to the conclusion that the defendants' efforts had been inadequate *Nichia Corp v Argos Ltd* [2007] IP & T 943 considered".

Morgan J found that the defendants had not carried out a reasonable search, in so far as they had omitted to search for, and in, the e-mail accounts of seven specified individuals, to the extent that those e-mail accounts might exist in the back-up tapes which had survived. Rather than order that the tapes simply be restored, the court appeared to order a management *process*: the parties' solicitors were to meet to discuss how best the restoration of the back-up tapes could be done; the defendants were then to restore the back-up tapes as best they could to enable a search of relevant e-mail accounts; and the defendants' solicitors were to report to the claimants' solicitors at relatively short intervals on the rate of progress. The parties' solicitors would be expected by the court to co-operate fully with each other, to maintain a dialogue and for there to be questions and answers passing between them as to whether anything further could be done or should be done, with liberty to apply granted to the defendants.

On the issue of keywords, Morgan J remarked:

> "It would often be appropriate for a party to search electronic documents using positive keywords and in the instant case the claimants had agreed that the defendants should be permitted to do so. It would usually be wrong in principle to adopt the 'leave no stone unturned' approach to disclosure, and it would be wrong to adopt that approach in the instant case. The court had to consider the proportionality of adding an additional keyword to the searches and for that purpose the court had to form a view as to the possible benefit to the claimants and the possible burden to the defendants."

Morgan J found that 'interim agreement, 'interim rate, 'liberalize', 'liberalization' and 'delay', 'frustra*'[27], 'impede' and 'obstruct' ought to have been included in a reasonable search and that a new search of the e-mail accounts should take place using these new words in addition to the original 10 words selected by the defendants. The defendants' original search was found to be unilateral, to be not adequate, and not to have followed the advice given in CPR PD 31 as to co-operation with the other party to litigation in advance of the search being done. The e-mails of sixteen further individuals were also required to be searched using the new keyword list.

It might be noted that the cost of the initial disclosure exercise in *Digicel* (before the court ordered it to be done again) was over £2 million. In this regard, Appendix 19 of the *Review of Civil Litigation Costs, Preliminary Report* by Lord Justice Jackson gives some interesting figures about the costs of e-Disclosure, as provided by a City firm of solicitors said to be regularly engaged in heavy commercial litigation. Three cost models ("small, medium, and huge") are set out: the costs varying from £64,000 to £30 million to £303,000 million.

The *Report and Recommendations of the Commercial Court Long Trials Working Party*[28], chaired by Mr Justice Aikens, published in December 2007, provides a model of the management of e-Disclosure following a CMC. A *List of Issues* document is produced as part of the pleadings, identifying the principle issues in the case. A *Disclosure Schedule* emerges from the CMC, setting out each issue, the disclosure implications for each party, and the corresponding disclosure order of the court. Interesting examples of such documents are given in Appendix 2 and Appendix 3 of the report.

United States

Rules governing e-Discovery were introduced in 2006 by amending the Federal Rules of Civil Procedure[29] (FRCP). The FRCP set out that early attention should be given to electronic discovery in litigation and this measure seems designed to

26 [2009] 2 All ER 1094 at 1096 – 97.

27 The expression "frustra*" involves the wild card symbol * - this will detect a word beginning with frustra such as frustrate, frustration etc.

28 www.judiciary.gov.uk/docs/long_trials_statement.pdf

29 http://www.law.cornell.edu/rules/frcp/

encourage companies to organise their electronic documents in the expectation of e-Discovery[30]. There is a compulsory initial discovery conference to discuss issues relating to preserving discoverable information and discovery of electronically stored information (ESI), including the forms in which it should be produced as well as privilege issues.

The parties' initial disclosures following the discovery conference must include descriptions of ESI by category and location, and results of the conference are reported to the court.

The rules pay particular attention to the forms in which ESI is produced and this enables parties to request that ESI be produced in native format with metadata included.

The rules also require a balancing test for ESI that is difficult or costly to locate or produce, such as data stored on back-up tapes. There are sanctions for non-compliance with e-Discovery requirements which can be imposed on the clients and the lawyers.

The costs of e-Discovery, like the costs of discovery generally, fall upon the party who is disclosing. Lord Justice Jackson[31] points out in his report that some US judges make orders for e-Discovery on condition that the requesting party meets the costs. This has a marked effect in restricting the demands that are made for e-disclosure.

A recent 4-3 decision of the Ohio Supreme Court, *State v. Rivas*[32], confirms that discovery of electronically-stored information is inherently no different than discovery of hard copy documents and things. Also, a party's mere assertion that the opponent falsified, altered or destroyed evidence is typically insufficient to warrant further discovery. Here, the defendant's contention that the prosecution had falsified the transcript of information stored on a hard drive, without more, was not sufficient for the Court to order production of a mirror image of the hard drive to the defendant.[33] As stated by the Court, "[t]he presumption should be that counsel comply with our rules of discovery." Presuming a lack of compliance based on one party's mere speculation "sends the wrong message to the legal community and does not represent the law of this state."

Some debate has opened in the United States regarding the effectiveness of *keyword search* methods. *Concept search* is said to be a more effective method. Whatever approach is used, lawyers must have a defensible and systematic approach to keyword searches. In *Victor Stanley v Creative Pipe Inc.*[34] Judge Grimm pointed out that keyword searches often produce over- and under- inclusive results. Lawyers using keyword searches should *either collaborate with the other parties to agree a keyword search methodology or use keyword search best practices to show the Court that reasonable measures have been taken to reduce over- and under- inclusive results*.

A defensible and effective approach[35] to keyword search might be to:

(a) Agree search keywords (also Boolean and Proximity expressions) with the other party.[36]
(b) Run the searches.
(c) Review results.
(d) Adjust the search by means of meetings and reviewing a sample of the documents found.
(e) Have the search keywords recorded in the Court Order.
(f) Consider concept search with large data sets.
(g) Document the entire process so that it can be defended.

Concept searches (as used on *Google*) involve the use of proprietary mathematical algorithms which the owners may be reluctant to reveal in court. [See the prescient remarks of Clarke J in this regard in *Mulcahy v Avoca Capital Holdings* discussed above].

It is recognised that privileged material is liable to be disclosed accidentally during e-Discovery and that this may not amount to waiver of privilege. FRCP rule 26(f)(3) provides:

> "A discovery plan must state the parties views and proposals on ... (D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order".

Australia

A new Practice Note (No. 17) came into effect on 29 January 2009 for the Federal Court.[37] Paragraph 1.2 provides that the code set out in the Practice Note is to be used in "any proceeding in which the Court has ordered that: (a) discovery be given of documents in an electronic format; or (b) a hearing be conducted using documents in an electronic format. Paragraph 1.3 provides that:

> "It may be expected that an order of the nature mentioned in paragraph 1.2 will be made in any proceeding in which:(a) a significant number (in most cases, 200 or more) of the documents relevant to the proceeding have been created or are stored in an electronic format; and (b) the use of technology in the management of documents and conduct of the

30 The provision of such services is now a new industry, and companies who sell such services also point out that one feature of these systems is the automatic and complete deletion of files after given dates (subject to law). The impact of such efficient and timely destruction of data on litigation remains to be assessed.
31 *Review of Civil Litigation Costs, Preliminary Report* Volume 2, p. 385.
32 121 Ohio St. 3d 469 (March 31, 2009)
33 This is an interesting question. Under what circumstances will a court order the production of a forensic copy of (say) a hard drive to an opposing party? Would it be a good idea for courts to order the making of forensic copies of data before investigations begin?
34 F.Supp.2d – 2008 WL 2221841
35 Albert Barsocchini, *The Keyword vs. Concept Search Debate*, Real eDiscovery, Winter 2009, 11.
36 Boolean expressions involve AND, OR, and NOT conjunctions to narrow searches. A proximity expression such as "traffic W/5 noise" finds documents with "traffic" within five words of "noise" in the text.
37 http://www.fedcourt.gov.au/how/practice_notes_cj17.htm

proceeding will help facilitate the quick, inexpensive and efficient resolution of the matter".

Parties are expected to have "discussed and agreed upon a practical and cost-effective discovery plan" before any order is made by the court.

Conclusion

S.I. No. 93 of 2009 has the effect that where electronic documents are involved in discovery applications, the applying party should indicate if discovered documents should be capable of being inspected in a searchable format, and also if access is required by the party requesting discovery to the IT equipment of the party holding the documents.

The provisions evident in other jurisdictions require that the parties communicate freely about the progress of discovery and that there is a key role for Case Management Conferences (CMCs). While CMCs are not expressly mentioned in S.I. No. 93 of 2009, Mr Justice Geoghegan's remarks in *Dome* set out the considerable discretion of the Court in these matters and the courts might be minded to adopt the CMC approach in e-Discovery in future.

Digicel provides a salutary example of how unilateral e-Discovery can go wrong where the Court found that the discovering party had not followed the CPR prescribed procedure. The absence of an equivalently detailed CPR and Practice Direction in Ireland need not imply that an Irish Court will not find a party to be at fault in failing to carry out searches in a reasonable way. In the United States, similar pointers to good practice in e-Discovery have emerged from the courts. These pointers include clear communication with other parties about keyword searches and a role for the Court in approving these keyword lists.

The discussion has been based on a scenario where one party seeks e-discovery against another party by means of a notice of motion. The possibility that a Court might order discovery in the course of a hearing is not discussed, but the possibility exists that similar principles would apply. ■

Bar Tennis

From right to left is: Mark Murphy, Sunniva McDonagh, Nicola Cox and Eugene Hill. Mark and Sunniva were the overall winners in a three set final which took place in Donnybrook Lawn Tennis Club. A barbecue followed the event.

Dying with Dignity: A new Era in Assisted Suicide?

Sonya Donnelly BL and Sophia Purcell BL

Introduction

The landmark decision of *R (on the application of Purdy) v. Director of Public Prosecutions* was delivered recently by the House of Lords. [1] The case addresses the offence of assisted suicide and notably, whether it is an offence when the suicide occurs in another jurisdiction. Marking the unique proceedings, all 12 Law Lords were present in the House of Lords Chamber, making the decision all the more groundbreaking**.** The House of Lords concluded that the Director of Public Prosecutions (hereinafter the D.P.P), should be required to promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding whether or not to consent to a prosecution under section 2(1) of the Suicide Act 1961 (hereinafter the 1961 Act), a provision which is, notably, identical to the Irish provision.[2] This decision could have significant implications for the law on assisted suicide in this jurisdiction and furthermore assist the courts in any future interpretation of the legislation.

Section 2(1) provides that: "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."

Ms. Purdy, a sufferer of primary progressive multiple sclerosis has been wheelchair bound since 2001. It is expected that there will come a time where she will wish to have her life legally terminated in Switzerland. At that time she may require the assistance of her husband travel owing to the nature of her condition. She feared that he could be prosecuted for assisting her suicide under section 2(1) of the 1961 Act. It should be noted that her grounds of appeal did not seek immunity for her husband from prosecution if that were to happen.[3] Rather, she argued that the D.P.P., without whose consent no such prosecution may be brought, had a duty to promulgate specific policy guidance, additional to that contained within the Code for Crown Prosecutors.[4] This policy, she argued, should identify the circumstances in which a prosecution would or would not be considered appropriate. She further argued that such policy guidance would enable her to decide whether she would travel at an earlier stage to end her life without his assistance. Ms. Purdy's appeal was granted on the second ground, wherein she had sought clarification of the circumstances in which the D.P.P. would prosecute those who assist a person in ending their own life

The Director's Consent

Section 2(4) of the 1961 Act provides that no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions. This topic was widely discussed by the House and is highly relevant to the Irish provision on assisted suicide, where the consent of the Director is equally required. Lord Hope in his decision noted that consistency of practice is especially important in such cases as the issue of assisted suicide is both sensitive and controversial. He noted that the Crown Prosecution Service and the police require guidance if they are to avoid criticism of their decisions as arbitrary. Therefore, such an offence specific policy would set out the parameters in which a decision could be made.

Baroness Hale commented that a major objective of the criminal law is to warn people that, if they behave in a way which it prohibits, they are liable to prosecution and punishment. People are entitled, she stated, to be warned in advance so that if they are of a law-abiding persuasion, they can behave accordingly. She further noted that the object of the exercise of the discretion should be to focus on the features that will distinguish those cases in which deterrence will be disproportionate from those cases in which it will not and not upon a generalised concept of the "public interest". She did not underestimate the task noting the prime object being to protect people who are vulnerable to all sorts of pressures to consider their lives "a worthless burden to others".[5] She further stated that the object must also be to protect the right to exercise a genuinely autonomous choice and that "It is not for society to tell people what to value about their own lives. But it may be justifiable for society to insist that we value their lives even if they do not." [6]

In relation to the Code and the Director's discretion, Lord Brown of Eaton-Under-Heywood stated:-

> "In short, as it seems to me, there will on occasion be situations where, contrary to the assumptions underlying the Code, it would be possible to regard the conduct of the aider and abettor as altruistic rather than criminal, conduct rather to be understood out of respect for an intending suicide's rights under article

1 [2009] 3 W.L.R. 403 [2009] UKHL 45 on the 30th July, 2009.

2 The offence of assisted suicide in this jurisdiction is contained in section 2(2) of the Criminal Law (Suicide) Act 1993.

3 The House of Lords had previously ruled that no such promise could be given in *R. (on the application of Pretty) v DPP* [2001] UKHL 61; [2002] 1 A.C. 800.

4 This is a public document setting out the general principles Crown Prosecutors should follow when making a decision whether to prosecute a matter.

5 [2009] 3 W.L.R. 403 at 426.

6 At pp.426 and 427.

> 8 than discouraged so as to safeguard the right to life of others under article 2." [7]

In this jurisdiction, the consent of the Director is required to prosecute the offence in the same manner as the English legislation. There have been, unlike England where the D.P.P. specifically commented on the Daniel James assisted suicide case, no public comments on the offence of assisted suicide or any particular case.[8] We have no guidance as to how the Director would prosecute the offence nor have there been any successful prosecutions where a family member or close friend has assisted someone to travel and terminate their life in a jurisdiction such as Switzerland.

Article 8 of the European Convention on Human Rights

Article 8 of the European Convention on Human Rights guarantees respect for private and family life and for a person's home and correspondence. Counsel for Ms. Purdy submitted that the prohibition in section 2(1) of the 1961 Act constitutes an interference with her right to respect to private life under article 8(1) and that secondly, this interference was not in accordance with law as required by article 8(2) in the absence of an offence-specific policy by the D.P.P. Ms. Purdy did not seek a guarantee of immunity from prosecution, it was argued, rather she sought information so she can take an informed decision that affects her private life. If the risk of prosecution is sufficiently low, she can wait until the very last moment before she makes her journey. If the risk is too high, she would have to make her journey unaided to end her life before she would otherwise wish to do so.

The Court of Appeal was unable to find in favour of Ms. Purdy in light of the decision of *R (Pretty) v. Director of Public Prosecutions (Secretary of State for Home Department Intervening).*[9] The House of Lords had held in that case that Article 8 was directed to the protection of personal autonomy while a person was alive but did not confer a right to decide when or how to die. The European Court of Human Rights disagreed with this decision in *Pretty v. United Kingdom,* but did hold that there had been no violation of the European Convention on Human Rights. However, unlike the House of Lords, the Strasbourg Court held that that:-

> "The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is *not prepared to exclude* that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1) of the Convention."[10]

The Court of Appeal felt bound to follow the decision of the House of Lords and not Strasbourg, following their previous line of jurisprudence.[11] However, in the House of Lords, Lord Hope disagreed with the approach taken by the Court of Appeal and stated that the House was free to depart from its earlier decision and follow that of the Strasbourg court. He noted that it is the duty of domestic courts to give practical recognition to the principles laid down by the Strasbourg Court; as the effectiveness of the Convention as an international instrument depends on loyal acceptance by member states of the principles that it lays down.[12] He expressly noted that:-

> " …it is obvious that the interests of human rights law would not be well served if the House were to regard itself as bound by a previous decision as to the meaning or effect of a Convention right which was shown to be inconsistent with a subsequent decision in Strasbourg. Otherwise the House would be at risk of endorsing decisions which are incompatible with Convention rights."[13]

He observed that the difference between the *Purdy* and *Pretty* cases were firstly that Ms. Pretty was seeking immunity from prosecution if her husband assisted her in the very act of suicide. Secondly, she was not contemplating travelling to another country for this purpose, nor was there any question of her being forced by lack of information about prosecution policy to choose between ending her life earlier than she would have otherwise wished. He concluded that the Court should depart from the decision of *Pretty* and hold that the right to respect for private life in Article 8(1) was engaged in the case. He concluded that section 2(1) of the 1961 Act satisfies all the requirements of Article 8(1). However, the issue Ms. Purdy had raised was directed to section 2(4) of the Act and the question of the consent of the Director to her husband's prosecution.

On the question of the Code for Crown Prosecutors, it is worthy to note that he stated that the code is to be regarded for the purposes of Article 8(2) as forming part of the law in accordance with which an interference with the right to respect for private life may be held to be justified. Since the inception of the Code, the Director created a Special Crimes Division staffed by a small number of specially trained officers whose function it is to supervise prosecutions of exceptional difficulty or senstivity. This change in practice, Lord Hope noted, goes one step further towards meeting the challenge of arbitrariness. However, he concluded that the developments fall short of what is required to satisfy the Convention tests of accessibility and forseeability.

The Code, he concluded, will normally provide sufficient guidance to Crown Prosecutors and the public as to how decisions should or are likely to be taken and whether it is in the public interest to prosecute. But Lord Hope stated that such cannot be said of cases where the offence in

Article continued on p.101

7 At p.431.

8 James, a young man paralysed from the chest down in a rugby accident, died in 2008 after travelling to a Swiss euthanasia clinic with his parents. The Director of Public Prosecutions, in deciding not to prosecute his parents, stated that the determination of James to take his own life was a significant factor in his decision.

9 [2002] 1 A.C. 800

10 (2002) 35 E.H.R.R. 1 at p. 37; para 67.

11 *Kay v. Lambeth London Borough Council* [2006] 2 A.C. 465, R *(RJM) v. Secretary of State for Work and Pensions* [2009] 1 A.C. 311.

12 Following Lord Bingham in *R (Ullah) v. Special Adjudicator* [2004] 2 A.C. 323 at para.20.

13 [2009] 3 W.L.R. 403 at 416.

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 14, Issue 5, November 2009

A directory of legislation, articles and acquisitions received in the Law Library from the 24th June 2009 up to 15th October 2009.
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

ABORTION

Article

Drislane, Siobhan
Abortion and the medical profession in Ireland
15 (2009) MLJI 35

ARBITRATION

Set aside

Application to remit or set aside award - Misconduct alleged – Reasons for award set out in separate document – Privileged material accidently disclosed – Reasons sent to party directly instead of to legal representatives – Inappropriate remarks made -Whether misconduct - Whether award with reasons in separate document valid - Whether reasons inadequate – Whether award ambiguous and inaccurate – Whether bias - Whether failure to deal with counterclaim – Whether issue of termination of contract addressed - Whether prejudice to applicant - IEI rules – *Bremer Handelgesellschaft v Westzucker* [1981] 2 Lloyds Rep 130, *Bord na Móna v John Sisk & Son Ltd* [1990] 1 IR 85, *McCarthy v Keane* [2004] IESC 104 [2004] 3 IR 617, *Keenan v Shield Insurance Company Ltd* [1988] IR 89, *King v Thomas McKenna Ltd* [1991] 2 QB 480 and *JH Rayner v Shaher Trading Co* [1982] Lloyds Rep 632 considered; *Uniform Construction Ltd v Cappawhite Contractors Ltd* [2007] IEHC 295 (Unrep, Laffoy J, 29/8/2007) distinguished - Arbitration Act 1954 (No 26), ss 27, 36, 37, 38 and 40 - Rules of the Superior Courts 1986 (SI 15/1986), O 54, r 4 – Matter remitted to arbitrator (2008/5MCA – Murphy J – 13/2/2009) [2009] IEHC 117
JJ Rhatigan & Company Ltd v Paragon Contracting Ltd

Library Acquisition

Hanessian, Grant
International arbitration checklists
2nd edition
New York: Juris Publishing, 2009
C1250

AVIATION

Library Acquisition

Holding, John D
The British manual of international air carriage
Toronto: Irwin Law Inc., 2009
N327

BANKING

Article

Barrett, Max
The Irish state guarantee scheme and the Irish deposit protection scheme
2009 ILTR 187

BANKRUPTCY

Library Acquisitions

Fletcher, Ian Frank
The law of insolvency
4th ed
London: Thomson Sweet & Maxwell, 2009
N310

Forde, Michael
Bankruptcy law
Dublin: Thomson Round Hall, 2009
N310.C5

BUILDING & CONSTRUCTION

Article

Meehan, Gerard
Global claims under construction contracts 69
14 (3) 2009 BR 69

CHILDREN

Library Acquisitions

Hagger, Lynn
The child as vulnerable patient
Farnham: Ashgate, 2009
N185.122.Q11.C5

Hershman and McFarlane children act handbook 2009/2010
2009/2010 ed
Bristol: Jordan Publishing Limited, 2009
N176

COMMERCIAL LAW

E-Commerce

Internet – Website – Liability – Liability for material hosted on website – Chat room – Intermediary service provider – Relevant service provider – Information society service – Gambling exemption – Whether internet chat room covered by E-Commerce Directive – Whether host of chat room intermediary service provider – Whether provision of chat room constitutes relevant service consisting of storage of information provided by recipient of service – *Bunt v Tilley* [2006] EWHC 407, [2007] 1 WLR 1243 followed - European Communities (Directive 2000/31/EC) Regulations 2003 (SI 68/2003) – Directive 2000/31/EC – Preliminary issues answered in favour of the defendants (2004/19924P & 19925P – Clarke J – 18/3/2009) [2009] IEHC 133
Mulvaney v Sporting Exchange Ltd t/a Betfair

COMMUNICATIONS

Article

Coonagh, Aoife
Follow the leader
2009 (June) GLSI 41

COMPANY LAW

Articles

Barr, Anthony
Security for costs under S.390 of the companies act, 1963 - an overview
14 (3) 2009 BR 61

Cotter, Barbara
Share and share alike
2009 (June) GLSI 38

Craig, Rosemary
Accountants, their role and other related company matters under the UK companies act 2006

2009 ILT 101

Little, Cormac
Merger control rules in a downturn
2009 16 (7) CLP 146

Library Acquisitions

Fuller, Geoffrey
Corporate borrowing law and practice
4th edition
Bristol: Jordan Publishing Limited, 2009
N263

Walmsley, Keith
Butterworths company law handbook 2009
23rd ed
London: LexisNexis, 2009
N261

COMPETITION LAW

Mergers and acquisitions

Analysis of competition – Definition of product market – Statutory appeal from determination of Competition Authority – Nature and scope of appeal – Standard of review to be applied by Court – Interpretation of evidence by Authority – Adequacy thereof – Whether product substitutability disregarded by Authority – Whether extent of countervailing power of retailers disregarded – Whether approach of Authority ambiguous and incoherent – Whether proposed acquisition would substantially lessen competition in market for products – Whether material error in determination– *Orange v Director of Telecommunications Regulation* (Unrep, Macken J, 4/10/1999) applied; *Glancré Teo v Cafferkey* [2004] 3 IR 401 and *Microsoft v Commission* (Case T-201/04) [2004] ECR II-4463 considered – Competition Act 2002 (No 14), 24 – Appeal allowed and determination annulled (2008/145MCA – Cooke J – 19/3/2009) [2009] IEHC 140
Rye Investment Ltd v Competition Authority

Library Acquisitions

Koenig, Christian
EC competition and telecommunications law
2nd edition
London: Kluwer Law International, 2009
W110

Lindrup, Garth
Butterworths competition law handbook
14th ed
London: LexisNexis Butterworth, 2008
N266

CONSTITUTIONAL LAW

Bodily integrity

Prisoner - Complaint regarding medical treatment – Detoxing programme – Absence of suggestion that failure of proper medication rendered custody unlawful – Failure to make sufficient case that medication inappropriate – Provision of medical report by prison governor directed (2009/326JR – Clarke J – 1/4/2009) [2009] IEHC 150
Foley v Governor of Limerick Prison

Detention

Infectious disease – Legal basis for detention - Relevant statutory provisions - Whether section properly invoked - Constitutional validity of section authorising detention - Presumption of constitutionality - Constitutional rights - Terms of reference of inquiry - Public policy – Whether detention authorised on ongoing basis - Burden of proof - Natural and constitutional justice - Existence of safeguards - Paternal character of legislation - Whether adequate level of protection for personal rights of detainees - Existence of readily accessible remedy if section not operated constitutionally – *Application of Gallagher (No 2)* [1996] 3 IR 10, *State (Nicolaou) v Attorney General* [1966] IR 567, *State (McFadden) v Governor of Mountjoy Prison (No 1)* [1981] ILRM 113 , *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *People v Shaw* [1982] IR 1, *East Donegal Cooperative Livestock Market Limited v Attorney General* [1970] IR 317, *RT v Director Central Mental Hospital* [1995] 2 IR 65, *JH v Russell* [2007] IEHC 7, [2007] 4 IR 242, *T O'D v Kennedy* [2007] IEHC 129, [2007] 3 IR 689, *Croke v Smith (No 2)* [1998] 1 IR 101, *Gooden v St Otteran's Hospital (2001)* [2005] 3 IR 617, *JB v Mental Health (Criminal Law) Review Board* [2007] IEHC 147, (Unrep, Hanna J, 25/7/2008), *Re Philip Clarke* [1950] IR 235, *Osheku v Ireland* [1986] IR 733, *Laurentiu v Minister for Justice* [1999] 4 IR 42, *Minister for Justice v Butenas* [2008] IESC 9, [2008] 4 IR 189, *DP v Governor of the Training Unit* [2001] IR 493 and *State (O) v Daly* [1977] IR 312 considered - Constitution of Ireland 1937, Articles 40.1, 40.3, 40.4.2° and 40.4.3° - Health Act, 1947 (No 28), ss 2, 29 and 38 - Health Act 1953 (No 26), s 35 - Infectious Diseases Regulations 1981 (SI 390/1981) - Infectious Diseases (Amendment) (No 3) Regulations 2003 (SI 707/2003) - European Convention on Human Rights, arts 5 and 8 - Claim of constitutional invalidity dismissed, detention declared lawful (2008/1632SS - Edwards J - 11/2/2009) [2009] IEHC 106
S (VT) v Health Service Executive

Fair trial

Risk to life – Risk to health - Medical evidence - Independent medical examination – Evidence of cardiologist – Inability to give instructions for purposes of cross-examination – Medical history – Ruling that trial should proceed – Constitutional rights – Prejudice to ability to mount proper defence – Claim that constitutional right to life outweighed right of community to prosecute – Whether decision to proceed irrational – Whether court should intervene to restrain trial – Ability to work – Ability to drive – Ability to give evidence in other court cases – *Sparrow v Connellan* [2006] IEHC 231 (Unrep, de Valera J, 22/6/2006), *T(P) v DPP* [2007] IESC 39 (Unrep, SC, 3/7/2007), *B(J) v DPP* [2006] IESC 66 (Unrep, SC, 29/11/2006) and *DPP v O'C* [2006] IESC 54 (Unrep, SC, 27/7/2006) considered – Diseases of Animals Acts 1966 (No 6), s 49 – Disease of Animals Act 1966 (Restriction on Movement of Certain Animals) Order 2001 (SI 121/2001) – Application refused (2007/1617JR – Sheehan J – 1/4/2009) [2009] IEHC 151
Sparrow v Minister for Agriculture, Fisheries and Food

Jurisdiction

European law – Jurisdiction of administrative bodies and courts of limited jurisdiction – Jurisdiction of Equality Tribunal – An Garda Síochána eligibility – Age discrimination – Whether Equality Tribunal entitled to make a declaration of inconsistency under Article 34 of Constitution – Whether national legislation must be construed in light of European law – Whether body defined by statute entitled to overrule statutory instrument – *Impact v. Minister for Agriculture and Food (Case C-268/06)* [2008] ECR I-02483 followed - Employment Equality Act 1998 (No 21), s 82 – Equality Act 2004 (No 24) – Constitution of Ireland 1937, Article 34 – Relief granted (2008/793JR – Charleton J – 17/2/2009) [2009] IEHC 72
Minister for Justice, Equality and Law Reform v Equality Tribunal

Statute

Validity – Public order offence – *Locus standi* – Charged not convicted - Application for declaration of unconstitutionality of criminal statute – Constitution – Freedom of expression – Whether provision of statute unconstitutional – Delay – Whether applicant moving application for judicial review promptly – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21 – Criminal Justice (Public Order) Act 1994 (No 2), s 6 – Constitution of Ireland 1937, Articles 38.1 and 40.6.1° – *King v Attorney General* [1981] IR 233 distinguished – Relief refused (2007/933JR – Ó Neill J – 27/3/2009) [2009] IEHC 166
Kershaw v Ireland

Article

Daly, Eoin
The congregational indemnity agreement: an unconstitutional endowment of religion?
2009 ILTR 111

CONTRACT LAW

Auctioneer

Commission and expenses - Fees relating to sale of properties –Proceedings for repossession

– Engagement to intervene with building society – Instructions to prepare properties for sale – Formal contract – Terms of agreement – Services – Marketing of property – Public auction – Bids – Contract for sale – Deposit – Transfer of deposit to defendant – Failure to pay fees – Complaints – Whether authority to sell property – Whether auction conducted in appropriate and professional manner – Whether services provided – Whether conspiracy or misleading of defendant so that best price not obtained – Whether entitlement to sum claimed – Conflict on evidence – Whether break in course of auction to consult with defendant – Whether offer made to third party – Awareness of defendant – Signing of contract – Appreciation of implications – Defence - Failure to amend pleadings – Whether marketing campaign inadequate – Whether promise of editorial for property – Whether failure to follow up on bid – Whether failure to phone around prior to auction – Whether promise and failure to get reduction in sum owed to building society – Failure of defendant to brief plaintiff as to indebtedness – Inability to enter into meaningful negotiations with building society – Ratification of conduct of agent – Retrospectivity - Relief from liability to principal –*Firth v Staines* [1897] 2 QB 70 and *Keay v Fenwick* [1879] 1 CPD 745 considered – Award in favour of plaintiff (2004/1003S – McMahon J – 31/3/2009) [2009] IEHC 147
Campion Property Consultants Limited v. Kilty

Formation

National association - Membership – Renewal refused - Trial of preliminary issue – Whether contract between plaintiff and association giving rise to claim – Whether as matter of law case could be founded in contract – Claim that no right of membership for private individuals – Nature of contractual liability – Relationship between unincorporated association and members - Constitution and rules of association - Member of club affiliated to council – Compensation fund – Contract of insurance between member of fund and fund board – Associate member as member of compensation fund – Contractual relationship between plaintiff and national association - – *Walsh v Butler* [1997] 2 ILRM 81 and *Robertson v Ridley* [1989] 1 WLR 872 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 25 – Held that contractual relationship existed (2004/16720P – Laffoy J – 18/12/2008) [2008] IEHC 438
Fitzharris v O'Keeffe

Sale of land

Oral agreement - Whether any concluded oral agreement - Enforceability of contract - Adequacy of note or memorandum - Essential terms of contract - Statute of Frauds Absence of reference to deposit - Part performance - Estoppel - Agency - Authority - Actual authority - Ostensible authority – Whether defendant estopped from denying authority of agent to enter into agreement - Whether appropriate to direct specific performance of agreement - Whether exchange of written documentation between parties could give rise to a binding contract in absence of concluded oral agreement – *Embourg Ltd v Tyler Group Ltd* [1996] 3 IR 480, *Higgins v Argent Developments Ltd* (Unrep, SC, 13/5/2003) and *Feeney and Shannon v McManus* [1937] IR 23 applied; *Mulhall v Haran* [1981] IR 364, *Tiverton Ltd v Wearwell Ltd* [1975] Ch 146 and *Boyle v Lee* [1992] I IR 555 distinguished - Decree of specific performance granted (2008/3677P - Clarke J - 30/1/2009) [2009] IEHC 67
Greenbrand Investments v Bruton

Sale of land

Special conditions - Contract subject to planning permission - Delay in applying for planning permission - Whether purchaser used all reasonable endeavours to ensure application for planning permission successful and planning permission obtained as soon as possible - Whether purchaser complied with obligations under special conditions - Whether purchaser in breach of special condition - Whether purchaser thereby precluded from relying on right of termination - Whether plaintiff entitled to forfeit deposit and resell the property - *Costelloe v Maharaj Krishna Properties (Ireland) Ltd* (Unrep, Finlay J, 10/7/1975) and *Jolley v Carroll (2000)* States Gazette considered – Specific performance ordered (2008/2SP - Murphy J - 12/2/2009) [2009] IEHC 59
Lynch v Duffy

Sale of land

Specific performance – Interpretation of contract – Whether defendants required to compel council to consent to mortgage – Whether defendants required to execute further limited recourse mortgage – Contractual obligations of parties – Legal structure of arrangements – Building licence agreement – Agreement to receive lease – Stamp duty – Mortgage clauses – Nature of mortgage arrangements – Principles applicable to construction of commercial documents – Text – Context of agreement – Material backgrounds facts – Whether obligation on defendant procure that mortgage be made available as security – Whether mortgage obligation spent – *Kramer v Arnold* [1997] 3 IR 43 and *Ryanair Ltd v An Bord Pleanála* [2008] IEHC 1 (Unrep, Clarke J, 11/1/2008) considered – Held obligation to procure mortgage and execute further limited recourse mortgage (2008/8311P – Clarke J – 20/3/2009) [2009] IEHC 135
Marlan Homes Limited v Walsh

Article

Meehan, Gerard
Global claims under construction contracts
69
14 (3) 2009 BR 69

Library Acquisition

Morgan, Richard
Morgan and Burden on computer contracts
8th edition
London: Thomson Sweet & Maxwell, 2009
L157

CONVEYANCING

Article

Wheeler, Deborah
The Land and conveyancing law reform act 2009: significant changes or mere tweaking?
2009 14 (3) C & PLJ 62

COPYRIGHT & INTELLECTUAL PROPERTY

Article

O'Keeffe, Gail
Pirate song
2009 (June) GLSI 24

Library Acquisitions

Gibbons, Glen
Trade marks law
Cork: Oak Tree Press, 2009
N114.2.C5

Gibson, Johanna
Intellectual property, medicine and health
Farnham: Ashgate, 2009
N111

Statutory Instruments

Patents (amendment) act 2006 (certain provisions) (commencement) order 2009
SI 196/2009

Patents (amendment) rules 2009
SI 194/2009

CORONERS

Article

Cusack, Denis A.
The growing diversity of deaths with human rights dimensions reportable to the coroner: the young, the old and influenza pandemic victims
15 (2009) MLJI 2

COSTS

Article

Barr, Anthony

Security for costs under S.390 of the companies act, 1963 - an overview
14 (3) 2009 BR 61

COURTS

Jurisdiction

Court of Criminal Appeal – Application for leave to appeal – Whether Court of Criminal Appeal has jurisdiction to hear an appeal from refusal to accept change of plea prior to imposition of sentence – Courts of Justice Act 1924 (No 10), ss 32, 34 and, 63 – Application dismissed (131/2008 – CCA – 13/10/2008) [2008] IECCA 124
People (DPP) v McCormack

CRIMINAL LAW

Administration of justice

Incest – Anonymity - Order prohibiting publication of identities of parties – Application by victim to have anonymity lifted – Whether blanket ban on publication provided by statute – Whether statute allowed for exceptions – Contention that removal of anonymity would do injustice to perpetrator – Lapsing of time – Whether anonymity taken into account at sentencing stage – Penalties – Intention of Oireachtas – Triggering of ban by act of charging - Absence of temporal limit – Regulation of ban by operation of law – Whether necessity for order prohibiting publication – Whether useful purpose to be served by quashing of order - Delay – Extension of time – Activity of applicant - Prejudice – *Independent Star v O'Connor* [2002] 4 IR 166 distinguished; *Barry v Fitzpatrick* [1996] 1 ILRM 512 considered – Criminal Law (Incest Proceedings) Act 1995 (No 12), s 3 – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Leave refused (2006/858JR – Hanna J – 9/12/2008) [2008] IEHC 378
McG (L.) v Judge Murphy

Bail

Appeal - Bail pending hearing of appeal - Jurisdiction of court to grant bail – Strength of grounds of appeal – Likelihood of success on appeal – Refusal of trial judge to respond to requisition at trial – Whether presumption of innocence adequately explained in judge's charge - *People (DPP) v Corbally* [2001] 1 IR 180 distinguished; *People (Attorney General) v Byrne* [1974] IR 1, *People (DPP) v Cronin* [2003] 3 IR 377, *People (DPP) v Wallace* (Unrep, CCA, 30/4/2001) and *People (DPP) v Kiley* (Unrep, CCA, 21/3/2001) considered - Bail refused (22/2008 - CCA - 6/6/2008) [2008] IECCA 88
People (DPP) v Morrison

Delay

Complainant delay – Evidence – Witnesses – Prejudice to defence – Whether fair trial prejudiced by unavailability of witnesses – Whether real risk of unfair trial which could not be cured by appropriate judicial directions – Relief refused (2007/1291JR – Peart J – 13/3/2009) [2009] IEHC 121
C (J) v DPP

Delay

Fair trial – Sexual offence – Defence request that statements be taken from relatives of complainant as to collateral matters - Statement not taken from complainant's mother because of her age and circumstances – Applicant elderly and in ill health – "Omnibus test" - Whether respondent delayed in prosecuting offence – Whether delay in seeking relief – Whether time in which to seek relief ran from date of being sent forward – Whether applicant could impugn prosecutorial delay where he had sought to have further statements taken – Whether applicant entitled to await outcome of request for further investigations before seeking relief – Whether age of applicant relevant in considering delay - Whether respondent conducted proper inquiry into offence – Whether failure to ensure testimony of all necessary witnesses obtained – Whether failure on part of prosecution to identify "islands of fact" - Whether real risk of unfair trial – *D v DPP* [2004] 3 IR 172 applied; *H(S) v DPP* [2006] IESC 55 [2006] 2 IR 575, *Braddish v DPP* [2001] 3 IR 127, *Dunne v DPP* [2002] 2 IR 305, *B(J) v DPP* [2006] IESC 66 (Unrep, Supreme Court, 29/11/2006), *De Roiste v Minster for Defence* [2001] 1 IR 190, *C(D) v DPP* [2006] 1 ILRM 348, *O'Flynn v Clifford* [1988] 1 IR 740, *Blood v DPP* [2005] IESC 8 (Unrep, Supreme Court, 2/3/2005), *O'Domhnaill v Merrick* [1984] 1 IR 151, *O'Keeffe v Commissioners of Public Works* (Unrep, Supreme Court, 24/3/1980) and *T(P) v DPP* [2008] IESC 47 [2008] 1 IR 701 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21 – Prohibition granted (2008/449JR – O'Neill J – 20/12/2009) [2009] IEHC 87
R (M) v DPP

Delay

Sexual offences – Prohibition - Prosecutorial delay - Prejudice – Inordinate delay - Risk of unfair trial - Conduct of investigation - Applicable legal principles - Totality of circumstances - Unavailability of witness - Materiality - Extensive pre-trial publicity - Absence of explanation for delay - Whether any culpable prosecution delay - Balancing exercise - Public interest - Right to expeditious trial - Stress and anxiety – No medical evidence - Whether applicant subjected to significant stress and anxiety - Whether any evidence of "something extra" over and above normal stress - Delay in disclosure attributable to long incomplete investigation – Whether prejudice caused by late disclosure of psychiatric reports - Whether prejudice established which could not be addressed by rulings of trial judge - Consideration of cumulative circumstances - Proportionality - *PM v Malone* [2002] 2 IR 560, *PM v DPP* [2006] IESC 22, [2006] 3 IR 172, *Cormack v DPP* [2008] IESC 63, (Unrep, SC, 2/12/2008) *JM v DPP* [2004] IESC 47, (Unrep, SC, 28/7/2004), *Savage v DPP* [2008] IESC 39, (Unrep, SC, 3/7/2008), *Barker v Wingo* (1972) 407 US 514, *McFarlane v DPP* [2006] IESC 11, [2007] 1 IR 134, *SH v DPP* [2006] IESC 55, [2006] 3 IR 575, *B v DPP* [1997] 3 IR 140, *Noonan v DPP* [2007] IESC 34, [2008] 1 IR 445 , *M O'H v DPP* [2007] IESC 12, [2007] 3 IR 299 and *CC v Ireland* [2005] IESC 48, [2006] 4 IR 1 followed - Relief granted (2008/46JR - MacMenamin J - 3/2/2009) [2009] IEHC 48
D (J) v Director of Public Prosecutions

Delay

Prohibition - Applicable principles – Whether delay inordinate and excessive – Whether real and substantial of unfair trial – Prejudice - Relevant factors - Length of delay - Reasons for delay - Role of applicant - Existence of prejudice – Whether applicant's role in delay central feature - Execution of bench warrants – Whether applicant an evader of justice – Whether any prejudice attributable to culpable prosecutorial delay - Gravity of alleged crime - *DC v DPP* [2005] IESC 77, [2005] 4 IR 281, *McFarlane v DPP* [2008] IESC 7, [2008] 4 IR 118 and *Z v DPP* [1994] 2 ILRM 481 applied - Relief refused (2007/508JR - Hedigan J - 12/2/2009) [2009] IEHC 73
McDonagh v Director of Public Prosecutions

Detention

Extension – Challenge to legality of extension - Time of commencement of application - Multiple detainees – Indication given by Detective Superintendant that further applications pending – Indication given prior to expiry of prior period of lawful detention – Applications not completed until prior period of lawful detention had expired – Witness sworn in for previous application but not for subsequent – Warrant not indicating time of pronouncement of decision – *Habeas corpus* - Whether giving of indication meant that applications had commenced - Whether sworn evidence – Whether form of warrants sufficient – *Finnegan v Member in Charge (Santry Garda Station)* [2006] IEHC 79 [2007] 4 IR 62, *DPP v Finn* [2003] IR 372, *DPP v Walsh* [1980] IR 294, *Mapp v Gilhooley* [1991] ILRM 695 and *DPP v Kemmy* [1980] IR 160 considered - Offences Against the State Act 1939 (No 13), s 30 - Constitution of Ireland, art 40 – Extensions of detention declared lawful (2009/326SS, 2009/327SS and 2009/328SS – Peart J – 5/3/2009) [2009] IEHC 112
O'Brien v Member in Charge Bridewell Garda Station

Double jeopardy

Fourth trial – Jury discharged in 3 previous trials

- Applicable legal principles - Whether any basis for inhibiting further prosecution – Whether each case must be decided according to circumstances – Relevant factors - Seriousness of offence under consideration – Extent to which applicant may have contributed to requirement for further trial - Period of delay - No jury disagreement – Whether reasonable prospect of conviction - Whether any infirmities or intrinsic weakness in case – Circumstances in which previous discharges occurred - Whether previous decisions to discharge jury erroneous in law – Whether any special factor pertaining to stress or ill health – Whether any prospective unfairness of further trial – Indecent assault - Partial confession of guilt – Whether extraordinary to prohibit trial in circumstances where defendant admits to behaviour of criminal nature - *DS v Director of Public Prosecutions* [2006] IEHC 303, [2007] 2 IR 298 and *Attorney General v Kelly (No 2)* [1938] IR 109 approved; *R v Henworth* [2001] 2 Cr App R 4 distinguished; *McFarlane v DPP* [2008] IESC 7, [2008] 4 IR 118 followed - Relief refused (2007/34JR- McCarthy J - 2/2/2009) [2009] IEHC 81
P (A) v Director of Public Prosecutions

Evidence

Absence - CCTV footage – Error in downloading footage - Loss of video footage from one camera – Whether absence of still photographs prejudiced fair trial – Significance of footage - Prohibition – Alleged sexual assault on garda - Delay – Lapse of time inadequately explained - *Braddish v DPP* [2001] 3 IR 129 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84 - Application refused (2006/1313JR –O'Neill J – 20/3/2009) [2009] IEHC 132
D (C) v DPP

Evidence

Absence - CCTV footage – Error in downloading of footage – Prohibition – Whether defence gravely disadvantaged – Significance of footage – Other evidence available to prosecution – Sexual offences - Whether real risk of unfair trial – Whether obligation on gardaí to seize available footage – *Braddish v DPP* [2001] 3 IR 129 and C(D) v DPP [2005] IESC 77 (Unrep, SC, 21/11/2005) considered – Application refused (2008/1028JR – Birmingham J – 18/3/2009) [2009] IEHC 130
M (B) v DPP

Evidence

Admissibility - Prejudice to accused - Whether fact that gardaí acting on"salient information" admissible - Whether such evidence prejudicial to accused - *People (DPP) v Bowes* [2004] IECCA 44, [2004] 4 IR 223 distinguished; *People (DPP) v McGartland* (Unrep, CCA, 20/1/2003) and *People (DPP) v Bowes (No 2)* [2006] IECCA 183, (Unrep, CCA, 20/1/2006) considered - Warrant – Search warrant - Whether Superintendent entitled to issue warrant - Whether serious genuine and reliable steps taken to find District Judge or peace commissioner – Urgency of situation – Whether warrant valid and correctly admitted into evidence - *People (DPP) v Byrne* [2003] 4 IR 423 considered - Misuse of Drugs Act 1977 (No 12), s 26 – Criminal Justice (Drug Trafficking) Act 1996 (No 29), s 8 - (150/2006 - CCA – 31/1/2008) [2008] IECCA 18
People (DPP) v Tanner

Evidence

Admissibility – Hearsay - Whether any breach of hearsay rule – Direct evidence – Whether any error in principle – Whether any legal requirement for contemporaneous note to made by gardaí of permission granted to enter dwelling – Leave to appeal refused - (25/2007 - CCA - 15/12/2008) [2008] IECCA 170
People (DPP) v Curran

Evidence

Appeal - Whether finding of jury perverse — Provocation - Whether jury entitled to reject evidence of provocation – Whether any loss of control - Jury – Allegation that two members known to accused after verdict reached – Whether any bias real or apparent – Whether verdict unsafe – No objection raised at trial - *People (DPP) v Cronin* [2003] 3 IR 377 applied - Criminal Justice Act 1964 (No 5), s 4(2) - Application for leave to appeal refused (109/2006 - CCA - 26/1/2009) [2009] IECCA 9
People (DPP) v Donovan

Evidence

Circumstantial evidence – Charge to jury - Whether trial judge misdirected jury – Whether correct explanation of nature of circumstantial evidence given to jury – Formulation of words used – Charge as whole – Sentence – Whether 20 year sentence excessive - *People (Attorney General) v Byrne* [1974] IR 1 considered - Misuse of Drugs Act 1977 (No 12), s 15A - Sentence of 12 years substituted for sentence of 20 years (86/2004 - CCA - 12/3/2008) [2008] IECCA 43
People (DPP) v O'Connor

Evidence

Disclosure - Duty of prosecution to disclose - Failure to disclose documentary evidence to defence prior to trial - Prejudice to defence - Effect of failure to disclose - Whether conviction unsafe – Materiality of evidence – Whether any material disadvantage to defence or material advantage to prosecution - *People (DPP) v Dundon* [2007] IECCA 64, (Unrep, CCA, 25/7/2007) and *People (DPP) v AC* [2005] IECCA 69, [2005] 2 IR 217 considered - Application for leave to appeal refused (202/2007 - CCA - 15/12/2008) [2008] IECCA 171
People (DPP) v Ward

Evidence

Recognition – Recognition of accused on CCTV – Witness member of An Garda Síochána – Whether permissible to admit evidence of recognition of accused by member of An Garda Síochána – Whether prejudicial effect of such evidence outweighs probative value - Sentencing – Attempted murder – Life sentence – Deterrence – Prevalence of crime – Whether permissible to consider prevalence of crime in structuring sentence – Whether sentence for attempted murder should be lesser than for murder in situation where culpability equivalent to that of murder – Appeal against conviction dismissed, appeal against sentence allowed (129/2007 – CCA – 19/12/2008) [2008] IECCA 138
People (DPP) v Larkin

Jurisdiction

Special Criminal Court – Whether jurisdiction of Special Criminal Court lawfully invoked - Whether applicants lawfully before court – Delay of 15 hours between arrest and charge before Special Criminal Court – Whether applicants in unlawful detention at time of charge in Special Criminal Court – Manner in which accused brought before court - Whether applicants brought as soon as practicable before court – Re-arrest for purpose of charge forthwith – Whether point as to jurisdiction should be made in timely fashion - Point at which objection should have been raised - *Brennan v Governor of Portlaoise Prison* [2008] IESC 12, (Unrep, SC, 12/3/2008), *People (DPP) v Cronin* [2003] 3 IR 377 and *People (DPP) v Birney* [2006] IECCA 58, [2007] IR 337 considered; *O'Brien v Special Criminal Court* [2007] IESC 45, (Unrep, SC, 24/10/2007) followed - Criminal Law Act 1997 (No 14), s 4 - Offences Against the State Act 1939 (No 13), ss 21 and 30(A)(3) - Criminal Justice Act 2006 (No 26), s 187(b)(ii) - Convictions quashed (134/2005 - CCA - 6/5/2008) [2008] IECCA 69
People (DPP) v Varian

Indictable offence

Summary offence – Indictable offence capable of being tried summarily – Time limit – Whether indictable offence tried summarily subject to prescribed time limit for prosecuting summary offences – *DPP (O'Brien) v Timmons* [2004] IEHC 423, [2004] 4 IR 545 followed; *DPP v Logan* [1994] 3 IR 254 distinguished - Petty Sessions (Ireland) Act 1851 (14 & 15 Vict, c 93), s 10(4) – Children Act 2001 (No 24), s 75 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 14 and 53 – Accused's appeal dismissed (6/2006 – SC – 2/3/2009) [2009] IESC 17
DPP (Murphy) v G (G)

Murder

Manslaughter – Co-accused – Whether verdict of guilty of murder for accused consistent with verdict not guilty of murder but guilty of manslaughter for co-accused - Jury – Undue pressure – Length of deliberations – Whether trial judge placed undue pressure on jury to arrive at verdict – Whether accused can appeal where no objection to undue pressure made at trial – Leave to appeal refused (233/2006 – CCA – 11/3/2008) [2008] IECCA 50
People (DPP) v Mulhall

Practice and procedure

District Court - Book of evidence – Preferment of new charges related to same incident - Statutory period for service of Book on original charges expired – Application to extend time refused by District Judge – District Judge refused to require application to extend time in respect of new charge – Applicant remanded in continuing custody on new charge – *Habeas corpus* - Whether preference of new charge *mala fides* – Whether proper to prefer charge without forensic science certificate – *Dunne v Governor of Cloverhill Prison* [2008] IEHC 21 (Unrep, Peart J, 15/01/2008) and *Dunne v Governor of Cloverhill Prison* [2008] IEHC 16 (Unrep, Edwards J, 21/01/2008) considered - Misuse of Drugs Act 1977 (No 12), ss 3, 15, 15A and 23 – Criminal Procedure Act 1967 (No 12) s 4B – Legality of detention upheld (2009/233SS – Hedigan J – 4/3/2009) [2009] IEHC 109
Andjelkovic v Governor of Cloverhill Prison

Sentence

Activation of suspended sentence – Accused convicted of public order and minor theft offences whilst bound to the peace – Previous suspension of sentence activated – Jurisdiction of court to review – Factors to be taken into account – Seriousness of offence which gave rise to breach of terms of suspension – Period of suspended sentence – 12 months of suspended sentence activated in lieu of 3 years - Criminal Justice Act 2006 (No 26), s 99(12) (171/2008 - CCA - 30/3/2009) [2009] IECCA 25
People (DPP) v Duff

Sentence

Severity – Violent disorder – Possession of weapon – Jointly indicted with co-accused who received lesser sentences – Whether court entitled to distinguish applicant from co-accused – Previous convictions – Failure to have regard to plea of guilty – Seriousness of offence - Criminal Justice Public Order Act 1994 (No 15), s 15 – Firearm and Offensive Weapons Act 1990 (No 12), s 95 - Appeal dismissed (264/2007 - CCA - 2/2/2009) [2009] IECCA 11
People (DPP) v Butt

Sentence

Undue leniency – Drugs offences - Entirety of three year sentence suspended – Whether trial judge departed from applicable sentencing principles – Seriousness of offence – Maximum sentence of life imprisonment – Whether error in principal not to impose custodial sentence – Significant evidence of rehabilitation – Responsibility of courts to assist in rehabilitation – *People (DPP) v Gethins* (Unrep, CCA, 23/11/2001) considered - Criminal Justice Act 1993 (No 6), s 2 - Application refused - (142CJA/2008 - CCA - 16/01/2009) [2009] IECCA 6
People (DPP) v Gray

Sentence

Undue leniency – Drugs offences – Twelve month term of imprisonment imposed suspended for 2 years to facilitate treatment in alcohol abuse centre – Whether sentence represented sufficient deterrent – Seriousness of offence - Misuse of Drugs Act 1977 (No 12), ss 15 and 27 - Criminal Justice Act 1993 (No 6), s 2 - Sentence of six years imposed, suspended for 6 years on conditions (158CJA/2008 - CCA - 2/2/2009) [2009] IECCA 10
People (DPP) v Foran

Sentence

Undue leniency – Firearms offence - Presumptive minimum sentence of 5 years – Value of guilty plea – Previous convictions - Whether any exceptional and specific circumstances which rendered it unjust to impose minimum sentence - Firearms Act 1964 (No 1), ss 27A and 47A Criminal Justice Act 1993 (No 6), s 2 – Sentence increased from four to five years (182CJA/2008 - CCA - 9/2/2009) [2009] IECCA 12
People (DPP) v Dwyer

Sentence

Undue leniency – Mandatory minimum sentence - Possession of firearms – Previous convictions – Presumptive minimum sentence – Increased penalties – Seriousness of offence – Mitigating circumstances – Tragic family background – Personal circumstances – Value of guilty plea - Probation report - Firearms Act 1964 (No 1), s 47A(8) - Criminal Justice Act 1993 (No 6), s 2 - Seven and a half year term of imprisonment with 18 months suspended substituted for 5 year sentence (183CJA/2008 - CCA - 9/2/2009) [2009] IECCA 13
People (DPP) v Clail

Sentence

Undue leniency – Whether error in principle – Entirety of three year sentence suspended –Plea of guilty – Timing and circumstances of guilty plea – Previous convictions - Seriousness of offences – Whether any good reason for not imposing custodial sentence – Criminal Justice Act 1999 (No 10), s 29 - Criminal Justice Act 1993 (No 6), s 2 - Sentence set aside and sentence of three years imprisonment with eighteen months suspended imposed (43CJA/2008 - CCA - 16/01/2009) [2009] IECCA 5
People (DPP) v Fagan

Sentence

Undue leniency - Whether error in principle – Three year term of imprisonment with final year suspended imposed – Seriousness of offence - *People (DPP) v Keegan* (Unrep, CCA, 28/4/2003) considered - Criminal Justice Act 1993 (No 6), s 2 – Application refused (232CJA/2008 - CCA - 16/1/2009) [2009] IECCA 7
People (DPP) v O'Brien

Sentence

Undue leniency - Whether error in principle – Assault – Whether insufficient regard had to objective evidence in probation report – Previous convictions – Undue weight given to evidence of victim of assault who was applicant's partner – Sentence of two and a half years with 12 months suspended substituted - Criminal Justice Act 1993 (No 6), s 2 - (210CJA/2008- CCA - 26/1/2009) [2009] IECCA 8
People (DPP) v Ward

Trial

Bias - District Court appeal – Witness statements given to judge to read in chambers prior to hearing of evidence – No objection made at time – Theft offence – Property of company alleged to have been stolen - Conflict on evidence as to whether proof of offence charge given at hearing - Whether reading of statements prior to hearing of evidence indicative of prejudgment of case – Whether failure to object at time constituted waiver of right to raise issue in judicial review – Whether *actus reus* of offence charge proven - *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412, *Fogarty v O'Donnell* [2008] IEHC 198 (Unrep, McMahon J, 27/06/2008), *Truloc Ltd v McMenamin* [1994] 1 ILRM 151 and *Roche v Martin* [1993] ILRM 651 applied; *Vakauta v Kelly* [1989] HCA 44 approved; *Saloman v Saloman and Co Ltd* [1897] AC 22 and *DPP v O'Donnell* [1995] 2 IR 294 considered - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 12, 18 and 29 – Relief refused (2008/134JR – Hedigan J – 5/3/2009) [2009] IEHC 110
Balaz v Judge Kennedy

Trial

Book of evidence – Extension of time for service – Nature of application for extension of time – Whether necessary for evidence to be adduced – Whether District Court Judge competent to extend time without evidence where accused objects – Whether detention unlawful – Criminal Procedure Act 1967 (No

12), s 4B – Criminal Justice Act 1999 (No 10), s 9 – Constitution of Ireland 1937, Article 40.4.2 – Respondent's appeal allowed (28/2008 – SC – 18/2/2009) [2009] IESC 11
Dunne v Governor of Cloverhill Prison

Trial

Direction – Evidence – Onus of proof - Whether application for direction should have been acceded to by trial judge – Whether ample evidence at close of prosecution implicating accused – Charge to jury - Explanation of possession – Explanation of duress - *People (Attorney General) v Whelan* [1934] 1R 518 considered – Sentence – Whether sentence imposed excessive – Mitigating factors – Conviction affirmed; sentences for possession of explosives reduced from 12 years to 10 years; sentence for possession of firearms reduced from 10 years to 8 years (178/2004 - CCA - 11/3/2008) [2008] IECCA 51
People (DPP) v Smith

Articles

McDermott, Mark
The law lord
2009 (June) GLSI 28

Walsh, Marion
Human trafficking
(2009) 1 JSIJ 104

Library Acquisitions

Bacik, Ivana
Criminal law and procedure: current issues and emerging trends
Dublin: First Law, 2009
M500.C5

Klip, Andre
European criminal law: an integrative approach
Belgium: Intersentia, 2009
W133

Statutory Instruments

Criminal justice act 2006 (commencement) order 2009
SI 309/2009

Criminal justice (miscellaneous provisions) act 2009 (commencement) order
2009
SI 293/2009

Criminal justice (miscellaneous provisions) act 2009 (commencement) (no.2) order 2009
SI 310/2009

Firearms acts 1925 to 2009 (firearm certificate) regulations 2009
SI 295/2009

Firearms act 1925 (prescribed firearm certificates) regulations 2009
SI 311/2009

Firearms (secure accommodation) regulations 2009
SI 307/2009

CUSTOMS & EXCISE

Statutory Instrument

Customs-free airport (extension of laws) regulations 2009
SI 306/2009

DAMAGES

Contract

Breach – Fair procedures – Implied term - Whether damages recoverable for breach of contractual right to fair procedures – Terms and conditions – Implied term of right of member of association to fair procedures leading to expulsion from association – Appropriate level of damages for breach leading to distress and embarrassment – *Audi alteram partem – Glover v BLN Ltd* [1973] IR 388 applied; *McDonnell v Ireland* [1998] 1 IR 134 and *Dinnegan v Ryan* [2002] 3 IR 179 considered (2007/2148P – Laffoy J – 24/3/2009) [2009] IEHC 145
McMahon v Irish Road Haulage Association

Personal injuries

Long term sequelae of psychiatric and psychological nature – Post traumatic stress disorder – Loss of earnings – Poor pre-accident earning record – *Reddy v Bates* [1983] IR 141 applied - €190,000 awarded for loss of earnings, €175,000 awarded for pain and suffering (2003/14880P – Laffoy J – 20/2/2009) [2009] IEHC 86
Vernon v Colgan

Personal injuries

Road traffic accident – Assessment of damages – Damages for pain and suffering – Effect on earning capacity – Loss of income – Principles to be applied – Appropriate level of damages to be awarded – Plaintiff awarded €719,985 in total damages (2004/2106P – Peart J – 27/3/2009) [2009] IEHC 144
Quinn v Dunne

DISCOVERY

Library Acquisition

Mack, Mary
A process of illumination: the practical guide to electronic discovery
New York: Fios Inc., 2008
N386

EDUCATION

School

Judicial review – Enrolment – Pupil refused enrolment on basis of lack of capacity – Appeal against refusal allowed – Applicant school seeking to set aside appeal – Scope of appeal – Statutory interpretation – "Informed interpretation rule" - Whether appeals committee exceeded jurisdiction – Whether board of management only body capable of determining capacity of school – Whether appeals committee bound by terms of enrolment policy – *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 and *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 applied; *Crowley v Ireland* [1980] IR 102, *O'Keeffe v Hickey* [2008] IESC 72 (Unrep, Supreme Court, 19/12/2008), *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 and *Killeen v DPP* [1998] 1 ILRM 1 considered - Education Act 1998 (No 51), ss 6 (e), 9 (m), 12, 13, 14, 15 (2) (d), 29 and 30 – Education (Welfare) Act 2000 (No 22) s 27 - Constitution of Ireland, art 42.4 – Decision of appeals committee quashed (2008/593JR – Irvine J – 17/2/2009) [2009] IEHC 91
Board of Management of St Molaga's National School v Secretary General of the Department of Education and Science

EMPLOYMENT LAW

Costs

Interlocutory injunction restraining appointment – Relief no longer necessary – Hearing to determine costs issue – Job description – Duty to act as manager in absence of manager – Whether contractual right to act as manager in absence of manager – Custom of deputising – Interpretation of clause – Whether ambiguity – *Contra preferentum* – Whether clause covered prolonged and total absence of manager – Absence of provision for additional remuneration - *Collins v McDermott* [2007] IESC 14, (Unrep, SC, 29/3/2007) considered – Costs order against defendant refused (2006/30IA – Peart J – 29/11/2007) [2007] IEHC 485
Brennan v North Western Regional Tourism Authority Ltd

Discrimination

Age – Termination of employment at age of sixty –Claim that retirement age of sixty five agreed – Assurances of employer - Appeal against determination of Labour Court –Appeal on point of law – Scrutiny of decision – Decision on retirement age – Whether outside role of court to determine retirement age – Whether finding sustainable on evidence – Procedural issue – Surprise – Request to call additional evidence – Procedural autonomy – Constitutional justice – Ability to seek information in advance of hearing – Discretion – Compensation – Jurisdiction – Requirement for compensation to be effective and proportionate – Complaint of absence of analysis regarding award of compensation – Pecuniary loss – *Henry Denny and Sons Ireland*

Ltd v Minister for Social Welfare [1988] 1 IR 34, *National University of Ireland Cork v Ahern* [2005] IESC 40, [2005] 2 ILRM 437, *Ashford Castle v SIPTU* [2006] IEHC 201 [2007] 4 IR 70, *Felix Palacios de La Villa v Cortefiel Servicios SA* [2007] ECH 6773 and *Von Colson v Land Nordhein-Westfalen* [1984] ECR 1891 considered – Employment Equality Act 1998 (No 21), ss 34 and 90 – Appeal dismissed (2008/62MCA – Clarke J – 19/3/20089) [2009] IEHC 139
Calor Teo v McCarthy

Interlocutory injunction

Dismissal - Relevant legal principles - Minimum threshold for mandatory interlocutory injunction - Whether damages adequate remedy - Balance of convenience - Legal basis for plaintiff's claim - Specialised statutory regime - Whether plaintiff established strong case likely to succeed at trial - *Coffey v Connolly* [2007] IEHC 319, (Unrep, Edwards J, 18/9/2007), *Campus Oil v Minister for Industry (No 2)* [1983] 1 IR 88, *Maha Lingham v Health Service Executive* [2006] ELR 137, *Orr v Zomax Ltd* [2004] IEHC 131, [2004] IR 486 and *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518 applied - Protection of Employees (Fixed-Term Work) Act 2003 (No 29), ss 9, 14, 15 and 16 - Relief refused (2009/595P - Murphy J – 13/2/2009) [2009] IEHC 58
Buckley v NUI Maynooth

Articles

Connolly, Maura
Management of employment in an economic downturn
2009 IELJ 48

Feeney, Conor
The Supreme Court and vicarious liability - implications for employers
2009 IELJ 43

Hanratty, Emma
Bully for you
2009 (June) GLSI 32

Redmond, Mary
The implied obligation of mutual trust and confidence - a common law action for "unfair" dismissal?
2009 IELJ 36

Library Acquisitions

Regan, Maeve
Employment law
Haywards Heath: Tottel Publishing, 2009
N192.C5

Thomson Round Hall
Round Hall 6th annual employment law conference 2009 papers
Dublin: Thomson Round Hall, 2009
N192.C5

EQUITY

Trusts

Charitable - Benefit to community – Whether trust with tourism as its object may be charitable – Whether trust with sport as object may be charitable – Construction of trust – Clearly expressed intention – Whether extrinsic evidence may be considered– Rule against perpetuities - *Re Horley Town Football Club: Hunt v. McLaren* [2006] EWHC 2386 (Ch), (Unrep, Lawrence Collins J, 4/10/2006), *In re Nottage* [1895] 2 Ch 649 and *Commissione of Income Tax v Pemsel* [1891] 1 A.C. 531 approved; *Verge v Somerville* [1924] AC 496 and *Travel Just v Canada (Revenue Agency)* [2006] FCA 343 approved; *Crystal Palace Trustees v Minister of Town and Country Planning* [1951] Ch 132, *O'Connell v Bank of Ireland* [1998] 2 IR 596 and *In re Julian* [1950] IR 57 applied; *Commissioners of Inland Revenue v Yorkshire Society* [1928] 1 KB 611, *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439, *Igote Ltd v Badsey Ltd.* [2001] 4 IR 511 and *In re the Worth Library* [1995] 2 IR 336 and *In re McNamara* [1943] IR 372 considered; *In re Gulbenkian's Settlements* [1970] AC 508 approved; *Inland Revenue Commissioners v Oldham Training and Enterprise Council* (1996) 69 TC 231 distinguished – Trust held not to be charitable (2007/7760P – Charleton J – 17/2/2009) [2009] IEHC 53
National Tourism Development Authority v Coughlan

Library Acquisition

Martin, Jill E
Hanbury & Martin: modern equity
18th edition
London: Thomson Sweet & Maxwell, 2009
N200

EUROPEAN LAW

Directives

Harmonisation of laws – Road traffic – Compulsory insurance – Directives not transposed at time insurance contract entered into – Time limit for transposition by State had passed – Insurance company declining to provide indemnity – Passenger travelled in rear of vehicle where no seats – Whether "excepted person" – Primacy of Community law – Interpretation of national law in light of wording and purpose of Directive – *Marleasing SA (C-106/89)* [1990] ECR I-4135, *Farrell v Whitty (C-356/05)* [2007] ECR 1-3067 and *Ruiz Bernáldez (C-129/94)* [1996] ECR I-1829 applied - Council Directive 72/166/EEC, article 3(1) – Council Directive 84/5/EEC, recitals 7 and 9, and article 2(1) – Council Directive 90/232/EEC, article 1 – Road Traffic (Compulsory Insurance) (Amendment) Regulations 1992 (SI 346/1992) – European Communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations 1992 (SI 347/1992) – Road Traffic Act 1961 (No 24), s 65(1)(a) – Held that exclusion clause void (2000/10527P – Peart J – 5/2/2009) [2009] IEHC 99
Smith v Meade

Articles

Flynn, Tom
Developments in European environmental law
2009 IP & ELJ 30

McIntyre, Owen
The emerging European community/union competence in respect of environmental crime
2009 IP & ELJ 91

Samad, Mahmud
West tankers: a critique
2009 16 (5) CLP 103

Shields, Aoife
Critical analysis of the land damage provisions of the environmental liability directive
2009 IP & ELJ 57

Library Acquisitions

Curtin, Deirdre
Executive power in the European Union: law, practices, and the living constitution
Oxford: Oxford University Press, 2009
W86

Faber, Wolfgang
National reports on the transfer of movables in Europe
Munich: Sellier, 2009
W141

Klip, Andre
European criminal law: an integrative approach
Belgium: Intersentia, 2009
W133

Koenig, Christian
EC competition and telecommunications law
2nd edition
London: Kluwer Law International, 2009
W110

EXTRADITION

European arrest warrant

Correspondence – Offence - Act intended to pervert course of public justice – Whether same offence under Irish law – Substantive offence – Result offence – Continuing offence – Posting of DVD to foreman of jury and trial judge - Whether surrender breach of freedom of thought and expression – Nature of right – Whether offence committed outside issuing state – Whether correspondence established – Interception of DVD – Absence of end result – Whether necessary to view contents

of DVD – Ingredient of offence – Whether tendency to and was intended to pervert justice –Approaches to jury –Whether triable in jurisdiction where result intended to be achieved – *R v Mickleburgh* [1995] 1 Cr App R 297, *Reg v Doot* [1973] AC 807 and *DPP v Stonehouse* [1978] AC 55 considered - European Arrest Warrant Act 2003 (No 45), s 44 – Surrender ordered (2009/3EXT – Peart J – 3/4/2009) [2009] IEHC 159
Minister for Justice, Equality and Law Reform v Hill

European arrest warrant

Correspondence – Issuing state indicating on warrant that offence one of "bugrlary" – Theft – Whether correspondence made out – Whether order for surrender of applicant should be made – Criminal Justice (Theft and Fraud Offences) Act 2001, s 4 – European Arrest Warrant Act 2003 (No 45) – *Myles v Sreenan* [1999] 4 IR 294 and *Attorney General v Scott Dyer* [2004] 1 IR 40 followed; *Minister for Justice v Dunkova* [2008] IESC 156 (Unrep, Peart J, 30/5/2008) and *Minister for Justice v Wroblewski* [2008] IEHC 263 (Unrep, Peart J, 9/7/2008) distinguished – Order for surrender of respondent (2008/39EXT – Peart J – 13/3/2009) [2009] IEHC 120
Minister for Justice v Fil

European arrest warrant

Fleeing - Statutory interpretation – Whether respondent "fled" issuing state – Correspondence – Whether description of offence in warrant sufficient to establish correspondence – Whether order for surrender of applicant should be made – European Arrest Warrant Act 2003 (No 45), s 10 – Order for surrender of respondent (2008/127EXT – Peart J – 10/3/2009) [2009] IEHC 116
Minister for Justice v Slonski

European arrest warrant

Multiple warrants – Statutory interpretation – Whether surrender could be ordered on more than one warrant – Rule of speciality – Literal interpretation – Purposive interpretation – Statutory presumption – Obligation to interpret national law in light of Framework Decision – Singular and plural – *Criminal Proceedings against Pupino (Case C-105/03)* [2005] ECR I-05285 and *Ó Fallúin v Governor of Cloverhill Prison* [2007] IESC 20, [2007] 3 IR 414 followed - European Arrest Warrant Act 2003 (No 45), s 22 – Framework Decision, articles 6 and 27 – Applicant's appeal allowed (359/2007 – SC – 19/2/2009) [2009] IESC 13
Minister for Justice v Gotszlik

European arrest warrant

Sentence – Suspended sentence – Non-compliance with conditions – Lifting of suspension – Points of objection – Claim that respondent did not flee – Breach of constitutional rights – Breach of convention rights – Absence of notification of hearing following which suspension lifted - Right to be heard – Right to fair trial – Presence at trial – Awareness of conditions - Failure to comply with conditions – Claim that denied adequate time for preparation of defence – Attempts to mislead court – Correspondence – 'Swindling money' – Writing of cheques causing illegal debit - Whether correspondence with offence of making gain or causing loss by deception – Whether warrant failed to disclose dishonesty – Possibility of innocent, negligent or mistaken misrepresentation – Existence of overdraft facility –Whether ingredients of offence sufficiently made out – *Baksys v Ministry of Justice of the Republic of Lithuania* [2007] EWHC 2838 (Admin) (Unrep, 78/11/07) considered - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 6 - European Arrest Warrant Act 2003 (No 45), s 5 – Surrender refused (2007/156EXT – Peart J – 14/1/2009) [2009] IEHC 3
Minister for Justice, Equality and Law Reform v Laks

European arrest warrant

Serving of two sentences – Absence of details concerning deferrals of sentence – Whether insufficient details contained in warrant –Fleeing – Whether absence of flight – Whether power to order surrender – Grant of deferral of sentence - Enforceable sentence of imprisonment on date of exit - European Arrest Warrant Act 2003 (No 45), ss 10 and 11 – Surrender ordered (2008/70EXT – Peart J – 1/4/2009) [2009] IEHC 152
Minister for Justice, Equality and Law Reform v Malek

European arrest warrant

Single offence – Minimum gravity – Correspondence - Point of objection – Whether facts in warrant disclose two possible offences within jurisdiction – Assault – Robbery - Absence of words 'dishonestly' in warrant - Whether facts sufficient to establish correspondence – *Minister for Justice v Dunkova* [2008] IEHC 156 (Unrep, Peart J, 30/5/2008) and *Minister for Justice v Wroblewski* [2008] IEHC 263 (Unrep, Peart J, 9/7/2008) considered – Non-Fatal Offences Against the Person Act 1997 (No 26), s 3 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 14 - European Arrest Warrant Act 2003 (No 45), s 13 – Surrender ordered (2008/132EXT – Peart J – 17/12/2008) [2008] IEHC 377
Minister for Justice, Equality and Law Reform v Mazurkiewicz

European Arrest Warrant

Surrender for prosecution – Points of objection – Claim that respondent not within relevant classes of persons – Delay – Absence of prejudice – Correspondence – Removal of chassis number of vehicle – Relevance of availability of defence – Whether lack of sufficient information in warrant as to where alleged offence took place - Finance Act 1992 (No 9), s 139 - European Arrest Warrant Act 2003 (No 45), ss 10, 11 and 44 – Surrender ordered (2008/141EXT – Peart J – 19/3/2009) [2009] IEHC 129
Minister for Justice, Equality and Law Reform v Walas

FAMILY LAW

Child abduction

Rights of custody – Wrongful retention - Applicant father – Respondent stepfather – Deceased mother -Whether child wrongfully retained in breach of rights of custody – Onus on applicant – Consent to return to Ireland – Whether document executed solely for travel purposes – Stay of custody proceedings – Habitual residence – Standard of proof – Balance of probabilities – Whether change in habitual residence – Whether decision by applicant had effect of altering habitual residence – Ordinary and natural meaning of habitual residence – Factual position – *PAS v AFS* [2005] ILRM 306, *CM v Delegacion Provincial de Malaga* [1999] 2 IR 363, *S(A) v H(E)* [1999] 4 IR 504, *Re: S (Abduction: Hague and European Convention)* [1997] 1 FLR 958 and *Re J(A Minor)(Abduction)* [1990] 2 AC 562 considered – Guardianship of Infants Act 1964 (No 7), s 8 - Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – Application dismissed (2008/41HLC – Finlay Geoghegan J – 4/3/2009) [2009] IEHC 104
B (E) v G (A)

Divorce

Financial provision – Proper provision - Relevant factors – Statutory test and considerations - Family home – Lump sum - *TD v TC* [2002] 3 IR 334 considered - Family Law (Divorce Act) 1996 (No 33), s 20 - Order of Circuit Court amended (2006/198CA - Sheehan J - 30/1/2009) [2009] IEHC 40
C (C) v C (P)

Documents

Disclosure - Trusts – Beneficiaries - Potential interest of children of marriage – Post-nuptial settlements – Whether sham – Whether assets to be regarded as beneficial property of settlor – Whether assets to be treated as financial resources of spouse – Power of court to vary ante-nuptial or post-nuptial settlement - Obligation of court to ensure provision for each spouse and dependent family members - Obligations of trustees to provide information – Whether request for disclosure fishing expedition – Ordinary obligations of respondent as party to proceedings to disclose assets – Quasi-inquisitorial role of court – Constitutional position of family

– Involvement of respondent as settlor and expert in development of trusts – Procedural difficulties related to third party discovery – *Charalambous v Charalambous* [2004] 2 FLR 1093, *Charman v Charman* [2006] WLR 1054, *Re Norway's Application* [1987] QB 433, *Re Londonderry's Settlement* [1965] Ch 918, *Murphy v Murphy* [1999] 1 WLR 282 and *D v D (Production Appointment)* [1995] 2 FLR 497 considered – Constitution of Ireland 1937, art 41.3.2° - Judicial Separation and Family Law Act 1989 (No 6) – Family Law Act 1995 (No 26), s 9 & 16 - Rules of the Superior Courts 1986 (SI 15/1986) – Disclosure ordered (2005/40M – Abbot J – 18/4/2008) [2008] IEHC 452
W (M A) v W(S)

Proper provision

Judicial separation - Division of assets – Order for sale of family home – Apportionment of net proceeds of sale – Proper provision – Whether and by how much apportionment in favour of wife should be reduced – Family Law Act 1995 (No 26), s 16 – Order that net proceeds of sale be split as to 60% in favour of wife and 40% to husband (2007/63CA – Dunne J – 4/12/2008) [2008] IEHC 393
B (P) v F (P)

Articles

Crowley, Louise
Collaborative law: the future cornerstone of the resolution process?
(2009) 1 JSIJ 19

Fisher, Eimear
Hidden crimes: efforts to reduce domestic and sexual violence in Ireland
(2009) 1 JSIJ 97

Mallon, Patricia
Collaborative practice: an overview
(2009) 1 JSIJ 3

Library Acquisitions

Cretney, Stephen M
The continuing evolution of family law
Bristol: Jordan Publishing, 2009
N170

Probert, Rebecca
Responsible parents and parental responsibility
Oxford: Hart Publishing, 2009
N176.6

Wilson, The Right Hon Lord Justice
The family court practice 2009
Bristol: Family Law, 2009
N170.Z71

FIREARMS

Statutory Instruments

Firearms (authorisation of rifle or pistol clubs) regulations 2009
SI 308/2009

Firearms acts 1925 to 2009 (firearm certificate) regulations 2009
SI 295/2009

Firearms act 1925 (prescribed firearm certificates) regulations 2009
SI 311/2009

Firearms (secure accommodation) regulations 2009
SI 307/2009

FISHERIES

Statutory Instruments

Mussel seed (prohibition on fishing) (no 2) regulations 2009
SI 197/2009

Sea-fisheries (prosecution of offences) order 2009
SI 314/2009

GARDA SÍOCHÁNA

Discipline

Judicial review – Alleged neglect of duty and disobedience of order – Delay in investigating allegation - Complaint made by member of public in relation to failure to proceed with prosecution – Failure of applicant to respond to inquiries made by Superintendant in relation to matter – Applicant maintaining Superintendant aware of all matters – Witness deceased - Whether delay in investigating allegation – Whether delay of prejudice – Whether regulations were to be strictly construed – Whether duty on respondent to carry out investigation expeditiously – Whether lapse of time grossly excessive – Whether lapse of time breach of regulations – Whether lapse of time in making of complaint imposed added degree of urgency – Whether distinction to be drawn between complaint made under regulations and complaint to Garda Síochána Complaints Board - *McNeill v Commissioner of An Garda Síochána* [1997] 1 IR 467, *Gibbons v Commissioner of An Garda Síochána* [2007] IEHC 266 (Unrep, Edwards J, 30/07/2007), *McCarthy v An Garda Síochána Complaints Tribunal* [2002] 2 ILRM 341 and *Application of Butler* [1970] 1 IR 45 considered - Garda Síochána (Discipline) Regulations 1989 (SI 94/1989), reg 8 – Relief granted (2006/1312JR – O'Neill J – 20/2/2009) [2009] IEHC 89
Kneafsey v Commissioner of An Garda Síochána

Powers

Seizure of vehicle by gardaí – Application for declaration that seizure unlawful - Whether vehicle lawfully seized – Whether vehicle lawfully detained for purposes of carrying out PSV examination - Whether vehicle unroadworthy – Inspection – Garda powers to seize and detain vehicles - Public place – Whether applicant free to have vehicle towed away - Road Traffic Act 1961 (No 24), ss 3, 20 and 91 - European Communities (Vehicle Testing) Regulations 1991 (SI 356/1991) - Application for judicial review dismissed (2006/1318JR - Peart J - 12/2/2009) [2009] IEHC 111
Harnett v O'Reilly

Statutory Instrument

Garda Síochána (retirement) regulations 2009
SI 205/2009

HEALTH

Statutory Instruments

Health insurance (amendment) act 2007 (commencement) order 2009
SI 212/2009

Health professional (reduction of payments rophthalmologists, optometrists and dispensing opticians) regulations 2009
SI 195/2009

HOUSING

Traveller accommodation

Trespassers - Unlawful occupation – Injunction to require cessation of occupation – Contract for sale of lands – Necessity for vacant possession – Offer of alternative site - Defence of necessity – Counterclaim for declaratory relief regarding statutory duties of plaintiff and suitability of alternative site – Claim that alternative site unfit for habitation – Claim that alternative site unsafe – History of violent feuding between defendants and family on neighbouring site – Whether defence of common law necessity available – Property rights – Threat to social order – Statutory scheme to cater for accommodation of travellers – Attempts to meet accommodation needs – Limited availability of land – Whether veto of accommodation provision available – Absence of responsibility for maintenance of law and order – Whether grant of injunction futile – Lack of urgent need for vacant possession of occupied lands - Necessity for alternative site to be restored and made fit for habitation - *R v Martin* [1989] 1 All ER 652, *Esso Petroleum v Southport Corporation* [1956] AC 218, *Southwark London Borough Council v Williams* [1971] CH 734 and *People (DPP) v Delaney* [1997] 3 IR 453 considered – Housing Act 1988 (No 28), s 13 – Matter adjourned until plaintiff able to provide suitable site (2008/1277P – Peart J – 19/12/2008) [2008] IEHC 444
Dublin City Council v Gavin

HUMAN RIGHTS

Articles

Browne, Peadar
Remembering the rights of man

2009 (June) GLSI 22

McGrath, Anthony
"In whose service?" - The use and abuse of victims' rights in Ireland
(2009) 1 JSIJ 78

Library Acquisitions

Binchy, William
Timor-Leste: challenges for justice and human rights in the shadow of the past
Dublin: Clarus Press, 2009
C200.C5

Keller, Helen
A Europe of rights: the impact of the ECHR on national league systems
Oxford: Oxford University Press, 2008
C200

Wills, Siobhan
Protecting civilians: the obligations of peacekeepers
Oxford: Oxford University Press, 2009
C1281

IMMIGRATION

Asylum

Credibility - Assessment of credibility - Negative findings – Well founded fear of persecution – Whether decision flawed, irrational or unreasonable - Leave refused (2007/655JR - Cooke J - 10/2/2009) [2009] IEHC 70
O (A) v Refugee Appeals Tribunal

Asylum

Credibility - Well founded fear of persecution - Previous United Kingdom asylum application – Subsequent Irish asylum application - No right to oral appeal – Documentary based appeal - Assessment of applicant's claim - Whether any adequate assessment of applicant's claim – Whether any failure to take account of applicant's minority - Whether analysis of claim insufficient – Whether any real assessment of evidence – Lack of correspondence - Substantial grounds - Whether any breach of fair procedures - *Bujari v Minister for Justice* [2003] IEHC 18 (Unrep, Finlay Geoghegan J - 7/5/2003), *Biti v Refugee Appeals Tribunal* [2005] IEHC 13, (Unrep, Finlay Geoghegan J, 24/1/2005), *FAA v Minister for Justice* [2008] IEHC 220, (Unrep, Birmingham J, 24/6/2008), *GK v Minister for Justice* [2002] 2 IR 418 considered; *MGU v Refugee Appeals Tribunal* [2009] IEHC 36, (Unrep, Clark J, 22/1/2009), *Idiakheua v Minister for Justice* [2005] IEHC 150, (Unrep, Clarke J, 10/5/2005) and *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218, (Unrep, Clark J, 23/5/2005 distinguished - Refugee Act 1996 (No 17) , ss 11A, 13(6)(d) and 17(7) - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) - Leave refused (2007/979JR - Clark J - 6/2/2009) [2009] IEHC 83
A (JM) v Minister for Justice

Asylum

Fair procedures - Well founded fear of persecution - Decision to refuse relief to applicant but not to her family – Whether decision flawed - Errors of fact – Failure to draw reasonably logical conclusion from best evidence which was unquestioned and uncontradicted in parallel case of applicant's family - Order of certiorari granted (2007/1277JR - Cooke J - 6/2/2009) [2009] IEHC 55
D (W) v Refugee Appeals Tribunal

Asylum

Female genital mutilation – Error in report – Repetition of error in decision of tribunal – Incorrect statement that applicant failed to identify location – Adverse credibility findings - Whether finding on credibility related to mistake – Basis on which claim rejected – Inconsistencies – Country of origin information – Whether mistake material in decision – Whether mistake prejudicial – Whether material defect in decision-making process – *Traore v Refugee Appeals Tribunal* [2004] IEHC 606 (Unrep, Finlay Geoghegan J, 14/5/2004) applied - Refugee Act 1996 (No 17), s 13 – Relief refused (2006/330JR – McGovern J – 29/01/2009) [2009] IEHC 43
J (B) v Refugee Appeals Tribunal

Asylum

Judicial review –Credibility – Reasonableness – Applicant not availing of oral appeal hearing - Whether decision of respondent unreasonable – Whether irrelevant matters taken into account – Whether error in assessing subjective fear of persecution – Whether personal conjecture or erroneous interpretation of evidence employed in reaching adverse conclusion on credibility – Whether findings of credibility related to peripheral matters – *Memshi v Refugee Appeals Tribunal* (Unrep, Peart J, 25/06/2003), *Sango v Minister for Justice* [2005] IEHC 395 (Unrep, Peart J, 24/11/2005), *Da Silveira v Refugee Appeals Tribunal* (Unrep, Peart J, 9/7/2004), *Keagnene v Refugee Appeals Tribunal* [2007] IEHC 17 (Unrep, Herbert J, 31/01/2007), *K (D) v Refugee Appeals Tribunal* [2006] IEHC 132 [2006] 3 IR 368, and *Kikumbi v Refugee Appeals Tribunal* [2007] IEHC 11 (Unrep, Herbert J, 07/02/2007) considered; *Bisong v Minister for Justice* [2005] IEHC 157 (Unrep, O'Leary J, 25/04/2005) distinguished – Relief refused (2006/570JR – Clark J – 24/2/2009) [2009] IEHC 93
A (OA) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave – Absence of well-founded fear of persecution – Negative credibility findings – Claim that applicant unfit to be interviewed – Medication – Absence of medical evidence to support claim – Whether first safe country of origin – Evidence of intermediate country – Whether flaw in process – Whether substantial grounds for review – *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) considered - Refugee Act 1996 (No 17), s 11 – Leave refused (2006/1302JR – Edwards J – 18/12/2008) [2008] IEHC 415
D (G) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave - Adverse credibility findings – Whether well founded fear of persecution - Country of origin information – Whether any error of law or fact in assessment of availability of State protection – Application out of time – Substantial delay – Unexplained inaction – Whether any good and sufficient reason for extending time - Whether any factual error - Whether substantial grounds - *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 and *GK v Minister for Justice* [2002] 2 IR 418 considered - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) - Leave refused (2007/1475JR - Cooke J 6/2/2009) [2009] IEHC 79
DD (C) v Refugee Appeals Tribunal

Asylum

Judicial review - Leave - Adverse credibility findings – Whether assessment of credibility based on significant error of fact - Alleged failure to consider all evidence - Whether any arguable grounds - Refugee Act 1996 (No 17), s 11B - Leave refused (2006/486JR - Clark J - 4/2/2009) [2009] IEHC 60
A (O) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave – Application by mother - Inclusion of Irish born child in application – Application of Nigerian born child – Refusal of applications - Whether failure to give separate consideration to risk to individual applicants - Extension of period – Delay – Principle of family unity – Centrality of credibility of mother – Failure to establish credibility – Ill health – Right of State to control and regulate immigration – Balancing of rights – Extreme circumstances or ill health – Claim of ill health not made to statutory bodies – Precedent – Delay – *N(A) v Minister for Justice* [2007] IESC 44 (Unrep, SC, 18/10/2007), *N(F R) v Minister for Justice* [2008] IEHC 107, (Unrep, 24/4/2008), *O(A) v Minsiter for Justice* [2003] 1 IR 1, *Kouaype v Minister for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005), *Kozhukarov v Minister for Justice* [2005] IEHC 424 (Unrep, Clarke J, 14/12/2005), *Agbonlahor v Minister for Justice* [2007] IEHC 166 (Unrep, Feeney

J, 18/4/2007), *D v United Kingdom* (1997) 24 EHRR 423 and *A(J) v Refugee Applications Commissioner* [2008] IEHC 440, (Unrep, Irvine J, 3/12/2008) considered - Refugee Act 1996 (No 9), s 2 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Extension of time and leave refused (2008/1182JR – Charleton J – 16/3/2009) [2008] IEHC 125
K (F L) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave – Application by mother - Inclusion of Irish born child in application – Application of Nigerian born child – Refusal of applications - Whether failure to give separate consideration to risk to individual applicants - Extension of period – Delay – Principle of family unity – Centrality of credibility of mother – Failure to establish credibility – Ill health – Right of State to control and regulate immigration – Balancing of rights – Extreme circumstances or ill health – Claim of ill health not made to statutory bodies – Precedent – Delay – *N(A) v Minister for Justice* [2007] IESC 44 (Unrep, SC, 18/10/2007), *N(F R) v Minister for Justice* [2008] IEHC 107, (Unrep, 24/4/2008), *O(A) v Minsiter for Justice* [2003] 1 IR 1, *Kouaype v Minister for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005), *Kozhukarov v Minister for Justice* [2005] IEHC 424 (Unrep, Clarke J, 14/12/2005), *Agbonlahor v Minister for Justice* [2007] IEHC 166 (Unrep, Feeney J, 18/4/2007), *D v United Kingdom* (1997) 24 EHRR 423 and *A(J) v Refugee Applications Commissioner* [2008] IEHC 440, (Unrep, Irvine J, 3/12/2008) considered - Refugee Act 1996 (No 9), s 2 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Extension of time and leave refused (2008/1182JR – Charleton J – 16/3/2009) [2008] IEHC 125
K (F L) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave – *Certiorari* – Refusal of refugee status – Stateless person - Claim of persecution based on nationality – Discrimination against Palestinians in former habitual residence – Positive credibility findings – Finding of absence of well founded fear of persecution – Whether failure to record evidence – Whether failure to consider whether discrimination suffered could amount to persecution - Whether well founded fear of persecution on cumulative grounds – Restriction on right to earn livelihood and access education – Fear of rape – Whether failure to demonstrate subjective fear of persecution – Failure to make case that past experiences and inability to return amounted cumulatively to current persecution – Failure to submit objective evidence to corroborate subjective fear - Country of origin information – *Revenko v Secretary of State for the Home Department* [2001] 1 QB 601 considered - Refugee Act 1996 (No 9), ss 2 and 11 – Judicial review refused (2006/833JR – Clark J – 12/3/2009) [2009] IEHC 128
M (S H) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave – Claim of trafficking and forced prostitution – Failure to make complaint of abuse before commissioner – Finding of failure to establish well founded fear of persecution – Dual citizenship – Option of returning to Liberia or Nigeria – Whether migrant – Onus of proof – Whether adequate alternative remedy – Whether appeal on documents unfair – Absence of credibility issues - Whether decision irrational or unfair - Refugee Act 1996 (No 17), ss 2 & 13 – Leave refused (2007/64JR – McGovern J – 14/1/2009) [2009] IEHC 6
N (NJ) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Country of origin information – Internal relocation – Subsidiary protection – Deportation - Extension of time – Family rights - Whether failure to consider separate rights of children – *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795 distinguished - European Convention on Human Rights, art 8 – Constitution of Ireland arts 44 and 41 - Council Directive 2004/83/EC – Relief refused (2008/1356JR – Charleton J – 18/2/2009) [2009] IEHC] 97
B (A) v Refugee Applications Commissioner

Asylum

Judicial review – Leave – Credibility – Country of origin information - Fear of persecution on basis of membership of social group forced into prostitution – Internal relocation – Whether selective reliance on country of origin information – Whether failure to consider previous Refugee Appeals Tribunal decisions – Whether obligation to indicate why particular country of origin information preferred over conflicting information – Whether formula of words used by in decision of respondent wanting - *Simo v Minister for Justice* [2007] IEHC 305 (Unrep, Edwards J, 04/07/2007), *Zhuchova v Refugee Appeals Tribunal* (Unrep, Clarke J, 26/11/2004), *A (PP) v Refugee Appeals Tribunal* [2006] IESC 53 [2007] 4 IR 94 and *E (M) v Minister for Justice* [2008] IEHC 192 (Unrep, Birmingham J, 27/06/2008) considered; *Lema v Minister for Justice* [2009] IEHC 26, (Unrep, Clarke J, 21/1/2009) distinguished – Relief refused, no order for costs made against applicant (2007/1457JR – Clarke J – 25/2/2009) [2009] IEHC 94
I (EF) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave - Credibility - Issue arising as to authenticity of documents produced in the course of appeal hearing – Decision in appeal delayed pending verification of authenticity of documents – Documents subsequently lost – Multiple grounds for relief advanced – Whether fair procedures – Whether substantial grounds – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Refugee Act 1996 (No 17), s 16 – Leave granted (2007/605JR – Feeney J – 5/3/2009) [2009] IEHC 105
S (N) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave - Credibility - Negative credibility assessment - Country of origin information – Alleged failure to consult country of origin information when assessing applicant's credibility - Consideration of risk faced by applicant's child - Substantial grounds – Whether grounds reasonable, arguable and weighty - *OAO v Refugee Appeals Tribunal* [2008] IEHC 217 (Unrep, Hanna J, 30/5/2008) distinguished; *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416, (Unrep, Clarke J, 27/5/2005)and *Nwole v Minister for Justice* [2004] IEHC 433, (Unrep, Peart J, 26/03/2004) followed; *BVE v Minister for Justice*, [2008] IEHC 230, (Unrep, Birmingham J,10/6/2008) considered - Refugee Act 1996 (No 17), ss 11B & 16(8) - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) - Leave refused (2007/1294JR - Clark J - 13/2/2009) [2009] IEHC 82
AO (O) v Minister for Justice

Asylum

Judicial review – Leave –Documentary appeal – Fear of persecution based on membership of political party – Alleged corrupt prosecution for murder – Failure to provide evidence of unjust nature of trial – Whether applicant fleeing prosecution rather than persecution – Adverse inferences – Failure to seek asylum on arrival – Negative credibility findings – Factors aiding assessment of credibility – Alleged breach of fair procedures – Flawed treatment of country of origin information – Alleged failure to consider medical evidence – Alleged error of fact – Alleged failure to take account of past maltreatment – Whether doubts regarding authenticity of letter should have been put to applicant – Assessment founded on examination of applicant's own documents – Absence of reliance on new or undisclosed document -Whether substantial grounds for review of deportation orders – *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218 (Unrep, Clarke J, 23/6/2005) and *Idiakheua v Minister for Justice* [2005] IEHC 150 (Unrep, Clarke J, 16/5/2005) distinguished; *Kikumbi v Refugee Applications Commissioner* [2007] IEHC 11 (Unrep, Herbert J, 7/2/2007) considered - Refugee Act 1996 (No 17), ss 11 and 13 – Leave refused (2006/642JR – Clarke J – 22/01/2009) [2009] IEHC 36

U (M G) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave – Extension of time - Good and sufficient reason - Explanation for delay –Exercise of court's discretion – Factors to be taken into account – Applicable principles - Assessment of credibility – Fear of persecution - Whether decision contained errors of fact – Whether errors material – Whether any adequate objective assessment fear of persecution – Whether tribunal member failed to consider applicant's claim to fear persecution on account of having applied for asylum - Failure to state reasons - Lack of clarity and precision in decision - No adequate statement of reasons why applicant's claim to fear persecution was rejected as not being credible - *De Róiste v Minister for Defence* [2001] 1 IR 190 *, Guerin v Guerin* [1992] 2 IR 287*, Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360*, GK v Minister for Justice* [2002] 2 IR 418 and *S v Minister for Justice* [2004] IESC 36 (Unrep, SC, 10/6/2004) considered - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2A) - Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Leave granted on limited grounds (2007/1204JR - Cooke J - 11/2/2009) [2009] IEHC 62
L (Y) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review - Leave - Failure to take into account relevant considerations - Country of origin information – Departure from conclusions reached in earlier tribunal decisions - Relevance of previous decisions – Whether tribunal bound to follow earlier decisions - Consistency in interpretation and application of law - Consistency in treatment of asylum seekers - Failure to have regard to age and gender of applicant – Whether certain findings irrational and/or unreasonable – Whether significant over reliance and over interpretation of available information - Failure to consider explanation or excuse actually advanced - *Fasakin v Refugee Appeals Tribunal* [2005] IEHC 423,(Unrep, O' Leary J, 21/12/2005) and *Atanasov v Refugee Appeals Tribunal* [2006] IESC 53, (Unrep, SC, 26/7/2006) considered - Refugee Act 1996 (No 17), s 11B(c) - Leave granted (2007/1540JR - Birmingham J - 3/2/2009) [2009] IEHC 63
S (SS) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave - Fair procedures – Assessment of credibility – Evidence – Whether country of origin material to support adverse credibility finding by Tribunal – Cumulative reasons for adverse credibility finding – Whether overall credibility finding affected by fact that two of four reasons may have been unlawfully reached –Whether finding on credibility *ultra vires* – Whether substantial grounds for contending that decision invalid – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave to seek judicial review granted (2007/361JR – McGovern J – 23/1/2009) [2009] IEHC 19
M (J) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave - Fair procedures – Assessment of credibility – Whether material before Tribunal allowing it to reach conclusions arrived at – Whether findings on credibility irrational and *ultra vires* – Internal relocation – Undue hardship test – Whether findings on internal relocation material when credibility of claim for asylum validly impugned – Whether substantial grounds for contending that decision invalid – *Imafu v Refugee Appeals Tribunal* [2005] IEHC 182 (Unrep, Clarke J, 10/6/2005) followed; *Darjania v Refugee Appeals Tribunal* [2006] IEHC 218 (Unrep, McGovern J, 7/6/2006) applied – Leave to seek judicial review refused (2007/955JR – Clark J – 24/3/2009) [2009] IEHC 137
A (SO) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave - Fair procedures – Assessment of credibility –Whether finding on credibility *ultra vires* – Evidence – Medical reports supportive of applicant's claim furnished – Whether cogent reasons for rejecting medical reports furnished by Tribunal – Consideration of previous Tribunal decisions – Whether properly assessed – Whether cogent reasons given for deeming prior Tribunal decisions irrelevant – Whether alleged errors of fact made in assessment of credibility material or relevant – Whether country of origin information submitted in support of claim for asylum relevant – Whether substantial grounds for contending that decision invalid – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) applied; *Keagnene v Minister for Justice* [2007] IEHC 17 (Unrep, Herbert J, 31/1/2007) considered – Leave to seek judicial review granted (2007/1436JR – Clark J – 21/1/2009) [2009] IEHC 26
C (LL) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave - Fair procedures – Country of origin information – Whether failure to take information into account in reaching decision – Whether substantial grounds for contending that decision invalid – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Leave to seek judicial review refused (2007/325JR – McGovern J – 22/1/2009) [2009] IEHC 20
N (N) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave - Fair procedures – Country of origin information in assessment of claim – Whether material before Tribunal allowing it to reach conclusions arrived at – Whether reliance on portions of country of origin document by Tribunal fair and rational – Whether substantial grounds for contending that decision invalid – Leave to seek judicial review refused (2007/376JR – Clark J – 24/3/2009) [2009] IEHC 138
H (MB) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave - Fair procedures - Infringement of entitlement to fair procedures - Unfairness of conduct of appeal hearing - Difficulties with interpretation – Objections raised at hearing as to manner in which tribunal member treating applicant's evidence - Hearing abandoned - No fresh hearing *de novo* – Whether first hearing so unsatisfactory that evidence unreliable and should not be taken into account - Whether tribunal member prejudged issue of credibility as result of manner in which first hearing conducted – Bias - Leave granted (2007/91JR - Cooke J - 5/2/2009) [2009] IEHC 57
M (SI) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave – Female genital mutilation – Credible claim – State protection – Finding that failure to approach state for protection defeated claim –Whether obligation to seek state protection – Alleged failure to have regard to totality of country of origin information – Option of relocation – Presence of genuine subjective fear – Valid basis for subjective fear –Whether decision arguably unreasonable – Obligation on state to provide protection – Rebuttable presumption that state capable of protecting citizens -Whether substantial grounds for review – *Imoh v Refugee Appeals Tribunal* [2005] IEHC 220 (Unrep, Clarke J, 24/6/2005), *Muia v Refugee Appeals Tribunal* [2005] IEHC 363 (Unrep, Clarke J, 11/11/2005), *Canada (Attorney General) v Ward* [1993] 2 SCR 689, *G(B O) v Minister for Justice* [2008] IEHC 229 (Unrep, Birmingham J, 3/6/2008), *Islam v SSHD* [1999] 2 All ER 545, *Okeke v Minister for Justice* [2006] IEHC 46 (Unrep, Peart J, 17/2/2006), *Darjania v Refugee Appeals Tribunal* [2006] IEHC 218 (Unrep, McGovern J, 7/7/2006) and *O(H) v Refugee Appeals Tribunal* [2007] IEHC 299 (Unrep, Hedigan J, 19/7/2007) considered - Refugee Act 1996 (No 17), s 2 – Leave granted on multiple grounds (2006/1283JR – McMahon J – 16/01/2009) [2009] IEHC 5

E (E A) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave - Female genital mutilation – Extension of time – Explanation for delay – Difficulty in understanding legal matters - Limited means – Whether good and sufficient reasons for extension – Seriousness of time limit - Subsidiary protection – Claim of serious harm – Country of origin information - Availability of state protection - Deportation order – Failure to seek state protection – Whether flawed treatment of country of origin information regarding state protection – Whether failure to assess adequacy of state protection – Presumption that states capable of protecting citizens – Whether failure of state protection where government not given opportunity to respond - Whether failure to assess proportionality of deportation – Failure to mention article 8 rights in representations seeking leave to remain – Consideration of family and domestic circumstances - Whether failure to consider best interests of child – Whether *prima facie* case made out with respect to subsidiary protection decisions -Whether substantial grounds for review of deportation orders – *A(K) v Refugee Applications Commissioner* [2008] IEHC 314 (Unrep, Hedigan J, 16/10/2008), *T(O S) v Minister for Justice* [2008] IEHC 384 (Unrep, Hedigan J, 12/12/2008), *O(E) v Minister for Justice* [2008] IEHC 433 (Unrep, Hedigan J, 18/12/2008), *Üner v The Netherlands* (App no 46410/99, 18/10/2006), *Nwole v Minister for Justice* [2003] IEHC 72 (Unrep, Finlay Geoghegan J, 31/10/2003), *Keegan v Ireland* (1994) 18 EHRR 342, *G v DPP* [1994] 1 IR 374, *Canada (Attorney General) v Ward* [1993] 2 RSC 689, *DK v Minister for Justice* [2006] IEHC 132 [2006] 3 IR 368, *R(Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, *Agbonlahor (a minor) v Minister for Justice* [2007] IEHC 166 (Unrep, Feeney J, 18/4/2007), *U(F) v Minister for Justice* [2008] IEHC 385 (Unrep, Hedigan J, 11/12/2008) and *S(B I)v Minister for Justice* [2007] IEHC 398 (Unrep, Dunne J, 30/10/2007) considered - Refugee Act 1996 (No 17), s 5 – Criminal Justice (United Nations Convention Against Torture) Act 2000 (No 11), s 4 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on Human Rights Act 2003 (No 20), s 3 - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 2 & 5 – Leave refused (2008/1130JR – Hedigan J – 16/01/2009) [2009] IEHC 8
I (S) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave – Female genital mutilation - Possibility of internal relocation – Fair procedures – Claim that information relied upon not put to applicant - Whether onus on applications commissioner to identify safe alternative location – Country of origin information – Whether substantial grounds for review – Availability of alternative remedy – *Stefan v Minister for Justice* [2001] 4 IR 203, *Imoh v Refugee Appeals Tribunal* [2005] IEHC 220 (Unrep, Clarke J, 24/6/2005), *E(E) v Minister for Justice* [2008] IEHC 137 (Unrep, Herbert J, 8/5/2008), *N v Minister for Justice* [2008] IEHC 308 (Unrep, Hedigan J, 9/10/2008), *D(E) v Refugee Appeals Commissioner* [2008] IEHC 56 (Unrep, Charleton J, 22/2/2008), *O'Reilly v Mackman* [1983] 2 AC 237, *Z(A) v Refugee Appeals Commissioner* [2008] IEHC 36 (Unrep, McGovern J, 6/2/2008), *McGoldrick v An Bord Pleanala* [1997] 1 IR 497 and *B(V) v Minister for Justice* [2007] IEHC 479 (Unrep, Birmingham J, 13/7/2007) considered - Refugee Act 1996 (No 9), ss 11 & 13 – Leave refused (2006/974JR – Clark J – 18/11/2008) [2008] IEHC 418
E (VC) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review - Leave - International protection - Alleged failure to have regard to correct UNHCR guidelines – Substantial grounds – Arguable case – Leave to apply for judicial review granted (2008/483JR - McGovern J - 5/2/2009) [2009] IEHC 56
GN (O) v Minister for Justice

Asylum

Judicial review - Leave– Negative credibility assessment - Threshold on leave application - Substantial grounds - Identity documentation - Leave refused (2007/1082JR - McGovern J - 30/1/2009) [2009] IEHC 44
F (W) v Minister for Justice Equality and Law Reform

Asylum

Judicial review - Leave – Well founded fear of persecution - Country of origin information - Whether tribunal erred in law in failing to assess evidence and information available - Reasonable likelihood of persecution for Convention reason – Standard of proof - Whether conclusions irrational or manifestly unreasonable - Relief refused (2007/353JR - Cooke J - 4/2/2009) [2009] IEHC 71
A (A) v Refugee Appeals Tribunal

Asylum

Mother and infant daughter – Female genital mutilation – Failure of applicant mother to report threat to police in country of origin – Infant out of time for relief - Whether well founded fear of persecution – Whether failure to consider all relevant evidence in respect of availability of state protection – Whether failure to consider adequacy of state protection - Whether selective use of country of origin information – Whether fair procedures followed – Whether irrelevant matters taken into account – Whether failure to consider infant's case separately – *Nwole v Minister for Justice* [2004] IEHC 433 (Unrep, Peart J, 26/5/2004), *S(E) v Refugee Applications Commissioner* HC 411 (Unrep, Feeney J, 12/12/2006) applied; *AG v Ward* [1999] 2 SCJ 689, *Horvath v Secretary of State for the Home Department* [2002] 3 All ER 577, *Simo v Minister for Justice* [2007] IEHC 305 (Unrep, Edwards J, 04/07/2007), *Muia v Refugee Appeals Tribunal* [2005] IEHC 363 (Unrep, Clarke J, 11/11/2005), *Idiakheua v Minister for Justice* (Unrep, Clarke J, 27/5/2005), *Rostas v Refugee Appeals Tribunal* (Unrep, Gilligan J, 31/7/2003), *Da Silveria v Refugee Appeals Tribunal* (Unrep, Peart J, 9/7/2004), *Karanakaran v Secretary of State for the Home Department* [2000] 2 All ER 449, *Ojuade v Refugee Applications Commissioner* (Unrep, Peart J, 2/5/2008), *L v Secretary of State for the Home Department* [2003] All ER 1062, *Ali v Minister for Justice* (Unrep, Peart J, 26/5/2004), *Rajudeen v Minister of Employment and Immigration* [1985] 55 NR 129 (FCA) and *Adeniran v Refugee Appeals Tribunal* [2007] IEHC 169, (Unrep, Feeney J, 9/2/2007) considered- Refugee Act 1996 (No 17), s 2 – Relief refused (2006/1319JR – Edwards J – 25/2/2009) [2009] IEHC 92
A (H) v Refugee Appeals Tribunal

Deportation

Judicial review – Leave – Challenge to ministerial decision – Independent adult – Sister of citizens – Claim of persecution – Absence of adverse credibility findings – Complaint that incomplete picture given regarding connection with state – Consideration of family unit - Convention rights – Family life – Whether rights of foreign parent capable of being extended to other family members – Whether right to assert family life entitlements in favour of adult applicant - Family rights under international and European law – Legal norms to recognise family ties giving rise to legal rights – Definition of family members – Qualified nature of right to family life – Precedent - Requirement for consistency of approach – Review of ministerial decision – Whether decision founded on error of fact or unreasonable – Separation of powers – Test of proportionality – Whether substantial grounds for review – *Oguekwe v Minister for Justice* [2008] IESC 25 (Unrep, SC, 1/5/2008), *O(G) v Minister for Justice* [2008] IEHC 190, (Unrep, Birmingham J, 19/6/2008), *Pawandeep Singh v Entry Clearance Officer* [2005] 2 WLR 325, *Marckx v Belgium* (1980) 2 EHRR 330, *S(B I) v Minister for Justice* [2007] IEHC 398, (Unrep, Dunne J, 20/11/2007), R(Mahmood) v Home Secretary [2001] 1 WLR 840 and *Agbonlahor v Minister for Justice* [2007] IEHC 166 (Unrep, Feeney J, 18/4/2007) considered - Refugee Act 1996 (No 9), s 18 – Immigration Act 1999 (No 22), s 5 – European Convention on Human Rights, article 8 - Leave refused

(2008/1236JR – Charleton J – 11/3/2009) [2009] IEHC 148
O (Y) v Minister for Justice, Equality and Law Reform

Deportation

Judicial review - Leave – Erroneous reference to applicants as failed asylum seekers in letter informing them of deportation - "Anxious scrutiny" test – Country of origin information – *Locus standi* - Whether duty on respondent to engage in more extensive inquiry where deportee not asylum seeker – Whether obligation to give detailed reasons - Whether failure to give due consideration to relevant matters - Whether deportation orders disproportionate to legitimate aim of protecting integrity of immigration system – Whether inadequate consideration by respondent of applicant's family rights – Whether failure to allow applicant opportunity to counteract material in country of origin information – Whether failure to sufficiently consider educational issues pertaining to minor applicants - *O'Keeffe v An Bord Pleanála* [1993] 2 IR 39, *BJN v Minister for Justice* [2008] IEHC 8, [2008] 3 IR 305, *R v Refugee Appeals Tribunal* [2008] IEHC 406 (Unrep, McCarthy J, 28/11/08), *Idiakheua v Minister for Justice* [2005] IEHC 150 (Unrep, Clarke J, 10/5/2005), *Kouaype v Minister for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005), *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218 (Unrep, Clarke J, 23/6/2005), *W v Refugee Appeals Tribunal* [2008] IEHC 343 (Unrep, Hedigan J, 4/11/2008), *S v Refugee Appeals Tribunal* [2008] IEHC 342 (Unrep, Hedigan J, 4/11/2008), *Kikumbi v Refugee Applications Commissioner* [2007] IEHC 11 (Unrep, Herbert J, 7/2/2007), *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *T v Minister for Justice* [2007] IEHC 287 (Unrep, Peart J, 27/7/2007), *Baby O v Minister for Justice* [2002] 2 IR 169 and *Pok Sun Shum v Ireland* [1986] ILRM 593 considered – Immigration Act 1999 (No 22), s 3 - European Convention on Human Rights, art 8 – Leave refused (2008/1014JR – McCarthy J – 5/3/2009) [2009] IEHC 108
V (I) v Minister for Justice, Equality and Law Reform

Deportation

Judicial review – Leave – Humanitarian leave to remain – Extension of time – Whether explanation for delay inadequate – Necessity for reasonable and credible reasons to explain delay – Failure to advance reasons for delay – Whether flawed consideration of convention rights – Whether mistake of fact – Whether failure to assess proportionality of proposed interference with right to respect for family life – Obligation to consider and balance competing interests – Whether failure to consider interests of family as whole – Family and domestic circumstances – Claim that no functioning family unit existed – Error in relation to name of child in order – Whether substantial grounds for review – Failure to provide information relating to husband – Obligation on applicants to act in process – Failure to update Minister as to birth of child – *AN v Minister for Justice* [2007] IESC 44 [2008] 2 IR 48, *CS v Minister for Justice* [2004] IESC 44, [2005] 1 IR 343 , *Bugovski v Minister for Justice* [2005] IEHC 78 (Unrep, Gilligan J, 18/3/2005), *A(K) v Refugee Applications Commissioner* [2008] IEHC 314 (Unrep, Hedigan J, 16/10/2008) , *T(O S) v Minister for Justice* [2008] IEHC 384 (Unrep, Hedigan J, 12/12/2008), *Spartariu v Minister for Justice* [2005] IEHC 104 (Unrep, Peart J, 7/4/2005), *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795, *S(B I) v Minister for Justice* [2007] IEHC 398 (Unrep, Dunne J, 30/11/2007), *Beoku-Betts (FC) v Secretary of State for the Home Department* [2008] 3 WLR 166, *Sezen v The Netherlands* (2006) 43 EHRR 621, *Lupascu v Minister for Justice* [2004] IEHC 400 (Unrep, Peart J, 21/12/2004), *Adeghemi v Minister for Justice* [2007] IEHC 393 (Unrep, McCarthy J, 23/11/2007) and *A(P) v Minister for Justice* [2008] IEHC 359 (Unrep, Hedigan J, 18/11/2008) considered - Refugee Act 1996 (No 17), s 5 – Immigration Act 1999 (No 22), s 3 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Leave refused (2006/1155JR – Hedigan J – 18/12/2008) [2008] IEHC 433
O (E) v Minister for Justice, Equality and Law Reform

Deportation

Judicial review – Reasonableness - Applicants husband and wife – One spouse unsuccessful asylum seeker – Other spouse legally resident in State – Applicants engaged in fertility treatment - Test to be applied – Delay - Whether deportation order breached right to respect for family life – Whether deportation order proportionate - Whether law relating to reasonableness in review of deportation decisions compatible with European Convention on Human Rights – Whether lapse of time and consequent dilution in uncertain relationship with State a factor to be considered in balancing exercise – Whether respondent had duty to engage in detail with applicant or give reasons of an elaborate kind - *Irish Trust Bank Ltd v Central Bank of Ireland* [1976] IR 50, *O'Keeffe v An Bord Pleanála* [1993] 2 IR 39 applied; *BJN v Minister for Justice* [2008] IEHC 8 (Unrep, McCarthy J, 18/1/2008), *Z v Minister for Justice* [2002] 2 ILRM 215, *L (D) v Minister for Justice* [2003] 1 IR 124, *Laurentiu v Minister for Justice* [1999] 4 IR 26, *Baby O v Minister for Justice* [2002] 2 IR 169, *N v Minister for Justice* [2008] IEHC 107 (Unrep, Charleton J, 24/4/2008), *O v Minister for Justice* [2008] IEHC 405 (Unrep, McCarthy J, 28/11/2008), *Clinton v An Bord Pleanala (No 2)* [2007] IESC 19 [2007] 4 IR 701, *East Donegal Co-operative v Attorney General* [1970] IR 317, *Agbonlahor v Minister for Justice* [2007] IEHC 166 [2007] 4 IR 309, *Dickson v United Kingdom* App No 44362/04 (Unrep, ECHR, 4/12/2007), *N v Secretary of State for the Home Department* [2005] 2 AC 296, *Da Silva v The Netherlands* App No 50435/99 (Unrep, ECHR, 31/1/2006), *Konstatinov v The Netherlands* App No 16351/03 (Unrep, ECHR, 26/4/2007), *S v Minister for Justice* [2007] IEHC 398 (Unrep, Dunne J, 30/11/2007), *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, *R (Razgar) v Secretary of State for the Home Department* [2004] 1 AC 368 and *Huang v of State for the Home Department* [2007] 4 All ER 15 considered; *Itare v Minister for Justice* [2007] IEHC 180 (Unrep, McGovern J, 2/3/2007) and *C v Minister for Justice* [2007] IEHC 176 (Unrep, McGovern J, 2/3/2007) not followed - European Convention on Human Rights Act 2003 (No 20), s 5 – Immigration Act 1999 (No 22), s 3 - European Convention on Human Rights, arts 8 and 13 – Relief refused (2006/218JR – McCarthy J – 5/3/2009) [2009] IEHC 107
L (OR) v Minister for Justice, Equality and Law Reform

Judicial review

Asylum – Procedure – Time limit – Extension of time– Leave to apply– Delay – "Good and sufficient reason for extending period" – Access to legal advice – Whether fact that applicant an infant good and sufficient reason for extension – Weight of substantive case – Credibility – Whether adverse credibility finding could be made by officer who had not conducted interview – Bias – Whether failure to afford an extension of time would amount to manifest injustice – *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360 applied; *Reg v Stratford-on-Avon DC, Ex p Jackson* [1985] 1 WLR1319 and *Muresan v Minister for Justice* [2004] 2 ILRM 364 followed - Rules of the Superior Courts 1986 (SI 15/1098), O 84 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2)(a) – Extension of time refused (2008/1096JR – Irvine J – 3/12/2008) [2008] IEHC 440
A (J) v Refugee Applications Commissioner

Naturalisation

Statutory requirements - Whether decision irrational - Whether irrelevant considerations taken into account - Absolute discretion of Minister - Whether reasons for refusal should have been given in circumstances despite no general requirement to give reasons – Whether Minister acted judicially in exercise of absolute discretion - Whether Minister incorrect to have regard to character of applicants' sons in consideration of application for naturalisation - *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759, *Misha v Minister for Justice* [1996] 1 ILRM 189, *State (Keegan) v O'Rourke* [1986] ILRM 95 and *Pok Sun Shum v Ireland* [1986] ILRM 3 considered - Irish Nationality and Citizenship Act of 1956 (No 26), s 15 - *Certiorari* granted, matter remitted

for reconsideration (2007/1438JR - Edwards J - 30/1/2009) [2009] IEHC 78
H (LG) v Minister for Justice Equality and Law Reform

INFORMATION TECHNOLOGY

Library Acquisition

Morgan, Richard
Morgan and Burden on computer contracts
8th edition
London: Thomson Sweet & Maxwell, 2009
L157

INJUNCTIONS

Interlocutory

Prohibitory – Injunction sought to restrain eviction from local authority house for alleged anti-social behaviour – Whether serious question to be tried – Whether damages adequate remedy – Balance of convenience – Whether respondent performing functions in manner compatible with European Convention on Human Rights – Whether court having jurisdiction to grant perpetual injunction to restrain breach of duty under European Convention on Human Rights at trial – Whether implementation of warrant for possession would breach respondent's duty to act in accordance with European Convention on Human Rights – Whether interlocutory injunction should be granted – Housing Act 1966 (No 21), s 62 – European Convention on Human Rights Act 2003 (No 20), ss 1, 2 and 3 – *Campus Oil v Minister for Industry* (No. 2) [1983] IR 88, *Ferris v Ward* [1998] 2 IR 194 and *Controller of Patents v Ireland* [2001] 4 IR 229 applied; *Dublin City Council v Fennell* [2005] 1 IR 604 and *Pullen v Dublin City Council* [2008] IEHC 379 (Unrep, Irvine J, 12/12/2008) considered; *Mahon v Butler* [1997] 3 IR 369 distinguished – Injunction granted (2007/7804P – Murphy J – 18/3/2009) [2009] IEHC 122
Byrne v Dublin City Council

Interlocutory

Restraint of prosecution – Constitutional challenge to statute - Rationale of injunctions – Whether plaintiff would suffer irreparable prejudice - Real fear of conviction in criminal trial – Whether pleadings disclosed clearly issue - *Campus Oil v Minister for Industry (No 2)* [1983] IR 88 followed - Sea-Fisheries and Maritime Jurisdiction Act 2006 (No 8) - Relief refused (2008/8386P - McMahon J - 6/2/2009) [2009] IEHC 85
Bates v Minister for Agriculture

INTERNATIONAL LAW

Library Acquisition

Hanessian, Grant
International arbitration checklists
2nd edition
New York: Juris Publishing, 2009
C1250

JUDICIAL REVIEW

Certiorari

Delay - Time limits - Leave to be made promptly – Whether good reason for extending time limits - Whether any evidence to explain delay - Special circumstances justifying extension of time – Prejudice – Conduct of applicant - - *O'Flynn v Mid-Western Health Board* [1991] 2 IR 223, *Slattery's Ltd v Commissioner of Valuation* [2001] 4 IR 91 and *Solan v Director of Public Prosecutions* [1989] ILRM 491 applied; *Dekra Éireann Teo v Minister for Environment* [2003] 2 IR 270 and *O'Brien v Moriarty* [2005] IESC 32, [2006] 2 IR 221 considered - Availability of relief – Whether non-justiciable issue - Whether complaint amenable to judicial review – Whether proceedings inadmissible – Whether any material implications for applicant- Public interest - *Maguire v Ardagh* [2002] 1 IR 385, *de Róiste v Judge-Advocate General* [2005] IEHC 273, [2005] 3 IR 494 and *Ryanair v Flynn* [2000] 2 IR 240 considered - *Locus standi* - Participation in investigative process - Legal arguments not adequately raised throughout complaint process - Whether applicant had sufficient interest in impugned determination - Issue estoppel - *Cahill v Sutton* [1980] IR 269, *Lancefort Ltd v An Bord Pleanála* [1999] 2 IR 270 and *Crotty v An Taoiseach* [1987] IR 713 considered - Error of law - Whether findings reached *ultra vires*- Interpretation of legislation - Literal or purposive approach – Whether determination premised on manifest error of law – Whether respondents deprived of jurisdiction - Rules of statutory interpretation - *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, *Killeen v DPP* [1997] 3 IR 218 , *Keane v An Bord Pleanála* [1997] 1 IR 184 and *Monahan v Legal Aid Board* [2008] IEHC 300, (Unrep, Edwards J, 6/10/2008) considered - Rules of the Superior Courts 1986 (SI 15/1986) O 84, rr 20(4) & 21 - Interpretation Act 2005 (No 23), s 5 - Local Government Act 2001 (No 37), ss 175 & 176(2) - *Certiorari* granted, declaratory relief refused (2005/1052 JR - Hedigan J - 4/2/2009) [2009] IEHC 54
De Burca v Wicklow County Manager

Certiorari

Effect of order – Normal temporal effect that decision quashed null and void *ab initio* – Effect of order of *certiorari* previously granted on construction development carried out prior to date of order – Proceedings re-entered for purposes of clarifying effect of order of *certiorari* – Whether variation in normal effect of order of *certiorari* should be ordered – Whether temporal effect of order of *certiorari* should be limited to being prospective only – Dublin Docklands Development Authority Act 1997 (No 7), s 25(7) – *Deerland Construction Ltd v Aquaculture Licences Appeals Board* [2008] IEHC 289 (Unrep, Kelly J, 9/9/2008) distinguished – No variation of original order of *certiorari* (2007/1527JR – Finlay Geoghegan J – 20/1/2009) [2009] IEHC 11
North Wall Property Holding Co Ltd v Dublin Docklands Development Authority

Remedy

Availability of judicial review – Criminal trial – Evidence – Admissibility – Trial judge possessing necessary power to rule on issue – Whether High Court should intervene by way of judicial review – Whether oppressive to deploy different evidence in second trial – *Byrne v Grey* [1988] IR 31 and *Director of Public Prosecutions v Dunne* [1994] 2 IR 537 followed; *CC v Ireland* [2005] IESC 48, [2006] 4 IR 1 distinguished - Criminal Justice (Miscellaneous Provisions) Act 1997 (No 4), s 10(1) – Applicant's appeal dismissed (162/2006 – SC 18/2/2009) [2009] IESC 12
McNulty v DPP

LANDLORD & TENANT

Lease

Arrears of rent - Claim for sum due and owing on foot of guarantee – Service charges – Absence of dispute regarding amount of rent arrears – Whether entitlement to look for service charge until amount certified – Terms of lease – Covenant to pay without any deduction – Clause requiring advance payment of service charge on account – Whether breach of obligations of good estate management – Departure of anchor tenant – Loss to business of tenant – Clause requiring payment without deduction – Reliance on equitable right of set-off – Cross claim arising out of same contract – Whether entitlement to equitable set-off – Failure to raise issue previously – Paucity of evidence to permit assessment of strength of cross claim – Failure to attempt to quantify cross claim – Whether *bona fide* defence – *MacCausland v Carroll* (1938) 72 ILTR 158, *Moohan v S & R Motors (Donegal) Ltd* [2007] IEHC 435, (Unrep, Clarke J, 14/12/2007) and *Prendergast v Biddle* (Unrep, SC, 21/7/1957) considered – Landlord and Tenant (Amendment) (Ireland) Act 1860 (23 & 24 Vict, c 154), s 48 – Judgment granted (2007/789S – Dunne J – 31/3/2009) [2009] IEHC 153
Irish Life Assurance plc v Quinn

New tenancy

Application to renew lease – Good and

sufficient reason for refusing to renew - Covenant to repair – Premises in derelict state – Cost of repairs prohibitive - Mistaken belief of tenant of right to buy out ground rent – Over holding - Appeal from Circuit Court - Whether failure to keep premises in good repair and inability to do so good and sufficient reason for refusing to renew lease – Landlord and Tenant (Amendment) Act 1980 (No 10), s. 17 - Tenant's appeal against refusal to grant new lease rejected, recovery of property ordered (2008/245CA – Clark J – 18/2/2009) [2009] IEHC 75
McCarthy v Larkin

Articles

Cannon, Ruth
Leasehold and freehold covenants affecting building
2009 14 (3) C & PLJ 66

Curtis, Sinead
Collection of rent for private rented dwellings
2009 14 (3) C & PLJ 76

LEGAL AID

Statutory Instruments

Enforcement of court orders (legal aid) regulations 2009
SI 301/2009

LEGAL PROFESSION

Article

Martin, Elaine
West side story
2009 (June) GLSI

MEDICAL LAW

Articles

Cusack, Denis A.
The growing diversity of deaths with human rights dimensions reportable to the coroner: the young, the old and influenza pandemic victims
15 (2009) MLJI 2

Drislane, Siobhan
Abortion and the medical profession in Ireland
15 (2009) MLJI 35

Geraghty, Clodagh
Advancing patient safety in Ireland: the American model and cultural change
15 (2009) MLJI 27

Ison, Terence G.
Statistical significance and the distraction of "scientific proof"
15 (2009) MLJI 6

Library Acquisitions

Gibson, Johanna
Intellectual property, medicine and health
Farnham: Ashgate, 2009
N111

Hagger, Lynn
The child as vulnerable patient
Farnham: Ashgate, 2009
N185.122.Q11.C5

MENTAL HEALTH

Detention

Involuntary patient – Earlier arrest - Applicant previously assessed by psychiatrist and admission order not made – Application made for involuntary admission – Alleged failure of psychiatrist to complete recommendation order – Whether Gardaí had reasonable grounds for believing serious likelihood of applicant causing immediate harm to himself or others - Whether Gardaí should have sought detention under alternative provision – Whether applicant lost out on procedural safeguards as result – Whether lack of urgency meant arrest power should not have been used - Whether involuntary admission order tainted by earlier impermissible arrest – Whether conscious and deliberate violation of constitutional rights - *L(R) v Clinical Director of St Brendan's Hospital* [2008] IEHC 11 (Unrep, Feeney J, 17/1/2008) applied; *The People (Attorney General) v O'Brien* [1965] IR 142, *CC v Clinical Director of St. Patrick's Hospital* [2009] IEHC 13 (Unrep, McMahon J, 20/1/2009), *L(R) v Clinical Director of St Brendan's Hospital* [2008] IEHC 11 (Unrep, Feeney J, 17/1/2008), *L(R) v Clinical Director of St Brendan's Hospital* (Unrep, Supreme Court, 15/2/2008) considered - Mental Health Act 2001 (No 25), ss 9, 12 and 14 – Constitution of Ireland, Art 40.4.2 – Applicant's detention declared lawful (2009/286SS – Dunne J – 26/2/2009) [2009] IEHC 100
C (S) v Clinical Director of St. Brigid's Hospital

Detention

Involuntary patient – Previously voluntary patient – Renewal order – Statutory interpretation– Purposive approach – Definition of voluntary patient – Whether applicant had capacity to be voluntary patient –Whether person receiving care and treatment in approved centre but not subject to admission or renewal order and whose presence in approved centre is illegal is excluded from definition of voluntary patient –Best interests of patient – Mental Health Act 2001 (No 25), ss 2(1), 4, 9 ,14 ,15 , 18, 23 and 24 – European Convention on Human Rights Act 2003 (No 20), ss 2(1) – Constitution of Ireland, 1937, Article 40.4.2° – European Convention on Human Rights, article 5(1) – Detention found to be lawful (2009/91SS – O'Neill J – 6/2/2009) [2009] IEHC 69
H (E) v Clinical Director of St Vincent's Hospital

Detention

Involuntary patient –Renewal order – Period of order – Specified period – Whether responsible consultant psychiatrist authorised to make renewal order "for a period not exceeding 12 months" – Mental Health Act 2001 (No 25), ss 15 and 28 – Relief granted with stay (2008/749JR – McMahon J – 31/10/2008)
M (S) v Mental Health Commission

Detention

Mental health tribunal –Replacement renewal order – Replacement renewal order of short duration – Review of replacement renewal order – Expiry of replacement renewal order before review –Whether mental health tribunal has power to review replacement renewal order after expiry of replacement renewal order – Whether review required of replacement renewal order of short duration – Whether renewal order lawful – Mental Health Act 2001 (No 25), ss 3, 4, 9, 17, 18, 23, 24 and 28 – Mental Health Act 2008 (No 19), s 4 – Detention lawful (2008/1791SS – McCarthy J – 12/12/2008) [2008] IEHC 450
G (P) v Branigan

Renewal order

Legality of detention – Form of order - Failure to indicate that applicant suffering from mental disorder – Oral evidence given – Whether error in form cured by evidence - Whether error in completing form such as to render detention unlawful – Whether applicant lawfully detained – Whether tribunal bound by decision of another tribunal - Mental Health Act 2001 (No 25) – *T O'D v Kennedy* [2007] IEHC 129 [2007] 3 IR 689 followed – *JH v Lawlor* [2007] IEHC 225 [2008] 1 IR 476 – Application for release refused (2008/2033SS – O'Keeffe J – 24/3/2009) [2009] IEHC 143
R (A) v Clinical Director St Brendan's Hospital

Article

Kelly, Brendan D.
Community treatment orders under the Mental health act 2007 in England and
Wales: what are the lessons for Irish mental health legislation?
15 (2009) MLJI 43

MINISTER

Powers

Exercise of ministerial discretion – Whether unlawful fettering of discretion – Decision to prohibit hunting on State lands – Application to quash decision by way of judicial review – Scope afforded to ministerial decision on judicial review – Whether decision ought to be quashed – State Property Act 1954 (No 25), s 11(2) – *British Oxygen v Board of Trade* [1971]

AC 610, *O'Keeffe v An Bord Pleanála* [1993] 1 IR 40, *Mishra v Minster for Justice* [1996] I IR 189 and *Humphrey v Minister for Environment* [2001] 1 IR 263 applied; *O'Neill v Minister for Agriculture* [1998] 1 IR 539 distinguished – Relief refused (2004/634JR – Hedigan J – 10/3/2009) [2009] IEHC 114
Crofton v Minster for the Environment

Powers

Statutory instrument – Certificate – Suspension of requirement - *Locus standi* -Whether decision irrational – Whether respondent unlawfully fettering discretion – Whether respondent acting in breach of fair procedures – Whether applicant having legitimate expectation – Safety, Health and Welfare at Work (Construction) (Amendment) Regulations 2008 (SI 130/2008) – Safety, Health and Welfare at Work (Construction) (Amendment) (No 2) Regulations 2008 (SI 423/2008) – Safety, Health and Welfare at Work Act 2005 (No 10), 58 – *Mulcreevy v Minster for the Environment* [2004] 1 IR 72 considered – Relief refused (2008/689JR – Sheehan J – 13/3/2009) [2009] IEHC 155
O'Connell v Minister for Enterprise

NEGLIGENCE

Causation

Onus of proof – Negligent driving – Evidence - Whether probability that driver of bus drove in negligent manner causing impact with plaintiff's car – Whether case of negligence made out - Civil Liability and Courts Act 2004 (No 31), s 26 - Plaintiff's claim dismissed (2008/27CA Peart J - 5/2/2009) [2009] IEHC 98
Flanagan v Bus Atha Cliath

Contributory negligence

Passenger – Driver of motor vehicle intoxicated – Decision to travel in motor vehicle – Whether contributory negligence – Test to be applied – Whether plaintiff aware or ought to be aware driver intoxicated – Whether best evidence rule applied – Liability – Apportionment – Extent of apportionment – General Damages – *Quantum* – Subsequent accident – Whether court entitled to have regard to non disclosure by plaintiff of subsequent accident – *Owens v Brimmell* [1977] QB 859, *Froom v Butcher* [1976] QB 286 and *Hall v Hebert* [1993] 2 SCR 159 approved; *Judge v Reape* [1968] IR 226 and *Malone v Rowan* [1984] 3 All ER 402 distinguished; *Kajola v Noble* (1982) 75 Cr App Rep 149 considered; *Vesey v Bus Eireann* [2001] 4 IR 192 and *Shelley-Morris v Bus Átha Cliath* [2003] 1 IR 257 applied; *Hay v O'Grady* [1992] 2 IR 210 approved - Civil Liability Act 1961 (No 41), s 34 (1) – Plaintiff's appeal dismissed (103/2005 – SC – 21/1/2009) [2009] IESC 1
Hussey v Twomey

Duty of care

Mortgagee - Loss of title deeds – Reasonable care in storage of deeds – Quantification of claims - Whether reasonably foreseeable that careless storing of title deeds would be likely to cause injury - Reasonableness of imposition of duty of care - Whether causal link between negligence and loss - Whether plaintiff legally liable for losses – Whether losses suffered reasonably foreseeable - Whether fair and just to impose liability - Nature of damage claimed - Whether any duty in respect of loss suffered – Whether losses within scope of duty of care - Reduction in probable profits - Scope of duty of care - Set-off – Interest - *Gilligan v National Bank Ltd* [1901] 2 IR 513, *Donoghue v Stevenson* [1932] AC 562, *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84, *Heaven v Pender* (1883) 11 QBD 503, *Fletcher v Commissioners of Public Works* [2003] 1 IR 465, *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, *Breslin v Corcoran* [2003] 2 IR 203, *Burke v John Paul & Co Ltd* [1967] IR 277, *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 and *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2002] 1 Lloyd's Rep 157 considered - Conveyancing and Law of Property Act 1881 (44 & 45 Vict, c 41), s 16 – Damages awarded (2007/5373P - Finlay Geoghegan J - 4/2/2009) [2009] IEHC 45
ACC Bank v Fairlee Properties Ltd

Occupier's liability

Burden of proof – Balance of probabilities – Landlord – Renovations - Allegation that obstruction caused by furniture – Serious leg fracture – Plea that plaintiff failed to have regard for own safety – Plea of drunkenness – Claim that trip occurred whilst in pursuit of intruder – Evidence of witnesses – Whether account of plaintiff credible – Absence of sufficient credibility – Search for truth – Defence case - Claim dismissed (2003/2713P – Charleton J – 31/3/2009) [2009] IEHC 149
Essalhi v Falconer

NOTARIES

Library Acquisition

Ready, Nigel P
Brooke's notary
13th edition
London: Thomson Sweet & Maxwell, 2009
L88

PATENTS

Statutory Instruments

Patents (amendment) act 2006 (certain provisions) (commencement) order 2009
SI 196/2009

Patents (amendment) rules 2009
SI 194/2009

PERSONAL INJURIES ASSESSMENT BOARD

Right to legal representation

Client/solicitor relationship – Confirmation and authority given by claimant to solicitor to act on behalf of claimant – Whether refusal to deal directly with solicitor ultra vires – Whether policy adopted necessary, expedient or incidental to functions – Mechanism of scheme – Whether procedures administrative in nature – How scheme compares to court proceedings – Right of property in personal injuries action – Whether principle of equality of arms applicable – *In re Haughey* [1971] IR 217, *Maguire v Ardagh* [2002] 1 IR 385, *Mosley et al v St Louis Sough Western Railway* (1981) 634 F2d 942 and *Powell v Alabama* (1932) 287 US 45 considered - Personal Injuries Assessment Board Rules (S. 219/2004), rr 3 and 5 – Personal Injuries Assessment Board Act 2003 (No 46), ss 7, 20(4), 29, 51(A), 54 and 79(1) – Personal Injuries Assessment Board (Amendment) Act 2007 (No 35), s 1 – Respondent's appeal dismissed (169/2005 – SC – 19/12/2008) [2008] IESC 71
O'Brien v PIAB

Articles

Ilan, Jonathan
Four years of the personal injuries assessment board: assessing its impact
(2009) 1 JSIJ 54

O'Connor, Tim
Counting the hidden costs - the personal injuries assessment board (amendment) 2007 and infant plaintiffs
2009 ILT 98

PLANNING & ENVIRONMENTAL LAW

Judicial review

Appeal hearing - Nature and scope – Review procedure - Administrative appeal procedure - Substantial grounds - Legislative characteristics of directives in Community law - Remedy of *certiorari* discretionary - Whether statutory appeal remedy inadequate and unsuitable to meet complaints raised - Whether substantial grounds raised in support of relief - *State (Abenglen Properties Ltd) v Dublin Corporation* [1984] 1 IR 381 and *McGoldrick v Bord Pleanála* [1997] 1IR 497 applied; *Lancefort v Bord Pleanála (No 2)* [1999] 2 IR 270, *Sweetman v Bord Pleanála* [2007] IEHC 153 [2008] 2 IR 177 and *Friends of the Curragh Environment Ltd v Bord Pleanála* [2006] IEHC 243, (Unrep, Kelly J, 14/7/2006) considered - Planning and Development Act 2000 (No 30), ss 37 and

50(2) - Council Directive 85/337/EEC, art 10A - Council Directive 2003/35/EEC, art 3(7) - Rules of the Superior Courts 1986 (SI 15/1986), O 84 - Leave refused (2008/1175JR - Cooke J - 6/2/2009) [2009] IEHC 76
Cairde Chill an Disirt Teo v An Bord Pleanála

Judicial review

Leave - Planning permission – *Locus standi* – Substantial interest in planning permission sufficient to challenge decision to grant planning permission – Whether applicant having substantial interest for leave to seek judicial review to be granted – Planning and Development Regulations 2001 (SI 600/2001), reg 29 – Planning and Development Act 2000 (No 30) – *Harding v An Bord Pleanála* [2008] 2 ILRM 251 and *Cumann Thomas Daibhis v South Dublin County Council* [2007] IEHC 118 (Unrep, O'Neill J, 30/3/2007) considered – Leave to apply for judicial review refused (2006/1043JR – Hedigan J – 24/3/2009) [2009] IEHC 136
Treacy v Cork County Council

Permission

Development - Exempted development - Unauthorised development - Planning permission granted for development of premises - Claim that proposed development to be carried out on top of illegal structure – Whether Bord Pleanála erred in law in granting planning permission - Whether development for which permission sought incorporated extant unauthorised use - Whether Bord Pleanála prohibited from granting planning permission in circumstances - Retention – Whether decision irrational - Discretion of planning authority - Estoppel - Whether Bord Pleanála obliged to determine whether or not disputed works unauthorised or exempted development – Whether Bord Pleanála fail to have regard to matters which they ought to have taken into account - *Convery v Dublin County Council* [1996] 3 IR 153, *Keane v Bord Pleanála* [1998] 2 ILRM 241, *Cablelink Ltd v Bord Pleanála* [1999] 1 IR 596 and *Fingal Co Co v Keeling & Sons Ltd* [2005] IESC 55, [2005] 2 IR 108 considered; *Frescati Estates v Walker* [1975] IR 177 distinguished - Local Government (Planning and Development) Act 1963 (No 28), s 26(11) - Local Government (Planning and Development) Act 1976 (No 20), s 27 - Local Government (Planning and Development) Act 1992 (No 14), s 19 - Relief refused (2001/396 JR - Feeney J - 30/1/2009) [2009] IEHC 38
Murphy v An Bord Pleanala

Planning permission

Development plan – Refusal to notify applicants of decision – Judicial review – Time limits – Delay – Whether application made out of time – Discretionary nature of remedy – Planning and Development Act 2000 (No 30), ss 18(3), 34(8)(f) and 50 – Planning and Development Regulations 2001 (SI 600/2001), art 31 – *Dekra Éireann v Minister for Environment* [2003] 2 IR 270 and *O'Brien v Moriarty* [2006] 2 IR 221 considered – Relief refused (2007/1474JR – Hedigan J – 11/3/2009) [2009] IEHC 115
Ryan v Clare County Council

Planning permission

Outline planning permission - Planning permission refused on appeal by notice party – Alleged error of fact in appeal decision refusing planning permission –Whether error of fact in decision of respondent – Whether alleged error of fact could be characterised as *de minimis* - Planning and Development Act 2000 (No 30), s 50 – Relief refused (2007/1716JR – O'Neill J – 18/2/2009) [2009] IEHC 88
O'Sullivan v An Bord Pleanala

Articles

Flynn, Tom
Developments in European environmental law
2009 IP & ELJ 30

Kennedy, Ronan
The Irish national climate change strategy: new laws, future policies
2009 IP & ELJ 100

McIntyre, Owen
The emerging European community/union competence in respect of environmental crime
2009 IP & ELJ 91

Shields, Aoife
Critical analysis of the land damage provisions of the environmental liability directive
2009 IP & ELJ 57

Whittaker, Alice
Environmental impact assessment: split decision-making functions
2009 IP & ELJ 47

Library Acquisition

Ryall, Aine
Effective judicial protection and the environmental impact assessment directive in Ireland
Oxford: Hart Publishing, 2009
N96.4.C5

POWER OF ATTORNEY

Library Acquisition

Terrell, Martin
A practitioner's guide to the court of protection
3rd ed
Haywards Heath: Tottel Publishing,
N155.3

PRACTICE & PROCEDURE

Costs

Judicial review – Notice party costs – Respondent unsuccessful in judicial review proceedings – Position adopted by notice party in proceedings same as that of respondent – Discretion to award costs to notice party as against respondent – Whether order for costs should be made against respondent in favour of notice party – *Deerland Construction Ltd v Aquaculture Licences Appeals Board* [2008] IEHC 289 (Unrep, Kelly J, 9/9/2008) distinguished – No costs order in favour of notice party (2007/1527JR – Finlay Geoghegan J – 20/1/2009) [2009] IEHC 11
North Wall Property Holding Co Ltd v Dublin Docklands Development Authority

Costs

Judicial review – Judicial review not opposed – Judicial immunity from suit – Whether extending to immunity from costs – Human rights – Whether recovery of costs essential feature of right of access to justice – Proportionality of rule on prohibiting award of costs against judge – Whether State can lawfully indemnify judges in respect of acts done in discharge of judicial function – European Convention on Human Rights Act 2003 (No 20), ss 2 and 5 – European Convention on Human Rights, articles 6 and 13 – *McIlwraith v Fawsitt* [1990] 1 IR 343 applied; *Stephens v Connellan* [2002] 4 IR 321 approved; *O'Connor v Carroll* [1999] 2 IR 160, *Kudla v Poland* (Application no 30210/96, ECHR, 26th October, 2000) considered – Application for costs refused (2006/507JR – Ó Neill J – 27/3/2009) [2009] IEHC 142
F (O) v Judge O'Donnell

Costs

Taxation – Review of taxation of costs – Applicable principles – Onus on party seeking review to show error in principle and decision unjust – Instruction fee – Premium – Test case – Consideration of ruling of trial judge – Consistency with ruling – Whether entitlement to recover VAT in respect of legal fees – Whether VAT otherwise recoverable – Evidence of revenue commissioners – Whether failure to discharge onus of proof – *Re Kevin J Walshe* (1960) 96 ILTR 173 and *Smyth v Tunney (No 3)* [1999] ILRM 211 considered – Courts and Courts Officers Act 1995 (No 31), s 27 - Rules of the Superior Courts 1986 (SI 15/1986), O 99 – Application refused (2004/18545P – McGovern J – 31/3/2009) [2009] IEHC 146
Kenny v Ireland ROC Limited

Delay

Dismissal of claim – Delay of eight years since plenary summons issued – Defendant found to be partly responsible for delay - Whether delay excusable – Whether distinction between active

delay and inactive delay - *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 applied; *Gilroy v Flynn* [2004] IESC 98 [2005] 1 ILRM 290 considered; *Rogers v Michelin Tyre plc (No 2)* [2005] IEHC 294 (Unrep, Clarke J, 28/6/2009) doubted - Dismissal of claim refused, no order for costs made against defendant (2001/592OP – McMahon J - 27/02/2009) [2009] IEHC 134
Dwyer v Lakes Care Central Ltd

Delay

Pre–commencement of proceedings – Dismissal of action – Inordinate and inexcusable delay prior to commencement of proceedings – Principles to be applied – Whether defendant unable to properly defend proceedings by reason of lapse of time – Whether real and serious risk of unfair trial – *Manning v Benson and Hedges Ltd.* [2004] IEHC 316, [2004] 3 IR 556, *McH v M* [2004] IEHC 112, [2004] 3 IR 385, *Toal v Duignan (No 1)* [1991] ILRM 135 and *Toal v Duignan (No 2)* [1991] ILRM 140 applied;
Birkett v James [1978] AC 297 and *Ó Domhnaill v. Merrick* [1984] IR 151 approved; *Kelly v O'Leary* [2001] 2 IR 526 considered; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 distinguished - Statute of Limitations (Amendment) Act 2000 (No 13), s 3 – Claim dismissed (2003/4074P – Dunne J – 2/12/2008) [2008] IEHC 407
K (P) v Deignan

Delay

Pre-commencement delay - Dismissal of claim - Personal injury – Claim for damages against religious order for abuse suffered while in school – Plaintiff maintaining consequences of abuse inhibited commencement of proceedings - Whether delay in prosecuting claim inordinate, inexcusable and unreasonable – Whether delay prior to commencing proceedings of prejudice to defendants – *McH (J) v M (J)* [2004] IEHC 112 [2004] 3 IR 385 applied; *Stephens v Paul Flynn Ltd* [2008] IESC 4 [2008] 4 IR 31, *O'Domhnaill v Merrick* [1984] IR 151, *Toal v Duignan (No 1)* [1991] ILRM 135, *Toal v Duignan (No 2)* [1991] ILRM 151 and *Kelly v O'Leary* [2001] 2 IR 526 considered; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 distinguished – Application for dismissal of claim refused (2006/1448P – Dunne J – 20/2/2009) [2009] IEHC 95
S (J) v McD (AM)

Discontinuance

Withdrawal of notice of discontinuance – Jurisdiction – Prejudice to defendant – Defence under Statute of Limitations – *Castanho v Brown & Root* [1981] AC 557 and *Ernst & Young v Butte Mining plc* [1996] 1 WLR 1605 considered - Pleadings – Statement of claim – Amendment of statement of claim – New cause of action – New facts – Whether prejudice to defendants – *Krops v Irish Forestry Board Ltd* [1995] 2 IR 113 and *Croke v Waterford Crystal Ltd* [2004] IESC 97, [2005] 2 IR 383 followed - Statute of Limitations 1957 (No 6) - Rules of the Superior Courts 1986 (SI 15/1986),O 26, r 1 & O 28, r 1 – Defendants' appeal allowed (204/2004 – SC – 23/1/2009) [2009] IESC 5
Smyth v Tunney

Discovery

Litigation privilege – Discovery of correspondence between plaintiff and body set up under government bond scheme sought – Latter body not a party to litigation - Test to be applied – Dominant purpose of correspondence - Whether "common interest" between plaintiff and government body for purposes of claim of privilege - Whether court should consider if privilege might attach in other litigation – *Silver Hill Duckling Ltd v Steele* [1987] IR 298 applied; *Waugh v British Railways Board* [1980] AC 521 approved; *Grant v Downes* [1976] 135 CLR 674, *Buttes Gas and Oil v Hammer (No 3)* [1981] QB 223 and *Moorview Developments Ltd v First Active Plc* [2008] IEHC 274 (Unrep, Clarke j, 31/7/2008) considered - Rules of the Superior Courts 1986 (SI 15/1986), O 31, r 18 – Claim of privilege rejected (2007/4691P – McGovern J - 17/2/2009) [2009] IEHC 90
Hansfield Developments v Irish Asphalt Ltd

Discovery

Relevance – Necessity – Fair disposal of case – Costs – Proportionality – Redundancy scheme – Documents including correspondence with legal advisors – Documentation relating to previous proceedings – Whether appropriate to order discovery and leave privilege to be claimed subsequently – Documents *prima facie* privileged – Importance of legal professional privilege – Internal documents – Scope of discovery – Whether draft documents should be disclosed – Aid to interpretation of documents – Employment file – Minutes of meetings between company and union – Time – Allegation of fraudulent concealment – *Bula Ltd v Tara Mines* [1994] 1 IR 494 considered – Discovery ordered with references to legal advisors removed (2001/6543P – Birmingham J – 31/3/2009) [2009] IEHC 158
Croke v Waterford Crystal Limited

Discovery

Necessity – Relevance – Whether documents necessary for disposing fairly of matter – Privilege – Public interest privilege – Whether documents privileged – Rules of the Superior Courts 1986 (SI 15/1986), O 31, r 12 – *Compagnie Financière du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55; *KA v Minister for Justice* [2003] 2 IR 93 and *Ryanair Ltd v Aer Rianta* [2003] 4 IR 264 applied; *Burke v DPP* [2001] IR 760 considered – Appeal allowed, discovery refused (2004/18528P – Murphy J – 18/3/2009) [2009] IEHC 119
O'Neill v An Taoiseach

Dismissal of proceedings

Want of prosecution – Delay – Principles to be applied – Whether delay inordinate and inexcusable – Whether prejudice such that unfair to defendant to allow action proceed – Delay on part of defendant – Weight to be attached to conduct of parties – Whether balance of justice requires dismissal of action – European Convention on Human Rights, article 6 – *Desmond v MGN Ltd* [2008] IESC 56 (Unrep, SC, 15/10/200) applied and *Price v United Kingdom* (Case Nos 43185 and 43186/98, ECHR, 29/7/2003) – Order dismissing proceedings (1999/4890P – Hedigan J – 13/3/2009) [2009] IEHC 165
Mannion v Bergin

Dismissal of proceedings

Want of prosecution – Delay – Conduct of proceedings – Pre-commencement delay – Occupier's liability – Negligence – Slip on wet floor – Duration of process of discovery – Duration of process of inspection – Applicable principles – Concession of inordinate and inexcusable delay – Inherent jurisdiction to control procedure – Requirement of interests of justice – Balance of justice – Fairness of procedures – Delay on part of defendant – Whether conduct of defendant amounted to acquiescence – Whether prejudice – Recollection of witnesses – *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459, *Stephens v Paul Flynn Ltd* [2008] IEHC 4, (Unrep, SC, 25/2/2008), *Desmond v MGN Ltd* [2008] IESC 56, (Unrep, SC, 15/10/2008) and *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 36 and 122 – Relief refused (2001/12657P – Dunne J – 31/3/2009) [2009] IEHC 154
Rooney v Ryan

Isaac Wunder order

Leave to maintain proceedings – Whether case bound to fail – Necessity for precision in pleading – Proceedings seeking to prevent enforcement of cost orders – Assertion that cost orders invalidated because original planning permission invalid – Procedure for questioning validity of planning permission – Judicial review – Interaction between community law and Irish law – Obligation to take measures to remedy failure to carry out environmental impact assessment – Procedural autonomy – Procedural requirement that judicial review appropriate method to challenge permission – Extension of time – Whether good and sufficient reason for extension – Whether circumstances causing delay outside control of applicant – Principle of effectiveness – Onus on applicant – Finality of judgments – Abuse of process - Costs of failed set aside applications – Failure of challenge based on fraud – Duplication of proceedings – Pending complaint to European Commission – Right

to enforce cost orders – Whether legitimate basis for suggesting good legal grounds for postponing enforcement – *Riordan v Ireland (No 5)* [2001] 4 IR 463, *Commission v Ireland* (case C-215/06) (Unrep, ECJ, 3/7/2008) and *Henderson v Henderson* (1843) 3 Hare 100 considered – Planning and Development Act 2000 (No 30), s 50 - Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Permission to bring proceedings refused (2008/1319P – Clarke J – 28/01/2009) [2009] IEHC 35
Kenny v Trinity College

Limitations

Estoppel – Statute bar – Admission of liability by defendant – Whether actions and representations of defendant rendered it unconscionable to allow reliance on Statute of Limitations – Whether equitable estoppel arose to preclude defendant from relying on Statute – *Doran v Thompson Ltd* [1978] IR 223 and *Ryan v Connolly* [2001] 1 IR 627 followed - Statute of Limitations 1957 (No. 6), s 11(2)(b) – Defendant's appeal dismissed (79/2006 – SC – 10/2/2009) [2009] IESC 9
Murphy v Grealish

Limitation of actions

Fraud - Sale of property in 1986 – Alleged fraud on Revenue – Whether alleged fraud prevented operation of Statute of Limitations - Whether any loss to plaintiff as result of alleged fraud – Whether right of action concealed by fraud of defendant - Whether any fraud on plaintiffs – When period of limitation began to run - Test of discoverability - Whether action statute barred - *Morgan v Park Developments Ltd* [1983] ILRM 156; *Hegarty v O'Loughran* [1990] 1 IR 14; *Doyle v C and D Providers (Wexford) Ltd* [1994] 3 IR 57 and *Touhy v Courtney* [1994] 3 IR 1 applied - Statute of Limitations 1957 (No 6), s 71(1)- Stamp Duties Consolidation Act 1999 (No 31), s 160(2) - Action statute barred (2007/1570P - Dunne J - 30/1/2009) [2009] IEHC 74
Task Construction v Devine Solicitors

Preliminary issue

Question of law - Tort of conversion – Whether dispute of fact - Whether trial of preliminary issue possible where dispute of fact – Whether public interest in avoiding lengthy trial of relevance – Whether granting of application would effectively set aside order consolidating proceedings - *Kilte v Hayden* [1969] 1 IR 261 and *Tara Mines v Minister for Energy and Commerce* [1975] IR 242 applied; *N v Refugee Appeals Tribunal* [2007] IESC 25 [2008] 1 ILRM 289, *BTF v DPP* [2005] IESC 37 [2005] 2 ILRM 367 and *Windsor Refrigeration Co Ltd v Branch Nominees Ltd* [1961] Ch 375 considered - Road Traffic Act 1994 (No 7), s 41 – Rules of the Superior Courts 1986 (SI 15/1986), O 25, rr 1 and 2 – Application for preliminary determination refused (200/13487P, 2005/308P, 2005/3836P, 2006/4012P, 2006/4013P, 2006/4014P, 2006/4015P, 2006/4016P, 2006/3852P and 2005/309P – MacMenamin J – 27/2/2009) [2009] IEHC 101
Murray v Ireland

Renewal of summons

Set aside – Multiple renewals of summons – Medical negligence – Claim for damages arising out of death of child –Onus on defendant – Whether onus to adduce new evidence – Fair procedures – Right to make submissions – Discretion – Whether good reason to renew summons – Overall interests of justice – Application not made during currency of previously renewed summons – Definition of currency – Obligation to give effect to meaning of rule – Whether obligation to renew summons if reasonable efforts made to serve summons – Existence of criminal complaint – Ongoing inquest – Necessity to source expert evidence – Absence of warning letter – Absence of link between necessity for evidence and failure to serve summons – Statute of limitations – Justice between parties – Whether necessity to demonstrate actual prejudice – Whether entitlement to bring application subject to time limit – Delay – *Behan v Bank of Ireland* (Unrep, Morris J, 14/10/1995) and *O'Grady v Southern Health Board* [2007] 2 ILRM 51 distinguished; *Chambers v Kenefick* [2005] IEHC 402, [2007] 3 IR 526 and *Allergan Pharmaceuticals (Ireland) Ltd v Noel Deane Roofing and Cladding Ltd* [2006] IEHC 215, (Unrep, O'Sullivan J, 6/7/2006) followed; *Baulk v Irish National Insurance Co Ltd* [1969] 1 IR 66, *Cavern Systems Dublin Ltd v Clontarf Residents Association* [1984] ILRM 24, *Cunningham v Neary* [2004] 2 ILRM 498, *Roche v Clayton* [1998] 1 IR 596, *Celtic Ceramics Limited v IDA* [1993] 1 ILRM 248, *Hogan v Jones* [1994] 1 ILRM 512, *Birkett v James* [1977] 2 All ER 801 and *Gilroy v Flynn* [2005] ILRM 290 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 8 – Renewal set aside (2002/15811P – Feeney J – 17/12/2008) [2008] IEHC 453
Bingham v Crowley

Security for costs

Limited liability company – Finances – Inadequacy – Cause - Applicable principles of law – Whether defendant established *prima facie* defence – Whether credible evidence that company unable to pay costs of defendant if successful in defence - Discretion of court - Special circumstances – Onus on plaintiff – Weak financial position of plaintiff - Whether inability to pay attributable to defendant - Causal link between impecuniosity of plaintiff and alleged wrongful acts of defendant - Plaintiff's conduct of proceedings - Delay in bringing application - *Pearson v Naydler* [1977] 1 WLR 899, *Harrington v JVC (UK) Ltd* (Unrep, O' Hanlon J, 16/3/1995), *Comhlucht Paipear Riomhaireachta Teo v Udaras na Gealtachta* [1991] IR 320, *Bula Ltd v Tara Mines Ltd (No 3)* [1997] IR 494, *Inter Finance Group Ltd v KPMG Peat Marwick* (Unrep, Morris J, 29/6/1998), *O'Toole Ltd v MacEoin Kelly Associates* [1986] IR 277, *Framus Ltd v CRH plc* [2004] IESC 25, [2004] 2 IR 20, *Rayan Restaurant Ltd v Julies Company Restaurant Ltd* [2005] IEHC 137, (Unrep, Budd J, 18/4/2005), *Usk District Residents Association v Environmental Protection Agency* [2006] IESC 1, [2006] ILRM 363 and *Boyle v McGilloway* [2006] IEHC 37, (Unrep, Clarke J, 19/1/2006) considered; *Peppard and Co Ltd v Boghoff* [1962] IR 180 and *Hidden Ireland Heritage Holidays Ltd v Indigo Services Ltd* [2005] IESC 38, [2005] 2 IR 115 applied - Companies Act 1963 (No 33), s 390 - Rules of the Superior Courts 1986 (SI 15/1986), O 29, r 3 - Security of costs granted (2007/377P - Dunne J - 5/2/2009) [2009] IEHC 46
Ferrotec Ltd v Myles Bramwell Exec Services Ltd

Security for costs

Onus on moving party – *Prima facie* defence to claim – Inability of plaintiff to pay costs if defendant successful – Discretion - Onus on resisting party to establish special circumstances – Whether inability to discharge costs stemmed from wrongdoing of defendant – Whether actionable wrongdoing – Whether causal connection between wrongdoing and consequences for plaintiff – Whether consequence gave rise to specific loss recoverable in law – Whether loss sufficient to make difference between ability and inability to meet costs – *Quantum* – Special purpose company set up solely for single transaction – Approach to third party document assessing likely profits - Estimate of legal costs – *Usk and District Residents Ass Ltd v EPA* [2006] IEHC 1 (Unrep, SC, 13/1/2006) and *Interfinance Group Ltd v KPMG Peat Marwick* (Unrep, Morris P, 29/6/1998) applied; *Jack O'Toole Ltd v McEoin Kelly Associates* [1986] IR 277, *Irish Conservation and Cleaning Ltd v International Cleaners Ltd* (Unrep, SC, 19/7/2001), *Framus Ltd v CRH plc* [2004] 2 IR 21, *Cork County Council v Shackleton* [2007] IEHC 241, *Glenkerrin Homes v Dun Laoghaire Rathdown County Council* [2007] IEHC 241 (Unrep, Clarke J, 19/7/2007) and *Lough Neagh Exploration Ltd v Morrice* (Unrep, Laffoy J, 27/8/1992) considered – Companies Act 1963 (No 33), s 390 – Security for costs ordered (2007/7114P – Clarke J – 16/1/2009) [2009] IEHC 7
Connaughton Road Construction Ltd v Laing O'Rourke Ireland Ltd

Striking out pleadings

Unnecessary or scandalous – Intellectual property rights – Defence of abuse of dominant position – Delay - Prejudice of fair hearing – Broad discretion – Test of relevancy – Whether pleadings seek to introduce extraneous matters for unconnected purpose – Whether portions necessary to prove claim of anti-competitive behaviour – Necessity to establish dominance of undertaking – Test of dominance – Necessity to establish proper

market – Whether reasonable possibility that material pleaded relevant – Market for online booking ancillary market to market for flights – Whether abuse of dominant position relevant to claim of dominance – Pleading of allegation of anti-competitive behaviour – Degree of particularity required – Balance between bald claim and requirement of overly detailed particularisation of claim – Grey area between fact and evidence - Cross subsidisation – Application by second defendant to dismiss proceedings for want of jurisdiction - Jurisdiction under Brussels regulation – Defendant domiciled in England – Exclusive jurisdiction clause in terms of use of website – Whether clause governed jurisdiction – Whether consensus between parties in relation to clause – Reliance on jurisdiction clause by party denying contract – Dispute of jurisdiction clause by party seeing to rely on contract – Applicability of jurisdiction clause to be determined by European law – Undesirability of embarking on detailed inquiry – Entitlement to rely on jurisdiction clause even where denying existence of contract – *Morony v Guest* (1878) 1 LR IR 564, *Christie v Christie* (1873) LR 8 Ch App 499, *Riordan v Hamilton* (Unrep, Smyth J, 26/6/2000), *Hanly v Newspaper Group Ltd* [2004] 1 IR 471, *Michelin v Commission* [1983] ECR 3461, *Ryanair v Aer Lingus* (Case No COMP/M 4439) (Com dec 27/6/2007) *National Education Board v Ryan* [2007] IEHC 428 (Unrep, Clarke J, 14/12/2007), *Continental Bank NA v Aeokos Cia Naviera SA* [1994] 1 WLR 588, *Leo Laboratories v Crompton BV* [2005] 2 ILRM 43, *Estas Salotti v Rua* [1976] ECR 1831, *Benincasa v Dentalkit* [1997] ECR 1 6767, *Soc Trasporti Castelletti Spedizioni Internazionali SA v Hugo Trumpy SpA* [1999] ECR 1/597 and *Minister for Agriculture v Alte Leipziger* (Unrep, Laffoy J, 6/3/1998) considered - Rules of the Superior Courts 1986 (SI 15/1986), O 19 – Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters Regulation (EC) no 44/2001 – Portions of pleadings struck out and claim against second defendant struck out (2008/2204P – Clarke J – 29/01/2009) [2009] IEHC 41
Ryanair Limited v Bravofly

Summons

Validity – Proceeds of crime - Commencement of proceedings under s 4 by way of special summons – Appeal to Supreme Court – Extension of time to appeal – Principles applicable - Whether final order contemplated under s 3 – Words and phrases – Meaning of "injustice" - *Murphy v GM* [2001] 4 IR 114 and *F(McK) v AF (Statement of claim)* [2002] 1 IR 242 and *Murphy v MC* [2004] IESC 70 (Unrep, SC, 8/3/2004) and *Henderson v. Henderson* (1843) 3 Hare 100 considered; *Éire Continental Trading Co Ltd v Clonmel Foods Ltd* [1955] IR 170 applied - Proceeds of Crime Act 1996 (No 30), ss 3 & 4 – Defendants' appeal dismissed (235/2006 – SC – 19/12/2008) [2008] IESC 70
Murphy v Gilligan

Third party notice

Application to set aside third party notice – *Res judicata* – Whether party seeking to litigate issue that could or should have been dealt with in earlier proceedings – Whether third party notice should be set aside – *McCauley v McDermott* [1997] 2 ILRM 486 applied – Order setting aside third party notice (2004/1066P – Dunne J – 12/3/2009) [2009] IEHC 118
Hickey v Geary

Articles

Barr, Anthony
Security for costs under S.390 of the companies act, 1963 - an overview
14 (3) 2009 BR 61

Canny, Martin
Debt collection through the summary judgment process in the wake of the Celtic Tiger
2009 16 (7) CLP 142

Samad, Mahmud
West tankers: a critique
2009 16 (5) CLP 103

Library Acquisitions

Blackhall's rules of the Superior Courts 1986: updated to 27 March 2009
Dublin: Blackhall Publishing, 2009
N361.C5

Blake, Susan
A practical approach to effective litigation
7th ed
Oxford: Oxford University Press, 2009
N350.Z71

Mack, Mary
A process of illumination: the practical guide to electronic discovery
New York: Fios Inc., 2008
N386

Statutory Instrument

Enforcement of court orders (legal aid) regulations 2009
SI 301/2009

PROFESSIONS

Disciplinary proceedings

Nurses - Judicial review – Applicant erased from Register of Nurses following inquiry by fitness to practice committee - Allegations of misconduct – Competence - Appellate procedure to court - Whether conclusion as to truth or falsity of allegations could be appropriately be disposed of on affidavit - Whether correct approach was to proceed by way of plenary re-hearing - Whether findings justified by evidence – Whether findings wrong in law and fact - Whether sanction disproportionate – Whether sanction an indirect restriction on entitlement to recognition of qualifications and rights of free movement as worker - Whether gross incompetence or negligence may amount to professional misconduct - Whether applicant's conduct amounted to professional misconduct – Whether findings of fitness to practice committee true, fair, balanced and accurate assessment of evidence - *K v An Bord Altranais* [1990] 2 IR 396 approved; *McCandless v General Medical Council* [1996] 1 WLR 167, *Perez v An Bord Altranais* [2005] IEHC 400, [2005] 4 IR 298 considered - Nurses Act 1985 (No 18), ss 6 & 39 – Relief refused, order affirmed - (2008/544SP - Hedigan J - 10/2/2009) [2009] IEHC 68
Kudelska v An Bord Altranais

Solicitors

Legal representation - Order directing former solicitors to transfer file to new solicitors sought – Former solicitors seeking security for fees as condition precedent to transfer of file – Former solicitors maintaining retainer constructively terminated by plaintiff's refusal to heed legal advice – Plaintiffs seeking to pursue case of professional negligence against other solicitors - Whether plaintiff or former solicitors terminated retainer – Whether termination of retainer for reasonable cause – Whether exceptional circumstances required security for costs already accrued – Whether constructive termination of retainer a concept known to Irish law - *Mulheir v Gannon* [2006] IEHC 274 (Unrep, Laffoy J, 17/7/2006), *Ahern v Minister for Agriculture* [2008] IEHC 286 (Unrep, Laffoy J, 11/7/2008), *Ismail v Richards Butler* [1996] 3 WLR 129, *Gamlen Chemical Companu (UK) Ltd v Rocham Ltd* [1980] 1 WLR 614 and *State (Gallagher, Shatter & Co) v de Valera* [1986] ILRM 3 considered – Attorneys and Solicitors (Ireland) Act 1849 – Solicitors (Amendment) Act 1994 (No 27), ss 8 and 9 - Rules of the Superior Courts 1986 (SI 15/1986), O 99, rr 14 and 15 – Application for security for fees refused (2001/16429P – Laffoy J – 27/2/2009) [2009] IEHC 103
Treacy v Roche

PROPERTY

Mortgage

Possession – Loan to finance development of mine – Guarantee debenture – Default – Well charging order – Refusal of order of possession on grounds of necessity - Appeal on basis that well charging order should have been postponed – Further proceedings claiming judgments obtained by fraud – Abuse of process – *Isaac Wunder* order – Setting of conditions and date for sale by examiner – Judicial review of decision

of examiner – Dismissal of judicial review – Application for possession – Motion of defendant – Application for order to set aside or vary well charging order – Application for declaration that obligations discharged – Claim that terms of guarantee debenture did not reflect true agreement – Whether claim for rectification could be made by way of defence to application for possession – Procedure by special summons – Failure to raise issue prior to well charging order – Whether right to litigate issue - Application for order directing that title extinguished – Statute of limitations – Purpose of statute – Uncertainty of late claims – Prejudice in proving defence – Action – Policy reasons for distinguishing between actions and procedures for execution – Right of mortgagee to apply for possession – Whether fresh action being maintained – Whether process of execution – Intention of legislature – Application for declaration that arrears of interest limited to six years by statute – Whether interest incurred within six year period prior to commencement – Whether restriction on entitlement to recover interest arising subsequent to well charging order – Adverse possession – Covenant creating equitable charge – Absence of title or right to occupation – Discretion – Delay – Absence of complaint regarding delay – Prejudice – Time limits – Whether proceeds of sale of shares should have been placed in interest bearing account – Whether monies in interest bearing account would have exceed liability – Absence of legal basis for claim – Absence of challenge to sum well charged – *Res judicata - Lowsley v Forbes (Trading as LE Design Services*) [1999] 1 AC 329, *Ezekiel v Orakpo* [1997] 1 WLR 340, *Yorkshire Bank Finance Limited v Mulhall* [2008] EWCA Civ 1156, *Bank of Ireland v Slattery* [1911] 1 IR 33, *Re Lloyd* [1903] 1 Ch 385, *Ashe v National Westminster Bank* [2008] EWCA Civ 55 [2008] 1 WLR 710 and *Philip Smith v Tunney* [2004] 1 IR 512 considered – Statute of Limitations 1957 (No 6), ss 2, 11, 13, 32, 33 & 72 - Rules of the Superior Courts 1986 (SI 15/1986), O 1, 38, 42 & 54 - Possession ordered (1986/1055Sp – Irvine J – 14/01/2009) [2009] IEHC 4
Ulster Investment Bank Ltd v Rockrohan Estate Ltd

Mortgage

Possession - Loan for purchase of shares – Loan to refinance home loan - Acceptance of terms and conditions - Security – Family home – Legal charge over shares purchased – Default – Demand for payment – Claim that defendant influenced by third party – Claim that assurances given that loan would be serviced and repaid – Alleged failure of bank to inquire into ability to repay – Alleged reliance on assurances of third party – Whether *bona fide* defence – Summary judgment – Applicable principles – Purpose of plenary hearing – Resolution of dispute on facts – Discretion – Commercial transaction – Whether proceedings to be adjourned to allow defendant to litigate entitlement to judgment – Absence of deficiency in execution of mortgage – Collateral agreement – Default in home loan element of borrowing - *Birmingham Citizens Permanent Building Society v Caunt* [1962] 1 Ch 883, *National Irish Bank Limited v Graham* [1995] 2 IR 244, *Bayworld Investments v McMahon* [2004] 2 IR 199, *First National Commercial Bank plc v Anglin* [1996] 1 IR 75, *Aer Rianta v Ryanair Ltd* [2001] 4 IR 60 and *Harris Range Ltd v Duncan* [2003] 4 IR 1 considered – Possession ordered (2008/505Sp – Dunne J – 29/01/2009) [2009] IEHC 141
Anglo Irish Bank Corporation plc v Fanning

Article

Wheeler, Deborah
The Land and conveyancing law reform act 2009: significant changes or mere tweaking?
2009 14 (3) C & PLJ 62

RELIGION

Article

Daly, Eoin
The congregational indemnity agreement: an unconstitutional endowment of religion?
2009 ILTR 111

RESTITUTION

Article

Horan, Shelley
Agreements to agree: do restitutionary concepts provide a remedy?
2009 16 (5) CLP 95

ROAD TRAFFIC

Statutory Instrument

Road traffic (driving instructor licensing) (no.2) regulations 2009
SI 203/2009

SECURITY

Statutory Instrument

Private security (identity badge) regulations 2009
SI 332/2009

SENTENCING

Article

Conroy, Brian
The Irish sentencing information system (ISIS): a practical guide to a practical tool
(2009) 1 JSIJ 37

SOCIAL WELFARE

Benefit

Supplementary welfare allowance - Jobseeker's allowance - Judicial review – Benefits refused - Habitual residence – Financial eligibility - Documentary evidence - Whether applicant failed to furnish sufficient or adequate information to enable decision to be made – Whether requests for information and documents relevant, necessary, reasonable and appropriate - Whether any breach of applicant's constitutional or convention rights - Whether applicant given ample opportunity to address legitimate concerns raised - Refusal to respond to reasonable requests - Irrationality - *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 considered; *R (Linbuela) v Secretary of State for Home Department* [2005] UKHL 66, [2005] 3 WLR 1014 distinguished; *Hosford v Murphy* [1987] IR 621, *Keegan v Stardust Tribunal* [1986] IR 642 and *O'Keeffe v An Bord Pleanála* [1993] IR 39 considered - European Convention on Human Rights, arts 3 and 13 - Relief refused (2008/605 &1193JR - Ó Néill J - 6/2/2009) [2009] IEHC 66
Ayavoro v Health Service Executive

Statutory Instruments

Social welfare (consolidated supplementary welfare allowance) (amendment) (rent supplement) regulations 2009
SI 202/2009

Social welfare (reduction of payments to health professionals) regulations 2009
SI 198/2009

SOLICITORS

Statutory Instrument

Solicitors (professional practice, conduct and discipline-secured loan transactions) regulations 2009
SI 211/2009

STATUTE

Interpretation

Literal interpretation – Purposive or paternal approach – Whether power to make order for period not exceeding twelve months means definite period must be fixed – Whether literal approach leads to ambiguity and absurdity – *DPP (Ivers) v Murphy* [1999] 1 IR 98 applied; *Pepper v Hart* [1993] AC 593 followed; *Gooden v St Otteran's Hospital (2001)* [2005] 3 IR 617 distinguished; *In re Philip Clarke* [1950] IR 235 mentioned; Mental Health Act 2001 (No 25), ss 15 & 28 - Relief granted with stay (2008/749JR – McMahon J – 31/10/2008)
M (S) v Mental Health Commission

Interpretation

Legal aid regulations – Plaintiff barrister removed from legal aid register because of failure to furnish tax clearance certificate – Tax clearance certificate subsequently obtained and furnished to respondent – Plaintiff subsequently restored to legal aid register shortly after taking instructions in legal aid case – Whether obtaining of tax clearance certificate prior to receipt of instructions entitled plaintiff to recover fees – Whether purposive interpretation appropriate – Whether regulation ambiguous – Whether necessary to imply words into regulations in order to give them sense and meaning - Whether *casus omissus* in regulations – Whether perceived *lacuna* in regulations - Whether regulations failed to provide for fair procedures – Whether regulations unconstitutional or incompatible with European Convention on Human Rights – Whether regulations *ultra vires* - Whether right of defendants in criminal proceedings to representation of relevance – Whether plaintiff's rights under Convention engaged - Criminal Justice (Legal Aid) Act 1962 (No 12), ss 3, 7, 10 – Finance Act 1998 (No 3) s 132 – Interpretation Act 2005 (No 23), s 5 – European Convention on Human Rights Act 2003 (No 20), s 2 – Health Act 1970 (No 1), s 72 - Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations 1999 (SI 135/1999), regs 4, 5, 6, 7, 8, 9 and 11 – *DB v Minister for Health* [2003] 3 IR 12 applied; *Howard v Commissioners of Public Work* [1994] 1 IR 101, *Cooke v Walsh* [1984] IR 710 and *East Donegal Co-Operative Livestock Mart Limited v Attorney General* [1070] IR 317 considered; *Mulcahy v Minister for the Marine* (Unrep, Keane J, 4/11/1994), *State (Healy) v. Donoghue* [1976] IR 325 and *Artico v Italy* [1980] 3 EHRR 1 distinguished – Plaintiff's claim dismissed (2006/1190P – Laffoy J – 18/2/2009) [2009] IEHC 102
Walsh v Minister for Justice

TAXATION

Valuation

Valuation Tribunal - Case stated – Rateable valuation of car park at hospital – Car park also made available to non-users of hospital on commercial basis – Test to be applied - Whether car park at hospital a "relevant property not rateable" so as to be exempt from rates – Whether car park inextricably linked to aim of caring for sick persons – Whether Valuation Tribunal erred in law in applying test - *Clonmel Mental Hospital v Commissioner of Valuation* [1958] IR 381 applied; *Mara v Hummingbird Ltd* [1982] 2 ILRM 421 considered - Valuation Act 2001 (No 13), s 39 and sch 4 – Poor Relief (Ireland) Act 1838 (1 & 2 Vict, c 56), s 63 – Tribunal determined to have erred in law in determining that property not relevant property (2007/404SS – Cooke J – 26/2/2009) [2009] IEHC 113
St Vincent's Healthcare Group Ltd v Commissioner of Valuation

Article

Dwyer, Edward
Recent developments in taxation on property transactions - Finance act 2009
2009 14 (3) C & PLJ 80

Library Acquisitions

Brennan, Philip
Tax acts 2009: finance act 2009
Haywards Heath: Tottel Publishing, 2009
M335.C5.Z14

Cassidy, Breen
Law of value-added tax: finance act 2008
9th ed
Dublin: Irish Taxation Institute, 2008
M337.45.C5

Martyn, Joe
Taxation summary: finance act 2009
33rd ed
Dublin: Irish Taxation Institute, 2009
M335.C5

Moore, Alan
Taxmagic 2009
Dublin: Alan Moore, 2009
M335.C5

O'Brien, Dermot
VAT on property: law and practice
Dublin: Institute of Chartered Accountants in Ireland, 2009
M337.45.C5

Statutory Instruments

Stamp duty (designation of exchanges and markets) (no. 3) regulations 2009
SI 184/2009

Value-added tax (amendment) regulations 2009.
SI 289/2009

TORT

Negligence

Liability – Vicarious liability – Liability of State for school managed by religious order – Sexual assault on pupil at school – Whether State vicariously liable – Control – Whether direct employment relationship existed – Scope – Whether "close connection" test appropriate – Whether vicarious liability should be extended on basis of enterprise liability – Whether broader policy rationales should be taken into account - *Fox v Higgins* (1912) 46 ILTR 222, *McEneaney v Minister for Education* [1941] 1 IR 430, *Moynihan v Moynihan* [1975] 1 IR 192 and *Crowley v Ireland* [1980] IR 102 followed; *Trotman v North Yorkshire County Council* [1999] LGR 584 approved; *Bazley v Curry* (1999) 174 DLR (4th) 45, *Jacobi v Griffiths* (1999) 174 DLR (4th) 71, *Lister v Hesley Hall Ltd.* [2001] UKHL 22, [2002] 1 AC 215, *Rose v Plenty* [1976] 1 WLR 141 and *New South Wales v Lepore* [2003] HCA 4, (2003) 195 ALR 412 not followed – Plaintiff's appeal dismissed (174/2006 – SC – 19/12/2008) [2008] IESC 72
O'K (L.) v H (L.)

Article

Feeney, Conor
The Supreme Court and vicarious liability - implications for employers
2009 IELJ 43
O'Connor, Tim
Counting the hidden costs - the personal injuries assessment board (amendment) 2007 and infant plaintiffs
2009 ILT 98

TRIBUNALS

Equality Tribunal

Jurisdiction – Disability - Allegation of discrimination on ground of disability – Definition of disability – Fair procedures – *Audi alteram partem* – Limits of right to be heard – Whether applicant having right to have submissions on appropriate exercise of its jurisdiction considered by respondent – Equal Status Act 2000 (No 8), ss 2 and 38 – *State (Cork County Council) v Fawsitt* (Unrep, McMahon J, 13/3/1981) and *Doherty v South Dublin County Council* [2007] 2 IR 696 applied; *Wiseman v Borneman* [1971] AC 297; *Lewis v Heffer* [1978] 1 WLR 1061 and *O Ceallaigh v An Bord Altranis* [2000] 4 IR 54 considered – Relief refused (2006/1478JR – Hedigan J – 18/3/2009) [2009] IEHC 124
Eagle Star v Equality Tribunal

Library Acquisition

Cane, Peter
Administrative adjudication and administrative tribunals
Oxford: Hart Publishing, 2009
M303

WARDS OF COURT

Library Acquisition

Terrell, Martin
A practitioner's guide to the court of protection
3rd ed
Haywards Heath: Tottel Publishing,
N155.3

AT A GLANCE

European Directives implemented into Irish Law up to 16/10/2009

Information compiled by Clare O'Dwyer, Law Library, Four Courts.

European communities (assessment of acquisitions on the financial sector) regulation 2009
DIR/2007-44, DIR/2002-83, DIR/2004-39, DIR/2005-68, DIR/2006-48
SI 206/2009

European communities (authorisation, placing on the market, use and control of plant protection products) (amendment) (no. 2) regulations 2009
DIR/2009-25, DIR/2009-37
SI 204/2009

European communities (control on mussel fishing) (amendment) (no. 2) regulations 2009
Please see SI as it implements a number of directives
SI 186/2009

European communities (road haulage and road passenger transport operator's licences) regulations 2009
DIR/1996-26, DIR/1998-76
SI 318/2009

European communities (undesirable substances in feedingstuffs) (amendment) regulations 2009
DIR/2008-76, DIR/2009-8
SI 185/2009

Shareholders' rights (directive 2007/36/EC) regulations 2009
DIR/2007-36
SI 316/2009

ACTS OF THE OIREACHTAS AS AT 15TH OCTOBER 2009

Information compiled by Clare O'Dwyer, Law Library, Four Courts.

1/2009 Anglo Irish Bank Corporation Act 2009
Signed 21/01/2009

2/2009 Residential Tenancies (Amendment) Act 2009
Signed 28/01/2009

3/2009 Gas (Amendment) Act 2009
Signed 17/02/2009

4/2009 Electoral Amendment Act 2009
Signed 24/02/2009

5/2009 Financial Emergency Measures in the Public Interest Act 2009
Signed 27/02/2009

6/2009 Charities Act 2009
Signed 28/02/2009

7/2009 Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Act 2009
Signed 05/03/2009

8/2009 Legal Services Ombudsman Act 2009
Signed 10/03/2009

9/2009 Electoral (Amendment) (No. 2) Act 2009
Signed 25/03/2009

10/2009 Social Welfare and Pensions Act 2009
Signed 29/04/2009

11/2009 Industrial Development Act 2009
Signed 19/05/2009

12/2009 Finance Act 2009
Signed 03/06/2009

13/2009 Financial Services (Deposit Guarantee Scheme) 2009
Signed 18/02/2009

14/2009 Financial Measures (Miscellaneous Provisions) Act 2009
Signed 26/06/2009

15/2009 Nursing Homes Support Scheme Act 2009
Signed 01/07/2009

16/2009 Aviation (Preclearance) Act 2009
Signed 08/07/2009

17/2009 European Parliament (Irish Constituency Members) Act 2009
Signed 08/07/2009

18/2009 Broadcasting Act 2009
Signed 12/07/2009
[Not yet available 12/10/2009]

19/2009 Criminal Justice (Surveillance) Act 2009
Signed 12/07/2009

20/2009 Companies (Amendment) Act 2009
Signed 12/07/2009

21/2009 Enforcement of Court Orders (Amendment) Act 2009
Signed 14/07/2009

22/2009 Housing (Miscellaneous Provisions) Act 2009
Signed 15/07/2009
[Not yet available 12/10/2009]

23/2009 Public Health (Tobacco) (Amendment) Act 2009
Signed 16/07/2009

24/2009 Health Insurance (Miscellaneous Provisions) Act 2009
Signed 19/07/2009
[Not yet available 12/10/2009]

25/2009 Health (Miscellaneous Provisions) Act 2009
Signed 21/07/2009
[Not yet available 12/10/2009]

26/2009 Harbours (Amendment) Act 2009
Signed 21/07/2009

27/2009 Land and Conveyancing Law Reform Act 2009
Signed 21/07/2009

28/2009 Criminal Justice (Miscellaneous Provisions) Act 2009
Signed 21/07/2009
[Not yet available 12/10/2009]

29/2009 Oireachtas (Allowances to Members) and Ministerial and Parliamentary Offices Act 2009
Signed 21/07/2009

30/2009 Local Government (Charges) Act 2009
Signed 21/07/2009

31/2009 Defamation Act 2009
Signed 23/07/2009
[Not yet available 12/10/2009]

32/2009 Criminal Justice (Amendment) Act 2009
Signed 23/07/2009

BILLS OF THE OIREACHTAS AS AT 15TH OCTOBER 2009

[pmb]: Description: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Adoption Bill 2009
Bill 2/2009
Report Stage – Seanad *(Initiated in Seanad)*

Air Navigation and Transport (Prevention of Extraordinary Rendition) Bill 2008
Bill 59/2008
2nd Stage – Dáil **[pmb]** *Deputy Michael D. Higgins*

Anglo Irish Bank Corporation (No. 2) Bill 2009
Bill 6/2009
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Arbitration Bill 2008
Bill 33/2008
Report Stage – Dáil

Broadband Infrastructure Bill 2008
Bill 8/2008
2nd Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Central Bank and Financial Services Authority of Ireland (Protection of Debtors) Bill 2009
Bill 20/2009
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Child Care (Amendment) Bill 2009
Bill 61/2009
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Civil Liability (Amendment) Bill 2008
Bill 46/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Civil Liability (Amendment) (No. 2) Bill 2008
Bill 50/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Civil Liability (Good Samaritans and Volunteers) Bill 2009 as initiated
Bill 38/2009
2nd Stage – Dáil **[pmb]** *Deputies Billy Timmins and Charles Flanagan*

Civil Partnership Bill 2009
Bill 44/2009
Order for 2nd Stage - Dáil

Civil Unions Bill 2006
Bill 68/2006
Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Climate Change Bill 2009
Bill 4/2009
2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Communications Regulation (Premium Rate Services) Bill 2009
Bill 51/2009
Order for 2nd Stage - Dáil

Communications (Retention of Data) Bill 2009
Bill 52/2009
Order for 2nd Stage - Dáil

Consumer Protection (Amendment) Bill 2008
Bill 22/2008
2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad *(Initiated in Seanad)*

Corporate Governance (Codes of Practice) Bill 2009
Bill 22/2009
2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

Courts and Court Officers Bill 2009
Bill 57/2009
Order for 2nd Stage - Dáil

Credit Institutions (Financial Support) (Amendment) Bill 2009
Bill 12/2009
2nd Stage – Seanad **[pmb]** *Senators Paul Coghlan, Maurice Cummins and Frances Fitzgerald*

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Feargal Quinn, Shane Ross, Ivana Bacik and Rónán Mullen*

Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009
Bill 55/2009
Order for 2nd Stage - Dáil

Criminal Justice (Violent Crime Prevention) Bill 2008
Bill 58/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Criminal Law (Admissibility of Evidence) Bill 2008
Bill 39/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Criminal Law (Home Defence) Bill 2009
Bill 42/2009
2nd Stage – Dáil **[pmb]** *Deputies Charles Flanagan and Michael Ring*

Criminal Procedure Bill 2009
Bill 31/2009
Committee Stage – Seanad *(Initiated in Seanad)*

Data Protection (Disclosure) (Amendment) Bill 2008
Bill 47/2008
2nd Stage - Dáil **[pmb]** *Deputy Simon Coveney*

Defence (Miscellaneous Provisions) Bill 2009
Bill 58/2009
Order for 2nd Stage - Dáil

Defence of Life and Property Bill 2006
Bill 30/2006
2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Electoral Commission Bill 2008
Bill 26/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Electoral (Gender Parity) Bill 2009
Bill 10/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Employment Agency Regulation Bill 2009
Bill 54/2009
Order for 2nd Stage - Dáil

Employment Law Compliance Bill 2008
Bill 18/2008
Awaiting Committee – Dáil

Ethics in Public Office Bill 2008
Bill 10/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
2nd Stage – Dáil *(Initiated in Seanad)*

Financial Emergency Measures in the Public Interest (Reviews of Commercial Rents) Bill 2009
Bill 39/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Fines Bill 2009
Bill 18/2009
Committee Stage - Dáil

Freedom of Information (Amendment) Bill 2008
Bill 24/2008
2nd Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Brendan Ryan, Alan Kelly, Michael McCarthy and Phil Prendergast*

Freedom of Information (Amendment) (No.2) Bill 2008
Bill 27/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
2nd Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Fuel Poverty and Energy Conservation Bill 2008
Bill 30/2008
2nd Stage – Dáil **[pmb]** *Deputy Liz McManus*

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
Bill 23/2006
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Housing (Stage Payments) Bill 2006
Bill 16/2006
2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan*

Human Body Organs and Human Tissue Bill 2008
Bill 43/2008
2nd Stage – Seanad **[pmb]** *Senator Feargal Quinn*

Human Rights Commission (Amendment) Bill 2008
Bill 61/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Order for Report – Dáil

Industrial Relations (Amendment) Bill 2009
Bill 56/2009
Committee Stage – Seanad

Industrial Relations (Protection of Employment) (Amendment) Bill 2009
Bill 7/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Institutional Child Abuse Bill 2009
Bill 46/2009
2nd Stage – Dáil **[pmb]** *Deputy Ruairi Quinn*

Irish Nationality and Citizenship (Amendment) (An Garda Síochána) Bill 2006
Bill 42/2006
1st Stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke*

Labour Services (Amendment) Bill 2009
Bill 62/2009
Order for 2nd Stage - Dáil

Legal Practitioners (Qualification) (Amendment) Bill 2007
Bill 46/2007
2nd Stage – Dáil **[pmb]** *Deputy Brian O'Shea*

Local Elections Bill 2008
Bill 11/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Local Government (Planning and Development) (Amendment) Bill 2009
Bill 21/2009
2nd Stage – Dáil **[pmb]** *Deputy Martin Ferris*

Local Government (Rates) (Amendment) Bill 2009
Bill 40/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Medical Practitioners (Professional Indemnity) (Amendment) Bill 2009
Bill 53/2009
2nd Stage – Dáil **[pmb]** *Deputy James O'Reilly*

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik*

Mental Health (Involuntary Procedures) (Amendment) Bill 2008
Bill 36/2008
2nd Stage – Seanad **[pmb]** *Senators Déirdre de Búrca, David Norris and Dan Boyle*

Merchant Shipping Bill 2009
Bill 25/2009
Committee Stage - Dáil

Ministers and Secretaries (Ministers of State Bill) 2009
Bill 19/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Alan Shatter*

Multi-Unit Developments Bill 2009
Bill 32/2009
Committee Stage – Seanad *(Initiated in Seanad)*

National Archives (Amendment) Bill 2009
Bill 13/2009
2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

National Asset Management Agency Bill 2009
Bill 60/2009
2nd Stage - Dáil

National Cultural Institutions (Amendment) Bill 2008
Bill 66/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Alex White*

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Offences Against the State Acts Repeal Bill 2008
Bill 37/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

Offences Against the State (Amendment) Bill 2006
Bill 10/2006
1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn*

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Paul Coghlan and David Norris*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
Order for Report – Dáil

Planning and Development (Amendment) Bill 2009
Bill 34/2009
2nd Stage – Seanad *(Initiated in Seanad)*

Planning and Development (Amendment) Bill 2008
Bill 49/2008
2nd Stage – Dáil **[pmb]** *Deputy Joe Costello*

Planning and Development (Enforcement Proceedings) Bill 2008
Bill 63/2008
2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
Committee Stage – Dáil

Privacy Bill 2006
Bill 44/2006
Order for Second Stage – Seanad *(Initiated in Seanad)*

Prohibition of Depleted Uranium Weapons Bill 2009
Bill 48/2009
2nd Stage – Seanad **[pmb]** *Senators Dan Boyle, Deirdre de Burca and Senator Fiona O'Malley*

Prohibition of Female Genital Mutilation Bill 2009
Bill 30/2009
2nd Stage – Dáil **[pmb]** *Deputy Jan Sullivan*

Property Services (Regulation) Bill 2009
Bill 28/2009
Committee Stage – Seanad *(Initiated in Seanad)*

Protection of Employees (Agency Workers) Bill 2008
Bill 15/2008
2nd Stage – Dáil **[pmb]** *Deputy Willie Penrose*

Public Appointments Transparency Bill 2008
Bill 44/2008
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Public Transport Regulation Bill 2009
Bill 59/2009
Report Stage – Seanad

Registration of Lobbyists Bill 2008
Bill 28/2008
2nd Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Residential Tenancies (Amendment) (No. 2) Bill 2009
Bill 15/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Sea Fisheries and Maritime Jurisdiction (Fixed Penalty Notice) (Amendment) Bill 2009
Bill 27/2009
2nd Stage – Dáil **[pmb]** *Deputy Jim O'Keffee*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Small Claims (Protection of Small Businesses) Bill 2009
Bill 26/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Spent Convictions Bill 2007
Bill 48/2007
Awaiting Committee – Dáil **[pmb]** *Deputy Barry Andrews*

Statute Law Revision Bill 2009
Bill 33/2009
Order for 2nd Stage - Dáil

Stem-Cell Research (Protection of Human Embyros) Bill 2008
Bill 60/2008
2nd Stage – Seanad **[pmb]** *Senators Rónán Mullen, Jim Walsh and John Hanafin*

Student Support Bill 2008
Bill 6/2008
Awaiting Committee – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
Order for Report – Dáil

Twenty-eighth Amendment of the Constitution (Treaty of Lisbon) Bill 2009
Bill 49/2009

Passed by both Houses of the Oireachtas
Twenty-ninth Amendment of the Constitution Bill 2008
Bill 31/2008
2nd Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

Victims' Rights Bill 2008
Bill 1/2008
2nd Stage – Dáil **[pmb]** *Deputies Alan Shatter and Charles Flanagan*

Vocational Education (Primary Education) Bill 2008
Bill 51/2008
2nd Stage – Dáil **[pmb]** *Deputy Ruairí Quinn*

Witness Protection Programme (No. 2) Bill 2007
Bill 52/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabitte*

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
ILTR = Irish Law Times Reports
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.

Article continued from p.100

contemplation is aiding or abetting the suicide of a person who is terminally ill or incurably disabled, who wishes to travel to a country where assisted suicide is lawful.

In Ireland, there is a Code of Ethics and furthermore, Guidelines for Prosecutors prosecuting cases on behalf of the D.P.P but notably, it does not appear that there is a specal crime division to deal with such prosecutions. Therefore, it is open to the courts in this jurisdiction, to follow Lord Hope's opinion and consider the guidelines insufficient guidance in the case of assisted suicide. It is arguable, on the basis of the decision in *Purdy* and Lord Hope's comments, that the code and guidelines in this jurisdiction form part of the law for the purposes of Article 8(2) and that there is an arbitary interference with one's right to private life without sufficient guidelines or information on the prosecution of the offence of assisted suicide thereby opening a claim for damages under the European Convention on Human Rights Act 2003.

Is it an offence to assist someone to commit suicide in another jurisdiction?

The House of Lords also addressed the question of whether acts in the jurisdiction of England and Wales, that assist a person to travel to Switzerland for the purpose of committing suicide there, fall within the scope of section 2(1) of the 1961 Act. A criminal act done within England and Wales is committed within its jurisdiction, and if assistance or encouragement is rendered within England and Wales the argument accepted in the Court of Appeal was that whether or not the suicide itself takes place in that jurisdiction or abroad, notably Switzerland is immaterial.

Lord Phillips of Worth Matravers was of the view that there is a strong presumption that the offence created by section 2(1) of the 1961 Act was intended to ensure that, in circumstances where committing suicide and an attempt to commit suicide were decriminalised, assisting suicide remained a criminal offence. As a general rule he noted that English criminal law does not extend to acts committed outside the jurisdiction.[14] There is a presumption that criminal law applies on a strictly territorial basis although there are various statutory exceptions to the general rule.[15] The uncertainty as to the ambit of section 2(1) of the 1961 Act is a further reason, he opined, for the need for a more specific published policy by the D.P.P. on the matter. He concluded that the question of whether acts in England and Wales that assist a person to travel to Switzerland for the purpose of committing suicide fall within the scope of 2(1) "should not be resolved unless and until it falls for determination in the context of a prosecution".[16]

Lord Hope of Craighead stated that the offence described in section 2(1) is an offence itself and not ancillary to anything else, noting:-

> "Its language suggests that it applies to any acts of the kind it describes that are performed within this jurisdiction, irrespective of where the final act of suicide is to be committed. So acts which help another person to make a journey to another country, in the knowledge that its purpose is to enable the person to end her own life there, are within its reach."[17]

He stated that it was not the function of the House to change the law in order to decriminalise assisted suicide. If changes are to be made, these must be a matter for Parliament. He concluded that it is an offence to assist someone to travel to Switzerland or anywhere else where assisted suicide is lawful and anyone is liable to prosecution as a result.[18] However he noted that "judges have a role to play where clarity and consistency is lacking in an area of such sensitivity"[19]

Lord Neuberger of Abbotsbury opined that it is right to proceed on the assumption that aiding, abetting or procuring in England a suicide may be an offence contrary to section 2(1) irrespective of where the suicide is committed. He noted in the circumstances of this offence, it is not safe to rely on cases or legislation where the crime of aiding and abetting is a secondary crime, as the primary and sole criminal act on which the legislation is focusing is the assisting and not the act being assisted. The natural meaning in simple language of the section seemed to him to provide that if the assisting occurred within the jurisdiction, then the section is satisfied. As the Act defines a crime, it should, he concluded, be construed in a narrow sense rather than a wide one, at least in a case of doubt.

There was the opinion that there was a slight air of unreality about this case following the reasons published by the Director for not prosecuting in the Daniel James case. In fact while there have been over a hundred people who have travelled abroad to Switzerland to Dignitas, there have been no resulting prosecutions in any those earlier cases.[20] Lord Neuberger of Abbotsbury stated that:-

> "…it must be pretty clear to Ms Purdy, and to Mr Puente, how the Director approaches the difficult and tragic cases where a loving relative assists a person, who is of sound mind and determined to end her life, to travel abroad to achieve her wish in a country where assisting suicide is not unlawful."[21]

In this jurisdiction, it remains to be seen whether the courts will follow the reasoning of the House.

14 He referred to *Cox v. Army Council* [1963] A.C. 48 at 67; *Treacy v. D.P.P.* [1971] A.C. 537 at 552-553.

15 See Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford University Press, 2003), and "*Murder as an Offence under English Law*" (2004) 68 J. Crim. L. 315.

16 [2009] 3 W.L.R. 403 at 406.

17 At p.409.

18 It is unclear if he was also referencing assisting suicide in the Netherlands. Considering this case law in this jurisdiction of *A.G. v. X* [1992] 1 I.R. 1 and the right to avail of services elsewhere in the European Union, it is doubtful whether it would be an offence to assist a person to avail of services to assist their committing suicide in the Netherlands, Luxembourg or Belgium, all Member States of the EU where assisted suicide is legal.

19 At p.413.

20 Dignitas, the Swiss clinic that offers assisted suicide. According to its most recent figures from 1998-2008, 107 Britons have terminated their lives there.

21 At p.434.

Conclusion of the House of Lords

The House of Lords concluded that an offence-specific code was necessary in the circumstances relating to the offence of assisted suicide and its prosecution. Lord Brown suggested a custom-built policy statement indicating the various factors for and against prosecutions. This would be designed to distinguish between situations which, however tempted to assist, the prospective aider and abetter should refrain from doing so and those situations in which he or she may fairly hope to be, at the very least forgiven rather than condemned.

The House of Lords concluded that the Director ought to formulate and publish a policy which sets out what he would generally regard as the aggravating and mitigating factors when deciding whether to sanction a prosecution under Section 2 of the 1961 Act. Each case though must still be decided by reference to its own particular facts and the contents of such a policy are not exhaustive. The Code, although providing guidance, is not sufficiently clear for the purpose of the crime created by section 2(1) of the 1961 Act. Lord Neuberger noted the unusual features of the crime in that:

> "… it involves the offender assisting an action by a third party which is not itself a crime, the third party who is being assisted is also the victim, the victim will almost always be willing, indeed will very often be the positive instigator of the crime, and the offender will often be a relatively reluctant participator, and will often be motivated solely by love and/or sympathy. In addition, the potential offender is not the person, or at least is not the only person, whose Convention rights are engaged: it is the victim whose article 8 rights are engaged, and he or she will almost always be unusually vulnerable and sensitive."[22]

The Significance of Purdy for Ireland

It is difficult to see how much added clarity a statement of policy will bring the matter. As Stephen states, it is "a mechanism intentionally designed in loose terms in order to allow the DPP to bring proceedings in cases if and when he chooses, on a discretionary basis; in other words, where he feels it is in the public interest to do so"[23] In this jurisdiction, we are at an even greater loss to understand the position of the Director considering that a statement of policy has never been made nor does it appear that there have been any significant attempts to prosecute the offence of assisted suicide, where the final act of suicide has taken place in another jurisdiction. Cases in this area have been almost unheard of in the Irish context, with the only media coverage from an Irish perspective relating to an incident in 2002.[24] That case differed however to the circumstances raised in *Purdy* in that the final act of suicide occurred in this jurisdiction and there can be no doubt but that the offence of assisted suicide also occurred here.[25]

However, according to Dignitas, the Swiss assisted dying group, 5 Irish citizens have ended their lives with the use of their services between 1998 and 2008.[26] The fact that access to abortion is so restricted in Ireland under the interpretation of *X v Attorney General* infers that the Irish courts may not follow the approach the House of Lords took on the matter.[27] Furthermore, the right to life is expressly preserved and recognised by Article 40.3 of the Constitution, a consideration that did not have to be taken in account in *Purdy*. This right and its parameters were defined in the case of *In Re A Ward of Court (No. 2)*[28] where Hamilton C.J. stated:

> "This right, as so defined, does not include the right to have life terminated or death accelerated and is confined to the natural process of dying. No person has the right to terminate or to have terminated his or her life, or to accelerate or have accelerated his or her death."[29] *[Emphasis added.]*

However, the interesting and most significant point to note for practictioners in Ireland from *Purdy* is that the House of Lords concluded on the basis of Article 8(2) of the European Convention, that there had been an interference with Ms. Purdy's right to a private life on the basis that the Prosecutors Code, which formed part of the law for the purposes of this article, was insufficient and fell short on the requirement of forseeability and accessibility. The right to life is expressly enshrined in our Consitution. The courts must also take into account the European Convention on Human Rights as provided for in Ireland under the European Convention on Human Rights Act 2003. Therefore, the House of Lords interpretation of the Convention in this regard will assist significantly in any argument surrounding the matter. Whether the courts will conclude that the code and guidelines are insufficient in this regard remains to be seen.

Purdy greatly assists in the controversial debate surrounding the prosecution of the offence of assisted suicide especially where the final act of suicide occurs in a separate jurisidiction. It is hugely relevant to this jurisdiction where the offence is almost identical yet there has been no judicial comment on the prosecution of the offence to date. However, the position here differs significantly to *Purdy* in that the offence is a lot more recent to our statute books, (having only been promulgated in 1993) and the right to life has been expressly enshrined in our Consitution. It will be interesting, should the topic arise, to see how the matter will be interpreted in light of the Convention and in light of the decsion of the House of Lords in *Purdy*. ■

22 At p.435.

23 Stephen "*From Pretty to Purdy: suicide and assistance from across the border - R (on the application of Purdy) v Director of Public Prosecutions"* (S.L.T. 2008 39)pp. 267-270.

24 See Irish Times article 30 June 2007.

25 There were attempts being made to extradite Reverend George Exoo and his partner Thomas McGurrin on the grounds of assisted suicide. "*Emails prove Exoo 'helped' in Rosemary suicide case'*, Irish Independent, 13 October, 2002. A verdict of death by suicide in the presence of two others has since been returned earlier this year; "*Inquest into 2002 death gives verdict of suicide*", The Irish Times, 14 May, 2009.

26 Available at www.dignitas.ch.

27 [1992] 1 I.R. 1.

28 [1996] 2 I.R. 79

29 At p.124.

Child sexual abuse cases: the need for cultural change within the criminal justice system

Úna Ní Raifeartaigh SC*

Introduction

There seems to be a gap between public opinion and criminal justice standards on the issue of child sexual abuse. In contemporary Irish society, child sexual abuse is one of the most reviled crimes. In the last quarter of a century, this crime has come from being something rarely spoken about, poorly understood and infrequently prosecuted, to being a crime in respect of which there is enormous public awareness and concern, and much more frequent prosecution. The long-term suffering and pain that can be caused by child sexual abuse is much better understood than previously. A person convicted of this offence will be stigmatised and despised in his or her community. In these changed times, one would expect the strength of public feeling on the issue of child sexual abuse to be reflected by a similar strength of commitment to children in the criminal justice system. Yet, surprisingly, this has not been so. The problem is that while certain high-profile cases in this area attract the public spotlight from time to time, there has been little in the way of sustained focus on the treatment of child sexual abuse cases in the system, in particular to the kind of practical detail that can make all the difference between a criminal justice system functioning poorly, or well.

I offer the views in this article as the views of a practitioner who sees, and discusses with colleagues, practical problems that arise in these cases on a regular basis. These problems arise with depressing frequency; daily, weekly, and monthly. Indeed, they are so endemic in our system that practitioners have almost become de-sensitised to them. In my view, these problems greatly affect the quality of the justice on offer in this area of the criminal law. The cumulative deficiencies make it clear, in my view, that what is needed is a root and branch cultural change, so that child sexual abuse cases are taken more seriously by the system as a whole.

By what criteria does one measure the existing system?

Let me be clear on my perspective with regard to offering a critique of the present system. Rather than being partisan to the prosecution, or to the defence, what is attempted is to measure the system primarily in light of the most basic or fundamental principles of the Irish criminal justice system. These include the following; (1) maximising the chances of convicting the guilty; (2) eliminating as far as possible the risk of convicting the innocent; and (3) treating all persons, adult or child, within the system with dignity and respect. I have no agenda in terms of increasing the conviction rates; or the acquittal rates; or making it easier to convict or acquit. It is the quality of the result that matters, not the number crunching.

One of my particular concerns is to ensure that children are at all times treated by the people in the system with dignity and respect. This should be the case whether we believe they are telling the truth or not; whether we believe they are mistaken in their evidence or not; or whether we accept everything they say as literally true. A child should be treated with respect by our criminal justice agencies, and yet many of the current policies (or lack of policy) means that, unintentionally perhaps, child witnesses are not afforded the respect they should be.

Another significant concern is to ensure that any guilty conviction returned by a jury is based on solid, probative evidence. Often, the evidence in these cases consists of 'one word against the other', and this is of immense concern to practitioners who see this operating in trials on a daily basis. It is immensely difficult for a jury to decide between a young person telling a story of abuse and an accused who may get into the box and deny it, as they frequently do in such cases. How can you convince a jury that the abuse happened when it happened in secret? But equally, how can you convince a jury that it did not happen if you are accused of this crime? One can readily see why the burden of proof (beyond reasonable doubt) may be the deciding factor in many cases. In these circumstances, the least we can do is make sure that the statement-gathering and investigative process is as good as it could possibly be, because the task in choosing between two different oral accounts is so extraordinarily difficult. So difficult that some practitioner say that, given the burden of proof beyond reasonable doubt, cases of 'one word against the other' should not even be prosecuted. Consider the trauma that would be caused by a wrongful conviction of child sexual abuse. It is easy to see why it is necessary to reduce the risk of wrongful conviction to a minimum. But equally, we must try to ensure the conviction of the guilty. The sexual defilement of a child is an appalling crime. It

* This article is based on papers given by the author at a joint DPP-St. Louise's Unit, Crumlin Hospital conference on Child Witneses in November 2008, and an Irish Criminal Bar Association seminar in July 2008, respectively.

would be wrong if the prospect of a rightful conviction were thwarted because of obstacles placed in the way of the child by the system itself.

In sum, like most practitioners, I think of prosecuting or defending a criminal sexual assault trial as involving the walking on a very high tightrope. On the one side, the appalling vista of a wrongful acquittal and a traumatised child whose rights have not been vindicated by the State. On the other side, the appalling vista of a wrongful conviction, and an accused forever tainted with the stigma of this revolting crime. The stakes are high. Our commitment to a quality system should be correspondingly high.

Special Features of Child Sexual Abuse Cases

Moving from this 'macro' view of what is at stake in child sexual abuse cases, let us also take a look at some of the special features of these cases which, in my view, lead to the need for some special measures and policies in this area. Sometimes it seems that almost every category of criminal offence can claim its own 'special' features, whether it be the taking of life (murder, manslaughter); the organized nature of the criminality (gangland crime); the damage caused to society (drugs crime); the threat to democracy (subversive crime); or other special feature. What claims, then, can child sexual abuse cases make for degree of special treatment within the criminal justice system. I would itemise a minimal list as follows:

(a) *The rapid psychological and physical development of children*; The importance of this is that the child grows, both mentally and physically, between the time of the first report to the Gardai and the time the case is tried before a jury. This has many implications, both for the child giving evidence and for the jury watching the child give evidence, and for the barrister seeking to elicit evidence from a child who may now be several years older than when he or she made the statement on the Book of Evidence. The child's conceptual grasp of the world will be different, as will his or her ability to describe events in language. His or her memory may be affected by the passage of time, particularly when one bears in mind how differently a child experiences time from an adult. Such factors strongly point to the need to reduce as far as possible the time it takes for a case involving a key child witness to come to trial. Delays of several months at a time, while the file sits idle on someone's desk, have the potential to affect the quality of the evidence in a manner that does not apply in cases involving adult witnesses.

(b) *The absence in most cases of any other witnesses or evidence because of the secretive nature of child sexual abuse*; Rare is the case where there is medical evidence in addition to the child's own narrative. Usually, given the nature of the offence, the key and perhaps only evidence will be that of the child witness. This makes it particularly important to ensure that this key oral evidence is of the best possible quality.

(c) *Possible ongoing relationship between child and accused person;* (e.g. parent; step-parent; relative; friend of family; person in authority at school or sporting activity). Unlike many other crimes, it will frequently be the case that the child complaining of abuse is in a long-standing relationship with the alleged abuser. This adds an extra dimension to the process of the child giving evidence against that person. Family and other relationships may be 'on hold' until the trial is over. For this reason, it is also important that the trial be deal with as speedily as is practicable.

(d) *The trauma caused by child sexual abuse*; If the child has been abused, it will be better for the child to have the trial over so that he or she can move on and put it behind him or her, and undergo counselling if necessary. There is, incidentally, no guidance, as far as I am aware, from any official body in Ireland as to whether a child should be permitted to receive counselling prior to giving evidence at a criminal trial.

(e) *The fragility of the child in an adult world*; A child witness who comes to court leaves his familiar and secure surroundings and steps into an adult world of strangers, strange language, and unfamiliar places. The newness of all of these things can make coming to court a frightening experience for a child.

Taking these factors into account, it should be clear that child sexual abuse cases, therefore, require a number of special measures to ensure appropriate speed of progress within the system and a high degree of expertise and sensitivity on the part of those professionals within the system dealing directly with the child. There is also a need for careful and meticulous investigation of anything potentially relevant to the allegations of abuse.

The need for a speedy procedure is a recurring theme throughout this paper. It is worth pausing to consider whether the system could present itself with the challenge of dealing with a child's complaint from start to finish, within one year. At present, that timescale would be impossible to comply with. With improved procedures, one would hope that this time-frame would actually become the norm.

A Multi-Agency Approach to Change

One of the striking things about the progress of any criminal case through the system is the number of State agencies and other professionals involved in the process. These include An Garda Siochana, the office of the Director of Public Prosecutions, the office of the Chief Prosecution Solicitor, the Bar (barristers who prosecute and defend), solicitors, the Courts Service (responsible for the administration of the courts), the Judiciary, and the Department of Justice Equality and Law Reform (responsible for legislation and related matters).

There are, in my view, numerous practical steps that could be taken to improve the quality of the system in child sexual abuse cases and it may be helpful to adopt an 'agency

by agency' approach, to see what each agency in the criminal justice system could do to improve matters. One of the dangers of having a criminal justice 'system' is that individual and even collective responsibility becomes blurred and, at times, lost. We may work within a 'system' that we know is not working optimally; we blame the 'system'; but we fail to do anything to do anything to improve it. Perhaps many of us feel a sense of powerlessness in the face of such challenges; perhaps there is insufficient communication between the different parts of the system, so that those who have the information do not have the power to reform, and *vice versa*. It may help, then, to break down the problem, and see where each agency might look at its own practices and find ways in which its practices might be improved. Like a child making a complaint of sexual abuse, therefore, my first port of call is, logically, An Garda Siochana.

An Garda Siochána

The importance of taking a good statement from the child

For a complainant, usually the first point of contact with the criminal justice system is the local Garda station. Arrangements are made for a statement to be taken from the child. This may seem a simple and obvious step, but it is difficult to over-emphasise the importance of that initial statement of the child. This is the statement that will form the notice of evidence to the accused on the Book of Evidence; this is the statement around which the examination and cross-examination of the child will pivot at the trial. The prosecution will be strictly confined to the content of that statement when the child comes to give evidence; the defence will draw attention to any inconsistencies within that statement, any inconsistencies between that statement and the child's evidence at the trial, and any inconsistencies between that statement and other independently provable facts. The indictment will also be drawn up on the basis of the precise wording in that statement. Every word of that statement will be carefully parsed and analysed by legal teams on both sides many times.

The importance of the statement is probably matched only by the difficulty in taking a good statement. Taking a statement from a child requires skills above and beyond those which are normally required of members of An Garda Siochana. There is no comparison between taking a statement from a child who may have been sexually abused on a continuous basis by a relative, for example, to taking a statement from an adult witness in respect of a once-off concrete event such as a burglary, a robbery or an assault. The skills required are quite different.

In that context, it has been for a long time a source of dismay to practitioners that there seems to have been insufficient awareness of this within the Garda Siochana. Frequently, it was the case that the statement had been taken by a Garda who had little or no experience of criminal trials, let alone a criminal trial involving child sexual abuse. Frequently one found that few, if any, senior level Gardai were involved in the case at all. Indeed, what seems usually to have happened, until recently, is that the case was assigned to a local female Garda in the hope that she will be more sensitive in dealing with a child; and the local Sergeant would then supervise her handling of the case. I mean no disrespect at all to those individual members, who frequently responded heroically to the challenge, and whose dedication sometimes produced results far beyond their training and expertise. The problem, I believe, was more systemic. There does not, in my view, appear to have been a general understanding within the organisation of An Garda Siochana as a whole, or perhaps at senior levels, of the importance of having an experienced and expert officer taking the statement from a child in a sexual abuse case and contributing to the investigation generally.

This situation is undergoing some change. This arises from a desire (finally) to give effect to the provisions of section 16(1)(b) of the Criminal Evidence Act, 1992, which made provision for the videotaping of a child's account and the subsequent playing of that videotape at the trial. In this context, some members of An Garda Siochana and Health Board social workers have being trained to carry out videotaped interviews. These will be carried out in accordance with *Good Practice Guidelines 2003*. It is worth noticing that it took a full 15 years for the section to be brought into force, the commencement order having been introduced in October 2008. In other words, a whole generation of children was born and practically reached adulthood while this provision sat optimistically on the statute book, looking good but achieving nothing. The idea behind the section, it will be recalled, is that the initial statement made by the child will be video-recorded and can then be played at the trial. The child, of course, has to be present at the trial for cross-examination. Nonetheless, there are a number of advantages in capturing the child's statement on video-tape at an early stage. First, the key piece of evidence in the trial is already 'in the bag', as it were, from the outset; the accused can consider his position in light of this situation; and the evidence is captured in a more 'fresh' state than it will be a year or two later in court. Further, it may help to prevent accused persons long-fingering the accusation in the hope that the child will simply get cold feet on the day of trial and fail to give evidence. Further, it will give the accused a precise idea of the evidence he is actually going to be facing. For this reason, one side-effect of the introduction of the videotaped statements in court might be that it would lead to earlier guilty pleas in cases which, under the current system, might result in a guilty plea on the day of trial, or would actually proceed to trial. In principle, I welcome the idea both of video-taping statements and playing them as evidence in chief at the trial. In practice, I have concerns that such video-recorded statements will not be admitted by the trial courts unless great care has been taken with the training of Garda officers and social workers in this respect. I would hope that those in charge of this programme would build-in a review of the earliest cases to see if the statements are being ruled admissible and to carefully analyse and eliminate any problems arising in practice. Also, one would hope and assume that persons with sufficient experience are selected for the training process. Let us hope that the Garda Siochana have used this opportunity to up-grade the treatment of child complainants significantly.

Thorough investigation

Another aspect of taking child sexual abuse cases seriously, is, in my view, the need for the Gardai to conduct a thorough investigation. There should be an exploration of any possible independent avenues of corroboration or supportive evidence in such cases. This is routinely done in other (non CSA cases), whereas the norm in child sexual abuse cases seems to be simply to take the child's statement, interview the accused some months later, and leave it at that. A possible approach might be to emulate that done in murder confession cases, where each factual assertion made by the suspect is cross-checked against any available independent evidence. Sometimes the accused, as well as the child, in a child sexual abuse case may have raised points in interview that yielded avenues of further inquiry, and yet there was no further investigation of those points. Any possible leads (phone records; hospital records; dates of school and hospital attendance, dates of house moves, school records and reports, and so on) should, I would respectfully suggest, be followed up by the Gardai with careful attention. In these desperately difficult cases, where a serious allegation from one person's lips can only be countered by a denial from another person's lips, any 'island of fact' , to borrow a memorable phrase from Hardiman J., may assist in assessing each witness' credibility. It helps the trial to become more like a forensic inquiry, and less like a swearing match.

From a practitioner's point of view, there is one other plea I would make to the Garda Siochana. The gathering of detailed background information on the child, his or her circumstances, his or her family, schooling and so on, can sometimes be very helpful, even if such information is not intended to make its way into the Book of Evidence as probative evidence. One of the difficulties in such cases is that when it comes to trial, an accused person will frequently, in denying the accusation, suggest that there is a motive for fabrication on the part of the complainant which lies in some family or relationship history. Frequently, the prosecution may be unaware of any background issue until it is raised at trial, at which point investigative efforts are severely constrained by time. Given the strictly limited nature of pre-trial meetings between the child/family and prosecution counsel, the information available to the prosecutor comes from the Book of Evidence and Garda File. Defence counsel, by way of contrast, can simply ask their client about lots of things beyond the Book of Evidence. The child may have psychological or communication difficulties, that have to be considered in terms of taking evidence. Accordingly, and again, unlike other cases, there are unusual aspects to these cases that require, perhaps, a somewhat different type of Garda file than the norm.

Speedy Investigation

Another aspect of the investigation I wish to emphasise is the need for speed. Frequently one sees Books of Evidence where there has clearly been a passage of several months between the taking of the statement from the child and the interviewing of the accused. Why it has taken several months to approach the accused is not apparent, as there may have been no other evidence at all gathered in the intervening period. I would suggest that child sexual abuse cases should be treated as urgent. The child's biological clock is ticking fast, and the casual loss of a few months is not defensible. I am not, of course, suggesting that there should be such haste that the thoroughness of the investigation is compromised. However, there have been many cases in the past where the lack of haste was not due to the thoroughness of the investigation.

Given the need for speedy and thorough investigation, together with the need for special skills in taking video-recorded statements from children, I would suggest that there may even be a need for a specialist unit or units within An Garda Siochana to deal with child sexual abuse cases. It is notable that the Report on Child Protection of the Joint Oireachtas Committee in 2006 recommended the establishment of regional specialist child protection units within An Garda Siochana, which would take responsibility for the investigation of child sexual abuse complaints. Whatever the method, I would suggest that these cases be given a higher priority generally than has been the experience to date.

Offices of the Director of Public Prosecutions and the Chief Prosecution Solicitor

Speed

As regards the offices of the DPP and CPS, I would echo the theme of speedy progress of child sexual abuse cases . While the general case burdens on individual officers within those services are high, I would suggest that each of the offices might need to develop some system for identifying, and 'red-flagging', as it were, cases involving child witnesses, in order to ensure that a speedier time-frame is implemented for those particular cases. For the CPS, preparation of the Book of Evidence and disclosure are two of the important issues that have to be dealt with. Perhaps internal office guidelines could be developed for recommended time-frames for dealing with these issues, and systems developed to ensure that the guidelines do not remain aspirational.

Particular care, in my experience, has to be taken in order to ensure that any cases that are transferred from one location to another, in order to avail of video-link equipment, do not suffer from unnecessary delays caused by the transfer process and do not result in missing documentation.

The DPP's office is sometimes the locus of delay, particularly where further queries are raised with the Gardai before a decision on charging can be reached. Obviously, if cases were investigated more fully from the outset, the need for such requests might not arise as frequently. However, the DPP's office might also be able to set the tone in terms of urgency, by requiring strict and short time-limits to be complied with in child sexual abuse cases.

Specialisation and facilitating research

A case might also be made for a degree of specialisation within the offices of the DPP or CPS, or at least some method (perhaps electronic) for sharing information about

child sexual abuse cases, whether about recent authorities and decisions or about practical matters relating to equipment, disclosure and so on. Further, given the high quality of raw material and data that the DPP has within its files, the office might be more proactive in finding ways to encourage bona fide researchers to conduct research projects. With appropriate conditions as to confidentiality, there might be ways to harness the enthusiasm and expertise of young postgraduates, academics and barristers, for example, to carry out projects assessing and monitoring numerous aspects of cases passing through the DPP's office. The DPP's files contain a wealth of material, but there is a dearth of research in relation to those files.

It is encouraging that the DPP's office has twice co-hosted conferences in recent years on the subject of child witnesses. It would be good to see the office producing documents akin to those produced in the UK by their counterparts, such as the CPS documents *Safeguarding Children: Guidance on Children as Victims and Witnesses (2008); Children and Young People: CPS policy on prosecuting criminal cases involving children and young people as victims and witnesses (2006);* and *Provision of Therapy for Child Witnesses Prior to a Criminal Trial (2001).* I am not recommending the production of documents as a public relations exercise. It is clear from the UK documents that there is some serious thinking taking place about cases involving child witnesses, and that the ongoing developments are being recorded in policy documents such as those mentioned.

Appointment of counsel

Another issue for the DPP is the question of appointment of counsel in relation to child sexual abuse cases. The current practice is that those cases which are tried in the Circuit Court (as distinct from the Central Criminal Court) are prosecuted by one Junior Counsel without Senior Counsel. Invariably, however, the defence have a Senior Counsel on their team, by reason of the seriousness of the allegation; whether the accused be privately represented or on legal aid. This can lead to dismay on the part of the child's family when they discover what they perceive to be an 'imbalance' in favour of the defence. Quite apart from the optics of the situation, some, at least, of these cases can be very complex, involving at times multiple complainants and numerous legal issues, and the strictly 'legal' test for requiring a Senior Counsel might, arguably, be satisfied. While I am certainly not making the case for two counsel in every child sexual abuse prosecution, I would suggest that the current briefing practice is too inflexible and might be re-considered.

The Courts and the Courts Service

Obtaining an early Trial Date

Again, the theme of speedy progress through the system is important when it comes to considering the courts' listing system. A case may have gone through the process of Garda investigation, DPP charge, preparation and service of Book of Evidence, and disclosure of unused material, and then it may sit for a year waiting for its trial date. All cases that have been sent forward for trial enter the same list for the appropriate trial court, be it the Dublin Circuit Court or the Central Criminal Court, irrespective of whether the case involves children or not. For good reason, custody cases (cases where the accused is in custody) are given priority in the assignment of criminal trial dates. Nonetheless, a good case can be made that child witness cases should also be treated with priority, even if the accused is on bail. This could be done within the existing list system, although the Courts Services might consider a special list for cases involving child witnesses. Perhaps the imminent move to the new Criminal Courts Complex might be an appropriate opportunity to consider creating a special list in this regard.

Case Management and Pre-Trial Applications

Further, it would be helpful if provision could be made for case management of children cases, in order to ensure that matters such as discovery, applications for separate trials, and any other matters are dealt with in advance of trial to ensure that there are no delays on the date of trial itself. Both case management and pre-trial applications are matters that would probably have to be addressed by way of legislation (see below). It is not infrequently the situation that a case which has been through the entire process described above, and which has reached its trial date, cannot proceed on that date because of an outstanding disclosure issue (perhaps raised quite late in the day) or the lack of a trial judge. Alternatively, sometimes a case will be 'severed', so that some complainants go home for another day (months hence) and some are allowed to stay and give their evidence. Under current law, this application for severance cannot be ruled on until the date of trial. The result is that all complainants have to turn up on the day, not knowing whether their cases are proceeding or not. This degree of uncertainty is stressful for anybody, but it must be harmful to a child. Again, if there were a special List for these cases, pre-trial applications and case management could be done within that list to ensure that matters do in fact proceed on the allocated trial date.

In this context, it is of interest that the Joint Oireachtas Committee Report on Child Protection 2006 recommended that further study should be made of the arrangements for listing and hearing trials of sexual offences against children, to include such matters such as pre-trial hearings.

The Judiciary

Training for judges is a matter that has frequently been raised, particular by persons outside the legal profession who work with children. This is a matter that, under the current arrangements, can only come by way of initiative from the judges themselves. This is problematic in circumstances where few judges may think that they require any further information in this area and believe that their experience of life, and of trials, fully equips them to deal with the issues presented by children cases. I would suggest, however, that judges and barristers alike (see below) could at least listen to what other professionals working with children have to say in a non-trial environment, to see if there are aspects they, the judges, would like to explore further. In this regard, the

Judicial Studies Institute could have a role in facilitating matters. It may be noted that, as far back as 1990, the Law Reform Commission had recommended that '*opportunities should be provided for judges and justices who may be dealing with child sexual abuse cases to acquire information by way of training courses and otherwise to the special problems posed by such cases'*. Again, proper research conducted by bona fide researchers attending trials might reveal whether or not there is a glaring need for judicial education in this area, and, if so, in what regard. It is of interest to note that some significant studies have been conducted in the UK recording childrens' experiences in the courtroom, including the most recent *2009* survey, entitled *Measuring Up? Evaluating Implementation of government commitments to young witnesses in criminal proceedings;* and also the earlier 2004 report *In their own words; the experiences of 50 young witnesses in criminal proceedings.* It is not appropriate here to engage with the detail in such reports, but suffice to say that they make it clear that many child witnesses reported having problems with the language and manner of questioning in court, both in terms of comprehension and oppression.

The Bar

Having made criticisms and suggestions in respect of every other agency and profession, I have no intention of sparing my own. Complaints about the conduct of barristers feature anecdotally, but frequently, in accounts from non-legal professionals who work with children. Again, I would suggest that, at the very least, we barristers would benefit from at least listening to what other professionals have to say about our handling of children cases, and how, in their view, child witnesses should be approached, from the point of view not only of eliciting the best probative evidence but also from the point of view of causing the least possible damage to the child witness, a goal which I hope is shared by all barristers. In this regard, it is of interest that the Irish Criminal Bar Association will shortly be holding a seminar series for barristers on the subject of taking evidence from children, the speakers for which will be from non-legal professionals working children. As noted above, research conducted across the Irish Sea has indicated that much work needs to be done to ensure that practitioners have the necessary understanding and skills to question children appropriately.

The idea of compulsory training for all barristers, including defence barristers, has previously been raised. It is difficult to see that compulsory training for barristers could be introduced within the present system. There may be, at least *prima facie*, a right to the barrister of one's choice, and it is difficult to see that under current law, an accused person could be prevented from having access to the barrister of his or her choice simply because that barrister has not undergone a particular form of training. Previous attempts to restrict access to lawyers in other areas have encountered difficulties and been challenged in the courts (e.g. before the Child Abuse Commission; before the Personal Injuries Board). None of this is to say that it cannot necessarily be done; rather that there would probably have to be carefully constructed legislation dealing with the matter, and prior careful consideration of the content of any such legislation in order to ensure that the restriction on any right involved was proportionate. In any event, no such training for barristers exists at present. For the present, any such idea is entirely aspirational, unless someone decides to take it further. Let us remember the history of the video-taped interviews of children, and be wary of aspirational measures that lack commitment to the provision of underlying training and resources. Interestingly, the Law Reform Commission had also, back in 1990, suggested that '*the legal professions should give serious consideration to adopting special codes of practice relating to representation in, and the conduct of, cases involving children. The professions should also consider ways, including the possibility of a certification system, of ensuring that laywers involved in such cases have appropriate training or experience'*. More recently, the 2006 Child Protection Report of the Joint Oireachtas Committee recommended that a structured programme of training and education on child psychology, child development and related matters be developed and provided to Gardai, officers of the DPP, prosecuting solicitors and counsel, and judges hearing cases involving allegations of child sexual abuse.

Given the close connection between barristers and the questioning of child witnesses, this might be an appropriate point at which to mention the issue of intermediaries. There is provision for the use of intermediaries in the questioning of child witnesses in section 14 of the Criminal Evidence Act 1992, but unlike the UK, for example, no resources or planning have taken place for this section to be given effect. For example, there is no provision for the registration of intermediaries; no guidelines as to how this provision is to operate; no information for barristers as to how find or interact with an intermediary in the case of a child with a communication difficulty. Indeed, this problem can also feature with regard to cases involving mentally impaired adults who allege sexual abuse. In the absence of any movement on this front, it may well be that some of the most vulnerable victims of sexual abuse may never be able to have a voice in the criminal justice system, simply because of their communication difficulties –that is to say, communication issues that are considered 'difficulties' within the current limited parameters of a criminal trial. I wonder whether there is, possibly, a European Convention issue here more generally, in terms of our failure to take positive measures that would make it possible for certain victims of sexual abuse to have their cases brought to trial.

Legislative Reform and Government Departments

It is of interest to note that three of the Law Reform Commission's projects for its Third Programme overlap with issues mention in this paper. They have undertaken to examine 'The Law of Sexual Offences', 'The victim and the criminal justice system', and 'Children and the Law'. All of these projects are to be welcomed, and indeed it is often forgotten that a significant Report on Child Sexual Abuse was published by the Law Reform Commission in 1990. It would be very interesting to see the Commission report on the area again, some twenty years later. In the meantime, I might touch on some of the areas of legislative reform that jump out at the practitioner, as it were.

Codification and Reform of the Law on Sexual Offences

It might seem odd to call for reform of the law relating to the offences in this area, given the amount of legislation introduced since 1990 dealing with sexual offences. It is true that, to some extent, what is required is codification rather than reform. The law relating to the prosecution of child sexual abuse cases is spread across the Punishment of Incest Act 1908; the Criminal Law (Rape) Act, 1981 ('traditional' rape); the Criminal Law (Rape)(Amendment) Act, 1990 (s.2 sexual assault; s.3 aggravated sexual assault and s.4 rape); the Criminal Law (Sexual Offences) Act, 1993 (buggery of person under 17 and gross indecency with males under 17); and the Criminal Law (Sexual Offences) Act, 2006, which provides for defilement of a child (replacing the offence formerly known as unlawful carnal knowledge with an expanded offence and a defence of honest mistake). There are also other provisions in these and other Acts dealing with matters such as consent of a child; the issue of media reporting; and so on. Consideration of this alone would suggest that codification might be a useful exercise.

Nonetheless, it would also be appropriate to re-examine the range of offences to see if they are consistent, coherent, appropriate and fair. For example, there is a glaring loophole in the law regarding cases described in the law reports as 'invitation to touch' cases. If, for example, a man asks a girl to masturbate him, and she does, that is no offence. He has not 'assaulted' her within the meaning of 'assault'. In the UK, some cases in the 1950's made this clear, and the loophole was closed in a 1960 statute. In Ireland, the loophole remains open in 2009. This was noted by the Law Reform Commission in its Consultation Paper on Child Sexual Abuse in 1990, and reform was recommended, but this was not done. Indeed, the LRC made a carefully considered recommendation for an offence of 'child sexual abuse' which was never implemented. Curiously, this 'invitation to touch' loophole has attracted no public attention. Usually, in such cases, the accused may have engaged in other conduct which does fall within 'sexual assault', so the offender is not necessarily entirely off the hook as far as charges are concerned. But the loophole is indefensible and it is astonishing that such loopholes continue to survive in Irish law.

In recent times, public discussion about the range of offences has tended to centre on the fall-out from the Supreme Court decisions on sexual intercourse with minors, and whether a Constitutional referendum should be held in order to permit the re-introduction of an offence of sexual intercourse with a minor, to which lack of knowledge would not be a defence nor knowledge required to be proved by the prosecution. In these public discussions, people sometimes appear to be talking at cross-purposes about different aspects of the law on sexual offence relating to children. One speaker may have in mind an adult in authority who is sexually abusing a six-year-old, while another speaker may be thinking about a teenage boy who is having consensual sex with his girlfriend. Any coherent and fair set of criminal offences needs to deal with at least the following variety of issues:

(a) The need to protect young children from sexual activity that cannot, because of their age, be deemed consensual in any way;
(b) The need to protect older children/teenagers from sexual activity to which they may in fact be consenting but which society condemns;
(c) The need to protect older children/teenagers from sexual activity to which they do not consent in fact as well as in law;
(d) The need to differentiate between consensual and non-consensual behaviour in the older child/teenager, either in terms of offence or in terms of sentence;
(e) The need to achieve a fair situation as between the sexes, so that, for example, the law does not unfairly discriminate against young men;
(f) The need to protect children from abuse by an adult of a position of authority;
(g) The need to recognise that some young couples are in fact engaging in consensual sex and consideration of whether it is appropriate to criminalise either or both of them in that situation.

It may be noted that the 2006 Report of the Houses of the Oireachtas Joint Committee on Child Protection recommended codification and reform of the law relating to sexual offences. It also recommended 'as a legislative priority' the creation of the offence of child sexual abuse recommended by the Law Reform Commission.

Indictments

Another problem relates to the drafting of indictments. The current practice is that counsel must draft multi-count indictments in sex abuse cases because of the absence of any special rules for dealing with such cases. The superior courts have sanctioned the use of devices such as monthly or quarterly counts, but this still makes for lengthy and potentially oppressive indictments running to hundreds of counts. Even a relatively simple legislative provision here could remove, at a stroke, the need for this lengthy form of indictment and replace it with something much more simple. In the UK, for example, a special rule provides that

> 'More than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose'.

The 2006 Report of the Joint Oireachtas on Child Protection also alluded to the problem of reconciling the framing of charges with the cognitive and mental abilities of children.

Doctrine of recent complaint

Another issue potentially warranting some legislative attention is the evidential doctrine of 'recent complaint'; this doctrine as it operates in criminal trials seems to be based on suppositions that conflict with the pronouncements of the superior courts in recent years about why victims delay to report these crimes. I would suggest, quite simply, that juries

always be told the circumstances in which the complaint came to light, together with the complainant's explanation for the delay, so that they can decide for themselves whether the delay in reporting the offence was understandable, or instead suggests a lack of credibility. They need not be told the content of the complaint unless the defence wish that to be done in order to highlight inconsistencies in the account. Rather what would be adduced in evidence would be the fact of the complaint and the circumstances in which it was made. The current operation of the doctrine can lead to the jury being artificially blinkered about how the complaint came to be made to the Gardai.

Distribution of Jurisdiction

Another matter that has already been addressed by way of legislation but, in my view not entirely satisfactorily, is the question of the allocation of jurisdiction as between the Circuit Court and Central Criminal Court. Put simply, in sexual cases, the distinction between those two courts is whether or not penetrative sexual abuse has taken place. Essentially, the Central Criminal Court deals with rape and 'section 4' rape, while the Circuit Criminal Court deals with sexual assault. This approach, while originally intended to upgrade the seriousness with which rape was viewed, is rather rigid. There are various factors that might render a sexual assault case very serious, even though no penetrative sex has taken place. For example, there might be multiple complainants; the accused might be a parent of the child; the time-span of the offences might be very lengthy; there might have been considerable sexual activity (including digital penetration) that falls just short of penetrative rape; the child might have special needs; or any combination of the above. Further, when combined with current DPP briefing practice referred to above, parents of child complainants in the Circuit Court can sometimes feel aggrieved that the child's case is not being treated seriously enough within the system.

Absence of Discovery in Criminal Cases

I have saved to the very end a most pressing matter, namely the absence of third party discovery in criminal cases. This was made clear by the Supreme Court decision in *Sweeney v. DPP and Rape Crisis Centre* [2001] IESC 80*, and D.H. v. Groarke, DPP and North Eastern Health Board* [2002] IESC 63. Let us remember that third party discovery is available in civil cases; yet not available in criminal cases, even though the accused in a criminal case is at risk of serious social stigma, and substantial terms of imprisonment. The absence of third party discovery is of particular relevance in sexual abuse cases. Why? First, because, as already noted, very often the only evidence is that of the complainant and therefore his or her credibility is pivotal to the case. Secondly, because complainants sometimes make statements about the alleged abuse to other persons or bodies such as counsellors, psychiatrists or assessment units, such as St. Louise's Unit in Crumlin Hospital and St. Claire's Unit in Temple Street hospital. Any defence counsel worth his or her salt would want to see those prior statements to see if the description of the abuse is consistent or not, or whether, as has happened in the past, a different abuser may be named as the abuser, or an altogether different account of the abuse has been given. Indeed, any fair-minded decision-maker wishing to be sure of the reliability of a witness, on whom the fate of an accused depends, should also want to know if the witness had given a significantly different account on a previous occasion. Inventive defence practitioners were pondering the use of the deposition procedure, as now provided for in the Criminal Justice Act 1999, in order to gain access to such material, but this was stopped by the Supreme Court decision *in J.F. v. Reilly and DPP* [2008] 1 IR 753. Another possible indirect route to gain access to these materials is via the 'right to adequate investigation' line of authority, as described by the Supreme Court in *Braddish v. DPP* [2001] 3 IR and *Dunne v. DPP* [2002] 2 IR 305, and much litigated in decisions since then. Most interestingly, Hardiman J. opined *in P.G. v. DPP* [2007] 3 IR 39, a so-called delay case, that the prosecution in a sexual offence case might have a duty to seek and obtain any prior statements of the complainant relating to the alleged abuse.

It is not only defence counsel who are interested in prior statements and wondering how to use the law to get around the absence of discovery. Prosecution counsel have difficulty advising the DPP what the limits of the prosecution duties are in such cases. And counsellors, hospitals and other agencies who deal with victims of abuse are also uncertain about the extent of their rights and duties regarding complainant-material in their possession. While uncertainty prevails in this area, the practice on the ground is uneven; in some cases, the consent of the complainant to the taking up of the materials is obtained, sometimes it is not. Sometimes, the material is gathered by the Gardai and sent to the DPP, and in other cases, it is not. Worst of all, sometimes one reaches practically the eve of a trial, and a late request is made by the defence for this material, potentially resulting in an adjournment. In my view, the absence of discovery in criminal cases, especially sexual offence cases, should be resolved without us having to go down the inevitable road of further constitutional litigation to determine the precise parameters of the prosecution's duty to seek out evidence and the defence's entitlement to material potentially relevant to the guilt or innocence of the accused. For once, let us be proactive rather than reactive in our legislative response.

Conclusion

In view of the above broad sweep, it should be clear that there are many practical improvements that could be made to the criminal justice system as it applies to child sexual abuse cases, many of which do not require legislation. Many detailed recommendations for change have been made over the years, most recently in the 2006 Houses of the Oireachtas Report on Child Protection. What is important now is that these and other changes are implemented, and that our 'best practice' moves off the shelves and into the system. This requires a significant commitment not only from the relevant Government Departments, but from within each of the agencies operating in the criminal justice system. As

a society, we are not doing our best by the children who go through the criminal justice system. In fact, we are not doing our best by anyone involved in these cases. We need to devote attention, thought, energy, time and resources to improving the treatment of child sexual abuse cases in the system. Given the number of changes that are required, none of this will happen unless the system and those within it, undergo a change of attitude and take these cases more seriously. It is to our shame that we have not done so already. What we need is a thoroughgoing cultural change within the criminal justice system regarding cases involving allegations of child sexual abuse, and a commitment to implement much-needed reforms. ■

FLAC Thank you to Volunteers

Noeline Blackwell, Director General, FLAC

This year, FLAC, the Free Legal Advice Centres organisation, is 40 years in existence. To mark the occasion, we are sending each practising lawyer in the country a copy of our quarterly newsletter, which explains the work that we do, and the difference for good that we hope FLAC makes in the lives of many marginalised and disadvantaged people in Ireland. Through the pages of *The Bar Review*, we would be most grateful for the opportunity to thank the many volunteers who have allowed us reach this milestone.

In 2008 FLAC provided free legal advice to over 7,500 people at its evening centres. This was an increase of 53% from 2007. From returns that we have so far, we expect figures for 2009 to be considerably higher. We also answered some 9,250 information queries via our Lo-Call information and referral line. These figures too will increase in 2009. FLAC gave basic free legal assistance on a wide breadth of subjects including family law, employment law, debt and consumer law, immigration law and social welfare.

The work done by approximately 400 FLAC lawyers on a voluntary basis in some 70 centres around the country remains an essential stepping stone in the overall aim of achieving justice for all. Without that first-stop legal advice offered by dedicated volunteers, many people would not be aware of their rights and responsibilities and would be unable to partake in important legal processes affecting them. FLAC is also grateful to the many legal experts who help to provide first-class information and training in various areas of law to our volunteers and seminars and sessions throughout the year.

In addition, the money that FLAC has received through donations from lawyers has been, and continues to be an essential source of income for our work.

FLAC wishes to publicly acknowledge all those who support its work, the volunteers who have worked with us throughout the years, staff at Citizens Information Centres who facilitate our work, the lawyers who support us, our staff and volunteer governing body and all those who donate to our efforts. Together we will keep striving to ensure the realisation of equal access to justice for all. ■

Pupil Exchange Programme in Spain

Emma Keane BL and Tricia Sheehy Skeffington BL

The authors went on the Bar Exchange to Madrid and Malaga in 2008.

The jurisdiction of Spanish courts is divided geographically, by subject matter and by the gravity or value of the case. The Spanish legal system is governed by the civil and penal codes. Penal matters of the gravest nature and those which are deemed to pose a threat to the security of the State are heard in the Audiencia Nacional. This court sits in Madrid and has jurisdiction over the whole of Spain.

The Audiencia Nacional heard the ETA cases and more recently the Madrid bombing cases. The public and press sit in a section at the back of the court, looking on through a large glass partition. A television screen facilitates documents under court scrutiny to be viewed by the press and public, however whether this happens or not is at the discretion of the judge.

Defendants who are considered dangerous sit in what is known as the fish bowl (*"la pecera").* This glass cubicle offers a clear view of the court. If however a witness's identity requires protection, blinds are drawn obscuring the defendant's vision. It should be noted that judges have been ETA targets. In 1990 there was a bomb attack on the Constitutional Court and six years later, its former President, Francisco Tomás y Valiente was assassinated by terrorists.

Consultations with detained clients take place in less than ideal conditions. A window separates lawyer and client, with the lawyer perching their papers on a slanting ledge. Certain procedures allow particular detainees to be held incommunicado.

There are two superior courts in Madrid: the Supreme Court and the Constitutional Court. The former hears appeals from lowers courts, while any civil or criminal trials involving the government or President would also be heard here. While one would expect this to be a hive of activity, the building, which is housed in an old monastery, is as quiet as if its use had never changed. The majority of appeals are limited to written submissions.

The Constitutional Court, at the same level of the Supreme Court, is as quiet for similar reasons, despite a purpose-built chamber having been constructed for it in 1980. As its name suggests, the Court deals with constitutional matters only. The Court has sat in full plenary session a mere thirty times since inception, despite having dispensed with over 100,000 appeals in its first twenty-five years.

At the other extreme of the Spanish judicial system are the provincial courts which hear (or as the Spanish term has it, celebrate, *"celebrar")* civil, penal, administrative and employment law issues. In Malaga, the Ciudad de la Justicia (City of Justice) complex is the hub of legal activity and also houses forensic labs and civil wedding halls.

The smallest civil hearing is known as a *verbal* – however the name gives a false impression as while it is verbal, many of the other hearings are also. The distinguishing features are a simplified process for issues which are of a lesser value than €3000.

The figure of €3000 is the only monetary cut-off point in jurisdictional terms however. Once the value exceeds that level, it becomes *ordinario*, an ordinary hearing. The process starts with a claim ("*demanda*") in which the plaintiff's lawyer (*"abogado")* sets out his or her claim in a manner very similar to a Statement of Claim. The defence must then issue within a strict 20 days which is not easily extended, if at all.

The *demanda* is then taken to the Courts to be stamped, thereby officially initiating the process. This is the job of the *procurador*, which is often incorrectly translated as "barrister". The chasm between the work of a barrister and a procurador could not be more profound.

The procurador, who must have a law degree, delivers court documents from the various court offices to the abogado. He or she is the official court representative of the client, although without the right of audience. Being there in person suffices to represent from the point of view of the procurador, which means that the procurador may be seen openly enjoying a good novel in court or simply sitting at side of the abogado, with no pen or paper, staring into space. Abogados (who wished to remain nameless) often referred to their procuradors as *correos de lujo:* luxury postmen.

On the other hand, the abogado's remit includes consultation with the client (alone, with no need for the procurador being present), written pleadings and court advocacy. The abogado takes control of the court process for their client. This starts with *previa* – a pre-hearing which nets down issues and sets a timeframe within which proofs have to be furnished.

Procuradors, abogados and judges wear *togas* (silky black gowns… not flowing white linen). Togas have the astonishing ability to cover jeans and sandals and even stunning orange suits. The judge's *toga* is distinguished by intricate white lace on the cuffs.

Judges are appointed by way of a highly competitive exam open to law graduates. Encompassing a fifteen-minute oral compression of a lengthy technical document, the biannual exam is often repeated by candidates aspiring to the bench. However, those who pass start their job with no further practical training in the small provincial courts. The judge will often be the youngest in the room and is affectionately referred to as a *juezito* - a little judge.

Every Spanish court hearing is recorded. Courts hear cases between 10am and 2pm and abogados see clients for consultation after 5pm.

Abogados in Spain organise themselves into *colegios* – which combine the function of Bar Schools and Bar Councils. While an abogado does not need a professional bar qualification or to complete an apprenticeship to practice, many do both. It seems to be a matter of time before a vocational bar qualification will be required.

On a personal level, the Colegios of Malaga and Madrid and their abogados were open, warm, professional and welcoming to their visiting lawyers. As generous with their professional time as invitations to dinner, they made our exchange enjoyable, informative and memorable. ■