The Bar Review

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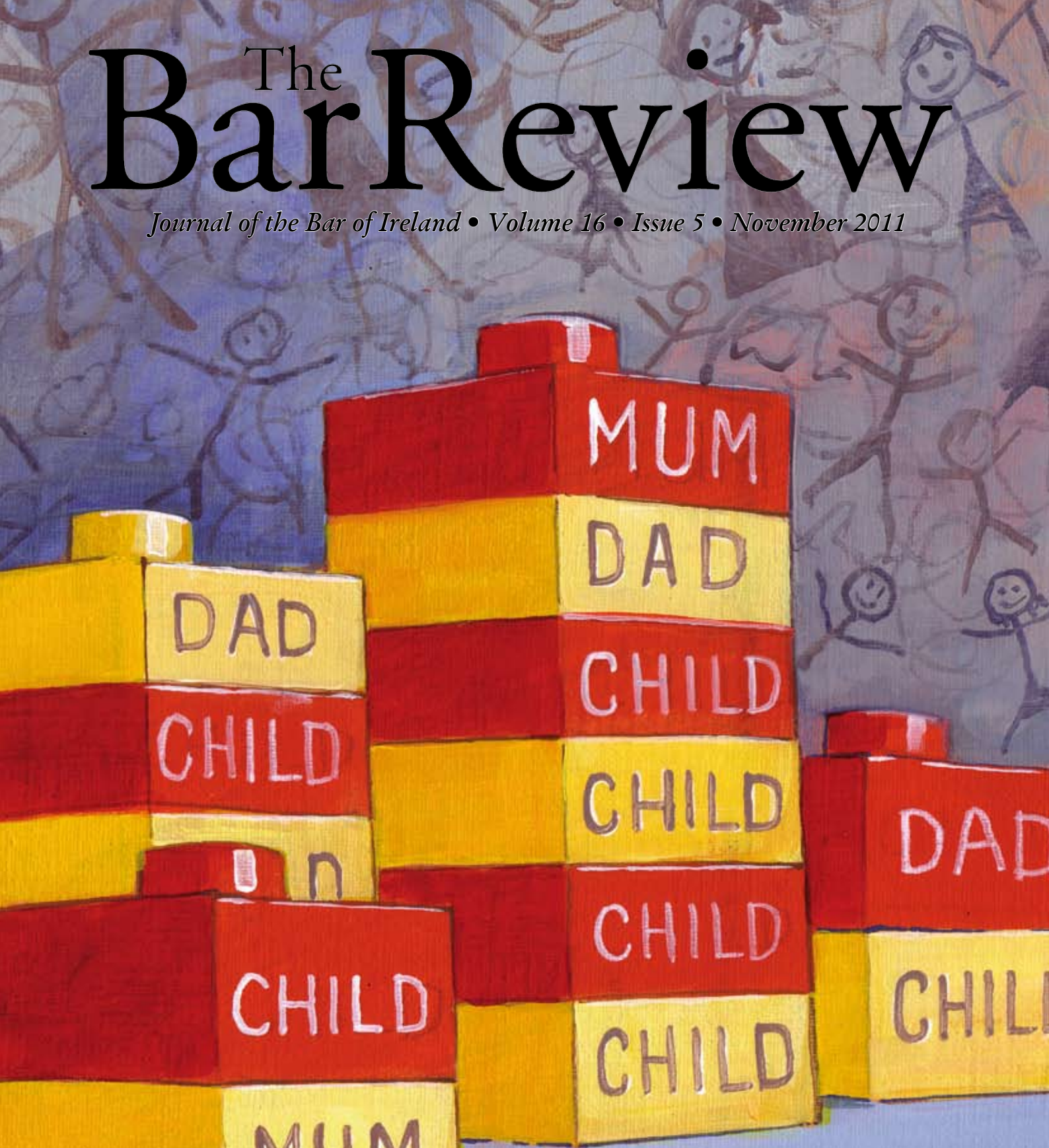

Marriage and the Family – A Changing Institution

The Right to Legal Aid

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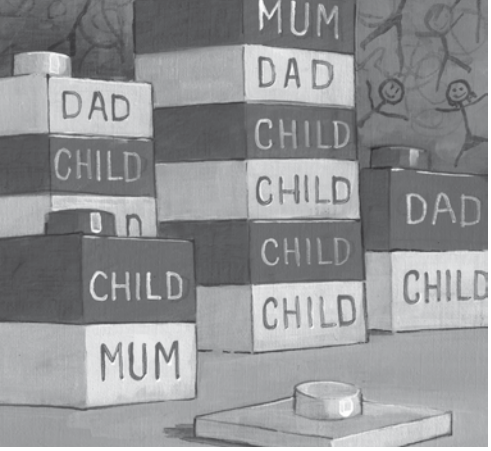

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Tribute to Mr Justice Vivian Lavan

The Honourable Mr Justice Nicholas Kearns, President of the High Court

Writing at this point in time – when so many tributes have already recorded the many achievements of my late friend and colleague - I can not imagine that Vivian himself would want a reheated account at this stage of those milestone moments in his career which have been so fully documented elsewhere.

On this, a Saturday morning in autumn, Vivian would for many years have been preparing himself for one of UCD's home rugby matches in Belfield, preceded of course by a convivial lunch where Messrs Maughan and Scally could be relied upon to inject appropriate levels of mischief and fun in the kind of environment Vivian so enjoyed. The lunches were even more enjoyable when they involved half-time visits to the bar (purely to get warm) and a later visit for the apres-match analysis which could, of course, take some time. Shortly before his death he had arranged a bumper lunch in UCD (for which I was fortunate to make the cut), which included Fred Morris, John Murray, Paul Gilligan, Esmonde Smyth, Mick O'Shea, David Byrne and Michael Moriarty, but sadly Vivian was too ill on the day to make it himself. We felt keenly on that occasion that it was organised by Vivian as a form of farewell lunch .

It was typical of Vivian to be thinking of people other than himself. He so enjoyed those lunches in Hunter's Hotel which were arranged around David Maughan and Jimmy Scally during their bouts with ill health. Vivian knew it was a practical way of showing affection and providing support. He was always very good at that, entering any company with his booming trademark salutation "gentlemen! How are we?" That first word really encapsulates for me Vivian's own outstanding characteristic.

On his last day in court, I said that I had never heard Vivian speak ill of anyone. In the Law Library, there are many who would regard this as an unpardonable virtue, but Vivian was certainly a very good listener when a good story was doing the rounds. In this respect, he had a sense of humour which was compassionate rather than acerbic. He would be the first to admit that he had his own little faults but he was expert at working with and around them.

I recall once on circuit when, after a case before him had abruptly finished (on bad terms from my point of view), we coincidentally met later that day. I am sure I looked even more cranky than I do on the bench nowadays, but found myself disarmed and mollified within minutes as he talked about everything other than the case in the most charming manner. It was his way of inviting you to put it behind you and -the funny thing is - it always worked. In short, it was impossible to stay cross with Vivian and that is one attribute I reckon we would all like to possess.

Many will agree that Vivian showed towering strength in his final days. Of course, he had such wonderful support from Una and the family, but I think in large measure, Vivian had himself exceptional qualities which shone through at that time and which in turn provide us with consolation now that he is no longer with us. I think a lot about this supremely decent man and, like all his colleagues and friends at the Bar, miss him greatly ■

Abuse of Process

Yvonne Mullen BL

The expeditions of the Zoë Group to the High Court and the Supreme Court in the summer of 2009 have thrown the doctrine of abuse of process into sharp relief. Originally considered a sub-set of res judicata, the doctrine has found a new lease of life over the past few years with a number of significant judgements from the Irish and English Courts, particularly the Supreme Court decision in *In Re Vantive Holdings*[1], which so spectacularly made the headlines. The sword of abuse of process, upon which the applicant in *Vantive* ultimately fell, has sometimes been incarnated as "estoppel by omission" and in America is known as "equitable preclusion".

A starting point

The recognised starting point of the doctrine of abuse of process must inevitably be the 1843 case of *Henderson v Henderson*[2] and the oft-quoted dicta of Sir James Wigram V.C. who declared that:

> "I believe that I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of Res Judicata applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgement, but to every point which properly belongs to the subject of the litigation, and to which parties exercising reasonable diligence might have brought forward at the time."[3]

The proposition has long been accepted in Ireland as can be seen from the judgement of Dowse B in *Russell v Waterford & Limerick Rly Co*[4].

> "When the cause of action is the same and the plaintiff has an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the later action." [5]

In a similar vein, Pallas C.B. in the case of *Cox v Dublin City Distillery (no 2)*[6] held that a party to previous litigation was bound "not only [by] any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein"[7].

Accordingly it can be seen that the doctrine of abuse of process binds plaintiffs and defendants equally. Further, the onus of proof lies with the party alleging the abuse of process.

The Rationale

The rationale behind the doctrine is to prevent a multiplicity of cases, all essentially litigating the same issues. The desirability of such an approach is clear; it prevents the hounding of individuals and companies and enables the courts to manage it's resources most effectively. In the House of Lords decision of Johnson v Gore Wood[8], Lord Bingham declared that;

> "The underlying public interest is the same; that there should be a finality to litigation and that a party should be not twice vexed in the same matter. The public interest is reinforced by the current empathsis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole."[9]

This reasoning was reiterated in the decision in *Woodhouse v Condigna*[10], where Brooke L.J. referred to the public interest and held that:

> "But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in *Henderson v Henderson* that, in the absence of special circumstances, parties should bring their whole case to court so all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should

1 [2009] IESC 69
2 Henderson v Henderson 1843 3 Hare at 100
3 at 114
4 (1885) 16 L.R. IR 314
5 at 321
6 [1915] 1 IR 345
7 at 372
8 [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481
9 [2002] 2 AC 1 at 31
10 [2002] 1 WLR 2558; [2002] 2 All ER 737

> not drag on forever and that a defendant should not be oppressed by successive suits."[11]

These dicta have been expressly adopted into the Irish jurisprudential psyche by the Supreme Court in the recent decisions of *Carroll v Ryan*[12] and *A.A. V Medical Council*[13].

In the case of *A.A. v Medical Council*, the proceedings arose from an alleged sexual assault by the applicant. He was acquitted at trial and afterwards sought temporary registration as a medical practitioner by the respondent. The respondent then decided that there was a *prima facie* case to hold an inquiry pursuant to Part V of the Medical Practitioners Act 1978. The applicant had brought judicial review proceedings seeking to prohibit the holding of the said inquiry on the grounds of double jeopardy and breach of natural justice by reason of the multiple proceedings in the same matter. The applicant was only partly successful and O'Caoimh J refused to prohibit the holding of an inquiry.

It was after this determination (which was not appealed) that the applicant launched fresh judicial review proceedings, again seeking to prohibit the holding of an inquiry. However the grounds on this occasion were a breach of natural justice by reason of a failure to provide legal aid. It was contended by the respondent that the second judicial review proceedings were an abuse of process of the court, unreasonable, unjust and contrary to fair procedures by virtue of the fact that all issues should have been raised in the first judicial review proceedings.

Hardiman J, giving judgement with which his brethren agreed, adopted and approved the English jurisprudence in the area, endorsing *Henderson*, *Johnston v Gore Wood and Woodhouse v Consigna*. However, he took a further step, which to some extent can be said to ameliorate any harshness that a hard and fast rule would create. He said at page 317:

> "Rules or principles so described cannot, in their nature, be applied in an axiomatic or unconsidered fashion. Indeed it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the courts".

Further, the Judge had regard to the European Convention of Human Rights and Fundamental Freedoms 1950, which has since been fully incorporated into Irish law by the European Convention on Human Rights Act 2003. Article 6(1) of the Convention guarantees a right of access to the courts. Such a right is, of course, limited. In *Ashingdane v United Kingdom,*[14] the European Court of Human Rights said: -

> "The right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by it's very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals.[15]"

There must be proportionality between the means employed and the aims sought to be achieved.[16]

Notwithstanding the liberal language employed by Hardiman J in his decision, the applicant's proceedings were struck out for abuse of process.

Settlement v Judgement

The question then arises as to what point exactly does the original litigation have to have reached in order to bar any subsequent proceedings? If an earlier claim is abandoned and later revived in new proceedings is this sufficient to warrant a dismissal for abuse of process?

The problem has been examined in a number of decisions both here in Ireland and in our neighbouring jurisdiction. The 1999 decision of the House of Lords *in Bradford and Bingley Building Society v Seddon*[17] sheds some light on the difficulty where Auld LJ (Nourse and Ward LJJ concurring) held: -

> "[Thus], abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later to continue".

The matter was further considered in *Johnston v Gore Wood* (mentioned above). The brief facts of that case were that the plaintiff was director of a company who had instructed the defendant, a firm of solicitors. Litigation ensued between the company and the solicitors due to the alleged negligence of the defendant. The said litigation was compromised, however the plaintiff subsequently issued proceedings in his own name, suing the solicitors for breach of duty owed to him personally, but arising from the same set of facts. The defendant applied to have the action dismissed for abuse of process. Lord Bingham held that: -

> "An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often indeed that outcome would make the second action the most harassing"[18].

It is this willingness to take into account previous litigation that has been compromised or abandoned that distinguishes

11 [2002] 1 WLR 2558 at 2575
12 [2003] 1 IR 309
13 [2003] 4 IR 302
14 (1985) 7 E.H.R.R. 528
15 at 546
16 *Tinneally & Sons Ltd v United Kingdom* 1999 27 E.H.R.R. 249
17 1999 1 WLR 1482
18 [2002] 2 AC 1 at 32

the doctrine abuse of process from the classic understanding of res judicata, which traditionally requires a court determination on the substantive issues.

In this jurisdiction, this willingness to examine previous compromised litigation has been taken a step further. In fact, the Supreme Court here has determined that a party to a proceeding can be prevented from litigating a matter where he has raised that point in previous litigation, but abandoned the point. In *Eamon Carroll and Mary Carroll v Chris Ryan, John Rogers and the Law Society of Ireland*[19] (which set of facts are rather protracted), the first plaintiff sought to revive a claim that the third named defendant was abusing its dominant position in the market for legal services, which it had earlier abandoned. In his decision, Hardiman J agreed with the judgement in *Gore Wood* and went further, stating "[this] harassment, in my view, may arise whether or not a set of proceedings is pursued to judgement or settlement"[20]. A practical approach was taken to the matter and the Judge pointed out that just because a case has not reached a conclusion does not mean that the opposing party has not had to prepare for it.

Special Circumstances

It has been a consistent element of the jurisprudence in this area that if special circumstances prevail, a party who may otherwise be guilty of an abuse of process may be allowed to proceed.

What manner of factual matrix amounts to "special circumstances"? Certainly, on an examination of the case law, the bar sits quite high. The case of *Barrow v Bankside Agency Ltd*,[21] emerged from the morass of what became know as the "Lloyds litigation". Subsequent to significant losses in the insurance market in the United Kingdom in the late 1980's, a plethora of cases emerged. By way of case management the Commercial Court determined that that the claims should be divided into generic classes and selected particular actions for early trial. The hope was that by identifying basic principles and determining certain matters, other cases would be resolved. Mr Barrow was a co-plaintiff, along with 3000 other persons, as against 71 defendants in one of the matters selected and heard for early determination.

The plaintiff was partly successful at trial, and recovered 60% of his losses. In what can be supposed to be an attempt to recover the other 40%, he issued further proceedings against two defendants, one of whom was a party to the earlier case. In the second set of proceedings, he claimed damages for breach of duty for portfolio selection, which had not been claimed in the earlier generic claim.

The defendant applied to strike out the claim on the grounds of estoppel, and in the alternative, for abuse of process.

The Court of Appeal examined the background of the case very closely, and considered the very unusual history of the Lloyds litigation. Saville LJ points out in his judgement that in the early months of 1993, the volume of the litigation threatened to overwhelm the Commercial Court and that it represented possibly the largest and most complicated civil litigation that had ever arisen.[22] In an attempt to avoid catastrophe, the particular case management system that is outlined above was put in place. Any attempt to litigate the claims from the second proceedings in the first would have been rebuffed by the Court.

Both Saville LJ and Bingham MR felt that it would not actually have been possible for the plaintiff to litigate the breach of duty issues in the first set of proceedings and therefore that the mischief anticipated by *Henderson v Henderson* did not arise. However, Bingham MR went on to say that if he was wrong in this proposition that the very particular circumstances of the Lloyds litigation and the case management that attached to it would amount to special circumstances and as such the plaintiff would not be barred by reason of abuse of process.

Interestingly, both Judges felt that if the defendant could show prejudice, this might have effected their decisions. However, no prejudice could be pointed to and as such, they dismissed the defendant's application.

In Re: Vantive Holdings

On the 17th July 2009 the petitioner, Vantive Holdings presented a petition to the High Court seeking orders appointing an examiner, pursuant to the Companies (Amendment) Act 1990, as amended. On the 31st July, Kelly J dismissed the application, and his decision was affirmed on appeal by the Supreme Court. Essentially, the difficulty was that the applicant had failed to place sufficient evidence before the Court as to whether the companies had a reasonable prospect of survival, as required under the Act. In this respect, it has failed to disclose its business plan and failed to adduce any evidence as to the future prospects of the property market.

A second petition was presented on the 14th August 2009, when the petitioner seemingly plugged its evidential deficit. The issue of whether the petitioner should be allowed to continue with its second petition was heard on the 20th and 21st August, 2009 before Cooke J. ACC bank, a creditor of Vantive, contended that the second petition was an abuse of process of the Court and as such, it should be struck out. The learned High Court Judge, however, did not agree. Interestingly, he felt that the nature of the petition precluded the application of the rule in *Henderson v Henderson*. As the procedure was not traditional inter-parties litigation, rather "a plea for the intervention of the court to protect the undertaking," the traditional abuse of process jurisprudence was not pertinent. The issue of the failure to adduce all the relevant information at the time of the first petition might be relevant to the exercise of the court's discretion pursuant to section 4A of the Act, but not otherwise. As such, Cooke J allowed the petition to proceed for a second hearing.

It is respectfully suggested that the learned Judge failed to recognise that, while a petition for examinership might not be traditional inter-parties litigation, it has many of the features of such litigation. Creditors are entitled to be heard in an application for appointment of an examiner. The

19 (2003) 1 IR 309

20 at 319

21 [1996] 1 WLR 257; [1996] 1 ALL ER 981; [1996] 1 Lloyds' Rep 278

22 [1996] 1 WLR 257 at 267

reasons for the existence of the rule in *Henderson v Henderson* are equally applicable to examinership applications. Notice parties to an examinership application may be equally as vexed by repeated applications as a defendant to ordinary civil litigation. Furthermore, the issue of the use and abuse of court resources is equally applicable to examinership applications.

The decision of Cooke J was appealed to the Supreme Court.

The Supreme Court identified three factors to be applied in the case to determine whether the presentation of the second petition was an abuse of process. Firstly, the actions and explanation of the petitioner; secondly, the effect on persons of multiple petitions and thirdly, the use of scarce court resources.

The Court demanded an explanation as to the presentation of the second petition within days of the first being dismissed, particularly as the evidence presented in the second petition was available at the time of the first. The justification offered was that the information was of commercial sensitivity and that Mr Carroll's health had lead him to make poor decisions. The Court concluded that the reason the evidence was not available for the first hearing was a strategic decision taken by Mr Carroll, taken in the teeth of legal and financial advice.

Having examined the decision of the High Court, the Supreme Court specifically rejected the idea that the court had an "overriding consideration" to investigate whether there was a reasonable prospect of survival. It confirmed that the doctrine of abuse of process applies to examinership petitions, holding that there "is a duty on a petitioning company to present all relevant information to the court" and that "a petitioner should not abuse the processes of the court".

The Court pointed to the effect of multiple applications, that there should be finality to litigation and parties should have "closure on an issue". Further, court resources should be protected. Flowing from this, the court has an inherent power to prohibit an abuse of process, which it exercised in this case, allowing ACC's appeal and dismissing the petitioner's application.

Conclusion

The concept of an abuse of the process is one that has withstood judicial ebbs and flows remarkably well. This is likely due to the utility of the doctrine and its flexibility. It emerged from the Victorian era, yet can be usefully employed in modern legal areas, such as examinership. It is a useful tool in the judicial armoury, allowing it to regulate its own processes. The reason for its longevity can also be accounted for by the sensible foundations for the doctrine. Frugal use of court resources has persistently been relevant, and is likely to continue to be so. Further, the importance of protecting litigants from a continuous stream of vexatious litigation still resonates over 150 years after *Henderson* was decided. The flexible, common sense doctrine will no doubt be utilised in various contexts into the future, with its fundamental rationale adaptable to a multitude of litigation. ■

"At Risk" of a Legal Aid Injustice?

Sorcha Cristin Whelan BL*

Introduction

Legal aid for impecunious persons is a fundamental right, acknowledged in all civilised societies, guaranteeing access to a fair trial in due course of law. Section 2 of the Criminal Justice (Legal Aid) Act, 1962[1] provides for the provision of that right in this jurisdiction. Under sub.s 1 the required criteria for the granting of legal aid are: a) that the means of the person are insufficient; and b) that the offence is a grave one *or* exceptional circumstances require, in the interests of justice, that legal aid be provided. The insufficient means requirement does not generally present any major problems. However issues have arisen with regard to the second strand of the section; in relation to deciding whether the offence is indeed a grave one, and what exceptional circumstances warrant the granting of legal aid. The Act of 1962, now nearly five decades old, was the first tentative step by the State to provide legal aid for indigent defendants where the interests of justice so required and its material provisions have remained unchanged since 1962. However, as will become apparent from the analysis of the judgments below, the Act of 1962 and it's somewhat restrictive language, is an imperfect expression of this constitutional right, and it certainly has not kept pace with the expanded jurisdiction of the District Court in the 50 years since its enactment.

Following the recent Supreme Court decision of *Joyce v Brady*, [2] which significantly clarified the law in relation to the application of legal aid, this article aims to provide an examination of the law as it now stands. The foundational Supreme Court decision of *The State (Healy) v Donoghue*,[3] and the recent decision of *Carmody v the Minister for Justice*,[4] which helped form the basis for this new decision, will both be examined. It shall be argued that *Joyce*[5] helps clarify the proper manner in which to interpret the Act of 1962 and the correct criteria to apply when deciding on the issue of legal aid. Ultimately it shall be argued that it advocated a move away from an overly rigid and strict interpretation of the Act of 1962 to following more closely the central principles as set down in *The State (Healy) v Donoghue*[6] decision.

* With thanks to Mr Cathal McGreal BL, Mr Eoin Lawlor BL and Ms Gemma O'Farrell BL for their helpful advice in the preparation of this article. Any inaccuracies or omissions are my own.

1 Hereafter "the Act of 1962"

2 *Joyce v DJ Brady & Anor* [2011] IESC 36, unreported, 29th July, 2011.

3 [1976] I.R. 325

4 [2010] 1 I.R. 635

5 *Joyce v DJ Brady & Anor* [2011] IESC 36, unreported, 29th July, 2011.

6 [1976] I.R. 325

The State (Healy) v. Donoghue

The *State (Healy) v Donoghue*[7] is the landmark Supreme Court decision on the constitutional principles underpinning the right of indigent persons to legal aid in criminal cases. Crucially the case affirmed that the right to legal aid in certain cases is indeed a constitutional right. The decision emphasised that the Act of 1962 merely vindicates the constitutional right to legal aid rather than creating that right. The primacy of the Constitutional principles underlying this area of the law was emphasised repeatedly in the judgment.[8] Unfortunately, as is wont to happen with well-known landmark decisions, some misapprehensions have developed over time of what was actually decided in the case (in particular in linking the gravity of the offence with the risk of imprisonment) and what was in fact actually determined.

The facts of the case are as follows: the Court was asked to grant orders of *certiorari* quashing certain convictions and sentences which had been pronounced against the applicant John Healy and his co-accused, Anthony Foran. For the purposes of this article it is sufficient to state that John Healy was a youth of 18 years, whose formal education had effectively ceased at 13 years and he was unable to pay for legal advice. He had been convicted in the District Court on two separate occasions. The first was a charge of breaking and entering; the second was a charge of larceny. In neither case was he represented by a lawyer. In respect of the breaking and entering charge he was not informed of his entitlement to legal aid and accordingly legal aid was not granted. On the larceny charge he was granted legal aid, however owing to a dispute at the time between solicitors and the Legal Aid Scheme and the Department of Justice, solicitors had withdrawn from the scheme in protest. After a number of adjournments, the District Court decided to proceed with sentencing in the absence of any legal representation and Mr Healy was convicted.

The Supreme Court quashed both convictions. It was held that the provisions of, *inter alia*, Article 38[9] of the Constitution, in requiring a criminal trial to be conducted in due course of law, import the requirements of fair procedures which provided an accused with an adequate opportunity to defend himself against the charge made. O'Higgins CJ noted;-

> "it is clear that the words 'due course of law' in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and the person accused will be afforded every opportunity

7 *ibid* and 112 I.L.T.R. 37

8 Interestingly the case did not concern the constitutionality of the Act, merely its application.

9 Articles 34 and 40 were also mentioned in the judgments.

> to defend himself. If this were not so the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights." [10]

The primary outcome of the judgment is that where an accused faces a serious charge and by reason of a lack of education requires the assistance of a lawyer in the defence of that charge then, if the accused is unable to pay for that assistance, the administration of justice requires (a) that the accused should be afforded the opportunity of obtaining legal assistance at the expense of the State, even if the accused has not applied for it and (b) that the trial of the accused should not proceed against his will without such assistance if an appropriate certificate under s. 2 of the Act of 1962 has been granted in relation to the trial of the accused.

It should be noted that there was, procedurally speaking, complete compliance with the Act of 1962; under the Act it is not specified that an accused must be informed of his or her right to legal aid. However, in a theme echoed in the judgments below, it is clear from the Supreme Court decision that the Act of 1962 was not definitive on the extent of the constitutional right. The Chief Justice found that the provisions of the Act did not match exactly what the Constitution requires.[11] Perhaps Henchy J put it most succinctly and clearly when he stated:

> "It is the duty of the District Court to give full effect to the provisions of the Act of 1962. But as this Act is designed to give practical implementation to a constitutional guarantee, the judicial function in respect of the Act would be incompletely exercised if a bare and perfunctory application of it left the constitutional guarantee unfulfilled."[12]

When considering whether the charge was a grave one under sub.s 1 (b), the risk of imprisonment is briefly referred to in the judgment, naturally given the fact that Healy had been sentenced to imprisonment on both charges. It is these comments[13] that led to an assumption by many that if the accused was liable to imprisonment, the offence was a grave one. However this one factor taken into account, *in conjunction* with a number of other factors or variables, appeared to become the primary deciding factor in many District Courts. This is ironic considering the flexibility required in the application of the relatively "restricted language"[14] of the Act of 1962, as acknowledged by O'Higgins CJ in his judgment:

> "The general view of what is fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed. The right to speak and give evidence and the right to be represented by a lawyer of one's choice were recognised gradually."[15]

Arguably, one of the most pertinent points made by the Chief Justice in his judgment, that what is fair and appropriate in criminal trials has always been the subject of change, seems to have been forgotten, and this one factor of a risk of imprisonment became a rigidly applied formula.

The *Healy*[16] decision determined that the granting of legal aid, and ensuring its operation, did not begin and end with a strictly literal interpretation of section 2, but with an assessment as to whether the constitutional protections afforded to an accused are indeed vindicated and respected.

Carmody v The Minister for Justice, Equality and Law Reform

The *Healy*[17] case provided a solid foundation for the Supreme Court decision of *Carmody*.[18] Carmody had been charged with 42 offences before the District Court which in general were alleged to be contrary to various regulations intended to protect cattle from certain bovine diseases and to prevent their spread. The plaintiff, having sought legal aid to include the assignment of a junior counsel *as well* as a solicitor was granted legal aid by the District Court in the form of a solicitor only, in accordance with s. 2 of the Act of 1962; section 2 only providing for counsel in murder cases. The Supreme Court found that the plaintiff had a constitutional right to apply for legal aid to include solicitor and counsel in criminal proceedings brought against him in the District Court and to have that application heard and determined on its merits, essentially on a case-by-case basis. It further held that the principles of constitutional justice required that a person charged with a serious criminal offence, including an offence before the District Court, who could not afford legal representation, should be provided with such representation by the State as was essential in the interests of justice. The nature and extent of that representation could be affected by a series of factors including the gravity of the charge, the complexity of the case, including any applicable law, and the existence of any exceptional circumstances.[19]

Again one sees the Court being obliged to go beyond the wording of the Act of 1962, which simply refers to counsel as well as a solicitor being granted in murder cases only, where the justice of the case so requires. Similar to the approach in *Healy*,[20] the Court read the Act of 1962 in the light of constitutional considerations; not adhering to a strictly literal interpretation, but one that allows for a certain measure of flexibility in light of changing requirements. Indeed it was acknowledged by the Court that in the subsequent decades following the passing of the act, there had been a wide range of potentially complex offences created by detailed modern legislation and regulatory measures for which the District

10 *ibid.*, at 349
11 *ibid.*, at 352.
12 *ibid.*, at 354.
13 *ibid.*, at pp 346, 352, and 359.
14 *Joyce v DJ Brady & Anor* [2011] IESC 36, unreported, 29th July, 2011, at 7.
15 [1976] I.R. 325 at 350.
16 State (Healy) v Donoghue, [1976] I.R. 325; 112 I.L.T.R. 37.
17 *ibid.*
18 *Carmody v The Minister for Justice, Equality and Law Reform*, [2010] 1 I.R. 635.
19 *ibid.*, at 657.
20 *State (Healy) v Donoghue*, [1976] I.R. 325; 112 I.L.T.R. 37.

Court now had jurisdiction. The Court further recognised that the act was certainly a creature of its time.[21] When considering what type of legal representation was appropriate the Court decided the case based on its individual merits, having regard to the gravity of the charge and the complexity of the case *etc*. The Court declined to make any hard and fast rule on the matter, which it is submitted, is appropriate and consistent with the Supreme Court decision in *Healy*.[22]

Joyce v. DJ Brady and Anor

This recent Supreme Court decision[23] further builds and follows on from the cases of *Healy*[24] and *Carmody*,[25] and perhaps most explicitly deals with the correct procedure to be taken when deciding on the issue of legal aid, providing valuable guidance in that regard. This case afforded a look at the common practices utilised in the District Courts when considering whether legal aid should be granted. The applicant, Joyce, was charged with the indictable offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. It is common case that the applicant's means were insufficient to allow him to retain legal aid. He also had no previous convictions, nor any experience of appearing before a court.

When he appeared before the District Court, a Garda Sergeant indicated that the DPP was consenting to summary disposal. At a later date, a copy of the CCTV footage of the offence was furnished to the defence together with a witness statement, following a request for disclosure, which was ordered. The Supreme Court found it significant that disclosure was ordered and held that this indicated that the case was being treated as one of the more serious or complex cases. Legal aid was not granted by the respondent as a vouched statement of means had not been produced.[26] At a subsequent court date, an application for legal aid was again forwarded. At this stage both the solicitor and counsel involved had appeared on a *pro bono* basis on several occasions.

The Court proceeded to undertake a very brief analysis of whether the accused was entitled to legal aid, a practice which undoubtedly any practitioner in the district courts has observed; the judge making an inquiry generally of a Garda Sergeant (described as the Court Presenter) whether the application was "at risk". For clarification this phrase means to ascertain whether if convicted the accused was at risk of a custodial sentence. In this case the Sergeant opined that the applicant was not "at risk". Consequently legal aid was refused. In his explanation for the refusal the respondent said that having considered the case of *State (Healy) v O'Donoghue*[27] he considered the offence a minor one, with no risk of a custodial sentence. Furthermore, he found that there were no exceptional circumstances which should lead him to granting legal aid.

The Supreme Court noted that the first named respondent considered that the gravity of the offence, as referred to under subs. 1(b) of the Act of 1962, was to be determined by considering whether a conviction in the District Court would result in a possible sentence of imprisonment. This was encapsulated in a short-hand reference to a garda whether the applicant was "at risk." The Court found this practice to be flawed:- " [I]n seeking to apply a restrictive test, reduced almost to a rule of thumb encapsulated in the two words 'at risk' the respondent was, in my view, in error."[28] The Court also expressed its surprise at the almost universal practice of a District Court inquiring of a member of an Garda Síochána whether in their opinion an accused is at risk; –

> "There is something more than odd in a court deciding the entitlement to legal aid by inviting a member of an Garda Síochána to consider if an accused is at risk that another court will or may impose a custodial sentence on the accused if convicted. This indirect and coded inquiry is adopted no doubt to avoid the Court becoming directly apprised of any previous convictions the accused may have, but in cases where the outcome of this exchange is a refusal of legal aid, the process may appear unsatisfactory."[29]

Further in the judgment the Court noted,

> "the refusal of legal aid following an inquiry by one District Justice of one member of the gardaí as to whether that member perceived the accused to be 'at risk' (particularly when the trial may proceed before another District Judge and be prosecuted by another garda) falls, in my view, short of what the Constitution requires."[30]

The Court acknowledged the desirability of dealing with issues expeditiously, and found that as long as the system is administered with flexibility and with a significant margin of error, there might be few causes for complaint in practice. But where, as in this case, the regime is applied with some rigidity and results in a refusal of legal aid, the flaws in the system become more apparent.[31] In fact the Court acknowledged that a flawed reading or practice had grown up from the misinterpretation of Healy:-

> "it is flawed logic to seek to conclude that because a person who was at risk of imprisonment must receive legal aid, it necessarily follows that absent a risk of imprisonment (the assessment of which is always somewhat speculative) that legal aid should not be provided. More importantly such a conclusion is in my view inconsistent with the reasoning of the Court in *State (Healy) v. Donoghue*."[32]

21 See *Carmody v The Minister for Justice, Equality and Law Reform*, [2010] 1 I.R. 635 at 658.
22 [1976] I.R. 325; 112 I.L.T.R. 37.
23 [2011] I.E.S.C. 36 unreported, 29th July, 2011.
24 *State (Healy) v Donoghue*, [1976] I.R. 325; 112 I.L.T.R. 37.
25 *Carmody v the Minister for Justice* [2010] 1 IR 635.
26 This appears to be the practice in a number of District Courts, however, it should be noted that there is no requirement, *per se*, for this under the Act of 1962.
27 [1976] I.R. 325; 112 I.L.T.R. 37.
28 [2011] I.E.S.C. 36 unreported, 29th July, 2011 at 14.
29 *ibid*., at 14.
30 *ibid*., at 13.
31 *ibid*., at 8.
32 *ibid*., at 9.

Clearly the Court felt that the emphasis placed by the District Court on the possibility of imprisonment is misplaced, and was a simple, if strict, view of s. 2 of the Act of 1962. The statute itself refers to the gravity of the charge, rather than an assessment of the potential sentence. The Supreme Court found that it was necessary to look further- e.g. at the impact on a young man of a first conviction in relation to job prospects[33] (a consideration that was particularly relevant given that this case related to a dishonesty offence). A similar consideration was noted in *Carmody*;[34] "[e]ven where no detention or imprisonment is imposed, conviction for an offence before the District Court may, because of its nature, result in serious reputational damage to citizens in the eyes of the community."[35] The gravity of the offence was not adequately determined by the sole question of whether the accused was at risk, "The constitutional right, from which an entitlement to legal aid for impecunious defendants was deduced is, primarily, the right to a trial in due course of law guaranteed by Article 38 of the Constitution. That is a right to a fair trial; it cannot be reduced to a right not to be deprived of liberty without legal aid." [36] In fact, the absence of previous convictions, which many District Court judges seem to attach significance when refusing to grant legal aid, should, according to the Supreme Court, have led to a different view: "the absence of previous convictions and the accused's lack of familiarity with a courtroom were factors which in my view should have led to the opposite conclusion."[37] Clearly, whether an offence is grave is not limited to a risk of imprisonment but involves the consideration of a number of factors.

Factors to be Considered

From the above decisions it is possible to distil certain factors which the various Supreme Courts deemed relevant when considering whether the charge was a grave one, or if any exceptional circumstances existed under subs 1(b) of the Act of 1962. Below are circumstances which were taken into account when considering these requirements. It should be noted that this is not an exhaustive list, nor was one intended to be created by the Courts, however the following appear to be valid and pertinent factors which can be taken into account:

The age of the accused; a lack of education or intelligence; any emotional disturbance that may exist; ill health;[38] the complexity of the charge; or if there are numerous charges; illiteracy; immaturity; whether they are currently in detention; inexperience of a courtroom environment-[39]their total unfamiliarity with court proceedings making the need for legal representation a more significant requirement. Similarly, whether an accused has no previous convictions will have a bearing on the matter, reversing the practice when an accused had "no previous;"[40] potential effect on employment prospects[41]; potential damage to reputation;[42] whether disclosure was ordered; whether statements were provided;[43] whether the charge carries a right of election;[44] the practicalities of what would be involved in the professional defence of the case;[45] whether a particular matter involves extensive law which has developed in recent years;[46] whether witnesses would be appropriate in the defence of the case.[47]

Method of Interpretation used

The Act of 1962, which was drafted nearly half a century ago, represented a substantially different legal environment in which the District Court now functions. An "updating construction"[48] approach is an appropriate means of interpreting this piece of legislation, and this author submits that it was employed by the above Courts when interpreting the relevant provision. It avoids the legislature having to constantly update legislation in the light of social and legal developments. Moreover this approach has acquired approval from the legislature in the Interpretation Act, 2005.[49]

Conclusion

The criminal jurisdiction of today's District Courts has undoubtedly grown and developed in the 50 years since the enactment of the Criminal Justice (Legal Aid) Act, 1962. Of course it is desirable that the vast volume of cases are dealt with as expeditiously as possible in order to ensure the smooth running of the District Court. Furthermore, it cannot be denied that legal aid represents a considerable burden on the public purse; a burden which would be even more onerous if legal aid was assigned to every case, no matter how trivial or insignificant.

However it must be borne in mind that the Act of 1962 deals with a constitutional right and is designed to give practical implementation to a constitutional guarantee. The judiciary, as an organ of the State, is entrusted to defend and vindicate from unjust attack the constitutional rights of the citizen.[50] Arguably the Act of 1962 needs to be updated and modified to reflect the changed nature and volume of the District Courts' criminal jurisdiction. Until this occurs, it appears that it will fall upon the judiciary to ensure the Act of 1962 is read in light of contemporary circumstances. ■

33 *ibid.*, at 8.
34 *Carmody v the Minister for Justice* [2010] 1 IR 635
35 *ibid.*, at 658.
36 *Joyce v DJ Brady & Anor* [2011] IESC 36, at 10.
37 *ibid.*, at 13.
38 *State (Healy) v Donoghue*, [1976] I.R. 325 at 339, *per* Gannon J, in the High Court decision, see also Henchy J's judgment, at 354.
39 *ibid.*, at 354 per Henchy J.
40 Something which is undesirable to be discussed in any event in advance of trial, see *Joyce v Brady* & *Anor.* [2011] IESC 36, at 14.
41 *ibid.*, at 8.
42 *Carmody v the Minister for Justice* [2010] 1 IR 635 at 658.
43 *Carmody v the Minister for Justice* [2010] 1 IR 635, at 664.
44 *Joyce v Brady* & *Anor.* [2011] IESC 36 at 7.
45 See *Joyce v Brady* & *Anor.* [2011] IESC 36 at 8 and 9; provides a detailed analysis of what would be involved in a professional defence.
46 *ibid.*
47 *ibid.*
48 See Dodd, *Statutory Interpretation in Ireland*, [5.96].
49 See Section 6 of the Interpretation Act, 2005.
50 Article 40.3.1°

Hidden crimes: Efforts to reduce domestic and sexual violence in Ireland

Eimear Fisher*

Domestic and sexual violence are major issues in Ireland. Research shows that 29% of women and 26% of men suffer domestic abuse when severe abuse and minor incidents are combined. 15% of women and 6% of men have experienced severely abusive behaviour from a partner yet less than 25% of these people have reported to An Garda Síochána.[1] 70% of the Irish public believe that domestic abuse against women is common but only 38% of us would be willing to help a neighbour subjected to such abuse.[2] The statistics for sexual violence are even more worrying, with 42% of women and 28% of men experiencing some form of sexual violence in their lifetime, with only 1% of men and 7.8% of women reporting such incidents to An Garda Síochána[3]. This situation has been consistent over recent years despite a wide range of initiatives to prevent and respond to these crimes.

Because of the high prevalence of domestic and sexual violence and the low level of disclosure and reporting, the Government established a dedicated office in June 2007. Cosc - the National Office for the Prevention of Domestic, Sexual and Gender-based violence, has been given responsibility for ensuring the delivery of a well co-ordinated "whole of government" response to domestic, sexual and gender-based violence.

Domestic and sexual violence and the interplay of organisations that provide frontline services and support in these fields are very complex and the preventive/responsive landscape is not very well aligned to deal with this difficult area. In addition, the general societal response to these issues is also falling short of what victims need. Cosc supports and works closely with service providers (both state and non-governmental organisations) who support victims and treat perpetrators.

Research has shown that the attitude of the community surrounding the victim, and that of wider society, is an important consideration for the victim in deciding to report domestic and sexual violence. It is for that reason that one of Cosc's first research projects was the first national survey of Irish attitudes to domestic abuse. The findings of this survey were launched on January 13th 2009. Simultaneously, we began a national public awareness campaign (Your Silence Feeds the Violence) aimed at encouraging the general public to become involved in supporting victims of domestic abuse.

The campaign itself was directly informed by the research on the public's attitudes. It showed that although the Irish public was very sensitive to the issue of domestic abuse and indicated high levels of awareness of its prevalence and its criminal nature, there was a marked reluctance to get involved in supporting the victim.

As a result, we designed the campaign to illustrate that domestic abuse is not someone else's business. The key message is "Your silence feeds the violence" and it is a challenge to the community to take positive action when we encounter such abuse. While domestic abuse may be behind closed doors, it is often known to us and we, as a society, by not supporting victims, are giving perpetrators tacit permission to continue to abuse.

We are not recommending that bystanders or neighbours directly confront perpetrators however. Such action may be dangerous for the bystander or neighbour but crucially also may be a trigger for further abuse against the victim. Due to the need for appropriate action and the need to raise awareness of the many services which work in this area, the campaign call to action is to visit the Cosc website (www.cosc.ie) and find out how to provide support to the victim by understanding what steps to take and where to find the support agencies that are the experts in this area.

It is not enough to drive awareness and change attitudes. The state services and NGOs must also deliver a system that prevents and responds effectively to domestic, sexual and gender-based abuse. This involves facilitating and coordinating existing services, across the system, so that they work in concert together, to give victims the service and help they need. We are drawing on the immense experience that NGO and State service providers possess, to help structure and provide services that support the victim better and expose the perpetrator.

This collaborative work led to the production of a national strategy on domestic, sexual and gender based violence. The strategy was approved by Government in February 2010 and sets out Government policy in relation to domestic, sexual and gender-based violence as well as an action plan of commitments to be achieved by state bodies in collaboration with NGOs in the period 2010-2014. The strategy covers all sectors working in this area – justice, health and social services, housing, education and community support.

The justice system plays a unique role in the response to domestic and sexual violence. It is often the intervention of last resort. As mentioned above, the National Crime

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1 Domestic Abuse of Women and Men in Ireland: Watson & Parsons, 2005

2 Attitudes to Domestic Abuse in Ireland: Horgan, Muhlau, McCormack & Roder, 2008

3 Sexual Abuse and Violence in Ireland (SAVI): McGee et al, 2002

Council survey found that less than 25% of people who have experienced severely abusive behaviour from a partner have reported it to An Garda Síochána[4]. According to Yearnshire, on average a woman is assaulted 35 times before reporting it to the police.[5]. Even where victims make the courageous decision to report, there are many complex reasons why they may withdraw their application in a civil/family law court or be unwilling to act as a witness in a criminal court. Having taken the step into the court system, victims are often apprehensive to complete the process because of their emotional attachment to their abusers, fear of retaliation, mistrust or lack of information about the criminal justice system, or fear of the demands of court appearances.[6] Some victims have told Cosc that they do not want to end the relationship but they want the violence to stop. This can be for a variety of reasons including shame, economic dependency, and family influence.

Often the courts are accessed at key points in the victim's disengagement from the perpetrator such as when the victim is seeking protective orders. The initiation of legal action can sometimes spur the perpetrator onto more extreme abuse. It is critical therefore, that all those involved in the process have a good understanding of the complex dynamics of this abuse. In addition, support and court accompaniment services are often a key source of hope for the victim and their involvement is important to support the legal process and the victim's progression onto a non-abusive life.

The court experience is central to the recovery of victims. Survivors have reported that the experience has very real potential to cause further significant damage and distress to the victim, but when effective, the court experience can greatly assist in the victim's recovery. In the consultation submissions received on the national strategy, Cosc received a number of suggestions relevant to the courts. Respondents repeatedly expressed concern at pre-court decisions that delay the progress of a prosecution, pre-/during court experiences which affect attrition rates, and what they perceive as inconsistent sentencing in cases of domestic and sexual violence.

A broad range of actions relevant to the courts were suggested for inclusion in the national strategy, but the common thread was the value of the provision of information to all those involved in the court process on the dynamics of domestic and sexual violence. This information would cover matters such as how perpetrators 'groom' their victim's friends, family and support services. This is particularly important in the consideration of risk assessment of both perpetrators and the safety of victims and their children. A number of submissions also highlighted the issue of access to and custody of children in cases where domestic violence has been a feature, and the potential for offenders to use access to children as a means of control and ongoing violence.

In this regard, it is important to recognise that domestic violence forms a pattern of abuse combining physical and psychological pressures that can turn even seemingly innocent activities (such as sending flowers to the victim or passing messages via children) into further opportunities for the perpetrator to intimidate or pressure their client.

There are some myths surrounding domestic abuse such as 'it only happens to low-income couples' or the pernicious "s/he could/should have just left at any stage". Equally pernicious in cases of sexual violence is the tendency to confuse or equate the expectation that a victim should have avoided risk with culpability for the actual sexual assault. This contributes to the belief that the victim is responsible, in whole or in part, for the assault on the basis that they failed to avoid the risk. Only through a clear understanding of the prevalence of the issue and the measures that a perpetrator uses to exercise control over the victim can the true nature of the victim's plight be comprehended. In addition, an understanding of the behaviour patterns of abuse supports the detection of tell-tale indicators and the recognition of potential strategies that may be raised to avoid criminal penalties or court mandated domestic violence intervention treatment.

The 'timeliness' of the court process was emphasised as a critical determinant of a complainant's willingness to assist a prosecution. It was pointed out that many victims, particularly those dependent on abusive relatives/carers, are trapped in extremely vulnerable situations while awaiting court procedures. Submissions emphasised the importance of speedy procedures to deal contemporaneously with issues of access, maintenance, loss of family home and disposal of household chattels and orders under the Child Care Act 1991. Other suggestions included the establishment of specialised Domestic Violence Courts; the use of family conferencing methods (as already applied in work with young people) be applied to complex cases of violence against older adults; and that court scheduling has regard to the particular nature of these cases including the ongoing pattern of abusive behaviour and the proximate relationship of the victim to the perpetrator.

The material gathered in the submissions such as those set out above, were taken into account in the development of the strategy. An effective national strategy which makes victims aware of the services available to them, exposes perpetrators to censure and intervention and encourages Irish society to play its part in preventing this criminal abuse, will undoubtedly increase the number of such cases before the courts. An increase in reporting will be an indicator of a successful strategy but with strong complementary preventative actions, it should also lead to a reduction of abuse in the longer term.

We considered it important that the members of the Bar are aware of the actions taking place to improve the system of prevention and response for these horrific and usually hidden crimes as well as tragic personal situations. If you are interested in this subject please visit *www.cosc.ie* for more information on the strategy and on Cosc's broader work. ■

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Re Birchwell Developments Limited

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K(P) v Minister for Justice

Asylum

Credibility - Minority social group – Unreliable evidence – Contradiction in evidence - Lack of Convention reason for persecution – Lack identification documentation – Effect of absence of country of origin information on credibility assessment – Subsidiary protection refused – Deportation order made – No distinct case made on behalf of applicant children - Whether position of applicant children properly considered – Whether medical evidence of applicant parents properly considered – Role of medical evidence in refusal of subsidiary protection and in making of deportation order – Immigration Act 1999 (No 22), s 3 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 – European Convention on Human Rights, articles 3 & 8 - Leave refused (2008/977JR – Cooke J - 02/07/2010) [2010] IEHC 256
D(G) v Minister for Justice, Equality and Law Reform

Asylum

Dublin II Regulation – Order of transfer - Application for interim injunction – Applicant out of UK for more than three months – Whether obligation to take back under Regulation ceased – Whether entry visa constituted a valid residence document for purpose of exception to cessation of obligation – Definition of "residence document" – Failure to inform UK authorities of claim by applicant to have been outside that state for more than three months – Whether failure had material bearing on transfer order – Lack of candour in application – No fair issue to be tried – Council Regulation 343/2003/EC, art 2, 16 and 20 – Leave refused (2010/911JR – Cooke J - 02/07/2010) [2010] IEHC 258
W(A) v Minister for Justice

Asylum

Ethnic and political persecution – Credibility – Misnaming country of origin – Material error of fact – Substantial grounds – Whether mistake of fact was so material to substantive analysis and consideration as to vitiate its validity – Whether actual misunderstanding or misconception – Whether decision contrary to natural justice and fair procedures – Whether error on face of record – *B-M (A) v Minister for Justice* (Unrep, O'Donovan, 23/7/2001); *State (Cunningham) v O'Floinn* [1960] IR 198 and *Simple Imports v Revenue Commissioners* [2000] 1 IR 243 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Refugee Act 1996 (No 17), s 2 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5(1)(a) – Leave refused (2008/1117JR – Cooke J – 15/10/2010) [2010] IEHC 362
L (VCB) v Refugee Appeals Tribunal

Asylum

Internal relocation – Religious persecution – Credibility – Delayed application – Whether internal relocation would provide protection – Whether asylum application made as soon as practicable after arrival in State – Whether reasonable explanation for delay – Refugee Act 1996 (No 17), ss 11, 13 and 17 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – UNHCR Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" – Application dismissed (2008/293JR – Cooke J – 14/10/2010) [2010] IEHC 361
Y (ZD) v Minister for Justice, Equality and Law Reform

Asylum

Mother and child - Fear of persecution based on previous trafficking for prostitution – Absence of finding of lack of credibility in relation to trafficking claim – Country of origin information – Availability of state protection – Alleged failure to make allowance for age of applicant in accordance with guidelines – Acceptance of account given – Status of guidelines – Burden of establishing illegality on applicant – Failure to identify guidelines breached – *VZ v Minister for Justice* [2002] 2 IR 135 and *R v Lancashire County Council* [1986] 2 All ER 941 considered – Application refused (2007/1731JR – Cooke J – 30/7/2010) [2010] IEHC 317
U(S) v Minister for Justice, Equality and Law Reform

Asylum

Negative recommendation – Rejection of appeal – Refusal of refugee status – Refusal of subsidiary protection – Whether procuring of inclusion of minor applicant void and in breach of fair procedures – Whether jurisdiction to make decisions

in respect of minor applicant – Whether good and sufficient reason for extension of time – Delay – Discretion – Explanation – Relevance of merits or strength of case – Absence of full explanation – Acquiescence – Inclusion of minor child in notice of appeal – Absence of challenge to inclusion of minor child's case – Seeking of leave to remain on behalf of minor applicant – Alleged failure to understand *ex debito justitiae* principle – Whether principle relevant – Absence of distinct claim to fear of persecution on behalf of child - *D v Minister for Justice, Equality and Law Reform* (Unrep, SC, 31/1/2003); *GK* v *Minister for Justice* [2002] 2 IR 418 and *De Roiste v Minister for Defence* [2001] 1 IR 190 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Extension of time and relief refused (2007/925JR – Cooke J – 27/7/2010) [2010] IEHC 306

I(M) v Refugee Applications Commissioner

Asylum

Report of Commissioner – Discretion to review report – Alleged failure to take into account relevant considerations – Allegations of persecution – Claim that past persecution contributed to well founded fear of persecution – Negative recommendations of authorised officers – Negative credibility findings – Express exclusion of past persecution from consideration – Whether refusal to consider past events mistaken – Whether mistake warranted exercise of discretion to quash reports – Whether mistake could be cured on appeal – Request for asylum file from another Member State – Entitlement of responsible Member State to seek information from other Member States – *Stefan v Minister for Justice* [2001] 4 IR 203 considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 – *Certiorari* granted (2010/180JR – Cooke J – 23/7/2010) [2010] IEHC 304

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

Deportation

Constitutional rights of three citizen children – Identification of substantial reason for deportation – Interest of State – Integrity of asylum and immigration procedures – Personal circumstances and history of applicants – Weight of rights against interests of State – Unfounded claim for asylum of father – Failure to disclose marriage breakdown – Request to consider entitlement to residence as father of Irish born children – Substantial reasons for belief that immigration procedures being abused – Right of Irish citizen child to care and support of parents – Age of children – Medical condition of children – Whether failure to give due weight to age, dependence and medical conditions – Whether failure to give due weight to contribution father could make practically and financially to children – Whether undue weight given to negative considerations - *Dimbo v Minister for Justice, Equality and Law Reform* [2008] IESC 26, (Unrep, SC, 1/5/2008); *Oguekwe* v *Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 IR 795 and *Haghighi v Netherlands* (2009) 49 EHRR SE8 considered – Leave granted (2010/659JR – Cooke J – 23/7/2010) [2010] IEHC 305

T(EZ) v Minister for Justice, Equality and Law Reform

Deportation

Injunction – Interlocutory injunction - Application to restrain deportation – – Residence - Family rights – Irish born child – Whether lawful to remove mother of dependent Irish born child pursuant to deportation order - Whether deportation of applicant would breach right of family members – Conduct of applicant – Whether arguable case for grant of leave to seek judicial review- Whether substantial grounds established - Whether applicant entitled to remain in State pending determination of proceedings – Whether breach of Convention rights – Independent review mechanism – Whether applicant entitled to a full and independent assessment to be made of all facts and circumstances of the case - Whether fair issue to be tried – Whether damages adequate – Balance of convenience – *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795 followed; *AO & DL v Minister for Justice* [2001] 1 IR 1 considered – Immigration Act 1999 (No 22), s 3 - Leave to seek judicial review & interlocutory injunction granted (2010/569JR – Cooke J – 14/7/2010) [2010] IEHC 296

B(J) v Minister for Justice, Equality and Law Reform

Deportation

Interlocutory injunction – Father of Irish citizen children – Leave to remain application – Admission regarding lies in asylum application – Claim of strong connection with State based on status as father of citizen children – Request to have regard to constitutional and convention rights of children – Examination of file of father – Consideration of school standards and education in Nigeria – Analysis of proposed interference with family life of applicant – Interests of State – Legitimate aim of deportation – Proportionality of deportation – Information on education in Nigeria – Extension of time for judicial review – Explanation for delay – Lawyer delay – Justice of case – Impact of deportation on rights of children – Power to consider documents not before Minister – Obligation to have regard to representations – Whether substantial grounds for review – Whether failure to consider impact of deportation on private life of children – Failure to furnish country of origin information in support of assertions regarding education – Adequacy of remedy of judicial review – Available remedies – Absence of test of anxious scrutiny – Necessity for candour – *Klass v Germany* (1979-80) 2 EHRR 214; *Abdulaziz v United Kingdom* (1985) 7 EHRR 471; *Vilvarajah v United Kingdom* (1992) 14 EHRR 248; *N v Finland* (2006) 43 EHRR 12; *CG v Bulgaria* (2008) 47 EHRR 51; *Abdolkhani v Turkey* (No 30471/08); *McD v L* [2009] IESC 81 (Unrep,. SC, 10/12/2009); *Muminov v Russia* (No 42502/06); *Izhevbekhai v Minister for Justice, Equality and Law Reform* [2008] IEHC 23 (Unrep, Feeney J, 30/1/2008); *Yang v Minister for Justice, Equality and Law Reform* [2009] IEHC 96 (Unrep, Charleton J, 13/2/2009); *Ugbo v Minister for Justice, Equality and Law Reform* [2010] IEHC 80 (Unrep, Hanna J, 5/3/2010; *Adebayo v Minister for Justice, Equality and Law Reform* [2004] IEHC 359 (Unrep, Peart J, 27/10/2004) *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 595 (Unrep, Clark J, 2/12/2009); *Ofobuike v Minister for Justice, Equality and Law Reform* [2010] IEHC 89 (Unrep, Cooke J, 13/1/2010); *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 2 ILRM 481; *Soering v United Kingdom* (1989) 11 EHRR 438; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; *Bensaid v United Kingdom* (2001) 33 EHRR 10; *Swedish Engine Drivers Union v Sweden* (1979-80) 1 EHRR 617; *Chahal v United Kingdom* (1997) 23 EHRR 413 and *Bakare v Minister for Justice, Equality and Law Reform* [2010] IEHC 296 (Unrep, Cooke J, 14/7/10) considered – Leave refused (2010/75JR – Clark J – 30/7/2010) [2010] IEHC 320

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

Deportation

Leave to appeal to Supreme Court – Refusal of leave to seek judicial review of deportation order – Whether decision involved point of law of exceptional public importance – Whether failure to consider rights of Irish born children – Impact of transfer on Irish born children having regard to hazards and disadvantages in parent's country of origin – Whether Irish born children of adaptable age – Whether interference with family life - *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795 followed; *R(I) v Minister for Justice* [2009] IEHC 510 (Unrep, Cooke J, 26/11/2009); *Beldjoudi v France* [1992] EHRR 801 and *Boultif v Switzerland* [2001] 33 EHRR 1179 considered -Immigration Act 1999 (No 22), s 3 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - European Convention on Human Rights, articles 3 and 8 - Leave to appeal refused (2010/238JR – Cooke J – 14/7/2010) [2010] IEHC 282

N(UT) v Minister for Justice, Equality and Law Reform

Deportation

Subsidiary protection – Ministerial discretion – Deportation orders prior to 20th October 2006 - New circumstances or facts shown to exist – Whether such discretion contained within Council Directive transposed by regulations into national law – Whether appellant has right to have subsidiary protection application heard – Interpretation of regulations - *NH v Minister for Justice, Equality and Law Reform* [2007] IEHC 277, [2008] 4 IR 452 overruled - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 3 and 4 - Council Directive 2004/83/EC – Applicant's appeal dismissed (2009/64 & 2008/393 – SC – 9/7/2010) [2010] IESC 44
Izevbekhai v Minister for Justice, Equality and Law Reform

Subsidiary protection

Mental illness – Involuntary detention under Mental Health Act 2001 - Availability of medical treatment in country of origin – No substantial grounds of real and substantial risk of being subject to conduct contrary to Convention – Whether less favourable medical treatment sufficient to engage Convention rights – Whether failure by respondent to consider impact of medical condition on capacity to avail of state protection relevant – Whether material before respondent capable of grounding claim decision unreasonable – Balance humanitarian considerations and integrity of asylum process – Right to family life – Relationship not amounting to family life – Whether application really assertion of choice of State within which to reside rather than interference with rights – Scope of justified interference with right – Whether medical evidence affected level of dependence on mother – *GK v Minister for Justice* [2002] 2 IR 418, *The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *S(BI) v Minister for Justice*[2007] IEHC 398 (Unrep, Dunne J, 30/11/2007) and *Agbonlahor v Minister for Justice* [2007] IEHC 166 [2007] 4 IR 309 applied – *R (Mahmood) v Home Secretary* [2000] EWCA Civ 315 [2001] 1 WLR 840 and *R (Razgar) v Home Secretary* [2004] UKHL 27 [2004] 2 AC 368 followed – *Bensaid v United Kingdom* (2001) 33 EHRR 205, *HLR v France* (1998) 26 EHRR 2, *N v Finland* (2006) 43 EHRR 12 and *Kouaype v Minister for Justice, Equality and Law Reform* [2005] IEHC 380 (Unrep, Clark J, 9/11/2005) considered – *DVTS v Minister for Justice* [2008] 3 IR 476 and *D v United Kingdom* (App No 30240/96) (Unrep, 02/05/1997) distinguished – Refugee Act 1996 (as amended) (No 17), s 5 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) - Mental Health Act 2001 (No 25) - European Convention on Human Rights Act 2003 (no 20), sch I art 3 - Criminal Justice (United Nations Convention against Torture) Act 2000 (No 11), s 4 - Immigration Act 1999 (No 22), s 3 – Leave refused (2008/1375JR – Herbert J – 01/07/2010) [2010] IEHC 268
A(O) v Minister for Justice

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Interlocutory injunction

Immigration - Subsidiary protection - Deportation order - Judicial review - Whether fair issue to be tried - Whether damages adequate remedy - Whether balance of convenience lay between grant or refusal of injunction - Whether compelling reason for immediate deportation - *Cosma v Minister for Justice, Equality and Law Reform* [2006] IESC 44 (Unrep, SC, 10/7/2006) distinguished - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) - Rules of the Superior Courts 1986 (SI 15/1986), O 84 - Relief granted (2010/171JR - Cooke J - 15/4/2010) [2010] IEHC 110
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INTELLECTUAL PROPERTY

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Delay

Certiorari – Limitation period – National school for children with intellectual disabilities – Employee – Allegation of sexual abuse by parents of child – Allegations by multiple children – Investigation by health board – Police investigation – Decision not to prosecute – Resumption of school disciplinary inquiry – Adverse findings in health board reports – Threat to issue proceedings if inquiry not concluded by school – Leave granted to challenge continued suspension – Offer to hold inquiry – Rejection of offer – Suspension on full pay for thirteen years – Whether applicant guilty of delay in bringing proceedings – No effort to obtain assessments – Whether applicant in 'constructive' possession of assessments – Duty to move promptly – Objective test – *O'Flynn v Mid-Western Health Board* [1991] 2 IR 223 and *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301 applied - *De Róiste v Minister for Defence* [2001] 1 IR 190 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21 – Extension of time refused (2009/508JR – Hedigan J – 06/07/2010) [2010] IEHC 278
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LANDLORD AND TENANT

Commercial lease

Validity of lease – Block owned by shareholders and directors of defendant – Occupation by defendant – Ownership changes – Due diligence - Proposal to treat lease as void and surrender property based on absence of resolution approving lease – Whether lease non-cash asset of requisite value - Whether defendant in breach of s. 29(1) when lease entered – Whether lease voidable – Whether defendant estopped from avoiding lease – Onus on defendant to establish section applied – Value of non-cash asset – Capital value of lease to lessee – Assignment value of lease – Authorisation by shareholders – Duomatic principle – Honest and *intra vires* informal agreement of all shareholders not requiring formal resolution – Purpose of section – Intention of Oireachtas – Protection of shareholders – Absence of time limit on right to avoid arrangement – Multiple changes of ownership – Compliance with obligations under lease – Rent reviews – Existence of preferential shareholder with right to attend meeting without voting – *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638(Ch) [2006] FSR 17; *Buchanan Ltd v McVey* [1954] IR 89; *Re Greendale Developments (In Liquidation) No 2)* [1998] 1 IR 8; *Re PMPA Garages Ltd* [1992] IR 315; *Re Duomatic Limited* [1969] 2 Ch 365; *Re Express Engineering Works Ltd* [1920] 1 Ch 466*; Parker and Cooper Ltd v Reading* [1926] Ch 975; *Re George Newman & Company Ltd* [1895] 1 Ch 674; *NBH Limited v Hoare* [2996] EWHC 73 (Ch) and *Demite Ltd v Protec* [1988] BCC 638 considered – Companies Act 1990 (No 33), s 29 – Declaration that lease valid and binding (2009/3946P – Finlay Geoghegan J – 22/7/2010) [2010] IEHC 300
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Notice to quit

Ejectment summons – District Court hearing – Refusal of adjournment to await outcome of related case – Time – Service of notice to quit – Act of eviction – Refusal of adjournment – Whether applicant guilty of delay – Prejudice – Whether wrong ongoing – Whether usual time limits applied – Acquiescence – Whether participation in District Court proceedings amounted to acquiescence – Whether statutory provision compatible with European Convention on Human Rights – *Dublin City Council v Fennell* [2005] 1 IR 604 and *Pullen v Dublin City Council* [2008] IEHC 379 (Unrep, Irvine J, 12/12/2008) applied – *Carmody v Minister for Justice* [2009] IESC 71 (Unrep, SC, 23/10/2009), *De Róiste v Minister for Defence* [2001] 1 IR 190, *BTF v Director of Public Prosecutions* [2005] IESC 37 [2005] 2 IR 559, *Q(M) v Judges of the Northern Circuit* (Unrep, McKechnie J, 14/11/2003), *McCann v United Kingdom* (2008) 47 EHRR 40, *Cosic v Croatia* (App No 28261/06) (Unrep, 15/01/2009) considered; *Donegan v Dublin City Council* [2008] IEHC 288 (Unrep, Laffoy, 08/05/2008) and *Connors v United Kingdom* (2005) 40 EHRR 9 not followed – Housing Act 1966 (No 21), s 62 – Housing Act 1970 (No 18), s 13 – European Convention on Human Rights – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21 – Application refused (2009/823JR – Hedigan J – 08/07/2010) [2010] IEHC 270
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Roads

Health and safety – Investigation - Administrative body – Jurisdiction – Order of prohibition from further investigations – Newly tarred roadway – Fatal accident – Place of work – Fair procedures – Retrospective effect – Statutory interpretation – Whether accident *locus* place of work – Whether investigation *ultra vires* – Whether investigation into completed road works permitted – Whether road works still in progress – Whether respondent's jurisdiction extended to protection of road users – Whether investigation statute-barred – Whether investigation oppressive – *Cork County Council v Health and Safety Authority* [2008] IEHC 304 (Unrep, Hediagn J, 7/10/2008) followed – Health and Safety Act 1989 (No 7) – Safety, Health and Welfare at Work Act 2005 (No 10), ss 32, 34, 62, 64, 70, 72, 77 and 82 – Roads Act 1993 (No 14) – Interpretation Act 2005 (No 23) – Council Directive 89/391/EEC – Council Directive 92/383/EEC – Order granted (2007/263JR – Kearns P – 9/7/2010) [2010] IEHC 286 *Donegal County Council v Health and Safety Authority*

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DIR/2009-28
SI 148/2011

ACTS OF THE OIREACHTAS AS AT 3RD OCTOBER 2011 (30TH DÁIL & 23RD SEANAD)

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

1/2011 Bretton Woods Agreements (Amendment) Act 2011
Signed 21/01/2011

2/2011 Multi-Unit Developments Act 2011
Signed 24/01/2011

3/2011 Communications (Retention of Data) Act 2011
Signed 26/01/2011

4/2011 Student Support Act 2011
Signed 02/02/2011

5/2011 Criminal Justice (Public Order) Act 2011
Signed 02/02/2011

6/2011 Finance Act 2011
Signed 06/02/2011

7/2011 Road Traffic Act 2011
Signed 27/04/2011

8/2011 Finance (No. 2) Act 2011
Signed 22/06/2011

9/2011 Social Welfare and Pensions Act 2011
Signed 29/06/2011

10/2011 Ministers and Secretaries (Amendment) Act 2011
Signed 04/07/2011

11/2011 Foreshore (Amendment) Act 2011
Signed 07/07/2011

12/2011 Medical Practitioners (Amendment) Act 2011
Signed 08/07/2011

13/2011 Biological Weapons Act 2011
Signed 10/07/2011

14/2011 Electoral (Amendment) Act 2011
Signed 25/07/2011

15/2011 Public Health (Tobacco) (Amendment) Act 2011
Signed 25/07/2011

16/2011 Residential Institutions Redress (Amendment) Act 2011
Signed 25/07/2011

17/2011 Defence (Amendment) Act 2011
Signed 26/07/2011

18/2011 Finance (No. 3) Act 2011
Signed 27/07/2011

19/2011 Child Care (Amendment) Act 2011
Signed 31/07/2011

20/2011 Environment (Miscellaneous Provisions) Act 2011
Signed 02/08/2011

21/2011 Communications Regulation (Postal Services) Act 2011
Signed 02/08/2011

22/2011 Criminal Justice Act 2011
Signed 02/08/2011

23/2011 Civil law (Miscellaneous Provisions) Act 2001
Signed 02/08/2011

24/2011 Criminal Justice (Community Service (Amendment) Act 2011
Signed 02/08/2011

25/2011 European Financial Stability Facility and Euro Area Loan Facility (Amendment) Act 2011
Signed 23/09/2011 [not yet available on Oireachtas website]

26/2011 Insurance (Amendment) Act 2011
Signed 30/09/2011[not yet available on Oireachtas website]

BILLS OF THE OIREACHTAS AS AT 12TH OCTOBER 2011 (31ST DÁIL & 24TH SEANAD)

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

[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.

Central Bank and Credit Institutions (Resolution) Bill 2011
Bill 11/2011
2nd Stage – Seanad *(Initiated in Seanad)*

Central Bank and Credit Institutions (Resolution) (No. 2) Bill 2011
Bill 20/2011
Committee Stage - Dáil

Central Bank (Supervision and Enforcement) Bill 2011
Bill 43/2011
Order for 2nd Stage – Dáil

Competition (Amendment) Bill 2011
Bill 55/2011
Order for 2nd Stage - Dáil

Construction Contracts Bill 2010
Bill 21/2010
2nd Stage – Dáil **[pmb]** *Senator Fergal Quinn (Initiated in Seanad)*

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

Criminal Justice (Female Genital Mutilation) Bill 2011
Bill 7/2011
Committee Stage – Dáil *(Initiated in Seanad)*

Criminal Law (Defence and Dwellings) Bill 2010
Bill 42/2010
Committee Stage – Dáil

Dormant Accounts (Amendment) Bill 2011
Bill 46/2011
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Electoral (Amendment) (Political Donations) Bill 2011
Bill 13/2011
Committee Stage – Dáil **[pmb]** *Deputies Dara Calleary, Niall Collins, Barry Cowen, Timmy Dooley, Sean Fleming, Billy Kelleher, Seamus Kirk, Michael P. Kitt, Brian Lenihan, Micheál Martin, Charlie McConalogue, Michael McGrath, John McGuinness, Michael Moynihan, Willie O'Dea, Éamon Ó Cuív, Seán Ó Fearghaíl, Brendan Smith, Robert Troy and John Browne.*

Energy (Miscellaneous Provisions) Bill 2011
Bill 54/2011
Order for 2nd Stage - Dáil

European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Bill 2011
Bill 45/2011
Order for 2nd Stage – Dáil

Family Home Bill 2011
Bill 38/2011
Order for 2nd Stage – Seanad **[pmb]** *Senators Thomas Byrne and, Marc MacSharry*

Health (Provision of General Practitioner Services) Bill 2011
Bill 57/2011
Order for 2nd Stage – Dáil

Human Rights Commission (Amendment) Bill 2011
Bill 52/2011
1st Stage – Dáil **[pmb]**

Immigration, Residence and Protection Bill 2010
Bill 38/2010
Committee Stage - Dáil

Industrial Relations (Amendment) Bill 2011
Bill 39/2011
2nd Stage – Dáil **[pmb]** Deputy Willie O'Dea

Jurisdiction of Courts and Enforcement of Judgments (Amendment) Bill 2011
Bill 10/2011
Order for 2nd Stage – Seanad

Legal Services Regulation Bill 2011
Bill 58/2011
Order for 2nd Stage - Dáil

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

Mobile Phone Radiation Warning Bill 2011
Bill 24/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Mark Daly (Initiated in Seanad)*

NAMA Transparency Bill 2011
Bill
2nd Stage - Seanad

National Tourism Development Authority (Amendment) Bill 2011
Bill 37/2011
2nd Stage – Dáil

Nurses and Midwives Bill 2010
Bill 16/2010
Report Stage – Dáil

Ombudsman (Amendment) Bill 2008
Bill 40/2008
2nd Stage – Seanad *(Passed by Dáil Éireann)*

Patents (Amendment) Bill 2011
Bill 17/2011
Order for 2nd Stage - Dáil

Privacy Bill 2006
Bill 44/2006
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Property Services (Regulation) Bill 2009
Bill 28/2009
Committee Stage – Dáil **[pmb]** *Senator Donie Cassidy (Initiated in Seanad)*

Public Service Pensions (Single Scheme) and Remuneration Bill 2011
Bill 56/2011
Order for 2nd Stage – Dáil

Qualifications and Quality Assurance (Education and Training) Bill 2011
Bill 41/2011
Committee Stage – Seanad *(Initiated in Seanad)*

Reduction in Pay and Allowances of Government and Oireachtas Members Bill 2011
Bill 27/2011
1st Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Registration of Wills Bill 2011
Bill 22/2011
Committee Stage – Seanad **[pmb]** *Senator Terry Leyden (Initiated in Seanad)*

Regulation of Debt Management Advisors Bill 2011
Bill 53/2011
1st Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Reporting of Lobbying in Criminal Legal Cases Bill 2011
Bill 50/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator John Crown*

Road Traffic (No. 2) Bill 2011
Bill 51/2011
2nd Stage - Dáil *(Initiated in Seanad)*

Spent Convictions Bill 2011
Bill 15/2011
2nd Stage – Dáil **[pmb]** *Deputy Dara Calleary*

Statistics (Heritage Amendment) Bill 2011
Bill 30/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Labhrás Ó Murchú*

Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiries) Bill Bill 47/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Tribunals of Inquiry Bill 2005
Bill 33/2005
Report Stage – Dáil

Twenty-Ninth Amendment of the Constitution (Judges' Remuneration) Bill 2011
Bill 44/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Veterinary Practice (Amendment) Bill 2011
Bill 42/2011
Order for 2nd Stage – Dáil

Welfare of Greyhounds Bill 2011
Bill 21/2011
Report Stage - Dáil

Whistleblowers Protection Bill 2011
Bill 26/2011
Order for 2nd Stage – Dáil **[pmb]** *Deputies Joan Collins, Stephen Donnelly, Luke 'Ming' Flanagan, Tom Fleming, John Halligan, Finian McGrath, Mattie McGrath, Catherine Murphy, Maureen O'Sullivan, Thomas Pringle, Shane Ross, Mick Wallace*

ABBREVIATIONS

A & ADR R = Arbitration & ADR Review
BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
ELR = Employment Law Review
ELRI = Employment Law Review - Ireland
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
IIPLQ = Irish Intellectual Property Law Quarterly
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.

Marriage and the Family: A Changing Institution? *Part I*

Peter Charleton and Sinéad Kelly*

This article is in two parts. It concerns legislative and judicial attitudes to marriage and the family. Although firmly grounded in the Constitution and in legislative provision, the family is an institution that provokes emotional debate. In some instances, judicial approaches may be argued to be capable of being discerned in the rulings on individual cases. Part I therefor examines the literature on the debate as to the value of marriage and the family and considers how liberal or strict approaches can yield differing arguments based on the same apparent statistics. The Constitution, as enacted in 1937, is an excellent starting point to this analysis as it may be seen as having been grounded in the belief that the family required high levels of protection, though judicial responses sometimes sought, with varying degrees of certainty, to mitigate the impact of that approach to divorce, inheritance and nullity. The fortress of legal protection so provided was challenged by multiple factors over the last twenty years; and this is the object of the article as continued in the next issue.

Introduction

As well as being a legal institution, marriage is a concept that inspires fierce ideological debate. Any search through empirical surveys on the stability of the married relationship, on the outcome for children of married/single/fractured relationships, and on the benefits to society in supporting this ancient institution may seem at first sight to yield clear information. At second sight, those in favour of marriage as a crucial foundation for a secure society and those of a more liberal frame of mind will interpret apparent findings to suit their own point of view. No matter what the nature of any specific litigation, advocates will always urge judges on some level to apply the law in a way that suits the apparent merits of the cause of one of the parties. In judicial review, for instance, where, according to the legal concepts shared by Ireland and Britain, only the process and not the facts underlying the process is under scrutiny, each side will set the perceived justice of his/her cause out in full, despite it being an irrelevance. When it comes to family law and the law that touches on family relationships, such as immigration or asylum or even criminal sentencing, individual approaches to the hallowed concept of marriage present the prospect that judges may be influenced by their attitude or background. It can become like the merits argument in judicial review: inadmissible but almost impossible to ignore. In litigation which engenders emotion, in other words, judges can be prone to prosopography as to the outcome.[1] Awareness of the problem diminishes any such danger. So let us start with the debate about the merits for society of stable marriage.

The Marriage Debate

Extensive empirical literature originating from the United States of America purports to show that children born to married parents generally achieve better education results and a more balanced social and emotional development than children born to couples who merely cohabit.[2] Families based on marriage, it is argued, are far more likely to provide a stable environment for children than cohabiting relationships: marriage involves a moral and legal commitment; cohabitation is said to be just that and thus is logically and statistically more susceptible to break up.[3] Going further, the U.S. 'Fragile Families and Child Wellbeing Study' has applied that moniker

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1 R.F.V. Heuston, "Judicial Prosopography", (1986) 102 Law Quarterly Review 90.

2 Manning, "The implications of cohabitation for children's well-being", in A. Booth and A.C. Crouter eds., *Just Living Together: Implications of Cohabitation for Children, Families, and Social Policy,* (2002); Brown, "Family structure and child well-being: the significance of parental cohabitation", (2004) 66 Journal of Marriage and Family 351; Manning and Lamb, "Adolescent well-being in cohabiting, married, and single-parent families", (2003) 65 Journal of Marriage and Family 876; Artis, "Maternal cohabitation and child well-being among kindergarten children", (2007) 69 Journal of Marriage and the Family 222; Manning and Lichter, "Parental cohabitation and children's economic well-being", (1996) 58 Journal of Marriage and Family 998; Graefe and Lichter, "Life course transitions of American children: parental cohabitation, marriage and single motherhood", (1999) 36 Demography 205; Bumpass and Lu, "Trends in cohabitation and implications for children's family contexts in the United States", (2000) 54 Population 29; Smock and Gupta, "Cohabitation in contemporary North America", in A. Booth and A.C. Crouter eds., *Just Living Together: Implications of Cohabitation for Children, Families, and Social Policy,* (2002); Manning, Smock and Majumdar, "The relative stability of cohabiting and marital unions for children", (2004) 23 Population Research and Policy Review 135; Acs and Nelson, "The kids are alright? Children's well-being and the rise in cohabitation", (2002) Urban Institute, Discussion Paper Series B, B-48; Acs and Nelson, "Changes in family structure and child well-being: evidence from the 2002 National Survey of America's Families", (2003) Urban Institute, Discussion Paper; Acs and Nelson, "Should we get married in the morning? A profile of cohabiting couples with children", (2004) Urban Institute, Discussion Paper.

3 The U.K. Centre for Social Justice Green Paper on The Family (January, 2010) reports at para. 2.21 that:- "[R]egardless of socio-economic status and education, cohabiting couples are between two and 2.5 times more likely to break-up than equivalent married couples. Indeed just one in 11 married couples split up before their child's fifth birthday compared to one in three unmarried couples."

of "fragile family child" to the young born to unmarried parents; this signifies a belief that although the parents and children form a *de facto* family, they are less likely than the traditional married family to remain together.[4] Research in this area is presented as establishing that family structure and stability matters: stable relationships, usually equated with those based on marriage, produce better outcomes for children.

In Ireland, since the old certainties of religion have been shattered by clerical misbehaviour and inadequate episcopal response, it is rare to find anyone publicly to espouse marriage as the foundation of social stability. Rather, our political discourse seems to assume liberal attitudes as the answer to most issues. In Britain, our nearest neighbour, no such experience has inhibited a healthy debate between conservative approaches to ordering society and those who argue that the reality of modern human relationships must inform law and policy. In April 2010, the United Kingdom Institute for Fiscal Studies produced a research paper entitled 'Cohabitation, Marriage and Child Outcomes', which purports to build on existing research in this area.[5] It examines the early developmental outcomes of approximately 10,000 children born in the U.K. in or around the year 2000 to married and cohabiting biological parents. It charts the relationship status of the parents and assesses the children's cognitive and behavioural development at various intervals, such as 9 months, 3 years and 5 years old. One finding is perhaps uncontroversial. The study confirms statistically that cohabiting parents are far more likely to separate than their married counterparts. This is perhaps a finding that could easily be explained by the difficulty, both from a legal and social perspective, of dissolving a marriage. So, marriage as a legal contract could be argued to have the effect of increasing the commitment of the parties to marriage more so than even a child born to the relationship.

Approximately 70% of the parents sampled were married when their child was born, while 30% were cohabiting. By the time the children were aged 3, approximately 19% of the parents who were cohabiting at the time of birth had separated, in comparison with only 5% of those who were married.[6] At age 3, the children born to married parents were said to display better social and emotional development and stronger cognitive skills than the children born to cohabiting parents. By the time the children were age 5, the gap in cognitive development was stated to have increased, but the gap in social and emotional development remained the same.

Such statistics are music to the ears of some, while cacophony to the ears of others. The Conservative element of the current U.K. Government has expressed itself determined to "make Britain more family friendly". Using the self-presented opportunity to trumpet the marriage contract, Iain Duncan Smith, the Secretary of State for Work and Pensions, stated that to ignore the evidence which shows that stable families tend to be associated with better outcomes for children is to "do a disservice to society".[7] He proclaimed that there were few more powerful tools for promoting stability than the institution of marriage; the promise of the government was to foster and promote this most basic institution by removing any fiscal barriers to marriage. He said:- "You cannot mend Britain's broken society unless you support and value the institution which is at the heart of a stable society."[8] The Centre for Social Justice, which announces itself as "unashamedly" supporting the institution of marriage, has published a number of reports on what it calls the tide of family breakdown in Britain and the consequential cost, in human and financial terms, to society at large.[9] Its research in this area culminated in the publication of a policy paper in 2010. All of the publications of the Centre for Social Justice are influenced by evidence that suggests that marriage produces the best outcomes for children and adults. Indeed, that body reports that marriage benefits not only the spouses and their children but also the workplace, the community and the nation. Those of us who are married may be interested to learn that we are more likely to enjoy better physical and mental health, a life longer by an appreciable number of years and greater financial prosperity than the unmarried. Marriage, the claim goes, makes us better employees and work colleagues than our single or cohabiting counterparts.[10] Does marriage also make you a better judge? What has happened to family misery, to family sexual abuse, to the fact that most murders are committed within the home, to divorce and the shattering of childish illusions? In Ireland, little is said on either side of this debate.

Our marriage rate reflects a nation buoyed by optimism, though now weighed by the stupidity of our banks. In 1950 Ireland saw 16,018 marriages celebrated (99.5% of these religious ceremonies), and by 2008 the number had increased to 22,187 (76% of these religious ceremonies)[11], while the population had increased from 2,960,593 to 4,422,100.[12] In

4 'The Fragile Families and Child Wellbeing Study' is a joint effort by Princeton University's Center for Research on Child Wellbeing and Center for Health and Wellbeing, the Columbia Population Research Center and the National Center for Children and Families at Columbia University. The study is following a cohort of nearly 5,000 children born in large U.S. cities between 1998 and 2000 (roughly three-quarters of whom were born to unmarried parents).

5 I.F.S. Commentary C114; The study used data from the Millennium Cohort Study (MCS), a longitudinal study of children which initially sampled almost 19,000 new births across the U.K. around the year 2000, with follow-up surveys when the children were 9 months old, 3 years old and five years old.

6 Among those couples who were cohabiting at the time of birth, 53% were continuing to cohabit when the child was age 3, while 27% had married: see I.F.S. Commentary C114 at p. 16.

7 From speech given by the Rt. Hon. Iain Duncan Smith at the launch of U.K. Marriage Week 2011.

8 See the foreword to The Centre for Social Justice Green Paper on The Family (January, 2010) at p. 5.

9 See generally, "The State of the Nation Report: Fractured Families" (December, 2006); "Breakthrough Britain, Volume 1: Family Breakdown" (July, 2007); and "Breakthrough Britain: Every Family Matters" (August, 2010).

10 See the Centre of Social Justice Green Paper on The Family (January, 2010) at p. 9; and "Breakthrough Britain, Every Family Matters" (August, 2010) at pp. 56 to 61.

11 This 76% may be broken down as follows: Roman Catholic (72%); Church of Ireland (2%); and Presbyterian, Methodist, Jewish or other (2%).

12 This equates to a crude marriage rate of 5.0 per 1,000 of the population. Between 2002 and 2007, the marriage rate was a constant 5.2 (excluding 2003 when it was 5.1). Figures from the Central Statistics Office; see www.cso.ie.

Britain, despite the benefits of marriage and an increasing population, its popularity waned. Statistics show that the number choosing to marry in the U.K. fell from a peak of 480,285 in 1972 to just 231,490 in 2009 (the lowest figure since 1895); though marriage remains the most common form of partnership.[13]

Many dispute the causal link between marriage and positive outcomes in child rearing. A closer examination of the research carried out by the Centre for Social Justice does not necessarily establish a causal link between marriage and better outcomes for children; rather it suggests a correlation.[14] In line with previous research in this area, the Institute for Fiscal Studies paper, referred to above, found that the children of married parents typically fare better than the children of cohabiting parents on measures of cognitive, social and emotional development. It, however, grappled with the apparent findings in an attempt to account for the gap in child outcomes. This was done by controlling for observable differences in the parents surveyed, for example their education, occupation, income and housing tenure. In so doing, it found that marriage, or its absence, does not necessarily cause the difference in child outcomes. Rather the difference in child outcomes may be reflective of the differences in the type of people who choose to marry and those who choose to cohabit.

For example, compared to cohabiting parents, married parents are likely to be more educated, to have a professional occupation and a higher household income. They are also more likely to have lived together for a number of years before their first child is born, to have planned the pregnancy and to have a higher relationship quality, insofar as this can be determined. Crucially, once observable differences are accounted for, there are apparently no longer any statistically significant differences in the cognitive, social or emotional development of young children born to married and cohabiting parents. This suggests that any gap in the development of children born to cohabiting parents when compared to those born to married parents may be largely accounted for by their parents' lesser opportunity for education and lower income, and not by their marital status. While the commentary does not definitively dismiss any causal effect of marriage, it concludes that encouraging parents to marry is unlikely to lead to significant improvements in the development of young children.[15]

13 Figures from the Office for National Statistics; see www.statistics.gov.uk.

14 The Centre for Social Justice itself appears to accept this. Its Green Paper on The Family (January, 2010) states that:- "[I]t is difficult to isolate causal effect when looking at the relationship between family breakdown and various adverse outcomes for children… However, the correlation between family breakdown and educational failure, alcohol and drug abuse, early sexualisation and offending is clear…" (p. 11); and its "Breakthrough Britain, Every Family Matters" report (August, 2010) states that:- "[T]he correlation between marriage and stability is partly a 'selection effect' due to the fact that the intrinsically most stable couples are the ones who are most likely to get married. Yet marriage has 'causal effects' that help to stabilise the relationship and help reduce the chance of breakdown" (p. 59).

15 It should be noted that the study is limited to the extent that it only considers (i) the differences between cohabiting and married *biological* parents; and (ii) child outcomes only up to the age of 5 years.

In a subsequent briefing note, the Institute for Fiscal Studies looked behind the statistics that cohabiting parents are more likely to separate than married parents and questioned whether marriage, of itself, improves relationship stability.[16] It found little evidence to suggest any causal or protective effect of marriage. Rather it found that relationship stability is mainly determined by other factors such as the age of the parties; their level of education, occupation and income; whether they own a home; and the quality of their relationship. These factors can also influence parties in their decision to get married in the first place.

One suspects that this debate between the adherents of marriage and the champions of liberalism is both healthy and will be unending. Marriage is of its nature difficult. Writing in 1925, Carl Jung viewed marriage as a union of opposites; the divine syzygy, as he put it. By locking a man and a woman together into a binding and indissoluble contract each would come to grow into consciousness though their relationship to the other: "Seldom or never does a marriage develop into an individual relationship smoothly and without crises. There is no birth of consciousness without pain". Some marriages do not survive the storms of life. Some people would rather avoid what they may have witnessed as the pain of their parents' relationship. Some women, by reason of various experiences, do not trust men, and it is the same with men. Some men and women are gay. All of this must be catered for, some argue, while others are advocates for the stability of the fundamental unity of a man and a woman coming together in the hope of lifelong commitment and the promise of Nature that their commitment will bear them children and make them happy. One suspects that this has a mythical attractiveness. Nowhere more so than in Ireland was this expressed as a legal ordinance. We turn to that in the hope of finding comfort in certainty but instead we seem to discover a rigidity that was exclusionary. Our paper then looks at modern developments in the light, among other factors, of the modernisation of European society and debates what definition in the marriage contract might have brought to the legal order and what has been lost in consequence of the dissolution of old certainties.

Marriage in Traditional Irish Law

Irish law, until recently, upheld marriage as primary to the good order of society. While the move towards promoting and encouraging marriage in the U.K. is a relatively recent one, the family founded on marriage has enjoyed a privileged constitutional position in Ireland since 1937. Article 41 of our Constitution recognises the Family as "the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law" (Art. 41.1.1). The State guarantees to protect the family in its constitution and authority "as the necessary basis of social order and as

16 "Cohabitation, marriage and relationship stability", I.F.S. Briefing Note BN107; the briefing note looked behind the assertion in the U.K. State of the Nation Report (May, 2010) that:- "Around 3 million children in the UK have experienced the separation of their parents. This is partly attributable to a rise in cohabitation, given the increased likelihood of break-up for cohabiting couples relative to married couples."

indispensable to the welfare of the Nation and the State" (Art. 41.1.2). The State pledges itself to "guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack" (Art. 41.3.1). In its original form, Article 41.3.2 expressly provided that "no law shall be enacted providing for the grant of a dissolution of marriage."[17]

The preceding Constitution of the Irish Free State of 1922 did not contain any provisions dealing with the family. The constitutionally expressed preference in Article 41 for the family founded on marriage was unusual compared to other constitutions.[18] Yet, despite its novelty, it was introduced without much debate in Dáil Éireann.[19] Even the uncompromising prohibition on divorce attracted very little attention. An attempt by one deputy to engage the House in a general discussion was defeated by the leader of the day and the principal political architect of the Constitution, Mr. Eamon de Valera. He told the parliamentarians that the "obvious evil" of divorce was so great that no useful purpose could be served by even discussing the matter.[20] Religious influences are clearly evident in the wording of Article 41 which is "obviously marked by Catholic thought", the faith of 95% of the country at the time.[21]

The Ireland of the past was traditional, conservative and orthodox. The teaching of the Church that marriage is a sacrament and is the proper foundation for the family was readily accepted by the majority of the population. Divorce was viewed as a "social evil": fears were often expressed that its introduction would threaten the stability of Irish marriages and family life generally, including the inheritance of family land. High rates of divorce in other countries were taken as evidence that divorce was a cause of marital breakdown, rather than a result. The introduction of divorce would, it was feared, diminish the value which Irish people would attach to the institution of marriage. During Dáil debates on divorce in 1925, reference was made to the "looseness of the marriage tie" in countries such as England and America where divorce was permitted and was "only too common". In England, it was said, extra judges had to be assigned to hear "an accumulation of [divorce] scandals"; while in America, it was claimed, divorce had destroyed any sense of civic responsibility.[22]

Yet, while the Constitution of 1937 professed marriage to be indissoluble, the reality was different. Marriages in Ireland were not immune from breakdown; the ban on divorce perhaps concealed the extent of such breakdown. No official statistics are available on the incidence of marital breakdown in Ireland between 1937 and 1995, when the prohibition on divorce was removed following a constitutional referendum. Yet, some indication of the scale of the problem may be gleaned from social welfare sources. By the end of 1976, there were 3,110 wives in receipt of Deserted Wife's Allowance and 1,675 in receipt of Deserted Wife's Benefit. By 1996, the number of wives in receipt of Deserted Wife's Benefit had increased to 14,738, while in the same year 2,138 claimed Deserted Wife's Allowance and a further 11,268 claimed its successor, Lone Parent's Allowance.[23] Campaigning for the introduction of divorce in the 1970s, Professor William Duncan of Trinity College Dublin noted an increase in applications for church annulments.[24] Church annulments were not recognised by the State as having legal effect.[25] In *F.M.L. & A.L. v. The Registrar General of Marriages,* Lynch J. emphasised the legal "difficulties and dangers" which arose where a man obtained a Papal decree of dissolution of his first marriage and entered into a second marriage prior to the determination of civil nullity proceedings:-

> "A marriage which is voidable for impotence is not known to be voidable nor consequently void *ab initio* unless and until the High Court shall have pronounced it to be so. In the meantime, the spouse remains apparently validly married and open to prosecution for bigamy… if a trial for bigamy should pre-date the

17 Article 41 should be read alongside the provisions of Article 42, in particular Article 42.5 which provides that:- "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

18 Article 119 of the German Constitution of 1919 also contained a declaration as to the special status, and the State's special protection, of marriage and motherhood, as well as parent's rights and duties.

19 The debates regarding the family provisions took place over three days – 11th May, 4th June and 9th June 1937; *Dáil Debates*, Vols. 67 to 68.

20 67 *Dáil Debates* 1886 (4th June, 1937).

21 See Kelly, *Fundamental Rights in the Irish Law and Constitution*, 2nd ed., (Dublin, 1967) at pp. 57 to 58:- "[Articles 41 and 42] are wholly inspired by Christian (or, more specifically, by Catholic) orthodoxy, in particular by well-known Encyclicals of modern Popes [Pope Pius XI, Divini Illius Magistri (1929) and Casti Connubii (1930)]"; Sheehy, however, submits that it has been "singularly unfortunate and misleading that suggestions, sometimes even condemnations, have been made to the effect that certain Articles of our Constitution… are no more than the covert importation of Catholicism into the fundamental law of our country…" Article 41, he submits, simply reiterates the pre-Reformation common law position: see Sheehy, "The Right to Marry in the Irish Tradition of the Common Law", in O'Reilly (ed.), *Human Rights and Constitutional Law* (Dublin, 1992), at pp. 20 to 21; Keane similarly submits that, save for the divorce prohibition, the provisions of Article 41 reflected values which were widely accepted in 1937 in many countries where the influence of Catholicism was not significant, even though they did not always receive express recognition in the constitutions of the countries concerned: see Keane, "The Constitution and the Family: The Case for a New Approach", Carolan & Doyle (eds.), *The Irish Constitution: Governance and Values* (Dublin, 2008) at pp. 347 to 348.

22 10 *Dáil Debates* 164 - 180 (10 – 11th February, 1925).

23 Given the tightly drawn eligibility requirements, it is likely that these numbers in fact understate the number of deserted wives in the State in 1976 and 1996; See Duncan, *The Case for Divorce in the Irish Republic: A Report Commissioned by the Irish Council for Civil Liberties,* (Dublin, 1979) at p. 12; see also Shatter, *Family Law,* 4th ed. (Dublin, 1997) at p.2.

24 *Ibid*, Duncan at pp. 12 to 13: In 1977 there were 884 applications for annulment of marriage to the Regional Marriage Tribunals of the Roman Catholic Church, an increase of 15% on the 1976 figure of 751.

25 See "Marriage Annulment in the Catholic Church", (September, 1978) 72(7), The Gazette of the Incorporated Law Society of Ireland, based on a book of the same title by Ralph Browne; see also discussion paper published by the Office of the Attorney General in 1976 proposing an extension of the grounds for civil annulments: *The Law of Nullity in Ireland* (Stationery Office, Dublin, August 1976).

> decree of nullity the accused spouse would be liable to conviction and penalty."[26]

In the 1970s, the Free Legal Advice Centre reported family law problems arising from marital breakdown as being the largest single category of cases in which advice was being sought.[27] While the ban on divorce may have been seen as commendable for its commitment values, in practice it left, as Duncan wrote, thousands of individuals in Ireland living in the limbo which existed when a marriage had died but, because of the absence of divorce, could not be buried.[28]

In the sphere of intimate human relationships, the effectiveness and influence of the law is considerably limited.[29] Some relationships will thrive and unfortunately some will fail: the law, whether it be strict or liberal in its approach, has very little to do with it. In fact, the restrictive regime which existed in Ireland prior to 1995, with the laudable aim of promoting the family based on marriage, may indirectly and unintentionally have resulted in the formation of extra-marital families. Many married couples who had separated (whether informally, by deed, or by court order) had no choice, on entering into second relationships, but to cohabit. The prohibition on divorce deprived them of the opportunity of creating a second family based on marriage and also denied them and any dependent children of that family the legal protection afforded to marital families. A practice of evasion developed in Ireland. Couples began to adapt the available non-divorce remedies to circumstances for which they were never intended.[30]

The prohibition on divorce eventually developed into the catalyst for a relaxation by the judiciary of their once conservative and cautious approach to granting civil annulments.[31] The courts invented an entirely new ground of nullity; inability through illness, at the time of marriage, to form or sustain a normal marriage relationship.[32] The evidential requirements in cases of physical impotence were also relaxed.[33] In *N. (K.) v. K.*, Henchy J. acknowledged the connection between the constitutional prohibition on divorce and the judicial extension of the grounds for nullity:-

> "In relation to the contract of marriage, it is to be said that the courts, at least in this jurisdiction, have given a more liberal scope to the doctrine of duress as a nullifying element than would be applied to the construction of certain other kinds of contract. This is probably because the dissolution of marriage being prohibited by the Constitution, certain marriages which at no stage were viable have been declared null on a liberal and humane interpretation of the doctrine of duress in relation to the contract of marriage."[34]

More wealthy couples were able, as Duncan put it, to "buy their freedom abroad", albeit in a legally ambiguous way.[35] In *Mayo-Perrott v. Mayo-Perrott*, Kingsmill Moore J. expressed the view (*obiter*) that the common law rule whereby the Irish courts recognised as valid divorces granted abroad provided both parties were domiciled in the divorce jurisdiction at the date of the institution of the proceedings, had survived the enactment of the Constitution.[36] This view was endorsed in later cases and in due course came to be regarded as settled law.[37] The apparent requirement that both spouses be domiciled in the foreign jurisdiction might at first appear to have been a sufficient barrier to prevent evasion of the constitutional divorce prohibition. However, the rule interacted with a further rule of the common law pursuant to which the domicile of a wife was deemed to be that of her husband. This effectively meant that a foreign divorce would be recognised in Ireland if the husband was domiciled in the jurisdiction of the divorce court at the date of the institution of the divorce proceedings. So, for example, if a deserting husband acquired a domicile of choice in England, the domicile of his wife also changed, even though she had been deserted and had remained in Ireland. This latter rule was subsequently abolished by the Domicile and Recognition of Foreign Divorces Act 1986.[38]

There always existed the danger that an unscrupulous spouse, feeling perhaps slightly hard done by, would subsequently challenge the validity of the foreign divorce to his or her own advantage. In *L.B. v. H.B.*, Barrington J. in the High Court refused, on the application of the wife,

26 [1984] 4 I.L.R.M. 667 at 670; Between 1973 and 1978, proceedings for bigamy were instituted in four cases: see 316 *Dáil Debates* 1844 (15th November, 1979); It would appear, however, that prosecutions for bigamy in such cases were rarely brought. The Irish Times (9th July, 1979) reports that, in one particular case, a woman, whose husband had obtained a Church annulment and subsequently remarried, reported the second marriage to the Director of Public Prosecutions. However, no proceedings were brought against the husband as the Director of Public Prosecutions did not consider that the evidence warranted any prosecution.

27 From October 1974 to October 1975, the eight Free Legal Advice Centres in operation dealt with 1,493 family law cases, 39% of the Centre's total caseload.

28 See Duncan, *The Case for Divorce in the Irish Republic,* fn. 23 above, at p. 16.

29 Duncan dismisses as erroneous the assumption that changes in family law have a powerful influence on the quality of family life and the stability of marriage: Duncan, "Family Law and Social Policy", Studies (Summer, 1986) 139; "Supporting the Institution of Marriage in Ireland", (1978) 13 Ir. Jur. (ns.) 215; and *The Case for Divorce in the Irish Republic*, fn. 23 above, at pp. 32 to 33.

30 See Duncan, *The Case for Divorce in the Irish Republic,* fn. 23 above, at p. 44.

31 For an example of the conservative and cautious approach of the judiciary, see *McM. v. McM. and McK v. McK.* [1936] I.R. 177 at 187 where Hanna J. stated:- "It must be realised that this is not a Court of convenience to release ill-assorted spouses from a marriage bond because it has become irksome to one, if not to both."

32 *R.S.J. v. J.S.J.* [1982] I.L.R.M. 263; *D. v. C.* [1984] I.L.R.M. 173.

33 In *S. v. S.*, (Unreported, Supreme Court, 1st July 1976), the Supreme Court (Henchy, Griffin JJ.) granted an annulment on the basis of the husband's impotence, despite the fact that there had been intercourse before the marriage, and in the absence of medical evidence. Kenny J. did not make a finding of impotence but agreed to the annulment on the basis that the husband had deceived the wife as to a fundamental feature of the marriage, *i.e.* he had not told her that he did not intend to consummate it.

34 [1985] I.R. 733 at 745.

35 See Duncan, *The Case for Divorce in the Irish Republic,* fn. 23 above, at p. 43.

36 [1958] I.R. 336.

37 See *Bank of Ireland v. Caffin* [1971] I.R. 123; *Gaffney v. Gaffney* [1975] I.R. 133; *Counihan v. Counihan*, (Unreported, High Court, Kenny J., July 1973).

38 See *W. v. W.* [1993] 2 I.R. 476 where the Supreme Court ruled that the dependent domicile rule was unconstitutional as it discriminated against wives contrary to Article 40.1 of the Constitution.

to recognise a French divorce obtained 22 years previously on the ground that "there was such a measure of collusion between the parties in the proceedings before the French Court as to amount to a fraud upon that Court."[39] On the instruction of their French counsel, the husband and wife (both of whom were domiciled in France and so no question as to the jurisdiction of the French courts arose) manufactured the grounds for divorce in an exchange of correspondence. The correspondence included a formal call by the husband to the wife to resume conjugal relations and a reply from the wife indicating that she had not felt any love or affection for the husband for a number of years. When the matter came before the Irish High Court, the husband admitted that the correspondence had in fact been prepared by their French avoués. In refusing to recognise the divorce, and in making orders in respect of maintenance and the family home in favour of the wife, Barrington J. stated that:-

> "The collusion… between the parties was such that the entire proceedings became a charade and the French Court was unwittingly led to a conclusion which had been predetermined by the parties. There was a substantial defeat of justice for which the parties, and not the Court, bear the responsibility… [O]nce this Court has been fixed with knowledge of what happened in the French divorce proceedings it is hard to see how it could recognise the validity of the divorce and at the same time observe the constitutional duty of the State to uphold the institution of marriage."

Commenting on the decision, Duncan cautioned that:

> "[I]f the courts begin applying to foreign divorces the lofty standards in relation to marriage insisted upon by the Irish Constitution, the product will not be the enhancement of marriage but the creation of limping marriages. Moreover the courts, by allowing recognition of domicile-based divorces and by accepting the right of the divorce court to stipulate its own ground, have already accepted that different standards must be accepted for married persons domiciled inside and outside the Republic of Ireland."[40]

Due, no doubt, to its proximity and relaxed jurisdictional rules, England was often the divorce destination of choice. The Domicile and Matrimonial Proceedings Act 1973 allowed the English courts to hear divorce proceedings where either the petitioner or the respondent had been domiciled or habitually resident in the jurisdiction for one year.

However, false allegations of domicile or habitual residence had unforeseen and unjust consequences in some cases, as illustrated by *Gaffney v. Gaffney*.[41] In that case, the plaintiff and her husband were both resident and domiciled in Ireland until the husband's death in 1972. The couple had separated and the husband sought a divorce. Despite the plaintiff not wanting a divorce, the husband instructed a firm of solicitors in Manchester to institute divorce proceedings on her behalf. The divorce petition falsely stated that the husband resided in Blackburn and that both he and the plaintiff were domiciled in England. The husband then threatened to physically harm the plaintiff if she refused to swear the grounding affidavit. The couple gave evidence as to their domicile and residence in the English court, after having apparently been coached by someone as to how to answer any questions asked. The decree of divorce was granted and the husband subsequently remarried. It was only after the husband died intestate that the issue of the validity of the English divorce came before the Irish High Court. The High Court, and the Supreme Court on appeal, found that the purported dissolution of the marriage was of no effect in Irish law as owing to the deception, it was made without jurisdiction. This meant that the plaintiff was the lawful spouse for succession law purposes; the husband's second marriage was not legally recognised and his "second wife" had no rights whatsoever to his estate.

Provision for 'no fault' divorce was introduced in Ireland in 1995 following a tightly contested referendum.[42] Article 41.3.2 of the Constitution now reads:-

> "A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that-
>
> i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years,
> ii. there is no reasonable prospect of a reconciliation between the spouses,
> iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
> iv. any further conditions prescribed by law are complied with."

Whilst Irish law now explicitly recognises that marriage is no longer necessarily for life, in *D.T. v. C.T.*, Murray J. referred to it as being "a solemn contract of partnership entered into between a man and a woman… in principle for life".[43] Our divorce legislation does not, however, provide for a "clean break" and, prior to granting a decree of divorce, the court is obliged to ensure that "proper provision" exists or will be made for both spouses and any dependent children. Consequently, divorced spouses may continue to have obligations to each other, even after their marriage has been dissolved. In 1997, the first year in which the legislation

39 (Unreported, High Court, Barrington J., July, 1980)

40 Duncan, "Collusive Foreign Divorces – How To Have Your Cake and Eat It", (1981) D.U.L.J. 17.

41 [1975] I.R. 133.

42 Only 61.95% of a total electorate of 2,637,476 voted in the referendum on 24th November, 1995: the proposal to amend the Constitution was supported by 818,842 (50.28%) votes and opposed by 809,728 (49.72%). The amendment was given legislative effect by the Family Law (Divorce) Act 1996. A previous attempt in June 1986 to repeal the constitutional prohibition on divorce failed by a much greater majority: 935,843 votes (63.5%) to 538,279 votes (36.5%).

43 [2002] 3 I.R. 334 at 405.

operated, 95 divorces were granted. This number increased to 3,684 in 2007, but dropped slightly in 2008 to 3,630.[44]

The Family and the Constitution

The ban on divorce was but one element of Irish policy designed to promote stable families based on marital unions. Irish law also actively sought to discriminate in favour of marital families, despite the discomfort that such discrimination might cause to other family units. In a long line of decisions, the Irish courts left it beyond doubt that the "family" referred to in Article 41 is the family based on marriage. In 1966, delivering judgment on behalf of the Supreme Court in *The State (Nicolau) v. An Bord Uchtála*, Walsh J. stated that:-

> "It is quite clear from the provisions of Article 41, and in particular section 3 thereof, that the family referred to in this Article is the family which is founded on the institution of marriage… While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based upon marriage."[45]

The cases that followed unanimously adopted the *Nicolau* concept of "the family". In 1966, Henchy J. in *In re J., an Infant,* stated that "[t]he Constitution gives no definition of the family, but it does recognise, in Article 41, section 3, sub-s. 1, that it is founded on the institution of marriage."[46] In 1970 in *McN. v. L.*, Kenny J. stated that "the mother of an illegitimate child and the child are not a family for the purposes of Article 41 because the family referred to in this Article is one founded on the institution of marriage."[47] In 1984, the Supreme Court in *O'B. v. S.* held that "the family recognised by the Constitution, particularly in Article 41, is the family based upon marriage – that is to say, a marriage which was a valid and subsisting marriage under the law of the State."[48] In 1988, delivering judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. J.T.*, Walsh J. reaffirmed that families not based on marriage do not come within Article 41.[49] And in 1996, Hamilton C.J. in *W.O'R. v. E.H & An Bord Uchtála* repeated that "a *de facto* family, or any rights arising therefrom is not recognised by the Constitution…"[50]

In the 2009 case of *McD. v. L.* (known as "the sperm donor case"), the Supreme Court dismantled any idea that the Constitution might protect *de facto* family units.[51] Denham J. reiterated that "arising from the terms of the Constitution, "family" means a family based on marriage…" and continued by stating that:-

> "there is no institution in Ireland of a *de facto* family… [A] *de facto* family… is a shorthand method of referring to the circumstances of a settled relationship in which a child lives…"[52]

Geoghegan J. regarded the term "*de facto* family" as a "rather useful expression… provided it is not regarded as a legal term or given a legal connotation… it connotes merely a factual situation and not a legal concept."[53] Our adherence to the concept of the traditional family unit is in marked contrast to the approach of the European Court of Human Rights.[54]

The exclusively marriage based definition of the family means that the many non-marriage based family groups in Irish society are outside the protection of the Constitution.[55] Take, for example, the situation of the unmarried father: he has no constitutional or statutory right to guardianship of the child of which he is the natural father; he has only a statutory right to apply for guardianship.[56] In its recent consultation paper on Legal Aspects of Family Relationships,

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44 Of the 22,187 marriages in Ireland in 2008, 2,464 of these involved at least one divorced person; 489 of these were marriages where both parties were divorced.

45 [1966] I.R. 567 at 643 to 644; the three judges of the divisional High Court expressed similar views. See the comments of Murnaghan J.:- "…the Constitution recognises only "the family" founded on the institution of marriage…" (at 590); and Henchy J.:- "Article 41 deals with only one kind of family, namely a family founded on the institution of marriage…"; and "I am satisfied that no union or grouping of people is entitled to be designated a family for the purposes of [Article 41] if it is founded on any relationship other than that of marriage" (at 622).

46 [1966] I.R. 295 at 306 to 307.

47 (Unreported, High Court, Kenny J., 12th January, 1970).

48 [1984] I.R. 316 at 333 (*per* Walsh J.)

49 (1988) 3 Frewen 141 at 162; Walsh J. also noted that the family based on marriage may not be placed in a less advantageous position or receive less protection from the law than the one not based on marriage.

50 [1996] 2 I.R. 248 at 265.

51 [2010] 1 I.L.R.M. 461; For an interesting discussion on both the Supreme and High Court judgments in the sperm donor case, see Claire Hogan, "JMcD v PL and BM, Sperm Donor Fathers and De Facto Families", [2010] 4 I.F.L.J. 83.

52 *Ibid* at 488; The Supreme Court held that Hedigan J. in the High Court had fallen into error in his finding that the lesbian couple and the child constituted a *de facto* family. Hedigan J. considered that the silence of the Constitution on same sex *de facto* families did not necessarily preclude the Court from coming to the conclusion that such units should be recognised. Further, he concluded that where a lesbian couple lived together in a long term committed relationship, they must be regarded as constituting a *de facto* family enjoying rights as such under Article 8 of the E.C.H.R.: [2008] IEHC 196, (Unreported, High Court, Hedigan J., 16th April, 2008).

53 See fn. 51 above at 495.

54 See, for example, *X. Y. and Z. v. The United Kingdom* (1997) E.H.R.R. 143 where the European Court recognised as a *de facto* family a transsexual father, his female partner and their child who had been conceived through artificial insemination by donor.

55 The 2006 census recorded a total of 121,800 cohabiting couples living in Ireland (11.6% of all family units), 2,090 of which were same sex couples. The census also recorded that 74,500 children were living with cohabiting parents and the number of lone parent families totalled 189,200.

56 Section 6A of the Guardianship of Infants Act 1964, as inserted by s. 12 of the Status of Children Act 1987. In *J.K. v. V.W.* [1990] 2 I.R. 437 at 446, Finlay C.J. stated that :- "Section 6A gives a right to the natural father to apply to be appointed guardian. It does not give him a right to be guardian, and it does not equate his position *vis-á-vis* the infant as a matter of law with the position of a father who is married to the mother of the infant. In the latter instance the father is the guardian of the infant and must remain so, although certain of the powers and rights of a guardian may, in the interests of the welfare of the infant, be taken from him."

the Law Reform Commission acknowledged that there are valid reasons for not extending automatic guardianship to all non-marital fathers: such a move would guarantee rights to genetic fathers who play no role in the child's life following conception. However, the Commission recognised that there may be different types of non-marital father: those who have no connection with the child from conception or birth and who play no role in the child's upbringing; and those who, although not married to the mother of the child, are in a committed relationship with her and play a significant role in raising the child.[57] Where the law denies rights to those fathers who feel a need to fulfil the parental role merely on the basis that they are not part of a marital family, the results may appear unjust. In *The State (Nicolau) v. An Bord Uchtála*, for example, the Supreme Court found that the natural father had no right to veto the placement for adoption of the child of which he was the natural father, even in circumstances where he was willing to play an active parental role. He did not even have an automatic right to be heard by the adoption board prior to it determining whether to make an adoption order. The argument that this did not respect the "inalienable and imprescriptible rights" recognised by Article 41 to exist in the family was swiftly dismissed by the Supreme Court as being "unsustainable" on the basis that Article 41 protected only the family based on marriage and was of no avail to a non-marital father (or, indeed, to a non-marital mother).

In *Keegan v. Ireland,* the European Court of Human Rights found that Irish adoption law which allowed the placement of a child for adoption without the knowledge or consent of the father amounted to an interference with the right to family life under Article 8 of the European Convention on Human Rights.[58] Following this decision, the Oireachtas enacted the Adoption Act 1998, amending the Adoption Act 1952, to make express provision for the right of the natural father to be heard and consulted on an application for an adoption order. In *W.S. v. An Bord Uchtála,* Ó Neill J. considered the scope of the amended legislation and concluded emphatically that the natural father should be excluded from the adoption process only in the most exceptional and extreme cases. He stated that:

> "The constitutional rights of the natural father that are involved are his right to fair procedures and to natural and constitutional justice. If the [natural father] is not heard… he will have suffered a very serious breach of his constitutional rights and a very grave injustice. In addition, there is a risk that in refusing to consult the [natural father], that [the child's] right under Article 40.3 of the Constitution to have her welfare protected on the same basis as a marital child, will be infringed…"[59]

The position of non-marital fathers in relation to their children has improved somewhat since the decision of the Supreme Court in *Nicolau*. Such improvement has been achieved indirectly through greater recognition of the need to involve the natural father in securing the rights of the child. The Supreme Court has acknowledged the relevance of the blood link between the natural father and his child in guardianship applications and the benefit to the child of having the guardianship and society of his or her father.[60] It appears that where children are born as a result of an established relationship and nurtured at the commencement of life by father and mother in a *de facto* family relationship, then the natural father will have extensive rights of interest and concern.[61] However, such rights of interest and concern are subordinate to the welfare of the child. In his judgment in *McD. v L.*, Fennelly J. noted that the use of the expression "rights of interest and concern" was designed to lay emphasis on the interests of the child and not to confer any distinct rights on the father.[62] The situation remains, therefore, that the absence of marriage undermines any argument in favour of constitutional and legal rights for the natural father.

An unmarried mother has no family rights as such under Article 41. This makes little difference as she does enjoy a natural right to the custody and care of her child, under Article 40.3 of the Constitution, pursuant to which the State guarantees to respect, defend and vindicate the personal rights of its citizens. This was recognised by the Supreme Court in *Nicolau* where Walsh J. stated:-

> "…the mother of an illegitimate child does not come within the ambit of Articles 41 and 42… Her natural right to the custody and care of her child, and such other natural personal rights as she may have… fall to be protected under Article 40, section 3, and are not affected by Article 41 or Article 42…."[63]

The rights of the natural mother "derive from the fact of motherhood and from nature itself".[64] Insofar as her natural rights are concerned, marriage to her child's father, or the absence of marriage, is immaterial. She is automatically recognised as the guardian of her child, a natural right which is given statutory support by s. 6(4) of the Guardianship of Infants Act 1964.[65] Yet, her rights, not being recognised by Article 41, are neither "inalienable" nor "imprescriptible". In this regard, Staines submits that the precise interpretation of

57 Law Reform Commission, *Consultation Paper on Legal Aspects of Family Relationships*, LRC CP 55-2009 (Dublin, 2009); The Commission provisionally recommended the introduction of a statutory presumption that a non-marital father be granted an order for guardianship unless to do so would be contrary to the best interests of the child or would jeopardise the interests of the child. The Commission also invited submissions as to whether it would be appropriate to introduce automatic guardianship for all fathers.

58 (1994) 18 E.H.R.R. 342.

59 [2010] 2 I.R. 530 at 579.

60 *J.K. v. V.W.* [1990] 2 I.R. 437.

61 *W.O'R. v. E.H.* [1996] 2 I.R. 248 at 269 (*per* Hamilton C.J.).

62 See fn. 51 above at 523.

63 See fn. 45 above at 644.

64 *G v. An Bord Uchtála* [1980] I.R. 32 at 55 (*per* O'Higgins C.J); also Parke J. at 99:- "The emotional and physical bonds between a woman and the child which she has borne give to her rights which spring from the law of nature and which have been recognised at common law long antecedent to the adoption of the Constitution."; see also *Marckx v. Belgium* (1980) 2 E.H.R.R. 330, (13th June, 1979).

65 As substituted by s.11 of the Status of Children Act 1987; In *North Area Health Board v. An Bord Uchtála*, (Unreported, Supreme Court, 17th December, 2002), the Supreme Court (*per* McGuinness J.) held that the rights conferred on the natural mother by the Guardianship of Infants Act 1964 do not alter or add to her rights under Article 40.3 as a mother.

the natural mother's rights under Article 40.3 "would appear to depend on the vagaries of a judiciary which, in the past, has delivered conservative judgments in relation to natural families."[66]

The children of extra-marital unions possess the same natural and imprescriptible rights as the children born to marital families, although it would appear that their rights arise under Article 40.3 rather than under Articles 41 or 42.[67] However, Article 41 and its preference for the marital family was previously used to justify a difference in the treatment of legitimate and illegitimate children for succession law purposes: non-marital children were precluded from succeeding on intestacy to their father's estate. In *O'B. v. S.* such treatment was found to be constitutionally permissible: it was "…designed to strengthen the protection of the family as required by the Constitution and, for that purpose, to place members of a family based upon marriage in a more favourable position than other persons in relation to succession to property whether by testamentary disposition or intestate succession…"[68] Subsequent to this decision, the Oireachtas passed the Status of Children Act 1987 which places all children in an equal position in relation to parental succession.

On paper, the constitutional preference for the marital family is black and white: real life, however, is not always so clear cut. In *N. v. H.S.E* (known as "the Baby Ann case"), the Supreme Court was faced with a truly difficult decision.[69] Baby Ann was born to a young unmarried couple (referred to as "the Byrnes") as a consequence of an unanticipated pregnancy. The Byrnes made a joint decision to place baby Ann for adoption, but subsequent to her placement with a married couple (referred to as "the Doyles"), they regretted their decision and the mother withdrew her final consent. The couple sought the return of their natural daughter and, in an effort to enhance their legal position, married in 2006.[70] By that stage, Ann had been in the care of the Doyles for twelve months. It fell to the Supreme Court to decide whether Ann should remain with the Doyles, whom she knew and loved as her family, or whether she should be returned to the Byrnes, who, from her point of view, were virtual strangers.

The Supreme Court applied the "compelling reasons" test enunciated by Finlay C.J. in the case of *In re J.H* [1985] I.R. 375 when faced with a similar set of circumstances:- "… the welfare of the child… is to be found within the family, unless… there are compelling reasons why this cannot be achieved…" McGuinness J. referred to "the dramatic and remarkable part played in the life and future of Ann by the marriage of her parents."[71] Had the parents not married, the central issue before the Court would have been the best interests of Ann. However, on marriage, the Byrnes became a constitutional family with all the concomitant rights and presumptions; the rights of the family were inalienable and imprescriptible: they could not give away guardianship of their child and nor could it be taken away from them. The central issue to be considered by the Court underwent a metamorphosis: the Court became bound by the "compelling reasons" test.

While expressing uncertainty about the effect of a transfer of custody on Ann, McGuinness J. did not consider that the evidence before the Court met the heavy burden of establishing that there were compelling reasons why her welfare could not be achieved in the custody and care of her natural parents. The unequivocal wording of Articles 41 and 42 mandated the return of the child and it was with "reluctance and some regret" that she made an order to this effect. She clearly felt constrained by the provisions of the Constitution and reiterated the view she expressed in the report of the Kilkenny Incest Inquiry in 1993 that the Constitution should be amended so as to give express recognition to the rights of the child.[72] McGuinness J. also expressly stated that she was influenced by the fact that by reason of her parents' marriage, Baby Ann could not now be adopted and, if she remained in the care of the Doyles in a continuing fosterage arrangement, her position would be insecure and anomalous and there would be no way to guard against future litigation.[73]

While the judgment of McGuinness J. suggests that her hands were tied by reason of the marriage of the natural parents, Keane submits that the Court would have reached the same decision even in the absence of a marriage.[74] Indeed, in his judgment, Hardiman J. specifically stated that "it would be wrong to conclude that but for the marriage the child would be left in the custody of the adoptive parents."[75] The

66 Staines, "The Concept of "The Family" Under the Irish Constitution", (1976) 11(2) Jur. 223.

67 See *In re M* [1946] I.R. 334 at 344 (*per* Gavan Duffy P.):- "[W]hile I do not think that the constitutional guarantee for the family (Art. 41 of the Constitution) avails the mother of an illegitimate child, I regard the innocent little girl as having the same 'natural and imprescriptible rights' [under Art. 42] as a child born in wedlock to religious and moral, intellectual, physical and social education…"; *The State (Nicolau) v. An Bord Uchtála* [1966] I.R. 567 at 642 (*per* Walsh J.):- "[The] "natural and imprescriptible rights" [in Article 42] cannot be said to be acknowledged by the Constitution as residing only in legitimate children…"; and *Eastern Health Board v. M.K.* [1999] 2 I.R. 99 at 117 to 118 (*per* Barrington J.):- "I doubt however if the distinction is of any real importance in the circumstances of the present case and certainly the rights of the children are the same whether they arise under Article 40.3 or under Article 42 of the Constitution."

68 [1984] I.R. 316 at 335 (*per* Walsh J.).

69 [2006] 4 I.R. 374.

70 The Court, however, did not doubt the commitment of the parties to each other and did not suggest that the marriage was a mere stratagem undertaken for legal advantage; see the comments of McGuinness J. at 497; and Hardiman J. at 535.

71 See fn. 69 above at 497.

72 In February 2007, the Government published the Twenty-Eighth Amendment to the Constitution Bill which contains proposals to amend the Constitution in respect of children. The Legislative Programme for the Oireachtas Autumn Session, which was published on 14 September 2011, states that the Amendment of the Constitution (Children's Referendum) Bill is expected to be published in 2012.

73 On this point, Hardiman J. stated:- "[I]f this child is not restored to the custody of her parents in the natural and constitutional family, she will live with [the Doyles] in what one of the expert witnesses described with moderation as "a complex" situation. She will not bear their name, since she has been registered as the child of the natural parents subsequent to their marriage. They would be neither natural nor adoptive parents and the household would not constitute a natural or a constitutional family which included her." (at 532).

74 See Keane, "The Constitution and the Family: The Case for a New Approach", fn. 21 above, at pp. 352 to 353.

75 See fn. 69 above at 535.

importance of the biological bond is a significant factor. He stated:-

> "[t]hough selflessness and devotion towards children may easily be found in other persons, it is the experience of mankind over millennia that they are very generally found in natural parents, in a form so disinterested that in the event of conflict the interest of the child will usually be preferred. A graphic and ancient example of this may be found in I Kings 3:16-28."[76]

In the case of married parents, Articles 41 and 42 must be considered and upheld. In the case of unmarried parents, the focus shifts to the welfare of the child under s. 3 of the Guardianship of Infants Act 1964. Yet, when one considers the trend in favour of biological ties, it is difficult, Keane submits, to see how the conclusion of the Court would differ in either event.

Preferring the Marital Family

The policy of preferring marriage and protecting it against attack affords certain ancillary benefits to married couples, although such benefits have been somewhat whittled away. Legislation which penalises marriage in contradistinction to other relationships is *prima facie* unconstitutional. Legislation which promotes or discriminates in favour of married couples and which places members of a family based upon marriage in a more favourable position than other persons is *prima facie* constitutional.[77] For example, marriage attracts certain tax advantages not available to other types of relationship; although research suggests that the potential for financial incentives to promote marriage is somewhat limited.[78] In *Murphy v. Attorney General,* the Supreme Court held that provisions of the Income Tax Act 1967 which aggregated the income of married couples and resulted in the imposition of a higher rate of tax on married couples than would have been imposed on two single persons enjoying identical incomes were invalid as they penalised the married state.[79] In *Hyland v. Minister for Social Welfare,* the same reasoning was used to declare unconstitutional certain provisions of the Social Welfare Act (No. 2) 1985.[80] The provisions in question reduced the amount of unemployment assistance payable to a married claimant whose spouse was in receipt of some other form of welfare. In *Greene v. Minister for Agriculture,* the High Court found that a subsidy scheme for farmers in disadvantaged areas was unconstitutional because the means test aggregated the off-farm income of married couples, but not of cohabiting couples.[81] Pursuant to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, civil partners are now entitled, on registration of their civil partnership, to the same tax rights as spouses.[82]

Marriage also previously guaranteed citizenship: s. 8 of the Irish Nationality and Citizenship Act 1956, in its original form, provided for the conferring of post-nuptial citizenship on any non-national who married an Irish citizen and who satisfied certain prescribed conditions.[83] Now a scheme of naturalisation operates in respect of the non-national spouses of Irish citizens and the Minister for Justice has absolute discretion in respect of the issuing of certificates of naturalisation.[84]

By right of marriage, guardianship and parentage is established: s. 6 of the Guardianship of Infants Act 1964 provides that the married father and mother of an infant shall be joint guardians; and s. 46 of the Status of Children Act 1987 presumes that where a woman gives birth to a child during a subsisting valid marriage, her husband is the father of her child.[85] In more recent times it has emerged that surrogacy can supplant nature. Can such a presumption survive? Is the husband of a surrogate mother legally presumed to be the child's father?[86]

These issues will be examined in more detail in Part II of this article, which will be contained in the December edition of the Bar Review. ■

76 *Ibid* at 502; Fennelly J. also noted the importance of biological ties and stated that:- "Even if it should become necessary to recognise the family relationships of the increasing number of couples who raise children outside marriage, such a development would be based in most cases on the natural blood link bond. It would in no way undermine, but would tend to emphasise the centrality of mutual rights and obligations of the natural parents and their children." (at 584); see also *McD. v. L.* [2010] 1 I.L.R.M. 461 at 524 where Fennelly J. referred to the blood link exerting, as a matter of almost universal experience, a powerful influence.

77 The Grand Chamber of the European Court of Human Rights has also expressed the view that marriage confers a special status on those who enter into it and that, on this basis, legitimate distinctions can be drawn between those in a relationship of marriage and others: see *Burden v. The United Kingdom* [2008] E.C.H.R. 357; Application No. 13378/05, 29th April, 2008.

78 Lunn, Fahey and Hannan, *Family Figures: Family Dynamics and Family Types in Ireland, 1986-2006*, The Economic Social Research Institute (Dublin, 2009) at 95 to 96.

79 [1982] I.R. 241; see also the decision of the Court in *Muckley v. Ireland* [1985] I.R. 472.

80 [1989] I.R. 624.

81 [1990] 2 I.R. 17.

82 The Finance (No. 3) Act 2011, which was signed into law on 7th June 2011, gives legislative effect to the taxation changes arising from the Act of 2010.

83 This provision was repealed by s. 4 of the Irish Nationality and Citizenship Act 2001.

84 Section 15A of the Irish Nationality and Citizenship Act 1956, as inserted by s. 5 of the Act of 2001.

85 The presumption can be rebutted by evidence which proves on the balance of probabilities that the husband is not the father. See *Russell v. Rusell* [1924] A.C. 687 ("the Russell peerage case").

86 See the Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction,* (Dublin: Government Stationery Office, 2005).

Civil law (Miscellaneous Provisions) Act 2011: Easements and Profits à Prendre

James Burke BL

I wrote in the most recent edition of the Bar Review[1] about complications arising from the Land and Conveyancing Law Reform Act 2009 (hereinafter referred to as the 2009 Act) in respect of the acquisition of easements and profit à prendre by prescription. The Act created a transitional period for the phasing out of the old methods of acquisition of easements and profit à prendre by prescription to a new method of acquisition under the 2009 Act. However, the changeover created a period i.e. from December 2012 to 2021 (where the servient owner is not a state authority), 2039 (where the servient owner is a state authority) and 2069 (where the servient land is foreshore), which effectively prevented a person relying on either the old method or the new method of acquisition by prescription[2].

However, while the article went to press, the Civil Miscellaneous Provisions Bill 2011 was introduced which bill was subsequently passed on the 2nd August 2011. Section 38 of the Civil Law (Miscellaneous Provisions) Act amends and extends the transitional period for claiming an easements or profit à prendre by prescription under the old rules from 3 years to 12 years. It is hoped that this amendment will correct the closed window period from 2012 to 2021 (created by the 2009 Act) although this is open to debate. At the outset, this would seem quite straight forward and logical however it is a missed opportunity to clarify some the more problematic areas that arose from the 2009 Act.

Existing Problems

The extension of the transitional period to 12 years is not sufficient to cover easements and profit à prendre obtained against state land and/or foreshore as the 2009 Act extended the relevant user period[3] to 30 and 60 years respectively. This means that one still will not be able to obtain an easement and/or profit à prendre where the land over which the easements and profit à prendre is claimed is state land or foreshore, during the periods from 2021 to 2039 (in respect of state land) and 2069 (in respect of foreshore). This is the case even where the easements and profit à prendre may have been used for a period far in excess of 30 or 60 years and so is patently unfair and inequitable on those landowners that would be entitled to an easement or profit à prendre if the land did not belong to the state.[4]

The amendment also frustrates the intention of the property registration policy as anyone applying under the old rules is not required to register the court order to obtain the easements or profit à prendre unlike the new method which does require registration.

More importantly, the amendment did not move to clarify the issue of the repeal and abolishment of the old methods of prescription. Section 8 of the Act repealed the Prescription Act 1832 and the Prescription (Ireland) Act 1858 and this repeal would appear to be upon the commencement of the 2009 Act. Section 34 of the Civil Law (Miscellaneous Provisions) Act 2011 abolished prescription by common law and by the doctrine of lost modern grant subject to section 38[5] and stated that upon the commencement of the 2009 Act, then prescription would be in accordance with section 35 of the 2009 Act.

There is nothing in the 2009 Act or the Civil Law (Miscellaneous Provisions) Act 2011 to resuscitate the Prescription Acts which was the method more often relied upon by practitioners when seeking to assert an easement or profit à prendre.[6] Thus, even though the transitional period has been extended from 3 to 12 years it can certainly be claimed that this extension is simply for easements and profit à prendre by common law and under the doctrine of lost modern grant, but not under the Prescription Act.

Also, the majority of claims for easements and profit à prendre occur in the Circuit Court where written decisions are rare and so the outcome will be dependant on the judges in the Circuit Court with the result that different views and approaches to the claims pursuant to the Prescription Act may be taken. This creates uncertainty for practitioners and makes it more difficult to advise.

Conclusion

The extension of the transitional period is to be welcomed as it does remove the time pressure for potential actions being lodged with the courts before the 2012 deadline. It also gives people more time to come to terms with the shortened period required to obtain an easement or profit à prendre under the 2009 Act. However as highlighted above, it is not the panacea that one would have hoped for in the amendment. ■

1 The Bar Review Volume 16 Issue 4 July 2011

2 Which I referred to in my previous article as the 'closed window period'

3 A period of use without interruption as defined in section 33 of the 2009 Act

4 The relevant user period under the new rules appears to only begin from the commencement of the 2009 Act i.e. December 2009 and any period of use prior to that cannot be taken into account in the calculation of the relevant user period.

5 Section 38 allows for the use of the old methods for the transitional period.

6 As it was easier to defeat the claim for an Easements or Profit à Prendre by common law or under the doctrine of lost modern grant than a claim pursuant to the Presription Act.

Obituary: Mahon Hayes

Patricia O'Brien*

Mahon Hayes, who died on 26 June, was an extraordinarily distinguished international lawyer and diplomat. As the Legal Adviser to the Department of Foreign Affairs and subsequently as the Permanent Representative to the United Nations, in Geneva and New York, Mahon brought his considerable intellect, expertise and tact to many fora. He was also elected to serve on the United Nations International Law Commission, the only Irish person to be so honoured. Mahon was also nominated as a member of Ireland's national group to the Permanent Court of Arbitration's Panel of Arbitrators.

Mahon was educated at CBS Thurles, University College Dublin and the King's Inns. He was called to the Bar in 1952 where he practiced for a number of years on the Leinster Circuit until he began his lengthy and impressive civil service career. Following spells at the Land Registry and the Department of Justice, Mahon joined the then Department of External Affairs in 1965. He was appointed Legal Adviser there five years later. Over the next quarter of a century, he was at the centre of Ireland's international legal affairs, including Ireland's accession to the European Economic Communities, Anglo-Irish relations and numerous United Nations issues.

Mahon's long and formal association with the United Nations was, quite simply, extraordinary. In his capacity as Permanent Representative in Geneva and then in New York, as well as his membership of the International Law Commission, he served at the highest levels with great distinction. In the area of the Law of the Sea, his name took on the international legal equivalent of a household one and his expertise was highly valued by colleagues from all parts of the world.

In developing an exceptional reputation in the Law of the Sea, Mahon underlined his commitment to the vital importance of internationally agreed rules of conduct among states. Throughout the nine years of negotiations leading to the Law of the Sea Convention in 1982, he was both a key member of the Irish delegation and a leading actor in the wider group of lawyers and diplomats who reached agreement on the Convention. The Convention provides for comprehensive global rules on the extent of coastal state jurisdiction, freedom of navigation, protection of the marine environment and the exploitation of the oceans' resources. Agreement on the Convention was a significant achievement of diplomacy and it has contributed to the reduction of conflict and tension between states in their activities at sea.

Mahon's account of the nine-year Law of the Sea Conference, "The Law of the Sea: the Role of the Irish Delegation in the Third UN Conference" was published in April by the Royal Irish Academy. It is entirely in keeping with his modest nature that, in his own book, he greatly understates the important and wide-ranging part he played in the negotiations, including his role as spokesman for a group of some 30 participating countries.

His formidable legal and diplomatic skills were only part of Mahon's many attributes. It has always been clear that his high professional standing was also matched by people's sense of him at the human level. His great warmth and his special ability to put people of many different cultures and backgrounds completely at ease were an integral part of his reputation. They were also an integral part of his professional success in fields where mediation, quiet persuasion and a keen sense or where areas of compromise might be located can be crucial.

The announcement of Mahon's death was greeted with sadness at UN Headquarters. Many people recalled a man of great professional standing and integrity, and a man who, at the same time, was unassuming, modest and gentle.

In addition to remembering his renowned professional qualities, those of us who had the privilege of working with Mahon will always recall the calm approach he took to the task at hand, his easy manner, his mischievous sense of humour, as well as his healthy disrespect for self-importance and pomposity. He was also someone who was happy to downplay his own role in events, often choosing to push others into the limelight to take the plaudits. Throughout his career, he made a point of being available to provide advice and mentoring to many of the junior colleagues who found themselves in his charge. They and the Irish public service are the beneficiaries of his selflessness.

Mahon's devotion to his family was a central part of his life. Kathleen, his wife of 53 years, was a constant support to him throughout his career and, together, they represented Ireland with great commitment, dignity and conviviality. My condolences go to Kathleen and to his children and grandchildren. ■

* UN Undersecretary General for Legal Affairs

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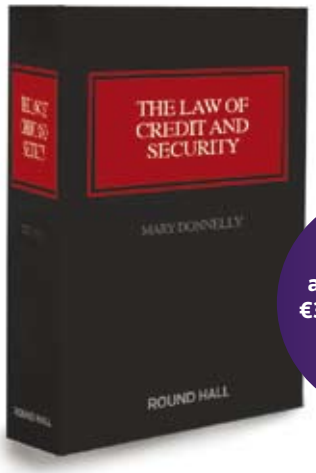

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