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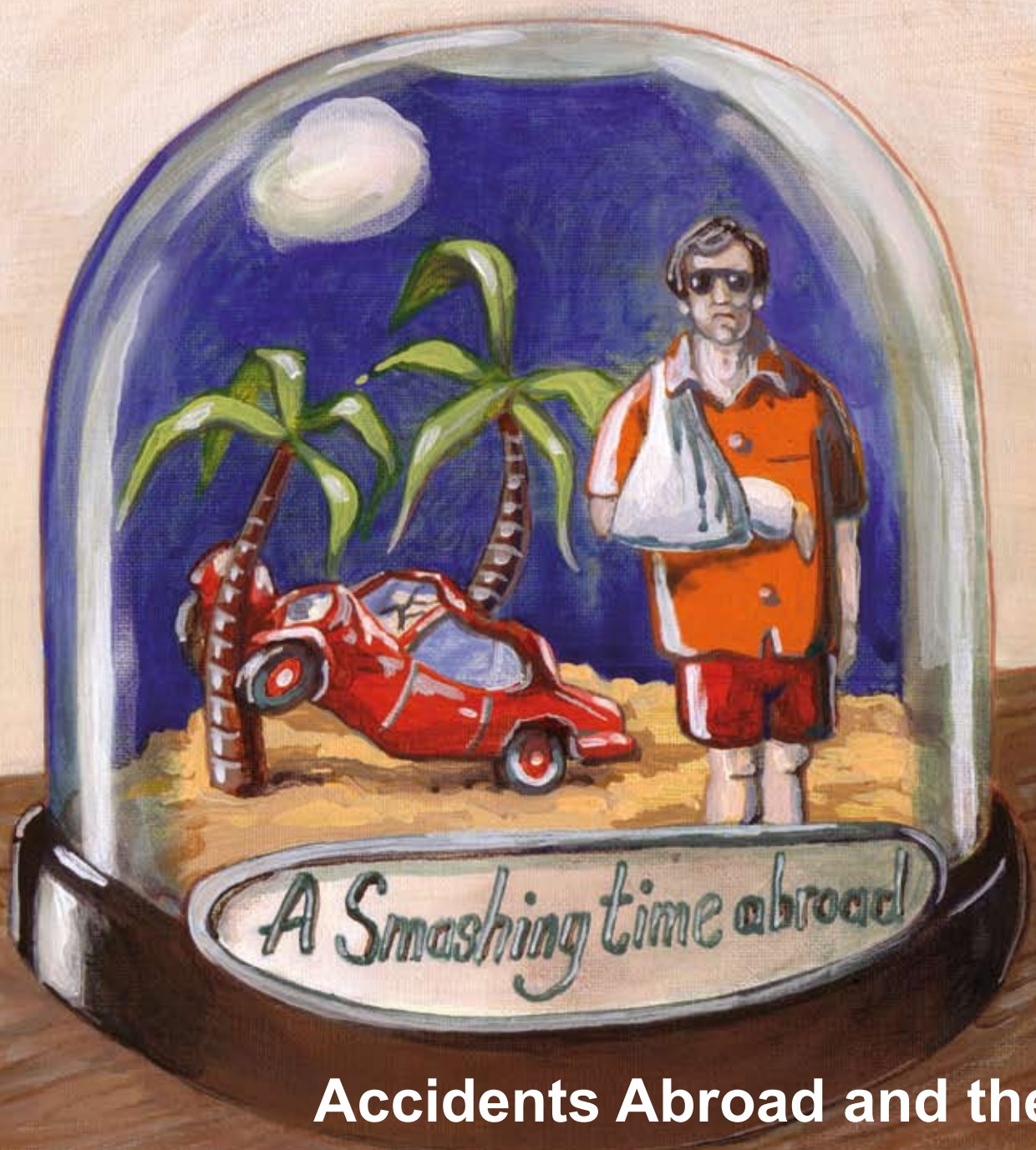

Accidents Abroad and the Assessment of Damages

ROUND HALL

LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

LAW REFORM COMMISSION INVITES SUBMISSIONS ON PROGRAMME OF LAW REFORM

The Law Reform Commission is preparing a *Fourth Programme of Law Reform* under the *Law Reform Commission Act 1975.* The new Programme will, over the coming years, form the principal basis on which we carry out our statutory mandate to keep the law under review with a view to its reform and modernisation.

We are inviting all interested parties to make submissions on possible areas of the law to be considered for inclusion in the new Programme of Law Reform. Submissions can be sent to fourthprogramme@lawreform.ie or Law Reform Commission, Fourth Programme of Law Reform, 35-39 Shelbourne Road, Ballsbridge, Dublin 4.

The development of the new Programme of Law Reform will also be the subject of the Commission's Annual Conference for 2012, which will take place on Tuesday 11th December. Details of the Annual Conference, including booking arrangements, are available at www.lawreform.ie.

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Striking Out a Finding of Guilt: A Broader View of the District Court's Jurisdiction

Mark Byrne BL

Introduction

It is well established that the District Court may "strike out" a case that is before the court but where a plea has not yet been entered.[1] It is also clear that such an order will not prevent the prosecution from re-entering the matter.[2]

However, in *DPP v. DJ Ryan and C.P.* [2011] IEHC 280, the "strike out" in question was of a different nature. It came, in effect, through the use of the "poor box" as a sentencing option. There the defendant had pleaded guilty to the offence of sexual assault and, after having paid a sum of money into court, left the court with no record of any kind against his name, the District Court having struck out the case against him. The High Court found that the District Court had jurisdiction to act in this way.

This article considers *DJ Ryan* in some detail, looks at some of the criticisms of the "poor box" approach, and analyses what modifications in approach District Court practitioners may wish to consider taking in light of *DJ Ryan*.

Director of Public Prosecutions v. District Judge Ann Ryan and C.P.

The notice party in *DJ Ryan* had been charged in the District Court with sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990. In accordance with the jurisdictional rules applicable to the charge, the Director of Public Prosecutions consented to summary disposal, the District Court considered jurisdiction, which was accepted, and the notice party elected to be tried in the District Court. A plea of guilty was entered early on in the proceedings.

The facts of the case were that the defendant had consumed a large quantity of alcohol in the hours leading up to the crime in question, which occurred in April 2009. He attended a birthday party in the injured party's house. The injured party went to sleep in her bedroom in the house. The notice party came to the bedroom at a later stage and lay down beside the injured party. The notice party made physical contact with the injured party resulting in him placing some of his fingers into the injured party's vagina. As she had her back to him, the injured party mistakenly thought that the notice party was her fiancé and she did not seek to stop the contact. After some time, another person at the gathering happened upon the notice party and the victim lying in bed together, and the crime came to light when the injured party realised that she had been touched by the notice party rather than her fiancé.

Having heard the facts of the case, the District Court ordered a probation report and a victim impact report. On a subsequent date, the District Court was informed that the notice party had €1,500 in court with him. Enquiries were made of the injured party as to whether she wished to accept this sum and it was made known that she did not but that, if it was to go anywhere, it should go to charity. The District Court directed that the money be paid to charity and then made an order striking out the matter.

The applicant in the High Court case sought an order of *certiorari* quashing the "strike out" on the grounds that it was a decision made without jurisdiction. Further, an order of *mandamus* was sought directing the District Court to enter a conviction in the matter and to impose a sentence on the notice party in accordance with law.

On behalf of the applicant it was argued, in the first place, that the respondent did not have jurisdiction to strike out the case in circumstances where a guilty plea had been entered. The applicant relied on the fact that the District Court Rules only provide for a case to be struck out in the limited circumstances outlined in the opening paragraph of this article.

Second, it was argued that the District Court's decision was irrational in that there was a written order of the District Court reciting that there had been a finding of guilt and the recording of a conviction and yet the order went on to state that the case had been struck out.

The applicant further submitted that the judicial review proceedings had been brought promptly and that an appeal was not feasible in circumstances where the case had been struck out by the District Court. The applicant also drew attention to the criticisms of the Law Reform Commission in its *Consultation Paper on the Court Poor Box*[3] of 2004, which concludes with the recommendation that the court poor box be replaced by a statutory regime.

1 Order 23, rule 3, of the District Court Rules provides: "Where the accused (or his or her representative) is present at the required time and place and the prosecutor (or his or her representative) is not present, the Court may strike out, dismiss without prejudice or adjourn the hearing of the complaint."; Order 33, rule 4, further provides: "Where the Court is of opinion that the complaint before it discloses no offence at law, or if neither prosecutor nor accused appears, it may if it thinks fit strike out the complaint with or without ordering costs."

2 See *State (Clarke) v. Roche* [1986] IR 619 at 627; see also *DPP v. Clein* [1981] ILRM 465 at 468.

3 Law Reform Commission Consultation Paper on The Court Poor Box (LRC CP 31-2004).

The notice party argued that the respondent had jurisdiction to act as she did, arguing that use of the word "may" in Order 23 rule 1 of the District Court Rules meant the District Court had discretion as to how it disposed of a case and allowed for a ruling of the type made in this case.[4]

It was also contended that section 50 of the Summary Jurisdiction Act 1850 and the Probation of Offenders Act 1907, which, although not directly encompassing the instant situation, demonstrated that the District Court had jurisdiction to dispose of summary matters without proceeding to conviction.

It was further argued by the notice party that the applicant had not shown any error on the part of the respondent in her application of sentencing principles and that, even if she had been mistaken, any such error was made within jurisdiction and was not, therefore, amenable to judicial review. It was also submitted that it was not open to the applicant, in circumstances where there had been prosecutorial consent to summary disposal, to then seek to review the sentence of the District Court on it merits. The contention was also raised that the applicant had acquiesced at all stages to the manner in which the respondent had handled the charge.

Kearns P. refused the reliefs sought, holding that the High Court should not quash an order made by a District Court judge who is acting within jurisdiction, particularly where to do so would effectively be instructing the District Court judge to enter and record a "guilty" verdict and deal differently with the matter of penalty. In this case, there was nothing in the order of the District Court, or the circumstances of the disposal of the case, that would meet the threshold for a finding of unreasonableness.

The High Court held that use of the "poor box" as a method of sentencing, notwithstanding doubts as to its exact provenance, was a long established common law sentencing option that was open to a District Court judge in a matter being tried summarily who had taken a view that it would be in the interests of justice to avail of it, Kearns P. stating:

> "Despite the fact that there is some lack of clarity surrounding the origins and development of the Poor Box jurisdiction, it has from time immemorial been part of the repertoire of remedies available in limited circumstances to judges of the District Court to apply where the facts of the particular case suggest that the higher interests of justice would best be served by doing so."[5]

In referring to a case the applicant had urged the court to follow, namely *DPP v. District Judge Maughan and McInerney* (Unreported, High Court, O'Caoimh, J., November 3, 2003), where the the High Court had held that the respondent was not entitled to strike out a drink driving charge in circumstances where there was a legislative provision expressly preventing the District Court from disposing of such a charge under the Probation of Offenders Act 1907, Kearns P. effectively distinguished it by noting that, unlike the High Court in that case, he was satisfied that the respondent in the instant case had the discretion to act as she did.

Thus, it is quite clear from the judgment of the High Court that the "poor box" is a valid sentencing option in appropriate matters being dealt with summarily and, further, that the High Court will be slow to interfere with the exercise of this jurisdiction by the District Court. The significance of this finding lies in the fact that, to take the case in question, a person who is found guilty of a relatively serious sexual assault, albeit one that is deemed suitable for summary trial, may walk out of court with absolutely no record of the finding of guilt against his name.

It might also be noted that, although, of course, good authority until held to be otherwise, *DJ Maughan* looks decidedly shaky in light of the judgment of Kearns P. in *DJ Ryan*. Applying the reasoning of Kearns P., the respondent in *DJ Maughan* had been making use of the poor box as a sentencing option, which is a discrete sentencing option to the dismissal of a matter under section 1(1)(i) of the Probation of Offenders Act 1907, notwithstanding that both options have in common that neither results in the conviction of a guilty person and both are generally availed of in tandem with a financial contribution from the guilty person.

While the road traffic legislation in *DJ Maughan* expressly prohibited disposal of a relevant matter under the Probation of Offenders Act 1907, it stated nothing that would, apparently, invalidate the application of the now clearly recognised, in light of *DJ Ryan*, "poor box" procedure leading to a strike out of the charge. From the judgment of O'Caoimh J., it seems that it was regarded as common case that the action of the respondent was effectively the same as a dismissal under the Probation of Offenders Act 1907. At page 2 of the judgment, it is stated:

> "It is not in dispute that if this was the intention of the respondent at the time [*to ultimately strike out the charges*] he did not have jurisdiction to strike out the charges in question as the same do not permit the application of the Probation of Offenders Act 1907."

Now that *DJ Ryan* clearly recognises the "poor box" approach as a valid and discrete sentencing option in appropriate cases, *DJ Maughan* is surely open to challenge.

Criticisms of the Poor Box System

The Law Reform Commission's 2004 *Consultation Paper on The Court Poor Box* outlines the many criticisms of the "poor box" system. These include concerns around:

- "buying" one's way out of justice, or a public perception of same;
- "one law for the rich and another for the poor", whereby those with money are more easily able to avail of the "poor box" approach;
- inconsistency in the application of the "poor box"

4 Order 23, rule 1 of the District Court Rules 1997 reads: "Where the accused, personally or by solicitor or counsel appears and admits the truth of the complaint made against him or her, the Court *may* [emphasis added] if it sees no sufficient reason to the contrary, convict or make an order against him or her accordingly, but if the accused does not admit the truth of the complaint, the Court shall, subject to the provisions of rule 2 hereof, proceed to hear and determine such complaint."

5 At p.20 of the judgment.

system, with some judges utilising it a lot and some not at all;
- use of the "poor box" for crimes that are not trivial and may merit significant fines or terms of imprisonment;
- uncertainty as to the jurisdiction of the poor box system (although *DJ Ryan* would seem to resolve this particular issue);
- possible impairment of public confidence in the criminal justice system because of misunderstandings and misinterpretations around the use of the poor box procedure;
- an absence of objective criteria around the beneficiaries of the "poor box" system;
- the inconsistency of receipt, administration and distribution of court poor box funds with the judicial function; and
- the loss to the Exchequer of the revenue which otherwise may have accrued to it from the levying of fines.[6]

The appropriateness of a failure to record a finding of guilt in the District Court might also be questioned. While, of course, there may be situations where the recording of a conviction would not be proportionate to the wrongdoing, the established statutory framework to cover such instances, namely the Probation of Offenders Act 1907, already provides for the recording of a finding of guilt and a dismissal under the Act. Such a record may be brought to the attention of any future criminal court the person to whom the order relates may appear before. However, by its nature, a "strike out" order would seem to see a finding of guilt disappear without trace. As Kearns P. writes at p.9 of *DJ Ryan* in summarising the submissions of the applicant concerning the difference between a "strike out" order and an under made under S.1(1) of the Probation of Offenders Act 1907:

> "The distinction between the two is that an order under the 1907 Act creates a record of the charge whereas a strike out means that there is no record whatsoever."

The consequences of this distinction are that any court sentencing a person who has, on a previous occasion, had a finding of guilt struck out by the District Court, may not have a true view of the character of that person.

Notwithstanding that there are certain advantages to the "poor box" system, chief among them that it may utilised in situations where to impose a conviction would be disproportionately harsh, and the fact that it enables a court to determine an appropriate punishment for the commission of an offence having regard to all of the circumstances of a case, the criticisms surely outweigh the advantages. This is particularly so in circumstances where the Probation Act 1907, although arguably in need of some modification, provides a statutory framework for dealing with just the sort of scenarios that might see a District Court judge avail of the "poor box" approach.

It would seem appropriate to move on the recommendations of the Law Reform Commission, outlined in both the *Consultation Paper on the Court Poor Box* of 2004 and the *Report - The Court Poor Box: Probation of Offenders*[7] of 2005, that the system be replaced by a statutory scheme based on updated provisions of the Probation of Offenders Act 1907 combined with those provisions of the Criminal Justice Act 1993 dealing with compensation orders.

A further consideration is that it may well be, as was alluded to in submissions on behalf of the notice party in *DJ Ryan*, and mentioned in passing in the judgment of Kearns P., that the absence of a spent convictions regime in this jurisdiction means that the "poor box" approach is regarded as one of the few safety valves (the other being the Probation of Offenders Act 1907) available to a District Court judge where the view is taken that a conviction, in all its permanence, is not warranted.

The Criminal Justice (Spent Convictions) Bill 2012, published in May 2012, should, assuming it becomes law in due course, allay concerns that, in a given case, a conviction order may cause a person undue hardship; if a matter is deemed minor enough such that it ought not stain a person's character for life, a spent convictions system will ensure that a relevant conviction may, if certain conditions are met, be expunged in due course.

Practical Considerations for Practitioners

What, then, are the practical implications of *DJ Ryan* for practitioners? It would appear that the effect of the decision is potentially significant in the impact it could have on the standard plea in mitigation for cases in the District Court. It has long been the view of defence practitioners that a "dismissal under the Probation Act [1907]" is a very good result for a client. In an appropriate case, this is often the height of what might be sought or suggested as an appropriate sentencing option in the course of a plea in mitigation. But, of course, although such an order is not a conviction, it is still recorded against a person's name, and may be mentioned before any court that person may come before in the future. In these circumstances, a strike out, where there is no official record of a finding of guilt, is an even better result for the client.

Although, pre-*DJ Ryan*, it was not unheard of to observe defence practitioners seek a strike out of a case, generally in association with an offer of a sum of money to charity, the uncertainty around the validity of the "poor box" regime, as acknowledged in the judgment of Kearns P., meant that many District Court judges simply took a view that they had no jurisdiction to take such a course of action and that an order under the Probation of Offenders Act 1907 was the most lenient sentence that they could construct.

However, for as long as *DJ Ryan* is a good authority, we have certainty and clarity that strike outs can be made within the jurisdiction of the District Court in the vast majority of cases dealt with summarily and also, perhaps, in cases that might previously have been thought to fall within the ambit of *DJ Maughan*. It would seem, then, that defence practitioners may well take a view that, in appropriate cases, a strike out

6 See pp.65-68 of the Paper.

7 See pp.75-78 of the Law Reform Commission Report - The Court Poor Box: Probation of Offenders (LRC 75-2005).

might be urged in a plea in mitigation in preference to an order under the Probation of Offenders Act 1907.

Conclusion

Summary matters form the vast majority of criminal business disposed of by our court system. Although, by definition, minor in nature, there will always be a scale of seriousness where summary cases are concerned and, for those matters at the higher end of the scale, and close to being dealt with on indictment, the facts of the alleged crimes are, at least on their face, sometimes surprisingly serious.

In these circumstances, it seems important that there would be a clear understanding of the basis on which a person found guilty of a summary matter may be sentenced and whether their guilt will be a matter of record or not.

Where previously there was uncertainty, *DJ Ryan* establishes that the District Court does have a "poor box" sentencing jurisdiction and it clarifies that a person found guilty of a *prima facie* serious crime, albeit one which is deemed suitable to be tried summarily, can be left without any official record of that guilt.

It would now seem to be a matter for the legislature to consider whether it is satisfied with this state of affairs. ■

The PILA Pro Bono Register: An opportunity for barristers

Alan D.P. Brady BL and Kim Watts*

Introduction

The Public Interest Law Alliance (PILA) was launched in 2009 as a project of the Free Legal Advice Centres Ltd (FLAC). FLAC is well-known as an organisation and many members of both branches of the legal profession in Ireland regularly provide pro bono advice through FLAC's Legal Advice Centres. While FLAC is well-established as a provider of general legal advice to individuals who cannot afford it, PILA assists organisations that work to help the marginalised and the disadvantaged. PILA does this by linking the legal needs of these organisations with lawyers who will do this work pro bono. Through PILA, lawyers use litigation, law reform and legal education as tools of change to help those organisations and the people they serve.

The pro bono register

PILA operates a professional Pro Bono Referral Scheme that matches legal expertise with specific legal needs in non-governmental organisations, community groups and law centres. It also promotes the use of the law in the public interest through events, roundtables and research. The pro bono register is designed so that barristers and solicitors can engage in specific pieces of detailed work but on a more sporadic basis. The Referral Scheme identifies unmet needs for legal services among groups working with marginalised and disadvantaged people, and links those groups to practitioners with relevant expertise on the pro bono register. Primarily, these groups include organisations working on issues such as housing, immigration, social welfare, equality, mental health, children and Travellers. When a practitioner signs up to the pro bono register, they can indicate specific areas of law in which they have an interest and expertise, which assists PILA in linking appropriate practitioners to requests for legal assistance.

The requests are distributed by group email to all barristers and solicitors who have expressed an interest in a particular field. The first practitioner (or practitioners where a referral requires multiple lawyers) to respond to the email will be assigned to the project. This system of group email requests means that practitioners are never overly burdened by PILA. Any work is, as the 'pro bono' title suggests, unpaid; the flexibility of the register ensures that barristers are not giving up paid work in order to do PILA referrals and need only respond to requests when they feel they have the time to engage with them properly.

The work of the register

The type of work fits into three broad categories: general advice, potential litigation and law reform. The general advice projects usually take the form of opinion work. For example, organisations often find themselves navigating complex legislative systems in order to assist those they work with. An opinion on statutory interpretation of an ambiguous point of law can provide immense aid and peace of mind for an organisation that lacks in-house legal personnel or the financial resources to source an opinion privately. In some instances, the opinion can be used to change the practice of a state agency dealing with marginalised people. For example, a recent PILA referral involved a barrister providing an opinion for Nasc, the Irish Immigrant Support Centre. Counsel advised that the Department of the Environment's guidelines on social housing for immigrants were *ultra vires*. The Department ultimately changed the policy to one which Nasc agrees is much fairer.

Potential litigation can sometimes arise out of seemingly straightforward opinion referrals, but the referrals can also arise at the stage where it appears that an individual or group has a potential cause of action. These referrals are often indicative of a problem that an organisation has seen repeatedly with groups it works with. These referrals are akin to a type of strategic litigation. For example, a PILA referral for assistance to the Transgender Equality Network Ireland (TENI) recently led to an equality action against a Dublin hospital. The action ultimately settled and the hospital agreed to provide transgender training for its staff and amend its transgender policy.

Law reform projects often require a team of pro bono practitioners over an extended period to engage in specific pieces of research to assist an organisation or group of organisations that are campaigning for law reform on a specific issue. In many instances, an organisation will have extensive expertise on an issue and the social policy difficulties relating to it, but they will lack the expertise to fully realise a programme for legislative action. These law reform projects often involve the practitioner or team of practitioners working quite closely with the NGO and on occasion speaking at briefings for legislators in the Houses of the Oireachtas.

Law reform projects can also lead to other interesting opportunities. A law reform working group of lawyers was set up to provide research on models of aftercare for children and those over 18 in other jurisdictions for the children's organisation Barnardos. The lawyers provided research on models of aftercare in England & Wales, Scotland, Northern Ireland and Ontario in Canada. This in turn led to a paper

* Barrister and Solicitor (New Zealand); PILA Legal Information & Communications Officer

on Scotland and Northern Ireland that was presented by one of the lawyers in the group at a PILA/Barnardos seminar on aftercare.

The PILA pro bono register provides a real opportunity for the Bar. Junior barristers can build experience and profile in a diverse range of public law areas. More experienced members of the Bar can use skills they have already honed to provide assistance to those who need it most. The work involved is invariably challenging and rewarding. Furthermore, it is always interesting. PILA referrals are directed to areas where there is space for innovation by skilled lawyers. Regardless of a barrister's existing areas of practice, the PILA referrals are likely to be some of his or her most engaging work.

Many of the referrals, particularly the more complex ones, require a team of lawyers, and so it is not uncommon for a number of barristers and solicitors to work together on a project. The referrals also provide practitioners with the opportunity to work with organisation staff and other professionals outside of the law. The projects can require an on-going working relationship as the strategy for a project is built by the team involved and ultimately brought to fruition. This diversity of personnel and the professional relationships it can foster is another key design strength of the PILA register.

PILA events

PILA organises regular 'meet and greet' events for those involved in the pro bono register, including solicitors and barristers who are on the register as well as staff from the organisations who avail of it. These informal gatherings provide a well-deserved opportunity to relax and socialise as well as a chance to discuss public interest law issues with other like-minded professionals. PILA also organises regular CPD seminars and conferences in fields connected with PILA's work, especially the type of work to which the pro bono register is directed. The speakers include practitioners, NGO professionals and academics. The CPD events are free of charge and often surpass expensive paid-for events in terms of their quality. The seminars are ordinarily followed by a free reception.

The PILA pro bono register is a flexible and interesting way for barristers to use their specialised skill-set to make a meaningful contribution. Barristers of all levels of experience in any area of practice are welcome to join the pro bono register. You can sign up by emailing Maeve.Regan@flac.ie or by visiting the 'For Lawyers' Section of the PILA website (www.pila.ie). ■

Defending the Mentally Unwell

Niall Nolan BL

Introduction

Defending the mentally unwell poses particular challenges to practitioners. The interplay between the purely civil arena, provided by the Mental Health Act 2001 (as amended) and the Criminal Justice side, essentially constructed by the Criminal Law (Insanity) Acts 2006-2010, is significant and one cannot hope to comprehensively advise on a particular issue, irrespective of it's origin, without a knowledge of both codes.

With this in mind, the recent publication in the United Kingdom of Kris Gledhill's *'Defending Mentally Disordered Persons'* (1st Edn 2012) by the LAG Education and Service Trust must be considered a very welcome development indeed.

Although the emphasis is on the practice and procedure in the neighbouring jurisdiction, it nonetheless compliments in a substantial way works published here in the relative recent past which partially deal with the interface between mental health law and the criminal law[1].

In particular, the exposition on insanity and fitness to plead issues should greatly inform how the procedure and substance of such sensitive and difficult areas are approached and Mr. Gledhill's publication is timely indeed when it is considered that our Superior Courts are coming more and more to consider the provisions of the Criminal Law (Insanity) Acts and the Mental Health Act 2001 and their compatibility with The Constitution and the European Convention of Human Rights.

In this regard, the recent decision of Mr. Justice Hogan in *BG v Judge Murphy & Ors (No.2)* [2011] IEHC 445 is of note. In this case, Hogan J. "highlighted what can only be described as a most disturbing oversight in the Criminal Law (Insanity) Act 2006" (*per* Yvonne Mullen BL in her article "*Unconstitutional Omissions*" Bar Review April 2012). In his judgment, the learned Judge found *inter alia* that the Oireachtas, albeit unintentionally, had nonetheless violated the constitutional command of equality as regards the operation of the fitness to be tried provisions in certain circumstances. Those suffering from mental illness had been discriminated against in the very legislation that was meant to guarantee the proper observance of rights and safeguards.

1 Darius Whelan, Mental Health Law (2009), Casey, Craven, Brady & Dillon Psychiatry & The Law (2010)

A Developing Jurisprudence

Mr. Gledhill's book is also highly insightful and illuminating when dealing with the sentencing stage and post-sentence considerations. A case which highlights the complexity of the legislation in issue in this sentencing context in this jurisdiction and how same may be susceptible to further challenge, is the case of *DPP v B*, 2011 [IECCC] 1. On the 4th of July 2011, Mr. Justice Garret Sheehan took the somewhat unusual step of delivering a formal written judgment in the Central Criminal Court in the context of dealing with an "insanity" case which had proceeded before him. This unprecedented judgment dealt largely with the Judge's "grave concerns about the adequacy of the treatment the defendant had received during the two and a half year period" the accused had already been in the Central Mental Hospital by the time he came to conclude the proceedings. The judgment expresses frustration with the limitations of the relevant legislation in the context of making an Order once a jury had returned a verdict of not guilty by reason of insanity, Mr. Justice Sheehan *inter alia* was moved to say the following having set out the background facts in the case:

> "[5.16] All the above matters give rise to a concern as to whether the Central Mental Hospital is the appropriate environment in which the defendant can achieve rehabilitation, let alone the kind of environment that will allow him to flourish as a human being. The emphasis on anti-psychotic medication, with the obvious detrimental effects to his physical health, and the failure by his psychiatrist to enter into a meaningful therapeutic relationship with him, as well as the apparent lack of real interest in the sources of the defendant's illness, are all causes for concern. Furthermore, the manner in which his initial refusal of Clozapine was dealt with is also a cause for concern. Rather than using the defendant's refusal as a platform on which to build a real relationship with the defendant, every effort was made to overcome this refusal by enlisting the support of others including family members.
>
> [5.17] This Court notes that there is a huge discrepancy in the protection afforded to patients detained pursuant to the Criminal Law (Insanity) Act 2006 and those admitted to the Central Mental Hospital pursuant to the Mental Health Act 2001. The purpose of both Acts must be such as to strive for the treatment or care of mentally ill persons in our society whether they are being detained in, or admitted to, the Central Mental Hospital. Yet, persons detained pursuant to the Criminal Law (Insanity) Act 2006 are not granted the same protections as those patients admitted to the Central Mental Hospital pursuant to the Mental Health Act; namely there is no requirement for the "best interests of the patient" to be at the forefront of a court's considerations in making such an order. This, therefore, appears to undermine any requirement for this Court to exercise its role as *pariens patriae*, pursuant to its inherent jurisdiction, at the sentencing stage. It is another cause for concern that the result of this web of legislative provisions is that once a person is found to be not guilty by reason of insanity for an offence in the criminal law sense, that person can only be detained if he or she has a mental disorder within the civil law sense. So while the person is detained using civil law criteria, he or she does not have the same rights as patients detained under the Mental Health Act 2001. For example, a person admitted as a patient pursuant to the Act of 2001 can only be detained for an initial period of 21 days within which there must be a review by a Mental Health Tribunal. In contradistinction to this, the requirement to review a person detained pursuant to the Act of 2006, on the basis that they have been found not guilty by reason of insanity, arises only every six months.
>
> [5.18] As I mentioned earlier, under the Criminal Law (Insanity) Act 2006, the Central Mental Hospital is the designated centre. It is also noteworthy that s. 3(1) (b) (i) of the Mental Health Act 2001 refers to an "approved centre". The legislation does not refer to an appropriate or adequate/suitable centre but more precisely an "approved centre"; this further removes any possibility for this Court to consider whether the Central Mental Hospital is appropriate, adequate or suitable for this particular defendant once it is decided that he is in need of further in-patient care or treatment."

The subject matter of this decision further serves to highlight the difficulty in taking instructions from someone in respect of whom there is an issue regarding their sanity at the time of the alleged commission of a criminal offence, or indeed their fitness to plead. In this regard, perhaps the Oireachtas, in coming to review the Criminal Law (Insanity) Acts, a process urged upon it in the particular context of the matter in issue in *BG (No.2)* above, might consider the somewhat broader range of options available to a Court in the United Kingdom after a finding of unfitness to be tried/not guilty by reason of insanity has been made. These issues are all discussed in detail in Mr. Gledhill's book. Reference here may also be made to the decision in *Redmond v DPP* [2006] 3 IR 188 where by a majority of 4:1 the Supreme Court decided that notwithstanding the availability of an insanity plea, it was only in very exceptional circumstances that a trial judge should intervene, second-guess the defence and reject a plea of guilty on an accused's behalf when the accused may have been seriously unwell at the time of an alleged offence.

Conclusion – vindicating fundamental rights

The vigilance of our Superior Courts in ensuring that accused persons are not deprived of fundamental rights has been made clear in recent decisions. Many issues regarding the operation of the Mental Health Act 2001 (as amended) and the Criminal Law (Insanity) Acts remain to be teased out and adjudicated upon. The deliberations of legislators on any proposed amending legislation will also involve difficult and complex exercises. In the writer's view, legislators, judges and practitoners alike will greatly benefit from an analysis of the law as developed by comparator jurisdictions and in this regard, Mr. Gledhill's book is certain to provide invaluable assistance. ■

The Decommissioning of *Gunn*

David O'Neill BL

This summer's court decisions on registered charges represent progress for lenders, coupled with one setback.

Some of the arguments raised show continued unawareness how Part 10 of the Land and Conveyancing Law Reform Act 2009, relates to pre-existing law. Moreover, none of them has resolved the apparent lacuna in a secured lender's right to obtain possession of registered land where the deed of charge was executed before 1 December 2009 but elements necessary for the lender to establish a right of application under s 62(7) of the *Registration of Title Act 1964* arose after its repeal on that date[1].

This article will respectfully suggest the following:

(1) both the repealed s 62(7) and the unamended s 62(6) of the 1964 Act were replaced by the amended s 62(6) as inserted by s 8(1) and Schedule 1 of the 2009 Act;
(2) the substitution by repeal and amendment took effect immediately on 1 December 2009 subject to the presumption that it did not interfere with vested rights;
(3) the substitution took effect notwithstanding s 96(1)(a) of the 2009 Act;
(4) the new provisions applied to deeds of charge executed before that date to the extent that rights had not vested either pursuant to ss 4(1) and 27 of the Interpretation Act 2005 or at common law under the replaced provisions;
(5) whether rights had vested depends on the terms of the particular deeds of charge;
(6) in particular, in relation to s 62(7), the right to apply vested on the making of an adequate demand, if the deed required a demand, or otherwise on default; and
(7) the right's not having vested before 1 December 2009 did not deprive the lender of a remedy, but vested in the lender the equivalent remedy under the 2009 Act, namely application (to the appropriate court) under ss 97 and 101 of that Act.

This Summer's Decisions

(a) EBS Ltd v Gillespie [2012] IEHC 243, Laffoy J, 21 June.

An "acceleration clause" is a clause in a contract of loan or ancillary security under which, notwithstanding that the loan is repayable by instalments, the entire balance becomes due on the occurrence of specified events or actions. The acceleration clause in this instance rendered due the whole money secured *either* on demand *or* on specified incidents of default. Laffoy J held the lender must show that (1) repayment of the principal had become due, (2) the power of sale had become exercisable, and (3) the application was made *bona fide* to realize the security. Where a lender relied on the Interpretation Act 2005 to preserve rights under s 62(7) of the 1964 Act those elements must have arisen before its repeal. Since the terms of the charge did not require a demand before the principal became due, the right to apply under s 62(7) arose before the repeal. On this basis, Laffoy J distinguished *Start Mortgages Ltd v Gunn*[2].

If the security is not really threatened e.g. where the borrower died with a void policy of life assurance, but the executor is, and can be expected to continue, paying the instalments, (2) and (3) could become important[3].

(b) Moran v AIB Mortgage Bank [2012] IEHC 322, McGovern J, 27 July.

The plaintiff challenged a receiver's appointment under 24 deeds of mortgage or charge. The deeds defined the term "Conveyancing Acts" to include a reference to those Acts as re-enacted. The borrower contended that when ss 20 and 24 of the *Conveyancing Act 1881* were repealed, a reference to s 108(1)(a) of the 2009 Act was substituted for the reference to s 24. The borrower argued that the prior notice required by s 108(1)(a) of the 2009 Act had not been given. He accepted that under the 1881 Act the similar notice requirement in s 20 of that Act could be, and was, displaced by the deeds. The court held that the deeds only incorporated any re-enactment of the 1881 Act passed before their execution, and did not incorporate s 108(1)(a), which had only come into force afterwards.

Strangely, s 96(3) of the 2009 Act was not mentioned, which, except as regards a housing loan mortgage[4], makes s 108(1)(a) and all other provisions of Part 10, Chapter 3, subject to the terms of the deed[5]. Since there were 24 mortgages, it is highly unlikely that they were all housing loan mortgages, and the plaintiff's overall argument should not have succeeded even had s 108(1)(a) become incorporated as he contended.

1 By s 8(3) of, and Schedule 2 to, the 2009 Act.

2 [2011] IEHC 275.

3 Cp *Quennell v Maltby* [1979] 1 WLR 318, and *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 AC 295 at 312, 315, 317 (Privy Council).

4 Defined by s 3 of the 2009 Act and s 2(1) of the *Consumer Credit Act 1995*, as substituted by s 33 of, and Part 12 of Schedule 3 to, the *Central Bank and Financial Services Authority of Ireland Act 2004*, in such a way as to extend only to security over the principal residence of the borrower or his or her dependants or for a loan taken out as consumer.

5 Thus having similar effect to that of s 19(2) and (3) of the 1881 Act on the powers and rights implied in favour of a mortgagee by deed under that Act (although without the exception for housing loan mortgages).

(c) McEnery v Sheahan [2012] IEHC 331, Feeney J, 30 July.

Here, the deed relied on the power to appoint a receiver implied by s 19 of the 1881 Act as applied by s 62(6) of the 1964 Act. The borrower argued that the power of appointment had been repealed with s 19; alternatively, that at the date of appointment the physical registration of the charge had not been completed in the Land Registry so the power under s 19 had not vested in the lender at that date. Feeney J held (1) the power of appointment vested on execution so the repeal of s 19 could not alter the terms of the contract, (2) *Start Mortgages Ltd v Gunn*[6] was distinguishable because the right to apply by special summons under s 62(7) was procedural only, but presupposed an underlying plenary right to possession unaffected by the repeal, (3) appointing a receiver was a substantive right that could not be withdrawn by the repeal of s 19, and (4) once registration of the charge was complete it was deemed[7] to be backdated to the date (before 1 December 2009) on which it was lodged for registration[8].

Aspects of the reasoning might be vulnerable. That the right of appointment vests as part of the contract of charge is consistent with s 19(2) and (3) of the 1881 Act, but the effective date must be the (deemed) date of registration: 1964 Act, s 62(2). A charge merely appropriates land as security without vesting any proprietary interest in the lender, who therefore without s 62(7) of that Act would have had no right to possession[9], and therefore what underlying plenary right was envisaged by the plaintiff in *McEnery* is unclear. It was held under comparable English legislation that the transferee of a charge had no statutory power to appoint a receiver before he was registered as owner[10]. Another defence might be that the right of action had not vested at the date the proceedings were issued[11].

(d) GE Capital Woodchester Home Loans Ltd v Reade [2012] IEHC 363, Laffoy J, 22 August.

Unlike in *Gillespie*, the deed here required a demand to trigger the acceleration clause. Laffoy J held that none of the supposed demands, before or after 1 December 2009, were effective triggers, none of them having specifically demanded payment. Moreover, those predating the repeal of s 62(7) were not relied on at the time as demands, but the lender continued to correspond with the borrowers to try to manage the arrears. The lender could not show that its rights under s 62(7) were preserved by s 27(1)(c) of the Interpretation Act 2005 through the principal's having been rendered repayable by a demand made before repeal.

6 Above, fn 2.

7 Cp *Land Registration Rules, 1972*, r 63.

8 The decision effectively extends the decision in *Kavanagh v Lynch* [2011] IEHC 348, Laffoy J, 31 August 2011, to registered land.

9 *Northern Banking Co Ltd v Devlin* [1924] 1 IR 90, *Bank of Ireland v Feeney* [1930] IR 457 (Supreme Court), *Re Jacks* [1952] IR 159 (Supreme Court), *Gale v First National Building Society* [1985] IR 609, *Bank of Ireland v Smyth* [1993] 2 IR 102, as well as *Gunn* and *Gillespie*.

10 *Lever Finance Ltd v Needleman's Trustee* [1956] Ch 375 at 382-3.

11 Cp *Creed v Creed* [1913] 1 IR 48, *Gaffney v Faughnan* [2006] 1 ILRM 481, *Minister of State for the Interior v RT Co Pty Ltd* (1962) 107 CLR 1 (High Court of Australia).

Need for Demand

The distinction between the wording of the deeds in *Gillespie* and *Reade*, however fortuitous, is well established[12]. The debt in *Wise Finance Co Ltd v Lanigan*[13] either fell within a clause under which it would have been payable after a fixed interval or within an alternative clause under which it was payable on demand. The Supreme Court held that (1) the debt was payable on demand, (2) the demand the lender had made was for possession, with an option for repayment of the principal in the alternative, (3) this did not constitute a demand for repayment of the principal, and (4) the claim under s 62(7) therefore failed. Although service of proceedings for recovery of a loan expressed to be payable on demand is normally in itself sufficient demand, this is not so where liability to pay the entire sum derives from an acceleration clause, because the triggering of such a clause "radically changes the nature of the debtor's obligation", and therefore an express demand must be made[14].

The House of Lords in *West Bromwich Building Society v Wilkinson*[15] held that, where there was an acceleration clause, the "principal sum of money" became receivable under the equivalent of s 36(1)(a) of the Statute of Limitations 1957 when demand was made[16]. It rejected an argument that time ran separately in respect of each instalment. Even if the principal became receivable earlier, when the right to make the demand arose, the House still treated a demand as being necessary to complete the cause of action[17].

S 27(1)(c) of the Interpretation Act 2005 only applies to statutory, not contractual rights[18]. If the deed requires a demand, the statutory right to apply under s 62(7) did not arise until an adequate demand was made (*Gunn* at pp 26-28).

Putting off the Evil Day

Much ingenuity has been expended in trying to devise an interpretation of s 62(7), its repeal, the Interpretation Act, or the common law of charges, that would not turn the lender's property right and the borrower's eviction on pinhead nuances between the wording of different deeds and demands. Nearly all the suggestions advanced to date argue for replacing demand (where required by the deed) with default as the incident envisaged by s 62(7) that caused repayment of the principal to become due. But many such charges have fallen into arrears after 1 December 2009, and any such solution would not avail the owner of such a charge[19].

12 Cp Barron J in *Bank of Ireland v. O'Keeffe* [1987] IR 47 and *First Southern Bank Ltd v Maher* [1990] 2 IR 477.

13 [2004] IESC 4.

14 *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 1 WLR 1474 at 1483.

15 [2005] 1 WLR 2303.

16 At 2309.

17 The majority were sceptical of an alternative argument that the principal became receivable on the date it was deemed by the deed to have become due for the purposes of the Law of Property Act 1925. Lord Scott at 2310 was downright hostile to the argument, observing that such a clause merely set the date on which the power of sale arose and that "The purpose is not to advance the date on which the mortgage money becomes due".

18 Cp *Re McLoughlin's Application* [1963] IR 465, *Lampitt v Poole Borough Council* [1991] 2 QB 545. This is an impediment to the solution suggested at (2012) 17 Bar Review 58.

19 It would, of course, be possible to argue as was done in *Gunn*

The EU Commission observed at pp. 27-28 of its Economic Adjustment Programme for Ireland Summer 2012 Review that:

> "The mission underscored the importance to…redress the legal gap which prevents creditors from exercising their right to collateral on defaulted loans in some circumstances, while preserving adequate protections for debtors' principal private residence":

and also in the following extract from footnote 15 that:

> "The authorities take the view that proposing legislation to redress this legal gap could prejudice the ongoing legal process, with several cases pending before the Supreme Court".

Despite, therefore, the possible merits of remedial legislation for Ireland's economic stability, such legislation cannot be expected any time soon, and no provision to cure the apparent lacuna has been included in the Personal Insolvency Bill or in any of its amendments[20].

2009 Act and pre-1 December 2009 Deeds

S 96(1)(a) of the 2009 Act provides:

> "Subject to this Part, the powers and rights of a mortgagee under *sections 97 to 111* … apply to any mortgage created by deed after the commencement of this Chapter":

This section has repeatedly been interpreted as *only* applying Part 10, Chapter 3, to a charge created after the Act commenced[21]. However, the contrary never seems to have been the subject of reasoned argument.

If the assumed interpretation were correct, the implied powers and rights under the 2009 Act would not apply to a deed executed before 1 December 2009 but registered after that date, yet the powers and rights of a mortgagee by deed under the Conveyancing Acts would probably not apply either. Under s 62(2) of the 1964 Act, they do not vest until registration and, in such an instance, by the time of registration the relevant provisions of the Conveyancing Acts would have been repealed. Moreover, legal security over registered and unregistered land is now created uniformly (s 89(1) and (5) of the 2009 Act), so, subject to registration, the holder of a 2009 Act charge automatically gains the powers and rights under Part 10, Chapter 3; there would be no need for special provision to that effect in s 62(6) of the 1964 Act. S 96(1)(b) of the 2009 Act makes the vesting of the powers and rights under Chapter 3 of Part 10 subject to s 62(2) of the 1964 Act. Therefore, if Chapter 3 *only* applied to "new" deeds, s 62(6) could have been repealed. Instead, it was amended by substituting a reference to the powers and rights under the 2009 Act, Part 10, for those under the relevant repealed provisions of the Conveyancing Acts.

Substitution, by amendment or repeal, operates on the presumption, whether incorporated in ss 4(1)[22] and 27 of the Interpretation Act 2005, or at common law, that it takes effect immediately but subject to vested rights[23]. *Carr v Finance Corporation of Australia*[24] and *National Trust Co Ltd v Larsen*[25] are particularly illustrative, both being concerned with the substitution and repeal of mortgagees' remedies.

It is therefore respectfully submitted that the "new" s 62(6) substitutes for *both* s 62(7) and the "old" s 62(6). Subject to the prior vesting of any corresponding rights under the repealed s 62(7), or under the relevant repealed provisions of the Conveyancing Acts pursuant to the "old" s 62(6), the owner of a registered charge is deemed to hold the powers and rights under Part 10 of the 2009 Act irrespective of the date of its creation. If a right has vested e.g. under s 19 of the 1881 Act or through an adequate demand for the purposes of s 62(7), the lender may rely on the "old" s 62(6) or on s 62(7) as applicable. Otherwise it must rely on the equivalent provisions of Chapter 3 of Part 10.

Therefore, in relation to extant proceedings:

(1) where proceedings have been commenced with an adequate demand (where a demand is required by the deed) made before 1 December 2009 they may continue in accordance with *Gunn*;
(2) where proceedings have been commenced before 1 December 2009 with an inadequate demand (where a demand is required by the deed) they should be struck out (*Wise Finance v Lanigan*[26]), but the lender may reapply under Chapter 3, – to

itself that the right to apply under s 62(7) arose when the deed of charge was registered, and that argument, if successful, would cover any default under a charge from before 1 December 2009. But this would not only require *Gunn* to be not followed as opposed to distinguished, but would also face the formidable cogency of the objections that (1) there was no immediate right to apply on registration because repayment of the principal had not yet become due, (2) exercise of the right would not only be conditional, but conditional on an event (default or demand on foot of default) neither desired nor expected by the holder of the right, (3) any attempted exercise of the right before default would, as Laffoy J found in *Gillespie*, normally be an abuse of process, since it would not be in aid of the power of sale, and (4) the right to apply under s 62(7) could thereby be preserved for decades after the repeal of the subsection.

20 The prejudice currently being suffered by lenders is obvious enough. However, borrowers have an interest in remedial action as well. There is evidence that lenders are now regularly obtaining judgment against borrowers on the underlying debt (often by lodging a judgment set in the Central Office), possibly with a view to waiving the security and bankrupting the borrower, on the basis that this course has become superior to the normal means of realizing security.

21 *ACC Bank plc v Kelly* [2011] IEHC 7 at paras 9.2-9.3, *Gunn* at p 30, *Gillespie* at para 20, *Moran* at paras 13-14, *McEnery* at para 4.1, and *Reade* at para 14.

22 Which makes any provision, including s 27, of the 2005 Act, subject to a contrary intention apparent in the 2005 Act or the repealing enactment.

23 *Re McLoughlin's Application* above. Also *Carr v Finance Corporation of Australia* (1982) 150 CLR 139 (High Court of Australia) and *National Trust Co Ltd v. Larsen* (1989) 61 DLR (4th) 270 (Court of Appeal, Saskatchewan).

24 *Ante.*

25 *Ante.*

26 Above, fn 13.

the Circuit Court in the case of a housing loan mortgage[27];

(3) where proceedings have been commenced on foot of a deed which rendered the principal immediately repayable on default with no need for a demand, and that default occurred before 1 December 2009, they may continue in accordance with *Gillespie*;

(4) any other proceedings pending in the High Court not in respect of a housing loan mortgage may be continued under Chapter 3 by amendment of the relief sought; and

(5) any other proceedings pending in the High Court in respect of a housing loan mortgage may probably, subject to a like amendment, be transferred to the Circuit Court[28].

27 2009 Act, s 101(4), (5), and (6).
28 *Courts of Justice Act 1924*, s 25.

This approach also has the merits:

(1) it is independent of the date of default, so can equally be applied where default first occurs after 1 December, 2009;

(2) if the repealed provisions are preserved beyond the interpretation favoured here, the 2009 provisions would still apply in all instances not covered by that further preservation;

(3) it does not preserve rights under the repealed s 62(7) many years into the future (a prospect raised by some rationales for overturning *Gunn*);

(4) it is not predicated on a notional right to apply under that subsection having vested in the lender at a date long before there was any default (also a prospect raised by those rationales); and

(5) it probably best reflects the draftsperson's intention. ■

Legal The Bar Review Update

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Asylum

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Patent infringement suit – Divisional patent in suit – Discoverability of material concerning parent patent – Commercial List – Relevance – Necessity – Onus on moving party – Proportionality – Whether information can be obtained by less expensive and less time consuming method – Interrogatories or notices to admit facts – Difference between discoverability and admissibility – Relationship between parent patent and divisional patent – Discovery relevant and necessary as leading to line of inquiry – Difference between line of inquiry application and fishing expedition – *Ryanair v Aer Rianta Cpt* [2003] 4 IR 264; *Framus Ltd v CRH Plc* [2004] 2 IR 20; *Anglo Irish Bank Corporation Limited v Browne* [2011] IEHC 40, (Unrep, Kelly J, 14/4/2011); *Schneider (Europe) GmbH v Conor Medsystems Ireland Ltd* [2007] IEHC 63, (Unrep, Finlay Geoghegan J, 2/2/2007); *Medinol Limited v Abbott (Ireland)* [2010] IEHC 6, (Unrep, Finlay Geoghegan J, 19/1/2010); *Medtronic Inc v Guidant Corporation* [2007] IEHC 37, (Unrep, Kelly J, 23/2/2007); *Peruvian Guano* [1882] 11 QB 55; *Vickers Plc v Horsell Graphic Industries Ltd* [1988] RPC 421; *Eli Lilly & Company v Apotex Inc* [2006] 4 FCR 104; *Napp Pharmaceutical Holdings Limited v Ratiopharm GmbH* [2009] EWCA (Civ) 252; *Ranbaxy Laboratories Ltd v Warner Lambert Company* [2005] IESC 81, (Unrep, SC, 2/12/2005) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 31 r 12 – Order for discovery granted (2010/7635P & 2010/265COM – Kelly J – 5/5/2011) [2011] IEHC 159
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Dismissal of claim

Cause of action – Whether reasonable cause of action – Inherent jurisdiction of court to strike out proceedings where no reasonable prospect of success or action bound to fail – Principles to be applied – Fisheries law – Claim for compensation owing to ban on drift net fishing for tuna – Whether claim justiciable in Irish court – Whether existence of cause of action based on legitimate expectation– Whether conflict of evidence – Whether defendants made out clear case that plaintiffs' claim must fail – Whether plaintiffs claim entirely devoid of merit and must fail – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28 – *Webb v Ireland* [1988] IR 353; *Lett & Co Ltd v Wexford Corporation* [2007] IEHC 195 (Unrep, HC, 23/5/2007); *Aer Rianta cpt v Ryanair Ltd* [2004] 1 IR 506 and *Barry v Buckley* [1981] IR 306 considered – Application dismissed (2007/9273P – Laffoy J – 15/4/2011) [2011] IEHC 187
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Default of defence – Set aside judgment Appeal against refusal – Unless orders - Whether requirement of special circumstances to exist at time of default – Whether obligation to move expeditiously to set aside judgment – Time limit for applying to set aside judgment in default – Whether threshold under O 27 r 14(2) RSC higher than under old Rules – Effect of art 6 of European Convention on Human Rights – Whether Court has discretion to refuse relief – Whether defence on merits of case must be shown – Rules of the Superior Courts 1986 (SI 15/1986), O 27, r 14(2) – European Convention on Human Rights, art 6 – European Convention on Human Rights Act 2003, (No 20) ss 2 & 4 – *Martin v Moy Contractors* (Unrep, SC, 11/2/1999) approved – Appeal refused (66/2009 – SC – 28/7/2011) [2011] IESC 33
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Limitation of actions

Claims for psychiatric injuries and nervous shock – Road traffic accident involving children – Whether actions barred – Applicable date of knowledge – Test – Whether plaintiffs knew or ought to have known from facts ascertainable that significant injury suffered – Failure to seek medical assistance until after attendance with solicitor – Prior history of depressive symptoms – Awareness of opportunities for treatment – *Byrne v Hudson* [2007] IESC 53, [2008] 3 IR 106; *Bolger v O'Brien* [1999] 2 IR 432 and *Whitely v Minister for Defence* [1998] 4 IR 442 considered – Statute of Limitations (Amendment) Act 1991 (No 18), s 3 – Rules of the Superior Courts 1986 (SI 15/1986), O 84 r 21 – Claims dismissed (2008/8087P, 2009/1669P & 2009/1670P – McGovern J – 28/6/2011) [2011] IEHC 260
McCoy v Keating

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Judicial review – Registration of assignment of leasehold interest – Certiorari – Whether applicant had *locus standi* to take proceedings – Whether claim within scope of judicial review – Delay in seeking relief – Whether more appropriate remedy available – Application refused (2011/380 JR – Kearns P – 9/8/2011) [2011] IEHC 320
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Stay

Order of High Court – Appeal to Supreme Court – Delay in Supreme Appeals – Whether just to ask plaintiffs to wait up to three years to be vindicated – *Redmond v Ireland* [1992] 2 IR 362 and *Hay v O'Grady* [1992] 1 IR 210 considered – Stay refused (2005/3590P – McMahon J – 1/03/2011) [2011] IEHC 96
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Strike out

Delay in prosecution – Attitude of courts to delay – Whether prejudice caused by delay – Whether balance of justice in favour of striking out proceedings – *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290 applied – *Mulcahy v Coras Iompair Éireann* [2011] IEHC 292, (Unrep, Peart J, 13/7/2011) approved – *Rainsford v Limerick Corporation* [1995] 2 ILRM 561*; Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 considered – European Convention on Human Rights Act 2003 (No 20) – European Convention on Human Rights 1950 – Proceedings struck out (2001/15031P – Peart J – 14/7/2011) [2011] IEHC 293
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31st Dáil & 24th Seanad

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

1/2012 Patents (Amendment) Act 2012
Signed 01/02/2012

2/2012 Water Services (Amendment) Act 2012
Signed 02/02/2012

3/2012 Energy (Miscellaneous Provisions) Act 2012
Signed 25/02/2012 **(Only available electronically)**

4/2012 Health (Provision of General Practitioner Services) Act 2012
Signed 28/02/2012

5/2012 Bretton Woods Agreements (Amendment) Act 2012
Signed 05/03/2012

6/2012 Euro Area Loan Facility (Amendment) Act 2012
Signed 09/03/2012 **(Only available electronically)**

7/2012 Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012
Signed 10/03/2012

8/2012 Clotting Factor Concentrates and Other Biological Products Act 2012
Signed 27/03/2012 **(Only available electronically)**

9/2012 Finance Act 2012
Signed 31/03/2012 **(Only available electronically)**

10/2012 Motor Vehicle (Duties and Licences) Act 2012
Signed 02/04/2012 **(Only available electronically)**

11/2012 Criminal Justice (Female Genital Mutilation) Act 2012
Signed 02/04/2012

12/2012 Social Welfare and Pensions Act 2012
Signed 01/05/2012

13/2012 Protection of Employees (Temporary Agency Work) Act 2012
Signed 16/05/2012 **(Only available electronically)**

14/2012 Education (Amendment) Act 2012
Signed 23/05/2012 **(Only available electronically)**

15/2012 Electricity Regulation (Carbon Revenue Levy) (Amendment) Act 2012
Signed 25/05/2012

16/2012 Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012
Signed 30/05/2012 **(Only available electronically)**

17/2012 Local Government (Miscellaneous Provisions) Act 2012
Signed 08/06/2012 **(Only available electronically)**

18/2012 Competition (Amendment) Act 2012
Signed 20/06/2012 **(Only available electronically)**

20/2012 European Stability Mechanism Act 2012
Signed 03/07/2012

21/2012 European Communities (Amendment) Act 2012
Signed 03/07/2012

22/2012 Companies (Amendment) Act 2012
Signed 04/07/2012

23/2012 Dormant Accounts (Amendment) Act 2012
Signed 11/07/2012 **(Only available electronically)**

24/2012 Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012
Signed 18/07/2012 **(Only available electronically)**

25/2012 Veterinary Practice (Amendment) Act 2012
Signed 18/07/2012 **(Only available electronically)**

26/2012 Credit Guarantee Act 2012
Signed 18/07/2012 **(Only available electronically)**

27/2012 Electoral (Amendment) Act 2012
Signed 18/07/2012

28/2012 Qualifications and Quality Assurance (Education and Training) Act 2012
Signed 22/07/2012 **(Only available electronically)**

29/2012 Wildlife (Amendment) Act 2012
Signed 24/07/2012

30/2012 European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012
Signed 24/07/2012 **(Only available electronically)**

31/2012 Microenterprise Loan Fund Act 2012
Signed 24/07/2012 **(Only available electronically)**

32/2012 Industrial Relations (Amendment) Act 2012
Signed 24/07/2012 **(Only available electronically)**

33/2012 Criminal Justice (Search Warrants) Act 2012
Signed 24/07/2012

34/2012 Gaeltacht Act 2012
Signed 25/07/2012

35/2012 Residential Institutions Statutory Fund Act 2012
Signed 25/07/2012 **(Only available electronically)**

36/2012 Electoral (Amendment) (Political Funding) Act 2012
Signed 28/07/2012 **(Only available electronically)**

37/2012 Public Service Pensions (Single Scheme and Other Provisions) Act 2012
Signed 28/07/2012 **(Only available electronically)**

BILLS OF THE OIREACHTAS AS AT 12TH OCTOBER 2012

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.

Access to Cancer Treatment Bill 2012
Bill 60/2012
2nd Stage – Seanad **[pmb]** *Senators John Crown and Marc MacSharry*

Advance Healthcare Decisions Bill 2012
Bill 2/2012
Committee Stage – Dáil **[pmb]** *Deputy Liam Twomey*

Advertising, Labelling and Presentation of Fast Food at Fast Food Outlets Bill 2011
Bill 70/2011
2nd Stage – Dáil **[pmb]** *Deputy Billy Kelleher*

Animal Health and Welfare Bill
Bill 31/2012
Committee Stage – Dáil *(Initiated in Seanad)*
Assaults on Emergency Workers Bill 2012
Bill 62/2012
2nd Stage – Dáil **[pmb]** *Deputy Dara Calleary*

Betting (Amendment) Bill 2012
Bill 68/2012
Order for 2nd Stage – Dáil

Broadcasting (Amendment) Bill 2012
Bill 72/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Éamon Ó Cuív*

Burial and Cremation Regulation Bill 2011
Bill 81/2011
2nd Stage – Dáil **[pmb]** *Deputy Thomas P. Broughan*

Business Undertakings (Disclosure of Overpayments) Bill 2012
Bill 48/2012
2nd Stage – Seanad **[pmb]** *Senator Rónán Mullen*

Central Bank and Financial Services Authority of Ireland (Amendment) Bill 2011
Bill 67/2011
2nd Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Central Bank (Supervision and Enforcement) Bill 2011
Bill 43/2011
Committee Stage – Dáil

Child Sex Offenders (Information and Monitoring) Bill 2012
Bill 73/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Denis Naughten*

Civil Registration (Amendment) Bill 2011
Bill 65/2011
Committee Stage – Dáil **[pmb]** *Senator Ivana Bacik (Initiated in Seanad)*

Competition (Amendment) Bill 2012
Bill 54/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Emmet Stagg*

Comptroller and Auditor General (Amendment) Bill 2012
Bill 17/2012
2nd Stage – Dáil **[pmb]** *Deputy John McGuinness (Initiated in Dáil)*

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

Consumer Credit (Amendment) Bill 2012
Bill 64/2012
2nd Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad

Corporate Manslaughter Bill 2011
Bill 83/2011
2nd Stage – Seanad **[pmb]** *Senator Mark Daly (Initiated in Seanad)*

Credit Reporting Bill 2012
Bill 80/2012
Order for 2nd Stage – Dáil

Credit Union Bill 2012
Bill 82/2012
Order for 2nd Stage – Dáil

Criminal Justice (Aggravated False Imprisonment) Bill 2012
Bill 3/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Seán Ó Fearghail*

Criminal Justice (Spent Convictions) Bill 2012
Bill 34/2012
Committee Stage – Seanad *(Intiated in Seanad)*

Criminal Law (Incest) (Amendment) Bill 2012
Bill 43/2012

Order for 2nd Stage – Dáil **[pmb]** *Deputy Denis Naughten*

Debt Settlement and Mortgage Resolution Office Bill 2011
Bill 59/2011
Committee Stage – Dail **[pmb]** *Deputy Michael McGrath*

Education (Amendment) (Protection of Schools) Bill 2012
Bill 56/2012
2nd Stage – Dáil **[pmb]** *Deputy Luke 'Ming' Flanagan*

Education and Training Boards Bill 2012
Bill 83/2012
Order for 2nd Stage – Dáil

Education (Welfare) (Amendment) Bill 2012
Bill 44/2012
1st Stage – Dáil **[pmb]** *Deputy Aodhán Ó Ríordáin*

Electoral (Amendment) (Dáil Constituencies) Bill 2012
Bill 84/2012
Order for 2nd Stage – Dáil

Electoral (Amendment) (Political Donations) Bill 2011
Bill 13/2011
Passed by Dáil Éireann **[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.*
2nd Stage – Dáil

Employment Equality (Amendment) Bill 2012
Bill 11/2012
2nd Stage – Seanad **[pmb]** *Senator Averil Power*

Employment Equality (Amendment) (No. 2) Bill 2012
Bill 14/2012
2nd Stage – Seanad **[pmb]** *Senator Mary M. White (Initiated in Seanad)*

Energy Security and Climate Change Bill 2012
Bill 45/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Catherine Murphy*

Entrepreneur Visa Bill 2012
Bill 13/2012
2nd Stage – Dáil **[pmb]** *Deputy Willie O'Dea*

Europol Bill 2012
Bill 74/2012
2nd Stage – Dáil

Family Home Bill 2011
Bill 38/2011
2nd Stage – Seanad **[pmb]** *Senators Thomas Byrne and, Marc MacSharry (Initiated in Seanad)*

Family Home Protection (Miscellaneous Provisions) Bill 2011
Bill 66/2011
2nd Stage – Dáil **[pmb]** *Deputy Stephen Donnelly*

Financial Emergency Measures in the Public Interest (Amendment) Bill 2012
Bill 49/2012
1st Stage – Dáil **[pmb]** *Deputy Mary Lou McDonald*

Financial Emergency Measures in the Public Interest (Reviews of Commercial Rents) Bill 2012
Bill 22/2012
2nd Stage – Dáil **[pmb]** *Deputy Peadar Tóibín*

Fiscal Responsibility Bill 2012
Bill 66/2012
Order for 2nd Stage – Dáil

Fiscal Responsibility (Statement) Bill 2011
Bill 77/2011
2nd Stage – Seanad **[pmb]** *Senator Sean D. Barrett (Initiated in Seanad)*

Freedom of Information (Amendment) Bill 2012
Bill 15/2012
2nd Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Freedom of Information (Amendment) (No. 2) Bill 2012
Bill 51/2012
2nd Stage – Dáil **[pmb]** *Deputy Sean Fleming*

Health and Social Care Professionals (Amendment) Bill 2012
Bill 76/2012
Committee Stage – Dáil

Health (Pricing and Supply of Medical Goods) Bill 2012
Bill 63/2012
2nd Stage – Dáil *(Initiated in Seanad)*

Health (Professional Home Care) Bill 2012
Bill 6/2012
2nd Stage – Dáil **[pmb]** *Deputy Billy Kelleher*

Health Service Executive (Governance) Bill 2012
Bill 65/2012
Committee Stage – Seanad

Houses of the Oireachtas Commission (Amendment) Bill 2012
Bill 77/2012
Order for 2nd Stage – Seanad

Housing Bill 2012
Bill 35/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Niall Collins*

Human Rights Commission (Amendment) Bill 2011
Bill 52/2011
2nd Stage – Dáil **[pmb]** *Deputy Jonathan O'Brien*

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

Industrial Relations (Amendment) (No. 3) Bill 2011
Bill 84/2011
Report Stage – Seanad *(Initiated in Dáil)*

Landlord and Tenant (Business Leases Rent Review) Bill 2012
Bill 20/2012
2nd Stage – Dáil **[pmb]** *Deputy Dara Calleary*

Legal Services Regulation Bill 2011
Bill 58/2011
Committee Stage – Dáil

Local Authority Public Administration Bill 2011
Bill 69/2011
2nd Stage – Dáil **[pmb]** *Deputy Niall Collins*

Local Government (Household Charge) (Amendment) Bill 2012
Bill 21/2012
2nd Stage – Dáil **[pmb]** *Deputy Niall Collins*

Local Government (Household Charge) (Repeal) Bill 2012
Bill 18/2012
2nd Stage – Dáil **[pmb]** *Deputy Brian Stanley*

Local Government (Superannuation) (Consolidation) Scheme 1998 (Amendment) Bill 2012
Bill 16/2012
2nd Stage – Dáil **[pmb]** *Deputy Mary Lou McDonald*

Medical Treatment (Termination of Pregnancy in Case of Risk to Life of Pregnant Woman) Bill 2012
Bill 10/2012
2nd Stage – Dáil **[pmb]** *Deputy Clare Daly*

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

Ministers and Secretaries (Amendment) Bill 2012
Bill 81/2012
Order for 2nd Stage – Dáil

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

Motorist Emergency Relief Bill 2012
Bill 30/2012
2nd Stage – Dáil **[pmb]** *Deputy Timmy Dooley*

NAMA and Irish Bank Resolution Corporation Transparency Bill 2011
Bill 82/2011
2nd Stage – Seanad **[pmb]** *Senator Mark Daly*

National Archives (Amendment) Bill 2012
Bill 8/2012
2nd Stage – Dáil **[pmb]** *Deputy Anne Ferris*

National Vetting Bureau (Children and Vulnerable Persons) Bill 2012
Bill 71/2012
Committee Stage – Dáil

Nuclear Weapons (Prohibition of Investments) Bill 2012
Bill 79/2012
1st Stage – Dáil **[pmb]** *Deputy Eoghan Murphy*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
Committee Stage – Seanad *(Initiated in Dáil)*

Personal Insolvency Bill 2012
Bill 58/2012
Committee Stage – Dáil

Planning and Development (Taking in Charge of Estates) Bill 2012
Bill 41/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Dominic Hannigan*

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

Privacy Bill 2012
Bill 19/2012
2nd Stage – Seanad **[pmb]** *Senators Sean D. Barrett, David Norris and Feargal Quinn*

Prohibition on use by Children of Sunbeds and Tanning Devices Bill 2012
Bill 52/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Billy Kelleher*

Protection of Children's Health from Tobacco Smoke Bill 2012
Bill 38/2012
Committee Stage – Seanad **[pmb]** *Senators John Crown, Mark Daly and Jillian van Turnhout*

Protection of Employees (Amendment) Bill 2012
Bill 33/2012
2nd Stage – Dáil **[pmb]** *Deputy Peadar Tóibín*

Reduction in Pay and Allowances of Government and Oireachtas Members Bill 2011
Bill 27/2011
2nd Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Registration of Wills Bill 2011
Bill 22/2011
2nd Stage – Seanad **[pmb]** *Senator Terry Leyden (Initiated in Seanad)*

Regulation of Debt Management Advisors Bill 2011
Bill 53/2011
2nd Stage – Dáil **[pmb]** *Deputy Michael McGrath*

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

Residential Tenancies (Amendment) Bill 2012
Bill 46/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Patrick Nulty*

Residential Tenancies (Amendment) (No. 2) Bill 2012
Bill 69/2012
Order for 2nd Stage – Dáil

Scrap and Precious Metal Dealers Bill 2011
Bill 64/2011
2nd Stage – Dáil **[pmb]** *Deputy Mattie McGrath*

Smarter Transport Bill 2011
Bill 62/2011
2nd Stage – Dáil **[pmb]** *Deputy Eoghan Murphy*

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

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

Statute of Limitations (Amendment) (Home Remediation-Pyrite) Bill 2012
Bill 67/2012
Order for 2nd Stage – Seanad **[pmb]** *Senator Darragh O'Brien*

Tax Transparency Bill 2012
Bill 24/2012
2nd Stage – Dáil **[pmb]** *Deputy Eoghan Murphy*

Thirty-First Amendment of the Constitution (Children) Bill 2012
Bill 78/2012
Committee Stage – Seanad *(Initiated in Dáil)*

Thirty-First Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2012
Bill 70/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Kevin Humphreys*

Thirty-First Amendment of the Constitution (The President) Bill 2011
Bill 71/2011
2nd Stage – Dáil **[pmb]** *Deputy Catherine Murphy*

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

Valuation (Amendment) Bill 2012
Bill 50/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy John McGuinness*

Valuation (Amendment) (No. 2) Bill 2012
Bill 75/2012
Order for 2nd Stage – Seanad

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*

Wind Turbines Bill 2012
Bill 9/2012
Committee Stage – Seanad **[pmb]** *Senator John Kelly*

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
KISLR = King's Inns Student Law 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

Accidents Abroad and the Assessment of Damages

Gerry Danaher SC

Introduction

In the recent case of *Kelly v. Groupama*[1], the High Court determined a claim for damages from an Irish Plaintiff for personal injuries arising from an accident in France. The case required a detailed analysis of the jurisdictional rules applying in cross border claims and required the application in an Irish court of rules of French law relating to the assessment of damages.

The Plaintiff, an Irish resident, brought his claim against the Defendant (which was the motor insurer of the Municipality of Cannes) for damages for personal injuries resulting from an accident in Cannes on June 16th, 2009 in which he was knocked down by a motor vehicle owned by the Municipality.

He suffered a broken hip and subsequently required a total hip replacement. The matter for decision by the Court was the amount of damages to be awarded for the injury itself.

Brussels I and *Odenbreit*

Given that under Brussels I[2] the general rule of jurisdiction in the EU in tort claims is that a Plaintiff can sue either in the State of the Defendant's "*domicile*" (in this context, meaning "*ordinary residence*") or in the State "*where the harmful event occurred*", how did Mr. Kelly come to pursue his claim before the Irish courts and indeed not against the tortfeasor but rather against the tortfeasor's insurer?

The answer lies in the ECJ decision in the *Odenbreit*[3] case.

Mr. *Odenbreit*, a German resident, was injured in a road traffic accident in the Netherlands. The negligent driver's insurer was domiciled in the Netherlands. Under the law of the Netherlands, Mr. Odenbreit had a right to claim directly against the driver's insurer but he brought his claim in Germany rather than in the Netherlands. The insurer disputed jurisdiction.

Recital 13 to Brussels I states that:-

> "In relation to insurance,…the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for."

The rules of jurisdiction in matters relating to insurance are established in Chapter II, Section 3 which comprises Articles 8 – 14 of the Regulation.

Article 11 states:

> "2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted."

Article 11(2) therefore applies Article 9 to claims brought by an injured party directly against an insurer. Article 9(1)(b) permits the policy holder, the insured or a beneficiary "*to claim in the courts of their own domicile when bringing a claim against the insurer*". The issue for the ECJ was whether Article 11(2) had the effect of giving the same jurisdictional entitlement to an injured claimant to make a direct claim against the tortfeasor's insurer. The ECJ decided that it did:

> "The reference in Article 11(2) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State."

The ECJ also held that:

> "The only condition which Article 11(2)…lays down for the application of that rule of jurisdiction is that such a direct action [against the insurer] must be permitted under the national law."

While stating that the only condition which Article 11(2) of Regulation 44/2001 lays down is that such a direct action must be permitted "*under the national law*", the ECJ did not specify the "*national law*" to which it was referring. The concept of a direct claim by a tort victim against the tortfeasor's insurer is generally alien to Irish law but of course the Fourth Motor Insurance Directive[4] required every Member State to introduce such a direct right of action against road traffic insurers.

The Fourth Motor Insurance Directive

Ireland transposed the Fourth Motor Insurance Directive

1 High Court, 20 April 2011 (O'Neill J.).

2 Brussels I, Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters.

3 *FBTO Schadeverzekingen NV v. Odenbreit* (C-464/06) 2007 E.C.R. I-11321.

4 Fourth Motor Insurance Directive 2000/26/EC.

by means of the European Communities (Fourth Motor Insurance Directive) Regulations 2003.[5]

In those Regulations, "*accident*" means an accident to which the Regulations apply.[6] Regulation 3(1) provides that, subject to paragraphs (2) and (3), the Regulations:

> "Shall apply to an injured party, who is normally resident in an EEA State, and who is entitled to compensation in respect of any loss or injury resulting from an accident in an EEA State other than an EEA State where the party is normally resident and which was caused by a vehicle that at the time of the accident was insured and normally based in an EEA State."

Thus, the right of direct action against road traffic insurers is given to Irish residents but only in respect of accidents occurring in an EEA State other than Ireland.

So if "*national law*" in the context of *Odenbreit* as referred to above means the national law of the claimant's domicile, i.e. place of normal residence, such a direct right of action exists in Irish law as regards road traffic accidents occurring in the other Member States or "*specified territories*"[7].

The other possible "*national law*" in the context of *Odenbreit* would be the "*national law*" of the relevant insurer's place of domicile. Even leaving aside the Fourth Motor Directive, French law, being the law of the place of Groupama's domicile, does permit direct actions against insurers.

Accordingly, in the *Kelly* case, irrespective of whether the "*national law*" required in the context of the *Odenbreit* decision to permit such direct action was to be regarded as Irish law or French law, the Plaintiff, as an Irish resident, was entitled to maintain his action in Ireland against the French domiciled insurer of the French tortfeasor and, indeed, no issue as regards the jurisdiction of the Irish courts arose in the *Kelly* case.

What national law is to be applied?

However, with jurisdiction not in dispute, the next issue to be determined was which national law was to be applied in the case.

As its title indicates, Rome II[8] determines which national law is to apply in cases involving non-contractual obligations in civil and commercial matters including tort/delict.

It compliments Rome I[9] which deals with the choice of law issues where contractual obligations are involved.

It applies to events giving rise to damage on or after January 11th, 2009.

It provides a general choice of law regime for use in tort cases and a number of special rules for certain classes of tort claims, particularly product liability and environmental damage claims.

Article 4(1) lays down a basic rule which applies the law of the country or place where the damage occurs.

Thus, as regards which law is to be applied in any case as opposed to which courts have jurisdiction to hear the case, the decisive location is, in the case of a personal injuries claim, the place where the injury was suffered. Unlike Brussels I, the place, if it is different, where the event giving rise to the damage occurred is irrelevant if it is not the place where the damage was suffered.

There are two exceptions to the basic rule. Firstly, Article 4(2), often referred to as the "common residence rule", provides:

> "2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply."

It is a special rule which, when its terms are met, will supplant the basic rule. However, Article 4(3), which is actually described in Recital 18 to Rome II as an "*escape clause*" from both Article 4(1) and Article 4(2), provides:

> "3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs (1) or (2) [of Article 4], the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

The Explanatory Memorandum for the Commission's original proposal regarding Rome II suggested that the provision which eventually emerged as Article 4(3) was to introduce a degree of flexibility to adapt an otherwise rigid rule to an individual case. Nevertheless, Article 4(3) does state that, where the "*manifestly closer connection*[10]" (whatever it might be) is established, then Article 4(3) "*shall*" apply.

The types of matter which might permit the use of the Article 4(3) exception to both the basic rule and the "common residence" rule are not specified in the Regulation. One author on the issue, Bernard Doherty[11], has suggested that "*presumably*" the same types of connecting factors as were envisaged under British legislation[12] (albeit pre Rome II) would be of relevance, i.e. parties, events, circumstances and consequences. He also suggested that it should not be possible to invoke the "*manifestly more closely connected*" test under Article 4(3) so as to escape from the common residence rule *[Article 4(2)]* but, by that route, to re-apply the law of the country in which the damage occurred as provided for in the basic rule, Article 4(1).

Of course, choosing the "*applicable*" or, to use a term often

5 European Communities (Fourth Motor Insurance Directive) Regulations, SI No. 651 of 2003.

6 Regulation 2(1).

7 Regulation 2(1) Other "specified territories" are Iceland, Liechtenstein and Norway.

8 Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations.

9 Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations.

10 See Section 3 relating to the originally proposed Article 3 (which in the final Rome II became Article 4).

11 Accidents Abroad International Personal Injury Claims. Bernard Doherty *et al,* 1st Edition, 2009, Sweet & Maxwell.

12 Private International Law (Miscellaneous Provisions) Act, 1995.

found in common law choice of law cases, the "*substantive*" law leads on the question of what matters are to fall within its scope and what is to be left to be decided in accordance with the *lex fori*.

Article 15 of Rome II provides that the law applicable to non-contractual obligations shall govern in particular:-

(a) The basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
(b) The grounds for exemption from liability, any limitation of liability and any division of liability;
(c) The existence, the nature and the assessment of damage or the remedy claimed;
(d) Within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage to ensure the provision of compensation;
(e) The question whether a right to claim damages or a remedy may be transferred, including by inheritance;
(f) Persons entitled to compensation for damage sustained personally;
(g) Liability for the acts of another person;
(h) The manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

It will be seen that paragraphs (a), (b) and (g) of Article 15, taken cumulatively, cover what, in Irish law, would be broadly regarded as liability issues.

Furthermore, Article 15(c) states that "*the assessment of damage*" is also to be determined in accordance with the applicable law.

It will be noted that Article 15(c) refers to assessment of "*damage*" (singular). In Ireland (and the UK) we refer to one part of a tort case as involving the assessment of "*damages*" and our courts engage in what is often referred to as "*measuring damages*". The possibility of seeking to distinguish between the assessment of "*damage*" as opposed to the assessment of "*damages*" (and thus to restrict in some way the scope of the applicable law as provided for in Article 15(c)) was considered by Doherty[13] but did not appear realistic to him.

As against Article 15(c), Rome II in Article 3(1) provides that the Regulation "shall not apply to evidence and procedure, without prejudice to Article 21 and 22"[14]

There is a long line of English authority for the proposition that, whether one refers to the assessment of "*damage*" or "*damages*", the law relating to damages "*is partly procedural and partly substantive*" with "*the actual quantification under the relevant heads being procedural only*"; per Lord Hodson in *Boys v. Chaplin*[15].

The thrust of the English case law, *albeit* prior to Rome II, was that, while whether a heading of damage was an actionable heading of damage was a matter to be determined in accordance with the substantive or "*applicable*" law (the same phrase being used in Rome II as had already been utilised in English statutory law, i.e. the English Private International Law (Miscellaneous Provisions) Act, 1995), the amount of damages for an injury actionable by the applicable law had to be determined according to the law of the forum in accordance with s 14(3)(b) of the 1995 Act because the question was one of procedure.[16]

It is of course the case that the origin of much of the English case law in this whole area derives from the *Phillips v. Eyre*[17] decision which was so resoundingly rejected by the Irish Supreme Court in the *Grehan*[18] case. However, the *Grehan* judgement was concerned with service out of the jurisdiction and whether Ireland was the appropriate forum for resolution of the dispute in question. There is nothing in it at odds with the English case law relating to the law to be applied to the quantification of damages.

But with the introduction of Rome II, the issue is, in crude terms, whether the actual amount of money to be awarded is still to be determined as a matter of procedure (and hence in accordance with the *lex fori*) or is the court simply to ascertain and award the amount a court in the country the law of which is being applied would award? Is it to regard itself as being bound by that amount regardless of what the *lex fori* might indicate would be appropriate?

Kelly and the application of French law

It was common case in *Kelly* that the applicable law under Rome II was French law which accordingly governed the "*assessment of damage*". Equally, it was common case that, as a matter of Irish procedure, the relevant French law had to be proved to the Court. Both sides retained French legal experts and, as the Court found, there was little or no material difference between their opinions.

The evidence as to the conduct of personal injury cases in France established that:-

(a) The purpose in France in awarding damages is to restore the Plaintiff to the position he was in before the commission of the tort, i.e. *restitutio in integrum*.
(b) Damages are awarded for pain and suffering.
(c) Such damages are awarded, where appropriate, under the following headings:-

Temporary non-pecuniary loss (until the setting of the injury)

1. Déficit fonctionnel temporaire (DFT); i.e. compensation for the temporary disablement

13 Doherty, *op cit,* see pages 261 - 262

14 Article 21 relates to the "*Formal Validity*" of certain acts and is likely to be of limited, if any, relevance to personal injury cases. Article 22 provides that provisions governing presumptions or burden of proof are to be applied as part of the applicable law and that acts intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 21, provided that such mode of proof can be administered by the forum.

15 *Boys v. Chaplin; sub-nom Chaplin v. Boys* 1969 2 A.E.R. at page 1093 (E)

16 *Harding* case, *Harding v. Wealands* (2006) 4 A.E.R.

17 *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1.

18 *Grehan v. Medical Incorporated & Valley Pines Associates* (1986) I.R. 528; (1989) I.L.R.M. 627.

of the victim, i.e. loss of amenity, isolation in hospital, etc. during this period;

2. Souffrances endureés (SE); i.e. the physical and psychological pain or illness during this period;

Permanent non-pecuniary loss (beyond the setting of the injury)

3. Déficit fontionnel permanent (DFP); i.e. the permanent physical and psychological pain and suffering, disablement, etc.;
4. Prejudicé d'agrément; i.e. deprivation of regular sports or leisure activity, etc.;
5. Aesthetic injury; i.e. disfiguration, etc.;
6. Sexual damage; and
7. Establishment damage; i.e. interference with achieving a normal family plan.

(d) French medical experts furnish reports which address the medical evidence by reference to the headings set out at (c)(1) – (7) above. Each particular Plaintiff's situation is evaluated under some headings on a graduated scale between 0 and 7; under others by categories reflecting certain percentages, etc.

(e) The French courts ordinarily appoint a medical expert, either by Order of the court or by agreement between the parties, to examine the Plaintiff and produce a medical evaluation.

(f) The French courts are required to award compensation by reference to the headings at (c)(1) – (7) above.

(g) There is available to all judges in France a book which is a compilation of the awards made in the courts throughout France. It is the invariable practice of French judges to consult or have regard to this book so as to achieve consistency and maximise fairness in the awarding of damages.

(h) However, French judges retain full discretion in deciding on the amount of compensation to be awarded under each heading.

Clearly, there is little if any difference between Irish and French law as regards the principles set out at (a) and (b) above.

As regards the headings set out at (c) above, the Irish courts simply perform a breakdown between damages for pain and suffering to date and into the future[19]. In *Kelly*, the Court held that "*the methodology of assessment of damages*" reflected in (c) above was "*prescribed by French law and therefore must be adhered to*". However, it is respectfully submitted that, while Irish courts do not adopt this methodology, it could hardly be said that it is one that is inherently incompatible with the Irish procedural approach to assessing damages. However, the judgement of the court makes it clear that, in adopting this methodology, the Court did so as a matter of French law.

The Court was then required to quantify the appropriate amount under each heading.

In *Kelly,* the Defendant had led evidence from its French lawyer based on an assessment of the Plaintiff's situation by a French medical expert who evaluated the Plaintiff's situation under the various headings at (c) above on the basis of the medical reports prepared in the ordinary way by the Irish medical experts. The French lawyer then gave evidence to the Court as to what amounts, in his opinion and having regard to the book referred to at (g) above, a French court might award under each heading[20].

In approaching the "*quantification*" of damages under each heading, the Court held:

> "The practice of French judges to have regard to a book of previous awards is no more than a practice and is not an obligation of French law. This book is a tool or a guide and does not fetter the discretion of the judge in deciding what is a fair amount of compensation. Apart altogether from the fact that French law permits the exercise of that discretion, the use in the French courts of a Book of Quantum is merely a non-obligated practice, and as matters of practice are governed by the *lex fori*, therefore this Court, in choosing the amounts of compensation to be ascribed to each category of loss discerned in accordance with French law, in addition to enjoying an unfettered discretion under French law, in a matter of practice should apply the lex fori, i.e. Irish law, and thus can have regard to levels of compensation awarded in the Irish courts in respect of similar losses."

Damages and "unfettered discretion"

The practical outcome of this approach was that whereas the total amount "*suggested*" by the French legal expert for what, in Irish law, would be termed "general damages" was €38,706.66, the Court awarded €63,900. Ultimately, the potentially "sharp end" of Rome II in cases of this type was averted by the ability of the Court to rely on the "*unfettered discretion under French law*" which sat comfortably with the Court and which, having obviously had some considerable regard "*to levels of compensation awarded in the Irish courts*" as "*a matter of practice*", awarded a total sum approximately 65% greater than the "*suggested*" French award.

So what is the scope of the change effected by Rome II as regards the assessment of damage or damages?

19 This practice was referred to in *Sinnott v. Quinnsworth,* 1984 ILRM 523 by O'Higgins CJ (at page 531) in the following terms: "While as is the case, a jury is usually asked to award two sums, one in respect of general damages for the infliction of the injury to the date of trial, and the other for the future, it is proper that (in this Court) regard should be had to the total of the two sums so assessed…".

20 At one point in the case when it was "for mention" before the Court, the Defendant suggested that the Court should appoint an appropriate French medical expert to examine the Plaintiff and prepare a report in line with French practice. However, this suggestion was not followed and indeed there was virtually no difference of opinion between the Irish medical experts on both sides. Depending on where precisely one decided French substantive law ended and Irish procedure took over, a French medical expert could have been appointed by the Court as a matter of French law or of Irish law pursuant to Section 20(1) of the Civil Liability & Courts Act, 2004 if an appropriate expert was approved for that purpose pursuant to Section 20(5).

Doherty utilised the facts of a pre-Rome II English case, *Hulse v. Chambers*[21], to consider the issue. His analysis is worth quoting in detail:-

> "The applicable law in [*Hulse*] was Greek. General damages for pain, suffering and loss of amenity could be awarded in Greek law. An English court would have awarded £125,000 for pain, suffering and loss of amenity, whereas a Greek court would have awarded something in the range of £56,000 - £94,000. Under English conflicts rules pre-Rome II, the assessment was made wholly according to English law as the law of forum, and the Greek figure was irrelevant. Whether the result under Rome II would be the same or not, it is suggested, depends on how the Greek court would have arrived at the lower figure. It may approach the question of quantification of this head of damage as English law does, which is to say treating it as a jury task, albeit one performed by a judge guided by comparable cases previously decided. In that case it is submitted, no question of Greek law arises, and the English court would still award the English figure. If, on the other hand, there were some statutory scale in Greek law for the relevant damages, or the level was in some other way fixed by law, then the Greek figure should be awarded."[22]

While expressed somewhat differently, the approach of the Court in *Kelly* had substantially the outcome that Doherty had anticipated in cases where the applicable law allowed for a judicial discretion as to the appropriate level of compensation.

Notwithstanding the views of some other commentators[23], there would still appear to be some fight left in the forum! ■

21 [2001] 1 W.L.R. 2386.

22 Doherty *op cit* see page 262.

23 For example, see the Introduction by Diana Wallis to Ahern & Binchy, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations, 1st Edition, 2009, Martinus Nijhoff Publishers.

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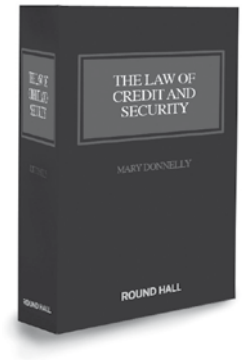

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The Recent Development of the Irish Equality Guarantee by the Superior Courts

Dr. Elaine Dewhurst*

Introduction

Despite the fact that Article 40.1 has rarely been the sole invalidating factor of statutory provisions[1] and the courts have generally shown "a marked reluctance to apply Article 40.1"[2], there appears to be some truth in the words of Doyle, Hogan and Whyte who have all argued that this trend of reluctance appears to be abating.[3] There is evidence that Article 40.1 has become "a more useful constitutional guarantee for litigants", due to the fact that the "current generation of judges – accustomed to applying non-discrimination guarantees of European Community law, as well as domestic legislation… may be more prepared to develop some of the potential of this constitutional provision".[4] In the first six months of 2012, the Superior Courts have dealt with one substantial case concerning the equality guarantee and many other cases discussing some equality element during the course of the proceedings.

This article will conclude that the scope of the constitutional equality guarantee is being expanded and the situations in which Article 40.1 is being engaged is widening. Of significant note is the simplification of the 'essential attributes of the human personality' doctrine which has been an obstacle to the development of Article 40.1 in previous cases. The comparator doctrine has also been specifically developed and become more prominent in recent case law. However, other aspects of the equality guarantee still remain uncertain such as the burden of proof in constitutional equality cases. This review highlights an increased judicial willingness to engage with Article 40.1, to identify interferences with Article 40.1 and to require specific tailoring of legislative measures to meet the specific objectives used to justify discrimination. Overall, a review of the case law reveals a general increase and simplification of the usage, interpretation and application of Article 40.1.

Equality in 2012: The Cases

In the first six months of 2012, there has been one case dealing with Article 40.1 in a substantive way and many others which have a more limited equality element. These cases provide some valuable insight into the manner in which the court is interpreting Article 40.1 and the potential uses to which Article 40.1 can be put.

The most significant equality case in the first six months of 2012 was the case of *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions*[5] (hereinafter referred to as "*M.D.*") which involved a challenge to sections 3(1) and 5 of the Criminal Law (Sexual Offences) Act, 2006. M.D. was charged at the age of 15 with having sexual intercourse and committing a sexual act of buggery with a female person under the age of seventeen years, contrary to s. 3(1). By virtue of s. 5 of the Act, a female under the age of 17 years would not commit an offence contrary to s. 3(1) by reason only of engaging in an act of sexual intercourse. M.D. sought a declaration that s. 3(1) and s. 5 were repugnant to the Constitution in that they discriminated on the basis of gender, contrary to Article 40.1 of the Constitution. The High Court determined that section 5 was discriminatory but that as the provision only provided immunity in respect of sexual intercourse (the one area of sexual activity that can result in pregnancy), the provision was justified by reference to differences in capacity, physical or moral or differences of social function of men and women in a manner not invidious, arbitrary or capricious. The Supreme Court agreed with the decision of the High Court. Denham C.J., in delivering the judgment of the Court, held that the while the provision was discriminatory, the State could justify section 5 by reference to a social policy of protecting young girls from pregnancy. Denham C.J. further held that the protection of the teenage girl from the danger of pregnancy was an objective which the Oireachtas was entitled to regard as relating to 'differences of capacity, physical and moral and of social function' and this decision was objective and not arbitrary.

Another interesting equality argument was raised in a civil context in the case of *Minister for Justice, Equality and Law*

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1 Hogan and Whyte noted in 2003 that the law in this particular area is underdeveloped. See Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (Dublin: Butterworths , 4th ed., 2003) at p. 1324.

2 Casey, *Constitutional Law in Ireland* (Dublin: Round Hall Sweet & Maxwell, 2000) at p. 451.

3 Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (Dublin: Butterworths , 4th ed., 2003) at p.1325 and Doyle, *Constitutional Law: Texts, Cases and Materials* (Dublin: Clarus Press, 2008) at p. 61.

4 Doyle, *Constitutional Law: Texts, Cases and Materials* (Dublin: Clarus Press, 2008) at p. 61.

5 *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions* (2012) IESC 10.

Reform v. Devine[6] (hereinafter referred to as "*Devine*"). The case involved an application for an interim injunction which normally requires the applicant to make an undertaking as to damages. However, the appellants in this case, the State, raised a specific equality argument in this context. They argued that as the interim injunction was necessitated by international cooperation to restrain dealings with assets that were claimed to be the fruits of crime, such an undertaking as to damages should not be required. In relation to the equality issue, the court had to decide whether there would be a breach of the equality guarantee if the State was not required to give an undertaking as to damages. In this case, both Fennelly J. and O' Donnell J. held that as there was a significant difference in the relative function of the State and the individual litigant, this was not a comparison which could give rise to an argument under Article 40.1 and therefore no question of discriminatory treatment could arise.

Many of the cases which have references to the equality guarantee involve procedural issues in the courts. One useful example is the case of *Minister for Justice, Equality and Law Reform v. Tobin*[7] (hereinafter referred to as '*Tobin*') involving an equality of arms argument in the context of European Arrest Warrant proceedings. The appellant had been involved in an accident in Hungary, in which his car struck and killed two young children. The appellant did not return to Hungary for his trial, was convicted and sentenced to three years. Hungary sought the surrender of the appellant in 2003 but the application was rejected. After a change in the law in 2009,[8] a fresh European Arrest Warrant proceeding was launched. The equality issue raised in this context related to whether there had been a breach of the right to equality of arms in the circumstances. The appellant argued that the State had an opportunity to change the law and demand a replay of the proceedings whereas he did not have this opportunity.[9] While the other judges did not consider that there was a legitimate equality argument, Hardiman J. did emphasise the 'massive disparity of resources and power between the State and an individual' as a relevant consideration in determining there was an abuse of process in a particular case.[10]

Another interesting example of equality arguments surrounding procedural issues in court is the case of *D.X. v. Her Honour Judge Olivia Buttimer*[11] (hereinafter referred to as "*D.X.*"). In this case, the High Court referred to the principle of equality in the context of judicial review proceedings in determining whether Judge Buttimer acted *ultra vires* in refusing to permit Mr. X. to be assisted by a friend in *in camera* proceedings relating to his judicial separation from Ms. Y. Mr. X., due to cancer and subsequent treatment could speak but with considerable difficulty and his speech was not always understood by those unfamiliar with his condition. Mr. X. sought to have a friend, Ms. S., admitted to the proceedings to assist him, but this was refused by the Judge in the Circuit Court. In addition to the legislative support in Article 40(5) of the Civil Liability and Courts Act 2004 in favour of allowing Ms. S. to be present at the proceedings, Hogan J. held that Article 40.1 also provided that the courts, where practical and feasible, should see to it that litigants suffering a physical disability are not placed at a disadvantage as compared with their able-bodied opponents by reason of that disability. This would ensure that all litigants are held equal before the law.[12] The failure to permit Mr. X. to have Ms. S. present 'to give the kind of practical assistance which the able-bodied litigant takes for granted' amounted to a breach of Article 40.1.[13]

Another case, *A.O. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (No. 2)*[14](hereinafter referred to as '*A.O.*'), involved an application for a stay on the implementation of a deportation order. Of interest from an equality perspective was the consideration by Hogan J. as to whether the non-marital child of the applicant had the same equal rights as a marital child. The High Court reaffirmed, consistent with previous jurisprudence on the matter, that they did in fact have equal rights as 'any other conclusion would be flagrantly inconsistent with the Constitution's command of equality before the law in Article 40.1'. Finally, in the case of *Doherty v. The Referendum Commission and the Honourable Mr. Justice Kevin Feeney*[15] (hereinafter referred to as '*Doherty*'), Hogan J. again considered equality in the context of a judicial review of certain public statements made by the Referendum Commission. Hogan J. held that as the Referendum Commission was publically funded it could not deviate from the principle of strict neutrality as this would infringe the equality guarantee in Article 40.1.[16] The learned Judge held that the court can interfere where this principle has been violated.

Equality in 2012: The Lessons

Many interesting insights into the treatment of Article 40.1 by the Superior Courts can be gleaned from the decisions in these cases. This article will review these developments in three stages: the engagement of Article 40.1, the interference with Article 40.1 and justifying a difference in treatment under Article 40.1.

Engagement of Article 40.1

In order to engage Article 40.1 in the first instance it must be shown that the case in question falls within the scope of Article 40.1. In order to determine this, two criteria must generally be satisfied. Firstly, the claimant must be a 'human

6 *Minister for Justice, Equality and Law Reform v. Devine* (2012) IESC 2.
7 *Minister for Justice, Equality and Law Reform v. Tobin* (2012) IESC 37.
8 The European Arrest Warrant Act 2003 was amended by the Criminal Justice (Miscellaneous Provisions) Act 2009 to give further effect to the Council Framework Decision of the 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States.
9 *Minister for Justice, Equality and Law Reform v. Tobin* (2012) IESC 37 at paragraph 95 (*per* Hardiman J.).
10 *Minister for Justice, Equality and Law Reform v. Tobin* (2012) IESC 37 at paragraph 137 (*per* Hardiman J.).
11 *D.X. v. Her Honour Judge Olivia Buttimer* (2012) IEHC 175.
12 *D.X. v. Her Honour Judge Olivia Buttimer* (2012) IEHC 175 at paragraph 14 (*per* Hogan J.).
13 *D.X. v. Her Honour Judge Olivia Buttimer* (2012) IEHC 175 at paragraph 16 (*per* Hogan J.).
14 *A.O. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (No. 2)* (2012) IEHC 79.
15 *Doherty v. The Referendum Commission and the Honourable Mr. Justice Kevin Feeney* (2012) IEHC 211.
16 *Doherty v. The Referendum Commission and the Honourable Mr. Justice Kevin Feeney* (2012) IEHC 211 at paragraph 36 (*per* Hogan J).

person' and secondly, the claim must relate to an 'essential attribute of a human person'.

(a) A Human Person

The express wording of Article 40.1 provides that the right is applicable to 'human persons'. It has been determined by the courts that non-human persons are not entitled to benefit from the guarantee of equality in Article 40.1[17] and, therefore, the provision does not apply to businesses or corporations of any sort.[18] The most recent cases have not had any difficulties in satisfying this first criterion under Article 40.1. All of the cases have related to human persons, therefore satisfying this first test.

(b) The Essential Attribute Test

Even if the claimant is a human person, it has been held that a claim can only be made if the claim relates to the "essential attributes of the human person", a criterion that has, in the past, "greatly emasculated the guarantee of equality".[19] From the decisions of the courts, it has become clear that this test can be satisfied in two ways: a contextual approach and a basis approach. The contextual approach espouses the idea that it is important to consider the context of the case. If the context is linked to some essential attribute of the human person then the claim will be considered. For example, in *Quinns Supermarket v. Attorney General*[20], as the context of the dispute was linked to the individuals trade or business this was not considered to be an essential attribute of a human person and as such did not fall within the scope of the guarantee. Walsh J. referred to the concept of human persons as "merely intended to illustrate the view that this guarantee refers to human beings for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow".[21] The courts have reaffirmed this contextual approach in many cases.[22] There has been some evidence of judicial disquiet with this approach. For example in *Brennan v. Attorney General*,[23]Barrington J. commented that Article 40.1 is concerned with human beings in society displaying a move away from the human personality in context doctrine. However, on appeal to the Supreme Court, O'Higgins C.J. restated and reaffirmed the restrictive doctrine. A move has been made in recent years to a "basis approach". In *Re Article 26 and the Employment Equality Bill 1996*,[24] counsel challenged the Bill on the grounds that certain provisions discriminated on grounds of age. The Supreme Court went into great detail in assessing the proportionality of the measure in the employment context, a fact "not usually seen as a an essential attribute of human personality" and Hogan and Whyte view this as the court now seeing "Article 40.1 as having a much wider field of application than previously thought, covering any context in which discrimination or classification may have been based on the essential attribute of the human person."[25]

Recent decisions of the courts have not mentioned this 'essential attribute' test but it would appear that this distinction between the contextual approach and the basis approach is abating and that the basis approach is the one more commonly adopted by the courts. Most of the cases involved clear examples of the application of the basis approach: gender in *M.D.,* disability in *D.X.,* and status of a child in *A.O.* More complicated are the cases of *Devine* and *Tobin* which, at first glance, may not appear to be based on either the basis approach or the contextual approach. However, closer analysis of the decisions reveals that the basis approach is being adopted in both cases. Both cases involve an examination of the position of the citizen *vis a vis* the State. The examination of the citizen as the basis of discrimination involves an examination of the basic characteristics of the citizen as a human person including the fact that the citizen has, unlike the State, no constitutional powers and has limited resources.

While it would be unwise to read too much into these cases, it could be argued that the courts appear to be moving towards a basis approach in all cases. This would explain more adequately the decision to consider the equality guarantee in the *Devine* and *Tobin* cases and its application in other contexts. If this is the case, it is a refreshing move in the direction of a more expansive reading of the equality doctrine and rids the doctrine of an unnecessary level of complexity. Therefore it can be argued that the courts will now find that Article 40.1 has been engaged in cases where there is a clear difference in treatment based on some irrelevant characteristic.

Interference with Article 40.1

In order to determine whether there is a breach of the equality guarantee, there must be some difference in treatment which amounts to an interference with Article 40.1.[26] Establishing a difference in treatment necessarily requires the use of a comparator.[27] Without a recognizable comparator, a difference in treatment and therefore an interference with Article 40.1 cannot be established.

17 *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345.

18 *Quinn's Supermarket v. Attorney General*[1972] 1 IR 1.This was reaffirmed by the Supreme Court in *Abbey Films v. Attorney General* [1981] IR 158 at p. 172 (*per* Kenny J.)

19 Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (Dublin: Butterworths , 4th ed., 2003) at p. 1342; See Doyle, "The Human Personality Doctrine in Constitutional Equality Law" (2001) 9 ISLR 101; See also Whyte "A Comment on the Constitutional Review Group's Proposals on Equality" in Byrne and Duncan (Dublin: Irish Centre for European Law, 1997) at pp. 100-104; and O' Dowd "The Principles of Equality in Irish Constitutional and Administrative Law" (1999) 11 *European Review of Public Law* 769 at pp. 808-823.

20 *Quinn's Supermarket v. Attorney General* [1972] 1 IR 1.

21 [1972] 1 IR 1 at p. 14.

22 See *Murtagh Properties v. Cleary* [1972] IR 330 ; *de Burca and Anderson* v. *Attorney General* [1976] IR 38; and *Murphy* v. *Attorney General* [1982] IR 241.

23 *Brennan* v. *Attorney General* [1983] ILRM 449.

24 (1997) IR 321.

25 Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (Dublin: Butterworths , 4th ed., 2003) at p. 1345.

26 See for example, *Dillane v. Ireland* [1980] ILRM 167; *G v. District Judge Murphy and Ors*[2011] IEHC 445.

27 *Breathnach v. Ireland* [2001] 3 IR 230 (comparison between prisoners), *JW v. JW* [1993] 2 IR 477 (married and unmarried women), *Foy v. An t-Ard Chlaraitheoir & Ors* [2002] IEHC 116 (comparison between transgender persons), *de Burca* v. *Attorney General* [1976] IR 38 *(comparison between men and women).*

(a) The Comparator Doctrine

In most cases the comparator is relatively clear and this is also certainly the case in the most recent decisions of the Superior Courts. In the case of *M.D.*, the obvious comparator with the accused male was a female. In the case of *D.X.,* the comparator of the disabled applicant was an able-bodied litigant and in the case of *A.O.* the comparator was a child of married parents as opposed to a child of unmarried parents.

However, the issue of the comparator became a significant obstacle in the case of *Devine* as no suitable comparator could be identified. In the case of *Devine*, it was alleged that the State should not be treated differently to another litigant in relation to an undertaking for damages in injunctive proceedings. The majority of the Supreme Court held that the State is 'clearly not to be equated with a private citizen or corporate litigant pursuing the protection of private interests'[28]. Therefore, as there was no comparator, a difference in treatment could not be established. O'Donnell J. gave more explicit reasons as to why the State was not comparable with a private litigant including the fact that the Constitution provides for a clear distinction between the State and the individual such that the State could enter into international agreements, pass legislation to implement such agreements and, in this context, was acting in the public interest, whereas a private individual could not do any of these things.

This difference in treatment of the State and an individual in the provision of compensation can be identified in many areas of the law - for example, in cases where bail is refused and the person is subsequently acquitted, the State is not required to compensate that person and similar considerations apply where the conviction is quashed on appeal. All of these examples are 'inconsistent with the assumed principle of equality, and go to show that the law distinguishes clearly between the position of the State authorities carrying out public duties and other litigants, and does so, in particular by protecting the State from exposure to claims for damages which private litigants pursuing private interests may face. The rationale appears to be that, if law enforcement bodies must also take into account the risk of damages claims of unquantifiable amounts, they may then be deterred from performing the duty which they owe to the public of pursuing and, if possible, prosecuting wrongdoers'[29]. This distinction is rooted in a policy consideration which seeks to avoid the 'chilling' or 'paralysing' effect of a broad exposure to potential claims for damages on the performance of the duty imposed.[30]

Therefore, it would appear from the most recent decisions that the comparator doctrine is still an essential element in finding an interference with Article 40.1.

Justifying an Interference with Article 40.1

In all cases where Article 40.1 is engaged and an interference with Article 40.1 has been established, it is open to the court to determine that this interference is justifiable and proportionate.

(a) Burden of Proof

An important opening question in this respect is who carries the burden of proof in equality cases. The general rule is that in all constitutional challenges, due to the presumption of constitutionality of legislation, the applicant has the burden of proving that the particular statutory provision in question is unconstitutional. However, there has been some discussion in equality cases that there may be an exception in cases where the discrimination is based on one of the very essential attributes of human personality such as sex or race. In these cases, the burden of proof will shift to the State to defend the classification. In *Haire v. Minister for Health and Children*,[31] it was held that where discrimination is based on sex, race, language or religious or political opinion, "the onus of proof may shift and the State may be obliged to justify the legislation in the first instance".[32]

It is interesting to examine the more recent cases in order to ascertain whether the general rule is being applied regularly or whether this exception has taken root in certain cases. An interesting case for such an analysis is the case of *M.D.* which involved alleged discrimination on the grounds of sex.The general rule is that the burden of proof rests with the applicant. However, as this was a case involving sex discrimination, there was room for the application of the exception in this case. In the case of *M.D.*, while not expressly dealt with, it would appear that Denham C.J. applied the general rule and not the exception. Denham C.J. examined the justification for the difference in treatment without referring at any stage to the burden of proof or any exceptional shift in the burden of proof. This would appear to suggest that this exception to the traditional rule has not been maintained in more recent cases. While this reduces uncertainty in the preparation of claims, it does mean that the burden on the applicant in equality cases, as in all other constitutional cases, is very high.

(b) Legitimate Justification and Proportionality

As previously mentioned, even where there is evidence of disparate treatment, there may be a legitimate justification for the difference in treatment which will save the measure from falling foul of the equality guarantee. Where a difference in treatment has been found by the court, such differences may in fact be legitimate as long as they are related to a difference in capacity; physical or moral or a difference in social function (second sentence in Article 40.1) or protect a particular constitutional value. However, the courts have also held that the rule must also satisfy a proportionality test defined as a "legitimate legislative purpose…it must be relevant to that purpose, and that each class must be treated fairly".[33] This test has been expanded upon in recent years and the most cited formulation is now that of Costello J. to the effect

28 *Minister for Justice, Equality and Law Reform v. Devine* (2012) IESC 2 at paragraph 60 (*per* Fennelly J).

29 *Minister for Justice, Equality and Law Reform v. Devine* (2012) IESC 2 at paragraph 45 (*per* O' Donnell J.).

30 *Minister for Justice, Equality and Law Reform v. Devine* (2012) IESC 2 at paragraph 45 (*per* O' Donnell J.).

31 *Haire v. Minister for Health and Children* [2010] 2 IR 615.

32 *Haire v. Minister for Health and Children* [2010] 2 IR 615 at p. 659 (*per* McMahon J).

33 *Brennan* v. *Attorney General* [1983] ILRM 449 at p. 480 (*per* Barrington J.).

that the measure must:— "(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible, and (c) be such that their effects on rights are proportional to the objective".[34] Where there is no justification, then a violation of Article 40.1 has been established. This occurred in the case of *D.X.* where the exclusion of Mrs. S. from the proceedings was a discrimination against *D.X.* in breach of Article 40.1 to which there was no justification.

In the case of *M.D.*, the issue of objective justification arose in a case involving legislation which treated men and women unequally for the purposes of a particular sexual offence. In the High Court it was held that the impugned section 5 was only a limited immunity for women in respect of sexual intercourse. The immunity thus only applied to one area of sexual activity "that can result in pregnancy. It is the one consequence of sexual activity that carries no risk for boys or men. The risk of pregnancy is only borne by girls."[35] The High Court therefore concluded that there was discrimination but that it was legitimated by being founded on difference in capacity, physical or moral or difference of social function of men and women in a manner not invidious, arbitrary or capricious. In the Supreme Court, Denham C.J. considered that the general scheme of the legislation attempted to achieve as far as possible a gender-neutral definition of sexual offences[36]. However, she held that the 'natural physiological differences between males and females cannot be entirely assimilated'[37]. Denham C.J. held that while the act of sexual intercourse is engaged in by a male and a female, 'each performs a distinct physiological function. The male's penis penetrates the female's vagina and may emit the sperm which, relevantly for this appeal, is capable of rendering the female pregnant. Thus some natural and inevitable differentiation of treatment is inherent in the statutory scheme'[38].

Therefore, the question for the court was whether 'it falls to the Court or to the Oireachtas to make the judgment as to whether the risk that the female will become pregnant justifies exempting her, but not her male counterpart, from prosecution'[39]. Denham C.J. recognised the notorious difficulty of this question and referred to similar cases in the United States where similar issues have been grappled with and which highlighted the very different situation of men and women with respect to the problems and risks of sexual intercourse. Additionally, the US courts have held that gender neutral statutes would 'frustrate its interest in effective enforcement' as it would deter females from reporting violations if she was potentially subject to criminal prosecution as a result. Denham C.J. held that here a similar approach had been taken by the Oireachtas.[40] Therefore, in this case the justification of the social policy of protecting young women from sexual intercourse was capable of justifying discrimination between males and females as long as this justification was proportionate.

While this might appear to be giving a wide discretion to the Oireachtas, Doyle has commented that the courts generally accept certain measures as legitimate where it appears that the measures imposed to meet the objective justification are 'tailored to achieving the purpose rather than merely relevant"[41] to it. This would certainly appear to be an accurate reflection of the decision of Denham C.J. in the case of *M.D.* It is therefore clear that the courts will give a broad discretion to the State in the implementation of policies as long as these policies are tailored to meet, and not merely relevant to, a legitimate objective.

Any perceived broad discretion granted to the State in the context of justifying discrimination can also be ameliorated by the proportionality doctrine which seeks to ensure that the measures implemented in support of some legitimate aims are not arbitrary and are necessary to meet that purpose. In the case of *M.D.*, Denham J noted that the decision of the Oireactas was made 'on an objective basis and not arbitrary'.[42] She concluded that decisions on such matters are 'a matter for the legislature. Courts should be deferential to the legislative view on such matters of social policy'[43]. Therefore, the provision of the legislation which provided for a difference in treatment between males and females was not contrary to the Constitution. This decision implies that even though the Supreme Court may not have chosen the same course of action in order to achieve the same result, they will not interfere with the discretion of the Oireachtas in matters of social policy. This approach is consistent with the jurisprudence of the European Court of Human Rights which is also generally reluctant to interfere with the measures chosen by a particular state to meet a certain objective as long as the objective chosen is not arbitrary. This is also linked to the comment of Doyle in relation to tailoring the measure to the objective. As long as the State can show that the measure is tailored to a particular objective, it will be very difficult for a court to find that the measure is arbitrary or to intervene and suggest alternative measures.

Conclusions

The recent decisions of the Superior Courts in the area of equality reveal some interesting insights into the manner in which the concept of constitutional equality is developing.

34 *Heaney* v. *Ireland* [1994] 3 IR 593 at p. 607 (*per* Costello J.).

35 *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions* (2012) IESC 10 at paragraph 40 (*per* Denham CJ).

36 *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions* (2012) IESC 10 at paragraph 45 (*per* Denham CJ).

37 *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions* (2012) IESC 10 at paragraph 46 (*per* Denham CJ).

38 *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions* (2012) IESC 10 at paragraph 47 (*per* Denham CJ).

39 *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions* (2012) IESC 10 at paragraph 48 (*per* Denham CJ).

40 *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions* (2012) IESC 10 at paragraph 53 (*per* Denham CJ).

41 Doyle, *Constitutional Law: Texts, Cases and Materials* (Dublin: Clarus Press, 2008) at p. 80.

42 *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions* (2012) IESC 10 at paragraph 54 (*per* Denham CJ).

43 *M.D. (A Minor Suing by his Mother and Next Friend, S.D.) v. Ireland, the Attorney General and the Director of Public Prosecutions* (2012) IESC 10 at paragraph 50 (*per* Denham CJ).

The use of the equality guarantee is certainly increasing and it appears to be rationalizing some of the more complex assessments that hindered its previous development such as the 'essential aspect of human personality' doctrine. The equality guarantee appears to be moving towards its natural place as the cornerstone of Irish human rights jurisprudence. The variety of cases and the level of analysis dedicated to the equality guarantee in these cases is evidence of this trend.

In relation to engaging Article 40.1, it now appears that the Superior Courts are applying a simple model in determining whether Article 40.1 has been engaged: (a) is the applicant a human person and (b) has the applicant been discriminated against on the basis of some irrelevant characteristic. In relation to determining whether an interference with Article 40.1 has occurred, the courts have held that (a) the applicant must have a suitable comparator and (b) the comparator and the applicant must have been treated differently. Finally, in relation to justifying an interference with Article 40.1 there are three important findings: (a) the general rule that the burden of proof rests on the applicant to show that there is no justification for the difference in treatment is dominating the case law. The exception to this rule has not been utilized in recent cases; (b) the State can justify differences in treatment, and the Court will give a wide discretion to States in this regard, as long as the measures imposed are tailored to meet the particular policy justification and; (c) the Courts will not interfere with the measures chosen by the State to implement a particular policy, even if this is not the choice that the court would have made, as long as the measure is objective and not arbitrary. It is not within the remit of the court to substitute its judgment for that of the Oireachtas in such matters.

The emerging case law on equality in 2012 would appear to show two distinct trends. Firstly, there is a rationalization of the previously cumbersome provisions in relation to the engagement and identification of an interference with Article 40.1. This certainly eases the difficulties previously faced by applicants in engaging Article 40.1 and establishing an interference with Article 40.1. Secondly, the State is given broad discretion in the policies it implements which can justify differences in treatment but only as long as these measures are specifically tailored to meet the stated objectives. There is an increasing judicial willingness to engage with and consider Article 40.1 and the enthusiasm with which the Superior Courts have employed equality rhetoric, certainly places the applicant in a much more positive position than had previously been possible under the older interpretations of Article 40.1. ■

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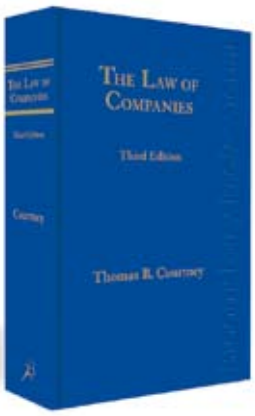

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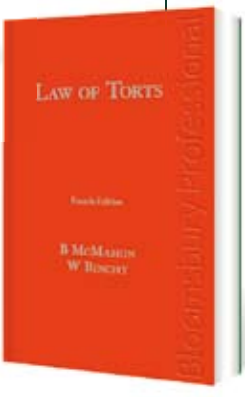

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