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- A Representative and Impartial Jury
- The "Newspaper Rule"
- Psychiatric Damage in the Aftermath of *Fletcher*

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The Personal Injuries Assessment Board Bill

Every citizen has a basic right to fair procedures and to equality before the law. The recently published Personal Injuries Assessment Board Bill aims to fetter those rights and to force a victim of personal injury to utilise a procedure that is effectively controlled by, and is skewed towards, the interests of defendants, who in most cases are represented by insurance companies. If any new system of dealing with personal injury claims is to work in practice, then it must more adequately take account of the rights of victims, particularly when those victims, as claimants, are pitted against the superior financial strength and legal sophistication of an insurance company.

The new Bill specifically bars a potential claimant from taking court proceedings until he has first submitted to a series of procedures at the Personal Injuries Assessment Board. A claimant has no choice in this matter. In contrast, the respondent insurance company can decide at the outset in each individual case whether it wishes to submit to the Board. If the insurance company does consent to the assessment, the evaluation process will realistically take about a year (and possibly a year and a half) from the date when the personal injury victim has first put in his claim. However, notwithstanding this delay, even when the PIAB ultimately delivers its evaluation of the amount of damages payable to the claimant, the respondent is under no obligation to accept that assessment, or to compensate the victim on foot of it. Thus, the claimant is in the invidious position of being forced into a process over which he has no control, which can delay his access to the courts for at least a year and which can result in his medical reports and other documents being furnished to the insurance company. All of this without any corresponding obligation on the insurance company to accept the final assessment. Indeed, an insurer, who has accepted liability and has flushed out details of the claimant's case through the PIAB process, is now free to turn around and contest liability in the courts.

If one considers that most defendants will be represented by an insurance company at every step of the PIAB scheme, the insurance company is in the driving seat – it decides initially whether a PIAB assessment should take place. It can then take issue with the medical reports submitted by the victim and effectively force an alternative medical examination. Then, if the final assessment is not to its liking, the insurance company can simply reject the PIAB award. The insurer has lost nothing. If anything, it has bought itself some time in terms of deferring the ultimate payout. The victim, however, has to start all over again in the courts, having wasted a year or more of his time, with little to show except the pleasure of having placed all his cards on the table and having engaged in a process which has given the insurance company a clear view of the strengths and weaknesses of the claim as well as a state-financed estimate of the worth of the case. A classic case of "heads I win, tails you loose."

Alternatively, if the insurance company agrees to accept an assessment, but the claimant is of the view that the award is inadequate, the claimant will nevertheless be under over-whelming pressure to accept such award. He may be under financial strain, particularly if his personal injuries prevent him from working. Also, having invested a year in the PIAB process, many claimants will simply be cowed from starting over and issuing proceedings in the courts. Thus, the PIAB system will effectively force claimants with little or no bargaining power, into accepting the assessment. Meanwhile, the respondent insurance company, with its wealth of financial resources and legal expertise, can play the system, reject the award and then say "Sue me."

The system is particularly egregious in the case of an uneducated, illiterate or impecunious claimant. The stated aim of the PIAB is to discourage the participation of lawyers by dealing directly with the claimant and by specifically not providing for the recovery of legal costs. Unfortunately however, there is no state funded civil legal aid in Ireland to assist those of limited resources in bringing a personal injury claim. Therefore, such a claimant is in the unenviable position of having to submit his claim in writing (even if illiterate), he has no opportunity to make an oral presentation to the Board and most importantly, he has no guidance on filling out forms or how best to most effectively pursue his case. This is in stark contrast to each insurance company, which has a staff of highly educated experts dedicated to handling personal injury claims.

Every week, countless cases are processed efficiently by bodies such as the Employment Appeals Tribunal. The aim of these bodies is to provide an informal and yet specialised service for the resolution of particular claims. However, unlike the proposed PIAB, these tribunals do not seek to restrict or delay access to the courts, they are not skewed towards a particular interest group, nor do they seek to limit the right of a claimant to present his case in person, with legal representation if desired. Furthermore, none of these tribunals confer on a particular class of respondents the tactical advantages and the open-ended ability to stage-manage proceedings in the skewed manner in which the PIAB Bill confers such advantages on insurance companies.

For very sound reasons, there is no existing precedent or model for the proposed PIAB. It is unfair and it is unbalanced. Worst of all, it will penalise the uneducated and the under-funded, who do not have the resources or the financial sophistication to properly pursue their claims.

Book Launch

Celebrating the launch of "The Irish Planning Law Factbook" published by Thomson Round Hall are (from L to R): Elanor McGarry, Director, Round Hall; The Hon. Mr Justice Ronan Keane and the editors of the book, Berna Grist BL and James Macken SC.

RTE People in Need Telethon

The RTE People in Need Telethon is back on April 2, 2004 and needs YOUR help!

Since the first Telethon in 1989, the People in Need Trust has distributed more than €28 million to voluntary organisations around the country, including the Finglas Youth Development Project, the Tallaght Homeless Advice Unit and the St. Vincent de Paul, Donnybrook. Whether people raise money by shaving off their 25 year old beard or doing a canoe jump off O'Connell Bridge, the proceeds from the event will go towards a charity in their local community. So please start thinking about novel ways that you can help to make Telethon 2004 the most successful Telethon yet.

For further information please contact:
People in Need, 33-37 Clarendon St., Dublin 2
Tel. (01) 679 2944 E-mail: pin@telethon.ie

European Competition Judges Meet in Dublin

Pictured after the recent meeting of the Association of European Competition Law Judges held in Dublin are the Hon. Chief Justice Ronan Keane, Sir Christopher Bellamy, President of the Association (and President of the Competition Appeal Tribunal in the U.K.) and the Hon. Nicholas Kearns (Treasurer of the Association). The AECLJ was set up in 2002 to provide a forum for the exchange of knowledge and experience in the field of competition law among the judiciary in the European Union and in the Accession States. In particular, it aims to promote consistency of approach in the modernisation of the application of Articles 81 and 82 under Regulation 2003/1. The Association is building a database of judgments in the competition law field and is compiling information on enforcement procedures for competition law in the Member States.

Rugby

Pictured at the recent rugby game between the Southern Bar and the Northern Bar held at Instonians rugby ground in Belfast were (L to R) Ronan Cosgrove, Anthony Lowry, Neill O'Driscoll, Ken O'Sullivan, Stephen McCullough, and John Sweetman. The Northern Bar won by 7 to 3.

Irish Women Lawyers Conference

Pictured at the recent conference and AGM of the Irish Women Lawyers' Association are (from L to R) Ivana Bacik BL, Judge Maureen Harding Clark, the Hon. Mrs Justice Mella Carroll and Elizabeth Mueller (President of the European Women Lawyers Association).

Deceased Colleague

Heartfelt sympathies to the family and friends of Gerard Lee SC, who passed away last month. May he rest in peace.

A Representative and Impartial Jury

Tom O'Malley BL*

Few legal institutions have had so many passionate defenders and so many detractors as the jury. To Lord Devlin, it was "the lamp that shows that freedom lives."[1] To Blackstone, it was a "palladium" and "the sacred bulwark of our nation".[2] while Mark Twain condemned it as "[putting] a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury".[3] Although scholars and commentators on both sides of the Irish Sea have, in more recent times, raised important questions about the value and reliability of jury trial,[4] the vast majority of lawyers, judges and, in so far as one can gauge, the general public, seem strongly committed towards this mode of trial. Two recent episodes in this country have focused attention on the jury. In one case, a murder conviction was quashed because of apparent misbehaviour involving a jury member and a member of the Gardai who was acting as jury keeper.[5] In another, a *nolle prosequi* had to be entered because prosecution witnesses appeared to be victims of intimidation. In the wake of the latter event, there were some calls for the transfer of such trials to the Special Criminal Court. If ever there was a case of misplaced criticism, this was it. Here, the mode of trial was largely irrelevant. The nature of the court has little impact, if any, on the likelihood of witness intimidation.

Be that as it may, the main statute[6] governing juries and jury trial will soon be in force for 30 years and the time may be ripe to review certain aspects of it. In this article, it is proposed to comment briefly on three matters: jury representativeness, jury impartiality and jury research. Strangely enough there has not been any comprehensive review of jury trial in this jurisdiction, although the Committee on Court Practice and Procedure and other bodies[7] have, from time to time, made recommendations on specific matters relating to juries. There is, in fact, one fairly recent law reform document on Irish jury trial though, strangely enough, it was published in Victoria in Australia. When the Victorian Parliament Law Reform Committee was reviewing its own jury law, it examined the equivalent Irish law and sent some representatives to Ireland. The chapter on Ireland in its final report remains quite valuable.[8]

Jury Representativeness

To be eligible to serve as a jury, one must first and foremost be a citizen.[9] Demographic changes since 1976, and especially over the past five years or so, have resulted in many non-citizens becoming long-term residents in Ireland. One must question therefore whether the insistence on jurors being citizens is any longer justified. Secondly, jurors must be drawn from the Dáil electoral register for the relevant jury district. This would be acceptable if one could be sure that all or most adults living in a particular locality were registered as electors in that locality. This may not be the case. Many young people who work in Dublin, for example, during the week "live" elsewhere in the country to which they regularly return at weekends and where they may still retain their vote. The extension of postal voting under the Electoral Act, 1997[10] has facilitated this trend.

When assessing jury representativeness, one must examine not only who is included, but also who is excluded. Under our present law, a very large section of the citizen population is either ineligible for service or else excusable, either as of right, or upon application. The list of ineligible and exempt categories is well-known and is set out in detail in the Juries Act, 1976, but the upshot is that most professional people, students, clergy as well as all members of the Gardai and armed forces do not serve on juries. One can understand why persons involved directly in the criminal justice system, such as Gardai and lawyers, should be ineligible to serve. But there must surely be a case for reviewing the other categories in an effort to make juries more representative.

Furthermore, Ireland has a remarkably generous system of peremptory challenges. In a criminal trial, each accused person and the prosecution may challenge up to seven jurors without cause, whereas any number may be challenged by either side with cause. Peremptory challenges were abolished in England and Wales in 1988, though not in Northern

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1 Devlin, Trial by Jury revised ed. (London, 1966), p. 164.
2 Blackstone, Commentaries on the Law of England (Oxford, 1765-1769), Book IV, Chap. 27, para. V.
3 Quoted in Gove, The Juryman's Tale (London, 1998), p. 3.
4 Darbyshire, "The Lamp that Shows that Freedom Lives – Is It Worth the Candle?" [1991] Crim L.R. 740; O'Hanlon, "The Sacred Cow of Trial by Jury" (1990-1992) 25-27 The Irish Jurist 57.
5 *People (DPP) v. McDonagh*, unreported, Court of Criminal Appeal, October 13, 2003
6 Juries Act, 1976.
7 See, for example, Committee on Court Practice and Procedure, 25th Interim Report, The Provision of Documentation to Juries in Serious Fraud Trials (Dublin, 1997).
8 Jury Service in Victoria: Final Report Vol. 2, Chap. 4. www.parliament.vic.gov.au/lawreform/default.htm
9 Juries Act, 1976, s. 6.
10 S. 63.

Ireland. Such challenges have been a particularly emotive issue in the United States where it has sometimes been alleged that they are used to prevent racially balanced juries been sworn in.[11] In this country, peremptory challenges are sometimes defended on the ground that defence and prosecution challenges cancel each other out. However, given the multiracial society now developing in Ireland, we must re-assess how peremptory challenges operate and what categories of person are most commonly excluded from juries as a result. On one or two occasions, I have seen the only black juror on a panel being excluded at the instance of the prosecution. It used to be said in the past that the Irish practice was to exclude any juror (invariably male in those days) who wore a neck tie.[12] We must be careful to ensure that we are not, consciously or otherwise, employing equally irrational criteria today. Any review of jury law should ask first if the practice of peremptory challenges is any longer justified and if it is consistent with the notion of random selection. If we are to retain such challenges, it must be questioned if the number need be as high as seven, given that any number can be challenged for cause.

Conversely, the English courts have recently had to consider claims that better efforts should have been made to secure a more racially balanced jury. To date, the courts have set their face against such demands. In *R v. Ford*[13], the appellant sought to have his conviction quashed on the ground, inter alia, that the trial judge should have acceded to an application for a multi-racial jury. The Court of Appeal rejected this argument, stating that while a trial judge had a discretion to exclude incompetent jurors, this discretion did not extend to discharging a competent jury in order to influence the racial or other composition of the jury. The court went on to say that the essence of the jury was random selection, and this was scarcely compatible with efforts to influence its make-up in terms of race or any other factor. A similar approach was adopted by the Court of Appeal in the more recent case of *R v. Smith (Lance Percival)*[14]

In Ireland, the High Court adopted a somewhat similar approach in *DPP v. Haugh*[15] where the respondent trial judge had suggested that potential jurors in a criminal case involving former Taoiseach, Charles Haughey, who was facing a charge of obstructing a tribunal of enquiry, should be asked to complete in advance a questionnaire in order to identify any possible prejudice on their part when it came to reaching a verdict in the case. A divisional High Court strongly disagreed with this approach, principally on the basis that there was no legal foundation for it in the Juries Act 1976 which formed a kind of legal code governing jury trial. Apart from that, some members of the Court were of the view that such measures were unnecessary in light of existing provisions, and in particular, the practice whereby a potential juror can inform a judge confidentially in court of any reason why he should not serve in the case.

It may well be that Irish juries are sufficiently representative, but at present we must rely on impressionistic and anecdotal evidence. As will be recommended at the end of this article, there is a need for research on the predominant composition of juries with a view to identifying whether juries routinely fail to include or represent certain sectors of the population.

Jury impartiality

Ideally, a jury should consist of 12 people who have no previous knowledge of the case they are asked to try or of any of the participants. They should listen to the evidence, observe the witnesses, pay close attention to the trial judge's instructions and then reach a sustainable verdict following careful and rational deliberation. Above all else, a jury must be impartial, meaning that neither the jury as a whole nor any member of it should approach their task with any predisposition as to the eventual outcome or as the credibility to be accorded to any witness or class of witness. A distinction is sometimes drawn between impartiality and neutrality. Adjudicators, be they judges or jurors, are not expected to be neutral about the issues arising in a case. As human beings, they may well feel anything but neutral about crime in general or about some category of crime, such as child abuse. This, in itself, should not be sufficient to disqualify them. Impartiality is concerned with the approach to be adopted in a specific case. A juror may feel strongly about the need to prevent and punish child abuse but may still be perfectly capable of reaching an impartial decision as to whether a particular accused is guilty of such an offence. Needless to say, if a potential juror feels so strongly about a certain issue that he would find it difficult to support a verdict of acquittal in any circumstances, he should ask to be excused on that ground.

The impartiality of a jury may be questioned on several grounds. Efforts are sometimes made to have a trial prohibited or postponed on the ground that the case has attracted so much pre-trial publicity, perhaps mainly adverse in nature, that no jury could reasonably be expected to reach a decision uninfluenced by the information and comment about the case that has already entered the public domain. Although the Court of Criminal Appeal has recently stressed that trials may be prohibited on this ground,[16] the fact remains that the manner in which the prevailing test is applied has meant that it is only in the most exceptional circumstances that an order of prohibition will be granted. Applicants stand a better chance of having their trials postponed until the so-called fade factor has taken effect, meaning that the publicity surrounding the matter in question has faded from public memory.[17] It is obviously a matter of judgment as to when a sufficient degree of fade has occurred; it is certainly not something that can be determined with any degree of scientific accuracy. Meanwhile, the test for prohibiting a trial because of pre-trial publicity is that developed in *D. v. DPP*[18] and *Z. v. DPP*[19], i.e. the applicant bears the onus of establishing that there is a real and serious risk that he cannot get a fair trial and that such a risk cannot be cured by appropriate rulings and directions from the trial judge.

Once a jury has been sworn in and the trial begins, a variety of issues may arise which call its impartiality into question. If the matter comes to light during the trial, it may lead to an application to have the jury discharged. Otherwise, it is likely to provide a ground of appeal. More often than not, the challenge will rely on the rule against bias and on the prevailing test of bias which, in this jurisdiction, is an objective, "reasonable apprehension" test. The operative question is whether a reasonable, right-thinking person, would reasonably apprehend that justice was not done on account of whatever vitiating factor

11 There is an enormous literature on this topic. See, for example, Broderick, "Why the Peremptory Challenge Should be Abolished" (1992) 65 Temple Law Review 369 and Ogletree, "Just Say No: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges" (1994) 31 American Criminal Law Review 1099.

12 Kenny, Outlines of Criminal Law 15th ed. (Cambridge, 1946), p. 567, n. 2 where he also quotes the famous French defence lawyer, Maitre Lachaud, as saying that he challenged every man who looked intelligent. Perhaps Mark Twain (note 3 above) was right after all!

13. [1989] Q.B. 868

14. [2003] 1 W.L.R. 2229

15 [2000] 1 I.R. 184

16 *People (DPP) v. Nevin* unreported, Court of Criminal Appeal, March 14, 2003.

17 *Zoe Developments Ltd. v. DPP*, uneported, High Court, March 3, 1999; *DPP v. Haugh and Haughey*, [2000] 1 I.R. 184

18 [1994] 1 I.L.R.M. 435.

19 [1994] 2 I.L.R.M. 481.

emerged.[20] As such, it is not necessary to prove actual bias (which would be difficult in any event). The law is equally concerned with apparent basis, reflecting the well-known adage that justice must not only be done but be seen to be done. The preoccupation with apparent bias does, of course, have an important functional element. The court system derives its legitimacy in large measure from public confidence in the impartiality and integrity of its decision-making processes. It is therefore important that the law be seen to react promptly and effectively to any departure or perceived departure from the expected standards.

One set of challenges to jury decisions may be grouped under the heading of "jurors behaving badly". Evidence may emerge either during or after a trial about the manner in which a jury reached its decision or about the behaviour of one or more jurors, and that evidence may strongly suggest that the verdict is unsafe. For instance in *R. v. Young*[21], the English Court of Appeal ordered a retrial when it transpired that the jurors had consulted a ouija board in a hotel room when arriving at a verdict. Much more recently, the Court of Criminal Appeal in this jurisdiction ordered a retrial in a murder case when it became known that some members of a jury, when sent to a hotel for the night, had been drinking with two members of the Gardai who were acting as jury bailiffs and that one of the Gardai ended up in a bedroom with a female juror. In *People (Attorney General) v. Heffernan*[22], a retrial was also ordered in a murder case where a jury, while sequestered, were brought on an outing to Glendalough and while getting refreshments in a hotel, were joined by a group of tourists with whom they dined and who travelled back to Dublin with them in the official bus. There was some evidence that the jurors were with the tourists at times when there were no jury keepers present. Applying the principle established by the Northern Ireland Court of Appeal in *R. v. Taylor*[23] that locked-up jurors should not be allowed such communication with the outside world, the Court of Criminal Appeal quashed the conviction and ordered a new trial.

In a fraud trial held at Swansea Crown Court in February 2003, the prosecutor, Dyfed Thomas received a Valentine card from a female member of the jury. He quite properly brought the matter to the attention of the judge, who was summing up at the time. She decided to discharge the jury member in question and allowed the trial to proceed with 11 jurors. A rather similar situation came to light a few months later in *R. v. Cunningham*[24] where the applicant sought to have his conviction quashed when it transpired that at the end of the trial as the jury was leaving the courthouse, a woman member of the jury asked the prosecuting counsel for a date. The Court of Appeal said that if such an event had occurred during trial, the judge might have discharged the juror in question, but it refused to quash the verdict saying:

> "To describe the invitation to dinner as evidence that the juror had become enamoured of crown counsel put the matter far too high…The only safe inference to draw was that the juror had found Crown counsel attractive and it was a considerable step on to infer that such feelings would bias her against defendant, or influence her views on the evidence".

While one must respect the expertise of the learned appeal judges on the rules of attraction, one might also ask if they were justified in concluding that the juror in question could be said or perceived to have carried out her duties with the kind of detached clinical impartiality we expect from juries. Might not the first date, had it occurred, have been all the more congenial if the lady in question had played a role in rendering her partner victorious in the trial in question?

A jury's impartiality might also, of course, be called into question if it happens that any one of its members was a victim of the crime in question or closely related to a victim. This famously occurred in *People (Attorney General) v. Singer*[25] when it transpired that the foreman of the jury was one of those who lost money in the fraudulent scheme for which Mr. Singer was on trial. The Court of Criminal Appeal quashed the conviction and ordered a re-trial, though it was careful to say that it did so on the basis that the applicant, Mr. Singer, was not aware at the time at which the jury was being sworn in that one of its members was in fact a victim of the offence in respect of which he was standing trial.

A more difficult situation arises when it becomes clear that a jury member has had some experience or displays a certain attitude towards the accused which suggests or creates a reasonable apprehension that the member in question might not be able to act entirely impartially. There may not be any recent equivalent to *R. v. O'Coigley*[26] where a member of the jury shouted "damned rascals" as the accused were being shown into the dock, but there have been cases here and elsewhere in which questions have arisen about jury attitudes. In *People (DPP) v. Tobin*[27] the accused was on trial for several sexual offences. While the jury was deliberating, one of its members disclosed that she had been a victim of sexual abuse.[28] Applying the reasonable apprehension test, the Court of Criminal Appeal, *per* Fennelly J., quashed the conviction on the basis that there was a possibility that this experience might have influenced the juror's decision and the applicant might not have received a fair trial as a result.[29] In light of this case and others like it in other jurisdictions, there is a case to be made for strengthening the provisons of s. 15(3) of the Juries Act 1976 to require potential jurors expressly to inform the judge of any experience of criminal victimisation that they have had.

The reluctance of trial judges to discharge entire juries and of appeal courts to overturn verdicts on the basis of alleged jury misbehaviour is understandable, especially if the trial has been a lengthy one. The costs of a retrial may be enormous and, if the alleged offence involves personal violence, one or more complainants may be put through the ordeal of yet another trial. Yet, as the superior courts in this jurisdiction have repeatedly pointed out, the right to a fair trial must always predominate,[30] and the public interest in ensuring that justice is done must outweigh any financial considerations. It is submitted that evidence of jury misbehaviour should raise a presumption that a trial has been unfair and that the party seeking to uphold the verdict should bear a heavy onus in convincing the court or the appeal court, as the case may be, that it is safe to allow the verdict to stand.

20 *Bula Ltd. v. Tara Mines Ltd.*(No. 6) [2000] 4 I.R. 142. XXXX
21 [1995] 2 Cr. App. R. 379.
22 [1951] I.R. 206, 1 Frewen 491.
23 [1950] N.I. 57
24 The Guardian June 26, 2003.
25 (1961) 1 Frewen 214 and [1975] I.R. 408.
26 (1798) St.Tr. 1991 quoted by Stannard, Northern Ireland Criminal Procedure (Dublin, 2000), p. 103, n. 310.
27 [2001] 3 I.R. 469
28 There have been suggestions that because of strong communal aversion to child sexual abuse, special jury selection procedures should be employed in such cases. See, for example, Vidnar, "Generic Prejudice and the Presumption of Guilt in Sex Abuse Cases" (1997) 21 Law and Human Behaviour 5. However, North American courts have declined to accept such an approach.
29 See also *Webb v. The Queen* [1994] C.L.R. 41 (High Court of Australia) and *Sander v. U.K.* (2001) 31 EHRR 1003 (European Court of Human Rights) and Gregory v. U.K. (1995) 25 EHRR 577.
30 *D. v. DPP* [1994] 1 I.L.R.M. 435, per Denham J.

Treatment of jurors

Earlier we referred to jurors behaving badly. Perhaps the biggest problem we face is treating jurors badly. The constitutional right to jury trial is unusual in one respect. It is a right which the accused is entitled to claim from the state. Yet, both the accused and the state must rely on a group of citizens to be sufficiently civic-spirited to undertake jury service. The maximum penalty for failing to answer a call to jury service is a mere £50 (about €64). As was pointed out in the report on jury trial in Ireland published by the Law Reform Committee of Victoria[31], jurors in Ireland are not treated particularly well. Facilities for jurors in many courthouses are rather poor. Often they must travel long distances and they may not even be provided with car parking facilities. In light of the factors being discussed here, the most important consideration must be to provide detailed information for jurors about their role, about the manner in which they are expected to behave and about the factors which may render them ineligible or disqualified to serve on a particular jury. Some steps are now being taken by the Courts Service to provide such information, but with the ever increasing willingness to challenge jury decisions on the ground of apparent bias, it is imperative that they should be given more detailed and concrete information and guidance once they are called. Furthermore, as was pointed out by the Court of Criminal Appeal, *per* Hardiman J. in *People (DPP) v. McDonagh*[32], members of the Gardai and others responsible for guarding jurors should be given proper training on their role. Any investment made in providing such training facilities will be worthwhile in view of the costs that may be saved on re-trials which have to be ordered if a conviction is quashed on grounds similar to those arising in *Tobin* or *McDonagh*.

Jury research

There is a commonly-held view that no research can be carried out in the jury because any attempt to question jurors about their deliberations would amount to contempt of court. This is certainly the law in England,[33] but there is no equivalent statutory provision in Ireland. The importance of protecting the secrecy of jury deliberations has certainly been stressed by the Irish courts but it does not automatically follow that properly conducted research would violate the law. At the outset, however, it is important to distinguish between different kinds of jury research, some of which are quite legal by any standards. First, research could legitimately be carried out on the composition of juries and an effort made to identify any correlation between jury composition and verdict, if only to satisfy ourselves that there is no statistically significant correlation between those two factors. Is there, for example, any correlation between the number of women members on a jury in a rape trial and the likely outcome in terms of acquittal or conviction? In the late 1980s, the Law Reform Commission carried out a short exercise on the basis of jury composition in rape cases for the years 1979 to 1986 and, while acknowledging the limitations of the exercise, it concluded that there was little support for the proposition that juries in which males predominated were more likely to acquit.[34]

The time is now ripe for a more detailed analysis, especially in light of the vast increase in sexual offence trials since 1986. The demographic characteristics of those who serve on juries should also be investigated. It is sometimes alleged that juries are composed mainly of young persons, students and the unemployed. Anecdotal and impressionistic evidence of this nature is always dangerous and is no substitute for a proper empirical investigation of the facts. Again this is research which can easily be carried out without any violation of jury secrecy. It was recommended earlier in this paper that the present law be reviewed to see if juries could be made more representative. Clearly research of the kind being advocated here would be a necessary prerequisite to any such review. Finally, under this heading, and for the reasons mentioned earlier, research is needed on the manner in which peremptory challenges are being used and, in particular, to establish if they are having the effect of routinely excluding certain sectors of the population from jury service.

This brings us to the vexed question of research on jury deliberation. Again, there is one entirely legal form of research that is possible and that is simulated jury research, though it obviously calls for a considerable amount of funding. Essentially, it involves running a mock trial, though with all the participants and characteristics of a real trial, before a randomly selected jury, and then questioning them about how they approached their task in reaching a verdict. Needless to say, a number of such trials would have to take place in order to produce credible results. Such an experiment would go some way towards answering the question of how well juries understand judges' charges, and especially those aspects of a charge explaining the law. One of the better known such exercises in these islands was carried out in England some years ago by Professor Lloyd Bostock in a effort to discover the impact of knowledge of the previous convictions of the accused on a jury's decision.[35] (On this point, it should be stated that, irrespective of the outcome of any research, there is an important point of principle involved here. Any possibility that a jury will find a person guilty on the basis of his record rather than on the evidence should be studiously avoided. After all, it may have been his previous convictions which led to the suspicion on which his arrest was grounded in the first place.)

Simulated studies can be valuable, but they are costly and never entirely satisfactory. After all, one would need to organise several mock trials in order to cover the wide range of circumstances and eventualities that can arise at real trials. A more fruitful approach might be to examine the feasibility of properly conducted research involving juries in real cases. If carried out by experienced researchers with the help of an advisory committee consisting of senior judges and lawyers, it need not in any material way infringe on the secrecy of jury deliberations. It would, of course, be understood that the published results of the research would not reveal how a jury in any one case approached its decision. Rather the focus would be on general problems and trends in jury deliberation. Such research would be highly desirable, if not essential, before any reforms are made to the present jury system. ●

31 Note 8 above.
32 See note 5.
33 Contempt of Court Act, 1981, s. 8.
34 Law Reform Commission, Consultation Paper on Rape (Dublin, 1987), p. 81. The statistics are set out, ibid. at pp. 94-97.
35 Lloyd-Bostock, "The Effects on Juries of Hearing about the Defendant's Previous Record: A Simulation Study" [2000] Crim L.R. 734.

Disclosure, Defamation and the "Newspaper Rule"

Brendan Gogarty BL

Introduction

It is not unusual for a newspaper article, a television programme or radio broadcast to be based upon information supplied by an unidentified source. Where the article or broadcast is alleged to be defamatory, the party defamed would have an understandable interest in unmasking the source to advance his or her action in defamation. For example, the plaintiff may wish to establish that the source was so obviously unreliable that the defendant must have been actuated by bad faith, malice or some other improper motive[1]. Furthermore, the plaintiff may wish to launch a separate action against the informant who supplied the allegedly defamatory material.[2]

As a means of identifying the source, a plaintiff could well employ pre-trial procedures, in particular discovery or interrogatories, as devices to compel the disclosure of the identity of a reporter's source. Equally media defendants could well employ each and every defence available in their efforts to maintain the secrecy of the identity of that source which could otherwise be revealed, directly or indirectly, as a consequence of documentary discovery or interrogatories.

General Principles of Disclosure

The general rule in litigation is that every party to that litigation is obliged to discover all documents that relate to any matter in question between the parties[3]. Likewise interrogatories must relate to those matters in question[4]. In defamation actions, the issue of malice is a question of obvious interest to a party seeking disclosure. Generally, where such actions concern statements published by the news media on the faith of information received from third parties and where an issue arises as to the attitude of mind of a defendant at the time when the alleged defamatory statements were published, the circumstances in which the defendant obtained the information may be relevant[5]. Therefore discovery of a reporter's notes, drafts and research materials may give an insight into the defendant's state of mind at the time of publication and the circumstances in which information was gathered.

Inevitably, discovery of such documentation could reveal a defendant's source of information. Certainly it would appear that documentation of the nature described may be currently discoverable in this jurisdiction. This is particularly so as the identity of an informant may be relevant to the issue of malice[6] where, for example, malice is advanced to defeat fair comment or privilege[7]. Nonetheless, there is a long line of authority going back more than one hundred years in England, Australia and New Zealand which holds against the discovery of documentation or the administering of interrogatories which would result in disclosure of the sources of information of news media defendants at the interlocutory stages of defamation actions and where publication is admitted. This is known as "*The Newspaper Rule*". This special exception to the general rules of disclosure in those countries is not based upon privilege but rather seems to be at least partially based upon the limits of the discovery process[8].

What is "The Newspaper Rule"?

"*The Newspaper Rule*" has been described in its generality as follows :-

> "By the so called 'Newspaper Rule', discovery (whether of documents or by interrogatories) will not be ordered in libel actions against newspapers so as to force them to disclose their sources of information before trial. The reasons for the rule are obscure but are probably founded in considerations of public policy. The rule only applies at interlocutory stages, and not at the trial of the action. It

1 On the relevance of the identity of a source in establishing a reporter's state of mind see *Wran v. Australian Broadcasting Commission* (1984) 3 NSWLR 241 at 250-251. Further see *Broadcasting Corporation of New Zealand v. Alex Harvey Industries* (1980) 1 NZLR 163 at 171-172. Likewise see *South Suburban Co-Operative Society Limited v. Orum and Others* (1937) 2 KB 690 at 701.

2 See *Allworth v. John Fairfax Group* (1993) 133 F.L.R. 254 regarding the avoidance of false issues in defamation actions.

3 Brett J in *Compagnie Financiere v. Peruvian Guano* (1882) 11 QBD 55 at 63. Adopted in this jurisdiction in *Sterling-Winthrop Group Limited v. Farbenfabriken Bayer AG* (1967) IR 97. See also *Brooks Thomas Limited v. IMPAC Limited* (1999) 1 ILRM 171. Further see Gatley on *Libel and Slander (9th Edition)* at para 30.42.

4 *Money Markets International Stock Brokers Limited v. Fanning* (2000) 3 IR 215.

5 *South Suburban Co-Operative Society Limited v. Orum and Others* (1937) 2 KB 691 at 700-701.

6 *White & Company v. Credit Reform Association and Credit Index Limited* (1905) 1 KB 653.

7 In my view, the situation may well be different where malice is not expressly pleaded by a plaintiff and a defendant simply relies on a defence of no libel without reference to a plea of privilege or fair comment. See also *McNab V Wellington Publishing Company Limited* (1914) 33 NZLR 1362.

8 *Attorney General v. Clough* (1963) 1 QBD 773 at 792. *McGuinness v. Attorney General of Victoria* (1940) 63 CLR 73 at 104-105.

has repeatedly been said to be subject to unspecified exceptions, but there seems to be no reported English case where an exception has been held to apply, and in New Zealand it has been suggested that the rule should be regarded as absolute .....

The protection of the Newspaper Rule extends to journalists in the fulltime employment of a newspaper, to trade periodicals, but not to the authors of letters published in newspapers, it is doubtful whether it extends to freelance journalists or to publishers of Crockford, the annual clerical directory, but it almost certainly applies to broadcasters" [9].

The Scope of The Rule

The status of the newspaper rule in this jurisdiction has yet to be determined. The source of the rule is attributed to Lindley LJ in *Hennessy V Wright*[10]. However its origin certainly precedes 1888 as Lindley LJ considered the rule to be a "*tolerably settled practice*" at that time[11]. Whilst *Hennessy V Wright* concerned the rule's application in the context of interrogatories, it was subsequently and repeatedly applied to discovery of documents[12]. The rule has been applied not only to the print media but also to television and radio broadcasting[13]. With respect to the print media, it would appear that the rule applies equally to the national press, monthly, quarterly and annual reviews and trade periodicals[14].

The "source" of information has been held to mean more than the name of an informant and includes notes of interviews[15]. It is not strictly confined to pure news items. It is considered that there could be endless difficulty in deciding whether some published material should be properly described as entertainment even though laced with information or vice versa. As such, the categorisation of information would be a "profitless exercise when related to the general context of a defamation action"[16]. Furthermore the rule applies not only to defamation but also to related actions like the slander of goods[17].

Is The Rule Absolute?

The rule reflects judicial caution in that it envisages special circumstances which would allow departure from the rule. This "opt out clause" was first referred to in *Hope v. Brash* (*supra*). In this case, a very high bar was deemed applicable to the nature of special circumstances. Smith LJ stated:-

"I do not say that the rule so laid down is one which can never be departed from but there must be something exceptional to take a case out of it".

Lyle-Samuel v. Odhams Limited & Others[18] appears to be the only reported case where judicial consideration was given to the precise nature of "special circumstances". This was a libel action where a newspaper article alleged that the plaintiff, an election candidate, had stolen his first wife's money, had driven her insane and left her a pauper in a lunatic asylum. The defendant pleaded fair comment.

The plaintiff argued that the identity of the informant was relevant as the source may have been unreliable. It was further contended that the newspaper rule did not apply where there was an attack on the private character as opposed to the public character of politicians. The plaintiff also gave an undertaking that, if the names of informants were disclosed by interrogatories, he would not bring any action against them. The Court of Appeal declined to accept that the foregoing matters qualified as special circumstances justifying a departure from the rule. Scrutton LJ recognised that an informant may be a convicted perjurer, a well known libeller or may be of low character, but nonetheless, he applied the rule against disclosure of sources.

It may be surprising that a rule, which has been described as a rule of practice[19] has been applied with such vigour regardless of strong arguments favouring special circumstances. In later cases such as *Broadcasting Corporation of New Zealand v. Alex Harvey Industries Limited (supra),* the fact that companies were alleged to have been defamed through their product and marketing methods was held not to be a special circumstance. It was also submitted in the *Harvey* case that where information was offered to a broadcaster in circumstances in which the informant did not expect confidentiality, the newspaper rule did not apply. Nevertheless, the Court of Appeal held that the level of confidence, or lack of it, could not be regarded as a special reason for departing from the rule.

Certainly whilst the rule allows a departure where special circumstances exist, there appears to be no case where this has occurred. Arguably the description of the rule in Carter-Ruck as being one of practice is a somewhat weak representation of a principle which has been applied in England, Australia and New Zealand for over one hundred years. The strength of the principle is evident in the *Plymouth Mutual Case* (*supra*) where Stirling LJ commented that the rule is not one from which we are at liberty to depart in the absence of special circumstances. In New Zealand, the rule is now treated as a rule of law and not merely as a rule of practice[20]. Indeed Lord Parker in *Attorney General v. Clough* (*supra*) expressed his view of the rule as follows:-

"It has however, now become ..... not merely a rule of practice but a rule of law that in matters of discovery where the press are concerned, they will never be required to reveal the source of their information"[21].

9 Gatley on *Libel and Slander (9th Edition)* at para 30.112. See also *Wran v. Australian Broadcasting Commission* (1984) 3 NSWLR 241 at 250.

10 *Hennessy v. Wright* (1882) (No: 2) 24 QBD 445, reported as a note to *Parnell v. Walter* (1890) 24 QBD 447.

11 See *Carter v. Leeds Daly News Company and Jackson* (1876) WN11

12 *Hope v. Brash* (1897) 2 QBD 188. *Brill v. Television Service One* (1976) 1 NZLR 683. *Wran v. Australian Broadcasting Commission* (1984) 3 NSWLR 241.

13 *Isbey v. New Zealand Broadcasting Corporation (No: 2)* (1975) 2 NZLR 237.

14 *Plymouth Mutual Co-Operative and Industrial Society Limited v. Traders' Publishing Association Limited* (1906) 1 KB 403. *Georgius v. Oxford University Press* (1949) 1 KB 729.

15 *Brill v. Television Service One* (1976) 1 NZLR 683.

16 *Broadcasting Corporation of New Zealand v. Alex Harvey Industries* (1980) 1 NZLR 163

17 *The Law of Defamation in Australia and NewZealand, page 89,* by Michael Gillooly.

18 *Lyle-Samuel v. Odhams Limited & Others* (1920) 1 KB 135.

19 Carter-Ruck on *Libel and Slander (5th Edition*) at page 105.

20 *Brill v. Television Service One* (1976) 1 NZLR 683.

21 *Attorney General v. Clough* (1963) 1 QBD 773, 789; (1960) 1 AER 420, 426

However certain *dicta* of Lord Denning in *British Steel Corporation v. Granada Television Limited* take a less robust approach to the rule[22].

What is the Rule's rationale?

Various justifications have been put forward for the rule over the years. It has been described as having been "carved out of the general field of relevance" in *South Suburban Co-Operative Society v. Orum* (*supra*). Some decisions hold that the rule has been fashioned as a limit on the discovery process, for example, *McGuinness v. Attorney General of Victoria* (*supra*). As early as *Hope v. Brash* (*supra*), there appears to have been a concern that plaintiffs may misuse the discovery process so as to unmask and sue informants and perhaps discontinue the substantive libel action. Perhaps this is why the plaintiff in *Hope v. Brash* gave an undertaking not to sue the author of that manuscript sought to be discovered. Similar undertakings were given in subsequent cases. The judiciary have always been alert to guard against the possibility that discovery could be invoked so as to enable a person to plead a cause of action which that person is not otherwise in a position to so plead[23]. It is viewed as undesirable that plaintiffs at the interlocutory stage of proceedings would "delve around" (as Lord Denning has expressed it) for other targets[24].

Whilst all of the foregoing reasons have a certain validity, the *causa causans* of the newspaper rule is more readily understandable with respect to public policy issues. In *Hodder v. Queensland Newspapers PTY Limited*[25], it was stated of the rule that:-

> "Differences in practice and procedure in defamation actions which may seem anomalous are at least partially explicable by reference to the need to balance the effective administration of justice with other public interests, including freedom of speech and the public's right to information. The balance struck in relation to disclosure of media sources of information entitles a person alleging defamation to ascertain the details at trial ..... but generally does not require disclosure before trial when litigation can be abandoned after the sources have been disclosed. One consequence may be to give publishers tactical advantages over those defamed and another may be to make defamation litigation more risky, expensive and difficult to settle, but these disadvantages have been accepted as the price of the freer flow of information to the public".

Press Freedoms and Public Policy

The interrelationship as between the newspaper rule and public policy was first considered in *Adams v. Fisher* (1914)[26]. Lord Buckley was of the opinion that :-

> "A newspaper stood in such a position that it was not desirable on grounds of public interest that the name of a newspaper's informant should be disclosed".

Banks LJ in the *Lyle-Samuel* case (*supra*) made similar observations, as follows:-

> "It would be difficult to maintain that freedom (press freedom), if the editor of a newspaper felt that he might be compelled to disclose the name of the person upon whose information he was acting in making the comment or inserting the article".

This case is also of interest as Banks LJ doubted whether the rule ought to be limited to newspapers, a view vindicated by later decisions.

Australian authorities such as the *Wran* and *Hodder* cases illustrate a clear trend in the justification of the newspaper rule in favour of press freedoms. Equally public interest arguments are of considerable importance in New Zealand[27]. Perhaps the best exposition of those challenges posed by the rule, when seeking to resolve the dynamic tension between competing public interests, is found in the dicta of Richardson J in *Broadcasting Corporation of New Zealand v. Alex Harvey Industries Limited (supra)*. The learned judge set forth the rationale of the rule as follows:-

> "The reasons for the rule are not found simply in the needs of particular litigants. The broader purpose is to encourage the flow of information to the public and thereby facilitate free trade in ideas. That flow is dependent on the reporting of matters of public interest to the news media. The rule promotes this end by holding out to news gatherers and contributors of information to the news media, the assurance that, unless and until a matter goes to trial and in the setting of the trial itself, identification of the source of the news media's information will not ordinarily be compelled".

Irish Jurisprudence

The status of the newspaper rule is unclear in Ireland as, to date, it has not yet been argued before our courts. It is interesting to note that *Hennessy v. Wright*, the case which is commonly viewed as the original authority for the rule, is cited as an authority in the only Irish text on Discovery[28]. Granted, the case is cited as an authority in the context of interrogatories. But those very interrogatories gave rise to the newspaper rule in the first instance. As a result, it may not be entirely correct to presume that there is no Irish authority on the point. Indeed English decisions, made pre-Irish independence, may inform the Irish common law by virtue of the provisions of Article 50 of the Irish Constitution dealing with the continuance of laws[29]. For example, it is to be noted that the *Lyle-Samuel* case is cited in McMahon & Binchy *"Law of Torts"* (3rd Ed.) as an authority pertaining to defamation actions.

Of course, any discussion of the newspaper rule must take cognisance of the provisions of Article 40.3.2, which specifically incorporates the right to a citizen's good name[30]. But equally the Court must balance those rights with the freedom of expression provisions set out in Article 40.6.1.i. That balancing of rights was considered in *In re Kevin O'Kelly*[31]. This decision arose with respect to a claimed "journalistic privilege" as opposed to the principles of the newspaper rule in defamation actions. Apart from constitutional arguments, Article 10 of the European Convention on Human Rights is a matter of considerable importance when considering whether or not media sources may be revealed at any stage of proceedings, be they interlocutory or otherwise[32].

22 *British Steel Corporation v. Granada Television Limited* (1981) AC 1096.
23 *Eileen Galvin v. Mary Graham-Twomey* (1999) 2 ILRM 315. *Allworth v. John Fairfax Group* (1993) FLR 254.
24 *Attorney General v. Mulholland* (1963) 2 QB 477, 490.
25 *Errol Raymond Hodder v. Queensland Newspapers PTY Limited* (1994) 1 Qd. R. 49.
26 *Adams v. Fisher* 30 Times LR 288
27 *Isbey v. New Zealand Broadcasting Corporation (No: 2)* (1975) 2 NZLR 237. *Brill v. Television Service One* (1976) 1 NZLR 683. See also *Media Law in New Zealand (4th Edition)* Burrows and Cheer.
28 *Discovery in Ireland,* Eamonn Cahill at page 62.
29 *The Irish Constitution (3rd Edition).* J.M. Kelly at page 1156.
30 *Maguire v. Ardagh* (2002) 1 IR 385.
31 *In re Kevin O'Kelly* (1974) 108 ILTR 97. See also *The Irish Constitution (3rd Edition).* J.M. Kelly at page 949.
32 For example, *Thoma v Luxembourg Application* No: 38432/97 – 29.3.2001. *Goodwin V United Kingdom* (European Court of Human Rights) (1996) 22 EHRR 123.

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Dated the 4th December 2003

Brendan Ryan B.L.
Secretary
Judicial Appointments Advisory Board

Certain Irish authorities may be viewed as unfavourable to the introduction of the newspaper rule to this jurisdiction. In *Kiberd v. Tribunal of Inquiry*, the High Court approved an order directing a journalist and an editor to produce documents upon which newspaper articles were based[33]. However, it should be said that in Australia, it has been determined that the newspaper rule does not apply to tribunals of inquiry[34]. It is difficult to understand the logic of the rule's non-application before tribunals of enquiry when it is applied before the Courts. The *dictum* of Holmes J. comes to mind that "the life of the law has not been logic, it has been experience"[35].

The decision of Kelly J in *Cooper Flynn v. RTE*[36] which concerned *inter alia* orders for non-party discovery and bankers' confidentiality, also seems to present a basis upon which to question the newspaper rule. On the other hand, this decision, on its facts, seems distinguishable from the principles of the newspaper rule, particularly those set out in the *Hodder* judgment above.

Therefore, with reference to the above, there would not appear to be any specific Irish authority or legal principle that presents an insurmountable impediment to the adoption of this rule into the corpus of the Irish common law.

Conclusion

The newspaper rule has yet to be tested before the Irish Courts. Certainly the rule would be a useful tool as media defendants are faced by pre-trial procedures which have considerable potential to unmask reporters' sources and, in particular, the identity of informants at the interlocutory stage. There has of course been a relative absence of disclosure applications in defamation actions until relatively recent times, which could well explain the absence of recent Irish authorities on the point. In light of the explosion in the number of discovery applications coming before the learned Master of the High Court, it seems likely that arguments concerning the protection of reporters' sources in the course of interlocutory applications will be aired before the Irish courts in the not too distant future. ●

33 *Kiberd v. Tribunal of Inquiry* (1992) ILRM 574.
34 *Independent Commission Against Corruption v. Cornwall* 116 ALR 97, (Supreme Court of New South Wales).
35 Holmes O.W., *The Common Law (Little, Brown & Co., 1881) p.1.*
36 *Cooper-Flynn v. RTE* (2000) 3 IR 344.

Regulating the Press: does Ireland need a statutory press council?

Anthony Moore BL

Introduction – Advisory Group Report

In June, 2003, the Report of the Legal Advisory Group on Defamation was published. The Group was established by the Minister for Justice in 2002 and was charged with considering *inter alia* "the nature and extent of any statutory intervention which might attach to the establishment of any entity concerned with the regulation of the press". The Group recommended the establishment of a statutory press council and the preparation of a press code of conduct, breaches of which would be investigated and adjudicated upon by the council. This has caused considerable unease amongst members of the press, who have expressed concerns that a statutory press council will restrict freedom of expression.

Why a Statutory Press Council?

In beginning its discussion of press regulation, the Group noted that self-regulation is the normal method of press regulation in other jurisdictions. The Group identified the salient argument used to justify self-regulation as being that it provided the only means of ensuring press freedom, to which statutory controls were inimical. It then dismissed that argument. Having briefly mentioned the vital importance to a democratic society of a free and independent press, the Group opined that the beneficial effects of a free press would not be lost as a result of statutory regulation and stated baldly that the case for a statutory press council was "compelling", a conclusion which was unsupported by any evidence.

Had this conclusion been reached in circumstances where individuals had had their reputations traduced by ill-informed, malicious newspaper articles, it would have been understandable. Yet this is not the case: most people would allow that the press in Ireland is exceedingly careful to ensure that its publications do not fall foul of the libel laws. The fact that plaintiffs have been successful in libel actions in recent years should not detract from this. Furthermore, defendants in libel actions face the possibility of a jury engaging in an assessment of damages without any directions or guidance from the judge trying the case. This situation has been challenged recently before the European Court of Human Rights in *Independent News and Media plc v. Ireland*, on the grounds that there are no adequate and effective safeguards in Ireland against disproportionately high awards and that this restricts freedom of expression.[1]

Nor did the Group's conclusion depend on an argument that self-regulation was inferior to statutory regulation. If this was the case, one could readily agree that statutory regulation should be the preferred option. However, an examination of the system of self-regulation in the United Kingdom would seem to suggest the opposite: self-regulation is just as good as, if not better than, statutory regulation.

Self-regulation in the United Kingdom: the Press Complaints Commission

The UK Press Complaints Commission was set up on the 1st January, 1991. Its code of conduct, to which all editors and publishers committed themselves, was drawn up by a committee composed of national and regional editors. The PCC is funded by the press, and its members, who are appointed by an independent appointments commission, include national and regional editors and a majority of lay members.[2]

The primary function of the PCC is to investigate complaints from members of the public about the editorial content of newspapers and magazines. A relatively simple complaints procedure is provided for, which aims to resolve the complaint by engaging in a process of conciliation with the newspaper concerned. Where this is successful, redress can include the publication of a correction, an apology or a clarifying article. Where a complaint cannot be resolved to the satisfaction of the complainant, the PCC may adjudicate on the complaint, and if it upholds it, the relevant publication is obliged to publish the PCC's adjudication in full and with due prominence. The adjudication will also be placed on the PCC's website. In the years since it was created, the PCC has built up a considerable body of caselaw setting out how the provisions of the code are to be applied.

The service provided by the PCC is free and those availing of it have included members of the royal family, politicians and the general

1 The Group has however proposed that the law be amended to require judges to provide juries with such guidance.

2 This ensures that the principle *nemo iudex in causa sua* is preserved.

Brennans L.S

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public: the PCC investigated 2,630 complaints in 2002, 60% of which concerned inaccuracies in reports, and was required to adjudicate on only 36 complaints. Most complaints are dealt with within 32 working days. This indicates a considerable degree of public confidence in the ability of the PCC to carry out its duties effectively and efficiently.[3] So successful has it been that discussion of statutory press regulation in the United Kingdom has been off the agenda for almost a decade.

The PCC's editorial code of conduct contains 16 chapters, dealing with such matters as accuracy, opportunity to reply, privacy, harassment, intrusion into grief or shock, children, listening devices, hospitals, crime reporting, use of misrepresentation and subterfuge by journalists to obtain information, discrimination, financial reporting and payment for articles.[4] It is kept up to date by a code committee. The flexibility inherent in self-regulation is evident from the ease and regularity with which the code has been amended and extended since 1991 to remove various *lacunae* exposed by newspapers' handling of certain issues. Following several controversial cases, payments by the press made to witnesses in criminal trials were prohibited except where their information should be published in the public interest and there was an overriding need for payment or a promise thereof to be made in order to do so. Revision has been carried out to ensure that publications accord greater respect to an individual's privacy: this forbids *inter alia* pictures of people in private places.[5] In many cases, the amendments afford greater protection to the most vulnerable members of society. Thus, rules are in place to ensure that children in sex cases are not identified in piecemeal or "jigsaw" fashion and, in respect of those suffering mental health problems, the PCC has issued guidelines to editors urging them to avoid the use of language which could cause them or their families distress, or could create a climate of public fear.

A number of incentives are in place to ensure compliance with the code. Failure by an editor to observe the code may result in the PCC bringing the matter to the attention of the publisher, with a view to having disciplinary action taken. The ability of the PCC to hold editors to account was also strengthened by having a commitment to observe the code written into the contracts of employment of a majority of senior editors.

A "Chilling Effect" on Press Freedom?

In the *Spycatcher* case[6], Donaldson M.R. stated that freedom of the press was:-

> "... an essential element in maintaining parliamentary democracy ... But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest, or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees".

On this view, the press is the agent of the public. In every liberal democracy, there exists a tension between the press and the government. The press harries the government on behalf of its readership where it feels such a course is warranted, but also undeniably performs the important task, which often accrues to the benefit of government, of providing an educative forum where government policies and their effects are explained to the people, the proposed smoking ban in the workplace being one example. To carry out these roles effectively and in such as way as to maximise public confidence, it is vital that the press remain independent of government.

The Working Group recommended the establishment of a council, the membership of which would be appointed by the government. Where members of a statutory press council are appointed by government, however, there exists a danger that this independence, and public confidence in the ability of the press to report and comment impartially, will be eroded. It is one of the hallmarks of a democratic society that the press, in the public interest, subject the conduct of government and elected representatives in general to scrutiny. The opinions of the latter about the conduct of the press do not at present enjoy any particular precedence over those of the ordinary citizen. However, an appointments procedure which is not completely independent of government will inevitably increase the influence of public representatives over the press *vis-a-vis* that of other citizens, which conceivably could see the press unwilling to publish unfavourable stories for fear of retaliatory action.

Suppose a newspaper, by undercover means, learns certain facts which would cause embarrassment to the government of the day. It fears that, if it publishes the information, the government might be tempted to appoint to the press council individuals who are known to wish to amend the code of conduct in order to subject the press to very strict rules on subterfuge, impacting adversely on its future ability to use this means of acquiring information.[7] In those circumstances, the offending publication might well consider that it would be better to engage in self-censorship and pull the story than run the risk of becoming embroiled in a dispute with the government which could rebound upon it to its disadvantage. However, it might not be so reticent about using

3 The courts in England have shown reluctance to interfere with the decisions of the PCC or the manner in which they were reached: see *R.. v. Press Complaints Commission, ex parte Ford* [2002] E.M.L.R. 5. There is uncertainty as to whether the PCC is judicially reviewable: the predominant view is that it is. If such a body were to exist in Ireland, it should allow a right of appeal from its decisions.

4 The code of conduct of the Irish National Union of Journalists is essentially a guide for journalists in the carrying out of their duties. It is not as comprehensive as the PCC's. Its provisions cover *inter alia* accuracy, the means by which information may be obtained, intrusion into grief or shock, protection of sources, acceptance of inducements and conflicts of interest. There is no complaints procedure whereby breaches of the code may be investigated. Thus only victims of libel have the possibility of redress.

5 The code defines a private place as "public or private property where there is a reasonable expectation of privacy".

6 *Attorney-General v. Observer Ltd.* [1990] 1 A.C. 109.

7 This possibility would not seem to be eliminated by the suggestion of the Group that some kind of formal consultation process could be provided for which involved press interests and the relevant minister both as to the membership of the body in question and as to the terms of a code of conduct. In order to safeguard against the possibility adverted to above, it might be necessary to provide press interests, in certain circumstances, with a right to veto proposed appointees.

subterfuge to obtain and publish information where there is no risk of offending the government, which illustrates the different standards that might be observed by the press depending on whom it is writing about. Clearly, a government-appointed press council could result in a placable, pliant press, leading to a loss of transparency and damaging freedom of expression, something which is in the interests of neither government nor the press.

Benefits of self-regulation

As is clear from the above experience of the PCC in the United Kingdom, self-regulation possesses the following advantages.

1. It provides editors and publishers themselves with an opportunity of creating and upholding a code which, to stave off government regulation and win public confidence, would have to be credible and be accompanied by a disciplinary mechanism to be activated in cases of breach. Editors would have a greater interest in observing rules created by themselves than ones drafted by a statutorily appointed committee, the composition of which could conceivably exclude journalists altogether. This would deprive the body of invaluable shop-floor expertise which, in the United Kingdom, was crucial in determining the issues which the code should cover and in identifying and overcoming subsequent problems therewith.
2. The flexibility inherent in self-regulation permits expeditious and efficient amendment of the code to ensure that it is capable of dealing with the challenges posed by newspaper coverage of particular events and that vulnerable sections of the community are afforded protection.
3. The complaints procedure under self-regulation is free and affords prompt redress to complainants who feel they have been wronged by the press.
4. Unlike statutory regulation, credible self-regulation would not give rise to public concerns that the press is engaging in self-censorship out of fear of incurring the displeasure of the government.
5. It would enable changes to be made to the law so that, for instance, adherence to the code by a newspaper could constitute a mitigating factor in an award of damages.
6. It is in keeping with the trend across Europe. Unlike a statutory council, a self-regulatory council would be entitled to join and benefit from membership of the Alliance of Independent Press Councils of Europe, which encourages self-regulation and in which press organisations from 24 European countries participate.
7. From the perspective of the Exchequer, self-regulation happily requires no State funding.

What should be done?

The press in Ireland would appear to be divided on the issue of statutory regulation. Some newspapers seem to be edging towards an acceptance of a statutory press council in the hope that it will be accompanied by the much-needed reforms to the libel laws proposed in the Group's report; others remain vehemently opposed to it, arguing that the press should not accept a statutory press council as a *quid pro quo* for libel reform.

The press should accept that some form of regulation is now inevitable. If it remains divided and shows no sense of initiative, statutory regulation is likely within a year, with a decision on the matter expected early in the new year. If members of the media wish to avoid this scenario, they should establish forthwith a press council along the lines of the PCC. This would require considerable cooperation amongst the editors of regional and national newspapers who would have to take steps *inter alia* to fund the council, appoint a committee charged with drafting a code of conduct, provide for penalties for breach thereof, establish a complaints mechanism, and bring the existence of the committee to the attention of the public. This would be difficult to achieve within the time available, but not impossible.[8]

In its turn, the government should reflect on whether the step of creating a statutory press council would not be disproportionate to the aims to be achieved thereby, such as maintenance of standards and affording redress to complainants, given that the evidence from the United Kingdom shows that these desirable goals can be effectively secured by self-regulation.[9] For this reason, it is submitted that the government should provide the press with a time frame within which to establish a self-regulatory council, the performance of which would be reviewed after a period of time. If the council had manifestly failed to vindicate the rights of complainants within that trial period, no-one could seriously object to the establishment of a statutory council. This compromise would seem to be the best means of assuaging the concerns of government and press on this most important issue. ●

8 The National Newspapers of Ireland is seemingly prepared to establish an independent press council and ombudsman, modelled on the Swedish regulatory system. A code of standards would be drawn up, breaches of which would be investigated by the council and ombudsman.

9 Self-regulation also works well in Ireland, the Bar being a good example.

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The Bar Review
Journal of the Bar of Ireland. Volume 8, Issue 6, December 2003

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Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
FSLJ = Financial Services Law Journal
GLSI = Gazette Society of Ireland
IBL = Irish Business Law
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
IFLR = Irish Family Law Reports
IILR = Irish Insurance Law Review
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

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Decrimininalising Murder?*

The Honourable Mr. Justice Paul Carney

The number of murder trials coming before the Central Criminal Court has been increasing at an exponential rate. In 2002, the Court received 55 murder cases as opposed to 25 in 1996. In 2002, the Court disposed of 48 murder cases as compared with 23 in 1996. At the end of 2002, 65 murder cases awaited trial.

One feature of these cases is very striking. In nearly every case, it is accepted and not in issue that the accused unlawfully killed the deceased. This is dramatically evidenced by the fact that in the entire of 2002, there was no outright acquittal in any trial for murder. The area of contest in contested trials is therefore between murder and manslaughter. Excluding cases where accused persons changed their plea in the course of the trial, there were 28 contested murder trials in 2002. These trials resulted in sixteen murder convictions and a further eleven accused persons were convicted of manslaughter or other offences. In one case there was a disagreement necessitating a retrial and as already noted, in no case was there an outright acquittal.

The fact that the unlawful killing of the deceased by the accused is scarcely ever in issue suggests that if the crimes of murder and manslaughter were merged in a crime to be known as unlawful homicide, or unlawful killing, the contested murder trial might become a rarity and almost a thing of the past. There would be no reason why there should not be a plea of guilty in nearly every case.

In the light of strains which the number of murder trials are imposing on the Central Criminal Court and by knock-on effect on the High Court as a whole, it might be opportune to examine the implications of such a change.

The conviction rate for murder as opposed to manslaughter fluctuates probably according to how concerned the community is in relation to violence at any given time. The conviction rate for murder as opposed to manslaughter appears to be running at present at 57%. Yet, when almost fourteen years ago I made an analysis of a term's cases in the Central Criminal Court, there was a conviction in one case out of seven, namely a percentage of only 14%. This analysis appeared at the time in an Irish Times article.

Charges are preferred by the Director of Public Prosecutions according to the law as stated in the textbooks and in the judgments of the Superior Courts. Offers of pleas of guilty to manslaughter are also assessed by the Director on this basis. Juries in this country do not, in my experience, give blind obedience to the textbook and there are certain categories of cases in which they will not go beyond a manslaughter conviction no matter what the textbook says. A plea offered in such a case may well be rejected on the basis of the text book and a contested trial will ensue, notwithstanding the inevitability of the outcome. These two latter points lead me to conclude that as matters stand, there is an arbitrary element in what the outcome of a murder trial may be.

The Central Criminal Court's other area of jurisdiction is the rape trial. Rape cases have been increasing as exponentially as murders. In 1996, 25 rape cases were received in the Central Criminal Court and 23 were disposed of. In 2002, 55 were received and 48 were disposed of.

The average length of a contested murder trial in 2002 was eleven days and the average length of a contested rape trial was six days.

When I came to the Bar in 1966, the junior Judge of the High Court went to Green Street Courthouse for a few weeks every term and disposed of the list of the Central Criminal Court. With the increasing caseload, more than this was obviously required and a backlog of two years developed to get a case on for trial. If a trial suffered any collapse or did not get on for want of a judge, it had to wait a similar period to get back on the rails again. By the permanent assignment of four judges to the Court (three of them rotating), a very structured discount for pleas and a rigid no-adjournment policy, the backlog has now come down to twelve months.

If the homicide cases could be reduced to one day or half day pleas, the backlog could be contained or substantially further reduced with a reduction in the trauma affecting victims, both direct victims in the sex cases and indirect ones in homicides. Delays have been eliminated in the Circuit Court but continue to be a problem in the forum which tries murder and rape. These are the cases in which delay particularly traumatises victims because they are crimes in which the victim and perpetrator predominantly know each other and, due to the liberal bail laws in operation in this State, involuntarily keep coming into contact with one another pending trial.

Due to the increased activity of victim support organisations there seems to me to be a greater attendance of family at murder trials now than ever before. There may, in the row of seats behind junior counsel, be a row of seven pairs of piercing eyes looking into mine because they have nowhere else to look. Whether the trial be days, weeks or months, they remain in situ right through the pathology and right through the evidence attacking their loved one, to set up a provocation defence to which there is no right of reply. In nearly half of these cases, the jury will return a verdict of manslaughter, even though the textbook says it should be murder. I have never known the family members concerned to accept this situation. They feel that the case has been lost if the verdict is manslaughter rather than murder and that they have not, as

* This speech was delivered to the Law Society at University College Galway on the 29th October, 2003.

they put it, "got justice". The murder/manslaughter distinction seems to me in this respect to impose a gratuitous suffering on the relatives of victims. This would be avoided if there were a hearing in pleas to unlawful killing in which all the facts of the crime were adduced in evidence.

Proponents of the murder/manslaughter distinction want it retained, firstly because the word murder has become synonymous with the word heinous in our language and culture. Secondly, they would want it retained for the mandatory penalty attaching to murder. This is a diplomatic way of saying that judges are not to be trusted. The Central Criminal Court, through the efforts of its registrar, Mr. Liam Convey, publishes a very substantial annual report that gives details of all sentences imposed. I believe they are consistent with each other, reflecting the gravity of the crime, its effect on the victim and the circumstances of the accused, including prospects of rehabilitation. It is also to be borne in mind that a life sentence or a substantial sentence is now in effect to be what the Parole Board says it is to be.

The cost of a murder trial is rarely looked at but it is obviously a legitimate area of inquiry if it diverts resources from other areas of the justice system. The two longest running cases of modern times were those of Catherine Nevin and one involving the Chinese community. What I am considering here would have made no difference to the Nevin trial as there was no admission in relation to the killing and I am not sufficiently familiar with the facts of the Chinese case to express a view on it. These two cases lasted months.

The murder trial rarely lasts less than a week, can run to months and averages eleven days. Fees payable to prosecution and defence counsel and defence solicitors are readily quantifiable and could be ascertained from the Department of Justice unit in Killarney. The same would apply to fees for interpreters and defence expert witnesses. The fees and expenses of prosecution witnesses fall to be discharged by An Garda Siochána. A murder trial will typically involve over 100 witnesses and if it originates outside Dublin, the Guards will have the expense of transporting these witnesses to and accommodating them in Dublin. This expense would of course only arise in the contested trial and not in the plea of guilty. The least quantifiable expense would be the provision of the court infrastructure, including court staff and judge.

It seems to me legitimate to inquire whether this order of expenditure continues to be justified because our culture has bestowed a particular mystique, gravity and aura of heinousness on the word "murder" over and above the word "killing".

The assumptions underlying this culture have been judicially questioned. In the case of *Hyam v. D.P.P.* 1975 A.C. 55 at p. 98, Lord Kilbrandon in his speech said:

> "There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment. It is no longer true; if it was ever true, to say that murder as we now define it is necessarily the most heinous example of unlawful homicide."

In our own jurisdiction in *The People v. Conroy (No. 2)* [1989] I.R. 160 at p. 163, Finlay C.J. noted that manslaughter in many instances may be as serious as, or even more serious than, murder. It has also been contended by the English Advisory Council on the Penal System in 1978 that:

> "Although murder has been traditionally and distinctively considered the most serious crime, it is not a homogenous offence but a crime of considerable variety. It ranges from deliberate, cold-blooded killing in pursuit of purely selfish ends, to what is commonly referred to as mercy killing."

The position of the Law Reform Commission has been that many of the difficulties associated with the distinction between murder and manslaughter can better be met by means other than abolition, including the removal of the mandatory life sentence for murder.

If the crimes of murder and manslaughter were merged, with the trial Judge having a discretion as to sentence, I believe the consequences would be as follows:-

1. Significantly fewer cases would proceed to trial and cases would be disposed of in half a day as opposed to a week, weeks or months.
2. A decisive impact would be made on the backlog problem affecting the Central Criminal Court.
3. Very significant savings would be made in prosecution and defence costs and in the peripheral costs and expenses associated with transporting witnesses to and accommodating them in Dublin.
4. Victims would be saved the disappointment and trauma occasioned to them by a manslaughter only verdict. They might well not appreciate this benefit by reason of the aura and mystique surrounding the word murder as opposed to the word killing.

A half-way house would be to leave matters as they stand but give the trial Judge discretion in relation to sentence. This would increase the number of pleas of guilty but it is not possible to estimate by how many.

Even if matters are left as they are, a small number of pleas to murder are now forthcoming. This is by reason of the parole board having power to open the file on a long term prisoner after four years. This contrasts with the position in the days of capital punishment when a Judge might refuse to permit a plea of guilty to murder on the basis that it would be regarded as an act of suicide. ●

Psychiatric Damage in the Aftermath of *Fletcher v The Commissioner of Public Works in Ireland*.

Alan Keating BL

Introduction

Fletcher v The Commissioner for Public Works in Ireland[1] represents the most authoritative Irish decision in the area of psychiatric damage since *Kelly v Hennessy*[2]. In *Kelly,* the Supreme Court decided on the applicable test in cases involving a plaintiff who suffers psychiatric injury after coming upon the aftermath of an accident. *Fletcher* on the other hand relates to a plaintiff who suffers psychiatric injury because of the fear of contracting a disease in the future. Although the decision in *Fletcher* concerns a different category of psychiatric illness cases to *Kelly,* it is indicative of a general shift in judicial thinking as regards the role of public policy in the imposition of the duty of care generally.[3] Thus it is reasonable to assume that the category of cases represented by *Kelly* will be affected by this general trend also.[4] The author intends to discuss briefly the public policy issues raised in *Fletcher* and will then assess the impact of the decision on cases involving "aftermath" victims.

Statement of the Case

The plaintiff in *Fletcher* inhaled large quantities of asbestos from 1985-1989 while in the employment of the defendants. There was uncontested evidence[5] that the defendants had been aware of the dangers involved in working with asbestos but had failed to take adequate steps to protect the plaintiff.

Following coverage in the media as to the dangers of asbestos, the plaintiff sought medical advice, which ultimately resulted in a consultant respiratory physician informing him that there was a risk that he could contract mesothelioma, an asbestos related illness. Importantly however, it was emphasised to him that the risk of contracting the condition was very remote. While the likelihood was that the plaintiff had inhaled asbestos fibres, and that some of them would have remained in his body and caused microscopic scarring, there were in fact no physical manifestations of the scarring visible on x-ray. There were no signs of what were called 'pleural plaques', which, if present, would have been significant.[6] Nonetheless the plaintiff continued to worry about the risks of contracting this illness. The plaintiff was later diagnosed, by a consultant psychiatrist, as suffering from reactive anxiety neurosis.

In the High Court, O'Neill J found that the defendants had been negligent and that as a consequence of that negligence, the plaintiff suffered a psychiatric injury. O'Neill J found that it was reasonably foreseeable that a person of normal fortitude would suffer from anxiety and develop a psychiatric illness. The Supreme Court, comprising of five judges, overturned this decision. Keane CJ and Geoghegan J each presented written judgments, while Denham, Murray and Hardiman JJ concurred with both. If the plaintiff were to succeed, it would have to be on the basis of suffering psychiatric damage by the combination of anger and anxiety resulting from being appraised of the risk. [7] In this case, the Supreme Court issued strong authority to the effect that the law should not be extended to allow recovery by plaintiffs of damages for psychiatric injury resulting from an irrational fear of contracting a disease, where that risk was characterised by medical advisers as very remote. In doing so, the Supreme Court considered public policy concerns outlined in other jurisdictions.

Public Policy

In their judgments, both Keane CJ and Geoghegan J rejected the notion that public policy did not play a part in determining novel duties of care.[8] The concerns expressed by both Keane CJ and Geoghegan J as applying to Mr. Fletcher may be summarised as follows:

1. The undesirability of awarding damages to plaintiffs who have suffered no physical injury and whose psychiatric condition is solely due to an unfounded fear of contracting a particular disease. Both the Chief Justice and Geoghegan J cited the *obiter dictum* from the

1 [2003] 2 ILRM 94. See also Moore *Damages for Exposure to Asbestos* Bar Review Volume 8 (2002) 2 at 78.

2 [1996] 1 ILRM 321.

3 See the comments of Keane CJ in *Glencar Exploration Plc v. Mayo County Council* [2002] 1 ILRM 481 (SC).

4 See the author's comments along with his co-author in Keating and Lowry *Liability for Negligently Inflicted Psychiatric Damage and The Aftermath Doctrine* (2002) 10 ISLR where the case is made for dispensing with the 'aftermath doctrine'. See in particular the authors' comments as to an alternative approach to the area and the possibilities of a 'new departure' in the wake of the comments of Keane CJ in *Glencar Exploration Plc v. Mayo County Council* [2002] 1 ILRM 481 (SC).

5 [2003] 2 ILRM 94

6 [2003] 2 ILRM 94 at 101.

7 Both Keane CJ and Geoghegan J held that the present case was not a 'nervous shock' case and thus *Kelly v Hennessy* would not determine the appeal. Furthermore, although the debate surrounding the primary/secondary victim distinction was mooted by both Keane CJ ([2003] 2 ILRM 94 at 106) and Geoghegan J ([2003] 2 ILRM 94 at 121) the clarification of the status of that distinction awaits a more suitable case.

8 See Keating and Lowry *Op. Cit* pages 166-167 as to the propriety of utilising public policy in determining a substantive legal right from the perspective of the European Convention on Human Rights.

judgment of McNulty J in *Majca v Beekil* 682 NE 2d 253 to the effect that awarding damages in such cases would be to reward ignorance about the disease and its causes.[9]

2. The implications for the health care field of a more relaxed rule as to recovery for psychiatric illness. Both Keane CJ and Geoghegan J refer to the Illinois Court of Appeal decision of Baxter J in the Californian Supreme Court in *Potter v Firestone Tyre Rubber Company* 25 Cal Rptr 2d 550. Baxter J referred to the danger of impeding access to prescription drugs if awards were to be made in fear of cancer cases based on new research as to their side affects.[10]

3. In cases before the US Supreme Court for emotional distress arising out of exposure to asbestos, public policy has played an important role in delimiting the range of potential plaintiffs. The Chief Justice referred to *Consolidated Rail Corporation v Gottshall* 512 US 532 and *Metro North Commuter Railroad Co. v Buckley* 521 US 424. *Buckley* concerned facts very similar to *Fletcher.* The concerns expressed by the US Supreme Court in interpreting federal legislation include (a) the difficulty for the court in separating valid claims from trivial claims (b) the threat of unlimited and unpredictable liability and (c) the potential for a flood of trivial claims.[11]

4. The Supreme Court in Texas in *Temple Inland Forest Products Corporation v Carter* 993 SWR 2d 88, noted that compensating plaintiffs in cases involving a fear of contracting a disease from exposure to asbestos could give rise to concerns, which may be summarised as the multiplicity of suits and the unpredictability of results.

The Aftermath Doctrine

Given the Supreme Court's acceptance of the role of public policy in de-limiting potential duties of care in *Fletcher*, the question now arises as to the extent to which those public policy concerns will be applied in other cases involving the so-called "aftermath" doctrine. That doctrine established by the House of Lords in *McLoughlin v. O'Brien*[12]operates to impose a duty of care upon a tortfeasor for psychiatric illness suffered by a person who comes upon the aftermath of the accident and is thus not a participant in the tort-producing event. A practical example is represented by a situation where a person suffers psychiatric damage as a result of coming on the aftermath of a road traffic accident in which another person is physically injured. In this situation, the House of Lords in *McLoughlin* stated that the plaintiff must establish the following. Firstly, that the plaintiff is in a position of relative proximity to the person injured in the accident. This would include parents, children, husbands and wives. The closeness of the tie is to be assessed not merely by reference to relationship, but also to care.[13] Secondly, that there is proximity in time and space. This may give rise to a difficulty as to where the line is to be drawn. It is now settled that arriving at the hospital to which the injured participant has been sent satisfies this requirement.[14] Finally, the plaintiff will have to satisfy the court as to the means of communication of the accident. The shock would have to come through either sight or hearing of the event or of its immediate aftermath, or through some equivalent of sight or hearing.[15] In subsequent cases in England, the courts have also held that there is a distinction between participants (primary victims) and non-participants (secondary victims) who suffer psychiatric injury. The above-mentioned control mechanisms apply to the latter category only.[16]

The aftermath doctrine has been applied to 'nervous shock' cases, meaning cases in which the plaintiff has suffered psychiatric damage through the sudden perception of the accident or its aftermath. This element of suddenness was not present in *Fletcher* and therefore cases on the aftermath doctrine were distinguished. However, aftermath cases were used to support the Supreme Court's view of the relevance of public policy.

In *McLoughlin*[17] the House of Lords first applied the aftermath doctrine in circumstances where the plaintiff suffered psychiatric damage after coming on the aftermath of an accident. The plaintiff's husband and one of her children had been injured in a traffic accident caused by the defendant's negligence. Another child died almost instantly. The plaintiff was told about the accident a couple of miles away from the locus and suffered psychiatric damage when she came upon the members of her family in the hospital. The granting of relief for psychiatric injury in this case resulted from the application of the "aftermath" doctrine".[18] However, in Lord Wilberforce's view, policy considerations[19] required the introduction of control mechanisms to check the march of foreseeabilty, namely the class of persons whose claims were to be recognised (relative proximity), the proximity of these persons to the accident (temporal and spatial proximity), and the means by which the shock was caused (the means of communication).

These 'control mechanisms', were developed in *Alcock v. Chief Constable of South Yorkshire Police*[20] and *White v. Chief Constable of South Yorkshire Police*.[21] In *Alcock,* the claimants suffered psychiatric injury in the aftermath of the Hillsborough football disaster, which was caused by the negligent management of an event by the police.[22] The relatives of those who died or were injured in the tragedy sought damages from the defendants for psychiatric injuries suffered from the trauma. The House of Lords in *Alcock* favoured the approach of Lord Wilberforce in *McLoughlin*. In *White* the members of the defendant police force sought damages for psychiatric damage arising from the same disaster. The thrust of the plaintiffs' argument was that, because of their status as employees of the defendant and indeed rescuers, they

9 The Supreme Court in *Fletcher* did not refer to the decision of the Supreme Court of Illinois in *Majca* 701 NE 2d 1084 (1998) Illinois Supreme Court at 1090 at 1091, where the Court of Appeal's view on the standard of compensation was arguably rejected.

10 The Supreme Court in *Fletcher* did not refer to the distinction in Californian law between 'fear of disease' cases, which do not require medical evidence and 'nosophobia' cases which do require medical evidence. See Baxter J in *Potter*25 Cal Rptr 2d 550. See Fisher *Potter v Firestone and the Infliction of Emotional Distress* (1995) 30 Tort & Ins. L.J 1071; Znaniecki *Cancerphobia Damages in Medical Malpractice Claims* (1997) U.Ill.L.Rev. 639; Getto *Potter v Firestone Tire and Rubber Co – Fear Alone is not Enough* 8 Toxics L.Rep. (BNA) 1133 (1994); See *Sterling v Velsicol Chemical Corporation* (6th Cir 1988) 855 F 2d 1188; Gale and Goyer *Recovery for Cancerphobia and Increased Risk of Cancer* (1985) 15 Cumb.L.Rev 723, 724-725. See generally Willmore *In fear of Cancerphobia* 3 Toxics L. Reptr. (Bur. Nat. Affairs) 559.

11 521 US 424 at 430-433.

12 [1983] 1 AC 410 at 422.

13 [1983] AC 410 at 422.

14 [1983] AC 410 at 423.

15 [1983] AC 410 at 423.

16 See *Page v. Smith* [1996] AC 155 and *White v. Chief Constable of South Yorkshire Police* [1999] AC 455.

17 [1983] AC 410.

18 *See McLoughlin v. O'Brien* [1983] 1 AC 410 *per* Wilberforce L.J., at 422.

19 [1983] AC 410 at 422.

20 [1992] 1 AC 310.

21 [1999] 2 AC 455.

22 *See* McMahon and Binchy, *op. cit.*, at para. 17.30.

were primary victims and therefore their claims did not necessitate control mechanisms. This claim was refused by the House of Lords.

The important point in relation to both *Alcock* and *White* is that they were 'hard cases', which tested the bounds of the 'aftermath doctrine'. For instance, in *Alcock*, the following difficulties arose from the application of the 'aftermath doctrine'. A claim failed on the basis that the degree of brotherly love between the primary and secondary victim was insufficient, as a particularly close tie of love and affection was required.[23] Those present at the ground were unsuccessful as their perception of the consequences of the disaster was too gradual.[24] It would appear, that an undefined (and perhaps indefinable) time limit applies to those who visit their relatives at the hospital following an accident, with no logical explanation as to why such a limit would be fixed at a particular point.[25] Likewise, the purpose for which a person visits the hospital will also be relevant.[26] Finally it would appear that viewing the disaster on television, prior to the post mortem identification of the victim's body, actually served to limit the secondary victim's entitlement to recovery by prolonging the period of realisation. This was seen rendering the secondary victim less likely to be traumatised by the event.[27] The difficulty with the application of the aftermath doctrine in *Alcock* was that it produced rather arbitrary results as well as uncertainty.

In Ireland the 'aftermath doctrine' was endorsed in the High Court in *Mullally v. Bus Éireann*,[28] and the Supreme Court in *Kelly v. Hennessy.*[29] In *Mullally* the plaintiff's husband and children were involved in a bus accident caused by the negligence of the defendant's employee. The plaintiff learned of the accident in another town and because of uncertainty as to her family's whereabouts, had to visit two hospitals. The scene in the first hospital was very distressing as two of her sons were in a disturbing condition. In the second hospital, her husband was dying and another son was injured. She was described as hysterical when she got home. One son died and the plaintiff developed a psychiatric illness. Denham J, in deciding that there was a duty of care, held that the control mechanisms imposed by Lord Wilberforce should not apply, as there was 'no policy in Irish law opposed to a finding of nervous shock'.[30]

In *Kelly,* the plaintiff's husband and two daughters were involved in a traffic accident. She observed her husband and daughters at the hospital in the aftermath of the accident. Her husband and one daughter suffered brain damage and the other daughter made a full recovery. In deciding in favour of the plaintiff, the Supreme Court applied the aftermath doctrine. Importantly the Chief Justice stated that that there was no public policy that the plaintiff's claim, if substantiated, should be excluded.[31] On the face of it therefore, it appears that the Supreme Court was endorsing the aftermath doctrine without 'control mechanisms'. However a closer look at the judgment of the Chief Justice discloses an emphasis on relational and temporal proximity in applying the test of reasonable foreseeability and some requirement as to the manner in which the accident was communicated.[32]

The main question in this jurisdiction has centred round whether or not the control mechanisms applied by the House of Lords as well as the primary/secondary victim distinction should be applied here. The general perception after the Supreme Court decision in *Kelly* has been that the control mechanisms have no application in this jurisdiction.[33] This in the author's view gives rise to difficulty in that it places too much emphasis on the test of foreseeability. The need for an alternative approach to this area is highlighted by the problems arising from the application of the aftermath doctrine in England. The courts in this jurisdiction have not been faced with these difficulties due to the fact that they have not been faced with hard cases. If confronted with difficult cases, the courts in this jurisdiction will have a choice of either applying an unrestricted aftermath doctrine, an aftermath doctrine with limitations or indeed an alternative approach, which will limit actionable injures within more definitive lines.[34]

The Aftermath of Fletcher

The Supreme Court decision in *Fletcher* seems to support the view that the policy considerations expressed in the English aftermath cases may well be considered in future Irish aftermath cases. At this juncture, it is necessary to mention one or two points on the similarity between psychiatric damage cases and economic loss cases. Firstly, the Irish Supreme Court has already initiated a general trend in applying public policy to restrict the development of the duty of care in the area of economic loss in the case of *Glencar Exploration Plc v. Mayo County Council.* [35] Keane CJ in *Fletcher* referred to this development.[36] Secondly, in *White,* Lord Steyn referred to a similar development in the area of economic loss in that jurisdiction in support of his decision.[37] Thirdly, it should be noted that the decision of the House of Lords in *White* and in particular the speech of Lord Steyn, was cited extensively by Keane CJ in *Fletcher.* The harmonisation of the law in Ireland and England in relation to economic loss and the concentric reasoning of *White* and *Fletcher* would suggest that the Irish position in aftermath cases might also follow suit.

In *Fletcher,* Geoghegan J was of the view that the Courts should not reward irrationality by imposing a duty of care in the circumstances before him.[38] The following statement, it is fair to say, adequately embodies Geoghegan J's view on the application of public policy:

> "I would express the view ... that if policy considerations are relevant in considering the extent of a duty of care in nervous shock cases

23 [1992] 1 AC 310 *per* Lord Keith, at 398.
24 *Ibid*,, at 410.
25 For instance, Mr. Alcock identified his brother in law in a bad condition some eight hours after the accident. This, was not regarded as "part of the *immediate* aftermath of the accident". [1992] 1 AC 310, at 405.4
26 [1992] 1 AC 310, at 424.
27 [1992] 1 AC 310, at 417. Whereas the length of time between the notification of the accident in *Alcock* was deemed to dilute the trauma experienced by the secondary victim, a similar break in *Kelly* was seen by Hamilton C.J. to have intensified it.
28 [1992] ILRM 722.
29 [1996] 1 ILRM 321.
30 [1992] ILRM 722 at 730.
31 [1996] ILRM 321 at 329. Denham J referred to (a) proximity of relationship (b) proximity in a spatial context and (c) proximity in a temporal sense at 355.
32 [1996] 1 ILRM 321, at 329.
33 [1996] ILRM 321 at 329. As to the view that the primary/secondary victim distinction has no application in this jurisdiction se *Curran v. Cadbury Ireland* [2000] 2 ILRM 343.
34 For a more comprehensive criticism of the Irish position in relation to aftermath cases see Keating and Lowry *Op. Cit.*
35 *Glencar Exploration Plc v. Mayo County Council* [2002] 1 ILRM 481 (SC)
36 [2003] 2 ILRM 94 at 112.
37 *Caparo v. Dickman* [1990] 2 AC 605.
38 Geoghegan J mentioned three more cases essentially relied on by the plaintiff namely *CJD Litigation Group B v Medical Research Council* [2000] Lloyd's Rep Med 161, *Bryan v Phillips New Zealand Ltd* [1995] 1 NZLR 633 and *Bittles v Harland and Wolff plc* [2000] NIJB 209 and discounted them for various reasons.

arising out of accidents or traumas, such considerations would seem to be all the more necessary in much vaguer cases where a condition considered psychiatric by the medical profession has arisen merely from worry that a disease might be contracted."[39]

Arguably the above passage by implication accepts the introduction of 'control mechanisms' in the form originally suggested by Lord Wilberforce in *McLoughlin*.

The author has previously extolled the virtues of the approach adopted by the Californian Supreme Court in cases of psychiatric damage arising from accidents.[40] This approach precludes the operation of the aftermath doctrine and may be gleaned from the following passage from the Californian Supreme Court decision in *Thing v Lachusa*[41]:

"The impact of personally observing the injury producing event in most, although concededly not all, cases distinguishes the plaintiff's resultant emotional distress from the emotion felt when one learns of the injury or death of a loved one from another, or observes pain and suffering but not the traumatic cause of the injury. Greater certainty and a more reasonable limit on the exposure to liability for negligent conduct is possible by limiting the right to recovery for negligently caused emotional distress to plaintiffs who personally and contemporaneously perceive the injury producing event and its traumatic consequences."[42]

The above approach would of course involve overruling previous decisions, which introduced the aftermath doctrine to this jurisdiction. It is however interesting to note that Geoghegan J considered a discussion ranging from two extremes, namely disallowing recovery for psychiatric damage altogether on the one hand and removing all restriction on the application of the test of foreseeability on the other. Geoghegan J pointed to the undesirability of adopting either approach.[43] It could be argued that the contemporaneous and sensory observance test strikes a happier medium between the two extremes outlined above than the aftermath doctrine tempered by 'control mechanisms'.

In *Thing v La Chusa,* a number of policy considerations were outlined so as to support the decision of the Californian Supreme Court. These considerations were in turn cited by Baxter J in *Potter*. They include the tremendous societal cost of allowing emotional distress compensation to a potentially unrestricted plaintiff class[44], the necessity for a sufficiently definite and predictable threshold for recovery to permit consistent application from case to case[45] and the necessity of limiting the class of potential claimants if emotional injury absent physical harm is to continue to be a recoverable item of damages in a negligence action.[46] These policy considerations would appear to be relevant to both fear of disease cases and aftermath cases. The first of these concerns, the fear of imposing an unduly burdensome liability on society as a whole, is particularly potent. Indeed in language fitting of the contemporaneous and sensory observance test, Prosser and Keeton have stated that "It would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured as well as all his friends."[47]

Conclusion

While the facts giving rise to the claim in *Fletcher* were very specific in that it was a 'fear of disease' case, the judgments of both Keane CJ and Geoghegan J may have provided the foundation for the development of more general principles. This includes the acceptance of public policy as an important and necessary element in determining whether or not a duty of care should be imposed. This general principle already has some Supreme Court pedigree in this jurisdiction in *Glencar*.[48] It appears that the Supreme Court has now left the door open for the imposition of the control mechanisms originally devised by Lord Wilberforce in *McLoughlin* in aftermath cases. Alternatively, it could apply public policy considerations to dispense with the aftermath doctrine altogether in favour of the contemporaneous and sensory observance test adopted in the Californian Supreme Court. In any event, it is clear that the U.S. jurisprudence was instrumental in steering the Irish Supreme Court towards adopting the public policy concerns, which operated to deny the plaintiff in *Fletcher*. ●

39 [2003] 2 ILRM 94 at 128.

40 See Keating and Lowry *Op. Cit* pages 150-162.

41 771 P 2d 814 (Cal 1989);

42 771 P.2D. 814 (Cal., 1989), at 828;

43 Referring to the speech of Lord Hoffman in *White* [2003] 2 ILRM 94 at 138.

44 25 Cal Rptr 2d 550 at 567. See *Thing v La Chusa;* 771 P.2D. 814 (Cal., 1989), at 827.

45 25 Cal Rptr 2d 550 at 568. See *Thing v La Chusa*; 771 P.2D. 814 (Cal., 1989) at 826-827.

46 25 Cal Rptr 2d 550 at 569. See *Thing v La Chusa* 771 P.2D. 814 (Cal., 1989) at 828;

47 Keeton *Prosser and Keeton on the Law of Torts* (5th ed., West, 1984) at 366. See also *Erony v Alza Corp* 913 F Supp 195 (SDNY 1995) for the New York Supreme Court's position. See also *Hegel v McMahon* and *Marzolf v Stone* 960 P 2d 424 (1998) for the position in Washington which is largely analogous to the position in Ireland and England. See Santel "Bystanders' Negligent Infliction of Emotional Distress Claims in Washington State: Must You Be Present to Win?" 23 *Seattle University Law Review* 769 (2000) for criticisms of the position in Washington.

48 *Glencar Exploration Plc v. Mayo County Council* [2002] 1 ILRM 481 (SC).

"Gender InJustice" - A Report on Women Lawyers in Ireland.

Ivana Bacik BL

Pictured at the launch of the report are (from L to R), The Hon. Ms Justice Susan Denham, Ivana Bacik BL, the Hon. Ms Justice Catherine McGuinness, Cathryn Costello, Helena Kennedy Q.C. and Eileen Drew.

Introduction

In October 2003, the first ever report on women lawyers in Ireland, *Gender InJustice*, written by Ivana Bacik, Cathryn Costello and Eileen Drew, was published by the Law School, Trinity College Dublin. The President, Mary McAleese, launched the report, which was based upon an 18-month study, funded by the Department of Justice, Equality and Law Reform, with support from the Bar Council and the Law Society.

We were motivated to conduct this study because of the dramatic increase in numbers of women entering law in recent years. Among the law class in Trinity, male students are clearly outnumbered almost two to one every year! We were also keen to examine whether this 'feminisation' of legal education was mirrored in a more general feminising of the legal profession, particularly at the top levels. So we carried out an extensive postal survey of practising lawyers, both women and men, to which we received 788 very detailed responses. We supplemented the valuable information gained from these, by carrying out interviews and focus groups, and by gathering comparative material about women lawyers from other countries.

Comparative Literature on Women Lawyers

A number of similar themes emerge from the studies examined in our review of comparative literature, in which we concentrated on common law jurisdictions. First, we found that in every country there are gender disparities among lawyers; at entry to the professions, and in the career prospects, specialisation, and income differentials of men and women. Second, we found that the culture of the legal professions has not been accommodating for women, who routinely tend to experience exclusion from the social networks that are necessary to further legal careers.

Third, in every jurisdiction the dual burden of work and family life has been found to be a significant factor impeding women's career advancement. Responsibility for childcare is invariably taken on by mothers to a far greater degree than by fathers, and this means that mothers are far more likely to take time out from their careers for family reasons. Fourth, an assumption has emerged, with the increase in women entering the professions in the last two decades everywhere, that women's progression is inevitable with time (the 'trickle-up fallacy'). This view however ignores the point that more women should surely have 'trickled up' the career ladder by now, if it were merely a matter of time! Finally, the self-regulating character of the legal professions, and the resistance among lawyers to invoking their legal rights where discrimination has occurred, tend to make legal practice a 'lawless domain' for women lawyers in many countries.

Figures on Women in Law in Ireland

Having reviewed the comparative literature and identified these five key themes, we then sought to measure the extent of recent changes in the gender breakdown of lawyers in Ireland. We found that two-thirds of all full-time undergraduate enrolments in law at university nationally (66%) are now female. Not only that, but women have made up half of all law enrolments since the mid-1980s, and more than 30 per cent since the mid-1970s.

When we reviewed the figures for practising lawyers, we found that women make up 39 per cent of all lawyers in Ireland, taking solicitors and barristers together. The figure is higher for solicitors, 41 per cent of whom are women, almost double the figure of 22 per cent that applied twenty years ago. By contrast, only just over one-third (34%) of barristers in Ireland are women, but this is up from a mere 16 per cent twenty years ago. Women also now constitute just over one in five of all judges in Ireland (21%). This is a relatively high figure, when compared to the figure of 12 per cent for women judges in the UK and US. But it is still very low compared to the number of women now practising as lawyers in Ireland, and it masks the very low figures for women at certain levels. In the High Court, for example, there are only three women judges (11% of the total). It is also a low figure compared with Canada, where 26 per cent of judges at federal level and one-third of judges at provincial levels are women. The Irish figure also compares unfavourably with much higher figures in EU civil law countries. In Finland, for example, 46 per cent of judges are women; in France, more than half the judiciary are women (54%).

When we looked at the senior levels of both professions in Ireland, we saw that women were more significantly under-represented there. As of October 1, 2003, women constituted only 9 per cent of all Senior Counsel. To put it another way, only 5 per cent of all women barristers are Senior Counsel, compared with 22 per cent of all male barristers. The consistently low figures for women at the top of the profession are

particularly surprising, given that the first woman graduated in law in Ireland as long ago as 1888, when Letitia Walkington received her Law degree from the Royal University of Ireland. She was the first woman to graduate with a Law degree in Britain or Ireland. The first two women barristers, Frances Kyle and Averil Deverell, were called to the Bar in 1921, again before any women were called to the Bar in England. The first woman solicitor in Ireland, Mary Heron, qualified in 1923. Women have therefore been working as lawyers in Ireland for many years; but few have made it to the top until very recently. We therefore wondered why this was so, and sought to discover what more could be done to encourage the career progress of women.

Gender Discrimination

From our survey of practising lawyers, supplemented with focus groups and interviews, we found that the greatest obstacle to women's career progression in law in Ireland is the difficulty of achieving work/life balance within the 'long hours' culture that exists within legal practice. Many women we surveyed believe that it is simply not possible for women lawyers to '*have it all*' as working mothers. In addition to this structural problem, many women lawyers also believe that an '*old boys club*' exists within the profession. These findings reflect the similar conclusions reached in other studies internationally.

In further support of this belief, we found that far more women than men tend to feel excluded from social networks within law. Almost one-third (31%) of all women we surveyed had experienced exclusion in this way, such as not being invited to golf outings or other events. More than one-third (36%) of the women lawyers we surveyed also reported having experienced sex discrimination in the form of inappropriate comments, such as being called '*good girl*' or *'love'* by male colleagues, or being asked about their husband at interview. One woman lawyer even reported that a male judge had said to her in public court: '*you're far too pretty to be taking this action'*. In addition, nearly one in five women (19%) had been asked to perform inappropriate tasks such as making tea, fetching files or buying personal gifts on behalf of their employer

Perhaps most worryingly, sexual harassment or bullying had been experienced by more than one in ten women (14%), and three out of ten women (30%) believe they are discriminated against in terms of level of earnings. When we examined the question of pay in more detail, we discovered that a significant gender pay gap indeed exists, even where lawyers of the same age are compared. Men over 50 years of age, we found, have a 60 per cent chance of earning more than €100,000 p.a., whereas for women of the same age, the chance of earning this much is only 20 per cent.

There was also a difference between men and women in terms of the area of work specialisation; unsurprisingly, far more women work in family law than men; and men are more likely to work in criminal law, and in commercial law, than women. Although both sexes do roughly equal amounts of personal injury work, we found that women barristers felt they were less likely to be briefed by insurance companies in this field than their male colleagues were. Since we were interested to examine the question of briefing policy generally, we therefore asked a range of large institutional clients of the Bar, to tell us about their briefing policy. We received a very detailed response from the Director of Public Prosecutions, and some helpful information from other public sector bodies such as health boards and tribunals; but unfortunately few insurance companies responded, and the answers we received throw little light on this area.

Our findings might be summarised by saying that despite the many advances made by women lawyers over the past decades, barriers to women's career progression remain, particularly in the form of exclusionary practices, structures that impede work/life balance, and pay inequity. As outlined above, clearly many women believe that an '*old boys club*' still exists within the professions, and they feel excluded from sporting and social networks that are highly influential in furthering a legal career. Disproportionately, it is women who have experienced the use of inappropriate language in the workplace, while harassment and bullying occur at an unacceptable level. However, it must be emphasised that the greatest obstacle to women's career progression remains the difficulty of achieving work/life balance within the 'long hours' culture that respondents overwhelmingly agreed exists in the legal workplace. This culture impacts particularly upon women where men are not taking on an equal caring role.

Recommendations

It is thus incumbent upon the professional bodies, in particular, to take preventive action to remedy the culture of discrimination experienced by many women lawyers. Responsibilities for furthering equality within legal practice also need to be borne by other bodies and institutions, including the State. Accordingly, based upon our findings, we developed fifty recommendations aimed at the professional bodies; the State, the university law schools, and consumers of legal services. These recommendations seek to achieve gender equality in the law, both through countering specific instances of discrimination, but also through the development of comprehensive strategies at a broader level to address the structural obstacles that continue to prevent women from succeeding professionally.

Those recommendations most relevant to barristers are aimed at the King's Inns and at the Bar Council. First, in relation to the professional training course at King's Inns, we were told by students on that course that more needed to be done to bring the course up to date, and to make it more relevant. By contrast, those studying at Blackhall Place were very positive about their educational experience. Thus, we recommended that the structure of the course at King's Inns should be revised and reformed, on a similar model to those reforms in legal education already carried out by the Law Society. It should be noted that extensive reform is already planned at King's Inns.

More generally, we also recommended that gender issues should be incorporated into the curriculum in each subject taught on both professional training courses, and that a structured career guidance programme should be introduced to assist students setting out on legal practice, in order to reduce gender segregation in choice of specialisation. We also recommended that the professional training bodies should adopt clear policies and procedures on harassment and bullying, modelled on existing codes used in the university system. Finally, we suggested that networks should be developed between generations of women lawyers, to provide role models, mentoring and support to students embarking upon a legal career.

Turning to the question of achieving equality among practising lawyers, we recommended that the professional bodies should both bear greater responsibility in this area, on behalf of their increasingly female membership. In particular, we recommended that each professional body should adopt an equality policy or Code, to be incorporated into the rules of professional conduct, governing relations among members, as well as between members and third parties. These equality codes

should include reference to the legislative framework, procedures for dealing with harassment and bullying, and monitoring and implementation practices.

In particular, data should be kept on the membership, according to gender; on applications for membership; entrants to the professions, career progression; and attrition rates. In light of the reluctance of lawyers to make formal complaints, structured confidential exit interviews aimed at establishing individuals' reasons for leaving legal practice should be introduced. For example, only recently has the Bar Council begun keeping figures on those leaving the profession. Thus it is impossible to say whether women are more likely than men to leave the Bar at any particular stage, or what are the main reasons why barristers leave practice; yet this information would be of great benefit to those who wish to improve conditions at the Bar.

We also recommended that each professional body should establish an Equality Committee, to ensure that equality policies are implemented. The functions of the Bar Council Equality Committee should include the drafting of equality policies for the Bar to adopt in General Meeting, particularly on harassment and bullying, work/life balance and the devilling relationship. A Bar Equality Committee could also provide support to networks like the Irish Women Lawyers' Association, as well as providing training in appropriate language use and sensitivity, since it is clear that inappropriate or sexist comments continue to be experienced by many women lawyers. Such a Committee could also conduct an equality audit on earnings or income at the Bar, as it is clear that disparities exist in pay between women and men, and that there is notable lack of transparency around income levels. An audit of this kind would help to ascertain the true extent of the gender pay gap, and would also allow steps to be taken to seek remedies.

On improving work/life balance, again proactive steps need to be taken by the professional bodies. Among our recommendations we included the idea of assistance in childcare provision, for example through the introduction of a crèche at the Law Library. We also suggested that measures could be adopted to facilitate women taking maternity leave. However, while childcare continues to be seen as a 'woman's responsibility', women in every profession, including law, will experience particular problems in balancing work and family commitments. In this respect, more fundamental societal change is ultimately required, notably a more equal shouldering of caring roles by men and women.

Similarly, structural discrimination is difficult to address in any profession, since it is insidious, manifesting itself through practices such as the use of inappropriate language and informal social exclusion. There are some ingrained cultural attitudes that will certainly take time to change. But the recommendations made in our report, if adopted and implemented by the Bar Council and other bodies, could lead to a significant improvement in the position of women lawyers, and indeed an enhanced quality of life for all legal practitioners,

What should happen next? It is important that these issues are debated widely, and that the professional bodies take responsibility for moving forward with the recommendations. Great progress has already been made in other countries, like Canada, through the adoption of positive interventions by the professional bodies and the State. It is important for us to learn from the experience of other countries, in seeking to achieve gender equality. Women lawyers have come a long way in Ireland since Letitia Walkington graduated in 1888 - but more needs to be done to ensure that the 'old boy' culture becomes a thing of the past.

Copies of *Gender InJustice* are available for €20 (to cover postage & packing), made payable to 'TCD No. 1 Account', from Women in Law project, Law School, Trinity College Dublin. See also *www.tcd.ie/Law/WomeninLaw.html* or email *womeninlaw@tcd.ie* ●

Northside Community Law Centre – Its Place in the Legal Landscape

Rory White BL

Harnessing the Legal Process

In August, 2003, Bupa Ireland, a large health insurance provider, wrote to its customers to inform them that it had begun legal action in the European Court of First Instance.[1] The company was challenging a proposed government scheme in the health insurance market and had retained the leading Brussels law firm, Jones Day to fight its case. [2]

In their letter, Bupa stated: that "[the proposed scheme] is contrary to European law and against the interests of consumers…. We have always said that we would take all necessary steps to protect our business…. That is why we have decided to make this challenge in the European Court". Bupa's legal challenge to the government initiative is a good example of an entity using the legal process to protect its interests. The company is keenly aware of developments which could hurt its business and it has the resources to retain leading lawyers to protect its interests in the courts.

Disadvantaged and Disenfranchised

However, the position of a company like BUPA can be starkly contrasted with the position of people living in a disadvantaged and marginalised community. People from disadvantaged backgrounds do not keep an eye on the activities of government or private enterprise. They do not follow legislative initiatives which affect them or inform themselves of the activities of private entities which have an impact on their lives. Unaware of these developments, people from disadvantaged backgrounds have no opportunity to protect and promote their interests.

Moreover, even where disadvantaged people are aware of developments affecting them, the legal process is mysterious and intimidating. Law and litigation is something to be avoided. This pernicious handicap is compounded by the expense of going to court. For people from disadvantaged communities, the cost of bringing court proceedings is prohibitive.

Community Law Centre Movement

The Community Law Centre movement represents an attempt to empower marginalised people so that they can harness the law to protect and promote their interests. The idea of Community Law Centres comes from the USA. The idea of the Centres was not only to provide free legal services to people who could not afford private representation but also to empower people and to use legal strategies to bring about legal and social changes which would benefit the disadvantaged community as a whole. The movement quickly spread to countries such as Canada, Australia and the UK.[3]

Law Centres' work is much broader than casework. They provide support and advice to community organisations, local groups and individuals within their community. For example, a Law Centre might give corporate law support to help a youth entrepreneurial activity develop into a viable business entity. They also engage in development work such as encouraging and supporting community based groups that are established in response to legal issues in the local area. A Law Centre might, for instance, give legal advice and support to a community tenants federation. Centres also focus on education, giving public talks and producing information leaflets designed to raise people's general awareness of their rights and entitlements.

Law Centres also campaign on behalf of the community on issues of policy relating to the lives of people in the community. Campaigning may take the form of lobbying, press releases, petitions and making reports to various bodies. Law Centres also respond to proposals put forward by government, local authorities or other bodies that might affect people in the local area.

The Northside Community Law Centre

The Coolock Community Law Centre was the first Law Centre to be set up in Ireland. Recently, the Ballymun Community Law Centre has also been established. The Coolock Community Law Centre was set up by FLAC in 1975 and since 1978, the Law Centre has been managed by members of the local community. It is financed by a grant from the

1 Letter dated 22nd August, 2003 from Martin O'Rourke, Managing Director, Bupa Ireland to Bupa customers.

2 Sunday Business Post, 25th August, 2003 'VHI sell-off hit by Bupa court action' by Kathleen Barrington

3 See generally 'What is a Law Centre? Some Answers' (Law Centres Federation, June 1991)

Department of Social, Community and Family Affairs.[4] In 2003, the Board of Directors of the Law Centre decided to change the name to Northside Community Law Centre to reflect the fact that many of the Law Centre's clients come from outside the Coolock area.[5]

The Law Centre works with individuals and community groups who otherwise would not have access to legal services. Some of the most common areas of the Centre's work are: family law (representation in emergency cases only); employment and equality law; housing law; social welfare entitlements and appeals; debt and consumer problems; health, education and disability issues; and refugee and asylum matters. The Centre also works in areas of community education, research and campaigning. For example, the Law Centre is currently participating in a series of library talks organised by Dublin City Council Library. The title of the series is "Straight Talking; Law".

The Community Mediation Project is perhaps the Law Centres most innovative project. The aim of the Mediation Project is to provide alternative and progressive ways to resolve disputes between residents, or between residents and organisations in a safe, neutral environment.

Public Interest Law

It is very important for Community Law Centres to strike a proper balance between offering advice to individuals and engaging in more strategic legal work designed to benefit the community. Public interest law is the term used to describe the use of law to advance the interests of the community as a whole. Public interest litigation is strategically designed to have an impact beyond the individual parties to the litigation[6] and is intended to effect an outcome which radiates out through the entire community. The term is not restricted to the use of law to promote the interests of minority and disadvantaged groups but also embraces the use of law to promote causes such as consumer rights and environmental protection.

Public interest law encompasses all areas of law and legal principles. For example, in Maryland in the United States, the Baltimore Law Center used nuisance laws in a litigation strategy to address quality of life issues, housing conditions and drug activity in low income Baltimore neighborhoods. The Centre conceived the idea that a deteriorating vacant house, infested with rats, or a property being used by drug dealers, could constitute legal nuisances and supported members of the community to take civil actions against the owners and tenants of the offending properties. The Baltimore Law Centre also has a successful history of using the liquor licensing process to rid communities of obstreperous liquor establishments that were contributing to alcohol abuse problems among young people.[7]

Judicial Activism

The most controversial type of public interest law is indubitably where a plaintiff asks the courts to compel the government to make provision for the community's needs where the political process has failed. Frustrated by the sclerosis of the political process, the plaintiff turns to the courts. An extreme example might be a plaintiff in a disadvantaged community who asks the court to compel the government to provide a medical service in her area. This type of public interest law is controversial because the plaintiff is asking the court to exercise functions which seem more properly within the remit of the political organs of government.

The constitutional legitimacy of this type of public interest law has been considered very recently by the Irish Supreme Court in *Sinnott v. Minister for Education*[8] and *T.D. v. Minister for Education*[9]. *T.D. v. Minister for Education* concerned the provision of appropriate accommodation for minors with emotional and behavioural disturbances. In the High Court, Kelly J. was highly critical of the way in which the executive was dealing with the problem of lack of appropriate accommodation. Eventually, the judge granted a mandatory injunction requiring the executive to take all steps necessary to facilitate the building and opening of secure and high support accommodation units for the applicants. Kelly J. stated

> "The court has to attempt to fill the vacuum which exists by reason of the failure of the legislature and executive".

The Supreme Court set aside the order of the High Court on the grounds that the mandatory order proposed by Kelly J. was precluded by the constitutionally mandated separation of powers. All five judges in the Supreme Court gave judgment and each of them are worthy of careful reading. The concerns of the Supreme Court are encapsulated in the opening paragraph of Hardiman J.'s judgment

> "Suppose a judge is dissatisfied with a policy of the legislature or government for the discharge of their constitutional obligations, or with its implementation. Is it open to him or her to determine or approve a particular policy, make detailed orders for its execution with public money and prohibit any change of policy without permission of the court? Or is that a constitutionally impermissible invasion of the functions of the Government and of its responsibility to Dáil Éireann?"

Keane CJ explained that the difficulty created by Kelly J.'s order was that it

> "involves the High Court in effectively determining the policy the Executive are to follow in dealing with a particular social problem."

Hardiman J. emphasised that the question had nothing to do with the merits of making provision for the applicants or whether it was desirable that provision should be made, but simply, whether the court had jurisdiction. Quoting with approval the phrase of Costello J. in *O'Reilly v. Limerick Corporation*[10], Hardiman J. stated that demands or claims of this sort "should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts".

Public Interest Law in Ireland

Public interest litigation which asks the courts to compel the government to make provision for the community's needs where the political process has failed is undoubtedly the most powerful form of public interest law. As a result, advocates of public interest law in Ireland are disappointed by the recent judgments of the Supreme

4 Coolock Community Law Centre, Annual General Meeting, 2002

5 Whyte, 'Social Inclusion and the Legal System – Public Interest Law' (Institute of Public Administration, 2002) contains a detailed history of the Northside Community Law Centre.

6 See generally Whyte (2002)

7 The Baltimore Law Center's website can be found at *www.communitylaw.org*

8 *Sinnott v. Minister for Education* [2001] 2 IR 545

9 *T.D. v. Minister for Education* [2001] 4 IR 259

10 *O'Reilly v. Limerick Corporation* [1989] ILRM 181

Court. Whyte writes that if the courts are right in their assessment of the constitutional legitimacy of judicial activism "then much of the type of litigation with which public interest lawyers are concerned is precluded by the Constitution".[11]

Northside Community Law Centre – The Future

Notwithstanding the constitutional restrictions on certain types of public interest law in Ireland, the Northside Community Law Centre has an exciting future. Arguably, the Centre has historically failed to strike a proper balance between offering advice to individuals and engaging in more strategic legal work designed to benefit the community as a whole. The Centre appears to have been saturated with casework leaving little time or resources for public interest law. Following a review of the Centre's activities in 1998-9, the Centre decided to only engage in casework in areas of law not covered by the statutory civil legal aid scheme. The expectation is that this will free up resources which can be devoted to more strategic public interest law.[12]

As part of this more strategic approach, the Centre might explore opportunities to appear as *amicus curiae* in cases which raise issues which may affect the people in their community. An *amicus curiae* is a party which is allowed to appear and participate in a case even though it is not a party to the proceedings. The practice is particularly common where matters of general public interest are concerned. It appears to be a conspicuous feature of the American legal scene where private non-profit organisations, formed to promote the interests of a particular group, are permitted to appear as *amicus curiae*.

The Irish Supreme Court very recently reviewed the courts jurisdiction to appoint an *amicus curiae* in *Iwuala v. Minister for Justice, Equality and Law*.[13] Keane CJ giving judgment for the court stated

> "While there are no statutory provisions or rules of court providing for the appointment of an *amicus curiae*, save in the case of the Human Rights Commission, the court is satisfied that it does have an inherent jurisdiction to appoint an *amicus curiae* where it appears that this might be of assistance in determining the issue."

In that case, the Supreme Court appointed the United Nations Commissioner for Refugees as an *amicus curiae* in circumstances where "an issue of public law arises and the judgment of the court may affect parties other than those now before the court."

The *amicus curiae* jurisdiction presents the Northside Community Law Centre with new opportunities to influence legal developments affecting the community. It should be noted, however, that an *amicus curiae* always pays its own costs for appearance in court.

Getting involved

The Northside Community Law Centre relies on volunteers to carry out much of its work. The Law Centre holds a weekly advice clinic every Thursday evening at its office at the Northside Civic Centre and also holds weekly outreach clinics in other locations. These clinics are staffed by solicitors and barristers who work in a voluntary capacity. The lawyers give advice and representation to people who attend at the advice clinics. Lawyers and law students who have worked for the Law Centre have found their experiences very rewarding and beneficial to their careers. If you would like to volunteer, you should contact the Law Centre.[14]

Unfortunately, the issue of funding for the Law Centre, which operates on a grant from the Department of Social and Family Affairs, is a constant concern. The amount of the grant was reduced in 2001 and has been frozen since. All indications are that there will be no further increase in 2004, despite ever increasing operational costs.[15] If you would like to support the Law Centre, you can become a member by making a contribution. Members are posted copies of the Law Centre's quarterly newsletter and can attend its AGM and influence its policy. Any persons or organisations interested should contact the Law Centre. ●

11 Whyte (2002), at p. 10

12 Whyte (2002), at p. 329

13 *Iwuala v. Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 14th July, 2003)

14 Contact details: Northside Community Law Centre, Northside Civic Centre, Bunratty Road, Coolock, Dublin 17. Tel. (01) 847 7804 Fax (01) 847 7563 Email *info@nclc.ie*

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Recent U.K. Caselaw on Mediation

Mary Bunyan BL

Introduction

The government and the courts in the United Kingdom have introduced a system that in some cases, forces parties to explore mediation in order to conclude early settlements and to avoid protracted and expensive litigation. A recent article in the Bar Review[1] has thoroughly explained the mediation process so it is not proposed to repeat this process here. Instead, this article will analyse some recent U.K decisions such as *Dunnet v. Railtrack*,[2] *Cowl v. Plymouth City Council*,[3] and *Royal Bank of Canada Trust Corp Ltd v. Secretary of State for Defence*[4]. In these cases, the courts have penalised the parties for refusing to mediate by refusing to allow costs, even if a party is successful in the action.

Implementation of Alternative Dispute Resolution (ADR) by the Courts

The overriding objective of ADR is that court time and costs are not wasted by futile litigation. One form of ADR is mediation whereby a third party is brought in, not to decide the dispute, but to help in bringing about a settlement. The essence of mediation is that it is neutral and non-binding, and therefore is different from negotiation and litigation. The mediator is a facilitator with no personal interest in the result, who helps the parties reach their own settlement. At first, however, it seemed that judges in the United Kingdom were not placing a great deal of emphasis on ADR. In *Federal Bank of the Middle East Ltd v. Hadkinson and Others*[5], Arden J. refused to order a stay for the purposes of mediation, despite the fact that the defendant argued that the overriding objective encouraged resolution by ADR. The judge decided that there was considerable mistrust between the parties, that mediation had to involve the free flow of information and that it was highly unlikely that ADR would be successful.

Three months later, in *Kinstreet Ltd v. Balmargo Corp Ltd*,[6] Arden J reversed her approach. She ordered ADR in that case, despite strong objections from the defendants, who argued that the application for ADR was not made in good faith and that there was a grave possibility of misuse of information obtained in the process. It was also argued that the court did not have jurisdiction to order such steps in any event. Arden J, was however, impressed by a witness statement from SJ Berwin and Co, Solicitors, which extolled the virtues of ADR and quoted the success of the Centre for Effective Dispute Resolution. She then held that ADR in this case was appropriate. Arden J also noted that information obtained in the course of ADR was confidential and was not to be used without agreement. She ordered that this was to be put in writing prior to the start of the ADR. She also gave directions for mediation, including the requirement to inform the court in the absence of settlement, what steps had been taken towards ADR and why they had failed.

In *Dyson v. Leeds City Council*[7], Lord Justice Ward, strongly supported by Lord Woolf and Lord Justice Laws, urged the defendants to "think again" about rejecting the claimant's overture to engage in mediation. All three judges emphasised that "the court has powers to take a strong view about the rejection of encouraging noises if necessary, by imposing eventual orders for indemnity costs or indeed ordering that a higher rate of interest be paid on any damages recoverable".

Recent U.K Decisions

In the case of *Dunnett v. Railtrack*[8], Lord Justice Brooke stated:

> "What is set out in CPR 1,4 is the duty of the court to further the overriding objective by active case management, which includes the feature to which I have referred. Mr Lord, when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both

1 See Klaus Reichert - *Commercial Mediation*, Bar Review Volume 8, Issue 4, July 2003.
2 (2002) 1 WLR 2434
3 The Times, 8th January, 2002
4 14th May, 2003
5 (2000) 3CPLR 295
6 Unreported Ch D 3 August 1999
7 Unreported CA, 22 November, 1999
8 22nd February, 2002

parties in many cases, which are beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms which they are happy to live with. A mediator may be able to provide solutions, which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away. It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of the lawyers to their duties to further the overriding objective in the way that is set out in Part 1 of the Rules and to the possibility that, if they turn out of hand the chance of alternative dispute resolution, when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence. In my judgment, in the particular circumstances of this case, given the refusal of the defendants to contemplate alternative dispute resolution at a stage before the costs of this appeal started to flow, I do not think that it is appropriate to take into account the offers that were made. In my judgment, taking into account all the circumstances of the case, as we are bound to do under CPR Part 44, which applies as much to the Court of Appeal as it does to courts at first instance, the appropriate order on the appeal is no order as to costs".

Lord Justice Walker and Lord Justice Sedley concurred with this judgment.

In March, 2001, the Lord Chancellor gave a commitment to Alternative Dispute Resolution. Three very recent judgments reflect this commitment. In the case of *Cowl v. Plymouth City Council*[9], Lord Woolf said that even in disputes between public authorities and the members of the public for whom they were responsible, insufficient attention was paid to the paramount importance of avoiding litigation whenever possible. He also said that in the case of such disputes, both sides must now be conscious of the contribution alternative dispute resolution could make to resolving disputes in a manner which met the needs of the parties and saved time, expense and stress. It was indeed, unfortunate, that, the process having started, instead of the parties focusing on the future, they insisted on arguing about what had occurred in the past. So far as the claimants were concerned, this was of no value since the Council were prepared, as they ultimately made clear, to reconsider the whole issue. Lord Woolf then stated:

"Without the need for the vast costs which must have been incurred, the parties should have been able to come to a sensible conclusion as to how to dispose of the issues which divided them. If they could not do that without help, then an independent mediator should have been recruited to assist. Today, sufficient should be known about alternative dispute resolution to make the failure to adopt it, in particular when public money was involved, indefensible. At the opening of the appeal hearing, the court insisted on the parties focusing on what mattered, which was the future well-being of the claimants and the parties had had no difficulty in coming to a sensible agreement. The present case would have served some purpose if it made it clear that the lawyers acting on both sides of such a dispute were under a heavy obligation only to resort to litigation if it was really unavoidable. If they could not resolve the whole of the dispute by the use of the complaint procedure, they should resolve the dispute so far as was practicable without involving litigation. At least in that way, some of the expense and delay would be avoided".

In the more recent case of *Royal Bank of Canada Trust Corp. Ltd v. Secretary of State for Defence*[10], the court penalised the Ministry for Defence in costs for ignoring the Lord Chancellor's ADR pledge made in March, 2001. The case centred on a point of law concerning the interpretation of a break clause in a lease. The claimant had expressed its willingness to resolve the matter by ADR, referring specifically to the court's recent decisions in relation to the use of mediation. However the Ministry for Defence rejected the suggestion of mediation on the basis that firstly, it was a dispute on a point of law, that required a black and white answer. Secondly, the dispute was not between individuals but was between commercial parties, and thirdly, unlike earlier cases on ADR, the matter was not one where emotions were running high, or played a significant part in the "conflict" between the parties. The case was heard in the Chancery Division of the High Court and the MOD was successful on the point of law. It did not however receive an award for its costs. The claimant drew the court's attention to the government's pledge, which stated clearly that "ADR will be considered and used in all suitable cases wherever the other party accepts it". The trial judge, Lewison J., stated that the reasons for refusing were "surprising" and added that these reasons did not make the matter unsuitable for mediation. The judge declined to award any costs to the department, effectively removing the financial gain obtained in the successful action.

This decision closely follows the precedent in *Dunnett v. Railtrack*. It also shows that in the U.K., it is dangerous for a government party to ignore its own public undertaking to use ADR.

In the recent case of *Evans v. Virgin Radio* in June 2003,[11] where the radio and T.V presenter, Chris Evans sued Virgin Radio for damages, the trial judge Lightman J. strongly criticised the "mammoth litigation" at "horrendous cost" that the twenty day hearing had entailed. He said that he had strongly tried to persuade the parties to seek a solution through mediation, without success.

Mediation in Family Law

Mediation is often used in family law in the U.K. In the recent case of *Fyshe v. Fyshe*[12], the applicant appealed a High Court award of £1.4 million. After hearing the arguments, the Appeal Court Judge, Thorpe LJ, urged the former couple to resolve their differences outside court. He said much of their collective wealth came in inherited assets which both had agreed to pass on to their 27 year old son Henry. Thorpe LJ commented on the fact that they had already run up £225,000 in legal fees. He then adjourned the case for mediation. ●

9 The Times, 8th January, 2002

10 14th May, 2003

11 The Times, 27th June 2003

12 The Times, 18th June 2003

Irish Peacock & Scarlet Marquess – The Real Trial of Oscar Wilde

Author: Merlin Holland

Publisher: Fourth Estate

Price: €24.20

Reviewed by John McGuiggan BL

There are trials in the Four Courts that attract so many members of the legal profession that more often than not, there is little or no room for the general public. This is particularly true of libel trials. It was always thus. Wilde's libel action against the Marquess of Queensbury attracted the profession in such great numbers that the Daily Chronicle was moved to observe of the briefless barristers that flooded into the Old Bailey:-

> "... they came not as single spies, but in whole battalions...They sat in the barristers' seats; they sat in the solicitors seats; they sat in the witnesses seats; they sat in the ushers seats, and excepting the Bench, they sat in all the seats they could capture. And when all the seats were used up, they stood, a serried mass of voluble, grey wigged, black gowned humanity hogging the gangways and approaches of the court..."

What drew them was the heady mix of the aristocracy, literary fame, and sex. And of course, the law of libel, for barristers know that libel trials attract advocacy of the highest quality. Here in Merlin Holland's most welcome book, we have the reason for the attendance of such serried ranks, for at last, we have the full transcript, the *ipssima verba* of the entire Wilde trial, containing a wealth of previously unpublished material including the simply brilliant opening speech of Edward Carson for the defence of Queensbury, a speech so outstanding that it alone justifies the price of the book.

The transcript is primarily the work of the court stenographers, Messrs Cherer, Bennett and Davis. Merlin Holland, besides contributing an excellent introduction to the trial, mainly acts as editor of their excellent shorthand notes.

The transcript covers the preliminary proceedings at the Magistrates Courts as well as the three days of the libel trial itself. It opens with Wilde's legal team presenting their case for the reputation of Wilde and the evidence of the libel itself. Wilde is cross examined by Carson and all the familiar repartee of that famous cross examination is presented in its full and extended form, including what is often seen as the critical turning point in the trial –the Carson/Wilde exchange of "Did you kiss him? – "Oh, no, never in my life. He was a peculiarly plain boy". Carson clearly caught Wilde off his guard in that exchange but it is when you turn to Carson's opening speech for Queensbury that you realise where the case was truly won and the damage to Wilde's case so overwhelmingly inflicted.

You will not hear nor read better advocacy than this. The speech must have been written as much with a hammer as with a pen, for it falls upon Wilde's legal team with such devastating blows that you can feel it smashing through their confidence and your sympathy goes out to the barristers being crushed by Carson's words. You get caught up in the power and pace of it's delivery as surely as the jury were so caught. Even the judge, in his staccato interventions, seems more intent on encouraging the pace than making any sensible contribution.

You have to remind yourself that this is just the opening speech. Carson outlines what evidence he intends to call to justify the "posing as a sodomite" alleged libel of his client. He names the rentboys to be called, the valet from the Savoy Hotel who saw the bed linen, the silver cigarette cases he will exhibit that Wilde so generously presented to his young male friends, the evidence of the private dinners with the poor the young and the vulnerable boys. It is by modern standards a speech so politically incorrect that it could never be given again. It belongs to the moral agenda of a time long passed. But it is marvellous advocacy. Before the speech is finished - mark you - before it is even finished, Wilde's legal team throw in the towel, hoist the white flag and abandon their libel action, consenting, under the duress of the speech, to a judgment that effectively declares to the world that Wilde was indeed posing as a sodomite.

The book confines itself to the transcript of the libel trial. It does not take us to the Cadogan Hotel, to Wilde's subsequent criminal prosecution, to Reading Goal or to Parisian poverty. Yet all those places are in Carson's speech. It is surely amongst the finest examples of the barrister's art and anyone who seeks to earn their bread by advocacy must read this book. ●