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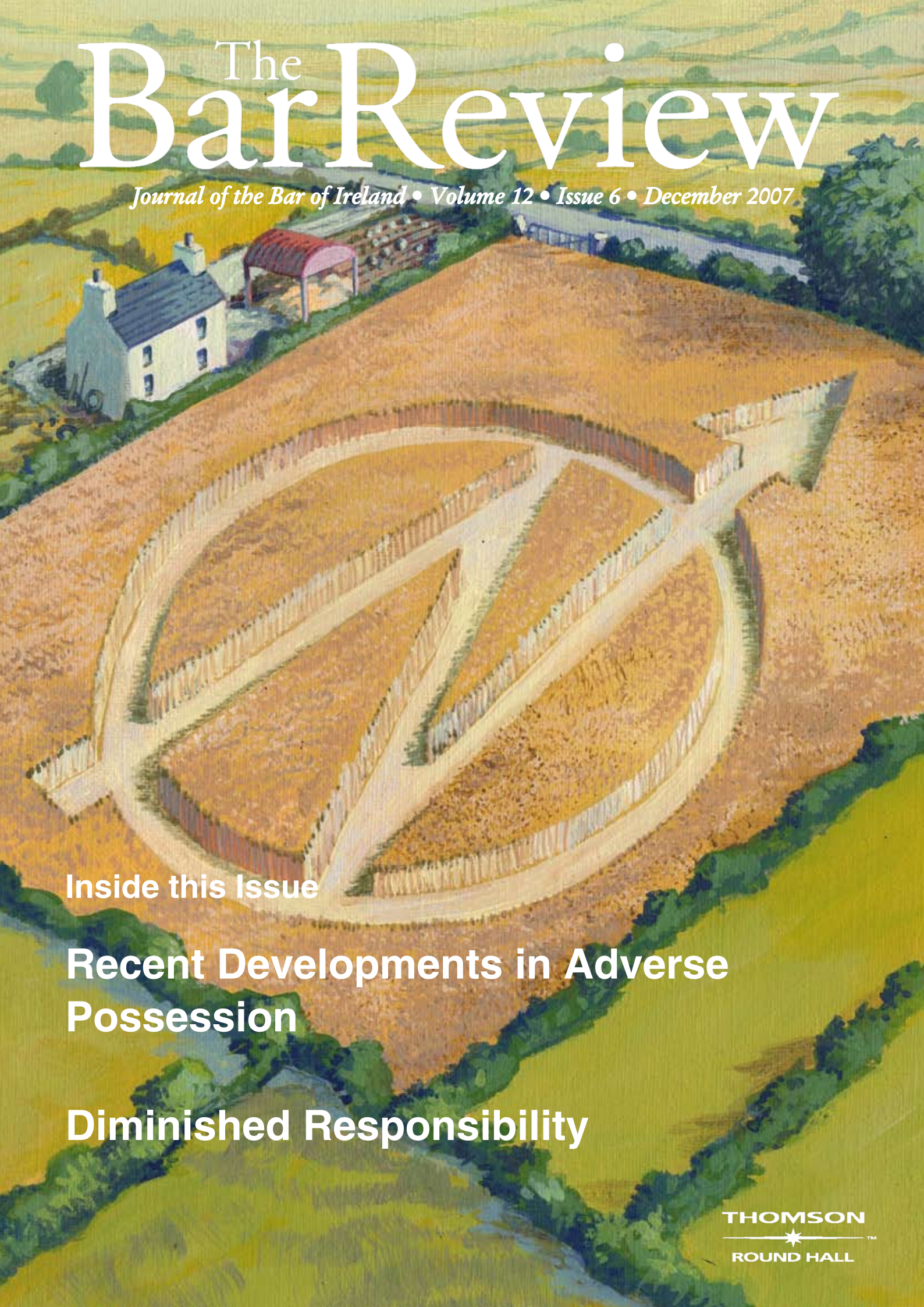

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Diminished Responsibility

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The Irish Criminal Bar Association

Mary Rose Gearty BL

Hundreds of barristers qualify every year, and most of them come to the Bar to practise (even if only for their first year of devilling). It has become more and more difficult to maintain links with all of those practising in the same field, let alone with all of our colleagues now in practice. As the volume of legislation and case law continue to increase in the area of criminal law, the task of assimilating the knowledge and information necessary to ensure that one is aware of all developments has become daunting indeed, particularly for those who must glean this information outside of court hours. Against this background, it became clear that the criminal bar would benefit from a representative body which would facilitate communication within the bar itself and promote our interests, particularly in terms of continuing education.

There was one further catalyst to the formation of the ICBA. Some members of the Irish Bar, and many of those practising in the criminal bar in particular, had been critical of legislation in this area (notably the Criminal Justice Bill of 2006) and wanted a group within which concerns like this could be raised and, if necessary, statements produced on behalf of a group rather than one or two individuals.

In July of 2006, a number of barristers practising at the criminal bar met and discussed plans to form a new association. Their aims were to foster more discussion on matters of interest, to maintain and promote high standards of practice and to make representations on behalf of all practitioners at the criminal bar.

Within months of an ad hoc meeting in the Distillery Building, a temporary committee had been elected and hundreds of barristers had attended at a preliminary meeting to discuss the planned association and at the first two seminars organised by ICBA.

The Association now has a draft constitution and a membership of around 220. Membership of the Association is open to any practising barrister, the fee is €20 for a devil and €50 for other members. The stated aims of ICBA are:

1. To promote the highest standards in the practice of criminal law.
2. To seek improvements in the area of criminal law, both in legislative provisions and administrative procedures.
3. To operate as a forum for barristers who practice in the area of criminal law.
4. To provide information and education in regard to criminal law.
5. To make representations on behalf of members' interests to the judiciary, the Courts Service of Ireland and any other body as appropriate.

The draft constitution contains provisions for 6 committees, as follows;

The Finance Committee

The Communications Committee — responsible for internal communication with members and external communication with other persons and bodies

The Law Reform Committee — responsible for the preparation and presentation of submissions and commentaries in areas where change or reform of criminal law is anticipated or required

The Education Committee — responsible for the preparation and provision of continuing education for members

The Circuit Committee — responsible for liaison between the Association and members who practice in different court areas throughout the country.

The Liaison Committee — responsible for liaison with the members, the judiciary and the solicitors' profession. It will also organise social events within the Association and assist with the social aspects of conferences, whether national or international.

The New Members' Committee — responsible for liaison, support and education for members in their first few years of practice.

In its short life, the Association has already arranged and hosted a number of successful seminars and a reception for new members of the Library. It has plans for a number of conferences in the near future, a general reception for members before Christmas and a week-end conference at a Circuit venue, with a view to travelling to each Circuit in turn in order to maximize the involvement of members throughout the country.

We strongly encourage all members to join this Association and to avail of the increased links and information it offers to us all, both as colleagues and as professionals in a highly competitive field. ■

World Bar Conference to be held in Dublin and Belfast

The cities of Dublin and Belfast are to host the World Bar Conference 2008 which will take place from the 27th June to 30th June next year.

Top international human rights experts will address delegates travelling from referral bars around the globe. Attending are acclaimed international speakers including human rights defender Beatrice Mtetwa, Middle East Correspondent Robert Fisk and Shami Chakrabati, Director of civil rights organisation, Liberty.

In previous years the international conference was held in Cape Town, Hong Kong and Shanghai. The Cross border conference is widely viewed as a coup for Ireland.

According to Mr Hugh Mohan, joint chair of the Conference, "This four day event has proven to be very successful in attracting legal experts from around the globe. Delegates will have the opportunity to partake in legal discussions with leaders in their fields. It is also an opportunity to meet other likeminded barristers. In addition, delegates will have the opportunity to enjoy pre-arranged activities and entertainment in the cities of Belfast and Dublin."

The conference is being held by the International Council of Advocates and Barristers, an organisation formed by the Bar Association in jurisdictions where there is a separate profession of an independent referral Bar. Its members are currently the Bar Associations of Australia, England and Wales, Hong Kong, the Republic of Ireland, New Zealand, Northern Ireland, Scotland, South Africa, Namibia and Zimbabwe. ■

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Pictured at the launch of the World Bar Conference, were Hugh Mohan SC, Co-Chair of The International Council of Advocates and Barristers, Turlough O'Donnell SC, Chair of the Bar of Ireland and Noelle McGrenera QC, Chair of the Bar of Northern Ireland and Co-Chair of The International Council of Advocates and Barristers.

Bioethics and The Middle of Life

Ann Power SC

This is the second in a three part series of articles dealing with bioethics and the law. The first article featured in the November edition of the Bar Review and the third and final article will be contained in the February edition.

Body Parts as Medicine

Margot Brazier, Professor of Law at the University of Manchester, has analysed how medicine has changed from being something that was given to us to something that we ourselves are.[1] Increasingly, as we enhance our understanding of the human body, we are aware that the human body itself is a source of medicine or that humans are medicine.

Biological materials harvested from human sources offer a promise of "cure" for many diseases. Blood and blood products have been used now for nearly a century both in transfusion and as treatment for conditions like Haemophilia. *In vitro* fertilisation (IVF) and an array of reproductive technologies which IVF gave birth to, brought hope to the infertile. Pre-implantation genetic diagnosis (PGD) allows parents to avoid the birth of a child with some devastating genetic disease. PGD when linked with Human Leukocyte Antigen Tissue Typing (HLA) allows for the creation of so-called "saviour siblings"—allowing one child to be created to become a source of survival for another. Organ transplants save lives. Stem cell therapies may one day enable us to manufacture new tissue and organs in the laboratory. Organ retention enables scientists to increase their understanding of disease and thereby save more lives. So the blood, cells, sperm, eggs, tissue and organs of the human body are in themselves "cures" for many debilitating and even life-threatening conditions. Nevertheless, each one of these life-saving therapies has caused controversy and at times public outrage.

To get a flavour for the ethical and legal issues raised by the use of "body parts" Brazier invites us to engage in a thought experiment. Imagine in 2010 a baby boy is born in Manchester. His parents name him Sam. He grows and thrives until the age of 3 when he contracts meningitis. However, his recovery is swift and so remarkable that he needed no antibiotics. Tests reveal an amazing result. Sam carries within him cells that can fight off most diseases and his organs and tissue have a capacity for regeneration unless catastrophically injured. Scientists believe that Sam could be used to understand and cure most human diseases that are unrelated to the ageing process. The question Brazier asks is: How far can they go?

- Few would object if Sam's doctors (with his parents' consent) took blood samples and tissue samples from the child.
- Could they take stem cells from his bone marrow to manufacture cell lines?

  If the risk or distress to Sam was minimal, moral objection to minor intrusive procedures would be subdued. Legally, the position is more dubious. Are any of those interventions in Sam's interest? And there are limits to parental powers to authorise procedures relating to their children.
- What if Sam's parents say "No—you may not so much as touch the child." Should the State have the power to restrict their freedom of choice in order to confer a benefit on others?
- What if his parents offer a conditional consent? You may "experiment" on Sam's tissue and cells but first you must pay us €50,000 plus a 20% royalty on therapies developed from his cells.

These different scenarios introduce some of the underlying themes of real debate. Must an absolute *veto* on a procedure which will do untold good and little, if any harm, be respected? And given the benefits that would flow from such research, why should Sam's parents not be paid? It may be bad taste but parents make money out of their gifted children in other ways, such as, for example, through advertising. Why should Sam's parents not profit from their "gifted" son?

- What if the scenario darkens? What if, in order to profit fully from our miracle boy, doctors need access to every organ in his body, to every speck of his tissue? What if, in order for society to benefit from his amazing biological secrets, we need to kill Sam?

  Would even the most committed utilitarian consider Sam's murder justified despite the far greater good that would accrue to the far greater number? The instinctive reply might be that even the most extreme utilitarian could not justify human sacrifice in order to bring about this greater good. Yet through conscription to military service, we sacrifice young lives by sending them to near certain death. What is the difference?
- And what if Sam were killed in a road accident? His

1 The inspiration for much of this part of the paper is taken from Margot Brazier's article, "Human(s) as Medicine(s)" in *First Do No Harm*, Sheila McLean (ed.), Ashgate, 2006 187.

> own miraculous properties cannot save him but his dead body contains the secrets of his miracle medicine. His parents refuse to consent to any form of intrusion on their dead son's body beyond what is required for the coroner's autopsy.
>
> Some would argue that parental objections should carry much less weight than the imperatives of science and the potential good to humanity.[2]

At the centre of the complexity about proper uses of bodies and bodily material lies a fundamental discomfort about what makes human beings special.

Organ Retention

Arguably, a fundamental cause of the recent controversies surrounding organ retention was the chasm of misunderstanding between families and clinicians. The clinicians perceived the body of the deceased as biological material, potentially useful in the advancement of medicine. The person whose body it was, no longer existed. It would be wasteful not to make use of what was left behind. The parents of a dead child still perceived the body as their child. Some claimed compensation for having suffered traumatic injury upon learning about the retention of bodily parts. While the Courts had much sympathy for such claimants, their claims were dismissed. [3]

Interestingly, many of those who attended meetings of the Retained Organs Commission (which was established to oversee the return of identifiable body parts in the wake of the organ retention scandals in England) said that had they been asked to consent to the retention and ensured that the parts would be beneficially and respectfully used, they would have agreed.[4] Is willingness to donate organs reconcilable with fury when they are retained without permission? What is at issue here? Is it the perceived insult to the living (in not being asked for consent) or the insult to the dead in what may be perceived as a dehumanised approach to the remains? According to the Bristol Inquiry Report, a lack of understanding about organ retention undoubtedly played a part. It stated:

> The fact that parents and the public were unaware that human material was routinely taken and used for a variety of purposes and large collections existed around the country was unacknowledged or ignored.[5]

2 See Harris, J. "Law and Regulation of Retained Organs: The Ethical Issues", (2002) 22 *LS* 527-550

3 See *Devlin v National Maternity Hospital* [Unreported, High Court, O'Donovan J., 1 July 2004] and *O'Connor & Another v Lenihan* [Unreported, High Court, Peart J., 9 June 2005]

4 See *Remembering the Past, Looking to the Future*, The Final Report of the Retained Organs Commissions, London, DOH, 2004 at para. 1.9

5 At para 32

Organ Donation

Cadaveric organ donation is another area of public policy where autonomy or "consent" is an issue. A grieving parent asked to donate a child's heart may have an immediate empathy between his pain and the pain of other parents whose child is dying. Perhaps there is a sense in which the dead child will "live on".

Coming as it did in the wake of the organ retention scandal in Britain it was perhaps not too surprising that the *Human Tissue Act 2004* in that jurisdiction focused heavily upon consent. Out of respect for "autonomy", the Act and its codes or practices strongly emphasised the need to comply with the former wishes of the individual where these are known. But "autonomy" or self determination in the context of the dead is somewhat anomalous. The Act seeks to respect autonomy by emphasising the prior wishes of the dead. Its credentials fail in respect of those who have expressed no choice. It not only fails those who would have been willing to donate (and most population surveys show significant support for cadaveric donation—up to 90% in some cases[6]) but also fails to reflect any notion of the wider public good with the result that the needs of patients desperately awaiting a transplant are unnecessarily sacrificed. Should legislation here be premised upon a rebuttable presumption in favour of donation?

Living Donation

One might imagine that the use of bodily materials taken from the living would be less complex given that the scene is not coloured by emotional loss or bereavement. No so. Transfusions are routine but have given rise to controversy within some religious communities.

What about the use of other bodily materials? What about donating a kidney or a lobe of your lung, or a segment of your liver? Arguably, these demand courage and a higher pain threshold but for the most part, such altruistic donations are applauded and are not prohibited by law. But unfettered live donations still remain problematic and may have to surmount legal obstacles. Brazier writes:

> Should I propose to donate my kidney to my dying brother, my wish will be likely to be granted and applauded. Should I offer my kidney to a stranger, my altruism may be regarded with suspicion. Should I advertise my kidney for sale, I will fall foul of UK law.[7]

In Britain, the sale of organs for transplantation was first criminalised by the *Human Organs Transplant Act, 1989*. That prohibition is continued by section 32 of the *Human Tissue Act, 2004*. But is a total ban on the sale of organs necessary and, if so, why? Is it a legitimate restriction on a person's freedom to do what he desires with his own body? What if we were to have a regulated market instead, one which

6 UK Transplant, *Barriers to Joining the NHS Organ Donor Register. Qualitative and Quantitative Research Carried out on Behalf of UK Transplant 2002/03,* Bristol, UK Transplant, 2005

7 Margot Brazier, *op cit.,* at n. 1.

ensures adequate protection to vendors and purchasers? Is it not the case that society has a legitimate interest in restricting autonomy on the grounds of prevention of harm to the vulnerable?

Refusal of Medical Treatment

In September 2006, the High Court ordered that a competent woman (Ms K) who had refused a blood transfusion should be given the transfusion against her will in order to save her life. The 23-year-old Congolese woman suffered massive blood loss following the birth of her child at the Coombe Hospital. Speaking in French and through an interpreter, she told hospital staff she did not want a blood transfusion as she was a Jehovah's Witness.

The Master of the Coombe applied to the High Court for directions and the Court directed the hospital to do everything in its power to save the life of the woman including, if necessary, restraining her if she physically attempted to stop doctors administering to her the transfusion.

The Judgment generated heated debate for a number of reasons. Firstly, the Court applied the "best interests" test often used in medical law. However, it was not the best interests of the woman but rather those of her child that were considered. The Court regarded the interests of the woman's newborn child as paramount and held that if its mother died, he could be left with no one to look after his welfare. Secondly, some have argued that in authorizing and directing non consensual medical treatment, the Court failed to have regard to the patient's natural right to self-determination and to her Constitutional rights to bodily integrity and to practice of religious freedom. In addition, it is questionable whether any regard was had to sections 4 (2) of the *Health Act, 1953* which expressly provides that:

> (2) Any person who avails himself of any service provided under this Act shall not be under any obligation to submit himself … to a health examination or treatment which is contrary to the teaching of his religion.

The Judgment of the Court in *Ms K* is something of a new departure in the jurisprudence of the Courts in the area of non consensual medical treatment. In earlier cases of this nature, the High Court had ordered transfusions to be carried out in circumstances where either there was a doubt as to the competence or capacity of the patient to refuse or where the decision to refuse treatment was being made by a parent on behalf of a child. Those cases are readily distinguishable from the *K* case.

In Ms K's case, the evidence was that she was neither a minor nor incapacitated. In such circumstances, was it legitimate for the Court to by-pass her refusal to have such treatment and to direct that it be administered, forcibly, if necessary? Perhaps the Court took the view that in circumstances of urgency, it would find in favour of saving life and allow the legality of the decision to be argued afterwards. Well motivated as such an approach undoubtedly is, one must however ask wherein lies the difference between requiring *Ms K* (against her wishes and, if necessary, by force) to have a blood transfusion in order to save her life and ordering her to have urgent chemotherapy (if necessary by force) in order to save her life? Is it legitimate for the Court to enforce its view of what ought to be done for the view of person who has decided against treatment?

Whilst one sympathizes with any Court obliged to decide upon matters of life and death in urgent circumstances, questions about the legal *ratio* of the decision arise. Had the Court, for example, found that the circumstances of *Ms K*'s condition (post delivery, post medication, stressful environment) were such that there was at least a doubt as to her actual capacity to make a fully informed choice and that in such circumstances it would err on the side of caution, then, arguably, the legal principles governing consent to and refusal of medical treatment may have been regarded as less compromised. Indeed, Professor Mason argues that because the implications of refusal of treatment are more serious than the implications of accepting treatment, the bar might justifiably be raised before the Court is satisfied that a patient's refusal should be respected.

The English Authorities

The cases in England on refusal of treatment have, generally, arisen where the life of a patient is threatened by the refusal and where doctors and hospitals, fearing liability in battery or negligence, have sought declarations of lawfulness prior to treating patients against their expressly stated wishes. The right to refuse medical treatment, as a corollary of the requirement of consent to treatment, has been articulated and repeated in a number of leading English decisions in recent years. In the case of in *Re T (An Adult: Refusal of Treatment)*, Lord Donaldson MR stated that:

> An adult patient who … suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments beings offered. [This right exists] notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent.[8]

The right to refuse is predicated upon the patient having sufficient capacity to enable him to exercise that right. The cases demonstrate that the right to refuse, while conceded in strong terms as a matter of first principle, is frequently undermined by the courts as they look for "some way out" whereby refusal is by-passed and treatment given without offending the integrity of legal principles involved.

The decision of the Court of Appeal in *Re T (An Adult: Refusal of Treatment)*[9] is the leading English case in this area. Ms T, in her 34th week of pregnancy was involved in a road traffic accident. She refused a blood transfusion after the visit of her mother, who was a Jehovah's Witness and with whom the patient had lived until the age of 17. Her condition deteriorated and the attending doctors decided that a Caesarean section was necessary. The Consultant

8 [1992] 4 EAR 649 at 102.
9 [1992] 4 AER 649 (CA).

Anaesthetist would have administered a blood transfusion, given the patient's critical condition, but felt inhibited from so doing by reason of the patient's refusal. Her father and boyfriend sought a declaration of lawfulness to cover the proposed transfusion. The Order was granted and upheld by the Court of Appeal.

It was held that the scope of the right to refusal was not such as to cover the particular situation which arose. Reference was made to Miss T's diminishing allegiance to the Jehovah's Witnesses since leaving her mother and that her decision had been announced "*out of the blue*". Additionally, the Court heard that medical staff had failed to inform her, fully, of the risk attendant upon refusal. Thus, there was held to be a situation of emergency and in those circumstances the clinicians were free and in fact were obliged to act in Ms T's best interests by performing the transfusion. Lord Donaldson, MR found that the patient lacked the capacity necessary for a valid decision. The accident, the medication, the advanced stage of pregnancy and her severe pneumonia all constituted, in his opinion, abundant evidence of the patient's incapacity at the time of her purported refusal and, consequently, her consent was impaired.

By way of contrast, in the subsequent case of *Re C (Adult: Refusal of Treatment)*[10] the patient's refusal of treatment was upheld by the High Court. C was suffering from schizophrenia and was confined to Broadmoor Prison. Having developed gangrene in one of his feet, he was advised by doctors of a significant risk of death if his leg was not amputated below the knee. The patient not only refused to consent to the operation but also sought an injunction preventing doctors from carrying it out in the future. It was held that such a patient was competent to refuse the treatment and the injunction was granted. It was held that to be competent, a patient had to understand or at least be capable of understanding the nature and effects of the proposed treatment in broad terms, to believe the information concerning this and to weigh the information so as to make a choice. In this case the medical witnesses were divided on the question of C's competence and the Judge chose between them and found in favour of C's competence to exercise his right to refuse treatment.

An exception to the right of the competent patient to refuse treatment was found in *Re S (Adult: Refusal of Medical Treatment).*[11] In this case, doctors at a London hospital sought an order, effectively compelling Mrs S to undergo an emergency Caesarean section against her express wishes. In a judgment which had to be delivered as quickly as possible if the life of the baby and the mother were, on the medical evidence, to be saved, Sir Stephen Brown granted the declaration. In doing so he relied on dicta in *Re T* to the effect that a compulsory operation of this sort might be permissible if the patient's refusal of treatment could lead to the death of a viable foetus. In reaching his decision under pressure of time, Sir Stephen Brown left open the question of Mrs S's competence although, such evidence as there was cast doubt on her capacity to refuse.

This decision was strongly condemned by exponents of the liberal pro-autonomy persuasion. The Court, clearly, had chosen one norm (the sanctity of life) over another (respecting the patient's right to self-determination) to the point where it was prepared to allow the forced subjection of the patient to invasive treatment. ■

10 [1994] 1 AER 819

11 [1992] 4 AER 671.

Deference and Redefining Reasonableness

Paul Daly*

Introduction

While judicial review principles in England continue developing in the wake of the Human Rights Act 1998,[1] review of the merits of Irish administrative decisions remains comparatively underdeveloped. The current law, as set out in *O'Keeffe v An Bord Pleanála* and *State (Keegan) v Stardust Victims' Compensation Tribunal*, allows only minimal substantive review of decisions taken by expert agencies. There has been some academic and judicial disquiet about the continued invocation of these rigid principles, but precious little commentary as to what might replace *O'Keeffe* and *Keegan*. Though the present author is a proponent of a more nuanced approach to substantive review, judges are correct to proceed with caution: the path to more intrusive review of the merits of administrative decisions is rutted with pitfalls. At the same time, the path ought to be negotiated, by academics, practitioners and, above all, judges. If a debate can be sustained, we should arrive at our ultimate destination with a sophisticated form of judicial review that accommodates the legal and political realities of the modern administrative state, allows the various branches of government to engage in constructive dialogue and furnishes principles of good administration which can improve the lot of the Irish citizenry. The purpose of this article is to identify some of the pitfalls and turn attention to key questions that need to be answered before the courts can feel comfortable about redefining reasonableness.

The Existing Doctrine

The modern Irish formulation of the doctrine that all administrative decisions must be reasonable came in *O'Keeffe v An Bord Pleanála*.[2] There, the Supreme Court held that decisions of the planning authorities can only be displaced in review proceedings where there is "no relevant material" before the decision-maker to justify her conclusion. This principle, springing from the concept of curial deference, under which judges should defer to the superior knowledge of expert decision-makers, now apparently extends to all administrative agency decisions.[3] The relationship between *O'Keeffe* and the earlier statement of irrationality in *State (Keegan) v Stardust Victims' Compensation Tribunal*[4] is unclear, the two often appearing together, but it appears as if *O'Keeffe* is a refinement of the *Keegan* test and "has become *the* definitive interpretation of the test."[5]

Apparently, only two cases have been decided in favour of the applicant under *O'Keeffe*.[6] As the terms of the *O'Keeffe* test suggest, victory on an unreasonableness ground, as Irish law currently stands, is virtually impossible, as most decisions are taken after consideration of an evidentiary record of some sort. As O'Sullivan J put it,[7] "[t]o be reviewably irrational it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and inexplicably mad; taken leave of his senses and come to an absurd conclusion."

Criticism of *O'Keeffe*

The *O'Keeffe* test has drawn criticism from a number of different angles. Conleth Bradley has argued that, at a time when the jurisprudence is advancing in other jurisdictions, *O'Keeffe's* rigidity has stymied the development of unreasonableness in Ireland: "the *O'Keeffe* reformulation has unnecessarily restricted the potential growth of unreasonableness because of its application in a planning context."[8] Indeed, *O'Keeffe* does not discriminate between types of decision-maker and types of administrative action.

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1 See generally Jeffrey Jowell and Dawn Oliver eds, *The Changing Constitution* 6th ed (Oxford, Oxford University Press, 2007).

2 [1993] 1 IR 39.

3 See generally Delany, "Judicial Review in Cases of Asylum Seekers" (2002) 24 DULJ 1.

4 [1986] IR 642, 658. Henchy J held, *inter alia*, that to justify correction by the superior courts, a decision would have to be "fundamentally at variance with reason and common sense…indefensible for being in the teeth of plain reason and common sense…plainly and unambiguously in the face of fundamental reason and common sense" or "flagrantly reject or disregard fundamental reason or common sense."

5 *Judicial Review* (Dublin, 2002) at p.493. (Emphasis in original.) Though Bradley later notes, at p.497, how "[t]he courts often invoke the seminal decision in *Keegan* rather than the *O'Keeffe* interpretation and on other occasions both decisions are cited together." See *Lobe v Minister for Justice* [2003] 1 IR 1, 61 (SC) *per* Denham J.

6 In both of these cases, *Dikilu* v *Minister for Justice*, [2003] IEHC 40; and *T* v *Refugee Appeals Tribunal* [2004] IEHC 606, it is debatable that *O'Keeffe* was applied correctly but that is an argument for another day. It may be three if one can count *I v Minister for Justice* [2007] IEHC 180, but McGovern J appeared to base his decision on a number of grounds other than a failure to meet the *O'Keeffe* test. See also *Fitzpatrick v Minister for Justice* [2005] IEHC 9, where Ryan J held that the respondent's failure to utilise his power to revoke a deportation order failed the *Keegan* test; specifically, a "failure to take into account the period during which the applicants lived together as a married couple in the State." One might argue that this was more a breach of the duty to take into account all relevant factors, though the same substantive outcome would have been reached.

7 *Aer Rianta v Aviation Commissioner*, [2003] IEHC 707/01.

8 *Op. cit.* at pp. 493-494.

Secondly, one judge has, albeit obliquely, noted the logical deficiencies present in *O'Keeffe*. Though speaking in the context of an appeal on a point of law, Kearns J suggested "the greater the level of expertise and specialised knowledge which a particular tribunal has, the greater the reluctance there should be on the part of the court to substitute its own view for that of the authority."[9] To risk putting words in the judge's mouth, a blunt instrument like *O'Keeffe* is inapposite in the era of hundreds of various statutory agencies.[10] Indeed, inapposite may be too mild: the Oireachtas has not used uniform statutory language or structure in setting up the battery of state agencies that advise government, promulgate rules and regulations and prosecute individuals. It has, as we shall see later, treated the agencies differently. If the Oireachtas has employed its exclusive law-making power to differentiate between agencies, the courts ought not to use one overarching principle when it reviews the decisions of those agencies.

Thirdly, from a procedural point of view, it puts the onus firmly on individual litigants to establish that a decision taken by a public body was irrational.[11] This may not be novel,[12] but, especially given the high threshold that must be scaled, it poses some troubling questions about the relationship between the citizen and the state.

A related point is that *O'Keeffe* carries all the disadvantages of a 'rule-based' approach – the risk of substantive injustice[13] – but none of the advantages – generally, the benefit of a 'rule-based' approach is that matters can be disposed of quickly: this is hardly the case with *O'Keeffe*, which in practice necessitates a lengthy review of the record to ensure that relevant evidence exists.[14]

Finally, and perhaps most importantly, it may not take account of important human rights questions. Is the same standard of review appropriate for refugee decisions, where it is no exaggeration to say that matters of life and death are involved, as for planning decisions where the consequences for the parties are much less severe? More pointedly, can the Irish courts ignore any longer the growing body of English law which applies an "anxious scrutiny" test in certain cases?[15]

At the same time, common sense dictates caution about disturbing settled law and, especially perhaps, borrowing legal concepts from other jurisdictions.[16] Hence the Supreme Court's apparent reluctance to grapple with the question without hearing full argument on it; and divergent views amongst eminent judges.[17] Ideally, any reform of *O'Keeffe* would be incremental, backed by substantial research and take into account the inherent difficulties in predicting the effects of divergence from past practice. Just as there are very good historical reasons for, say, the more intrusive powers of administrative review held by France's *Conseil d'État*, the jump towards *O'Keeffe* unreasonableness, in view of the huge – and expanding – judicial review list in the Irish High Court, may be motivated by a desire to ensure that the courts are not overwhelmed by a flood of complex and time-consuming public law litigation.

Just this concern prompted interesting comments from Kearns J in *Nash v Minister for Justice*.[18] An application under the Transfer of Sentenced Persons Act by a prisoner to serve the rest of his term in England was refused by the Minister after consultation with the Gardaí and other authorities, on the basis that the applicant was a suspect in two ongoing murder investigations. The applicant submitted that a test of "anxious scrutiny" should apply to the Minister's refusal, but, in rejecting the claim, Kearns J warned of the dangers of change:

> "[I do not] see any reason for extending the purview of the judicial review remedy by applying an 'anxious scrutiny' test in a case of this nature. This was the 'fall-back' submission advanced on behalf of the applicant. To go down that road would be a dangerous

9 *M&J Gleeson v Competition Authority* [1999] 1 ILRM 401, at 410. Furthermore, the doctrine may have been born in dubious circumstances: see Hogan and Morgan, *op. cit.*, at p.648.

10 See Paula Clancy and Gráinne Murphy, *Outsourcing Government: Public Bodies and Accountability* (Dublin, Tasc, 2006).

11 Hogan and Morgan, *op. cit.*, at p.645.

12 Professor Jowell has argued that at common law, prior to the introduction of the Human Rights Act 1998, "[t]he burden of proving unreasonableness was…placed squarely upon the claimant…" "Judicial Deference and Human Rights: A Question of Competence" in Paul Craig and Richard Rawlings eds, *Law and Administration in Europe* (Oxford, Oxford University Press, 2003).

13 Gerard Hogan, "Judicial Review, the Doctrine of Reasonableness and the Immigration Process" (2001) 6 Bar Review 329; Imelda Higgins, "If Not *O'Keeffe*, Then What?" (2003) 8 Bar Review 123.

14 *E.g. Ní Éilí v Environmental Protection Agency* [1998] IEHC 188; [1999] IESC 64.

15 Higgins, *op. cit.*

16 Kahn-Freund, "On Uses and Misuses of Comparative Law", 37 MLR 1, at 17-20 (1974). See also Ran Hirschl, "On the Blurred Methodological Matrix of Comparative Constitutional Law" in Sujit Choudhry ed, *The Migration of Constitutional Ideas* (Cambridge, Cambridge University Press, 2006).

17 McGuinness J in *Z v Minister for Justice, Equality and Law Reform* [2002] IESC 14, indicated a wish for full argument on the question, at [59] of her judgment. There have been varying statements from the Irish judiciary on the desirability of change. Some High Court judges have seemed happy with the current state of affairs. See *Memishi v Refugee Appeals Tribunal* [2003] IEHC 65 (Peart J); *Mohsen v Minister for Justice*, Unreported, High Court, Smyth J, 12 March 2002; *Cosma v Minister for Justice* [2006] IEHC 36 (Hanna J). Recently, in *TG v Refugee Appeals Tribunal* [2007] IEHC 174, Charleton J hedged, on the basis that the anxious scrutiny question is the subject of a number of reserved judgments. A desire for change has been evident from some quarters, however. McGovern J has gone furthest, actively applying the test in *KCC v Minister for Justice* [2007] IEHC 176, on the merits: "The respondent argues that the Minister's decision to refuse his consent must be decided on the basis of the established legal test of reasonableness as laid down by case law in this State including *O'Keeffe v An Bord Pleanála.* I accept that that is one basis on which the Minister's decision must be looked at but I think that the 'anxious scrutiny' test also applies." See also his decision in *I v Minister for Justice* [2007] IEHC 180. Strikingly, in a dissenting judgment, Fennelly J, in *Osayande and Lobe v Minister for Justice*, [2003] 1 IR 1, stated at p.203: "It seems to me that where as in this case, constitutional rights are at stake, [the *O'Keeffe* and *Keegan*] standard of judicial scrutiny must necessarily fall well short of what is likely to be required for their protection…In a case such as the present, the routine application of the unmodified test…makes decisions of the Minister virtually immune from review." See also *O(IL) v Refugee Appeals Tribunal* [2005] IEHC 470 (McMenamin J); and *Gritto v Refugee Appeals Tribunal* [2004] IEHC 119 (Laffoy J)(although the last two were applications for leave to apply for judicial review, rather than substantive decisions on the merits, the comments do not seem confined to the leave stage).

18 [2004] 3 IR 296.

> exercise in judicial adventurism which would set aside decades of caselaw in this area. To adopt such a course might quickly bring in its wake an endless stream of judicial review applications in cases where human rights might to any degree be said to be affected by some ministerial or administrative decision."

Kearns J's caution is typically wise, even if it may be at odds with his earlier suggestion about the logic of a blunt rule. As I hope to sketch now, redefining reasonableness and building an appropriate framework of judicial review for the modern administrative state will be a difficult process.[19]

Redefining Reasonableness

Perhaps the most intuitively attractive solution to the deference problem is suggested by Imelda Higgins: that "anxious scrutiny" ought to be applied in – at the very least – asylum cases.[20] This approach has the virtue of being supported by substantial English case law and commentary.[21] However, it is at once both too much and too little.

While the Irish jurisprudential tradition has long relied on borrowing from other common law jurisdictions, the justification for borrowing from England at the present time, in the present field, may not be as strong. The advent of the Human Rights Act in England has rendered a drastic effect on judicial decision-making there; it is far from clear that the European Convention on Human Rights has an analogous status in Irish law.[22] This is quite apart from any differences in legislative structure. In a thoughtful judgment, Clarke J recognised this latter problem. In *EMS v Minister for Justice*,[23] he noted the "potential difficulty in applying the *jurisprudence* of the courts of the United Kingdom in refugee matters to the Irish situation having regard to the difference in the manner in which the respective jurisdictions have legislated for the protection of those seeking refugee status." Though Clarke J borrowed from the English case law in this instance, his restrained approach seems correct. If "anxious scrutiny" is to be imported into Ireland, it should be accompanied by a careful appraisal of the comparisons and contrasts between the Irish and English systems.

Standing alone, the plea for "anxious scrutiny" also says too little. If it is to be applied to decisions in the area of refugee law, it is not easily cabined there. The justification for extending "anxious scrutiny" to certain administrative decisions is that key human rights are implicated, such as the rights to life, bodily integrity and family life. But whether one looks at the European Convention on Human Rights, or the Irish Constitution, there are other rights which arguably deserve the same, if not higher, levels of judicial protection. The right to private property, after all, is guaranteed twice by the Irish Constitution and again, albeit weakly, in the Convention. In short, if asylum decisions are to be subject to a higher standard of scrutiny, then the case is *a fortiori* for planning decisions.

Such a contention recently arose, somewhat obliquely, before the House of Lords. First, in *Kay v Lambeth Borough Council*,[24] the House had held that a local authority's housing policy was presumptively compliant with the property rights protection in the European Convention. Later, in *Huang v Home Secretary*, the respondent argued that sauce for the housing goose should be sauce for the immigration gander: that if housing policies were presumptively compliant with the Convention, then so were immigration regulations. The House was unimpressed:

> "Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented."[25]

This response gives the lie to any suggestion that "anxious scrutiny" can simply be employed in the immigration field. There must be some deeper justification for refusing to extend it to other areas, a justification which, unfortunately, must rely on abstract concepts such as the nature of democracy and the legitimacy of delegated powers.

There are further problems. The statutory schemes setting up Ireland's plethora of administrative and advisory agencies employ a bewildering array of legislative formulations to delegate authority. If jurists and judges are to be serious about giving effect to the intentions of the Oireachtas, sustained focus on the different policy choices made by elected representatives will be necessary. A blunt instrument of unreasonableness may not accord with parliamentary intention, but an insufficiently rigorous set of principles would have just the same shortcoming.

19 For the difficulties experienced by the Canadian courts, see David Dyzenhaus, "The Politics of Deference" in Michael Taggart ed, *The Province of Administrative Law* (Oxford, Hart, 1997) and generally Grant Huscroft and Michael Taggart eds, *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto, University of Toronto Press, 2006).

20 Higgins, *op. cit.* Dr Gerard Hogan, *op. cit.*, argues in a similar vein.

21 See Higgins, *op. cit.*

22 Suzanne Egan, "The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation" (2003) 25 DULJ 230; Evana Kirrane, "Human Rights in the Irish Constitution and in the European Convention on Human Rights – A Comparative Study" [2003] 21 ILT 7.

23 [2004] IEHC 398. However, after quoting this passage, McGovern J held in *KCC v Minister for Justice* [2007] IEHC 176: "while there are some differences of approach in the legislation in the United Kingdom and in Ireland the courts here and the United Kingdom have adopted a broadly similar approach to matters of Asylum Law."

24 [2006] UKHL 10; [2006] 2 AC 465. See especially Lord Bingham at [39], holding, "It is not necessary for a local authority to plead or prove in every case that domestic law complies with article 8. Courts should proceed on the assumption that domestic law strikes a fair balance and is compatible with article 8." See also Lord Nicholls, at [54-55] also raising the possibility of a landslide of litigation.

25 [2007] UKHL 11, [17].

Consider the webs of statutory provisions governing the relationship between agencies and the executive and legislature. Some, such as the Competition Authority, Office of Director of Corporate Enforcement and the Financial Services Regulatory Authority,[26] are not subject to policy directions from the government; many others are.[27] There are also differences in the mechanisms for accountability depending on the agency in question: usually, as with the Road Safety Authority, the chief executive officer must appear before Oireachtas committees when summoned;[28] however, on occasion, there is a prohibition on expressing a view on the merits and demerits of government policy, as with the Health Service Executive.[29]

What of the difference between the different types of decision that agencies make, and how they make them? Is a unilateral, politically-motivated decision by a Minister to be accorded the same level of respect as a regulation which is promulgated by an expert agency after members of the public and interested persons have been given the chance to comment on the record? On a less politically-fraught level, is an individual decision as to entitlement to benefits, which only directly affects one person, more or less deserving of curial deference than a decision taken at a higher level to exclude certain classes of individual from entitlement to benefits?

Finally, a question which has not been addressed in any systemic fashion – perhaps because the answer seems intuitively obvious[30] – is the justification for curial deference and why a reasonableness doctrine is needed in the first place. Is deference based on the nature of judicial review and the rule of law? Is it based on the separation of powers? Is it derived from the intentions of the Oireachtas? Or is it simply dictated by expediency: that the courts have less expertise than agencies in their specialist areas and do not have the time to run through administrative records with a fine toothcomb? It should be noted that some critics doubt that there is any rationale at all for the existence of a principle of curial deference.[31]

Addressing the justifications for administrative review alone would require a lengthy review of jurisprudence and commentary from Ireland and elsewhere. These are difficult questions, which will need sustained attention if they are to be answered properly. ■

26 Competition Act 2002; Company Law Enforcement Act 2001 and Central Bank and Financial Services Authority of Ireland Acts 2003, 2004.

27 *E.g.* the Health Service Executive, Commission for Energy Regulation, and the Commission for Communications Regulation: Health Act 2004, s.10; Electricity Regulation Act 1999, ss. 10, 38; and Communications Regulation Act 2002, s.13, respectively.

28 Road Safety Authority Act 2006, s.17(16).

29 Health Act 2004, s.21(9).

30 See the comments of O'Flaherty J ("We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis." *Faulkner v Minister for Industry and Commerce*, Unreported, Supreme Court, 10 December 1996); and more recently, Denham J ("The courts approach with caution the review of a specialist body. Such a body has particular expertise to apply to decision-making in their arena. That specialist knowledge is not held by the courts. The process of review by way of judicial review is not a full appeal, but rather a review of the process and fair procedures." *Scrollside Ltd. v. Broadcasting Commission of Ireland* [2006] IESC 24.)

31 For example, Professor Trevor Allan: "Human Rights and Judicial Review: A Critique of Due Deference" (2006) 65 CLJ 671; and "Common Law Reason and the Limits of Judicial Deference" in David Dyzenhaus ed., *The Unity of Public Law* (Oxford, Hart, 2004).

News

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If you missed the fabulous launch of "Christmas in the Library", a Cd of Christmas Songs in aid of the Bar Benevolent Fund, you can still buy a copy by contacting Conor Bowman at 01 817 4414 (Cost €20).

Artists include Maddie Grant, Mary Rose Gearty, Chris Meehan, The Bar Choir, Adrian Mannering, Declan Doyle, Cormac MacNamara, Michele Rayfus, Michael O'Donoghue, Jacinta Heslin, Mellissa English, Seamus Noonan, Mastaise Leddy, Conor Bowman and Maurice P. Gaffney

First Non Jury High Court trials in County Mayo

Pictured at the first Non Jury High Court trials in County Mayo were, Henry O.Bourke S.C., Fintan Murphy, County Registrar for County Mayo, Judge John MacMennamin, Judge Paul Gilligan, Judge George Birmingham, Pat O'Connor, President of the Mayo Solicitors' Bar Association

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 12, Issue 6, December 2007

A directory of legislation, articles and acquisitions received in the Law Library from the 9th October 2007 up to 16 November 2007.
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Delay

Sexual offences –Delay in making complaints – Dominion – Whether delay explicable by reference to alleged crime – Whether real risk of unfair trial - Disclosure – Failure to disclose material evidence – Fair procedures – Whether failure to disclose material evidence prejudicial to fair trial - *G v DPP* [1994] 1 IR 374; *Hogan v President of the Circuit Court* [1994] 2 IR 513; *B v DPP* [1997] 3 IR 140; *PC v DPP* [1999] 2 IR 25; *PO'C v DPP* [2000] 3 IR 87 and *JO'C v DPP* [2000] 3 IR 478 followed; *DH v Groarke* [2002] 3 IR 522 considered – Appeal dismissed (325/2004 – SC – 29/3/2006) [2006] IESC 19
G(P) v DPP

Delay

Right to fair trial – Right to expeditious trial – Complainant delay - Prosecutorial delay – Presumptive prejudice – Actual prejudice – Witnesses not available – Prohibition granted (2002/106JR – Quirke J – 20/4/2006) [2006] IEHC 128
D(P) v DPP

Delay

Right to fair trial – Reasonable expedition – Delay – Prosecutorial delay – Delay not referable to conduct of accused – Whether blameworthy delay on part of prosecuting authorities – Whether delay contributed to by accused – Right of accused to protection from stress and anxiety caused by delay – No evidence of stress and anxiety – Whether stress and anxiety can be inferred from facts – Public interest – Conflicting rights – Evidence – Procurement of evidence – Obligation to procure and disclose relevant material – *PM v DPP* [2006] IESC 22, [2006] 3 IR 172; *PM v Malone* [2002] 2 IR 560 and *TH v DPP* [2006] IEHC 48, [2006] 3 IR 520 applied - Constitution of Ireland 1937, Article 38.1 – Respondent's appeal allowed (172/2006 – SC – 28/3/2007) [2007] IESC 12
O'H(M) v DPP

Delay

Right to fair trial – Reasonable expedition - Sexual offences – Complainant delay – Prosecutorial delay – No specific prejudice – Whether applicant entitled to prohibition in absence of specific delay – Relief refused (2002/472JR – Quirke J – 4/4/2006) [2006] IEHC 120
M(J) v DPP

Delay

Right to fair trial – Right to trial with reasonable expedition – Prosecutorial delay – Actual prejudice – Presumed prejudice – Failure to explain delay - *BF v DPP* [2001] 1 IR 656 followed - Injunction restraining prosecution granted (2004/915JR - MacMenamin J – 6/4/2006) [2006] IEHC 135
D(A) v DPP

Evidence

Admissibility – Evidence as to credibility – Cross-examination – Test applicable – Consent not in issue – Whether evidence relating to credibility admissible – Disclosure – Late disclosure – Admissibility – Custody – Custody record – Bodily samples – Consent – Whether giving of consent to take bodily samples recorded in custody record – Child – Detention of child – Whether detention of child in cell illegal – Questioning of child – Whether child's social worker required to be present in absence of parent or guardian – *R v Narecha* [1997] 2 Cr App Rep 401 and *People (DPP) v AC* [2005] 2 IR 217 followed; *Harris v Tippett* (1811) 2 Camp 637 and *R v Busby* (1981) 75 Cr App Rep 79 considered - Criminal Justice (Forensic Evidence) Act 1990 Regulations 1992 (SI 30/1992), reg 6 – Criminal Justice (Forensic Evidence) Act 1990 (No 34), s 2 – Children Act 2001 (No 24), ss 56 and 58 – Leave to appeal refused (256/2006 – CCA – 24/5/2007) [2007] IECCA 48
People (DPP) v Onumwere

Evidence

Admissibility – Probative value of evidence

– Whether evidence of belief sufficient – Whether statement by accused of belief that substance in his possession a controlled drug sufficient evidence to confirm that substance in fact controlled drug – *R v Chatwood* [1980] 1 WLR 874; *Bird v Adams* [1972] Crim LR 174; *R v Bagshaw* [1995] Crim LR 433 and *City of Sunderland v Dawson* [2004] EWHC 2796 (Unrep, QBD, Thomas LJ, 12/11/2004) considered - Practice – Application for direction at close of prosecution's case – Role of trial judge or tribunal at direction stage – Test to be applied – Court must be satisfied as to existence of prima facie case – Whether trial judge should weigh evidence at direction stage – Whether tribunal of fact on full consideration having heard submissions on both sides could properly convict on evidence – Whether court required to accept or reject any particular piece of evidence in deciding whether prima facie case made out - *R v Galbraith* [1981] 1 WLR 1039 and *The People (DPP) v O'Shea (No 2)* [1983] ILRM 592 considered - - Misuse of Drugs Act 1977 (No 12), ss 3 and 27 – Case stated answered in favour of prosecution (2006/1638SS – Charleton J – 8/5/20070 [2007] IEHC 150
DPP v Buckley

Evidence

Failure to preserve evidence – Onus to show prejudice – Motor offences – Failure to make motor vehicle available for inspection by defence - Whether prejudice established or mere possibility established – Delay in applying – Whether good reason - *Murphy v DPP* [1989] ILRM 71; *McFarlane v DPP* [2006] IESC 11, [2006] 4 IR ?? considered – Extension of time granted but application dismissed (2004/1181JR - O'Donovan J – 11/7/2006) [2006] IEHC 2544
Halpenny v DPP

Evidence

Fingerprints – Admissibility of evidence – Reasonable suspicion – Whether burden of proof on prosecution to show that upon which reasonable suspicion founded lawfully obtained – Whether An Garda Síochána must show fingerprints retained lawfully taken or kept – Whether An Garda Síochána have power to take fingerprints on consent – Whether consent voluntary – *Hussein v Chong Fook Kam* [1970] AC 942; *The People (Attorney General) v Thomas McGrath* (1965) 99 ILTR 59; *The People (DPP) v Pringle* (1981) 2 Frewen 57; *The People (DPP) v Walsh* [1980] IR 294; *The People (DPP) v Costigan* [2006] IECCA 57, (Unrep, CCA, 28/4/2006), *The People (DPP) v Boyce* [2005] IECCA 143, (Unrep, CCA, 21/12/2005) and *The People (DPP) v Kenny* [1990] 2 IR 110 applied - Criminal Justice Act 1984 (No 22), s 6 – Held in favour of prosecution (2005/1088SS – Charleton J – 28/3/20070 [2007] IEHC 108
DPP (Walsh) v Cash

Extradition

Delay - Surrender of applicant – Lapse of time – Applicant seeking to restrain surrender due to lapse of time since alleged offence – Whether order for surrender should be made – *Lawlor v Hogan* [1993] ILRM 606 distinguished; *R v Jones* [2003] 1 AC 1 applied – Extradition Act 1965 (No 17), s 50 (2)(bbb) – Order for surrender of applicant to requesting state (2003/20EXT – Peart J – 26/10/2006) [2007] IEHC 85
Heywood v Minister for Justice

Extradition

Delay – Unjust oppressive – Lapse of time Delay of in excess of 10 years – Applicant residing openly in jurisdiction – No explanation for delay Extradition Act 1965 (No 17), s. 50(2)(bbb) – Extradition refused (2004/299SP – Dunne J – 4/4/2006) [2006] IEHC 354
Kerrigan v Attorney General

Extradition

Request – Delay - Whether extradition duly requested – Statutory interpretation – Strict interpretation of penal statute – Whether request for extradition communicated by diplomatic agent of requesting state – Delay – Whether respondent prejudiced by delay in request for extradition – Whether real risk of unfair trial if extradited – Whether legitimate expectation that prosecution not proceeding – *O'Rourke v Governor of Cloverhill Prison* [2004] IESC 29 [2004] 2 IR 456 and *Minister for Justice v SR* [2005] IEHC 37, (Unrep, Peart J, 15/11/2005) considered – Extradition Act 1965 (No 17), ss 23, 25 and 29(1) – Order for release of applicant (2006/64EXT – Peart J – 13/12/2006) [2006] IEHC 414
Attorney General v Q(MP)

Extradition

European arrest warrant – Abuse of process – Evidence of complainant withdrawn – Whether Irish court can have regard to strength of prosecution case – Whether court should have regard to fact that complaint withdrawn – Whether abuse of process - *Minister for Justice, Equality and Law Reform v Dundon* [2005] IEHC 13 [2005] 1 IR 261 followed – Surrender ordered (2006/50Ext – Peart J – 31/10/2006) [2006] IEHC 322
Minister for Justice v Dubikatlis

Extradition

European arrest warrant – Correspondence – Organised or armed robbery – Ambiguous translation of warrant – European Arrest Warrant Act 2003 (No 45) – Order granted (2006/19EXT – Peart J – 4/10/2006) [2006] IEHC 293
Minister for Justice, Equality and Law Reform v Stelmahs

Extradition

European arrest warrant – *Habeas corpus* – Order for surrender – Appeal – Application for release – Whether applicant entitled to be released where order of surrender under appeal – Whether High Court order under appeal is in force – Rules of the Superior Courts 1986 (SI 15/1986), O 58, r 18 – European Arrest Warrant Act 2003 (No 45), ss 16 and 18(5) – Constitution of Ireland 1937, Article 40.4.2º – Council Framework Decision 2002/584/JHA, article 23 – Applicant's appeal allowed (7/2006 – SC – 3/5/2007) [2007] IESC 20
Ó Fallúin v Governor of Cloverhill Prison

Extradition

European arrest warrant – Procedure – Points of objection – Amendment – Purpose of points of objection – Whether actual issues identified – Order for surrender made (2006/92Ext – Peart J – 31/10.2006) [2006] IEHC 321
Minister for Justice v Stowronski

Extradition

European arrest warrant – Production of warrant – Whether respondent entitled to actual warrant - *Minister for Justice v Fallon aka Ó Fallúin* [2005] IEHC 321(Unrep, Finlay Geoghegan J, 9/9/2005) considered - European Arrest Warrant Act 2003 (No 45) - Council Framework Decision 2002/584/JHA, articles 8 and 15 – Production of warrant ordered (2005/8Ext – Peart J – 29/11/20050 [2005] IEHC 409
Minister for Justice v Altaravicius

Extradition

European arrest warrant – Rape – Indecent assault – Delay – Credibility – Serious risk of unfair trial – Whether state of health prejudiced capacity to defend charges – *PM v DPP* [2006] 2 ILRM 361 and *H v DPP* [2006] IESC 55 (Unrep, SC, 31/7/2006) followed – European Arrest Warrant Act 2003 (No 45) – Order granted (2006/30EXT – Peart J – 24/11/2006) [2006] IEHC 372
Minister for Justice, Equality and Law Reform v TMC

Probation

Probation order – Breach of probation order – "Called on" – Time period – Whether accused in breach of probation order must be finally dealt with prior to expiration of probation order – Statute – Interpretation – Probation of Offenders Act 1907 (7 Edw vii, c 17), ss 1 and 6 – Case stated answered (2006/1692SS – Budd J – 4/5/2007) [2007] IEHC 151
DPP (Lynch) v W(M)

Proceeds of crime

Freezing order – Discharge – Material non-disclosure- Whether jurisdiction to vacate *ex parte* order – Whether material non-disclosure – Consequence of non-disclosure – Discretion of court - *Bambrick v Cobley* [2005] IEHC 43 (Unrep Clarke J, 25/2/2005) followed – Proceeds of Crime Act 1996 (No 30), s 2 – Discharge of order refused (2002/15006P – Clarke J – 26/5/2006) [2006] IEHC 185
McK(F) v C(D)

Proceeds of crime

Practice and procedure – Discharge of order – Variation of order – Inherent jurisdiction of court to discharge or vary order – Judgment in default of appearance – Interlocutory order – Whether order caused injustice – *Maher v Dixon* [1995] 1 ILRM 218 followed – Proceeds of Crime Act 1996 (No 30), s 3 – Order refused (1997/4783P – Finnegan P – 3/11/2006) [2006] IEHC 396
M(FM) v M(B)

Proceeds of crime

Procedure to be adopted – Application for declaration that monies constitute proceeds of crime – Whether reasonable grounds for belief of plaintiff that monies constitute proceeds of crime – Whether belief amounts to evidence – Whether monies constituting proceeds of crime – *F McK v GWD* [2004] 2 IR 470 applied – Proceeds of Crime Act 1996 (No 30), s 3 – Order granted (2003/13362P – White J – 31/7/2006) [2006] IEHC 447
McK (FJ) v G(S)

Proceeds of crime

Properties – Acquisition – Onus on respondent – Family home – Investment property - Whether properties acquired with proceeds of crime - Proceeds of Crime Act 1996 (No 30), s. 2(3) – Orders made in relation to various properties (2005/8CAB – Finnegan p -8/5/2006) [2006] IEHC 141
McK (F) v D(S)

Road traffic offence

Evidence – Use of exact statutory formula – Evidence of "having" control rather than "exercising" control – Whether charge should be dismissed - Road Traffic Act 1961 (No 24), s 49(1)(a) – Case stated answered that exact formula need not be used (2006/1343SS – De Valera J – 8/11/20060 [2006] IEHC 386
DPP (O'Connor) v Cronin

Sentence

Undue leniency – Review of sentence – Aggravating nature of offences – Interconnection between offences of manslaughter and rape – Whether sentences unduly lenient – Whether trial judge adequately addressed aggravating nature of offences – Whether trial judge erred in law in not adequately addressing aggravating nature of offences – Criminal Justice Act 1993 (No 6), s 2 – Appeal allowed, sentence increased from 8 to 12 years (64/2006 – CCA – 3/5/20070 [2007] IECCA 29
People (DPP) v Horgan

Trial

Evidence – Duty to preserve – Missing physical evidence – Perjury charge - Prohibition - Delay – Unexplained delay in bringing proceedings - *Dekra v Minister for Environment* [2003] 2 IR 270 and *De Roiste v Minister for Defence* [2001] 1 IR 190 followed – Extension of time to bring judicial review refused (2005/1254JR – Ó Néill J – 17/5/2006) [2006] IEHC 158
Donnelly v DPP

DAMAGES

Personal injury

Quantum – Personal Injuries Assessment Board Book of Quantum – Exaggeration - Civil Liability and Courts Act, 2004 (No 31), s, 22 – Damages of €73,446 awarded (2002/15876P – Herbert J – 16/2/2006) [2006] IEHC 41
Connaughton v Connaughton

Personal injury

Quantum– Past suffering – Future suffering - Plaintiff awarded €58,500 (2005/2305P - Finnegan P – 25/7/2006) [2006] IEHC 222
Corbett v Quinn Hotels Ltd

Personal injury

Road traffic accident – Liability – *Quantum* – Contributory negligence – MIBI agreement – Duty of care – Whether plaintiff wore seatbelt – Whether plaintiff knew driver intoxicated – Whether plaintiff knew driver uninsured to drive vehicle – *Kinsella v Motor Insurers' Bureau of Ireland* [1997] 3 IR 586 distinguished – *White v White* [2001] 2 All ER 43 applied – Contributory negligence of 50% found, damages of €45,250 awarded against first defendant (2004/15270P – Peart J – 31/7/2006) [2006] IEHC 287
Devlin v Cassidy and MIBI

Personal injury

Road traffic accident – Liability – *Quantum* – Contributory negligence – Failure to wear seatbelt – Failure to ensure seatbelts worn by passengers – *Hamill v Oliver* [1977] IR 73 distinguished – Road Traffic (Construction, Equipment and Use of Vehicles)(Amendment) (No.3) Regulations 1991 (SI 359/1991) – Damages of €165,252.74 awarded to first plaintiff; damages of €204,165.96 awarded to second plaintiff; and damages of €445,632.31 awarded to third plaintiff (2001/1910P – 2001/1893P – 2001/19055P – Peart J – 31/7/2006) [2006] IEHC 269
McNelis (a minor) v Armstrong; McNelis (a minor) v Armstrong; McGill (a minor v Armstrong

DEFENCE FORCES

Continuation in service

Absent without leave – Failure to continue applicant in service – Whether applicant on notice of service record – Whether failure to provide applicant with opportunity to remedy conduct – Relief refused (2006/31JR – Herbert J – 10/11/2006) [2006] IEHC 334
Carroll v Minister for Defence

Discharge

Oral hearing – Delay – Whether applicant entitled to oral hearing on discharge – Whether delay in seeking relief – Leave to seek judicial review refused (2004/48JR – Ó Néill J – 5/4/2006) [2006] IEHC 116
McKenna v GOC Eastern Brigade Defence Forces

EDUCATION

Special needs

Duty to provide for education – Provision of appropriate educational services – Early intervention – Whether "applied behavioural analysis" only appropriate method of education for plaintiff – Whether breach of statutory duty – Whether breach of constitutional rights – Whether breach of human rights – Negligence – Whether breach of duty of care in delay in diagnosing plaintiff's autism – Whether plaintiff entitled to award of damages, declarations and/or injunctions – *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84 considered – Health Act 1970 (No 1) – Education Act 1998 (No 51), ss 6 and 7 – Equal Status Act 2000 (No 8) – European Convention on Human Rights Act 2003 (No 20) – Constitution of Ireland 1937, arts 40 to 42 – Defendant found not to have breached duty to provide for plaintiff's education by provision of one specific teaching method over another and award of €60,686.56 damages for delay in diagnosis of plaintiff's autism (2004/18520P – Peart J – 16/5/2007) [2007] IEHC 170
O'C (S) (a minor) v Minister for Education

EMPLOYMENT

Disciplinary procedure

Interlocutory injunction – Teacher – Disciplinary proceedings – Attempt to restrain – Injunction refused (2006/1239P – Clarke J – 13/4/2006) [2006] IEHC 130
Becker v Board of Management of St Dominics

EQUITY

Injunction

Mandatory injunction – Necessity for supervision – Whether damages adequate remedy – Whether contract for personal services – Petrol pollution of site – Remediation works – Agreement to remediate – Whether plaintiff entitled to mandatory order – Whether sufficiently precise – Whether targets achievable – Whether targets achievable – *Sheppard v Murphy* (1868) IR 2 Eq 544 and *Neville & Sons Ltd v Guardian Builders Ltd* [1990] ILRM 601 considered – Mandatory injunction granted (2004/1936P – Lavan J – 6/12/2006) [2006] IEHC 391
Meath County Council v Irish Shell Ltd

EVIDENCE

Admissibility

Without prejudice negotiations – Compromise – Whether offer made in negotiations for settlement – Whether admission of liability – Whether concluded agreement – Whether plaintiff acted to its detriment on foot of compromise – Whether defendant estopped from denying agreement – Whether correspondence admissible to interpret terms of compromise – Whether terms of compromise achievable – Whether agreement frustrated – *Walker v Wilsher* (1889) 23 QBD 335; *Tomlin v Standard Telephone and Cables Ltd* [1969] 3 All ER 201; *Rush and Tomkins Ltd v Greater London Council* [1989] AC 1280; *Quinlivan v Tuohy* (Unrep, HC, Barron J, 29/7/1992); *Greencore v John Murphy* [1995] 3 IR 520; *Muller & Muller v Linsley & Mortimer* [1996] PNLR 74; *Hodgkinson and Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178; *Unilever plc v Proctor and Gamble Co* [2000] 1 WLR 2436 and *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2002] EWHC 233 (Ch) followed – Agreement reached; correspondence admissible to interpret terms of compromise (2004/1936P – Lavan J – 6/12/2006) [2006] IEHC 391
Meath County Council v Irish Shell Ltd

FAMILY LAW

Child Abduction

Wrongful removal – Consent of applicant – Onus of proof – Onus on respondent – Whether respondent establishing consent – Whether removal wrongful - *R(S) v R(MM)* [2006] IESC 7 (Unrep, SC, 16/2/2006) applied Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – Return of children ordered (2006/3HLC - Finlay Geoghegan J – 6/4/2006) [2006] IEHC 121
W(B) v W(M)

Child abduction

Wrongful removal or retention – Habitual residence of child – Subsequent acquiescence – Parental responsibility – Family rights – Adoption in another jurisdiction – Abandonment- Whether foreign adoption procedure includes criteria which would breach constitutional rights of family – Whether court should exercise discretion to refuse to return child where constitutional rights at risk – *London Borough of Sutton v RM* [2002] 4 IR 488 considered; *CM v Delagacion Provincial de Malaga* [1999] 2 IR 363 followed - Adoption Act 1988 (No 30), s 3 – Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – Constitution of Ireland, 1937, Articles 41 and 42 – Council Regulation (EC) 2201/2203 – Hague Convention on the Civil Aspects of International Child Abduction 1980, articles 3, 13 and 20 – Order for return refused (2006/8HLC – Dunne J – 7/9/2006) [2006] IEHC 448
Foyle Health and Social Services Trust v C(E)

FREEDOM OF INFORMATION

Access to records

Appeal on point of law from Information Commissioner – Inferences to be drawn from primary facts before Commissioner – Whether contract for services between Department of Education and religious orders – Whether department obliged to furnish records held by religious orders – Whether respondent erring in inferences made from primary facts before him – *Deely v Information Commissioner* [2001] 3 IR 439 considered – Freedom of Information Act 1997 (No 13), s 24(1) – Appeal dismissed (2002/55MCA – White J – 30/3/2007) [2007] IEHC 152
O'Grady v Information Commissioner

Appeal

Information Commissioner - *Locus standi* – Whether notice party "requester"– Whether notice party "relevant person" – Whether notice party "person affected" - Post mortem inquiry – Organ retention – *Deely v Information Commissioner* [2001] 3 IR439; *Sheedy v Information Commissioner* [2005] IESC 35, [2005] 2 IR 272 and *Construction Industry Federation v Dublin City Council* [2005] 2 IR 496 applied - Freedom of Information Act 1997 (No13), ss 6(1), 7, 14, 20(1), 21, 23(10(a)(iv), 26(1)(a) and (b), 34(2), 37(6), 42(1) – Freedom of Information (Amendment) Act 2003 (No 9), s 17 – Appeal dismissed (200549MCA – Quirke J – 30/3/2007) [2007] IEHC 113
National Maternity Hospital v Information Commissioner

HEALTH

Public health

Licensed premises – Prohibition on smoking in specified places – Exempted structures – Whether structure in compliance with legislation – "Outdoors" – "Perimeter" – "Wall" – "Indoors" – Public Health (Tobacco) Act 2002 (No 6), s 47(7)(d) – Public Health (Tobacco) (Amendment) Act 2004 (No 6), s 16 – Declaration refused (2006/2115P – Murphy J – 21/7/2006) [2006] IEHC 307
Malone Engineering Products Ltd v Health Service Executive

HOUSING

Traveller accommodation

Duty on housing authority to provide accommodation – Extent of duty – Whether housing authority acted reasonably in refusing to provide fully equipped caravan in addition to site – *Maha Lingam v Health Services Executive* [2005] IESC 89 (Unrep, SC, 4/10/2005); *Chapman v United Kingdom* (2001) 33 EHRR 18; *Codona v United Kingdom* (Unrep, ECHR, 7/2/2006) followed - Housing Act 1966 (N 21), s 56(2) – Housing Act 1988 (No 28), ss 2 & 13 – Housing (Traveller Accommodation) Act 1998 (No 33) – Claim dismissed (2006/131JR – Charleton J – 22/1/2007) [2007] IEHC 4
Doherty v South Dublin County Council

HUMAN RIGHTS

Equality

Discrimination – Treatment of travellers as compared with settled community – Race directive – Housing authority – Statutory scheme of enforcement – Equal Status Act 2000 (No 8) – European Convention on Human Rights Act 2003 (No 20), ss 2 and 3 – Equality Act 2004 (No 24) – Council Directive 2000/43/EC – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, articles 8 and 14 - Claim dismissed (2006/131JR – Charleton J – 22/1/2007) [2007] IEHC 4
Doherty v South Dublin County Council

Equality

Discrimination - Provision of accommodation – Human rights – Whether obligation on defendant to provide mobile home accommodation for plaintiffs – Whether plaintiff's human rights breached – Whether statutory obligations performed in manner compatible with European Convention on Human Rights – Whether defendant in breach of statutory duties – *University of Limerick v Ryan* (Unrep, Barron J, 21/2/1991); *Chapman v United Kingdom* (2001) 33 EHRR 399; *R v A* [2001] 3 All ER 1 and *R (Bernard) v Enfield London BC* [2003] LGR 423 and *Bode v Minister for Justice* [2006] IEHC 341 (Unrep, Finlay Geoghegan J, 14/11/2006) considered – Housing Act 1988 (No 28), ss 9 to 13 – Housing (Traveler Accommodation) Act 1998 (No 33) – Equal Status Act 2000 (No 8) – European Convention on Human Rights Act 2003 (No 20) – Defendant found to be in breach of art 8 of European Convention on Human Rights (2006/1904P – Laffoy J – 22/5/2007) [2007] IEHC 204
O'Donnell v South Dublin County Council

IMMIGRATION

Asylum

Appeal – Error of fact made by refugee appeals tribunal – Whether error of fact going to jurisdiction of respondent to validly make decision in respect of applicant – Whether speculation engaged in by respondent – Whether rational basis for conclusions reached by respondent – Whether substantial grounds for grant of leave to seek judicial review – *M (AB) v Minister for Justice* (Unrep, O'Donovan J, 23/7/2001) considered – Application refused (2005/737JR – McGovern J – 22/5/2007) [2007] IEHC 148
K (K) v Refugee Appeals Tribunal

Asylum

Appeal – Oral hearing - Credibility – Assessment of credibility – Whether decision of refuge appeals tribunal so irrational as to warrant grant of leave to seek judicial review – Whether substantial grounds for grant of leave to seek judicial review – Whether anxious scrutiny test to be applied - *I(V) v Minister for Justice* [2005] IEHC 150 (Unrep, Clarke J, 10/5/2005) and *Imafu v Minister for Justice*[2005] IEHC 416 (Unrep, Peart J, 9/12/2005) followed – Leave to seek judicial review refused (2005/520JR – McGovern J – 30/6/2006) [2006] IEHC 203
O (K) v Minister for Justice

Asylum

Appeal – Hearing – Credibility – Whether Tribunal decision ill founded – whether sufficient evidence for Tribunal to dismiss appeal – *Imafu v Minister for Justice* [2005] IEHC 186 (Unrep, Clarke J, 27/5/2005) and *Imafu v Minister for Justice* [2005] IEHC 482 (Unrep, Peart J, 9/12/2005) considered – Application dismissed (2005/506JR – Murphy J– 6/11/2006) [2006] IEHC 384
O (A) v Refugee Appeals Tribunal

Asylum

Appeal – Hearing - Credibility – Assessment of credibility – Whether decision of refuge appeals tribunal so irrational as to warrant grant of leave to seek judicial review – Whether substantial grounds for grant of leave to seek judicial review – *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) and *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 applied; *AO v Minister for Justice* [2003] 1 IR 1 and *Z v Minister for Justice* [2002] 2 ILRM 215 considered – Application refused (2006/4JR – Charleton J – 18/4/2007) [2007] IEHC 174
G (T) v Refugee Appeals Tribunal

Asylum

Appeal - Reasoned decision - Refugee Appeal Tribunal –Whether sufficient evidence to reach conclusion – Whether decision reasonable – *A(R) v Minister for Justice* [2004] IEHC 241 (Unrep, Peart J, 26/5/2004) followed - Application dismissed (2004/739JR - De Valera J – 4/7/2006) [2006] IEHC 246
E (M) v Minister for Justice

Asylum

Credibility – Fear of persecution – County of origin information – Minimal basis for claim – Refugee Act 1996 (No 17), s13 – Leave to seek relief by way of judicial review granted (2005/440JR – Clarke J – 27/6/2006) [2006] IEHC 247
S (BR) v Refugee Applications Commissioner

Asylum

Fair procedures – Access to previous decisions of tribunal – Statutory discretion – Refugee status – Appeal against refusal to grant refugee status – Whether applicants entitled to access to previous decisions of tribunal – Whether tribunal exercised statutory discretion lawfully – *Manzeke v Secretary of State for the Home Department* [1997] Imm AR 524 approved - Refugee Act 1996 (No 17), ss 16(17), 19 and 28 – Immigration Act 2003 (No 26), s 7 – Constitution of Ireland 1937, Article 40.3 – Respondent's appeal dismissed (294/2005 – SC – 26/7/2006) [2006] IESC 53
A (PP) v Refugee Appeals Tribunal

Asylum

Leave – Credibility – Fear of persecution – County of origin information – *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 followed – Leave to seek judicial review granted (2005/1025JR – Feeney J – 1/6/2006) [2006] IEHC 302
G (DA)l v Refugee Appeals Tribunal

Asylum

Legitimate expectation – Family reunification – Member of family – Permission to be in State – Discretion of Minister – Whether spouse entitled to join refugee in State – *Fakih v Minister for Justice* [1993] 2 IR 406 considered -
Refugee Act 1996 (No 17), s 18 – *Mandamus* granted (2005/1192JR – Clarke J – 2/2/2006) [2006] IEHC 30
I (V) v Commissioner of an Garda Siochána

Asylum

Judicial review - Fair procedures – Assessment of credibility – Whether substantial grounds for granting leave to apply for judicial review – *McNamara v An Bord Pleanála* [1995] 2 ILRM 125 considered; *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) followed – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2)(b) - Application refused (2005/1050JR – Charleton J – 30/7/2007) [2007] IEHC 173
A (T) v Minister for Justice

Citizenship

Post- nuptial citizenship – Fair procedures – allegations that marriage fraud – Citizenship refused – Applicant not given hearing or opportunity to rebut allegations- Irish Nationality and Citizenship Act 1956 (No 26), s 8 – *Certiorari* granted (2003/950JR – Hanna J – 11/10/2005) [2005] IEHC 478

Deportation

Application for leave to remain in State on humanitarian grounds – Whether proper consideration given to psychological condition of applicant – Whether error of fact going to jurisdiction of respondent to validly make decision in respect of applicant – Whether respondent unlawfully fettering discretion – Whether respondent having regard to wrong issue – Whether arguable case for grant of leave to seek judicial review – Whether fair question to be tried – Whether leave to seek judicial review should be granted – *G v DPP* [1994] 1 IR 374; *K v Minister for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005) and *A v Minister for Justice* [2007] IEHC 19 (Unrep, MacMenamin J, 11/1/2007) considered – Immigration Act 1999 (No 22), s 3 – Application refused (2006/90JR – MacMenamin J – 28/2/2007) [2007] IEHC 162
L (U) v Minister for Justice

Deportation

Judicial review – Leave – On notice – Test

to be applied – Procedure to be observed in application for leave to seek judicial review and injunction restraining deportation – Evidential threshold – Appropriate test – Distinction between standard of arguability and that of substantial grounds – *G v DPP* [1994] 1 IR 374; *DC v DPP* [2005] 4 IR 281 applied; *Potts v Minister for Defence* [2005] 2 ILRM 517 not followed - – New material – Whether matters presented in application to revoke deportation order must be materially different from those presented or capable of being presented in making of deportation order itself - *D v Minister for Justice* [2006] IEHC 140, (Unrep, Ó Néill J, 3/5/2006); *K v Minister for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005); *M v Minister for Justice* (Unrep, Peart J, 6/11/2003) and *C v Minister for Justice* [2006] IESC 36, (Unrep, SC, 10/7/2006) followed - Immigration Act 1999 (No 22), s 3 – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 20 – Leave to apply for judicial review refused (2006/280JR – MacMenamin J – 12/1/2007) [2007] IEHC 19
A (CR) v Minister for Justice

Deportation

Legality of detention – Contempt of court – Intention to deport – Whether continuing intention lawful pending judicial review proceedings – Immigration Act 1999 (No`22), s 5 – Constitution of Ireland 1937, Article 40.4 – Appeal dismissed (380/2005 – SC – 9/3/20065) [2006] IESC 13
A (JO) v Minister for Justice

Deportation

Reconsideration – New submissions - Family rights – Father of Irish citizen – Failure to disclose paternity in original application – Material non-disclosure – Speed of reconsideration – Short deadline for reply - Whether adequate consideration given to new submission – Whether rights of child considered – Father refused leave but child granted leave to seek judicial review; deportation injuncted pending hearing (2006/371JR – Dunne J – 4/7/2006) [2006] IEHC 211
E (O) v Minister for Justice

Deportation

Right of access to legal advice – Whether conscious and deliberate act to defeat right – Circumstances in which stay operates – Conduct of applicant – Proceedings initiated outside time limit – Whether applicant's conduct disentitling him to relief - *Adebayo v Commissioner of An Garda Síochána* [2006] 2 I.R. 298; *Re The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 and *Margine v Minister for Justice Equality and Law Reform* [2004] IEHC 261 (Unrep, Peart J, 14/7/2004) considered – Application dismissed (2003/255JR – MacMenamin J – 13/7/2006) [2006] IEHC 251
O (AGA) v Minister for Justice

Naturalisation

Negligence – Whether defendant under a duty of care to provide information to applicants for naturalisation – Whether defendant negligent in provision of information to applicants for naturalisation – *Dublin Corporation v McGrath* [1978] ILRM 208 applied – Claim dismissed (2005/4452P – Smyth J – 1/5/2007) [2007] IEHC 157
Aswad v Minister for Justice

INJUNCTIONS

Interlocutory injunction

Adequacy of damages – Difficulty in assessing damages – Whether injunction should be granted where difficult but not impossible to assess damages – *Curust Financial Services Ltd v Loewe-Lack-Werk* [1994] 1 IR 450 and *Hart v. Kelly* (Unrep, Laffoy J, 16/7/1997) applied – Interlocutory injunction granted (2006/342P – MacMenamin J – 17/2/20060 [2006] IEHC 171
Whelan Frozen Foods Ltd v Dunnes Stores

Interlocutory injunction

Electricity Supply Board – Power line - Enter land – Way leave notice served – Defendant disputing planning permission – Common good - *ESB v* Harrington (Unrep SC, 9/5/2002) and ESB *v Gormley* [1985] IR 129 - Electricity (Supply) Act 1927 (No 27), s 53 – Injunction granted (2005/2008P - Clarke J – 23/5/2006) [2006] IEHC 214
ESB v Burke

INSURANCE

Motor insurance

Commercial policy of insurance – Indemnity refused on basis that policy did not cover passenger liability – Claim by passenger for declaration that defendant bound to indemnify driver – Whether defendant bound to indemnify driver pursuant to provisions of policy of insurance – Whether passenger cover applicable under policy – Whether driver insured to carry passengers in vehicle – Whether defendant bound to indemnify driver – Whether vehicle constructed primarily for carriage of one or more passengers – Whether passenger cover properly excluded – Whether driver obliged at time to have insurance cover against passenger liability – Whether compulsory insurance statutorily mandated – Whether passenger could litigate directly against defendant – *Whelan v Dixon* (1963) 97 ILTR 195 approved - Road Traffic Act 1961 (No 24), ss 56, 62, 65 and 76 – Civil Liability Act 1961(No 40), s 62 – Road Traffic (Compulsory Insurance) Regulations 1962 (SI 14/1962), reg 6 – Road Traffic (Compulsory Insurance) (Amendment) Regulations 1992 (SI 346/1992), reg 6 – Council Directive 90/232/EEC – Claim dismissed (3315P/1998 – Laffoy J - 2/2/2007) [2007] IEHC 105
Power v Guardian PMPA Insurance Ltd

INTELLECTUAL PROPERTY

Trade mark

Registration – Characterisation of use – Whether use of registered trade mark amounted to genuine use – Meaning of requirement of genuine use in relation to goods for which trade mark is registered – Purpose of registration – Whether trade mark registered in bad faith – Meaning of bad faith in this context – *Ansul BV v Ajax Brandbeveiliging BV (Case C-40/01)* [2003] ECR I-2439*, La Mer Technology Inc v Laboratoires Goemar SA* (Case *C-259/02)* [2004] E.C.R. I-1159 and *The Sunrider Corporation v Office for Harmonisation in the Internal Market (OHIM) (Case C-416/04)* (Unreported, European Court of Justice, 11th May, 2006) followed; *Harrison v Teton Valley Trading Company Ltd* [2004] EWCA Civ 1028, [2004] 1 WLR 2577 and *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 considered - Council Directive 89/104/EEC – Trade Marks Act 1996 (No 6), s 51(1)(a) – Trade Marks Rules 1996 (SI 199/1996) – Revocation granted but declaration of invalidity refused (2006/1391P – Finlay Geoghegan J – 20/4/2007) [2007] IEHC 126
Compagnie Gervais Danone v Glanbia Foods Society Ltd

JUDICIAL REVIEW

Costs

Deportation - Judicial review- Application withdrawn – Substantive relief achieved – New evidence – Whether applicant entitled to costs – Whether special circumstances – Rules of the Superior Courts 986 (SI 15/1986), O 99, r 1 – Costs awarded to applicants (2003/76JR – Herbert J – 16/11/2006) [2006] IEHC 371
G (S) v Minister for Justice

Locus standi

Sufficient interest – Substantial grounds – Alternative remedy – Delay – Applicant not applicant for certificates in question – Applicant gaining no benefit from certificates – Certificates ultimately granted by respondent – Whether defence of other court proceedings sufficient interest – Whether failure to pursue alternative remedy – *Cahill v Sutton* [1980] IR 269; *Lancefort Ltd v*

An Bord Pleanála (No 2) [1999] 2 IR 270; *De Roiste v Minister for Defence* [2001] 1 IR 190; *Criminal Assets Bureau v Hunt* [2003] 2 IR 168; *Mulcreevy v Minister for Environment* [2004] 1 IR 72 and *Construction Industry Federation v Dublin City Council* [2005] IEHC 16, [2005] 2 IR 496 followed – Housing (Miscellaneous Provisions) Act 1979 (No 27) s 18 – Taxes Consolidation Act 1997 (No 39) s 372AT – Finance Act 2002 (No 5) s 24 – Rules of the Superior Courts 1986 (SI 15/1986) O 84, rr 20(4) and 21(1) – Application for judicial review dismissed (2006/197JR – Kelly J – 15/8/2006) [2006] IEHC 255
John Paul Construction Ltd v Minister for the Environment

Natural and constitutional justice

Fair procedures – Rejection of psychiatric evidence by respondent on basis that it inferred psychiatric witness to be unprofessional for failing to have clinical notes with him at hearing – Whether respondent failing to consider all relevant material – Whether respondent should have afforded applicant and her psychiatrist opportunity to produce clinical notes – Whether respondent acting in breach of fair procedures – Whether respondent acting *ultra vires* – Whether adequate alternative remedy – *Stefan v Minister for Justice* [2001] 4 IR 203 applied – Residential Institutions Redress Act 2002 (No 13), s 10 – Relief granted (2006/618JR – Gilligan J – 3/11/2006) [2006] IEHC 401
S (P) v Residential Institutions Redress Board

Relief

Discretion – Moot – Delay – Impugned order expired – Whether any benefit to be gained – Inordinate and unexcused delay – Whether good reason for extending time – Barring order – Collateral attack on family law orders - *Barry v District Judge Fitzpatrick* [1996] 1 ILRM 512 and *Q(M) v Judge of Northern Circuit* (Unrep, McKechnie J, 14/11/2003) applied *DK v Judge Timothy Crowley* [2002] 2 IR 744 considered – Relief refused (2004/529JR – MacMenamin J – 28/4/2006) [2006] IEHC 147
C (C) v Judge Early

LICENSING ACTS

Licence

Intoxicating liquor licence – Renewal – Objection to renewal of licence – Fair procedures – Bias – Prejudgment – *O'Neill v Beaumont Hospital* [1990] ILRM 419 and *O'Reilly v Cassidy (No 2)* [1995] 1 ILRM 311 followed – Intoxicating Liquor Act 1960 (No 18) – *Certiorari* refused (2006/579JR – Feeney J – 8/9/2006) [2006] IEHC 306
Hume v Judge O'Donnell

MENTAL HEALTH

Detention

Involuntary patient – Mental disorder – Mental health tribunal – Standard of proof – Legality of detention – Validity of renewal order – Forms – Whether statutory forms appropriate – Purposive approach - Whether applicant suffered from mental disorder – *Gooden v St Otteran's Hospital* [2005] 3 IR 617 and *Re Philip Clarke* [1950] IR 235119 applied - Mental Health Act 2001 (No 25), ss 3 and 15(2) – Detention found to be lawful (2007/117SS – Ó Néill J – 2/3/2007) [2007] IEHC 73
R (M) v Byrne

Detention

Involuntary patient – Mental Health Tribunal – *Habeas corpus* – Whether Mental Health Tribunal had jurisdiction to affirm detention where at time of review applicant was in unlawful detention – Whether decision by Tribunal to affirm admission order had effect of curing past irregularities in patient's detention – Mental Health Act 2001 (No 25), ss 3, 4, 9, 10, 12, 14, 16, 18, and 23 – Detention found to be lawful (2007/408SS – Charleton J – 25/4/2007) [2007] IEHC 129
O'D (T) v Kennedy

Detention

Involuntary patient – Renewal order – Making – Coming into effect – Whether Mental Health Tribunal had jurisdiction to affirm renewal order extending applicant's detention where such renewal order was made after expiry of previous renewal or admission order – Weight to be attached to endorsement of renewal of detention – Mental Health Act 2001 (No 25) – Detention found to be unlawful (2007/330SS - Peart J – 24/4/2007) [2007] IEHC 136
M (A) v Kennedy

Detention

Lawfulness – Remedy – Availability – Delay in making complaint - Temporary chargeable patient – Transitional provisions – Mental health tribunal –- Extension of period of detention – Opinion to be formed by certifying medical officer – Power to make renewal order – Statutory safeguards – Jurisdiction of mental health tribunal – Whether possible to rely on defects in prior orders – Best interests of the patient – Obligation to make timely complaint – *State (Byrne) v Frawley* [1978] IR 326 considered; *A v Governor of Arbour Hill Prison* [2006] IESC 45 [2006] 4 I.R. 88 and *H(J) v Russell* [2007] IEHC 7 (Unrep, Clarke J, 6/2/2007) followed - Mental Treatment Act 1945 (No 19), ss 184, 207 and 208 – Mental Health Act 2001 (No 25), ss 4, 14, 15, 18 and 72 – Constitution of Ireland, 1937, Article 40.4.2° - Detention found to be lawful (2007/497SS – Ó Néill J – 15/5/2007) [2007] IEHC 154
Q (W) v Mental Health Commission

Detention

Liberty – Detention under Mental Treatment Acts – Person of unsound mind – Inquiry pursuant to Article 40.4.2° of Constitution – Whether entitled to disclosure of medical records – Whether possible adverse consequences of disclosure – Whether detention unlawful – Whether informed of nature of detention – Procedures for carrying out inquiry – Whether capacity to authorise disclosure – *O(E) v St John of God Hospital* [2004] IEHC 361, (Unrep, Finnegan P, 15/11/2004); *Croke v Smith (No 2)* [1998] 1 IR 101; *X v United Kingdom* (1981) 4 EHRR 188 and *Winterwerp v The Netherlands* (1979) 2 EHRR 387 followed; *P(E) v Medical Director of St Vincent's Hospital* (Unrep, O'Higgins J, 15/3/2004) considered - Mental Treatment Act 1945 (No 19), ss 165, 184 and 185 – Mental Treatment Act 1953 (No 35), s 5 – Constitution of Ireland 1937, Article 40.4.2° – European Convention on Human Rights, article 5(4) – Detention lawful (2006/615SS – Clarke J – 17/5/2006 & 6/7/2006) [2006] IEHC 196
K (L) v Clinical Director, Lakeview Unit

Detention

Transitional provision - Involuntary patient – Mental Health Tribunal – Renewal of detention – Time limit for review – *Habeas corpus* application – Patient admitted under Mental Treatment Act 1945 – Detention now deemed detention under Mental Health Act 2001 – Whether detention legal – Whether transitional provisions of Mental Health Act 2001 correctly applied when renewing detention – Whether review of extension of detention carried out by Mental Health Tribunal within 21 days of renewal order – *H(J) v Russell* [2007] IEHC 7 (Unrep, Clarke J, 6/2/2007) followed -
Mental Treatment Act 1945 (No 19), s184 – Mental Health Act 2001 (No 25), ss15, 16, 18, and 72 – Detention held to be unlawful (2007/118SS - Peart J – 28/2/2007) [2007] IEHC 65
C (AM) v St Luke's Hospital Clonmel

Detention

Transitional provision - Lawfulness - *Habeas corpus* – Temporary chargeable patient – Inquiry involving compliance with statutory regime – Opinion to be formed by certifying medical officer – Procedure on expiry of maximum detention period – Whether treatment and conditions of detention appropriate – Whether transitional provisions could be invoked – Jurisdiction of mental health tribunal to consider procedural

validity of detention under Act of 1945 – Whether detention legal – Form of order – *State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82 followed; *N v Health Service Executive* [2006] IESC 60 [2006] 4 IR 320 and *DG v Eastern Health Board* [1997] 3 IR 511 considered - Mental Treatment Act 1945 (No 19), ss 184, 186 and 189 – Mental Health Act 2001 (No 25), ss 16, 17, 18 and 72 – Constitution of Ireland, 1937, Article 40.4.2° - Detention found to be unlawful (2006/1719SS – Clarke J – 6/2/2007) [2007] IEHC 7
H (J) v Russell

NEGLIGENCE

Duty of care

Contributory negligence – Bus driver pursuing plaintiff – Whether pursuit justified – Whether conduct of plaintiff contributing to injury – Finding of contributory negligence of 50%; damages of €30,000 awarded (2004/16924P – Peart J – 6/12/2006) [2006] IEHC 429
Lewis v Bus Eireann

Duty of care

Extent of duty of care – Occupier's liability – Foreseeability of injury – Open gate – Whether trap or allurement to children – Whether inherently dangerous – *Breslin v Corcoran* [2003] 2 IR 203; *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and *Smith v Littlewoods Organisation Ltd* [1987] AC 241 followed – Claim dismissed (2003/13762P – Peart J – 4/5/2007) [2007] IEHC 159
Ryan v Golden Vale Co-operative Mart Ltd

Medical negligence

Duty of care – causation – Wrongful diagnosis of cancer – Chain of events leading to diagnosis – Whether surgeon liable - *Dunne v National Maternity Hospital* [1989] I.R. 91 *Conole v Redbank Oyster Company* [1976] IR 191 considered – Claim for indemnity against seventh defendant dismissed (2003/7267P – Lavan J – 5/12/2006) [2006] IEHC 398
O'Gorman v Jermyn

Negligence

Personal injuries – Duty of care – Employer – Defence Forces – Psychiatric illness – Foreseeability – Post traumatic stress disorder – Soldier serving in Lebanon – Whether defence forces aware of existence of illness – Whether plaintiff could have communicated difficulties – Claim dismissed (2000/9186P – de Valera J – 25/4/2006) [2007] IEHC 240
Corbett v Ireland

PLANNING AND ENVIRONMENTAL LAW

Appeal to Bord Pleanála

Notification – Failure to notify – Substantial failure to comply – *De minimis* rule – Fair procedures – Whether failure to notify applicant depriving him of right of appeal - *State (Elm Developments Ltd) v An Bord Pleanála* [1981] ILRM 108 followed – Planning and Development Regulations 2001 (SI 600/2001), art 69 – *Certiorari* granted (2004/1002JR – Feeney J – 26/5/2006) [2006] IEHC 180
Rowan v An Bord Pleanála

Appeal to Supreme Court

Certificate of leave to appeal to Supreme Court – Point of law of exceptional public importance – Public interest – Planning and Development Act 2000 (No 30), s 50(4)(f) – Certificate refused (2005/144JR – Quirke J – 2/10/2006) [2006] IEHC 288
Power v An Bord Pleanála

Appeal to Supreme Court

Certificate of leave to appeal to Supreme Court – Point of law of exceptional public importance – Exercise of discretion – Whether of public importance – Certificate granted (2004/350JR – Peart J- 16/11/2005) [2006] IEHC 202
Talbot v An Bord Pleanála

Appeal to Supreme Court

Stay pending appeal – Whether entitlement to appeal justified stay on planning appeal – Jurisdiction of High Court to grant stay – Planning permission – Judicial review – Refusal to grant leave – *Erinford Properties v Cheshire County Council* [1974] Ch 261 approved; *Ketchum International plc v Group Public Relations Holdings* [1997] 1 WLR 4; *Orion Property Trust Ltd v Du Cane Court Ltd.* [1962] 1 WLR 1085 and *Williams v Minister for the Environment and Heritage* (2003) 199 ALR 352 considered - Planning and Development Act 2000 (No 30), s 50 – Stay granted (2005/1323JR – Clarke J – 31/1/20070 [2007] IEHC 31
Harding v Cork County Council

Judicial review

Application for leave – European Community directive – Alleged failure to transpose directive – Whether entitled to judicial review at cost not prohibitively expensive – Whether process of judicial review available in Irish courts sufficient to meet obligations on Ireland by European Community directive – Whether Irish law adequately implemented requirements of directive – Whether applicant established substantial connection with the proceedings – Whether substantial grounds for challenge – Whether directive directly effective – Whether generous interpretation of substantial interest required so as to meet access to justice criteria in directive – Whether higher level of scrutiny needed to be applied– *Harding v Cork County Council* [2007] IEHC 31 (Unrep, Clarke J, 31/1/2007); *Gashi v Minister for Justice* [2004] IEHC 394, (Unrep, Clarke J, 3/12/2004); *Muresan v Minister for Justice* [2003] IEHC 385 [2004] 2 ILRM 364; *Ní Eilí v Environmental Protection Agency* [1997] 2 ILRM 458 and *Friends of the Curragh Environment Ltd v An Bord Pleanála* [2006] IEHC 243 (Unrep, Kelly J, 14/7/2006) considered – Leave to apply for judicial review refused (2006/477JR- Kelly J – 26/4/2007) [2007] IEHC 153
Sweetman v An Bord Pleanála

Permission

Enforcement –– Non–compliance with conditions – Deposition of excavated material on neighbouring lands – Interpretation of conditions – Exempted development – Whether substantial compliance with conditions – Whether works incidental to planning permission – Whether works exempted development – Whether planning permission to be read as a whole – Security to reinstate the site – Adequacy of security – Exclusive jurisdiction of planning authority – Whether form and amount of security to be left to planning authority – Whether security adequate – *Monaghan UDC v Alf-a-Bet Promotions Ltd* [1980] ILRM 64 considered - Planning and Development Regulations 2001 (SI 600/2001), class 16, part I, schedule 2 – Planning and Development Act 2000 (No 30), ss 4(1)(f) and 160 – Relief refused (2005/17MCA – Smyth J – 14/3/2006) [2006] IEHC 85
Sweetman v Shell E & P Ireland Ltd

Permission

Notice – Adequacy of notice – Residential Conservation Area – Statement of reasons – Whether reasons given at appeal sufficient – Whether notice adequate - *O'Keeffe v An Bord Pleanála* [1993] I.R. 39 followed - Planning and Development Regulations 2001 (SI 600/2001), arts 17, 22, 23 - Planning and Development Act, 2000 (No 30), s 34(10) – Application dismissed (2004/309JR & 2005/1165JR – McGovern J – 14/12/2006) [2006] IEHC 400
Dunne v An Bord Pleanála

Planning

Compensation – Refusal of condition – Diminution of development value – Whether arbitrator precluded from granting compensation - In *Re X.J.S. Investments Ltd* [1986] IR 750; *Dublin City Council v Liffeybeat* [2005] 1 IR 478; *Dublin County Council v Eighty Five Developments Ltd (No 2)* [1993] 2 IR 392

and *Hoburn Homes v An Bord Pleanála* [1993] ILRM 368 considered - Local Government (Planning and Development) Act 1990 (No 11) ss 11 and 12, sch 4 – Compensation not precluded (2004/1955SS – Murphy – 8/11/2006) [2006] IEHC 353
Cooper v Cork City Council

Pollution control

Integrated pollution control licence – Environmental Protection Agency – Whether grant of licence *ultra vires* powers of Environmental Protection Agency – Power to attach condition to licence – Condition for legitimate environmental purpose – Means intended to control emissions – Best available technology not entailing excessive costs – Proportionality in exercise of statutory powers – Whether condition proportionate to object of power – Whether Environmental Protection Agency can adopt policy and set of rules – Whether Environmental Agency can engage consultant – Implied powers – Incidental or consequential to powers – Interpretation of national law where European directive not implemented within time.

Judicial review – Procedural fairness – Role of Environmental Protection Agency as specialist regulatory body – Whether evidence available for decision – Jurisdiction of court in review – Remedy – Severance – Effect of severance of invalid conditions – Whether appropriate to sever condition - *An Blascoad Mór Teo v Commissioners of Public Works* (Unrep, SC, 19/12/1996); *Attorney General v. Great Eastern Railway Company* [1880] 5 App Cas 473; *Director of Consumer Affairs v Bank of Ireland* [2003] 2 IR 217; *Keane v An Bórd Pleanála* [1997] 1 IR 184; *Minister for Transport v Trans World Airlines Inc* (Unrep, SC, 6/3/1974); *Ashbourne Holdings Ltd v An Bórd Pleanála* [2003] 2 IR 114; *The State (FPH Properties SA) v An Bórd Pleanála* [1987] IR 698; *In re Arcaro* [1996] (Case C–168/95) ECR I-4705; *La Comercial Internacional de Alimentation SA v Marleasing SA* (Case C-106/89) [1990] ECR I-4135; *Wells v Secretary of State for Transport* (Case C-201/02) [2004] ECR I-00723; *Aer Rianta CPT v Commissioner for Aviation Regulation* (Unrep, O'Sullivan J, 3/4/2003); *M & G Gleeson & Co v Competition Authority* [1999] 1 ILRM 401; *Orange Communications v Director of Telecommunications Regulations* [2000] 4 I.R. 159; *Devitt v Minister for Education* [1989] ILRM 639; *Mishra v Minister for Justice* [1996] 1 IR 189; *Robert v Minister for Justice* [2004] IEHC 348 (Unrep, Peart J, 2/11/2004) *Bord na Mona v An Bord Pleanála* [1985] IR 205; *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 followed - Environmental Protection Agency Act 1992 (No 7), ss 5, 42, 83 and 84 – Council Directive 96/61/EC, article 3 – Application dismissed (2003/22JR – Smyth J – 21/7/2005) [2005] IEHC 249
Hanrahan Farms Ltd v EPA

Substantial interest

Judicial review – Substantial grounds – Corporate applicant – Whether environmental impact statement required – Whether unlawful delegation of powers by respondent – Whether breach of public participation directives – Failure to advance grounds of challenge before respondent – Failure to point to possible adverse impact on environment – Whether general interest in protecting environment and ensuring lawfulness of decisions sufficient – *Boland v An Bord Pleanála* [1996] 3 IR 435; *Lancefort Ltd v An Bord Pleanála (No 2)* [1999] 2 IR 270; *Ryanair Ltd v An Bord Pleanála* [2004] IEHC 52, [2004] 2 IR 334; *Harrington v An Bord Pleanála* [2005] IEHC 344, (Unrep, Macken J, 26/7/05); *O'Brien v Dun Laoghaire Rathdown County Council* [2006] IEHC 177, (Unrep, O'Neill J, 1/6/2006); and *Harding v Cork County Council* [2006] IEHC 80, [2006] 2 ILRM 392 followed – Rules of the Superior Courts 1986 (SI 15/1986) O 84, r 20(4) – Planning and Development Regulations 2001 (SI 600/2001) art 103 – Planning and Development Act 2000 (No 30) ss 3, 32, 33, 34, 38, 50 and 173(4) – Council Directive 85/337/EEC, art 2 and 10a – Council Directive 2003/35/EC –Leave to apply for judicial review refused (2006/240JR & 2006/38COM – Finlay Geoghegan J – 8/12/2006) [2006] IEHC 390
Friends of the Curragh Environment Ltd v An Bord Pleanála

Substantial interest

Planning permission – Application to quash grant of planning permission – Whether applicant having substantial interest in subject matter of application – Statutory interpretation – "substantial interest" – Whether interest needs to be personal or peculiar to applicant – Whether substantial grounds for contending that decision invalid and ought to be quashed – *Harrington v An Bord Pleanála* [2006] IEHC 223 (Unrep, Macken J, 16/3/2006) and *McNamara v An Bord Pleanála* [1995] 2 ILRM 125 considered – Planning and Development Act 2000 (No 30), s 50 – Leave granted (2006/429JR – Ó Néill J – 30/3/2007) [2007] IEHC 118
Cumman Thomas Daibhis v South Dublin County Council

Substantial interest

Planning permission – Demolition of protected structure - Exceptional circumstance – Member of An Taisce - Substantial ground established - Planning and Development Act 2000 (No 30), s 57(10)(b) – Leave refused (2004/138JR – Ó Néill J – 1/6/2006) [2006] IEHC 177
O'Brien v Dun Laoghaire Rathdown County Council

Roads

Environmental impact statement – Whether EIS required – Whether EIS adequate - Substantial grounds – Whether substantial grounds established- *McNamara v An Bord Pleanála* [1995] 2 ILRM 125; *Kenny v An Bord Pleanála (No 1)* [2001] 1 IR 565; *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Arklow Holidays Ltd v An Bord Pleanála* [2006] IEHC 15 (Unrep, Clarke J, 18/1/2006) and *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39 followed - Roads Act 1993 (No 14), ss, 50, 51 and 52 – Relief refused (2005/832JR – MacMenamin J – 10/3/2006) [2006] IEHC 173
Kildare County Council v An Bord Pleanála

Waste

Definition – Concept of waste – Integrated pollution control licence – Conditional licence – Whether respondent has power to impose conditions on licence – Whether conditions attached to licence by respondent impose responsibility on applicant for conduct of third parties – Strict liability – Statutory offences – Regulatory offences – *Mens rea* – *G Vessoso and G Zanetti* (Joined Cases C206/88 and C207/88) [1990] ECR I – 1461; *Euro Tombesi & Others* (Joined Cases C304/94, C-330/94, C342/94 and C-224/95) [1997] ECR I – 3561; *Palin Granit Oy and Vehmassalon kansanterveystyon kuntayhtyman hallitus* (Case C-9/00) [2002] ECR I - 3533 and *Inter-Environnement Wallonie ASBL v Région Wallone* (Case C129/96) [1997] ECR I-7411 approved - Waste Management Act 1996 (No 10) – Environmental Protection Agency Act 1992 (No 7) – Constitution of Ireland, Article 29 – Council Directive 74/442/EEC – Council Directive 91/156/EEC – European Communities (Good Agricultural Practice for Protection of Waters) Regulations 2006 (SI 378/2006) – Treaty of Rome, Article 10 – Claim dismissed (1999/473JR – Charleton J – 9/3/2007) [2007] IEHC 58
Brady v EPA

PRACTICE AND PROCEDURE

Abuse of process

Application to strike out proceedings for abuse of process – Whether pleadings failing to disclose reasonable cause of action – Whether proceedings frivolous or vexatious – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28 – Proceedings dismissed (2005/254P – Peart J – 14/7/2007) [2007] IEHC 188
Barrett v Beglan

Abuse of process

Striking out – Cause of action – Plaintiff brought judicial review proceedings seeking to restrain prosecution of certain offences – Action dismissed – Plaintiff subsequently bringing action challenging constitutionality of offence – Whether statutory provision could be challenged on grounds of unconstitutionality in earlier judicial review proceedings or by way of plenary proceeding – Whether constitutional challenge to statutory provision should ordinarily be by way of plenary proceedings – Whether plaintiff abusing process of court by raising issues which could have been raised before – Whether question of abuse of process to be judged broadly on merits – Whether special circumstances exist – Whether unfair, excessive or disproportionate to strike out for abuse of process - *Henderson v Henderson* (1843) 3 Hare 100; *Woodhouse v Consignia plc* [2002] EWCA Civ 275, [2002] 1 WLR 2558; *AA v Medical Council* [2003] 4 IR 302; *Landers v DPP* [2004] 2 IR. 363; *Johnson v Gore Wood and Co* [2002] 2 AC 1; *Riordan v An Taoiseach (No 2)* [1999] 4 IR 343 and *The State (Lynch) v Cooney* [1982] IR 337 followed – Plaintiff's appeal allowed (157/2005 – SC – 28/3/2007) [2007] IESC 11
M (S) v Ireland

Appeal

Decision of Pensions Ombudsman – Mode of trial – Whether declaratory relief also available – Evidence – Whether further evidence permitted – Expert evidence –Whether expert evidence admissible on question of law – Construction – *Res judicata – Murphy v Minister for Defence* [1991] 2 IR 161 and *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323 (Unrep, Finnegan P, 1/11/2006) considered - Pensions Act 1990 (No 25), s 140 – Scope of appeal defined (2006/309P – Kelly J – 25/1/2007) [2007] IEHC 27
Murray v Trustees of Irish Airlines (General Employees) Superannuation Scheme

Appeal

Extension of time – Formation of intention to appeal – Good grounds for appeal – Consent order - *Eire Continental Trading Co Ltd v Clonmel Foods Ltd* [1955] IR 170 and *Dalton v. Minister for Finance* [1989] IR 269 – Rules of the Superior Courts 1986 (SI 15/1985), O 61, r 2 - Appeal from Master's grant of extension of time granted (2005/201CA – Quirke J – 13/10/2006) [2006[IEHC 298
McLoughlin v Smyth

Costs

Taxation of costs – Appeal from ruling of Taxing Master – Whether ruling unjust – Factors to be taken into account in determining appropriate instructions fee – Whether Taxing Master obliged to consider comparator cases – *Smyth v Tunney* (No. 3)[1999] 1 ILRM 211, *Best v Wellcome Foundation Ltd* [1996] ILRM 34, *Superquinn Ltd v Bray UDC* (Unrep, Kearns J, 5/5/2000) and *Gallagher v Stanley* (Unrep, Kearns J, 23/3/ 2001) followed – Courts and Courts Officers Act 1995 (No 31), s 27 – Appeal granted, solicitor's instructions fee reduced from €60,000 to €45,000 – (2001/828JR – Smyth J – 20/6/2006) [2006] IEHC 248
Landers v Judge Patwell

Costs

Taxation of costs – Appeal from Taxing Master – Party and party costs – Liability to pay – Letter of agreement or estimate in advance – Strict compliance with procedure – Whether failure to comply with procedure should be regarded – Whether lower liability achieved on another basis of costing – Whether error in award of Taxing Master – Whether award unjust - Counsel's fee – Refresher – Amount thereof - *Attorney General (McGarry) v Sligo County Council* [1991] 1 IR 99; *A & L Goodbody Solicitors v Colthurst* [2004] IEHC 13 (Unrep, Peart J, 5/11/2003); *Garbutt v Edwards* [2006] 1 All ER 553 and *Superquinn Ltd v Bray UDC (No 2)* [2001] 1 I.R. 459 followed - Solicitors (Amendment) Act, 1994 (No 27), s. 68 - Courts and Court Officers Act, 1995 (No 31), s 27 – Award upheld except for accountant's fee (2000/12133P – Gilligan J – 14/6/2006) [2006] IEHC 209
Boyne v Dublin Bus

Court officers

Examiner – Functions of examiner – Sale of lands on foot of well charging order – Setting of conditions and date of sale of lands – Whether acting *ultra vires* – Fair procedures – *Audi alteram partem* – Refusal to allow counsel attend at hearing before examiner – Whether adequate alternative remedy – Whether breach of fair procedures – Whether duty on examiner to give reasons for decision – *Delves v Delves* (1875) 20 LR Eq 77; *Pemberton v Barnes* (1872) 13 LR Eq 349; *Bank of Ireland v Smith* [1966] IR 646 and *McEniry v Flynn* (Unrep, McCracken J, 6/5/1998) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 55, rr 1, 48 and 53 – Court Officers Act 1926 (No 27), s 3 – European Convention on Human Rights Act 2003 (No 20), s 3 – Reliefs refused (2006/1182JR – McGovern J – 30/3/2007) [2007] IEHC 112
Rockrohan Estate Ltd v Assistant Examiner Kinirons

Discovery

Documents – Necessity – Whether documents necessary – Whether claim can be established otherwise - *Framus Ltd v CRH plc* [2004] IESC 25 [2004] 2 IR 20 followed – Limited order for discovery made (2004/382p – Master Honahan – 20/1/2006) [2006] IEHC 4
Dowling v Dunnes Stores

Discovery

Necessity for discovery – Documents relating to State funding of education for autistic children – Whether resource related discovery appropriate or necessary before trial of action for fair disposal of cause or matter - *Kildare Meats Ltd v Minister for Agriculture* [2004] 1 IR 92 applied; *Dempsey v Minister for Education and Science* [2006] IEHC 283 (Unrep, Laffoy J, 18/5/2006) not applied – Discovery refused (1999/12903P – Smyth J – 12/1/20070 [2007] IEHC 36
F(E) v minister for Education

Discovery

Judicial review- Leave not contested – Claim of bias – Statistics not already available – Fishing exercise – Whether respondent required to compile statistics – Discovery of existing documents ordered (2004/483JR – de Valera – 26/4/2006) [2006] IEHC 152
Popovici v Refugee Appeals Tribunal

Dismissal of action

Frivolous and vexatious – No cause of action – Whether claim should be struck out as showing no cause of action – Whether unjust to plaintiff who could develop injury at future date - *Packenham v Irish Ferries Ltd* [2004] IEHC 97 (Unrep, Finnegan p, 26/2/2004) followed – Claim stayed *sine die* (1999/257P – Butler J – 22/3/2004) [2004] IEHC 439
McCabe v ESB

Dismissal of action

Medical negligence – Limitation of actions – Dismissal of proceedings – Inordinate and inexcusable delay – Whether proceedings commenced within relevant period - *Moynihan v Greensmyth* [1977] IR 55 followed – Civil Liability Act 1961 (No 41) ss 9 and 31 – Claim dismissed (2000/8232P – Quirke J – 2/10/2006) [2006] IEHC 283
Keane v Western Health Board

Dismissal of action

Medical negligence - Inordinate and inexcusable delay – Delay explained – Fair trial – Death of witnesses – Prejudice to defendant – Whether possible for defendant to have fair trial - *Toal v Duignan (No 1)* [1991] ILRM 135 and *Toal v Duignan (No 2)* [1991] ILRM 140 applied – Proceedings struck out (2004/6652P – Dunne J – 31/5/2006) [2006] IEHC 186
Kearney v McQuillan

Dismissal of action

No reasonable cause of action – Disputed facts – mere assertions- Public record – Whether matters of public record could be disputed by mere assertions – Whether cause of action shown – Whether discovery adequate – Whether defence should be struck out for failure to comply with discovery order – Proceedings struck out (2004/4524P – Murphy J - 29/6/2006) [2006] IEHC 208
McCabe v Minister for Justice

Dismissal of action

Want of prosecution – Delay – Whether delay inordinate – Evidence – Whether prejudice to defendant from unavailability of evidence – Whether risk to right to fair trial in due course of law – Whether delay caused or contributed to by defendants – Whether action should be dismissed – Action dismissed (2004/5204P – O'Neill J – 16/3/2007) [2007] IEHC 117
Ward v Minister for Education

Dismissal of action

Want of prosecution – Inordinate and inexcusable delay – Excuse – Balance of justice – Prejudice to defendant – Inaction on part of defendant – Proceedings dismissed (1994/6889P - Clarke J – 5/7/20060 [2006] IEHC 210
Kategrove Ltd v Anglo Irish Bank Corp plc

Limitations

Time – Statute of Limitations – Inducement - Whether action barred- Whether plaintiff induced to delay in issuing proceedings _ Whether defendant precluded from relying on statute - *Yardley v Boyd* [2004] IEHC 385 (Unrep, Herbert J, 14/12/2004); *Ryan v Connolly* [2001] 2 ILRM 174 and *Doran v Thomson Ltd* [1978] I.R. 223 considered – Civil Liability Act 1961 (No 41), s 9 – Defendant refused relief (2000/8343P – MacMenamin J – 27/1/2006) [2006] IEHC 47
Evanson v McColgan

Parties

Medical negligence – Joinder of parties – Inherent jurisdiction – Delay – Inordinate and inexcusable delay – Balance of justice – *Toal v Duignan* (No 2) [1991] ILRM 140 and *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 followed – Rules of the Superior Courts 1986 (SI 15/1986) O15, r14 – Order joining further defendant granted (2005/7107P – O'Sullivan J – 23/6/2006) [2006] IEHC 282
Faughan v Maguire

Pleadings

Amendment - Statement of claim – Statute of limitations – Delay – Whether claim ascertainable earlier – Whether amendment would defeat Statute of Limitations - *Croke v Waterford Crystal* [2005] 2 IR 283; *Woori Bank v KDB Ireland* [2006] IEHC 156 (Unrep, Clarke J, 17/5/2006) and *Krops v Irish Forestry Board* [1995] 2 I.R. 113 followed – Application refused (2000/14609P – Clarke J – 30/6/2006) [2006] IEHC 317
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Plenary Summons

Renewal - Set aside - Application to set aside renewal of plenary summons – Claim for professional negligence – Whether good and sufficient reason disclosed for renewal of summons – Whether appropriate to issue protective writ in professional negligence proceedings – *Roche v. Clayton* [1998] 1 IR 596 considered – Order granted (2003/10788P – Dunne J – 18/12/2006) [2006] IEHC 406
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Plenary summons

Renewal – Set aside – Statute of limitations – Summons issued to stop time running- Defendant not notified of claim- Summons not served – No good reason for failure to serve - *Behan v Governor of Bank of Ireland* (Unrep, Morris J, 14/12/1995); *Chambers v Kenefick* [2005] IEHC 205, (Unrep, Finlay Geoghegan J, 11/11/2005) and *Roche v Clayton* [1998] 1 IR 596 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 8, r 2 – Renewal of summons set aside (2002/12417P – Peart J – 13/10/2006) [2006] IEHC 318
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Receiver by way of executable execution

Execution – Appointment – Unpaid loans - Debt admitted – Whether appointment of receiver justified – Whether appointment should be set aside – Appointment of receiver affirmed (2004/7855P – Smyth J – 22/11/2005) [2005] IEHC 460
E-Services and Communication Credit Union Ltd v Breathnach

Security for costs

Judicial review – Undertaking as to damages – High Court granting leave to apply for judicial review and placing stay on decision sought to be impugned – Application for variation of order granting leave so as to provide for security for costs, undertaking as to damages and lifting of stay – No private law right of applicant involved in proceedings – Whether security of costs should be imposed – Whether undertaking as to damages should be imposed – Whether stay should be lifted – *Lancefort Ltd v An Bord Pleanála* [1998] 2 IR 511; *Broadnet Ltd v Director of Telecommunications Regulation* [2000] 3 IR 281 and *McDonnell v Brady* [2001] 3 IR 588 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 20(6) – Application refused (2006/925JR – Dunne J – 23/3/2007) [2007] IEHC 110
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Set aside

Fraud – Set aside order on grounds of fraud – Whether matters relevant – *Isaac Wunder* order – Whether number of proceedings issued excessive – Whether appropriate to restrict applicant - *Waite v House of Spring Garden* (Unrep, Barrington J, 26/6/2985) and *Riordan v Ireland* [2001] 3 IR 365 followed – Applicant's relief refused; *Isaac Wunder* order granted (2005/3320P – Clarke J – 30/3/20060 [2006]] IEHC 131
Kenny v Trinity College

Stay

Company law – Estoppel – Inherent jurisdiction of court – Claim bound to fail – Abuse of process – Receiver – Priority of charges – Lease - *Henderson v Henderson* (1843) 3 Hare 100 and *AA v Medical Council* [2003] 4 IR 302 followed – *Barry v Buckley* [1981] IR 306, *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425 and *LAC Minerals v Chevron Corporation* [1995] ILRM 161 mentioned – Rules of the Superior Courts 1986 (SI 15/1986) O19, r28 – Order refused (2004/18785P – Clarke J – 4/10/2006) [2006] IEHC 285
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Leave to defend – *Bona fide* defence – Employment law – Unfair dismissal – Salary arrears – *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607 followed – *Myles v Wakefield Metropolitan District Council* [1987] AC 539 not followed – Payment of Wages Act 1991 (No 25), s 5 – Liberty to enter judgment granted (2005/198S – Finlay Geoghegan J – 3/10/2006) [2006] IEHC 292
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Summary judgment

Leave to defend – *Bona fide* defence – Guarantee - Non est factum – Counterclaim – Connected series of transactions - *Aer Rianta v Ryanair* [2001] 4 IR 607 and *McGrath v O'Driscoll* [2006] IEHC 195 (Unrep, Clarke J, 14/6/2006) followed – Liberty to enter judgment for half of sum claimed granted and liberty to file defence on balance granted (115SS/2005 – Clarke J – 12/7/2006) [2006] IEHC 309
ADM Londis plc v Arman Retail Ltd

Summary summons

Guarantee – Liquidated debt - Guarantor not having paid out – Whether claim against principal debtor on foot of unpaid guarantee liquidated debt – Whether conditional or

contingent claim - Whether suitable for summary procedure – Whether *prima facie bona fide* defence made out – Whether summary judgment should be entered - *Wolmerhausen v. Gullick* [1893] 2 Ch. 514 considered – Proceedings dismissed (2006/77S, 78S, 79S & 80S - Clarke J – 14/6/2006) [2006] IEHC 195
McGrath v O'Driscoll

PROFESSIONS

Medical profession

Fitness to practise – Erasure from register – Relevant date – Jurisdiction of court – Whether court can attach conditions to practice – Whether doctor fit to practise - In re *M a Doctor* [1984] IR 479 considered – Medical Practitioners Act 1978 (No 4), s 46 – Erasure from register cancelled (2006/600Sp – Hanna J – 19/12/20060 [2006] IEHC 439
Moore v Medical Council

Solicitor

Compensation Fund Committee – Investigation - Fair procedures – Evidence or material – Whether difference between evidence, information and material – Whether applicant afforded fair procedures – Relief refused (2004/45JR – MacMenamin J – 23/3/2006) [2006] IEHC 172
Kennedy v Law Society of Ireland

Solicitor

Solicitors Disciplinary Tribunal– Alleged professional misconduct – Preliminary stage – *Prima facie* case - Dismissal of application – Power to dismiss application where complaint fails to disclose *prima facie* case – Failing to disclose client had altered relevant document - Whether prima facie case of misconduct – Whether power to make findings of fact at preliminary stage – Duty to court – Misleading court – Failing to disclose client had altered relevant document — Whether failure to inform court that client had altered document breach of duty to court – Whether personal duty of solicitor to court – Whether defence for solicitor to rely on advices of counsel - Solicitors (Amendment) Act 1960 (No 37), s 7 – Solicitors (Amendment) Act 1994 (No 27), s 17 – Solicitors (Amendment) Act 2002 (No. 19), s. 9 – Appeal granted (2006/21SA – Finnegan P – 21/7/20060 [2006] IEHC 387
Law Society of Ireland v Walker

RATING

Valuation

Valuation tribunal – Case stated – Expert administrative tribunal – Whether error of law in decision – *Henry Denny and Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34 adopted and *Premier Periclase Ltd v Commissioner of Valuation* (Unrep, Kelly J, 24/6/1999) followed – All questions posed answered in affirmative (2005/276SS – de Valera J – 13/3/2007) [2007] IEHC 114
Marconi Communications Optical Networks Ltd v Commissioner of Valuation

STATUTORY INTERPRETATION

Construction

Words and phrases – "administrative" and "executive" – Ordinary and natural meaning – Adult education officer – Nature of duties – Whether administrative or executive – *E.M.S. v. Minister for Justice* [2004] 1 IR 536 considered – Local Elections (Petitions and Disqualifications) Act 1974 (Section 25) (No 3) Order 1974 (SI 137/1974) – Held that functions of adult education officer were neither wholly or mainly of an executive or administrative nature (2005/354JR – Feeney J - 28/2/2007) [2007] IEHC 82
Farrell v Minister for Education

SUCCESSION

Administration of estate

Proceedings issued before grant of administration – Whether defendants had competence and capacity to act as intestate's representatives – Whether proceedings maintainable at law against estate of deceased person – Whether intestate estate vested in person to whom grant of administration was made – Doctrine of relation back – Differences between executors and administrators – *Austin v Hart* [1983] 2 AC 640; *Ingall v Moran* [1944] KB 160 considered; *Gaffney v Faughnan* [2005] IEHC 367 [2006] 1 ILRM 481 not followed; *Tharpe v Stallwood* (1843) 5 M & GR 760 and *Foster v Bates* (1843) 5 M & W 266 considered - Civil Liability Act 1961 (No 41) s 9(2) – Succession Act 1965 (No 27) s 13 – Defendant's application to dismiss refused (2006/1995P – McKechnie J – 20/4/2007) [2007] IEHC 134
Finnegan v Richards

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Conversion

Misrepresentation – Allegation that defendant failing to obey plaintiff's instructions in relation to investment of monies – Whether defendant liable to plaintiff for loss of monies – Proceedings dismissed (2000/1682P – Charleton J – 15/6/2007) [2007] IEHC 191
Cagney v First Active plc

TRADE UNIONS

Contempt

Picketing – Unlawful picketing – Injunction restraining picket in place – Breach of order – Restraint of vehicles entering premises – Held limited breach of order not justifying committal for contempt (2006/4124P – Clarke J – 20/10/2006) [2006] IEHC 340
P Elliott & Co Ltd v BATU

Industrial action

Collective bargaining - Trade dispute – Excepted body – Jurisdiction – Whether employer engaged in practice of collective bargaining – Whether trade dispute – Whether Labour Court acted outside jurisdiction – Whether Labour Court adopted unfair procedures – Whether employees excepted body – Whether oral evidence required – Trade Union Act 1941 (No 22), s 6 – Industrial Relations Act 1946 (No 26), s 3 – Industrial Relations (Amendment) Act 2001 (No 11), ss 2, 3 and 5 – appeal allowed (377/2005 – SC- 1/2/2007) [2007] IESC 6
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Injunction

Trade dispute – Control of members - Fair issue – Evidence – Whether union in control of members – Whether evidence sufficient – Whether fair issue established on evidence – Injunction refused (2006/ 572P & 760P – Clarke J – 16/5/2006) [2006] IEHC 159
Collen Construction Ltd v BATU

Injunction

Trade dispute - Registered employment agreement – Labour Court recommendation Entitlement to picket – Manner of picketing – Whether picketing peaceful – Ballot – Method of balloting – Whether valid ballot — Industrial Relations Act 1946 (No 26) - Industrial Relations Act 1990 (No 19), ss 11, 14 and 19 – Limited form of injunction granted (2006/4124P – Clarke J – 20/10/2006) [2006] IEHC 320
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Appointment of special adviser (Táiniste and Minister for Finance) Order 2007
EA Public Service Management Act, 1997 s11(1)
SI 550/2007

Asset covered securities (amendment) act 2007
SI 591/2007

Circuit Court Rules (criminal law (insanity) act 2006) 2007
SI 596/2007

Circuit Court rules (pensions ombudsman) 2007
SI 588/2007

Criminal evidence act 1992 (section 13) (commencement) (no. 2) order 2007
EA Criminal Evidence Act, 1992 s1(3)
SI 572/2007

District Court districts and areas (amendment) order 2007
SI 579/2007

District Court districts and areas (amendment) order 2007
SI 593/2007

District court (districts) order 2007
SI 584/2007

Electricity regulation act 1999 (public service obligations) (amendment)
order 2007
SI 582/2007

Electricity regulation act 1999 (public service obligations) (amendment)
(no.2) Order 2007
SI 583/2007

European Communities (diseases of animals acts 1966 and 1979 orders) (general authorisations for imports) (restriction) regulations 2007
EA European Communities Act, 1972 s3
SI 575/2007

European Communities (foodstuffs intended for particular nutritional uses) (amendment) regulations 2007
EA European Communities Act, 1972 s3 (DIR/2007-26)
SI 554/2007

European Communities (foot and mouth disease) (restriction on imports from the United Kingdom) regulations 2007
DEC/2007-552
SI 578/2007

European Communities (foot and mouth disease) (restriction on imports from the United Kingdom) (amendment) regulations 2007
EA European Communities Act, 1972 s3 (DEC/2007-554)
SI 581/2007

European Communities (labelling and marketing standards for poultry meat) (amendment) regulations 2007
EA European Communities Act, 1972 s3 (REG/1029-2006, REG/814-2004, REG/81-2006, REG/433-2006, REG/2029-2006)
SI 546/2007

European Communities (plastics and other materials) (contact with food) regulations 2007
EA European Communities Act, 1972 s3 (DIR/78-142 [DIR/1978-142], DIR/80-766 [DIR/1980-766], DIR/81-432 [DIR/1981-432], DIR/84-500 [DIR/1984-500], DIR/2005-31, DIR/93-11, [DIR/1993-11], DIR/2002-72, DIR/2004-1, DIR/2004-19, DIR/2005-79, DIR/2007-19, DIR/2007-42, REG/1935-2004, REG/1895-2005, REG/2023-2006, REG/372-2007)
SI 587/2007

European communities (road transport activities checks) regulations 2007
DIR/2006-22
SI 545/2007

European Communities (tax exemption for certain non-commercial imports of goods from third countries) regulations 2007
(DIR/2006-79)
SI 549/2007

Infectious diseases (amendment) regulations 2007
SI 559/2007

Justice, equality and law reform (delegation of ministerial functions) order, 2007
SI 555/2007

Justice, equality and law reform (delegation of ministerial functions) (no. 2) order, 2007
SI 556/2007

Land registration rules 2007
SI 568/2007

Litter pollution (increased notice payment) order 2007
SI 558/2007

National oil reserves agency act 2007 (remaining provisions) (commencement) order 2007
SI 565/2007

National oil reserves agency act 2007 (returns and levy) regulations 2007
SI 567/2007

National oil reserves agency act 2007 (share transfer day) order 2007
SI 566/2007

Public service management (recruitment and appointment) act 2004 (extension of application to health information and quality authority) order 2007
SI 551/2007

Qualifications (education and training) act 1999 (charter) regulations 2007
SI 571/2007

Rules of the Superior Courts (criminal law (insanity) act 2006) 2007
SI 597/2007

Safety of fishing vessels regulations 2007
SI 563/2007

Sea pollution (hazardous substances) (compensation) Act 2005 (commencement) order 2007
SI 586/2007
SI 466/2007

Taxes (electronic transmission of certain excise returns) (specified provisions and appointed day) order 2007
SI 544/2007

Vehicle registration and taxation (amendment) regulations 2007
SI 576/2007

European Communities (foodstuffs intended for particular nutritional uses) (amendment) regulations 2007
EA European Communities Act, 1972 s3 (DIR/2007-26)
SI 554/2007

European Communities (foot and mouth disease) (restriction on imports from the United Kingdom) regulations 2007
EA European Communities Act, 1972 s3 (DEC/2007-552)
SI 578/2007

European Communities (good agricultural practice for protection of waters) (amendment) regulations 2007
EA European Communities Act, 1972 s3 (DIR/75-442 [DIR/1975-442], DIR/76-464 [DIR/1976-464], DIR/80-68 [DIR/1980-68], DIR/91-676 [DIR/1991-676], DIR/2000-60, DIR/2003-35)
SI 526/2007

European Communities (implementation of the rules on competition laid down in articles 81 and 82 of the Treaty) (amendment) regulations 2007
EA Eurpean Communitiea Act, 1972 s3(REG/1-2003, REG/411-2004)
SI 525/2007

European Communities (labelling and marketing standards for poultrymeat) (amendment) regulations 2007
EA European Communities Act, 1972 s3 (REG/1029-2006, REG/814-2004, REG/81-2006, REG/433-2006, REG/2029-2006)
SI 546/2007

European communities (road transport activities checks) regulations 2007
EA European Communities Act, 1972 s3 (DIR/2006-22)
SI 545/2007

European Communities (tax exemption for certain non-commercial imports of goods from third countries) regulations 2007
EA European Communities Act, 1972 s3 (DIR/2006-79)
SI 549/2007

Financial transfers (Iran) (prohibition) order 2007
EA Financial Transfers Act, 1992 s4
SI 523/2007

Gas (amendment) act 1987 (section 2) (distribution) (amendment) order 2007
EA Gas (Amendment) Act, 1987 s2
SI 528/2007

Greyhound industry (control committee and control appeal committee) regulations2007
EA Greyhound Industry Act, 1958 s13
SI 301/2007

Greyhound industry (racing) regulations, 2007
EA Greyhound Industry Act, 1958 s25, s48
SI 302/2007

Infectious diseases (amendment) regulations 2007
EA Health Act, 1947 s5, 29, s31
SI 559/2007

Irish Medicines Board (miscellaneous provisions) act 2006 (commencement) (no. 2) order 2007
EA Irish Medicines Board (Miscellaneous Provisions) Act, 2006 s1(7)
SI 543/2007

Justice, equality and law reform (delegation of ministerial functions) order, 2007
EA Ministers and Secretaries (Amendment) (No. 2) Act, 1977 s2(1)
SI 555/2007

Justice, equality and law reform (delegation

of ministerial functions)
(no. 2) order, 2007
EA Ministers and Secretaries (Amendment) (No. 2) Act, 1977
SI 556/2007

Litter pollution (increased notice payment) order 2007
EA Waste Management (Amendment) Act, 2001 s14(4)
SI 558/2007

Medicinal products (control of advertising) regulations 2007
EA Irish Medicines Board Act, 1995 s32
EA DIR/2001-83, DIR/2004-27
SI 541/2007

Medicinal products (control of manufacture) regulations 2007
EA Irish Medicines Board Act, 1995 s32
EA DIR/2001-83, DIR/2004-27, DIR/2001-20
SI 539/2007

Medicinal products (control of placing on the market) regulations 2007
EA Irish Medicines Board Act, 1995 s32
EA DIR/2001-83, DIR/2004-27
SI 540/2007

Medicinal products (control of wholesale distribution) regulations 2007
EA Irish Medicines Board Act, 1995 s32
EA DIR/2001-83, DIR/2004-27
SI 538/2007

National oil reserves agency act 2007 (remaining provisions)
(commencement) order 2007
EA National Oil Reserves Agency Act, 2007 s1(2)
SI 565/2007

National oil reserves agency act 2007 (returns and levy) regulations 2007
EA National Oil Reserves Agency Act 2007 s44, s59
SI 567/2007

National oil reserves agency act 2007 (share transfer day) order 2007
EA National Oil Reserves Agency Act, 2007 s5
SI 566/2007

Natural heritage area (Carna Heath and Bog NHA 001241) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 512/2007

Natural heritage area (Corveen Bog NHA 001108) order 2007
EA Wildlife (Amendment) Act, 200 s18
SI 511/2007

Natural heritage area (Crocknamurrin Mountain Bog NHA 001878) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 515/2007

Natural heritage area (Doogort East Bog NHA 002381) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 516/2007

Natural heritage area (Ederglen Bog NHA 002446) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 520/2007

Natural heritage area (Glenturk More Bog NHA 002419) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 518/2007

Natural heritage area (Knockroe Bog NHA 000366) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 508/2007

Natural heritage area (Meenmore West Bog NHA 002453) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 521/2007

Natural heritage area (Oughterard District Bog NHA 002431) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 519/2007

Natural heritage area (Pollatomish Bog NHA 001548) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 513/2007

Natural heritage area (Sraheens Bog NHA 002403) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 517/2007

Natural heritage area (Tristia Bog NHA 001566) order 2007
EA Wildlife (Amendment) Act, 2000 s18
SI 514/2007

Public service management (recruitment and appointment) act 2004 (extension of application to health information and quality autority) order 2007
EA Public Service Management (Recruitment and Appointments) Act, 2004 s6(1)
SI 551/2007

Qualifications (education and training) act 1999 (charter) regulations 2007
EA Qualifications (Education and Training) Act, 1999 s31
SI 571/2007

Registration of deeds and title act 2006 (section 66) (commencement) order 2007
EA Registration of Deeds Title Act, 2006 s2(1)
SI 537/2007

Safety of fishing vessels regulations 2007
EA Merchant Shipping Act, 1992 s19
SI 563/2007

Social welfare (consolidated claims, payments and control) (amendment no. 4) (bereavement grant and payments after death) regulations 2007
EA Social Welfare Consolidation Act, 2005 s4, s248, s300
SI 536/2007

BILLS OF THE OIREACHTAS 8/11/2007 [*30TH DÁIL & 23RD SEANAD*]

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

Charities bill 2007
2nd stage-Dail

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

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

Civil unions bill 2006
2nd stage – Dail **[pmb]** *Deputy Brendan Howlin*

Climate protection bill 2007
2nd stage- Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Competition (amendment) bill 2007
2nd stage – Dail **[pmb]** Deputies Michael D. Higgins and Emmet Stagg

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

Copyright and related rights (amendment) bill 2007
2nd stage Dail - *(Initiated Seanad)* **[pmb]** *Mary O'Rourke*

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

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

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

Criminal law (human trafficking) bill 2007
2nd stage – Dail

Criminal procedure (amendment) bill 2007
2nd stage - Dail

Defamation bill 2006
Committee stage – Seanad

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

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

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

Enforcement of court orders (no.2) bill

2004
1st stage- Seanad **[pmb]** *Senator Brian Hayes*
Ethics in public office (amendment) bill 2007
2nd stage- Seanad **[pmb]** *Mary O'Rourke*

Fines bill 2007
1st stage- Dail

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

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

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

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

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

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

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

Legal practitioners (qualification) (amendment) bill 2007
2nd stage – Dail **[pmb]** *Deputy Brian O'Shea*

Local Government (roads functions) bill 2007
1st stage – Dail

Markets in financial instruments and miscellaneous provisions bill 2007
As passed by Dail Eireann

Mental capacity and guardianship bill 2007
Committee stage- Seanad

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

Nuclear test ban bill 2006
Committee stage – Dail

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

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

Passports bill 2007
Committee stage- Dail

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

Spent convictions bill 2007
2nd stage – Dail **[pmb]** *Deputy Barry Andrews*

Tribunals of inquiry bill 2005
1st stage- Dail

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

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

Witness protection programme bill 2007
1st stage – Seanad

ACTS OF THE OIREACHTAS 2007 (AS OF 13/07/2007)

[29th Dail& 22nd Seanad]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recent developments in Adverse Possession

Nicholas McNicholas BL

Introduction

There have been a number of recent developments in the law of adverse possession. Firstly, the House of Lords overruled the Court of Appeal in the much celebrated *Pye* case back in July 2002. Secondly, since October 2003 the Land Registration Act 2002 in the UK has brought sweeping changes to the procedure on adverse possession as it relates to registered land. Thirdly, the Grand Chamber overruled the first Chamber of the European Court of Human Rights, again in the Pye case, as recently as 30 August 2007. Then on 7th September, 2007, Mr. Justice Clarke handed down his judgment in *Dunne v Iarnrod Eireann and CIE*[1] which on the one hand, is a welcome distillation of the law, but on the other, creates (it is suggested) a novel and hitherto unexplored test for stopping adverse possession, which is very favourable to the paper owner.

Part I of this Article is a comparative discussion of the law in England and Ireland. It looks at the decision in *Pye* (now that the dust has settled and the Grand Chamber has given adverse possession the all-clear) and compares it to Irish jurisprudence, and in particular, the very recent High Court decision of *Dunne v CIE*. Part II looks at the test for "ceasing" adverse possession as enunciated in *Dunne* and suggests that it, wrongly or rightly, breaks new ground. Part III looks briefly at the decision of the Grand Chamber in *Pye*.

Part I: A Comparative Analysis.

Pye and the Story of The Grahams

The Grahams occupied 23 hectares in Berkshire under a grazing agreement.[2] Pye (a large development company) did not renew the agreement when it expired at the end of 1983, nevertheless the Grahams continued in occupation[3]. They in fact tried to contact Pye to obtain a further grazing agreement. Importantly, they were allowed to buy the standing crop of grass on the land for £1,100 and this cut was complete on 31 August 1984. From 1 September 1984 on, it was held by the House of Lords that the Grahams no longer had permission to be on the land and thus their possession became "adverse".[4] From September 1984 until 1999, they continued to use the lands without permission.

The Grahams farmed the land to its utmost use. The chartered surveyor who gave evidence stated that he could not think of anything else that they could do with the land. On the other hand, nothing was done by Pye in relation to the land during this time and they showed no interest in it. In 1993, a representative of Pye visited the disputed land to inspect it but even then he only viewed it from the road and from the drive. He did not actually go on to the land. Pye showed no interest in the agricultural management of the land.

The House of Lords held for the Grahams, whom they said had acted honourably throughout though the windfall afforded them sat uncomfortably with Lord Bingham who agreed with Neuberger J when he had said in the High Court[5] that it was a conclusion which he reached "with no enthusiasm". Nevertheless, it was a five Law Lord unanimous decision and the Court of Appeal was overruled without apology.

The House of Lords overruled the Court of Appeal on their application of the law to the facts. Lord Browne-Wilkinson questioned the Court's conclusion that the initial 11 month agreement for occupation "plainly" did not give exclusive possession to the Grahams. Whilst questioning it, he accepted that there was substantial evidence to hold that it constituted only a licence (particularly that it was actually called and referred to as a "grazing licence") and did not upset their finding.

It was the "intention to possess" that caused the most trouble. The House overruled the Court of Appeal when they held that a willingness to take a licence or pay rent was not incompatible with an intention to possess. The House concluded that the Grahams did have the necessary intention to possess on the facts. It felt that the Court of Appeal had singled out parts of Michael Graham's evidence (which was by witness statement[6] only as by this stage, he had died tragically in 1998 in a shooting accident) unfairly. They felt it to be particularly persuasive that there was independent evidence that Michael Graham treated the land as his own.

1 Unreported, High Court, 7th September 2007

2 The Court of Appeal held that it was occupied under a licence and the House of Lords although it expressed doubt as to whether it was "possession" or "licence" but accorded with the Court of Appeal on this point. *J.A. Pye (Oxford) Ltd. v. Graham* [Court of Appeal] [2001] Ch 804 and *J A Pye (Oxford) Ltd v Graham [House of Lords] 418*.

3 On this point, crucially in the House of Lords the Court of Appeal was overruled in holding that the Grahams merely continued under a licence, and that they in fact went beyond the terms of any licence and into possession, whether or not they were in possession or not under the actual terms of the licence.

4 The Court of Appeal had said that the Grahams were not in possession at all as it had been under a "licence".

5 Neuberger J [2000] Ch 676

6 Witness statements as under the Civil Procedure Rules, 1998

The 4 Principles in Pye

Lord Browne-Wilkinson put to rest many notions which he referred to as "heresies" that had grown up out of jurisprudence in adverse possession cases. He set out the law as he saw it, firmly and without ambiguity. I have taken 4 key principles from his speech and tested them against the law in Ireland. The principles are as follows:

(1) That the word "adverse" in the Limitation Acts of 1939 and 1980 was an unfortunate addition and that contrary to what had been thought, possession for time to run does not have to be "adverse" at all. All the possessor has to do is enter into ordinary possession without permission, with the requisite intention to possess;

(2) That possession in the context of a claim for land being statute barred involved ordinary possession which was made up of two elements namely (i) factual possession and (ii) an intention to possess. That factual possession denotes a degree of adequate control or sufficiency and varied according to the circumstances particularly the nature of the lands and the use to which they were normally put to or that the possessor was doing as much on the land as the owner would be expected to do;

(3) That an intention to possess was an "*intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow*" and that it does not mean an intention to own or acquire title. Furthermore, that there is no incompatibility between a squatter being willing to pay the paper owner if asked and his being in the meantime in possession.[7] It was on this point, predominantly, that the Court of Appeal had erred, according to the House.

(4) That the idea that possession depends on the intention of the paper owner is heretical and wrong and that at the very most, only an inference that can be drawn from the actions or inactions of the possessor in view of the expressed intentions or interests of the paper owner if appropriate.

The 4 Principles tested against the law in Ireland

The judgment of Clarke J in the recent case of *Dunne* is a good place to start. Curiously, Clarke J did not refer at all to the decision of the House of Lords in *Pye* but did refer to the celebrated judgment of Slade J (as he then was) in the High Court in *Powell v. McFarlane*[8] upon which the House of Lords heavily relied[9]. This case was heard before the *Pye* case had been approved on human rights grounds and this may have a bearing on its absence from mention.

Clarke J set out the test as he saw it at page 12 of his judgment and formulated it as follows:

1. Is there a continuous period of twelve years during which Mr Dunne was in exclusive possession of the lands in question to an extent sufficient to establish an intention to possess the land itself, rather than to exercise grazing rights or the like over it.
2. Is any contended period of possession broken by an act of possession by CIE. If so, time will only commence to run when that act of CIE terminates.[10]

He qualified the second part of the test by holding that the sufficiency of the act of possession required for CIE to break possession and wind the clock back to zero, was a very low threshold. This would be satisfied by even the slightest of acts of possession on the part of the paper owner.

Principle No. 1

In formulating the test to be applied, Clarke J avoided getting bogged down by the niceties of words like "adverse" or "inconsistent" and his judgment in the author's view benefits as a result. This very much accords with what Lord Browne-Wilkinson was at pains to point out in *Pye,* namely that the word "adverse" causes more confusion than anything and adds nothing to the test for the limitation defence. Thus, it would appear Clarke J. was *ad idem* with Principle No. 1 above.

Principle No. 2

In relation to Principle No. 2 above, Clarke J at page 8 of his judgment agreed that factual possession and intention to possess was necessary to amount to ordinary possession and that factual possession meant "single and exclusive possession"[11] which entailed a "sufficient degree of exclusive physical control". He stated that the possession must be "objectively viewed by reference to the lands concerned and the type of use which one might reasonably expect a typical owner to put those lands to."[12]

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7 "An admission of title by the squatter is not inconsistent with the squatter being in possession in the meantime."

8 [1977] 38 P&CR 452

9 Lord Browne-Wilkinson stated "Although there are one or two minor points on which (unlike Slade J) your Lordships are not bound by authority and can therefore make necessary adjustments, for the most part the principles set out by Slade J, as subsequently approved by the Court of Appeal in Buckinghamshire *CC v Moran* [1989] 2 All ER 225, [1990] Ch 623, cannot be improved upon."

10 It is also abundantly clear by now that the possession has to be without the consent, permission or licence of the paper owner. This is the essence of "dispossession" cf. *Powell's* case (1977) 38 P&CR 452 Slade J at page 459.

11 Citing Slade J. in the High Court of England and Wales, In *Powell v McFarlane (*He became Slade L.J. by the time he delivered his judgment in the Court of Appeal in *Buckinghamshire County Council -v- Moran* [1990] 1 Ch. 623.

12 Para. 4.5, page 9, unreported judgment

The "sufficiency" of possession was described in the often cited passage in *Lord Advocate v. Lord Lovat*[13] as follows:

> "The question whether a defendant who relies on the Statute of Limitations was and is in adverse possession must be considered in every case with reference to the particular circumstances …, the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with due regard for his own interest.... all these things greatly bearing as they must under various conditions, are to be taken into account in determining the sufficiency of a possession."

This has been followed in many of the Irish authorities on the topic.[14]

It is also said that possession in Ireland needs to be "obvious" or of a "definite character".[15] This requirement is really one of "sufficiency" of possession any by definition therefore relevant to whether or not there is an intention to possess. Either way, it can be squared with *Pye*.

Principle No. 3

In relation to Principle 3, it seems clear that Clarke J. did not suggest that the intention to possess was an "intention to own or acquire title". Paragraph 1 of his test refers to an "intention to possess the land itself". He did not go so far as to say that it was an "intention to possess so far as is reasonably practicable". In *Pye,* the Court held that an intention to possess was there if it was an intention to possess *so far as reasonably practicable*. Lord Hutton quoted and endorsed Slade J in *Powell*[16] who explained what is meant by "*an intention on his part to …. exclude the true owner*":

> "What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

It is now well established that *Powell v McFarlane* is good law in Ireland and in the UK as it has been approved and cited on numerous occasions. Slade J.'s rider of "*so far as is reasonably practicable*" has not received the express approval of the Irish Courts but it should certainly be argued by a squatter if helpful to his case.

Clarke J in his judgment made reference to the fact that the plaintiff, Mr Dunne, had not excluded local children who used the lands under question frequently. This (although it was not expressed in this way) may have indicated that he did not intend "to exclude the world at large". Clarke J stated that accordingly, Mr Dunne was not the "exclusive user". There is no indication that Mr Dunne had excluded the children "as far as reasonably practicable" or whether if he did, that would have been enough to maintain an intention to possess. Therefore it is not yet clear whether Irish Law accords with Principle No. 3 above.

In order to determine what is meant by "exclusive possession" one can look at the now favoured decision in *Powell*'s case (1977) 38 P&CR 452 at 470–471 Slade J said:

> "Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed … *Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so".*

In *Pye,* the House of Lords endorsed this view. The last sentence indicates that the test might be: was the possessor acting as you would expect the occupying owner to act?

There is a good argument therefore that if a possessor has done no more or less than what the occupying owner would have been expected to do, given the nature of the land, the way it was commonly used or enjoyed etc, then he is in exclusive possession, even if others used it from time to time. This, it could be argued, can only ever be to do "*what is reasonably practicable*".

Secondly there was no indication in *Dunne* whether the Plaintiff would have, if asked, being willing to pay for the use of the land or whether this would have effected the outcome. In *Pye,* the Court had approved what was said in *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, 24 by Lord Diplock that an admission by the squatter to that effect "which any candid squatter hoping in due course to acquire a possessory title would be almost bound to make" did not indicate an absence of an intention to possess. It remains to be seen whether the Irish courts will follow this.

Principle No. 4

In relation to Principle No. 4, Clarke J again clarified the law in this regard and affirmed that Irish law accords with *Pye* in this regard. Clarke J approved the judgment of Barron J. in *Seamus Durack Manufacturing Limited v. Considine*, (1987) I.R. 677 whereby he accepted that the future intended use of the property by the paper owner could not be relevant except

13 *(1880) 2 App. Cas. 173.*

14 e.g. *Murphy v. Murphy [1980] IR 183, Browne v. Fahy* [1975] WJSC-HC 2272*, Feehan v. Leay* Finnegan J, 29th May 2000, *Keelgrove Properties v Shelbourne* [2005] IEHC 238, Gilligan J.

15 *Dunne v CIE (cited above), Doyle v O'Neil,* Judgment delivered the 13th day of January, 1995, by O'Hanlon J., [1995] IEHC 4*, Keelgrove Properties v Shelbourne (cited above).*

16 In his judgment at pp 471-472

perhaps as one of the indicators relevant to a bona fide held intention to possess, or lack thereof.[17]

Part II: A critique of the new test.

Clarke J. cited with approval[18] Slade J. (as he then was) in *Powell v. McFarlane* when he stated:

> "…an owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest of acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession."

Slade J. was however talking about what acts were necessary to negative the initial discontinuance of possession by the paper owner, such that the squatter can move into ordinary exclusive possession. He was not talking about the paper owner re-establishing possession after dispossession or discontinuance of possession had occurred.

Clarke J. put the test another was as follows:

> "The real question which I need to ask, therefore, is as to whether Mr. Dunne can establish a single continuous twelve year period during the last 30 years in which he was in exclusive possession of the lands in question to such a degree as would be reasonable having regard to the standard of an owner making normal and usual use of lands of the type in question *and during which twelve year period no act of possession, however slight, occurred by or on behalf of CIE."*

The author can find no other application of a similar test in the jurisprudence of Ireland or the UK. Neither is there an indication in the words of the Statute that this is the test to be applied and as such, it represents new territory. It is well established that adverse possession must be "continuous". Adverse possession is a limitation defence[19] and is enshrined in Section 13(2) Statute of Limitations 1957. It gives a limitation period of 12 years for the recovery of land. There are other relevant sections that must all be read together in order to provide the full picture for the law on adverse possession. These sections are in particular Sections 14 and 18. Section 14 states that the cause of action accrues on the date of discontinuance of possession or dispossession. Section 18 says that the land has to be "in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run". Section 18(3) provides that if the land ceases at any time to be in adverse possession, for a fresh right of action to accrue the possessor has to start again. The question is therefore, when does the land "cease to be in adverse possession"?

The phrase "*slightest of acts*" used by Slade J. does crop up in earlier and later cases. These cases are *Ocean Estates Ltd v Pinder*[20], *Portland Managements Ltd v. Harte and Others*[21], and in *Mount Carmel Investments Ltd v Peter Thurlow Ltd and Another*.[22] However, the phrase "*slightest of acts*" was only used and approved in relation to a paper-owner who had been out of possession re-establishing a possession in order to take and maintain an action for trespass (either for damages or possession).

In *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, can be found the first mention of the phrase "slightest of acts" by Lord Diplock used by Slade J in Powell:

> "This contention is based upon a relic of the ancient law of seisin under which actual entry upon land was required to perfect title and to enable the owner to bring a personal action founded on possession such as ejectment or trespass. In *Bristow v. Cormican* (1878) 3 App.Cas. 641, Lord Black-burn, at p. 661, explains how in the development of the action of ejectment the entry ceased to be actual and became a mere legal fiction. It is in their Lordships' view unnecessary to consider to what extent at the present day, more than a century after the abolition of forms of action, actual entry by the person having title to the land is necessary to found a cause of action in trespass as distinct from ejectment or recovery of possession. Put at its highest against the plaintiffs it is clear law that *the slightest acts by the person having title to the land or by his predecessors in title, indicating his intention to take possession*, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title unless there can be shown a subsequent intention on the part of the person having the title to abandon the constructive possession so acquired: see *Bristow v. Cormican* (1878) 3 App.Cas. 641, Lord Hatherley at p. 657, and *Wuta-Ofei v. Danquah* [1961] 1 W.L.R. 1238.
>
> In the present case, the plaintiffs can rely upon the entry on the land by Mr. Chipman on behalf of the Chipper Orange Co. Ltd. from 1941 to 1946 and his use of it for growing fruit trees, and upon their own entries by their architect in 1957 and by their surveyor in 1959-60. In addition to being enough in themselves to establish sufficient possession to bring an action for trespass these later entries negative any intention on the part of the plaintiffs to abandon possession, having regard to the purpose, *viz* that of eventual building development, for which the plaintiffs held the land."

These dicta were upheld by the Court of Appeal in *Portland Managements Ltd v. Harte and Others*[23]. Scarman L.J. stated at page 182:

> "I cite those cases in support of the proposition, which appears to me to be clear law, that when an owner of land is making a case of trespass against a person alleged to be in possession, all that the owner

17 Para. 4.6, page 9 of the unreported judgment.
18 Para. 4.9, page 10 of the unreported judgment
19 Not any more in the UK, since the Land Registration Act 2002.
20 [1969] 2 AC 19,
21 [1976] 2 W.L.R 174, Court of Appeal, Scarman L.J
22 [1988] 3 All ER 129, Court of Appeal
23 [1976] 2 W.L.R 174

> has to prove is his title and an intention to regain possession."

The Court of Appeal in *Mount Carmel Investments Ltd v Peter Thurlow Ltd and Another*[24] limited the operation of the dicta, stating that the mere assertion by the paper owner of his title through a letter to the squatter is not enough to stop time running.

The law in the UK stipulates that only certain acts will break the adverse possession in the UK. For example, in *Markfield Investments Ltd v Evans*[25], Simon Browne LJ stated the law as follows:

> "Essentially, therefore, the true owners' cause of action accrues once his land is in adverse possession, and continues to be treated as accrued unless and until the land ceases to be in adverse possession. Adverse possession may cease (a) by the occupier vacating the premises, (b) by the occupier giving a written acknowledgment of the true owner's title (see sections 29 and 30 of the 1980 Act), (c) by the true owner's grant of a tenancy or licence to the occupier (even a unilateral licence: see *BP Properties Ltd v Buckler* (1987) 55 P & CR 337), or (d) by the true owner physically re-entering upon the land. Once, however, the land has been in continuous adverse possession for 12 years, the owner is barred by section 15 from bringing an action to recover it and, indeed, his title to the land (assuming, as here, that it is registered) becomes held in trust for the adverse possessor who may himself apply to have the title registered in his own name."

Finnegan J had stated in *Feehan v Leamy* in relation to dispossession:

> "The plaintiff here at no time had any cattle or other animals on the land and did not require the same for grazing. The only use to which he put the land was to visit it on a number of occasions each year when he would park his car and standing on the road or in the gateway look over the hedge or the gate into the same. He was never prevented from doing this by the second named defendant. Insofar as the plaintiff's title is concerned the presumption is that it extends to the centre of the road and so when standing at the gate looking into the lands the plaintiff was in fact standing on his own lands. This he did from the evidence several times a year throughout the period in which the second named defendant claiming to have been in adverse possession. As I understand his evidence, the plaintiff was exercising all the rights of ownership which he wished to exercise in respect of the lands pending the determination of litigators. I find as a matter of fact that he was not dispossessed."

In *Dunne*, the "acts of possession" were in fact potentially much greater than the acts in *Feehan*. However, Clarke J seemed to implicitly accept that they were still "minimal" but enough in all the circumstances to wind the clock back. The defendant had carried out renovation works over a period of one year and a half to a station which was at one end of the land. The defendant had also (pursuant to a complaint by a neighbour) sent out a contractor to re-establish the fences between the neighbour's land and the disputed lands. Either of these acts it would seem would have been enough to wind the clock back.

Clarke J seemed to state that these acts were still "minimal" when he stated:

> "I am mindful, of course, that the acts concerned did not involve the entirety of the lands. The station works were at one end of the lands, the fencing to Mr. Kavanagh's property on the other. However the lands were not divided in any way so that one could meaningfully state that a party was in possession of some but not all of them. Therefore, it seems to me that, though minimal, the acts of possession by CIE must be taken to relate to all of the lands at the relevant times."

In conclusion, Clarke J.'s judgment represents on the one hand a most welcome clarification of the law on establishing adverse possession. On the other hand, the test for "ceasing adverse possession", if the author's view is correct, would appear to be a novel formulation and hitherto unexplored. There is a strong legal foundation for the approach, because of the presumption that the paper owner intends to take possession. However, should the same test be applied for re-possession, once possession has been lost or abandoned? Or, is it right that minimal or co-incidental acts that look like possession or an intention to possess are enough to stop time running, even though an intention to re-possess might not exist?

With the threshold for re-possession so low, and the test so favourable to paper-owners, it is difficult to see how a possessor can win, short of the paper-owner being unaware of his title, or being abroad, or having absolutely no interest over the land. Perhaps, however, this is the correct scope for the doctrine. Perhaps if this had been the law in the UK, the human rights dimension would never have been in question.

Part III: The Effect of the Grand Chamber Decision

The Grand Chamber of the ECHR handed down their decision on 30 August 2007 at a public hearing in Strasbourg. The judges were by no means in agreement. They voted 10:7 to keep the doctrine as it exists.

Article 1 of Protocol No. 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in

24 [1988] 3 All ER 129

25 [2001] 1 WLR, Simon Browne L.J. at page 1324

> any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Grand Chamber held that in order to be compatible with the general rule set forth in Article 1, an interference with the right to the peaceful enjoyment of possessions must "strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".

The Grand Chamber held that a "fair balance" was achieved and that although it was not disputed that the land lost by them was worth a substantial sum of money and that the Grahams had fell into a substantial windfall, limitation periods, if they are to fulfil their purpose at all *must apply regardless of the size of the claim*. Therefore, the value of the land was of no consequence.

The Grand Chamber held that the law as it exists is used as a "control of use" of land by the State and not a "deprivation of possessions" which might have warranted a compensatory regime. It was on this point that Mr Palmer had failed in the case of *Beaulane Properties Ltd v Palmer*.[26] He had successfully established adverse possession, but the law was held incompatible with Article 1.[27]

The Irish government very much supported, echoed and added to the submissions made by UK government. They had a similar vested interest to avoid a system of compulsory compensation for those dispossessed by the operation of the doctrine. They put forward several areas of public interest which are served by the law. They cited the quieting titles and clarification of title where land, whether registered or unregistered, had remained abandoned and was occupied by another person; the failure to administer estates on intestacy; the desirability of using land to advance economic development; the perfection of title in cases of unregistered title, and in dealing with boundary disputes.

The Irish Government also submitted that ownership of land brings duties as well as rights, and the duty to take some action to maintain possession was not unreasonable. It submitted that the Chamber should not be influenced by *post hoc* legislative changes which provided a higher standard of human rights protection. By this, they were referring to the Land Registration Act 2002 since enacted in the UK.

They referred to the antiquity of the doctrine and the familiarity of purchasers and owners of land with it, and submitted that the doctrine did not upset "the fair balance between the public interest and the right to peaceful enjoyment of possessions".

The ECHR has no Irish judges and only one British judge out of a total of some 46 judges. The British judge, Sir Nicholas Bratza dissented along with a Greek, Macedonian, Slovakian and Armenian Judge. A separate dissenting opinion was delivered by one Russian and one Cypriot judge. The dissenting opinions are of more interest.

The 5-judge dissenting opinion stated that whilst they could accept that where land is abandoned, it may be in the general interest that it should be acquired by someone who would put it to effective use, they could not accept that this general interest would extend to depriving a registered landowner of his beneficial title to the land except by a proper process of compulsory acquisition for fair compensation. The 5-judge opinion also stated that the general interest served by the law of adverse possession in the case of *registered land* was of limited weight and the impact of the law on the registered landowner was exceptionally serious. They accordingly felt that a fair balance had not been struck and that there were no adequate safeguards to protect the registered owner's legitimate title. Interestingly, they agreed that a system of compensation was not the answer either, as this did not sit well with the operation of limitation periods. However the lack of compensation was relevant to the overall proportionality of the control of use of land by the State.

The Russo-Cypriot opinion was even more forthright dismissing the notion of there being any legitimate aim with regard to registered land and holding that the affect of the doctrine was entirely disproportionate and that no fair balance was struck. They stated: *"I do not see how illegal possession can prevail over legitimate ownership (de facto v. de jure)."*

Part IV: Conclusion

The sustainability of such an antiquated doctrine in an era of registered land hangs very much in the balance. However, for the time being, it has survived a Grand Chamber of 17 judges from countries with very different legal systems from our own common law system (or that of the UK). As it turns out, the UK took a more Article 1-compliant stance than the Grand Chamber itself by its pre-emptive amendment of the law in England and Wales on adverse possession in the Land Registration Act 2002.

Sections 15-17 of the Limitation Act 1980 no longer apply to registered land and a new "early warning" system after 10 years has been introduced. The changes mean that after 10 years, a possessor may apply to register his title but he must first give notice to the Registrar who, in turn, gives notice to the legal owner. The legal owner must oppose the registration and then a two-year clock starts to run within which time the owner must take steps to regularise his title, namely by taking eviction proceedings and also, importantly, enforcing any order for possession within that time. The Act also gives a statutory recognition to any equity the possessor may have and allows registration where he can show that equity.

The Act only applies in the jurisdiction of England and Wales. Adverse Possession in the context of registered land is now to be considered in applications for registration by the Chief Land Registrar or by an Adjudicator to whom appeals can be made. Therefore the Courts' workload is eased. Hearings are in public. The meaning of adverse possession is unchanged and the definition as it stands in *Pye* therefore continues unchanged. The Land Registry gives guidance on

26 Judgment of the Nicholas Strauss Q.C. (Deputy) High Court of England and Wales, Chancery Division, [2005] 4 All ER 461

27 The decision was reluctantly handed down before the ECHR delivered their judgment (wisely as it turns out as the wait would have been even longer with the referral to the Grand Chamber) and it remains to be seen whether this decision will now be appealed in the light of *Pye*. In *Beaulane* by the time the action had been determined "time-barred" i.e. June 2003, the Human Rights Act 1998 was in operation which was not the case in *Pye*.

how they are dealing with applications and there has already been some case law on the subject.[28] In Schedule 6, adverse possession is defined simply as follows: "A person is in adverse possession of an estate in land for the purposes of this Schedule if, but for section 96, a period of limitation under section 15 of the Limitation Act 1980 (c 58) would run in his favour in relation to the estate."

The Law Reform Commission has recommended amending the law on adverse possession in a consultation paper[29] in 2002 and in a further paper in 2005.[30] The recommendations were put forward in a section of that paper entitled "The Limitation of Actions". However it looks like the proposed amendments were left out of the Law and Conveyancing Law Reform Bill 2006, which has been passed by the Senate and is entering its second stage. It can only be assumed therefore that the legislature have no desire at this stage to amend the law.

The definition of the concept of adverse possession has remained the same and has been clarified by the House of Lords in *Pye* as well as *Dunne*. Also, the pre-October 2003 system has been held to be human rights compliant by virtue of the Grand Chamber decision on 30 August 2007. There is now a distinct difference between the two jurisdictions in terms of (a) the definition of an intention to possess and (b) the test to be applied in ceasing adverse possession. On both counts, the paper owner comes out more favourably in Ireland as the law stands. Therefore although the fairness of the system in an era of registered land, still hangs in the balance, there is no obligation on Ireland to follow the suit of the UK. ■

28 http://www.landreg.gov.uk/info/noticeboard/item/?article_id=12487
29 LRC 67 of 2002
30 LRC 74 of 2005

Diminshed Responsibility and the Insanity Defence

Diane Duggan BL

Introduction

The development of the concept of criminal responsibility reached a watershed last year with section 2 (1) of the Criminal Law (Insanity) Act 2006 which introduced Diminished Responsibility into Irish Law:

> (1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person:
>
> (a) did the act alleged,
>
> (b) was at the time suffering from a mental disorder, and
>
> (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,
>
> the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.[1]

From the outset it must be noted that this article is not a commentary on the legislation, as this has been done when the Act was introduced as a bill in 2002. Rather, this is an examination of how diminished responsibility came about within the context of the development of the insanity defence and the legal environment within which it will feature.

The extent to which an accused can be held responsible for their actions has been debated and argued in courts for centuries. In the past 150 years, legal systems have slowly come to acknowledge advancements in medical and behavioural sciences, in tandem with recognition of the fact that certain circumstances reduce the culpability of the accused. The onset of diminished responsibility is the latest development in this regard, and will arguably become quite a prominent feature of criminal law in time to come.

The defence can only be used on a charge of murder and in recent months, it has had its first foray in Central Criminal Court murder trials, essentially as a partial defence to the charge. To examine its implications in full, it is necessary to look at the development of the insanity defence as heretofore, this was the sole area of law where criminal responsibility could be varied owing to a person's mental condition.

English law made provision for diminished responsibility almost 50 years prior to its Irish counterpart, in the Homicide Act of 1957[2]. The differences between the law in each jurisdiction are interesting, in terms of how and when the need for such a law arose. This subject will be exxamined, while glancing briefly at US law.

A core requirement of this defence is the expert testimony that is given by psychiatrists. The matter is ultimately for the jury to decide and the role of expert testimony in this regard is noteworthy in terms how psychiatry and law work together.

In the broad spectrum of criminal responsibility, mental conditions, psychiatric testimony and the standard of proof required by potential defences - there may be some implications for the insanity defence which will become clearer once the above aspects have been examined.

Background to Criminal Responsibility

The law in this area has been set out extensively in Irish caselaw[3] and older law was succinctly analysed by O'Hanlon J. in his 1967 article[4]. It is necessary to have regard to early developments in order to properly view the circumstances in which diminished responsibility has emerged, and for this, insanity law is a useful frame of reference.

It is necessary to state at this point that diminished responsibility does not naturally stem from the insanity defence. They are quite different concepts, which is not alone reflected in their conviction implications[5], but also in the statement their findings make about the human mind. The insanity defence prescribes a particular label on the accused, whereas diminished responsibility claims that the accused was suffering from a mental disorder at the time of the offence. They are connected however by the manner in which they both require expert testimony. When questions are raised about the state of the mind of an accused, inevitably, either defence will be employed. This close relationship is also demonstrated in the wording of the 2006 Act,[6] whereby when an accused is found to be suffering from a mental disorder, it is open for the jury to decide whether or not it amounts to insanity or diminished responsibility.

1 Criminal Justice (Insanity) Act 2006 s.6(1)

2 Section 2(1)

3 *Doyle v Wicklow County Council* [1974] IR 55, *DPP v O'Mahony* [1985] IR 517, *AG v O'Brien* [1936] IR 263

4 *Not Guilty because of Insanity,* Ir. Jur 1967 Vol 3

5 The insanity defence denotes a conviction of 'Not Guilty by Reason of Insanity', while the diminished responsibility defence results in a finding of not guilty of murder, but guilty of manslaughter by reason of diminished responsibility.

6 Section 6 (1) (c) "the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act"

The English Precedent

As far back as the 17th century, there was a certain level of intolerance towards any measures that were seen to excuse an individual from the responsibility of having committed a crime. The level of proof required was extremely high and somewhat unrealistic. Coke's "wild beast" definition persisted for quite some time, most notably in the 1724 trial of Arnold wherein the jury were told that a man must be "totally deprived of understanding and must not know what he is doing no more than an infant, a brute or a wild beast" to avail of an insanity defence.

A more enlightened era was heralded in the *Hadfield* case in 1800 where it was agreed that previous insanity definitions were never truly met in reality and the jury were told that "if a man was in a deranged state of mind at the time, he is not criminally answerble for his acts."[1] This era of enlightenment did not prevail however, particularly because the message Hadfield's acquittal sent out was that it was possible for someone to attempt to kill the King and be acquitted.

The seminal case of *M'Naghten*[2] in which the accused was acquitted on the basis of the insanity defence led to such controversy, that Judges were summoned by the House of Lords to make judicial pronouncements about the state of the insanity defence. This was an extremely unusual move and the judiciary objected to being asked to make law without reference to a specific case. From this quandery, the M'Naghten Rules emerged.[3] This aspect of the history of the insanity defence is probably the most cited and most criticised. Even those defending the rules stated that

> "although the present law lays down such a definition of madness that nobody is hardly ever really mad enough to be within it, yet it is a logical and good definition."[4]

This demonstrates quite clearly the conflict that always existed in attempting to cater for the fact that in certain cases, the accused was not in a position to be held fully responsible, if at all for his actions. There were always competing interests at play even before advancements in medicine and psychiatry entered the field. While there were attempts to exhibit that mens rea was lacking due to mental conditions, this was often overidden by the security interests of the Crown. Deliberations at defining flawed mental capacity were so problematic that they were overridden by the need to make concise and applicable law. The fact that the M'Naghten Rules were not borne out of specific circumstances (albeit instigated by a specific case) has been heavily criticised. Questions surrounding a state of mind are so complex in any individual case, that providing answers for one case alone would have been difficult. Having to enforce blanket rules was wholly problematic, particularly in an era where there was little sympathy for mental deficiencies.

It must also be noted that the decision to raise such a defence as insanity came about in an environment where the death penalty was a potential outcome. This affected the nature of its development. The confines of the era from which the M'Naghten Rules were born are in stark contrast to the contemporary legal climate which has provided us with diminished responsibility.

Development in the United States

As the M'Naghten Rules were held as the authority for the insanity defence across common law jurisdictions, reaction to them and development from them varied outside of England. US law was the first to show signs of moving away from *M'Naghten* as behavioural sciences began to emerge. This was manifest in the Durham Rule[5] and Model Penal Code[6]. The Durham Rule was set out by Judge Bazelon in which he stated that an accused is not criminally responsible if his act was the result of a mental disease or defect. This was not universally applied however, but was closely followed by the rule from the Model Penal Code wherein it was decided that the M'Naghten Rules should be abandoned and replaced by this code which accounted for the possibility of a mental disease or defect which would lead to the accused lacking capacity to appreciate the wrongfulness of his conduct. Judge Irving R. Kaufman stated that:

> "the rule, moreover, reflects awareness that in the perspectives of psychiatry absolutes are ephemeral and gradations inevitable. By employing the telling word 'substantial' to modify 'incapacity' the rule emphasises that any incapacity is not sufficient to justify avoidance of criminal responsibility, but that total incapacity is also unnecessary."

Here it was clear that law was beginning to recognise in a positive manner, the complexities that arise when questioning the state of the human mind and that there were varying degrees of conditions within such.

The Irish Position

Change was not quite so clearcut in Ireland. There appeared to be a certain will to move away from *M'Naghten* in the early twentieth century, as attempts were made to advocate for certain categories of insanity. This was demonstrated in arguments for irresistible impulse as opposed to full insanity. In *AG v O'Connor*[7], it was held that uncontrollable impulse was not allowed as a defence and soon after, in *AG v O'Brien*[8], it was found that there was no evidence to substantiate the defence of irresistible impulse. However, it was stated in *O'Brien* that the M'Naghten Rules were not comprehensive

1 *R v Hadfield* (1800) 27 St. Tr. 1281, per Lord Kenyon CJ
2 *R v M'Naghten* (1843) 4 St. Tr. M'Naghten was accused of murdering Edward Drumond, in the mistaken belief it was the Prime Minister, Robert Peel. He claimed the insanity defence in that he was being persecuted by the Tory party and that his life was in danger.
3 For a full reproduction of the rules see O'Hanlon, *Not Guilty because of Insanity (see 4)*.
4 Baron Bramwell commenting on the rules before the select committee on Sir James Stephens Homicide Law Amendment Bill in 1874. See 4, p. 67
5 *Durham v United States,* 214 F. 2d 862 (1954)
6 Subsequent to *United States v Freeman* 357 F. 2d 606 (1966)
7 1933 L.J. Ir. 130
8 [1936] IR 263

and that in the correct circumstances, a case for irresistible impulse may be possible:

> "No doubt substantial grounds of objection in practise may be raised against admitting the defence of irresistible impulse…but the English Court of Appeal notwithstanding, that is not sufficient to rule it out of consideration if it be shown to rest on any established principle of criminal law."[9]

This indicated a tentative acknowledgement by the courts, as early as 1936, that *M'Naghten* was not the definitive statement on mental conditions. However, it would be some time before the courts took positive action in this direction and make a ruling contrary to *M'Naghten*, and it is only when this would happen that conditions would be right for diminished responsibility to emerge. The length of time was illustrative of the slow and sometimes hesitant pace of change in Ireland as opposed to Britain where the M'Naghten rules were robustly defended until the introduction of the Homicide Act 1957 which altered English insanity law with the provision for diminished responsibility. The requisite test was where the accused was suffering from an abnormality of the mind, his mental responsibility for his acts was substantially impaired. Despite the fact that the M'Naghten rules still applied for the insanity defence, diminished responsibility introduced a certain vernacular into English law which paved the way for medicine and psychiatry playing a role in cases where the mental culpability of the accused was questioned and recognized the degrees to which mental impairment and deficiencies could occur.

This contrasted with the pace of change in Ireland. While inclinations to move away from M'Naghten rules were intimated by the courts here, no such moves were manifest until perhaps the case of *People (Attorney General) v Hayes*[10] which O'Hanlon commented upon as follows:

> "The charge of the trial judge appears from the newspaper reports to have contained a radical re-statement of the law as to insanity which – if followed – will have brought the law in this country very much into line with modern law in the US and will have carried it well beyond the stage which has hitherto been reached in England."[11]

Doyle v Wicklow County Council[12] was a vital case in Ireland in that it acknowledged the restrictive approach the M'Naghten rules set forth for the insanity defence, noting that there was little or no input from behavioural sciences into their inception. It illustrated that a greater psychiatric contribution was required to better define legal insanity. Griffin J made reference to Henchy J's ruling in *Hayes*[13] where he outlined:

> "[The M'Naghten Rules] do not take into account the capacity of a man on the basis of his knowledge to act or to refrain from acting, and I believe it to be correct psychiatric science to accept that certain serious mental diseases, such as paranoia or schizophrenia, in certain cases enable a man to understand the morality or immorality of his act or the legality or illegality of it, or the nature and quality of it, but nevertheless prevent him from exercising a free volition as to whether he should or should not do that act." [14]

The cases of *Doyle* and *Hayes* both widened the scope of issues to be considered in criminal responsibility, particularly by raising the notion of volitional insanity and the flaws of *M'Naghten*, given that it was purely a knowledge based test. This signalled that there were many perspectives in how the insanity issue should be approached and was a further example of gradual moves in Irish law away from *M'Naghten*.

Despite this mood for progressive change in the area of criminal responsibility, there was no conclusive statement in legislation or otherwise to bring Irish law up to speed with other jurisdictions. Thus when the defence of diminished responsibility was raised in *DPP v O'Mahony*[15] in 1985, it was wholly rejected on the grounds that there was no basis for such a defence in Irish law. Finlay CJ commented as follows:

> "It seems to me impossible that, having regard to these considerations, there could exist side by side with what is now the law in this country concerning a defence of insanity a defence of diminished responsibility such as has been contended for in this case which would, in effect, leave to an accused person and his advisers the choice as to whether to seek to have him branded as a criminal or whether to seek on the same facts the more humane and, in a sense, lenient decision, that he was not guilty of a crime by reason of insanity."[16]

This comprehensive statement made it clear that the only defence available when an accused's mental capacity was in question in this jurisdiction was the insanity defence. The authority for the insanity defence by this point was *Doyle*[17] however, it was becoming evident that in certain circumstances a number of cases would fall short of reaching the requirements of an insanity defence while the mental capacity in question in these cases was still flawed to a certain extent. The changes brought about by the Criminal Law (Insanity) Act 2006 were therefore much welcomed.

Diminished Responsibility – the Irish Definition

The wording of the 2006 Act differs from its much older English counterpart. The 2006 Act describes a situation where the accused may be suffering from a 'mental disorder'[18], whereas in England the test requires 'an abnormality of the

9 *ibid* at 271
10 Unreported, CCC, 30th November 1967, Henchy J.
11 *ibid* n4 at 61
12 [1974] IR 55
13 *ibid* n16
14 *ibid* n18 at 71
15 [1985] IR 517
16 *ibid* at p.523
17 *ibid* n18
18 Criminal Justice (Insanity) Act 2006, s. 6(1)

mind'[19]. The 2006 Act defines a 'mental disorder' as including 'mental illness, mental disability, dementia or any disease of the mind but does not include intoxication'[20].

English law was not so express in its preclusion of intoxication and there have been grounds for it to be included in certain circumstances such as if alcoholism gave rise to an abnormality of the mind[21]. This is an interesting point because in the first case to go to a jury in this State since the enactment of the 2006 Act, *DPP v John Collins*[22] where diminished responsibility was raised as a defence, the accused's alcoholism was a crucial factor in determining the extent of his responsibility. The accused was ultimately unsuccessful in pleading diminished responsibility on the basis of the fact that his Alcohol Dependency Syndrome and resulting organic brain damage was found not to amount to a mental disorder within the meaning of the Act.

It is of note that the Act sets out how the mental disorder in question must "diminish substantially his or her responsibility for the act." The use of the word 'substantially' echoes deliberations decades previously that degrees and gradations of mental deficiency are possible and should be recognised by law. It also assists in ascertaining the extent to which a mental disorder should feature for the defence to be availed of.

The Act also provides that the onus of proof of establishing the defence of diminished responsibility rests on the defence.[23] This is in keeping with traditional practises in insanity law, and the prosecution are afforded the opportunity to rebut evidence adduced by the defence in support of their assertions. This evidence is put forward in the form of expert testimony.

The English term,'abnormality of the mind' has lent itself more to legal definition than medical definition and has been interpreted extensively in the courts .[24] By contrast, the use of the term 'mental disorder' in the 2006 Act very much so lends itself to expert testimony as it is a common term for medical and psychiatric professionals. The role of such testimony is worth exploring to some extent.

Role of Expert Testimony in determining Diminished Responsibility

Psychiatrists or other medical practitioners are frequently called upon to give evidence when the insanity defence is pleaded, and will continue to be necessary in determining diminished responsibility. Their role however can sometimes be controversial. Ultimately, the question to be decided in any case will be left to the jury and the expert witnesses merely assist the court in providing information. Nonetheless, interaction between law and the input of medicine or psychiatry or behavioural sciences is fraught with difficulties.

Conflicting Disciplines

Law and psychiatry have contrasting conceptual frameworks. While there have been moves throughout the twentieth century across common law jurisdictions for the two to interact, there has never been a definitive approach to how they should collaborate. Psychiatry is subject to constant research and is constantly updated in endeavours to make true findings about mental capacity. In this manner it is almost a fluid doctrine which is not well met by the adversarial system of law. Concepts within criminal law such as irresistible impulse, voluntary and involuntary acts, volitional and cognitive insanity do not feature in psychiatric language and make the task of the expert witness quite problematic, to the extent where neither discipline understands the other at times.

> "…lawyers, with their conceptions of psychiatric disability largely it seems fashioned by the case law on "insanity" may regard legal definitions as synonymous with clinical problems such that neither group can necessarily see the conceptual (and practical) problems encountered by the other." [25]

The extent to which such a contribution should occur is carefully considered. If expert testimony is to be awarded too much authority in the courtroom, the role of the jurors will be diminished which may affect the adversarial process. However, disallowing expert testimony has proven to render judgements somewhat uninformed. Of this question of balance, McAuley writes:

> "The point is that neither [criminal courts or juries] should be compelled to disregard the additional evidence regarding the springs of human action provided by the behavioural sciences."[26]

The prescribed course of action is for non-experts to continue to use their own judgement, but to take notice of what behavioural science can provide.

Conflict within Psychiatry

It is perhaps a minor issue, but it is worth noting that conflicts can occur within psychiatry itself. The two main tools of diagnosis are the ICD 10[27] and the DSM IV[28]. It is within such classifications that psychiatric standards are set in order to comment upon the mental health of individuals. It is worth noting that different editions of the DSM have varied significantly in what constitutes a major mental illness and what criteria is required. As new research and findings are ongoing, the last editions of such diagnostic manuals as

19 Homicide Act 1957 s.2(1)
20 Criminal Justice (Insanity) Act 2006, s.1
21 *R v Tandy* 87 Cr.App.R. 45, CA
22 CCC, March 26th 2007
23 Criminal Justice Act 2006, s.6(2)
24 *R v Byrne* [1960] 2 QB 396
25 Patricia Casey and Ciaran Craven, *Psychiatry and the Law* (Dublin: Oak Tree Press, 1999) 385
26 Finbarr McAuley *Insanity, psychiatry and criminal responsibility* (Dublin: Round Hall Press, 1993) 108
27 International Classification of Diseases, Vol 10 – World Health Organisation
28 Diagnostic and Statistical Manual of Mental Disorders, Vol IV – American Psychiatric Association

the DSM or ICD can quickly become outdated, and prove to be an extra obstacle for psychiatry and law to co-operate. In fact, in the recent case of *DPP v John Collins*[29], the two expert witnesses clashed on the issue of whether the ICD 10 or DSM IV was the foremost authority in Ireland in an effort to determine which of alternative definitions took precedent.

How Psychiatry and Law Co-operate

The problems for expert witnesses were highlighted in research regarding attempts by psychiatric and legal authorities to work together in Oregon, United States[30]. A Psychiatric Security Review Board (PSRB) was established to set the psychiatric standard for determination of 'mental disease or defect' (term used in US at the time) in a court of law. However, it proved to be a difficult task as it was not easy for the two disciplines to create a lexicon that worked for both. In this, the relevant legal sources set the legal standard for insanity and the relevant psychiatric sources (PSRB) set the relevant psychiatric standard for determination of mental disease or defect. Inconsistency occurred when psychiatrists using the psychiatric standard were called upon to satisfy the legal standard.

> "The problem is that "mental disease or defect" … is not part of psychiatric or psychological nomenclature; thus, experts are free to interpret these legal terms in light of their professional beliefs. Without guidance…there is a lack of uniformity and predictability in the application of these terms… This encourages unseemly battles of experts in court, [and] inconsistency of findings between judges."[31]

Thus expert testimony can be a minefield for potential experts who seek to reconcile their knowledge with the outcome that the defence or prosecution is looking for. With psychology laying much of its foundations in theory, it is very difficult for experts to provide a concise and definite opinion that meets the requirements of legal insanity.

> "Lawyers are rightly skeptical of psychological agonizing over notions of responsibility, they look for practical guidance, rather than expressions of doubt and concerns."[32]

It may be the case that law does not wish to reconcile itself to behavioural sciences' efforts to explain human behaviour, rather law seeks an expert who will support legally created concepts. The answers to legal questions are not easily arrived at among expert witnesses, however, the fact that the wording of the 2006 Act is 'mental disorder' eases the procedure to some extent.

Conclusion

It is contended that in the midst of all these challenges, in terms of how psychiatry and law interact, and conflicts within psychiatry, that it may be less daunting a task to find that an accused fits the criteria for diminished responsibility, by use of the easily transferable term 'mental disorder', than it is to find an accused fitting the insanity defence. 'Insanity' is a term which is not recognized in psychiatry, and requires a higher level of mental deficiency to be proven in a way that complies with the insanity defence. The 2006 Act states that as well as suffering from a mental disorder, the accused must either:

- not know the nature and quality of the act or
- not know that what they were doing was wrong or
- were unable to refrain from committing the Act.[33]

It is also possible that the conviction implications may influence which defence appears more attractive. Persons found not guilty by reason of insanity are committed to a "designated centre" subject to the Mental Health Review Board established under the 2006 Act.[34] Those successfully availing of the defence of diminished responsibility are found not guilty of murder but guilty of manslaughter on the grounds of diminished responsibility. This may be the preferred outcome if a manslaughter verdict is more appealing to an accused than an indefinite period of detention being declared insane.

It could tentatively be stated that because the threshold for a successful plea is slightly lower for diminished responsibility, it will be employed to a far greater extent than the insanity defence in future. It is perhaps an easier task to present a situation to a jury where the accused momentarily lost all reason which caused him to commit the act, than the task of fixing the accused with the label of insanity. Diminished responsibility is the product of a long and controversial path paved by insanity law, but rather than being an ultimately positive concept, some practitioners argue that it is merely medical diagnosis eroding personal responsibility, and to some extent this could be true.

Nonetheless, there are undoubtedly large numbers of convictions in the past where the circumstances dictated that the insanity defence was unsuccessful, but diminished responsibility may well have been pleaded successfully. There has only been one successful plea of diminished responsibility so far since the Act was introduced[35], with one trial ongoing at the time of writing[36], but we can be certain that many more will follow. ■

29 *ibid* n28
30 Carolyn Alexander, 'Oregon's Psychiatric Security Review Board – Trouble in Paradise' (1998) 22 *Law and Psychology Review*.
31 *ibid*
32 Max Taylor, 'Psychology, law and law enforcement' (1987) 1, *The Irish Journal of Psychology* 20 at 22
33 Criminal Justice (Insanity) Act 2006, s.5(1)(b)
34 Criminal Justice (Insanity) Act 2006, s.12
35 *DPP v Patrick O'Brien,* CCC, April 23rd 2007
36 *DPP v Brendan McGahern,* CCC, November 12th 2007