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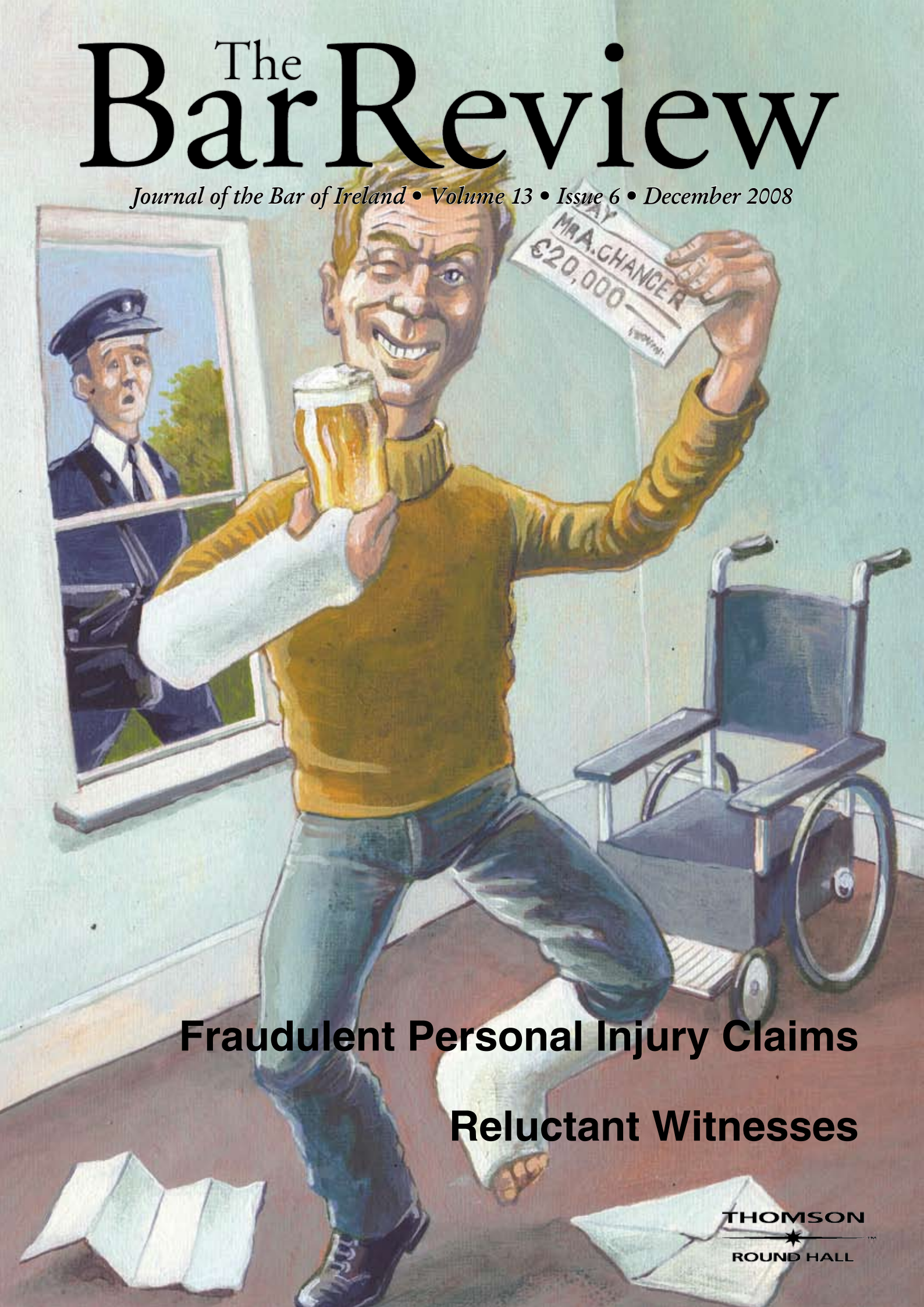

Fraudulent Personal Injury Claims

Reluctant Witnesses

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Reluctant Witnesses and Section 16 of the Criminal Justice Act 2006

JOHN D. FITZGERALD BL*

Introduction

In the course of a trial before Dublin Circuit Court in July of this year, the injured party and 10 civilian witnesses who had originally made statements to gardai identifying the person who had stabbed the injured party indicated that they did not wish to give evidence. The prosecution, however, applied successfully to the trial judge to admit their garda statements in evidence pursuant to section 16 of the Criminal Justice Act 2006, leading to the conviction of the accused for assault causing serious harm. In sentencing him to 10 years' imprisonment, the trial judge observed - "I watched (the injured party) and the other witnesses decline to give evidence in the trial, having initially given very damning statements to gardaí. These young people all gave the same message with fear written all over their face and embedded in their composure, and I have no doubt as to the source of their fear"[1].

It might appear, then, that the introduction of section 16 has served its purpose and that it has proved to be an effective remedy where a witness is afraid to give evidence consistent with a previous statement to gardai. In the present article, however, it is argued that questions remain as to operation of the section in practice, and as to how widely it might be applied in future.

The terms of the section

Section 16 provides as follows:

> "(1) Where a person has been sent forward for trial for an arrestable offence, a statement relevant to the proceedings made by a witness (in this section referred to as "the statement") may, with the leave of the court, be admitted in accordance with this section as evidence of any fact mentioned in it if the witness, although available for cross-examination—
>
> (a) refuses to give evidence,
> (b) denies making the statement, or
> (c) gives evidence which is materially inconsistent with it.
>
> (2) The statement may be so admitted if—
>
> (a) the witness confirms, or it is proved, that he or she made it,
> (b) the court is satisfied—
> (i) that direct oral evidence of the fact concerned would be admissible in the proceedings,
> (ii) that it was made voluntarily, and
> (iii) that it is reliable,
> and
> (c) either—
> (i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or
> (ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.
>
> (3) In deciding whether the statement is reliable the court shall have regard to—
>
> (a) whether it was given on oath or affirmation or was videorecorded, or
> (b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability,
> and shall also have regard to—
> (i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or
> (ii) where the witness denies making the statement, any evidence given in relation to the denial.
>
> (4) The statement shall not be admitted in evidence under this section if the court is of opinion—
>
> (a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or
> (b) that its admission is unnecessary, having regard to other evidence given in the proceedings.
>
> (5) In estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances

* I would like to thank Una Ni Raifeartaigh BL and Melanie Greally BL who made comments on an earlier draft of this article

1 Irish Times, Saturday, 25th October, 2008

from which any inference can reasonably be drawn as to its accuracy or otherwise.

(6) This section is without prejudice to sections 3 to 6 of the Criminal Procedure Act 1865 and section 21 (proof by written statement) of the Act of 1984."

To what statements does the section apply?

The admission into evidence of such statements is, of course, a departure from the preference of our courts for oral evidence[2] and, as argued below, leaves open questions as to how the evidence contained in such statements might be tested by cross-examination. In introducing the new provision, therefore, the then Minister for Justice, Michael McDowell, made it clear that a court would have to be satisfied that the witness understood the requirement to tell the truth when making the prior statement to gardai[3]. In this regard, he referred to the decision of the Canadian Supreme Court in *R. v. B. (K.G.)*[4] to the effect that before any previous statement would be admissible, certain "indicia of reliability" would have to be present. In the Canadian decision, the court held that there would be sufficient guarantees of the reliability of the previous statement if the prosecution could show:-

(a) that the statement was made under oath, affirmation or solemn declaration following an explicit warning to the witness as to the existence of severe criminal sanctions for the making of a false statement;
(b) that the statement was videotaped in its entirety; and
(c) that the opposing party has a full opportunity to cross-examine the witness at trial as to the circumstances in which the statement was made.

The terms of section 16(3) outlined above are slightly less exacting as to what a court must consider in deciding if a previous statement is reliable, in that there is no requirement to have regard to any warning regarding false statements nor any express provision for cross-examination of the witness, a point I shall deal with in further detail below.

Even under the terms of the section, however, it would appear that few, if any, of the above indicia will normally be present under the procedure adopted by gardai for taking witness statements, a point Mr McDowell seems to have recognised in stating that "It is a high fence to cross and the average witness statement in the average book of evidence would not comply with it"[5]. As I understand it, the procedure commonly adopted is that the witness statement is recorded contemporaneously in manuscript on a form which is preceded by a printed statutory declaration that it is true to the best of his or her knowledge or belief, a form of words that is presumably read over to the witness prior to commencing. The witness will then be invited to make any alterations if they wish and will then sign and date it. This process will not, however, be videotaped, nor is it common practice to require the witness to swear their statement on oath or affirmation.

In other words, the only one of the various "indicia of reliability" referred to in either the Canadian decision or the terms of the section that will normally be present in taking a witness statement is a statutory or solemn declaration that it is true to the best of his or her knowledge or belief. While this is one of the various requirements under subsection (2), however, it is curiously not a matter to which the court is required to have regard in considering the reliability of the statement pursuant to subsection (3). In such circumstances, the court will be left to consider whether the catch-all provisions elsewhere in the section can apply, such as whether there is "other sufficient evidence in support of its reliability", with little guidance as to what such evidence might be. While it is no doubt often difficult to predict whether a witness might be intimidated, therefore, it might be advisable where such a fear exists for the gardai either to have the witness statement sworn before a peace commissioner or recorded on videotape in order to clearly come within the terms of the section.

Can the witness be cross-examined?

At common law, a party is unable to question the credibility of, or cross-examine, its own witness[6], unless the trial judge has declared the witness hostile. In the context of a criminal trial, the procedure is that the witness should be asked to stand down and in the absence of the jury the prosecution applies to the trial judge for leave to treat the witness as hostile, to include if necessary leave to adduce evidence to prove the making of the original statement[7]. Once the trial judge has declared the witness hostile, then and only then can counsel seek to cross-examine its own witness, and is not limited in doing so to the matters contained in the previous inconsistent statement[8].

Section 16, however, is silent on the procedure to be followed and does not make it clear when, and by whom, a witness may be cross-examined, or the extent of such cross-examination. This is surprising given that, as indicated above, the requirement that a witness who departs from a previous statement be available for cross-examination by the opposing party as to the circumstances in which the statement was made is one of the various matters referred to in the *R. v. B. (K.G.)* case, which appears to some extent to have provided the template for section 16. More importantly, however, the courts have long emphasised the importance of cross-examination in testing the truthfulness of a witness[9], and indeed the right of an accused person to

2 For instance, in *Phonographic Performance Limited v. Cody* [1998] 4 I.R. 504, Murphy J. stated at p.521 that "the examination of witnesses *viva voce* and in open court is of central importance in our system of justice and…it is a rule not to be departed from lightly".
3 Proceedings before the Select Committee on Justice, Equality, Defence and Women's Rights, 19th April, 2006: Dail debates, Vol.74, p.5
4 [1993] 1 S.C.R. 740
5 Dail debates, 19th April, 2006, Vol.74, p.5
6 See for instance *Ewer v. Ambrose* (1825) 3 B. & C. 746
7 See *The People (Attorney General) v. Taylor* [1974] I.R. 97
8 *O'Flynn v. Smithwick* [1993] 3 I.R. 589
9 For a recent consideration of this issue, see the judgment of Hardiman J. in *O'Callaghan v. Mahon* [2006] 2 I.R. 32

cross-examine a witness is considered a fundamental aspect of the constitutional guarantee of due process[10]. It might be argued therefore that such a right could be read into the section given the reference to the witness being "available for cross-examination" in subsection (1), though it is unclear whether this refers to the witness being available for cross-examination as to the contents of their evidence generally or whether it would encompass the circumstances in which their previous statement was made.

Even if such a right is to be read into section 16 along the lines of the decision in *R. v. B. (K.G.)*, there is the added difficulty in this context that the identity of "the opposing party" may vary according to the oral evidence of the witness. In seeking to have a statement admitted under section 16, the prosecution will presumably seek to adduce evidence from the gardai as to the circumstances in which they took the statement, in order to demonstrate its reliability and to show that they were satisfied the witness understood the requirement to tell the truth at the time. While there is no doubt the gardai can be cross-examined by the defence on this evidence, the position of the witness is less clear.

If the witness agrees with the garda version of events, presumably the defence will wish to cross-examine both as to the circumstances in which the original statement was made and as to the contents of that statement. However, if the witness disagrees with the gardai and appears to question the reliability of their own statement, there is no guidance in the Act as to how prosecuting counsel should proceed. It is unclear whether counsel must follow the traditional procedure of declaring the witness hostile before proceeding to cross-examine, a procedure which in this context is not without its own difficulties as I shall argue below.

It is also unclear whether any such cross-examination should be limited to the circumstances in which the previous inconsistent statement was made, or whether it could extend to the contents of that statement and beyond as under the hostile witness procedure. The better view in my opinion would be that prosecuting counsel can cross-examine in these circumstances along the lines of the hostile witness procedure without necessarily adopting that procedure, but it would be preferable if this could be clarified in the legislation or by the courts as opposed to being dealt with, as currently, on a case by case basis.

The forgetful witness

In the case referred to at the beginning of this article, the witnesses each indicated that they did not wish to give evidence. In doing so, such a refusal to give evidence in accordance with an earlier statement clearly came within the terms of section 16(1)(a). However, it is equally possible (and in my view more common) that a witness who has been intimidated will simply state that they now have little recollection of the incident, and this may extend to an inability to recall anything of the circumstances in which they previously gave a statement to gardai.

In such circumstances, it is at least arguable that section 16 does not apply at all[11]. Such a witness is neither refusing to give evidence, nor denying that he made a statement, but simply saying that he does not know either way. It could, of course, be argued by the prosecution that section 16(1)(c) applies, as the witness has now given evidence that is "materially inconsistent" with the original statement. However, this must equally be open to question. Where a witness simply says he cannot remember, it could be argued convincingly that there is no second version of events which is inconsistent in some material way with the first. Rather, the witness is neither confirming nor denying the account contained in the earlier statement. Furthermore, as identified by Labrosse J.A. in *R. v. Conway*[12], any assistance that might be gained by cross-examining the witness is very limited in these circumstances:-

> "This case is different. There are not two versions. [The witness] did not give a different account at trial. There is the statement of December 11, 1994 and the statement at trial 'I don't remember'. How does cross-examination of the witness at trial afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement when the evidence of the witness at trial is 'I don't remember'? Cross-examination becomes, to a large extent, an exercise in futility and does not serve as a substitute for contemporaneous cross-examination on the prior statement, as it does in most cases."[13]

It is unclear why no specific provision was made in section 16(1) for a witness who claims not to remember what happened. Even if provision were made, however, the admission of a statement in such circumstances will always be more questionable given that the constitutional protection afforded to the accused by the ability to cross-examine the witness on the evidence will be of little value.

Compatibility with the hostile witness procedure

Section 16(6) provides that any application under the section is "without prejudice" to sections 3 to 6 of the Criminal Procedure Act 1865, which is effectively a codification of the hostile witness procedure. Indeed, as indicated above, there may be situations where the adoption of such a procedure would appear to make sense. However, as the caselaw makes clear, once a witness is declared hostile, their previous inconsistent statement is evidence going to their credibility only, and cannot be used to prove the facts contained in it[14]. In declaring the witness hostile, in other words, the aim is to demonstrate to the jury that their oral evidence is unreliable given the existence of a previous inconsistent statement.

10 See *In re Haughey* [1971] I.R. 217; *The State (Healy) v. Donoghue* [1976] I.R. 325; and *Donnelly v. Ireland* [1998] 1 I.R. 321

11 This is in spite of the fact that in his remarks to the Select Committee, Mr McDowell clearly envisaged the application of the section in such cases, stating "It gets us to the point where people cannot be intimidated into amnesia", Dail debates, Vol. 74, p.5

12 (1997) 36 O.R. (3d) 579, 121 C.C.C. (3d) 397

13 At para. 29

14 *The People (Attorney General) v. Cradden* [1955] I.R. 130; *The People (Attorney General) v. Taylor* [1974] I.R. 97 and *The People (Director of Public Prosecutions) v. McArdle* [2003] 4 I.R. 186

Under section 16, by contrast, the purpose of introducing the previous statement is very different in that the prosecution is seeking to rely on the truthfulness of the earlier statement. In such circumstances, there would appear to be an inevitable tension between demonstrating to a jury that the credibility of a witness may be open to question and yet arguing that a previous statement of the same witness might properly be relied on. Given that any earlier proven untruthfulness may affect the credibility of a particular witness[15], it is advised that the admission of the statement of a witness shown to be hostile would have to be viewed with considerable caution by a trial judge and the jury directed accordingly.

15 For instance, in *The People (Director of Public Prosecutions) v. Gilligan* [2006] 1 I.R. 107, one of the factors which led the trial court to conclude that it would be unsafe to rely on any evidence of two particular witnesses unless it was supported by circumstantial evidence or by independent testimony was the fact that they had been shown to be "self-confessed perjurors" in previous proceedings

Conclusion

Section 16 of the Criminal Justice Act 2006 seeks to provide a mechanism by which previous statements can be proved where a witness is afraid to give oral testimony. As such, it is no doubt a welcome solution to what has been perceived to be a growing problem of witness intimidation. As currently drafted, however, the section leaves open a number of questions as to how it might operate in practice. This is particularly problematic given that the failure of a witness to testify will often be a sudden, and unexpected, development in the course of a criminal trial. In such circumstances, it is to be regretted that section 16 does not provide clearer guidance as to its applicability and to the procedures to be adopted. ■

Applications to Dismiss Fraudulent Claims in Personal Injury Cases

Simon Kearns BL

Introduction

The litigation of personal injury actions was fundamentally altered with the coming into force of the Civil Liability and Courts Act 2004.[1] Arguably, the biggest change in the law was the amendment to the Statute of Limitations, which reduced the time period in which personal injury actions must be instituted from three to two years. In addition to that change however, many new concepts were introduced by the Act such as the 'personal injury summons', 'mediation conferences', 'formal offers', 'verifying affidavits' (section 14) and 'fraudulent actions' (section 26). This article will focus on the connection between the latter two concepts, the significance of which was put into sharp focus by the decision of the High Court (Peart J.) in *Carmello v. Casey & Casey*.[2]

Sections 14 and 26 of the Act of 2004 address concerns raised by the insurance industry following a long line of cases such as *Vesey v. Bus Éireann*.[3] In that case, the High Court awarded £72,500 despite the fact that the court found that the plaintiff's evidence lacked credibility and that he lied to both his own doctors and those of the defendant. The Supreme Court, on appeal, reduced the award to £30,000 on the basis that the High Court award was excessive but in so doing, the Supreme Court indicated that a court was not entitled to reduce the damages or extinguish the damages to which a plaintiff was entitled in order to mark the court's disapproval of any dishonesty which characterised the prosecution of the claim.

The Civil Liability and Courts Act 2004

Section 14 of the Act of 2004 requires all parties to a personal injuries action to swear an affidavit verifying assertions and allegations contained in *any* pleadings. Section 2 of the Act defines "pleadings" in a personal injuries action as "a personal injuries summons, a defence, a defence and counterclaim or any other document (other than an affidavit or a report prepared by a person who is not a party to that action) that, under rules of court, is required to be, or may be, served (within such period as is prescribed by those rules) by a party to the action on another party to that action."

A plaintiff must also swear an affidavit in replying to a defendant's request for further information under section 11.[4] In reality, this means that not only must a verifying affidavit be sworn and furnished by a plaintiff with his/her personal injury summons but also for example where additional particulars of personal injury or special damages are to be served on a defendant, or where further information is furnished to a defendant.[5] A plaintiff cannot apply for judgment or other relief in default of pleading in a personal injuries action unless the plaintiff can satisfy the court that he has verified his previous pleadings in the action.[6]

By virtue of sections 26(1) and (2), a plaintiff runs the real risk of having his case dismissed if the court is satisfied that a plaintiff gives, or dishonestly[7] causes to be given, any evidence which he knows to be false or misleading in any material respect, or has sworn a verifying affidavit that is false or misleading in any material respect, which he knew to be false or misleading at the time of swearing unless dismissing the action would result in an injustice.

It is important to note that the section is mandatory in nature and it is only where the court expresses reasons why such a dismissal would cause injustice that the action is *not* dismissed.[8] A direct consequence of this is that legal practitioners must be accurate in how particulars of personal injury, loss or special damage are drafted, how replies to particulars are compiled and should outline the risks to any plaintiff or witness giving evidence at the hearing of the case.

1 S.I. 544 of 2004 brought sections 1, 5, 6, 8, 19, 21, 22, 25, 26, 29, 39, 41- 44, 54 and 55 into force on the 20th September, 2004 with the remaining sections coming into force on the 31st March, 2005.

2 *Carmello v. Casey* [2007] IEHC 362 (Unreported, High Court, Peart J., 26th October 2007).

3 [2001] 4 I.R. 192. See also: *Shelley-Morris v. Bus Átha Cliath* [2003] 1 I.R. 232 where the Supreme Court held that the telling of deliberate falsehoods by the plaintiff could impact on the plaintiff's credibility and might mean the plaintiff had failed to discharge the onus of proof which could lead to the case being dismissed. See also: *O'Connor v. Bus Átha Cliath* [2003] 4 I.R. 459.

4 Further information may include whether there was a previous award made by a court in a personal injuries action or whether there are particulars of any injuries sustained or treatment administered that would have a bearing on the current claim. It is open for a defendant to include the section 11 request in a standard notice for particulars or to serve a separate request pursuant to section 11.

5 Under s. 14(2) a defendant or third party who wishes to make allegations/assertions in its pleadings must also swear an affidavit.

6 Order 1A, r. 11(2) of the Rules of the Superior Courts 1986, as amended.

7 Section 26(3) states that an act is done dishonestly by a person if it is done with the intention of misleading the court. There is no definition of "injustice" contained in the Act.

8 Applications under s. 26 were unsuccessfully made in *Mulkern v. Flesk* (Unreported, High Court, Kelly J., 25th February, 2005); *Ahern v. Bus Éireann* (Unreported, High Court, Feeney J., 16th May, 2006); *Corbett v. Quinn Hotels Limited* (Unreported, High Court, Finnegan P., 25th July, 2006); *Kerr v. Molloy and Sherry (Lough English) Limited and Onalis Limited* (Unreported, High Court, Herbert J., 16th November 2006). An application under s. 26 was also made in *Purcell v. Cleland and Others* (Unreported, High Court, Irvine J., 18th December, 2007).

Carmello v. Casey – the facts

As a result of a road traffic accident in October 2002, the plaintiff suffered personal injuries. The defendant conceded liability and the case proceeded as an assessment. At the hearing, the defendants contended that the facial numbness which represented the most significant aspect of the plaintiff's claim - and which the plaintiff alleged was related to the accident - was actually caused by a subsequent accident in May 2003. The solicitors for the defendants had only become aware of this incident, which was not disclosed in replies to particulars even though other accidents were disclosed, as a result of other litigation involving the plaintiff in which they were also involved. The plaintiff maintained under cross-examination that he could not recall any such subsequent incident and that the numbness in his face was caused by the accident in 2002.

There was no reference to facial numbness in either the particulars of personal injuries contained in the statement of claim or in the initial medical reports. The first complaint of facial numbness by the plaintiff was made in a medical report prepared in September, 2003. The particulars of injury further stated that the plaintiff sustained a broken nose in the accident. This was in direct contradiction with a medical report prepared prior to the delivery of the statement of claim.

The plaintiff swore an affidavit verifying the particulars in the statement of claim and the replies to particulars. The defendants alleged that the plaintiff, in his evidence and by swearing the affidavit had deliberately given false and misleading evidence to exaggerate his claim and applied to dismiss the plaintiff's claim under sections 26(1) and (2) of the Civil Liability and Courts Act 2004. It should be noted that the defendants adduced no evidence themselves as to fact that the plaintiff suffered an injury to his face in May 2003.

Decision

Peart J. dismissed the entirety of the plaintiff's claim on the basis that it was "substantially fraudulent". The court found on the balance of probability that the plaintiff was deliberately untruthful in his pleadings, affidavit of verification and in giving evidence, in an attempt to obtain an award of damages to which he was not entitled. The court could not accept that there was the slightest possibility that the plaintiff could not recall the accident of May 2003. To do otherwise, the court held would "defy any credibility in a young man such as the plaintiff". The court found that the plaintiff gave false and misleading evidence in a material respect contrary to section 26(1) in relation to questions about his injuries.

The court also found that the plaintiff swore the affidavit, as required by section 14, verifying the facts and particulars in the statement of claim and the replies to particulars knowing that the contents in relation to his injuries was false and misleading in a material respect contrary to section 26(2). In dismissing the plaintiff's claim, the court highlighted that the very clear purpose of section 26 was to avoid injustices to defendants against whom false and exaggerated claims were mounted. The court held as follows:

- In applications under section 26 the question for the court was whether on the balance of probability the court could be satisfied that in relation to his evidence and/or verifying affidavit, the plaintiff had knowingly given false and/or misleading evidence in a material respect.
- The section was mandatory in nature once the court was satisfied on the balance of probability that the plaintiff had so behaved, unless dismissing the claim would result in an injustice.
- The court had to look to the plaintiff's evidence and then all the surrounding circumstances including the pleadings, any replies to particulars and the medical reports and then arrive at a conclusion as to the truthfulness or otherwise of the plaintiff on the balance of probability.
- False or exaggerated claims were an abuse of court and it was a very serious criminal offence to knowingly give false evidence under oath. Proof of any criminal offence must be beyond a reasonable doubt.

Conclusion

The practical reality is now that a plaintiff will face the very real risk of having his/her claim dismissed under s. 26 if the particulars of injuries or special damages contained in a personal injury summons transpire at hearing not to reflect the actual injuries sustained, or if evidence contrary to the pleadings is given at a hearing. For example, should a plaintiff claim he was unable to work into the future and furnish further particulars of personal injury and special damages with an affidavit verifying that information and if it then transpires that the plaintiff is in fact working, one can easily envisage an application being made by the defendant under section 26(2).[9]

Legal practitioners will have to continue to be thorough in the drafting of pleadings in personal injuries actions and in advising plaintiffs and their witnesses before the hearing of cases.

The jurisdiction to dismiss has been rarely invoked by the courts with the majority of applications under section 26 being refused. For example Finnegan P. found in *Corbett v. Quinn Hotels Limited*[10] that even though the plaintiff's evidence was misleading, the plaintiff had given evidence honestly believing the same to be true and that the plaintiff had not intended to mislead the court. In the majority of cases, the courts have found subjective rather than deliberate exaggeration by a plaintiff.

Section 26 is certainly draconian in nature but this "is deliberately the case in the public interest"[11]. This is yet another example of how the Civil Liability and Courts Act 2004 has impacted on the arena of personal injuries litigation and fundamentally altered the way it is conducted. ■

9 See: 'The Civil Liability and Courts Act 2004', David Nolan S.C., Bar Review, Volume 9, p. 181.

10 *Corbett v. Quinn Hotels Limited* (Unreported, High Court, Finnegan P., 25th July, 2006).

11 Per Peart J., *Carmello v. Casey* [2007] IEHC 362 (Unreported, High Court, Peart J., 26th October 2007 at page 8).

Mediation and the 2004 Civil Liability and Courts Act

David Nolan SC*

Introduction

In 2004, the Oireachtas introduced a novel concept into Irish Law, namely compulsory mediation. Mediation *per se* is not a new idea. The earliest records suggest that it may be a Hindu concept or may have arisen in circumstances where primitive hunter/gatherer societies discovered the benefits of dispute resolution while staring into the flames of fires. Confucious believed that the best way to resolve a dispute was through moral persuasion with agreement rather than coercion. Further sources of mediation can be found in the cultures of Africa and Asia and not surprisingly there is a strong flavour of mediation in many religions.

The formalisation of mediation in the modern common law, has a resonance with the conciliation process in industrial disputes which arose in the early 20th Century. The American Arbitration Association (AAA) set up a commercial strand for the resolution of disputes in private in 1926. The 1960s and 1970s saw it used with greater frequency in family law disputes, as an alternative to court litigation. In the 1980s, it became popular in the United States in an attempt to avoid lengthy and costly litigation, in larger commercial disputes. The building of the Boston Highway known as the "Big Dig" is the oft quoted example where commercial disputes between contractors and sub-contractors were mediated, on the spot, while the project was ongoing.

In Ireland, the mediation process, up until recently has been very much a "non lawyer – non-litigation" process, primarily used by family law practitioners before litigation commences. It is a requirement, prior to the commencement of such proceedings, that the parties be advised of the benefits of mediation (see The Judicial Separation and Family Law Reform Act 1989 and the Family Law (Divorce) Act, 1996). However its effectiveness is questionable since it operates entirely outside the legal process.

Stephen Dowling in his excellent book *"The Commercial Court"* quotes the Cedr Mediation Handbook as defining mediation as "A flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated Agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of the resolution."

Rule 6(1) XIII of the Rules of the Superior Court, which facilitates the operation of the Commercial Court allows a Judge, on his own Motion or that of the parties, the right to direct "that proceedings on any issue be adjourned for such time, not exceeding 28 days, as he considers appropriate to allow the parties time to consider whether such proceedings ought to be referred to a process of mediation, conciliation or arbitration."

The Decision to Mediate

It has always been regarded as a key element to the process of mediation that the parties themselves should decide to mediate, in that it has been felt that forced mandatory mediation will not work. In the UK, the Civil procedure rules (CPR) seek to promote, encourage and facilitate dispute resolutions assisting parties to attend mediation, but do not make it mandatory (see *Dunnett v. Railtrack plc* [2002] 1 WLR 2434). In, what is regarded as the leading case in relation to mediation in the UK, *Halsey v. Milton Keyes General* [2002] 1 WLR 3002, the Court of Appeal noted the use of mediation in medical negligence actions and supported such initiatives.

Dyson L J made an interesting comment when he said:

> "We heard argument on the question whether the Court has power to order parties to submit their dispute to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to Order them to do so. It seems to us that to oblige truly unwilling parties to refer their dispute to mediation would be to impose an unacceptable obstruction on their rights of access to the Court."

The Court accepted the following as a guiding principle:

> "The hallmark of ADR procedure and perhaps the key of their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute in question, if the parties so wish, which are non binding. Consequently the Courts cannot direct that such methods be used but merely encourage and facilitate."

In this jurisdiction, the recent "*Battle of Gorse Hill*" (*Charlton v. Kenny*) can be seen as a classic example of such judicial encouragement. In that case, after the opening, before Ms Justice Clarke, the Judge asked the parties to consider seriously the option of mediation which was ultimately successful, due in no small part to the active assistance of a neutral party, namely the former Attorney General Rory Brady S.C., enabling the parties to reach a negotiated settlement.

* David Nolan is a C.E.D.R. Accredited Mediator.

Section 15 of the Civil Liability and Courts Act, 2004

With this background it is therefore surprising, that the Oireachtas enacted Section 15 of the Civil Liability and Courts Act, 2004.

The Section reads as follows :

> "(i) Upon the request of any party to a Personal Injuries action, the Court may,
>
> (a) at any time before the Trial of such action, and
>
> (b) if it considers that the holding of a meeting pursuant to a direction under this sub section would assist in reaching a settlement in the action,
>
> direct that the parties to the action meet to discuss and attempt to settle the action, and a meeting held pursuant to a direction under the sub-section is in this Act referred to as a "Mediating Conference".

As can be seen, this Section authorises a Judge to "*direct*" mediation. Once the Court makes such an Order, the parties are mandated to attend. There is no subtle encouragement or even heavy handed encouragement. Once the Judge believes that the holding of a mediation "*would assist in reaching a settlement in the Action"* he can order the parties to proceed to mediation.

The Mediation Conference

Once the mediation has taken place, the Mediator, on conclusion of the Mediation Conference, must prepare and submit a report to the Court. What he can put into the report seems to be circumscribed. If the Mediation Conference doesn't take place (which would be in breach of a court order), his report should say why, to his knowledge. If the Mediation Conference does take place (which is far more likely) then he can only report if a settlement had been reached or not. If it has, he must set out the terms of that settlement. If no settlement has taken place, he cannot report as to the reasons why. For example, if one party turns up and while purporting to take part in the mediation actually sits on their hands, or does not engage thereby setting the whole process at nought, the Chairman cannot comment upon this.

At the conclusion of the action, the parties can make submissions to the Court about the mediation process and if the Court comes to the conclusion that a party has "failed to comply" with a direction to mediate, can make an order directing that party to pay the costs of the action and not just the costs of the mediation. See section 16(3)(b).

However, it is difficult to see what criteria the Court would use in reaching such a view. While Section 15 directs the parties to "meet to discuss and attempt to settle the action" there may be many reasons including liability, causation, remoteness or the absence or otherwise, of negligence which could cause one party not to seek to attempt to settle the action. They may wish to fight the case in full as they are entitled to do. It would seem possible, on one reading of Section 16, that where a Defendant has not fully engaged in Mediation, defended the action and won, could still be liable for the costs of the failed Mediation and action at the conclusion of the action. It is submitted however that such an outcome would be both illogical and unfair and indeed contrary to the Decision of the Court of Appeal in the *Halsey* case, where the Court of Appeal refused to overturn a court order against a widow who had unsuccessfully sued for the alleged wrongful death of her husband, in circumstances where the NHS Trust had refused to agree to Mediation before the trial.

The First Case Directed to Mediation pursuant to Section 15

On the 4th December, 2006, Mr Justice Feeney made the first order pursuant to Section 15 directing the parties to attend a Mediation Conference in the case of *McManus v. Duffy*. The background to the case is similar to the *Halsey* case. On the 2nd June, 2004, Philip McManus, son of the Plaintiff died after being admitted to hospital for the purpose of treatment and management of complaints of abdominal pain, vomiting and weight loss. He was diagnosed as suffering from acute severe ulcerative colitis. Six days later, he suffered a cardiac arrest and sustained severe anoxic brain damage and subsequently died on the 16th June, 2004.

Arising from the death, the Plaintiff issued proceedings claiming that her son's cardiac arrest was caused by the negligence and breach of duty of the hospital.

The Defendants denied the claim in its entirety and had amassed a significant body of medical opinion to support their defence. It was clear that the action was going to be fully defended. Indeed the issues between the parties had, to a certain extent been aired at an inquest held over a number of days, where the battle lines had been drawn.

Thereafter, an application was brought by Solicitors for the Plaintiff seeking an order, pursuant to Section 15 of the Civil Liability and Courts Act 2004, directing the parties to attend the Mediation.

The application was strenuously resisted by the Defendants. Affidavits were exchanged exhibiting correspondence, where the Plaintiffs made reference to the *Halsey* and *Dunnett* cases. In his submissions to the Court, Counsel for the Plaintiff noted that the English authorities set out a number of factors which should be considered by the Court in deciding whether to consider Mediation. These included:

(i) The nature of the dispute;
(ii) The merits of the case;
(iii) Whether other settlement methods had been attempted;
(iv) The costs of Mediation;
(v) Any possible delay caused by Mediation;
(vi) Whether the Mediation has a reasonable prospect of success.

In the *Dunnett* case, it was noted that passions were running high and that legal costs would be heavy. Brook L. J. said at paragraph 14:

> "Skilled Mediators are now available to achieve results

> satisfactory to both parties in many cases which are quite beyond the powers of lawyers and Courts to achieve. This Court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims but when the parties are brought together on neutral soil with a skilled Mediator to help them resolve their differences, it may very well be that the Mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A Mediator may be able to provide solutions which are beyond the powers of the Court to provide."

In giving his decision Feeney J noted that there was no case law in this jurisdiction to assist him in relation to dealing with Section 15. He noted that this was an important Section, in that a Court could exercise its power to compel a mediation conference, following an application of either party where one party did not wish to mediate. In making the order, he noted that mediation must "*assist in reaching a settlement in the action*". He noted that "assist" had a different meaning to "likely". In those circumstances while it may well not be likely that a mediation would lead to a settlement, the Mediation may in fact "assist" in the settlement of the case. For example, it could make the Plaintiff or the Defendant realise that its case was weaker than first envisaged and therefore allow one or other party to make various decisions in relation to the action. In the circumstances, he believed there was considerable merit in taking an open view, noting the similarities between the *Halsey* case and the present application. In *Halsey* however, there was a truly unwilling party. In this case, correspondence suggested that the Mediation was "unlikely" to succeed, therefore he drew a distinction between the stances taken by the Defendants in each case.

In reality, it seems to the writer that there was no distinction between the position of the Defendants in each case but that Feeney J took a "open view". Further, the wording of Section 15, gives the Court a power which does not exist elsewhere.Given the nature of the dispute, he noted there was a considerable benefit for experts to understand the conflicting views of other experts which, he felt was a significant factor in exercising his discretion to compel mediation. He observed that the costs of Mediation were not disproportionately high but that the cost of a medical negligence trial, could be very high indeed. Finally, he noted, that as this was a fatal action pursuant to Part IV of the Civil Liability Act 1961, that there was a potential cap on the damages. This was a further strong factor in exercising his discretion to compel Mediation.

The learned High Court Judge considered that the Mediation would not unduly delay the trial and that it would take place far more speedily than a trial and therefore was not an unacceptable obstruction to the Defendant's right of access to the courts. In the circumstances, he decided that Mediation was likely to "assist" in reaching the settlement of the action and therefore he made the order sought.

As Gavin Carthy has pointed out in his article in the Law Society Gazette, the decision by Feeney J, is an interesting variation on the *Halsey* decision. There, the Court of Appeal held that the burden of satisfying the court that Mediation had a reasonable prospect of success should not be on the objecting party. The fundamental question was whether it could be shown by a proposing party that the objecting party unreasonably refused to agree to Mediation. In the *McManus* case, Feeney J found that in this jurisdiction the question was not whether Mediation had a reasonable prospect of success, but rather whether the Mediation was likely to "assist" the settlement of an action, relying on the precise wording of this Section.

Conclusion

The *McManus* case is the first recorded decision in this jurisdiction of a Judge directing a Mediation in circumstances where one party was against the Mediation, and believed that it was unlikely to give rise to a settlement. If the parties do not wish cases to be sent to Mediation by the Court pursuant to Section 15, then it is suggested that their arguments should focus on the fact that Mediation would not assist.

In reality however, it is difficult to see what such factors could be. As Feeney J pointed out, in the course of bringing parties together in the form of a Mediation, attitudes may change. Therefore the parties should keep an open mind on the issue. It is submitted that Mediation in clinical negligence cases, may become an increasing feature of the litigation landscape, particularly in cases which are multi issue, complex and lengthy. In those circumstances, it is an important tool in the lawyer's armaments not only in clinical negligence actions, but also in cases of bullying or harassment and other personal injury actions, which are multi issue, complex and potentially lengthy and expensive. In cases where emotions can run high, Mediation gives to the parties the opportunity to explore settlement options which the Court cannot order. Obviously, the issue of saving costs may itself become the factor which will persuade a judge as to the benefits of Mediation in personal injury actions. ■

Legal The Bar Review Update

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Judgment Information Supplied by The Incorporated Council of Law Reporting

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Road traffic offences

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Road traffic offences

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Leniency - Prosecution application for review of sentence – Rape and false imprisonment of prostitute – Plea of guilty - Nine year sentence imposed with nine years post–release supervision – Previous conviction for indecent assault – Whether error of principle – Whether sentence unduly lenient – *People (DPP) v Tiernan* [1988] IR 250, *People (DPP) v Keane* [2007] IECCA 119 (Unrep, CCA, 19/12/2007) and *People (DPP) v Drought* [2007] IEHC 310 (Unrep, Charleton J, 4/5/2007)

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European arrest warrant

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European arrest warrant

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European arrest warrant

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– Right to fair hearing – Sentence hearing – Confiscation order – Whether surrender should be refused – Whether remedy for breach of rights exist – Whether decision to proceed in absence violated right to fair trial – Whether obligation to notify of trial date encompasses obligation to notify of sentence hearing – Whether undertaking required – Whether confiscation order amounted to prosecution for offences other than specified in warrant – *Minister for Justice v Brennan* [2007] IESC 21, [2007] 3 IR 372 and *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 ILRM 267 applied - European Arrest Warrant Act 2003 (No 45), ss 22, 37 and 45 – Council Framework Decision 2002/584/JHA, articles 5.1 and 27.3 – Surrender ordered (2006/122EXT – Peart J – 30/5/2008) [2008] IEHC 154
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European arrest warrant

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Child abduction

Wrongful removal - Family law summons seeking return of child under Hague Convention – Sole custody – Objections of child – Report of clinical psychologist – Right of child to be heard during proceedings – Fundamental right of child to have views taken into account – Age and maturity of child - Discretion – General policy considerations – Swift return of abducted children – Comity between contracting states - Deterrence of abduction - Undertakings from applicant – *Re M* [2007] 2 FLR 72, *B v B (Child Abduction)* [1998] 1 IR 299, *Re T* [2000] 2 FLR 192, *Re D* [2007] 1 AC 619 and *Re M* [2007] 3 WLR 975 considered - Hague Convention on the Civil Aspects of Child Abduction 1980, articles 12 and 13 – Charter of Fundamental Rights of the European Union 2000, article 24 – Council Regulation EC 2201/2003, art 11 – Family Law Act 1995 (No 26), s 47 - Application for return of child granted (2006/36HLC – Sheehan J – 21/5/2008) [2008] IEHC 162
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Asylum

Credibility - Alleged error of fact - Whether alleged error of fact invalidated decision - Relevance of existence of statutory right to appeal - Whether question of availability of alternative remedy relevant where applicant seeking review in relation to credibility - Whether error of fact a proper matter for judicial review or matter for appeal -Whether error of fact within jurisdiction – Whether substantial grounds for seeking judicial review made out - Whether opportunity to probe issues as to error of fact at appeal hearing - Whether grounds relied on trivial, tenuous artificial or contrived - *Aer Rianta cpt v Aviation Commissioner* (Unrep, O'Sullivan J, 4/6/2003), *A (OA) v Minister for Justice* [2007] IEHC 169, (Unrep, Feeney J, 9/2/2007), *McNamara v An Bord Pleanála (No. 1)* [1995] 2 ILRM 125, *N (A) v Refugee Appeals Tribunal* [2008] IEHC 171, (Unrep, Birmingham J, 10/6/2008), *Ojuade v Refugee Appeals Tribunal* (Unrep, Peart J, 2/5/2008), *T(AM) v Refugee Appeals Tribunal* [2004] IEHC 219, [2004] 2 IR 607, *Ryanair Ltd v Flynn* [2002] 3 IR 240 and *Stefan v Minister for Justice* [2001] 4 IR 203 considered - Refugee Act 1996 (No 17), s 11 - Leave to seek judicial

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Credibility – Court review of tribunal - Country of origin information – Whether decision based on conjecture or speculation - Whether conclusions in relation to credibility based on rational analysis capable of being objectively considered - Whether tribunal erred in applying standards of a country based on rule of law to country of origin - Whether elements of "jumping to conclusion" - Whether interests of justice best served if applicant given opportunity to recanvass certain matters - *Imafu v Minister for Justice* [2005] IEHC 182, (Unrep, Clarke J, 27/5/2005), *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) and *R v Immigration Appeal Tribunal* [1999] INLR 473 considered - *Certiorari* granted (2006/718JR - Birmingham J - 29/5/2008) [2008] IEHC 228
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Credibility - Country of origin information - Weight to be attached to country of origin information - Whether tribunal member made fundamental error of fact – Whether tribunal member took impermissible approach to assessment of credibility - Whether obligation to refer to every aspect of evidence or to identify all documents referred to - Whether documentation so critical as to call for specific assessment - Whether tribunal member had insufficient regard to limited intellectual ability when assessing applicant's credibility – *D(K) v Refugee Appeals Tribunal* [2006] IEHC 132, [2006] 3 IR 368 applied; *G(T) v Refugee Appeals Tribunal* [2007] IEHC 377, (Unrep, Birmingham J, 7/10/2007) distinguished; *K(G) v Minister for Justice* [2002] 2 IR 418 and *Banzuzi v Refugee Appeals Tribunal* [2007] IEHC 2, (Unrep, Feeney J, 18/1/2007) considered - Leave to apply for judicial review refused - (2006/992JR - Birmingham J- 4/7/2008) [2008] IEHC 213
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Fair procedures – Assessment of credibility – Age assessment procedures – Whether invalid age assessment having material and practical effect upon assessment of credibility by Tribunal – Whether substantial grounds for contending that decision invalid – *Moke v Refugee Applications Commissioner* [2005] IEHC 317 (Unrep, Finlay Geoghegan J, 6/10/2005) applied; *GK v Minister for Justice* [2002] 2 IR 418 considered – Leave to seek judicial review refused (2006/784JR – Birmingham J -17/4/2008) [2008] IEHC 102
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Judicial review – Application for leave – Extension of time – Fundamental human rights – Anxious scrutiny – Medical reports – Country of origin information – Credibility – Conjecture – Risk of persecution – Whether evidence of probative value - *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39, *AO & DL v Minister for Justice* [2003] 1 IR 1, *Gashi v Minister for Justice* [2004] IEHC 394, (Unrep, Clarke J, 3/12/2004), *Gritto v Minister for Justice* [2004] IEHC 119, (Unrep, Laffoy J, 27/5/2004), *COI v Minister for Justice* [2006] IEHC 136, [2007] 1 IR 718, *Idiakheua v Minister for Justice* [2005] IEHC 150, (Unrep, Clarke J, 10/5/2005), *Ogunyemi v RAT* [2006] IEHC 203, (Unrep, McGovern J, 30/6/2006), *Vilvarajah v UK* (1992) 14 EHRR 248 and *Da Silveira v RAT* [2004] IEHC 436, (Unrep, Peart J, 9/7/2004) considered – Time extended but relief refused (2006/156JR – Birmingham J – 27/6/2008) [2008] IEHC 192
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Judicial review – Application for leave - Assessment of credibility – Decision of RAT — Nigerian national – Challenge to manner in which assessment of credibility approached – Whether decision irrational - Evaluation – Drawing of inferences – Application of common sense – Challenge to finding on authenticity of membership card - Whether necessary to refer to existence of alternative country of origin information – Whether substantial grounds for review – *Imoh v Refugee Appeals Tribunal* [2005] IEHC 220 (Unrep, Clarke J, 24/6/2005)*; Banzuzi v Minister for Justice* [2007] IEHC 2 (Unrep, Feeney J, 18/1/2007) and *G(T) v Refugee Appeals Tribunal* [2007] IEHC 337 (Unrep, Birmingham J, 7/10/2007) considered – Leave granted on limited basis (2006/993JR – Birmingham J – 12/6/2008) [2008] IEHC 173
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Judicial review – Application for leave - Application for extension of time – Reasonable explanation for short delay – Decision of RAT — Cameroon – Application for asylum – Assessment of credibility – Whether applicant seriously mistreated for his political views – Whether applicant at future risk – Failure to refer to documentation submitted – Necessity to indicate aspects of account not accepted – Analysis of discrepancies – Whether basis of decision could be clearly identified – Whether decision could be supported – Whether substantial grounds for review – *Muia v Refugee Appeals Tribunal* [2005] IEHC 353 (Unrep, Clarke J, 11/11/2005), *Sango v Minister for Justice* [2005] IEHC 395 (Unrep, Peart J, 24/11/2005), *Zarady v Home Secretary* [2002] EWCA Civ 153 and *R v Immigration Appeals Tribunal (ex p Jose Vicenta Ivila Luga)* [2001] EWCA Civ 91 considered – Refugee Act 1996 (No 17), s 11B – Leave refused (2006/97JR – Birmingham J – 10/6/2008) [2008] IEHC 170
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Judicial review – Fair procedures - Whether specific matter pertaining to applicant from country of origin information put to applicant at interview - Whether applicant had full opportunity to comment and respond to country of origin information - Whether matter relevant to determination -Whether decision *ultra vires* and without efficacy - Whether investigation, report and recommendation conducted and concluded in infringement of applicant's right to fair procedures and natural and constitutional justice - *I(V) v Minister for Justice* [2005] IEHC 150, (Unrep,

Clarke J, 10/5/2005), *Moyosola v Refugee Appeals Commissioner* [2005] IEHC 218, (Unrep, Clarke J, 23/6/2005 and *Olatunji v Refugee Appeals Tribunal* [2006] IEHC 113, (Unrep, Finlay Geoghegan J, 7/4/2006) followed; *S(DVT) v Minister for Justice* [2007] IEHC 305, (Unrep, Edwards J, 4/7/2007), *Z(A) v Refugee Appeals Commissioner* [2008] IEHC 36, (Unrep, McGovern J, 6/2/2008), *Jolly v Minister for Justice,* (Unrep, Finlay Geoghegan J, 6/12/2003) and *V(Z) v Minister for Justice* [2002] 2 I.R. 135 considered - Refugee Act 1996 (No 17), ss 11A, 11(3)(a) 12, 13(6)(e) and 13(10) - Leave to apply for judicial review granted (2006/836JR - McMahon J – 11/7/2008) [2008] IEHC 235
PS (an inf) v Refugee Appeals Commissioner

Asylum

Judicial review – Leave - Credibility – Question of internal relocation – Excusive reliance by respondent on UK Home Office operation guidelines – Delay between oral hearing and decision - Whether credibility conclusions flawed - Whether court should substitute own views for those of respondent – Whether delay undermined integrity of decision - Whether absent special circumstances a delay of less than three and a half months could provide grounds for challenge to decision - Whether decisions must be based on most up to date and authoritative information possible – *I(S) v Minister for Justice* [2007] IEHC 165, (Unrep, Finlay Geoghegan J, 11/5/2007) applied; *Biti v Refugee Appeals Tribunal* [2005] IEHC 13, (Unrep, Finlay Geoghegan J, 24/1/2005) and *Sango v Minister for Justice* [2005] IEHC 395, (Unrep, Peart J, 24/11/2005) distinguished; *Rasheed Ali v Minister for Justice* [2004] IEHC 108, (Unrep, Peart J, 26/5/2005), *Sambasivam v Secretary of State for the Home Department* [2000] Imm AR 85 and *Mario v Secretary of State for Home Department* [1998] Imm AR 306 considered - Refugee Act 1996 (No 17), s 11 - Leave to apply for judicial review granted (2006/1268JR - Birmingham J - 24/6/2008) [2008] IEHC 220
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Asylum

Judicial review – Credibility - Whether applicant demonstrated well founded fear of persecution - Whether objective basis in fact for the persecution feared - Whether fear was a convention based ground – Fair procedures - Whether failure to take into account certain evidence relevant to ultimate outcome - Correct procedures and criteria for determining refugee status - Meaning of phrase "well-founded fear of being persecuted" - Whether doubts about credibility determining factor in decision – *S(DVT) v Minister for Justice* [2007] IEHC 451, (Unrep, Edwards J, 30/11/2007) and *V(Z) v Minister for Justice* [2002] 2 IR 135 considered - Illegal Immigrants Trafficking Act 2000 (No 24), s 5 - Leave to apply for judicial review refused (2006/969JR - Edwards J- 25/6/2008) [2008] IEHC 237
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Judicial review – Fair procedures – Purported errors of fact in first instance decision – Appeal lodged – Whether errors within jurisdiction – Whether appeal appropriate remedy – Whether purported errors of fact capable of being cured on appeal – *McGoldrick v An Bord Pleanala* [1997] 1 IR 497 applied; *State (Abbeyglen Properties) v Corporation of Dublin* [1984] IR 381 and *Buckley v Kirby* [2000] 3 IR 431 considered; *Stefan v Minister for Justice, Equality and Law Reform* [2001] 4 IR 203 distinguished – Refugee Act 1996 (No 17), s 13 – Relief refused (2006/66JR – McGovern J – 6/2/2008) [2008] IEHC 36
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Asylum

Judicial review – Leave - *Certiorari* quashing decision of RAT –– *Certiorari* quashing decision of Minister - Afghanistan – Political involvement – Claims of torture – Submission of documentation – Medical reports – Request to await arrival of identity documentation prior to decision – Refusal of asylum status – Application for extension of time – Breach of fair procedures – Absence of credibility findings – Tribunal member in best position to assess credibility – Whether obligation to expressly reject or accept credibility of each fact asserted - Treatment of medical reports – Treatment of country of origin information – Consideration of identity documents and membership card – Whether party membership card considered as valid identity document – Reference to absence of identity information – Absence of reference to membership card – Whether substantial grounds for review – *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *NK v Refugee Appeals Tribunal* [2004] IEHC 240 [2005] 4 IR 321, *R v Immigration Appeals Tribunal, ex parte Sardar Ahmed* [1999] INLR 473, *Kikumbi v Refugee Applications Commissioner* [2007] IEHC 11 (Unrep, Herbert J, 7/2/2007) and *P(F) v Minister for Justice* [2002] 1 IR 164 considered – Leave granted (2006/865JR – Birmingham J – 10/6/2008) [2008] IEHC 171
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Judicial review – Application for leave – Right to family life –Applicant the only member of extended family not eligible to remain in State – Grounds not previously advanced before respondent - Threshold to be met for leave to be granted - Whether right to family life incorporated extended family – Whether respondent had proper regard to applicant's family life – Whether obligation on respondent to indicate that he had such regard - *Gul v Switzerland* (1996) 22 EHRR 93, *Sisojeva v Latvia* (Unrep, ECHR, 15/1/2007), *Akujobi v Minister for Justice* [2007] IEHC 9 (Unrep, MacMenamin J, 12/1/2007), *Abdulaziz v United Kingdom* (1985) 7 EHRR 471, *Keegan v Ireland* (1994) 18 EHRR 342 and *Moustaquim v Belgium* (1991) 13 EHRR 802 considered – European Convention on Human Rights and Fundamental Freedoms, Art 8 (1) – Leave to seek judicial review granted (2006/416JR – Clarke J – 19/2/2008) [2008] IEHC 80
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Deportation

Subsidiary protection refused – Use of country of origin information – Approach to be adopted – Issue of state protection in applicant's state – Whether properly considered – Issue of internal relocation – Whether decision made in breach of fair procedures – Whether deportation order should be quashed – *O v Minister for Justice* [2007] IEHC 169 (Unrep, Feeney J, 9/2/2007), *Ali v Minister for Justice* [2004] IEHC 108 (Unrep, Peart J, 26/5/2004), *R (Obasi) v Secretary of State* [2007] EWHC 381 (Admin), *Susan O v Minister for Justice* [2008] IEHC 107 (Unrep, Charleton J, 24/4/2008) considered – Relief refused (2007/1684JR – Birmingham J – 3/6/2008) [2008] IEHC 229
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INJUNCTIONS

Interlocutory

Discretionary relief – Grant or refusal resulting in disposal of substantive matter – Principles to be applied – Balance of risk of injustice

– Conflict on evidence – Strength of plaintiff's case on evidence – Whether so strong that injustice to refuse injunction – Sporting event – Amateur rowing – Injunction to facilitate participation in 2008 Olympic Games qualifying event - *American Cyanamid v Ethicon* [1975] AC 396 distinguished; *NWL Ltd v Woods* [1979] 1 WLR 1294 and *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 approved; *Campus Oil Ltd v Minister for Industry and Commerce (No 2)* [1983] IR 88 considered - – Injunction refused (2008/4248P – Laffoy J – 10/6/2008) [2008] IEHC 196
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Prohibitory – Mandatory – Defamation – Prior restraint of continuing publication – Criteria to be applied – Likelihood of success at trial – Requirement to show that plaintiff will clearly succeed at trial – Whether fair issue to be tried – Whether damages adequate remedy – Balance of convenience – Interference with freedom of expression – Right to good name – Whether words complained of clearly libellous – Whether mandatory injunction should be granted – *Campus Oil v Minister for Industry (No 2)* [1983] IR 88 applied; *Bonnard v Perryman* [1891] 2 Ch 269, *Cullen v Stanley* [1926] IR 73, *Sinclair v Gogarty* [1937] IR 377 and *Cogley v Radio Telefis Éireann* [2005] 4 IR 79 considered – Injunction granted (2007/5496P – Hedigan J – 8/5/2008) [2008] IEHC 143
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Trespass to land – Laying of water pipe on lands of which plaintiff 1/17th joint owner – Majority of owners giving consent – Plaintiff withholding consent following her indication that consent would be forthcoming – Compulsory purchase of lands pending – Principles to be applied – Extent of injury to plaintiff's rights – Whether capable of being adequately compensated by award of damages – Conduct of parties – Whether oppressive to defendant to grant injunction – Whether injunction should be granted – *Patterson v Murphy* [1978] ILRM 85 followed; *Greenwood v Hornsey* (1886) 33 Ch D 471, *Jaggard v Sawyer* [1995] 1 WLR 269 and *Keating & Co Ltd v Jervis Shopping Centre* [1997] 1 IR 512 considered – Provisional injunction granted subject to refusal of compulsory purchase order and €7,500 damages awarded for interference with plaintiff's rights (2000/12541P – Feeney J – 8/5/2008) [2008] IEHC 45
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INSURANCE

Contract

Repudiation – Insurance of unoccupied protected structure – Fire cover – Implementation of loss prevention programme of alternative insurer – Inadvertent disconnecting of alarm system – Whether alarm operational when contract concluded – Statements regarding shuttering and alarm – Warranties – Whether continuing warranties – Whether terms of contract – Whether statements material to risk – Whether failure to disclose blocking up of windows and doors material non-disclosure – Reinstatement – *Uberrimae fidei* – Onus of disclosure – Reciprocal duty to make reasonable inquiries – Fiduciary duties of broker – Departure from good business practices – *Superwood Holdings v Sun Alliance & London Insurance Plc* [1995] 3 IR 303, *Ballasty v Army Navy and General Insurance Association Ltd* (1916) 50 ILTR 114, *Furey v Eagle Star and British Dominions Insurance Co Ltd* (1922) 56 ILTR 23, *Coen v Employer's Liability Assurance Corporation Ltd* [1962] IR 314, *Keating v New Ireland Insurance Company* [1990] 2 IR 383, *Thomson v Weems* (1884) 9 App Cas 671, *Zurich General Insurance Co v Morrison* [1942] 2 KB 53, *Anderson v Fitzgerald* (1853) 4 HLC 484, *Re Sweeney and Kennedy's Arbitration* [1950] IR 85, *Hussain v Brown* [1996] 1 Lloyd's Rep 627, *Krelinger and Fernau Ltd v Irish National Insurance Co Ltd* [1956] IR 116 and *AMP Financial Planning PTY Ltd v CGU Insurance Ltd* [2005] FCAFC 185 considered – Declaration that defendant pay plaintiff on foot of policy (2004/1119P – McMahon J – 13/6/2008) [2008] IEHC 174

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Trademarks

Registered community trade mark - Copyright - Application for injunction restraining defendant from infringing copyright of plaintiff in label of plaintiff's whiskey - Whether defendant infringed plaintiff's copyright - Distinguishing features-General visual impressions of label - Test to be applied – Visual impact of labels - Whether substantial similarities between labels – Whether names of products reduced risk of confusion - Whether on balance of probability there existed likelihood of confusion on part of public including likelihood of association on part of substantial section of public and trade - Trade Mark Act 1996 (No 6), ss 6(1) and 14(2)(b) - European Communities (Enforcement of Intellectual Property Rights) Regulations 2006 (SI 360/2006), art 9 (1)(b) - Copyright and Related Rights Act 2000 (No 28), ss 31(1)(a), 45 and 139 - Council Regulation EC/40/94 art 1, 2 and 4 - Injunction granted (2008/191P- Murphy J – 4/7/2008) [2008] IEHC 236
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INTOXICATING LIQUOR

Criminal prosecution

Intoxicating liquor – Sale - Supply of intoxicating liquor at reduced price during limited period – Premises apportioned in two parts – Meaning of 'day' - Whether permissible

to charge different prices in different parts of premises – Whether necessary to keep both parts of premises open at the same time - *Cassidy v Minister for Industry and Commerce* [1978] 1 IR 297 applied – Intoxicating Liquor Act 2003 (No 31), s 20 – Interpretation Act 1937 (No 38), s 12 – Interpretation Act 2005 (No 23), ss 3 and 21 – Retail Price (Beverages in Licensed Premises) Display Order 1999 (SI 263/1999), art 3 – Case stated answered in favour of accused (2007/909SS – O'Neill J – 31/1/08) [2008] IEHC 24
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JUDICIAL REVIEW

Delay

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Remedy

Alternatives – Justiciable issue - Recording and mapping of broadband coverage in State - Respondent published indicative map of areas served with affordable, quality broadband services - Satellite broadband coverage not included in map - Whether decision not to include satellite broadband coverage a decision or policy that no reasonable decision maker could properly arrive at - Whether decision had no basis in fact or in law and was unreasonable, invalid and *ultra vires*- Whether respondent failed to take into account relevant considerations - Whether decision arrived at without any consultation with the applicant or other satellite broadband providers – Whether decision constituted unlawful fettering of powers - Whether decision to exclude constituted breach of European Union rules on State aids - Whether delay in bringing application - Whether decision gave rise to justiciable issue - Whether effective alternative remedies which could have been taken by applicant - Whether any evidence of irrationality or unreasonableness in decision - Relief refused (2008/423JR – McGovern J – 11/07/2008) [2008] IEHC 240
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LANDLORD AND TENANT

Lease

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New tenancy

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Detention

Involuntary patient - *Habeas corpus* - Renewal order - Signed by consultant psychiatrist – Consultant psychiatrist based in institution other than that in which applicant detained - Meaning of 'consultant psychiatrist responsible for care and treatment of patient' – Whether necessary for psychiatrist in daily charge of detainee to sign renewal order – *JB v Director Central Mental Hospital* [2007] IEHC 201 (Unrep, MacMenamin J, 15/6/2007) considered; *WQ v Mental Health Commission* [2007] IEHC 154 [2007] 3 IR 755 distinguished – Mental Treatment Act 1945 (No 19) s 184 - Mental Health Act 2001 (No 25), ss 15, 21 and 72 – Applicant's appeal dismissed (81/2008 – SC – 7/5/2008) [2008] IESC 31
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Involuntary patient – Procedure – Legality of detention – Standard of examination by medical practitioner – "As soon as may be" – Breach of technical requirements – Whether detention legal – Whether process must continue under section under which it was initiated – Whether breach of technical requirement amounted to breach of individual's constitutional rights – Whether examination by medical practitioner adequate – Mental Treatment Act 1945 (No 19), s 184 – Mental Health Act 2001 (No 25), ss 9,10, 12, 13 and 14 – Detention found to be lawful (2008/1038SS – Peart J – 29/7/2008) [2008] IEHC 262
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Road traffic accident

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PLANNING & ENVIRONMENTAL LAW

Compulsory purchase order

Objection to confirmation of order – Meeting between parties - Whether objections withdrawn on basis of representation that roundabout to provide access to lands – Whether legitimate expectation of consultation if plans regarding access to change - Resolution of dispute – Credibility of witnesses – Failure to mention assurances in subsequent correspondence - Planning and Development Act 2000 (No 3), s 50 – Relief refused (2004/717JR – Sheehan J – 4/6/2008) [2008] IEHC 167
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Development

Exempted development – Quarry – Unauthorised works - Intensification of use –Whether future planned use of lands constituted material change in use of the lands - Whether question of fact to be determined independently of planning considerations - Proper sequential approach - Whether intensification affected proper planning and development of area - Whether any finding of fact that there would be a change in use in applicant's lands by reason of planned southward expansion of quarried area - Whether any proper determination in accordance with law that expansion of quarried area constituted a material change in use of lands - *Monaghan County Council v Brogan* [1987] IR 333 followed; *Waterford County Council v John A. Wood Ltd* [1999] 1 IR 556 distinguished; *Kildare County Council v Goode* [1999] 2 IR 495 and *Galway County Council v Lackagh Rock Ltd* [1985] IR 120 considered - Planning and Development Act 2000 (No 30), ss 2(1), 3(1), 5(4), 32(1),160 and 261- *Certiorari* granted (2007/419JR - Finlay Geoghegan J – 4/7/2008) [2008] IEHC 210
Roadstone Provinces Ltd v An Bord Pleanála

Planning permission

Fair procedures - Applicants contending deprivation of opportunity to make submissions - Notice of planning application – Computerised system operated by respondents used by applicants to enquire as to existence of application – Input error in computer system – Disclaimer – Alternative means of enquiring as to planning applications available to applicant – Delay - Whether use of computerised system relieved applicants of further obligation to ascertain whether application had been made - Whether appropriate to determine disputed fact in the course of leave application – Whether necessary for affidavits to identify which matters within deponent's own knowledge – Whether breach of respondent's statutory obligations – Whether substantial grounds made out – Whether time limit ran from decision to refuse applicants' submissions or from grant of planning permission - *G v DPP* [1994] 1 IR 374 considered; *O'Connor v Cork County Council* [2005] IEHC 352 (Unrep, Murphy J, 1/11/2005) distinguished – Planning and Development Act 2000 (No 30), ss 7, 50 and 50A – Planning and Development (Strategic Infrastructure) Act 2006 (No 27), s 13 – Planning and Development Regulations 2001 (SI 600/2001) - Rules of the Superior Courts 1986 (SI 15/1986), O 84 –Leave to seek judicial review refused (2007/692JR and 2007/127COM – Finlay Geoghegan J – 19/2/2008) [2008] IEHC 76
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Planning permission

Reasons – Adequacy – Development plan – Interpretation – Approach to be adopted – Whether correct in law – Level of deference to be accorded to local authority's interpretation of its own development plan – Whether development would materially contravene development plan – Whether failure to take relevant matters into consideration – Whether development in conformity with proper planning and development of area – Planning

and Development Act 2000 (No 30), ss 34, 37 and 178 – *Re XJS Investments Ltd* [1986] IR 750, *McNamara v An Bord Pleanála* [1995] 2 ILRM 125 and *Mulholland v An Bord Pleanála (No 2)* [2006] I IR 453 applied; *O'Leary v Dublin County Council* [1988] IR 150, *Attorney General (McGarry) v Sligo County Council* [1991] 1 IR 99 and *Tennyson v Corporation of Dun Laoghaire* [1991] 2 IR 527 considered – Relief refused (2007/1564JR – Irvine J – 8/5/2008) [2008] IEHC 146
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Planning permission

Terms - Nuisance – Race track adjoining stud farm - Noise pollution – Intensification - Amenity of area – Diminution of business – Planning permission originally granted subject to conditions – Construction of grant of planning permission – Prescription - Whether intensification capable of constituting change of use – Whether existence of nuisance dependent on amenity of area – Whether action for nuisance capable of being barred by claim of prescription – *Denis v Ministry of Defence* [2003] EWHC 793 approved; *O'Kane v Campbell* [1985] IR 115, *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, *Butler v Dublin Corporation* [1999] 1 IR 565, *Galway County Council v Lackagh Rock Ltd* [1985] IR 120, *Readymix (Éire) Ltd v Dublin County Council* (Unrep, SC, 30/7/1974), *Clare County Council v Floyd* [2007] IEHC 48 [2007] 2 IR 671, *Morris v Garvey* [1983] IR 319 and *Wicklow County Council v Forest Fencing Ltd* [2007] IEHC 242 (Unrep, Charleton J, 13/07/2007) considered– Planning and Development Act 2000 (No 30), s 160 – Local Government (Planning and Development) Act 1976 (No 20), s 27 - Prescription Act 1832 (2 & 3 Will 4, c 71), ss 1 and 4 – Injunction granted (2007/4654P – Charleton J – 15/2/2008) [2008] IEHC 29
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PRACTICE & PROCEDURE

Costs

Amend statements of claim – Significant hearing required - Costs of application and consequent amendments to other pleadings – Application made shortly prior to hearing date of claim – Costs 'thrown away' – Proceedings already amended on previous occasion - Factors to be taken into account in awarding costs - Whether costs of application to amend should always be borne by party seeking amendment – Whether costs of significant interlocutory hearing should be treated as separate event – Whether amendments could reasonably have been included in the original proceedings – Whether necessary for two applications to amend proceedings – Whether reasonableness of opposition to amendments a factor in awarding costs - *Bell v Peterson* [1996] ILRM 290, *Wolfe v Wolfe* [2001] IR 313 and *Veolia Water v Fingal County Council* [2006] IEHC 240 [2007] 2 IR 81 considered – Costs under all categories awarded against party seeking amendment (2003/9018 P, 2004/18795P and 2006/1645P – Clarke J – 21/2/2008) [2008] IEHC 42
Porterridge Trading Ltd v First Active plc

Costs

Taxing master – Review - Costs of motion to dismiss appeal to Supreme Court – Whether error in principle in disallowing costs of service of motion – Mode of service not reasonably necessary – Mode of service not in accordance with rules – Whether error in principle in disallowing fee for junior counsel – Failure to assess reasonableness by reference to circumstances of particular case - Whether error in principle in disallowing mileage charges for person attending on behalf of solicitor – Legal executive – Unqualified person – Whether proper and reasonable for person with carriage of case to attend – Whether error in principle in conclusion on amount to be allowed as instructions fee – Onus of proof – *Lowe Taverns (Tallaght) Ltd v South Dublin Co Co* [2006] IEHC 383 (Unrep, McGovern J, 28/11/2006),*Dhand v McCrabbe* (1960) 96 ILTR 196, *Superquinn Ltd v Bray UDC* [2001] 1 IR 459, *Minister for Finance v Goodman (No 2)* [1999] 3 IR 333, *Smyth v Tunney* [1999] 1 ILRM 211, *Re Foster* [1878] 8 Ch Div 598, *Garthwaite v Sherwood* [1976] 2 All ER 1015, *Martin v Sherry* [1905] 11 KB 62, *Tobin v Kerry Foods Ltd* [1999] 1 ILRM 428, *Quinn v South Eastern Health Board* [2005] IEHC 399 (Unrep, Peart J, 30/11/2005), *Bloomer v Incorporated Law Society of Ireland (No 2)* [2000] 1 IR 383 and *Best v Wellcome Foundation Ltd (No 3)* [1996] 3 IR 378 considered – Solicitors Act 1954 (No 36), ss 2, 55, 56 and 57 - Courts and Courts Officers Act 1995 (No 31), s 27 - Rules of the Superior Courts 1986 (SI 15/1986), O 10, 52, 58, 99 and 121 – Appeal in respect of costs of counsel and mileage allowed and appeal in respect of costs of service and instructions fee disallowed (2004/3783P – Herbert J – 27/5/2008) [2008] IEHC 161
Cremin v Lynch

Discovery

Privacy – Third party - Plaintiff injured in course of performing medical procedure on third party – Third party allegedly carrying virus – Discovery of medical file of third party and hospital protocols sought – Whether necessary for entire file to be discovered – Whether necessary for protocols to be discovered – Whether matters in issue – *Brooks Thomas Ltd v Impac Ltd* [1999] 1 ILRM 171 considered – Discovery refused (2004/6091P – Master Honohan – 22/2/2008) [2008] IEHC 45
Abdullah v North Eastern Health Board

Discovery

Public inquiry sought - Whether access to documents necessary for fair hearing – Material facts to cause of action pleaded – Whether Government under legal obligation to inquire into matter – Legal position regarding information made available on express basis of confidentiality – Nature of tribunal public inquiry – Obligation to protect lives of citizens – Convention rights – Whether stateable case – Whether right to life compromised by failure to hold public inquiry – Whether right to life compromised by failure to examine fresh material – Whether release of material would put lives at risk - State privilege – Confidentiality – Duties of confidence – Assurances – Grounds of privilege - Failure to provide specifics or supportive assessments – Whether privilege asserted self evident – *Independent Newspapers Ltd v Murphy* [2006] IEHC 276 [2006] 3 IR 566 - *Leander v Sweden* [1987] 9 EHRR 433, *Taylor v UK* [1994] 79 DR 127, *Edwards v UK* (App 46477/99) (Unrep ECHR 14/3/2002), *Murphy v Corporation of Dublin* [1972] IR 215, *R (Corner House Research) v Director of Serious Fraud Office* [2008] EWHC 714, *R v Coventry Airport* [1995] All ER 3762, *Ambiorix Ltd v Minister for Environment* [1992] IR 277 and *D v NSPCC* [1978] AC 171 considered – European Convention on Human Rights and Fundamental Freedoms, article 2 – Discovery ordered with privilege to be subsequently considered (2004/18528P - Master Honohan – 7/5/2008)
O'Neill v Ireland

Documents

Disclosure - Evidence - Nature and purpose of evidentiary documents used in criminal proceedings – Books of evidence – Transcript of evidence at criminal trial – Discovery and production of documents used in prior criminal proceedings sought by plaintiffs for inspection in aid of civil litigation in different jurisdiction – Whether implied undertaking against any collateral use of books of evidence and transcript – Whether absolute prohibition on disclosure of transcript to third party for collateral use – Whether discretion vested

in court to release defendant from implied undertaking in respect of books of evidence for collateral use – Circumstances in which such discretion may be exercised – Existence of special circumstances and satisfaction that no injustice to person giving discovery would ensue – Rules of the Superior Courts 1986 (SI 15/1986), O 3, r 22, O 31, rr 19 and 29, O 86, rr 14 and 17 – *Roussel v Farchepro Ltd* [1999] 3 IR 567 followed; *Cork Plastics v Ineos UK Ltd* [2008] 1 ILRM 174 applied; *Kelly v Ireland* [1986] ILRM 318 considered; *Chambers v Times Newspapers Ltd* [1999] 2 IR 424 distinguished –Disclosure granted (2007/403SP – Gilligan J – 20/3/2008) [2008] IEHC 122
Breslin v McKenna

Documents

Production – Inspection - Civil proceedings – Transcripts of criminal proceedings – Books of evidence – Qualified production order made in civil proceedings outside jurisdiction – Whether impediment under Irish law preventing production of transcripts and books of evidence for inspection – Permission of court – Responsibility of courts to ensure due administration of justice – Discretion – Whether distinction where possibility of retrial – Risk of prejudice – Role of trial judge at retrial – Information necessary for exercise of discretion - *Kelly v Ireland* [1986] ILRM 318 and *Cork Plastics (Manufacturing) v Ineos Compounds UK Ltd* [2008] IEHC 93, [2008] 1 ILRM 174 considered – Defendants' appeal dismissed (110/2008 – SC – 16/7/2008) [2008] IESC 43
Breslin v McKenna

Judicial review

Applicant failing to comply with Rules of Superior Courts in seeking leave to issue judicial review – Medical treatment – Whether applicant should be granted leave to seek judicial review in respect of administrative decision concerning his medical condition – Whether rules of court should be waived in circumstances of application – *In Re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Relief refused (Charleton J – 27/5/2008) [2008] IEHC 153
In re Sean Lannon, a patient

Strike out proceedings

Commercial case seeking to have judgment and costs orders in s. 205 proceedings set aside – Claim that court misled regarding beneficial ownership of particular shares – Allegations of misrepresentations and false evidence - Application for dismissal of claim – Whether no reasonable cause of action – Whether action frivolous or vexatious - Whether no reasonable prospect of success – Whether abuse of process - Application for striking out of statement of claim – Whether statement of claim contained unnecessary or scandalous matters – Whether allegations of fraud, deceit, misrepresentation, conspiracy and breach of fiduciary duty made without being particularised – Attempt to delay – Attempt to re-litigate – Jurisdiction of court – Inherent jurisdiction – *Res judicata* – Impugning judgment obtained by fraud – Conflict of fact – Right of access to courts – Benefit of doubt – Whether case could be sustained if viewed at high watermark – Absence of evidence – Whether knowledge of beneficial ownership of shares would have affected outcome of proceedings – *Crindle Investments v Bula Holdings* (Unrep, Murphy J, 2/3/1993); *Crindles Investments v Wymes* [1998] 4 IR 567; *Aer Rianta v Ryanair* [2004] 1 IR 506; *Adams v Minister for Justice* [2001] 2 ILRM 452; *O'Siodhachain v O'Mahony* (Unrep, SC, 7/12/2001); *Fay v Tegral Pipes Ltd* [2005] 2 IR 261; *Kilcoyne v Westport Textiles* (Unrep, Finnegan P, 26/7/2006); *Barry v Buckley* [1981] IR 306; *Sun Fat Chan v Osseous Limited* [1992] 1 IR 425; *Flanagan v Kelly* (Unrep, O'Sullivan J, 26/2/1999); *Supermacs Ireland v Katesan (Naas) Limited* [2000] 4 IR 273; *Jodifern v Fitzgerald* [2000] 3 IR 321; *Lynch v O'Flynn* (Unrep, Kelly J, 18/6/2003); *Tassan Din v Banco Ambrosiano* [1991] 1 IR 569; *Landers v Garda Siochana Complaints Board* [1997] 3 IR 347; *Riordan v Ireland* [2001] 4 IR 463; *Riordan v Hamilton* (Unrep, SC, 9/10/2002); *Riordan v Government of Ireland* (Unrep, Smyth J, 6/10/2006); *Dykun v Odishaw* (Unrep, Alberta Court, 3/8/2000); *Re Lang Michener and Fabian* (1987) 37 DLR (4th) 685; *McCabe v Minister for Justice* (Unrep, Murphy J, 29/6/2006); *McSorley v O'Mahony* (Unrep, Costello J, 6/11/1996); *Cahill v Sutton* [1980] IR 269; *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468; *Lynch v O'Flynn* (Unrep, Kelly J, 18/6/2003); *Bula v Crowley* (Unrep, Murphy J, 10/6/2005); *Boswell v Coakes* (1894) 6 R 167; *Ampthill Peerage Case* [1977] AC 547; *Janesco v Beard* [1930] AC 298; *St Albans Investment Co v London Insurance Co Ltd* (Unrep, Murphy J, 27/6/1990); *P(L) v P(M)* (Unrep, SC, 19/7/2007); *Belville Holdings Ltd v Revenue Commissioners* [1994] ILRM 29; *Re Greendale Developments Ltd (No 3)* [2000] 2 IR 514; *Waite v House of Spring Gardens Ltd* (Unrep, Barrington J, 6/6/1985); *Kenny v Trinity College Dublin* (Unrep, SC, 20/6/2003); *P(L) v P(L)* [2002] 1 IR 219; *Quinn Group Ltd v An Bord Pleanala* [2001] 1 IR 505; *Goldsmith v Sperrings Ltd* [1977] 1 DPP 478; Lonrho *Plc v Fayed (No 5)* [1993] 1 DPP 1489; *Keaney v Sullivan* (Unrep, Finlay Geoghegan J, 16/1/2007); *Byrne v RTE* (Unrep, MacMenamin J, 3/3/2006); *Cooney v Browne* [1985] IR 185; *Moffit v Agricultural Credit Corporation* [2007] IEHC 245; *Superwood Holdings Plc v Sun Alliance* [1995] 3 IR 303; *Kilcoyne v Westport Textiles* (Unrep, Finnegan P, 26/7/2006); *Lawlor v Ross* [2001] IESC 110; *Lac Minerals v Chevron Corporation* (Unrp, Kean J, 6/8/1993); *Price v Keenaghan Developments Ltd* [2007] IEHC 190 and *Belton v Carlow Co Council* [1997] 2 ILRM 405 considered – Companies Act 1963 (No 33), s 205 - Rules of the Superior Courts 1986 (SI 15/1986), O 19, 52, 58, 99 and 121 – Proceedings dismissed (2007/192P – Edwards J – 6/5/2008) [2008] IEHC 208
Bula Holdings Ltd v Roche

Strike out proceedings

Inherent jurisdiction – Judicial immunity – Motion to dismiss or strike out claim – Claim of racial discrimination by courts – Whether frivolous or vexatious – Whether reasonable cause of action – Whether claim scandalous – Whether Minister can be vicariously liable where judges immune – *Desmond v Riordan* [2000] 1 IR 505, *Sirros v Moore* [1975] 1 QB 118, *Deighan v Ireland* [1995] 2 IR 56, *Barry v Buckley* [1981] IR 306, *Goodson v Grierson* [1908] 1 KB 761, *DK v King* [1994] IR 166 and *Riordan v Hamilton* (Unrep, Smyth J, 26/6/2000) followed - Constitution of Ireland 1937, art 35 – Treaty establishing the European Community, Article 13 – Proceedings struck out (2007/2370P – Hanna J – 11/6/2008) [2008] IEHC 246
Lopes v Minister for Justice, Equality and Law Reform

Strike out proceedings

Inherent jurisdiction - Judicial review proceedings - Proceedings amount to abuse of process – Procedure to be adopted - Whether procedure adopted to dismiss flawed - Whether applicant required to issue separate plenary proceedings - Whether court had jurisdiction to consider application to dismiss in absence of plenary proceedings - Burden of proof - Principles to be applied - *Ryanair Ltd v An Bord Pleanála* [2008] IEHC 1, (Unrep, Clarke J, 11/1/2008) applied; *Barry v Buckley* [1981] I.R. 306, *Sun Fat Chan v Osseous Ltd* [1992] 1 I.R. 425, *Olympia Productions Ltd v Mackintosh* [1992] ILRM 204, *Harrington v An Bord Pleanála* [2005] IEHC 344, [2006] 1 I.R. 388, *Fulham Football v Cabra Estates* [1994] 1 BCLC 363 and *O'Neill v Ryan (No 1)* [1993] ILRM 557 considered; *Lyttelton Times Co Ltd v Warners Limited* [1907] AC 476 not applied - Planning and Development Act 2000 (No 30), s 50 - Rules of the Superior Courts 1986 (SI 15/1986) O. 19 r 28 and O.84 r. 20 (7)(a) - Proceedings dismissed (2008/509JR - Irvine J – 8/7/2008) [2008] IEHC 224
Connolly v An Bord Pleanála

Summary summons

Summary judgment – Fees for legal services - Leave to defend – Whether *bona fide* defence – Cogency of evidence – Credibility of defence – Counsels' fees – Fees determined on taxation - Assertion that fees sought exceeded sums in initial fee notes – 'No foal no fee' practice

– Delay between determination of costs and payment – Solicitor's fees – Assertion that charges made for work after termination of solicitor's retainer – Failure to refer fees to taxation – Discretion to refer matter to taxation – Costs – Success in respect of large proportion of claim – Failure to take opportunity to refer fees to taxation – *First Commercial Bank Plc v Anglin* [1996] 1 IR 75, *Banque de Paris v De Naray* [1984] 1 Lloyd's Rep 21, *National Westminster Bank plc v Daniel* [1993] 1 WLR 1453, *ACC Bank plc v Malocco* [2000] 3 IR 191 and *Aer Rienta cpt v Ryanair Ltd* (Unrep, Kelly J, 5/12/2002) considered – Judgment in respect of portion of claim and remainder referred to taxation (2007/666SS - Clarke J – 19/6/2008) [2008] IEHC 203
Clarke v Stephens

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Smith de Bruin, Michelle
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PRISONS

Prison conditions

Discipline of prisoners – Disciplinary procedures – Fair procedures – Constitutional justice – European Convention on Human Rights – Whether applicant's constitutional and European Convention rights infringed in context of imposition of sanctions following disciplinary proceedings – *Certiorari* of sanctions sought – European Convention on Human Rights Act 2003 (No 20) – Relief refused (2004/1093JR – Hedigan J – 1/7/2008) [2008] IEHC 206
Gibbons v Governor of Wheatfield Prison

PROFESSIONS

Medical profession

Disciplinary proceedings - Doctor – Fitness to practise inquiry – Applicant previously refused leave for judicial review – Members sitting on first instance hearing to decide whether *prima facie* case against applicant also sitting on substantive hearing – Medical council deemed applicant for purposes of legislation – Suggestion phrase "*inter alia*" used in giving reasons for inquiry implied additional undisclosed and impermissible grounds for inquiry – Delay – Whether applicant could have advanced grounds in first judicial review – Whether overlap between members deciding existence of *prima facie* case and members conducting substantive inquiry necessary or permissible – Whether use of phrase '*inter alia*' grounds for relief – *O'Callaghan v Disciplinary Tribunal* [2002] 1 IR 1 applied; *O'Donoghue v Veterinary Council* [1975] IR 398 distinguished – Medical Practitioners Act 1978 (No 4), s 45 – Relief refused (2007/837JR – Gilligan J – 15/2/2008) [2008] IEHC 31
F (W) v Fitness to Practise Committee of the Medical Council

REAL PROPERTY

Partition

Dwelling house – Application for partition or sale in lieu - Tenants in common – Non-marital relationship - Beneficial interests – Whether interest of moiety or more – Contributions to purchase – Extension – Options – Viability of partition – Prospects for purchase of two separate properties - Valuation of property – Lay litigant – Misunderstanding regarding adjournment of proceedings – Application for *in camera* hearing – Application for adjournment – Request for maintenance of *status quo* – Deterioration of relationship – Adverse effect on health of applicant – Costs – Exercise of discretion - Partition Act 1868 (31 & 32 Vict, c 40), ss 3 and 4 – Order for sale in lieu of partition and no order as to costs (2007/180CA – Edwards J – 3/7/2008) [2008] IEHC 207
Sheehy v Talbot

RELIGION

Article

Higgins, Louise
The hijab in schools - religious belief and Irish law
2008 (November) GLSI 20

SALE OF LAND

Right of way

Contracts for sale of lands – Special conditions – Right of way – Right of passage – Way-leave for services - Whether agreement to provide right of way for retained lands to and from public road– Whether agreement to provide passage and running of services to and from retained lands – Whether obligation to extend distributor road to existing public road – Construction of special conditions – Purpose of facilitating access – *Dwyer Nolan Developments Ltd v Kingscroft Developments Ltd* [1999] 1 ILRM 141 – Breach of contractual obligations found; appropriate remedy to be determined (2006/364SP – Laffoy J – 5/6/2008) [2008] IEHC 166
Geraghty v Quinn

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SI 387/2008

Merchant shipping fees (amendment) order 2008
SI 390/2008

SOCIAL WELFARE

Statutory Instrument

Social welfare and pension's act 2008 (section 27) (commencement) (no. 2) order 2008
SI 398/2008

SPORTS LAW

Injunction

Team selection - Amateur rowing – Selection to national squad to compete at qualifying regatta for Olympic Games – Decision of organisation governing particular sport as to selection for competitive events – Whether judicial intervention in decision warranted - *American Cyanamid v Ethicon* [1975] AC 396 distinguished; *NWL Ltd v Woods* [1979] 1 WLR 1294 and *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 approved; *Campus Oil Ltd v Minister for Industry and Commerce (No 2)* [1983] IR 88 considered; *Quirke v Bord Luthcleas na hEireann* [1988] 1 IR 83 distinguished – Injunction refused (2008/4248P – Laffoy J – 10/6/2008) [2008] IEHC 196
Jacob v Irish Amateur Rowing Union Ltd

STATUTORY INTERPRETATION

Literal approach

Purposive approach – Statute transposing

Framework Decision into law of State – European Arrest Warrant Act 2003 (No 45), s 38(1)(b) – Framework Decision, (2002/584/JHA), article 2 – Respondent's appeal allowed (287/2007 – SC – 31/7/2008) [2008] IESC 53
Minister for Justice, Equality and Law Reform v Desjatnikovs

Retrospective effect

Amendment – Commencement – Right accrued – Right acquired – Whether commencement of amendment could have effect of removing right accrued or right acquired – Interpretation Act 2005 (No 23), s 27 – Case stated answered in favour of applicant (2008/57SS & 60SS – Dunne J – 1/4/2008) [2008] IEHC 78
O'Sullivan v Superintendent Togher Garda Station

SUCCESSION

Article

Doyle, Elaine
Examining succession and tax planning in family businesses in Ireland
Godwin, Adrian
2008 (21) ITR 72

TAXATION

Income tax

Self-assessment - Raising of notices of assessment – Appeal against assessment – Injunction sought requiring disclosure of information forming basis of assessment – Whether obligation to furnish documentation – Fair procedures – Legitimate expectation – Risk of allegations of criminal wrongdoing at hearing – Failure to establish prejudice – System of self-assessment – Entitlement to professional advice – Personal knowledge of income - *Keogh v Criminal Assets Bureau* [2004] 2 IR 159 and *Glencar Exploration plc v Mayo County Council* [2002] 1 IR 84 considered – Taxes Consolidation Act 1997 (No 39), ss 58, 922, 933, 934 and 954 – Application dismissed (2006/216JR – Gilligan J – 1/5/2008) [2008] IEHC 168
J (T) v Criminal Assets Bureau

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Examining succession and tax planning in family businesses in Ireland
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Statutory Instruments

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SI 397/2008

Taxes consolidation act 1997 (accelerated capital allowances for energy efficient equipment
SI 399/2008

TORT

Limitation of actions
Personal injuries – Application for leave to deliver an amended defence – Amendment for purposes of reliance on Statute of Limitations – Representation previously made that liability not in issue – Whether defendant entitled to regard claim as abandoned - Whether defendant estopped from relying on Statute of Limitations – *Ryan v Connolly* [2001] 2 ILRM 174, *Doran v Thomas Thompson & Sons* [1978] 1 IR 223 and *Murphy v Grealish* [2006] IEHC 22 (Unrep, MacMenamin J, 11/1/2006) considered - Rules of the Superior Courts 1986 (SI 15/1986), O 28, r1 – Application to amend defence refused (2002/8224P – Edwards J – 1/2/2008) [2008] IEHC 83
Griffin v Calally

Personal injury

Negligence – Employer's liability – Contributory negligence – Part-time fireman – Bog fire - Failure to have regard to guidelines – Absence of lighting – Damages -Whether weight gain brought on by inactivity due to injury caused diabetes – Plaintiff's claim successful (2001/4672P – Peart J – 12/2/2008) [2008] IEHC 57
Adams v County Council of Galway

Negligence

Personal injuries – Motorcycle race participant – Breach of duty – Causation - Breach of rules – Inexperienced rider – Whether accident caused by failure to limit support rider to less powerful bike –Whether high kerb should have been insulated – Minimal safety measures – Obligation to conduct proper risk assessment of hazards – Damages – Loss of job opportunity – Damages awarded (2001/15543P – Clark J – 31/5/2008) [2008] IEHC 175
Gordon v Louth Motorcycle Racing Club

TRANSPORT

Statutory Instruments

Taxi regulation act 2003 (maximum fares) order 2008

SI 394/2008
Vehicle registration and taxation (amendment) regulations 2008
SI 396/2008

TRIBUNAL OF INQUIRY

Standard of proof

Proof beyond all reasonable doubt – Legal representation – Power of tribunal to order costs – Provision for costs in advance of finding by tribunal – *Goodman International v Mr Justice Hamilton* [1992] 2 IR 542 and *O'Callaghan v Mahon* [2005] IESC 9, [2006] 2 IR 32 applied; *Haughey v Moriarty* [1999] 3 IR 1, *Georgopoulos v Beaumont Hospital Board* [1998] 3 IR 132, *O'Laoire v Medical Council* (Unrep, SC, 25/7/1997), *Mooney v An Post* [1998] 4 IR 288, *In re H (Minors)* [1996] AC 563, *B v Avon and Somerset Constabulary* [2001] 1 WLR 340, *Banco Ambrosiano SPA v Ansbacher & Co* [1987] ILRM 669, *In re Haughey* [1971] IR 217, *Maguire v Ardagh* [2002] 1 IR 385, *McBrearty v Morris* (Unrep, Peart J, 13/5/2003) and *K Security Ltd v Ireland* (Unrep, Gannon J, 15/7/1997), *Lawlor v Flood* [1999] 3 IR 107 and *Steel & Morris v United Kingdom* (2005) 41 EHRR 22 considered - Tribunals of Inquiry (Evidence) (Amendment) Act 1979 (No 3), ss 4 and 6 – Tribunals of Inquiry (Evidence) (Amendment) Act 1997 (No 42), s 3 – Claim dismissed (2007/80JR – Murphy J – 31/7/2008) [2008] IEHC 282
Lawlor v Judge Mahon

WILLS

Article

Considine, Rita
The best will in the world
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WORDS AND PHRASES

"**As soon as may be**" – *McCarthy v An Garda Siochána Complaints Tribunal* [2002] 2 ILRM 341 followed - Mental Health Act 2001 (No 25), s 14 - Detention found to be lawful (2008/1038SS – Peart J – 29/7/2008) [2008] IEHC 262
Z (M) v Khattak

EUROPEAN DIRECTIVES IMPLEMENTED INTO IRISH LAW UP TO 17/11/2008

European communities (compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems) regulations 2008
REG/816-2006
SI 408/2008

European communities (control on mussel fishing) (amendment) regulations 2008
Please see S.I as it implements a lot of Directives
SI 395/2008

European communities (financial instruments analogous to prize bonds) regulations 2008
DIR/88-361
SI 419/2008

European communities (feeding stuffs intended for particular nutritional purposes) regulations,2008
DIR/1993-74, DIR/2000-16, DIR/2008-38, DIR2008-82
SI 389/2008

European communities (labelling, presentation and advertising of foodstuffs) (amendment) regulations 2008
DIR/2007-68
SI 424/2008

European communities (lifts) (amendment) regulations 2008
DIR/2006-42, DIR/95-16
SI 406/2008

European communities (recognition of driving licences of other member states) regulations 2008
DIR/91-439
SI 464/2008

European communities (machinery) regulations 2008
DIR/2006-42, DIR/95-16
SI 407/2008

National beef assurance scheme act 2000 (animal movement) regulations 2008
REG/1760-2000
SI 400/2008

Sea-fisheries (control on fishing for hake) regulations 2008
REG/811-2004
SI 418/2008

BILLS OF THE OIREACHTAS AS AT 14TH NOVEMBER 2008 (30TH DÁIL & 23RD SEANAD)

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

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

Arbitration Bill 2008
Bill 33/2008
Order for 2nd Stage - Dáil

Broadband Infrastructure Bill 2008
Bill 8/2008
1st Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Broadcasting Bill 2008
Bill 29/2008
2nd Stage – Dáil *(Initiated in Seanad)*

Charities Bill 2007
Bill 31/2007
Report and Final Stages – Dáil

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

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

Civil Partnership Bill 2004
Bill 54/2004
2nd Stage – Seanad **[pmb]** *Senator David Norris*

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

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

Cluster Munitions and Anti-Personnel Mines Bill 2008
Bill 52/2008
Committee Stage – Dáil

Cluster Munitions Bill 2008
Bill 19/2008
2nd Stage – Dáil **[pmb]** *Deputy Billy Timmins*

Consumer Protection (Amendment) Bill 2008
Bill 22/2008

2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

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

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

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

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

Defamation Bill 2006
Bill 43/2006
2nd Stage – Dáil *(Initiated in Seanad)*

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

Electoral (Amendment) Bill 2008
Bill 38/2008
Order for 2nd Stage - Dáil

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

Employment Law Compliance Bill 2008
Bill 18/2008
Order for 2nd Stage – Dáil

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

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

Fines Bill 2007
Bill 4/2007
Order for 2nd Stage – Dáil

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

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

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

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

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

Gas (Amendment) Bill 2008
Bill 55/2008
2nd Stage – Dáil

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

Harbours (Amendment) Bill 2008
Bill 42/2008
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Housing (Miscellaneous Provisions) Bill 2008
Bill 41/2008
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

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

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

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Committee Stage – Dáil

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

Juries (Amendment) Bill 2008
Bill 25/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Land and Conveyancing Law Reform Bill 2006
Bill 31/2006
Committee Stage – Dáil *(Initiated in Seanad)*

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

Legal Services Ombudsman Bill 2008
Bill 20/2008
2nd Stage – Dáil

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

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

Mental Health Bill 2008
Bill 53/2008
Committee Stage - Dáil

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

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

Nursing Homes Support Scheme Bill 2008
Bill 48/2008
Order for 2nd Stage – Dáil

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

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

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

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

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

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
Order for Second Stage – Dáil

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

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

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

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

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
1st Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Social Welfare (Miscellaneous Provisions) Bill 2008
Bill 54/2008
2nd Stage - Dáil

Spent Convictions Bill 2007
Bill 48/2007
2nd Stage – Dáil **[pmb]** *Deputy Barry Andrews*

Student Support Bill 2008
Bill 6/2008
2nd Stage – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
2nd Stage – Dáil

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

Twenty-eighth Amendment of the Constitution Bill 2008
Bill 14/2008
Report and Final Stages – Dáil

Twenty-eighth Amendment of the Constitution Bill 2007 (Rights of Child)
Bill 14/2007
Order for 2nd Stage - Dáil

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

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

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

ACTS OF THE OIREACHTAS AS AT 14TH NOVEMBER 2008 (30TH DÁIL & 23RD SEANAD)

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

1/2008 Control of Exports Act 2008
Signed 27/02/2008

2/2008 Social Welfare and Pensions Act 2008
Signed 07/03/2008

3/2008 Finance Act 2008
Signed 13/03/2008

4/2008 Passports Act 2008
Signed 26/03/2008

5/2008 Motor Vehicles (Duties and Licences) Act 2008
Signed 26/03/2008

6/2008 Voluntary Health Insurance (Amendment) Act 2008
Signed 15/04/2008

7/2008 Criminal Justice (Mutual Assistance) Act 2008
Signed 28/4/2008

8/2008 Criminal Law (Human Trafficking) Act 2008
Signed 07/05/2008

9/2008 Local Government Services (Corporate Bodies) (Confirmation of Orders) Act 2008
Signed 20/05/2008

10/2008 Prison Development (Confirmation of Resolutions) Act 2008
Signed 02/07/2008

11/2008 Electricity Regulation (Amendment) (Eirgrid) Act 2008
Signed 08/07/2008

12/2008 Legal Practitioners (Irish Language) Act 2008
Signed 09/07/2008

13/2008 Chemicals Act 2008
Signed 09/07/2008

14/2008 Civil Law (Miscellaneous Provisions) Act 2008
Signed 14/07/2008

15/2008 Dublin Transport Authority Act 2008
Signed 16/07/2008

16/2008 Nuclear Test Ban Act 2008
Signed 16/07/2008

17/2008 Intoxicating Liquor Act 2008
Signed 21/07/2008

18/2008 Credit Institutions (Financial Support) Act 2008
Signed 02/10/2008

ABBREVIATIONS

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Law Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

The references at the foot of entries for Library acquisitions are to the shelf mark for the book.

The Future of the Law of Restitution in Ireland: the Unjust Question.

Laura Farrell BL

Introduction

In the mid 1990s, Keane J recognised that "unjust enrichment exists as a distinctive legal concept, separate from both contract and tort".[1] These comments were in conformity with the trend of recognising a law of unjust enrichment elsewhere in the common law world.[2] The principle against unjust enrichment recognised, a stable pattern of analysis has been derived and it consists of the following five-fold enquiry: (i) Was the defendant enriched? (ii) Was it at the expense of this plaintiff? (iii) Was it unjust? (iv) What kind of right did the plaintiff acquire? (v) Does the defendant have a defence?[3] Globally, courts dealing with restitutionary claims have been grappling with the third question: whether the defendant's enrichment at the plaintiff's expense is unjust, the "unjust question".

The unjust question is not new, but it is a question for which there has been a recent call from the House of Lords for further academic consideration because it has "not yet been fully considered".[4] The question is of academic interest: it caused Professor Birks, one of the architects of the 'unjust factors' approach, to change his mind declaring "[a]lmost everything of mine now needs calling back for burning"[5]. The question is of interest to the practitioner, affording as it might an alternative method of formulating a client's claim – even in circumstances where the client realises he or she has made a bad bargain, realising the performance (which he has received in full) was worth less than the performance which he made. This proposition will be especially important in view of the potential availability of compound interest following *Sempra Metals Limited (formerly Metallgesellschaft Limited) v Her Majesty's Commissioner of Inland Revenue and another*[6], ("*Sempra*").

This article looks at the unjust question from an Irish perspective, and argues that restitution, without the plaintiff needing to put forward a particularised reason for restitution, cannot be the best answer to the unjust question.

Unjust Factors and Absence of Basis

There are two opposing approaches to establishing that the defendant's enrichment at the plaintiff's expense is unjust. The first is the so-called 'unjust factors' approach, this method reflects common law orthodoxy and is used in Ireland.[7] It cannot however be referred to as the 'common law approach' because Canada now follows a different model.[8] 'Unjust factors' is short hand for a method in which the plaintiff has to establish that his facts bring him within one of the established categories of restitution: mistake, ignorance, failure of consideration, illegitimate pressure, undue influence, exploitation of weakness, legal compulsion, necessity, illegality, incapacity, and *ultra vires* demands by public authorities. The categories have been established in case law, and the list is not closed.[9]

The unjust factors approach therefore requires the plaintiff to put forward a positive reason for restitution. By contrast the civilian tradition begins from the proposition that every enrichment in the hand of the defendant received at the plaintiff's expense either has an explanation known to the law, or has not:

> "Enrichments are received with the purpose of discharging an obligation or, if without obligation, to achieve some other objective as for instance the making of a gift, the satisfaction of a condition, or the coming into being of a new contract. These outcomes succeeding, the enrichment is sufficiently explained. An enrichment which turns out to have no such explanation is inexplicable and cannot be retained."[10]

The sharp edges of these two approaches have been slightly blurred, with South Africa following somewhat of a hybrid approach,[11]and Canada following an approach which is not identical to, but which looks a lot like the civilian enquiry where to ground restitution it must be shown that there is no "juristic reason" for the enrichment and the deprivation.[12]

1 *The Right Honourable the Lord Mayor, Aldermen and Burgesses of the City of Dublin v Building and Allied Trade Union and its Trustees James Foley Frederich Hosford Dermot Gray Jams Lyons and Laurence O'Brien* [1996] 1 I.R. 468, 483.
2 For example, *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 558 (Lord Bridge), 559 (Lord Templeman), 568 (Lord Ackner), 578 (Lord Goff); *Pavey & Matthews v Paul* (1986) 162 C.L.R. 221 (HCA); *Delgman v Guaranty Trust of Canada* [1954] 3 D.L.R. 785 (SCC).
3 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 39.
4 *Deutsche Morgan Grenfell Group Plc v Her Majesty's Commissioners of Inland Revenue and Anor* [2006] UKHL 49, [157] (Lord Walker).
5 Birks, *Unjust Enrichment*, First Edition (OUP, Oxford, 2003) xiv.
6 [2007] UKHL 34.
7 [1996] I.R. 486, 484 (Keane J);
8 *Garland v Consumers' Gas Co* [2004] SCC 25
9 *CTN Cash and Carry Ltd v Gallaher* [1994] 4 All ER 714 (CA)
10 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 102-103.
11 See for discussion of the unjust question in South Africa Scott, 'Restitution of Extra-Contractual Transfers: Limits of the Absence of Legal Ground Absence of Legal Ground Analysis' [2006] 14 R.L.R. 93.
12 *Pettkus v Baker* [1980] 2 S.C.R. 725.

A Test to the Unjust Factors Approach

During the 1980s, local authorities of the United Kingdom became involved with interest rate swaps.[13] In *Hazell v Hammersmith and Fulham LBC*[14], the House of Lords held that such interest swaps were beyond the powers of the local authorities. When the nullity of the swaps was discovered, some interest swaps were at an end, the fixed period the parties had chosen had passed and both parties had received what they had bargained for, a so-called 'closed swap'. In other cases when the nullity was discovered, the parties stopped making payments mid term, 'an open interrupted swap'. The difficulty with ordering restitution in the closed swap is that the parties had received everything that they were to receive under the bargain they had reached. The obvious obstacle for restitutionary relief was in identifying the ground of restitution. The plaintiff could not rely upon mistake since the only mistake was mistake of law (if indeed there had been a mistake of law) and in the earliest stages of the swaps litigation, no exceptions to the then existing mistake of law bar were applicable. Failure of consideration was also hard to argue, since the parties had received what they had bargained for. Subsequent case law has come to the conclusion that the party who had won or was winning had to make restitution of the amount by which its receipts exceeded its payments out. This answer was to put in doubt the 'unjust factors' method of explaining why it is that an enrichment is unjust. This litigation is discussed here because: it forms the source of arguments in an English context that a civilian approach should be (had been) adopted; it provides an illustration of the huge practical significance of the seemingly subtle differences between the two approaches; and, it affords an opportunity to lay the foundations for the argument in this paper in favour of the unjust factors, by asserting that the swaps litigation does not necessitate a change in response, or even indicate the desirability of change.

Westdeutsche Landesbank v Islington LBC[15] *("Westdeutsche")* was the first swaps case to reach the High Court. It was heard before Hobhouse J along with *Kleinwort Benson Ltd. v Sandwell Borough Council* ("Sandwell"). The swaps in *Westdeutsche* were open interrupted swaps, however one swap in *Sandwell* was a closed swap. In both the open and the closed swaps, Hobhouse J ordered restitution because there had been "no consideration" for the payments, the swap agreement having been void from the start. The *Sandwell* swap was not appealed, and therefore at this stage, the Court of Appeal were not able to look at the question of whether restitution was available in closed swaps. The question of whether, and the more important question of why restitution is available in completed swaps reached the appellate courts in *Guinness Mahon & Co v Kensington and Chelsea London BC*[16] ("*Guinness Mahon*"), which was an appeal in substance if not in form from the decision of Hobhouse J in *Sandwell*. The claim to restitution succeeded, but the precise reason why is difficult to identify with certainty. Morritt LJ held that the local authority was entitled to restitution of the net payments it had made on the ground of total failure of consideration, because the contract was *ultra vires*.[17] Waller LJ however expressly doubted whether absence of consideration was an appropriate ground of restitution,[18] There were also suggestions that the reason for restitution in the closed swap should be policy.[19]

In *Kleinwort Benson v Lincoln City Council*[20] ("*Kleinwort*") the ground of "absence of consideration" was no longer sufficient reason to give restitution because some of the payments had been made more than six years before issue of the writ, and therefore the claimants, if they were to succeed at all, needed to rely on the ground of mistake, and in so doing make use of s. 32(1)(c) Limitation Act 1980 to mean that time would only have begun to run when the mistake could have been discovered, namely when the nullity was discovered in *Hazell*. Their Lordships were in agreement that the mistake of law bar should be abrogated, and by a majority held that a mistake of law had been made.

The swaps cases were heralded by academics as posing an open invitation to move from the consensus' unjust factors approach to a typically civilian approach.[21] The argument runs as follows: as seen above in *Guinness Mahon* following the lead from Hobhouse J in *Westdeutsche,* restitution was ordered in a closed swap (where each party had received the whole of its bargained for counter performance) because there was "no consideration", the swap agreement having been void from the start. Therefore, arguably restitution was based upon the nullity of the underlying transactions alone, without looking for substantive reasons for restitution. By contrast, the unjust factors approach gives "an immediately intelligible reason why restitution should follow"[22], and nullity as such does not lead to restitution. Furthermore, the breadth of the notion of mistake that their Lordships countenanced in *Kleinwort* perhaps dressed the civilian approach in 'unjust factors' sheep's clothing. The underlying rationale for the unjust factor of mistake is that "it is unjust for a person to retain a benefit which he has received at the expense of another which that person did not intend him to receive because it was made under a mistake that it was due".[23] Where a party (as in the swaps litigation) pays under a consensus amongst practitioners and that consensus is subsequently overruled by the courts, is a mistake really made in those circumstances? It is likely in such circumstances that the data which determined the decision could not have been improved upon at the date the decision was made, and the data falsifying the beliefs held at the time of the payment will not have come into existence until after the payment was made. A true mistake involves impairment, and the impairment consists in the wrong data. If the data actually used could not be shown to be wrong at the time, it must follow that the decision was not impaired. In such circumstances, a misprediction is made and not a

13 See for definition of an interest rate swap *Hazell v Hammersmith and Fulham LBC* [1990] 2 QB 697, 739-741.
14 [1992] 2 AC 1 (HL).
15 [1994] 4 All ER 890 (QBD).
16 [1999] QB 215 (CA).
17 [1999] QB 215, 230 (CA).
18 [1999] QB 215, 231 (CA).
19 [1999] QB 215 (CA) 229 (Morritt LJ), 232-3 (Waller LJ).
20 [1999] 2 AC 349.
21 Birks, 'No Conideration: Restitution after Void Contracts' (1993) 23 UWALR 195
22 Krebs, 'In Defence of Unjust Factors' (2000) Oxford U Comparatice L Forum 3 at ouclf.iuscomp.org, text after note 3.
23 *[2006] 3 W.L.R. 781 (HL) [59] (Lord Hope). See also Virgo, The Principles of the Law of Restitution, Second Edition (OUP, 2006) 159.*

mistake.[24] On this argument, the broad notion of mistake in *Kleinwort* does not respond to intent in the manner that the unjust factor of mistake does.

It was not however the view of all commentators that a change of direction had been or had to be made: arguments were made that the swaps cases can be explained with the unjust factor of mistake[25]; or failure of consideration.[26] In this piece, the argument that the swaps litigation posed a standing invitation to adopt the civilian approach, and the further argument that they indicated a civilian approach had been adopted, is rejected. It would be possible to make this argument by asserting that the swaps cases were wrongly decided or at least incorrectly reasoned, the Law Reports are replete with examples of this, and in response we do not abandon taxonomies to fit the peculiarities. However, neither concession is necessary here. Firstly, from the perspective of the 'unjust factors' approach, the swaps cases were not wrongly decided, as the results are plainly justifiable in terms of unjust factors. Failure of consideration could provide the reason for restitution in the open, interrupted swaps. However in closed swaps it cannot. Contractual reciprocation has two aspects: the legal liability of the other to make the counter performance and the counter performance itself. In *Fibrosa v Spolka Akcyna v Fairbairn Lawson Combe Barbour*[27], the Polish company did 'possess' the legal liability of the other to make the counter performance, but it never got what the legal tie was supposed to deliver, the machinery. The initial legal tie was not sufficient to prevent there having been a failure of consideration when the contract went off without its end being achieved. Conversely the nullity of the supposed legal tie cannot in itself amount to a failure of consideration if as things turn out the counter performance itself is achieved.[28]

However, the unjust factor of policy provides a reason for restitution in the closed swaps. If we add to this the reservation that the swaps cases failed to spell out this policy properly[29] we do not see an argument for the civilian approach, but a reason for an even more rigorous adherence to the unjust factors approach, because it may have led to the courts articulating the policy more fully. By contrast, the absence of basis reference back to the reason for invalidity leads into a void.[30] Secondly, from the perspective of the consensus approach the swaps cases were not incorrectly reasoned. Their Lordships in the swaps litigation clearly saw the obligation to identify an unjust factor, whatever one may think about the breadth of notion of failure of consideration or mistake that is countenanced. Indeed, *Kleinwort* demonstrates the swaps cases working out the unjust factors, in abrogating the discredited mistake of law bar.

Birks' change of direction

Unjust Enrichment[31] contains three major shifts since Birks' important text, *An Introduction to the Law of Restitution*[32]. Namely that it is important to separate out restitution from unjust enrichment, secondly that there is no need for a plaintiff in unjust enrichment to have suffered a loss corresponding to the defendant's gain. Thirdly, and of central import to this article, that in deciding whether an enrichment is unjust, it is better to proceed by looking for an absence of basis rather than an "unjust factor". After the publication of the first edition of *Unjust Enrichment* it seemed that his absence of basis approach had been adopted by judicial authority[33]. It is now established by case-law (which perhaps merits the label 'heavy weight' to the same degree as the swaps cases did) that although there is room for further discussion of the unjust question, English law follows an unjust factors approach.[34] Birks' absence of basis approach will be set out here as it is the thinking of the architect of the unjust factors approach on a new better model, based on the civilian approach, but set out to work in a common law system. It is therefore Birks' new approach that will also be used as the target of the criticisms of the civilian approach, arguing that Ireland should not adopt a civilian approach.

Birks sets out the operation of his 'no basis' test in three questions "which will resolve nearly all cases"[35] (1) Was the enrichment perceived to be obligatory? If it was, its basis will have failed if there was in fact no obligation. Cases of payments made under a mistake as to liability, of money paid under void contracts, and of taxes demanded by a public authority *ultra vires* will come within this category. (2) If it was not obligatory but voluntary, what end was it intended to achieve or depend upon and, in particular, was it intended to bring about or depend upon a contract, trust, gift or other outcome? If that outcome did not come about, the basis of the enrichment will have failed. (3) If the enrichment was acquired without the participation of the claimant or his agents, was there any legal authority for its acquisition by the defendant? Generally enrichments of that kind have no basis. There is no need to add the caveat in case (1) and (2) that the claimant must not have knowingly taken the risk that the desired outcome would not be achieved because one who takes such a risk desires one outcome, but intends two, therefore in relation to the undesired but intended outcome, there is no failure of basis. The basis for the undesired

24 Birks, 'Private Law' in Birks and Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press, 2000) 17.
25 Burrows, *The Law of Restitution*, Second Edition (OUP, 2003) 156.
26 McFarlane and Stevens, 'In Defence of Sumpter v. Hedges' (2002) 118 LQR 569, 577.
27 [1943] AC 32 (HL) 64-65.
28 Birks, 'Private Law' in Birks and Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press, 2000) 9-12.
29 Birks, 'Private Law' in Birks and Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press, 2000) 17-18.
30 Krebs, 'The New Birksian Approach to Unjust Enrichment' [2004] RLR 260, 274; Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish Publishing, London, 2001) 182-184.
31 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005).
32 Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985).
33 *Deutsche Morgan Grenfell Group plc v. Inland Revenue Commissioners and Another* (2003) STC 1017 (Park J).
34 *Deutsche Morgan Grenfell Group Plc v Her Majesty's Commissioners of Inland Revenue and Anor* [2006] UKHL 49; *Sempra Metals Limited (formerly Metallgesellschaft Limited) v Her Majesty's Commissioner of Inland Revenue and another* [2007] UKHL 34.
35 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 129.

but intended outcome is gift.[36] Identifying risk-taking and labelling a payment made with the risk of getting nothing as a gift is important in Birks' scheme for identifying the basis of an enrichment.[37]

Birks demonstrates his new approach in graphic form using a pyramid. His pyramid makes "intent based unjust factors subservient to absence of basis, which itself then becomes an intermediate generalization between the unjust factors and unjust."[38] The unjust factors sit at the base of this pyramid and "become reasons why, higher up, there is no basis for the defendant's acquisition, which is then the master reason why, higher up still, the enrichment is unjust".[39] It is perhaps that Birks adopted the pyramid, and placed emphasis upon the submerged relevance of intent in his new approach for political reasons: to make the new approach closer to the existing approach, and therefore a friendlier prospect for the judiciary, indeed Birks labels the pyramid a 'limited reconciliation'. It may also be that this has enjoyed some success. In *Deutsche Morgan Grenfell group Plc v Her Majesty's Commissioners of Inland Revenue and Anor* ("*Deutsche Morgan*") Lord Walker first referencing the pyramid said as follows:

> "I would be glad to see the law developing on those lines. The recognition of "no basis" as a single unifying principle would preserve what Lord Hope refers to as the purity of the principle on which unjust enrichment is founded, without in any way removing (as this case illustrates) the need for careful analysis of the content of particular "unjust factors" such as mistake."[40]

However, in my view the pyramid does not work and substantially weakens Birks' argument. If it is possible to prove absence of basis without proving one of the unjust factors that sit below it on the pyramid, then it is misleading to say that the new approach is based upon the pyramid. It seems that on the new Birksian approach, an absence of basis can indeed be proven without showing one of the factors below it first. Policy is not one of the particular unjust factors that sit at the base of the pyramid.

> "The logic of the pyramid is that a policy which does not invalidate the basis of an enrichment has no relevance at all, and a policy which does destroy that basis is irrelevant, since the invalidity is sufficient in itself, without regard to the reason for it."[41]

It is therefore clear that in Birks' schema, invalidity is sufficient reason for restitution without regard to the reason for that invalidity. It therefore seems that the pyramid construction serves only as an illusion, if it is on his scheme sufficient to go straight to absence of basis without demonstrating one of the unjust factors at the base of the pyramid.

If the pyramid worked, then an advantage of the pyramid would be as follows. It is a feature of approaches to the unjust question based upon 'absence of basis' that the unjust question sometimes has to find its answer outside the law of unjust enrichment, because of the difficulty of defining basis sufficiently well to avoid the dangers of granting too much restitution and also to grant restitution when necessary. That unjust enrichment is left with little (or less) to say on the unjust question, becomes a grave problem if the rest of the law is not developed to answer those questions for it, this is the problem of importing civilian terminology without civilian substance to which this piece returns later. With the pyramid, Birks has perhaps attempted to avoid this by bringing the details of invalidity into the pyramid,[42] and so within the remit of unjust enrichment. However, we are here brought to a deep criticism of the new Birksian approach. Lord Walker in *Deutsche Morgan*, was quoted above in praise of the pyramid, as follows: "The recognition of "no basis" as a single unifying principle would preserve what Lord Hope refers to as the purity of the principle on which unjust enrichment is founded, without in any way removing (as this case illustrates) the need for careful analysis of the content of particular "unjust factors" such as mistake." If that praise for the pyramid is true, in other words, if all of our learning from the unjust factors sits at the base of the pyramid, then why do we have absence of basis there at all? I agree, and it is the thesis of this piece that it would be a shame to throw all of the learning from the unjust factors away, but if we are keeping them, then surely there is no need to also dabble in civilian terminology. That we might apply the unjust factors approach but simply muddle it by the use of civilian terminology sounds like a defenceless position. It should however be noted that it is perfectly plausible that Ireland may well arrive in this position if it were to attempt to apply an absence of basis approach. It is plausible, because this is arguably what happened when Canada moved from the safe berth of the consensus approach to its new approach: it adopted what has been referred to by commentators as the "deeply confusing habit of saying one thing and doing another".[43]

The Potential Dangers of Absence of Basis in Ireland

Perhaps chief amongst the difficulties which any absence of basis approach must overcome are the difficulties inherent in defining what is meant by basis, to avoid offering too much restitution. The problem with the general clause of enrichment in German law in BGB §812.1 is overkill. Absence of basis

36 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 130.

37 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 160. See also Burrows, 'Absence of Basis: the New Birksian Scheme' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 35.

38 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 116.

39 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 116.

40 *Deutsche Morgan Grenfell Group Plc v Her Majesty's Commissioners of Inland Revenue and Anor* [2006] UKHL 49, [158] (Lord Walker).

41 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 116.

42 See also Burrows, 'Absence of Basis: the New Birksian Scheme' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 36.

43 McInnes, 'Juristic Reasons and Unjust Factors in the Supreme Court of Canada' (2004) 120 L.Q.R. 554, 555.

has always been too wide.[44] German law has surmounted the obstacle of overcoming the inherent problem in the general clause of the potential for palm tree justice. However this required the general clause to be narrowed first by jurists and then by judges who have adopted the proposed academic solutions.[45] The fears of palm tree justice associated with an absence of basis approach until it has been properly bedded into a legal system have a particular resonance in Irish law. In the *Bricklayers Hall* case Keane J said "the law, as it has developed, has avoided the dangers of 'palm tree justice' by identifying whether the case belongs in a specific category which justifies so describing the enrichment".[46] In the court below, Budd J had commented:

> "[r]esistance to the evolution of a principle of restitution based on unjustified enrichment also stemmed from the spectre of judges relying on their own notions and intuitions about concepts of fairness, adrift from well chartered guidelines in decided cases."[47]

If an absence of basis approach were to be adopted in Irish law, these criticisms would perhaps be well founded, this would be a grave shame when the subject has secure foundations following the unjust factors approach.

German Law

German law has been able to cope with an absence of basis approach because it is not the definition of basis which is providing the reason for restitution: rather the reasons for restitution lie outside the law of unjust enrichment, and the term "*ohne rechtlichen Grund*" is a label which can be provided in response to the determination elsewhere in the law. This approach is apposite to the unjust factors approach where the unjust enquiry provides the reason for restitution. Such an approach works in the German law, because German law is drafted with a technical notion of voidness which is used only if restitution is to follow; whereas in countries which follow the unjust factors approach, for example in Irish and in English law, 'void' has no such meaning.[48] In German law whether a contract is void, voidable, unenforceable or valid is determined by the rules of contract. In making this determination, the law of contract makes use of the same considerations as the countries which follow the unjust factors approach use to determine whether an enrichment is unjust. However, the crucial difference is that German law is *drafted* with this consequence in mind. In Ireland, the law of contract would need to be changed to enable a new absence of basis system to work. In a common law system, the re-orientation would be hard to achieve.[49]

If Ireland were to adopt an absence of basis approach, then this would change the way in which unjust enrichment engages with other areas of the law. One such way is that the unjust factors approach has refused restitution in situations in which the new civillian approach may struggle to find the basis which allows recipients to keep their enrichments. To make the new approach work the wider law (such as contract, tort or property) would need to prevent restitution and changes to the wider law may be necessary to prevent restitution. This moves towards the conclusion: "civilian terminology can only do harm if it is imported without civilian substance"[50]

An absence of basis approach of course requires a definition of basis and without the mechanisms in place in civilian countries to help, in Ireland the definition of basis would have to be capable of doing a lot of work: it is this definition which would determine whether there is a reason (and so a *prima facie* right) for restitution. For instance, if recovery were to be allowed in respect of a failure of every present or future fact contemplated by the transferor but not necessarily communicated to the recipient, there would be a "danger of an uncontrollable flood of restitution claims".[51] The unjust factors approach answers the problem, as follows if the fact which the plaintiff wrongly assumes concerns the future, it is not a mistake but is a misprediction and a misprediction does not vitiate consent. If the plaintiff wishes to ground a restitutionary claim upon a wrong assumption as to the future, then his options are either (arguably) free acceptance, or failure of consideration. The safe course for one who does not wish to bear the risk concerning assumptions about the future is to communicate with the recipient and specify the events in which his intent to transfer would be absolute.[52] Under the new Birksian approach, the plaintiff must not knowingly take the risk that the basis does not exist or will not come into existence. He does not take the risk if his intention is or appears to be manifest to the recipient, if his intention is impaired, or if he has communicated the basis to the recipient.[53] The problem with this solution is that it undercuts the supposed merit of the new Birksian scheme, that of simplicity. To make the new Birksian scheme work judges would have to differentiate shades of risk.

The German experience has shown that in an absence of basis approach, concessions need to be made for circumstances in which the absence of basis should not lead to restitution. German law recognises as legal grounds obligations which are not enforceable but which nevertheless provide a reason for the recipient to retain the benefit, for

44 Krebs, 'The New Birksian Approach to Unjust Enrichment' 2004 RLR 260, 271; Meier, 'No Basis: A Comparative View' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 343.

45 Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish Publishing, London 2001) 13-31.

46 [1996] 1 I.R. 468, 484.

47 At p. 51-52 of the transcript.

48 Krebs, *Restitution at the Crossroads: A Comparative Study* (Cavendish Publishing, London 2001) 88, 179-199, 247-8; Meier, 'No Basis: A Comparative View' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 349.

49 Krebs, 'The New Birksian Approach to Unjust Enrichment' RLR [2004] RLR 260, 274.

50 Birks, 'No Consideration: Restitution after Void Contracts' (1993) 23 UWALR 195, 195.

51 Meier, 'No Basis: A Comparative View' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 352.

52 Birks, An Introduction to the Law of Restitution (Clarendon Press, Oxford, 1985) 147-148, 219.

53 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 142.

example time barred claims. They exclude recovery even if the transferor mistakenly assumed that the obligation was legally enforceable.[54] Birks' approach is to use the defences "[t]he claimant cannot say that the money was not due if, behind the technicalities of the law, there was still a moral obligation to pay. In such a case the defendant must be allowed a defence".[55] Take the example of a contract with a minor. For Birks, the contract provides no basis and the bar to restitution by the adult has to be explained by the defences. In Birks' scheme, natural obligations are recognised not as bases but as defences.[56] Birks' approach attracts criticism. Danneman suggests that classifying natural obligations under defences is not suitable under an absence of basis approach: the enrichment is not unjust but can be explained by an obligation which, although not enforceable, allows the defendant to keep the enrichment once the claimant has performed.[57] Meier points to a tension between an unresolved tension in the new Birksian scheme between the notion of basis and those defences which Birks calls 'unjust related', noting that *res judicata* appears both as a basis and in the chapter on defences.[58] Meier would prefer that this tension should be resolved in favour of placing the analysis within basis. A problem with giving the defences the work to do is whether these defences are fully developed. A further problem rests in what moving the enquiry to the defences does to the burden of proof. If the existence of an underlying time-barred obligation, judgment or informal contract is disputed, the burden of proof should be on the claimant. If the natural obligations are regarded as bases, then the burden of proof will be on the claimant.

The potential for overkill is also seen in the factual scenarios concerned with by benefits. Krebs notes that it is precisely this category of cases that has led to the greatest disagreements among German jurists. He gives the example of the paradigm example in the German debate of unfair competition: I engage in unfair competition contrary to UK and EU competition laws. Your business suffers as a result; my business increases its profits. I am enriched at your expense and there is no legal basis for my enrichment. Birks gives the following example: I live in a flat and you live above me. In winter, my central heating will cut your fuel bills because heat rises from my flat to your flat.[59] Meier's answer is to frame the problem in the "at the expense of" rather than the "unjust" stage of the enquiry. The answer then runs as follows: attention should be focussed upon whether he law attributes the benefit to the plaintiff. Heat which escapes a flat is not attributed to the owner of the flat, or to the person generating it; it belongs to no one. I am allowed to prevent the heat from escaping from my flat but as soon as it does, any resulting benefits are no longer attributed to me.[60]

Under the new Birksian scheme, restitution is not allowed because there is a basis, that of gift. A further instance in which Birks uses the basis of gift to prevent restitution is to provide a solution where the transferor knew that the legal ground does not exist. The German law's approach to this is to provide a defence.[61] Birk's answer is not by way of defence but rather to establish a basis for the transfer: a claimant who pays under an obligation, knowing that it does not exist or not caring whether it exists is denied recovery because the basis is a gift, which does not fail.[62] However Birks allows recovery in *Woolwich* and therefore it seems necessary to add the caveat that knowledge by the transferor that the obligation does not exist does not bar recovery if the transferor (i) communicated his intention to recover to the defendant and (ii) instated legal proceedings in order to establish the non-existence of the legal proceedings. We see again that the reliance in the new Birksian scheme on gift, (necessary to provide a basis when restitution is an undesired consequence) prevents the scheme working with simplicity when applied to other factual situations.

The unjust factors approach focuses upon the intent of the transferor. Meier argues in defence of the new Birksian approach that legal certainty would be better served if instead of focusing on "some diffuse elements of the transferor's state of mind" we were to look at the underlying defective basis.[63] It is my submission that the mechanisms or fillers that the new Birksian approach has developed to overcome the problems referred to in this section (of granting too much restitution) have completely undermined this supposed merit in the new approach. The new Birksian approach does not aid legal certainty in comparison with the unjust factors approach, this is because of the importance of risk taking in the new Birksian scheme.

Conclusion

The answer to the unjust question provides a reason for and a *prima facie* right to (subject to defences) restitution. In answering this question, the Irish judiciary have expressed a wish to avoid the "siren song of unjust enrichment" and "the shoals of palm tree justice".[64] The unjust factors approach provides a well-chartered answer to the unjust question. Against this is the prospect of absence of basis and specifically, the new Birksian approach based upon the typically civilian notion of absence of basis. This article has argued that the absence of basis approach could only cause harm, because of the dangers inherent in importing

54 Meier, 'No Basis: A Comparative View' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 350.

55 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 258.

56 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 257-258.

57 Dannemann, 'Unjust Enrichment as Absence of Basis' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 350.

58 Meier, 'No Basis: A Comparative View' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 350; Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 140, 233.

59 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 158.

60 Meier, 'No Basis: A Comparative View' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 356.

61 BGB §814 and BGB §815.

62 Birks, *Unjust Enrichment*, Second Edition (Clarendon Law Series, Oxford, 2005) 103-104.

63 Meier, 'No Basis: A Comparative View' in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006) 348.

64 See note 30 above, at p. 21 of the transcript.

civilian terminology without civilian substance, coupled with the difficulty of defining basis. If adopted, an absence of basis approach might justifiably re-awaken fears of palm tree justice, and this is particularly potent in Ireland. The supposed merit of the new absence of basis approach is its elegance and simplicity. However it has been seen that the (necessary) reliance of the new approach upon the notion of risk has sacrificed and lost this supposed advantage. Once it became apparent that Canadian law had moved away from the consensus position to a hybrid position, McInnes commented that the "result will be a prolonged period of confusion and hardship. All the more regrettable because justice so easily could have been administered from the safe berth of the common law tradition."[65] The best way of saying when it is that an enrichment is unjust, in those countries which follow the consensus approach, is still by proof of an unjust factor. Following the unjust factors approach is well chartered water. ■

65 McInnes, 'Juristic Reasons and Unjust Factors in the Supreme Court of Canada' (2004) 120 L.Q.R. 554, 558.

Round Hall 5th Annual Planning and Environmental Law Conference

The Round Hall 5th Annual Planning and Environmental Law Conference was held on Saturday the 8th of November in The Law Library Distillery Building. The speakers were as follows: John O'Connor (Chairman of An Bord Pleanála), Deborah Spence (Arthur Cox), Eamon Galligan SC, Garrett Simons SC, and Tom Flynn BL. The topics covered were: the strategic infrastructure process two years on, the interaction of strategic needs versus the planning process, planning enforcement, planning retention, regulation of quarries, judicial review, and an update on environmental law. The conference was sponsored by Arthur Cox and was chaired by Mr Justice Ronan Keane, former Chief Justice. The collection of papers from the conference can be purchased from Round Hall for €165. Contact Customer Service: 662 5301.

Pictured at The Round Hall Planning and Environmental Law Conference are (L-R) Tom Flynn BL; John O'Connor, Chairman of An Bord Pleanála; Mr Justice Ronan Keane, former Chief Justice; Eamon Galligan SC; and Catherine Dolan, Commercial Manager, Round Hall – Thomson Reuters.

Book Review

A Night at the Inns and Other Stories

by Henry Murphy SC

Anyone interested in a quick, easy and amusing read of a Winter's evening should immediately purchase Henry Murphy's new book. While its appeal will be primarily to those in the legal profession (especially those at the Bar), it has the entertainment value of most good fiction of having a sufficiency of factual background to give it credibility. The interests of readers are well catered for by the differing subjects and locations.

In *First Day Back,* those who take their religious beliefs seriously may be surprised that some of the congregation who attend the Votive Mass of the Holy Ghost, at the beginning of each legal year, do so only out of superstition. If "the male members of the Bar pack the altar, while their leader shakes the thurible with gusto" I doubt it is "in celebration of the good old days" and that their "theology is unlikely to be over influenced by Vatican II". On the contrary, I would have considered lay involvement in the liturgy and the incensor who enkindles reverence at a religious ceremony to accord very much with Vatican II, which did not change theology (even if it may have altered some emphases).

The hero of the book, Dermot McNamara, a journeyman Junior barrister is, on his first day back to the Four Courts, thrown in at the deep end to take instructions from Samantha (the Miss Moneypenny of the office of J. Arnold O'Reilly, Solicitor). The instructions consisted of a hurried look through the Office file. The outcome of *Moriarty v. T.C.D.* before Judge Pilkington was perceived by J. Arnold O'Reilly as a miscarriage of justice. McNamara's view of his attorney is succinct –

> "One of Arnold's strengths is the fact that, because he so seldom sees the full implications of anything, he has great confidence in his opinion, which he expresses without the burden of equivocation."

Professor Moriarty figures in later stories, but it would spoil readers' pleasure to disclose outcomes of other encounters.

Ecumenical Affairs, the longest of the stories, is perhaps the most successful in the book. The "facts" of *Sorenson v. Irish Daily News* are sufficient to enable the author to illustrate a good narrative style, maintain the tensions of a court hearing and intersperse it with the light relief of visits to the barristers' restaurant. In this libel action, our hero is led by Richard Thornton, S.C., of whose reliability McNamara is warned (those of a certain age will discern the fact behind the fiction), and who is described thus –

> "Richard is very comfortable with silence. His ability to remain mute for considerable lengths of time, even when people are looking for leadership is legendary."

However, there are other characteristics and details of Richard's life which leave open the possibility of his character being based on at least four others.

To disclose the outcome of *Sorenson's* case would be to deprive the reader of justifiable anticipation. However, it is clear that whether through fright, circumstances or due to his reflection on Moore's Utopia ("you must not abandon the ship in a storm because you cannot control the winds"), McNamara's faith in the reliability of Senior Counsel was shaken, fortunately not his courage. This may have arisen on his reflection that –

> "There was nothing reluctant about her (the Plaintiff's) procession through the courtroom, nor her ascent to the witness box. Indeed, quite the contrary. Her demeanour suggested relish and confidence. Her right hand did not shake as she held the Bible and there was no hint of hesitation in her voice as she swore to Almighty God. A discreet tug of her skirt as she sat down, and Mr Justice Fleming was in like a shot"
> Read on.

A Night at the Inns illustrates that a profession so often justifiably criticised for pomposity, can, in wine, take itself less seriously. The ponderous and pedantic Laurence provides a suitable target for the less than reverential Jimmy.

Down from Dublin justifies every Master in the Law Library and every Solicitor with an apprentice purchasing this book. Norman, the unsung hero of this tale, is a wonderful amalgam of earnestness and error: a cautionary report of the uninitiated coping with the realist school of jurisprudence.

The bibulous Christy O'Brien is the injured pedestrian plaintiff in the wonderfully woven *The Pink Palace and The Ivory Tower.* Another client of J. Arnold O'Reilly, whose intended visit to a St. Patrick's Day Parade in Dublin took a wayward turn of almost twelve hours spent in The Pink Palace where he consumed three gallons of Guinness, and, as he reminded cross-examining defence counsel –

> "Oh loads of sangers, ham and mustard sangers go down a treat with Uncle Arthur".

The passage of arms in which the Plaintiff admits to being under the influence but not drunk – a distinction appreciated by a Chancery judge assigned to hear the case prior to his departure for a judges' conference in Rio, has a zaniness that is a real delight. ■

Nemo Judex

Pupil Exchange in Belfast

Catherine McLoone BL

Ms. Marie Claire Mc Dermott BL welcomed the pupil exchange programme to the Northern Bar. At the introductory talk I was interested to learn that only twenty five Barristers are called to the Northern Bar yearly. Pupilage is for a term of twelve months as is here, however it is divided into two 6 month periods. In the first period, the pupils shadow their Masters, it is in the second period that pupils gain advocacy experience enjoying a right of audience.

Mr. Brendan Garland, Chief Executive of the Bar gave a tour of the New Library Building, where the desks and offices are located, similar to that in the Distillery; and of the Old Library building, where the issue desk, Queens Bench Courts 1 & 2, and Family courts are. The architecture of the new library is based on the style of the *Titanic ship*. He showed the Legal research area and Old library building, which has been restored. The Library is similar to that of the Kings Inns Library in Dublin. Later, we visited the Laganside Court, which has four levels and houses the court rooms of the Crown Court; the County Court and the Magistrates Courts.

The Omagh trial commenced that week before Mr. Justice Morgan in Queens Bench Court 2. Senior Counsel Mr. Michael O'Higgins, a member of the Irish Bar and Northern Bar is acting in the case. It was interesting to listen in on the trial, albeit the evidence was very gruesome.

A notable difference in the Criminal court is that bail applications and appeals are heard via TV link up. The Chief Justice, Mr. Justice Brian Kerr (gowned in navy and pink robes) presided over these applications in Queens Bench Court 1. This method of Live TV Link up is very effective, the Applicant can see the court and the Court members can see the Applicant. The Registrar states before each application '*Your hearing is taking place by live TV link up; this does not change the seriousness and importance of the hearing'*. Of the four Bail appeals I heard; three were refused.

I met Mr. Paul Matier from the PPS (Public Prosecution Service) who explained how their system operates, similar to ours. They have commenced hiring 'In House Counsel' to appear on their behalf, who are no longer members of the Law library.

We dined very well with a huge appreciation to Mrs. Margaret Ann Dinsmore QC who arranged a supper in her home with members of the Bar and Judiciary; and dinner out on another occasion. We had the pleasure of dining with Judge Philpot (Laganside County Registrar Judge; ex registrar County Court Judge of Derry/Recorder of Derry) and Mrs. Fiona Bagnall, the Resident Magistrate.

Mr. Justice Weatherup invited us to his chambers. He told of the case presently before him where a member of the bars' failed application to become a Queens Counsel was being judicially reviewed.

There was a contested freeing for adoption case before Judge Philpot. The HSC Trust were seeking an order to have a child, aged three, freed for adoption, pursuant to Article 18 of 1987 Adoption (NI) Order. The freeing order was granted with a recommendation of 3-4 times post adoption contact yearly.

I shadowed Mr. Richard Mc Conkey BL in my second week; he was defending in criminal matters. He appeared in the Magistrates Court, and held consultations with clients in the cells below. It was also interesting to see the system in operation where video link up is used as well for consultations. It was extremely efficient for barristers to have a video consultation subsequent to a court hearing. I learned that in the North, there is no longer *challenge without cause* to jury members, unlike in this jurisdiction.

The Northern Bar operates a List system whereby in the morning, members of the bar can put their name down with the reception at the New Bar Library if they are available for work. Solicitors can ring and acquire the name of a Barrister available.

The bar has not diluted its traditions. Wigs and gowns are still worn in family court. The Magistrate is addressed as 'Your Worship'; and Judges are addressed 'Your Lordship' in higher courts. There are as yet no female High Court Judges.

It was a fantastic experience. Many thanks to the organsiers of the pupil exchange, to Inga Ryan, Turlough O'Donnell SC in Dublin, and to the members of the Northern bar who welcomed us enormously. ■

Pupil Exchange in London

Michael McNamara BL

Two weeks at London's Doughty Street Chambers in July provided the opportunity to witness the increasing differences between this jurisdiction and that of England and Wales, as well as increasing similarities as both reconcile themselves with an evolving European common law.

Recent changes in Court garb, of both the Bench and the Bar, with the almost complete abandonment of wig, gown and tabs in many areas of civil practice, came as quite a surprise to this practitoner, growing accustomed to fermenting under wig, gown and three piece suit in the putative Irish summer. So too did the increasing reliance upon written submissions with the resultant diminution of court time.

Perhaps most surprising was the Special Advocate, a creature entirely alien to the common law in this jurisdiction.

In *Chahal v. UK* 23 EHRR 413 the European Court of Human Rights held that the arrangements in the UK, whereby a decision to deport a person on grounds of national security was taken by the Home Secretary personally on the basis of all relevant material, some of which at least would be material which could not be disclosed to an applicant because to do so would potentially compromise national security, were not Convention compliant.

In response to the *Chahal* decision, Parliament passed the Special Immigration Appeals Commission Act 1997. This Act set up a new body, the Special Immigration Appeals Commission (SIAC), to consider asylum and immigration appeals in cases where the grounds for the decision were based on national security. The Special Advocate was first introduced in this Act.

The role of the Special Advocate is to act in an appellant's interests in relation to any material which an appellant is prevented from seeing as a result of the Secretary of State's national security and public interest objections. The Act is careful to set out that a Special Advocate acts only in the best 'interests' of an appellant to whom he is appointed. He does not 'act' for the appellant and the appellant is not his client. He owes an appellant no duty of care in relation to the role he undertakes.

The use of Special Advocates in English law has increased, particularly following the introduction of Part IV of the Anti-Terrorism, Crime and Security Act 2001. This Act was passed by Parliament in response to the terrorist attacks of 11 September 2001 and provided for a system of certification by the Home Secretary of foreign nationals whom the Home Secretary reasonably suspected of being international terrorists. Any individual so certified could be detained under the Immigration Acts notwithstanding that he could not be deported and an appeal against such certification lay to the Special Immigration Appeals Commission (SIAC). Part IV was repealed by the Prevention of Terrorism Act 2005, which provides under s.1(2) for two different types of Order:

a) A derogating Control Order (one which infringes Article 5 rights)
b) A non-derogating Control Order (one which does not infringe Article 5 rights).

The Secretary of State for the Home Department v AP, the open sessions of which I attended, involved an appeal against one such non-derogating Order by an Ethiopian national suspected of involvement in terrorism-related activity. That suspicion was based on three alleged activities over the last few years – attendance at a camp in Cumbria which was assessed to be a terrorist training camp, a visit to Somalia to undergo paramilitary or terrorist training, and his connection with people associated with Islamist extremism, including would-be suicide bombers involved in the attacks which were planned to take place in London on 21 July 2005.

Among the restrictions imposed by his control Order, he was moved to a city outside London (where he had lived since moving to England as a teenager), was subject to a curfew for 16 hours a day, had to wear an electronic monitoring tag and had to permit to be searched at all times.

The hearing featured security personnel giving evidence from behind a curtain, frequently declining to answer questions from the appellant's counsel for national security reasons. There are also closed sessions attended only by AP's special advocate and counsel for the Secretary of State.

In its judgment, the High Court disregarded some evidence from the Secretary of State, concluding that the respondent would have to provide it to AP's counsel if she wished to rely on it. She declined. The Court ultimately found the Order to have violated AP's Article 5 rights. ■