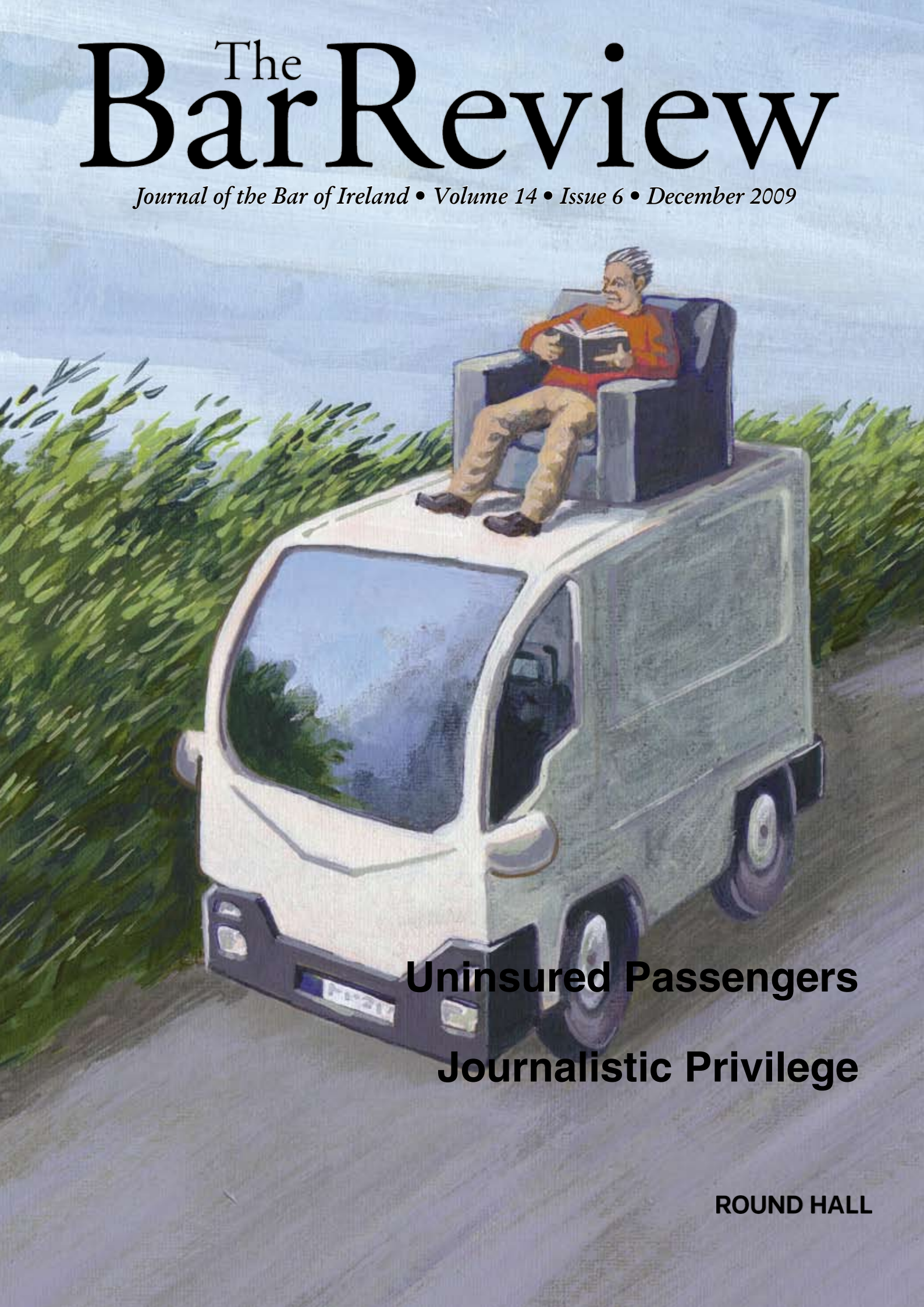
The Bar Review

Journal of the Bar of Ireland • Volume 14 • Issue 6 • December 2009



Uninsured Passengers

Journalistic Privilege

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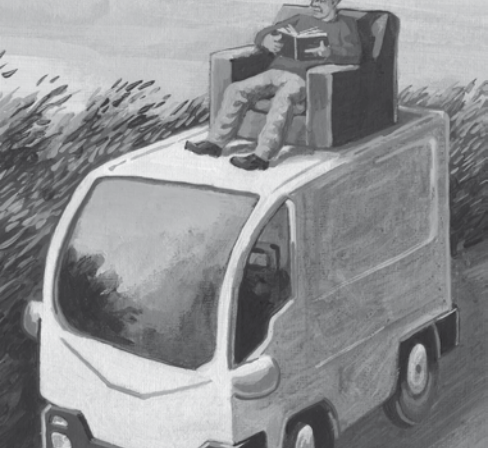

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The Bar Review

Volume 14, Issue 6, December 2009, ISSN 1339-3426

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The Bar Review is published by Round Hall on behalf of The Bar Council of Ireland.

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Subscriptions: January 2009 to December 2009—6 issues
Annual Subscription: €240.00 + VAT

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The District Court and the duty to give reasons

Julia Fox BL

This article will examine the duty of district judges to give reasons for their decisions. An overview of some recent case law reveals an uncertainty as to the extent to which such a duty is recognised.

The parameters of the duty of a district judge to give reasons were explored by the Supreme Court in *O'Mahony v Ballagh and the DPP*[1]. In *O'Mahony*, the applicant was tried and convicted in the district court for an offence contrary to ss.49(2) and 6(a) of the Road Traffic Act, 1961. At the conclusion of the case for the Prosecution, counsel for the applicant made a submission for a non-suit. The District Judge rejected the submission, commenting that the Applicant 'was drunk, wasn't he?.'The applicant therefore went into evidence and afterwards, renewed his submission for a non-suit. The District Judge made no specific ruling on the submission and proceeded to convict and sentence the applicant. The applicant was refused an order of certiorari of his conviction by the High Court and he appealed to the Supreme Court. The Supreme Court (Murphy, Hardiman and Geoghegan JJ.) allowed the appeal. It held that by reason of the failure of the District Judge to rule on the arguments made in support of an application for a non-suit, he fell "into an unconstitutionality"[2]. Murphy J held at 416:-

> "At the conclusion of the State's case, the applicant and his legal advisors were required to decide whether they should go into evidence or not. To make that decision, it was essential to know which of the arguments were accepted and which were rejected. I would be very far from suggesting that judges of the District Court should compose extensive judgement to meet some academic standard of excellence. In practice, it would be undesirable—and perhaps impossible---to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for doing so.…In failing to rule on the arguments made in support of the application for a non-suit he [the First Named Respondent] fell "into a unconstitutionality" to use the words of Henchy J in *The State (Holland) v. Kennedy* [1977] I.R. 193 at p.201"

In *Patrick Kenny v Judge John Coughlan and the DPP,*[3] O'Neill J analysed the Supreme Court's dicta in *O'Mahony* regarding the duty to give reasons. The Applicant in *Kenny* sought to quash the order of the District Judge to convict the Applicant of a speeding offence. In the district court, the applicant had made various legal submissions to the effect that the offence charged had not been proven. Nonetheless, the District Judge concluded that he was satisfied with the evidence presented and saw no reason to dismiss the prosecution. The applicant, in seeking judicial review, argued *inter alia* that the decision of the District Judge to convict the applicant was contrary to natural and constitutional justice and in breach of fair procedures since the District Judge failed to give reasons for his decision and in particular failed to address the submissions made.

While accepting that at the heart of the Supreme Court's decision in *O'Mahony* was the perceived need of the applicant to know which of his argument were accepted or rejected, O'Neill J in *Kenny* stated that it was not at all apparent from the judgment *why* the applicant in that case needed to be given reasons in order to decide whether or not to go into evidence. O'Neill J was of the belief that the passage of Murphy J quoted above was confined to cases where that type of need exists.

O'Neill J stated that the first factor to have regard to in determining the extent of the obligation on a district judge to give reasons for his decision is the particular need of a person appearing before the district court to be given specific reasons. He said that in general, the reason for the rejection of a submission of no case to answer will be immaterial, since the critical question at that stage is whether the defendant needs to offer evidence to resist the prosecution. A reasoned analysis of the evidence or legal principles, will not, in general, alter the choices that have to be made at that point. He stated that it is not necessary for the purposes of an appeal since the appeal will be a complete rehearing.

O'Neill J. also stated that the absence of reason is not relevant to the bringing of a case stated pursuant to s.51 of the Courts Supplemental Provisions Act, 1961 since the party seeking to state a case is invariably aware that a legal point has been determined against him and hence is either aware of any reasons given by the district judge, which clearly give him dissatisfaction, or if no reasons are given, is of the view that the High Court's determination may lead to a reversal of the conclusion of the district judge on the point in question. O'Neill J believed that the absence of reasons can have little or no relevance in enabling a party to decide whether to seek judicial review since the reasons given would only be relevant to the irrationality ground and unless the circumstances were extremely unusual, it could not be said that the absence of reasons amounts to irrationality. The absence of reasons for a decision would be immaterial to whether to seek judicial

1 [2002] I.R. 410
2 [2002] 2 IR 410 at 416
3 (Unreported, High Court, O'Neill J., 8th February, 2008),

review or not, unless it could be said that there was a general or universal obligation on a district judge to give reasons.

The High Court judge further held that the absence, in general, of a specific need of the party for reasons for the decision, combined with the summary nature of the jurisdiction, dictates that in giving decisions, district judges need only make clear the nature of the decision they are making and in unambiguous terms, the basis for that decision.

O'Neill J concluded that one has to take what is said by a district judge in giving his decision with what has transpired in the proceedings. He held that if evidence has been given by both the prosecution and the defense and the judge says he prefers the prosecution evidence or that the charge has been made out, that is sufficient to convey to any reasonable person that the judge has made his decision on the basis of accepting the prosecution evidence and rejecting the defense.

Other judgments by MacMenamin and McCarthy JJ also deal with the duty to give reasons and arguably suggest that district judges have a more extensive duty to give reasons.

Nasiri v The Governor of Cloverhill Prison,[4] was a habeas corpus application in which it was contended *inter alia* that there was a fundamental lack of fair procedures in the district court which rendered the detention unlawful. This included a contention that the District Judge had not given reasons for his decision to continue the Applicant's detention.

Ultimately it was both the failure to give reasons and the fact that there was prosecution material before the District Judge that was not disclosed to the applicant or his solicitor that led to MacMenamin J's ruling of unlawful detention. The dicta regarding the duty to give reasons must be seen in light of the particular facts of the case. The Applicant, Mr. Nasiri, had arrived at the airport holding a forged passport and was detained by An Garda Siochana pursuant to the provisions of s.9(8) of the Refugee Act, 1996, as amended. In the district court, An Garda Siochana had successfully applied to further detain the applicant on the grounds set out in ss.9(8)(c) and (f) of the Refugee Act, 1996, as amended.

In the High Court, MacMenamin J held that there was no evidence that the District Judge had specifically addressed the question as to whether there was before him evidence *accepted by him* that An Garda Siochana had reasonable cause for their suspicion justifying the detention of the applicant under s.9(8)(c) and (f). It was therefore the failure to give reasons in circumstances where in order to invoke the jurisdiction of the relevant legislation, the district judge must *himself* have been satisfied by the information on oath that facts existed which constituted reasonable grounds for justifying the detention of the applicant. This was in circumstances where, as already noted, there was material placed before the District Judge by An Garda Siochana which the Applicant had not seen and which the Judge may have been influenced by in reaching his decision

What then can be deduced from MacMenamin J's judgement regarding the duty to give reasons? MacMenamin J did not maintain that the duty to give reasons is solely confined to circumstances such as existed in that case. Rather, the fact that the district judge could only extend the detention where he himself was satisfied that certain criteria applied to the applicant "rendered it *more important* on the facts of this case that there should be a clear indication of the precise finding made by the District Court Judge and the basis upon which he proceeded to direct the applicant's detention" [emphasis added].

In *SF v Her Honour Judge Yvonne Murphy and the Director of Public Prosecutions*[5], the Applicant sought to judicially review a decision of the Circuit Court Judge to refuse an order for costs in his favour consequent upon his acquittal. It was argued *inter alia* that the Circuit Judge had acted otherwise than in accordance with law and in violation of fair procedures by failing to give any or any adequate reasons for reaching the decision to refuse to award the applicant his costs.

McCarthy J held that the reasons given by the Circuit Judge were so general that one could not know what piece of evidence, correspondence or legal submission gave rise to her conclusion. The applicant could not know whether or not the Trial Judge misdirected herself such that he might have a good ground for judicial review on the basis of an error of law, which took her outside jurisdiction or whether the decision was irrational and unreasonable. McCarthy J concluded that in light of the absence of reasons of specificity, the decision was a nullity as being a breach of the constitutional entitlement to fair procedures.

While O'Neill J in *Kenny* stated that reasons were not in general necessary for the purpose of an Applicant deciding whether to bring judicial review proceedings, McCarthy J's view was that, in this case at least, reasons were necessary for that purpose. However, in making his decision, McCarthy J relied heavily on the fact that there had been significant debate between the parties, both in submissions and through correspondence, on the issue on costs. If it had been a summary matter in a busy district court, where there were more limited submissions, would the same duty to give reasons have applied?

In *Smith v Ni Chonduin*[6],, McCarthy J addressed more specifically the necessity for reasons in the district court context. The applicant brought successful judicial review proceedings quashing the decision of the district judge to convict him for the offence commonly known as drunk driving. The applicant argued that by failing to give reasons for her refusal of a directed acquittal, the applicant's right to a fair trial was breached. Considering *O'Mahony*, McCarthy J stated that

> "I do not think it of any significance whether an accused needs reasons for the purpose of going into evidence and do not agree that this is the only reason why it is necessary. I do not believe that the Supreme Court intended to be regarded as having restricted the need to give reasons to cases where an accused needed them to decide whether or not to give evidence here in any event since there were disputed issues of fact. He needed them for that reason alone"

McCarthy J continued:

> "He [the applicant] would be entitled to them [reasons]

4 (Unreported, High Court, MacMenamin J.,14th April, 2005)

5 (Unreported, High Court, McCarthy J, 2nd July, 2007)

6 (Unreported, High Court, McCarthy J, 3rd July, 2007)

> also to decide whether or not he should seek to avail of a case stated or seek judicial review and indeed to assist him in any decision as to whether to appeal or not. This is to say nothing of the fact that there is a free standing basis in fair procedures that an accused person knows why he has been convicted. Reasons of course may be express or implied…. Their extent will also depend, especially in a court of summary jurisdiction, on the nature of the case."

Considering the particular facts of the case, McCarthy J held that it would have been necessary for the respondent to analyse the evidence and submissions in somewhat greater detail in order that the applicant could be quite clear as to the basis upon which she was rejecting the several submissions which McCarthy J identified as pertinent. He added:

> "…I want to emphasise again the fact that this is a court of summary jurisdiction. No great detail was required…Dare I say it, perhaps a little more would have been sufficient. What was required was that that those issues which I have identified were specifically referred to and, again, I think there was too high a level of generality in relation to the manner in which she gave reasons."

McCarthy J in *Hayde v Residential Institutions Redress Board*[7] elaborated on the rationale behind the duty to give reasons and it could be argued that this case suggests that there is a duty to give reasons in any case where a body is exercising a judicial or quasi-judicial function and where a significant number of legal issues arise.

The applicant sought to judicially review a decision of the Residential Institutions Redress Board to refuse an extension of time for his application to that Board. It was argued by the applicant that the Board was obliged by law and had a duty under the Constitution to give reasons for its decision not to allow an extension of time.

McCarthy referred to his own decision in *SF* and noted that there was an obligation on courts to engage intellectually with arguments and not to make or give bald conclusions, without engaging with evidential or legal issues in a case where a significant number of issues arise. In addition, McCarthy J stated that the requirement that justice should appear to be done necessitates that the unsuccessful applicant before a court or tribunal exercising a judicial or quasi-judicial function should be made aware in general and broad terms of the grounds on which he or she has failed.

McCarthy J stated that there is a free-standing right to reasons because justice must not only be done but be seen to be done. The benefit of the obligation on a tribunal such as the respondent, if there is such an obligation, is that it concentrates the mind and ensures that they do not fall into error.

McCarthy J stated that the difficulties encountered by district judges, in having to proceed with great expedition, did not arise in the current case as there was ample time for the Board to give reasons if it saw fit. However, implicit in McCarthy's statement that 'reasons given in the District Court might accordingly be quite limited' is a contention that district judges are obliged to give some degree of reasons. Such a view is in keeping with his views as expressed in *Smith*.

In the recent High Court decision of *Clare County Council v. Kenny*[8], MacMenamin J stated at p36 that the necessity of giving reasons… 'is not a general duty'. Referring to a number of the cases outlined above, MacMenamin J held at p38 that, "A judge dealing with a busy list must necessarily make many decisions. Not every decision requires reasons". In this particular case however, there was a necessity for reasons.

It is evident from a review of the above judgments that the obligation on district judges to give reasons for their decisions has been the subject of considerable recent judicial consideration. However, I would suggest that a reconciliation of the various decisions and the themes explored therein is not an easy task. Given that *O'Mahony* was decided some time ago and that the High Court jurisprudence is as it is, it would appear that the area would greatly benefit from further analysis by the Supreme Court. ■

7 (Unreported, High Court, 3rd October, 2007)

8 [2009] 1 I.R. 22

Lawyer training programme in Nepal

Aileen Donnelly SC

On looking at the peaks of the Himalayas rising above the clouds as I flew towards Kathmandu, I had little idea that it would be almost 2 months before I would see those same peaks from ground level. Monsoon season was in full swing when I arrived and not a day went by without ferocious rain making it impossible to tell the potholes from the rest of the road. This was Nepal but there was never a hint of disappointment as the 9 weeks I spent there were some of the most exciting, enjoyable and rewarding that I have ever spent. Having been appointed as an International Fellow (IF) with the International Legal Foundation – Nepal, it would be my job, in combination with the other IF, to supervise, mentor and train Nepali lawyers who worked for the ILF-Nepal as criminal defence lawyers. The ILF is a non-governmental organisation, established in New York, which aims to ensure that in post-conflict societies, there is a focus on the provision of effective criminal defence. The provision of such effective and proactive criminal defence ensures that there is a focus on justice and the rule of law. In Nepal, the ILF office operates as an independent public defenders office. While there is provision for legal aid in Nepal, it is fair comment to say that in general this representation lacks effectiveness.

When I began with ILF-Nepal there were 6 lawyers employed in the Kathmandu office and 2 lawyers in Janakpur in the southern Terai (plains) region. While there, I was involved in the interviewing and training process for 4 new lawyers who would work, after 4-6 months training/working in the Kathmandu office, in the cities of Biratnagar and Nepalgunj which are situated in the far South East and South West respectively of Nepal. All of the lawyers are of many years standing but wish to take advantage of the opportunity for learning and improvement that ILF-Nepal presents.

The work was a curious mixture of the very familiar and the wildly different. As I sat in a courtroom at the District Court of Kathmandu (full original civil and criminal jurisdiction for the District), while striving to hear my translator above the cacophony of rain pelting the corrugated roofing which in turn was vying with the whirring fan, peering through the gloom towards the Judge who sat in front of a Hindu calendar (he apparently had not got the memo about the 2007 Interim Constitution declaring the once Hindu state to be a secular one), there was a momentary disorientation. Then as I looked around the court and out through the open door into the courtyard where people were sheltering under the covered parts, I was struck by the familiarity of the scene - mainly young men, some trying to look cool and unconcerned while others smoked incessantly and nervously with the women, be they wives, girlfriends or mothers, fretting around them. There were the huddles where lawyers took instructions. Prisoners handcuffed together in threes interacted easily with their armed guards. There was an endless stream of clerks who went back and forth across the courtyards with files for court. Time to pay attention to the case at hand however, a "jailbail" hearing for a woman accused of murdering her daughter-in-law. Our lawyer, Neelam Poudel had been to talk to the doctor who dealt with the deceased in hospital and he had given his opinion that it was a suicide. Such proactive defence is new to Nepal and this information is being placed before the Court. Ultimately, bail is granted to our client, this is a rarity for such a charge in Nepal. While the reasoning for the decision may have been fudged there is no doubt that ILF-Nepal made a difference for this woman.

Constant case-reviews with the lawyers means that every client of the office is guaranteed at least 2 legal minds working on the case. The lawyer must work out a strategy for dealing with the case and this is reviewed by the international fellow. Are there witnesses to speak to, crime scenes to visit or further instructions to take? Is this a case where a habeas corpus is warranted? Is the evidence inadmissible? Was the warrant properly executed? Part of the case-review may be to assist in the preparation of the cross-examination of witnesses or the final submissions in the case. You may "moot" the arguments to be submitted to the Appellate or Supreme Court by the lawyer. Going to court provides the opportunity to critique the lawyer's performance. Continuing Legal Education sessions were given by the IFs every week. Crimes being dealt with vary from public order type offences (which in reality can carry lengthy loss of liberty for the most minor of offences) which are dealt with by a non-judicial person (the Chief District Officer), to rape, robbery, human trafficking (a major problem in South Asia) and murder dealt with by the District Court. There are no jury trials and the regular motorcycle theft cases can be dealt with by the same judge who deals with the murder cases.

ILF-Nepal provides the IF with a comprehensive practice manual about the operation of Nepal criminal law and practice (with an emphasis on the ideal practice) and a separate folder containing relevant Statutes, the Constitution and International Covenants. As a common law country with a written modern Constitution and a commitment to following its many ratified international treaties, it is a legal system ripe for positive development. As with many countries, practice at the coalface is far from the ideal. The right to remain silent and to be represented by counsel does not stop the client being directly pressurised in court to make a statement. However, the Supreme Court has taken a positive approach towards fair trial rights and no doubt this will eventually filter down to the judges who actually run the trials.

Working with the ILF was also a learning experience, there were aspects of Nepali law that would be great additions here e.g. the 2007 Interim Constitution contains provision for the bringing of public interest litigation – no worries about *locus standi* for these types of cases, and the attitude to international

treaties was refreshing. The US approach to criminal defence, i.e. aggressively proactive in defence, that was fostered by the ILF, was a good reminder of just why and how it is necessary in every case. Working in Nepal presented an opportunity to learn about the people and the country in a way which never happens when you are a tourist. It is a fascinating country with its mix of ethnicities, castes and religions, fabulous temples, shrines and stupas, the highest mountains in the world and, in Kathmandu, a really fun city. ILF-Nepal is recruiting volunteer lawyers for next year so hurry – now is your chance to be part of the action! For more information, check out their website: *www.TheILF.org* ■

Pictured in Nepal, during the ILF program are Aileen Donnelly SC, (having just received a blessing or "tika") are as follows: Advocate Kalayan Chettri Karki, me!, Adv. Neelam Poudel, Adv. Bimala Yadav, Adv. Bir Bahadur Khadka, Adv. Shyam Bishwakarma, Translator Guneshwor Ojha

The Law on Protection of Journalistic Sources in Ireland

Damian Byrne BL*

Introduction

Protection of sources is a bedrock of journalistic ethics. The Press Council Code of Practice for Newspapers and Periodicals provides, as its sixth guiding principle, that: "Journalists shall protect confidential sources of information".[1] Similar principles are enshrined in Recommendation R (2000) 7 of the Committee of Ministers of the Council of Europe, adopted on March 8, 2000.[2] It is argued in favour of this stance that without such protection, sources would be deterred from assisting the press and the public would, as a consequence, not be informed about matters of public interest; that a failure to protect sources would lead to the vital public watchdog role of the press being undermined; and that the protection of confidential journalistic sources is therefore one of the basic conditions for press freedom and for a properly functioning democracy. However, notwithstanding the importance for informed debate of protecting source confidentiality, the law must take account of other rights and interests; and the wider public interest may warrant disclosure in exceptional circumstances. Countervailing factors arguably outweighing the right to protect sources may include, for example, the right of an accused person to a full defence; the interest of litigants in a civil trial to obtain evidence; prevention of crime; or safeguarding public order or national security.

This article presents an overview of the current state of Irish law in this area, taking into consideration the recent case law of the European Court of Human Rights and the decisions of the High Court and Supreme Court in *Mahon Tribunal v Keena & Kennedy*.[3] It shall be argued that enactment of the European Convention on Human Rights Act 2003[4] and the principles affirmed in the case law of the European Court of Human Rights have led to a substantial shift in the Irish position towards greater protection of confidentiality of journalistic sources.

Recent European Court of Human Rights case law

Article 10 of the European Convention on Human Rights ("the ECHR") provides that:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society. …"

The issue arising in this context, therefore, is whether the restriction on the right of freedom of expression inherent in directing disclosure of confidential sources is "prescribed by law and necessary in a democratic society" for a purpose contemplated by Art 10(2).

The leading authority in this area is *Goodwin v United Kingdom*,[5] in which the European Court of Human Rights ("ECtHR") ruled by a vote of 11 to seven that an attempt to force a journalist to reveal his source for a news story violated Art 10. The case involved a contempt of court application against a journalist for refusing to comply with an order to disclose his source of information in relation to a published piece concerning the corporate plan of a company (which the company sought an injunction to restrain the publication of). The basis of the application was that it was necessary for the source's identity to be disclosed in order to enable the company in question to bring proceedings against the source to recover the document and to obtain an injunction preventing further publication. It was asserted that there had been a theft of a confidential file which could result in the company suffering serious commercial damage. The journalist was held to have been in contempt of court for refusing to comply with the House of Lords' order directing disclosure of his sources. He brought an action before the ECtHR alleging that the contempt of court order was a violation of his rights under Art 10.

Upholding his claim, the Court analysed the extent of

*The author is grateful to Mr Cian Ferriter BL for his assistance in the preparation of this article.

1 See www.pressombudsman.ie.

2 Principle 1 states: "Domestic law and practice in member States should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the principles established herein, which are to be considered as minimum standards for the respect of this right."

3 Unreported, High Court, Johnson P, Kelly & O'Neill JJ, October 23, 2007; unreported, Supreme Court, Murray CJ, Geoghegan, Fennelly, Macken & Finnegan JJ, July 31, 2009.

4 In accordance which the Irish courts, in interpreting or applying any rule of law, shall do so in a manner compatible with the State's obligations under the Convention provisions.

5 Judgment of 27 March 1996, 22 EHRR 123.

the Art 10 rights is some detail and formulated the following test:[6]

> "Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament,18 January 1994, Official Journal of the European Communities No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."

The Court went on to note that "As a matter of general principle, the 'necessity' for any restriction on freedom of expression must be convincingly established," and that "[I]n sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court".[7]

The ECtHR made clear in *Goodwin* that the balance in a democratic society lies very much in favour of securing a free press, and against restriction on it, even where the restriction may have very tangible benefits for the parties seeking it or there is a "pressing social need" for restraint of publication:

> "it will not be sufficient, *per se*, for a party seeking disclosure of a source to show merely that he or she will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she bases his or her claim in order to establish the necessity of disclosure (see paragraph 18 above). In that connection, the Court would recall that the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 (art. 10-2) tip the balance of competing interests in favour of the interest of democratic society in securing a free press (see paragraphs 39 and 40 above). On the facts of the present case, the Court cannot find that Tetra's interests in eliminating, by proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source. The Court does not therefore consider that the further purposes served by the disclosure order, when measured against the standards imposed by the Convention, amount to an overriding requirement in the public interest."[8]

In the circumstances, the ECtHR was not satisfied there was a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim.

The test in *Goodwin,* i.e. that an order compelling disclosure "cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest", has been followed in a number of cases, including the two more recent judgments in *Voskuil v The Netherlands*[9] and *Tillack v Belgium.*[10]

In *Voskuil,* the Applicant had been summoned to appear as a witness for the defence in appeal proceedings concerning three individuals accused of arms trafficking. He had written about the case in two articles for the newspaper Sp!ts. The court ordered the journalist to reveal the identity of a source, in the interests of those accused and the integrity of the police and judicial authorities. Voskuil invoked his right of non-disclosure and, subsequently, the court ordered his immediate detention.

The EctHR observed that the protection of a journalist's sources is one of the basic conditions for freedom of the press, as reflected in various international instruments, including the Council of Europe's Committee of Ministers Recommendation No. R (2000) 7.[11] Without such protection, sources might be deterred from assisting the press in informing the public on matters of public interest and, as a result, the vital public-watchdog role of the press might be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. The order to disclose a source can only be justified by an overriding requirement in the public interest.[12] In essence, the Court was struck by the lengths to which the Netherlands authorities had been prepared to go to learn the source's identity. Such far-reaching measures cannot but discourage those who have true and accurate information relating to an instance of wrongdoing from coming forward in the future and sharing their knowledge with the press. The Court found that the Government's interest in knowing the identity of the journalist's source had not been sufficient to override the journalist's interest in concealing it. There had therefore been a violation of Art 10.

In *Tillack*, the Applicant complained of a violation by the Belgian authorities of his right to protect the confidentiality of sources.[13] Tillack, a journalist working in Brussels for the

6 *ibid.* at para 39.
7 *ibid.*
8 *ibid.*
9 *Application No 64752/01*, 22 November 2007.
10 *Application No 20477/05*, 27 November 2007.
11 *Application No 64752/01*, 22 November 2007, at para 65.
12 *ibid.*
13 *Application No 20477/05*, 27 November 2007.

weekly magazine *Stern*, was suspected of having bribed a civil servant in exchange for confidential information concerning investigations in progress in the European institutions. The European Anti-Fraud Office (OLAF) opened an investigation in order to identify Tillack's informant. After the investigation by OLAF failed to unmask the official at the source of the leaks, the Belgian judicial authorities where requested to open an investigation into an alleged breach of professional confidence and bribery involving a civil servant. On 19 March 2004, the Belgian police took the journalist into custody and raided his home and office, seizing computers, mobile phones, address books, bank statements and notes. After the Belgian Supreme Court rejected his complaint under Article 10 of the Convention, Tillack lodged an application with the ECtHR.

The Court emphasised that a journalist's right not to reveal his sources could not be considered a mere privilege, to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information and should be treated with the utmost caution—even more so in the applicant's case, since he had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed by the fact that no charges were placed. The Court also took into account the amount of property seized and considered that although the reasons given by the Belgian courts were "relevant", they could not be considered "sufficient" to justify the impugned searches. The Court accordingly found that there had been a violation of Art 10 of the Convention.[14]

The Irish position

In *re Kevin O'Kelly*,[15] a journalist at the trial of an accused was questioned about an interview he had had with the accused; the prosecution was relying upon this evidence to establish an admission by the accused that he was a member of an illegal organisation. However, the journalist refused to reveal the name of the man he had interviewed and said that it would be in breach of journalistic ethics to disclose the name. The Court found him in contempt of court and sentenced him to three months' imprisonment. On appeal against sentence, it was found by the Court of Criminal Appeal that it had not been made clear what was the confidence that the appellant felt he had been asked to break as the interview in question was made for public broadcast and one of the essential features of the publication was the fact that the identity of the person interviewed was Sean MacStiofain. Walsh J, rejecting the concept of privilege against disclosure, commented that:

> "Journalists and reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence. The fact that a communication was made under terms of express confidence or implied confidence does not create a privilege against disclosure. So far as the administration of justice is concerned the public has a right to every man's evidence except for those persons protected by a constitutional or other established and recognised privilege."[16]

It is worth noting, however, that as a matter of fact, the Court of Criminal Appeal found that the question of confidence simply did not arise in that case.[17] Further, Kevin O'Kelly did not appeal the conviction for contempt of court—simply against the sentence imposed. Thus, the comments of Walsh J should properly be regarded as *obiter dicta* in light of the facts.

In *Burke v Central Independent Television*,[18] the plaintiffs sued for libel after a television programme made a series of allegations linking them to terrorist and other criminal activities. The defendant objected to the production for inspection of documents that could lead to the identification of sources on the grounds that, *inter alia*, to do so would put the life and safety of those sources and others at risk; and that the information contained in the documents had been proffered on the understanding that confidentiality would be maintained. Murphy J, in the High Court, relied upon the decision in *re Kevin O'Kelly* in ordering the production of the documents for inspection. He concluded that the Court had no right or duty to create an entirely new ground of privilege consisting of the possible danger to life due to the production of the documents in issue.[19] The Supreme Court, allowing the appeal, held that, given the assertion that production of the documents would imperil life, the constitutional right to protection of life and bodily integrity must take precedence over a citizen's right to protect or vindicate his good name.[20] However, no submission was made to the Court seeking to overturn the learned trial judge's view concerning the claim for the privilege of confidentiality or for a journalist's privilege.[21]

In *Gray v Minister for Justice, Equality and Law Reform*,[22] a journalist refused to answer when questioned as to whether he had spoken to members of the Garda Síochána in sourcing a story in issue in the case. Quirke J, speaking *obiter*, expressed scepticism about the journalist's attempt to assert "a questionable privilege in support of his refusal."[23]

Change of approach—*Mahon v Keena and Kennedy*

More recently, however, the Art 10 right of a journalist to protect the confidentiality of sources received strong endorsement from a divisional High Court in *Mahon v Keena and Kennedy*[24] and also, on appeal, from the Supreme Court.[25] This case concerned correspondence received, unsolicited

14 Note that this judgment is only available in French at the time of writing.
15 (1974) 63 ILTR 97.
16 *ibid.*, at 101.
17 See judgment of Walsh J, at 101.
18 [1994] 2 I.R. 61.
19 *ibid.*, at 72.
20 *ibid.*, at 80.
21 *ibid.*, as per Finlay C.J., at 77.
22 [2007] 2 I.R. 654 at 665.
23 *ibid.*
24 Unreported, High Court, Johnson P, Kelly & O'Neill JJ, October 23, 2007.
25 Unreported, Supreme Court, Murray CJ, Geoghegan, Fennelly, Macken & Finnegan JJ, July 31, 2009.

and anonymously, by the first-named defendant, a journalist with the *Irish Times*. The said correspondence included letters from the Mahon tribunal to Mr David McKenna seeking information in relation to certain payments made to the then Taoiseach, Mr Bertie Ahern. The *Irish Times* published a report on the matter on 21 September, 2006 under the headline "Tribunal Examines Payments to Taoiseach."

Both defendants were summoned to appear before the tribunal and to hand over copies of all documents comprising the communication between the tribunal and Mr McKenna received by the *Irish Times* which led to the publication of the article in question. They stated that they could not produce the documents requested by the tribunal as they had already been destroyed on legal advice. Both defendants declined to answer any questions that in their view would give any assistance in identifying the source of the anonymous communication. The tribunal then commenced proceedings in the High Court seeking, *inter alia*, an order compelling the defendants to attend before the tribunal and answer all questions in relation to the source and present whereabouts of the documents in question.

Having concluded that the tribunal had the legal right to seek to enforce confidentiality in respect of the material in issue, the Court went on to consider whether the restriction on the right to freedom of expression contended for by the tribunal "is necessary in a democratic society." In this respect, it was greatly influenced by the fact that the communication in issue was anonymous and that, as the journalist could not identify his source in any case, little weight should therefore attach to the defendants' privilege against disclosure of sources. In the circumstances, the Court concluded that the defendants' privilege against disclosure of sources was "overwhelmingly outweighed by the pressing social need to preserve public confidence in the tribunal."[26]

Notwithstanding this conclusion, however, the Court, having surveyed a number of key decisions of the ECtHR on the scope of the right to freedom of expression in Art 10, strongly endorsed the general right of journalists not to reveal sources. In a key passage, it stated:

> "An essential feature of the operation of a free press is the availability of sources of information. Without sources of information journalists will not be unable to keep society informed on matters which are or should be of public interest. Thus there is a very great public interest in the cultivation and protection of journalistic sources of information as an essential feature of a free and effective press ...
>
> These cases also illustrate on the part of the European Court of Human Rights a stalwart defence of freedom of expression, and a trend of strictly construing potential interferences with that right that might claim justification under the variety of justifiable interferences set out in Article 10(2). This approach by the European Court of Human Rights is particularly evident in cases involving publications relating to political matters."[27]

The Court further noted that:

> "If, of course, the questions to be asked could or would lead to the source or give assistance which could result in the identification of the source then *we are satisfied that the privilege against disclosure can be invoked*. In this context, the Court must consider the likelihood, in the circumstances of this case, of the potential answer to the questions to be asked leading to identification of the source."[28]

Thus, the language of the Court clearly implies the recognition of journalistic sources as a discrete category of privilege.

In allowing the appeal, The Supreme Court found, *inter alia*, that the High Court had erred in attaching to much weight to the "reprehensible conduct" of the appellants in destroying the documents in issue prior to the matter coming before the Court. However, in delivering judgment on behalf of the Court, Fennelly J held similarly on the broader issue that:

> "According to the reasoning of the European Court in *Goodwin*, an order compelling the appellants to answer questions for the purpose of identifying their source could only be 'justified by an overriding requirement in the public interest.'"

The judge also used the term "privilege" in his judgment in reference to the right of non-disclosure of journalistic sources.

Conclusion

The recent decisions of the High Court and Supreme Court in *Mahon v Keena & Kennedy* are very much at odds with older Irish authorities, most notably the decision of the Court of Criminal Appeal in *Re Kevin O'Kelly*.[29] It is worth noting that the right of non-disclosure does not seem to have been challenged or contested in this case, and *Re Kevin O'Kelly* was not considered. Nevertheless, it is submitted that *re Kevin O'Kelly* can no longer be regarded as good law in light of the enactment of the European Convention on Human Rights Act 2003 and the principles in respect of protection of disclosure of journalists sources which have been confirmed by the European Court of Human Rights in the case law on Art 10 of the Convention. These principles were emphatically endorsed by both the High Court and Supreme Court in *Mahon v Keena & Kennedy,* in which they appeared to recognise the right of non-disclosure of journalistic sources as a discreet category of private privilege. Nonetheless, there is no question of journalism as a profession enjoying an absolute privilege against disclosure of confidential sources—it is subject to judicial discretion, to be weighed against competing rights and interests on a case-by-case basis. Journalists will still be compelled to answer questions or reveal sources by a court if disclosure is deemed justified "by an overriding requirement in the public interest". ■

26 See n 21, above.
27 *ibid.*
28 *ibid.* Emphasis added by author.
29 (1974) 63 ILTR 97.

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 14, Issue 6, December 2009

A directory of legislation, articles and acquisitions received in the Law Library from the 16th October 2009 up to 19th November 2009.
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

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CONTRACT LAW

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Rescission

Contract for sale – Apartment – Purported right of way from public roadway to development - Easement – Whether evidence of easement adequate to show good marketable title to right of way – Whether defendant able to show good and marketable title at expiry of completion notice – Whether entitlement to rescind contract for sale - Whether entitlement to return of deposit - Pre-contract inquiries – Correspondence – Documents – Completion notice – Deed of grant of right of way from local authority – Assent to registration of deed as burden – Whether failure by council to comply with statutory procedure – Whether deed void – Nature of right of way – Validity of deed of confirmation – Creation of easements – Whether grant of right of way disposal of land within meaning of legislation – Undertaking – Whether sufficient assurances provided – Planning and Development Act 2000 (No 30), s 211 and Local Government Act 2001 (No 37), s 15, 151, 183 and 211 – Finding that plaintiff had sufficient assurances and evidence before expiry of completion notice (2008/307SP – McGovern J – 18/3/2009) [2009] IEHC 23
Byrnes v Meakstown Construction Ltd

Terms

Sale of land – Conditions of sale - Special conditions – Interpretation - Contractual obligations - Dispute in relation to meaning of special condition – Whether defendant in breach of contract - Construction of special condition – Interpretation of special condition - Whether words should be given natural and ordinary meaning - Whether words in special condition clear - Whether defendant's contractual obligation suspended until pre-condition fulfilled - Whether any contractual liability on defendant - Necessary implication of condition – Whether meaning urged by the defendant would involve re-writing parties' bargain - Whether any breach of contract - Appropriate remedy - *Analog Devices BV v Zurich Insurance Company* [2005] IESC 12, [2005] 1 IR 274 and *ICS v West Bromwich BS* [1998] 1 WLR 896 considered – Damages *in lieu* of specific performance awarded (2004/7031P - Laffoy J - 24/4/2009) [2009] IEHC 191
Hannon v BQ Investments

COSTS

Article

Walsh, Ian
An order for costs: some issues to consider on appeal
2009 (16) 9 CLP 190

COURTS

Jurisdiction

Appeal - Application seeking to set aside final judgment and order of Supreme Court - Finality of orders - Jurisdiction to vary or discharge final order of Supreme Court - Exceptional jurisdiction - Constitutional principles - Whether decision of Supreme Court final and conclusive on matters - Common law exceptions - Circumstances in which court can interfere after passing and entering of judgment - Finality of litigation – Inherent jurisdiction -Whether circumstances of case such as to justify disregarding primary principle that order is final - Applicable law – Onus on applicant - Bias - Whether applicants claim manifestly ill-founded - *Belville Holdings Ltd v Revenue Commissioners* [1994] 1 ILRM 29; *Ainsworth v Wilding* [1896] 1 Ch 673; *G McG v DW (No 2) (Joinder of Attorney General)* [2004] 4 IR 1; *Ampthill Peerage* [1977] AC 547; *Attorney General v Open Door Counselling Ltd (No 2)* [1994] 2 IR 333; *In Re Greendale Developments Ltd (No 3)* [2000] 2 IR 514; *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412; *Kenny v Trinity College* [2007] IESC 42, [2008] 2 IR 40 considered - Constitution of Ireland 1937, Article 34.4.6° - Rules of the Superior Court 1986 (SI 15/1986), O 84 - Application dismissed (114/2006 - SC - 26/3/2009) [2009] IESC 25
Talbot v McCann Fitzgerald

Jurisdiction

Appeal - Set aside final decision - Alleged incorrect statement of fact - Whether decision of Supreme Court in final and conclusive - Exceptional jurisdiction - Inherent jurisdiction - Exceptional circumstances - Whether final order may be rescinded or varied - Onus of proof on applicant - Whether application manifestly unfounded - Whether decision of court in any way affected by the incorrect reference in judgment -Whether error in question had bearing on limited grounds of appeal – Whether application unmeritorious and opportunistic - *Tassan Din v Banco Ambrosiano SPA* [1991] IR 569; *Kenny v Trinity College Dublin* [2007] IESC 42, [2008] 2 IR 40; *P v P* (Unrep, SC, 31/7/2001); *Bula Ltd v Tara Mines (No 6)* [2000] 4 IR 412; *In Re Greendale Developments Ltd* (No 3) [2000] 2 IR 514; *Andrews Productions Ltd v Gaiety Theatre Enterprises Ltd* [1973] IR 295 and *Philp v Ryan* [2004] IESC 105, (Unrep, SC, 18/1/2005) - Courts of Justice Act 1924 (No 10), s 29 - Constitution of Ireland 1937, Article 34.4.6 - Application refused (467/06 - SC - 26/3/2009) [2009] IESC 29
People (DPP) v McKevitt

Jurisdiction

Appeal - Final order of Supreme Court - Allegations of bias – Jurisdiction of court to review - Principle that order of Supreme Court final and conclusive - Whether circumstances of case so exceptional as to give rise to jurisdiction – Whether any reason or objective basis to exercise exceptional jurisdiction - Whether claim manifestly ill-founded - Applicable test - *Talbot v McCann Fitzgerald* [2009] IESC 25, (Unrep, SC, 26/3/2009); *Belville Holdings Ltd v Revenue Commissioners* [1994] 1 ILRM 29; *McG v DW (No 2) (Joinder of Attorney General)* [2000] 4 IR 1; *Attorney General v Open Door Counselling Ltd (No 2)* [1994] 2 IR 333; *In re Greendale Developments Ltd (No 3)* [2000] 2 IR 514 and *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412 followed; *Kenny v Trinity College Dublin* [2007] IESC 42, [2008] 2 IR 40 distinguished - Constitution of Ireland 1937, Article 34.4.6 - Application dismissed (97/2007 - SC - 26/3/2009) [2009] IESC 26
Talbot v Hermitage Golf Club

CRIMINAL LAW

Appeal

Evidence - Application to adduce new evidence on appeal – Newly discovered evidence - Documents discovered subsequent

to trial – Potential impact of documentation - Whether conviction unsafe – *People (DPP) v Gannon* [1977] 1 IR 40 and *DPP v Kelly* [2008] IECCA 7, [2008] 3 IR 697 considered- Leave to appeal refused (77/02 - CCA - 3/3/2008) [2008] IECCA 36
People (DPP) v N(P)

Arrest

Purpose of arrest - Initial arrest and course of detention – Whether any *bona fide* intention of charging applicant with offence arrested for - Whether initial arrest unlawful - Purpose of charging applicant - Ulterior purpose of arrest – Re-arrest – Whether decision to issue warrant for detention in prison tainted by unlawfulness of initial arrest - Relevant statutory provisions - Whether deliberate unlawful arrest and detention – Whether fundamental breach of due process of law – *People (DPP) v Madden* [1977] IR 336 applied - *People (DPP) v O'Brien* [2005] IESC 29, [2005] 2 IR 206; *State (McDonagh) v Frawley* [1978] IR 131; *People (DPP) v Pringle* [1981] (2 Frewen) considered - Constitution of Ireland 1937, Article 40.4 - Immigration Act 1999 (No 22), s 3 - Immigration Act 2003 (No 26), s 5(2) - Immigration Act 2004 (No 1), ss 4(1), 4(3), 5(2), 13 and 16 - Order for immediate release made (52/2009 -SC - 20/5/2009) [2009] IESC 42
Oladapo v Governor of Cloverhill Prison

Bail

Pending appeal – Applicable test – Likelihood of success on appeal – Rationale for rule – Whether any case made out with strong chance of success – *People (DPP) v Corbally* [2001] 1 IR 180 applied; *People (DPP) v Tanner* [2008] IECCA 18, (Unrep, CCA, 31/1/2008) considered – Application for bail refused (302/08 – CCA - 16/01/2009) [2009] IECCA 3
People (DPP) v Dunne

Bail

Pending appeal - Applicable test – Likelihood of success on appeal - Whether threshold requirements met – Previous convictions – Whether any chance of success on appeal - *People (DPP) v Corbally* [2001] 1 IR 180 applied – Application for bail refused (79/2009 – CCA - 26/03/2009) [2009] IECCA 34
People (DPP) v Forrester

Charge to jury

Multiple counts - Possession of drugs – Observation by judge that conviction on all counts necessary where conviction on possession count *simpliciter* – Absence of specific requisition – *De facto* requisition – Whether jury left with wrong impression of function – Propriety of sentence - Whether reduction in sentence appropriate - *People (DPP) v Cronin* [2006] IESC 9 [2006] 4 IR 329 considered – Sentence reduced from seven to five years (199/2007 – CCA– 17/12/2008) [2008] IECCA 182
People (DPP) v McDermott

Detention

Search of house – Appellant detained in kitchen of house while search took place – Whether direction to remain in kitchen while search took place could be construed as detention – Whether gardaí restrained or prohibited appellant from leaving house – Subsequent detention at garda station following arrest – Lithuanian citizen – Delay in interpreter arriving at station and explaining rights – Minor breach of regulations – No *mala fides* - Criminal Justice Act 1984 (No 22), s 4 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 15 and 48 – Leave to appeal refused (66/2008 – CCA - 27/4/2009) [2009] IECCA 61
People (DPP) v Valiukas

Disclosure

Third party disclosure – Defendants charged with manslaughter and reckless endangerment arising from alleged neglect of relative – Applicant health board ordered by trial judge to make disclosure of certain material – Applicant not party to criminal prosecution – Equality of arms principle – *Subpoena duces tecum* – Separation of powers - Whether circuit court empowered to make disclosure order – Whether power to make disclosure order against non-party – Whether public interest and constitutional imperative of fair trial provided grounds for order – Whether applicant's status as State body of relevance - Whether disclosure order in the nature of order of discovery – Whether courts obliged to interpret and develop common law rules of procedure so as to vindicate constitutional rights – Whether making of order in breach of separation of powers - *DH v Groarke* [2002] 3 IR 524, *DPP v Sweeney* [2001] 4 IR 102, *Ward v Special Criminal Court* [1999] 1 IR 60, *JF v Reilly* [2005] IEHC 198 (Unrep, Macken J, 10/06/2005), *JF v Reilly* [2007] IESC 32 [2008] 1 IR 753, *PG v DPP* [2006] IESC 19 [2007] 3 IR 39, *DPP v Flynn* [1996] 1 ILRM 317, *Conlon v Kelly* [2001] ILRM 198, *DPP v SK* (Unrep, Circuit Court, Judge Dunne, 14/12/1999), *Nolan v Irish Land Commission* [1981] IR 23, *DPP v JB* [2006] IESC 66 (Unrep, Supreme Court, 29/11/2006), *O'Callaghan v Mahon* [2005] IESC 9 & [2005] IEHC 265 [2006] 2 IR 32, *Jespers v Belgium* [1981] 27 DR 61, *Rowe & Davis v United Kingdom* (2000) 30 EHRR 1, *DPP v Browne* [2008] IEHC 391 (Unrep, McMahon J, 9/12/2008), *DPP v McCarthy* [2007] IECCA 64 [2008] 3 IR 1, *DPP v Kelly* [1987] IR 596, *R v Collister and Warhurst* (1995) 39 Cr App R 100, *R v Parks* [1961] 1 WLR 1484, *R v Paraskeva* (1982) 76 Cr App R 162, *Braddish v DPP* [2001] 3 IR 127, *Dunne v DPP* [2002] 2 IR 305, *Scully v DPP* [2005] IESC 11 [2005] 1 IR 242, *McFarlane v DPP* [2006] IESC 11 [2007] 1 IR 134, *Whelan v Kirby* [2004] IESC 17 & [2004] IESC 66 [2005] 2 IR 30, *McGonnell v AG* [2004] IEHC 312 (Unrep, McKechnie J, 16/9/2004), *Traynor v Delahunt* [2008] IEHC 272 [2009] 1 IR ???, *BJ v DPP* [2003] 4 IR 525, *DPP v GK* (Unrep, Court of Criminal Appeal, 06/06/2002), *DPP v JT* (1988) 3 Frewen 141, *X and Y v Netherlands* (1986) 8 EHRR 235, *DPP (Walsh) v Cash* [2007] IEHC 108 (Unrep, Charleton J, 28/3/2007), *DPP v Tuite* (1983) 2 Frewen 175, *R v Ward* [1993] 1 WLR 619, *Healy v DPP* [2007] IEHC 87 (Unrep, McGovern J, 13/3/2007), *Dodd v DPP* [2007] IEHC 97 (Unrep, McGovern J, 13/3/2007), *Edwards v United Kingdom* 15 EHRR 417, *R v PJO'N* [2001] NICC 5, *R v Boucher* [1955] SCR 326, *DPP v Special Criminal Court* [1999] 1 IR 60, *McKevitt v DPP* (Unrep, SC, 18/03/2003), *McKevitt v DPP* [2005] IECCA 139 (Unrep, CCA, 09/12/2005), *R v Ward* (1993) 96 Cr App R 1, *R v Keane* [1994] 1 WLR 746, *DPP v Gilligan* [2005] IESC 78 [2006] 1 IR 107, *Z v DPP* [1994] 2 IR 476, *D v DPP* [1994] 2 IR 465, *Blanchfield v Hartnett* [2002] 3 IR 207, *R (Martin) v Mahoney* [1910] 2 IR 695, *State (Healy) v Donoghue* [1976] IR 325, *In re Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129, *Kelly v O'Neill* [2000] 1 IR 354, *DPP v O'Shea* [1982] IR 384, *DPP v Quilligan (No 2)* [1989] IR 46, *B v DPP* [1997] 3 IR 140, *PC v DP* [1999] 2 IR 25, *Bowes and McGrath v DPP* (Unrep, Supreme Court, 6/2/2003), *RD Cox Ltd v Owners of MV Fritz Raabe* [2002] 1 ILRM 532, *O'Doherty v AG* [1941] IR 569, *State (Quinn) v Ryan* [1965] IR 70, *Sinnott v Minster for Education* [2001] 2 IR 549, *MM v PM* [1986] ILRM 515, *Buckley v AG* [1950] IR 67, *O'Reilly v Limerick Corporation* [1989] ILRM 181, *TD v Minister for Education* [2001] 4 IR 259, *FN v Minister for Education* [1995] 1 IR 409, *DG v Eastern Health Board* [1997] 3 IR 511, *DB v Minister for Justice* [1999] 1 IR 29, *Crotty v An Taoiseach* [1987] IR 713, *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, *McMenamin v Ireland* [1996] 3 IR 100, *DPP v O'Shea* [1982] IR 384, *DPP v Shaw* [1982] IR 1, *Doyle v Commissioner of An Garda Síochána* [1999] 1 IR 249, *Megaleasing UK Ltd v Barrett* [1993] ILRM 497 and *Lord Montague v Dudman* 2 Ves Sen 396 considered - Courts of Justice Act 1947 (No 20), s 16 – Courts (Supplemental Provisions) Act 1961 (No 39), ss 11 and 25 - European Convention on Human Rights Act 2003 (No 20), ss 1, 2 and 3 - Constitution of Ireland, articles 15, 28, 34, 38.1 and 40.4.1 - European Convention on Human Rights, art 6 – Rules of the Superior Courts 1986 (SI 15/1986) O 31 – Disclosure order quashed (2008/646JR – Edwards J – 22/5/2009) [2009] IEHC 242
HSE v White

Double jeopardy

Criminal estoppel – Part heard trial – Complaint made by defendant to Garda Service Ombudsman Commission – Defendant sought

to adjourn summary trial pending outcome of Commission investigation – Application for adjournment refused by District Court Judge – Evidence of injuries received by defendant in course of incident given at trial – Order that trial should not proceed until completion of investigation then made by Judge – Complaint to Commission subsequently deemed inadmissible – Matter then listed for hearing before different District Court Judge - Judicial review - Whether principle of double jeopardy offended - *Lynch v Moran* [2006] IESC 31 [2006] 3 IR 389, *Z v DPP* [1994] 2 IR 476, *McNulty v DPP* [2009] IESC 12 (Unrep, Supreme Court, 18/2/2009), *DS v Judges of the Circuit Court* [2008] IESC 37 [2008] 4 IR 379 and *Registrar of Companies v Anderson* [2005] 1 IR 21 applied; *Rogers v The Queen* (1994) 181 CLR 251 followed – Relief refused (2008/607JR – 26/5/2009 – Hedigan J) [2009] IEHC 252
O'Brien v Fahy

Double jeopardy

Representation – Return for trial - Assault – Return for trial for assault causing harm – Whether director of public prosecutions estopped from prosecuting charge of assault causing serious harm – Whether plea of *autrefois convict* available – Interference with decision of director – Necessity for final determination in first criminal proceeding – Necessity for passing of sentence – *Richards v The Queen* [1993] AC 217 and *DPP v Finnamore* [2008] IECCA 99 (Unrep, CCA, 1/7/2008) considered - Criminal Procedure Act 1967 (No 12), s 13 - Non-Fatal Offences Against the Person Act 1997 (No 26), ss 3 and 4 - Relief refused (2008/1160JR – O'Neill J – 1/5/2009) [2009] IEHC 203
Higgins v DPP

Evidence

Admissibility - Confession - Right of access to solicitor – Telephone call to solicitor made by applicant from station – Brief two minute conversation - Applicant spoke to secretary not solicitor before interview – Whether gardaí required to satisfy themselves that true consultation took place – No objections raised by applicant to interview – Whether right of access to solicitor adequately vindicated — Appeal dismissed (166/07 - CCA - 4/12/2008) [2008] IECCA 165
People (DPP) v Cronin

Evidence

Cross-examination – Statement - Allegation that reply by complainant during cross examination prejudiced defence – Original handwritten statement contained phrase which allegedly surprised defence – Whether statement illegible – Leave to appeal conviction refused - Sentence – Severity - Rape – 8 year term of imprisonment suspended for 2 years imposed – Aggravating factors – Appeal dismissed (197/07 - CCA 17/12/2008) [2008] IECCA 183
People (DPP) v Pavlak

Evidence

Failure to preserve - CCTV footage – Robbery – Whether respondent discharged onus of establishing real risk of unfair trial – Apprehension – Finding of stolen videos in bag – Finding of disguise – Admissions – Duty of prosecution authorities – Failure to contest available evidence – Failure to deny guilt – Freedom to challenge admissibility of statements at trial – *Savage v DPP* [2008] IESC 39 (Unrep, SC, 3/7/2008); *Scully v DPP* [2005] IESC 11 [2005] 1 IR 242 and *Dunne v DPP* [2002] 2 IR 305 considered; *Braddish v DPP* [2001] 3 IR 129 distinguished – Appeal allowed (382/2005 – SC – 24/2/2009) [2009] IESC 14
Dunne v DPP

Evidence

Failure to preserve - CCTV footage – Robbery – Whether real risk of unfair trial – Identification by witnesses by recorded CCTV footage – Evidence based on inspection of footage – Absence of access to original moving footage – Availability of still photographs – Inability of defence to test identification evidence - Apprehension – Finding of stolen videos in bag – Finding of disguise – Admissions - *Braddish v DPP* [2001] 3 IR 129 considered – Appeal dismissed (492/2006 – SC – 24/2/2009) [2009] IESC 15
McHugh v DPP

Evidence

Lost evidence – Risk of unfair trial – Non availability of telephone records – Duty to seek out and preserve relevant evidence - Failure of prosecution to seek phone records of complainant while obtaining those of accused - Duty of An Garda Síochána - Whether failure to procure telephone records significantly prejudiced accused – Whether telephone records collateral to central feature of case - Whether records probative in value - Materiality of records - Whether specific prejudice established from non-availability of records - Exceptional circumstances - Test to be applied - Relevance of telephone records – Whether real risk of unfair trial which could not be avoided by rulings and directions by the trial judge- Circumstances of case - Approach taken in investigation - *Dunne v DPP* [2002] 2 IR 305; *Scully v DPP* [2005] IESC 11, [2005] 1 IR 242; *McFarlane v DPP* [2008] IESC 7, (Unrep, SC, 5/3/2008); *Savage v DPP* [2008] IESC 39, (Unrep, SC, 3/7/2008); *Murphy v DPP* [1989] ILRM 71; *D v DPP* [1994] 2 IR 465 and *Z v DPP* [1994] 2 IR 476 considered - Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 2 – Sex Offenders Act 2001 (No 18), s 37 - Appeal allowed; prohibition granted (94/2008 - SC - 1/4/2009) [2009] IESC 32
C (R) v Director of Public Prosecutions

Evidence

Preservation - Risk of unfair trial - Failure to preserve relevant evidence - Motor vehicle – Forensic testing – Examination - Accused not notified of intention to return vehicle to owner – No opportunity of examining vehicle - Whether accused entitled in law to have access to car for inspection in support of defence - Whether absence of vehicle or opportunity to examine vehicle would lead to real or serious risk of unfair trial - Whether trial judge failed to distinguish criminal damage from burglary charge – Whether real and serious risk of unfair trial - Evidence at highest - *Scully v DPP* [2005] IESC 11, [2005] 1 IR 242 and *Murphy v DPP* [1989] ILRM 79 distinguished - *McKeown v Judges of Circuit Court* (Unrep, SC, 9/4/2003) considered - Appeal allowed in respect of criminal damage charge; dismissed in respect of burglary charge (282/2006 - SC - 24/3/2009) [2009] IESC 23
O'Driscoll v Director of Public Prosecutions

Practice and procedure

Appeal - Time limits - Enlarge time to lodge appeal - Undue leniency – Discretion of court to allow for longer period than 28 days from date of sentence – Delay of 10 days – Whether delay *de minumus* – Arguable case on undue leniency – Length of delay – Public interest – Whether appropriate to extend time - *People (DPP) v Fitzgerald* [2008] IECCA 169, (Unrep, CCA, 15/12/2008) considered - Criminal Justice Act 1993 (No 6), s 2 – Criminal Justice Act 2006 (No 26), s 23 - Application granted (109/2008 – CCA - 30/3/2009) [2009] IECCA 35
People (DPP) v Purcell

Practice and procedure

Criminal contempt of court – *Sub judice* contempt – Nature of contempt proceedings – Whether prosecution appeal lies from directed acquittal in contempt case – Direction of no case to answer – Whether fade factor relevant in prosecution for *sub judice* contempt - *People v O'Shea* [1982] IR 384 distinguished; *State (DPP) v Walsh* [1981] IR 412 approved; *State (DPP) v Walsh* [1981] IR 412; *Rattigan v DPP* [2008] IESC 34 [2008] 4 IR 639 and *R v Glennon* (1992) 173 CLR 592 followed; *R v Galbraith* [1981] 1 WLR 1039 considered – Applicant's appeal allowed; no new trial (221/2005 – SC – 5/3/2009) [2009] IESC 20
DPP v Independent Newspapers Ltd

Proceeds of crime

Retention of cash – Order - Purported errors on face of record - Statutory interpretation – Substitution of statutory provision –Whether

failure to insert express reference to amending statutory provision invalidated order of District Court authorising further detention of cash – Whether alleged failure to specify that order made pursuant to sworn evidence invalidated order – Whether alleged failure of Judge to record election for particular grounds of suspicion invalidated order – Whether failure to show jurisdiction - *Mullins v Harnett* [1998] 4 IR 426, *Swaine v C* [1964] IR 423 and *DPP v Kemmy* [1980] 1 IR 160 considered; *Byrne v Grey* [1988] 1 IR 31, *Simple Imports v Revenue Commissioners* [2000] 2 IR 243 and *DPP v Dunne* [1994] 2 IR 537 distinguished - Misuse of Drugs Act 1977 (No 12), s 26 – Criminal Justice Act 1994 (No 15), s 38 – Proceeds of Crime (Amendment) Act 2005 (No 1), s 20 – Interpretation Act 2005 (No 23), s 5 – District Court Rules 1997, O.38 r. 6 - Relief refused (2008/258JR – O'Neill J – 15/5/2009) [2009] IEHC 243
K (K) v Taaffe

Road traffic offences

Drink driving - Arrest – Driving – Intention to drive - Applicant alleged to have been found in driver's seat of car with engine running – Applicant arrested for offence contrary to s. 50 of the Road Traffic Act 1961 – Alternative verdicts – Literal interpretation - Whether grounds for arrest valid – Whether suspicion of arresting garda rational - Whether arresting garda could have reasonably concluded that applicant intended to drive – *DPP v Kenny* [1990] ILRM 569 applied; *DPP v Tyndall* [2005] IESC 28 [2005] 1 IR 593, *DPP v O'Connor* [1985] ILRM 333, *DPP v Byrne* [2002] 2 ILRM 268, *DPP v Kenny* [2006] IEHC 330 (Unrep, Herbert J, 13/10/2006), *Christie v Leachinsky* [1947] 1 All ER 567, *Gelberg v Miller* [1961] 1 All ER 29, *Hobbs v Hurley* (Unrep, Costello J, 10/6/1980) and *DPP v Connell [1998] 3 IR 62* considered; *DPP v Moloney* (Unrep, Finnegan P, 20/12/2001) distinguished - Road Traffic Act 1961 (No 24), ss 49 and 50 – Interpretation Act 2005 (No 23), s5 – Arrest declared unlawful (2007/1492SS – Edwards J – 15/2/2008) [2008] IEHC 457
DPP v O'Neill

Road traffic offences

Drink driving – Proofs - Section 17 certificate - Due completion of statement - Statutory procedure – Whether requirements of statute satisfied – Whether guard administering test should have signed form before accused rather than afterwards - Consequences in law of adopting procedure at variance from statutory provisions - Relevant statutory provisions - Whether non-compliance entitled accused to direction of acquittal –Presumptions - Technical defect - Whether certificate inadmissible in evidence - Nature and effect of error - Nature of evidential deficit - Mandatory provisions – Whether non-compliance vitiated evidential presumption - Strict interpretation of penal statute - *Stare decisis* - Precedential status of prior judgment – Whether precedent contained manifest error – Whether any relevant distinctions on facts identified from precedent - *DPP v Keogh* (Unrep, Murphy J, 9/2/2004) followed; *DPP v Kemmy* [1980] IR 160; *DPP v Somers* [1999] 1 IR 115; *DPP (O'Reilly) v Barnes* [2005] IEHC 245, [2005] 4 IR 176; *Ruttledge v Judge Clyne* [2006] IEHC 146, (Unrep, Dunne J, 7/4/2006); *McCarron v Judge Groarke* (Unrep, Kelly J, 4/4/2000); *People (DPP) v Greeley* [1985] ILRM 320 ; *DPP v Collins* [1981] ILRM 447; *DPP v Geasley* [2009] IECCA 22, (Unrep, CCA, 24/3/2009); *Maguire v Ardagh* [2002] 1 IR 385; *Howard v Commissioners of Public Works* [1994] 1 IR 101; *DPP v Moorehouse* [2005] IESC 52, [2006] 1 IR 421 and *DPP (Bermingham) v Reville* (Unrep, O'Caoimh J, 21/12/2000) considered - Road Traffic Act 1994 (No 7), ss 13, 17, 21 and 24 - Road Traffic Act 1994 (Section 17) Regulations 1999 (SI 326/1999) regs 4 and 5 - Road Traffic Act 1961 (No 24), ss 6(a) and 49 - Interpretation Act 2005 (No 23), s 5 - Case stated answered in affirmative (2008/1438SS - MacMenamin J - 21/4/2009) [2009] IEHC 179
Director of Public Prosecutions v Freeman

Road traffic offence

Driving under intoxicant - Invalid medical certificate – Arrest – Blood sample – Absence of alcohol in sample –Disposal of sample by applicant - Second certificate showing presence of cocaine in sample – Prosecution for driving under influence of drugs – Submissions in relation to invalidity of certificate – Acceptance of certificate as evidence – Absence of bureau seal – Claim that certificate not furnished as soon as reasonably practicable – Claim that 'cocaine class' not drug within meaning of legislation – Claim that later reanalysis raised serious risk of contamination – Claim that certificate furnished unfairly – Sufficiency of certificate as evidence until contrary shown – Whether presumption rebutted - Interpretation of 'as soon as practicable' – Whether word 'class' fatal to prosecution – Whether unfair procedures – Right to carry out second analysis – Absence of representation that second analysis would not take place – *Stokes v Director of Public Prosecutions* [1999] 3 IR 218; *Lennon v District Judge Clifford* [1992] 1 IR 382; *Chief Constable v Evans* [1982] 1 WLR 115; *Truloc Limited v District Justice McMenamin* [1994] 1 ILRM 151; *Director of Public Prosecutions v Corrigan* (Unrep, Finlay P, 21/7/1980) and *Director of Public Prosecutions v Spaight* (Unrep, Finlay P, 27/11/1981) considered – Road Traffic Act 1961 (No 24), s 49 - Road Traffic Act 1994 (No 7), ss 19 and 21 – Application dismissed (2008/237JR – O'Keeffe J – 21/4/2009) [2009] IEHC 212
Sweeney v District Judge Finn

Search warrant

Validity – Content – Terms – Incorrect reference to Act in standard printed form warrant – Categorisation of error – Whether error of form or error of substance - Whether error such as to render warrant invalid - Application to refuse admission into evidence items found pursuant to search — Whether judge wrong to admit evidence secured pursuant to warrant – Whether warrant made without authority – Whether any error in law – Whether warrant invalid - *People (DPP) v Balfe* [1998] 4 IR 50; *DPP v Dunne* [1994] 2 IR 537; *People (AG) v O'Brien* [1965] IR 142; *People (DPP) v Kenny* [1990] 2 IR 110 and *Creaven v Criminal Assets Bureau* (Unrep, SC, 29/10/2004) considered -Criminal Justice (Miscellaneous) Provisions Act 1997 (No 4), s 10 - Application for leave to appeal against conviction refused -
- Sentence - Severity - Term of 15 years imprisonment imposed for rape to run concurrently with a five year sentence for burglary – *People (DPP) v Keane* 2007 IECCA 119, (Unrep, SC, 19/12/2007) considered – Whether any error in principle – General sentencing principles – Age of accused – Whether sentencing judge adequately took into account young age of applicant – Rehabilitation – Offences at serious end of scale – Aggravating factors – Offence committed whilst on bail – Application refused (60/2007 - CCA 31/03/2008) [2008] IECCA 92
People (DPP) v Cummins

Sentence

Competition law – Offences – Sentencing principles – Purpose of sentence – Deterrence – Mitigating Factors – Imposition of custodial sentence – Equality before law – Requirement of equivalence of penalty for equivalent offences – *McMahon v Leahy* [1984] IR 525 followed; *People (DPP v Roseberry Construction Ltd* [2003] 4 IR 338 considered - Constitution of Ireland 1937, Article 40.1 – Competition Act 1991 (No 24), s 4 – Competition (Amendment) Act 1996 (No 19), ss 2 and 3 – Sentence imposed (34/2008 – Mckechnie J – 23/3/2009) [2009] IEHC 208
People (DPP) v Duffy

Sentence

Severity – Attempted murder – Attempted robbery – Assault – Guilty plea on second day of trial – Sentenced to fifteen years, ten years and ten years of imprisonment respectively – Viciousness and seriousness of offences – Foreign national - Whether trial judge took relevant factors into account in passing sentence – Whether any error in principle in sentences imposed - Non-Fatal Offences Against the Person Act 1997 (No 26), s 4 - Leave to appeal refused (117/2008 – CCA - 24/4/2009) [2009] IECCA 49

People (DPP) v Belousova

Sentence

Severity – Blackmail - Nature of offence – Effect on victim – Co-operation with gardaí – Full admissions – Remorse – No previous convictions – Personal circumstances – Low risk of re-offending – Two sentences of 18 month terms of imprisonment to run consecutively imposed – Whether offences should have been treated as single transaction - Criminal Justice Public Order Act 1994 (No 2) – Criminal Justice Act 1999 (No 10), s 99 - Appeal allowed; sentences of three years to run concurrently with twelve months suspended substituted (167/2008 – CCA - 30/3/2009) [2009] IECCA 36
People (DPP) v Doheny

Sentence

Severity – Burglary – Five year term of imprisonment with last two years suspended for five years imposed – Effect of crime on victim – Gravity of offence – Plea of guilty – Offer of compensation refused by victim - Structure of sentence – Appeal dismissed (217/2008 – CCA - 27/4/2009) [2009] IECCA 78
People (DPP) v Connors

Sentence

Severity – Co- accused in joint enterprise – Disparity of sentences - Eight year term of imprisonment imposed on first appellant - Seven year term of imprisonment imposed in second appellant - Whether sentences justified – Need for rehabilitative element in structuring sentence – Addiction – Terms of suspension – Similarity of roles in offence with co-accused who received lesser sentence - *People (Attorney General) v Poyning* [1972] IR 402 followed; *People (DPP) v Claxton* 2007 IECCA 104, (Unrep, CCA, 25/7/2008) considered – Appeal allowed in respect of first appellant with last two years of sentence suspended; Appeal dismissed in respect of second appellant (40 and 41/2008 – CCA - 22/6/2009) [2009] IECCA 73
People (DPP) v Callaghan

Sentence

Severity – Consecutive sentences - Credit card fraud - Guilty plea - History of offending – Aggravating factors - Offences committed whilst on bail — Totality principle – Whether any error in principle - Criminal Justice Act 1984 (No 22), s 11 - Bail Act 1997 (No 16), s 10 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 26 and 29 – Leave to appeal refused (190/2008 – CCA - 30/3/2009) [2009] IECCA 38
People (DPP) v Idowu

Sentence

Severity – Consecutive sentences - Cumulative effect– Totality of sentences - Sexual assault – Guilty plea – Whether any error in principle in construction of sentences – Whether sentence excessive – *People (DPP) v JM* [2002] 2 IR 263 and *Magee v Attorney General* [1974] IR 284 considered - Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 2 - Sex Offenders Act 2001 (No 18) - Leave to appeal refused (266/07 - CCA - 6/11/2008) [2008] IECCA 155
People (DPP) v Fylan

Sentence

Severity – Consecutive sentences – Effective sentence of four year term of imprisonment imposed - Approach to sentence by trial judge – Whether error in construction of sentence – Principle of 'totality' - Discretion of trial judge - Whether overall sentence reflected seriousness of offence – Whether any error in principle – *People (DPP) v TB* [1996] 3 IR 294 and *People (DPP) v NW* (Unrep, CCA, 20/11/03) considered - Criminal Law (Rape) (Amendment) Act 1990 (No 32) – Sex Offenders Act 2001 (No 18), s 37 - Leave to appeal refused - (54/07 - CCA - 21/1/2008) [2008] IECCA 6
People (DPP) v B (J)

Sentence

Severity –Error of principle - Nature of offence – Whether all relevant factors taken into account –Whether any basis to interfere with sentence –Leave to appeal refused (33/2008 –CCA - 25/5/2009) [2009] IECCA 58
People (DPP) v Davis

Sentence

Severity - Maximum sentence - Plea of guilty - Absence of any reduction in sentence – Whether any error in principle – Diminished value of plea on day of trial - Whether matters taken into account erroneously – *People (DPP) v JM* [2002] 2 IR 263 considered – Appeal allowed; sentence of 18 months and two and a half years to run concurrently substituted for sentences of 2 years and 3 years (262/07 - CCA - 3/11/2008) [2008] IECCA 150
People (DPP) v Downey

Sentence

Severity - Mitigation – Drugs offences – Early guilty plea – Ten year sentence imposed with review clause after five years –Previous convictions – Whether trial judge engaged sufficiently in individuated and proportionate matter with circumstances of appellant – Leave to appeal refused (229/2008 – CCA - 26/6/2009) [2009] IECCA 69
People (DPP) v Barker

Sentence

Severity – Mitigation - Three year term of imprisonment imposed - Alcohol abuse difficulties – Young appellant - Previous convictions - Criminal Damage Act 1991 (No 31), s 2 – Criminal Justice Public Order Act 1994 (No 2), s 19 – Appeal allowed; last twelve months of sentence suspended (244/2008 – CCA - 26/6/2009) [2009] IECCA 66
People (DPP) v Barry

Sentence

Severity – Mitigation - Whether sentence contained error of principle – Whether mitigating factors adequately taken into account – *People (DPP) v Drought* [2007] IEHC 310, (Unrep, CCA, 4/5/2007) considered – Appeal allowed; sentence of eight year term of imprisonment substituted for ten year sentence (Unrep, CCA, 4/5/2007) (36/08 - CCA - 7/11/2008 [2008] IECCA 175
People (DPP) v McC

Sentence

Severity - Mitigating factors – Aggravating factors – Circumstances of offence - Immaturity of applicant –Whether any error of principle – Whether trial judge gave adequate regard to youth of applicant – Possibility of rehabilitation - *DPP v DG* [2005] IECCA 75 (Unrep, CCA, 27/5/2005) Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 3 – Criminal Justice (Theft and Fraud) Offences Act 2001 (No 50), s 13 – Non Fatal Offences Against the Person Act 1997 (No 26), s 5 - Appeal allowed; last two years of sentence suspended (9/08 - CCA - 24/11/2008) [2008] IECCA 159
People (DPP) v T(W)

Sentence

Severity – Sexual offences - Aggravating factors – Gravity of offences – Whether trial judge erred in principle – Whether trial judge failed to give sufficient weight to mitigating factors- Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 4 - Appeal dismissed (161/07 - CCA – 19/2/2008) [2008] IECCA 59
People (PP) v Power

Sentence

Severity – Technical error in sentences imposed by trial judge - Overall period of nine years imprisonment imposed with no suspension- Statutory provision directing mandatory five year term without suspension - Offences committed whilst on bail – Whether consecutive sentences had to be imposed – Seriousness of offences – Previous convictions – Chronic drug addiction – Gravity of offences – Pattern of re-offending — Leave to appeal refused; sentence adjusted to correct technical defect; total effective sentence not interfered

with (227/2008 – CCA - 31/3/2009) [2009] IECCA 41
People (DPP) v Conlon

Sentence

Undue leniency – Concurrent sentences - Sexual offences – Gravity of offences – Effect of offences on victim – Whether sentence imposed represented significant departure from appropriate sentence - *People (DPP) v Drought* [2007] IEHC 310, (Unrep, CCA, 4/5/2007) considered - Criminal Law (Sexual Offences) Act 2006 (No 15) - Criminal Justice Act 1993 (No 6), s 2- Application for review refused (116/CJA 0 CCA 31/10/2008) [2008] IECCA 144
People (DPP) v Y

Sentence

Undue leniency - Indecent assault – Entirety of sentences suspended – Seriousness of offences – Effect on victims – Mitigating factors – Nature of offences – Whether obligatory that custodial sentence be imposed for sexual offences – Whether trial judge took all appropriate factors into account - Criminal Justice Act 1993 (No 6), s 2 – Criminal Law Amendment Act 1935 (No 6), s 6 – Criminal Law (Rape) Act 1981 (No 10), s 10 – *H v DPP* [2006] IESC 55, (Unrep, SC, 31/7/2006 considered– Application refused (196/CJA - CCA - 14/4/2008) [2008] IECCA 71
People (DPP) v B(A)

Sentence

Undue leniency - Sexual offences – Guilty plea – Sentence of two years suspended for three years – Whether sentence inappropriate – Whether substantial departure from appropriate sentence - Whether any error in principle - Criminal Justice Act 1993 (No 6), s 2 – Application granted; sentence increased to four years suspended for a period of three years (212CJA/07 - CCA - 21/4/2008) [2008] IECCA 60
People (DPP) v Leonard

Sentence

Undue leniency - Sexual offences – Suspended sentence – No previous convictions – Compensation paid to victim – Guilty plea - Criminal Justice Act 1993 (No 6), s 2 – Application granted; sentence increased to five years with entire term suspended (6CJA/08 - CCA - 21/4/2008) [2008] IECCA 61
People (DPP) v Higgins

Verdict

Evidence - Conviction of one count on indictment containing 49 counts of indecent assault - Whether jury verdict inconsistent –Whether for jury to decide and resolve matters of inconsistency in evidence – Whether jury entitled to convict on one count only - *R v Galbraith* [1981] 1 WLR 1039 applied - *DPP v DF* [2008] IECCA 81, (Unrep, CCA, considered – Criminal Justice (Administration) Act 1924 (No 44) – Leave to appeal refused – Sentence – Severity – Mitigating factors – Whether trial judge failed to take into account no previous convictions of applicant – Appeal allowed; entirety of 18 month sentence suspended (236/07 - CCA 16/12/2008) [2008] IECCA 172
People (DPP) v Kearns

Verdict

Inconsistent verdict of jury – Allegation of assault as result of stabbing with knife on count one – Allegation of producing knife in course of fight on count two - Conviction on first count and acquittal on second - Whether jury verdicts from facts and evidence stood up – Non-Fatal Offences Against the Person Act 1997 (No 26), s 4 – Firearms and Offensive Weapons Act 1990 (No 12), s 11 - Conviction on first count quashed; re-trial ordered (208/2008 – CCA - 25/5/2009) [2009] IECCA 59
People (DPP) v Doody

Warrant

Committal warrant - Whether warrant authorised detention of applicant beyond end of "present sittings of Circuit Court" – Applicant not brought before Circuit Criminal Court before end of last sittings - Whether committal warrant survived - Whether warrant spent - Whether any lawful basis for continued detention of applicant beyond end of last sittings of Circuit Criminal Court – *Attorney General v Judge Sheehy* [1990] 1 IR 434; *State (Hughes) v Neylon* [1982] ILRM 108 and *In the Matter of Paul Singer (No 2)* (1960) 98 ILTR 112 considered; *In re Singer (No 1)* (1960) 97 ILTR 130 followed - District Court Rules 1997 (SI 93/1997), O 12, r 25 and O 24, r 12 - Criminal Procedure Act 1967 (No 12), s 4A - Immediate release directed (2009/607 SS - Peart J - 23/4/2009) [2009] IEHC 193
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Criminal Injuries Compensation

Prison officer - Injuries sustained while attempting to prevent escape of prisoner – Reasons for refusal – Failure to submit up to date medical report - Absence of satisfaction that violent struggle had taken place – Absence of satisfaction that applicant followed correct procedures – Whether breach of natural and constitutional justice – Verification of facts by independent witnesses – Whether decision irrational – Conviction of prisoner for assault of applicant – Provision of medical reports – Experience of officer – Whether tribunal member entitled to come to conclusion on basis of material – Entitlement to full hearing on appeal – Whether decision flew in face of fundamental reason – Whether tribunal member considered all material – Repetition of errors in report of secretary - *Garvan v Criminal Injuries Tribunal* (Unrep, SC, 20/7/1993); *Creedon v Dublin Corporation* [1984] IR 428 and *Stefan v Minister for Justice* [2001] 4 IR 203 considered - Relief granted (2007/1395JR – Sheehan J – 27/4/2009) [2009] IEHC 198
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EDUCATION

School

Expulsion - Breach of constitutional and statutory rights – *Certiorari* – Incident during charity football match – Meeting – Submissions – Decision to permanently exclude student – Appeal – Impact of incident on teacher – Good faith – Failure to disclose material fact regarding invitation to emergency board meeting – Delay – Mootness – Consequences for reputation and self-esteem - Breach of statutory duty – Failure to notify educational welfare officer – Primary function of officer – Violation of statutory procedure - Error of law – Whether decision of appeals committee based on irrelevant issues – Fair procedures – *Audi alteram partem* – Unreasonableness - *State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] IR 642; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *State (Vozza) v O'Floinn* [1957] IR 227; *Dekra Éireann Teoranta v Minister for Environment and Local Government* [2003] 2 IR 270; *O'Brien v Moriarty* [2005] IESC 32 [2006] 2 IR 221; *Minister for Labour v Grace* [1993] 2 IR 53; *Barry v Fitzpatrick* [1996] 1 ILRM; *Anisminic Ltd. v Foreign Compensation Tribunal* [1969] 2 AC 147 and *Killeen v. Director of Public Prosecutions* [1997] 3 IR 218 considered - Education Act 1998 (No 51), s 29 – Education (Welfare) Act 2000 (No 22), ss 21 and 24 - – Rules of the Superior Courts 1986 (SI 15/1986), O 84 r 21 – Declaration that expulsion in breach of statutory rights (2007/418JR – Hedigan J – 3/4/2009) [2009] IEHC 163
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EMPLOYMENT LAW

Contract

Repudiation - Claim for wrongful dismissal – Breach of implied term of contract – Relationship of trust and confidence – Claim for breach of contract – Personal injury – Store buyer – Colour blindness test – Transfer back to store management – Mutual obligations of employer and employee – Reciprocal duties – Whether conduct amounted to repudiation of contract – Applicable test – Objective test – Conduct of parties – Cumulative effect of conduct – Whether conduct of employer unreasonable and without proper cause – Effect of conduct on employee – Liability for stress engendered injury – Liability in negligence – Duty of care – Failure to take reasonable care – Damage – Reasonable foreseeability – Awareness of vulnerability – Risk of harm – Gravity of potential harm – Cost and practicality of prevention of harm – *Malik v Bank of Credit and Commerce International SA* [1996] ICR. 406; *Lewis v Motorworld Garages Limited* [1986] ICR 157; *Western Excavating (ECC) Limited v Sharp* [1978] ICR 221; *Post Office v Roberts* [1980] IRLR 347; *Woods v W.M. Car Services (Peterborough) Limited* [1981] ICR 666; *Omilaju v Waltham Forest London Borough Council* [2005] 1 All ER 75; *Brown v Merchant Ferries Limited* [1998] IRLR 682; *Courtaulds Northern Textiles Limited v Andrew* [1979] IRLR 84; *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308; *British Aircraft Corporation Limited v Austin* [1978] IRLR 332; *Harrington v Irish Life and Permanent Plc* (Unrep, Smyth J, 18/05/2003); *Pepper v Webb* [1969] 2 All ER 216; *Brewster v Burke* [1985] 4 JISLL 98; *Maher v Jabil Global Services Limited* [2005] 16 ELR. 233; *McGrath v Trintech Technologies Limited* [2005] ELR 49; *Quigley v Complex Tooling and Moulding* [2005] IEHC 71 (Unrep, Lavan J, 9/3/2005); *Hatton v Sunderland* [2002] 2 All ER 1 and *Stokes v Guest Keen and Nettlefold (Bolts and Nuts) Limited* [1968] 1 WLR 1776 considered – Appeal substantially allowed (464/2006 – SC – 12/2/2009) [2009] IESC 10
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Infringement proceedings

Confidentiality – Whether applicant in judicial review proceedings entitled to discovery of communications with European Commission – *World Wide Fund for Nature v European Commission* C-105/95 and *Petrie v European Commission* ECR II-3677 considered - E.C. Treaty, Article 226 - Application dismissed (2009/99JR – Kelly J – 3/4/2009) [2009] IEHC 174
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EVIDENCE

Identification

Visual identification - Possession of firearms – 'Drive by' shooting – Absence of reference to difficulties of visual identification in relation to witness - Absence of requisition – Adequacy of direction to jury – Whether direction engaged sufficiently with facts – Brevity of opportunity to witness perpetrator – Slipping of disguise – *People (DPP) v Cronin* [2006] IESC 9 [2006] 4 IR 329 and *People (DPP) v Casey (No 2)* [1963] IR 33 considered – Application dismissed (48/2008 – CCA – 16/12/2008) [2008] IECCA 173
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EXTRADITION

Delay

Unexplained prosecutorial delay – Prejudice - Right to fair procedures and fair trial - Appropriate legal principles - Whether issues such as delay and right to fair trial matters to be raised in requesting state - *State (Trimble) v Governor of Mountjoy Prison* [1985] IR 550 and *Minister for Justice v Corrigan* [2006] IEHC 101, [2007] 2 IR 448 considered; *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 664 applied - Hardship - Whether family and personal circumstances factors which court can take into account - Whether hardship more appropriate to plea in mitigation - European Arrest Warrant Act 2003 (No 45) - Council Framework Decision 2002/584/JHA - Appeal

dismissed; surrender ordered (167/2008 -SC - 7/5/2009) [2009] IESC 40
Minster for Justice v Hall

European arrest warrant

Correspondence - Whether correspondence evident from warrant - Whether correspondence established – Whether all ingredients for offence in Irish law established – Whether any correspondence with offence - *Whelan v Madigan* [1978] ILRM 136 applied - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 12 (1) - Criminal Justice (Public Order) Act 1994 (No 2), ss 11(1) and 13(1) - European Arrest Warrant Act, 2003 (No 45), ss 3 and 5- Order for surrender granted (2008/166Ext - Peart J - 23/4/2009) [2009] IEHC 195
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European arrest warrant

Fleeing - Meaning of "fled" - Whether respondent avoided executable sentence - Whether surrender could be ordered - European Arrest Warrant Act 2003 (No 45), s 10(d) – Surrender ordered (2007/191Ext & 2008/161 Ext - Peart J - 24/4/2009) [2009] IEHC 194
Minister for Justice v Cieply

European arrest warrant

Fleeing – Warrant – Error on warrant - Temporary release – Terms of release breached – Consecutive sentences imposed – First of two consecutive sentences served - Warrant stating respondent's return necessary for prosecution of offences – Whether respondent fled – Whether sentence already served – Whether error on warrant of consequence - European Arrest Warrant Act 2003 (No 45), ss 10, 13, 16(1) and 22 – Respondent's surrender ordered (2008/164EXT – Peart J – 22/5/2009) [2009] IEHC 241
Minister for Justice, Equality and Law Reform v Doyle

Evidence

Documentation – Documentation supporting request – Documents provided by requesting state to rebut allegations made by respondent - Whether court entitled to have regard to further documents furnished - Appropriate method of putting documentation in evidence - Whether trial judge erred in law in admitting evidence - Applicable statutory provisions - Relevant applicable law - Regime for authentication of material in support of request for extradition - Statutory scheme as to proof of documents – Whether evidence brought in appropriate form - Appropriate statutory law - Extradition (European Union Conventions) Act 2001 (No 49), ss 9, 10 and 17 - Extradition Act 1965 (Application of Part II) Order 2000 (SI 474/2000) - Extradition Act 1965 (No 17), ss 3, 7B, 25, 29 and 37 - Appeal allowed; matter remitted to High Court (338/2007 -SC - 2/4/2009) [2009] IESC 34
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FAMILY LAW

Child abduction

Views of child – Acquiesance - Rights of access – Child expressing desire to remain in Ireland – Weight to be attached to child's view - Whether father had acquiesced in child's relocation – Whether purported ambivalence amounted to acquiescence – Whether child of age and level of maturity at which appropriate to take into views account - *RK v JK (Child Abduction: Acquiescence) [2000] 2 IR 416, Re H (Abduction: Acquiescence)* **[1998] AC 72,** *P v B (Child Abduction: Undertakings) [1994] 3 IR 507, W v W (Abduction: Acquiescence)* **[1993] 2 FLR 211,** *FL v CL* [2006] IEHC 66 [2007] 2 IR 630, *Re M (Abduction: Child's Objections)* [2008] 1 AC 1288 and *B v B (Child Abduction) [1998] 1 IR 299 considered* **-** Hague Convention on Civil Aspects of International Child Abduction, arts 1, 3, 12, 13 and 24 – Child's return ordered, stay put on order to allow mother to apply to Lithuanian Court for review of access (2008/35HLC – Sheehan J – 1/5/2009) [2009] IEHC 213
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Custody

Non-married parents – Father resident in Ireland – Custodial mother seeking to move to England and marry – Psychiatrist's report – Allegations that children influenced by respective parents as to their views – Whether father or mother appropriate custodian – Whether appropriate to reduce Circuit Court award of maintenance in light of economic downturn - *WPP v SRW* [2001] 1 ILRM 371, *W v R* (2006) 35 Fam LR 608, *AMS v ALF* [1999] FLC 92-852, *Frisconi v Frisconi* [2009] FAN CA 45, *Johansen v Norway* [1996] 3 EHRR 979, *Payne v Payne* [2001] Fam 473, *Poel v Poel* [1970] 1 WLR 1469, *Northwestern Health Board v HW* [2001] 3 IR 622 and *FL v CL* [2006] IEHC 66 [2007] IR 630 considered - Guardianship of Infants Act 1964 (No 7), ss 3 and 11 – Circuit Court order giving mother custody of children affirmed, maintenance order varied (2009/75CA – Murphy J – 15/5/2009) [2009] IEHC 247
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Judicial separation

Property adjustment orders – Settlement previously made – Motion to enforce terms of consent order – Opposing motion to vary or discharge order - Change in financial position of respondent husband – Assertion that consent orders made in contemplation of assurances from bank – Bank no longer offering assistance – Whether appropriate to enforce or vary original orders - Whether hearing should take place on affidavit or by way of oral evidence – Whether open for spouse to make more than one application for property adjustment order – Whether change in financial situation a new development or continuation of trend evident at time of original orders - *Benson v Benson (deceased)* [1996] 1 FLR 692, *Barder v Caluori* [1988] 1 AC 20, *Dixon v Marchant* [2008] EWCA Civ 11 and *VB v JP* [2008] EWHC 112 (Fam) approved - Family Law Act 1995 (No 26), ss 9, 16 and 18 – Judicial Separation and Family Law Reform Act 1989 (No 6), s 15 – Property adjustment order in favour of applicant made (2007/37M – Dunne J – 14/5/2009) [2009] IEHC 248
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Maintenance

Judicial review – *Certiorari* – Maintenance order made by Circuit Court – Interpretation of order – Clarification of order – Whether absence of evidence to found order – Whether breach of fair procedures – Note of court clerk – Hearing for purpose of clarification – Relief refused (2006/679JR – Hedigan J – 3/4/2009) [2009] IEHC 162
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Licensing

Seamen - Manning regulations - Certificate of equivalent competency – Officers holders

of certificates of equivalent competency from competent authority in UK – Trawlers previously surveyed by Marine Survey Office with no issue as to manning requirements raised – Respondent not recognising certificates of equivalent competency as satisfying Irish regulatory requirements – Applicant operating for 27 years without previous difficulties - Legitimate expectation – Delay – Requirement to move promptly – Whether certificate of equivalent competency issued by UK sufficient to meet Irish regulatory requirements - Whether necessary to interpret regulations in light of directly applicable provisions of EU law and common fisheries policy – Whether breach of principles of equivalence and effectiveness – Whether legislation concerning different jurisdictions could be interpreted differently in different jurisdictions – Whether failure to previously raise issue conferred legitimate expectation on applicant - *Glencar Explorations Plc v Mayo County Council (No 2)* [2002] 1 IR 84 followed; *R v North and East Devon Health Authority, Ex Parte Coughlan* [2001] QB 213 followed; *Henderson v Henderson* (1843) 3 Hare 100, *AA v Medical Council* [2003] 4 IR 302, *Power v Minister for Social and Family Affairs* [2006] IEHC 170 [2007] 1 IR 543, *O'Brien v Moriarty* [2005] IESC 32 [2006] 2 IR 221 considered; *AG (Butler) v Sheehan* [1927] IR 546 distinguished – Merchant Shipping Act 1947 (No 46), s7 – Merchant Shipping Act 1992 (No 2), s 28 – Merchant Shipping (Certificate of Seamen) Act 1979 (No 37), ss 3 and 8 - Merchant Shipping (Recognition of British Certificates of Competency) Order 1995 (SI 228/1995), art 2 – European Communities (Second General System for the Recognition of Professional Education and Training) Regulations 1996 (SI 135/1996) – Fishing Vessels (Safety Provisions) Regulations 2002 (SI 418/2002) – Merchant Shipping (Safety of Fishing Vessels) (15-24 meters) Regulations 2007 (SI 640/2007) - European Communities (Safety of Fishing Vessels) (Amendment) Regulations 2003 (SI 72/2003) – Merchant Shipping (Training and Certification) (STCW Convention States) Order 1998 (SI 555/1998) – Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 1988 (SI 289/1988) - Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 2000 (SI 192/2000) - Council Directive 97/70/EC - Rules of the Superior Courts 1986 (SI 15/1986) O 84, r 21 – Relief refused (2008/496JR – O'Neill J – 15/5/2009) [2009] IEHC 240
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SI 387/2009

GARDA SÍOCHÁNA

Discipline

Fair procedures - Undue delay - Right to expeditious resolution of disciplinary inquiries - Alleged failure to process complaint expeditiously – Whether breach of natural and constitutional justice - Public interest - Rationale behind need for expeditious resolution of complaints - Whether any overall time limit provided for completion of investigation – Whether statutory provisions required speedy resolution of complaints - Minimum degree of expediency required in all cases – *R v Chief Constable Merseyside Police* [1989] 1 WLR 1077; *McCarthy v Garda Síochána Complaints Tribunal* [2002] 2 ILRM 341; *Boland v Garda Síochána Complaints Board* (Unrep, Kearns J, 28/11/2003) considered; *McNeill v Commissioner of An Garda Síochána* [1997] 1 IR 469 applied - Garda Síochána (Complaints) Act 1986 (No 29), ss 4(1)(a), 4(3)(c), 4(4), 5(5), 6(2)(a) and 7(5) - Relief granted (2007/1707JR - Hedigan J - 28/4/2009) [2009] IEHC 197
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Asylum

Leave – Credibility – Country of origin information – Internal relocation – Medical report dismissed by respondent because of

failure to conform with terms of Istanbul Protocol - Extension of time – Applicant asserting difficulty in obtaining translator – Whether good and sufficient reason for extending time – Whether purported errors severable from decision – Whether decision internally incoherent – Whether substantial grounds - *N v RAT* [2007] IEHC 230 [2008] 1 IR 501, *S v Minister for Justice* [2005] IEHC 395 (Unrep, Peart J, 24/11/2005), *G v RAT* [2006] IEHC 302 (Unrep, Feeney J, 01/06/2006), *E v Minister for Justice* [2006] IEHC 23 (Unrep, Clarke J, 26/01/2006), *K v Minister for Justice* [2007] IEHC 11 (Unrep, Herbert J, 07/02/2007) and *I v Minister for Justice* [2005] IEHC 182 (Unrep, Clarke J, 27/05/2005) considered - Refugee Act 1996 (No 17), s 11B – Illegal Immigrants (Trafficking) Act 2000 (No 20), s 5 – Leave granted (2006/681JR – Clark J – 12/5/2009) [2009] IEHC 217
A (MM) v Minister for Justice, Equality and Law Reform

Asylum

Leave – Refusal of asylum – Absence of identity documents – Multiple dates of birth provided – Negative credibility findings – Country of origin information – Inconsistencies between questionnaire and interview – Discrepancies in accounts of events – Failure to refer to grounds of appeal – Whether substantial grounds for review – Whether tribunal member should have had express reference to notice of appeal – Definition of refugee – Risk from future involvement in protests – Assessment of credibility – Date of birth – Whether failure to assess knowledge in light of age and mental distress – Absence of medical evidence – Whether risk of serious harm – Standard of proof – Consideration of past events – Absence of state protection – Whether prejudice as result of absence of express reference to grounds of appeal – *A(J) v Refugee Appeals Tribunal* [2008] IEHC 310, (Unrep, Hedigan J, 15/10/2008); *Muanza v Refugee Appeals Tribunal* (Unreported, Birmingham J, 8/2/2008); *Banzuzi v Minister for Justice* [2007] IEHC 2, (Unrep, Feeney J, 18/1/2007) and *K(G) v Minister for Justice* [2002] 2 IR 418 considered - Refugee Act 1996 (No 9), ss 11, 13 and 16 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5
- Leave refused (2007/1104JR – Clark J – 31/3/2009) [2009] IEHC 157
A (G) v Refugee Appeals Tribunal

Asylum

Leave – Refusal of refugee status – Claim of persecution based on nationality – Allegations of stabbing and beating - Negative credibility findings – Country of origin information – Assessment of credibility – Material discrepancies – Differing versions of events - Absence of identity documentation – Whether credibility findings based on objective analysis of material - Whether substantial grounds for review - *Bujari v Minister for Justice* (Unrep, Finlay Geoghegan J, 7/5/2003); *Zhuckhova v Minister for Justice* [2004] IEHC 414, (Unrep, Clarke J, 26/11/2004); *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436, (Unrep, Peart J, 9/7/2004); *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005); *Imafu v Refugee Appeals Tribunal* [2005] IEHC 182, (Unrep, Clarke J, 27/5/2005); *Camara v Minister for Justice* (Unreported, Kelly J, 26/1/2000) *Imoh v Refugee Appeals Tribunal* [2005] IEHC 220 (Unrep, Clarke J, 24/6/2005) and *T(G) v Minister for Justice* [2007] IEHC 287 (Unrep, Kelly J, 26/7/2007) considered - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2006/590JR – Clark J – 18/3/2009) [2009] IEHC 126
I (K) v Refugee Appeals Tribunal

Asylum

Leave –Refusal of refugee status – Credibility - Claim of persecution - Allegations of murders and assaults of family members - Negative credibility findings – Inconsistencies – Absence of documents – Inadequacy of explanation for failure to claim asylum in Ethiopia – Application to join children as applicants – Prior inclusion in proceedings before commissioner and tribunal – Common interest in legality of decision – Whether good and sufficient reason to grant extension of time – Discretion – Relevant factors – Length of delay – Explanation for delay – Obligation to act promptly – Gap in information provided – Absence of explanation by or on behalf of children – Principle of family unity – *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; GK *v Minister for Justice* [2002] IR 418; *Azubugu v Refugee Appeals Tribunal* [2007] IEHC 290 (Unrep, Peart J, 27/7/2007); *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301; *OST v Minister for Justice* [2007] IEHC 441 (Unrep, Hedigan J, 12/12/2007); *De Roiste v Minster for Defence* (Unrep, McCracken J, 28/6/1999); *Golan v DPP* [1989] ILRM 491; *Ojuade v Minister for Justice* [2008] IEHC 126 (Unrep, Peart J, 2/5/2008) and *A v Refugee Appeals Commissioner* [2008] IEHC 440 (Unrep, Irvine J, 3/12/2008) considered - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2007/1192JR – Cooke J – 7/5/2009) [2009] IEHC 219
O (SM) v Refugee Applications Commissioner

Asylum

Leave – Refusal of refugee status – Minor child – Claim of forced prostitution - Claim of persecution based on threat to child by brothel owner – Country of origin information - Negative credibility findings – Breach of fair procedures – Refusal to permit cross examination of presenting officer – Purpose of regulatory provisions – Discretion – Absence of prejudice – *Bozsa v Refugee Appeals Tribunal* [2002] IEHC 136 (Unrep, Smyth J, 25/4/2002) and *Nicolaev v Refugee Appeals Tribunal* (Unreported, Smyth J, 8/7/2002) considered – Refugee Act 1996 (No 9), s 13 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Refugee Act 1996 (Appeals) Regulations 1993 (SI 424/2003), reg 9 – Leave refused (2006/590JR – Clark J – 31/3/2009) [2009] IEHC 156
T (J) (a minor) v Refugee Appeals Tribunal

Asylum

Remedy - First instance decision – Appeal brought but left in abeyance pending outcome of judicial review – Country of origin information – State protection - Whether appeal more appropriate remedy - *N v Refugee Applications Commissioner* [2008] IEHC 308 (Unrep, Hedigan J, 9/10/2008) applied; *State v Dublin Corporation* [1984] IR 381, *Stefan v Minister for Justice* [2001] 4 IR 203, *M v RAC* [2009] IEHC 64 (Unrep, Cooke J, 27/1/2009) and *D v RAC* [2009] IEHC 77 (Unrep, Cooke J, 27/1/2009) considered – Relief refused (2006/875JR – Cooke J – 29/4/2009) [2009] IEHC 215
A (TT) v Minister for Justice, Equality and Law Reform

Asylum

Persecution – Resident other than in country of origin – Errors in decision
Applicant Iranian national but ordinarily resident in Iraq – Applicant maintaining fear of persecution in Iraq – Failure of respondent to disclose report relied upon –Whether applicant entitled to rely upon fear of persecution in State other than that of nationality – Whether decision internally incoherent – Whether purported errors sufficient to justify relief – Refugee Act 1996 (No 17), ss 2 and 16 – Relief refused (2007/1050JR – Cooke J – 13/5/2009) [2009] IEHC 244
M (HH) v Refugee Appeals Tribunal

Deportation

Leave – Applicant unsuccessful asylum seeker – Negative credibility findings – Application for subsidiary protection unsuccessful – Extension of time – Country of origin information – Whether selective or arbitrary reliance on country of origin information – Whether failure to analyse certain aspects of applicant's perceived fear of persecution – Whether substantial grounds - *Kouyape v Minister for Justice* [2005] IEHC 380 (Unrep, Clarke J, 09/11/2000) applied; *DVTS v Minister for Justice* [2007] IEHC 305 [2008] 3 IR 476 considered– Immigration Act 1999 (No 22), s 3 – Refugee Act 1996 (No 17), s 5 – Relief refused (2008/1360 JR – Harding Clarke J – 6/5/2009) [2009] IEHC 239

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

Deportation

Leave – Genuine family unit – Order in respect of father of Irish citizen child - Substantial grounds - Arguable grounds – Anxious scrutiny - Reasonableness of administrative decision – Irish citizen child losing rights if moving to China – Minor criminal offence committed - Whether decision to deport reasonable – Whether decision to deport proportionate – Whether wrong test of insurmountable obstacle to family living together in country of origin applied - *K v Refugee Appeals Tribunal* [2008] IEHC 294, (Unrep, McCarthy J, 31/7/2008); *N v Minister for Justice* [2008] IEHC 8, (Unrep, McCarthy J, 18/1/2008); *Meadows v Minister for Justice* (Unrep, Gilligan J, 19/11/2003); *Vilvarajah v United Kingdom* (1992) 14 EHRR 248; *Soering v United Kingdom* (1989) 11 EHRR 439; *N (FR) v Minister for Justice* [2008] IEHC 107, (Unrep, Charleton J, 24/4/2008) considered - *G v Director of Public Prosecutions* [1994] 1 IR 374 not applied - *Ogueksve v Minister for Justice* [2008] IESC 25, (Unrep, SC, 1/5/2008) applied - Constitution of Ireland 1937, Article 40 - European Convention on Human Rights, arts 8 & 13 - Leave granted (2008/1350JR- Charleton J - 13/2/2009) [2009] IEHC 96
Y (HL) v Minister for Justice

INJUNCTIONS

Interlocutory injunction

Copyright – Breach – Restraint - Concept for television programme - Contractual dispute – Applicable principles - Whether fair issue to be tried – Adequacy of damages – Balance of convenience – Interference with schedules – Interference with advertising – Potential for exploitation of concept abroad – Clear imbalance between consequences for parties – Issue of costs – Interlocutory injunction refused (2009/1632P – Clarke J – 24/4/2009) [2009] IEHC 237
Kinsella v McAleer

Mareva

Discharge or variation – Breach of partnership obligations - Jurisdiction of court to vary injunction – Access to funds to discharge living expenses and legal costs – Discharge of injunction – Proposed substitution of undertakings – Whether third parties bound by undertaking – Dishonest nature of secret profits – Evidence of expenditure and debts – Assets of wife – Assets of applicant – Whether order should be varied to allow service of mortgages – Household expenses – *DPP v H(E)* (Unrep, Kelly J, 22/4/1997) and *A v C* [1981] 2 All ER 126 considered – Order varied to facilitate mortgage payments and household expenditure (2008/8054P – Kelly J – 27/3/20089) [2009] IEHC 172
Daly v Killally

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The life of PII
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LAND LAW

Lender

Purchase money - Defendant claiming to have been party to purchase – Caution entered by defendant against folio - Plaintiff seeking declaration that defendant had no interest in lands – Conflicting oral evidence – Defendant named on documentation relating to loan for deposit – Whether defendant estopped from claiming interest in lands – Whether lender obtains interest in lands where borrowed money used to purchase it – *Re Sharpe (a bankrupt)* [1980] 1 WLR 219 considered – Declaration that defendant had no interest in lands granted, Registrar of Titles directed to cancel caution (2007/5018P – McGovern J – 2/7/2008) [2008] IEHC 445
Golden v Maughan

Profit à prendre

Prescriptive rights - Ownership of fishery through use over thirty year period - Whether defendant acquired statutory prescriptive right - Permission - Documentary title – Abandonment - Whether plaintiffs or predecessors abandoned fishery – Consent - Overall conduct – Whether defendant could legitimately claim prescriptive right - Whether each case depends entirely on facts - Whether alleged permission operative - Prescription Act 1832 (2 & 3 Will 4), s 1 - Appeal dismissed (122/2006 - SC - 28/5/2009) [2009] IESC 45
Agnew v Barry

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Wade, Gordon
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MEDICAL LAW

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2009
SI 343/2009

MEDICAL NEGLIGENCE

Article

Boylan, Michael
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MENTAL HEALTH

Detention

Involuntary patient – Previously voluntary patient – Renewal order – Statutory interpretation – Definition of voluntary patient – Whether applicant had capacity to be voluntary patient – Best interests of patient – Legal challenge to detention of patient not warranted unless best interests of patient demand – *Gooden v St Otteran's Hospital (2001)* [2005] 3 IR 617 approved; *State (McDonagh) v. Frawley* [1978] IR 131 followed - Mental Health Act 2001 (No 25), ss 2(1), 4(1), 9 ,14(1) ,15(1) , 18(1), 23(1), 24 and 29 – European Convention on Human Rights Act 2003 (No 20), ss 2(1) – Constitution of Ireland, 1937, Article 40.4.2° – European Convention on Human Rights, article 5(1) – Applicant's appeal dismissed (74/2009 – SC – 28/5/2009) [2009] IESC 46
H (E) v St Vincent's Hospital

PENSIONS

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PLANNING & ENVIRONMENTAL LAW

Development

Objection – Overdevelopment – Damage to landmark - Injury to visual amenities of area – Appeal of decision – Breach of county development plan – Report of inspector suggesting reduction in size – Invitation to submit revised proposal – Grant of permission attaching conditions – Whether obligation to explain decision to reject recommendation of inspector – Duty to give reasons - Whether reasons for decision inadequate –Whether reasons to be read in light of conditions – Absence of necessity for discursive reasons - Assessment of adequacy of reasons – Reading of decision in conjunction with conditions – Necessity for reasons to provide minimum standard of practical enlightenment – Adoption of recommendations of inspector – Whether prejudice to applicant – *Grealish v An Bord Pleanála* [2007] 2 IR 536; *Mulholland v An Bord Pleanála* [2006] 1 IR 453; *Deerland Construction Ltd v Aquaculture Licenses Appeals Board* [2008] IEHC 289 (Unrep, Kelly J, 9/9/2008); *South Bucks County Council v Porter* [2004] 1 WLR 1953; *O'Donoghue v An Bord Pleanála* [1991] ILRM 750; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *Fairyhouse Club Ltd v An Bord Pleanála* [2001] IEHC 106 (Unrep, Finnegan P, 18/7/2001) considered - Planning and Development Act 2000 (No 3), s 34 – Planning and Development Regulations 2001 (SI 600/2001), art 73 – Relief refused (2005/1179JR – Hedigan J – 105/2009) [2009] IEHC 202
O'Neill v An Bord Pleanála

Planning permission

Conditions - Grant of planning permission on appeal subject to conditions – Validity of planning permission – Interpretation of planning permission - Whether development in compliance with relevant conditions of planning permission - Whether changes to permitted development - Discretion of planning authority in approving compliance with conditions - Whether decision made without or in excess of jurisdiction and *ultra vires* - Applicable legal principles – Objective interpretation - Construction of planning documents - Whether court confined to literal interpretation of conditions – True meaning and objectives of conditions - Immaterial departures from terms of planning permission - Inconsequential discrepancies - Whether council's decision within scope of authority – Whether application without merit - *Kenny v An Bórd Pleanála* [2001] 1 IR 565; *Kenny v Trinity College Dublin* [2007] IESC 42, [2008] 2 IR 40; *Boland v An Bórd Pleanála* [1996] 3 IR 435; *Readymix (Eire) v Dublin County Council* (Unrep, SC, 30/6/1974); *Gregory v Dun Laoghaire Rathdown County Council* (Unrep, SC, 28/7/1977) and *Re XJS Investments Ltd v Dun Laoghaire Corporation* [1986] IR 750 considered - Local Government (Planning and Development) Regulations 1994 (SI 86/1994), art 35 - Planning and Development Act, 2000 (No 32), s 160 - Delay – Obligation to act promptly - Whether failure to apply promptly for judicial review - Circumstances of particular case - Special factors - Prejudice – Whether application for leave to apply for judicial review could be defeated for failure to move promptly where application made within permitted time - Financial consequences – *Dekra Éireann Teoranta v Minister for Environment* [2003] 2 IR 270; *State (Cussen) v Brennan* [1981] IR 181 and *O'Brien v Moriarty* [2005] IESC 32, [2006] 2 IR 221 considered – Rules of the Superior Courts 1986 (SI 15/1986) O 84, r 21(1) - Appeal dismissed (383JR/2002 - SC - 5/3/2009) [2009] IESC 19
Kenny v Dublin City Council

Planning permission

Protected structure – Refurbishment and extension –Attachment of condition that premises to be used solely as embassy – Appeal against imposition of conditions – Development plan – Zoning objective – Application relating to works - Whether condition not reasonably related to development where condition related to use – Whether office use for embassy purposes came within class 3 office use – Whether condition in relation to entirety of premises unreasonable – Whether condition justified by development plan – Whether condition imposed for ulterior purpose – Established use of property – Whether Board entitled to consider established use was as embassy and not within definition of office use - Whether court appropriate body to determine established use of property – *Locus standi - O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *Grianan an Aileach Centre v Donegal County Council (No 2)* [2004] 2 IR 625; *B&Q Ireland Ltd v An Bord Pleanála* (Unrep, Quirke J, 10/11/2004); *Dublin City Council v Liffey Beat Ltd* [2005] 1 IR 478; *Rehabilitation Institute v Dublin Corporation* (Unrep, Barron J, 14/1/1988); *Pyx Granite Company Ltd v Minister for Housing* [1958] 1 QB 554; *Newbury District Council v Secretary for the Environment* [1981] AC 578; *Re Viscount Securities Ltd* [1976] 62 ILTR 17; *Kildare County Council v Goode* [1999] 2 IR 495; *Ashbourne Holdings v An Bord Pleanála* [2003] 2 IR 114; *Killiney and Ballybrack Development Association Ltd v Minister for Local Government* [1978] ILRM 78 and *McDowell v Roscommon County Council* (Unrep, Finnegan P, 21/12/2004) considered - Planning and Development Act 2000 (No 3), ss 34 and 50 – Planning and Development Regulations 2001 (SI 600/2001), art 10 – Relief refused (2008/1199JR – Dunne J – 13/05/2009) [2009] IEHC 228
Quinlan v An Bord Pleanála

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PRACTICE & PROCEDURE

Appeal

Moot – No live issue - Release of applicant ordered from custody after inquiry – Applicant re-arrested and charged with new charge - High Court subsequently ordered applicant's release on the new charge - Appeal from decision of High Court ordering release of applicant - Applicant no longer in custody on foot of new charge - Charge inoperative - No live issue remaining – Whether issue of new charge justiciable – Whether matter moot - *Dunne v Governor of Cloverhill Prison* [2009] IESC 11, (Unrep, SC, 18/2/2009) considered - Criminal Procedure Act 1967 (No 12), s 4B - Criminal Justice Act 1999 (No 10), s 9 - Appeal dismissed (50/2008 -SC - 21/5/2009) [2009] IESC 43
Dunne v Governor of Cloverhill Prison

Discovery

Documents – Relevance – Privilege – Transposition of European directive – Public interest confidentiality – Whether public interest in preserving confidentiality of communications with European Commission – *Sweetman v An Bord Pleanála* (Unrep, Clarke J, 9/3/2007); *World Wide Fund for Nature v European Commission* C-105/95 and *Petrie v European Commission* ECR II-3677 considered - Planning and Development Act 2000 (No. 30), s. 50 – Council Directive 2003/35/E.C. – Council Directive 85/337/E.C. art. 10a - Application dismissed (2009/99JR – Kelly J – 3/4/2009) [2009] IEHC 174
Sweetman v An Bord Pleanála

Discovery

Documents - Relevance – Group of companies - Discovery of documents from other companies in group sought – Other companies not involved in subject matter of proceedings - Whether discovery sought disproportionate and oppressive - *Ryanair plc v Aer Rianta cpt* [2003] 4 IR 264 and *Framus Ltd v CRH plc* [2004] 2 IR 20 applied - Rules of the Superior Courts 1986 (SI 15/1986), O 31, r 12 – Order for discovery refused (2008/3370S – 22/5/2009 – Kelly J) [2009] IEHC 251
Ellis v Dunne

Dismissal of proceedings

Abuse of process - *Res judicata* - Public interest in finality in law suits - Applicable principles – Inherent jurisdiction of court – Whether intervention necessary to avoid injustice – Pleadings – Whether jurisdiction may be exercised where dispute on facts – Whether case bound to fail – Whether plea could and should have been maintained in earlier action – Role of documents – Onus on defendant – Whether impossible plaintiff might produce evidence necessary to succeed at trial – Profit share on residential portions – Whether open to plaintiff to allege transfer pricing – Whether allegation of transfer pricing covered by prior ruling – Secret profit on sale of commercial units – Possibility of additional evidence emerging during discovery process – Prior disclosure of documentation – Allegations of breach of fiduciary duty – Whether proceedings should be struck out as against parent company – Involvement of parent company in agreements – *Moorview Developments Ltd v First Active plc* [2009] IEHC 214 (Unrep, Clarke J, 6/3/2009); *Moorview Developments Ltd v First Active plc* [2008] IEHC 211 (Unrep, Clarke J, 20/5/2008); *Moorview Developments Ltd v First Active plc* [2008] IEHC 274 (Unrep, Clarke J, 31/7/2008); *Barry v Buckley* [1981] IR 306; *Bula v Crowley (No 4)* [2003] 2 IR 430; *Henderson v Henderson* (1843) 3 Hare 100; *Sun Fat Chan v Osseous Limited* [1992] 1 IR 425; *Lac Minerals v Chevron Corporation* (Unrep, Keane J, 6/8/1993); *Ruby Property Co Ltd v Kilty* (Unrep, McCracken J, 1/12/1999); *A v Medical Council* [2003] 4 IR ???; *Carlow Kilkenny Radio Ltd v Broadcasting Commission of Ireland* [2003] 3 IR 528*; R v Secretary of State for Health, ex parte Hackney Borough* (Unrep, Court of Appeal, 24/7/1994); *Medforth v Blake* [2000] Ch 86; *McMullen v Clancy (No 2)* [2005] 2 IR 445; *Bristol and West Society v Mothew* [1998] Ch 1 and *Corbett v Halifax Building Society* [2003] 1 WLR 964 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 19 – Application refused (2008/8540P – Clarke J – 30/4/2009) [2009] IEHC 207
Salthill Properties Limited v Royal Bank of Scotland plc

Dismissal of proceedings

Delay - Inordinate and inexcusable - Onus on plaintiff to prosecute case –13 year delay - Claim against bank for negligence and breach of contract – Applicable principles – Inaction on part of defendant – Explanation for delay – Affidavit of solicitor - Implausibility of explanations – Hearsay – Lack of detail – Balance of justice – Prejudice – Balancing of interests – Prejudice to parties – Whether risk of unfair trial – Lapses of memory of witnesses - *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290; *McMullen v Ireland* ECHR 422 97/98; *Stephens v. Paul Flynn Ltd* [2008] IESC 4, [2008] 4 IR 31; *Desmond v MGN Limited* [2008] IESC 56, (Unrep, SC, 15/10/2008); *Rainsford v Limerick Corporation* [1995] 2 ILRM 56; *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Stephens v Flynn Ltd* [2005] IEHC 148, (Unreported, Clarke J, 28/4 2005); *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 and *Lipkin Gorman v. Karpnale Ltd* (1986) [1992] 4 All ER 313 considered – Statute of Limitations 1957 (No 6), s 11 – Rules of the Superior Courts 1986 (SI 15/1986), O 122 – Proceedings struck out as against first defendant (2001/5907P – Herbert J – 6/3/2009) [2009] IEHC 176
Razaq v Allied Irish Banks plc

Dismissal of proceedings

Delay - Statute barred - Whether fair trial impossible due to delay – Personal injuries – Pupil at industrial school - Physical and sexual assaults – Whether action against State bound to fail – Assaults between 1968 and 1970 – Whether plaintiff under disability due to sexual abuse – Whether medical report admissible where no affidavit sworn – Opportunity to have plaintiff examined – Interlocutory application – Procedural steps – Applicable principles - Whether inordinate and inexcusable delay – Balance of justice – Balancing of interests – Prejudice to parties – Deaths of perpetrators of assaults – Difficulties in defending claim – Impact on memories of witnesses - Whether real and serious risk of unfair trial – Vagueness of plaintiff's recollections – Confusion of plaintiff as to facts – *RT v VP* [1990] 1 IR 545 and *JF v DPP* [2005] 2 IR 174 distinguished; *O'Keeffe v Hickey* [2008] IESC 72 (Unrep, SC, 19/12/2008); *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Stephens v Flynn Ltd* [2005] IEHC 148 (Unrep, Clarke J, 28/4 2005); *Comcast v Minister for Enterprise* [[2007] IEHC 297 (Unrep, Gilligan J, 13/6/2007); *Birkett v James* [1978] AC 297; *O'Domhnaill v Merrick* [1984] IR 151; *Toal v Duignan (No 2)* [1991] ILRM 135 considered – Statute of Limitations 1957 (No 6), s 48 – Rules of the Superior Courts 1986 (SI 15/1986), O 40 and 122 – Proceedings struck out (2001/17320P – Dunne J – 13/5/2009) [2009] IEHC 227
O'D (J) v Minister for Education

Dismissal of proceedings

Frivolous and vexatious - Abuse of process – Inherent jurisdiction of court – Return of monies – Allegation that monies represented bribe – Claim for return of land certificates - Isaac Wunder order – Lay litigant – Objection to counsel for defendant – Hearing of application in absence of plaintiff – Prior unsuccessful proceedings seeking to be discharged as bankrupt – Taxation of order for costs – Enforceable debt – Recovery of payment from receiver in bankruptcy – Whether court limited to considering pleadings only or free to consider evidence on affidavit – Whether dispute on issues of facts – Whether claim bound to fail – Issue previously determined – Proceedings brought for improper motive – Failure to pay costs of unsuccessful proceedings – Whether appropriate to make Isaac Wunder order - *Barry v Buckley* [1981] IR 306; *Tassan Din v Banco Ambrosiano* [1991] 1 IR 569; *Sun Fat Chan v Osseous Limited* [1992] 1 IR 425; *Supermac Ireland Limited v Katesan (Naas) Limited* (Unrep, SC, 15/3/1999); *Doe v Armour Pharmaceutical Inc* (Unrep, Morris J, 31/7/1997); *Behan v Governor and Company of Bank of Ireland*

[2008] IEHC 18 (Unrep, Irvine, 27/1/2008); *Riordan v Ireland* [2001] 4 IR 463; *Lang Michener v Fabian* (1987) 3 DLR (4th) 685 and *Riordan v Ireland (No 5)* [2001] 4 IR 562 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 19 – Proceedings struck out (2008/1844P – Feeney J – 31/3/2009) [2009] IEHC 210
Gill v Bank of Ireland

Dismissal of proceedings

Jurisdiction – Failure to show cause of action - Proceedings to set aside judgment - Allegation that court misled by perjured evidence of witnesses – Jurisdiction to set aside judgment procured by fraud – Heightening of caution where claim by lay litigant – Application prior to delivery of statement of claim - *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425 considered – Motion adjourned with liberty to re-enter and plaintiff given time to deliver statement of claim (2008/10550P – Cooke J – 27/4/2009) [2009] IEHC 205
Cotter v Minister for Agriculture

Dismissal of proceedings

Locus standi - Lay litigant suing multiple public figures – Plaintiff not personally affected by many matters pleaded — Complaints vague and imprecise - Some defendants enjoying immunity from suit in negligence - Whether statement of claim prolix or containing statements which were unnecessary or scandalous – Whether proceedings vexatious – Whether failure to disclose reasonable cause of action – Whether duty on court to sift through material to find claims in proper form or whether court entitled to have regard to document as a whole - *Riordan v Hamilton* (Unrep, Smyth J, 26/6/2000), *Cahill v Sutton* [1980] IR 269, *Riordan v Ireland (No 5)* [2001] 4 IR 463 and *Faye v Tegral Pipes ltd* [2005] IESC 34 [2005] 2 IR 261 applied; *Beatty v Rent Tribunal* [2005] IESC 66 [2006] 2 IR 191 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 27 – Statement of claim struck out (2007/9400P – McGovern J – 15/5/2009) [2009] IEHC 246
Doherty v Minister for Justice

Dismissal of proceedings

No reasonable cause of action - Allegations of bias – Whether action frivolous and vexatious - Whether pleadings prolix – Whether claim bound to fail – Inherent jurisdiction - Whether plaintiff failed to disclose reasonable cause of action - Rules of the Superior Court 1986 (SI 15/1986), O 19, r 28 - Appeal dismissed (350/2007 - SC - 26/3/2009) [2009] IESC 27
Talbot v Hibernian Group plc

Limitation of actions

Inheritance – Intestate estate - Deceased's promise – Plaintiff asserting promise of estate in return for assistance in working lands – Proceedings commenced outside statutory period - Whether claim statute barred – Whether claim subsisting cause of action – Whether claim based on breach of contract, quasi contract or equity – *Corrigan v Martin* (Unrep, Fennelly J, 13/3/2006) applied; *DB v Minister for Health* [2003] 3 IR 12, *Howard v Commissioners of Public Work* [1994] 1 IR 101, *Moynihan v Greensmyth* [1977] 1 IR 55, *Basham v Basham* [1987] 1 All ER 405, *McCarron v McCarron* (Unrep, Supreme Court, 13/2/1997) and *Reidy v McGreevy* (Unrep, Barron J, 19/3/1993) considered; *Bank of Ireland v O'Keeffe* (Unrep, Barron J, 3/12/1986) distinguished - Civil Liability Act 1961 (No 41), ss 6, 8, 9 - Statute of Limitations Act 1957 (No 6), ss 9, 11 and 45 - Succession Act 1965 (No 27), s 126 - Rules of the Superior Courts 1986 (SI 15/1986), O 25 – Claim declared to be statute barred (2006/3411P – O'Keeffe J – 20/5/2009) [2009] IEHC 250
Prendergast v McLaughlin

Limitation of actions

Period – Injury on fishing vessel – Legislative provision governing damage caused by vessels –Whether section applicable only where injury caused by collision between two or more vessels – Whether limitation period frozen on application for authorisation – Exclusion of section from provision governing freezing of limitation period – Origins of provision – Interpretation of section – Literal interpretation – Purposive interpretation – Discretion – Necessity for authorisation – Delay beyond control of plaintiff - *Carleton v O'Regan* [1997] 1 ILRM; *Albany and the Mary Josaine* [1983] 2 Lloyds Reports 195; *The Gaz Fountain* [1987] 2 Lloyds Reports 151; *The At Tabith and The Alanfushi* [1993] 2 Lloyds Reports 214; *Lawless v Dublin Port and Docks Board* [1988] 1 ILRM 514 considered - Civil Liability Act 1961 (No 41), s 46 – Personal Injuries Assessment Board Act 2003 (No 46), s 50 – Relief refused (2007/529P – Dunne J – 9/3/2009) [2009] IEHC 177
McGuinness v Marine Institute

Pleadings

Strike out - Failure to comply with order to provide particulars - Application to strike out portions of defence and counterclaim – Proceedings objecting to use of automated systems to extract flight information – Screen scraping – Alleged breach of online terms and conditions – Alleged breach of intellectual property rights – Particulars of operating system directed – Adequacy of replies – Reference to specification not setting out matters required – Whether defendant in position to provide particulars – Details known by third parties – Whether defendant should be given opportunity to obtain information and comply – Striking out pleadings measure of last resort – Persistent and culpable failure – Whether weight to be given to argument that blanket traverse would have previously sufficed – Case management – Specifying of case – Whether requirement for replies to be in clear English – Technical nature of information – Whether reference to specification that would be clear to expert sufficient – *Ryanair v Bravofly* (Unrep, Clarke J, 29/1/2009) [2009] IEHC 41 considered – Defendant given additional time to reply (2008/2204P – Clarke J – 14/05/2009) [2009] IEHC 224
Ryanair Limited v Bravofly

Res judicata

Issue estoppel –Appropriate parties to proceedings - Abuse of process - Whether claim bound to fail – Legality of re-possession of premises determined in Circuit Court - Claim dismissed – New High Court proceedings issued – Whether principal purpose of instituting proceedings to re-litigate claim made in Circuit Court – Whether issues raised *res judicata* – Whether any new cause of action disclosed - New additional claim not litigated in Circuit Court - Claim in conversion or in detinue – Whether new claim should have been raised previously - *Henderson v Henderson* [1843] 3 Hare 100; *Carroll v Law Society of Ireland* [2003] 1 IR 309; *Foss v Harbottle* (1843) 2 Hare 492; *Robinson v Chartered Bank* LR 1 Eq 32 and *O'Neill v Ryan* [1993] ILRM 557 considered - High Court order affirmed; third party personal action remitted to High Court with directions as to pleadings (433 & 434/2006 - SC - 27/3/2009) [2009] IESC 28
Rayan Restaurant v Murphy-Flynn

Striking out of proceedings

Abuse of process – *Res judicata* – Right of access to courts – Isaac Wunder order – *Henderson v Henderson* (1843) 3 Hare 100 followed - Rules of the Superior Courts 1986 (SI 15/1986), Os 19 & 27 – Plaintiffs' appeal dismissed (262 & 314/2005 – SC – 3/4/2009) [2009] IESC 35
Bula Ltd v Crowley

Summary summons

Commercial court – Summary judgment – Applicable principles – Test – Whether arguable defence – Investor fund – Investment in sub-fund which established discretionary account with company under criminal control – Process for redemption of shares – Notification – Calculation – Reports of fraudulent "Ponzi" scheme – Emergency meeting of board of directors – Resolution to suspend all share redemptions – Articles of association – Grounds of defence – Valid exercise of power to temporarily suspend redemption of shares – Whether net asset value of shares effective to trigger payment obligation – Whether unfairness to other shareholders – Whether fundamental mistake vitiating redemption transaction – Whether power of directors had prospective effect only – Interpretation

of redemption process – Undertaking not to make payments to shareholders without notice to plaintiff - *First National Commercial Bank Plc v Anglin* [1996] 1 IR 75; *Irish Dunlop Co Ltd v Ralph* (1958) 95 ILTR 70; *Banque de Paris v de Naray* [1984] 1 Lloyd's Law Rep 21; *National Westminster Bank Plc v Daniel* [1993] 1 WLR 1453; *Aer Rianta CPT v Ryanair Limited* [2001] 4 IR 607 and *In Re Strategic Turnaround Master Partnership Ltd* (Unreported, Cayman Court of Appeal, 12/12/2008) considered - *Harrisrange Ltd v Duncan* [2003] 4 IR 1 applied - Rules of the Superior Courts 1986 (SI 15/1986), O 37 – Leave to defend granted and case adjourned to plenary hearing (2009/656S – Kelly J – 27/3/2009) [2009] IEHC 173
Consulnor Gestion SGHC SA v Optimal Multiadvisors Ireland plc

Summary summons

Commercial court – Summary judgment – Applicable principles – Test – Whether arguable defence – Director of property owning company - Personal guarantee – Defence – Cross-claim for damages for wrongful refusal to permit drawdown of facility – Set off – Whether terms of guarantee excluded set off – *Contra proferentem* - Whether clause limited to setting off of personal claim - Whether cross-claim credible - Evidence limited to assertions of defendant – Inconsistencies between assertions and documentation – Change in basis of computation of loss – Discretion - *Harrisrange Ltd v Duncan* [2003] 4 IR 1 applied; *Aer Rianta CPT v Ryanair Ltd* [2001] 4 IR 607 and *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502 considered - Summary judgment granted (2009/728S – Finlay Geoghegan J – 8/5/2009) [2009] IEHC 220
Bank of Ireland v Walsh

Time limits

Appeal - Time expired for service - Extension of time - Proceedings dismissed on grounds of no reasonable prospects of success and bound to fail - *Bona fide* intention to appeal formed within permitted time - Failure to serve and file notice of appeal as result of error on part of plaintiffs' solicitor – Applicable legal conditions - Whether arguable ground of appeal exists - Whether any arguable ground of appeal made out – Whether appeal likely to succeed - *Eire Continental Trading Co Ltd v Clonmel Foods Ltd* [1955] IR 170 applied - *Gatti v Shoosmith* [1939] 1 Ch 841 considered - Relief refused (364/2008 -SC - 3/4/2009) [2009] IESC 36
Bula Ltd v Roche

Article

Kennedy, Liam
Total recall
2009 (August/September) GLSI 18

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N386

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N365

Statutory Instruments

Circuit Court Rules (service in member states of judicial documents in civil or commercial matters) 2009
SI 375/2009

District Court (service in member states of judicial and extra-judicial documents in civil or commercial matters) rules 2009
SI 367/2009

Rules of the Superior Courts (opening hours of offices) 2009
SI 354/2009

PRISONS

Discipline

Legal representation – Governor – Exercise of disciplinary jurisdiction – Whether accused entitled to legal representation – Whether Governor having discretion to permit legal representation – Factors to be considered – *Reg v Home Sec, Ex p Tarrant* [1985] 1 QB 251 approved; *Curley v Governor of Arbour Hill Prison* [2005] IESC 49, [2005] 3 IR 308 followed - Prison (Disciplinary Code for Officers) Rules 1996 (SI 289/1996), r 8(2) – Respondent's appeal allowed (132/2006 – SC – 2/4/2009) [2009] IESC 33
Burns v Governor of Castlerea Prison

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PROPERTY

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3rd ed
Bristol: Jordan Publishing, 2009
N65.6

Statutory Instruments

Land and conveyancing law reform act 2009 (commencement) order 2009
SI 356/2009

Land registration rules, 2009
SI 349/2009

Registration of deeds rules, 2009
SI 350/2009

ROAD TRAFFIC

Library Acquisition

McCormac, Kevin
Wilkinson's road traffic offences
24th edition
London: Sweet & Maxwell, 2009
M565.T7

Statutory Instrument

Road traffic (immobilisation of vehicles) (amendment) regulations 2009
SI 406/2009

SOCIAL WELFARE

Statutory Instruments

Social welfare and pensions act 2008 (section 17) (commencement) order 2009
SI 347/2009

Social welfare (consolidated claims, payments and control) (amendment) (no. 6) (nominated persons) regulations 2009
SI 378/2009

SOLICITORS

Discipline

Disciplinary tribunal - Law society dissatisfied with recommendations of disciplinary tribunal - Role of Supreme Court on appeal - Statutory function of President of High Court - Basis for appeal - Appropriate factors to take into account – Applicable test - Whether decision of High Court can only be reversed if as matter of law clearly incorrect - Question of real potential injustice being caused to solicitors - Solicitors (Amendment) Act 1960 (No 37), ss 6, 7, 8(1)(a), 12 and 13 - Solicitors (Amendment) Act 1994 (No 27), ss 8(1), 9, 10, 16, 17, 18(1) and 39 - Solicitors (Amendment) Act 2002 (No 19), ss 8 and 9(11)(b) - Appeal dismissed (104/2008 - SC - 20/5/2009) [2009] IESC 41
Law Society v Carroll

Discipline

Strike from roll of solicitors –Solicitor found guilty of misconduct on seven previous occasions - Mitigating circumstances - Whether penalty proposed by Law Society appropriate or too severe – Whether respondent fit person to be solicitor – Order striking respondent from Roll of Solicitors made, costs of application and Solicitors Disciplinary Tribunal granted to applicant (2009/12SA and 2009/14SA – Johnson P – 18/5/2009) [2009] IEHC 249
Law Society of Ireland v Murphy

Solicitor's undertaking

Enforcement – Conduct of solicitor – Whether performance of undertaking possible – Whether isolated obligation could be enforced even where performance of undertaking possible – Court's inherent supervisory jurisdiction – Disciplinary nature of jurisdiction – Compensatory nature of jurisdiction – Assessment of compensation - *IPLG Ltd v Stuart* (Unrep Lardner J, 19/3/1992), *Fox v. Bannister* [1988] 1 Q.B. 925, *Udall v. Capri Lighting Ltd.* [1988] 1 Q.B. 907 and *Myers v. Elman* [1940] A.C. 282 followed – Plaintiff's appeal allowed (451/2006 – SC – 5/5/2009) [2009] IESC 38
Bank of Ireland v Coleman

Articles

Bradshaw, Jason
The price is right
2009 (August/September) GLSI 32

Elliot, John B
The life of PII
2009 (October) GLSI 22

Statutory Instrument

The solicitors acts 1954 to 2008 (professional indemnity insurance) (amendment) regulations 2009
SI 384/2009

SUCCESSION

Article

Keating, Albert
The defeasance of testamentary gifts by ademption
2009 ILT 209

TAXATION

Articles

Gill, John
CAT and double taxation - credit where it's due
2009 (September) ITR 73

Hackett, Fiona
A look ahead to accounting for income tax under IFRS
2009 (September) ITR 48

Heffernan, John
Finance act 2009 - tax relief for investment in intellectual property
2009 (September) ITR 64

Heron, Rob
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Walton, Kevin
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Judge: Irish income tax 2009
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Statutory Instruments

Disabled drivers and disabled passengers (tax concessions) (amendment) regulations 2009
SI 368/2009

Finance act 1993 (section 60) regulations 2009
SI 382/2009

TELECOMMUNICATIONS

Article

Smith, Gordon
Talk is cheap
2009 (August/September) GLSI 26

Statutory Instrument

Wireless telegraphy (radio link licence) regulations 2009
SI 370/2009

TORT

Medical negligence

Breast enlargement surgery – Visible scars – Permanent disfigurement - Damages – Indemnity - Relationship between plaintiff and company providing cosmetic surgery – Relationship between company and surgeon – Relationship between company and third party company providing surgeon - Payment of fee by company to third party company – Payment of fee by third party company to surgeon – Absence of professional indemnity insurance – Whether company had involvement

in medical aspects of service – Whether surgeon employee of company – Whether surgeon independent contractor – Whether vicarious liability – Judgment granted against surgeon (2003/6265P – Peart J – 3/4/2009) [2009] IEHC 164
Reilly v Moir

Medical negligence

Failure to recognise and treat symptoms – Inadequacy of standard of observation - Plaintiff discharged without treatment – Acute bowel obstruction – Medical evidence - Failure to investigate concerns of mother – Failure to record incidents adequately - Whether negligence of paediatrician caused or contributed to injury – Whether negligence of hospital caused or contributed to injury – Whether negligence of hospital amounted to *novus actus interveniens* – Joint and several liability – Claims for contribution and indemnity - Apportioning of liability between hospital and paediatrician – *Conole v Redbank Oyster Co* [1976] IR 191; *Crowley (an infant) v Allied Irish Banks Ltd* [1987] IR 282 and *Hayes v Minister for Finance* [2007] 3 IR 190 distinguished - Finding that hospital entitled to 75% contribution of liability from paediatrician (2004/6479P – Quirke J – 8/5/2009) [2009] IEHC 221
Healy (a minor) v Health Service Executive

Negligence

Liability - Alleged hit and run by unidentified driver – Evidence of alcohol consumption - No recollection of accident by plaintiff - Partial recall some years later - Cause of injuries – Evidence - Whether any forensic evidence to support possibility of hit and run - Whether injuries sustained as result of being struck by motor vehicle - Nature of appeal to Supreme Court - Role of court in appeal - Circumstantial evidence – Findings of fact made and inferences drawn by trial judge - Conclusions of law to drawn from primary facts and inferences - Whether conclusion of trial judge as to negligence erroneous - Whether trial judge's conclusion based on inference of fact – Whether appellate tribunal in as good a position for arriving at correct conclusion - *Res ipsa loquitur* – Onus of proof - Legal burden of proof – Whether burden discharged - Standard of proof - Whether any evidence to support trial judge's inference - Whether applicant failed to establish causation as matter of probability - Whether evidential deficit can be overcome by conjuncture — *Hay v O'Grady* [1992] IR 210 ; *The Gairloch* [1899] 2 IR 1 - *People (DPP) v Madden* [1977] IR 336; *Royal Bank of Ireland Limited v O'Rourke* [1962] IR 159; *JM & GM v An Bórd Úchtála* [1988] ILRM 203; *Rothwell v Motor Insurers Bureau of Ireland* [2003] I IR 268; *Hanrahan v Merck Sharp & Dohme* [1988] ILRM 629 and *Cosgrove v Ryan* [2008] IESC 2, (Unrep, SC, 14/2/2008) considered - Rules of the Superior Courts 1986 (SI 15/1986), O 58 r 1 - Appeal allowed; claim dismissed (239/2004 -SC- 31/3/2009) [2009] IESC 30
Rogers v MIBI

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Corbett, Val
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WILLS

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AT A GLANCE

European directives implemented into Irish Law up to 18/11/2009

European communities (arterial drainage) regulations 2009
DIR/2003-35
SI 388/2009

European communities (authorization, placing on the market, use and control of plant protection products) (amendment) (no. 4) regulations 2009
Please see S.I as it implements a number of Directives
SI 329/2009

European communities (control of dangerous substances from offshore installations) regulations 2009
DIR/2006-11
SI 358/2009

European communities (control on mussel fishing) (amendment) (no.2) (revocation) regulations 2009
DIR/79-409
SI 379/2009

European communities (Iraq) (financial sanctions) regulations 2009
REG/1210-2003
SI 365/2009

European communities (foreshore) regulations 2009
DIR/2003-35
SI 404/2009

European communities (mutual assistance for recovery of claims relating to certain levies, duties, taxes and other measures) regulations 2009
DIR/2008-55
SI 353/2009

European communities (natural habitats and birds) (sea-fisheries) regulations 2009
DIR/1979-406, DIR/1992-43
SI 346/2009

European communities (payment services) regulations 2009
DIR/2007-64
SI 383/2009

European communities (phytosanitary measures) (anoplophora chinensis) regulations 2009
DEC/2008-840)
SI 391/2009

European communities (port reception facilities for ship-generated waste and cargo residues) (amendment) regulations 2009
DIR/2007-71
SI 376/2009

European communities (transmissible spongiform encephalopathies and animal by-products) (amendment) (no 2) regulations 2009
DEC/2008-908
SI 345/2009

European communities (vehicle drivers certificate of professional competence) (amendment) regulations 2009
DIR/2003-59
SI 348/2009

European communities (working conditions of mobile workers engaged in interoperable cross-border services in the railway sector) regulations 2009
DIR/2005-47
SI 377/2009

BILLS OF THE OIREACHTAS AS AT 17TH NOVEMBER 2009 (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.

Adoption Bill 2009
Bill 2/2009
2nd Stage – Dáil *(Initiated in Seanad)*

Air Navigation and Transport (Prevention of Extraordinary Rendition) Bill 2008
Bill 59/2008
2nd Stage – Dáil **[pmb]** *Deputy Michael D. Higgins*

Anglo Irish Bank Corporation (No. 2) Bill 2009
Bill 6/2009
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Appointments to Public Bodies Bill 2009
Bill 64/2009
2nd Stage – Seanad **[pmb]** *Senator Shane Ross*

Arbitration Bill 2008
Bill 33/2008
Report Stage – Dáil

Broadband Infrastructure Bill 2008
Bill 8/2008
2nd Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Central Bank and Financial Services Authority of Ireland (Protection of Debtors) Bill 2009
Bill 20/2009
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Child Care (Amendment) Bill 2009
Bill 61/2009
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

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 Liability (Good Samaritans and Volunteers) Bill 2009 as initiated
Bill 38/2009
2nd Stage – Dáil **[pmb]** *Deputies Billy Timmins and Charles Flanagan*

Civil Partnership Bill 2009
Bill 44/2009
Order for 2nd Stage - Dáil

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

Climate Change Bill 2009
Bill 4/2009
2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

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

Communications Regulation (Premium Rate Services) Bill 2009
Bill 51/2009
Order for 2nd Stage - Dáil

Communications (Retention of Data) Bill 2009
Bill 52/2009
Order for 2nd Stage - Dáil

Companies (Miscellaneous Provisions) Bill 2009
Bill 69/2009
1st Stage – Seanad **[pmb]** *Senator Donie Cassidy* on behalf of the Minister for Enterprise, Trade and Employment

Consumer Protection (Amendment) Bill 2008
Bill 22/2008
2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

Consumer Protection (Gift Vouchers) Bill 2009
Bill 66/2009
2nd Stage – Seanad **[pmb]** *Senators Brendan Ryan, Alex White, Michael McCarthy, Phil Prendergast, Ivana Bacik and Dominic Hannigan*

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

Corporate Governance (Codes of Practice) Bill 2009
Bill 22/2009
2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

Courts and Court Officers Bill 2009
Bill 57/2009
Committee Stage – Seanad {*Initiated in Dáil*}

Credit Institutions (Financial Support) (Amendment) Bill 2009
Bill 12/2009
2nd Stage – Seanad **[pmb]** *Senators Paul Coghlan, Maurice Cummins and Frances Fitzgerald*

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

Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009
Bill 55/2009
Order for 2nd Stage - Dáil

Criminal Justice (Violent Crime Prevention) Bill 2008
Bill 58/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

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

Criminal Law (Home Defence) Bill 2009
Bill 42/2009
2nd Stage – Dáil **[pmb]** *Deputies Charles Flanagan and Michael Ring*

Criminal Procedure Bill 2009
Bill 31/2009
Committee Stage – Seanad *(Initiated in Seanad)*

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

Defence (Miscellaneous Provisions) Bill 2009
Bill 58/2009
2nd Stage - Dáil

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

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

Electoral (Gender Parity) Bill 2009
Bill 10/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Employment Agency Regulation Bill 2009
Bill 54/2009
Order for 2nd Stage - Dáil

Employment Law Compliance Bill 2008
Bill 18/2008
Awaiting Committee – 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)*

Financial Emergency Measures in the Public Interest (Reviews of Commercial Rents) Bill 2009
Bill 39/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Fines Bill 2009
Bill 18/2009
Committee Stage - Dáil

Foreshore and Dumping at Sea (Amendment) Bill 2009
Bill 68/2009

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*

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

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*

Human Rights Commission (Amendment) Bill 2008
Bill 61/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Order for Report – Dáil

Industrial Relations (Amendment) Bill 2009
Bill 56/2009
Committee Stage – Seanad

Industrial Relations (Protection of Employment) (Amendment) Bill 2009
Bill 7/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Institutional Child Abuse Bill 2009
Bill 46/2009
2nd Stage – Dáil **[pmb]** *Deputy Ruairi Quinn*

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*

Labour Services (Amendment) Bill 2009
Bill 62/2009
Order for 2nd Stage - Dáil

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

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

Local Government (Planning and Development) (Amendment) Bill 2009
Bill 21/2009
2nd Stage – Dáil **[pmb]** *Deputy Martin Ferris*

Local Government (Rates) (Amendment) Bill 2009
Bill 40/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Medical Practitioners (Professional Indemnity) (Amendment) Bill 2009
Bill 53/2009
2nd Stage – Dáil **[pmb]** *Deputy James O'Reilly*

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

Merchant Shipping Bill 2009
Bill 25/2009
Committee Stage - Dáil

Ministers and Secretaries (Ministers of State Bill) 2009
Bill 19/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Alan Shatter*

Multi-Unit Developments Bill 2009
Bill 32/2009
Committee Stage – Seanad *(Initiated in Seanad)*

National Archives (Amendment) Bill 2009
Bill 13/2009
2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

National Asset Management Agency Bill 2009
Bill 60/2009
Passed by Dáil Éireann

National Cultural Institutions (Amendment) Bill 2008
Bill 66/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Alex White*

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

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 Report – Dáil

Planning and Development (Amendment) Bill 2009
Bill 34/2009
2nd Stage – Seanad *(Initiated in Seanad)*

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

Planning and Development (Taking in Charge of Estates) (Time Limit) Bill 2009
Bill 67/2009
2nd Stage – Dáil **[pmb]** *Deputy Sean Sherlock*

Planning and Development (Enforcement Proceedings) Bill 2008
Bill 63/2008
2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
Committee Stage – Dáil

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

Prohibition of Depleted Uranium Weapons Bill 2009
Bill 48/2009
2nd Stage – Seanad **[pmb]** *Senators Dan Boyle, Deirdre de Burca and Senator Fiona O'Malley*

Prohibition of Female Genital Mutilation Bill 2009
Bill 30/2009

2nd Stage – Dáil **[pmb]** *Deputy Jan Sullivan*

Property Services (Regulation) Bill 2009
Bill 28/2009
Committee 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*

Public Transport Regulation Bill 2009
Bill 59/2009
2nd Stage – Dáil *(Initiated in Seanad)*

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

Residential Tenancies (Amendment) (No. 2) Bill 2009
Bill 15/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Road Traffic Bill 2009
Bill 65/2009
Order for 2nd Stage – Dáil

Sea Fisheries and Maritime Jurisdiction (Fixed Penalty Notice) (Amendment) Bill 2009
Bill 27/2009
2nd Stage – Dáil **[pmb]** *Deputy Jim O'Keffee*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Small Claims (Protection of Small Businesses) Bill 2009
Bill 26/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Spent Convictions Bill 2007
Bill 48/2007
Awaiting Committee – Dáil **[pmb]** *Deputy Barry Andrews*

Statute Law Revision Bill 2009
Bill 33/2009
Order for 2nd Stage – Dáil

Stem-Cell Research (Protection of Human Embyros) Bill 2008
Bill 60/2008
2nd Stage – Seanad **[pmb]** *Senators Rónán Mullen, Jim Walsh and John Hanafin*

Student Support Bill 2008
Bill 6/2008
Awaiting Committee – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
Order for Report – Dáil

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

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 Ruairí Quinn*

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

ACTS OF THE OIREACHTAS AS AT 17TH NOVEMBER 2009 (30TH DÁIL & 23RD SEANAD)

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

Constitutional Amendments

Twenty-eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009
Signed 15/10/2009

Acts of the Oireachtas

1/2009 Anglo Irish Bank Corporation Act 2009
Signed 21/01/2009

2/2009 Residential Tenancies (Amendment) Act 2009
Signed 28/01/2009

3/2009 Gas (Amendment) Act 2009
Signed 17/02/2009

4/2009 Electoral Amendment Act 2009
Signed 24/02/2009

5/2009 Financial Emergency Measures in the Public Interest Act 2009
Signed 27/02/2009

6/2009 Charities Act 2009
Signed 28/02/2009

7/2009 Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Act 2009
Signed 05/03/2009

8/2009 Legal Services Ombudsman Act 2009
Signed 10/03/2009

9/2009 Electoral (Amendment) (No. 2) Act 2009
Signed 25/03/2009

10/2009 Social Welfare and Pensions Act 2009
Signed 29/04/2009

11/2009 Industrial Development Act 2009
Signed 19/05/2009

12/2009 Finance Act 2009
Signed 03/06/200

13/2009 Financial Services (Deposit Guarantee Scheme) 2009
Signed 18/02/2009

14/2009 Financial Measures (Miscellaneous Provisions) Act 2009
Signed 26/06/2009

15/2009 Nursing Homes Support Scheme Act 2009
Signed 01/07/2009

16/2009 Aviation (Preclearance) Act 2009
Signed 08/07/2009

17/2009 European Parliament (Irish Constituency Members) Act 2009
Signed 08/07/2009

18/2009 Broadcasting Act 2009
Signed 12/07/2009

19/2009 Criminal Justice (Surveillance) Act 2009
Signed 12/07/2009

20/2009 Companies (Amendment) Act 2009
Signed 12/07/2009

21/2009 Enforcement of Court Orders (Amendment) Act 2009
Signed 14/07/2009

22/2009 Housing (Miscellaneous Provisions) Act 2009
Signed 15/07/2009

23/2009 Public Health (Tobacco) (Amendment) Act 2009
Signed 16/07/2009

24/2009 Health Insurance (Miscellaneous Provisions) Act 2009
Signed 19/07/2009
[Not yet available 12/10/2009]

25/2009 Health (Miscellaneous Provisions) Act 2009
Signed 21/07/2009

26/2009 Harbours (Amendment) Act 2009
Signed 21/07/2009

27/2009 Land and Conveyancing Law Reform Act 2009
Signed 21/07/2009

28/2009 Criminal Justice (Miscellaneous Provisions) Act 2009

Signed 21/07/2009

29/2009 Oireachtas (Allowances to Members) and Ministerial and Parliamentary Offices Act 2009
Signed 21/07/2009

30/2009 Local Government (Charges) Act 2009
Signed 21/07/2009

31/2009 Defamation Act 2009
Signed 23/07/2009

32/2009 Criminal Justice (Amendment) Act 2009
Signed 23/07/2009

33/2009 European Union Act 2009
Signed 27/10/2009

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.

Uninsured Passengers and EU law

Cathal Murphy BL

Commencing in 1972, with the enactment of Council Directive 72/166/EEC on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles ("the First Directive"), the European Union has sought to harmonize the law relating to compulsory motor insurance across the Member States. Article 3 of the First Directive obliged Member States to render motor insurance compulsory. To date there have been five substantive directives enacted in the area of motor insurance. In recent times, a number of cases have come before the European Court of Justice ("the ECJ") and the Irish Courts where the central issue is the correct interpretation of these European Directives and their impact on domestic legislation governing compulsory motor insurance. These cases have had a significant impact on the compulsory motor insurance regime as it applies in Ireland with a consequential impact on the liability of the Motor Insurers' Bureau of Ireland ("the MIBI") and individual insurance companies to compensate victims of road traffic accidents. Indeed, as is discussed below, one of the consequences of these cases has been the determination of the 1988 MIBI agreement by an agreement dated March 31st 2004, which agreement itself has been determined by an agreement dated January 29th 2009. In its current form, the 2009 MIBI agreement will not have a long life as clause 3.10.3 of this agreement states that it will be reviewed in the light of the Supreme Court judgment in the case of *Elaine Farrell v. Alan Whitty, The Minister or the Environment, Ireland and the Attorney General.* It is this case that is the starting point for a review of recent developments in the law of compulsory motor insurance.

Farrell v Whitty

On the night of January 26th 1996, Elaine Farrell, was a passenger in the defendant's vehicle. This was a small van with seating only in the front for the driver and a passenger. However, there were a number of passengers in the defendant's vehicle on the night in question. As a result, Ms Farrell was travelling in the rear of the van where there were no seats. In the course of the journey, the defendant's vehicle collided with a wall and Ms Farrell suffered significant injuries as a result. The defendant was uninsured to drive the vehicle. Consequently, Ms Farrell looked to the MIBI for compensation. However, the MIBI refused to accept any liability to compensate Ms Farrell. It did so for the following reasons.

At the time of the accident, the relevant MIBI agreement was the 1988 MIBI agreement. The 1988 MIBI agreement had been entered into with a view to State complying with Council Directive 84/5/EEC ("the Second Directive"). Pursuant to Article 1(1) of the Second Directive, motor insurance was rendered compulsory in respect of damage to property and personal injuries. Pursuant to Article 1(4) of the Second Directive, the Member States were obliged to establish, or authorise, a body to compensate the victims of road traffic accident were the compulsory insurance requirement in respect of the use of the vehicle had not been met. The MIBI was authorised to act as the body required to be established pursuant to Article 1(4). Accordingly, the 1988 MIBI agreement obliged the MIBI to compensate the victim of a road traffic accident where the liability for the injury to the victim was a liability required to be covered by an approved policy of insurance under Section 56 of the Road Traffic Act 1961 ("the 1961 Act"). At the time of the accident, Section 56 of the 1961 Act provided for a compulsory insurance requirement in the following terms:

> "(i) A person (in this sub-section referred to as "the user") shall not use in a public place a mechanically propelled vehicle unless either a vehicle insurer, or an exempted person would be liable for injury caused by the negligent use of the vehicle by him at that time or there is in force at that time either:
>
> (a) an approved policy of insurance whereby the user or some other person who would be liable for injury caused by the negligent use of the vehicle at that time by the user, is insured against all sums without limit…….which the user or his personal representative or such other person or his personal representative shall become liable to pay to any person (exclusive of the excepted persons) by way of damages or costs on account of injury to person or property caused by the negligent use of the vehicle at that time by the user…"

This section rendered insurance compulsory in respect of liability for injury to any person, other than excepted persons. What were excepted persons? One has to look to Section 65(1) of the 1961 Act[1], which, at the time of the accident, defined excepted persons in the following terms:

> "(a) Any person claiming in respect of injury to himself sustained while he was in or on a mechanically propelled vehicle … to which the relevant document relates other than a mechanically propelled vehicle or vehicles forming a combination of vehicles of a class specified for the purposes of this paragraph by regulations made by the Minister provided that such regulation shall not extend compulsory insurance for civil liability to passengers to:

1 Inserted by the European Communities (Road Traffic)(Compulsory Insurance) (Amendment) Regulations, 1992, S.I.347 of 1992.

(i) any part of a mechanically propelled vehicle, other than a large public service vehicle, unless that part of the vehicle is designed and constructed with seating accommodation for passengers;…"

What the interaction of Section 56 and Section 65(1)(a) meant at the time of Ms Farrell's accident was that a person using a vehicle must have an approved policy of insurance to cover any liability for personal injuries caused to persons other than excepted persons. Excepted persons were those persons claiming compensation for an injury sustained while in a vehicle other than those specified by ministerial regulation. In essence, this legislation was drafted in such a way that all passengers were excepted persons unless they were passengers in a vehicle specified by ministerial regulation. However, crucially from the point of view of Ms Farrell was the restriction placed on the Minister's power to specify vehicles for which there would be a compulsory insurance requirement in respect of liability for injury to passengers. Regardless of what vehicles (other than large public service vehicles) the Minister specified by regulation, the compulsory insurance requirement in respect of liability for injury to passengers could not extend to passengers travelling in that part of the specified vehicle not fitted with seats. As a consequence, on the night of Ms Farrell's accident, the legislation did not impose a compulsory insurance requirement on the driver of the vehicle, Mr Whitty, in respect of liability for the injuries sustained by Ms Farrell.

As there was no compulsory insurance requirement and as the MIBI was only obliged to compensate the victim of a road traffic accident where a compulsory insurance requirement had not been met, the MIBI refused to compensate Ms Farrell for the injuries she suffered in the accident. Therefore, Ms Farrell instituted proceedings challenging the compatibility of the domestic legislative framework concerning compulsory motor insurance with certain provisions of the European Directives. In particular, Ms Farrell sought to challenge the compatibility of the domestic legislation with Article 1 of Council Directive 90/232/EEC ("the Third Directive"), which states that *"…the insurance referred to in Article 3(1) of the* [First Directive] *shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle"*. It will be recalled that Article 3 of the First Directive imposes an obligation on each Member State to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. It is to be noted that, in respect of passengers other than pillion passengers on motorcycles, Ireland had until December 31st 1995, the transposition date, to give effect to Article 1 of the Third Directive in national law. Accordingly, as Ms Farrell's accident did not occur until January 26th 1996, the transposition date had passed.

Ms Farrell's challenge raised the issue of whether the domestic legislation, which excluded from the compulsory motor insurance requirement liability for injury to passengers travelling in that part of a vehicle not fitted with seats, offended Article 3 of the First Directive, as amplified by Article 1 of the Third Directive? The High Court decided that it required the assistance of the ECJ and asked the following two questions by way of preliminary reference.

Firstly, under Article 1 of the Third Directive, is Ireland obliged, as of 31 December 1995, the date by which Ireland was obliged to implement the provisions of the Third Directive in respect of passengers on vehicles other than motorcycles, to render insurance compulsory in respect of civil liability for injury to individuals travelling in a part of a motor vehicle not designed or constructed with seating accommodation for passengers? Secondly, if the answer to the first question is in the positive, does Article 1 of the Third Directive confer rights on individuals that may be relied upon directly before the national courts?

Before the ECJ, the argument was distilled even further. Does the term "passenger" in Article 1 of the Third Directive extend to cover an individual travelling in that part of a vehicle not fitted with seats? Ms Farrell and the European Commission argued that it did. Ireland, supported by the MIBI, argued that it did not.

The ECJ delivered its judgment on April 19th 2007[2]. Having recited the relevant provisions of the First and Second Directives, the court referred to the preamble of the Third Directive, in particular, the fifth recital which states that there are gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States and, to protect this particularly vulnerable category of victims, such gaps should be filled. The ECJ then recited the provisions of Article 1 of the Third Directive and the domestic legislation at issue. At paragraph 21 of the judgment, in what can only be described as a summary dismissal of Ireland's case, the ECJ held that the arguments of Ireland could not be accepted. The ECJ continued that, since Article 1 of the Third Directive clearly extends insurance cover to all passengers, Ireland's argument could be accepted only in so far as persons carried in a vehicle that was not designed for their transport could not be classified as "passengers". On this point, the ECJ stated:

> "It would be contrary to the objectives of the Community legislation to exclude from the concept of 'passenger', and thus from insurance cover, injured parties seated in a vehicle which was not designed for their carriage or equipped for that purpose. According to the fourth and fifth recitals in the preamble to the Third Directive, the objective of that legislation includes the filling of gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States and the protection of that particularly vulnerable category of potential victims, coupled with the guaranteeing of comparable treatment to motor vehicle accident victims irrespective of where in the Community accidents occur."

In conclusion, the ECJ stated that the answer to the first question should be that Article 1 of the Third Directive was to be interpreted as precluding national legislation whereby compulsory motor vehicle liability insurance did not cover liability in respect of personal injuries to persons travelling in a part of a motor vehicle which had not been designed and constructed with seating accommodation for passengers.

The second question referred to the ECJ was whether Article 1 of the Third Directive was capable of having

2 *Farrell v. Whitty* [2007] ECR I-3067

direct effect. Direct effect is a concept in European law that, in certain circumstances, allows an individual to rely on a provision of European legislation directly where the relevant State has failed to give effect to that provision by the transposition date. In Ms Farrell's case, the question was whether she could rely on Article 1 of the Third Directive directly as Ireland had failed to give effect to Article 1 by December 31st 1995. The answer to that question is relevant to any action against the State for recovery of damages for loss arising from the State's failure to give effect to Article 1. The answer to the second question is also relevant to any action against the MIBI to compel the MIBI to compensate Ms Farrell.

The ECJ concluded that Article 1 of the Third Directive satisfies all the conditions necessary for it to produce direct effect and accordingly confers rights upon which individuals may rely directly before the national courts. However, the ECJ went on to State that it is for the Irish Courts to determine whether that provision may be relied upon against a body such as the MIBI.

Directives can only be relied upon by individuals against the State or, what have come to be known as, emanations of the State. The seminal decision of the ECJ in which it attempted to offer a definition of what constitutes an emanation of the State is *Foster & Ors v British Gas*[3]. In this case, the ECJ identified three factors relevant to the determination as to whether a body is to be deemed to be an emanation of the State. Firstly, the body must be responsible, pursuant to a measure adopted by the State for providing a public service. Secondly, in providing that service, the body must be under the control of the State. Thirdly, for the purpose of providing that service, the body has special powers beyond those which result from the normal rules applicable in relations between individuals.

In Farrell, the ECJ was not asked to determine whether the MIBI was an emanation of the State. Therefore, it left that matter to be determined by the Irish Courts. The question as to whether the MIBI is an emanation of the State was the subject of a subsequent preliminary application heard by Birmingham J in the High Court who delivered judgment on January 31st 2008[4]. The arguments of the parties focused on whether the three factors referred to by the ECJ in *Foster* were to be considered mandatory criteria that must be satisfied before a body could be deemed to be an emanation of the State or whether the ECJ's reference to those factors was merely illustrative of the factors that could be taken into account in determining whether a body could be deemed to be an emanation of the State. In his judgment, Birmingham J concluded that the conditions referred to by the ECJ in *Foster* did not amount to a tripartite test, each condition of which had to be satisfied before a body could be deemed to be an emanation of the State. Furthermore, Birmingham J concluded that, even if he had concluded that the ECJ had laid down a tripartite test in *Foster*, he was of the view that the MIBI satisfied that tripartite test. Accordingly, he concluded that the MIBI was an emanation of the State.

The consequence of judgment of the ECJ, coupled with the judgment of Birmingham J was that Ms Farrell could rely on Article 1 of the Third Directive to strike down the domestic legislation and rely on Article 1 of the Third Directive directly against the MIBI as an emanation of the State. The MIBI has appealed the decision of Judge Birmingham and the 2009 MIBI agreement will be reviewed in light of the outcome of that appeal[5].

The legislative consequence of the decision of the ECJ in *Farrell v. Whitty* was the enactment of the European Communities (Motor Insurance) Regulations 2008[6], Regulation 2 of which amends Section 56 of the Road Traffic Act 1961 by deleting the phrase "exclusive of excepted persons" from that section[7]. The effect of the deletion of this phrase is to render insurance compulsory in respect of liability for injury to any person travelling in a motor vehicle regardless of the manner in which they are travelling.

European Commission v Ireland

On September 14th 2001, Mr Martin Woods was riding his motorcycle without insurance when he was involved in a collision with his brother, Stephen Woods, who was also riding a motorcycle and who was also uninsured. Mr Martin Woods was paralysed as a result of the accident and, as his brother was uninsured, he sought compensation from the MIBI. However, relying on clause 5(3) of the 1988 MIBI agreement, the MIBI refused to compensate Mr Woods. Clause 5(3) of the 1988 agreement excluded the liability of the MIBI to compensate the victim of a road traffic accident in the following terms:

> "Where a vehicle, the use of which is not covered by an approve policy of insurance, collides with another vehicle and the use of that other vehicle is also not covered by an approved policy of insurance, the liability of the MIB of I shall not extend to any judgment or claim in respect of personal injury, death or damage to the property of the user of either vehicle."

Consequently, as the use of both motorcycles at the time of Mr Woods' accident was not covered by approved policies of insurance, the MIBI refused to compensate Mr Woods. Therefore, Mr Woods instituted proceedings against his brother, the MIBI and the State. In those proceedings he challenged the compatibility of Clause 5(3) of the 1988 MIBI agreement with Article 1(4) of the Second Directive, which article provides for the establishment of a body to compensate victims of road traffic accidents caused by uninsured drivers, i.e. the MIBI in Ireland's case. However, paragraph 3 of Article 1(4) entitles the Members States to exclude the payment of compensation by the compensatory body in respect of injuries suffered by any person who voluntarily entered the vehicle which caused the damage or

3 [1990] ECR I-3313

4 *Farrell v Whitty & Ors* [2008] IEHC 124

5 In the case of *McCall v Poulton* [2008] EWCA Civ 1263, the English Courts have asked the ECJ whether the English MIB is an emanation of the State.

6 S.I. No.248/2008.

7 The 2008 Regulations also delete this phrase from Section 62 of the 1961 Act, which sections defines an approved policy of insurance.

injury when the body can prove that the person knew it was uninsured.

Mr Woods' proceedings were ultimately settled before going to trial. However, prior to that settlement, Mr Woods made a complaint to the European Commission regarding Ireland's alleged failure to properly implement the Second Directive. By the time Mr Woods' complaint was taken up by the Commission, the 1988 MIBI agreement had been replaced by the 2004 MIBI agreement and the Commission took issue with clauses 5.2 & 5.3 of that agreement. Clause 5.2 states, under the heading "Exclusion of Certain User and Passenger Claims":

> "Where at the time of the accident the person injured or killed or who sustained damage to property knew, or ought reasonably to have known, that there was not in force an approved policy of insurance in respect of the use of the vehicle, the liability of the MIBI shall not extend to any judgment or claim either in respect of injury or death of such person while the person injured or killed was by his consent in or on such vehicle or in respect of damage to property while the owner of the property was by his consent in or on the vehicle or the property was in or on the vehicle with the consent of the owner of the property."

Under the same heading, clause 5.3 of the 2004 agreement states:

> "Where a vehicle, the use of which is not covered by an approved policy of insurance, collides with another vehicle and the use of that other vehicle is also not covered by an approved policy of insurance, the liability of the MIBI shall not extend to any judgment or claim in respect of injury, death or damage to the property of the user of either vehicle."

The Commission delivered two reasoned opinions contending that Ireland had improperly transposed Article 1(4) of the Second Directive. It then instituted proceedings before the ECJ as it was not satisfied with Ireland's response to its reasoned opinions[8]. The ECJ delivered its judgment on February 21st 2008 and summarised the Commission's argument in the following terms:

> "According to the Commission, clauses 5.2 and 5.3 of the Agreement are incompatible with Article 1(4) of the Directive. First, clause 5.2 excludes from the right to compensation persons who entered any uninsured vehicle, and not only those who entered an uninsured vehicle which caused damage or injury. Second, clause 5.3 of the Agreement, which concerns accidents between uninsured vehicles, excludes from the right to compensation all persons who entered the vehicles involved, even if, at the time of the accident, they were unaware that the vehicle they were in was an uninsured vehicle and even if the driver of that vehicle was not responsible for the accident."[9]

It was conceded by Ireland that the wording of clauses 5.2 & 5.3 were not wholly compatible with Article 1(4) of the Second Directive. However, the ECJ accepted the Commission's argument in its entirety stating:

> "It must be stated, first, that, by excluding from the right to compensation persons who entered any uninsured vehicle, without restricting that exclusion to persons present in an uninsured vehicle which caused damage or injury and, in relation to collisions between uninsured vehicles, to persons who, at the time of the accident, were aware that the vehicle which they had entered was uninsured, clauses 5.2 and 5.3 of the Agreement infringe the third subparagraph of Article 1(4) of the Directive."

As a result of the judgment of the ECJ, the 2004 MIBI agreement was determined and replaced by the 2009 MIBI agreement. Under the heading "Exclusion of Certain User and Passenger Claims", the following provision now applies:

> "5.2 Where at the time of the accident the person injured or killed or who sustained damage to property voluntarily entered the vehicle which caused the damage or injury and MIBI can prove that they knew that there was not in force an approved policy of insurance in respect of the use of the vehicle, the liability of MIBI shall not extend to any judgment or claim either in respect of injury or death of such person while the person injured or killed was by his consent in or on such vehicle or in respect of damage to property while the owner of the property was by his consent in or on the vehicle."

Interestingly, while this clause was introduced to take account of the judgment of the ECJ, it goes further and removes the concept of ought to have known that the vehicle was uninsured which was present in the corresponding provisions of the earlier MIBI agreements. This was perhaps a pragmatic decision taken to remove this terminology from the 2009 MIBI agreement in an effort to avoid challenges to the compatibility of the 2009 MIBI agreement with the First, Second and Third Directives. As already stated above, Article 1(4) of the Second Directive refers to persons who knew that the vehicle was uninsured. Accordingly, by restricting the exclusion contained in clause 5.2 to persons who knew that the vehicle was uninsured, there can be no challenge to that provision on the grounds that it goes beyond the permissible exclusion provided for in the Second Directive. On the other hand, in an appropriate case, it will still be open to the MIBI to argue that "knew" within the meaning of the 2009 MIBI agreement and Article 1(4) of the Second Directive goes beyond actual knowledge and encompasses imputed knowledge[10]. Consequently, should such an argument fail, it

8 Case C-211/07 Commission of the European Communities –v- Ireland

9 Paragraph 11

10 See White –v- White [2001] WLR 481 for a discussion of the

will only affect the outcome of the case in which it is raised and not the 2009 MIBI agreement.

Smith v Meade & Others

In *Smith v. Meade*, *Meade, FBD Insurance, Ireland and the Attorney General*[11], the facts of the case are similar to those in *Farrell v. Whitty*, i.e. at the time of the accident, the plaintiff, Mr Smith, was travelling in that part of the vehicle not fitted with seating accommodation for passengers. As the accident occurred on June 19th 1999, the domestic legislation in existence did not render insurance compulsory in respect of liability for the injuries suffered by Mr Smith. However, unlike the case of *Farrell v. Whitty*, at the time of the accident in which Mr Smith suffered his injuries, there was a valid policy of insurance covering the use of the vehicle. The insurance policy was held with FBD Insurance ("FBD"), which company refused to provide cover in respect of the injuries suffered by Mr Smith. In doing so, FBD relied upon a clause in the policy of insurance providing that "passenger cover only operates for one passenger seated on a fixed seat in the front of the vehicle" ("the Clause"). Furthermore, FBD claimed that, under the terms of the insurance policy and the relevant legislation, it was only obliged to provide cover in respect of a liability for injuries for which there was a compulsory insurance requirement pursuant to Section 56 of the 1961 Act. As Mr Smith was travelling in that part of the vehicle not fitted with seats, he was an "excepted person" within the meaning of Section 65(1)(a) of the 1961 Act. Accordingly, there was no compulsory insurance requirement. Consequently, FBD claimed it was not obliged to provide cover.

As a result, Mr Smith instituted proceedings in which he challenged the compatibility of the Clause the provisions of the First, Second and Third Directives. In his judgment, Peart J summarised the question in the following terms:

> "The preliminary issue for decision at this point ahead of the hearing of the plaintiff's claim for damages for his injuries is whether or not the clause in the policy upon which FBD seek to rely in order to decline indemnity to the first and second defendants in respect of any liability they may be found to have to the plaintiff is in fact void, having regard to certain EU Directives and certain judgments of the European Court of Justice."

It was accepted by the plaintiff that the First, Second and Third Directives could only be relied upon directly as against the State or emanations of the State. As FBD is a private motor insurance company, it was accepted by the plaintiff that it was not an emanation of the State. Accordingly, the plaintiff accepted that he could not rely upon the provisions of those directives directly against FBD. However, the plaintiff argued that the court should apply the European law principle of harmonious interpretation, or *Marleasing* principle, to give indirect effect to these directives. Consequently, the plaintiff could rely on the directives to render the Clause void.

The principle of harmonious interpretation provides that the courts of the Member States are obliged to interpret national legislation in a manner compatible with European legislation governing the same area of law as the national legislation. The seminal decision in which this principle of European law was enunciated by the ECJ is *Marleasing SA v. La Commercial Internacionale de Alimentacion SA*[12]

> "As the Court pointed out in its judgment in Case 14/83" Von Colson … the Member State's obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including , for matters within their jurisdiction, the Court. It follows that, in applying national law, whether the provisions in question were adopted before or after the Directive, the national Court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty." [Emphasis added]

Having recited this passage, Peart J concluded his judgment as follows:

> "All passengers being carried in vehicles and who are injured as a result are intended to be guaranteed equal treatment throughout the European Community regardless of in which Member State the injury is caused. The Second Directive required each Member State to take all necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes from insurance persons, inter alia, such as this plaintiff shall for the purposes of Article 3(1) of the First Directive be void. I should note perhaps that this obligation is one imposed upon Member States, i.e. to put measures in place to ensure. The Directive does not itself state that such a clause is void. Nevertheless the objective is clear. The amendment to s.65 of the Road Traffic Act, 1961 which I have set forth above is clearly in conflict with these objectives, and the failure to transpose the Third Directive by the date required has meant that on the date of the accident in which the plaintiff received his injuries, the law of this State was out of line with what was required by community law.
>
> I have set out the relevant passage from the Court of Justice's judgment in Marleasing. It requires a national court, when applying national law, to do so as far as possible in the light of the wording and purpose of the directive to pursue the result sought to

meaning of "knew" in the context of Article 1(4) of the Second Directive and clause 6(1)(e)(ii) of the UK Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1988.

11 [2009] IEHC 1

12 [1990] ECR I-4135

> be pursued by the directive. It seems inescapable that in the present case this Court is required to read s.65 of the Act as amended by S.I. 346 and 347 of 1992 by overlooking or ignoring the exclusion permitted therein in respect of liability for injuries caused to persons such as the plaintiff in this case. It follows inevitably from this that the Court must conclude that the clause to that effect contained in the policy of insurance by the second named defendant must be regarded as void." [Emphasis added]

In *Marleasing*, the ECJ stated that the obligation on the national courts to interpret national legislation in a manner compatible with European directives is to do so *"as far as possible"*. In the present case, the legislation at issue was Section 65(1)(a) of the 1961 Act, which specifically excluded from the compulsory insurance requirement liability to any person injured while travelling in that part of a vehicle specified by the Minister not fitted with seats. Accordingly, in order for Peart J to deem the Clause void, he had to *"overlook or ignore"* that part of Section 65(1)(a) of the 1961 Act that restricts the compulsory insurance requirement. Does the *Marleasing* principle oblige the national courts to disregard national legislation in order to achieve an interpretation that is compatible with a European directive?

The decision of the ECJ in *Marleasing* is a short judgment and contains no information as to the underlying dispute between the parties that gave rise to the preliminary reference to the ECJ. However, the opinion of Advocate General Van Geven gives a little more detail and, importantly from the point of view of understanding the judgment of the ECJ, summarises the issue that confronted the national court as follows:

> "Since the First Directive had not been transposed into Spanish law at the material time, and the Spanish Law of 17 July 1951 concerning public limited companies lacked a specific rule as to nullity applicable to those companies, the prevailing view in legal literature is that the provisions relating to nullity of contracts are to be applied by analogy.
>
> The national court is thus faced – as I understand it – with a problem concerning the interpretation of company law. The question which arises is to what extent the grounds of nullity under ordinary law can be applied by analogy to public limited companies. It follows, in my view, from the reasoning set out in the preceding paragraphs that the requirement that an interpretation must be consistent with a directive precludes the application to public companies of the provisions on nullity under ordinary law in such a way as to permit a declaration of nullity of such a company on grounds other than those exhaustively listed in Article 11 of the First Directive."

Earlier in his opinion, the Advocate General identified the obligation to interpret national legislation in a manner compatible with European law:

> "The obligation to interpret a provision of national law in conformity with a directive arises whenever the provision in questions is to any extent open to interpretation. In those circumstances the national court must, having regard to the usual methods of interpretation in its legal system, give precedence to the method which enables it to construe the national provision concerned in a manner consistent with the directive." [Emphasis added]

On the facts of the case before him, the Advocate General concluded:

> "The national court is under an obligation to interpret its national company legislation in conformity with the directive whenever such legislation is open to divergent interpretations. This would appear to be the case where, with regard to the nullity of (public limited) companies, general concepts of the law of contract are applied by analogy, first because such concepts are open to interpretation, and secondly because application by analogy is only one possible method of interpretation. In such a case, it seems to me, the national court can easily, when applying national law, apply the exhaustive list of grounds in Article 11…"

Accordingly, in *Marleasing*, there was no specific national law governing the issue before the national court. It was applying national law by analogy. Accordingly, it was possible to apply the national law by analogy in a manner that was compatible with the European Directive.

In a later case, then Advocate General Fennelly expressed the opinion that the *Marleasing* principle "… cannot go so far as to require a national court to do violence to or expressly contradict the terms of national law. The interpretation and application of national law remains the function of the national courts."[13] The opinion of Advocate General Fennelly is echoed by the ECJ in its judgment in *Arcaro*[14], in which case the ECJ was asked the following question by the Italian courts:

> "The national court essentially seeks to ascertain whether, on a correct interpretation of Community law, there is a method of procedure allowing the national court to eliminate from national legislation provisions which are contrary to a provision of a directive which has not been transposed, where the latter provision may not be relied upon before the national court."

Having cited the extract from *Marleasing* already referred to above, the ECJ answered this question as follows:

> "There is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court."

13 *Gemeente Emmen v. Belastingdienst Grote Ondernemingen* [1996] ECR I-1721

14 [1996] ECR I - 4705

The language used by the ECJ is resonant of the language used by that court when discussing the direct effect of directives. It seems clear that the ECJ was stating firmly that the *Marleasing* principle cannot be extended to allow the national courts to dis-apply a provision of national law in favour of a provision contained in a directive. However, it has been suggested elsewhere[15] that, in a series of more recent judgments, the ECJ has indicated that the *Marleasing* principle can be relied upon to interpret national legislation so as to dis-apply national legislation that is not compatible with a directive[16]. In *Pfeiffer v. Deutches Rotes Kreuz*[17], the ECJ expanded the *Marleasing* formula regarding a national court's obligation to interpret domestic legislation as follows:

> "Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.
>
> In that context if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive."[18]

Applying that formula to Section 65(1)(a) of the 1961 Act, the following questions arise. Firstly, is it possible to interpret that section in a manner compatible with the requirement under the Directives that all passengers benefit from compulsory insurance? If not, is it possible to apply that section only insofar as it is compatible with that requirement under the Directives?

In order to answer these two questions, it must be remembered that Section 65(1)(a) of the 1961 Act does not create the compulsory insurance requirement. That requirement is created by Section 56 of the 1961 Act. Section 65(1)(a) only defines the category of individuals that will, or will not, benefit from that compulsory insurance requirement.

In relation to the first question, Section 65(1)(a) expressly excludes certain passengers from the benefit of the compulsory insurance requirement by virtue of the definition of "excepted persons". Accordingly, the answer to the first question must be that it is incapable of being interpreted in a manner compatible with the First, Second and Third Directives.

In relation to the second question, it is arguable that the scope of Section 65(1)(a) can be restricted so as to achieve the result sought by the Directives. Section 56 of the 1961 Act restricts the compulsory insurance requirement by reference to Section 65(1)(a). Accordingly, it is only through the application of Section 65(1)(a) to Section 56 that the restriction to the compulsory insurance requirement is achieved. Therefore, it is arguable that the Irish Courts could restrict the application of Section 65(1)(a) so that it does not apply to Section 56. This would remove the restriction on the compulsory insurance requirement, thereby achieving the result sought by the directives.

However, it is difficult to reconcile the judgment of the ECJ in *Arcaro* with its judgment in *Pfeiffer*. Perhaps the nuance is that where there is clear conflict between the national law and the directive, the *Marleasing* principle cannot be relied upon, whereas if the national law can be restricted in its application then the *Marleasing* principle can be relied upon. However, in restricting the application of a national law, the national court is removing a conflict between the national law and the relevant directive as, otherwise, it would be unnecessary to restrict the national law[19].

As can be seen from his judgment, Peart J decided that he must overlook the exclusion contained in Section 65(1)(a) and then concluded that it *"…*seems to follow inevitably from this that the Court must conclude that the clause to that effect contained in the policy of insurance by the second named defendant must be regarded as void." In arriving at this conclusion, Peart J appears to place reliance on Article 2(1) of the Second Directive, which obliges the Member States to take measures to ensure that clauses in insurance policies are rendered void as regards claims by injured third parties in certain circumstances. However, it is submitted Article 2(1) of the Second Directive has no bearing on Mr Smith's position, i.e. a passenger travelling in that part of a vehicle not fitted with seats. Article 2(1) of the Second Directive identifies three circumstances in which the Member States were obliged to introduce measures to render statutory provisions or contractual clauses void with respect to claims by injured third parties[20]. None of these three cover Mr Smith's circumstance. That this is so is clear from the wording of the Article 2(1), but also from the fact that prior to the introduction of the Third Directive, the extent to which insurance was compulsory in respect of liability for injury to passengers was still a matter of discretion for the Member States[21]. Accordingly, it is the provisions of Article 3 of the First Directive, as amplified by Article 1 of the Third Directive, that created the obligation on the Member States to introduce measures to render insurance compulsory in respect of liability for injury to all passengers, including individuals in the Mr Smith's circumstance.

Assuming for the moment that the *Marleasing* principle can

15 Craig & DeBúrca, "EU Law Text, Cases, and Materials" Fourth Edition, pages 292 – 296.

16 *Centrosteel v. Adipol* [2000] ECR I – 6007; *Océano Grupo Editorial v Rocio Murciano Quintero*.

17 [2004] ECR I-8835.

18 Paragraphs 115 and 116.

19 In *McCall v. Poulton* [2008] EWCA Civ 1263, the English Courts have also asked the ECJ whether the *Marleasing* principle can be applied to the English MIB agreement. Hopefully, the ECJ will take the opportunity to clarify the scope of the principle.

20 The three circumstances are where the driver does not have the consent of the insured, where the driver does not hold a licence to drive and where there is a breach of statutory technical requirements concerning the condition and safety of the vehicle.

21 See Case 158/01 *Withers v. Delaney* [2002] ECR I-8301

be applied so as to remove the restriction on the compulsory insurance requirement created by interaction of Section 56 and 65(1)(a) of the 1961 Act, what is the effect on the Clause? It appears that the interaction of Sections 66(1) and 62(1)(b) of the 1961 Act creates a situation whereby FBD is estopped from relying on the Clause. Section 66(1) states:

> "Where a vehicle insurer issues an approved policy of insurance he shall give to the person to whom it is issued the prescribed number of certificates … in the prescribed form certifying that it has been issued and stating the prescribed particulars thereof."

For present purposes, Section 62(1)(b) defines the relevant characteristic of an "approved policy of insurance" in the following terms:

> "A policy of insurance shall be an approved policy of insurance for the purposes of this Act if, but only if, it complies with the following conditions-
>
> (b) the insurer by whom it is issued binds himself by it to insure the insured against all sums without limit which the insured or his personal representatives shall become liable to pay to any person (exclusive of excepted persons) whether by way of damages or costs on account of injury to person or property caused by the negligent use … of a mechanically propelled vehicle."

Consequently, FBD has certified that it has issued an approved policy of insurance. An approved policy of insurance must indemnify the insured in respect of injury to any person (exclusive of excepted persons). However, excepted persons no longer include persons travelling in that part of a vehicle not fitted with seats. Accordingly, FBD can not seek to rely on the Clause as it has certified that it has issued an approved policy of insurance. An approved policy of insurance cannot contain a clause such as the Clause. Accordingly, it may be through the application of national law, and not European law, that FBD is precluded from placing reliance on the Clause.

Conclusions

1. Irish law now imposes a compulsory insurance requirement in respect of liability for injury to all persons travelling in a vehicle.
2. Under the 2009 MIBI agreement, the MIBI is obliged to compensate persons injured while travelling in an uninsured vehicle where that vehicle did not cause the damage giving rise to the claim for compensation.
3. The *Marleasing* principle has been relied upon to dis-apply Section 65(1)(a) of the 1961 Act with a consequential effect of rendering void a clause in a policy of insurance that restricted passenger cover to one passenger travelling in the front seat of the vehicle. ■

The Bar Council of Ireland Pupil Exchange Programme 2009

Inga Ryan CPD Manager

We initiated a Pupil Exchange programme in 2007 and it has been run annually since then. The scheme is a service for recent entrants to the Bar scheme and was set up to promote communication and relationships with other Bars and to give an understanding of the administration and practice of law in other jurisdictions. It is my understanding from those who participate is that it achieves these goals. Barristers who partake in the two week programme consider if insightful and a lot of fun.

We try to give visiting barristers a feel for what it's like to practice here and for the culture of the Bar of Ireland. In the mornings they attend Court with a 'host' barrister while in the afternoon they have other activities such as tours of the Courts, meetings and discussions with judges whose Court they attended, educational talks in the Kings Inns and tours of the prison. We are lucky that barristers always offer to 'host' our visitors, going out of their way to act as mentor and show them the ropes. Without such volunteers the programme could not be run. I would like to thank the host barristers for giving their time and expertise.

Last year the Bar of England and Wales and the Bar of Northern Ireland hosted two devils each as their guests. Sonya Donnelly BL and Sophia Purcell BL were in London and Cian Cotter and Eoin Morris were in Belfast from 1 to 12 June 2009. Below is a short account of their experiences.

Sonya Donnelly BL and Sophia Purcell BL

The Young Barristers' Committee (YBC) organised many activities for us, including a Tour of the Houses of Parliament, a visit to Treasury Solicitors offices and the a tour of the Royal Courts of Justice and the Old Bailey. On the second week we met with the Chairman of the Bar, Desmond Browne QC and spent a morning at the Old Bailey marshalling His Honour Judge Anthony Morris. In addition to the day-time programme there were some evening events. The first was a

Masters of Advocacy seminar chaired by Michael Mansfield QC, which took place at the Inner Temple. Mr Mansfield is well known at the English Bar and has represented the Guildford 4 and Birmingham 6, Stephen Lawrence's family; Michael Barrymore at the Stuart Lubbock inquest; Barry George at the inquest into the death of Jill Dando; the Bloody Sunday families and Mohamed al-Fayed in the inquest into the deaths of Dodi al-Fayed and Princess Diana.

We spent our first week with Outer Temple Chambers and Blackstone Chambers. We were privileged enough that Dinah Rose QC of Blackstone was appearing in the House of Lords for two days during our stay in *R (on the application of Purdy) v Director of Public Prosecutions*, one of the last judgments ever to be made by the Law Lords before a new Supreme Court starts in October 2009. We were able to observe first-hand the marvellous advocacy at the House of Ms Rose QC and the infamous Lord Pannick QC who was representing the applicant, Ms Purdy in this interesting and complex case addressing various issues of Physician Assisted Suicide.

Our second week was spent with 25 Bedford Row Chambers which is unsurpassed in the field of criminal defense representation and New Square Chambers which specialises in chancery and commercial matters. It was interesting to see the difference in the chambers system in comparison to the library system. For junior members, it provided a lot more security including an office and a steady stream of work along with the support of more senior members of chambers. Counsel in chambers are never involved in the negotiation of fees or the chasing up of such fees after work was completed because this was taken care of by clerks.

Our last day was spent with a barrister practicing at the Employed Bar. Provisions in the Code of Conduct enable barristers to be employed by a firm or government branch such as the Treasury Solicitors but yet still practice as a barrister.

The most important aspect of the whole exchange was seeing how the Young Bar worked in England and Wales and specifically the Young Bar Committee. We were invited to the Young Bar Committee meeting on the final evening followed by a farewell dinner. We discovered that the issues facing the Young Bar there are, similarly to Ireland, numerous and varied. With an increase in numbers, reductions in fees and low earnings, they are in many ways facing into as difficult a climate as we are. However, things differ for a young barrister in that jurisdiction in two significant ways that cannot be underestimated. The first is the reform of the Pupilage system and the second is the presence of a Young Bar Committee.

The Bar Code of Conduct now requires all pupillage vacancies to be advertised centrally online. Pupillage Portal contains information on every available Bar Council authorised pupillage vacancy. Each person is able to apply to up to 12 chambers as well as make one 'clearing' application using the site and to tailor each application to the individual set to which they are applying. This is not without its own problems, for example out of 2864 applications in 2008, only 1720 were successful and in 1999, while 541 people were successful after pupilage in gaining tenancy, only 287 achieved this in 2008. However the bar doesn't shy away from these statistics and publishes them and a break down of gender, ethnicity and special needs of applicants every year on its website.

Pupillage is divided into two parts in England and Wales: the non-practising six months during which pupils shadow, and work with, their approved pupil supervisor and the second practising six months when pupils, with their approved pupil supervisor's permission, can undertake to supply legal services and exercise rights of audience. All pupils must be paid no less than £833.33 per month plus reasonable travel expenses where applicable during their pupilage year. The lowest paying pupilages being in the Criminal law area (no surprise there) and the payments are usually increased substantially if the pupil works for a large Chambers or is involved in Maritime Law. Some of the largest chambers offered a pupilage salary of £40,000 or more.

The YBC was set up over fifty years ago, its main aim being to specifically advocate and address the needs of the newer members of the bar (those of 7 years call and under). It comprises elected members of the Bar Council (employed and self-employed barristers) as well as barristers who are co-opted to ensure representation from different practice areas and all circuits. It advises the representative committees of the bar council on all matters of concern to young barristers and it liaises with the Bar Standards Board on such matters as; training and entry to the Bar, pupilage, fees and public funding, practice management, regulatory issues and rule changes and equality and diversity.

It also meets regularly with officials in government including the Lord Chancellor, the Attorney General and the DPP.

Cian Cotter BL and Eoin Morris BL

David John Reid BL was our liaison and chairman of the Young Bar Association of Northern Ireland. He excellently organised our agenda to include exposure to civil and criminal courts in both Belfast and on circuit, in which the northern bar practice. Brendan Garland, Chief Executive (Director) of the Bar explained the strategy of the Bar and gave us a tour of the facilities available to practitioners. Interestingly, all barristers in Northern Ireland practice from a newly designed purpose built office complex next to the Royal Courts of Justice. This creates many advantages, notably it is costs effective but further it provides a readily accessible pool of knowledge and assistance for younger member of the bar who practice in the same complex.

The Young Bar Association invited us to a Gala Casino night which involved welcomed amounts of refreshments and entertainment. The autonomy, budget and respect entrusted to the Young Bar Association are testament to its success. It acts as a powerful voice for the junior bar and holds a seat on the Bar Council. As a result of its suggestions in previous years the membership fee for members in their first five years is significantly subsidised.

The court service of Northern Ireland employ customer service agents to assist members of the public while on the courts premises. This consists of explaining which court they should attend, where they should sit and the procedural system of the court. While this is no doubt an expensive service to provide, it did appear to put clients, witnesses and

members of the public at ease and allowed for a smooth transition into the courts system for those not normally involved.

The Chairman of the Northern Irish Bar shared his views regarding recent reviews of the manner in which counsel send their fee notes to Solicitors. The Scottish sytem was used as an example of how what might be the most effective system for billing clients. In Scotland, Counsel send their fee notes to the Bar Council who in turn send them to Solicitors on their behalf, while keeping a log. When a fee is paid, it is paid directly to the Bar Council who deduct VAT, income tax and PRSI together with a percentage towards the discharge of membership fees. The result is that the remainder is fully disposable and members are not open to a tax liability at the end of the year. The result is, that the Bar Council have a live record of which Solicitors are paying or withholding Counsels' fees. Where patterns emerge as to which Solicitors are not paying members fees, then sanctions can be put in place. These sanctions may range from a warning to a suspension of Counsel's services. Regardless of views in relation to the administration of fees, it must be accepted that the ability to regulate non-payment of fees in this manner protects members, particularly members in their first few years, and is wholly beneficial to the Bar.

It is plain to see that the Master's list in Northern Ireland is under enormous pressure. Lists contain between 120 to 150 matters daily. Members often waste days waiting for matters to be heard, and when they are reached, it is not unusual for them to be adjourned weeks in advance. In Northern Ireland the Masters of the High Court have a weekly call-over of matters which are due to come before them in the following week. Each matter is assigned a day and a time and is heard in chambers. The net effect of this is mutually beneficial to the Courts and to Practitioners. On the one hand, practitioners are not spending hours on end waiting for their matter to be heard and they can diary their days efficiently. On the other hand, the Masters are under less pressure insofar as their day is diaried in a way which means that they can give each matter the due consideration it deserves rather than having the pressure of a never ending list before them. It also has the benefit of Masters being assigned to different areas, such as common law motions, chancery and family law division.

Despite the advances into the technological era and the pronounced corporate strategy policy, the Bar of Northern Ireland remains a bastion of traditions. The Bar strongly upholds their position within the legal system as independent officers of the court. Wigs and gowns are still worn and although the professions remains male dominant, this demographic is changing with time. Court procedure and edict is considered paramount and texting or emailing from a mobile phone in court is strictly prohibited.

Our timing was very fortunate in that two major judgements occurred during our visit to Belfast:

The first was *R v Manmohan Sandhu*, where the accused pleaded guilty to the common law offence of incitement to murder on 26th May 2009. The charge related to dates between 18th and 26th August 2005 when the accused, while acting and practicing as a solicitor, incited other persons to murder Jonathan Hillier. The accused was also charged with intent to pervert the course of public justice contrary to common law. The particulars of this charge included the accused using information gathered as the solicitor of a suspect being interviewed by police in Antrim Serious Crime Suite, to alert persons outside the police station to hide evidence that could be used against his client.

The main allegation and first count on the indictment relates to a consultation the accused had with his clients where the accused made a number of comments including that Mr Hillier should not be allowed to give evidence, that "dead men can't talk" and that "he's got to be taken out".

The court acknowledged that there was no guidance case for this type of offence and noted that there where aggravating factors namely, that there was a grave breach of trust by the accused as an officer of the court and those breaches occurred on a number of occasions, as well as mitigating factors; that the accused had no previous criminal record, delay, had pleaded guilty (although not at the earliest opportunity), that he was unlikely to work as a solicitor in the future and that he provides for his family for whom his imprisonment would bear heavily upon.

Nevertheless Mr Justice Deeny issued a severe sentence of ten years imprisonment on the first count and five three year sentences for the other counts to run concurrently with the first.

Judgment was also delivered in the case of *R v Mark Brisling & Ors and McKenna & Ors.*

All twelve plaintiffs brought an action in damages for personal injury sustained by them as a result of the explosion of a bomb in Omagh town on 15th August 1998 pursuant to the Fatal Accidents (Northern Ireland) Order 1977 and the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1937.

The Defendants consisted of five named individuals and an unincorporated association, namely The Real Irish Republican Army. The case against the Defendants was that they were in various ways "responsible for the planning, production, planting and detonation of the bomb at Omagh".

Despite legal submission from Counsel for the Defendants the court found that the standard of proof to be applied was the civil standard. The third, fourth, fifth and sixth named defendants were held to be individually liable.

Interestingly the court held that the second named defendant, namely the members of the Army Council of the Real IRA bore responsibility for "directing this attack as part of the campaign that was being waged at that time". Thus the court made a representation order against the second named defendant through the fourth named defendant, as the latter was a member of the Army Council of the real IRA at the time of the attack.

The court awarded damages to all plaintiffs proportionate to the loss, damage and suffering in each particular case. In total the Court awarded circa £1.6 million to the plaintiff's with interest.

The pupil exchange programme exceeded our expectations and we would strongly recommend it to any pupil considering applying.

The authors wish to extend their sincere thanks to Inga Ryan, CPD Manager, to the Bar Council of Ireland, to the members of the Northern Bar, Gillian Dollamore of the Bar Council of England and Wales and to the members of the Young Bar Committee in England and Wales. ■