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In this issue

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Front cover illustration by Bob Dewar, Fife, Scotland.

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Jean Giraudoux (1882-1944)

From the Editor

In this issue of the Independent Law Review, Val Corbett considers recent developments in the doctrine of qualified privilege. He assesses the impact of the House of Lord's decision in *Reynolds v. Times Newspapers* (2001), and considers the Irish High Court's endorsement of *Reynolds* in *Hunter v. Duckworth and Company Limited and Louis Bloom Cooper*, an unreported decision of O'Caoimh J (2003).

Fiona De Londras continues her series of articles on effective methods of carrying out legal research, and in this issue she focuses on the problems faced by those researching areas of the law which are under-reported.

Claire McHugh assess the ramifications of the enactment of the Protection of Employees (Fixed-Term Work) Act, 2003, while Cian Murphy continues his Web Review series by focusing on two English law sites, consilio.com and lawontheweb.co.uk.

In the first of a series of Student Matters articles, law graduate Joan O'Connell shares her experiences as an intern with Amnesty International's Irish Section. Finally, Venessa Landers enjoys an evening in the salubrious surroundings of Dublin's Shelbourne Hotel, a venue that has long been popular with Dublin's legal fraternity.

I would like to take this opportunity to thank our readers for the immensely positive response to the first issue of the Independent Law Review. Please feel free to contact the Editorial Board should you wish to respond to any matters published in the Independent Law Review or contribute to forthcoming issues.

Philip P Burke,
Editor,
The Independent Law Review,
March 2004.

Editorial Board

Qualified Privilege: *Reynolds* Comes Home to Roost

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The liar is no whit better than the thief, and if his mendacity takes the form of slander, he may be worse than most thieves. It puts a premium upon thievery untruthfully to attack an honest man, or even with hysterical exaggeration to assail a bad man with untruth. An epidemic of indiscriminate assault upon character does not good, but very great harm. The soul of every scoundrel is gladdened whenever an honest man is assailed, or even when a scoundrel is untruthfully assailed . . .

(Theodore Roosevelt, Washington DC, 14 April 1906)

Introduction

In a speech made at the laying of the cornerstone of the office building of the House of Representatives, President Roosevelt first coined the phrase "muck-raker" to describe certain investigative journalists who are more interested in the sensational "scoop" than factual accuracy. It is the fear of the muck-raker that may explain, in part, the reluctance of the Irish courts and legislature to liberalise our archaic libel laws over the past forty years.

However, a number of recent developments give proponents of greater press freedom some reason for optimism. The recent completion of the *Report of the Legal Advisory Group on Defamation*,[1] the incorporation into Irish law of the European Convention on Human Rights,[2] and recent judicial pronouncements by English and Irish courts on defamation,[3] may engender debate and give fresh impetus to the development of less restrictive libel laws in this country. My thesis is that a move towards liberalisation is necessary in order to properly vindicate the citizen's right to freedom of expression, which has unfairly suffered at the expense of protecting an individual's right to a good name in this jurisdiction.

The aim of this article is to examine whether the liberalisation of Irish defamation law can be best achieved through the modification of the traditional defence of qualified privilege. A similar modification has been made in other jurisdictions such as England,[4] the United States,[5] Australia[6] and New Zealand,[7] where to a greater or lesser degree the right to free expression has been vindicated through a liberal interpretation of the formerly narrow defence of qualified privilege. The recognition by the Irish High Court in *Hunter v. Duckworth and Company Limited and Louis Bloom Cooper*,[8] of a general public interest defence akin to that developed by the House of Lords in *Reynolds v. Times Newspapers* is to be welcomed as a move in the right direction, particularly since legislative inaction in the area of defamation reform appears to have restricted the development of the law in this area.

Irish Defamation Law

As the right to free expression and the protection of one's good name is guaranteed under the Irish Constitution[9] and the right to free expression under the European Convention on Human Rights,[10] Irish tort law must seek to achieve an appropriate balance between these competing interests.[11] Under the common law, a person is only liable in defamation where he publishes a false statement about another which tends to lower that person in the eyes of right thinking members of society, or tends to hold him up to hatred, ridicule or contempt, or causes that person to be shunned by right thinking members of society.[12] However, a defendant may avoid liability for such publication if the plaintiff authorised it, or he can prove that the statement is true,[13] privileged,[14] or is considered to be honest commentary on a matter of public interest.[15]

Irish defamation law has developed in the shadows of Articles 40.3.2 and 40.6.1.i of the Constitution. The protection of reputation may be vindicated by bringing a common law action in defamation, while the right to free expression should be supported through the defences available to the defendant to any such action. Unfortunately, the limited scope of these defences has led to a situation where the right to free expression now plays second fiddle to the right to a good name, unduly restricting the Irish press from discharging its "vital functions as bloodhound as well as watchdog."[16]

Unlike other tort actions where the principle of "he who asserts, must prove" applies, in defamation it is for the defendant to prove that he was justified in publishing the statement. The principle that every citizen is possessed of a good reputation unless, and until, the proposition is proven untrue has resulted in the rather unusual situation where it is the defendant who must prove his case or be found liable in defamation. Shifting the burden of proof to the defendant in such actions can cause practical difficulties.[17]

It is submitted that the current state of the law is far from satisfactory. The presumption that every individual has a good reputation, the placing of the burden of proof on the shoulders of the defendant and the limited scope of the defences to an action, has loaded the defamation dice very much in

> "[can] the liberalisation of Irish defamation law ... be best achieved through the modification of the traditional defence of qualified privilege?"

favour of the plaintiff. Certainly the very threat of litigation has had a chilling effect on the media in this country and has made our jurisdiction a happy hunting ground for those seeking compensation for damaged reputations. The words of Robertson & Nicol (commenting on the state of English law) could equally apply when summing up the current Irish position:

"English Law is the preferred option of international public figures because it has traditionally tilted the balance against freedom of speech, with the practical consequence that foreign publishers fearful of attracting an English libel action cut passages critical of wealthy and powerful public figures, or else do not publish here at all . . . Even Daniel Moynihan's celebrated aphorism about his friend Henry Kissinger ("Henry doesn't lie because it's in his interests. He lies because it's in his nature.") was solemnly edited out of books on American politics before they were published here. That Britain should have become a no-go area for information freely published elsewhere in the world poses a serious question: in the global village created by instantaneous electronic communication, does it make any sense for people to have different reputations in different parts of town?"[18]

Qualified Privilege

The publication of a defamatory statement is not actionable where the publication was made on an occasion that was considered privileged. A statement will attract qualified privilege in circumstances where the publisher has a duty or legitimate interest in publishing the statement, and the receiving party has a reciprocal duty or interest in receiving the information provided such publication is made in the absence of malice.[19]

Traditionally, the defence of qualified privilege was narrowly defined through the use of what has become known as the duty/interest test. Was the occasion one where the publisher had a duty/interest to make the statement and the recipient of the information a duty/interest in receiving it? This element of reciprocity is critical to the operation of the defence.[20]

Duty Situations

Communications made between parties where one of the parties was under a duty to communicate may be privileged. In *Kirkwood Hackett v. Tierney*,[21] the President of University College Dublin was found to have a duty to question a student (in the presence of the College Secretary) regarding the mistaken payment of a money draft to a student. A similar conclusion was reached in *Kearns & Co. v. The General Council of the Bar*,[22] where the Bar Council of England & Wales received a letter of complaint from a barrister. He was concerned about instructions that junior barristers were receiving from a firm known as Kearns Agency and believed that this firm had breached the Bar's code of conduct. Having reviewed the matter, the Bar Council forwarded a circular to all chambers and senior clerks to the effect that Kearns & Co. was not a firm of solicitors and that it would be improper for barristers to receive instructions from Kearns Agency. It transpired that the Bar Council were incorrect, Kearns & Co. were indeed a firm of solicitors and Kearns Agency was a body recognised by the Law Society and was permitted to instruct counsel. However, the defendant successfully pleaded the defence of qualified privilege. It was held that the Bar Council had a duty to deliver this information to its members, and in the absence of malice on their part, the information was considered privileged.

While the duty to communicate may be "legal, social or moral,"[23] it is clear that the law will only recognise its existence in limited situations (usually within recognised relationships). For example, in *Watt v. Longsdon*[24] a manager of a company wrote to a director of the company (the defendant) alleging that the plaintiff - who was a managing director of the company – had acted dishonestly and immorally. In response, the defendant requested that the manager obtain confirmation of these allegations in order that he may communicate them to the plaintiff's wife, who he said was a friend of his. However, before he received any such confirmation, the defendant showed the original letter to the chairman of the company and to the plaintiff's wife. The statements were false. The court held that the communication of the letter to the chairman by the defendant was privileged, concerning as it did, information regarding a fellow employee and board member. However, the communication of the contents of the letter to the plaintiff's wife was not privileged. A sufficient duty/interest did not exist which would entitle the defendant to communicate such information to the plaintiff's wife.

Interest Situations

Equally, a statement will be protected by qualified privilege where the defendant makes a statement for the purpose of protecting his or her legitimate interests. The categories of "interest situations" are not closed and as "long as the interest is of so tangible a nature that for the common convenience and welfare of society it is so expedient to protect it, it will come within the rule."[25] Thus, a shop owner's statements to a suspected shoplifter will be the subject of the privilege where he was acting to protect his proprietary interests.[26] Similarly, communications made by an insurance company regarding a particular agent were found to come within the privilege.[27] However, it must be remembered that the privilege will only apply where it is used as "a shield, not a sword"[28] and does not entitle the defendant to unjustly attack the reputation of another in the perceived defence of his own.[29]

Malice

Statements made between individuals will only lose the protection of qualified privilege in circumstances where the plaintiff can establish that the communication was actuated by malice. In the words of Brett LJ, in *Clark v. Molyneux*,[30] the plaintiff:

". . . is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive."

The existence of malice may be garnered from the tone of the communication, its method of publication or other extrinsic facts. As such, the privilege will not apply

where it can be established that the plaintiff was predominantly motivated by ill will or personal spite in making the statement and did not believe in the truth of his statement or was reckless as to whether the statement was accurate. In the words of O'Byrne J in *Kirkwood Hackett v. Tierney*,[31] "*it must be shown that he acted from an indirect and improper motive. The state of mind of the defendant is the cardinal consideration . . .*"

The Expansion of Qualified Privilege

Initially, the defence of qualified privilege provided little protection to the media in publishing material in the public interest. The scope of the defence was greatly curtailed by a narrow interpretation of the elements of duty and interest. Traditionally, media organs would struggle to establish that there was any privilege attached to statements made by that organisation to the public at large, notwithstanding the possible public interest in the information. The conventional view was that any such expansion should not occur as "the damage that [could] be done when there are thousands of recipients of a communication [are] obviously so much greater than when there are only a few recipients."[32] However, a number of recent cases have evidenced a gradual move away from this strict interpretation of "duty/interest" to a more flexible approach whereby a more general public interest will be recognised as giving rise to the existence of the privilege.

The U.S. Approach

The United States Supreme Court in *New York Times v. Sullivan*[33] adopted a more expansive approach to the issue of qualified privilege. In that case, the respondent was an elected Commissioner of the City of Montgomery, Alabama, whose duties included the supervision of the city's police and fire departments. He argued that the petitioner newspaper had libelled him when it alleged – through an advertisement in the newspaper - that the peaceful protests of civil rights activists were violently dealt with by the local police department. It was the respondent's contention that the advertisement (which was factually incorrect) implied that he was associated with, or had authorised, such violent conduct. The Supreme Court found in favour of the petitioner newspaper, stating that, in light of the constitutional protection of free expression provided by the First and Fourteenth Amendments of the US Constitution, a publisher who criticised the performance of a public official in that capacity should not be required to prove the factual accuracy of such statements. In delivering his judgement, Brennan J expressed the opinion that such a requirement would lead to "self-censorship" and such statements should be privileged in the public good. The privilege would only be lost where it could be established that the publisher made the statement with "actual malice." A publisher would only be found to have acted with "actual malice" where it could be proven that he had published the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." The Supreme Court justified such an approach by pointing out that the:

"*allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred . . . would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.*"

The decision in *Sullivan* was hugely significant. For the first time, the law found that statements made by the media regarding a public official were privileged, notwithstanding that such statements may have been factually incorrect. The privilege would only be lost where the maker of the statement knew it was false or was reckless as to whether it was true or not. This was a very high standard to meet and it would prove difficult for a plaintiff to establish such malice to the satisfaction of the court in many circumstances. Of course, one should remember that the conclusion reached in *Sullivan* was decided in light of the U.S. Constitution which recognises the citizen's right to freedom of expression (under the first amendment), but does not elevate the right to a good name to a similar level. This situation is very different to the Irish jurisdiction where both rights are constitutionally protected.

The Australian / New Zealand Approach

In Australia, an expansion of the qualified privilege defence occurred in *Lange v. Australian Broadcasting Corporation*.[34] In that case, a current affairs programme criticised the then Prime Minister of New Zealand, David Lange. The plaintiff argued that the programme implied that he was unfit to hold office. In response, the defendant pleaded that the statements took the form of political discussion and as such should be considered privileged provided that their publication was not motivated by malice. The High Court, in a unanimous decision, found in favour of the defendant and held that political communication could be privileged in such circumstances. The court pointed out that:

"*[E]ach member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters.*"

There are two important differences of note between the qualified privilege defence as it was applied in *Sullivan* and *Lange*. First, the expanded privilege as applied in *Lange* will only attach itself to political debate. The scope of *Sullivan* privilege is much wider in that it can apply not solely to debate of political matters, but may also include discussions of other matters of public interest. Second, the *Lange* defence was limited by a requirement of 'reasonableness.' If the plaintiff can establish that, notwithstanding the political nature of the statement, the conduct of the defendant in publishing the information was unreasonable, then the privilege will be lost.

A publication may be deemed unreasonable where the publisher did not have reasonable grounds for

believing that the information was true, failed to make reasonable checks as to its accuracy or has failed to seek and publish the plaintiff's side of the story. Under *Lange*, the privilege can also be lost where the existence of malice can be proven. However, the new requirement of 'reasonableness' has rendered malice in this context redundant. The standard of 'reasonableness' places a heavier duty of care on the shoulders of the defendant than that required under *Sullivan*. Under the *Sullivan* defence, the privilege will be lost where the publisher knew the publication to be false or was reckless as to whether it was true or false. Under *Lange*, the publisher must establish that a reasonable man would have believed the publication to be accurate.

The same plaintiff brought an action in New Zealand in the case of *Lange v. Atkinson*.[35] Here, the New Zealand Court of Appeal developed a similar defence to that recognised by the Australian High Court. However, the defence recognised in New Zealand was different in some important respects. Firstly, the New Zealand version of the *Lange* defence was much more limited in terms of the subject matter which would attract the privilege. The Court of Appeal stated that the defence should only apply to political matters, commenting that:

"a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities."

Thus, unlike its Australian counterpart, the New Zealand defence was strictly limited to political candidates in their role as public representatives, and did not provide defendants with a blanket coverage defence to discuss 'other' matters of political interest. Secondly, and probably most significantly, the privilege can only be lost where the publisher has acted with malice. There was no separate requirement that the publisher must have acted reasonably in publishing the information.

> "In *Reynolds*, the defendant was unable to rely on this newly formed defence since it had, in the English edition of its newspaper at least, failed to publish the plaintiff's side of the story"

The English Approach

The House of Lords adopted a modified defence of qualified privilege in *Reynolds v. Times Newspapers Ltd*.[36] In that case the defendant published a story about the plaintiff (a former Taoiseach) which was entitled "Goodbye Gombeen man". The general tenor of the story was that the plaintiff had deliberately and dishonestly misled the Dáil. The defendant claimed that the story, because of its political subject matter, should attract a generic qualified privilege. It argued that it was under a duty to publish the information and that the general public had a corresponding interest in receiving it as it concerned an Irish politician who was well known to the British public through his work in the Northern Ireland peace process. The House of Lords rejected the plaintiff's contention. Their Lordships were of the view that such an approach would tilt the balance too far in favour of free speech for two reasons. First, the plaintiff may face great difficulties in establishing malice (thereby causing the defendant to lose the shield of the privilege) particularly in a jurisdiction where a journalist's sources were well protected. If the publisher could not be obliged to reveal its sources, how could the plaintiff establish whether they had acted maliciously? Second, limiting such a defence to political discussion would be much too narrow an interpretation and would be of little usefulness in informing the public of matters of public interest. Instead, the House of Lords were in favour of a more general public interest defence that would include all matters of public interest. Acknowledging the practical difficulties in proving malice, Lord Nicholls listed ten factors which must be considered when determining whether the information was to be protected by the privilege:

… (1)The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands the respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or may have discarded. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the story. (9) The tone of the article. A newspaper can raise queries or call for investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing.

"…the court should have particular regard to the importance of freedom of expression… [and] should be slow to conclude that the publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion."[37]

In *Reynolds*, the defendant was unable to rely on this newly formed defence since it had, in the English edition of its newspaper at least, failed to publish the plaintiff's side of the story.

The *Reynolds* defence was unsuccessfully pleaded in *Grobbelaar v. News International*.[38] In particular, the court was concerned with the sensational manner in which the allegations were made. The allegations had been published in a series of exposés by *The Sun*

> In his judgement [*in Hunter v. Duckworth and Company Limited and Louis Bloom Cooper*], O'Caoimh J acknowledged that while the right to free expression was not paramount, it was clear that the right to free expression and the right to a good name should be balanced in an appropriate manner under Irish defamation law

newspaper over a number of days and were, in the view of the court, reported as a matter of fact rather than as allegations. Further, the fact that the only attempt made by the defendant to seek a response from the plaintiff was to 'doorstep' him while he was attempting to board a flight in Heathrow airport was also significant. Interestingly, the court accepted that the allegations concerning bribery in professional soccer were of public importance thereby confirming the broad approach of *Reynolds*. In *GKR Karate v. Yorkshire Post Newspapers*,[39] the defence proved successful. In that case, the defendant published information alleging that, *inter alia*, the plaintiffs were 'doorstep salesmen flogging dodgy karate lessons.' It was held that the public (in this case the local community) had an interest in receiving such information.

Qualified privilege as it was applied and developed in *Reynolds*, represented a significant advance forward for press freedom. The liberal interpretation of the traditional defence left great scope for publishers to make statements in the public interest irrespective of the truth of such allegations. If the publisher could establish that they had acted reasonably and responsibly in all aspects of its publication then, in the absence of malice, such statements would be considered privileged. The *Reynolds* approach lessens the burden of proof on the shoulders of the defendant. Where the privilege applies, he no longer needs to prove that the allegations are true. On the other hand, the list of factors relating to responsible journalism as outlined by Lord Nicholls will ensure that careless publication is kept to a minimum.

The *Reynolds* reinterpretation of qualified privilege has not been without its critics. It has been argued that the list of ten factors as outlined by Lord Nicholls has only served to confuse the traditional basis of qualified privilege. Do these factors go towards establishing malice as the language would indicate? Or are these factors to be considered in determining the circumstances when such a privilege will arise? As Eoin O'Dell has pointed out:

"*Too many of the issues in that list pertain not to the general public policy issues which give rise to the privilege as a matter of principle, but to issues more specific to the parties by which such a privilege might be lost in an individual case. Furthermore, the shopping list, whilst it is a not-inappropriate list of factors to be taken into account in determining whether a defendant has acted reasonably, seems to exist entirely independently of the expanded though still reciprocal duty-interest test to which the House of Lords subscribed for qualified privilege generally; it seems impossible to equiperate the duty/interest test and the shopping list. For that reason, it does not seem to be a qualified privilege case at all.*"[40]

The appropriate positioning of the 'shopping list' does create some conceptual difficulties regarding the operation of the defence. O'Dell is correct in pointing out that these factors do not sit well within the traditional duty/interest test and may render the requirement of malice somewhat redundant. However, the difference in approach from the traditional test of duty/interest by the English House of Lords in *Reynolds* should not be too greatly exaggerated. The privilege still depends on the defendant establishing that the general public had an interest in receiving the information. In such circumstances the press have a corollary duty in making that information available to the public. The ten factors listed by Lord Nicholls are simply a guide as to the manner in which the press should carry out their duties in making the information public. Lord Philips MR explained the matter thus in *Loutchansky v. Times Newspapers*:[41]

"*The interest is that of the public concern in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed. The vital importance of this interest has been identified and emphasised time and again in recent cases … The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist. He can have no duty to publish unless he is acting responsibly any more than the public has an interest in reading whatever may be published irresponsibly. That is why in this class of case the question whether the publisher has behaved responsibly is necessarily and intimately bound up with the question whether the defence of qualified privilege arises.*"

While the 'shopping list' may have been intended as a guide to journalists as to how and when they should discharge their duty to publish information of a public interest, the House of Lords approach is open to the criticism that a new form of privilege may have been inadvertently created that is somewhat removed from the orthodox principles of qualified privilege. In focusing on the specific manner, tone, credibility etc. of the particular publication, the House of Lords decision implies that it is the publication itself which attracts the privilege and not the occasion of the publication. Such a move would mark a departure from traditional common law principles and would, in the words of O'Dell, "not seem to be a qualified privilege case at all."[42] However, given the wide public interest ambit of *Reynolds* privilege, their Lordships were of the view that journalists needed to be reminded that

the publication of information based on shoddy or irresponsible journalism was not acceptable, nor in the public interest.

Recent Developments in Irish Jurisprudence

The most recent pronouncement on the issue of qualified privilege in Irish law was delivered by O'Caoimh J in a decision of the High Court in *Hunter v. Duckworth and Company Limited and Louis Bloom Cooper*.[43] In that case, the first-named defendant was the publisher of a booklet entitled "The Birmingham Six and Other Cases." The second-named defendant was a barrister and the author of the booklet. In the publication, the second-named defendant claimed that the quashing of the plaintiffs' conviction did not automatically restore their presumption of innocence. Further, the plaintiffs alleged that the defendant's emphasis on the circumstantial evidence in "The Birmingham Six" case inferred that this would have been sufficient to convict the plaintiffs of the crime, even though the trial judge in that case had delivered a clear direction to the jury against making such an inference.

In his judgement, O'Caoimh J acknowledged that while the right to free expression was not paramount,[44] it was clear that the right to free expression and the right to a good name should be balanced in an appropriate manner under Irish defamation law.[45] The issue which fell to be decided by the High Court in this case was whether the current position of the common law:

"*…represented a violation of the right to freedom of expression enshrined in the Constitution and whether it should result in a fundamental re-appraisal or whether the law of defamation should be tempered to deal with the right to freedom of expression relied upon by the defendant.*"[46]

Intriguingly, in assessing whether the defendant should be entitled to plead a defence to the plaintiff's assertion of defamation, O'Caoimh J found refuge in the *Lange* decisions and the decision of the House of Lords in *Reynolds*. He held that the *Reynolds* case in particular was "persuasive authority" in that it did "indicate that the law with regard to qualified privilege should be expanded to something close to a general interest defence."[47] O'Caoimh J found the decision of the High Court of Australia in *Lange* to be particularly instructive, as the court in that case was required to consider whether the common law rules on privilege should be developed in order to give due to recognition to the implied right to freedom of communication under the Australian Constitution.[48] Having also considered the *Lange* decision in New Zealand, it was O'Caoimh J's view that to define a blanket rule (rendering all debate of a political nature privileged, for example) would be virtually impossible and that any introduction of a test of reasonableness in these circumstances was a matter for the legislature.[49] In light of this fact, O'Caoimh J concluded that:

"*…the flexible approach represented by the decision of the House of Lords in Reynolds v. Times Newspapers Ltd. is the most appropriate way of approaching the problems in the instant case, in the absence of a clear legislative framework. It is clear that in the context of Ireland being a democratic State, clear recognition has to be given to the right to freedom of expression. I believe that this right should not be undermined by the provisions of the Constitution relating to the protection of one's reputation. It is clear that the rights have to be construed on a harmonious basis. Nevertheless, it is clear that in certain cases, in the context of the democratic nature of the State, primacy may have to be given to freedom of expression. The approach adopted by the House of Lords has the merit of enabling the law to be developed on a case by case basis having regard to the requirements of the Constitution and the Convention which may inform the court in its approach to the interpretation of the Constitution.*"[50]

O'Caoimh J then decided that while he could not agree with the defendants' assertion that the publication could not give rise to an action in defamation, he would allow the defendant to amend his defence in light of his decision on the *Reynolds* defence.

The decision in *Hunter* represents an important shift in Irish defamation law. The High Court has now approved the adoption of a general public interest defence along the lines of that developed by the House of Lords in *Reynolds*. In light of the Constitution and the Convention, O'Caoimh J concluded that if Irish defamation law was to strike an appropriate balance between the right to free expression and the right to a good name, it was necessary, "*in the absence of a clear legislative framework*,"[51] to expand the traditional defence of qualified privilege.

For the media at least, the decision of the High Court in *Hunter* has created the mouth-watering prospect of the development of a general public interest defence. The advantages are clear. A media defendant would no longer be obliged to prove the truth of their assertions provided they could show that the occasion of publication was such that the public had an interest in receiving the information, while the media in carrying out their corresponding duty to make such information public would be regulated by Lord Nicholls' check list for responsible journalism. It is submitted that O'Caoimh J's approach is to be commended. In the absence of legislative reform, the High Court has taken steps to readdress the current inadequacies of the common law by making the *Reynolds* privilege available to Irish defendants which at the very least gives them greater flexibility when publishing material of public interest. Whether the development in *Hunter* has any real effect on freedom of expression in this jurisdiction remains to be seen. The uncertainty surrounding the exact requirements of the shopping-list may do little to prevent the chilling of certain communications. However, taken as a whole, the availability of this new defence may tip the balance in favour of publication whereas previously, bitter experience of Irish defamation law would have counselled against such a move.

Conclusion

As a society we should remain vigilant to ensure that the highest standards of journalism are always maintained. President Roosevelt's words that "the liar is no whit better than the thief" remain true today. One need only look across the Irish Sea at the results of the Hutton Inquiry in order to see the great damage that can be caused

> "While the development in *Hunter* is to be welcomed as an immediate attempt at redressing the balance between the right to free expression and the right to a good name, it cannot be accepted as a replacement for legislative reform"

personally, professionally and politically by irresponsible reporting. However, let us not forget that, properly exercised, the right to free expression is probably one of the most powerful and important rights that any citizen in a democratic society has.

Legislative reform of Irish defamation laws has been slow in coming. Whether there exists a lack of political will to make such a move is open to conjecture. The completion of the *Report of the Legal Advisory Group on Defamation* is most encouraging, and does represent reason for optimism for proponents of greater press freedom. However, in the continuing absence of any legislative change, the judiciary both here and abroad have decided to drive defamation reform themselves. The acceptance of an expanded form of qualified privilege by the Irish judiciary was inevitable in these circumstances. In light of this, I believe that the *Reynolds* approach taken by O'Caoimh J in *Hunter* was the most sensible route to follow.

The *Reynolds* defence provides media defendants with greater manoeuvrability than that provided by the *Lange* decisions, which were limited to subject matter of a political nature. On the other hand, the *Reynolds* defence pays due recognition to the right to a good name in encouraging fair and responsible reporting in requiring the media to comply with Lord Nicholls' checklist. The requirement of fair reporting is absent in the *Sullivan* defence which is more media-friendly, in that the privilege will only be lost in circumstances where the defendant knew the publication was untrue, or was reckless as to whether it was true or false.

While the development in *Hunter* is to be welcomed as an immediate attempt at readdressing the balance between the right to free expression and the right to a good name, it cannot be accepted as a replacement for legislative reform. The recommendations proposed by the Legal Advisory Group should be put on a statutory footing in order that the common law properly reflects the requirements both of the Constitution and the European Convention on Human Rights.[52] Until that day, it is hoped that the incorporation of *Reynolds* privilege into Irish law will take the chill out of media reporting in Ireland, while at the same time ensuring that those with the muck-rakes who attack others in an irresponsible and untruthful fashion remain where they belong, outside its protection.

1. http://www.justice.ie.
2. The Human Rights Act 2003.
3. *Reynolds v. Times Newspapers* [2001] 2 A.C. 127 (CA and HL); *Hunter v. Duckworth and Company Limited and Louis Bloom Cooper*, High Court, unreported, 31 July 2003.
4. *Reynolds v. Times Newspapers* [2001] 2 A.C. 127 (CA and HL).
5. *New York Times v. Sullivan* (1964) 376 US 254.
6. *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520.
7. *Lange v. Atkinson* [1997] 2 N.Z.L.R. 22.
8. High Court, unreported, 31 July 2003.
9. Article 40.3.2 and A 40.6.1.i.
10. Article 10 of the European Convention of Human Rights.
11. *per* Denham J., *O'Brien v. Mirror Group Newspapers Ltd*. [2001] 1 I.R. 1 at pp. 32 – 33. See also *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359; where Barrington J. stated that Article 10 of the ECHR was ". . . merely making explicit something which [was] implicit in Article 40.6.1 of our Constitution."
12. *Quigley v. Creation Ltd*. [1971] I.R. 279.
13. *McPherson v. Daniels* (1829) 10 B & C 263 at 272
14. *Kirkwood Hackett v. Tierney* [1952] I.R. 185.
15. *Kane v. Mulvaney* (1866) IR 2 CL 402
16. *Reynolds v. Times Newspapers* [2001] 2 A.C. 127 (CA and HL), *per* Lord Nicholls at p 206.
17. The case of *Grobbelaar v. News Group Newspapers Ltd.*, [2002] 4 All E.R. 732; is a good example of the difficulties that may arise for a defendant when attempting to establish the truth of a statement to the satisfaction of jury. In that case, the plaintiff, a professional footballer was accused by *The Sun* newspaper of having accepted bribes in order to fix football matches in which he had played. The plaintiff had been surreptitiously videotaped accepting money from a former business partner in order to fix matches. During the subsequent trial, the plaintiff argued that the sting of the libel lay in the allegation that he had fixed matches, while the defendant argued that the sting lay in the fact that the plaintiff had corruptly agreed to fix matches, whether he actually did so or not was of minor importance. The House of Lords accepted the plaintiff's argument and found that the articles were libellous as the defendant had not proven to the satisfaction of the jury that he had actually fixed matches notwithstanding the videotaped evidence of his acceptance of corrupt payments and his admission that he had fixed matches in the past. However, the House of Lords did substitute the sum of £85,000 damages which were awarded by the jury at first instance with an award of £1 nominal damages given the fact that the plaintiff had destroyed the value of his own reputation with his taped confessions.
18. *London Artists Ltd. v. Littler* [1969] 2 Q.B. 375.
19. Robertson & Nicol, *Media Law* (4th ed.), Sweet & Maxwell (2002) at p 9.
20. *Watt v. Longsdon* [1930] 1 K.B. 130; *Toogood v. Spyring* (1834) 1 C.M. & R. 181 at 193; *Adam v. Ward* [1917] A.C. 309 at 334.
21. *Adam v. Ward* [1917] A.C. 309.
22. [1952] I.R. 185.
23. [2002] 4 All E.R. 1075.
24. *Adam v. Ward* [1917] A.C. 309 at 334 (Lord Atkinson)
25. [1930] 1 K.B. 130.
26. *Howe v. Lees* (1910) 11 C.L.R. 361 at 377.
27. *Coleman v. Keanes Ltd*. [1946] IR Jur Rep 5.
28. *Nevill v. Fine Art and General Insurance Co*. [1897] A.C. 68.
29. Fleming, *The Law of Torts (9th ed.)*, LBC (1998) at 625.
30. *News Media v. Finlay* [1970] NZLR 1089 (CA).
31. (1877) 3 Q.B.D. 237 at 246-247.
32. [1952] I.R. 185 (SC) at 203.
33. *Lange v. Australian Broadcasting Corporation* (1997) 182 C.L.R. 104 at p 571.
34. 376 US 254 (1964).
35. (1997) 177 C.L.R. 104.
36. [1998] 3 NZLR 424.
37. [1999] 4 All E.R. 609.
38. [2001] 2 A.C. 127 at 205.
39. [2001] 2 All E.R. 437.
40. [2000] EMLR 410.
41. O'Dell, *At Long Last, Libel Reform*?, Paper delivered at Symposium on Freedom of Expression, Trinity College Dublin, 5th & 6th December 2003.
42. [2002] 1 All E.R. 652 at 665-66.
43. *supra.*, n. 39.
44. High Court, unreported, 31 July 2003.
45. At p 46 of the transcript.
46. At p 44.
47. At p 46.
48. At p 49.
49. *ibid*.
50. At p 52.
51. At p 59.
52. *ibid*.
53. Of particular interest is the proposed new defence of 'reasonable publication.' My colleague Mr Mark Cockerill will examine the merits of this proposal in the next issue.

Protection of Fixed Term Workers Under Irish Law:

An Overview of the Protection of Employees (Fixed-Term Work) Act, 2003.

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Atypical workers were frequently overlooked in legislating for the rights of employees. A concerted effort at European level to introduce protections for those who are not in full-time permanent employment resulted in (i) a Framework Agreement on part-time work concluded in June 1997 by UNICE, CEEP and ETUC[1] and (ii) a Framework Agreement on the Rights of Workers on Fixed-Term Contracts between the same parties on 18th March, 1999. The Framework Agreements were given legal effect in Directives 97/81/EC (the Part-Time Workers Directive) and Directive 99/70/EC (the Fixed-Term Work Directive). Irish legislation to implement both of these Directives is now in force, and extends the principle of non-discrimination to atypical workers.[2]

This article will discuss the statutory scheme adopted to give effect to the Fixed-term Workers Directive in Ireland, focusing on (i) definitions of core concepts employed by the Protection of Employees (Fixed-Term Work) Act, 2003, (ii) the protections conferred on fixed-term workers (FTWs), (iii) exceptions thereto and (iv) provisions relating to remedies and enforcement.

The Purpose of the Directive

A central concern of the EC legislation is to facilitate flexible working arrangements, which are essential to competitiveness and may reflect the needs of both the worker and the employer, while achieving job security for an atypical worker and ensuring that s/he is not unnecessarily disadvantaged by his/her status. The Fixed-Term Workers Directive is particularly concerned with improving the quality of fixed-term work by ensuring the application of the principle of non-discrimination, with the added objective of preventing abuse arising from the successive use of fixed-term contracts.[3] The Directive was intended to set down general principles, and is expressed as a minimum standard of protection which Member States can progress beyond.[4]

The Irish legislation

Who is a fixed-term worker?

The Framework Agreement on Fixed-Term Contracts defines a fixed-term worker as a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a certain event.[5] This definition is adopted in the 2003 Act. Ireland has availed of the option under the Directive to exclude employees in initial vocational training relationships and apprenticeship schemes and employees with a contract of employment which has been concluded within the framework of a specific public or publicly-supported training, integration or vocational retraining programme.[6]

Workers placed at the disposal of a user undertaking by a temporary employment agency are not within the scope of the Framework Agreement on Fixed-Term Work as they are the subject of similar proposed legislation to provide a minimum standard of protection to temporary agency workers across the EU.[7] This exclusion is reflected in the 2003 Act's definition of a '*contract of employment*' (section 2). Another important limitation on the personal scope of the 2003 Act is section 17, which provides that the Act shall not apply to members of the Defence Forces, trainee Gardaí, and trainee nurses.

The appropriate comparator

Similarly, the Framework Agreement on Fixed-Term Work states the applicable comparator is a comparable permanent worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills. Furthermore, where an appropriate comparator is not available in the same establishment, comparison shall be made by reference to the applicable collective agreement or, where none exists, in accordance with national law, collective agreements or practice.

Finding an applicable comparator is an essential requirement in establishing discrimination, both in complaints under the Employment Equality Act, 1998, and on the basis of status as a fixed-term employee. The 2003 Act has opted for a broad definition of the comparator. An employee may be a comparator if:

a. the employee is employed by the same or an associated employer as the complainant; and
   i. both employees perform the same work under the same or similar conditions or each is interchangeable in relation to the work; or
   ii. the work performed by one employee is the same or a similar nature to that performed by the other, and any differences either in the work or the conditions under which it is performed are minor and occur infrequently; or

> "The Fixed-Term Workers Directive is particularly concerned with improving the quality of fixed-term work by ensuring the application of the principle of non-discrimination, with the added objective of preventing abuse arising from the successive use of fixed-term contracts"

iii. the work performed by one employee is equal or greater in value to the work performed by the other employee, taking account of such things as skill, physical or mental requirements, responsibility and working conditions.

or

b. the employee is specified as a comparator in a collective agreement which applies to the complainant;[8]

or

c. the employee is employed in the same industry or sector of employment as the fixed-term employee, and one of the conditions referred to at (a)(i) to (iii) above is satisfied.[9]

The reference to '*the same industry or sector of employment*' is potentially very broad, and goes much further than the terms of the Directive. Michelle Ni Longain points out that this definition allows an external comparator to be used.[10] This will make it easier for complainants to identify comparators, but the utility of the provision may be reduced by a restrictive interpretation of what constitutes the same industry or sector of employment. Furthermore, the use of such a comparator will require the complainant to gather complex information. As a consequence, Hayes suggests that only trade unions will be in a position to bring such cases.[11]

The principle of non-discrimination

The core obligation imposed by the Act is not to treat fixed-term employees, in respect of employment conditions, in a less favourable manner than comparable workers solely because of their status as FTWs. A worker seeking to pursue a claim will have to prove (i) that s/he is a fixed-term employee within the meaning of the legislation, (ii) that s/he has an appropriate comparator and (iii) that his/her conditions of employment are less favourable than the comparator. The burden of proof will then shift to the employer to establish that the difference in treatment is not in fact based on the prohibited ground, or alternatively, that it is objectively justified. Glenfield emphasises that the duty of employers to treat FTWs no less favourably than comparators does not (and indeed, could not) require identical treatment in all circumstances.[12] A primary example of this is the pro rata principle adopted by the Framework Agreement (discussed *infra*).

In *Hendrickson Europe Ltd v Pipe*,[13] the UK Employment Appeals Tribunal (EAT) set out four key issues to be considered in determining if a breach of the principle of non-discrimination has taken place:

- What is the treatment complained of?
- Is that treatment less favourable?
- Is that less favourable treatment on the basis of the worker's status?
- If so, is the less favourable treatment justified?

The onus will rest upon the complainant to establish that less favourable treatment occurred, and that s/he is a fixed-term worker. The burden then shifts to the employer to rebut the inference of discrimination.

Conditions of employment

'Conditions of employment' are defined as including conditions in respect of remuneration and matters relating thereto. In relation to any pension scheme or arrangement, it includes conditions for membership of the scheme or arrangement and entitlements to rights thereunder and conditions related to the making of contributions to any scheme or arrangement. Remuneration is defined as including any consideration, whether paid in cash or given by way of benefit in kind, which the employee receives either directly or indirectly from the employer, and any amounts which an employee will be entitled to receive on foot of any pension scheme or arrangement.

The Framework Agreements excluded statutory social security as matters for decision by the Member States, and Ireland has not chosen to extend protection to this sphere.

Pensions

A restriction on the scope of the non-discrimination principle is set down in section 6(5) of the 2003 Act, which states that a pension scheme or arrangement may not apply to a fixed-term employee whose normal hours of work constitute less than twenty per cent of the normal hours of work of a comparable full-time or permanent employee. In *Schonheit v Stadt Frankfurt*,[14] the ECJ held that Community law does not preclude a retirement pension being calculated *pro rata temporis* in the case of part-time employment. Consequently "*the fact that, in addition to the number of years spent working..an [employee's] actual period of service during those years, as compared with the actual period of service of an [employee] who has worked on a full-time basis throughout his career, is also taken into account is an an objective criterion unrelated to any discrimination on grounds of sex, allowing his pension entitlement to be reduced proportionately.*"

The provision under examination, which affected only the predominantly female category of part-time workers, failed to meet the terms of this exemption. The Court held that national legislation which has the effect of reducing a worker's retirement pension by a proportion greater than that resulting when his periods of part-time work are taken into account cannot be regarded as objectively justified.

The rationale of the restriction is that the administrative costs of providing access to persons with such little service would be far in excess of any benefits that might accrue to the worker.[15] Glenfield is of the view that this exclusion may be difficult to apply in practice. He points out that even if a complainant works less than twenty per cent of the hours worked by a full time employee expected to work forty hours per week, the worker could still claim an entitlement to pension benefits if there is a comparator available working less than forty hours per week, such that that the hours of the complainant would be more than twenty per cent that of the comparator.[16]

Periods of service qualifications

Clause 4(4) of the Framework Agreement made special provision for periods of service qualifications to differ between temporary and permanent workers when '*justified on objective grounds.*' This is given effect in section 6(3) of the 2003 Act.

Murray criticises the Framework Agreement in this respect for failing to fully recognise all relevant prior service. She argues "*the protection which temporary workers need is therefore a fully-fledged scheme of*

portability of entitlements, which recognises all relevant working experience (even if undertaken with different employers and with breaks in between)."[17] The Directive undermines its aim of ensuring economic competitiveness by failing to apply this logic. The 2003 Act does nothing to rectify this, opting for the minimum standard set down by the Agreement.

Fixed-term workers may derive some comfort from caselaw. In *Nimz*, the ECJ held that a pay increment scheme based on length of service may have to be justified in terms of the relationship between the period worked and the nature of the duties performed.[18] In *Crossley v ACAS*, a UK employment tribunal condemned as indirectly discriminatory a pay increment scheme which rewarded longer service and experience, the tribunal finding that this did not reflect actual improvements in job performance.[19]

The pro rata principle

The Framework Agreements adopted a *pro rata temporis* principle, allowing a condition of employment to be provided to FTWs related to the proportion which the normal hours of work of that employee bear to the normal hours of work of the comparable full-time employee. Section 6(7) of the 2003 Act clarify that this principle relates either to the amount of the benefit if it is of a monetary nature or the scope of the benefit if is non-monetary, and relates only to conditions of employment which are dependent on the number of hours.

A key limitation on the scope of the *pro rata* principle to bear in mind is that it only applies to benefits, such as pay, which are determined on the basis of hours worked.

Glenfield states "*there may be no right for an employer to pro rata certain benefits in kind, such as health cover or insurance, which are not provided to full time employees based on the number of hours worked.*"[20]

Objective Justification

It is a defence for an employer to show that a difference in treatment between FTWs and comparable permanent employees is objectively justified.[21] O'Rourke points out that no definition is provided of what constitutes an objective ground justifying a difference in treatment,[22] but an understanding of the scope of this defence can be gleaned from relevant statutory provisions, and caselaw of the European Court of Justice (ECJ).

The Act provides that "*a ground shall not be regarded as an objective ground …unless it is based on considerations other than the status of the employee…and the less favourable treatment which it involves for that employee is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose.*"[23]

This statutory test reflects the conditions of objective justification set down by the ECJ in *Bilka- Kaufhaus*.[24] The Court ruled that the measure at issue must (i) correspond to a real need on the part of the undertaking, (ii) be appropriate to achieve the objective pursued, and (iii) be necessary to that end. In effect, this introduces a proportionality standard for measures seeking to qualify for this exemption. National courts will be required to examine the individual circumstances of a case to determine if a difference in treatment is objectively justified.

An important precedent is the decision of the ECJ in *Hill* and *Stapleton v Revenue Commissioners*, which established the important principle that an employer cannot justify discrimination on the basis of increased cost alone.[25] The case concerned two female employees, who had previously job-shared and had, on their conversion to full-time employment, been placed on a point of the full-time pay scale lower than that of the job-sharing pay scale which they had previously occupied. They challenged this as indirect sex discrimination under the terms of the Equal Pay Directive. The Irish Government argued that objective justification existed as (i) there was an established practice within the civil service of only crediting actual service and (ii) increased costs to the employer would result otherwise. The ECJ refused to accept the justification provided. The Court stated "*[s]o far as justification based on economic grounds is concerned, it should be noted that an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs.*" The Court accepted that a job-sharer may acquire the same experience as a full-time worker.

Objective justification was found to exist by the UK Employment Appeals Tribunal (EAT) in *Sibley v The Girls' Day School Trust*.[26] A teacher complained of indirect discrimination where the school refused to allow her to return to work part-time after maternity leave. The EAT accepted as necessary the school's policy that the post of form tutor was one which had to be discharged by one person, in order to provide a continuous level of discipline and support to children. This case illustrates the leeway afforded to employers by the objective justification defence in order to protect the needs of the establishment or undertaking.

Atypical workers receive lesser protection from discrimination than workers who claim discrimination on one of the nine grounds under the Employment Equality Act, 1998. The defence of objective justification is available only in respect of indirect discrimination under the 1998 Act. Under the 2003 Act, objective justification is a defence even where direct discrimination is established. Gill and Monaghan explain this on the basis that "*discrimination against… fixed-term workers is not based on characteristics personal to the workers and, accordingly, permits of a general defence of justification.*"[27]

Section 7(2) of the 2003 Act is a somewhat ambiguous provision, which provides that a difference in treatment between a fixed-term worker and a comparable permanent employee shall be regarded as objectively justified where "*the terms of the fixed-term employee's contract, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.*" The express intention of the legislature was that this provision would allow flexibility to employees who wish to provide an attractive package of benefits in order to attract employees to work on a fixed-term basis. Hayes comments "*It is highly likely that this provision may prove contentious in practice with Rights Commissioners being forced to make judgments about the comparable value of various aspects of an employment package.*"[28]

This provision appears to attempt to apply a 'balancing out' approach to

the conditions of employment of FTWs. No such clause is expressly contained in the Framework Agreement, and it will be interesting to see how section 7(2) operates in practice. It was held in the UK case of *Matthews v Kent and Medway Towns Fire Authority* that, in respect of **part-time** workers, a comparison must be made between each condition of employment, and a similar 'balancing-out approach' cannot be adopted.[29]

Penalisation of employees

Section 13 of the 2003 Act protects an employee from penalisation for:

a. invoking any right of the employee to be treated in the manner provided for by the relevant Act,
b. having in good faith opposed, by lawful means, an act which is unlawful under the Act or
c. for giving evidence in any proceedings under the Act or notice of an intention to do so, or to do any thing referred to above.

The 2003 Act specifically provides that an employer shall not dismiss an employee for the sole or partial purpose of avoiding a fixed-term contract being deemed to be a contract of indefinite duration under section 9(3) (discussed below).

The Act identifies penalisation as dismissal; any unfavourable change in an employee's conditions of employment; any unfair treatment (including selection for redundancy); or any other action prejudicial to his or her employment.

Fixed-Term Contracts: Measures to Prevent Abuse

The Framework Agreement required Member States to place general limits on the use of temporary work, but did not identify the specific measures to be taken. In order to prevent abuse arising from the use of successive fixed-term employment relationships, Member States must introduce one of the following measures:

- The requirement of objective reasons justifying the renewal of such contracts or relationships;
- The maximum total duration of successive fixed-term employment contracts or relationships
- The maximum number of renewals of such contracts or relationships.

The Irish legislation fulfills this obligation by placing a four year limit on the aggregate duration of successive fixed-term contracts (section 9(2)). Section 9(1) provides that where an employee completes his or her third year of continuous employment, a fixed-term contract may only be renewed once for a period of not more than one year. Section 9(3) provides that any contract which purports to contravene these provisions shall be deemed to be a contract of indefinite duration.

The effectiveness of section 9 is diluted, however, by section 9(4) which allows an exemption "*where there are objective grounds justifying such a renewal.*" The guide to the UK regulations implementing the Fixed-Term Workers Directive points out that there may be a collective agreement in existence outlining objectively justifiable reasons. For example, the employers and representatives of professional sports people, actors or other employees may agree that the nature of the profession or work should be regarded as an objective reason for renewing fixed-term contracts.[30]

It should also be noted that a failure to renew a fixed-term contract may be challenged as discriminatory by invoking one of the grounds of discrimination prohibited by the Employment Equality Act, 1998. In *Melgar v de Los Barrios*, the ECJ held that a refusal to renew a fixed-term contract, which has come to the end of its stipulated term, cannot be regarded as a dismissal, but may constitute a refusal of employment in certain circumstances.[31] The case concerned a female part-time worker employed on a fixed-term contract, which was not renewed after she had informed her employer that she was pregnant. The ECJ stated that a refusal to employ a female worker based on her state of pregnancy constitutes direct discrimination based on sex, and was prohibited in this case by Art 10 of the Equal Treatment Directive, if the national court found that the non-renewal of employment following a succession of fixed-term contracts was in fact motivated by the worker's state of pregnancy.

Written statements of employer

Section 8 of the 2003 Act places an obligation on employers to provide a fixed-term employee with written notice of the objective condition determining the contract "*as soon as practicable*". An employer must also inform an employee in writing, where it is proposed to renew a fixed-term contract, of the objective grounds justifying a renewal of the contract and the failure to offer a contract of indefinite duration. This obligation must be complied with by the date of renewal.

The Act provides that any such statement under section 9 is admissible as evidence in proceedings under the Act. Furthermore, section 9(4) allows for the drawing of inferences by the Labour Court or a Rights Commissioner if it appears:

- That the employer omitted to provide a written statement, or
- That a written statement is evasive or equivocal.

Information and Consultation

Clause 6 of the Framework Agreement places an obligation on employers to inform fixed-term workers about opportunities to secure permanent positions. It further states that employers should facilitate access to training opportunities for FTWs. This is given effect by section 10 of the 2003 Act, which obliges employers to inform a fixed term employee in relation to vacancies which become available to ensure that he or she shall have the same opportunity to secure a permanent position as other employees. However, there is no express obligation to include FTWs in a competition for a particular post, though non-inclusion of the basis of their status as FTWs would be likely to contravene the Act.

Section 10 also provides that an employer shall facilitate access by a fixed term employee to appropriate training opportunities "*as far as practicable.*" This extends beyond a mere obligation to afford them the same opportunities as permanent workers, and creates a specific duty in relation to FTWs.

Clause 7 of the Framework Agreement relates to consultation and provides:

- FTWs shall be taken into account in calculating the threshold above which workers' representative bodies may be constituted in an undertaking as required by national provisions.
- As far as possible, employers should consider providing appropriate

information to workers' representative bodies about fixed-term work in the undertaking.

These provisions are implemented as mandatory obligations on employers by section 11 of the 2003 Act.

Complaints

Complaints under the 2003 Act are to be addressed, in the first instance, to a Rights Commissioner. A complaint may be brought by the employee or any trade union of which s/he is a member with that employee's consent. The Act specifies a six-month time limit for referral of a complaint, but the Rights Commissioner may extend this period to not more than twelve months where the failure to present the complaint within the statutory time limit was due to "*reasonable cause*." Time begins to run from the date of contravention of the Act to which the complaint relates, or the date of termination of the employment contract, whichever is earlier.

The Rights Commissioner shall give the parties an opportunity to be heard, and to present any evidence relevant to the complaint. Hearings are to be conducted in private. A decision is to be given in writing and communicated to the parties. There is no provision for the Rights Commissioner to "investigate" a complaint under the Act as is done by the Director of Equality Investigations or the Labour Court under the 1998 Act. Nor are Rights Commissioners empowered to carry out preliminary investigations into claims concerning equal remuneration. Consequently, Ni Longain opines that "*an employer could refuse to allow a site visit by a Rights Commissioner…in view of the absence of a power for a Rights Commissioner to investigate.*"[32] It remains to be seen how Rights Commissioners will deal with equal pay claims advanced under the 2003 Act.

Remedies

The Act provides that a decision of a Rights Commissioner shall do one or more of the following:

- declare that the complaint was or, as the case may be, was not well founded,
- require the employer to comply with the relevant provision,
- require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding two years remuneration in respect of the employee's employment.

A particularly appropriate remedy for full time workers is the statutory power of the Rights Commissioner to require that the employer re-instate or re-engage the employee (including on a contract of indefinite duration). The Act expressly makes provision for situations in which the ownership of a business changes, stating that "*an employer shall be read in a case where ownership of the business of the employer changes after the contravention to which the complaint relates occurred, as references to the person who…becomes entitled to such ownership.*"

The Act places limits on the ability of complainants to seek statutory redress, in order to avoid double recovery in respect of the same prohibited act. Section 18(2) of the 2003 Act provides that an employee, who falls within the statutory definitions of both fixed-term and part-time employees, must elect to pursue a claim arising from the same circumstances under either the 2001 Act or the 2003 Act, but cannot seek relief under both. Section 18(1) recognises that penalisation of an employee may constitute dismissal under the Unfair Dismissals legislation, but states that relief may not be granted to the employee in respect of that penalisation under both pieces of legislation. An employee must opt to pursue his claim under one statute only. O'Rourke points out that if an employee does not have the requisite service under the Unfair Dismissals Acts, s/he may only present a complaint to a Rights Commissioner.[33]

Appeals and Enforcement

A right of appeal to the Labour Court exists against a decision of the Rights Commissioner, within six weeks of the date on which the decision was communicated to the parties.[34] The Act further provides that the Minister may, at the request of the Labour Court, refer a question of law arising in the proceedings to the High Court for determination. A party to proceedings before the Labour Court may also appeal to the High Court from a determination of the Labour Court on a point of law. The determination of the High Court shall be final in both instances.

The Act also contains several provisions relating to enforcement. Where an employer has failed to comply with the decision of a Rights Commissioner and the six week time limit for appeal has expired, the employee may bring the complaint before the Labour Court. Section 17(9) of the Protection of Employees (Part-Time Work)Act, 2001 requires an employee to do so not later than six weeks after the expiry of the time for bringing an appeal, but no such requirement is imposed in respect of FTWs by the 2003 Act. Therefore, an employee who is both a part-time and fixed-term worker for the purposes of the Acts may be better off to elect to pursue a claim under the 2003 Act. Where the complaint is brought to the Labour Court in respect of non-compliance, the Court is empowered to issue a judgment intended to have the same effect as a decision, without hearing the employer or any evidence other than the terms of the original decision.

Section 16 of the 2003 Act permits a worker, a trade union acting on his or her behalf, or the Minister if s/he thinks it appropriate, to apply to the Circuit Court where the employer fails to implement the Labour Court's determination within six weeks. The Circuit Court may make an *ex parte* order directing the employer to carry out the Labour Court's determination. The Circuit Court is also empowered, if it is deemed appropriate, to direct that the employer pay interest on any award of compensation previously made by the Labour Court. Interest may be ordered in respect of the whole or any part of the period beginning six weeks after the date on which the determination of the Labour Court was communicated to the parties and ending on the date of the Circuit Court order.

Conclusion

The 2003 Act represents long overdue regulation of the employment of fixed-term workers, and balances the need to ensure the preservation of economic competitiveness with the fundamental principle that a fixed-term worker is not to be treated less favourably on account of his status. This protection, coupled with the prevention of abuse arising from successive fixed-term

contracts will greatly improve the lot of the fixed-term employee. In addition, a number of positive duties are placed on employers by the Act, such as the facilitation of training opportunities and the obligation to inform FTWs of permanent work opportunities. These provisions address the long-term interests of the fixed-term worker. However, the protections conferred by the 2003 Act are curtailed by the extensive scope afforded to employers to argue that less favourable treatment is objectively justified, and the failure of the Irish legislation to progress beyond the minimum standards of the Directive. It remains to be seen how the Rights Commissioners will approach enforcement of the legislation, and how quickly fixed-term worker status will come to be meaningfully recognised by employers as a prohibited ground of discrimination.

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* LL.B (UCC), Legal Researcher at ODEI- The Equality Tribunal. The views expressed are entirely those of the author and do not purport to represent in any way the views of the Equality Tribunal.

1. Union of Industrial and Employers' Confederations of Europe, European Centre of Enterprises with Public Participation and European Trade Union Confederation.
2. The Protection of Employees (Part-Time Work) Act, 2001 and the Protection of Employees (Fixed-Term Work) Act, 2003.
3. Clause 1 of the Framework Agreement on Fixed-Term Work.
4. Clause 8.
5. Common law principles may be of assistance in determining if a contract is a fixed-term contract. See *Bell, Particular Categories of Worker*, paper delivered to IRS Changing Work Patterns Conference, London, 24 Sept 2003, at 33-34.
6. S.2(2).
7. The proposed Directive on Agency Workers seeks to apply the principle of non-discrimination to agency workers. Its core obligation is that the basic working and employment conditions of agency workers, during the posting at the user undertaking, must be at least as good as those that would apply if they had been recruited directly by the employer to the same job. At its meeting on 3rd June 2003, the Council of Ministers failed to reach political agreement on the terms of the proposed Directive. Germany, Denmark, Britain and Ireland are seeking dilution of the Directive, being Member States where the use of agency work is particularly common.
8. This provision reflects the European origins of the legislation where sectoral collective bargaining is the norm. As there are very few agreements of this kind in Ireland, this approach is unlikely to be frequently used. Hayes, "The Protection of Employees (Fixed- Term Work) Act, 2003" *Employment Law Today* Q2 2003, at 14.
9. S.5 of the 2003 Act. s.6(4) states that the gender of the comparator is irrelevant. S/he may be of the same or of the opposite sex as the comparator.
10. Ni Longain, "Part-Time Workers and the Law" (2002) 96(8) *Law Society Gazette* 19.
11. Hayes, *op. cit.*, at 15.
12. Glenfield, *Atypical Workers: The Rights of Part Time, Fixed Term and Agency Workers*, paper delivered to the Law Society of Ireland Employment Law Conference; Booklet 1, 58, at 59: 12 November 2002.
13. *IDS Brief*, August 2003, at 8.
14. C-4/02 & C-5/02, 23 Oct 2003.
15. Glenfield, *op. cit.*, at 62.
16. *Ibid.*
17. Murray, "Normalising Temporary Work- The Proposed Directive on Fixed-Term Work" (1999) 28 *Industrial Law Journal* 269.
18. (1991) IRLR 222.
19. ET Case no. 1304744/98.
20. Glenfield, *op. cit.*, at 61.
21. s.6(2) of the 2003 Act.
22. O'Rourke, *Atypical Workers Legislation (Part-Time and Fixed Term Workers)*, paper delivered to EIRI Employment Law Conference, Dublin, September 11-12, 2002 at 4.
23. s.7(1) of the 2003 Act.
24. (1986) ECR 1607.
25. (1998) ECR I-3739.
26. *IDS Brief*, August 2003, at 7.
27. Gill and Monaghan, "Justification in Direct Sex Discrimination Law: Taboo Upheld" (2003) 32 *Industrial Law Journal* 115.
28. Hayes, *op. cit.*, at 14.
29. Employment Appeal Tribunal, 5 June 2003.
30. "The New Rules on Fixed-Term Contracts" (2002) 717 *IDS Brief* 12, at 15.
31. (2001) IRLR 348.
32. Ni Longain, *op. cit.*, at 22.
33. O'Rourke, *op. cit.*, at 6.
34. s.15 of the 2003 Act.

Questions and Answers: *A Guide to Overcoming (Some) Difficulties of Legal Research in Ireland*

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Researchers of Irish law are regularly faced with obstacles to effective research that are, in the main, peculiar to the Irish legal system. In this article, I aim to address these problems and simplify the task of legal research for practitioners and students alike by looking, in the first instance, at the general challenges of researching in a common law system and, secondly, at the particular problems in Ireland relating to under-reporting in certain areas of the law and to the difficulties, caused largely by historical factors, to achieving certainty as to the legislative position in relation to questions of law.

In common with other jurisdictions formerly under British rule, Ireland has a common law system.[1] As a result there are three core elements of our legal system – a hierarchy of courts, the reasonably accurate and reliable recording of judicial decisions, and a general acceptance on the part of the legal community of the binding force of precedent.[2] Combined, these three elements ensure the workability of the principle of *stare decisis*[3] (or precedent) in our legal system, and also offer a range of difficulties for the aspiring legal researcher.

While there can be no question that there exists in Ireland a hierarchy of courts, and this is indeed firmly rooted in a Constitutional basis,[4] question marks over the strictness of our adherence to precedent,[5] and the adequacy of our reporting system still remain. For legal researchers it is absolutely vital that cases are reported in an accurate and accessible manner. This has largely been achieved since the establishment of the Incorporated Council of Law Reporting for Ireland in 1866, which has produced a great volume of reported judgments.[6] The advent of online databases such as LEXIS-NEXIS, Westlaw and BAILII has also led to the prompt and thorough 'reporting' of unreported cases. This large volume of reporting, however, brings with it a particular (perceived) problem – a fear on behalf of legal researchers that they may not be able to locate the relevant current law amidst the volume of reports being produced. Byrne and McCutcheon characterise this fear as follows: "[l]awyers…[are]…concerned that the reporting of ever increasing amounts of case law is potentially overwhelming and the belief is that the system of precedent is compromised by this phenomenon. As more and more cases are reported it becomes more difficult to locate relevant materials and there is a corresponding greater danger that important precedents will be overlooked. In short, the perennial complaint is that there is too much law".[7] I would contend, however, that this problem can be effectively overcome by recourse to printed reviews[8] and more sophisticated methods of legal research, particularly the ability to use Boolean searches effectively on legal databases.[9]

While the perceived problem of 'over reporting' should not trouble a legal researcher too much, there is a particularly grave problem in relation to law reporting in certain areas of the law, namely a shortage of reporting of family law cases. According to Nathaniel Lindley, those who compile law reports should take care to include (a) all cases which introduce, or appear to introduce, a new principle or a new rule, (b) all cases which materially modify an existing principle or rule, (c) all cases which settle, or materially tend to settle, a question upon which the law is doubtful, and (d) all cases which for any reason are peculiarly instructive.[10] While these guidelines are, in the main, adhered to in Irish reporting, family law suffers a great dearth of reporting as a result of the operation of the *in camera* rule. While Article 34(1) of the Constitution espouses the general principle that justice is to be administered in public, there are certain situations where the administration of justice in closed proceedings is deemed acceptable, including matrimonial matters and cases relating to minors.[11]

The *in camera* rule in family law has led to a myriad of problems for practitioners and researchers. Flockton notes that

"[a]s a consequence of the 'in camera' rule, information about how judges make decisions and what criteria they apply to different cases is gathered in a very haphazard way. Legal practitioners such as solicitors and barristers glean information about how judges may decide cases through anecdote and mutual exchange of information from their colleagues, sometimes outside the door of the court, about what a particular judge decided or is likely to decide in a particular case."[12]

In order to counteract the adverse affects of the *in camera* rule for both practitioners and academics, the

> "The *in camera* rule in family law has led to a myriad of problems for practitioners and researchers"

Family Law Reporting Pilot Project was established, and had as its aims the gathering of information about family law cases, the provision of information about family law to the public, and the provision of meaningful statistics on the family courts. In order to achieve these aims, a system was put in place whereby family law cases could be reported (under certain conditions), and a new publication (*The Family Law Information Bulletin*) would be distributed throughout the country – the pilot scheme published four editions, all of which are available on www.courts.ie. Unfortunately the project was discontinued after the initial one-year period (mainly due to concerns about the legality of the publication of these law reports), though it would appear to have been an exceptionally valuable scheme for both practitioners and researchers alike. As a result of its discontinuance, researchers are once again confined to the occasional law report on family law, trudging through unreported judgments (a quicker and easier job when done online), and relying on case notes in periodicals such as the Irish Family Law Journal. In order to rectify this situation, the Courts and Civil Liabilities Bill 2004 contains proposals that would allow for the publication of family law proceedings and decisions, provided the identities of the participants are not revealed. This move on behalf of the Minister for Justice, Equality and Law Reform should protect participants in family law cases (especially since the media ban will not be lifted), but does it constitute an effective solution to the study, research and practise of family law? According to Frank Martin, lecturer in family law in University College Cork,

"since there is no stenographer present at District and Circuit Court hearings of family law cases, academics and family practitioners are left in a significant vacuum as to judicial interpretations of various statutory provisions. What we have are rumours and anecdotes. No rule of law can survive on such a basis. The proposed changes are merely cosmetic. We need to see family law in action with all the requisite due process principles. The *in camera* rule is too absolutist and no longer necessary. It is outdated. Australia and New Zealand have removed some of the harshness of the rule, and we should follow their example."[13]

The second problematic area of researching Irish law is statute law. Legislation can be separated into two broad categories – primary and secondary legislation. O'Malley offers a concise definition of both as follows: "[p]rimary legislation consists of the statutes enacted by the Oireachtas and those carried over into Irish law in accordance with Article 50 of the Constitution. Secondary legislation consists of statutory instruments, bye-laws and similar rules made under the authority of a parent statute".[14] The main difficulty likely to be encountered when researching statute law in Ireland is a product of the country's turbulent legal history, which has resulted in there being six different categories of statute in force in Ireland, namely Acts of the Irish Parliaments pre-1880, Acts of the English Parliaments pre-1707, Acts of the British Parliament 1707-1800, Acts of the Parliament of Great Britain and Ireland 1801-1922, Acts of the Oireachtas of the Free State 1922-1937, and Acts of the Oireachtas 1937 to the present. As a result of the wide provenance of Acts in force in Ireland, ensuring certainty in relation to the statutory position on particular issues can be a laborious, and often overwhelming, process.

All is not lost however – not only are all current Statutes published yearly in the Statute books, but they also quickly appear online on the official website[15] and on a number of legal databases.[16] In addition to these resources, older acts have predominantly been collected in publications that should be to the fore of any good law library, of which the most useful is arguably *The Irish Statutes, Revised Edition AD 1310-1800*.[17] The various indexes to the Statutes are an exceptionally useful and time-efficient research tool in this area. These indexes come in the form of the *Index to the Statutes 1922-1985* and *Chronological Table of the Statutes 1922-1995*. The *Chronological Table* is divided into a number of parts, the most important of which are Parts I and V, which deal with the Public Acts since 1922 and the pre-1922 statutes respectively. Both parts indicate the ways in which the Acts have been affected by subsequent legislation and, in order to find out whether any sections have been affected by judicial decisions, one should consult either the statute citatory in the *Irish Current Law Statutes Annotated* (since 1993) or the various digests that have been published on a variety of areas of the law.[18] All these resources should greatly decrease the amount of time it takes to become certain of the legislative status of any area of the law, and alleviate the problems undoubtedly caused to legal researchers by the great volume of statute law in force in Ireland.

In addition there is a great number of aids to the interpretation of statute law – annotated legislation,[19] explanatory memoranda,[20] Dáil debates,[21] and academic commentary[22] can greatly aid both practitioner and student in their interpretation of statutory provisions, though it should be noted that these sources are *not* admissible as evidence on the meaning of pieces of legislation.

Secondary legislation is largely unproblematic and has a relationship of reliance with primary legislation analogous to the reliant relationship between primary legislation and the Constitution.[23] Secondary legislation is, in the main, made up of statutory instruments,[24] which have been published in annual collections every year since 1948. In addition to these annual publications there are two indexes of statutory instruments: *the Index*[25] and the *Index to Irish Statutory Instruments*.[26] Statutory Instruments are also available online via the usual electronic legal databases. The Rules of Court are also statutory instruments, and are published in a number of volumes, each of which is dedicated to a particular category of court.[27] Statutory Instruments, then, pose no particular difficulties for the legal researcher, notwithstanding the volume of their production.

The final trickster of the Irish common law system is what Ferguson refers to as '*ersatz* legislation',[28] though it is most often known as quasi-legislation. Essentially *ersatz* legislation is the "range of regulatory instruments…promulgated by various Governmental agencies, in particular Government departments".[29] While the creation of some of these regulations

and rules is provided for by Statute, this is by no means always the case. In many cases these rules are created in order to establish standards within a particular department or agency and carry with them a heavy expectation of compliance and, on occasion, disciplinary procedures for non-compliance. Three problems can be associated with this category of 'legislation', only one of which concerns us from a strictly research-based perspective: accessibility.[30] Because these rules are predominantly unpublished, it is practically impossible for those whose activities are governed by them to access them and know their nature. In addition the legal researcher is practically precluded from accessing, researching, interpreting and analysing them. There is little question of the need for the formalisation of the publication of this kind of 'legislation', though its abolition would in all likelihood be the preferred option of many. While the Courts have not condemned such non-statutory schemes outright,[31] there have been frequent expressions of discontent with this practice. Commenting on such 'legislation' Keane J. (as he then was) held as follows:

"The fact that such administrative decisions may be challenged, as here, by the invocation of the judicial review procedure is not, of itself, sufficient to justify…departure…from the salutary practice of ensuring that a scheme such as the exclusivity scheme in the present case is embodied in regulatory form, ensuring both legislative supervision and accessibility to the public, rather than be implemented by administrative decisions taken by the first respondent in private."[32]

It is, therefore, beyond doubt that the Irish legal system presents some mammoth challenges to legal researchers. However, these challenges are not insurmountable. Not only has the Government itself presented a legislative solution of some kind to the lack of law reporting on family law matters, but private enterprise has also provided the legal researcher with tools to overcome the majority of difficulties. Online databases greatly simplify the process of finding relevant precedents, placing the onus firmly on lawyers to acquire the skills necessary to utilise these facilities effectively. Any practitioner, academic or student who can carry out a basic search on LEXIS-NEXIS, for example, should have no fears about missing a vital point of law as a result of the proliferation of reports. Legal research skills offer no solution, however, to the difficulties inherent in researching *ersatz* or quasi legislation. The solution to that problem – not only in terms of research but also in terms of accessibility and democracy – must come from the willingness of Government departments to commit firmly to the constitutionally conferred sovereign right of the Oireachtas to be this country's sole legislative body.

Reading List:

Byrne & McCutcheon, *The Irish Legal System*, 4th Edition, (2001, Dublin; Butterworths)
Cross & Harris, *Precedent in English Law*, 4th Edition, (1991, Oxford; Clarendon Press)
Flockton, "*The Family Law Reporting Project*", (2003) 1 IJFL 17,
Mee, "*Taking Precedent Seriously*", (1993) ILT 254
O'Malley, *Sources of Law*, 2nd Edition, (2001, Dublin; Roundhall)

Websites:

www.bailii.org
www.courts.ie
www.irlii.org
www.irlgov.ie
www.gov.ie/oireachtas/frame.htm
www.lawreports.co.uk
www.lexis-nexis.com
www.westlaw.co.uk

References

1. Common law is generally taken to mean judge-made, or case, law as opposed to statute law. The origins of the term come from its beginnings as the ancient, unwritten law common to the whole of England and Wales after the Norman Conquest in 1066. The introduction of the common law in Ireland was incremental, but by 1394-1395 King's Bench courts had been established here. See generally Doolan, *Principles of Irish Law*, 2nd Edition, (1986, Dublin; Gill & MacMillan), pp.2-3.
2. See Byrne & McCutcheon, *The Irish Legal System*, 4th Edition, (2001, Dublin; Butterworths), p.324.
3. Literally this means 'let the decision stand', in other words previous decisions of superior courts on analogous questions of laws should be binding. As remarked by Cross and Harris "[j]udicial precedent has some persuasive effect almost everywhere because *stare decisis*…is a maxim of practically universal application. The peculiar feature of the [common law]doctrine is its strongly coercive nature…judges are sometimes obliged to follow a previous case although they have what would otherwise be good reasons for not doing so". (Cross & Harris, *Precedent in English Law*, 4th Edition, (1991, Oxford; Clarendon Press), p.3).
4. A hierarchal court structure was outlined in Articles 64-73 of the Constitution of Saorstát Éireann 1922 and elaborated upon in the Courts of Justice Act 1924. Articles 34-38 of Bunreacht na hÉireann generally reproduce the structure of the 1922 court system (though with a number of amendments), and the new courts system under the 1937 Constitution was formally established by the Courts (Supplemental Provisions) Act 1961.
5. See, for example, Mee, "Taking Precedent Seriously", (1993) ILT 254.
6. For further details see the website of the ICLR on http://www.lawreports.co.uk
7. Byrne & McCutcheon, *supra* No. 2, p. 331
8. For example, the *Annual Review of Irish Law, Irish Current Law Monthly*, and the case notes carried in general and specific law reviews.
9. See the fifth article in this series for instruction on this, and, in the interim period, the 'Help' facilities in the online databases should hone your abilities substantially.
10. These points were contained in a paper by Nathaniel Lindley (then a Lord of Appeal in Ordinary in the House of Lords, and later the Master of the Rolls (1897)), which W.T.S. Daniel QC attached to his proposal for the Council of Law Reporting in 1863. Carol Ellis, QC CBE (former Editor of the Law Reports) discusses this paper in "The History of the Incorporated Council of Law Reporting for England and Wales", available on www.lawreports.co.uk/history.htm (accessed January 13th, 2003).
11. Some situations where *in camera* hearings are permitted are described in section 45(1) of the Courts (Supplemental Provisions) Act 1961, and section 205 the Companies Act 1963.
12. Flockton, "The Family Law Reporting Project", (2003) 1 IJFL 17, 17.
13. Private correspondence.
14. O'Malley, *Sources of Law,* 2nd Edition, (2001, Dublin; Roundhall), p.55.
15. www.irishstatutebook.ie
16. www.bailii.org, www.lexis-nexis.com, www.westlaw.co.uk, www.irlii.org
17. (1995, Dublin; Roundhall).
18. A full list of these digests is included in O'Malley, *supra* No.13, p.79.
19. *Irish Current Law Statutes Annotated*
20. As a Bill passes through the Oireachtas it is usually accompanied by an explanatory memorandum which, although neither published in the statute books not admissible in court, can be of invaluable assistance. It has become common practise to publish these explanatory memoranda online along with the Bill or Act.
21. The debates of the Dáil and the Seanad are published daily and bound annually in two separate volumes. The Oireachtas debates are also available from the online Parliamentary Archive 1919-1997 at www.gov.ie/oireachtas/frame.htm, and since June 1997 there have been daily postings of Dáil debates on the government website (www.irlgov.ie).
22. The majority of periodicals carry notes on important new legislation, and commentary will also usually be found in the *Annual Review of Irish Law*.
23. In other words, it finds its source of validity (in purely positivistic terms) in the primary legislation to which it relates.
24. According to Section 1 of the Statutory Instruments Act, 1947 "the expression "statutory instrument" means an order, regulation, rule, scheme or bye-law made in exercise of a power conferred by statute".
25. This index is published by the Stationary Office and consists of several volumes covering, in total, 1922 – 1995.
26. Humphreys, *Index to Irish Statutory Instruments*, (1998, Dublin; Butterworths).
27. *Rules of the Superior Courts* (S.I. No. 15 of 1986), *Rules of the Circuit Court* (S.I. No. 179 of 1950), and *Rules of the District Court* (S.I. No. 93 of 1997).
28. Ferguson, "Legislation", in *Stair Memorial Encyclopaedia of the Laws of Scotland*, (1987) Vol. 22, para 224.
29. Byrne & McCutcheon, supra No. 2, p.410.
30. The two other problems I would identify with *ersatz* legislation are, firstly, the patently undemocratic nature of often unelected representatives creating rules intended to be binding and carrying with them a sanction, and secondly, the Constitutional imperative that the Oireachtas is the country's sole law-making body (see Article 15.2.1, Bunreacht na hÉireann).
31. See Hogan, "The Legal Status of Administrative Rules and Circulars" (1987) 22 Ir Jur 194.
32. *O'Neill v. Minister for Agriculture & Food* [1997] 2 ILRM 435; [1998] 1 IR 539.

Internships at Amnesty International's Irish Section – *Connecting the Local to the Global*

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Joan O'Connell is a recent graduate of University College Dublin, where she was awarded a Bachelor of Civil Law degree. She is currently completing an internship with Amnesty International's Irish Section, and in this piece she offers both an insight into the work of Amnesty International and into the reasons why leaving the beaten path of the professions can be a valuable experience for law graduates.

Amnesty International is a worldwide human rights movement that works to prevent grave governmental violations of fundamental human rights. Much of Amnesty International's work is focused on ensuring word-wide observance of human rights as set out in the Universal Declaration of Human Rights. The organisation takes a two-fold approach to fulfilling this aim – it promotes human rights generally, while also campaigning in relation to specific human rights abuses. Amnesty International is an impartial organisation, even to the extent of being completely independent of funding from any government, political organisations and religious creed.

There is little doubt that getting involved in such non-governmental organisations is of immense interest to all, though becoming an intern for Amnesty International carried an additional interest for me. Amnesty International is an organisation I have long admired, and which had in fact prompted me to pursue legal studies in university in the first place.

The Irish Section is staffed to a large degree by volunteers, and also offers internships as they arise. These internships can involve a range of responsibilities, from reporting to the Human Rights Education team or Student And Youth team, to working with the section's Policy Officer. I was placed with the Research and Campaigns team, as Research and Campaigns Assistant. My internship runs from October 2003 to March 2004. This presented me with the opportunity to see the full variety of work involved in the Irish Section, how such an organisation operates on a day-to-day basis, how the campaigns in particular are carried out, and in what way the Section decides which actions to concentrate its energies on.

Being a graduate of law, it came as something of a surprise to some of my friends and family members that I choose not to immediately pursue a career in one of the professions. What prompted me to take this alternative route, however, was my wish to explore the other avenues down which my degree qualification could take me. I sought to gain experience in a field of work which related directly to my knowledge of the law and which might be of benefit to me in pursuing further study or a career as a solicitor or barrister. As my internship draws to a close, I can say conclusively that the experience has been exceptionally beneficial and has, in fact, given me a greater deal of career focus.

The work of the Irish Section is driven to a significant degree by the International Secretariat, which carries out most of the research on, and reacts to, reported human rights abuses around the world. From this basis, the various national Sections decide which campaigns and network activities they will undertake in any given year. An example of a past worldwide Amnesty International campaign is the Take a Step to Stamp Out Torture campaign, and the next worldwide focus will be a Stop Violence Against Women (SVAW) campaign. In the run-up to the latter, the Irish Section not only receives information from the International Secretariat, but also collates its own information, and embarks on its planning for action, correspondence with governments, and engagement with other non-governmental organisations with whom they can work in partnership.

There were two significant decisions taken at the International Council Meeting (ICM) of all Amnesty sections in 2001 that allowed for Amnesty Ireland to conduct two of its most recent campaigns. Firstly, the organisation expanded its mandate to include work on economic, social, and cultural (ECR) rights in addition to its traditional work in the area of political rights. Secondly, it was agreed that Section offices could campaign on own-country issues. This led to the

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first Irish domestic campaign, Leadership Against Racism, in 2002, followed by the Mental Health Campaign in 2003. The latter campaign in particular was an excellent example of how this international organisation was able to work effectively on a local level. The Irish Section worked with interested domestic organisations, such as the National Disability Authority and Schizophrenia Ireland in carrying out its action. In ensuring the success of this campaign, the Research and Campaigns team contributed to mental health conferences, press conferences and report launches. It may be a long way from drafting affidavits, but it's certainly an insightful and, I feel, useful experience to take with me into my professional career.

Campaigns such as this one, that focus on rights-based approaches to legislation and on the provision of adequate health services, provide an example of Amnesty International's broader mission-changes in relation to economic, social and cultural rights. This reflects the global change in the evaporation of cold war ideologies and the universality of human rights in the world today, two areas I find exceptionally interesting, and even more interesting at the 'coal face'.

Related to this is the current worldwide joint Control Arms campaign by Amnesty International, International Action Network on Small Arms (IANSA) and Oxfam. As a member of the Research and Campaigns team, I have been heavily involved in disseminating information and assisting in local activities as part of a campaign for a global Arms Trade Treaty to bring the trade in weapons under control – another area of work that only very few experience when they progress directly to the professions. In addition, the Section's other departments and teams participate in activities on the Control Arms campaign, such as the student and youth "die-in" on the plaza of the Central Bank of Ireland, which took place on the 25th of January, 2004.

And so, from my little desk in Temple Bar, it is heartening to know that, during my internship, my various assignments - from envelope stuffing to attending conferences - have contributed to an overall movement in preventing human rights violations. It has also been wonderful to take a break from law libraries, examinations, and student life!

> "It may be a long way from drafting affidavits, but it's certainly an insightful and, I feel, useful experience to take with me into my professional career"

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Book Reviews

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This section is devoted to reviewing the latest books of interest to the legal profession.

Publishers or authors who would like to have their books reviewed in this section should contact Patricia McDonnell at ilr1@eircom.net

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Editor: Eoin O'Dell
ISSN: 0332-3250
Price: €98

The twenty-fourth volume of the Dublin University Law Journal, edited by Eoin O'Dell, offers a collection of essays and shorter notes of a quality and range that practitioners, academics and students alike have come to expect from this periodical. In as much as any general journal is themed, this volume offers a number of pieces with two common threads: the rights of the child and constitutional theory. *The Sinnott* ([2001] 2 IR 545) and *TD* ([2001] IESC 86) cases feature heavily in pieces by Fergus Ryan[1] and Conor O'Mahony.[2]

Ryan considers the first important question in any consideration of children's rights – who is a child? His article is based substantively on the decision in Sinnott, and is highly critical of the Supreme Court definition of a 'child'. In this case the Court held that the right to education of a child, enshrined in Article 42 of the Constitution, ends at the time that the child attains the age of 18. This decision, based clearly on age rather than need considerations, is described by Ryan as "excessively literal and restrictive",[3] and fails to appreciate the reality for those who suffer from intellectual disabilities. Ryan clearly and persuasively argues that not only is there no constitutional basis for this decision, but that the appropriate basis for the determination of when the State's obligation to provide education ends is that of need – in other words that adulthood should be conceived as a functional rather than chronological condition. This article is stylistically and substantively wonderful, and offers a concise and convincing argument with the potential to be used successfully before the courts.

While Ryan concentrates on the definition of childhood, O'Mahony's piece considers the remedies available to an applicant who successfully argues that their right to education has been breached. The central question of O'Mahony's analysis is whether or not it is right for the judiciary to dictate policy matters to the Executive by granting injunctive relief in these cases. The author considers all three remedies available to the successful applicant – damages, declaratory relief and injunctive relief – although his main focus is on injunctive relief and its potential conflict with the doctrine of the separation of powers. The most forceful argument in this article can be found in O'Mahony's consideration of the formulation of policy and expenditure of public resources (pp. 85,86) where he draws heavily on the writings of Fabre to refute Hardiman J.'s dicta in *TD*. The main thrust of Hardiman J.'s dicta is that the judiciary are both constitutionally enjoined and incapable of making executive policy decision, but O'Mahony correctly points out that "[t]he granting of injunctions against the State is necessary if the constitutional right to education is to be fully justiciable" (p. 86). The chronology of both O'Mahony's and Fabre's theses is that the separation of powers has, as one of its main aims, the maintenance of democracy, that the right to education is a fundamental part of democracy, and that injunctions are vital to ensure the effectiveness of this right where the State, as in Ireland, fails in its duty to provide this education. While generally supportive of injunctive relief in such cases, O'Mahony also notes that an alternative remedy should be introduced because the high threshold that must be achieved in order to gain injunctive relief results in many applicants being left with no effective remedy.

These dual themes of children's rights and the separation of powers are further advanced in this volume with a short piece by Ursula Kilkelly,[4] and very capable reviews of Morgan's *A Judgment too Far? Judicial Activism and the Constitution* (reviewed by William Binchy) and Kilkelly's *The Child and the European Convention on Human Rights* (reviewed by Lawrence LeBlanc).

Not only is this volume a vital contribution to academic discourse on injunctive relief, the right to education and the separation of powers, but it also contains very capable pieces by well-known members of the Irish academia, with the contributions of Hilary Delany and Máire Ní Shúilleabháin being worthy of particular note. In short, Volume 24 of this ever-impressive periodical represents a useful, contemporary and capable contribution to Irish legal discourse.

Fiona de Londras, BCL, LLM (NUI),
Lecturer in Law,
Griffith College Dublin, Dublin, Ireland.

1. Ryan, 'Disability and the Right to Education: Defining the Constitutional Child', (2002) 24 D.U.L.J. 96.
2. O'Mahony, 'Education, Remedies and the Separation of Powers', (2002) 24 D.U.L.J. 57.
3. Ryan, *supra* No. 1, p. 97.
4. Kilkelly, 'Children's Rights – *DG v. Ireland*: Protecting the Rights of Children at Risk – Lazy Government and Unruly Curts', (2002) 24 D.U.L.J. 268.

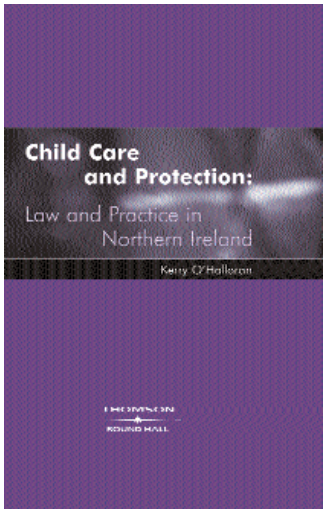
Competition Winners

Venue: Four Jurisdictions Family Law Conference, Belfast Hilton.
Thomson Roundhall and Jordan Publishing kindly donated the prizes.

Ms Dara Montague, Solicitor, Enniskillen, Co Fermanagh won a copy of *Child Care and Protection: Law and Practice in Northern Ireland* (Thomson Roundhall), and Ms Diane Coulter, Solicitor, Kilkeel, Co Down won a copy of *Irish Family Legislation Handbook* (Jordan Publishing).

Child Care and Protection: Law and Practice in Northern Ireland

Published by: Thomson Roundhall
Author: Kerry O'Halloran
ISBN: 1-85800-366-0
Price: €184



This book is one of a number written by Kerry O'Halloran, a qualified barrister and social worker, currently employed as Assistant Director (research) in the Centre for Voluntary Action Studies, School of Policy Studies at the University of Ulster. As with his earlier work it is a well-researched, comprehensive, succinct document.

The book is divided into four sections. Part I provides a good introduction to the subject and overview of the court structure. Part II contextualises the subject and includes a useful table of cases and legislation. In Parts III and IV he then reviews the principles of this area of law, and outlines the statutory orders that may be made by the Court.

This is a useful handbook, particularly as it refers to case law and provisions specific to Northern Ireland, whereas other well-known texts on this subject deal exclusively with English case law and regulations, which clearly differ from those applicable in this jurisdiction. This volume not only features the clear expression and analysis characteristic of O'Halloran's work, but also has the practical advantage of being easier to transport than its bulkier counterparts.

It is not however quite as detailed a guide as the practitioner might wish and has the potential to be slightly misleading on this basis. In Chapter 12, section 12.5.4., for example, the author refers to certain categories of children who are excluded from eligibility for placement in secure accommodation under the provisions of the Children (Secure Accommodation) Regulations (NI) 1996, defining them as "any young person aged between 16 and 21 years who is being provided with accommodation by a Trust…"

This point is neither elaborated on nor cross referenced in the footnotes, but on examination of the regulations it appears that this regulation may only apply to children provided with accommodation by the Trust under Part VII of the Children (NI) Order 1995 in a 'children's' home' and not for example children subject to a care order with a care plan which provides for the child to be placed with a parent or other family member. I highlight this point only as a caveat, because overall I found this book to be an extremely useful tool in this constantly evolving area of child-care law.

Overall I would recommend Child Care and Protection: Law and Practice in Northern Ireland as a good introductory guide for the novice and a useful aid for the experienced practitioner.

Ms Michelle McDonnell,
Solicitor, Patrick Fahy & Co, Solicitors,
Omagh, Co Tyrone, Northern Ireland.

Web Review

Cian C Murphy
is a BCL II student in University College Cork. He has served as both Recording Secretary and Webmaster of the U.C.C. Law Society.

Web Review is compiled by Cian Murphy, who is completing his BCL in University College Cork. The section is devoted to reviewing law related websites and will carry sometimes serious, sometimes light-hearted but always honest reviews of legal web pages. Cian aims to analyse, inform, share good humour and encourage enhanced online activity and creativity within the legal community. Submit your comments, suggestions or website for review by email to cianmurf@eircom.net

While my mission statement for the first issue of the Independent Law Review was quite clear, the two sites under the microscope this month are quite different. The first of these two British sites, Consilio, has strong links with the Cork Online Law Review, and so it is there that our browser is first pointed…

Consilio Online Law Magazine - www.spr-consilio.com

Upon first visiting this online magazine, the question which springs to mind is "what exactly is Consilio?" The homepage has more links than the world's oldest chain letter, and causes twice as much confusion. The screen is littered with news stories, articles and advertisements, without much indication as to where one should begin.

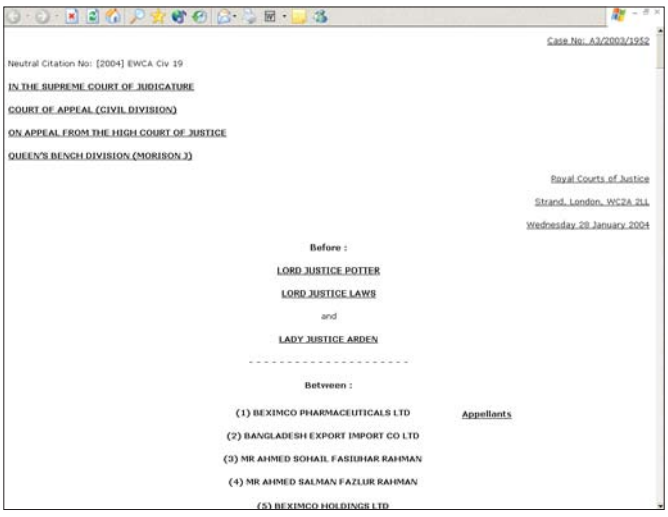
The purpose of the site becomes somewhat clearer when the befuddled visitor clicks the link entitled 'Semple Piggot Rochez'. This link springs forth a new browser window, welcoming the visitor to 'the foremost provider of internet supported law training programmes, and founder of the world's first online law degree'. It is this that belies the true nature of Consilio – for if www.spr-law.com is the online law school, then Consilio is its newsletter, notice board, and law review, all bundled into one.

This insight gained, and not wishing to avail of an online LLM (finishing one's offline BCL first seems like a good career move!), it is possible to return to Consilio and properly explore its contents. Trying out some of the links on the left-hand side navigation bar leads to the realisation that some of them are inaccessible to the general public - most notably those relating to SPR Law courses, while others are completely frivolous – such as the e-card section.

These criticisms aside, there is much genuinely good content available on the site. This comes in three main forms – law articles and essays as would be published in a traditional journal, up to date legal news, mainly from the British jurisdiction, and up to date law reports.

The latter would appear to be the jewel in the crown of the site, as at the time of writing, reports were available for cases heard mere days before. Such prompt reporting makes Consilio a great tool for practitioners and students hoping to keep up to date with the most recent developments in the law. While other sites such as Bailii and Irlii (to be reviewed in future editions) also offer online access to law reports, this up to the minute accuracy is important in the dynamic legal world.

Having parted with your email address, you will be sent a username and password for the members' area. Unfortunately, having tried more than once to register for this area, no such access information was forthcoming to your correspondent. This noted, some excerpts from the SPR online textbooks are available through Consilio. Current favourites on the site include 'Offer and Acceptance, Part 2', and 'Introduction to the Law of Evidence'. While these short extracts are clearly well written and published, two shortcomings spring to mind.



In the first instance, it is the obvious point that the majority of these documents are published with the needs of the practitioner and students in mind. Secondly, it is worth bearing in mind that the texts are primarily 'teasers' – akin to trailers for a movie, and only give the viewer a taste of what the full texts, available at a price, would be like. These two caveats aside, the excerpts are worth a look, for curiosity's sake if nothing else.

Of equal novel value is the technologically primitive, but effective, message board area in the site. It seems to be visited by students and professionals, with varying frequency, and while not a place to seek legal advice to build a case on, it might certainly throw up a few ideas for those facing a blank essay sheet.

The technological simplicity of the discussion fora is typical of Consilio's major flaw as an online publication. As a site whose content is fast outgrowing its design architecture, there's simply too much information in the one place, without an efficient indexing or archiving system. This makes window shopping and casual browsing very interesting, but effective use of the magazine as a resource practically impossible. If the site is to continue to grow, it needs to be better tended to.

Consilio, therefore, is a site with much potential, but at the moment, is suffering from under-administration. While its strong points are many and varied, its lack of an information hierarchy makes return visits, at present, unlikely.

Law On The Web - www.lawontheweb.co.uk

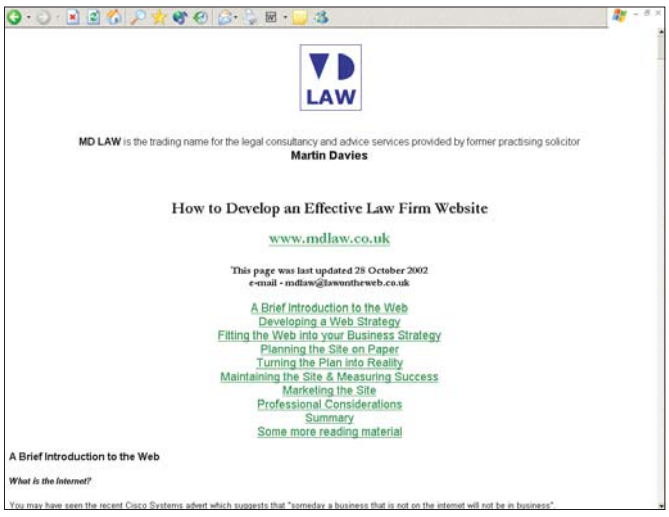
Fisher-Price don't do law websites, but if they did, they would probably be much like *Law On The Web*. Whether "the UK public's favourite gateway to a legal solution" will list this amongst its list of accolades and reviews remains to be seen. Its façade is simple, text structured by HTML tables and big clunky images. That this adds to the experience, rather than detracts from it, is a credit to the site designer.

Fortunately, compared to Consilio, Law On The Web is relatively easy to navigate. Not only can you choose between frames and no-frames versions, but an A-Z listing of all of its content makes finding your way around a walk in the park. The listing itself reveals the diverse nature of the legal spectrum covered – from an explanation of dispute resolution by mediation, to an episode-by-episode guide to Ally McBeal!

The site contains section after section of easy to understand, jargon-free legal facts. It is most helpful in the law of tort, providing information on personal injury claims dos and don'ts, but it's also quite informative in the areas of family, tax and property law.

The site's tagline however, is rather apt – for while a provider of legal know-how, it is first and foremost a directory of the fastest, most efficient, and often cheapest way to obtain advice. Run by Martin Davies, a solicitor, it is a classic example of a no-nonsense site that knows what it's trying to do, and how it intends to do it. In addition, the 'Us' section of the website contains links to detailed and well-informed advice about how to launch a legal practice online. The comprehensive seminar notes are a must-read for any practitioner seeking to maintain an online presence for their company. True to form, it is as accessible to an IT-ignorant lawyer as the rest of the site is to an IT expert not at home in the legal world. With a comprehensive glossary, and web links a plenty, it could only be easier if he built your site for you himself.

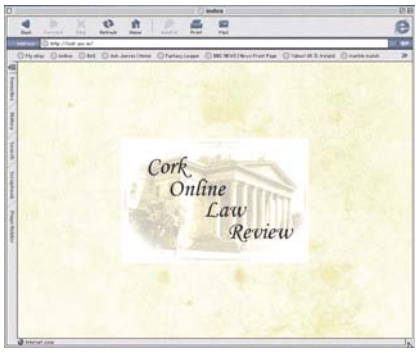
MD Law, the management company that owns Law On the Web, deserves its status on the Top 25 British Legal Hitlist. Though not of great academic use to those of us on this side of the Irish Sea, its straightforward approach to the law serves as a lesson to all who've ever written an article, essay or letter to a client and its directory should help someone seeking advice in a hurry! All in all, Law On The Web is a site to bookmark, not just visit.



Web News

Cork Online Law Review 3rd edition

Information Commissioner and Ombudsman Emily O'Reilly will launch the much-anticipated third edition of the Cork Online Law Review on 1st March. The Launch will take place in the Aula Maxima in University College Cork, home of the Review. As Ireland's only student-run, student-written online law review, this exciting project has gone from strength to strength in the three years since its inception. The third edition is accompanied by a vibrant new-look website which will feature a fresh, contemporary layout and a search engine. The editors of C.O.L.R. are confident that this format will provide greater accessibility for law students and practitioners to what is already a hugely popular site. Moreover, the third edition promises to encapsulate a more diverse range of legal subjects than ever before while maintaining the award-winning standard of essays



for which C.O.L.R. has gained international recognition. This year's edition of the review will include the winners of the prestigious Southern Law Association, Matheson Ormsby Prentice and Bank of Ireland Gold Medal essay awards.

Cork Online Law Review may be viewed at colr.ucc.ie

Web News

- Has your company launched a new website recently?
- Have you expanded or re-launched an existing website?
- Have you developed new sections or pages to your website?
- Has your company's website won any awards?

Why not tell our readers about it?

To announce your Web News contact Patricia McDonnell on ilr1@eircom.net or +353 (0)44 33341.

Web Directory

Make sure your company's website doesn't become a cyber-needle in a virtual haystack! Each web directory listing includes your company name, web address and 25 words of descriptive text featured in 6 issues for €125 + VAT. For further information please contact Patricia McDonnell at Independent Law Review on Tel: +353 (0)44 33341 or Email: ilr1@eircom.net

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Griffith College Dublin • www.gcd.ie

The GCD website contains information for both current and prospective students. Details of our highly successful preparatory courses for the New York Bar, FE1 and King's Inns entrance examinations are available via the 'Professional Law School' section, accessed from the homepage.

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A website provides little or no benefit if no one gets the chance to hear about it. The *Independent Law Review* Web Directory will provide easy access to your website address from an alphabetical index, giving a brief description of its contents and services.

For further information, please contact Patricia at Independent Law Review on Tel: +353 (0)44 33341 or Email: ilr1@eircom.net

Conference News

Are you organising an annual meeting or conference which you would like to tell our readers about? Or would you like to write a report on a meeting or conference of particular interest to members of the legal community?
If so, contact Patricia McDonnell at Independent Law Review on Tel/Fax: 00 353 (0)44 333 41 or by Email: ilr1@eircom.net

Second Annual Conference on Law and the Environment

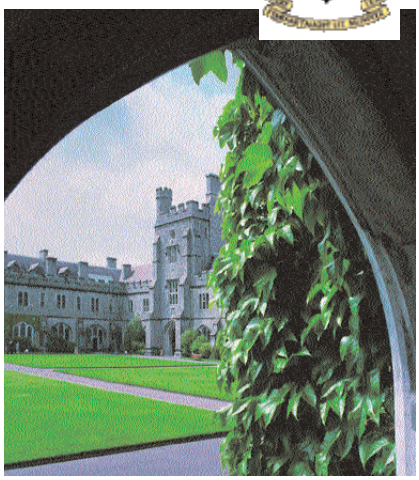
PREVIEW **Venue:** Cork, Ireland. **Date:** April 15, 2004.

The Faculty of Law, University College Cork, will host the second annual Law and the Environment conference on Thursday, 15th April 2004. This event builds on the success of a similar conference held in 2003, at which there were over one hundred lawyers and other professionals in attendance to hear from a panel of expert speakers in the area. This one-day conference is aimed at practising and academic lawyers, local authority and other regulators, environmental interest groups, environmental compliance officers and a wide range of other environmental professionals.

With the assistance of the Higher Education Authority, UCC's Law Faculty is currently developing an active research group in the area of Environmental Law which is fast becoming a recognised centre of excellence in this area, and which continues to build strong links with the legal professions, regulators, industry and environmental interest groups. The annual conference provides an opportunity for the dissemination of information to Irish environmental professionals on the latest legislative and judicial developments, research results and evolving best practice in the area of Environmental Law.

Confirmed speakers include:

- Dr Matt Crowe, Office of Environmental Enforcement, Environmental Protection Agency, 'The Establishment and Role of the Office of Environmental Enforcement of the EPA';
- Tom Flynn BL, 'Recent and Future Developments in Irish and European Waste Law';
- Eamon Galligan SC, 'Procedural Restrictions on Access to the Courts under Planning and Environmental Law';
- Duncan Laurence, Environmental Consultant, Duncan Laurence Environmental, 'Protection of the Environment Act 2003';
- Conor Linehan, William Fry Solicitors, 'Division of Functions between the EPA and Planning Authorities in Relation to Pollution Control of Licensable Facilities';
- Finola McCarthy, Ronan Daly Jermyn Solicitors, 'Contaminated Land Issues in Ireland';
- Owen McIntyre, Faculty of Law, UCC, 'The EC Directive on Environmental Liability: Substantive Content and Practical Implications';
- Dr Aine Ryall, Faculty of Law, UCC, 'Implications of the European Convention on Human Rights Act 2003 for Irish Environmental Law'.



For further information please contact:
Conference Convenor: Mr Owen McIntyre, Law Faculty, UCC
Email: o.mcintyre@ucc.ie
Tel: 021 4902090
Conference Secretary: Lucette Murray, c/o Law Faculty, UCC
Email: lucette@iol.ie
Tel: 021 4293918

Spring Conference and AGM of the European Criminal Bar Association

PREVIEW **Venue:** Paris, France. **Date:** April 30 - May 1, 2004.

The European Criminal Bar Association (ECBA) will be holding its Spring conference and AGM from the 30th April to the 1st May, 2004 at The Old Library, Palais du Justice, Paris, France.

The conference coincides with the historical event of ten new countries joining the EU. The conference theme is the European Arrest Warrant and the first experiences of the new regime. This will include an overview of the European Arrest Warrant from the Prosecution and judicial perspective plus a practical panel discussion of the first experiences of defence practitioners with the European Arrest Warrant. There will also be contributions on the recently proposed European Evidence Warrant and extradition and mutual assistance between the US and the EU.

There will be plenty of opportunity to socialise with colleagues from throughout Europe. The conference will start on Friday with a tour of the Palais du Justice and a lecture from a senior judge, including a brief background into criminal law in France and the Palais du Justice. This will be followed by a reception at The Old Library in the Palais du Justice to welcome all the delegates and celebrate the expansion of the European Union.

Since its foundation in 1997, the European Criminal Bar Association (ECBA) has become the pre-eminent independent organisation of specialist defence lawyers in all Council of Europe Countries. The ECBA aims to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons.

The ECBA consists of specialist defence lawyers and membership is open to all lawyers, whether practising or in academic life, who support those aims. The Association holds conferences twice a year, in Spring and Autumn, during which members and non-members meet and discuss the latest developments in European Criminal Law.

Further details of membership and the work and conferences of the ECBA can be found on the website at www.ecba.org

Third Corporate Criminal Liability Conference

PREVIEW

Venue: Sante Fe, New Mexico, USA. **Date:** September 18-19, 2004.

Criminal Law is increasingly being harmonised internationally, and it is vital for practitioners not only to have an appreciation of the situation in other jurisdictions but to have strong professional contact with international practitioners. Recognising this, Irish firms may wish to take the opportunity of participating in a forthcoming Conference on Corporate Criminal Liability being co-hosted by Irish, UK and US law firms. This year's conference is the third in the series, the first will be held in London and the second in Dublin. This year the conference is being held in Sante Fe, New Mexico. Speakers will be drawn from all three jurisdictions. There will be contributions from civil law countries also. The conference will include seminars on extradition, white-collar crime, terrorism and the differences between common and civil law procedure. There will also be a half-day devoted to the International Criminal Court and the War Crimes Tribunals.

Any Irish practitioner interested in travelling can contact James MacGuill on james.macguill@macguill.ie for further information.

Booking Information will soon be available for the Irish Association of Law Teachers' Annual Conference

Venue: Derry, Northern Ireland.
Date: April 2-4, 2004.

For further information contact:
Dr Fergus Ryan,
(President of the IALT),
Dublin Institute of Technology,
Aungier Street, Dublin 2,
Ireland.
Tel: +353-1-402-3016
Email: fergus.ryan@dit.ie

Belfast Solicitors' Association Annual Dinner Dance

Venue: Belfast, Ireland. **Date:** January 17, 2004.

The Belfast Solicitors' Association annual Dinner Dance was held on Saturday 17 January 2004 at the Ramada Hotel, Shaw's Bridge, Belfast. The event, which is the highlight of the Association's social calendar, was attended by over 400 of its membership, friends and invited guests. The Chairman, Martin Mallon, who hosted the pre-dinner drinks reception and dinner, welcomed the Association's guests who included the Recorder of Belfast, His Honour Judge Anthony Hart QC, District Judge Andrew Wells, the President of the Law Society of Northern Ireland, John Pinkerton, the President of the Dublin Solicitors' Bar Association, John O'Connor, the President of the Liverpool Law Society, James Benson, the Chairman of the Bar Council of Northern Ireland, Peter Cush BL, the Chairperson of The Northern Ireland Young Solicitors' Association, Miss Nuala Sheeran and the Director of the Institute of Professional Legal Studies, Mrs Anne Fenton. Music was provided by The Booze Brothers and the event was organised by the Honorary Secretary, Gavin Patterson. An excellent time was had by all.

The Belfast Solicitors' Association Annual General Meeting at which the office bearers and committee are elected and reports on the year's activities are presented will take place in November 2004 (date tba).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Photographs

1. **The Recorder of Belfast, His Honour Judge Anthony Hart QC, the Director of the Institute of Professional Legal Studies, Mrs Anne Fenton, the Chairperson of The Northern Ireland Young Solicitors' Association, Miss Nuala Sheeran and the Chairman of the Belfast Solicitors' Association, Martin Mallon.**

2. **The Chairman of the Bar Council of Northern Ireland, Peter Cush BL, the Chairman of the Belfast Solicitors' Association, Martin Mallon and District Judge Andrew Wells.**

3. **The President of the Law Society of Northern Ireland, John Pinkerton, the President of the Liverpool Law Society, James Benson, the Chairman of the Belfast Solicitors' Association, Martin Mallon and the President of the Dublin Solicitors' Bar Association, John O'Connor.**

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2nd Annual Conference on Law and the Environment

Thursday, 15th April 2004

The Faculty of Law, University College Cork

This one-day conference is aimed at practising and academic lawyers, local authority and other regulators, environmental interest groups, environmental compliance officers and a wide range of other environmental professionals.

The annual conference provides an opportunity for the dissemination of information to Irish environmental professionals on the latest legislative and judicial developments, research results and evolving best practice in the area of Environmental Law.

Confirmed speakers include:

- Eamon Galligan SC
- Dr Matt Crowe
- Tom Flynn BL
- Duncan Laurence
- Conor Linehan
- Finola McCarthy
- Owen McIntyre
- Dr Aine Ryall

Cost: Seminar, including lunch, tea and coffee: €250 (Academics / NGOs: €150) - Two delegates: €400

For further information please contact:
Conference Convenor: Mr Owen McIntyre,
Law Faculty, UCC
Email: o.mcintyre@ucc.ie • Tel: 021 4902090
Conference Secretary: Lucette Murray,
c/o Law Faculty, UCC
Email: lucette@iol.ie • Tel: 021 4293918
Further details from: www.ucc.ie/law/events

I.A.L.T. Annual Conference 2004

The City Hotel, Derry, Northern Ireland
April 2nd-4th, 2004

Call for Papers

This event will mark the 25th Anniversary of the Irish Association of Law Teachers.

While papers on any legal or socio-legal topic are welcome, (from members and non-members alike) the theme of this year's conference is "Law in the Modern World: New Problems, New Solutions". In the 25 years of the Association, much has changed in the landscape of law and legal systems. Law Reform, codification and consolidation, as well as fresh caselaw, have transformed legal rules and legal systems both at home and abroad, sometimes beyond recognition.

In other areas, however, legal change has been more muted, with the result that some legal rules appropriate to former times may sit uneasily with the realities of the 21st century. Thus, the more established legal disciplines (such as property law or equity) may equally be the subject of a worthy paper, given that the rules of former times still apply in many cases to modern property transactions and contracts. How do these rules cater to the realities of the 21st century?

This conference thus seeks to examine, under a variety of headings, the role of law and laws in our modern, complex and heterogeneous society, both at home and abroad.

Papers are welcome on all legal topics, but in particular in the following areas:

- Law and Information Technology (incl. e-commerce and m-commerce)
- Human Reproduction, Genetics, Biotechnology and Law
- Criminal Law
- Family Law, Marriage Law and Child Law
- Media (especially new media) and the Law
- Cultural Diversity and the Law
- Human Rights Law

Suggestions for papers should be sent to:
Dr. Fergus Ryan, (President of the IALT),
Dublin Institute of Technology, Aungier Street, Dublin 2, Ireland
Tel: +353-1-402-3016 or by e-mail to: fergus.ryan@dit.ie

Recruitment

This section will be read by more than 4000 people in the legal profession throughout Ireland.
To promote your recruitment services or to advertise a vacancy, please contact Patricia McDonnell on Tel: +353 (0)44 33341 or Email: ilr1@eircom.net

Deadlines:

May/June	*10 April*
July/August	*10 June*
September/October	*10 August*
November/December	*10 October*
January/February	*10 December*
March/April	*10 February*

Diary of Events

If you would like to have an event listed in the Independent Law Review Diary please send the relevant information to Patricia McDonnell on Email ilr1@eircom.net or Fax: +353 (0)44 33341 by April 2nd 2004.

2004

March

New

Family Law Conference
March 4, 2004; Dublin, Ireland.
Info: CPD Unit, Law School, Law Society, Blackhall Place, Dublin 7, Ireland.
Tel: 01 672 4802 Fax: 01 672 4803
Email: lawschool@lawsociety.ie

Through the Looking Glass: Socio-Economic Rights and Positive Duties
March 10, 2004; Belfast, Northern Ireland.
Info: Dr Heather Conway, School of Law, Queens University Belfast, 28 University Square, Belfast, BT7 1NN, Northern Ireland.
Tel: 028 9027 3868 or
Email: h.conway@qub.ac.uk

The American Constitution, the Supreme Court, and the Death Penalty
March 11, 2004; Cork, Ireland.
Info: Mary Donnelly, Lecturer in Law, Law Department, University College Cork.
Tel: +353-21-490 2857
Fax: +353-21-427 0690
Email: m.donnelly@ucc.ie

Unlawful Sexual Harassment in the American Workplace
March 11, 2004; Cork, Ireland.
Info: Mary Donnelly, Lecturer in Law, Law Department, University College Cork.
Tel: +353-21-490 2857
Fax: +353-21-427 0690
Email: m.donnelly@ucc.ie

New

Further Advanced Advocacy Course for Solicitors from 3 Jurisdictions (Scotland & Ireland, North & South)
March 11-14, 2004; Newcastle, Co. Down, Northern Ireland.
Info: Kevin Delaney, Law Society (NI), 98 Victoria Street, Belfast, Northern Ireland.
Tel: 02890 231614
Email: info@lawsoc-ni.org

New

NIYSA Lecture Costs in Personal Injury Cases
March 12, 2004; Belfast, Northern Ireland.
Info: Catherine Calvert, Secretary NIYSA, c/o Samuel D Crawford & Co, 105-109 Victoria Street, Belfast, BT1 4PD, Northern Ireland.
Tel: 028 9059 5300,
Fax: 02890 59 5301.
Email: catherine@caldwellwarner.co.uk

The Implementation of EU Criminal Justice Measures in Ireland: Implications for Democratic Legitimacy
March 24, 2004; Belfast, Northern Ireland.
Info: Ms Katie Quinn, School of Law, Queens University Belfast, 28 University Square, Belfast, BT7 1NN, Northern Ireland.
Tel: 028 9027 3370 or
Email: c.m.quinn@qub.ac.uk

Tribunals of Inquiry
March 25, 2004; Dublin, Ireland.
Info: Mary MacMurrough Murphy, B.L.
Tel: 01 817 4828.

NI Law Society Conference 2004
March 26-28, 2004; Peebles, Scotland.
Info: The Law Society of Northern Ireland, Law Society House, 98 Victoria Street, Belfast, BT1 3JZ, Northern Ireland.
Tel: +44 (0)28 90 231 614
Website: www.lawsoc-ni.org

April

New

NIYSA Lecture Practice Management Standards
April 2, 2004; Belfast, Northern Ireland.
Info: Catherine Calvert, Secretary NIYSA, c/o Samuel D Crawford & Co, 105-109 Victoria Street, Belfast, BT1 4PD, Northern Ireland.
Tel: 028 9059 5300, Fax: 02890 59 5301
Email: catherine@caldwellwarner.co.uk

Irish Association of Law Teachers Annual Conference 2004
April 2-4, 2004; Derry, Northern Ireland.
Info: Dr. Fergus Ryan, President I.A.L.T., Dublin Institute of Technology, Aungier Street, Dublin 2, Ireland.
Email: fergus.ryan@dit.ie
Website: www.ialt.org

New

Easter Disco
April 8, 2004; Belfast, Northern Ireland.
Info: Catherine Calvert, Secretary NIYSA, c/o Samuel D Crawford & Co, 105-109 Victoria Street, Belfast, BT1 4PD, Northern Ireland.
Tel: 028 9059 5300
Email: catherine@caldwellwarner.co.uk

New

Environmental Law 2004
April 15, 2004; Cork, Ireland.
Info: Owen McIntyre, Faculty of Law, University College Cork, Cork, Ireland.
Email: o.mcintyre@ucc.ie
Website: www.ucc.ie

The Law of Murder: Myth and Meaning
April 21, 2004; Belfast, Northern Ireland.
Info: Dr Heather Conway, School of Law, Queens University Belfast, 28 University Square, Belfast, BT7 1NN, Northern Ireland.
Tel: 028 9027 3868 or
Email: h.conway@qub.ac.uk

'Let 'em Rot': Understanding Punitive (and non-Punitive) Attitudes Among the Public
April 22, 2004; Belfast, Northern Ireland.
Info: Ms Katie Quinn, School of Law, Queens University Belfast, 28 University Square, Belfast, BT7 1NN, Northern Ireland.
Tel: 028 9027 3370 or
Email: c.m.quinn@qub.ac.uk

New

Sexual Violence: The Way Forward: Therapeutic and Legal Perspectives
April 22-23, 2004; Cork, Ireland.
Info: Sexual Violence Centre Cork, 5 Camden Place, Cork, Ireland.
Tel: 021 4505736
Fax: 021 4505736
Email: info@sexualviolence.ie
Website: www.sexualviolence.ie or www.cork-rapecrisis.ie

New

Spring Conference & AGM of the European Criminal Bar Association
April 30-May 1, 2004; Paris, France.
Info: www.ecba.org

May

New

eLaw: Commercial Transactions, Data Protection and the Internet
May 7, 2004; Cork, Ireland.
Info: University College Cork Law Faculty
Email: d.whelan@ucc.ie

NIYSA 2004 Conference
May 13-16, 2004; Newcastle-upon-Tyne, UK.
Info: Catherine Calvert, Secretary NIYSA, c/o Samuel D Crawford & Co, 105-109 Victoria Street, Belfast, BT1 4PD, Northern Ireland.
Tel: 028 9059 5300.

Law and Society Association Annual Meeting
May 27-30, 2004; Chicago, USA.
Info: Law and Society Association Annual Meeting, 205 Hampshire House, University of Massachusetts, 131 County Circle, Amherst, MA 01003-9257, USA.
Tel: +1 413 545 4617
Fax: +1 413 577 3194
Website: www.lawandsociety.org

June

New

Fédération Internationale pour le Droit Européen (FIDE) Congress 2004
June 2-5, 2004; Dublin, Ireland.
Info: Irish Society for European Law, Honorary Secretary, Patricia O'Sullivan Lacy
Email: osullivan@lacy.com

New

Solicitors' Continuous Professional Development Seminar
June 4, 2004; Crumlin, Northern Ireland.
Info: Glenny Whitley, McKelvey Training & Consulting, 140 Malone Road, Belfast, BT9 5LH, Northern Ireland.
Tel: 028 9066 3263
Email: glenny.whitley@mckelveytraining.com
Website: www.mckelveytraining.com

New

Solicitors' Continuous Professional Development Seminar
June 11, 2004; Crumlin, Northern Ireland.
Info: Glenny Whitley, McKelvey Training & Consulting, 140 Malone Road, Belfast, BT9 5LH, Northern Ireland.
Tel: 028 9066 3263
Email: glenny.whitley@mckelveytraining.com
Website: www.mckelveytraining.com

New

35th Annual Study Conference British and Irish Association of Law Librarians Conference
June 11-13, 2004; Edinburgh, Scotland.
Info: Sovereign Conference, Secure Holdings Business Centre, Studley Road, Redditch, Worcestershire, B98 7LG, England.
Tel: +44 (0)1527 518777
Fax: +44 (0)1527 518718
Email: association@sovereignconference.co.uk

July

NIYSA AGM
July 31, 2004; Belfast, Northern Ireland.
Info: Barbara Johnston, Secretary, NIYSA, c/o Hewitt & Gilpin Solicitors, 14-16 James Street South, Belfast, Northern Ireland.

September

New

Annual Conference of Society of Legal Scholars
September 13-16, 2004; Sheffield, England.
Info: Mrs Sally Thomson, Administrative Secretary, The Society of Legal Scholars, School of Law, University of Southampton, Highfield, Southampton, SO17 1BJ, England.
Tel: 023 8059 4039, Fax: 023 8059 3024
Email: s.j.thomson@soton.ac.uk

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You don't even have to like malt whisky to join! Indeed, one of the joys of the Society is that enthusiasts blend easily with those who simply enjoy good company.

Over the years we have built up an unrivalled reputation for hospitality – striking that elusive balance of professionalism and the personal touch. So, when we say we are looking forward to the pleasure of your company be confident we mean it, whether you come to us or we come to you.

HOME FROM HOME at The Vaults, Leith, Edinburgh

The 18th Century Vaults, just back from the quayside in the old port, is the traditional, much-loved home of the Society where you'll be made to feel very welcome. In addition to the Members Room, there are three superb flats and the elegant Tasting Room for private events.

MAKING AN EVENT AN OCCASION in the UK and world-wide

A seminar, a conference, a reunion, a reception – whatever the occasion, we'll tailor our services to make sure it's just that: an occasion rather than merely another event. The Society conducts whisky tastings and events all around the world. Relaxed, involving and above all enjoyable, there's no better way to 'break the ice' than over a dram.

GOOD COMPANY MEMBERSHIP

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London – 020 7831 4447 london@smws.com
www.goodcompany.smws.com

The Side Door Restaurant, Shelbourne Hotel

The Grand old Lady of Dublin

Paris has the Ritz, New York has the Plaza, and Dublin has The Shelbourne Hotel. Standing proudly in the heart of Dublin city, the hotel has overlooked St. Stephen's Green for the past 180 years. In that time, it has played host to the luminaries of the literary, entertainment, and legal worlds. On a wet and miserable February evening, I decided to investigate exactly what this Dublin landmark has to offer.

On arrival, I was warmly greeted by Carol Ni Ghabhann, Shelbourne Bar & Room Service Manager, who escorted me past the gleaming Old Masters in the foyer to my room on the fifth floor. Decorated in a pristine manner with fine selected furniture and luxurious drapes, the room boasted every modern convenience, including a champagne filled mini-bar, wireless internet access, and an extensive in-room dining menu. I could quite happily have put my feet up and ordered any one of the dishes listed, but I resisted the temptation having earlier made a dinner reservation at the hotel's Side Door Restaurant, located downstairs.

In stark contrast to the antiquity of the grand hotel, The Side Door is a chic, intimate and modern restaurant. Its eclectic contemporary menu offers a choice of seven starters and seven main courses. The Irish Oak smoked salmon served with baby capers, crème fraiche and citrus dressing to start (€11) was mouth-watering. My companion decided on the medallions of beef served lavishly on a bed of portbello mushrooms, grilled asparagus, sautéed onion, bérnaise sauce and french fries (€26) as his main course. 'Deliciously succulent' was the verdict. It was a joy to be waited on by the knowledgeable and attentive staff who wisely recommended a rich and fruity Australian Shiraz, Wolf Blass Presidents Selection (€38), and a crisp Italian Pinot Grigio, La Vis Trentino (€30), to complement our choice of dishes.

For dessert lovers, disappointment is not on the menu at the Side Door. The chocolate fondue for two, four or six, served with strawberries, mango, banana and madeleines (€15/€27/

€40) is guaranteed to send your pulse racing. We both gleefully indulged in this serotonin inducing experience.

Not wishing the evening to end, we went in search of a nightcap. Unfortunately, we had missed last orders at the savvy society watering-hole that is the Shelbourne Bar with its political caricatures, and the Horseshoe Bar where political and legal heavy-weights can be found relaxing over a pint of Bass. So instead, we retired to the hotel's residents bar. During the day, it is known as the Lord Mayor's Lounge, and is famous for its cream laden High Teas. However, in the evening, the grand old lady lets her hair down, kicks off her shoes, and it becomes the domain of the residents, who we found enthroned on regal antique armchairs indulging in cock-tails and gossip! As the old saying goes, "If you can't beat them, join them", so we made ourselves comfort-able, ordered brandies and partook in the once-great Irish art of conversation.

I awoke to the sound of breakfast being delivered. God Bless room ser-vice! If the cob-webs from the night before have not been blown away by a hearty breakfast, then the hotel offers a comprehensive health & leisure cen-tre, complete with pool, sauna and steam rooms. After your exertions you can be massaged and coiffured back to normality, ready to face the world again. Tempting 'though all of this was, I gave it a miss in favour of the more sedate pleasures of coffee and yet another butter laden croissant. It was Sunday after all….

In an ever-changing city, where tow-ering cranes dominate the sky-line, each signifying commitment to development, the Shelbourne Hotel offers a warm and rather grand sanctuary, where young and old sit side by side amongst statues of Nubian princesses and attendant slaves. If a taste of elegance from times past is what you seek, then look no fur-ther. This grand old lady of Dublin is deservedly synonymous with character, charm, and fine food. A night in her company is definitely an experience I would recommend.

Venessa Landers, Dublin, Ireland.


No 27 The Green


Horseshoe Bar


Deluxe double bedroom

Competition Winners

In the first issue we had two very kind sponsors who enabled us to run two fantastic competitions. The first of the sponsors was the **Scotch Malt Whisky Society (SMWS)**, who offered one lucky reader the chance to indulge in some of the finest whiskies in the world, through membership of the SMWS.

The winner of this fabulous prize is **James MacGuill of MacGuill & Company, Dundalk, Co Louth**.

Our second sponsor was **Irish Court Hotels**, who very kindly offered a weekend break for two at one of their luxury hotels.

The winner, faced with the dilemma of choosing which lovely hotel to stay in, is **Geraldine Conaghan of MacBride Conaghan Solicitors, Moville, Co Donegal.**

Many thanks to our sponsors, and congratulations to both our winners.

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