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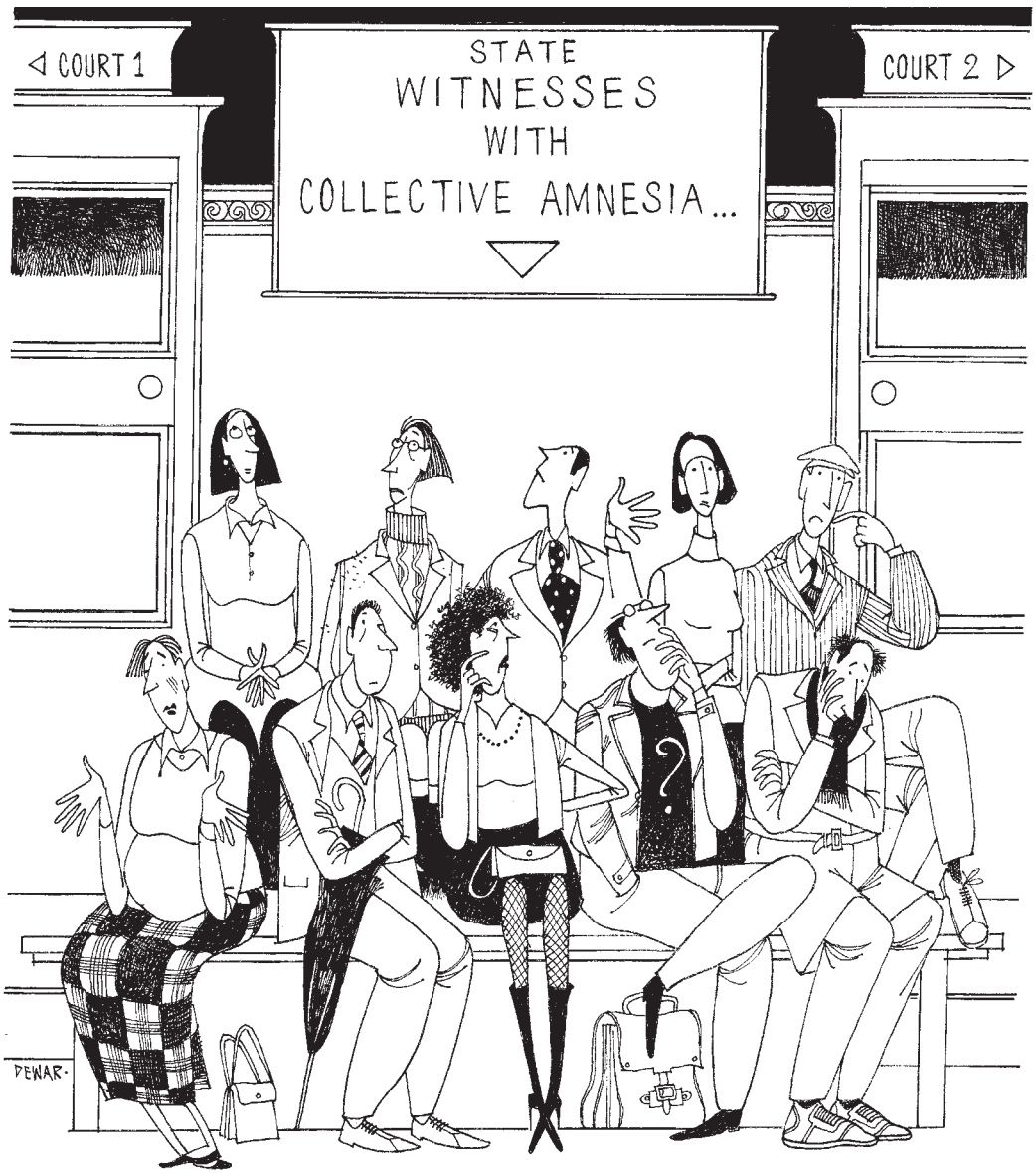

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Front cover illustration by
Bob Dewar, Fife, Scotland.

An Examination of the Proposed Reform of the Rules Governing Criminal Procedure and Evidence

John Healy
is a practising barrister and author of Medical Negligence: Common Law Perspectives (London: Sweet & Maxwell, 1999) and Irish Laws of Evidence (Thomson Round Hall, 2004).

Reform of the rules governing criminal procedure and evidence has suddenly become de rigeur in Ireland and England over the past decade. In this article, John Healy BL explores some of the key changes being proposed - in Ireland, the admissibility of repudiated witness statements in lieu of viva voce testimony; in England, provision for the admissibility of criminal record and bad character evidence in trials for sexual offences and theft. Mr Healy argues that currently in both jurisdictions, criminal justice is being sacrificed for political expediency.

In swift response to media and public indignation at the dramatic collapse of a criminal trial towards the end of 2003,[1] the Minister for Justice announced plans to enact a provision that would enable juries for the first time in Ireland to receive a witness' pre-trial statement in evidence in circumstances where the witness turns 'hostile' in court and repudiates his prior statement.[2] Immediate reference was made to a new set of rules adopted by the Canadian Supreme Court sanctioning admissibility of the pre-trial statement where the trial judge is satisfied that it constitutes a reliable account of the relevant events.[3] The case that caused this precipitous *volte face* in Ireland was one where suspected intimidation by the accused and criminal associates had wrought 'collective amnesia' in the State's witnesses, as memorably decried by Carney J. from the bench.

In order to understand the perceived need to reform the law on admissibility of statements by witnesses who later repudiate the statements in court and become treated as 'hostile witnesses', it is necessary to set out the common law position on witnesses who spontaneously, in the context of a live trial, refuse 'to swear up' or to give an account consistent with statements they made prior to the trial. By traditional common law rule, a witness who is deemed 'hostile' may be cross-examined by calling counsel in an attempt to bring the witness 'back to proof' or, where this option is strategically out of reach, to discredit that witness by underscoring his inconsistency. Inconsistent pre-trial accounts may, by common law principle, be received by the court for the limited purpose of bearing upon the witness' (lack of) credibility, but, owing to the rule against hearsay (which applies in the absence of statutory exception) they may not be received to establish the truth of any facts asserted therein. Accordingly, the prosecution may not properly invite the jury to consider the witness' pre-trial account as evidence supplementing or replacing his sworn oral evidence in the trial. Where the hostile witness repudiates aspects of his prior statement, and is adamant about the truth of his revised account given from the witness box, the revised account constitutes that witness' testimony and in principle the jury is free to act upon that – although invariably it will be argued that the witness is now unworthy of belief, and the trial judge may be obliged to indicate to the jury at the close of the case that the witness' evidence has been shown to be inconsistent and therefore may be unreliable.[4] Thus in most events, the witness' account given testimonially in the trial constitutes that witness' evidence, whether or not probative of the accused's guilt. Moreover, it is consistently recognised that where a pre-trial statement is admitted in evidence to assist the jury with respect to a specific issue, the trial judge is obliged to warn the jury that the statement is not evidence tending to prove any of the facts at issue in the trial, and that when considering the accused's guilt as charged they must disregard the statement. The failure adequately to direct the jury on this point has led to the quashing of conviction on numerous occasions.[5]

Part 3 of the Criminal Justice Bill 2004 sets out the proposed reform pledged by the Minister for Justice in the wake of the aborted Keane trial. Section 15 provides for the admissibility of pre-trial statements by witnesses who during the trial either refuse to give evidence, deny having made the statement, or give evidence materially inconsistent with the account provided in their pre-trial statement – subject to an exclusionary discretion in the trial judge to reject the statement where its admission would be 'unfair to the accused' or contrary to 'the interests of justice'. The conditions to be satisfied for admissibility are as follows: (1) it must be proved that the witness made the statement; (2) the facts alleged in the statement must, if otherwise directly testified to, be admissible in evidence (i.e., the assertions must not infringe other rules of evidence such as the rules against opinion evidence, multiple hearsay, and bad character evidence); (3) the statement must have been made voluntarily; and (4) the statement must be 'reliable'. Additionally, the trial judge must satisfy himself either that the statement was given under oath or affirmation or by statutory declaration (for which provision is made under s. 16) or that when the statement was made the witness understood the requirement to tell the truth. When assessing whether the statement is reliable, the trial judge will 'have regard' to whether it was video-recorded, although this is not necessary where "there is other sufficient evidence in support of its reliability". Additionally, the trial judge will have regard to any explanation by the witness for refusing to give evidence at the trial or for giving evidence inconsistent with his pre-trial statement, or, where the witness denies having made the statement, any evidence given in relation to the denial.

The interesting aspect of this debacle is that legislative provision had been put in place not long before the Keane trial which specifically anticipated the predicament of intimidated witnesses. The Criminal Justice Act 1999 amended s.4 of the Criminal Procedure Act 1967 to enable witnesses to give their evidence, by deposition or via television link, in the District Court in advance of the trial, so long as the accused is given an opportunity to attend and to

cross-examine the witness. That evidence may later be tendered in the trial as fully probative evidence in lieu of *viva voce* evidence where it is shown that the witness was intimidated or is in fear of the accused. The 1999 Act also created a separate criminal offence of interference with, or intimidation of, a witness. The critical difference between the provisions introduced by the 1999 Act and the currently proposed measures under the Bill of 2004 is that the former preserves the opportunity to cross-examine the witness, one of the fundamental pre-requisites for the admissibility of testimonial evidence in common law trials. Although the 1999 Act provisions are certainly not capable of removing the prospect of intimidation, they are likely to reduce that prospect by enabling evidence to be taken shortly after charges are brought, and by the threat of separate prosecution for the crime of intimidating a witness.

The possibility of the type of reform currently proposed by the 2004 Bill had been considered but rejected by the Law Reform Commission in its working paper on The Rule Against Hearsay[6] two decades prior to enactment of the Criminal Justice Act 1999. The Commission for good reason rejected the alternative option of receiving unsworn pre-trial statements, which would "[open] the door to the manufacture of evidence or to the perpetuation of previously told lies or inaccuracies".[7] It took the view that a provision of this nature would depart perilously from the best evidence principle, and in all likelihood would act counter-productively to deter witnesses from giving testimony, less from their fear of reprisal than their fear of exposing a false or inaccurate account of events. The Commission concluded that such a direction was fraught with risks of prejudice and unfairness for the trial, given that pre-trial statements are unsworn and made in the absence of the accused. As such, admissibility of pre-trial statements would certainly precipitate questions of constitutionality (and, now, of compliance with the European Convention on Human Rights). Furthermore, admissibility subject to explanatory direction by the trial judge, implicitly assumes the ability of judicial warnings on the limited probative use of statements to surmount the prejudice caused by their admissibility.

The biggest threat to the rule of law posed by the admissibility of pre-trial statements is less the fear that the statement was not given in the form or words of the statement or the fact that it was not given under oath, than the concern that the statement was made in the absence of the accused and in a context where cross-examination of the declarant did not occur. This has been one of the abiding concerns of the rule against hearsay, which precludes pre-trial statements not only by absent third party declarants but also by declarants who are present in court to testify. The witness is required to testify *de novo* as to the relevant facts, and his uncross-examined statement is never permitted to plug the gaps in the account he gives testimonially under oath before the jury. That is to say that the justification for the strictness of the hearsay rule has, in more recent years, been the opponent's lack of opportunity to cross-examine the declarant upon the accuracy or reliability of the information narrated or implied in the statement. Wigmore famously described cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience".[8] Lord Ackner expressed the view in *R. v Kearly*[9] that the hearsay rule "is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can be properly given to a statement by a person whom the jury has not seen or heard and which has not been subject to any test of reliability by cross-examination".

Central to the concept of natural justice developed by the Irish courts is the necessity to be presented with direct oral evidence in circumstances where a person has a right to an oral hearing, not only in criminal proceedings but potentially in any proceedings where adverse findings may be drawn against the person and serious consequences may ensue. This principle has been applied regularly by the Irish courts in recent years to tribunals exercising quasi-judicial functions, in response to the argument that the rules of evidence are more flexible in this context. In *Kiely v Minister for Social Welfare*,[10] the appeals enquiry had wrongly permitted a written statement by a doctor, engaged by the Department of Social Welfare, to prevail over evidence given testimonially by two doctors called as witnesses for the applicant. Henchy J. observed:

> *"Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. Audi alteram partem means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination".*[11]

The loss of so fundamental a protection for the accused in criminal proceedings is a matter of grave concern. A witness' version of events given to a garda prior to the trial is, of course, one-sided. It has not been challenged or tested by an opponent in sight of the jury. If, as contemplated by the proposed reform, a statement given before the trial, but later repudiated by the witness during the trial is allowed to function as admissible probative evidence in lieu of the witness' *viva voce* testimony, selective truth-telling and falsehoods will inevitably be permitted to attain a stability and status that is unwarranted and most dangerous. The proposed reform will eviscerate the long-maintained distinction between hearsay evidence (in this context, statements made by a witness prior to the trial) and *viva voce* testimonial evidence, as well as flouting one of the abiding concerns of the laws of evidence, namely the avoidance of unreliable evidence and undue prejudice in the trial – matters, surely, of more acute concern given recent incorporation of the European Convention on Human Rights in Ireland.

David Blunkett, former British Home Secretary, spearheaded fundamental legislative reform in England designed to remove the ages-old prohibition against reference to an accused's criminal record and bad character in criminal trials. Of most concern, in England and here, is the reform that would render criminal record evidence generally admissible in child sex abuse and theft cases. The coupling of these qualitatively different offences was justified by the then Home Secretary on the basis that there is a high level of "public concern about paedophilia and theft". In other words, the reform was clearly calculated to curry favour with the

public, in an election year. Ireland is by no means immune from this type of abuse of law reform, and although the attempted reforms in England thankfully appear unthinkable at present to the legal community in Ireland, the prospect of a similar attempt here can of course never be ruled out. To understand the effect of such reform, it is necessary to reflect on the reasons why criminal record evidence has been staunchly prohibited by the common law judges, and then to consider the current status of this body of law, often referred to as 'similar fact evidence'.

The prohibition against reference to the accused's criminal or deviant past was famously articulated in *Makin v Attorney-General for New South Wales*, where the Privy Council described what has since become known as 'the forbidden reasoning':

> *"It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."*[12]

Given the obvious risks of prejudice and unfairness in the criminal trial, the rules and principles developed by the courts over the years to justify exceptions to the prohibition against bad character evidence have always tended to court controversy. In 1893, *Makin* had somewhat obliquely sanctioned admissibility where the bad character evidence was independently relevant (for instance to rebut a particular defence, such as accident, which did not depend upon an appeal to 'the forbidden reasoning'). By 1974, *Boardman v DPP*[13] had proposed a test based on the 'striking similarity' of the prior crimes to the offence being tried, thereby engendering the term 'similar fact evidence' which is now used generally to describe bad character evidence admissible by way of exception to the general prohibition. By 1991, in *DPP v P*,[14] the House of Lords decided that 'striking similarity' was too restrictive a test, and that trial judges should instead evaluate whether the evidence was sufficiently probative in light of the resultant prejudicial effect for the defence. Each of these landmark decisions have routinely been approved in the Irish courts, the most recent of these, *DPP v P*, by the High Court in *B v DPP*[15] and by the Court of Criminal Appeal in *People (DPP) v BK*.[16] Each development has emphasised the exceptional nature of admissibility, however, and the prohibition has been defended by the common law judges in England, Ireland, and elsewhere in the common law. Why, then, this prohibition?

The prohibition reflects the fear, shared by other exclusionary rules of evidence, that the particular evidence might "have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value".[17] The objection to bad character evidence is not based on the irrelevance of such evidence (although some have adopted this approach). Rather, it is based on the devastating prejudice the evidence inevitably wreaks for the defence – where 'prejudicial' means "the capacity [of the evidence] to unfairly predispose the triers of fact toward a particular outcome."[18] Bad character evidence is notoriously prejudicial. Once introduced into court, it "irreversibly changes the chemistry of the trial" so that "it becomes almost impossible for the accused to be tried dispassionately on the facts of the case."[19] It encourages the jury to indulge in the "forbidden reasoning", potentially to infer present guilt from past misdeed. It is feared that proof of the accused's criminal past may prompt the view that it is unlikely he reformed himself and more likely that he repeat-offended. Even if not fully convinced of the accused's guilt beyond a reasonable doubt, the jury may consider that he should be punished for his past behaviour. In such a trial, the presumption of innocence can have little real effect. The tendency of jurors to label the accused has been highlighted by Ellsworth, who found that jurors "do not seem to spend a great deal of time trying to define the legal categories, evaluating the admissibility of evidence they are using, or testing their final conclusion against a standard of proof. In fact, many jurors simply appear to select a sketchy stereotyped theme to summarise what happened (eg. 'cold-hearted killer plots revenge', 'nice guy panics and overreacts') and then choose a verdict on the basis of the severity of the crime as they perceive it".[20]

The common law – which Ireland inherited from England – operates a jury trial for criminal offences. The rules of evidence we operate are largely an attempt to filter the evidence a jury may hear. Because members of a jury have only occasional familiarity with the trial, and because the trial is a once-off event, there is a great need to regulate the evidence that is presented to them and to ensure that adjudication is dispassionate and logical. The technicality of evidence laws derives necessarily in part from the temporally concentrated nature of the common law trial; further from the absence of a pre-trial stage dedicated to the examination and testing of contemplated evidence; and yet further from the "inscrutability of the jury verdict, and the minimal possibility of reconsidering factual issues on appeal".[21] One of the core concerns of the laws of evidence – aside from the fear of unreliable evidence – is the avoidance of undue prejudice to the defence. Dillon L.J. once observed: "Where there is a jury the court must be more careful about admitting evidence which is in truth merely prejudicial than is necessary where there is a trial by a judge alone who is trained to distinguish between what is probative and what is not".[22]

There is a very close nexus between the prohibition on bad character evidence and the presumption of innocence, essentially since the prohibition aims to ensure that the accused is not *pre*-judged by evidence of his past behaviour or disposition. In *Attorney-General v O'Leary*,[23] the presumption of innocence was acknowledged by Costello J. to have protected constitutional status under Art.38(1), despite the absence of express reference to it in the Constitution: "It seems to me that it has been for so long a fundamental postulate of every criminal trial in this country that the accused was presumed to be innocent of the offence with which he was charged that a criminal trial held otherwise than in accordance with this presumption would, prima facie, be one which was not held in due course of law under Article 38." The presumption of innocence has likewise been construed to constitute a fundamental human right embedded in Art. 6(2) of the European Convention of Human Rights. In *Barbera, Messegue and Jabardo v Spain*,[24] the European Court of Human Rights reasoned that the presumption of innocence entails the non-admission of prejudicial evidence (such as evidence of past crimes), adherence to the principle that the prosecution bears the

burden of proving guilt beyond reasonable doubt, and adequate pre-trial disclosure by the prosecution.

Liberal admissibility of bad character evidence would be a most retrograde step, particularly in the realm of sexual offences, in light of what is generally known or assumed about the propensity of sex abusers to *repeat-offend*. The reform would undoubtedly *encourage* the 'forbidden reasoning' – the inference of present guilt from past misdeed – and would culminate in a shift in many such cases from a presumption of innocence to a presumption of guilt, especially where the charge is of sexual offence. A recent test of jury deliberations by the Law Commission in England found that where it was made known to the jury that the accused had been previously convicted for child sexual abuse, the jury was instantly negative towards him, and significantly more willing to disbelieve and convict him of any crime: by contrast, disclosure of other convictions, even of dishonesty, had negligible effect unless conviction was for a recent similar offence.[25]

It is inherently difficult to prove sexual offences, given that they tend to take place in private and to suffer a deficit of independent proof. There is no quick-fix solution to this predicament that does not entail the abandonment of core values and principles that have defined our culture after centuries of applied reason. The law has already made a number of advances toward improving the course and conduct of such trials for complainants and child witnesses – including the introduction of television link testimony for child witnesses under Part III of the Criminal Evidence Act 1992, the abolition of restrictive corroboration requirements for child witnesses, flexibility with respect to the oath and the taking of un-sworn evidence by children, and relaxation of the hearsay rule as it applies to recorded interviews with child complainants under 14 years. As a solution putatively in the name of the victims of child abuse and theft, however, the Home Secretary's intended reform has the potential to create new classes of victims through miscarriage of justice and to corrupt the criminal process generally through the erosion of one of its most fundamental protections. It would, moreover, engender a two-tiered system of justice in criminal proceedings. Trials for sexual offence and theft would experience significantly more prejudice through evidence of predisposition, and indirectly a lower standard of proof, when contrasted with trials for other offences that observe the rule of law and the requirement of fairness of trial.

At the end of the day, the bad character evidence reform anticipated in England, and the admissibility of repudiated witness statements anticipated in Ireland, appear politically motivated. These measures will curry favour with the general public whose direct experience of trial by jury is minimal and whose anxiety to protect the vulnerable from grotesque crimes, stoked by sensationalist media perspectives, is ever at risk of prevailing over reason. Irish criminal justice emphasises fair process for criminal trials somewhat more than other jurisdictions. For this it has been praised abroad by criminal lawyers. It would be a great shame to abandon any of the core values that distinguishes this system as fair.

Endnotes

1. *People (DPP) v Keane* (Central Criminal Court, October 30, 2003).
2. *Irish Times*, 5 November, 2003.
3. See *R v B (KG)* [1993] 1 S.C.R. 740 (SC).
4. See *R v Goodway* [1993] 4 All E.R. 894 (CA).
5. E.g., *People (Attorney-General) v Cradden* [1955] I.R. 130 (CCA); *People (Attorney-General) v Taylor* [1974] I.R. 97 (CCA); *R. v Golder, Jones, & Porritt* [1960] 1 W.L.R. 1169 (CA).
6. *The Rule Against Hearsay*, Working Paper 9-1980.
7. Words used by the Criminal Bar Association: *ibid*. at p.34.
8. Wigmore, *Evidence in Trials at Common Law* (Chadbourn rev., Little Brown & Co., Boston, 1981) at para.1367, p.29.
9. [1992] 2 W.L.R. 656 at 679 (HL).
10. [1977] I.R. 267 (SC). See also *Borges v Medical Council* (HC, March 5, 2003; SC, 30 January, 2004).
11. *ibid*. at 281, *per* Henchy J.
12. [1894] A.C. 57 at 65, per Lord Herschell CJ (PC).
13. [1974] 3 All E.R. 887 (HL).
14. [1991] 2 A.C. 447 (HL).
15. [1997] 3 I.R. 140 (HC).
16. [2000] 2 I.R. 199 (CCA).
17. *R v Christie* [1914] A.C. 545 at 559, *per* Lord Moulton (HL).
18. Damaska, *Evidence Law Adrift* Yale University Press, 1997, at p. 15.
19. Murphy, "Character Evidence: the Search for Logic and Policy Continues" [1998] 2 E. & P. 71 at 73.
20. Ellsworth, "Some Steps between Attitudes and Verdicts" in Hastie (ed.), *Inside the Juror: The Psychology of Juror Decision Making* (Cambridge, 1993) at pp.47-8.
21. Damaska, *op. cit.* n. at p.65.
22. *Thorpe v Chief Constable of Greater Manchester Police* [1989] 2 All E.R. 827 at 831 (CA).
23. [1991] I.L.R.M. 454 at 459 (HC).
24. (1988) 11 E.H.R.R. 360 at para.77.
25. Criminal Law Revision Committee, *Eleventh Report: Evidence*, 1972, Cmnd. 4991, at para.89.

"Demystifying 'Virtual Law': Using the Internet for Effective Legal Research"

Fiona de Londras BCL, LL.M (NUI)
Máiréad Enright BCL

Introduction

Lawyers' reputation for attachment to traditional methodologies is almost legendary and we have been relatively slow in committing to the Internet as a means of storing and accessing legal information. This hesitation was, to some extent, understandable a number of years ago, particularly as few outside the hallowed cyber-spaces of IT specialists could have predicted the impact that the virtual world would have on means of disseminating information. It is now apparent that the Internet represents a revolution in teaching, learning and 'doing' law and that it is in all of our interests to be familiar with its workings and content. The purpose of this issue's research article is to assess the usefulness of online resources and expose the most effective ways of doing research online, as well as some of the hidden treasures of our online legal databases.

Advantages of Online Research

The increased availability of legal information online brings distinct advantages in terms of accessibility, cost, physical space and current awareness.

It is beyond doubt that the accessibility of law to all people within a jurisdiction is a fundamental requirement of justice. It was traditionally the case that the only people with access to the law were lawyers, and indeed that the level of access was dependent on how much money people had to buy the materials. This was particularly so as the number of specialised law reports increased and the price of legal texts continued (and continues) to rise almost beyond control. This meant that advocates were operating on an uneven playing field and, as a consequence, that those seeking legal redress were very much disadvantaged if their representative did not happen to occupy a place on the top of the money-pile. As non-subscription online legal databases continue to grow this problem depreciates accordingly and the resultant positive effects for the legal system generally are immense.

In addition, online legal resources play an exceptionally important role for students in newer law schools. While the vast majority of law schools are long established and have an extensive paper library as a result, a growing number of independent institutions are offering law degrees and other legal qualifications. Students in these institutions naturally have the same research requirements as those in the more established law schools, however it would be practically impossible for a law school that is only ten or so years old to have a comparable paper library to one that is over one hundred years of age. The use of online resources, and particularly subscription services such as Westlaw and LexisNexis, can practically negative this disparity while concurrently forcing students of these newer institutions into a familiarity with and competence in online research that will serve them in good stead in their future careers.

As already mentioned the cost of acquiring legal materials in paper form can very often be prohibitive. While online legal research is not without substantial cost implications, which will be discussed below, the proliferation of non-subscription legal databases is gradually opening the profession up to those students and practitioners who cannot afford subscriptions for reports and journals. The problem of cost is not limited to individuals. Third level institutions in Ireland are currently trapped in an economic crisis that is likely to become worse should the free fees initiative be discontinued within the foreseeable future as seems increasingly probable, and it simply may not be possible to continue acquiring paper volumes of primary and secondary legal sources. Not only is the cost of the volumes themselves considerable but they also take up an immense amount of physical space, very often requiring library expansion projects beyond the purse of educational institutions. Placing greater reliance on online resources, and particularly making them available to people with passwords that can be used off-campus, is an obvious solution to such a problem.

It is perhaps in the area of current awareness that the advantages of online legal research are most clear. Speaking about the merits of online legal research at the Commonwealth Law Conference, Lord Justice Brooke remarked that the administrative nightmare involved in distributing seminal judgments in which he was involved "showed … just how inefficient our arrangements were" prior to the introduction of online law reports.[1] Now that judgments can be put online within a relatively short time of them being decided, and indeed the Incorporated Council of Law Reporting publishes daily law notes online,[2] lawyers who acquaint themselves with online resources should find it easier to keep themselves up to date on the law. As the European Convention on Human Rights becomes progressively more important in the Irish courts online legal research will be fundamental to ensuring thoroughness of arguments in both academic work and practice. Indeed Lord Justice Brooke expressly addressed this issue when referring to the English experience in light of the Human Rights Act 1998. He mentioned that online sources had been "particularly valuable in the early days of the Human Rights Act, where we have so much to learn from each other. The law would be in chaos if our early decisions were being made in ignorance of what another court had been saying on the same point".[3]

Disadvantages of Online Research

It would be remiss of us to fail to consider the disadvantages of online legal research at this stage. Online research and particularly online reporting has led to a proliferation of legal judgments beyond what many would consider to be either necessary or controllable. Such a situation brings with it two potential difficulties. The first is that important points of law would be quite simply 'missed' because there is too much information out there to be considered. This issue has already been addressed earlier in the series where it was noted that a commitment to familiarising oneself with effective searching

mechanisms (considered below) should negative any risk of important precedents going unnoticed.[4] The second difficulty with 'over reporting' is that quite unimportant cases would be reported, and even cases that are to some extent ridiculous. We thankfully do not experience this problem in any serious way in Ireland, though it has become a cause of some concern in North American jurisdictions.

Online legal research can also be a costly affair. While most recent primary sources of law are available free online one has to pay subscriptions to either LexisNexis or Westlaw in order to access comprehensive online libraries, a financial commitment that may be beyond the bounds of some practitioners.

Other problems that arose originally in relation to online research, and particularly online judgments, have been easily solved: almost all judges have adopted the practice of using paragraph numbers to compensate for the lack of page numbers in online reports, and a new system of citation (neutral citation) has been developed for cases reported online.

Therefore while there are some disadvantages associated with online legal research, it is, generally speaking, a favourable way of carrying out research: fast, comprehensive and relatively uncomplicated.

Primary Sources of Law Online

Primary sources tend to be much more easily accessed online than secondary sources and, very importantly, the availability of these sources from jurisdictions outside of the United Kingdom and Ireland allows the legal researcher to explore the law in a greater degree of richness and for ease of comparative research.

Constitutions Online

The Irish Constitution can be downloaded from the website of the Office of the Taoiseach (www.irlgov.ie/taoiseach). Unfortunately there is not a great wealth of online information relating to *Bunreacht na hÉireann*, although it is important to remember that, primarily as a result of the doctrine of supremacy of the Constitution, judicial interpretations of the Constitution are invaluable in any research project (see consideration of researching Irish case law online below).

The Internet does contain a relatively good collection of information relating to the American Constitution. The text of the Constitution can be accessed on the website of the House of Representatives (www.house.gov) and the Yale Law School's Avalon Project contains an impressive collection of documentation relating to its development (www.yale.edu/lawweb/avalon). In addition the website of Cornell Law School offers a good starting point for those engaging in research of the American Constitution for the first time (www.law.cornell.edu).

Another useful source for comparative constitutional law studies is the Constitution of South Africa. The text can be accessed through the website of the Department of Justice and Constitutional Development (www.doj.gov.za). We will later consider how to access South African Constitutional law online.

Legislation Online

Acts of the Oireachtas can be found online through the online Statute Book (www.irishstatutebook.ie), BAILII (www.bailii.org) and the Oireachtas website (www.oireachtas.ie).

In order to assess whether an Act has been changed or amended by subsequent legislation one should use the Chronological Table of the Statutes, which are also available online (www.irishstatutebook.ie). On this page you will find a link to the Chronological Table of the Public General Acts enacted from 6 December 1922 to 31 December 2002, on which you should click. You then select the relevant year and a table of the statutes enacted that year will appear. The statutes are listed first by year, then by number, then by short title. If a statute has been repealed, its short title is in italics and there is a note is made of the change. Abbreviations used in these notes are relatively simple to comprehend: 's. 2 am' notifies the researcher that "section 2 has been amended", and 'r' would indicate that a provision had been repealed. The provision effecting the change is named by year and number.

Statutory instruments can be accessed online through www.bailii.org and www.irishstatutebook.ie.

When researching legislation you should make use of secondary sources in order to aid interpretation, particularly annotated legislation (www.westlaw.ie), explanatory memoranda (www.irishstatutebook.ie) and parliamentary debates. Parliamentary debates are a very useful resource in trying to figure out the intention behind a piece of legislation and can also be accessed online. Current debates can be accessed on www.debates.oireachtas.ie, and historical debates can be located *via* http://historical-debates.oireachtas.ie.

Irish Case Law Online

There are numerous free and subscription services offering online versions of Irish case law. In terms of subscription services LexisNexis and Westlaw are possibly the most useful. LexisNexis includes Irish reported cases from 1950 and unreported cases from 1985. Westlaw offers online versions of the Irish Law Reports Monthly in full text format.

The free online resources for case law will often be perfectly sufficient for the majority of students' and practitioners' needs in relation to seminal case law from the relatively recent past. The British and Irish Legal Information Institute (www.bailii.org) contains reported and unreported case law from the High Court (1995 – present in full and selected earlier cases) and Supreme Court (1999 onwards and selected earlier cases). In addition, the site features decisions of the Competition Authority from 1991 and decisions of the Information Commissioner from 1998, making BAILII an invaluable source of free case law. BAILII's sister site, the Irish Legal Information Initiative (www.irlii.org) contains a complete index of all decisions of the Irish High Court, Supreme Court and Court of Criminal Appeal from 1st January 1997 to the present as well as a collection of full cases. The case law collection can be broadly separated into two databases: a collection of the 225 leading cases in the core legal subjects, and a collection of recent decisions. The leading cases are searchable through either an alphabetical index or a subject index. The recent case law collection is organised in broadly the same manner as the BAILII collection.

The Courts Service has also begun to place judgments online, though they have sadly not been forthcoming in advertising this important development. The judgments are accessed through the homepage of the Courts Service (www.courts.ie) and the database contains exceptionally up-to-date judgments of the Supreme Court and Court of Criminal Appeal, with cases dating back to 2001.

Case Law of Other Jurisdictions Online

Case law of other jurisdictions can be useful when creating legal arguments, particularly where there is no existing Irish precedent on a situation. It is important to remember that decisions of courts in other jurisdictions are not binding on the Irish courts, though they are of persuasive authority (particularly where they are decisions of superior courts in other common law jurisdictions). The following are the most useful websites and searching strategies for all of them will be considered below.

British case law:	www.lexisnexis.ie/professional
	www.bailii.org
	www.lawreports.co.uk
Australian case law:	www.austlii.edu.org
Canadian case law:	www.canlii.org
American case law:	www.findlaw.com
	www.lexisnexis.com/professional
New Zealand case law:	www.austlii.org
South African case law:	www.worldlii.org
Indian case law:	www.supremecourtonline.com
Miscellaneous case law:	www.findlaw.com
	www.worldlii.org

South African Constitutional Court cases from 1995 can be found at www.concourt.gov.za. Cases of the Supreme Court of Appeal from 1999 are available at www.server.law.wits.ac.za/scrtappeal/scaindex/html. The sites offering free access to South African case law do not include a specialised search facility, and there is no subject access. Cases may be found by browsing chronological and alphabetical indexes.

Neutral Citations

Many online publishers are developing neutral citations which don't refer to any law reports e.g. *Ryan v Minister for Justice* [2000] IESC 33: the 33rd case in which the Irish Supreme Court delivered judgment in the year 2000. Decisions of the High Court would carry the citation IEHC.

In terms of British case law the neutral citation system is more or less the same, with decisions of the House of Lords, for example, carrying the citation UKHL.

Using the Internet to find out whether a decision has been affected by subsequent case law

It is important to be sure that the case you cite as an authority is still binding and has not been altered, distinguished or overturned by a subsequent legal authority. The standard hard copy resources, such as the *Irish Digests*, the *Indexes*, the *Irish Current Law Monthly*, and the *Annual Review of Irish Law* are of course of relevance here, but perhaps the easiest method of discovering the current standing of a precedent is to do a general search for the case in an online case law database. The results produced will mention all subsequent cases that considered this decision, which you can then search to assess its standing. Many online cases do feature headnotes, meaning that the effect of a subsequent case on an earlier authority can be discerned quickly and easily.

The headnotes will often feature the following phrases in brackets after the case-names – indicating the place of the instant case in the overall scheme of legal reasoning on a particular topic:

Topic	Meaning
Affirmed	The court agrees with the decision in a lower court on the same case
Applied	The court has followed precedent and used the same reasoning as in a previous case
Approved	The court agrees with the decision in a lower court on another case
Considered	The court discussed the case but came to no particular conclusion
Distinguished	The court decided NOT to apply a previous case because they thought that the facts in the current case were sufficiently different for the principle not to apply and either could not or would not overrule the case.
Overruled	The court decided that a decision of a lower court (exceptionally a court equal in status) is invalid and no longer good law.
Reversed	The court takes the opposite decision from that of a lower court in the same case – and overturns the previous decision.

If you are using BAILII the 'noteup' function will prove particularly useful in assessing the current status of a piece of law. Once you have located your source and selected it you will almost always see a 'noteup' button on the screen above the beginning of the source (in much the same place as the download and search buttons). Selecting this option will cause the database to search for all other sources of law in which your first selected source is mentioned and one can therefore read through these sources and assess what changes, if any, these decisions made to your first selected source. The 'noteup' function can be used for statute law, statutory instruments etc. as well as for case law.

The Law of the European Union

Primary and secondary sources of EU law, including decisions of the Court of First Instance and the European Court of Justice, can be accessed online through the official database: CELEX (http://europa.eu.int/celex).

International Law Online

International law is a primary source of law as it is created by entities that have the entitlement to create law. This is, however, a very particular kind of law as it applies only to states that have voluntarily subscribed to that law. International law is made by agencies such as the United Nations and generally deals with relations between states. Some international law also concerns the relationship between states and their citizens. As Ireland is a dualist nation we must incorporate a piece of international law in order for it to become part of our domestic legal system, and

we do this through Constitutional referenda and Acts of the Oireachtas. Therefore in order to rely on an argument in international law you must first ascertain its status within the domestic legal sphere. Unincorporated international law can, of course, be used as a persuasive source in legal argumentation. An invaluable guide to researching international law is available on the American Society of International Law's website; www.asil.org. The ASIL also run EISIL, the Electronic Information System for International Law, an open database of authenticated materials across the breadth of international law, which may be used free of charge *via* the ASIL website.

International treaties, conventions *etc.*, can usually be accessed on the websites of the individual international organisations, some of which are listed below.

United Nations	www.un.org
International Court of Justice	www.icj-cij.org
International Criminal Court	www.un.org/law/icc/index.htm
International Criminal Tribunal Rwanda	www.un.org/ictr/
International Criminal Tribunal of the Former Yugoslavia	www.un.org/icty/
International Law Commission	www.un.org/law/ilc/index.htm
International Committee of the Red Cross	www.icrc.org
World Trade Organisation	www.wto.org
World Intellectual Property Organisation	www.wipo.int
International Labour Organisation	www.ilo.org
European Union	http://europa.eu.int
European Union Law	http://europa.eu.int/eur-lex/
CELEX (EU Publications)	http://europa.eu.int/celex/
Council of Europe	www.coe.int
North Atlantic Treaty Organisation	www.nato.int
Organisation for Security and Co-Operation within Europe	www.osce.org
Organisation of African Unity	www.africa-union.org
Inter-American Court of Human Rights	www.corteidh.or.cr

European Human Rights Law Online

The European Convention on Human Rights has been incorporated into Irish law by means of the ECHR Act 2003. The most important aspect of this Act, from a research point of view, is the following provision:

> **2.**—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

The effect of s. 2 is that Irish courts are now obliged to have regard to decisions of the European Court of Human Rights in relation to any relevant issues. The decisions of the ECHR can be found online through LexisNexis and through the website of the Council of Europe (www.echr.coe.int).

Secondary Sources of Law Online

Textbooks Online

The basic textbook is always a good place to start in the research of any topic. There are a number of online resources you can use to identify the leading textbooks in any are of law, some of which are listed below. The online catalogues of the British Library and Trinity College Dublin should also prove useful for searches as they are deposit libraries.

Round Hall	www.roundhall.ie
Lexis Nexis	www.lexisnexis.ie
Gill and MacMillan	www.gillandmacmillan.ie
TCD Library	www.tcd.ie
The British Library	www.bl.co.uk
Irish Law Site	www.irishlaw.org

While e-books have become relatively popular in other disciplines, this has not generally been the case in relation to the law. Questia, the relatively inexpensive and grandly self-styled "world's largest online library", provides access to a wide range of secondary sources as well as a collection of bibliographies. E-books in its large legal collection range from Raz's *The Concept of a Legal System* to Beatson and Friedmann on contract law. Though the site is biased in favour of North American publications it does include Kelly's *Short History of Western Legal Theory*. The website www.bartleby.com provides the full text of a number of classic books for free.

It is also worthy of note that a number of UK legal publishers have begun to publish updates and companion materials to their core texts online.

Periodicals Online

Journals and other periodicals are of particular use because they very often include case notes on recent decisions in specific areas of practise. The vast majority of British and American journals are available online through Westlaw or LexisNexis, and www.westlaw.ie carries the text of the Irish Law Times. It is hoped that Westlaw IE will get around to publishing the rest of Round Hall's journals as part of their subscription service in the near future. ILRLII provides the researcher of Irish law with the most useful tool for online periodicals research in the form of the IRLII periodicals index. This Index provides information on the contents of the seventeen major Irish periodicals since 1997. The researcher may choose to search for articles by author, title or keyword, or to choose a particular periodical from the menu on the left of the screen and view its contents by volume and issue. Ingenta, (www.ingenta.com) though a subscription service, allows users to download some articles for free. Many individual journals which publish full-text articles online levy no charge on the reader. *The European Journal of International Law*[5] is the exception to the rule that

such journals are by and large of poor quality. At, the student end of the market, the Irish Student Law Review, (www.islr.ie), the Cork Online Law Review (colr.ucc.ie) and UCL's *Jurisprudence Review* feature full-text articles. The desperately impoverished should note that many subscription services are good for a free trial and some journal publishers place free back editions as samples on their websites.

Law Reform Commission Publications Online

The Law Reform Commission produces reports and consultation papers that are intended to influence the future development of law. They can be useful from a research perspective as they provide starting points for reform based arguments and concise summaries of the present law on the area under consideration. All consultation papers and reports of the LRC are available online on www.lawreform.ie and may also be accessed *via* BAILII.

You can also access the law reform publications of other common law jurisdictions online, for example:

UK Law Reform Commission	www.lawcom.gov.uk
Australian Law Reform Commission	www.alrc.gov.au
The Law Commission of Canada	www.lcc.gc.ca
New Zealand Law Reform Commission	ww.lawcom.govt.nz

Current Awareness Services

LexisNexis and Westlaw both provide high quality current awareness search engines as part of their subscription packages. Web-based discussion boards are also increasingly popular. Many researchers prefer the comparatively low-maintenance alternative to these tools: the free e-mail list. Although these lists score slightly lower on the anorak scale than message boards, they tend to teeter on the line between useful information and unadulterated spam. The Irish Law site's list is a good example of a free, effective service that manages to avoid that problem, while still covering a wide variety of matters of interest to lawyers (www.irishlaw.org). Many academic publishers now provide a free table of contents service, enabling the researcher to keep up to date with new articles as and when they are published. On the cases and general materials front, the Butterworths Daily Updater (http://lexisnexis.butterworths.co.uk/law/index.htm) is a good free service. In general, choosing your current awareness service(s) is largely a matter of trial and error, but there is now ample material available to suit all needs.

How to Search Effectively

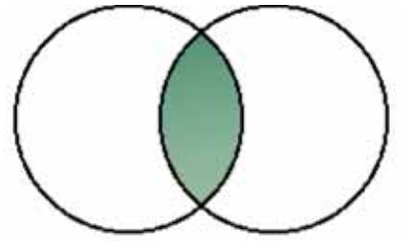
It should be clear by now that the Internet offers a myriad of legal information for those willing to trawl through it, but unless one familiarises oneself with effective searching techniques the process may take an interminable amount of time thereby ridding the Internet of one of its greatest assets: speed.

All websites will have their own searching protocols, which can be viewed by means of the 'help' menu, but the vast majority of them will be based on Boolean search methods.

Boolean searching is based on combinations of keywords with connecting terms called operators. The three basic operators are the terms 'AND', 'OR', and 'NOT'.

AND

When the operator 'AND' is used the computer will combine the terms and your results will show all documents that contain both of the specified terms. Therefore to locate information on adequacy of consideration would search for 'adequacy AND consideration'.

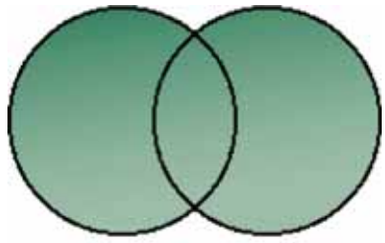


"adequacy" AND "consideration"

The Venn diagram above illustrates the AND search. The left circle includes all results including the word 'adequacy'. The right circle includes all results including the word 'consideration'. Only documents including both of the terms, indicated by the shaded portion of the diagram, will be given as results to your search.

OR

Searches done using the OR operator will retrieve documents that contain either specified keyword, meaning that one will normally get far more results from an OR search than from an AND search. The OR search can be particularly useful when there are a number of terms used to describe the same thing, or varieties of spelling for the same word. So to search for information on remuneration one could use the following search wage OR salary

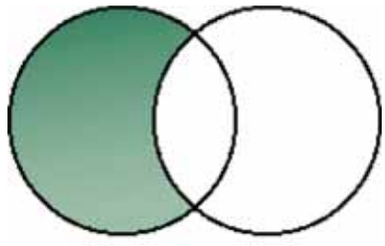


"wage" OR "salary"

As the diagram shows, the computer searches for all documents containing 'wage' and all documents containing 'salary', and all results will be retrieved.

NOT

Combining search terms with the NOT operator narrows a search by excluding unwanted terms. To find information on



"marriage" NOT "children"

marriage but not children one could use the search 'marriage NOT children'.

All documents containing the word marriage but not containing the word children will be included in the results of your search.

Conclusion

The Internet presents the legal community with an opportunity to develop methodologies of researching that are time efficient and comprehensive. While the volume of information may at times seems overwhelming, developing skills of Boolean searching and familiarising ourselves with the most important online legal resources allows lawyers to bypass irrelevant materials and cut a direct path to relevant, up-to-date and very often free primary and secondary sources of law. Conducting research online continues to grow in popularity and while we may experience the odd sentimental pang for the feeling of the leather spine of an old statute book under our fingertips, our keyboards are bound to become our best friends in practise, study and academe. The time is nigh to purchase a modem and familiarise ourselves with virtual law that can make a very real difference to research.

Endnote

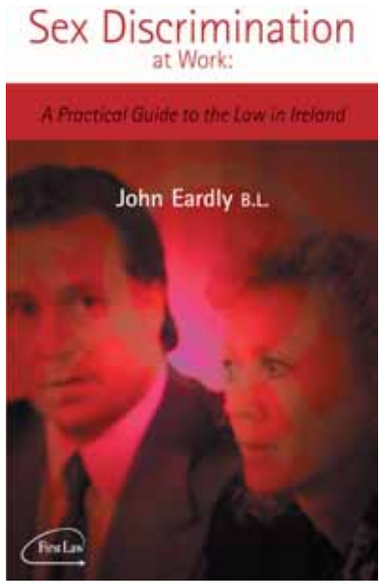
1. Lord Justice Brooke, "Publishing the Courts: Judgments and Public Information on the Internet", Melbourne, 15 April 2003
2. www.lawreports.co.uk
3. *Supra* No. 1
4. *C.f.* de Londras, "Questions and Answers: A Guide to Overcoming (Some) Difficulties of Legal Research in Ireland", (2004) 1(2) ILR 49, p. 49
5. While the E.J.I.L. publishes many full-text articles online but confines itself to publishing abstracts of others.

Book Reviews

This section is edited by
Máiréad Enright,
BCL

Sex Discrimination at Work: A Practical Guide to the Law in Ireland

Published by: First Law
Author: John Eardly B.L.
ISBN: 1-904480-18-7
Price: € 20.00



Following up on his earlier publication *Bullying and Stress in the Workplace: Employers and Employees – A Guide* John Eardly applies a similar format and style in his latest outing. Whether or not it will be as successful as the above-mentioned guide remains to be seen. What is clear at present is that the area of sex discrimination in the workplace is in need of a new text of this kind: a simple guide with a pragmatic approach for employers and employees. Simplicity and clarity are tools Eardly employs and the book's up-to-date content is displayed in a fresh structure, which is evident from a glance at the table of contents alone. If the hostile-looking people on the front cover don't scare the reader off, then he or she is in for an accessible and informative read!

I set out to examine whether or not this publication is "an essential book to have handy in any office" as opined by Pat Delaney (Director, SFA) in his foreword, and I did get the impression that employers would benefit more from its reading than employees would. In saying that, however, if an aggrieved worker got their hands on this book they would find, in Chapter 2, ample information on the routes available to them in challenging sex discrimination. Here we see for the first time Eardly's ability to inject case-law into the text smoothly and to great effect. This chapter provides *inter alia* a concise description of the many options open to a complainant and would ensure they wouldn't be daunted if they were to follow one of these avenues.

I would encourage employers to resist jumping straight to Chapter 5 – Specific Forms of Aggressive Sex Discrimination – in an attempt to resolve any complaint that may have arisen, but to instead examine the early chapters where they will garner an understanding of the area that might otherwise be lacking. Small businesses have long bemoaned the fact that the burgeoning Europe-inspired legislation is leaving them creaking under its weight. Instead of once again cursing our membership of the EU, exploring the first two chapters of this book would give them an insight into the origin of equality in Ireland as well as a better understanding of the European approach to the concept and how that applies here.

Chapters 3 and 4 are essential to any employer's comprehension of the obligations he or she must meet. Eardly outlines the law on equal pay and explains who is protected by it. Key concepts are addressed, e.g. "equal pay for equal work", "work of equal value", and "like work". His novel presentation of an employer's responsibilities regarding equal pay in "The Six Basic Steps..." is a thorough yet accessible way to highlight the area. The author expands on the concepts of direct and indirect discrimination, mentioned earlier in the book, using recent case-law in a manner that is lay-person friendly. He then addresses the notion of equal treatment, another form of protection against sex discrimination. Here the writer describes a whole range of unlawful behaviour through the use of illustrative cases, both Irish and European. In the next chapter he goes on to examine the specific forms of aggressive sex discrimination, namely sexual harassment, harassment and victimisation, and sets out the pitfalls an employer may face in relation to these.

What is refreshing about the book is its overriding theme of prevention. The reader is never under an impression that he or she is being told how to get around the legislation or beat an employee's accusation, rather we gain an idea on how to prevent inequalities and therefore avoid the costly litigation. (For instance, employers might be shocked to realise that they are even liable for harassment carried out by such groups as customers, trade contractors or those who deliver goods.)

Likewise the reader is always aware that the book is a guide to this particular area of employment law and not a "How to" for employees wishing to make some money on a potential claim. Never is this more obvious than in the final chapter on ways to prevent sex discrimination at work. The author advocates the implementation of an Equality policy from the outset but recommends dealing with grievances informally at first, on a non-confrontational basis, before the formal procedure is initiated.

As to whether it will be in demand by students, it is unlikely they will find it gives them anything more than the larger textbooks but they will dip into it for the healthy smattering of case-law, especially as it contains some very current cases. It also outlines some of the changes of the 2004 Equality Bill as it was passing through the Oireachtas.

John Eardly cannot himself re-arrange workplaces all over the country so that they are in line with the current law or able to confront instances of sex discrimination allegations, but on completion of this book any employer should be able to initiate compliance. This practical guide definitely demystifies the area for employers. You could say, "it does exactly what it says on the tin"!

Cliodhna Boland

Immigration, Refugee and Citizenship Law in Ireland; Cases and Materials

Published by: Thomson Round Hall, 2004
Authors: Dug Cubie and Fergus Ryan
ISBN: 1–85800–342–3
Price: € 215

It is the nature of the law that it is slow to catch up. Ireland is a state experiencing net immigration for some years now and the full legal repercussions have yet to work themselves out. Refugee law, immigration law and citizenship law have a significant overlap and are growing rapidly in importance in the light of this increase in immigration. Almost all of the major domestic case law and legislation in these areas are from the last decade and there is likely to be more developments before a settled body of law emerges. The mass public confusion in the debate leading up to the recent citizenship referendum is testament to the fact that we have a long way to go before this area of law is clear and accessible. Over time these areas may come to be commonly understood as a single body of law under the heading of 'immigration law' in the way that it is understood in the United States, but for now that is some way off.

There is as yet (to this author's knowledge) no comprehensive text on immigration, refugee and citizenship in Ireland. Cubie and Ryan's book attempts to start a process of bringing together a common understanding of the law on immigration into this state. As it is a cases and materials book there is, of course, a limit to how far it can go. The stated purpose of this volume is not to provide a detailed commentary or recommend reforms but to provide a comprehensive resource to anyone working in this area or studying it. The book aims to set out all relevant provisions of EU and domestic legislation, international treaties as well as summaries of all the major Irish cases on citizenship, immigration and asylum. The book is divided into five parts: Irish legislation; cases on citizenship, asylum and immigration; bilateral re-admission agreements; EU legislation; and international human rights instruments.

Prior to 1996 the legislative framework for asylum law in Ireland consisted of two letters sent by representatives of the Department of Justice to representatives of the United Nations High Commissioner for Refugees. Since then a number of pieces of legislation of note have been published, in particular the *Refugee Act 1996.* Part One of this book provides the full text of the major Acts and secondary legislation directly focused on immigration citizenship or asylum as well as extracts from two acts which obliquely affect the area, the *Adoption Act 1952* and the *Criminal Justice (United Nations Convention Against Torture) Act 2000.* The legislation is presented in consolidated form, which is extremely useful for the reader.

Part Two chooses almost 50 leading Irish cases in this area. Each summary is presented with four headings: Abstract, Facts, Ruling, and Commentary. This straightforward and user-friendly format makes it easy and quick to find the main points and the commentaries help the reader to appreciate each case's place in the broader common law tapestry. Landmark cases such as *Fajujonu v Minister for Justice [1990] ILRM* 234 and *Lobe, Osayande and Others v Minster for Justice Equality and Law Reform* (*Supreme Court, 23 January 2003*) are presented in clear concise terms. However, the casenotes are often brief and do not contain any extracts from the judgments. For a reader requiring any significant amount of detail, this makes them useful as a first port of call before going on to read the case itself, rather than obviating the need for further research.

Part Three lays out in full the text of Ireland's bilateral re-admission agreements with Poland, Nigeria, Bulgaria and Romania, all of which are designated safe countries for the purposes of the *Refugee Act 1996*.

Part Four covers EU legislation in the area. This includes relevant treaty provisions and protocols, directives and regulations. This part also covers Ireland's participation in the Schengen Acquis and some proposals that are still under discussion.

Part Five provides the text of a number of international human rights instruments to which Ireland is a party which have a bearing on immigration and asylum law in Ireland. This section includes not only the relevant international agreements on refugee law but also the core UN human rights instruments such as the International Covenant on Civil and Political Rights and the Torture Convention. These may be of use in making an application for asylum.

Appendix 1 lists a large number of useful contact details and sources of further information. These include NGOs, government bodies and professional organisations from Ireland, Europe and further afield. Where an organisation has a website the URL has been included. Appendix 2 is a bibliography.

A few minor points on formatting arise. Notwithstanding the fact that the contents page lists all the legislation and statutory instruments reproduced in this book, a dedicated alphabetical table of statutes and SIs would still have been useful. Finding them in the index can be cumbersome at times. Also, the page headings on the odd numbered pages state only the section of the book. They could instead have given the name of the act, case or treaty on that page. This may seem a small issue but in a cases and materials book which is designed to function as a user friendly reference this would have been helpful. Perhaps it might be considered in a second edition.

The fact that it is only available in hardback would suggest that this book is not targeted at the student market. Perhaps this is because refugee and immigration law are not commonly taught at third level in Ireland or perhaps the publishers recognise that, in the absence of an accompanying textbook, this book may be of limited use to students. That said, this is the only one of its kind and it does a good job of compiling the important sources of a broad and rapidly developing body of law in a single volume. It will no doubt be an invaluable resource for legal practitioners and others working in this area.

The views expressed in this review are the author's own and do not necessarily represent those of the Law Reform Commission.

Reviewed by Alan Brady LL.B. (Dubl.), LL.M. (Lond.), Attorney-at-Law (New York), Legal Researcher with the Law Reform Commission

Western Jurisprudence

Tim Murphy (ed.)
Thomson Round Hall
ISBN: 1-85800-378-4
Price: € 100

Jurisprudential Introductions

Jurisprudence should enjoy a central role in the study and practice of law, yet it is too often isolated in law schools and ignored in practice. The Utilitarians among us describe it as a waste of time, yet as a subject it seeks to engage with some of the most serious and telling questions. *Western Jurisprudence*, edited by Tim Murphy and published by Thomson Round Hall, seeks to give an up-to-date introduction for students and practitioners to the theories which lie just below the surface of the law. While initially engaging with the laws historical background, it swiftly moves on to those current disciplines of legal philosophy which seek to inform and challenge the existing conception and practice of law. Given the fact that the "majority of those directly involved with... the operations of the law continue... to subscribe the view that law is basically a closed and logical system,"[Ringrose, J, "Jurisprudence and Legal Education," in "Western Jurisprudence," (Round Hall Press; Dublin, 2004), p493.] Murphy's book sets itself a challenging educational role.

A brief examination of the table of contents displays the sheer scope of the project. Beginning with Ancient Greece Murphy leads us through; medieval natural law and the enlightenment, Positivism and Utilitarianism, and the Historical, Sociological, Realist schools; however, the great strength of this work is that it focuses on the more recent and topical schools in jurisprudence. The book deals with the historical baggage of legal thought and brings us up to the last century without appearing to have shortened, simplified or dealt with the essential historical movements with undue brevity.

The full spectrum of current jurisprudence is present. While Hart and Kelsen are the prerequisites of any discussion of modern legal thought, the inclusion of interdisciplinary studies such as law and literature and psychoanalysis distinguishes *Western Jurisprudence* from other more traditional jurisprudence textbooks. The studies are cogent in their exposition of the theories. They place their 'minor' discourses firmly within the legal academy and display the relevance and perhaps even importance of the studies to the practice of law. The book boasts an extensive and impressive list of contributors from Ireland, the UK and beyond, from a wide variety of backgrounds from philosophy, theology, psychology and history as well as the disparate arms of legal thought and practice.

Critical discussion of legal theory is mixed with a number of engaging case studies which bring what can often be obscure philosophical concepts down to the level of practice. For instance Melissaris's case study on *Re C (HIV test)* adeptly displays the potential uses for deconstructive and post-modern thought in common law cases. By problemizing what may seem inconsequential statements and presumptions in the judgment, traditional notions of law and justice are undermined.

Mulally's chapter on feminism is representative of much of what is good in the book. It provides a broad introduction to the current and (to an extent) historical schools of feminism, displaying mastery of the subject without isolating the reader by use of overly specialised language. Furthermore, while the complexities of the movements are explained, they are not simplified or overly abridged.

Murphy and Staunton's chapter exemplifies the cutting edge of the book. It provides a fascinating justification of a Law and Literature movement firmly focused on expanding and challenging the formalist paradigm of law. They use a number of texts to display both the law-*in*-literature and the law-*as*-literature channels of thought.

Western Jurisprudence is a well written and put together introduction to legal philosophy. It covers, in manageable sections a fair selection of jurisprudential thought. Murphy steers the book into a gap in the textbook market. Unlike Freeman's tome *Lloyds Introduction to Jurisprudence*, Murphy's *Western Jurisprudence* relies on commentators rather than primary sources and this is both its greatest strength and weakness. Murphy's book will not provide as great an insight for those involved in an advanced study of legal philosophies, yet I suspect that this was never its intended role. What is lost in lack of immediacy to the primary texts, is gained in over-all coherence, readability and scope of discussions.

The dust-jacket announces that while its primary aim is "to serve as an undergraduate textbook, it is also essential reading for those judges and lawyers who seek to remain informed regarding the present state of legal theory." In recommending *Western Jurisprudence* without reservation I would go further and say that it should be compulsory reading for all involved in the study and practice of the law. This is a book which should find its way onto most if not all lawyer's and student's shelves.

Reviewed by Illan Wall. Illan is reading for a PhD in Legal Philosophy at Birkbeck College, University of London. He holds a BCL from UCC and an LLM from NUI Galway.

Asian Discourses of Rule of Law: Theories and Implementation of the Rule of Law in Twelve Asian Countries, France and the U.S.

Editor: Peerenboom
Published by: Routledge 2004

The Rule of Law has always been a central feature of political and legal discourse in western (and predominantly democratic) society. This notwithstanding the concept has traditionally alluded precise definition. In a time when the Rule of Law is being increasingly politicised and redefined in order to introduce ever more draconian legislation in countries such as the United States and the United Kingdom this volume of work, edited by Randall Peerenboom of UCLA, serves as a timely reminder of the richness of definition of this concept. The book can be broadly separated into a consideration of the Rule within liberal democratic societies where it has always played a central role (*i.e.* United States and France) and, secondly, an analysis

of the emerging discourses of the Rule of Law in societies that are traditionally less concerned therewith. This consideration takes on a particular relevance and interest in relation to transitional societies such as China and Vietnam, which are increasingly adopting economic and social policies more analogous to those of western states.

For readers interested in studies of the Rule of Law within more traditional western jurisprudential terms Brian Tamahana's chapter on the Rule of Law in the United States is of immense value. Tamahana performs a gargantuan task in reducing the jurisprudence on the Rule down to a mere twenty-three pages within which he not only exposes but also analyses formative texts from the many diverse jurisprudential schools. American concepts of the Rule of Law emerged from traditional Lockean and Hobbesean liberal origins with the concept of minimal state interference in the private sphere at its heart. Tamahana perfectly exposes how the Rule of Law is inextricably linked to the four traditional notions of liberalism: one retains his liberty inasmuch as the only laws he is required to obey are those that are promulgated by democratically elected representatives and in line with established procedures; individual freedom is further bolstered by the principle that all are equally subject to the laws of the state regardless of position or status; additional safeguards exist in the form of restrictions on governmental rights usually contained within constitutional proclamations of fundamental freedoms and, finally, the division of governmental functions between organs of state with diverse responsibilities including ensuring that all other organs exercise their powers in lines with principles of natural justice. Tamahana observes that "[a]lthough these four themes of liberty are regularly found together, that is not necessarily required....[the Rule of Law] can exist without political liberty (without democracy)" (p. 58), which is particularly astute in terms of discourses on the Rule within non-democratic societies and in relation to discourses on the Rule in situations where the head of government may not necessarily have been democratically elected, such as President Bush's first term of office. In contemporary terms the most important and valuable part of Tamahana's consideration of the Rule of Law may well be his commentary on writings assessing the decline of the Rule of Law in American society from Hayek's formative works (*The Road to Serfdom*, *The Political Left and the Rule of Law* and *The Political Idea of the Rule of Law*) to those of the great critical scholar Roberto Unger (particularly *Law in Modern Society*). In a time when the reconceptualisation of law as a means for the maintenance of 'homeland security' in the United States is resulting in ever more incursive and violatary legislation Tamahana's contribution serves as an important reminder of the lasting damage that such moves may well do to the 'greatest democracy on earth'.

The vast majority of this book concerns the Rule of Law in Asian societies and is a particularly valuable contribution to the continuing debate between communitarian and individualistic legal traditions about the role of human rights. This so-called 'South East Asian perspectives' debate revolves around the centrality of civil and political rights in western societies and the feeling in many emerging Asian societies that economic and social rights should (and indeed must) take precedence until a level of economic autonomy has been achieved that allows for the nurturing of civil and political rights. Peerenboom's own contribution, on the Rule of Law in China, serves as a good example of these perspectives. Although China committed to the Rule of Law in 1999 the concept as adopted was not a liberal democratic one but rather a socialist interpretation of the Rule. The 'Statist Socialism' Rule of Law, as adopted in China, is vastly different to American (and Irish) theories. It has at its centre a socialist economy (though of course China's economy is currently undergoing a redevelopment of almost unprecedented proportions which redefines 'socialist economy' in itself), a non-democratic system in which the ruling party has centre stage, and a commitment to communitarian concepts of rights over individualistic (or liberal) concepts of rights. While the constituent parts of the Rule of Law are clearly vastly different to those in liberal societies Peerenboom's analysis of the commonalities within the concepts is perhaps the most valuable part of this chapter. He rightly notes that proponents of the Rule of Law in both traditions seek certainty and predictability in the legal system, a reduction in arbitrary government action and correlative increase in regime legitimacy, increased efficiency in administrative functions, a method by which disputes may be resolved and a system of rights protections. The differences in the operation of the Rule therefore show the richness of all of these concepts and force the reader to examine whether universalist (read liberal) notions of law and particularly of rights are really readily applicable to vastly different social and cultural communities.

Through its assessment of the emerging discourses on the Rule of Law in Asian countries this volume offers a comprehensive communitarian contribution to the universalism *v* relativism debate within international law (and particularly within international human rights law) that was previously difficult to locate. While nothing within the book dispels the natural suspicions that many concepts of the Rule of Law influenced by communitarian concerns may be duplicitous, particularly inasmuch as they may misrepresent the reality of the culture at issue in order to avoid adherence to international standards, the volume as a whole is a fascinating window on the richness of legal systems and legal thinking. Those of us who study and practice in the common law world are too often insulated from different ways of thinking about law and, if for no other reason, should dip into at least three or four chapters in *Asian Discourses of Rule of Law* to broaden our horizons.

Reviewed by Fiona de Londras, BCL, LLM (NUI).

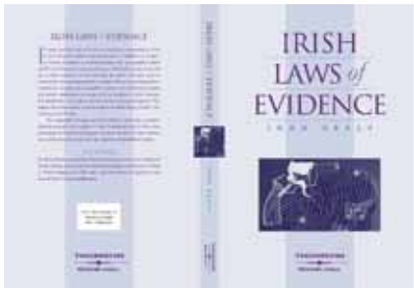
Irish Laws of Evidence

Published by: Thomson Round Hall
Author: John Healy
ISBN: 1-85800-381-4
Price: € 210 (hardback); € 120 (paperback)

Although there have been a number of evidence textbooks published in Ireland in recent years this latest addition to the shelves is certainly welcome. Embarking on an analysis of the laws of evidence is no mean feat, and Healy firmly set out his task as being one of framing the law of evidence's "diffuse rules and precedents". In his *Irish Laws of Evidence* the author truly fulfilled his aim and produced a volume that will prove of significant utility to students and practitioners alike.

The book is laid out in an extremely accessible manner, which is rare in a subject as complex and voluminous as

evidence. Healy's style allows for a crystal clear exposition of the law and the easy extraction of information notwithstanding the high level of cross-referencing necessary in any consideration of this area of the law. In chapter one Healy introduces the reader to the law of evidence and its place within the trial process intimating that his intention may be to create a volume that is of benefit to the seasoned student of laws, rather than to introduce newcomers to the law to evidence in a broader sense.



Chapters two and three deal with the area of witnesses in general, and include an interesting and comprehensive section on the controversial questions surrounding sexual history evidence and rape shield rules. Healy's discussion of hostile witnesses is of particular relevance in light of the current debate on Part Three of the Criminal Justice Bill 2004, which deals with the admissibility of certain witness statements. References are made, for example, to the "dramatic collapse" of the murder trial of Liam Keane in 2003 in which six prosecution witnesses denied ever having made statements identifying Keane as the killer. Following this case the Minister for Justice Equality and Law Reform proposed allowing pre-trial statements as evidence, as previously done in Canada. Healy discusses this in light of the Law Reform Commission recommendations over two decades ago in which the LRC proposed that allowing such statements was fraught with risk of prejudice and unfairness for the trial (LRC Working Paper 9–180, *The Rule against Hearsay*). Having regard to current political trends towards punitivism, however, it is not beyond the realms of possibility that such provisions could be introduced in the name of public protection. Where others concentrate on pure legal theory, Healy grounds his writing in the practical and the text is remarkable for its illumination of the genuine human interest at the heart of the law of evidence. Students in particular will benefit from his engaging analysis of landmark decisions.

Healy's review of identification evidence is a helpful summary of the law in this area. Chapter twelve on Opinion and Expert Evidence, when read in conjunction with chapter six (identification evidence), provides an excellent overview of the newer technology and science-based aspects of the law of evidence. The in-depth coverage of these areas is certainly an argument for the inclusion in future editions of a chapter devoted entirely to technology and its application to the law of evidence. It is a general rule of evidence that witnesses may comment on facts as perceived by them, but may not go on to express opinions arising from these facts. The exception to this rule is that of the expert witness. The author notes how this exception has broadened over the years and the inclusive treatment of the area in this work certainly reflects this expansion. The problem arising from this expansive approach to expert testimony relates to very specific scientific areas such as DNA Evidence. Healy notes how the seminal case in this area, *R v Turner* ([1975] 1 Q.B. 834), although decided in 1975, still has relevance to modern scientific procedures relating to evidence. In this case the Court held that the danger of expert witnesses is that the jury will, in response to impressive scientific qualifications, award their opinions too much weight. This is a particular concern in relation to DNA evidence. DNA-related expert evidence invariably poses a problem in court due to the perceived infallibility of the science involved, and so the laws of evidence in the area need to be controlled in order to ensure that the entire process doesn't become what Hall termed as a "black box into which scientific evidence is placed at one end and the verdict in a criminal case is produced at the other" ("DNA Fingerprints: Black Box or Black Hole?", 1990 NLJ 203). Another concern in relation to DNA is the introduction of a DNA database. While Healy does engage in a brief discussion on this area it remains the subject of sustained debate in legal circles and it is with optimism that I would anticipate that by the next edition of this book legislation covering this vital area will have been introduced. It is, in the meantime, most useful to be provided with an informed and practical guide to the area of law such as this.

The chapters which follow are a functional guide to such areas as similar fact evidence, cross examination of the defendant on bad character and hearsay evidence Confession evidence is covered in chapter ten, while chapter eleven goes on to discuss illegally and unconstitutionally obtained evidence. Healy's consideration of unconstitutionally obtained evidence is particularly interesting in the context of the current debate surrounding Garda powers and safeguards for the accused. As the number of cases being dismissed on the basis of the Gardaí overextending their powers continues to increase awarding more powers to Gardaí could become the first step on the slippery slope to what Garland terms the "culture of control" (*The Culture of Control: Crime and Social Order in Contemporary Society*, (2001, Oxford; Oxford University Press)). Considering the more punitive stance our government has gradually been taking over the past number of years the development of such a culture within the criminal justice system is increasingly becoming a real possibility. It is however useful and interesting to see this area dealt with in a practical way, rather than the somewhat alarmist perspectives that some socio-legal works have taken to adopting.

A useful point to note about this work is the comprehensive appendices it contains. Housing over sixty case extracts it is an exceptionally elaborate and inclusive appendix, with cases Ireland, England, commonwealth countries and the European Court of Human Rights. This appendix should prove most useful to practitioners and students alike, who, in light of various constraints, may not have access to full-text cases.

Healy notes that "laws and rules remain dynamic" and his book reflects this in his acceptance of new alternatives to old solutions that are becoming increasingly less suited to our changing legal world. It is with this in mind that Healy evaluates the rules of evidence taking into account the Constitution and its effect thereon, and also law reform in each area.

Evidence law is by its nature sprawling and unwieldy, particularly in Ireland and England where as yet no codification of the law has occurred. Perhaps the Report of the Expert Group to Advise the Minister for Justice on the Codification of the Criminal Law will be a starting point for the codification of the rules of evidence, but until such time we are left to our

own devices in working through the various laws on evidence. Regardless of the inherent difficulties in the creation of a work on evidence, there are those who will create for us a concise and all-inclusive body of work: John Healy is one such author.

One point to note is that in this book there is little in the line of jurisprudential discussions of policy as such as those included in other books on the subject. Fennell's *Law of Evidence in Ireland* (2nd Edition, 2003), for example, proves useful for its broader sociological educative value resultant of displaying to the reader the intricacies of evidence and its relationship with other areas of law. Healy's book is equally relevant but from a functional perspective. Healy provides a clear and succinct review of the law of evidence, displays tremendous clarity of thought and demonstrates the wealth of experience that comes from a life in the law.

Irish Laws on Evidence is a useful and practical guide to the laws of evidence and a valuable addition to the library of student and practitioner alike.

Reviewed by Roberta Guiry B.C.L. LL.M. (Criminal Justice)

Evidence

Published by: Thomson Round Hall
Author: Declan McGrath
ISBN: 1-85800-394-6
Price: € 320.00

"Evidence" by Declan McGrath provides a comprehensive and detailed account of the rules of evidence in Ireland. Until recently, there were few textbooks available in Ireland on the area, and those practicing in the field or studying the subject were required to rely on English textbooks. However, there have been significant developments in the area in Ireland of late and as a result, a number of titles have emerged addressing the fundamentals of the rules of evidence. So what does McGrath's title contribute to this area?

McGrath's book provides the most thorough and complete account of the rules of evidence in Ireland to date. For the practitioner, it will become an indispensable guide to the rules of evidence. It provides a comprehensive and accessible account of the rules of law in the area. In this respect, there is no other title available that can challenge McGrath's "Evidence" for its detail and ease of access. It will become an essential addition to the library of practitioners and is destined to be recognised within the legal profession as the ultimate and up-to-date authority on the rules of evidence.

The law of evidence in Ireland has changed dramatically in recent times and there have been significant reforms of the rules regarding the admission of evidence in the courtroom. Nowhere is the documentation of change so comprehensive than in this book and this is its primary strength. The high quality of research and the in-depth discussion of case law and legislation in Ireland is perhaps the most distinguishing aspect of this book compared to the other titles available. It is, in essence the ultimate reference book for the area of evidence and its clear style and structure makes it easily accessible for anyone seeking the legal authority on a particular area of evidence. Each chapter is structured to aid the reader in understanding the relevant legal developments in a logical and accessible but not over simplified manner. It communicates effectively the complexities of certain aspects of evidence to the reader in a clear and matter of fact manner.

Needless to say, the book provides the necessary detail on all areas of importance and recent reforms including a detailed explanation of evidence by live television link, reform of corroboration requirements and electronic recording regulations etc. There is also immense detail given to the rules of evidence regarding confessions. This is welcome as recently the confession has become a central aspect of the criminal justice system and is often the central piece of evidence in a criminal case. The importance of rules regarding confessions is recognised here by virtue of the detail provided. Again, the approach taken is to discuss the various tests and safeguards applicable to confessional evidence in a logical manner. McGrath details all aspects of the area from the voluntariness rule, Judges' rules, custody regulations and electronic recording of interviews. This chapter alone is a welcome addition as it collates an increasingly important and complex area of the law of evidence. Also of note, is the inclusion and analysis of material from outside the jurisdiction, in particular decisions of the European Court of Human Rights. Furthermore, the book discusses both civil and criminal rules of evidence which is a welcome change as there is a tendency to focus on the rules of criminal evidence alone in some textbooks.

It is clear that this is not intended as a student handbook. On the basis of the price alone, 320euro a copy, the book is clearly outside the confines of the average law student's budget. However, it will undoubtedly develop a reputation amongst students as the definitive statement on the law of evidence. Clearly, this book was not written to provide a basic introduction to the area for students. There are other titles that serve this purpose. Instead, it will be used by students as an addition to the knowledge they may have already gained from other sources. For those researching in the area, the book offers an excellent starting point for any area of specific research in evidence. Such is the comprehensive nature of the book, it will unquestionably eliminate countless hours of students searching for the most up-to-date statement on a specific area of the law they are researching.

While the book does not provide the same level of academic analysis as, for example, Fennell's "The Law of Evidence in Ireland" it does contribute significantly as an academic work. While it's primary use will undoubtedly be amongst practitioners that does not diminish the significance of its contribution academically. I predict that "Evidence" will become known as the definitive book available in Ireland for any individual working in or studying the rules of evidence.

Reviewed by Diarmuid Griffin B.C.L., LL.M., Lecturer in Law, N.U.I., Galway.

From Promise to Contract

Published by: Hart Publishing
Author: D. Kimel
ISBN: 1-84113-494-5, 1-84113-212-8
Price: Hbk £32.00, Pbk £15.00

Forget the mindset behind the traditional liberal views attempting to explain the basis of contract law, Kimel takes us on a journey not so much to destroy this basis but rather to journey *through* it to the very foundations itself so that we can view the wide spectrum of concepts which live and develop even as we travel. We will leave Hoppers[1] room where promises were made, where communication starts and then derails. We will attempt to decide the "undecidable" and seek to protect that initial undertaking as effectively as we can, because we know that the basis of the contract must be that promise.

Kimel argues that we must leave aside the necessity for convention or social practice for the promise to be made. Trust – Fried's[2] "Remarkable tool" – is, all that is necessary to feed the bonds of the promise. If a general custom already exists it is a "plus" but for a promise to be meaningful there must be trust ab initio – no trust no promise!

The argument extracts, in my view, the best from Fried, but when the problem of the "wrongness" of promise breaking is confronted Kant is brought in aid. I think Kant is an excellent foundation – indeed he is an acknowledged giant in western thought for building and understanding of moral and ethical concepts and concepts of trust and respect which can be applied to contract. Kimel's argument however, only extracts from Kant what is essential for the thesis – in effect Kant's iron law that something more than mere self interest, for example some duty attached to the promise, is required in order to make the promise meaningful. The duty gives force to the promise and when not discharged the trust is gone and the promise is broken for as Kimel reminds that Fried saw a futurity in trust that is trust in future actions.

Therefore unjustified failure to discharge is what makes promise breaking wrong. Kimmel is well aware that it is a matter of the degree of intensity involved and therefore the more trivial insults are excluded from "wrongness".

It is when Kimel considers pre existing trust between parties "...is this a condition for promising? .... in what sense? .... is it impossible? ... and futile?" We are drawn into complex analysis. Austin's speech act theory is analysed[3] and Kimel's thesis that trust is a necessary condition of the promise is confirmed. The thesis holds in normal circumstances and the exceptions – those areas outside of normal practice – only epitomise "the margins of the practice but not its core"[4] Kimel, however, has extracted from Austin what is necessary for grounding the thesis:

"With its correlative, respect, trust holds to the practice's most significant values, instrumental and intrinsic,"[5] Therefore, where these Kantian values are betrayed we can say definitely that promise breaking is "wrong".

It seem that Austin's main interest was to explain the serious aspect of language and indeed this helps the lawyer to understand how language can produce different effects. What about non serious language? His "performative" demands that the speaker's intention should be sincere, honest and authentic. It has to possess its context, correct in every detail to the last atom which is its centre. Otherwise the entire speech act will loose its correct colour. For Austin therefore language must have presence and where it merely re-uses, repeats or quotes it is classified as non serious. Here I will divert from Kimel in order to expand on how my view on language takes me on different paths. For example what Austin sees as aberrant or non-serious Derrida sees as a standard case. For Derrida writing is iterable[6] i.e. repeatable with difference. We are able to repeat any mark(s) which we can identify and in order to identify a mark(s) we must be able to repeat them. This means that "context" is undermined as the final guardian of meaning – where there is repetition it is always elsewhere – the Other has entered! Context exists without a centre and cannot completely govern meaning. Intention exists but again not completely present in the utterance; nor is it completely absent! Real repetition corresponds directly to a difference of the same degree as itself and difference makes itself. Take for example a signature on a cheque. The signature according to Austin is a "performative". An individual signs it and is "present" to the inscription. The signature takes its power from this assumption.

For Derrida the signature is writing. It is therefore "iterable" – capable of repetition and therefore can be counterfeited i.e. to repeat your signature you must counterfeit – you imitate it. The signature therefore casts doubt. Is it fraudulent? Iterability means that there is a possibility of the signature but also conditions of its impossibility i.e. of its purity. Furthermore there are *internal* differences – these dramatise an Idea before representation of an object. This makes the difference internal to the idea.

For Austin's speech act interpretation is important. It an hermeneutics which always proposes a convergent movement travelling straight to a unitary meaning and applies to the serious never the non serious.

For Derrida's words will always discern a dispersive perspective in which there is no one meaning and it applies to all words serious and non serious.

Is it possible to have a higher test for repetition i.e. a test which is the ultimate standard? Of course Kant constructed his own test for repetition which would be without contradiction in the form of moral law. He held that where we repeat as natural beings, for example an hedonistic act, we descend into evil, despair or boredom. Where we repeat as spiritual or moral beings then the repetition contains a possibility of success linked to the law of duty.

Derrida put forward his standard for repetition. We look to the decision (which for Derrida is a performative) and where the decision fails to conform to a rule, "ethics" enters. At this point we are confronted with the "undecidable". There is a possibility of Ethics which is not yet "ethical" or "political". Ethics at this stage is outside good and evil.

A complex infinity of space, time and meaning is then opened in which justice reigns and where it is possible for democracy to be trumped.

I justify this diversion from the path of Kimel and dare to suggest that the trust in the promise should reside in this space of time and meaning.

By the end of chapter one Kimel has established that the promise is at the heart of contract and that trust is the essential ingredient in the promise. The more that the trust intensifies, even between strangers to a promise, the more as I see it, "yours faithfully" becomes "yours sincerely" in the corporate context. This I feel is a useful guideline to remember in the new global economy.

Kimel's chapter on Normativity, Trust and Threats deals with H. L. A. Hart's view of how the law controls society by the normative method with the sanction attached to law being merely a supportive technique. Dan-Cohen would contest this thesis; "...Normativity and coercion are (also) at odds with each other."[7] Dan-Cohen also says that "A request backed by a sanction is an oxymoron"[8] This thesis is the disjunctive view. Kimel does not fully accept either view in order to build the thesis. The tension between the use of normativity and the use of threats must be assessed in context. The occasional use of a threat or even a coercive threat does not mean that the entire relationship is dominated by threats. Kimel points out that the legal power to make a contract gives access to the parties to avail of legal mechanisms to facilitate exchange between them. Kimel therefore argues that in effect the parties agree to subject themselves to the consequences of these mechanisms. He is also aware that the state may resort to coercion. He therefore concludes that there is a valid analogy which may be drawn between threats and enforceability. Contractual relations may be analogous to relations governed by coercive threats but for Kimel this analogy is of limited application. Threats are only one reason for compliance, availability of remedies for breach is another. Even entering a legal contract may in some societies merely amount to a convention. Insistence on a contract to make the relationship possible may even be offensive to a party or both parties. This conclusion of Kimel's spurs us on to explore the role of trust in the relationship between parties.

Enforceability is not a substitute for trust. Trust remains in the thesis in its own right. Trust of course is necessary for a contract but "in trusting a person to keep a contract simply requires less trust compared to trusting a person to keep a (non-legal) promise."[9]

For Kimel trust is a "context-sensitive concept."[10] There is its "instrumental function", that is trust facilitates reliance, "cooperation or coordination between people."[11] There is also the "intrinsic value" of the practice, that is the desire for special bonds beween parties and special relations that are voluntary and which are shaped and developed. Kimel elaborates upon "special relations", "special duties" and special obligations." For Kimel "special relations" denote a situation where people owe duties to each other that they do not owe to others. I believe this part of Kimel's work to be subtle containing deep insights with regard to relationships between parties. Transparency is necessary in a relationship which is special because in such relationships the parties simply have attitudes which can manifest themselves through certain actions without the necessity for a framework to support this. In other words, as I see it, trust is the springboard in the relationship and the parties can say "we have something special going for each other." This special thing according to Kimel is <u>why</u> the relationship is valuable and not the framework supporting the relationship.

What of the value of the contract? What of the value of non-legal promise? What of the relationship between these? Here in my view is the most profound and thoughtful chapter. The value of the contract and the value of the promise are, as Kimel points out, diametrically opposed. The practice operates differently in each case.

Within the contract on the one hand there can be a personal relationship without commitment to future prospects in the relationship. There is space for detachment – a type of freedom.

Non-legal promises on the other hand provide the framework where personal relationships may evolve and flourish because promises are appropriate for this purpose. Non-legal promises allow for this. Kimel is careful however to balance this and points out that contracts can generate and reinforce personal relationships and promises may actually fail to do this. It is a question of the functions which each practise is designed to fulfil.

Kimel skilfully applies the harm principle in relation to mitigation – where it is argued that the mitigation rules are an example of protecting contractual entitlements. As far as the freedom to change one's mind in relation to a contract is concerned, the harm principle is applied "subject to payment of damages"[12] and where the harm caused by the breach can be redressed by means other than performance, then this other means should be availed of. Kimel asks the question – is the core contractual obligation, including rights, analogous to that at the heart of promise i.e. performance? Or in other words is the essence of the contract performance?

It is argued that specific performance is the remedy which seeks to give the innocent party exactly what he/she wanted. Expectation damages merely compensates. Kimel quips; "at best, excuse the pun, it is a second best. So why not opt for the best?"[13]

(I would agree that specific performance is better!) Expectation damages however is commonly used and enforcement by comparison is rarely used. This, according to Kimel, explains why a belief in compensation for non-performance, which is Tort like, is the popular belief used to explain what contract law is based upon.

Kimel however is careful to stress the intrusive nature of specific performance as a remedy compared with damages. J.S. Mill is called in aid and the harm principle is applied in order to show how specific performance can be modified so that its intrusive nature is tamed. Expectation damages can therefore can take a back seat. In short the principle which Kimel applies is that whenever a harm can be effectively prevented in more than one way then the least intrusive one should be used.

The last chapter deals with the liberal state. For a proper understanding of Kimel's position we must remember to distinguish between contract and promise. A harsh view of liberalism will forward neutrality as a practice in order to explain how freedom to contract operates but we are not allowed by Kimel to forget that contract and promise are two different types of voluntary undertaking. Government

restraint may use neutrality and thus strives to help or hinder the parties concerned in an equal degree. By skilful use of examples Kimel demonstrates the limitations of neutrality – it can help one party and (unjustifiably) hinder the other. Kimel therefore concludes that neutrality is not the "soul" of liberalism and its guarantee of freedom of contract and Kimel therefore canvasses personal autonomy. This is a Kantian type solution and in my view eliminates any harshness from liberalism. Kimel draws an analogy between two values – one which emerges when we invoke personal autonomy and one which flourishes as the essential binding force of the promise i.e. "trust" dealt with earlier in Chapter 1 by Kimel. Personal autonomy is "an ideal of self creation, of people exerting control over their destinies."[14]

The autonomous life consists in "...the pursuit of freely chosen activities, goals and relationships."[15]

Yet personal autonomy must not be seen as a never ending invitation to endless options being opened. The autonomous life must be in pursuit of the good life. Kimel points out that personal autonomy on the one hand is suitable for promises because it enables the relationship between the parties to mature and develop. This is its intrinsic function. Contracts on the other hand facilitate personal detachment and are valuable only where it is necessary to deal with others or where some unwanted involvement with others is a possibility. It is therefore not necessary to protect arrangements which the parties do not want to engage in. Legal intervention therefore in freedom of contract is not so m much to prevent parties from making arrangements not wanted through contract but rather from making them in any event! Kimel thus pins down clearly the bearing that the value of personal autonomy has on freedom to contract in the liberal society.

Kimel in emphasising the role of trust in the promise widens the narrative in law to touch upon the socio-political and even historical aspects. If, for example, we were to consider what law has "blotted-out" or not "gazed upon" over the centuries, we can only guess how many times Kimel's "trust" was utilised in order to cement relationships in society where non-legal promises were the only procedure available to the parties. Trust therefore linked to the promise is a powerful cohesive force in society and especially in the legal and non-legal agreements. The many types of non-legal agreements must surely be legion. Igor Stranignoni[16] speaks of the contract of "marriage", i.e. a man and woman living together in Britain today. This term "marriage", however, would not be applied to same sex relationships forcing such relationships to exist in a world where non-legal agreement is necessary with strong reliance upon trust. This is a world hidden from law's gaze where trust reigns so that the cohesion necessary for the general community is not threatened. Trust therefore is covert and overt.

I have gone down paths perhaps not "sign-posted" by Kimel. Yet to find answers to the questions raised I found it necessary to wander. From Promise to Contract is a work of excellence in its research and Herculean in its strength necessary to ground an exciting concept of contract law in an enlightened liberal setting.

It is now time to return to Hopper's Conference Room. Here the "Zombie" takes shade in the black abyss of indifference. There is also Hopper's light – that inspiring metaphor which for the moment is formless. The light gets its identity by distinguishing itself from the darkness which does not need to distinguish itself from the light. Yet the light will produce its "difference" in a unilateral way – it will "make" the difference. It is in this world of light or in the world between the darkness and light that the decision is made. The decision can trump honesty, authenticity, duty, democracy and trust. Armed with these Kantian liberal attributes the contract is born and *difference* takes shape.

Reviewed by Michael J. Conneely, MA (TCD), LL.B(TCD), LL.M (ABU Nigera), BL (King's Inns).

Endnotes

1. See the cover image by Rachel O'Dowd of Edward Hopper's "Conference at Night"
2. Fried is used skilfully e.g. Contract as Promise, Cambridge, Mass. (1981)
3. Austin defined performatives e.g. "I declare you man and wife." These words perform an event. This is Austin's safe context. It has presence. He defines Constantives e.g. "Jack and Jill went up the hill." These words are statements of fact. In short for Austin language is serious, it must have presence and his Performative must always need a context. For Derrida all words serious or non-serious are regarded as a standard case and for Derrida writing is iterable that is repeatable – with – difference. Derrida has two strands (is this Derrida's Matrix?) to his thinking.

(i). Communication This is Derrida's context e.g. a lecturer in Greek in the lecture hall. It is possible to know exactly what he means but not everything will be crystal clear therefore communication becomes derailed even in the safe context of the lecture hall.

(ii). We are then face with Derrida's 2nd strand - Undecideability and he uses the zombie (an example from his days in the U.S. viewing horror films) is it human, alive, dead, good, evil, can it be killed or not? For Derrida therefore the text or writing is undecidable at the beginning and Derrida's task is always to intensify the disruptive interplay. Deconstruction, a word Derrida himself always found to be problematic, impels disorder, disarrangement and re-arranging but deconstruction will lead to a new construction eventually.

4. Kimel page 20
5. ibid page 20
6. "iterable" meaning once again from the Sanskrit.
7. Kimel page 34
8. Ibid, page 35
9. Ibid, page 58
10. Ibid, page 59
11. Ibid, page 65
12. Ibid, page 113
13. Ibid, page 95
14. Ibid, page 126
15. Ibid, page 126
16. Igor Stranignoni gives an example of what I would describe as his hidden history contained in the legal narrative. He speaks of the accepted "marriage" state of a man and woman living together but pints out that even today in Britain some people cannot conceive of two people of the same sex being in a "marriage" state. Thus this type of relationship is made up of the "blotted out". We can assume that the parties have a non-legal agreement in which trust must reign and the importance of trust as a hidden cohesive force is confirmed in the legal narrative. See Legal Studies Vol. 22 No. 3 Sept. 2002 Article by Igor Stranignoni. This path is not signposted by Kimel butt I can resist glancing down the road to try to see not only who we are but <u>when</u> we are!

Web Review

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The Courts Service Website – A Users Guide

Overview

The Courts Service website was the 2005 winner in the State Body category of the Irish eGovernment Award: The most remarkable feature of this website is its capacity to upload judgments onto the site within hours of their utterance in the courts of Ireland. There is a sea of information on this website – but I promise you will not drown. If you head straight to the site map on the right hand side of the homepage, this will allow you to see the information that is available to you in a clear and concise format.

Upon entering the site, the visitor is greeted with the Mission Statement of the Courts Service, which includes the aim of providing a high quality and professional service, which, it may be said, they have achieved. There is also a Message from Chief Justice John L. Murray identifying the importance of the website as a tool in the administration of the courts. An added touch is a Tour of the Four Courts wherein the Round Hall is probably described as the 'physical and spiritual centre of the building'.

Who is it for?

This site is for all users of the courts, including judges, staff, legal practitioners, victims, witnesses, accused persons, media and members of the public. Although it does not pitch itself with readers of law in mind, this is also a useful websites for students.

Laypeople

The site is layperson-friendly with a commitment from the authors at the outset to present the content of the site in plain language as far as possible. More than that, the authors are committed to ensuring accessibility for people with disabilities as they endeavour to ensure that all pages of the site conform to the guidelines adopted by the Irish National Disability Authority.

The Publications page is particularly geared toward the layperson approaching the court system for the first time as a juror, witness or otherwise. By way of illustration, the Family Law Bulletin (Vol.2, Issue 2, May 2002) details how one should prepare an application to the court under the Domestic Violence Act 1996, wherein a "how to" of obtaining protection/interim barring orders and conducting oneself in the witness stand is provided.

Students

For those at the threshold of their legal education, the 'About Us' section contains a very useful diagram of the structure of the courts. There is also a 'Glossary of Terms' explaining the meaning of such terms as *Nolle Prosequi* and the difference between a *Subpoena ad testificandum* and a *Subpoena duces tecum*. Such documents provide suitable decoration for the bare walls of a first year law student's study quarters.

For the more seasoned student, the judgments database provides you with the judgments of the courts within hours of their delivery. At present, the database contains all written judgments of the Supreme Court since the year 2001 and all written judgments of the Court of Criminal Appeal since 2004. Judgments of other courts will be available in due course.

The Heritage page delves into Brehon Law (ancient Irish law) and Ireland's most famous cases and trials. Under Brehon Law, divorce was permitted and capital punishment did not exist. Infamous cases and trials include the execution of Robert Emmet and the Sligo State trials. These provide us with not only inspiration but also anecdotal material to keep non-law acquaintances interested in one's life's work.

Practitioners

Practitioners are provided with the Terms and Sittings of the courts as well as the Legal Diary. The Legal Diary provides daily accounts of the location and time of cases and the sittings of judges. Practice Directions and Court Forms are also available on the site, which provide information, amongst other instructions on when and how to file a notice of motion for bail and a downloadable witness summons form respectively. The Rules and Fees of the Superior, Circuit and District Courts are also available on the site.

Conclusions and Recommendations

This site could be improved from a navigational prospective, for example

if links to the web pages were presented on the left-hand side of the page only and appeared in a different hue once accessed.

In sum, this is an excellent site tailor-made for its audience with an extensive customer services page, an excellent search engine with corresponding instructions and a plethora of information for the many categories of person who make use of it daily.

Conference Note

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NUI Galway Irish Human Rights Law Centre and Queen's University Human Rights Law Centre

Conference Title: "Future Developments in Refugee Law"
Date: 28 May 2005
Venue: NUI Galway

Speakers: Professor James Hathaway "Alternatives to 'Convention Minus': Points of Departure for Reform of the Global Refugee Protection System", Dr Siobhan Mullaly "New Developments in European Union law", Ms Cathryn Costello "The Asylum Procedures Directive", Ms Ciara Smyth "Transposing European Directives into Irish Law", Ms Dallal Stevens "Developments in Refugee law in the United Kingdom", Professor Colin Harvey "Human Rights Law and the Protection of Refugees and Asylum Seekers".

Participants: Private practitioners in the field of refugee law, Refugee Legal Service solicitors and caseworkers, barristers, academics and students.

The conference was blessed with Professor James Hathaway, the eminent legal scholar on refugee law, as its keynote speaker. Professor Hathaway wrote what is arguably the leading publication in this area entitled "The Rights of Refugees under International Law", the new edition of which is due out in October of this year and is eagerly anticipated. It was announced at the conference that a new website is soon to be launched (www.refugeecaselaw.org) which will see the completion of the most important and influential cases emerging in a host of jurisdictions on refugee law.

Professor Hathaway opened the lecture by examining positive trends in refugee law. This included wide affirmation of instruments, highly evolved jurisprudence and creative protection responses. The recent action of Europe and Australia in sending helicopters to rescue Kosovan refugees refused from the Macedonian border was given particular mention.

Focus then turned to the challenges faced. The first challenge identified was the unfair distribution of protection. It was noted that eighty percent of refugees are protected in Africa, South America and the Middle East. To put this in context, Jordan has one refugee for every one hundred people whereas Japan has one for every twenty thousand people. There is also a skew in the allocation of resources. Poorer countries spend $1 a day on refugees, whereas wealthier countries spend $25,000 just to process the application of a single refugee. The issue of resources leads to a serious denial of refugee rights, including illegal detention and expulsion. In states such as Malawi, which has one refugee for every ten people, there have been reports of sexual abuse and rumoured state-sanctioned theft of rations.

The failure to remove non-genuine claimants is a further challenge and has helped to undermine public confidence. By way of illustration, the system of Temporary Leave to Remain makes futile the process of assessing refugee status as a means to determine the right to remain, as failure to gain such status does not result in expulsion.

The greatest challenge was identified as the failure of 'Convention Plus' to address the core issues that will revolutionise refugee protection, such as the re-allocation of resources, and its insistence instead on asking states to take on further obligations. In an already highly-politised and over-burdened system, this is a viable suggestion. Moreover, the UNHCR was reprimanded by several African States for 'trading rights for political acceptence' in 'Convention Plus'.

Professor Hathaway then endeavoured to outline the most promising ideas on the table. One of these was to enhance the viability of repatriation. In Norway, the government has devised a creative solution to the problem of repatriation. Rather than relying on political assurances, for which countries have been harshly criticised by the Committee Against Torture[1] refugees are given the option of returning home to "test the waters" and see if the danger has passed and if repatriation is truly possible. They are given the cost of their flight home and a stipend to start their new life. 90% of those repatriated stayed. The flipside of this is the enhancement of resettlement opportunities (responsibility sharing) for those who cannot return. South Africa is the only country in which a permanent home and integration is offered. Another idea on the table is the empowerment of protection for the duration of the risk. This will allow states to see the refugee process as the human rights remedy it is – not as a migration vehicle. There is also a call for a reinforcement of the reception capacity in the regions of origins. This is seen as an ethical matter. There must be engagement with the quality of protection within the country of origin. If refugee status is to truly be temporary and repatriation is to be viable, organisations and states should endeavour to relocate people as close as possible to their homes.

Finally, and most ambitiously, there is the concept of extra-regional protection based on need. Those who are most in need of protection are rarely those who reach the shores of countries who can offer them protection. It is often those who can afford to pay smugglers and those with the most savvy with regard to the asylum process that are offered its protection. Children, the disabled and women at risk should be assessed in their country of origin based on their need. The pre-condition in the 1951 Convention that an asylum-seeker is

outside his/her country of origin is a debilitating one for those in the greatest need of refugee protection.

Professor Hathaway's ideas were clear, pragmatic and revolutionary. He praised the 1951 Convention as a flexible and living instrument and noted the importance of making the asylum process connected with it economically viable, true to its purpose and accessible to those who need it most.

Dr Siobhan Mulally looked at the Qualification Directive and the Hague Programme in light of the Constitution of Europe. Dr Mulally noted, favourably, that the Qualification Directive went beyond the requirements of the 1951 Convention, offering subsidiary protection previously only afforded to asylum seekers under the European Convention on Human Rights. Moreover the speaker recognised the incorporation of the EU Charter on Fundamental Freedoms and the ECHR into the Constitution of Europe as having the potential to strengthen the protection of refugees and asylum seekers. Dr Mulally noted with concern a common harmonizing down of refugee and asylum seeker rights by European countries.

Ms Catheryn Costello looked at the interaction between EU and Refugee Law. In particular the focus was on the new EU Asylum Procedures Directive. The directive outlines several procedural guarantees, some of which offer superior protection to its predecessors. The consensus seems to be that this is not a satisfactory instrument. However, annulment is not an option and torturous implementation seems to be the only way forward at this juncture.

Ms Ciara Smyth examined the Qualification Directive containing minimum standards on Subsidiary Protection. A person eligible for subsidiary protection is a third country national who does not qualify as a refugee and faces a real risk of suffering serious harm. The directive explicitly leaves some issues to the discretion of member states including the extent of exclusion, amplitude of rights and the type of procedure. There are two options for transposition: a statutory instrument under the European Communities Act or primary legislation such as an Immigration and Residence Bill. The latter was identified as preferable as it allows for debate on the issue.

Ms Dalall Stevens identified the future of English refugee law as being in line with the 5-year strategy the current Labour Government put in place by. This consists of an E-border program, which includes a system of fingerprinting, more stringent visa policies and carrier sanctions and the removal of failed claimants.

Professor Colin Harvey examined the protection of refugees and asylum seekers under Human Rights Law. He identified these sources of law as: Human Rights Principles, Human Rights Standards, Universal Human Rights law, Regional Human Rights law and Human Rights at a national level. Professor Harvey noted that the proposed Human Rights Commission in the UK would offer greater protection to refugees and asylum seekers under human rights law at a national level.

The Panel Discussion centred around Professor Hathaway's speech and his opinion on matters relating to refugee law and policy. My question to the great man was no different. I raised a question with regard to the culture in Africa of welcoming refugees, considering the fact that the word for "refugee" in certain African languages actually means "freedom fighter", and whether or not this culture still exists and why it exists. In his response, Professor Hathaway pointed to the existence of reciprocity between African states when it comes to seeking asylum. This is very different from the situation, for example, in Western Europe where the flow of refugees is almost entirely one-way.

Conclusion

The Conference was excellent, and as informative as it was innovative. Professor Hathaway, aptly described as a guru of refugee law, inspired the group with his clear ideas. Furthermore, the professor pulled no punches when discussing the changes that need to come about in the approach of the UNHCR, in order to see an improvement in refugee protection worldwide. Furthermore, Professor Hathaway referred to my question as an "interesting one" which made getting up at 5.30 that Saturday morning seem like a small sacrifice.

1 Agiza V. Sweden, Communication No.233/2003, UN DOC.CAT/C/34/D/233/2003 (2005). In this recent case sweden erroneously accepted the political assurances of the Egyptian government when repettiating on a sylum seeker which later proved to be untrust worthy.

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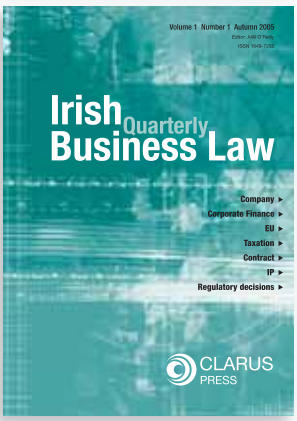

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