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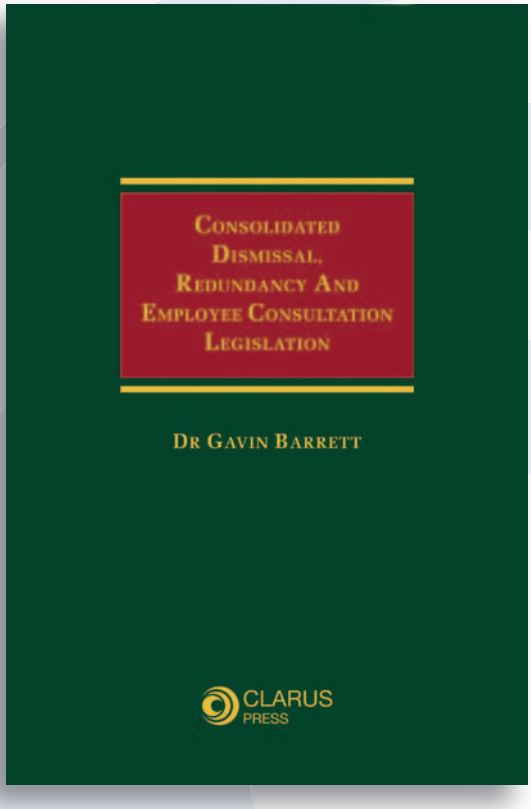

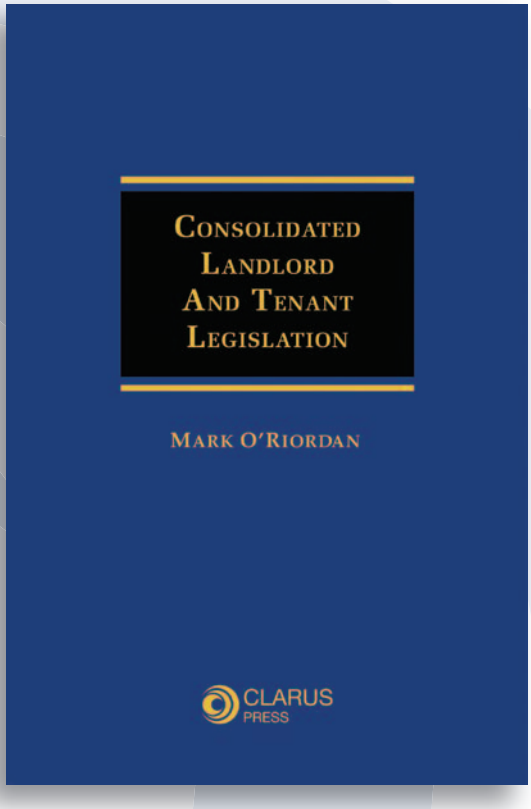

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Legal Iconography: How popular cinema represents the law

By Joe Jeffers
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Introduction

For the past hundred years, cinema has been an immensely successful manifestation of popular culture. Film continues to play a major role in shaping public understanding of many social issues. Whether we look at the early and more recent movies from Hollywood, or early Soviet cinema, the new wave of films from France, the British cinema of social realism or the emergence of Irish films in the last decade, the representation and resolution of conflict is a recurring central theme. Such conflict may be between good and evil or between order and disorder or between progress and the status quo or between the modern and the primitive or between civilisation and the uncivilised.

The history of cinema shows that many film producers and directors were concerned with addressing issues of law and order in a changing society. The response of the cinema going public confirms great public interest in these issues. From the slapstick portrayal of the police in the *Keystone Kops* films of the silent era, through the exploration of frontiers in the popular westerns of the early and mid twentieth century to courtroom drama classics such as *To Kill a Mockingbird* and *Twelve Angry Men* right up to modern day action films, shows how society is ordered is at heart of these films. Many of these films show a modern day technological exploration of the same issues which captured the imagination of the likes of Plato, Socrates, Aristotle, Cicero, Augustine, Thomas Aquinas, Hobbes, Locke and Marx.

In particular, much of the popular understanding of lawmaking, the enforcement of law and of concepts such as justice and retribution are shaped by films. This article will examine how the cinema has developed and has used legal iconography.

How Film Works

Film is considered the youngest art form and has inherited much from the older and more traditional arts. Like the novel, it can tell stories; like drama, it can portray conflict between live characters; like painting, it composes in space with light, colour, shade, shape, and texture; like music, it moves in time according to principles of rhythm and tone; like dance, it presents the movement of figures in space and is often underscored by music; and, like photography, it presents a two-dimensional rendering of what appears to be three dimensional reality, using perspective, depth, and shading. Film is primarily visual. It engages the audience at both intellectual and emotional levels. Film has its own language. The use of long-shots, close ups, silhouettes and other techniques, constitute the grammar of film language.

There are three principal functions all films serve: the artistic, the industrial and the communicative.

The artistic function concerns the nature and organisation of the formal elements of the medium: composition, sound, montage, lighting, decor, camera movement and performance. For any individual film to be art, one might say that its artistic function must be dominant, despite the other functions that may also be present. From an industrial viewpoint, one must bear in mind that films are products of human labour and are commodities to be consumed. In capitalist systems, profit is the basic motive that operates in the commercial film industry, and the kind of films that can be made are determined largely by their potential for making a profit. Organisations which invest in films do so for the same reason they invest in any other commercial venture. In socialist systems where there is a state control of the film industry, films are made if they are considered to fulfil an acceptable social role. Of course, in both capitalist and socialist systems, films are made which do not always fit neatly into such crude categorisation.

For most people, communication is the primary and most powerful function of film. Since its inception, film has been used to reach large numbers of people with a message that was meant to influence their actions and thinking. No less a shaper of mass opinion than Lenin, the intellectual leader of the Russian Revolution, is reputed to have said: "For us, film is the most important art." This belief found practical expression in an extraordinary body of films made in the Soviet Union in the decade immediately following the revolution. During the political ferment of those years, film led the way in spreading the message of the new social order and in bringing that vast country, made up of so many diverse nationalities, to a revolutionary consciousness. It was not only Soviet directors, such as Eisenstein (*Strike, Battleship Potemkin*), Pudovkin (*Mother, The End of St. Petersburg*) and Dovzhenko (*Arsenal, Earth*) that used film to advance their own cultural and political interests. With the Nazi film-makers Reifenstahl (*The Triumph of the Will, Olympia*) and Hippler (*The Eternal Jew)*, political film reached its zenith of political power between the world wars. With World War II came a flowering of political cinema in the United States, well illustrated by Frank Capra's series *Why We Fight.* American social documentaries of the 1930's (*The Plow that Broke the Plains, The Land*) also served specific political goals, linked, for the most part, with the programmes of Rooseveldt's New Deal.

These three functions of film, the artistic, the industrial and the communicative, are interdependent and embedded in a context of culture, economics and technology. Films reflect the cultural codes of the society in which they were produced, which often makes it difficult for individuals of other countries to understand fully the films of another country or era.

Iconography

The icon is a crucial element of any genre, as it is the first element that we immediately recognise and identify with. Icons are signs that have special meaning and are easily

recognised by members of a particular society or culture. People use icons as shortcuts to understand and interpret common concepts. Icons are useful in establishing a common view among people within a society. Therefore, legal iconography helps the public as a whole recognise and understand aspects of the making, enforcing, breaking and changing of legal systems.

There are three main types of icon: objects, backgrounds and sometimes stars. An icon is a sign that bears a strong resemblance to that which it signifies. For example, a map is an icon, as is the visual sign for 'no smoking' or the sign that denotes that a toilet is 'wheelchair accessible'. In film, particular icons are associated with distinctive genres. The icon is a symbol of the genre — see the icon and you know immediately what territory you are in. All the other elements of the genre are likely to be assumed once you have recognised the icon and interpreted it. Icons such as the Colt 45 of the Western, the Luger of the Spy Thriller, the Ray Gun of Science Fiction, are potent icons. They do not just stand for other genre elements, they also stand for the main ideas and themes of the genre. Icons work so effectively because communication is learned. It takes time and repeated exposure to examples of genres before new icons are created in the minds of the audience. Although mainly visual, icons can appear in other forms. The whine of the police siren, the thud of a judge's gavel or the whirr of a ricocheting bullet, have all reached iconic status. It is much harder to apply this concept to the print media, because there is not that quality of instant recognition — elements take time to unfold. However, icons such as the distinctive uniform of an American cop may be described in words and still be recognised as special to the genre.

Film, through its visual qualities, allows icons to be easily identified and appreciated. As a result of this, the way in which film perceives the law is crucial to many people's understanding of the legal system.

How many of today's criminals expect to be hauled away in the reflection of the sheriff's badge, to be interrogated by a good cop and a bad cop in a smoke filled room and finally to be defended by Tom Cruise or Gregory Peck? If they do, it is because of the way in which legal iconography is employed in cinema. As it will be argued, by looking at selected genres and films, legal iconography through the history of film has been carefully constructed.

Gangster Movies

Between the years of 1930 and 1932, Hollywood produced a number of gangster movies that were genuinely more radical in spirit than those of other genres. The three best known are *Little Caesar* (1930), *The Public Enemy* (1931) and *Scruffs* (1932). They are morality tales, a kind of Horatio Alger success story but viewed upside down and viewed from the point of view of the dispossessed of society, who have to steal and murder their way to the top, because all other legitimate avenues are cut off for them. The authorities were disturbed by the social undertones of these films and forced the studios to attach moral homilies to the movies: *Little Caesar* ends with words appearing on the screen that read; 'Rico's career had been a skyrocket, starting in the gutter and ending there'. Soon, the Hays Office, set up by the movie moguls themselves to stave off external censorship and to answer increasing protests about the moral depravity of movies, was clamping down on the way in which gangsters were portrayed on film. Criminals were to be represented as psychopathic and isolated individuals, whom all decent citizens should despise and help the authorities to destroy. The public loved the exploits of Cagney, Muni, Bogart and Raft on the screen, and all these actors became major stars, largely through their impersonations of real life gangsters such as Al Capone and John Dillinger. The gangster genre has never been as popular as it was in the thirties, but since then it has produced some of Hollywood's best movies: *The Asphalt Jungle* (1950), in which a character pronounces that 'Crime is merely a left-handed form of human endeavour', *Bonnie and Clyde* (1967), a glamorising and myth making treatment of the story of thirties' gangsters, and the *Godfather* and the *Godfather Part II* (1972 and 1974). These four films seem to imply that society is hypocritical in its attitude to crime and that the boundaries between 'respectable' business, the forces of law and order, and organised and 'disorganised' crime are very thin indeed. More recently, movies such as *Casino* and *Goodfellas* reflect the continuing fascination with gangsterdom and what criminals tell us about the society we live in.

The popular depiction is of the gangster as human and heroic and by contrast, the state and the forces of law are portrayed as cold and impersonal. On our own doorstep, similar criticisms have been made about the portrayal of the criminal Martin Cahill, in the film '*The General*'.

Westerns

The Western is the most cinematic of all genres because no other art form can hope to emulate the cinema's power to represent the myths of the American frontier in such an immediate and all-embracing manner. As far as legal iconography is concerned, the Western has perhaps the best examples. From bleak semi-desert landscapes, to the sheriff's office, the Western has laid down the foundations for civilised society. They present a view of America's frontier and agrarian past that feeds the American dream: the rugged individual striking out for the unknown, Man against raw Nature, the pursuit of an independent way of life, the acquiring of land and wealth, the conquering of hostile elements in the shape of Indians and 'bad' men, law and order versus anarchy and building communities out of the wilderness based on simple values and hard work. The most popular and typical Westerns broadly told similar stories; the new civilised American settlers faced with the task of taming both the raw countryside and the barbaric Indians that inhabited it. In some respects, much of the legal philosophy of the early Westerns can be grouped into the Natural Law category. Plato's concept of the just State, governed by the good and the wise, reflecting the naturally hierarchical structure of human society, runs through much of the genre. The emerging law and order brought the sheriff's badge to iconic status.

It was not until the fifties that the Western began to treat more serious and pessimistic themes. *Broken Arrow* (1950) was the first Western since the silent era to allow Indians some measure of self-respect. Perhaps too much reality has broken through the mists of legend to sustain the western myths any longer, hence the drastic drop in the number of Westerns produced in the last thirty years. It seems the American public no longer need frequent doses of western mythology. For example, most Americans now accept that a form of genocide was practised against the Indian population

in order for the white man's civilisation to flourish. In an era where so-called heroes turn out to be mere mortals after all, it is also difficult to suspend our disbelief when watching these larger than life western heroes create law and order out of chaos.

Cinemagoers are more interested in the new heroes, the urban guerrillas of Stallone and Schwarzenegger, than the straight shooting cowboys of yesteryear. There are indeed parallels between both these genres — just like the cowboy, the action hero is trying to impose law and order on the urban and almost lawless jungle. Indeed many of these films seem to suggest that conventional law is failing, which is why so many of them centre around one man's quest to bring the world to justice by whatever means possible. Respect for law is abandoned in the search for justice. Law is seen only as an obstacle. Take, for instance, *Dirty Harry*. At the end of that movie, Harry Callahan (Clint Eastwood) has finally been able to elicit a confession from a psychopathic child killer by utilising the type of extra-legal persuasion for which Dirty Harry is famous. When he is called to the District Attorney's Office, Harry expects to receive a commendation. Instead, the District Attorney informs him that he has violated the suspect's constitutional rights. The DA even has a retired judge calmly explain why the "law" requires that this psychopath must be released. Harry warns the DA that the suspect will kill again; and, as usual, Harry is right; the released suspect continues to kill until Harry finally shoots him down. As Dickens put it in *Oliver Twist*, "the law is an ass". Violence achieves the justice that law could not. Therefore justice is achieved by the gun when the law has failed. The gun has become iconic of justice but not of law. The new Western embraces this idea about the need for affirmative action to protect one's rights, reflecting the views Locke expressed in his *Two Treatises of Government* (1690). Similar to the thinking of Locke, many of these films set forth the view that the state exists to preserve the natural rights of its citizens. When governments fail in that task, citizens have the right — and sometimes the duty — to withdraw their support and even to rebel. Often the State and the legal system is portrayed as *wishy-washy* and liberal. What's needed, as suggested by the ideology of such films, is a return to the law of the jungle.

Very few films present a situation where the law is used conventionally to achieve justice. There are very few examples of heroic policemen who follow correct procedures, judges who do not have an outburst or prosecutors who do not deliver wonderful speeches that result in the entire courtroom cheering. Situations like these occur so frequently in films for one reason alone, because they make for good drama. It is because of this that we, the cinema-going public, receive a less than realistic picture of the way in which our legal system operates.

Social Problem Movies

Every so often, cinema deals with social problems of today, such as racial prejudice (*To Kill a Mockingbird*), alcohol (*Nil by Mouth*), drug abuse (*Trainspotting*), violence against women (*Once were Warriors*) or the disillusionment of urban youth (*La Haine*). The main problem facing these movies is the 'Hollywood factor' — the need to attract a mass audience and make the money. As a result many films present a distorted view of harrowing situations simply to appeal to the audience. Many tend to emphasise the personal problems of the individual at the expense of the general social issue that ostensibly is being represented. In the heyday of the studio era, Hollywood was careful not to alienate sections of public opinion, and thereby endanger box-office returns: studios had to contend with multifarious pressure groups such as the Catholic Legion of Decency, the American Legion and frequently bigoted local censorship boards, all of which might put a seal of disapproval on a film, a move that could have a major impact on how well it did at the box-office. The powerful Legion of Decency telling Catholics not to see a film because of its sexual explicitness, politics or perceived blasphemy was the stuff of producers' nightmares. Thus many of the movies that dealt with 'explosive' issues had to be so kid gloved in their treatment that they lost credibility as serious social documents.

It is left up to pioneering independent film-makers to tell the story as it really is. As a result many such films will not experience commercial success. The British filmmaker Ken Loach has tackled such social issues as homelessness (*Cathy Come Home*), poverty (*Kes*), unemployment *(Raining Stones)*, and alcohol (*Hey Joe*). Loach's portrayal of the oppression of social under-classes seems to reflect many of the ideas of communist theory. His films are similar to Marx's analysis of capitalism, as he deals with the theory of alienation, the labour theory of value, and the materialist conception of history. His characters are physically weakened, mentally confused and mystified, isolated and virtually powerless, reflecting Marxist theory of the worker in a capitalist society. Although Loach's films deal primarily with British society, his social analysis has universal application.

The 1996 film *Trainspotting* was perceived by many as a notable exception to the theory that films tackling social problems realistically, will ultimately fail at the box office. It is debatable however, whether the film actually does deal in a realistic manner with the issue at hand; in this case, drug abuse. It is argued that the film shies away from any realistic portrayal of life as a drug addict, preferring instead to glamorise the problem at hand and present in a modern and fashionable way, which ultimately helped the film to reach cult status. The film's directors were hailed as pioneers for bringing such a story to the big screen, but when compared to the original novel, by Irvine Welsh, it becomes apparent that *Trainspotting*, like so many other films, fell foul to the Hollywood syndrome and the lure of box office returns.

Detective Movies

Detective movies often give us an insight into both sides of the law, purporting to enable us to understand the mind of the law enforcer (the detective) and the law breaker (the criminal). The law itself plays a key role. It is the law that brings these two, apparently independent individuals together. Their independence is, of course, an illusion: each is bound to the other by the law that divides them, and the existence of which, in turn, depends upon the existence of the State. The State is fictionalised as the necessity required to protect men from themselves. And so the public is born, whose safety is guaranteed by the detective acting ultimately in the name of the law; while that same film going public's sympathy lies with the criminal while condemning the crime.

The law works as the common factor which ties these four elements together and at the moment of capture all four elements will converge: the detective who has tracked down

the criminal, the State in its repressive aspect ready with the handcuffs and the public, mute witness to what is going on.

It is however the relationship between the detective and the criminal which is pivotal, for it is that relationship which holds the whole structure in place. The criminal and the detective engage across the differentiating mark of the law: that which keeps them distinct, prevents their curious symmetry from collapsing into identity. Yet the law is a barrier which can be crossed. In the pursuit of the criminal the detective must know him, be as him, though not, finally be identical with him. And the criminal, in his flight, must preserve the mask of respectability and appear on the right side of the law. The detective is presented as separate from the public, but he must also resist the temptation to allow himself be won over by the other side. He must resist the lure of what is beyond the law, not for fear of being caught, but because within himself he embodies the law. His own conscience is the guarantor of his immunity. In this respect, too, he is different from us, the public, who need the law to protect us from ourselves.

Two recent films have specifically concentrated on this intriguing relationship between the detective and the criminal. In Andrew Davis' *The Fugitive* (1994), a remake of the classic 1960's television series, the main thrust of the film concentrates on the relationship between the presumed killer, Dr Richard Kimble (Harrison Ford) and Lt. Sam Gerrard (Tommy Lee Jones) from the US Marshall's Office. Kimble is the innocent vascular surgeon, wrongfully accused of the murder of his wife, who escapes from his incarceration following a bus crash. He finds himself on the run from the Chicago police and the U.S. Marshall service led by Lt. Gerrard. The audience are presented with an innocent man in an unknown situation. At first, the doctor is unsure whether or not he should run. The legal system has failed him so he has to turn to the driving will within to prove his innocence. In following this dangerous route, he is faced with many challenges. He himself has to break the law, (when he breaks into the home of the man he suspects killed his wife to gain valuable evidence), but this is legitimised by the fact that it is all in the name of justice. In this respect, the law is presented as an obstacle to the achievement of justice. The law enforcers are presented in a favourable light however, spearheaded by the highly intelligent Lt Gerrard. In the beginning, he is not concerned with whether or not Dr Kimble is innocent or not, he is just doing his job, upholding the law. He does finally manage to track Kimble down, but by then he has successfully proven his innocence, without the help of the law. As soon as the real killer has been revealed the State is once again ready with the handcuffs. Justice has been served and order is returned.

Similarly, Wolfgang Petersen's 1993 film *In the Line of Fire* concentrates on the relationship between a secret service agent and prospective presidential assassin. The assassin (John Malkovich) is presented as a highly intelligent individual who engages in an intriguing game of cat and mouse with the government agent (Clint Eastwood, whom many of the audience will remember from the aforementioned *Dirty Harry* movies). Just as the detective is bound to the criminal, so too is the criminal fixated on the detective, as authority, against whom, in some sense, all his criminal acts are directed, his whole project orientated. He can never escape the detective, in fact or fiction, for his very identity is based upon the law that gives him his name. In the end, we know — for that too is part of the fiction — he will get his comeuppance, will be forced to pay his accumulated symbolic debt.

The State has a determining position — it is the origin of the law around which the detective and criminal pivot — that nonetheless cannot in general be acknowledged, and hence it crops up in odd and indeterminate guises which vary according to whether the detective is within or outside it. When the eye is private, the State, as the police may be presented as incompetent (and in need of the intelligence of the detective), corrupt or deferential. When the eye is public the State is often presented as faceless or nameless authority (one thinks of 'M' in *James Bond*).

The iconography in detective movies reflects the role the individual characters play. As already illustrated, at the point of capture the State is always present, ready with the handcuffs to return the criminal to a climate of law and order. Often the film will close with the criminal being led away in a police car, complete with flashing siren, to indicate that society has been returned to its normal legal state and is safe again. The detectives use of the gun again symbolises the lengths he must go to, often beyond the law to bring the criminal to justice. James Bond has a licence to kill, a power not bestowed on regular members of the police force because the State recognises that he must go above and beyond the call of duty in bringing the criminal to justice. Film detectives, in general, have no reservations about drawing their weapon because they believe that they are no longer bound by the laws of the State. The criminal will often use a disguise to appear within the law. The disguise highlights the evil that lurks behind the guise of respectability within society, that only the detective's training and experience gives him the power to recognise. All these icons are devices constructed by the director to bring about an association in the mind of the viewer. For example, the State protects its citizens; it has developed institutions to uphold law and justice, and these institutions work well, fulfil their functions and thus ensure that the its law abiding citizens can sleep peacefully at night, secure in the knowledge that the State is in control.

Courtroom Drama

Legal iconography at its most intense is seen in the genre of courtroom dramas. These are films where the audience is, in effect, a spectator in court, observing the detailed administration of justice at first hand.

In films such as *To Kill a Mockingbird*, *Inherit the Wind*, or more recently *A Few Good Men*, we, the audience, are given a privileged position in the courtroom. In Sidney Lumet's *12 Angry Men* (1957), we, the audience, are brought behind the closed jury room door and we individually become a thirteenth juror. *12 Angry Men* begins with a worm's eye opening shot of the courthouse which will house all the action for the next hour and a half, or so. The camera highlights the architectural magnificence of the building. It leaves us in no doubt that the film is about power and authority. The vast courthouse becomes an icon, an icon of law and order. Its imposing structure is iconic of the legal system as it hangs imposingly above the public, watching their every move. Once inside the courthouse, the film concerns a Puerto Rican youth accused of knifing his father to death, and the trial testimony seems to present an open-and-shut case; the all white male jury can take a serious second look at everything,

or they can just vote guilty and go home the same day. One juror even explains that he would like to get out in time to go to a ball game. 12 jurors debate, argue and sweat it out to decide the guilt or innocence of the youth. To 11 jurors it is an open and shut case: guilty. The defendant's life lies in the hands of one liberal juror (Henry Fonda).

Fonda struggles to convince his fellow jurors that there is room for reasonable doubt, but he is working against dubious priorities and deeply-ingrained prejudices. Within the confines of a hot and angry room Fonda fights his corner, whilst highlighting both his open-minded and fair beliefs with the frailties and failures of his fellow jurors. He explains that he thinks the responsibility to decide the fate of a man's life should at least merit a thorough review of the evidence. As he shows the fallacies in some of the evidence and begins to sway others, we begin to understand the background and agenda of each juror through the arguments they voice. This film underscores the meaning of the American justice system, in which reasonable doubt should result in acquittal. Fonda becomes an iconic figure, in his white suit. He embodies integrity, virtue and honour. He is fighting against the bigotry and ignorance of the other jurors, who come to represent society, as a whole. The jury room is unbearably hot. Yet it is Fonda's belief in the justice of the legal system that carries him through in the face of such obstacles.

A more recent film that centres around a courtroom and the administration of justice, is Jim Sheridan's *In the Name of the Father* (1994). The film concerns the wrongful imprisonment of the Guildford Four, and their struggle to proclaim their innocence. The film received strong criticism for being factually misleading, but that does not alter its basic impact, or, in the words of Barry Norman, that "the British judicial system emerges reeking of corruption".

The lawyers in the original trial are depicted as incompetent and prejudiced. Fifteen years later, their case is taken on by the courageous Gareth Pierce (Emma Thompson), who is painted in a wholly different light to the lawyers from the original trial. Pierce, much like Fonda in *12 Angry Men*, has to fight against the masses, in the name of the law. The State, on the other hand, is depicted in a far from favourable manner. Throughout the film, the State, and its servants are portrayed as corrupt. Even when forced to quash the original guilty verdict on the four, they refuse to quash the conviction of the deceased Guiseppe Conlon, who was originally charged as an accessory. Mrs Pierce is left shouting at the judge for true justice, rather than the token gesture, which was forced upon him.

In the Name of the Father is particularly interesting because, on the one hand, it is based on a true story, while on the other, great dramatic licence was taken by Sheridan with the factual details of the case. This led to an outcry from reviewers and commentators. Mary Holland, an informed commentator on Northern Ireland affairs, wrote in *The Irish Times,* that she emerged from the cinema almost "speechless with anger", by the fact that "a film which purported to show how the suppression of the truth had led to a truly terrible miscarriage of justice, could present *as the truth* an almost wholly fictional account of what happened". Because of the film's serious tampering with the facts, she contends, the two groups actually responsible for putting the Guildford Four and the Maguire Family behind bars can dismiss *In the Name of the Father* as a work of fiction. Regardless of whether the film is to be regarded as fact or fiction, *In the Name of the Father* has had a profound effect on many people's perception of the law. The barrister's wigs are used as icons, worn by those who condemn the Four in the original trial, yet they are notably absent from the head of Mrs Pierce as she divorces herself from any connection with the establishment which wrongfully imprisoned the Guildford Four. When the judge passes his sentence in the original trial, who is waiting with the handcuffs ready, only the police, the loyal servants of the State, ready to act on the judge's command. On entering the courthouse for the first time, the four are met by the angry mob, as they seek retribution for the atrocity that occurred at the hands of the IRA. The State, in turn, has to appease the mob, which results in a knee jerk reaction, ultimately leading to the wrongful imprisonment of the Guildford Four and the Maguire Seven.

In movie after movie, courtroom scenes are constructed and presented in ways which familiarise us with the operation of the legal system. Many of these films are ideologically loaded in favour of encouraging the audience to trust the legal system. Whether they do or not, however, is a different matter.

Post Modernism

From time to time certain films are made that do not fit cleanly into one specific genre, or if they do, they challenge the essential elements of that genre. Many such films take the popular icons associated with that genre and present them in a manner which is inconsistent with the way in which they have been developed.

In the Coen Brothers *Fargo* (1996), the local sheriff, Mrs Margie Klundegard (Frances McDormand) is presented in a manner totally alien to the well developed icon of the town's sheriff; not only is she a woman, but a pregnant woman at that! Despite this divergence from the established macho male law enforcer, however, she remains an iconic figure of law and order, as she seeks to track down a pair of incompetent kidnappers. She is equipped with every icon necessary; the badge, the uniform, the police car complete with blue flashing light, and, of course, the gun. Yet unlike so many other members of the police force, she is calm and unsophisticated, concerned with the simple things in life, her home and her family. For years detectives and policemen have been presented to us in the mould of Clint Eastwood and Arnold Schwarznegger, whose only focus in life is the hunt for the criminal. They are emotionless in their single-handed pursuit. McDormand's character challenges all these traits, as she quietly goes about restoring law and order. Perhaps the portrayal of police in *Fargo* is much more realistic than the Hollywood portrayal of the macho-cop.

Another film which reworks the well established icons of law and order, is Tarantino's *Pulp Fiction* (1994). The film concerns the exploits of two henchmen as they set about retrieving their criminal boss's stolen money. The film is set in a lawless Los Angeles, where the law of the street prevails. Although the film is primarily about crime, the only representation of the police in the film is as a motorcycle riding homosexual rapist. Any law that does exist is that of the gangland. Although the gun is presented as a symbol of power, it is held to ridicule in one particular scene, when one of the characters, accidentally shoots another in the head. Like *Fargo, Pulp Fiction* challenges popular icons and presents them in an absurd and capricious manner.

As one of the main trends in cinema today is towards the iconoclastic, we can expect much of the established legal iconography to be challenged, reworked and subverted in the future.

Conclusion

It is the contention of this article that on a typical day in the Four Courts, or any other Irish legal institution, the first time visitor, whether a defendant, a legal professional or a member of the public, arrives with a certain framework of understanding. Much of this understanding has, it is suggested, been shaped by popular cinema. In particular, film, from its earliest days has established a legal iconography for the cinema going public. The history of cinema has within it, a particular history of the development of legal iconography. From the slapstick simplicity of the silent era, to the sophisticated subtle cross cultural referencing of Quentin Tarantino, the public's engagement with the issues of law and order has been promoted. The concerns of many filmmakers are not dissimilar from the questions asked by legal theorists, from Plato to the legal realists of the twentieth century.

While cinema has played the role outlined above, it is also important to recognise that the primary purpose of commercial cinema is to make a profit. This is done by making films as entertainment, rather than legal treatises. Exploration of legal issues and the development of legal iconography is always subservient to the industrial imperative. In practice, this greatly limits the extent to which films seriously explore issues of law.

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Causation in Tort Law: The Loss of Chance Doctrine

By John Healy
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From the *Principles of Irish Torts*

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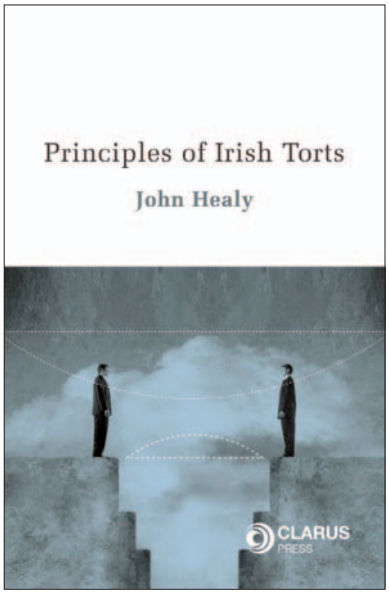

To succeed in his action, the plaintiff must do more than prove that the defendant committed a tort or acted negligently in breach of a duty he owed to the plaintiff. He must further prove that the defendant's tortious or negligent conduct caused his damage. Causation is a core proof of any tort, and in turn a fundamental justification for imposing liability on a defendant; a compensation award is justified not by the fact alone that the defendant acted tortiously, but by the further fact that the tort caused the plaintiff's damage. For torts that require proof of intentional wrongdoing, or that impose strict liability for designated occurrences, cause-and-effect is usually self-evident and comparatively straightforward. By contrast, the imposition of financial liability on a person for accidental or unintended damage is generally more difficult to justify, and thus we see that the elaborate and difficult nature of our modern causation rules has been entailed to the greater extent by the negligence action, which witnessed an explosion of litigation in the last century and a popular ascendancy in the pantheon of torts. As far back as the 1950s, the English courts have grappled with the complexities of cases in which the evidence suggested that the plaintiff's damage was caused by multiple or partial causes, amongst them the defendant's negligence. It was gradually acknowledged in England that the traditional 'but for' test of causation — requiring proof that the defendant's negligence or tortious conduct was a precondition or sine qua non *of the plaintiff's damage — was too blunt a tool to determine if the defendant's causative contribution to the plaintiff's damage was sufficient to attract liability in cases where that contribution was definite though partial, and where it was not dominant or contingent. Accordingly, by means of various innovations cultivated in landmark decisions such as* Bonnington Castings *and* McGhee, *more sophisticated tests were expressed by the judges for proof of factual causation, culminating in two high-profile decisions by the House of Lords in* Hotson *and* Gregg, *wherein the court considered and ultimately decided against incorporating continental approaches to causation reflected in the doctrine of loss of chance. The Irish courts have managed to avoid the complexities of multiple and partial causes until very recently, in marked contrast to the interest they generated decades earlier in England. Cases have in the past been run and determined in Ireland largely by reference to duty and standard of care considerations and, in the causation context, the broader principles of* novus actus interveniens *and remoteness—a long stretch of calm undoubtedly soon to be shattered.*

Loss of Chance Doctrine

McGhee demonstrated that the onus on the plaintiff to prove breach of duty and causation may come to be reversed at an earlier stage in the trial, according to how the court formulates the standard of proof the plaintiff must meet to satisfy the causation requirement. It has since become clear that this is a matter often decided by recourse to public policy.[1] For much the same reason, but with a wholly different effect, the doctrine of loss of chance has been presented by many jurists as a preferable alternative and it has been endorsed by a strong minority flow of English judges since *Hotson v East Berkshire AHA*[2] in 1987. This movement advocates a reformulation of the damage or 'compensatable loss' grounding the plaintiff's claim. Whereas orthodox negligence rules restrict recovery to *already suffered personal injury* and refuse to characterise the plaintiff's damage in terms of his loss of chance of avoiding injury or diminishment of his life expectancy, loss of chance reasoning enables damage to be reformulated in terms of the extent to which the defendant increased the plaintiff's chance of past or future injury or the extent to which it decreased his chance of avoiding such past or future injury. In return, it operates a form of discounted liability, whereby the defendant is required to pay compensation only to the degree to which he has been found to have caused or contributed to the injury or risk of injury.

To best understand how loss of chance would work within the common law, it is essential to recall how the orthodox torts and negligence rules operate. Traditionally, negligence law permits compensation for the plaintiff's loss of expectation of life where this is a loss that flows from personal injury already suffered by him and proved to have been negligently caused by the defendant. It is of note that the Supreme Court recently in *Fletcher v Commissioners of Public Works*[3] confirmed this traditional rule of negligence that recovery does not lie for injury which has not yet materialised. The common law traditionally has not recognised *independent* recovery for the plaintiff's loss of expectation of life or his reduction in the chance of avoiding future personal injury or death,[4] since the courts have insisted on prerequisite proof of already-suffered personal injury as the *damnum* or fulcrum of the plaintiff's action.

The doctrine of *loss of chance*, or 'la perte d'une chance', is of French civil law extraction. In recent years, its possible

incorporation into the common law has begun seriously to be debated by courts and legal scholars. The doctrine permits a plaintiff to sue for the loss of a chance of avoiding a result rather than merely for the result itself; the loss of chance is the *damnum* that grounds the plaintiff's cause of action. By recharacterising the *damnum*, at least in cases of hypothetical lost chance, the court is placed in a position where it can award partial damages proportionate to the approximate effect the defendant had upon the plaintiff's injury in cases where the plaintiff has fallen short of full proof of causation on the balance of probabilities. It also gives the court a wider measure of flexibility in cases of decisional causation— such as affect cases of informed consent and negligent misstatement—where it is difficult to commit to a categorical decision on subjective, objective, and mixed assessments of how the plaintiff would have acted at a hypothetical point in the past. The loss of chance model also honours the principle that where a defendant has caused the disappearance of the means of proof (by denying a plaintiff the opportunity to have acted in a certain way), it is unfair that the plaintiff should bear the full brunt of the evidential gap by being required to prove a certain hypothetical proposition as something more probable than not.[5]

Loss of chance theory diverges from a well-entrenched common law rule that once the plaintiff proves on the balance of probabilities that the defendant caused or contributed to his loss — even where that contribution to injury is only marginally greater than 50 per cent — he is entitled to damages in full from that defendant. The compensation to which the plaintiff is entitled under a loss of chance model is proportionately assessed according to the approximate degree by which the defendant reduced the plaintiff's chance of avoiding the injurious outcome. Thus the chief strength of the loss of chance model is seen to lie in the fact that it is tailored to provide a more accurate and just valuation of the impact of the defendant's conduct on the plaintiff, and that it does not insist that the defendant's contribution must be the greater cause. It thus promises justice both to plaintiffs (since more of them are entitled to recover) and to defendants (since they are required to pay damages only in approximate proportion to their causal contribution to injury).

The conventional 'all-or-nothing' approach of the common law to causation and *damnum* has often attracted pronounced criticism from legal scholars and occasionally judges for overcompensating plaintiffs by holding defendants liable in full for their injuries once causative associations have been established on the balance of probabilities, even where the probability of a causative link is much less than 100 per cent and closer to 50 per cent.[6] The effects of the test can be severe for plaintiffs. In *Stacey v Chiddy*,[7] for instance, the plaintiff established that the defendant had been negligent in failing to detect malignant cancer growths before they developed fourteen months later, but could not establish to the court's satisfaction that that failure caused the development of the cancer. According to one view, the all-or-nothing approach "subverts the deterrence objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses … . A failure to allocate the cost of these losses to their tortious sources undermines the whole range of functions served by the causation-valuation process and strikes at the integrity of the torts system of loss allocation."[8] The crudity and unfairness of the all-or-nothing or 'but for' model has placed considerable pressure on judges to reformulate the standard of proof and bend other rules of evidence such as *res ipsa loquitur* by way of mitigation.

The common law has for some time employed loss of chance analysis in breach of contract cases,[9] and in negligence cases of pure economic loss caused by negligent misstatement and advice. In *Stavold v Barlows*,[10] for instance, the Court of Appeal decided that where formulation of the plaintiff's loss — here the loss of a property purchase after the defendant solicitors sent the relevant papers to the wrong address — is dependent on the hypothetical actions of a third party, such as a vendor, the balance of probabilities test is inappropriate. Instead, the court should evaluate the loss of chance that the plaintiff would complete the sale in the event that the documents had been properly forwarded. If the chance was real and substantial, the plaintiff has proved causation and the extent of the chance becomes a question of *quantification* of damages. Even in this context, however, loss of chance reasoning has rarely been applied in express terms by the courts. Its logic was clear in *Davies v Taylor*,[11] a claim for loss of financial dependency under the Fatal Accidents Act 1846–1959. The plaintiff was estranged from her husband at the time of the wrongful death, and she attempted unsuccessfully to prove that if her husband had not died she would probably have reconciled and returned to live with him. By 1989, Professor Fleming could assert — though perhaps optimistically — that loss of chance had become recognised as a compensatable loss, when evaluating both causation and damages, once a nominate cause of action had otherwise been established.[12]

Loss of chance reasoning has been applied in the medical context in numerous American states[13] and by some English decisions prior to the House of Lords' tide-stemming decision in *Hotson*. In *Herskovits v Group Health Cooperative*,[14] the defendant's negligent diagnosis reduced the plaintiff's chances of survival from lung cancer by an approximated 14 per cent. This was accepted to constitute a proximate cause of the plaintiff's injuries, grounding recovery for loss directly caused by the premature death. In *Sutton v Population Services Family Planning Programme*,[15] again the plaintiff's cancer was detected at a negligently late stage, and though the cancer would ultimately have caused the plaintiff's death, the defendant's negligence had deprived him of approximately four years more of life. The trial judge awarded damages for the loss of those four years. In *Clark v MacLennon*,[16] Peter Pain J. invoked the decision in *McGhee,* but went one step further in allowing recovery for the loss of a one in three chance of a successful outcome. The learned judge then proceeded to assess damages according to the degree — 33 per cent — to which the operation might have succeeded for the plaintiff if it had been performed at the appropriate time. In *Hotson v Fitzgerald*,[17] Simon Brown J. at first instance rightly questioned the decision in Clark to invoke McGhee as an onus shifter once it had been established that there was a two in three chance of recovery had the operation been performed at the right time — there was, in other words, sufficient proof before the court of a contingent or dominant cause to enable application of the "but for" test. In *McGhee*, the court had been unable to assess the degree by which the defendant's breach of duty increased the risk of injury. According to Simon Brown J., in cases of this type where the defendant's contribution to injury cannot properly be ascertained, the plaintiff should be required to establish a

higher degree of materiality of risk or chance, though he is then entitled to full damages — so that the issue is causation and not quantification of damages.

The recent debate surrounding loss of chance owes its fervour to a bold chain of developments in England that commenced with *Hotson v Fitzgerald*.[18] For the first time, a version of loss of chance analysis in torts cases was expressly endorsed at first instance, and later then by the Court of Appeal, before it was ultimately overruled by the House of Lords.[19] The debate re-ignited recently again in *Gregg v Scott*,[20] where this time a slimmer majority of three to two in the House of Lords refused to modify the conventional all-or-nothing approach at the expense of the plaintiff's case. In *Hotson*, the plaintiff claimed that the defendants' negligent failure to diagnose his injury five days earlier had materially increased his risk of contracting necrosis leading to permanent disability. Evidence was accepted that without the delay, the plaintiff would have had a two in three chance of avoiding the injury. The Court of Appeal ventured further than the trial judge's already venturesome ruling and proceeded to approve classic loss of chance reasoning. According to Dillon L.J., the court had to ask what damage or loss the plaintiff had suffered — what he was permitted to sue for.[21] In the learned judge's opinion, this was the loss of a chance of avoiding his present injuries and not those injuries *per se*. The categories of compensatable loss were not closed and they were capable of extension.[22] Where the plaintiff could establish on the balance of probabilities that the defendant's breach of duty caused damage to the plaintiff, and the loss of a chance or benefit could be identified and valued, the plaintiff was entitled to recover on that basis so long as the loss of chance was not minimal or speculative. The novelty of the Court of Appeal's decision in *Hotson* has been interpreted to lie in its formulation of the *gist of the action* — not in terms of necrosis outcome but in terms of a loss of chance of avoiding that outcome. In other words, it relied on the orthodox assessment of causation by proof on the balance of probabilities, but mitigated its effects by redefining the damage caused by the defendant. Sir John Donaldson M.R. proposed that where the court is dealing with a hypothetical result, loss of chance principles ought to apply, but only to scenarios that concern 'fate' and not 'choice'.[23] Taking the case of a solicitor who failed to warn his client of a right-of-way, he said that whether or not the plaintiff would have gone ahead with the sale, having been informed of the right-of-way, would have been the client's choice and "not the choice of fate. Ascertaining what his choice would have been is possible, whereas the prospects for a cure of a particular patient are sometimes not. The damages recoverable by the solicitor's client would therefore be all or nothing, depending on whether he could prove, on the balance of probabilities, that he would have abandoned the transaction".[24]

In a decision described at the time as striking for its "analytic poverty and legal cowardice",[25] the House of Lords nipped this emerging innovation in the bud.[26] According to Lord Bridge, the argument rested on a superficially attractive analogy between obvious cases of lost chance and the avoidance of personal injury.[27] If a plaintiff could prove that the defendant materially contributed to his injury, no principle could justify a reduction in damages according to the degree by which the defendant's actions caused the injury. Both Lords Bridge and Mackay, however, qualified their findings so as to not to overrule *McGhee* wholly. According to Lord Mackay: "Material increase of the risk of contraction of dermatitis is equivalent to material decrease in the chance of escaping dermatitis."[28]

Another bid to prompt recovery in personal injuries cases for the loss of the chance of a successful or better medical outcome was attempted in *Gregg v Scott*.[29] The defendant doctor had negligently misdiagnosed a lump under the plaintiff's left arm, leading to a nine months' delay in treating him for non-Hodgkin's lymphoma, causing the cancerous lymphoma to enlarge and spread throughout his left side, and reducing his chances of a disease-free survival over the next ten years from 42 per cent to 25 per cent. The plaintiff framed his case as one seeking compensation for the loss of, or diminution in, his expectation of life, or the loss of the chance of a complete recovery — both traditionally non-compensatable losses at common law. His appeal against the trial judge's contrary decision on causation failed specifically in the House of Lords on the loss of chance issue, although on this occasion two members of the court dissented, advancing powerful ripostes to the conventional all-or-nothing rule of orthodox negligence doctrine, and likely to maintain the currency of the debate in England.

Against the attempt to subvert the orthodox approach to negligence liability, Lord Hoffman upheld the trial judge's finding that the plaintiff had established a reduction in chance of a good medical outcome by roughly 50 per cent, but that since the plaintiff would only have had a 45 per cent chance of a good outcome, he had failed to prove on the balance of probabilities that the defendant had caused the bad outcome; nor had the plaintiff been in a position to prove that in the event the defendant had not acted negligently, he would have had a better medical outcome.

In his dissent, Lord Nicholls accepted that in the circumstances of the case all that could be proved on the balance of probabilities was that the defendant had reduced the plaintiff's chances of a successful outcome. He favoured change in the law to render such a loss actionable, and approved the distinction elsewhere proposed between cases of past and future injury — with effect that where the court is asked to assess past hypothetical questions (whether such-and-such would have occurred had the defendant not been negligent), proof is based on probabilities and therefore must be discharged by the plaintiff on a preponderance of the probabilities; but that where the effect of the defendant's negligence on the health or mortality of the plaintiff is future-hypothetical, the court is permitted to apply the logic of possibility and to affix a degree of probability to the future occurrences: in other words, to determine the question of factual causation in a manner equivalent to quantification of damages proportionate to the chance the future injury would occur. Lord Nicholls considered the all-or-nothing approach inappropriate for future-hypothetical cases:

> "The theory underpinning the all-or-nothing approach to proof of past facts appears to be that a past fact either happened or it did not and the law should proceed on the same footing. But the underlying uncertainty, that a past fact happened or it did not, is absent from hypothetical facts. By definition hypothetical facts did not happen in the past, nor will they happen in the future. They are based on false assumptions. The defendant's wrong precluded them from ever materialising."[30]

In advocating that loss of chance be accepted as an actionable *damnum* in personal injuries proceedings, Lord Nicholls explained that this would require proof by the plaintiff on the balance of probabilities that the defendant had caused a loss of chance of a better medical outcome, and that — save to rule out cases where the loss of chance was 'insignificant' — quantification of the chance should not be formally relevant to proof of factual causation on the balance of probabilities but should become relevant later when assessing damages, an approach the courts have taken to the approximation of loss of chance in contract cases.[31] Lord Nicholls did not advocate an outright abandonment of the all-or-nothing approach to causation and damages, nor a renunciation of the general requirement of past injury for negligence claims. The learned judge instead considered that some loss of chance principles were of specific benefit to medical negligence cases where the effects of a defendant's delay in diagnosing or treating the plaintiff had left him with a significantly reduced chance of a better medical outcome:

> "The way ahead must surely be to recognise that where a patient is suffering from illness or injury and his prospects of recovery are attended with a significant degree of medical uncertainty, and he suffers a significant diminution of his prospects of recovery by reason of medical negligence whether of diagnosis or treatment, that diminution constitutes actionable damage. This is so whether the patient's prospects immediately before the negligence exceeded or fell short of 50 per cent. … The 'diminution in prospects' approach set out above is confined to medical negligence cases where the claimant was already suffering from illness or injury at the time of the negligence and the defendant's duty related to the amelioration of that very illness or injury. … A damages award reflecting diminution in a patient's prospects should be made only where, in a particular case, the patient had a reasonable prospect of recovery and the diminution was a significant one; for example, if a reasonable prospect such as a one in three or a one in four chance was eliminated or, as in the present case, a 45 per cent chance was halved. The amounts awarded should reflect the uncertainties involved, and courts should beware of giving percentage chances a spurious degree of precision."[32]

Lord Hope of Craighead, also dissenting, pragmatically reasoned that the plaintiff's case had not necessarily depended on application of loss of chance principle, since he had been able to prove that the diminution of life expectancy or disease-free existence was a loss that flowed from having suffered an enlarged tumour — therefore that the tumour was the plaintiff's compensatable loss (his physical injury) enabling him to recover consequential injuries and losses in the conventional way. More generally, however, he advocated the incorporation of loss of chance principles to the specific scenario of medical delays in treatment and misdiagnosis. As with Lord Nicholls, he did not support the general abandonment of the old requirement of proof of present injury, and he ruled out actionability of cases *where the plaintiff has yet suffered no physical injuries* but where he claims that the defendant has increased his risk of contracting a particular disease or condition. In principle, he accepted that where the plaintiff had already been suffering from illness at the date of the defendant's negligence "from which he had at that date significant prospects of recovery", he has a cause of action in the event that the defendant's negligence reduced those prospects.

The plaintiff's decision in *Gregg v Scott* to frame his case exclusively in terms of loss of chance was latterly surprising. The medical evidence in the case clearly established that the negligent misdiagnosis and delay had caused the plaintiff to suffer an enlarged tumour. If this were taken to be the *damnum* or gist of the plaintiff's cause-of-action in negligence, damages would conventionally have been recoverable for the reasonably foreseeable consequences of that enlargement, including intensification of his condition and diminution in his expectation of life.[33] A comparable scenario arose recently in Ireland in *Philp v Ryan*,[34] where the Supreme Court's approach was to accept loss of life expectancy as a compensatable loss or *damnum* — and not therefore contingent on proof that the defendant factually caused a precipitant physical injury.

In *Philp v Ryan*, the plaintiff sued the Bons Secours Hospital for personal injuries arising from their negligent failure to diagnose eight months earlier that he was suffering from prostate cancer. The High Court awarded damages of €45,000 for the mental distress and anxiety suffered by the plaintiff in consequence of discovering the fact of the delay and forming a reasonable belief that it had deprived him of opportunities for beneficial treatment and reduced his life expectancy. Though the High Court's decision was well-motivated — in the face of a clear division in the expert medical opinion on the likely benefits for the plaintiff of early treatment — the juridicial basis for the award was at variance with received common law notions of *damnum* capable of attracting compensation in negligence, which does not permit independent recovery for loss to life expectancy or for mental distress (unless constituting 'nervous shock')[35] and which awards damages for these losses only when quantifying the damages recoverable for *further* personal injuries or pecuniary loss likely in the future to be incurred in consequence of having already suffered the primary *damnum*. The defendant appealed not against liability, however, but against quantum of damages, asserting that the damages were excessive having regard to the fact that the plaintiff was never going to recover fully from the cancer — an argument often successfully made in England in denying proof of causation and liability. The plaintiff cross-appealed, asserting that it had been open to the trial judge to award damages for the loss of therapeutic opportunities and the reduction in his life expectancy — as opposed to damages for mental distress arising from same. The Supreme Court upheld the plaintiff's counterclaim and original awards, though it added awards of €5,000 in general damages for loss of life expectancy and €50,000 in aggravated damages,[36] yielding a final award of €100,000.

The defendants submitted that recovery could lie only where it was proven on the balance of probabilities — over but not under a 50 per cent likelihood — that the lost treatment would be successful. Giving judgment for the court, Fennelly I rejected this as the appropriate formulation of *damnum* in cases of delayed diagnosis and treatment, though he did so according to policy and justice, and declined to assess the problem in light of the orthodox principles and rules of negligence law. His conclusion in favour of

independent recovery for this loss was influenced ultimately by the following sense:

> "[I]t seems to me to be contrary to instinct and logic that a plaintiff should not be entitled to be compensated for the fact that, due to the negligent diagnosis of his medical condition, he has been deprived of appropriate medical advice and the consequent opportunity to avail of treatment which might improve his condition. I can identify no contrary principle of law or justice."[37]

As a general proposition, Fennelly J. decided that where a plaintiff sues for injury which historically has already occurred, he must prove the fact of injury and causation on the balance of probabilities.[38] Where the plaintiff has not yet suffered injury but is at risk of future injury because of the defendant's negligence, different principles apply, and to this end the court approved earlier *dicta* by O'Dálaigh C.J. in *Dunlop v Kenny*:

> "In cases such as this, where there is an issue of possibility or probability of some disability or illness arising or developing in the future, the damages to be awarded should be commensurate with, and proportionate to, the degree of that possibility or probability as the case may be. If the degree of probability is so high as to satisfy a jury that it remains only barely possible that the condition will not occur, a jury would be justified in acting upon the assumption that it will occur, and should measure the damages accordingly. On the other hand, if the probability that no such event will occur is so great that it is only barely possible that it would occur, damages should nevertheless be awarded, but should be proportionate to the degree of risk, small though it might be."[39]

Fennelly J. pointed out, however, that the above "statement applies, of course, only to the assessment of damages for future uncertain events. In respect of past events, whether related to liability or to the causation of damage or loss, the normal rule of proof on the balance of probability applies."[40]

Fennelly J. considered that *Dunlop* had addressed this "precise" issue before the court in *Philp*. Yet the principle expressed by the Supreme Court much earlier in *Dunlop v Kenny*[41] was with respect to quantification of damages in cases where the plaintiff had already proven on the balance of probabilities that the defendant caused him to suffer an actionable *damnum* or personal injury. In *Dunlop*, the founding *damnum* was the plaintiff's head injuries, and proof that this had negligently been caused by the defendant enabled the court to proceed to assess or quantify the compensatory damages to which the plaintiff was entitled. *Dunlop* merely confirmed the conventional common law rule that in such cases the plaintiff is entitled to recover damages for any future adverse *sequealae* likely to flow consequentially from his damnum — in Dunlop, the future possibility of major epilepsy — but that such damages should proportionately reflect the degree to which the future injuries may occur.[42] *Dunlop* was not an appeal on liability — in terms of proof of *iniuria*, *damnum*, and causative link between the two — but was decided on this question of the proper quantification of damages once negligent liability has been proven. *Philp v Ryan*, Fennelly J. essentially amalgamated the gateway common law rules determining *damnum* and causation with a rule that applies to *quantification* of compensatory damages for future injuries flowing *consequentially* from the plaintiff's *damnum*. Since orthodox torts law does not recognise loss of life expectancy or loss of beneficial treatment or loss of chance as *damnum* in personal injuries actions — though it makes awards reflecting these losses when they flow consequentially from the *damnum* or physical injury — a ruling of this nature fundamentally reformulates the *damnum* or compensatable loss capable independently of attracting compensation in negligence personal injury proceedings. It creates new law and throws open windows formerly assumed to be closed.

In *Philp*, the Supreme Court accepted evidence that the plaintiff would never have fully recovered from the disease, and that there was a division of opinion between the medical experts on whether much was to be gained by early treatment of prostrate cancer. On this basis, it confined the award for loss to his life expectancy to the modest figure of €5,000. The implications of *Philp* are as yet unclear, and the court did not lay down guidelines for future related cases. The Supreme Court appears, nonetheless, to have sanctioned recovery for future uncrystallised physical injury — in cases at least of negligent medical misdiagnosis, indirectly as loss of life expectancy — and to have determined that damages should proportionately reflect the degree by which the defendant caused this *damnum*. This in essence liberates the tort of negligence from the traditional formulation of personal injury as past physical injury, and in mitigation then proposes a discounted form of liability that breaks clearly from the all-or-nothing approach of the common law to proof of causation and entitlement to damages in full — a step the House of Lords has twice refused to do, first in *Hotson* and again recently in *Greg v Scott*.[43] In making the modest award, the Supreme Court has demonstrated that *damnum* is capable of being characterised as the loss of a chance of avoiding injury or death, or as the increase of risk of onset of illness and premature death. Since these are forms of *damnum* viewed by orthodox negligence rules not to suffice as the gist of the plaintiff's claim nor independently to ground a court's award of damages in negligence, the decision represents something of a breakthrough, if poorly signposted along the way. The decision stands curiously at odds with another recent Supreme Court decision in *Fletcher*, where the same court confirmed, in the context of a 'nervous shock' negligence claim, the traditional rules of torts delimiting *damnum* and compensatable loss.[44] *Philp* is a highly important decision — the more for its potential application in other cases — and as such it may mark a defining moment, no less because it omits to flag its reasoning or posit it within the grander scheme of common law negligence. Although it imports into Irish negligence law Continental loss of chance logic, and does not baulk at the prospect of defining a plaintiff's *damnum* in terms of the increase of risk of future injury, it is sensible for now to regard the ruling as applying to cases seeking compensation for loss to life expectancy or earlier future onset of injury in cases of negligent medical misdiagnosis.

There had been signs of emerging loss of chance reasoning in the High Court prior to *Philp v Ryan. In Quinn v South Eastern Health Board*,[45] O'Caoimh J. accepted expert medical evidence that when the plaintiff had been deprived of a better medical outcome due to the defendant's negligence, she had lost the opportunity of being amongst the 91 per cent of

patients who would have recovered on conservative treatment, and therefore that if she had been treated conservatively she would have had a "somewhat greater chance than 51 per cent of recovering." This reasoning was applied to a case of past injury and past lost chance, when all events had been played out, and the plaintiff's *damnum* could be determined conventionally as past personal injury and the contingent or dominant cause on the balance of probabilities. In *Carroll v Lynch*,[46] Johnson J. went further and adopted loss of chance logic to formulate the plaintiff's loss and to discount damages by the extent to which the defendant had caused the *damnum*, endorsing a passage from White's *Civil Liability for Industrial Accidents*,[47] summarising how the law *ought* to determine recovery for injuries to which the defendant, in breach of duty, contributed. The learned judge concluded on the evidence that the defendant had been negligent in positioning the second port through the plaintiff's breast during the course of a blebectomy by way of video assisted thoracic surgery, which mistake necessitated aborting that procedure and reverting to an older, less effective method, the open thoracotomy, in turn causing the plaintiff's injuries. Johnson J. found on the evidence that had the port not been placed in that position, on the balance of probabilities of 85 per cent at least, there would have been no need to switch over to the open thoracotomy. He then awarded £245,683.26 damages, being 85 per cent of the damages otherwise due.

More recently, the application of the *but for* test of causation in other cases of past injury was tentatively affirmed by the Supreme Court in *Quinn v Mid Western Health Board*.[48] The plaintiff sought compensation for severe brain damage suffered by a child who should not, it was alleged, have been delivered later than 35 weeks into the pregnancy. In the context of the plaintiff's appeal against a contrary ruling on the causation issue, the defendant conceded negligence in the plaintiff's delivery, but disputed that it was causatively responsible for the injuries, arguing that an acute episode had occurred between 28 and 30 weeks of the pregnancy and that the outcome would have been no different had due care been exercised in the circumstances. The condition ultimately suffered by the baby was diagnosed as periventricular leukomalacia — PVL — which Kearns J. accepted, on the evidence before the High Court, to be "multi-factorial, poorly understood and the subject-matter of widely diverging scientific and medical understanding, notably in term of its precipitating cause."

The plaintiff asserted that evidence had not been rebutted at hearing that the foetus had suffered placental insufficiency caused by hypoxic ischaemia progressively from 28 weeks to birth. In response to this, Kearns J. observed: "In the context of causation … I should immediately emphasise that it is not enough to show that the plaintiff's condition got worse during the period from the start of the difficulties until delivery, it must further be shown that early intervention would have prevented the damage. There is no dispute in the present case that the only form of effective intervention lay in delivering the baby at the earliest possible opportunity." He expressed surprise that the case had been framed as a *but for* or *all-or-nothing* case of injury instead of the *loss of a chance* of a better outcome or the *material contribution to damage* in the *McGhee* sense. Applying the traditional 'but for' test — and noting that the House of Lords had recently rejected the loss of chance approach to causation in *Gregg v Scott* — Kearns J. upheld the High Court's decision and rejected the claim.

Endnotes

1. One new rule was established by the House of Lords, grounded in public policy and fairness, in *Fairchild v Glenhaven Funeral Services Ltd*. [2003] 1 A.C. 32 (HL). The court effected change in causation rules specifically to benefit a workman who had contracted a mesothelioma after exposure to asbestos fibres by a series of employers. The court decided that an employer who has created 20 per cent of that exposure, and thus 20 per cent of an employee's risk of contracting the disease, is liable in full to the employee, even though the chances are five to one that the defendant employer was not in fact responsible for causing the disease.
2. [1987] 1 All E.R. 210 (CA); [1987] 1 A.C. 750 (HL): *cf*. at [4-21] *et seq.*
3. [2003] 2 I.L.R.M. 94 (SC): in the context of an unsuccessful attempt to recover for psychiatric injury sustained following an 'irrational' fear of contracting respiratory illness arising from exposure to asbestos at work: *cf*. at [3-64] *et seq.*
4. Save for the benefit of the 'dependants' of a person who died as a result of the defendant's tortious wrongdoing, where they institute 'fatal injuries' proceedings under Part IV of the Civil Liability Act 1961: *cf*. at [2-103] *et seq.*
5. Weinrib, *op. cit*. n. 13 at 525. Before *McGhee v National Coal Board* [1973] 1 W.L.R. 1 (HL), the reversal of the burden of proof was limited to instances where the absence of proof was somehow the doing of the defendant: for example in *Gardiner v National Bulk Carriers* (1962) 310 F. 2d 284, the captain of a ship had refused to turn back, thus making it impossible to tell whether a seaman could have been saved. In *McGhee*, medical science and not the defendant had been responsible for the evidential gap.
6. *Falcon v Memorial Hospital* (1990) 462 N.W 2d 44 at 47, *per* Levine J.
7. [1993] 4 Med. L.R. 345 (NSW, CA).
8. King, ''Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences'' (1981) 90 *Yale Law Journal* 1353 at 1377. This view is shared by many English torts scholars, including: Stapleton ''The Gist of Negligence: The Relationship Between 'Damage' and 'Causation''' (1988) 104 *Law Quarterly Review* 389; Price ''Causation *the Lords' Lost Chance'' (1981) 38 *International Comparative Law Quarterly* 735; and Foster.
9. *Cf. Chaplin v Hicks* [1911] 2 K.B. 786 (CA); *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563 (CA); *Esso Petroleum Co. Ltd. v Mardon* [1976] Q.B. 801 (CA).
10. [1995] N.L.J. 1649 (CA). Discussed in Church, ''Where Causation Ends and Quantification Begins'' [1996] *Cambridge Law Journal* 187. *Cf. Allied Maples Group Ltd. v Simmons & Simmons* [1995] 1 W.L.R. 1602 (CA).
11. [1972] 3 All E.R. 836 (HL).
12. Fleming, *op. cit* n. 18 at 673.
13. To facilitate a loss of chance analysis, some US states approved a standard of proof requiring the plaintiff to prove only that the defendant's negligence increased the risk of harm; the plaintiff could recover where the lost chance was a 'substantial factor' in causing the harm: Restatement (Second) of Torts #323 (1965). See decision by the Pennsylvania Supreme Court in *Hamil v Bashline* (1978) 392 A. 2d 1280 at 1286. *In Quinlan v Brown* (1980) 419 A. 2d 1274 at 1278, the same court restricted this development to situations where ''the nature of the case inhibits proof of causation to a reasonable degree of medical certainty.'' See Smith, ''Increased Risk of Harm: A New Standard for Sufficiency of Evidence of Causation in Medical Malpractice Cases'' (1985) 65 Boston University Law Review 275.
14. (1983) 664 P. 2d 474.
15. (1981) *The Times*, November 7, 1981.
16. [1983] 1 All E.R. 416 (CA).
17. [1985] 3 All E.R. 167.
18. [1985] 3 All E.R. 167.
19. Loss of chance analysis had already been employed in contractual lost chance cases: eg, *Chaplin v Hicks* [1911] 2 K.B. 786, and *Kitchen v RAF Association* [1958] 1 W.L.R. 563 (CA). The Australian High Court has recently recognised that recovery lies for the tortious loss of a commercial opportunity: *Poseidon Ltd v Adelaide Petroleum NL* (1994) 68 A.L.J.R. 313 (Aust, HC).
20. [2005] 2 A.C. 176 (HL).
21. *Hotson v East Berkshire* HA [1987] 1 All E.R. 210 at 219 (CA).
22. *ibid.* at 217, *per* John Donaldson M.R.
23. *Hotson v East Berkshire AHA* [1987] 1 All E.R. 210 (CA).
24. *ibid*. at 217.
25. Foster, [''A plea for a lost chance: *Hotson* revisited'' (1995) New Law Journal 228] *op.cit*. n. 30 at 229.
26. *Hotson v East Berkshire AHA* [1987] 1 A.C. 750 (HL).
27. *ibid*. at 782.
28. *ibid*. at 786.
29. [2005] 2 A.C. 176 (HL).
30. *ibid*. at 183.
31. Instancing *Chaplin v Hicks* [1911] 2 K.B. 786 and *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563 (CA), where the court considered (in the *Chaplin case*) the chance the plaintiff would have won the competition and (in the *Kitchen*

case) the chance the plaintiff would have got the new job, when assessing the plaintiffs' damages. In deciding that the loss of opportunity had been causatively established, the court was in each case content to find proof that the defendant had caused the loss of *opportunity* and did not at that stage enter into an assessment of the plaintiff's respective prospects of success.

32. [2005] 2 A.C. 176 at 191 (HL).
33. Lord Hope of Craighead observed that to this extent the plaintiff had put all his eggs in the one basket of loss of chance.
34. [2004] 4 I.R. 241 (SC).
35. *Cf.* at [3-40] *et seq.*
36. *Cf.* at [13-35] *et seq.*
37. [2004] 4 I.R. 241 at 249 (SC).
38. *ibid.* at 250.
39. Supreme Court, July 29, 1969.
40. [2004] 4 I.R. 241 at 250 (SC).
41. Supreme Court, July 29, 1969.
42. *McGregor on Damages* 17th ed. (London, Sweet & Maxwell, 2003) at p.348.
43. House of Lords, January 27, 2005.
44. *Cf.* at [3-64] *et seq.*
45. High Court, March 22, 2002.
46. High Court, May 16, 2002.
47. *Vol. 1* (Dublin, Oak Tree Press, 1993) at p.111.
48. Supreme Court, April 8, 2005; [2005] I.E.S.C. 19.

The Beginning of the End for Adverse Possession?

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Adverse possession has long been a controversial legal doctrine. The concept that a squatter can acquire title to land without compensating the true legal owner has never sat well with general legal principles. In England, a previous Home Secretary compared it with theft.[1] The English courts have repeatedly noted (but not necessarily put into practice) their reluctance to apply this principle and allow the squatter to acquire rights without reimbursing the legal owner. English law and its practice on adverse possession has been condemned by the European Court of Human Rights in *J.A. Pye (Oxford) Ltd. v United Kingdom*.[2] The Court in this case found a breach of Article 1 of Protocol 1 of the ECHR.[3] This decision was reviewed by 17 judges in the Grand Chamber in November 2006 and academics and practitioners alike await its ruling. The implications of this decision could be far-reaching indeed. This article will examine the basis and principles of the doctrine of adverse possession with a brief analysis of the law in Ireland. The cases of *J.A Pye (Oxford) Ltd. v Graham and Another*[4] and *J.A. Pye (Oxford) Ltd. v United Kingdom*[5] and their possible implications will also be considered.

The Rationales: Still Convincing?

The Law Commission in England produced a Consultative Document on land registration in 1998.[6] In it, the Commission noted that there are a number of different reasons which are said to legitimise the concept of adverse possession. The rationales said to support the doctrine of adverse possession are all historical in their origin and perhaps cannot be said to have the same application in modern land law.

The original purpose behind the doctrine of adverse possession was to ensure certainty of title in a system of unregistered land. It was to ease the job of conveyancers as title to land was dependent on possession. This rationale worked on the presumption that a landowner would assert his title against any person who was using his land without permission or lawful authority. Obviously, this justification was developed when there was no system of land registration in place. It is difficult to see how exactly this could be viewed as a reason to uphold the doctrine when the disputed land is registered land. Buckley notes that "the Irish legislature has consciously recognised the importance of the Land Registry reflecting the long-time occupant as owner in s 52 of the Registration of Title Act 1891 and s 49 of the Registration of Title Act 1964."[7] The aim of the registration of title system was to ensure State-guaranteed title to land. Such title would no longer be dependent on possession, it would depend on registration of the legal owner's interest. The system had to incorporate exceptions for practicality and adverse possession was one of those exceptions. While Buckley's point is legitimate, the right of the legislature to require the Land Registry to grant the long-time occupant the legal title is now in question following the decision in *Pye*.[8]

A second justification noted by the Law Commission is that which applies to all statutory limitations — protection of the squatter from stale claims and to deter the legal owner from sleeping on his/her rights. There are a number of flaws with this argument. Firstly, as the Law Commission points out in their Consultative Document,[9] the effect of adverse possession is not solely negative — it also results in a squatter obtaining legal title to a piece of land and a former land owner losing title in the same piece of land, with no compensation whatsoever. Such a result would require further justification than that usually adduced for limitation periods. Secondly, this argument really only works with regard to unregistered land where the basis of title is possession and not valid registration. Finally, this rationale assumes that in all cases the true legal owner will realise that he has been dispossessed of his land. The reality is that adverse possession can occur without the owner of the land being conscious that his rights are being threatened.

A third justification is to prevent the land becoming unmarketable. If the true owner of the land has gone astray, the doctrine of adverse possession allows a squatter to use the land and, ultimately, to keep it within the marketplace. The Law Commission also notes that in some instances there may have been "off-register transfers"[10] and in this case adverse possession is practical and useful. These reasons can still apply, both to registered land and unregistered land.

The final reason given by the Law Commission is that adverse possession is a remedy where a squatter has spent money on the disputed land by mistake, i.e. where the squatter mistakenly believes the land to be his. It is said to prevent hardship in this instance. In the case of unregistered land, it is easy to appreciate how this could occur. However, with regard to registered land, adverse possession is only allowing for carelessness on the part of the squatter. The boundaries of each piece of land are marked out — mistaken belief in ownership of a piece of land can be simply fixed by consulting the Land Registry.

Irish Adverse Possession: An Ambiguous Doctrine?

Adverse possession has not been treated with the same vocal disdain in Ireland as it has been in England. However, Buckley suggests that the actual application of the doctrine in Ireland is much more stringent.[11] Adverse possession is governed by a mixture of legislation and common law. The Statute of Limitations 1957, s 18 provides some of the requirements that must be fulfilled for a squatter to acquire title by adverse possession. There must be a person in possession of the land in whose favour the limitation period can run. The time period is 12 years for an ordinary person or 30 years for a State body.[12] This person's possession must be continuous and physical and they must commit acts of ownership on the land. This has been defined in *Lord*

Advocate v Lord Lovat[13] and endorsed in the recent case of *Feehan v Leamy*[14]:

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

In addition to the requirement that the squatter must possess the land, it is essential that the true owner has been dispossessed or has discontinued possession.

The squatter's possession must also be adverse to the title of the legal owner — this concept, however, has proven elusive to the judiciary. As Lord Browne-Wilkinson notes in *J.A. Pye (Oxford) Ltd. v Graham*[15] this requirement has been taken to mean various things:

> "It is said that he has to "out" the true owner in order to dispossess him; that he has to intend to exclude the whole world including the true owner; that the squatter's use of the land has to be inconsistent with any present or future use by the true owner."

Lord Browne-Wilkinson finishes with what he believes to be the ordinary meaning of adverse possession — that the squatter takes ordinary possession and by doing so dispossesses the owner for the requisite period and does not have the consent of the owner to do this.

In the Irish case of *Egan v Greene*[16] the court held that when looking for possession that is adverse, the intensity and type of user would be relevant. Here the land at the centre of the dispute was bogland. The legal owner instigated proceedings for possession when he noticed a turf cutter on his land and when turf had been destroyed by the defendant as he viewed these acts as adverse to his title. However, the occasional grazing of cattle by the defendant was not viewed by the plaintiff as adverse. The court agreed.

The recent case of *Keelgrove Properties Limited v Shelbourne Development Limited*[17] endorsed a dicta from a 1995 case:

> "In order to defeat the title of the original landowner, I am of the opinion that the adverse user must be of a definite and positive character and such as could leave no doubt in the mind of a landowner alert to his rights that occupation adverse to his title was taking place. This is particularly the case where the parcel of land involved is for the time being worthless or valueless for the purposes of the original owner."[18]

The final criterion to establish adverse possession, and probably the one that causes most problems, is the so-called intention to possess or the *animus possidendi*. There hasn't been any deep analysis of this requirement by the Irish courts but there have been numerous pronunciations on it — all of them conflicting. Justice Kenny in *Murphy v Murphy*[19] stated that what was required was "an intention to exclude the true owner and all other persons from enjoyment of the estate or interest which has been acquired". This does not seem like a particularly onerous requirement for the squatter to prove. The requirement, however, was added to in *Cork Corporation v Lynch.*[20] It was held where the true owner of the land intended to put the land to a specific use at some time in the future and the defendant's occupation was not inconsistent with that intended use, adverse possession would not be established. Barron J in *Durack Manufacturing v Considine*[21] however did not come to the same conclusion. He suggested that if the possession of the squatter was not inconsistent with a future intention of the owner, this was only one consideration to be taken into account — it was not always conclusive proof that the requisite intention did not exist.

Examination of recent Irish case law appears to show an increasingly high burden of proof imposed by the Irish courts on the adverse possessor, much more so than that imposed by the English courts. While the pronunciations on the requirements of adverse possession themselves by our judiciary do not seem particularly onerous, the proofs required by the courts of continuous, intentional and adverse user are substantial. *Feehan v Leamy*,[22] *Keelgrove Properties Limited v Shelbourne Development Limited* [23] and *Mulhern v Brady* [24] illustrate the stricter approach taken by the Irish courts in recent years. In *Feehan v Leamy* the legal owner of the land had no current use for the property but would visit it a number of times each year, stand in the gateway and look at the property. The judge held this was sufficient exercise of an act of ownership by the legal owner and, as this act was not prevented by the squatter, adverse possession could not arise. However, this move towards an apparently stricter approach by the Irish courts is not completely consistent[25] and as such may not distinguish our approach from that of the English and save Irish adverse possession from similar condemnation by the European Court of Human Rights.

In England, however, the courts initially placed a stringent burden on the squatter. In *Powell v McFarlane* [26] Slade J stated that the squatter must make clear to the world his intention to possess the land and if his actions were open to more than one interpretation he cannot be said to have the requisite *animus possidendi*. This requirement appears to have been lessened in recent years as in *Pye*, Lord Browne-Wilkinson suggested that all that was required of the adverse possessor was "an intention to exclude the paper owners only so far as is reasonably possible".[27]

The Law Reform Commission of Ireland produced a report on adverse possession in December 2002.[28] It would seem logical that one of the issues that should have been addressed was whether there are any justifications for this doctrine to exist at all, especially with regard to registered land. The Commission expressly did not discuss these issues. They noted that the only moral argument which could be offered contrary to adverse possession was that the squatter could be considered a "land-thief".[29] This criticism could be swiftly dismissed, they suggested, if you consider the categories of squatters:

> "a family member holding adverse to the interests of other family members, often under an intestacy … a person who has encroached on neighbouring land … a person who has a defective paper title … and the defect is one which it is impossible or impracticable to rectify … a person who has taken possession of land which has been effectively abandoned."[30]

This was to be further backed up by the main rationale of adverse possession — the quieting of titles. Adverse possession allows the law, it is claimed, to "lift the curse of dubious title"[31] that "sterilises" the land in the possession of the squatter. This reasoning is somewhat flawed — the majority of cases in which doubt as to title will arise will involve unregistered land yet the Law Reform Commission recommended in its 2002 report, no distinction be made in the law between the two types of land.[32]

In the end, the Law Reform Commission decided that adverse possession in Ireland would best be operated by the parliamentary conveyance, i.e. once the title of the legal owner was extinguished under s 24 of the Statute of Limitations, the interest in the property would be conveyed to the squatter. The Commission recommended this feature to ensure that the title of the squatter was clear in relation to registered and unregistered land, freehold and leasehold land. While it is agreed that there is a need for clarity in relation to adverse possession in Ireland, this suggestion does not take into account how land law in Ireland has changed with the introduction of land registration. It glosses over the fact that the rationales that were once applicable to adverse possession no longer justify its general application to both unregistered and registered land.

A report by the Commission on the reform and modernisation of land law,[33] published in 2005, acknowledged the unsettled nature of the doctrine as a result of the decision in *Pye*.[34] The Commission recommended that the law on adverse possession be reformed but the "extremely beneficial and useful purpose"[35] of "quieting titles"[36] be retained. It suggested that, while the doctrine can have harsh effects, the useful purpose of quieting titles could fall within the exceptions outlined Article 1 of Protocol 1 and the Irish Constitution (public interest, social justice and the common good).

Initially the Land and Conveyancing Law Reform Bill 2006 contained provisions to incorporate the suggestions of the Law Reform Commission. Any adverse possession applications would have to be made through the Courts and if an order were granted, it would positively vest the title in the adverse possessor. In addition, power was to be given to the Court to investigate by various means the ownership and possession of the land in question. These provisions received immense criticism and were withdrawn from the Bill.

J.A Pye (Oxford) Ltd. v Graham and Another[37]: Clarification or More Uncertainty?

The decision in this case was heralded as a much welcome clarification of the law on adverse possession in England.[38] It is suggested that its effect on the Irish doctrine could be far-reaching as well. The land, which was in dispute, originally belonged to an estate that was owned by Pye. The estate consisted of a farmhouse and a substantial holding of land. Pye sold the house and a portion of the land to the Grahams — the defendants. The land, which was retained by Pye, was considered to have development potential but at the time it was the subject of a grazing agreement between the plaintiffs and the defendants. This agreement was to run from the 1st of February 1983 to the 31st of December 1983. The Grahams sought a further grazing agreement for 1984 but Pye refused as it was intending to seek planning permission to develop the disputed land.

The Grahams never vacated the land and continued to use it for grazing purposes, their rationale being that they would use it until they were told not to. In August 1984 an agreement was put in place between Pye and the Grahams for the purchase of the crop of grass on the disputed land for a sum of money. This cut was made on the 31 August 1984. It would seem that from the 1 September 1984 the Grahams were using the land without the permission of Pye. They made further contact with Pye in December of that year seeking an agreement on a crop of grass or, preferably, a grazing agreement for 1985. Pye never replied and the Grahams never contacted the company again.

The Grahams maintained possession of the disputed land until 1999. They farmed all year round openly. They were more than willing to pay for a grazing agreement if Pye came requesting payment. But the company never did. Michael Graham, one of the original defendants, gave evidence stating that it was his belief that ownership could be obtained if it had been occupied for a number of years, which he believed to be seven years. With this intention, he registered cautions at the Land Registry against Pye's title claiming that he had obtained squatter's title by adverse possession. Essentially, Pye was now holding the land on trust for the Grahams. Obviously, Pye disputed this. It sought to cancel the cautions and sought possession of the land.

In the Court of first instance, Neuberger J found in favour of the Grahams. He held that they had been in factual possession of the land, taking into account the acts done on the land and the fact that the land had been enclosed by the Grahams. They also controlled access to the land and the refusal by Pye to grant another grazing licence showed the Grahams were not carrying on merely in the hope of obtaining one. However, despite finding in favour of the Grahams, Neuberger J expressed severe misgivings about his decision, stating that he arrived at it "with no enthusiasm".[39]

The Court of Appeal, sharing Neuberger J's dislike of adverse possession, overturned the learned judge's decision. Lord Justice Mummery, delivering the key judgment, placed emphasis on the fact that the Grahams were willing to pay for a further grazing agreement if one was proffered. This, he felt, negatived any intention to possess that the Grahams' could potentially have had. However, the Court of Appeal did expressly state that Article 1, Protocol 1 of the ECHR was not infringed upon. The reason for this was that the law on adverse possession in England did not deprive an individual of possession or confiscate any property: it merely blocked the right to bring an action once the limitation period had expired. Preventing access to the courts in this way was justified by the usual rationales of adverse possession — preventing stale claims and ensuring certainty of title.

Lord Browne Wilkinson delivered the key judgment in the House of Lords. In it, he untangled the complicated rules pertaining to adverse possession. In his view, the question to be asked in all cases of adverse possession is:

> "simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner."[40]

With regard to the ECHR, Lord Browne-Wilkinson held that the article was not engaged and there was no ambiguity in the legislation on adverse possession which required explanation. The Human Rights Act 1998 was also held not to have any retrospective effect, ruling out its use in this case in any event.

In holding with the Grahams, the House of Lords was overturning the judgment of the Court of Appeal and restoring the decision of the court of first instance. It is clear, however, that the judges took no pleasure in finding as they did. Judge Neuberger's sentiment was echoed by Lord Bingham and Lord Hope in their short judgments delivered in the House of Lords, Lord Hope praising the introduction of the Land Registration Act 2002 and, under it, a more rigorous regime.

This judgment may not have a significant effect on the law relating to adverse possession in England. In 2001 the Law Commission of England and Wales recommended rigorous changes to the law of adverse possession to reflect the public and judicial dissatisfaction with the doctrine and also to acknowledge its incompatibility with the land registration system.[41] This led to the introduction of reforms by the Land Registration Act 2002 which came into effect in England on 13 October 2003. Under the Act if the squatter has been in possession of a particular piece of land for ten years, he can apply for "possessory title". However, notice of this application is given to the legal owner who has two years to reassert his title to the piece of land. The relevant sections of the Limitation Act 1908 are dis-applied with regard to registered land only.[42] These procedural changes appear to ameliorate the unfair burden placed on the holder of the legal title and are compatible with the land registration system. The legal registered owner now has notice that his rights are being threatened and can take appropriate steps to reassert his title to the land in question. However, the problem arises when it is considered that this statute is not a statute of limitation and, unlike a statute of limitation, it does not bar the right of action. It puts in operation time limits after which the title of the paper owner is lawfully extinguished. It may not be able to avail of the justification of preventing stale claims. It has been suggested that as such, Convention rights are much more likely to be engaged.[43]

Stephen Murch notes, however, that the case of *J.A Pye (Oxford) Ltd. v Graham*[44] will still be of relevance in defining factual possession and intention to possess.[45] It could also be of enormous potential in expounding the tangled web of common law and legislation that governs adverse possession in Ireland if the ECtHR decision does not force a more radical overhaul.

J.A. Pye (Oxford) Ltd, v United Kingdom[46]: A Nail in the Coffin of Adverse Possession

The implications of this European decision on adverse possession in Ireland are, as yet, unclear. However, under the European Convention on Human Rights Act 2003, our judiciary has to take into consideration "any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction".[47] It would seem that under this provision, the courts will have to take a close look at the law on adverse possession and what the European Court of Human Rights deemed incompatible with the Convention. This may further compel the legislature to review the doctrine in the Oireachtas.

The provision which the Court was examining for a possible breach was Article 1 of Protocol 1:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

They saw this provision as encompassing three interlocking rules. First, there is the principle of peaceful enjoyment of property. Secondly, deprivation of possessions will be subject to rules. Both of these are contained in the first paragraph. Finally, in the second paragraph, is the principle that States can control property use in the general interest. The States' means of achieving both rule two and three have to comply with the principle of lawfulness and pursue a legitimate aim through proportionate means. The application of this provision would obviously allow the state a wide margin of appreciation in determining what exactly is in the public interest.

In arguing its case, the United Kingdom tried a number of arguments. They pointed out that Pye knew of the law on adverse possession when it bought the land originally. Due to the operation of this well-known law, Pye had lost its interest in the disputed land because of the land's inherent defeasibility and that this could not engage Article 1, Protocol 1. The UK further argued that even if the article was engaged, it could not be held liable as it neither encouraged nor discouraged interference with Pye's enjoyment of the land. This flowed from the actions of the Grahams. At most, the State's positive obligations might be at issue but it had certainly not breached its negative obligations. The UK called on the Court to apply the test that was used for all limitation periods — that the Government had a legitimate objective, which was the public interest in preventing stale claims. This should be accompanied by a wide margin of appreciation, taking into account that twelve years was a significant limitation period.

The UK closed with a couple of unconvincing attempts to avoid liability. It pushed the blame on Pye by contending that Pye could have ended the Grahams' adverse possession if it had gotten the Grahams to acknowledge, in writing, Pye's ownership of the land. It pointed out that just because adverse possession had been amended by the Land Registration Act 2002, does not mean the previous incarnation was incompatible with the Convention. In a final, almost feeble effort, to win the day, the UK told the Court it was not the only country that allowed adverse possession to operate without compensation for the dispossessed owner.

In comparison to the raft of arguments put forward by the UK government, counsel for Pye had a very simple yet compelling argument — the law on adverse possession did not just limit access to the courts, it had a positive effect in that it extinguished the title of the owner of the disputed land. This law had to be subject to the fair balance test of Article 1, Protocol 1. It was also pointed out that the rationales that were being used to justify this doctrine were not satisfactory with regard to registered land — no public benefit could be obtained as it was clear who was the legal owner.

A narrow majority (4:3), in finding for Pye, placed enormous emphasis on the cumulative effect of the laws relating to adverse possession. The judges were not content merely to look at the limitation period, they also looked at the fact that the title

of the paper owner was extinguished. Therefore, not only was he not entitled to seek redress in the courts, he also could not lawfully repossess his land. He no longer had the right to beneficial ownership of that land. A second issue, which played heavily against the UK, was the lack of compensation for the dispossessed owner. The Court noted that only in the most exceptional of situations would this be acceptable.

The Court, in determining the liability of the UK, had to establish whether there was a legitimate aim for this interference. The UK had pointed to the public interest in preventing stale claims and to ensuring that the reality of unopposed occupation of land and its legal ownership coincide, as justifications. The importance of these aims was questioned in relation to registered land however the Court stopped short of agreeing with the applicant that adverse possession has no public interest with regard to registered land. The reason the Court was reluctant to give a definite statement of this nature was due to the large margin of appreciation granted to States in determining the public interest in their countries. It was also noted that while the legislature had amended the law on adverse possession it had not been abolished altogether and it still applied with regard to registered land, albeit under a much stricter regime.

The final issue the Court had to discuss was the proportionality of the aims used by the Government to protect the public interest. The judges focused on the deprivation of property coupled with the additional blow of the lack of compensation. These two problems were compounded by the lack of procedural safeguards in place. No notice was given to the paper owner of the threat to his title. They noted that this harsh system had been ameliorated under the Land Registration Act 2002. Taken as a whole, the judges felt unable to find that the aims were proportionate and found that the UK had violated Article 1 of Protocol 1.

The three dissenting judges felt that the fault lay with Pye Limited. They were a specialised property company, with knowledge of the law on adverse possession and the consequences that could arise if they did not assert their title against the Grahams. They noted that ownership of property carries with it certain burdens and asserting one's right to that property is one such burden. The dissenters felt that the UK law on adverse possession fell within the margin of appreciate accorded to the State.

Conclusion

The arguments the ECtHR was faced with went to the very heart of adverse possession. The Court, while not condemning the doctrine to complete abolition, has certainly paved the way for a radical overhaul of its elements. The decision faces a final test in the Grand Chamber. Until the release of that judgment, the doctrine of adverse possession hangs in limbo. However, if the Grand Chamber upholds the decision handed down by the lower court, the system in Ireland may require sweeping change. The law in Ireland is a very similar regime to that which *Pye* was subjected to, albeit potentially stricter. The two issues which the European Court focused on — the effect of the laws of adverse possession and the lack of compensation — are issues which will need to be addressed in Ireland. Procedural safeguards, like those under the English Land Registration Act 2002 may have to be enacted to ensure that the paper owner is not subject to an unfair and harsh burden. However, it must be noted that while the English reforms do go some way to ameliorating the severe effects of adverse possession, it is unclear whether the new system is Convention compatible. It still applies to registered land and the ECtHR did accept that the rationales offered for adverse possession have much less force in relation to this type of land. In addition, as noted above, the LRA 2002 is not a statute of limitation and may lead to Convention rights be engaged more easily. Therefore, it is possible that the English will have further reforms to make. However, given the wide margin of appreciation granted to States in determining what is in their citizens' public interest, it is likely that these new improvements to the English system will render it compatible. The only area that remains weak is that of compensation for the dispossessed owner.

It appears that at the moment the Irish doctrine of adverse possession is very much up in the air. What the outcome of the Grand Chamber hearing and its potential effect on Irish law will be remains, to be seen.

Endnotes

1. Charlton, H, "The Criminalisation of the Squatter", [1993] NLJ, 6627, p 1721.
2. (Application no 44302/02).
3. Article 1 of Protocol 1 guarantees the right to peaceful enjoyment of possessions. It also states that an individual cannot be deprived of these possessions unless it is in the public interest to do so.
4. [2002] UKHL 30.
5. (Application no 44302/02).
6. Law Commission and HM Land Registry, "Land Registration for the Twenty-First Century — A Consultative Document", Law Com 254.
7. Buckley, "Adverse Possession at the Crossroads", [2006] 11(3) CPLJ 59.
8. (Application no 44302/02).
9. *ibid* at p 209.
10. Off-register transfers can be defined as a transfer of land that has occurred but evidence of which has never been registered either in the Registry of Deeds (if unregistered land) or the Land Registry (if registered land), e.g. where two land-owners "*swap*" land with each other.
11. Buckley, "Adverse Possession at the Crossroads", [2006] 11(3) CPLJ 59.
12. Statute of Limitations 1957, s 13.
13. (1880) 2 App. Cas. 173.
14. [2000] IEHC 118.
15. [2002] UKHL 30 (4 July 2002).
16. Unreported, Circuit Court, 12 November 1999.
17. [2005] IEHC 238.
18. *Doyle v O'Neill*, Unreported, High Court, 13 January 1995.
19. [1980] IR 183 endorsed in *Feehan v Leamy* [2001] IEHC 118.
20. [1981]ILRM 179.
21. [1972] IR 144.
22. [2000] IEHC 118.
23. [2005] IEHC 238.
24. [2001] IEHC 23.
25. In *Griffen v Bleithin* [1999] 2 ILRM 182 the High Court upheld a claim for adverse possession in circumstances where the acts of user by the adverse possessor were very ambiguous.
26. (1977) 38 P & CR 452.
27. (Application no 44302/02).
28. LRC 67–2002.
29. *ibid*, p 9.
30. *ibid*.
31. *Op cit* Fn 15 at p 10.
32. *Op cit* Fn 15 at p 11.
33. Law Reform Commission, *Report on the Reform and Modernisation of Land Law and Conveyancing Law*, (LRC 74-2005).
34. (Application no 44302/02).
35. Law Reform Commission, *Report on the Reform and Modernisation of Land Law and Conveyancing Law*, (LRC 74-2005), p 8.
36. *ibid*.

37. [2002] UKHL 30.
38. This clarification was rendered obsolete in England by the Land Registration Act 2002 which came into force in 2003.
39. [2000] Ch 676, p 709/10.
40. [2002] UKHL 30 at p 39.
41. Law Commission and Land Registry, "Land Registration for the Twenty-First Century — A Conveyancing Resolution", *Law Com* 271, p 30.
42. Sections 15, 16 and 17 no longer apply to registered land.
43. Letman, "Decline of the Adverse Possessors", [2004] NLJ 154.7128 at p 740.
44. [2002] UKHL 30.
45. Stephen Murch, "Adverse Possession — be warned", (2005) 155 NLJ 1912.
46. (Application no 44302/02).
47. European Convention on Human Rights Act 2003, s 4.

Book Reviews

This Business of Writing

Authors Terry Prone and Kieran Lyons
Published by ***The Institute of Chartered Accountants in Ireland***
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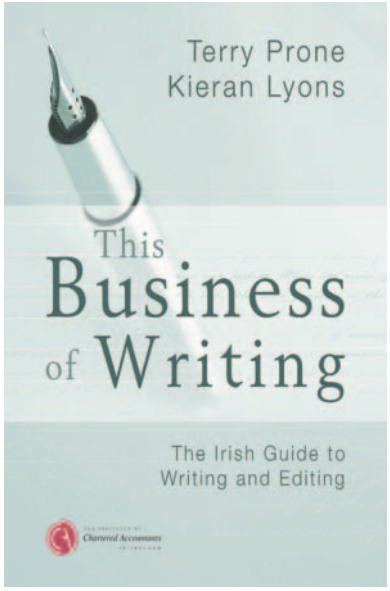


English is a vast, evolving language, with double the vocabulary of French and three times that of German. No wonder it's open to mistake and misuse. Imagine my relief when a new Irish book landed on my desk with a mission to demystify the written word for the time-pressed professional. Particularly when the credentials of the writers turned out to be impeccable.

This Business of Writing is a joint effort by Terry Prone, Ireland's best-known media commentator, business trainer and director of Carr Communications and Kieran Lyons, director of publishing of The Institute of Chartered Accountants in Ireland.

This book isn't just for the writing professional, but for every professional who writes. Clarity of expression in business life, particularly when it's on paper, is crucial to being taken seriously. How often have we dismissed the contents of a letter because it's badly laid out, full of misspellings or even addressed to the wrong person? I'm of a generation who didn't learn formal grammar and sentence structure, but who had to mug up on it very quickly, first by instinct, then by training and eventually have it honed by experience. I suspect I'm not alone in appreciating the value of a good sentence. No matter what the context, being able to write clearly gives you confidence and enhances your competence.

There are any number of writing and styles guides on shop bookshelves. They're collapsing under the weight of them, and they range from the cheap and cheerful (never good and always American so the grammar doesn't work this side of the pond) to the heavy and authoritative (like *The Economist Style Guide*, which is just too abstract for day-to-day use). Anyway, no-one ever thinks of using them because they're not strictly Irish. What's brilliant about Terry Prone and Kieran Lyons' book is that it is Irish. There's a terrific little section on using the language in text, penned by Padraig O Ciardha from TG4 and Jo O'Donoghue, the editor of *Brewer's Dictionary of Irish Phrase and Fable*. It's my bet that Terry and Kieran didn't know very much about Irish or had forgotten it all the second they left school, so they called in the big guns who do. That was a smart move because not only do they have the confidence as authors to make a call on how to use square brackets, but they refer you on to further reading and other authors on the same subject. But trust me when I say this book stacks up and far surpasses many of the books they reference.

Back to our day-to-day writing needs. *This Business of Writing* shows how to use English in work and study. Peppered with examples and advice, over six sections, it advises you on: the concept of language; the written worlds of study and work; online research and writing; English usage, grammar and punctuation; using Irish in contemporary text; and they provide a comprehensive miscellany of abbreviations, currencies, conversions, charts and country groupings. And most of it is hilarious. It takes some nerve to teach the world to write and to do it with humour. Terry Prone and Kieran Lyons pull it off with staggering aplomb.

More than a style guide and a list of dos and don'ts, I think this uniquely Irish text will become the go-to resource for how to write letters, reports, essays, articles, academic papers, speeches and presentations. (Yep, they even tell you how to use PowerPoint.) It's not an understatement to say that, given the right exposure, it can become Irish reference and writing companion for the 21st Century.

My advice to all writers is to have a good dictionary on your desk as well as a good style guide. And use them. Get consistent in your writing and you'll seriously impress your clients.

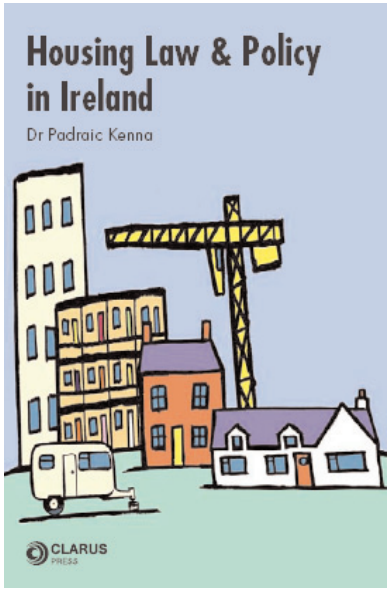
So if you found *Eats, Shoots and Leaves* too woolly and preachy, if you don't fancy the challenge or heft of the *Chicago Manual*, yet you want to communicate with clarity and purpose, *This Business of Writing* is a light, authoritative and witty read that manages to blend critical thinking with the use of the comma. This is the style guide for you.

This Business of Writing is published in paperback at €23.00 and at €34.00 in hardback by The Institute of Chartered Accountants in Ireland. It is available in Eason's and all good bookshops.

Reviewed by Paul Candon

Housing Law and Policy in Ireland

By Padraic Kenna
Published by Clarus Press
ISBN: 1-905536-01-1
Price:€49



Bringing Housing Law Home:

For many years we cried out like Colum's old woman of the roads: O, to have a little Irish housing law book! For too long we were forced to journey up the MI motorway for the battered Hadden and Trimble and we were grateful for it.

Now Padraic Kenna of NUI Galway has joined forces with Clarus Press to produce a mighty tome which will generate much needed debate about housing law and policy in Ireland and more importantly the necessary legal developments and law reform.

Dr Kenna will know only too well that housing law by itself never built one home but his book will certainly help to get solid legal foundations in place.

This is a most comprehensive piece of work covering every aspect of the topic. Even though its 387 pages are packed with worthwhile information, you know that the author has so much more to say.

He is also gifted, more likely hard work indeed, with a fine writing style that makes what he has to say so accessible to every reader. One sincerely hopes that this book will become available to every reader and certainly as law books go the price of €49 is amazing value.

Clarus Press must too be congratulated on their beautiful production and Brian Gallagher for his excellent cover.

I could go through the contents but I think from even a cursory glance you will find everything you need there and as I am strictly limited in the word count I would prefer to just touch on one area that strikes me.

I really like the way Dr Kenna demonstrates that 'home' as a concept is conspicuously avoided in Irish housing policy though it is central to the development of family and social life. He writes of the suggestion that home needs to be conceptualised as house plus an "x factor".

This "x factor" represents the social, psychological and cultural values which a physical structure acquires through use as a home. He reports Fox's words:

> "Home as a physical structure offers material shelter; home as territory offers security and control, a locus in space, permanence, security and privacy; home as a centre for self-identity offers a reflection of one's ideas and values and acts as an indicator of personal status; and home as a social and cultural unit acts as the locus for relationships with family and friends, and as a centre of activities."

Dr Kenna has written that the law does not always measure the sentimental and "emotive" approaches to home in contrast to the quantifiable claims of creditors, property owners or capital market issues.

Indeed our Supreme Court has made a tentative start to the process of appreciating the value of a home as opposed to a mere building in its creation of a constitutional easement in the Ballymun lifts case where O'Flaherty J noting that:

> "The Constitution expressly provides that the dwelling of every citizen is inviolable and cannot be forcibly entered save in accordance with law,' continues that in his judgement, 'the corollary of that guarantee must be that a person should be entitled to the freedom to come and go from his dwelling provided he keeps to the law." *Heeney and Others v The Right Honourable The Lord Mayor, Aldermen and Burgesses of Dublin* (unreported, Supreme Court (1998))

Indeed, Dr Kenna in his treatment of his subject particularly, in his examination of what he terms the draconian powers of eviction under s 62 of the Housing Act 1966, clearly demonstrates how far our law and its legal language is away from home.

In the light of our new Human Rights Act, he makes us question how our law seek to come to terms with our Irish homes through its property and housing laws down through the years.

Straight away you reach for your *Wylie* and its freehold and leasehold but maybe we should also recall the terrible history of Irish homes down through the years and Padraic Colum's *Old Woman of the Roads*.

> There may be a deed which talks of premises and heriditaments but not of
> The hearth and stool and all!
> The heaped up sods upon the fire,
> The pile of turf against the wall!
>
> There may be lease where you take
> All that and those the premises more particularly described in the schedule hereto but not
> A clock with weights and chains
> And pendulum swinging up and down
>
> Then when you look at the Notice to Quit again there is no mention of home but dwelling and premises and you are asked to show cause why you should not deliver up possession but not a word of homelessness nor being
> Weary of mist and dark,
> And roads where there's never a house nor bush

Dr Kenna points out that these summary procedures originate from s 86 of Deasy's Act 1860 which allowed for the speedy ejectment of 'servants, herdsmen and caretakers.' These procedures were carried forward in the Housing of the Working Classes Act and emerged again in the Housing Act 1966.

The legal language changes the home into a physical object separate from the people and circumstances that make it a home. Dr Kenna demonstrates this magnificently in his analysis of the Housing (Miscellaneous Provisions) Act 2002 which creates a criminal offence relating to entry on, and occupation of land, or bringing onto or placing an 'object' on land without consent:

> "Through this circuitous route the legislation of the Irish State has defined the temporary dwelling of a Travelling family not as a 'home' but as an 'object', which can be treated like any other object placed on the roadside or on private property without consent."

Our thanks to Dr Kenna for guiding us further along his road to the implementation of the human right to appropriate and affordable housing capable of bringing a new person centred and qualitative dimension into play in Irish housing law and policy of which the current reality the poet Paul Durcan reminds us is:

> Homeless in Dublin,
> Blown about the suburban streets at evening,
> Peering in the windows of other people's homes,
> Wondering what it must feel like
> To be sitting around a fire -
> Apache or Cherokee or Bourgeoisie -
> Beholding the firelit faces of your family,
> Beholding their starry or their TV gaze:
> Windfall to Windfall - can you hear me?
> Windfall to Windfall ...
> We're almost home pet, don't worry anymore, we're almost home.

Reviewed by Frank Murphy, Solicitor

Diary Dates

Provided by the Irish Law Page
www.irishlaw.org

April 2007

3–5 April 2007: Annual Conference of Socio-Legal Studies Association, Canterbury
http://www.slsa.ac.uk/conferences.htm#slsa2007

Thu.26 Apr.'07: Law and the Environment 2007 – Fifth Annual Conference for Environmental Professionals, Faculty of Law, University College Cork
http://www.ucc.ie/en/lawsite/eventsandnews/events/

May 2007

3 May 2007: Postgraduate Conference on Criminal Justice and Human Rights – Centre for Criminal Justice and Human Rights, Faculty of Law, University College Cork
http://www.ucc.ie/law/postgradconference2007

10 May 2007: The Protection of Human Rights in the War on Terror – Human Rights Lecture by Baroness Helena Kennedy QC – Law Society Third Annual Human Rights Lecture, Law Society, Blackhall Place, Dublin
http://www.lawsociety.ie

18 May 2007: Society of Trust and Estate Practitioners Annual Conference 2007
http://www.step.ie/newsevents.php

23 May 2007: Annual Family Law Conference - Law Society event, Clontarf, Dublin
http://www.irishlaw.org/events/lawsoc06-07.shtml

June 2007

14–16 June'07: Too Much Information: Annual Conference of British and Irish Association of Law Librarians – Sheffield
http://www.biall.org.uk/Home.asp?id=i97&h999

September 2007

10–13 Sep.'07: Annual Conference of Society of Legal Scholars – Durham
http://www.legalscholars.ac.uk

Conference Note

By Carol Daugherty Rasnic
Professor of Law
Virginia Commonwealth University, Richmond, Virginia

Socio-Legal Studies Association Annual Conference

Last year's annual conference of the Socio-Legal Studies Association was a model of planning and organization. The conference was held back in later March and the venue was the state-of-the-art University of Stirling law school in Perthside, Scotland.

Socio-legal research is referred to on the SLSA home page as a disciplinary approach that bridges a gap between law and sociology, social policy and economics. This broad-based group also encompasses criminology, history and political science, and this was reflected by the wide range of paper topics. Nicole Busby of the law faculty at University of Stirling ably chaired the conference, somehow coordinating concurrently scheduled papers according to 20 subject matter grouping. Panels consisted of papers on access to courts; administrative law; children and the law; cities and new urbanism; criminal law; criminology; environmental law; European law; family law; gender, sexuality and the law; human rights; information law; labour law; legal education; legal history; the legal profession; medical law; miscarriages of justice; sex offences; social theory and the law; and sports law.

There were more than 220 papers delivered with a diversity of concurrent presentations that provided something to delight all intellectual curiosities. The mixture of disciplinary perspectives lent a unique outlook that distinguished the approach that is usual for legal conferences. Some random examples of papers are illustrative of the breadth of subjects: "Social Dialogue in the European Professional Football Sector"; "Accident and Mistake in Provocation as a Defence to Murder"; "Child Labour in Developing Countries"; "Protection, Parity or Promotion — Why Reform the Law on Cohabitation?"; "Extraterritorial Application of the UK Human Rights Act in Iraq"; "Keeping Sports out of the Courts — Arbitration and the GAA"; "Compensating Biodiversity Loss"; "Giving 'Voice' to Prisoners Who May be Innocent: Unearthing Counter-discourses Subjugated by the Parole Deal"; "Youth, Crime and Responsibility"; "Jurisprudence in Self-Description: from Natural law to legal Position"; "War Crimes and the Failure of Law"; "Keeping Solicitors to Account: Auditing and Assessment of Solicitors' Accounts"; "Marriage, Religion and the Law"; "Pregnancy Discrimination in Wales: Lesbian Perspectives on Pregnancy and the Law"; "Cybercrime: an Emergency Challenge for Law Enforcement"; "Electoral Rights for citizens of the EU"; "Human Rights and the Power of Medical Law"; and "Same-sex Marriages in Canada and the Politics of 'Whiteness'."

In addition to England, Northern Ireland, Scotland and Wales and Ireland, participants came from Australia, Belgium, Canada, Finland, Germany, India, Malaysia, the Netherlands, New Zealand, Nigeria, South Africa, Spain, Switzerland, Turkey, and the United States. Accommodations were in the Victorian Dunblane Hotel, renowned since 1878 for its hosting of the well-to-do who were lured to the area for its therapeutic local spring water. This peaceful setting in the shadow of the Trossachs provided an ideal opportunity for combining scholarship with comfort.

Professor Busby very capably juggled an inordinate number of papers within a finite period. Perhaps the only negative aspects were the limited time for such an ambitious venture and the mid-week timing, making attendance at the entire conference for those with teaching and other work commitments. This might be remedied by extending this excellent conference an additional day for future sessions and re-scheduling so as to include a weekend, such as Friday through Sunday, or Saturday through Monday. Despite the insufficient time, Professor Busby is most deserving of accolades for the dedicated work she committed to this stimulating conference.

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