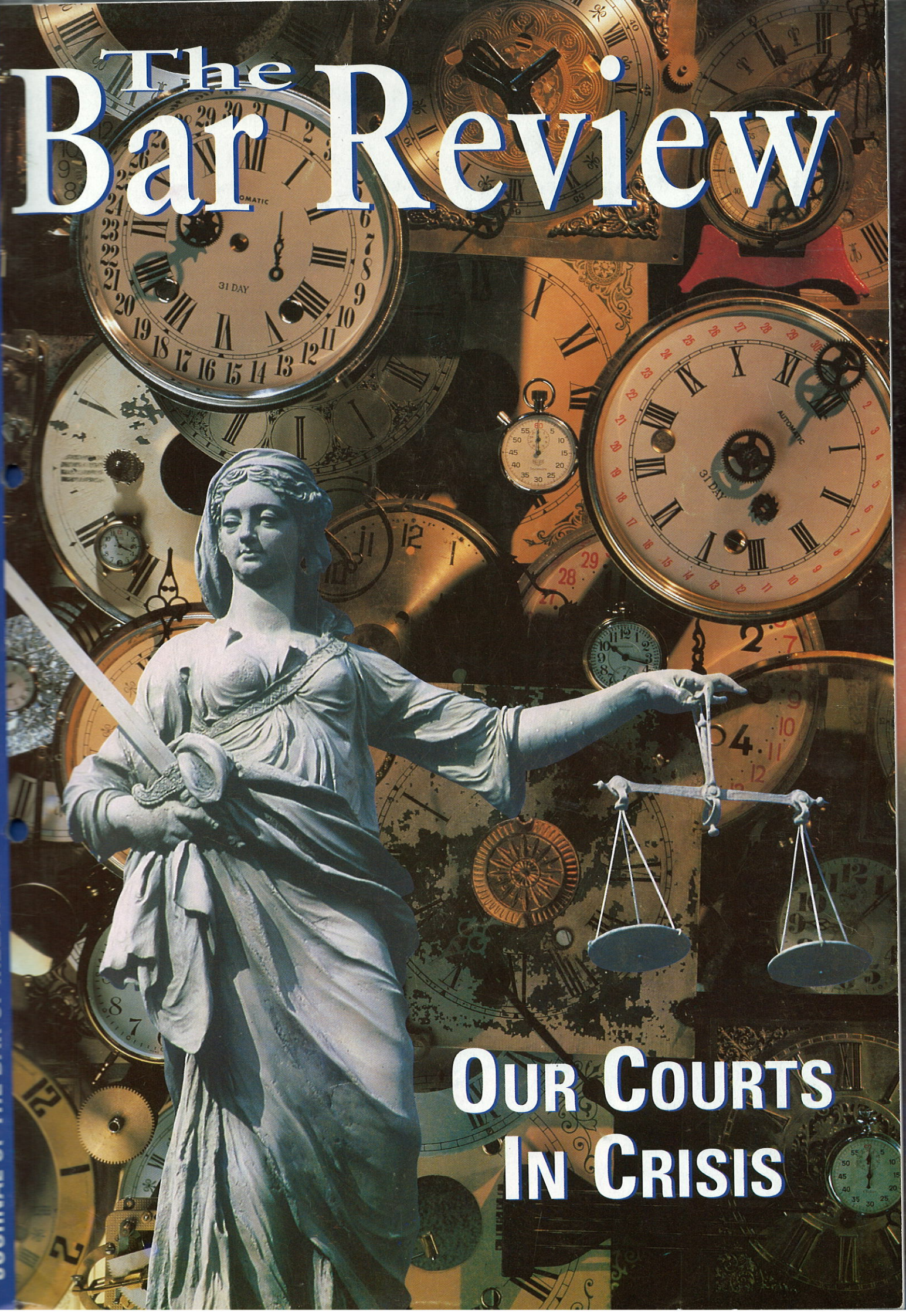
The Bar Review



Our Courts In Crisis

Journal of the Bar of Ireland

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The Bar Review

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Opinion

Our Courts in Crisis

The right to reasonable expedition in the dispatch of legal business has long been recognised as a right deriving from the Constitution. In civil as well as criminal cases the Courts have been to the fore in establishing that lapse of time can defeat the interests of justice to the extent that, in certain circumstances, the courts will prevent cases proceeding.

In it ironic indeed that the very courts which have striven to establish the right to reasonable expedition have themselves become a significant contributory factor in the overall delay in cases being heard. The reason for this is clear. The volume of cases in all courts is high and the number of judges, despite the recent additional appointments, is low. Cases which are ready to be heard must join long queues and often languish for years before a Court is available to hear the action.

The right of an accused person in a criminal case to have a trial in due course of law is recognised by Article 38.1 of the Constitution. The expression 'due course of law' has been judicially construed so as to include the right to a reasonably expeditious trial. The number of murder and rape cases presently awaiting trial before the Central Criminal Court challenge this ability of the courts system to deliver the constitutional right to a reasonable expeditious trial. In May 1996, eighteen murder and forty six rape cases appeared in the Central Criminal Court list. Fifty one of those cases were adjourned without a trial date being fixed.

Civil cases fare no better and in many instances the delays are worse. In the High Court in Dublin, personal injury actions which are ready for trial in the must join a queue which stretches three years into the future. In Cork the delay is 33 months, in Limerick it is 35 months and in Galway 36 months delay can be expected.

The Circuit Court experiences similar problems. Delays in the hearing of civil cases range from 3 years in Cork to 2 years in Dublin, Galway, Limerick and Waterford.

The Supreme Court list in April contained 259 cases awaiting hearing of which up to 150 are still awaiting a date for hearing. The first case in the Supreme Court list which does not yet have a date for hearing shows a delay from the date of hearing in the High Court of almost three years.

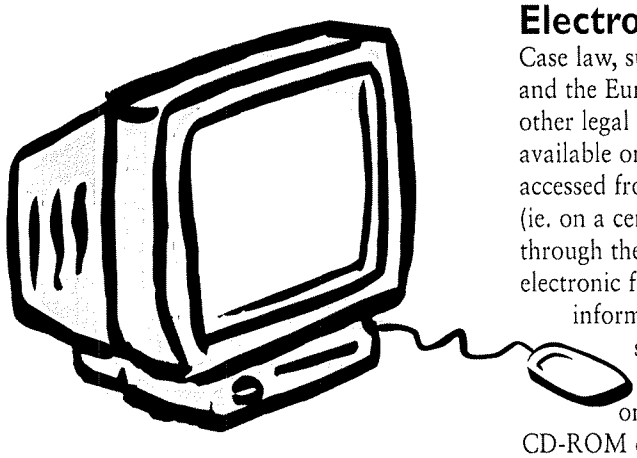
Such delays are unacceptable from the perspectives of litigants, lawyers and judges. They contribute to the frustration and uncertainty of the litigants, they constitute a substantial and unnecessary cost to business which impedes the economic development of the country and they impede the proper administration of justice as provided for in the Constitution. They point starkly to a courts system which is in crisis and is in urgent need of reform.

The First Interim Report of the Working Group on a Courts Commission rightly records that as well as the intolerable court delays which we have at present, other problems include inadequate court facilities, inadequate secretarial and research facilities provided to judges, the current poor use of information technology, inadequate responsiveness to the needs of court users and the absence of a proper system for the collation and dissemination of information on courts services to the public. The Report rightly traces all of these problems to the fragmented system for the administration of courts services which has grown up since the foundation of the state. The Bar Council fully endorses the recommendation of the working group that a centralised, independent Courts Service Board, composed mainly of members of the judiciary along with representatives from trade unions, management, the legal professions, court staff and court users, be established by statute as a matter of urgency and that it be given the power and resources to tackle all of these problems as a matter of the utmost urgency.

The problem has been identified and the solution suggested, only the political will to implement the reforms is awaited. The Minister for Justice has shown commendable commitment to the problem in our courts through the appointment of the working group and the ready acceptance of their proposals. This commitment must now be sustained and the new Courts Services Board established without delay.

The Virtual Law Library

The Barrister's job essentially involves finding information (through research), adding value to it (through analysis) and communicating the results (through advice and advocacy). Technology, from the internet and CD-ROMs, to electronic mail and scanning, is revolutionising each stage of this process. This article outlines developments in technology which could impact on the organisation and running of the barrister's practice and the specific services being introduced for barristers by the Law Library in the coming year.



Electronic Legal Research

Case law, such as the All England Reports and the European Court Reports, and other legal materials are increasingly available on CD-ROM (ie. in disk format, accessed from a local machine) or on-line (ie. on a central machine accessed through the telephone system). In these electronic formats, huge amounts of information can be searched in seconds using keywords and then printed or transferred onto your computer (A single CD-ROM disk can store over a quarter of a million pages of text - the entire 60 years of the All England Reports is on one CD-ROM disk), thus reducing research time (and costs) and enabling more comprehensive and accurate searching than is possible using the conventional paper sources. Legal information which is scheduled for publication on CD-ROM or on-line in the coming year includes the full text of all Irish statutes in force (a project being undertaken by the Attorney General's office), the full text of the Irish Reports since 1922 and the full text of the English reports since 1865. Other materials available electronically include the Dominion Law reports, US supreme court reports and the Federal Reporter and Australian High Court and Federal court decisions.

The Law Library has embarked on a programme of computerisation and training which will introduce barristers to the benefits of electronic legal research over the coming year. The purpose of the programme is to provide all barristers, whether they are in the Library, at home, in an office or on circuit, with round-the-clock access to a comprehensive range of electronic legal materials which they can search through and print from.

The programme commenced with a pilot project in the Church Street building enabling barristers there to access legal databases (including JILL and the All England Reports) from a computer on their desks. This project is now successfully up and running, with 25 members connected to the network and a further 15 scheduled for connection before the Summer.

This network will be extended to the public terminals in the Main Library by July so that members in the Library will be able to access all of the Library's current electronic holdings.

A further pilot project has just commenced with a group of 12 members, half of whom are based outside Dublin, to test a dial-in system, whereby members will be able to access the Library's databases by using a computer and modem. This is the service which will enable members to work from home or while on circuit. The pilot will run until the end of June and the service can be extended to the rest of the Bar by the start of the next legal year in October.

These networks all involve information on CD-ROM. The second phase of network services will involve adding access to on-line services, particularly legal materials on the Internet and LEXIS. This second phase will commence in October of this year. This will enable barristers, through the Libray's networks, to access information on the various international legal internet sites indexed on the Law Library's own internet Home Page, launched last April. The Law Library's homepage may be accessed at

http//:www.indigo.ie/barcouncil

An upgrade/replacement for the present library system will also be sought in the coming year which will enable members to check, stock and order books from home.

The two key issues, technical matters apart, are costs and training.

Costs

The cost of the equipment needed to support a platform of electronic services to a group the size of the Bar is large. In addition, there are high ongoing subscriptions costs to the databases. The pilot projects will be used to identify different pricing models for the services. Members will have to pay for the services however. In addition members will have to provide their own equipment if they want to access the services from outside the library. An evaluation of the computer suppliers in the market for equipment is currently being carried out and it is hoped to announce a shortlist of recommended suppliers, and favourable prices for barristers, before the end of June.

Training

It is absolutely essential to the successful introduction of electronic services that members are given full training and on-going support in the use of the databases and other services. To this end, a staff training team is being set-up to systematically train members over the next 12 months in the use of the electronic services. Completion of the training course will be a prerequisite to being allowed access to the Library's electronic services. On-going support will be available after the initial training through a helpline service and through members user groups which will act as fora for resolving problems, receiving feedback, testing out new services etc.

Other Electronic Services

Electronic Mail

Documents prepared on a word processor can be sent electronically without the need for printing and faxing/posting, by using electronic mail. Documents in paper form can be converted into electronic format using scanners (similar to those in use at supermarket checkouts) and then stored or sent electronically. Electronic mail access will be added to the Library's networks by Christmas of this year.

Case Management

The running of large cases is greatly assisted by electronic case management systems which allow documentation to be scanned into electronic format and then indexed and stored on computer where material can be retrieved using searching software. the library will shortly acquire a scanner which members can borrow for such purposes.

Electronic Legal diary

The Legal diary is now available in electronic format the evening before it is circulated in paper format. It is intended to make this electronic diary available on the Library's networks at the same time as providing access to electronic mail.

The Law Library becomes more than a physical location: it is also a nationwide network which provides a shared set of services to its members regardless of their location.

The Virtual Law Library

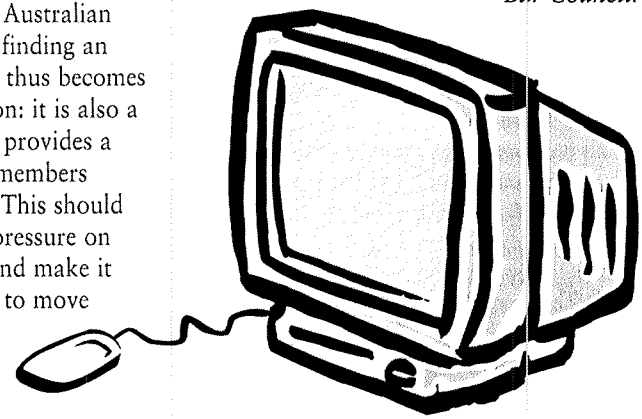
The ramifications of this technology plan, if successful, are enormous. The barrister's working patterns could be affected (why do your research in a cramped library when you could do it at home? why come in to the library on Friday afternoon to get materials for the weekend when you can access the materials at 7 o'clock on Sunday night?) as could the quality of your preparation for cases (finding a relevant Australian precedent will be as easy as finding an Irish one). The Law Library thus becomes more than a physical location: it is also a nation-wide network which provides a shared set of services to its members regardless of their location. This should have the effect of relieving pressure on space in the Main Library and make it more attractive to members to move into other premises such as the new Distillery Site.

The organisation of the individual practice is also affected. Case management is greatly simplified particularly in large cases by using scanning equipment and indexing software. Practice management is made easier by being able to conduct research, prepare documentation, send it to your solicitor, store it as a precedent and issue your fee all from the one machine at the one sitting. Communication is made more flexible by being able to send and receive documents regardless of location or time.

Of course there are limitations to these technologies. Much legal information, particularly older case law and texts, may never become available in electronic format. The equipment is a cost and needs to be maintained and upgraded, because machines do break down, systems do become obsolete, and viruses do corrupt files. You do have to spend time becoming familiar with the searching software and learning how to use the systems properly. It will be a long time before most people will read information from screens in preference to leafing through the printed source. And ultimately, the systems are only tools in your primary task of deciding how to solve the legal problem before you.

However, the benefits of technology to the individual legal practice and to the Bar as a whole are potentially enormous. For the individual barrister, research quality will improve and will take less time, a more flexible service can be provided to clients, the competitiveness of your practice can be sustained and time is freed up for other work or pleasure. The Bar as a whole will be able to use its collective bargaining power and organisation to ensure that the benefits of technology are available to all its members at a cheaper cost, with greater comprehensiveness and with better service back-up than if individual practitioners were left to fend for themselves. This will assist the Bar in maintaining its key role as a provider of highest quality legal services.

Cian Ferriter, Special Projects Manager, Bar Council.



The Bar Review

talks to Judge Barrington

The Honourable Mr. Justice Donal Barrington, Judge of the Supreme Court, recently returned from the European Court of First Instance. He spoke to The Bar Review about his experience as a Judge there and outlined his views on some of the differences between the two courts.

There are clear differences in style and procedure between the Irish and European courts and Mr. Justice Barrington believes in particular that the European emphasis on written pleadings can be totally new to an Irish barrister appearing before the court.

'People growing up in the common law tradition who just regard the pleadings as providing the outline of a case would make a great mistake if they treated them the same way in a European court where the case is largely decided on the basis of the written pleadings', he points out. The most important piece of advice which he would give to barristers in this context is that they should ensure they set their case out in full in the written pleadings and refer clearly to any exhibits upon which they intend to rely.

' This may sound very basic but I have found that one mistake advocates make is to produce written pleadings and a stack of other documents but frequently they do not relate those documents to the pleadings. The best piece of practical advice which I would give to any practitioner is this regard is to simply indicate clearly which document is intended to support which of their legal arguments' he said.

Despite the emphasis on the pleadings and the fact that the advocate only has a half an hour to present the oral argument, Mr. Justice Barrington believes the oral hearing should not be discounted in preparing a case. 'If the court has adopted a preliminary view on foot of the juge rapporteurs report, it may be difficult for the advocate to change that view in his oral arguments. However, where the court is divided or where, in the Court of Justice, the Advocate General and the reporting judge have taken differing views on a case, the oral hearing can be crucial', he said. 'The general view of the European judges would be that lawyers with experience in the common law tradition are generally more accomplished in oral argument than their civil counterparts', he adds.

Another point of distinction between the Irish and European courts is the fact that the limitation periods for hearing actions in the European courts are extraordinarily short. Usually an act must be challenged within two months of its commission. As Mr. Justice Barrington points out this time limit is all the more challenging since the document which must be lodged within that time is not like the Irish plenary summons which can act as a holding document pending the preparation of a more complete statement of claim. The plenary summons which must be lodged within the two months is as detailed as a statement of claim and so involves considerable work in a short time period. 'I believe that this short limitation period is particularly demanding in large competition law cases with significant issues at stake', he says.

'The rigidity of the European proceedings and the importance of getting matters right in the written pleadings was memorably illustrated to me by one unfortunate advocate who forgot to plead for costs. He won his case but there was nothing we could do for him within our rules. If he had at least asked for them at the oral hearing we might have been able to stretch matters for him but as it happened, there was nothing we could do', Mr. Justice Barrington said.

I can understand the necessity for the single judgement rule in the early years of the community when it was required to add weight to the authority of the court, however now I can see no reason for it, particularly where the court is dealing with important commercial matters and to issue a number of judgements could help to develop jurisprudence in this area.

On the differences between being a judge of the European Court and of being a judge in the Supreme Court, Mr. Justice Barrington saYS that it was of great assistance to have a cabinet when in Europe and he pointed out that the need for secretarial and research assistance is particularly pressing in light of all the paperwork involved in a case at European level. 'In addition', he said, 'there are two other aspects of difference which mean that one is not so isolated as a European judge than one is as a judge in an Irish court. In the first instance, there is a forum for discussion of cases within the cabinet and also, the judges of each chamber meet from time to time to discuss points of law and these can be very stimulating exchanges'.

As regards any possible future changes on the Court, Mr. Justice Barrington does not believe that there is no longer any necessity for the court to restrict itself to one judgement only. 'I can understand the necessity for the single judgement rule in the early years of the community when it was required to add weight to the authority of the court, however now I can see no reason for it, particularly where the court is dealing with important commercial matters and to issue a number of judgements could help develop jurisprudence in this area,' he says.

He believes that some administrative changes will be required if greater use of direct actions is to be promoted by the current Inter Governmental Conference as this would result in a huge increase in the workload going through the courts. He points out that this increase could best be accommodated by increasing the jurisdiction and number of judges of the Court of First Instance and that the numbers on the Court of Justice should rotate rather than be expanded. 'It would not make sense to have a large court of appeal. To have a panel of judges who could serve at times on the appeal court would contain the expansion of the Court of Justice but also pay homage to national demands from individual states that their representative sit on the Court of Justice.'

The Law Of Insanity In Ireland

The Age of Enlightenment witnessed what Michel Foucalt termed "the great confinement", the movement towards the segregation of the mentally disordered from society. This forced segregation, motivated by a mixture of fear, distress and compassion, was achieved through the construction of institutions (or "asylums", as they were then known) to detain the mentally disordered. Ireland's first asylum St. Patrick's Hospital, founded by Jonathan Swift[1], opened in 1757[2].

Laws providing for the civil committal of the mentally disordered first appeared with the enactment of the Vagrancy Acts 1714 and 1744[3]. These created classes of 'furiously mad' or 'dangerous' persons who could be committed by two or more justices of the peace to a 'secure place.' It was not necessary that they be charged with any crime before such committal. If certified by the magistrates they were detained in prisons. Subsequently, legislation providing specifically for the detention of the mentally disordered was enacted in 1800[4], 1838[5] and 1867[6] - the Dangerous Lunatics Acts . The latter remained in force until the enactment of the Mental Treatment Act, 1945 which established the legal mechanism used to-day for the civil law committal of the mentally disordered.

In the context of criminal law, since medieval times, those charged with criminal offences have been entitled to an acquittal on the ground of insanity. The test of insanity, as set out by Coke, and applied until the 18th century, was strict; the level of mental disorder had to be such that the accused resembled a beast rather than a man[7]. Prior to 1800 persons acquitted on the grounds of insanity were released into the community. It was the attempt on the life of George III by Hadfield[8], and his subsequent acquittal on the grounds of insanity, that provided the impetus for the enactment of legislation in England[9] allowing for the detention, at the pleasure of His Majesty, of those acquitted on the grounds of insanity. The legislation was extended to Ireland in 1821 when the Criminal Lunatics Act[10] was passed. In 1850, an institution, constructed specifically to detain the criminally insane, the Central Criminal Lunatic Asylum (now known as the Central Mental Hospital), was built in Dundrum pursuant to the Lunacy (Ireland) Act, 1845.

Not Guilty by reason of Insanity - Verdict and Consequences:

The Criminal Lunatics Act of 1821, as amended by the Trial of Lunatics Act, 1883, creates a special verdict for those found to have been insane at the time of the doing or making of a prohibited act or omission. Its archaic title shamefully reflects the absence of legislative reform in this area for over a century. Section 2 (2) of the 1883 Act provides that "where such special verdict is found, the Court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the Court shall direct till Her Majesty's pleasure shall be known."

In the Application of Gallagher[11] the Supreme Court held that the "special verdict" amounted in law to an acquittal and, upon its being returned by a jury, the function of the trial judge was to simply to direct the detention of the person until the question of his release was decided by the Executive[12]. Invariably, those found not guilty by reason of insanity are indefinitely detained in the Central Mental Hospital without any independent (as opposed to Ministerial) review of the necessity for their continued detention[13]. The fact that the accused is not insane when the verdict is returned, or recovers his sanity during his detention in the Central Mental Hospital, has no bearing on the validity and effect of the court order directing his detention there.[14]

Insanity in Irish law

In the criminal process legal insanity has implications for the accused at two stages. First, it may render him unfit to plead to a charge or prevent him from following the proceedings and, secondly, it may absolve him from criminal liability for the offence charged.

Fitness to plead and follow proceedings

The meaning of the phrase "insane" in the context of the "fitness to plead" inquiry under Section 2 of the Criminal Lunatics Act, 1800 (as adapted by the Lunacy (Ireland) Act, 1821) is different that that borne by the same phrase in Section 2 of the Act of 1883 which, as noted above, makes provision for a special verdict of not guilty by reason of insanity.

In a "fitness to plead" inquiry the court is solely concerned with whether or not an accused is capable of understanding the charge, following the proceedings and instructing his lawyers. If, due to a mental disorder, he cannot do any of the foregoing he is "insane" within the meaning of the Section 2 of the 1800 Act and liable to indefinite detention until he becomes fit to plead, if he ever does. In this jurisdiction persons found unfit to plead have spent substantial periods of time in the Central Mental Hospital as a result[15]. Yet there is not even an enquiry conducted as to the strength of the evidence against the accused in relation to the actual offence charged against him before he is dispatched to the Central Mental Hospital.

Although Section 2 of the Act of 1800 does not make it mandatory to order the detention of person so found (the section merely provides that "it shall be lawful" for the court to order the detention) Finbar McCauley in his book "Insanity, Psychiatry and Criminal Responsibility"[16] observes that persons found unfit to plead are automatically detained in the Central Mental Hospital until the medical authorities there decide that fitness has been regained or that they are well enough to be sent to a less secure mental facility. Thus about one third of the eighty patients detained in the Central Mental Hospital at any given time have been found unfit to plead."[17]

The mechanism provided by the section for disposing of the accused is clearly unsatisfactory because it provides for his indefinite detention notwithstanding that he enjoys the presumption of innocence or may be suffering from a mental disorder which will always render him unfit to plead.

The question of whether it may constitute an abuse of process to charge a person suffering from a mental illness with a criminal offence has not yet been fully considered by the courts although the recent case of T. v. Director of the Central Mental Hospital and others[18] has implications for the constitutionality of Section 2 of the Trial of Lunatics Act, 1800.

In the T. case Section 207 of the Mental Treatment Act, 1945, which created a special procedure for charging psychiatric patients (committed pursuant to the Mental Treatment Act, 1945, as amended) with criminal offences was declared unconstitutional by the High Court. The impugned section provided a procedure whereby a person, on being charged with an offence in a district mental hospital and found unfit to plead by a District Judge, was transferred to, and detained in, the Central Mental Hospital. In 1978, the applicant had been committed to a psychiatric institution pursuant to Section 184 of the Mental Treatment Act, 1945 (which permitted his detention there for six months). Whilst detained there he was charged with an assault, found unfit to plead and transferred to the Central Mental Hospital pursuant to Section 207. The section was found unconstitutional by Costello P. on a variety of grounds, in particular, because there were no safeguards against abuse or error in the making of the transfer order or in determining the length of time for which the person could be detained. In the course of his judgement, Costello P., noting that the section enabled a person to be charged with a criminal offence who, because of a mental illness, lacked the mens rea for the offence, said that "[in] such circumstances to prosecute might well amount to an abuse of the criminal process."[19]

The question of whether it may constitute an abuse of process to charge a person suffering from a mental illness with a criminal offence has not yet been fully considered by the courts.

Insofar as the reasoning in the T. case is equally applicable to a person found unfit to plead pursuant to Section 2 of the Act of 1800 the section must now be considered constitutionally suspect. McCauley offers several suggestions to resolve the problems created by the section which, if adopted, would protect an accused from unnecessary, unjust or unwarranted detention. He suggests;

(i) that a court must be satisfied that the facts grounding the charge can be proved before making an order detaining the accused on the ground of his unfitness to plead.

(ii) that a court should be given power to order the immediate release of such persons with or without conditions where the evidence discloses that their detention is not necessary in the public interest (a recommendation to that effect was made in the Henchy Report[20]) or

(iii) the power to order such detention should be made subject to the condition that the detention is required in the public interest.

Insanity as a Defence to a Criminal Charge

As noted above the test for insanity in the seventeenth and eighteenth centuries excluded from its narrow ambit all those save the most severely and grossly disordered. Many unfortunates were consigned to the gallows as a result. The most celebrated application of Coke's test occurred in 1724, in the case of R. v. Arnold[21]. There the jury was told:

"It is not every kind of frantic humour that exempts from punishment. It must be a man that is totally deprived of understanding and memory and doth not know what he is doing, no more than an infant, than a brute or wild beast."

In essence[22], this remained the test until the acquittal of McNaghten on a charge of murder. In 1843, McNaghten, in the belief that the Tory Government in England was persecuting him attempted to murder the Prime Minister but killed his Under-Secretary instead. His acquittal on the ground of insanity prompted the House of Lords to ask its own judges to answer a series of questions on the law of insanity. The answers, in particular, to Questions 2 and 3, became known as the McNaghten Rules[23] and they survive to this day in most common law jurisdictions, though not as the sole test for determining criminal liability with reference to a mental disorder.[24]

The Rules provide:

"The jury ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at that time of committing the act, the accused was labouring under such a defect of reason[25] from disease of the mind[26] as not to know the nature and quality of the act he was doing or if he did know it, that he did not know he was doing what was wrong."

Unlike England, where the Rules were considered as providing the sole test of insanity, the Irish courts, as early as the 1930's[27], clearly indicated that the Rules were applicable only in the context of those suffering from "insane delusions" and that other forms of mental illness which did not have a delusionary element might fall to be considered under a test for insanity outside the Rules[28]. Thus, it was contemplated that a person might have a defence of insanity where he acted under an "irresistible impulse" as a result of a mental disorder. However, it was not until 1974, in the case of Doyle v. Wicklow County Council[29], that the Irish Supreme Court authoritatively decided that the McNaghten Rules did not provide the sole test for insanity.

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legal update

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CONSTITUTIONAL LAW

McDonnell v. Ireland & Minister for Communications
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Carroll J. (19/01/1996)

Mallon v. The Minister for Agriculture, Food and Forestry & Ors.
Appeal; Regulations 1988 and 1990 implementing EC Directives concerning the use of farm animal substances; whether provisions of 1990 Regulations relating to minor offences are unconstitutional; whether unconstitutional provisions of regulation can be severed; doctrine of severability; Maher v. Attorney General, [1973] IR 40, principles

applied; whether regulations invalid for failing to give effect to all terms of the EC Directives

Held: by majority that certain terms of the 1990 Regulations were unconstitutional but could not be severed as they were inextricably bound up with remainder of provisions; regulations gave effect to policies and principles of the directives and therefore not invalid

Hamilton C.J. O'Flaherty J. Blayney J.* Denham J.* Barron J. (26/04/1996)
* Dissenting

articles

Interpreting natural rights, Humphreys, Richard XXVIII-XXX (1993-95) Irish Jurist 221

The protection of collective rights before the Irish courts : Part I, Cousins, Mel 1996 ILT 110

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1995 (commencement) order, 1996
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Impact day for the Consumer credit act, Johnston, William 1996 CLP 87

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the rebirth of hire purchase,
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The failed experiment with privity,
Friel, Raymond J 1996 ILT 86

COSTS

Meagher v. O'Boyle & Ors.

Plaintiff sought order that costs sought by defendant solicitors be taxed as between solicitor and client; S.10 Attorneys and Solicitors Act 1870; discretion of court that agreement be re-opened

Held: Bill of costs to be taxed as between solicitor and client

McCracken J. (20/02/1996)

CRIMINAL LAW

DPP v. Judge McMenamin & McGinley

Assault; indictment; book of evidence served on notice party; whether statements of evidence of witnesses not being called at trial to be included in book of evidence; trial judge held they should have been included and refused a return for trial; orders of certiorari and mandamus sought; judicial review

Held: Order of certiorari granted; book of evidence only requires statements by those who are to be called as witnesses at the trial; trial judge incorrect in seeking fresh book of evidence

Barron J. (23/03/1996)

articles

Money laundering - industry guidelines for the financial sector, Reid, Paula 1996 CLP 67

Stretching out the Actus Reus, Stannard, John E XXVIII-XXX (1993-95) Irish Jurist 200

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Minister for Justice
Scheme of compensation for personal injuries criminally inflicted on prison officers (Stationery Office 1990)

CUSTOMS AND EXCISE

article

The globalisation of customs rules,
McCarthy, Damian 1996 ITR 15

DAMAGES

Coppinger v. Waterford County Council (No.2)

Negligence; husband of plaintiff injured in accident; damages for loss of consortium; contributory negligence of husband; whether wife to suffer reduction in damages due to husband's contributory negligence; assessment of damages
Held: Plaintiff entitled to independent damages for loss of consortium

Geoghegan J. (22/03/1996)

EMPLOYMENT

Bolger v. Queally Pig Slaughtering Ltd.

Work related injury; duty of employer to employee to have regard to safety of employee; whether employer has a duty to consider complaint by employee with regard to an injury; damages for pain and suffering and loss of earnings

Held: Employer has a duty towards employee but it is not reasonable for him to anticipate in the particular situation that the employee would suffer injury; employer should have considered complaint made by employee

Barron J. (08/03/1996)

Telecom Eireann v. O'Grady

Employment equality; application by male employee for adoptive leave; refused by employers; whether S.16 Employment Equality Act 1977, allowed for discrimination; examination of Equal Treatment Directive 76/207; interpretation of word "childbirth"

Held: Discrimination not permitted by S.16 Employment Equality Act 1977

Murphy J. (19/04/1996)

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Industrial relations act, 1990, code of practice on disciplinary procedures (declaration) order, 1996
S.I.117/1996
Date: 6.5.96

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The basis and extent of employer liability for sexual harassment in Irish law, Flynn, Leo XXVIII-XXX (1993-95) Irish Jurist 36

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The EPA's draft guidelines on EIA and advice notes, Fry, John 1996 IPELJ 11

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Adams, Melville S
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EQUITY AND TRUSTS

Spencer & Ors. v. Kinsella & The Minister for Agriculture,Forestry and Food
Trust; land held on trust for use as directed by the trustees; conflict of interests; breach of duty by trustees; whether trustees continuance in office would be detrimental to welfare of beneficiaries; whether trustees should be removed

Held: Matter for the Department to re-organise the adminsitration of the trust, if this is not done, court will intervene

Barron J. (12/03/1996)

EUROPEAN UNION LAW

articles
Free movement of capital : a freedom reaching maturity?, Flynn, Leo 1996 CLP 94

European Community law and the French Conseil D'Etat, Pollard, David XXVIII-XXX (1993-95) Irish Jurist 79

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Similar fact evidence : still hazy after all these years, Mee, Michael D 1994 DULJ 83

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S.I.119/1996
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Charge-backs, set-off and flawed assets : taking security over self-held cash deposits, Hutchinson, Brian 1996 CLP 55

The netting of financial contracts act 1995 - a delectable piece of legislative dynamite, Foy, Agnes 1996 CLP 72

Money laundering - industry guidelines for the financial sector, Reid, Paula 1996 CLP 67

FAMILY

O'M. (M) v. O'C (B)
Marriage; nullity; whether husband and wife capable of entering into and sustaining a normal lifelong marital relationship; conflict of medical evidence; principle laid down in Hay v. O'Grady [1992] ILRM 447 considered; whether credible evidence to support conclusion reached by trial judge; whether wife gave full and informed consent to marriage; subjective test; non-disclosure of psychiatric illness by husband prior to marriage

Held: Marriage null and void by virtue of the fact that wife did not give informed consent; credible evidence to support conclusion reached by trial judge

Hamilton C.J. O'Flaherty J. Blayney J. (18/04/1996)

article
Sanfey, Mark
Consenting adults : the implications of Bank of Ireland v Smyth
1996 CLP 31

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Report on family courts (Law Reform Commission 1996)

GARDA SÍOCHÁNA

McGee v. The Minister for Finance
Assault by prisoner; Sergeant of An Garda Síochána suffered minor injury; sought compensation on foot of certificate from Minister for Justice; Garda Síochána Compensation Acts 1941 and 1945 interpreted; whether Minister's certificate can be set aside as being perverse; State (Keegan) v. Stardust Compensation Tribunal [1986] IR 642 relied upon
Held: Compensation granted; Minister's decision cannot be set aside as it is final and conclusive pursuant to S.6 (3) of the 1941 Act and Minister not a party to proceedings

Carney J. (19/04/1996)

HEALTH AND SAFETY

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Occupational injuries caused by task repetition: repetitive strain injury, Jordan, Mark F 1996 ILT 102

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Compensation Tribunal Scheme to compensate certain persons who have contracted hepatitas C from the use of human immunoglobulin - Anti-D, whole blood or other blood products (1996)

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Mareva injunctions : proving an intention to frustrate judgment, Courtney, Thomas B 1996 CLP 3

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Irish insurance law : an overview, O'Regan Cazabon, Attracta 1996 CLP 98

INTERNATIONAL LAW

article
Irish policy and practice on recognition, Symmons , Clive XXVIII-XXX (1993-95) Irish Jurist 175

JUDICIAL REVIEW

Gavin v. Criminal Injuries Compensation Tribunal
Judicial review of tribunal's decision; applicant suffered personal injury as a result of a crime perpetrated on him and was the victim of an intimidation campaign; tribunal reduced compensation; whether tribunal failed to comply with principles of natural and constitutional justice by its failure to state reasons for its decision;

Held: Decision "flies in the face of reason" to reduce the full compensation claim for no reason; order for certiorari and mandamus granted

Carroll J. (09/02/1996)

Lloyd v. Judge Hogan & Conroy
Judicial review; failure by applicant to return to prison; warrant issued for arrest; extradition; whether endorsement of warrant by Assistant Garda Commissioner ultra vires his powers under S.43 (3) Extradition Act 1965; examination of S.43(3); purpose of arrest; interpretation of word "purpose"; whether failure to reproduce precise wording of S.43 (3)(b) meant it was incapable of being lawfully endorsed for execution

Held: Endorsement of warrant intra vires the Assistant Garda Commissioner

Kelly J. (30/04/1996)

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Documentary error as a ground of judicial review in Irish law, Costello, Kevin XXVIII-XXX (1993-95) Irish Jurist 148

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Views from the National Archives on judicial appointments, Conway, Kieran 1996 ILT 95

LAND LAW

McKeen v. Meath County Council
Case stated; compulsory acquisition of land; Local Government (No.2) Act 1960; power of entry onto land; whether constitutional right to private property should be balanced with statutory right to acquire lands; whether onus on respondents to show no alternative lands available; fair procedures; powers of District Judge

Held: Power of entry should not have been refused; alternative sites not to be taken into account when exercising discretion

Barron J. (23/04/1996)

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Transfer of ownership of land, Wylie, John C W 1996 ITR 32

Retention of title in the 1990's : the disowning of Romalpa continues, Maguire, Barbara 1994 DULJ 40

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MEDICAL LAW

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Death, dying and the law, Feenan, Dermot 1996 ILT 90

NEGLIGENCE

Coppinger v. Waterford County Council
Negligence; accident between car and truck; no rear under run protection barrier fitted to truck; EC Directives 70/156, 70/221 and 79/490 relate to rear protective devices; whether State correctly implemented directives; whether county council an emanation of state; whether truck a "public works vehicle" under Directive 70/221; whether county council exempt from fitting protective barrier to truck; whether fitting of safety barrier incompatible with use of truck; contributory negligence; damages

Held: County Council responsible as emanation of state and breach of directives caused serious aspect of injuries; plaintiff found to be contributorily negligent

Geoghegan J. (22/03/1996)

Carroll v. An Post National Lottery Company
Negligence on part of Lotto agents deprived plaintiff of half share win in Lotto jackpot; whether National Lottery Company vicariously liable for agent's negligence; whether Lotto agent owed a duty of care to plaintiff; alternative claim for damages for breach of contract; whether breach of implied terms in contract for the supply of a service pursuant to SS. 39 and 40 of the Sale of Goods and Supply of Services Act 1980; whether exemption clauses were reasonable and brought to plaintiff's attention; contributory negligence; damages

Held: Company not vicariously liable as no employment relationship existed with agent; duty of care owed by agent to plaintiff; not a contract for the supply of a service; no breach of implied term; company can rely on exemption clauses otherwise they would be subject to fraud

Costello P. (17/04/1996)

PLANNING

Murray v. Wicklow County Council
Application for planning permission; insufficient fee paid; defendant made a decision refusing permission notwithstanding absence of fee; three years later plaintiff paid fee and sought to renew application; delay in this subsequent decision being notified; whether entitled to default permission

Held: Application had lapsed; in any event no default permission where failure to observe

planning regulations; material contravention of development plan

Barron J. (12/03/1996)

statutory instrument
Local government (planning and development) regulations, 1996
S.I.100/1996
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articles
Planning and telecommunications masts : some recent issues, Casey, John 1996 IPELJ 3
The interface between planning and IPC - after Masonite, Brassil, Declan 1996 IPELJ 20

PRACTICE & PROCEDURE (CIVIL)

Truck & Machinery Sales Ltd. v. Marubeni Komatsu Ltd.

Interlocutory injunction; petition for winding up of a company; whether the court can grant an injunction restraining a creditor from presenting a petition for winding up, where part of a debt is disputed; whether principles for granting an interlocutory injunction apply to all forms of interlocutory relief; creditor's rights; factors to be considered in winding-up; S.215 Companies Act 1963 considered

Held: application for interlocutory injunction dismissed

Keane J. (23/02/1996)

Mehta v. The Bank of Ireland & Ors.

Ejectment proceedings; whether proceedings brought by plaintiff should be struck out as vexatious

Held: Conflicts of fact to be resolved at hearing

Carroll J. (05/03/1996)

Murphy v. Minister for Marine

Preliminary issue; whether amended statement of claim statute barred pursuant to s.11 Statute of Limitations 1957; fishing licence refused; alleged assurances from Minister with regard to granting of fishing licence; alleged assurances in amended statement of claim; date of alleged representations; claim founded on tort; estoppel

Held: Further claims contained in amendments to plaintiff's statement of claim not statute barred; cause of action arose when application for licence refused

Morris J. (29/03/1996)

Radiac Abrasives Inc. v. Prendergast & Auto Abrasives Ltd.

Motion for better and proper discovery; whether confidential information was taken from plaintiff; whether defendant concealed documents which could establish the plaintiff's case; difference between deliberately concealing documentation and circumstances giving rise to a motion for further and better discovery

Held: Defendants ordered to place a full affidavit of discovery before the court

Barron J. (13/03/1996)

Dowling v. Armour Pharmaceutical Co. & Ors.

Application for third party joinder and to join third party as a co-defendant; haemophiliacs treated with contaminated blood products; contracted HIV virus as a result of defendant's negligence; whether joining of third party result in delay; whether under S.27 Civil Liability Act 1961, third party notice served "as soon as reasonably possible"; whether third party procedure appropriate; whether concurrent wrongdoers under s.27 of Civil Liability Act 1961; join co-defendant; legitimate expectation on part of plaintiff

Held: Leave granted to serve third party notice and to join proposed third party as co-defendant

Morris J. (18/04/1996)

Irish Permanent Building Society v. Utrecht Consultants Ltd. & Ors.

Discovery; motion for more discovery; inadequate compliance with earlier discovery order; damages sought in main action; whether funds taken from society not for provision of financial services but for the purchase of property; whether such sums are held on constructive trust

Held: Application for discovery refused; documents not relevant for determination of issues

Costello P. (26/04/1996)

Mintola Ltd. & Ors. v. The Minister for the Environment & Ors.

Interlocutory injunction sought; proceedings relating to validity of statutory regulations in relation to the operation of hackney vehicles in taximeter areas; whether fair question to be tried; whether regulations are an amendment of Wireless Telegraphy Act 1926; whether regulations arbitrary, unjust, illogical and ultra vires

Held: Application for injunction dismissed; fair question not raised as to validity of regulations

Costello P. (18/04/1996)

O'Connor v. Commercial General & Marine Ltd. & Ors.

Interlocutory relief; service of plenary summons on Belgian defendant; whether defendant should have been served with notice of the summons rather than the summons itself; Order 11, Rule 8 of the RSC 1986; whether "certification" is equivalent to "notice" of summons; whether order should be set aside on the ground that the court does not have jurisdiction under the Brussels Convention 1968; join co-defendants; amend pleadings

Held: Service to be set aside; service of summons itself does not constitute service in accordance with RSC; certificate does not constitute notice as it is merely an endorsement of service on the summons itself and not a copy of the full endorsement; jurisdiction is a substantive issue to be determined at trial

Morris J. (18/04/1996)

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Security for costs and plaintiffs resident outside the jurisdiction, Delany, Hilary 1996 ILT 119

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Oireachtas (allowances to members) regulations, 1996
S.I.116/1996
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REVENUE

O'Rourke v. Revenue Commissioners
Case stated; revenue; whether plaintiff entitled to payment of interest on foot of over - payment of tax pursuant to S.30 Finance Act 1976; plaintiff relied on statement of inspector of taxes dispensing with formalities of raising assessment

Held: without analysis of contents of agreement and conduct of offical(s) impossible to evaluate case which plaintiff seems to make; matter referred back to High Court to clarify basis on which question posed to court

Hamilton C.J. O'Flaherty J. Murphy J.
(15/05/199

statutory instrument
Value-added tax (refund of tax) (no 28) order, 1996 S.I.98/1996

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15% tax charge on purchaser of certain assets - broad outline, Appleby, Tony 1996 ITR 5

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Revenue information powers, Purcell, Brian 1996 ITR 24

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Social welfare adjudication in Ireland, 1847-1995 : a diachronic analysis, Cousins, Mel XXVIII-XXX (1993-95) Irish Jurist 361

The concept of social rights, Phelan, Diarmuid Rossa 1994 DULJ 105

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Joint bank accounts - a judicial reappraisal, Mee, Claire1996 GILS 70

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articles
Recent developments in the tort of negligent misstatement, Donnelly, Mary 1996 ILT 123

Developments in the action for breach of confidence, McDonagh, Maeve 1996 ILT 98

Abbreviations

CLP
Commercial Law pratitioner

DULJ
Dublin University Law Journal

GILS
Gazette of the Irish Law Society

ILT
Irish Law Times

IPELJ
Irish Planning and Environmental Law Journal

ITR
Irish Tax Review

The judges who delivered seperate judgements in Supreme Court cases are shown in bold.

Currency of Information

Judgments received from the Central Office and the Supreme Court Office in the period 15th April 1996 to 21st May 1996

Statutory instruments signed in the period 15th April 1996 to 21st May 1996

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at a glance

European provisions implemented into Irish law up to 21/05/96

European Communities (energy labelling of household electric tumble driers) regulations, 1996
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European Communities (energy labelling of household electric washing machines) regulations, 1996
S.I.109/1996 (DIR 95/12, 92/75) Date: 18.4.96

European Communities (environmental impact assessment) (amendment) regulations, 1996
S.I.101/1996 (DIR 85/337) Amends SI 349/1989 Commencement date: 1.10.96

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S.I.104/1996 (DIR 92/102) (REG 3508/92, 3235/94) Commencement date: 15.4.96

European Communities (trade in certain animal products) regulations, 1996
S.I.102/1996 (DIR 92/118) (DEC 96/103) Commencement date: 15.4.96

European Communities (vehicle testing) (amendment) regulations, 1996
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European Communities (introduction and movement of certain harmful organisms, plants, plant products and other objects for trial or scientific purposes and/or for work on varietal selections) regulations, 1996
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1/96	Domestic Violence Act.	Signed 27:02:96
2/96	Johnstown Castle Agricultural College (Amend.) Act.	Signed 28:02:96
3/96	Commissioners Of Public Works (Functions And Powers) Act	Signed 06:03:96
4/96	Voluntary Health Insurance (Amend.) Act.	Signed 06:03:96
5/96	Bovine Diseases (Levies)(Amend.) Act.	Signed 16:03:96
6/96	Trade Marks Act.	Signed 16:03:96
7/96	Social Welfare Act	Signed 03/04/96
8/96	Irish Steel Limited Act	Signed 30/04/96
9/96	Finance Act	Signed 15/05/96
10/96	Waste Management Act	Signed 20/05/96
11/96	Harbours Act	Signed 20/05/96

Bills in progress as at 21/05/1996

Child sex tours bill 1995	2nd stage	PMB
Civil service regulation (amendment) bill 1996	2nd stage	Dail
Committees of the houses of the oireachtas (compellability, Privileges and immunities of witnesses) bill, 1995	committee	Dail
Competition (amendment) bill,1994	committee	Dail
Contempt bill 1995	2nd stage	PMB
Control of horses bill, 1996	1st stage	Dail
Control and regulation of horses bill, 1996	2nd stage	PMB
Criminal justice (drug trafficking) bill, 1996	committee	Dail
Criminal justice (mental disorder) bill, 1996	2nd stage	PMB
Criminal law (sexual offences)(no.2) bill, 1995	2nd stage	PMB
Criminal law bill, 1996	2nd stage	Dail
Dumping at sea bill, 1995	committee	PMB
Electoral bill, 1994 -	committee	Dail
Electoral (amendment) bill, 1996	2nd stage	PMB
Energy (miscellaneous provisions) bill, 1995	APBH	Dail
Fifteenth amendment of the constitution (no.2) bill, 1996	Referred to the supreme court	Dail
Freedom of information bill, 1995	committee	PMB
Gaming and lotteries (amendment) bill, 1996	2nd stage	Dail
Garda siochana bill, 1996	1st stage	Dail
Health (amendment) bill, 1995	committee	Dail
Health (amendment) bill, 1996	committee	Dail
Malicious injuries (repeal of enactment) bill, 1996	1st stage	Dail
Marriages bill, 1996	2nd stage	PMB
Misuse of drugs bill, 1996	committee	Dail
Merchant shipping (liability of shipowners and others) bill, 1996	committee	seanad
Metrology bill, 1996	committee	Dail
National standards authority of Ireland bill, 1996	committee	Dail
Pensions (amendment) bill, 1995	committee	Dail
Powers of attorney bill, 1995	passed by Dail	Dail
Proceeds of crime bill, 1995	2nd stage	PMB
Protection of young persons (employment) bill, 1996 passed by Dail		Dail
Refugee bill, 1995	committee	Dail
Sexual offences (jurisdiction) bill, 1995	committee	Dail
Social welfare (charter of rights) bill, 1995	2nd stage	PMB
Social welfare (supplementary welfare allowance appeals) bill, 1995	2nd stage	PMB
Transport (dublin light rail) bill, 1996	1st stage	Dail

PMB = *Private Members Bill* APBH = *As passed by both houses of the Oireachtas*

Law of Insanity in Ireland,
continued from page 10.

Delivering judgement Griffin J. adopted with approval the statements made by Henchy J. in his direction to a jury in the Hayes case[30] where he said:-

"In the normal case, tried in accordance with the McNaghten Rules, the test is solely one of knowledge: did he know the nature and quality of his act or did he know that the act was wrong? The Rules do not take into account the capacity of a man on the basis of his knowledge to act or refrain from acting, and I believe it to be correct psychiatric science to accept that certain serious mental diseases, such as paranoia or schizophrenia, in certain cases enable a man to understand the morality or immorality of his act or the legality or illegality of it, or the nature and quality of it, but nevertheless prevent him from exercising a free volition as to whether he should or should not do that act. In the present case the medical witnesses are unanimous in saying that the accused man was, in medical terms, insane at the time of the act. However, legal insanity does not necessarily coincide with what medical men would call insanity, but if it is open to the jury to say, as they must, on the evidence that this man understood the nature and quality of his act, and understood its wrongfulness, morally and legally but nevertheless he was debarred from refraining from assaulting his wife fatally because of a defect of reason, due to his mental illness, it seems to me that it would be unjust in the circumstances of this case not to allow the jury to consider the case on those grounds."

Since that decision, reliance has been placed upon a wide variety of mental disorders as constituting evidence of insanity[31]. But the verdict of insanity absolving as it does an accused from all liability for an act or omission may not be an appropriate verdict (nor easily obtainable) in cases where the accused is perceived by a jury to bear partial responsibility for the act or omission.

As Glanville Williams noted:- "Much depends on whether the circumstances of the crime elicit sympathy. If a mother is charged with murdering her child and sets up a McNaghten defence based upon a psychotic depression everyone in court will co-operate in an effort to save her from conviction. The psychiatrist will readily be allowed to testify that she did not know what she was doing, or did not know it was wrong, and a special verdict will be given without difficulty. But if the defendant is a sexual ogre who has committed a sexual murder, the McNaghten Rules are likely to be applied strictly and a psychiatric expert who testifies that in his opinion the defendant did not know it was wrong will be given a warm (sic) time."[32]

The reluctance of juries (in certain cases) to return an insanity verdict is also undoubtedly motivated by a perception that a detainee may have an "easier" time in a hospital than in prison. Further, many jurors are undoubtedly aware that a person found not guilty by reason of insanity could be released into the community at any time after the verdict is returned. For his part, an accused may be reluctant to plead insanity as a defence because of the indefinite nature of the detention consequent upon a special verdict being returned.

These difficulties could be resolved by introducing, as an alternative to the verdict of "not guilty by reason of insanity", a verdict of "guilty, but with diminished responsibility." Such a verdict could allow the court to deal with the accused as if he had been convicted of manslaughter. In the United Kingdom a defence of diminished responsibility (which exists as an alternative to that of insanity) was introduced by Section 2 of the Homicide Act, 1957. It provides:

(1) Where a person kills or is party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind[33] (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by diseases or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

It is a sad indictment of the laws governing criminal responsibility for the acts and the ommissions of the mentally disordered that they date from the eighteenth century, an age when "the lunatic and the bastard" stood out as the favoured term of opprobium.

Sub-section 2 imposes the obligation to prove the defence on the accused. Sub-section 3 provides that a person who but for the section would be liable to be convicted of murder shall be liable instead to be convicted of manslaughter.

In the People (D.P.P.) v. O' Mahony[34] the Supreme Court held that the defence of diminished responsibility does not exist as a separate defence in Irish law entitling an accused to a verdict of manslaughter although, if he were suffering from diminished responsibility due to an abnormality of the mind, this would constitute insanity in Irish law.

The Henchy Committee[35] recommended the introduction of the defence of diminished responsibility on the basis that many people appearing before the criminal courts were suffering from mental disorders which substantially diminished their responsibility for their crimes. It is lamentable that the legislature has not seen fit to implement this recommendation (or indeed, any others made by that Committee) to date.

Conclusion

It is a sad indictment of the laws governing criminal responsibility for the acts and omissions of the mentally disordered that they date from the eighteenth century, an age when "the lunatic and the bastard" stood out as the favoured terms of opprobium."[36] The need for reform has long been evident. If it does not occur our prisons will continue to be populated by some who bear only a diminished responsibility for their crimes or none at all; the Central Mental Hospital will continue to be populated by some who are unfit to plead to criminal charges in respect of which they may be innocent (or, those who, had they been tried and convicted of the offences charged, might now have served their sentences); and the Central Mental Hospital will continue as a place of detention for those who, having been found not guilty of their crimes by reason of insanity and having recovered their sanity, await indefinitely the stroke of the Executive pen.

1 It is not the only irony of the history of madness in Ireland that the Dean died a "certified lunatic" himself.

2 His benevolence was immortalised in Verses on the Death of Mr. Swift (Davis ed. Swift-Poetical Works, p.513);

"He gave the little Wealth he had
To build a House for Fools and Mad
And shew'd by one satiric touch
No Nation wanted it so much."

3 12 Anne (II),c.23 and 17 Geo.II,c.5.

4 39 & 40 Geo.III, c.94,s.3 which provided that a justice could commit any person "discovered and apprehended under Circumstances that denote a Derangement of Mind and a Purpose of committing some [indictable] Crime as a dangerous Person suspected to be insane."

5 1&2 Vic.,c.14,s.2.

6 30 & 31 Vic.,c.118.

7 See O'Hanlon, "Not Guilty Because of Insanity" (1968) 3 Ir. Jur. (n.s.) 61 where he traces the development of the test of insanity.

8 Hadfield [1800] 27 St.Tr.1281.

9 39 & 40 Geo.III,c.94.

10 1 an 2 Geo.IV.c.33 (Lunacy (Ireland) Act),ss.16-18.

11 [1991] I.R. 31.

12 The Supreme Court decision in Gallagher

resolved the conflict which had been created by two High Court decisions, namely, the Application of Ellis [1990] 2 I.R. 291 and the Application of Neilan [1990] 2 I.R. 267. In Ellis O'Hanlon J. had held that the decision to release was a matter for the Executive; in Neilan Keane J. held that the order for release was a judicial act which could only be validly made by the judiciary.

13 "The foreman fumbled with a slip of paper. 'We find the prisoner guilty but insane.' Only then did the judge's voice betray his feelings; the Law and Medicine are at daggers drawn in cases of this kind. 'Let the prisoner be detained until His Majesty's pleasure be known' came the sentence and the red gown had vanished through the door at the back of the dais." (Warmark, Guilty but Insane: A Broadmoor Autobiography (1931)).

14 Writing of the Gallagher case in her article "Diminished Responsibility as a Defence in Irish Law" Irish Criminal Law Journal, Vol.5,p.173, Faye Boland states at p.178;

"Several features of the Gallagher case have aroused the suspicion 'that the failure to release the detainee has been motivated more by a concern to ensure that defendants of this type are seen not to be able to escape their just deserts by means of the insanity plea than by a dispassionate assessment of his state of mental health' [Faye quoting McCauley, "Insanity, Psychiatry and Criminal Responsibility" (1993), Round Hall Press]. Firstly, an advisory committee set up by the Minister for Justice in January, 1994 made recommendations which, if implemented, might have been expected to result in Gallagher's early release. As Barron J. noted in the High Court in December, 1994, the State had by then not responded adequately to the recommendations of the Committee. Secondly, in March [1995] the Inspector of Mental Hospitals (Dr. Dermot Walsh) exercised his powers under sub.s.6 of the Mental Treatment Act 1945 which allows him to carry out an inspection of the Central Mental Hospital whenever and as often as he sees fit and permits him to make a report to the Minister for Justice on the 'general character and conduct' of an inmate whom he believes has recovered. The report to the Minister which stated that John Gallagher had now 'recovered' was later withdrawn."

15 See McCauley, "Insanity, Psychiatry and Criminal Responsibility" (1993), Round Hall Press at p.145 where he refers to the comments made by the Director of the Central Mental Hospital in an article written in the Sunday Tribune. The Director recounted how one detainee had a twenty one year charge of murdering his mother withdrawn in 1990, subsequent to which he was transferred to St. Patricks Hospital. In another case he states that two patients accused of sexual offences had, at the time of the interview, spent seven years in the hospital.

16 (1993) Round Hall Press, Dublin at p.132 et.seq.

17 See McCauley, Insanity, Psychiatry and Criminal Responsibility, p.145 citing an interview with the Director of the Central Mental Hospital in the Sunday Tribune, 4 November, 1990. In the course of the interview Mr. Smith stated that in some cases the period of detention had exceeded twenty years.

18 [1995] I.L.R.M.

19 Costello P. stated a case for the opinion of the Supreme Court pursuant to Article 40.4 of the Constitution as to whether he was correct in law in his ruling but the point was never decided, the applicant being released from the Central Mental Hospital prior to the case coming on for hearing in the Supreme Court. At that stage, he had spent sixteen years in the Central Mental Hospital.

20 Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons. Treatment and Care of Persons Suffering from Mental Disorder who Appear before the Courts on Criminal Charges (Dublin, 1978), Prl.8275.

21 (1724) 19 St.Tr.885.

22 In Hadfield's case (supra) the trial was stopped by the trial judge who told the jury that if an accused was in a "deranged state of mind at the time he [was] not criminally answerable for his acts." O'Hanlon notes that this case marked the beginning of a more enlightened approach to the issue of insanity. However, rulings on the issue of insanity remained inconsistent.

23 (1843) 10 Cl & F 200.

24 See Section 2 of the Homicide Act, 1957 which introduced the defence of diminished responsibility in England.

25 Phipson states that this is the "central notion in the rules even though it is not the concept around which most of the case law turns. It is the basic reason why irresistible impulse and other emotional or volitional defects or disorders are not within the rules, since they are not defects of reason. Rationality is the litmus test of criminal responsibility, and defects of will are regarded either as non-existent or as irrelevant" (at p.42).

26 In Sullivan [1984] AC 156 the phrase "disease of the mind" was considered. Two medical experts gave evidence that they would not regard something as a disease of the mind unless it produced a disorder of brain functions for a prolonged period - in the case of one witness for more than a day and in the case of the other, for more than a month. It was argued that the relatively short period of time over which an epileptic seizure takes place meant epilepsy was not a disease of the mind. This was rejected by Lord Diplock who stated:

"The nomenclature adopted by the medical profession may change from time to time but the meaning of the expression 'disease of the mind' as the cause of 'a defect of reason' remains unchanged for the purposes of the application of the McNaghten Rules, 'mind' in the McNaghten Rules is used in the ordinary sense of the mental faculties of reason, memory and understanding. If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of the commission of the act."

27 See A.G. v. O'Brien [1936] I.R.263, A.G. v. Boylan [1937] I.R.449, The People (A.G.) v. Manning (1955) 89 I.L.T.R. 155, The People (A.G.) v. McGlynn [1967] I.R. 232..

28 For a detailed analysis of these cases see O'Hanlon, , "Not Guilty Because of Insanity" (1968) 3 Ir. Jur. (n.s.) 61 and Osborough, McNaghten Revisited (1974) 9 Ir.Jur 76.

29 [1974] I.R.55

30 See Irish Times 1st December, 1967.

31 For examples, see D.P.P. v. McCourtney, Irish Times, 22nd January, 1993 where the defendant claimed he was suffering from post - traumatic stress disorder at the time of the murder; D.P.P. v. O'Mahony [1986] I.L.R.M. 91 where the Supreme Court indicated that a condition of psychopathy could constitute insanity and D.P.P. v. Buckley, Irish Times, 24th November, 1989 discussed by McCauley, ibid. at p.99.

32 Glanville Williams, Textbook of Criminal Law (London, 1978),p.599.

33 The phrase was defined by Lord Diplock in R. v. Byrne [1960] 2 Q.B. 396 at 403; "Abnormality of mind', which has to be contrasted with the time-honoured expression in the McNaghten Rules, 'defect of reason', means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the minds activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also in the ability to exercise will power to control physical acts in accordance with that rational judgment."

34 [1986] I.L.R.M. 244.

35 Ibid.

36 Robins, Fools and Mad, A History of the Insane in Ireland (Dublin, 1993),p.204.

Padraig Dwyer B.L.

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Eurowatch

State Liability for Breach of EC Law: Francovich Developed Upon

The much awaited decision in Brasserie du Pecheur/Factortame (joined Cases C-46/93 and C-48/93) was handed down by the European Court of Justice ("ECJ") on March 5th, 1996. In it the ECJ have elaborated upon the principle of State liability for breach of EC law first set out in Francovich[1]. In Francovich the ECJ dealt with the failure by the Italian State to transpose a Directive, which the ECJ found not to have direct effect, into its domestic law within the relevant time limit. In holding that individuals who could have benefitted from the Directive could succeed in an action for damages against the State, the Francovich judgement gave rise to many questions as to how far this principle of state liability for breach of EC law could be extended in the future. For example, was the principle of damages against the State for breach of EC law to be applied only for non transposition of a Directive? Or were other situations included? Did it apply only where, as was the case in Francovich, the breach by the member State had been established by way of Article 169 infringement proceedings?[2]

The legal issues raised in the Brasserie du Pecheur and Factortame cases were almost identical although the facts of each case were of course different. In both cases the legal issues were whether the Member States were obliged to make good damage caused to individuals as a result of national legislation which breached the provisions of the EC Treaty. In Brasserie du Pecheur, a French beer producer claimed that it was forced to discontinue exports into Germany in 1981 as a result of German statutory provisions on beer purity which the German authorities considered that the French beer producer did not comply with. The German statutory provisions at issue were subsequently held by the ECJ to be in breach of Article 30 of the EC Treaty. Brasserie du Pecheur consequently brought an action for damages against Germany. In Factortame the Plaintiffs had challenged the provisions of the Merchant Shipping Act of 1988 setting up certain requirements as to nationality, residence and domicile of vessel owners for the purpose of the registration of vessels in the UK. These provisions were found by the ECJ to be contrary to the EC Treaty. Consequently, the Applicants were making a claim for damages against the United Kingdom.

Liability for Breaches of EC Law

Both of the Treaty provisions at issue in this case had previously been held by the ECJ to have direct effect. A number of governments, including the Irish Government, intervened in this case in order to argue that the Member States were only required to make good loss or damage caused to individuals where the provisions breached were not directly effective. The ECJ refused to accept this argument. It held that the principle of effectiveness, relied upon by the ECJ in Francovich, would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law. While this was so in the Francovich style non transposition situation, it was even more so the case in the event of infringement of a right directly conferred by Community provision which had direct

effect. The right to reparation was, it was held, the necessary corollary of the direct effect of the Community provision.

It was submitted by one of the Member States that the ECJ did not have jurisdiction to create a general right to reparation. The ECJ, however, held that since the Treaty contained no provision expressly governing the consequences of breaches of Community law by Member States, it was for the Court, in pursuance of the task conferred on it by Article 164 of the EC Treaty, to rule on this matter, by reference to the fundamental principles of Community law and the general principles common to the legal systems of the Member States. Invoking Article 215 of the Treaty which relates to the non contractual liability of the Community for damage caused by its institutions, the ECJ concluded that the principle of State liability for loss and damage caused to individuals, as a result of breaches of Community law for which it can be held responsible, was inherent in the system of the Treaty. This principle held good for any case in which a Member State breached Community law, whatever the organ of the State whose act or omission was responsible for the breach.

Conditions for Liability

The ECJ was then asked to decide on the conditions for State liability. The ECJ drew an important distinction between the conditions for liability in the type of situation which arose in Francovich and the more general conditions for liability when legislative measures were adopted. In effect, the Member States had relied on the case law of the ECJ relating to Article 215 setting out the conditions for liability of the Community for legislative measures. The ECJ should, in deciding upon the non contractual liability of the Member States, take account of the factors it had taken into consideration when deciding upon the non contractual liability of Community institutions and in particular take account of the wide discretion of national legislatures in adopting legislation. This the ECJ accepted to do, subject to certain limitations. It held that where a Member State acts in a field where it had a wide discretion comparable to that of the Community institutions in implementing Community policies, liability will only arise where, the rule of law infringed is intended to confer rights on individuals, the Member State has committed a sufficiently serious breach of EC law, and where there is direct causal link between the breach and the damage sustained. However, it added that the national legislature does not systematically have a wide discretion when it acts in a field governed by Community law. Community law could impose upon the Member State obligations to achieve a particular result or obligations to act or refrain from acting which would serve to reduce the margin of discretion of the Member State, sometimes to a considerable degree. Thus, in a situation such as that which arose in Francovich, the Member State had no wide discretion. In such narrow discretion cases, it was sufficient simply that it should be possible to identify the contents of the rights sought

The ECJ concluded that the principle of state liability for loss and damage caused the individuals, as a result of breaches of community law for which it can be held responsible, was inherent in the system of the treaty.

to be relied upon and that there be a causal link between the breach and the damage. Thus, in these circumstances there is no requirement that the breach be sufficiently serious and no requirement that there must be direct causal link between the breach and the damage sustained.

As has been pointed out by one commentator[3], 'it is likely that considerable attention will henceforth in litigation be focused on defining what cases will attract the broad discretion rules and which are the cases which attract the narrow discretion rules.

In wide discretion cases, for the purpose of deciding whether or not the breach is sufficiently serious, the ECJ held that the national Court could take into consideration a number of factors, including whether the infringement and the damage caused was intentional or involuntary, whether the error of law was excusable or inexcusable, the fact that the position taken by Community institutions may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

After setting out the conditions for liability where the Member State acted with a wide discretion, the ECJ nonetheless added an important rider to the effect that the European rules on liability did not mean that the State could not incur liability under less strict conditions on the basis of national law.

The Right to Reparation

The ECJ then went on to hold that the Member States had to make reparation for the consequences of loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law were not less favourable than those relating to similar domestic claims and were not such as in practice to make it impossible or excessively difficult to obtain reparation. It went on to hold that restrictions that exist in domestic legal system as to the non contractual liability of the State in the exercise of its legislative functions might be such as to make it impossible or excessively difficult in practice for individuals to exercise their right to reparation as guaranteed by Community law. Thus, for example, the requirement under the English law on state liability requiring proof of misfeasance in public office was such as to make it impossible in practice to obtain reparation for breach of Community law since, where the breach was attributable to the national legislature, it was inconceivable to be able to show the requisite abuse of power on the part of the Legislature. Similarly, reparation for loss or damage could not be made conditional upon the concept of fault on the part of the organ of the State responsible for the breach, where that notion of fault went beyond the idea of a sufficiently serious breach of Community law.

As regards the criteria for determining the extent of reparation, this was a matter for the domestic legal system of each Member State. However reparation for loss or damage caused to individuals as a result of breaches of Community law should be commensurate with the loss or damage sustained in order to

ensure the effective protection of Community rights. In addition, the criteria for the identification of the extent of the reparation should not be less favourable than those applying to similar claims based on domestic law and should not be such as to make it impossible or excessively difficult to obtain reparation in practice.

Lastly, the ECJ added that the obligation for Member States to make good loss or damage caused to individuals by breaches of Community law could not systematically be limited to damage sustained after the delivery of a judgement of the ECJ in Article 169 infringement proceedings.

Subsequent to the decision in this case, the ECJ gave judgement in the case of R -v- HM Treasury, ex parte BT[4]. "In this case, the EC was asked to decide on the liability of the United Kingdom as a result of its incorrect transposition of a public procurement Directive. This, the ECJ held, was a case of wide discretion. The narrower rules of State liability as applied in Francovich therefore were not applicable. The ECJ ruled in favour of the Applicant's construction of the Directive but held that no liability in damages arose. The breach of EC law was not considered to be sufficiently serious. The UK had incorrectly interpreted the Directive but the provision in question was imprecisely worded and was reasonably capable of bearing the interpretation given to it, in good faith, by the UK.

The Intergovernmental Conference

Ireland takes over the Presidency of the Council of Ministers on 1st July next[5]. It will also take over the chairing of the IGC which should be concluded under the Dutch Presidency in the first six months of 1997. The Treaty of Maastricht, at Article N, provided for the convening of this IGC in 1996 in order to examine certain of the provisions of the Treaty for which revision was provided. The Treaty anticipated that the IGC would review the common foreign and security policy (CFSP), would consider whether the EC should be given new powers in areas such as tourism and energy and lastly, the issue which is doubtless of most practical significance to lawyers and lobbyists, would review the new legislative procedure introduced by the Treaty of Maastricht and referred to as the "co-decision" procedure, set out at Article 189(b) of the EC Treaty, in order to decide whether this procedure should be extended to new areas.

The primary legislative procedures are set out at Article 189(a) to 189(c) of the EC Treaty and range from the original consultation procedure (189(a)) to the co-operation procedure (189(c) introduced by the Single European Act and the co-decision procedure (189(b)) referred to. The question of which procedure applies to legislation depends on the legal basis chosen for that measure. The role of the Parliament in the consultation procedure is quite insignificant. On the other hand, the co-decision procedure, introduced in Maastricht in order to deflect criticisms of the EC legislative procedure based on the supposed "democratic deficit" of the Community, was designed to grant the Parliament much more significant powers. Equally, the voting procedure at Council level differs according to which legislative procedure is being used. Consequently, the choice of legal basis and thus of legislative procedures can have significant political implications and affects the balance of power between the institutions.

As the position now stands, the Treaty is overly complex as regards legislative procedures. The Commission itself had criticised the Treaty for the lack of logic in the choice of the various procedures and the different fields of activity where they apply. Thus the question of the areas, if any, to which co-decision procedure will be extended is of great significance. The Parliament obviously wants the procedure which grants it the greatest powers to be extended to as many areas as possible while certain Member States are jealous of sharing the power of the Council of Ministers with any other institution, albeit the institution made up of elected representatives.

Lawyers and, in particular, lobbyists will thus be taking a keen interest in the outcome of the IGC on this point as wherever power goes, so too go the lawyer lobbyists in order to effectively represent their clients' interests which are likely to be affected by European measures.

If significant changes to the Maastricht Treaty are agreed upon at the IGC, a constitutional referendum will most probably be required in Ireland in order to allow the State to ratify the new treaty incorporating those changes. In the light of the McKenna decision, the Government will not be in a position to advocate that the proposed treaty be approved by voters.

European News on the Internet

Check out EUROPA, the web site of the European Commision (http:\\www.cec.lu). The site is made up of a number of sections including a "newsroom" which provides "what's new" update and a "midday express" newsflash giving information on the activities of the institutions for that day, together with general news. In the "On the Record" section certain official documents including important Green and White Papers can be consulted. The site provides information on other on-line services run by Community institutions and provides a listing of "Governments on-line" (no entry yet for Ireland) and details of the on-line services provided by the EC representation offices in certain Member States (no entry yet for Ireland). Generally worth a quick surf.

1 Francovich and Bonifaci -v- Italian State, EC 6/90 [1991] ECR I-5357.

2 As a matter of Irish law, answers to certain of these questions were provided by the decision of Carroll J in Tate and Robinson -v- The Minister for Social Welfare [1995] 1 IR 418 where Carroll J held that the Plaintiffs in this case were entitled to recover damages against the State for mis-implementation of a Directive even when the provisions of that Directive had previously been held by the ECJ to have direct effect.

3 See Peter Duffy, "European Briefing" SJ 5th April, 1996

4 Case C-392/93 of March 26th, 1996

5 For description of the implications for Ireland of the IGC, see Dermot Scott, "Ireland and the IGC", Institute of European Affairs, 1996

Eileen Barrington B.L.

Victim Support

The Irish branch of Victim Support was established in 1985 and has recently established a 'Court User's Group' to address how the process of going to court can be made easier for victims and their families. The Bar Review asked the chairperson of Victim Support, Mrs. Jennifer Guinness about Victim Support and what the Bar Council is doing to help.

'Victim Support is a voluntary organisation which has a very practical agenda of services which we would like to see made available to help each and every victim of crime' explains Mrs. Guinness. 'For example, in the immediate aftermath of any crime the victim must try to come to terms with it on a physical, emotional and psychological level and must address the feelings of frustration and helplessness which often affect their work, family and social relationships. Victim Support tries to help victims with this process of recovery by providing visitors and counsellors to help victims make it through this difficult time'.

In addition to coping with the personal frustration and fear which follows a criminal attack, the victim will often have to visit court, possibly for the very first time, to give evidence against the accused. While going to court at any time can be a daunting experience, it can be even more daunting if you are the victim of a crime or if you are a member of the victim's family. Mrs. Guinness points out that Victim Support's Victim Witness Programme operates to help victims through the process of going to court to give evidence against the accused.

'What victims need when going to court is information. Information as to what will happen in court, as to who sits where and does what. Our Victim Witness programme aims to make the victims court visit as comfortable as possible by explaining the court structures to witnesses in advance of the trial, by providing a room for victims to wait inbefore their trial is heard and by simply sitting with them during the trial' says Mrs. Guinness. 'And we have seen that this can make a big difference in making the court visit less traumatic for victim witnesses', she continues.

Victim Support would like to see these and other services made available on a nationwide basis and believes that the recently established Court User's Group will help in this regard. The Court User's Group includes representatives from the Department of Justice, the Bar Council, the Law Society, along with representatives of the presidents of the various courts, the Garda Commissioner's office, the D.P.P.'s office and the Chief State Solicitor's office.

Mrs. Guinness hopes the group will act as a forum for communication between the various interested parties and hopes that certain improved services will be made available to victims arising from decisions of the group.

'There are certain very basic services which we would like to see made available through the Court User's Group to victims. For example, we would welcome reserved seating for victims and their families in court so that they do not have to sit beside the accused would help make the court visit less traumatic. Another matter which we would like to see improved is the public address system in courts so that victims can hear what is being said', Mrs. Guinness says.

Other changes which Victim Support would like to see introduced include an information system for victims whereby they are informed of the various developments in their case and particularly if an appeal will be heard. 'Quite often the first time a victim realises that there has been an appeal is when they meet the accused on the street!' Mrs. Guinness points out.

Mrs. Guinness believes that Victim Support is fortunate to have a broad range of public support and support from organisations such as the Gardai. 'We operate very closely with the Gardai who have been very supportive and helpful. At present, a notice goes out with every victim witness summons notifying them of Victim Support and giving a number to call for information. Also, the Office of the Director of Public Prosecutions and the Chief State Solicitors Office tell us of victim witnesses whom they believe would benefit from being contacted by Victim Support. Of course the Bar Council has also been very helpful in the establishment of the Court User's Group. The Court User's Group really arose from our initial discussions with Mr. James Nugent, S.C., Chairman of the Bar Council who has lent us his full support in these crucial early stages

We would like to see greater awareness of our existence and the services we provide among the public at large and also among members of the Bar who could then refer more victims to us for assistance

and I am confident that with such strong support the Court User's Group will be a success in achieving its very worthwhile aims'.

The Bar Review asked if Victim Support believes that individual barristers can do anything to help victim witnesses. 'It can be helpful when barristers inform victims of the existence of victim support where they believe it may benefit that victim', Mrs. Guinness says. 'We would like to see greater awareness of our existence and the services we provide among the public at large and also among members of the Bar who could then refer more victims to us for assistance'.

Victim Support may be contacted at 29/30 Dame Street, Dublin 2. Tel: 01 679 8673.

Application for planning permission

The application for planning permission for the proposed Distillery Site development on Church Street was submitted on 10 May 1996. It is planned that following on a grant of planning permission, construction work will commence in August with a view to completion late next year. The project team for the building development (Phase 11) is as follows:

Design	Project Manager	John Maree & Associates
	Architects	Brian O'Halloran & Associates
	Quantity Surveyors	Keogh McConnell
	Structural Engineers	National Building Agency
	Services Engineers	BeMRA Limited
Other	Financial Advisers	Chapman Flood Corporate Finance
	Legal Advisers	McCann FitzGerald Solicitors
	Property Consultants	John T. Davin & Co.

Law Library Credit Union

The Bar Council is currently operating a credit union fund for a six month trial period at the end of which a decision will be made whether to register with the League of Credit Unions. During this trial period there can be no withdrawal of savings or loans granted. During those six months savings will accrue the best bank interest available and if a decision is made not to proceed, savings will be returned to members together with any interest.

To join, complete an application form available from the Bar Council office and return it completed with the sum of £1.00 to the Accounts Office. There is a direct debit on the application form, members can also save by standing order or by making contributions at the cash desk which operates weekly at lunchtime in the library.

All credit union transactions are completely confidential. Credit union funds are not subject to DIRT.

Clasp Garden Party

The Annual CLASP Garden Party will take place on 12th July from 6.30 to 9.30 in the Law Society, Blackhall Place. Tickets £15.00 and £10.00 Finger food and wine.. Music also.

Staff appointments


Cian Ferriter

Cian Ferriter has been appointed by the Bar Council to the post of Special Projects Manager. In this position Cian will be responsible for a variety of projects and in particular the development of the Distillery Site Complex.


Greg Kennedy

Greg Kennedy has been appointed as Information Technology Executive to reflect the increased responsibilities of maintaining the Bar's technological services.

Bar Council Elections

Elections will be held in July to fill five vacancies on the Senior Panel and five vacancies on the Junior Panel of the Bar Council. Nominations are invited for each vacancy. Each nomination should have the name of a proposer and seconder along with the written consent of the nominee.

The closing date for receipt of nominations at the Bar Council office is 12 noon, on Friday, 28th June.

Polling will commence on Friday, 5th July at 10 a.m. and conclude at 3 p.m. on Friday 12th July followed immediately by the counting of votes.

Members who are not on the Register of Postal voters and who wish to cast their vote by post may apply to the Bar Council to be placed on the register at any time up to commencement of voting on 5th July.

Security for Costs

The granting of orders for security for costs is an area which has undergone a significant change in recent months as a result of the decision of the ECJ in the case of Mund & Fester v. Hatrex International transport [1994] ECR I 467.

SOME RECENT DEVELOPMENTS*

Pursuant to Order 29 of the Rules of the Superior Courts 1986, the Irish courts have a discretion in requiring a plaintiff who is ordinarily resident outside the jurisdiction to provide security for costs. The underlying rationale of such an order is to ensure that a defendant who is ultimately successful can enforce an order for costs abroad.

Following the Mund & Fester decision the position is that a plaintiff who is a national of, and is ordinarily resident in, one of the Member States of the EU cannot be required to provide security for costs.

The European Decision

The case concerned a claim for damages by Mund and Fester, a German company, against the defendants, whose registered offices were in the Netherlands, in respect of damage to goods in transit. To ensure the recovery of the debt, the German company applied for a seizure order against the lorry owned by the defendants which was still in Germany.

It was held by the ECJ that the provision of the German Civil Code which allowed for seizure of assets, merely on the basis that the judgment was to be enforced abroad, was incompatible with Article 7, read in conjunction with Article 220 of the EEC Treaty, and with the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. Contravention of the Treaty arose from the discriminatory nature of the impugned provision which, according to the European Court of Justice, was not justified by objective circumstances.

Whilst the provision in question was not overtly discriminatory, it did in effect contain a covert form of discrimination, as it was found by the Court that the vast majority of enforcements abroad were against non-German nationals and so it led to the same result as discrimination based on nationality, which is precluded by Article 7 of the Treaty of Rome. Having established that the provision was discriminatory, the Court then looked to see if it could be justified by objective circumstances. Difficulty in enforcing judgments abroad was a justification that was flatly rejected by the ECJ, especially in relation to the Member States of the Community: the Brussels Convention was enacted to combat such difficulties by simplifying the formalities for the enforcement of judgments throughout the Contracting States in the Community.

The Irish Position

Although the case of Mund and Fester concerned an order for seizure of assets, the same principle enunciated by the Court is equally applicable to security for costs. Three recent Irish High Court decisions have each applied the Mund and Fester principles to Order 29 cases involving plaintiffs resident within the E.U.

The first of these is Maher v. Phelan (unreported judgment of the 3rd of November 1995), where Carroll J. in refusing an order for security, relied on the European decision in concluding that Order 29 was covertly discriminatory in that the majority of orders granted were against non-Irish nationals. As a result, the learned judge held that as a plaintiff resident in Ireland could not be ordered to give security for costs, it then followed that a plaintiff resident in another Member State could not be so ordered. In

addition, regardless of the discrimination issue, Carroll J. felt that as a result of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988, which brought the Brussels Convention into Irish law, the necessity for such an order did not arise. In Proetta v. Neil (unreported judgment of the 17th of November 1995), Murphy J. found that the conclusions reached in the Mund and Fester case "were at least equally applicable" to Order 29 and as such, felt that an order could not be made having regard to Article 7 of the EEC Treaty. Both of these decisions are now on appeal to the Supreme Court.

More recently is the case of Pitt v. Bolger (unreported judgment of the 2nd of February 1996), where Keane J. stated that the "principles of Mund and Fester are clearly applicable" to Order 29 cases and he also expressly agreed with and adopted the decisions of both Carroll and Murphy JJ.

From the foregoing, it appears that an order for security for costs cannot be made against a plaintiff who is a national of, and is ordinarily resident in, one of the Member States of the Union as this results in discrimination between nationals. But as Keane J. pointed out in Pitt v. Bolger, Order 29 is still applicable with regard to a plaintiff who is resident outside of the E.U. As such, the principles laid down by Finlay P. (as he then was) for the granting of an order for security for costs in Collins v. Doyle [1982] ILRM 495 and which gained Supreme Court approval in Fares v. Wiley [1994] 1 ILRM 465, still govern non-E.U. cases.

The English Position

Also worth noting is the English stance in this area of the law. Originally, the English courts had rejected the contention that Order 23 (the equivalent of the Irish Order 29) discriminated on grounds of nationality. In Berkeley Administration Inc. v. McClelland [1990] 2 Q.B. 407, the majority of the Court of Appeal held that the order related to residence and not nationality and so no discrimination occured. However, the English courts have now reconsidered the position in the light of the Mund and Fester decision. In Fitzgerald & Ors. v. Williams & Ors. (unreported judgment of the 20th December 1995), the Court of Appeal concluded, following the Mund decision that Order 23 did discriminate on the ground of nationality.

* *Laura Rattigan, B.C.L., L.L.M. Researcher, Judges Library, Four Courts.*

New Domestic Violence Law Enacted

The changes introduced by the Domestic Violence Act, 1996 are noted by Raghnal O'Riordan, B.L.

With effect from the 27th March of this year the Domestic Violence Act, 1996, which repealed the Family Law (Protection of Spousese and Children) Act, 1981, is now the governing legislation for the granting of interim and permanent relief from violence in domestic situation. The Act provides for relief in violent relationships between spouses and between cohabitees. It also deals with the reliefs available for parents from abusive children and for those available in sibling and same sex relationships.

The new Act is a significant development which materially changes the law in this area in a number of key respects.

Section 2 of the Act empowers the Courts to grant a new relief of Safety Order. This now allows an Applicant to seek a long term Protection type Order to protect themselves against threats and intimidation without seeking to have the offending Respondent actually barred. Previously, such Orders were only possible on an interim basis pending a Barring Order hearing.

The persons permitted to apply for such Safety Orders under the Act include a spouse, a parent providing the Respondent is of full age and is not dependent, a cohabitee who has lived with the Respondent as a spouse for an aggregate period of at least 6 months within the previous year and an Applicant who, being of full age, resides with the Respondent in a relationship which is not primarily contractual. This last category would seem to include cohabiting siblings and same sex relationships.

Barring Orders, which previously were confined to spousese, are now available in certain circumstances under the new Act to the couples living outside marraige and to parents against violent children. Barring Orders may not be applied for by these categories of persons where the Respondent has a greater legal or beneficial interest in the property in relation to which the order is sought than that held by the Applicant. Interestingly in the context of this restriction on the availability of Barring Orders, the Applicant's belief as to their interest in the property is now admissable in evidence. The intention behind this provision is not entirely clear and it has raised concern about the District Court dealing with such matters in light of its limited jurisdiction and the absence of pleadings there. Also, this could result in such issues being treated as 'res judicata' once the District Court Order is made. This could have serious implications for property disputes.

The new Act does not make Barring Orders available to persons living in a relationship which is not primarily

contractual and so they are still denied to cohabiting siblings and persons in same sex relationships.

Where granted, Barring Orders may now be made for a period of up to 3 years by the District Court and Safety Orders can be made for a period of up to 5 years.

Although the criteria for seeking Barring, Protection, and the new Safety Orders, remain substantially the same, namely that the safety or welfare of the applicant or dependent person requires that the Order be made, the definition of 'welfare' has been broadened for all applicants to include 'the physical and psychological welfare of the person in question' [section 1].

This broadened definition would appear to allow for threats which fall short of actual violence to ground a Barring Order application and lawyers may fear a deluge of 'mental torture' cases. Whether the law on Barring Orders as stated in O'B v. O'B [1984] ILRM 1 will be so changed awaits the appropriate case.

The Government have shown commendable concern for those involved in domestic violence by this Act. It must now show further concern and act to introduce a proper system for the resolution of these and other family law matters in our courts.

Another change which could have far reaching consequences is the extension of category of applicants who may apply for Barring Orders. Whereas the 1981 Act allowed for such Orders to be granted for the protection and welfare of a 'child' the new Act allows for such Orders to be granted to the broader category of 'dependent person'.

The Act specifically provides for Ex Parte and Interim relief and it will be vital that speedy return dates will be given where such relief is granted in order to avoid injustice.

The new Act also enlarged the scope for the granting of a Protection Order or a Safety Order to prevent a Respondent from 'watching or besetting' a place where an Applicant or a Dependent Person resides. This would seem to cover the situation for instance where a mother is trying to protect a child, who is perhaps ill or of limited mental capacity, from being annoyed or interfered with by the Respondent who resides at a different premises.

A controversial change in the Act is in Section 6 which gives Health Boards the power to apply for certain orders including Safety and Barring Orders. This section will come into force on 1 January 1997. It would appear to allow Health Boards apply for such orders whether those whom it is sought to be protected want it or not.

Section 7 of the Act provides a useful power whereby a party in proceedings under the 1996 Act or a Court of its own motion may direct a Health Board to make an investigation in relation to the circumstances of a 'dependent person' in cases other than those to which section 6 applies. This would be a useful power where an allegation of abuse is raised during a hearing and would mean that a report could be obtained speedily. Previously such allegations resulted in the denial of access and there was no automatic direct reporting to the Court.

The Court is also now empowered to make Orders pursuant to various Sections of the Guardianship of Infants Act, 1964, as amended by the Status of Children Act, 1987, the Family Law Maintenance of Spouses and Children Act, 1976, as amended by the Status of Children Act, 1987, the Family Home Protection Act, 1976 and the Child Care Act, 1991 at the time of the making of Safety or Barring Orders without the institution of proceedings. This may seem useful but may often mean that lawyers could be taken by surprise by an application, which is not desirable. The Court is not empowered to make a Safety Order where a Barring Order is applied for or vice versa. Separate applications must be made for such Orders.

The Act also provides for an increase in the penalties applicable for breaches of Orders in Section 17 and an increase in Garda powers in Section 18.

The Act is far reaching in the nature and duration of the Orders it provides for. It is arguable that legal aid should automatically be available for Respondents who cannot afford legal representation where Safety or Barring Orders are sought. This would help prevent injustice, particularly when Section 6, empowering the Health Boards to seek such Orders comes into force as the Health Board is always legally represented.

The Act is to be welcomed as the changes it introduces have been long sought by interested parties. It remains to be tested in practice and its introduction will undoubtedly mean yet another increase in the number of cases awaiting resolution in our courts. The Government have shown commendable concern for those involved in domestic violence by this Act. It must now show further concern and act to introduce a proper system for the resolution of these and other family law matters in our courts.

Raghnal O'Riordan, B.L.

Changes in membership of the Bar Council

David Byrne, S.C., has succeeded Judge Peter Kelly on the Barrister's Professional Conduct Tribunal and Eoin McGonigal, S.C., has succeeded Judge Kelly on the Library Committee. Frank Clarke, S.C., has succeeded Judge Peter Shanley as the Bar Council's representative to the International Bar Association.

Annual General Meeting

The Annual General Meeting of the Bar will take place on Friday, 19th July 1996 at 4.30 in St. Michan's Church, Church Street.

Professional Indemnity Insurance

Renewals were due on 1st May 1996. Members are reminded that even if a direct debit exists for payment of the premium, cover will not continue unless a completed declaration form is returned to the insurers. Professional indemnity insurance cover must be in place when a claim is made, not when the act in respect of which the claim is made occurred.

Book Reviews

Media Law

Ms. McGonagle's treatment of media law in this book covers not just the academic and practical aspects but also offers the reader an historical account of media law, largely from the printing press onwards. The introductory chapters set down the ground rules for the regulation of the media and sets out the principal media rights and the manner of their protection. The chapter on defamation extends to over 60 pages and gives a concise but comprehensive treatment of defamation which should be a valuable touchstone for any preliminary opinion in a defamation case. The author points out that the number of High Court defamation cases set down for hearing in 1986 to 1990 were twice the number of those set down from 1981 to 1985, which indicates the growing relevance of this area of law. The checklist for journalists at the end of the chapter is an admirable attempt at guiding journalists through the rather convoluted and complex territory of this area of the law.

The chapter on privacy might have benefitted from mention of the protection of citizens from the intrusion of long range cameras and trespass by tabloid journalists and more details on the UK Calcutt Commission's recommendations on the protection of privacy. The chapters on the principle of open justice: the media, and the courts and court reporting, parliament and local government begin with the premise that journalists are seen as a negative force by the courts, which colours the Author's view on what I would suggest are legitimate restrictions, including that of contempt of court, imposed on the media by the courts and the legislature.

The conflict between freedom of expression and the right to a fair trial is regularly played out when the media are summoned to explain misleading or inaccurate court reporting, sometimes leading to the discharge of a jury because of the effect which the particular report may have on a jury's decision. The Author challenges the effect, if any, that such reporting can have on what she considers are today's media-wise jury members. Ms. McGonagle's views on such matters certainly makes interesting reading as should be of educational value for practitioners and the judiciary.

The latter part of the book deals with the censorship of the media and public order and morality and provides a fascinating insight into the legislature and the courts' futile and inconsistent attempts to regulate public morality through the press, film and broadcasting. The problem of legal regulation of the Internet in this regard is not treated.

Ms. McGonagle's book is a brave and innovative treatment of media law. Its incredibly detailed footnotes and recommendations for further reading in each chapter add to the merit of the text, which at £29.00 represents good value as an addition to any practitioner, student's or journalist's library.

Michael Vallely B.L.

Review of Discovery in Ireland

BY EAMON CAHILL

published by Round Hall, Sweet and Maxwell, 1996

As is pointed out by the Author of this book and by the Master of the High Court in his introduction, Discovery has become of paramount importance to all practitioners in recent years.

As practioners will be aware, most case law relating to discovery has originated in the last twenty years and this book does an excellent job in compiling all that case law and in extracting the appropriate dicta from each case.

Some of the cases dealt with in the book include The Incorporated Law Society of Ireland v. Rawlinson and Hunter (a firm), High Court, unreported, 24th July, 1995 which deals with the criteria for being entitled to an Order for Discovery before a Statement of Claim is delivered.

X v. Mullins McGinty and ors, High Court, unreported, 19th May 1994 is also discussed. This case granted the Plaintiff a substantive right to discovery.

The book does not set out to be an exhaustive discussion of discovery and while it compiles the cases and enunciates the principles arising from the case law it does not go on to discuss the rationale behind those cases. However, the Author does illustrate the difficulties which certain litigants have with the lack of procedures for discovery in some areas of the law, such as Judicial Review and Tribunals and Enquiries. In addition, the Author records the reluctance of the Court to strike out proceedings for failure to comply with orders for discovery. This book went to press before the decision in Murphy v. Donohue and ors. (The Fiat Case) which endorses the views expressed by the Author.

The book usefully sets out the essential elements required for all discovery applications and constitutes a very helpful guide for all practitioners both for its compilation of reported and unreported caselaw and for its explanation of each of the rules and the appropriate practice directions applying.

Sara Moorhead B.L.

Bar of Ireland Retirement Trust Plan

Bank of Ireland

Congratulations to the inaugural issue of The Bar Review.

Over the years membership of the Bar of Ireland Retirement Trust Plan has grown steadily to the point where there are now 267 members.

Members who invested in the Scheme's Managed Fund at the start, have enjoyed an annualised growth rate of 15% over the period 1st May 1984 to 1st May 1996.

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A brochure is available which contains full details of the Scheme, indeed you may already have a copy. To find out more about becoming a member of the scheme, contact, Enda Murphy or Ian Mullen at Bank of Ireland Trust Services. 01 6615933.

Bar of Ireland Retirement Trust Scheme

Recent Fund Performance

	Managed fund	Cash fund	Inflation
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1986	20.4%	-	3.9%
1987	14.3%	-	3.2%
1988	25.9%	-	2.1%
1989	18.0%	-	4.0%
1990	-9.5%	-	3.4%
1991	15.9%	-	3.2%
1992	5.4%	-	3.0%
1993	44.4%	-	1.5%
1994	-7.5%	4.4%	2.4%
1995	19%	5.2%	2.5%

Comparing Investment Performance

	Bar of Ireland Retirement Trust Scheme	Average Exempt Managed Fund*
1985	33.1%	23.42%
1986	20.4%	16.84%
1987	14.3%	7.55%
1988	25.9%	17.25%
1989	18.0%	13.79%
1990	-9.5%	-14.09%
1991	15.9%	9.06%
1992	5.4%	-3.85%
1993	44.4%	37.56%
1994	-7.5%	-8.69%
1995	19.0%	11.06%

*Source: Money Mate (offer-to-bid performance)

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