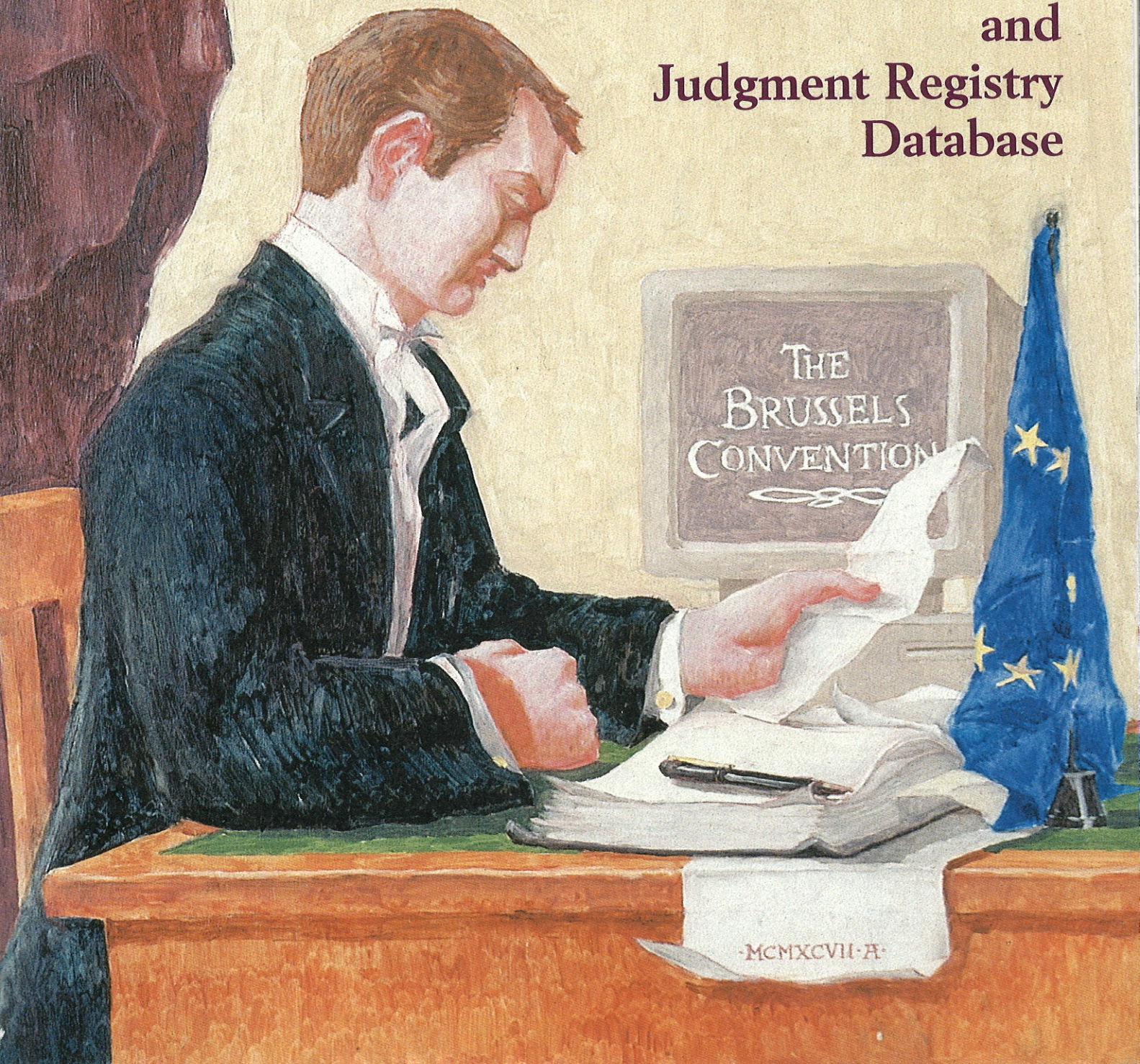


The Bar Review

Journal of the Bar of Ireland. Volume 3. Issue 1. October 1997

The Centralised European Union Convention Causebook and Judgment Registry Database



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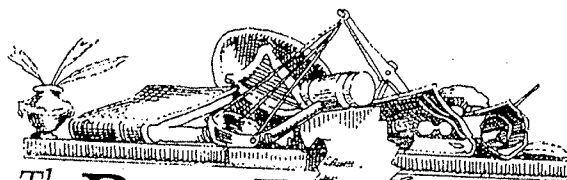
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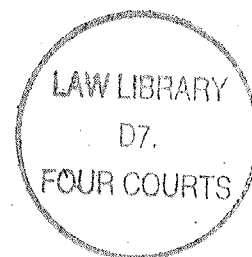
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The Bar Review

Volume 3. Issue 1. October 1997. ISSN 1339-3426



The Bar Review is a refereed journal. Contributions published in this journal are not intended to, and do not represent, legal advice on the subject matter contained herein. This publication should not be used as a substitute for legal advice.

Subscription (October 97 to July 98, 9 issues) £76.23 inclusive of VAT and air-mail post. Editorial and subscription correspondence to:

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Changes in the New Library

It has been decided to amalgamate all the library's EU texts and international reports in one area in the New Library.

All EU texts from the Issue Desk and American and Canadian reports etc. have been moved. The core lending section of the library has been cleared of outdated texts and Anna Curtis, who took charge of book acquisitions project, has replaced them with additional copies of those texts most frequently requested by members.

The Information Desk is situated in the New Library and staff, on request, can do searches on EU cases and legislation, English and Irish decisions, etc.

Thanks and congratulations is due to staff as a lot of time and effort has been put into this project. If you know of any texts due to be published soon (published EU texts) and you feel it should be stocked in the NL please tell Anna (ext. 4122) before the end of the budget date which is October 31st.

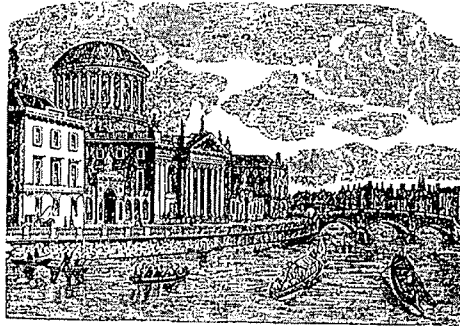
Sharon Byrne, Head of the Development Team

Mary Smartt, Head of Services Team

Distillery News

The first phase of the Distillery development has opened in Church Street. Some 160 barristers are currently taking occupation of their new rooms. There has been a very positive reaction to the finished building. The blend of the original Distillery stone, the glass ceilings on the atria and the wood and glass finishes in the circulation areas lend the building a unique character. There are four categories of room size which are mixed on each floor ensuring a good cross-section of the Bar in the complex.

The second (and final) phase of the building is on schedule to open in the New Year. The second phase will include the Legal Research Centre and the Arbitration Centre.



There is still a small number of A and B rooms available. Anyone wishing to book or view a room should contact Cian Ferriter at 804 5119.

Dates for your Diary

Dates for forthcoming court terms

Michaelmas 1997 - Monday, 6th October to Friday, 19th December

Hilary, 1998 - Monday, 12th January to Friday, 3rd April

Easter, 1998 - Monday, 20th April to Thursday, 28th May

Trinity, 1998 - Wednesday, 10th June to Friday, 31st July

Michaelmas, 1998 - Monday, 5th October to Monday, 21st December

Licensing Contracts and European Competition Law

13th and 14th November, 1997

Hotel Ramada, Trier

Organising by the Academy of European Law, Trier

Registration fee: DM680. Young lawyers under the age of 30 are eligible for 50% discount.

Contact: the Academy of European Law, Trier at +49 651 147100 or Nuala Jackson for further details.

The 7th Environmental Insurance Conference

11th November, 1997

The Brewery, Chiswell Street, London EC1

Registration fee: £399.00

Contact: The Conference Division, LLP Limited, 69 - 77 Paul Street, London at +44 171 553 1000 or Nuala Jackson for further details.

Annual Conference of AIJA

Sydney, 20 and 25th September, 1998

Pre - register by December 1997 to ensure a place

High calibre speakers and wide range of topics to be covered.

Extensive Spouses and children's program also included

Contact Gerard Coll at Eugene F. Collins Solrs, - 676 1924

SYS Solicitors and Barristers Conference

Adare Manor, 21st - 23rd November, 1997

Topics include Refugees in Ireland, Defamation and the Millennium Time Bomb

Fee (to include Friday and Saturday accommodation, breakfast, banquet and conference materials)

Adare Manor £150, Dunraven Arms Hotel, £130, Dunraven cottages, £105

Contact Sara Moorhead for further information

The Centralised European Union Convention Causebook and Judgment Registry Database

The Brussels Convention on Jurisdiction and Enforcement of Judgments, 1968 (the Brussels Convention) provides a legal framework to ensure that judgments of the courts of one Contracting State, (including, most importantly, any pre-judgment protective orders, such as Mareva and Anton Pillar orders in addition to pre-trial discovery orders), can be enforced in the courts of another Contracting State.

The matters covered in those judgments are many and varied. For example, the combined population of the Contracting States to the Brussels Convention is greater than 372 million and every year within those States, 80,000 people die and 40 million are injured in accidents involving consumer goods with over 300,000 left annually with a permanent disability. Many of these statistics inevitably give rise to transnational actions which require reliance on the terms of the Convention for their effective enforcement.

At present, however when citizens of those Contracting States rely on the mechanisms of the Convention to prosecute or defend civil and commercial litigation, the fact of that litigation and its outcome is not available in any central database accessible by other litigants and their lawyers throughout those Contracting States.

The Centralised European Union Convention Causebook and Judgment Registry Database ("the Database") is an initiative which aims to address this anomaly and to ensure the more effective operation of the Brussels Convention. It is intended that the Database will provide for on-line access to key information relating to Convention actions during their progress through the courts of the various Contracting States. Data collated in the database will be of assistance to litigants, lawyers and to those making investment and credit decisions. The information contained in the Database would, for example, allow a potential inward investor to any of those states to search for a target company in the Database in order to ascertain whether such company is a defendant in any proceedings under the Convention in respect of any of its prod-

ucts and if so, to check on the status or outcome of such proceedings. Similarly, a litigant in a product liability action will be able to check if other litigants are bringing similar actions against a common defendant in another Contracting State. The collation of such information may help in recalling or preventing distribution of offending products or in the up-grading of international standards where necessary.

To date, the Database has received the endorsement of, among others, the International Bar Association ("the IBA") which is the world's largest international organisation of Law Societies, Bar Associations and individual lawyers engaged in international law. As such the IBA is the representative body of over 2.5 million lawyers worldwide and is particularly concerned with the growth of transnational business across the globe, the implications of new technology and diminishing trade barriers which increasingly mean that events in one corner of the world can instantly affect legal practice elsewhere.

At present applications for EU funding for the establishment of the Database are ongoing. The EU Ombudsman, Mr. Jacob Sodderman, has taken an interest and has requested the Secretary General of the European Council to submit the results of the evaluation of the Database Scheme by the relevant EU institutions to him by 31st October, 1997.

A favourable outcome to the request for EU funding for the Database, which it is intended will be located in Dublin, would result in the provision, through the Database, of accurate, up to date and comprehensive information on matters of relevance to the legal regulation of international economic activity, which will benefit consumers and investors alike.



Bar Council Conferences for Michaelmas Term, 1997

Further details to follow. Please direct queries to Muireann O'Donovan, ext. 5000

Disclosure and Admission of Reports in Personal Injuries

Date: Monday 20th October 1997
Venue: Law Library, Four Courts -
(5 - 7.00pm)
Open to members of the Law Library
only

Milk Quotas

Date: Saturday, 15th November, 1997
Venue: Law Library Building, Church
Street

Employment Protection

Date: Saturday, 6th December, 1997
Venue: To be announced

Online News

The Bar Council is pleased to announce that the Law Library's Dial-In System is now available to the membership. The dial-in system enables barristers to access the law library databases through the telephone system with the help of a modem attached to their computer and a simple piece of software. Barristers will thus be able to access legal information from home or, if they have a laptop with a modem, while out on circuit. Barristers outside Dublin will be able to dial-in to the service at the cost of local telephone calls by accessing the system via the Internet. The dial-in system operates on a private network and is not generally accessible to those outside the Bar.

There will be a series of core databases on offer including the library's new electronic OPAC catalogue, a new version of JILL (the library's own database of Irish judgments), the electronic Law Reports (full text of official English reports since 1865), the All England Law Reports (full text from 1936), the Family Law reports, Valuation Tribunal Judgments and a periodical reference database, the Legal Journals Index. The service will also include the Daily Law reports Index of English newspaper reports.

Further databases will be added as the service expands.

Training on the databases will be provided by Law Library staff and telephone support will be provided for the installation and on-going use of the service. The service will be available outside normal library hours as well as during vacations and at the weekends.

As a starting offer those availing of the database training programme (£150 for members of over 5 years standing, £75 for those of less than 5 years standing) will be provided with free access to the dial-in service until Christmas. A subscription rate for the service will then apply for the New Year.

The dial-in system should greatly assist the flexibility of members practices by enabling legal research and printing of materials to take place outside of the Law Library and outside of normal library hours.

Those interested in subscribing to the service can contact staff at the Information desk at 702 4902 or Greg Kennedy at 702 4498.

Information Technology Services Team: New Members Update.

September 1998

The Information Technology Services Team for the Bar Council of Ireland has recently acquired the services of Karl Lynch and Joy O'Donnell. Karl joins The Bar Council with a background in companies and I.C.L. in which he worked as an on-site engineer for a number of years. Joy has joined the team coming from another position within the Bar Council. The Information Technology Services Team Leader is Greg Kennedy who has an excellent track record with the I.T. service and overview of the Bar Council. This year 1998, brings many new advancements in I.T. to the Bar Council such as direct 64 access to Internet Services and also updates to existing Hardware and Software issues.

New Team Leaders

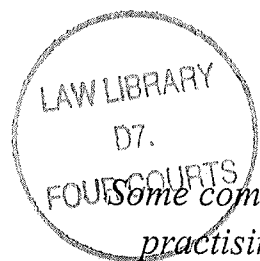
Sharon Byrne and Mary Smartt will lead the Library Services Teams for the next term. Sharon is head of the Library Development Team and Mary will head the Library Services Team. Members are invited to direct comments and queries to them as appropriate.

Muireann O'Donovan is the new face in the Bar Council office where she has been appointed as administrative assistant.

Two new telephonists have been recently appointed, they are Anne Marie Byrne and Michelle Smith.

Martina Curran has joined the team in Accounts as Accounts Assistant.

Some Practical Aspects of Copyright Law



Some common practical issues of copyright law which confront the practising barrister or solicitor, are outlined and addressed by

Pauline Walley, Barrister.

1. Introduction

Intellectual property describes the legal proprietary rights which the law gives to the output of artistic, creative and scientific endeavour. The term includes the statutory rights covered by copyright, trade marks, patents and design rights, and the common law tort of passing off. In practical terms, unless you have a specialised practice, the most common areas which the practising lawyer will encounter are copyright infringement and the allied areas of trade marks and passing off.¹

As many of you will know, Irish copyright law is not only modelled on UK statute; all pre 1922 case law is binding, and even current UK decisions have persuasive authority, particularly as there is a lack of significant case law here. Historically, copyright arose in England with the advent of the printing press. The dissemination of information on a mass scale presented a new threat to the Crown, and it was essential therefore that the copying of works was regulated and restricted by the Crown. Copyright in essence started life as a form of censorship. The regulation of copyright was later taken over by the Stationers Guild who were the predecessors of our modern publishers. They were more concerned with the commercial exploitation and financial benefits attached to copying, and they lobbied hard and successfully for protective legislation. By 1709 the Statute of Anne was passed which conferred the "the sole right and liberty of printing books" to authors and their assigns. This Act was succeeded by a number of later Copyright Acts, which broadened the protection base to include engravings,

paintings, photographs, sculptures and other artistic works. These Acts, which are part of Irish law as part of our pre 1922 legal heritage, culminated in the Irish Copyright Act 1963, which, together with subsequent amendments and statutory instruments, governs copyright law in the Republic of Ireland.

Before looking at the protection conferred on authors by the Acts, certain points must be stressed.

First, copyright protects the expression of ideas and not the ideas themselves. This is an extremely important point and one which clients are often confused about.² The privilege of copyright is conferred to reward the "labour, skill and judgement" which the creator or author has expended in producing the work. He is protected by copyright in his work by virtue of that effort, or the "sweat of his brow" as the American case law calls it.

Secondly, copyright is concerned with some degree of originality, although this really means that the work must not be copied. The originality threshold in Ireland and England, and other common law countries is far lower than that in the Civil Law countries such as France and Germany where the law seeks to encourage and laud the creative talent of the author as much as the energy expended in labour. For example in the *Magill* case, Lardner J. declared that RTE had a copyright in the daily TV schedules by virtue of the skill and effort required to compile them, thus precluding *Magill* from reprinting the schedules³. Equally, there are a number of cases in England and America where copyright has been recognised in rail-

way timetables, racing and football fixture lists, telephone directories, trade catalogues etc⁴. It is clear therefore, that originality has a pretty low standard here and in other common law countries, and indeed a much lower standard than that applied to design or patent law in Ireland.

Thirdly, the right to restrict or control copying of a work is, in essence, a monopoly right. We live in the European Union in a legal world where our laws are moving away from monopoly, particularly under the terms of the Treaty of Rome, so why do we retain copy-right?⁵ Again the answer seems to be that this is the only way to encourage and reward creative endeavour; to give the author some financial incentive and encouragement. However, the question must be asked how far should this monopoly go? If no limits are imposed, the development of the arts and sciences shrivels up because the work cannot be built upon or developed by other creators; the original work becomes writ in stone and prevents creative symbiosis⁶.

Finally, it must also be said that in Ireland and other common law countries, copyright is a purely economic right, and once the right is "sold" no other rights remain. This is not true in civil law countries where there are two categories of right: economic and moral. Moral rights are concerned with the integrity and reputational protection of the artist's work, and these do not yet exist in Ireland, although the European Commission does have harmonisation proposals on moral rights in the legal pipeline⁷. Examples of the recognition of integrity would include the prevention of the destruction⁸ or distortion of

the artist's work as in the Canadian case of *Snow v. Eaton Centre Ltd.*⁹ where the tying of yellow ribbons on 60 sculptural geese as part of the Christmas decorations was held to be prejudicial to the reputation of the artist!

2. What is Copyright?

So what is copyright? Copyright has, in fact, both a positive and a negative aspect. It is the positive right to copy, reproduce or use your own work in whatever way you wish, and the negative right to prohibit anyone else from using or reproducing your work without your permission, or contrary to your instructions. Section 7(1) of the Copyright Act 1963 defines the nature of the right as

"copyright means...the exclusive right to do and authorise other persons to do, certain acts in the State in relation to the work, which...are designated as the acts restricted by copyright."

Under Section 8¹⁰ of the Copyright Act 1963, copyright subsists in every original literary, dramatic or musical work if that work is published within the State, or the author of the work was a qualified person when the work was published. If the work was unpublished, copyright subsists if the author was a qualified person at the time the work was made.¹¹ To be a qualified person, you must be either be a citizen, domiciled or a resident of the State.¹² Similar provisions apply under Section 9 of the Act to artistic works, which include paintings, sculpture, drawings, engravings and photographs irrespective of their artistic quality.¹³ The classes of rights covered by these sections are called Part 11 rights and they are copyrights in the true sense. Copyright is also conferred in Part 111 of the Act in sound recordings under Section 17¹⁴, films under Section 18¹⁵, and television and sound broadcasts under Section 19¹⁶. It is important to note that the rights conferred in relation to sound recordings, film, TV and sound broadcasts are slightly different to the classic Part 11 rights in that they are at one remove from the creative process. They are not the rights of the authors or creators, but those who commercially

exploit such rights; as such they are sometimes referred to as neighbouring rights.¹⁷

From a practical point of view, the practising solicitor must first assess whether his client, who claims copyright infringement, comes in under these sections. To do so, the client must be the author or creator of the original work, although as mentioned earlier, that does not require a huge degree of originality. A literary work does not mean a piece of literature. It is defined in the Act as "including a written table or compilation" and has included exam papers¹⁸, trade catalogues¹⁹ and football fixture lists²⁰, so anything which requires labour skill and judgement will be covered providing it is in written form. In Magill²¹, Lardner J. said

"the term "original literary work" is not confined to work exhibiting literary art or style and includes any written or printed composition. It is not the ideas, but their expression in writing which must be original".

This form of protection extends to secondary sources such as translations, compilations and any collection of materials in written form. It is worth noting that computer software is also protected as if it were a literary work by the provisions of the Software Directive which was implemented into Irish law by SI 26/1993. It is estimated that 70% of software in Ireland is reproduced or copied in breach of copyright²².

3. The Copyright Term

The copyright protection period was originally set down in the 1963 Act as fifty years from the end of the year in which the author died, for a published work, and fifty years from the date of publication in relation to works which were unpublished by the author at the date of his death i.e. posthumous works. These provisions have now been amended by the Term Directive, a Germanic inspired piece of European legislation, which came into Irish law two years by SI 158/1995. This increases the term to 70 years in both instances from the date of death of the author. The effect of this new law has been twofold. First, some works which had previously been out-

side the copyright term by Yeats, Joyce, Virginia Woolf, D.H. Lawrence, Thomas Hardy and Beatrix Potter have now been brought back into copyright. But we also have the farcical prospect that computer software for example designed today by a programmer in his twenties could remain in copyright for over one hundred years!²³

5. Ownership

As mentioned earlier, the copyright holder is the author or creator of the original work, although these rights can be assigned or licensed. However, disputes often arise in practice as to who owns the copyright of a particular piece of work, and the following examples, which are set out in Section 10 of the Act, are a useful guide:

(a) Journalists

Where a journalist is employed by a newspaper, magazine or periodical under a contract of service, the copyright in the works he creates for publication in that newspaper etc. belong to the proprietor of the newspaper, but "in all other respects the author shall be entitled to the copyright". The statutory provision may be overridden by contractual agreement, and most of the print media have these types of issues covered by written contracts. It is worth noting that this anomalous position has been removed in the recent UK Copyright, Designs and Patents Act 1988 after extensive lobbying from the print media.

(b) Commissioned works

The person who commissions the taking of a photograph, portrait by painting or drawing or the making of an engraving, is the owner of the copyright, unless contractually agreed otherwise. Otherwise, the artist retains the copyright, although the owner of the painting retains possession. In practice, this comes as a surprise to many people because the commissioner of a landscape for example, or the owner of a painting would often assume that he held the copyright in the work.

(c) Employees

If a work is made in the course of the author's employment with an

employer, the employer is entitled to the copyright in the work unless contractually agreed otherwise. This is a problem which crops up a lot in the software industry, where there is a high degree of mobility and where employees are often working on their own projects. It is also a problem with project researchers on academic and scientific projects, who may subsequently claim acknowledgement or a partial copyright in the work.

When you are advising a client, it is important to establish what was agreed between the parties and it must be said that in practice this is often difficult. If there was no clear contractual arrangement as regards copyright, the above provisions of Section 10 will kick in. Employers should always be advised to obtain written assignments from their employees in relation to their works to avoid any difficulties.

6. Prohibited Acts

If one has copyright, certain acts are probated under the Act without the copyright holder's consent. In relation to a literary, musical or dramatic work, these include

- reproducing the work in any material form
- publishing the work
- performing the work in public
- broadcasting the work
- causing the work to be transmitted to a subscribers to a diffusion service
- making any adaptation of the work which includes a translation²⁴.

When you want to find out what acts are prohibited, you have to look at the particular sections of the Act which set out the rights, and each of the Sections setting out the Part 11 and Part 111 rights, have a subsection setting out the prohibited acts²⁵, all of which are similar to the above prohibited acts, but which vary slightly according to the particular right.

In addition, Section 11 also provides that copyright in a literary, dramatic, musical or artistic work is infringed where a person

- (a) imports into the State
- (b) sells, lets for hire or offers by trade
- (c) exhibits in public

knowing that the article is infringing copyright. Thus, secondary infringers such as distributors are also caught under this section if one can prove knowledge.

Finally, Section 13 of the Act provides a special exception in the case of sound recordings in musical works, sometimes referred to as the compulsory licensing section. This provides that where certain conditions are met, such as the fact that the record has already been sold in the State, the copyright holder cannot prohibit reproduction and is simply entitled to a "fair royalty".

6. Fair Dealing

There are however some limits to the rights of the copyright holder and the prohibitions against reproduction set out above are not totally unqualified. The Act permits "fair dealing" exceptions which, in relation to literary, dramatic or musical works, permits the use of the work for:²⁶

- (a) research or private study
- (b) criticism or review when accompanied by sufficient acknowledgement
- (c) reporting current events either in a newspaper, magazine, periodical or by film or broadcast accompanied by sufficient acknowledgement
- (d) reproduction for the purpose of judicial proceedings

Similar provisions are set out in Section 14 in relation to artistic works which in addition provides that the inclusion of an artistic work in a broadcast or film on current events will not constitute an infringement²⁷. Equally, the inclusion of an artistic work as an incidental background in a film or broadcast will not constitute infringement, and the making of a 3D object of a 2D artistic work will not infringe the 2D copyright if any of the features of shape, configuration and pattern which appear in the work and are applied to the object are wholly or substantially functional and more than 50 items are made and commercially available²⁸.

In practice, infringers may sometimes find protection under these provisions, and these should be checked first before a client initiates litigation. Obviously, in interpreting the above Sections, a court

will look at the portion of the work copied and the manner in which it has been used by the taker. Substantial regurgitation of the work under the guise of criticism or review may amount to a substantial taking which goes beyond the fair dealing defence²⁹.

One area which has attracted controversy is whether parody, which can replicate a substantial part of the work, amounts to a substantial taking of the work. In 1991 a small band called Negativland released a single called U2, which started with 35 seconds of the U2 single, "I Still Haven't found What I'm Looking For": the remainder of the single was their send up of the song which they maintained only proved their reverence for the U2 material. Island Records was not pleased and effectively injunctioned any further distribution and had the infringing copies impounded.

Finally, sometimes, a Court will allow an infringement for public policy reasons as in the case of *Hubbard v. Vosper* in the early Seventies. In this case, a disaffected member of the Church of Scientology published an article attempting to expose the cult aspect of the Church, and used extensive excerpts from the writings of their founder in his article to support this view. Hubbard claimed copyright in the text and alleged substantial taking, as well as alleging breach of confidence. The Court allowed the infringement on the grounds of public policy, as the Court felt that the public had a right to know how the cult of Scientology operated. But even the fair use provisions have their limits as amply demonstrated recently when the primary schools suddenly found themselves in breach of various musical copyrights by virtue of their public performance of music and songs in the school play! IMRO was totally right in law, but was this logical?³⁰

7. Remedies

So, you have a client who is the creator or author of an original work, who is a qualified person under the Act, and there has been a substantial taking of the work which is not justified under the "Fair Dealing" exceptions listed above. The remedies available to your client are

set out in the Act and are of a civil and criminal nature, although it must be said that civil litigation greatly outstrips prosecution in this area.

1. CIVIL REMEDIES

(a) Cease and desist letter

Obviously, the first thing to do is to write a cease and desist letter on behalf of your client as the infringer may not be aware that he is infringing your client's copyright. This is not as naïve as it sounds. There is no system of official registration for copyright in Ireland, so infringements sometimes occur on the basis of genuine ignorance. A financial institution which has bought an art work for its private collection may mistakenly believe that it can reproduce the artwork in its calendar or company accounts, without the artist's consent. A TV company may use the dramatic or literary works of a dramatist or author on the mistaken assumption that the work is no longer in copyright, because they are unaware of the provisions of the Term Directive³¹ which may have brought the author back into copyright. A company may publish the results of a scientific project under its own name, unaware that its researchers may have a copyright as well. A lot of infringement cases are disposed of at this stage, usually after some solicitors correspondence and subsequent negotiation. Obviously, if this does not work, a more litigious approach must be adopted.

(b) Injunction

Section 22 of the Act provides that the owner of a copyright work shall have the same legal remedies as the owner of any other proprietary right, and an injunction is one of the key tools for infringement in the whole IP area. Very often, it is too late to wait for the hearing of the substantive issue as the damage has already been done to reputation or goodwill or to the value of the work. The usual injunction principles set out in *American Cyanamid* and *Campus Oil*³² apply in that

- (i) there must be a serious issue to be tried
- (ii) damages must not be an

adequate remedy

- (iii) the court must look at the balance of convenience
- (iv) the status quo should be maintained

The type of injunction sought will very often be determined by the kinds of works which are being infringed. For example, in relation to software theft, the only effective remedy may be an Anton Pillar Order, as it is so easy to destroy infringing programmes and copies within seconds, thus rendering an ordinary injunction nugatory. Such Orders are difficult to obtain, but courts are more aware of the issues involved in areas like software infringement and the Internet, and are willing to grant these types of orders where the circumstances clearly show they are warranted, and where proofs are in order.³³ It is worth noting that very often the hearing of the injunction will effectively determine the issues between the parties

(c) Damages

The Court has power under Section 22 to order an array of damages. Damages are calculated with reference to the damage caused to the commercial exploitation of the work, and or to lost commercial opportunities suffered by the owner or licensee. In addition, if the infringement is a flagrant breach of the owners right, the Court has power to award "additional damages" which may, to be penal in nature, be over and above other damages. Under Section 24, the Court also has power to award conversion damages in the case of a non-innocent infringement. The damages are calculated as if the infringing copies belonged to the copyright holder. In *Dennis Trusts v. Barnwell Stores Ltd.*³⁴ the copyright holder was entitled to the proceeds of sale of the infringing copies (despite the fact that it was accepted that the infringing copy was sold in an entirely different market), and the proceeds of sale were the actual turnover generated and not the net sales.

(d) Account of Profits

If the infringement is innocent as mentioned above, the Court is not empowered to award damages, but merely an account of the profits made by the infringer³⁵. It is important to note that if the infringer has wrongly identified the copyright holder, and obtained permission from the wrong source, this does not permit him to avail of the relief under Section 22(3), as he knew there was a copyright in existence. A recent example of this was a case where an advertising agency wanted to reproduce a painting owned by a financial institution and housed in a gallery. The agency sought and obtained the permissions of the financial institution and the gallery, but not the artist, who was in fact the holder of the copyright. The artist was obliged to litigate before the issue was resolved.

False attribution is also a civil remedy under Section 54 of the Act and the right of action survives the death of the copyright holder for twenty years. So, if you erase the name of the author or artist and insert your own, that is a separate and distinct wrong aside from any act of reproduction. It is, in a sense, the nearest provision we have to a moral right³⁶.

Finally, one of the most important issues in copyright litigation is the proving of ownership. As mentioned above, there is no system of official registration in Ireland. Although Section 26 provides for a presumption of ownership of copyright, this can be put in issue by the Defendant, and the onus then shifts to the Plaintiff to prove copyright. If the Plaintiff is resident in Ireland, this may be relatively easy, but if your client is an American corporation or resident in some other jurisdiction, the issue becomes much more difficult. A number of District court cases, on both the civil and criminal side, have fallen by the wayside because of this tactical issue by the defendant. However, this has been remedied to some extent by the decision of Keane J. in *PPI v. Cody and Others*³⁷ who has recently ruled that such evidence can be taken on affidavit. The case is currently under appeal to the Supreme Court.

2. Criminal Sanctions

It may come as a surprise that the Act also sets out criminal sanctions under Section 27 and 28 of the 1963 Act, as amended by Section 2 of the Copyright Amendment Act 1987.

Under Section 27, anyone who

- (a) makes for sale or hire
- (b) sells or lets for hire
- (c) exhibits in public
- (d) imports into the State other than for private use

an infringing copy, knowing it to be the subject of copyright, will commit an offence, and will be liable to fines up to £1000 and or 6 months in prison³⁸. Both the distributor and the platemaker of infringing copies can also be prosecuted under Section 27(2) and (3).

Furthermore, if you believe that infringing copies are being offered for sale or hawked, the copyright holder can apply to the District Court to seize the infringing copies without warrant, and once it has been proved to the Court that they are infringing copies, they can be destroyed or given up to the copyright holder. This is particularly effective where your client is an artist or performer, and copies of their works are being sold on the street.

Under Section 27(5) a search warrant may be issued on a sworn information to search premises and seize infringing copies and plates. Again, these are brought to the District Court and once they have been proved to be infringing copies, may be destroyed or delivered up.

Section 28 allows for the copyright holder to request the Revenue Commissioners to impound infringing copies on importation. However, the section is cumbersome as the owner must prove copyright in advance to the Revenue, and must pay certain fees.

The search and seizure remedies in Section 27 in particular are extremely valuable but are really not used often enough by copyright holders. They are quick, cost effective and will often prevent the need for further more expensive litigation. However, you need the sup-

port of the local Gardai and there is no doubt that some are more au fait with these provisions than others. But as a general observation, the Garda Síochána are now taking white collar crime much more seriously, and it is worth noting that they have just set up a software piracy liaison unit in Harcourt Square under the direction of Detective Superintendent Brehony.

8. The Big Issues

The above is just a brief resume of the current statutory framework, which is now recognised as hopelessly out of date. The Act is generally regarded as a direct copy of the UK 1956 Act, which was rooted in the technology of the forties and fifties, and was just coming to terms with television! The Act predates the computer, the personal computer, cable and satellite and the Internet. The challenges presented by multi media and the Internet are obviously outside the ambit of this paper, but it is the area where copyright faces its greatest threat and opportunity. The text of an entire book can be downloaded in seconds as can pirated software or other works. The Irish Times carried a news item earlier in the year that three songs on the Pop Mart album had been stolen from the U2 files via the Internet. The story was never confirmed, but the technology makes it entirely possible. Does calling up copyright materials on a screen amount to a "reproduction in material form" as required by the Act? There is no doubt that the Software Directive implemented by SI 26/93 does protect temporary copies of software as act of reproduction.³⁹ Would the prohibited acts of Section 8(6) cater for the Internet?⁴⁰

However, the biggest source of change is Europe⁴¹. In 1988, the European Commission published its Green paper on Copyright and the Challenge of Technology.⁴² The Commission identified intellectual property and its service industries of music, film, broadcasting and publishing as one of the greatest sources of growth and income to the Community, and recognised the significant replacement of service jobs as traditional industrial jobs were disappearing. However, the draw-

backs were hugely inconsistent laws between Member States, and a significant gulf between the economic rights focus of Ireland and England, and the wider focus of economic and moral rights in France, Germany and the Benelux countries. There was also the significant problem of piracy and counterfeiting, and its consequent haemorrhage of income to right holders, which the Community has failed to tackle. The Commission set about an impressive programme of harmonisation, which has resulted in the implementation of the Software, Topography of Chips and Term Directives in Ireland in the last four years. The Commission has more recently published another follow up Paper called Copyright and the Information Society which records the staggering work which the Commission has done since 1988, and what it since plans to do.⁴³

Certain European legislation is already awaiting domestic implementation. This includes a Directive on Databases with the establishment of new compilation rights in databases⁴⁴, and a Rental and Lending Rights Directive which remunerates authors and other creators for the rental and lending of their work, even public lending. This latter directive is an extremely significant piece of legislation for clients, and should have been implemented into Irish law by 1994, with some derogations to 1 July 1997. The State's failure to implement the Directive is a potential source of claims against the State for compensation for lost revenue⁴⁵, based on the authority of *Francovich v. Italian Republic* as accepted into Irish law by Carroll J. in *Tate v. Minister for Social Welfare and others*⁴⁶. Other proposals at a less advanced stage include a type of resale royalty on art works which really only relates to the visual arts, known as the "droit de suite" and proposals are currently being drafted to deal with moral rights and private copying, particularly in the book, video and tape markets.

To date, we have implemented the Directives on a piecemeal basis by statutory instrument in a very unsatisfactory way. The Department of Enterprise, Employment and Trade is currently drafting a new Copyright Bill, which has

been in gestation for the last two years. The outgoing Minister promised last May that we should have a draft Bill late 1997 or early 1998. Given that the Bill will probably have 500 heads or sections (at last count), this is highly unlikely. If the Bill does deliver in such size, it will be the largest piece of legislation the State has ever seen, which gives one some idea of the centrestage position which copyright law now enjoys.

Copyright law is no long the esoteric and dusty legal backwater it once was. It is highly relevant in today's commercial world, which is becoming increasingly dependent and driven by technology. It is now about jobs in Tallaght or Ballydehob, as software companies or collecting societies locate in Ireland. Copyright started life with the advent of the printing press, and it is now taking a further quantum leap with the technology of the new millennium. As lawyers, we need to make that leap too. ●

1. Readers are referred to the forthcoming textbook *Intellectual Property Law in Ireland* by Professor Robert Clark and Shane Smyth Butterworths August 1997 for a comprehensive treatment of the subject.
2. Indeed the Preamble to the Statute of Anne 1709 describes the Act as "an Act for the Encouragement of Learning by Vesting the copies of Printed books in the Authors or Purchasers of such Copies", and the US Code in Article 1 justifies copyright to ipromote the progress of Science and the Useful Arts by securing for Limited times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries.
3. RTE v. Magill and Others [1990] ILRM
4. Ladbrokees v. Hill [1967] 1 All E R 465; Feist Publications Inc. v. Rural Telephone Service Company Inc SC 89-1909 27/3/91

5. The action by RTE against Magill was successful under domestic copyright law in Ireland, but RTE lost in the ECJ under competition law rules.
6. This is particularly obvious in the software industry where generations of software are spawned piggybacking onto one another.
7. Moral rights are concerned with the author's reputation vis a vis his own work, and are recognised in Article 6 bis of the Berne Convention. The Copyright Designs and Patents Act 1988 in the UK has gone some way towards recognising these types of rights. See EC Discussion Doc. IP/93/1
8. This would preclude the destruction of a commissioned work, such as Sutherland's portrait of Churchill allegedly destroyed by Clementine Churchill after her husband's death, or the alleged destruction of the Rivera murals by Rockerfeller destined for the Rockerfeller Centre in New York.
9. Snow v. Eaton Centre Ltd (1982) 70 CPR 2d
10. Section 8(2) Copyright Act 1963
11. Section 8(1) Copyright Act 1963
12. Section 7(5) Copyright Act 1963
13. Section 9(1) Copyright Act 1963
14. Section 17(1) Copyright Act 1963
15. Section 18(1) Copyright Act 1963
16. Section 19(1) Copyright Act 1963
17. In PPI v. Controller [1993] IR 267, Barr J. distinguished between the absolute right of the composer to prohibit performance of his work under Section 8, and the qualified right of the recording company under Section 17 re published work, which is limited to accepting equitable remuneration.
18. University of London Press v. University Tutorial Press [1916]
19. Collis v. Cater (1898) 78 L.T.
20. Football League v. Littlewoods [1959] Ch. 637
21. RTE v. Magill and Others [1990] ILRM
22. See Sheehy H. *Intellectual Property as it relates to Computers, Commercial law Practitioner* April 1995
23. Some people were obviously pleased with the extended term. The eldest grandson of D.H. Lawrence recently told the Sunday Times that the renewed royalties would go some way to compensate his family for the fact that Lawrence ran off with his grandmother.
24. Section 8(6) Copyright Act 1963
25. Prohibited acts:
 - literary, dramatic or musical works - Section 8(6)
 - artistic works - Section 9(8)
 - sound recordings - Section 17(4)
 - film - Section 18(4)
 - TV and broadcasts - Section 19(5)
26. Section 12 Copyright Act 1963
27. Section 14(2) Copyright Act 1963
28. Section 14(7) as amended by the Copyright Amendment Act 1987.
29. See Hubbard v. Vosper {1972} 2 QB 84 mentioned below
30. The exemption set out in Section 53 deals with the use of copyrighted material in schools, and provides that reproduction of literary dramatic musical or artistic works is permitted by the teacher or pupil for the purpose of instruction or examination. The Section goes on to protect performances of works which are performed in class and not in front of an audience. The IMRO view is that performance in a school play is a public performance and therefore outside the exemption. See Hickey J. *Irish Intellectual Property Review* (1997) 1 3
31. Term Directive implemented into Irish law by SI 158/95
32. American Cyanamid Co. Ltd. V. Ethicon Ltd [1975] AC 396 *Campus Oil v. Minister for Industry and Commerce* [1983] IR 88 *Westman Holdings Ltd. V. McCormack* [1992] IR 151

33. The eminent counsel credited with the invention of the Anton Piller order is Mr. Justice Hugh Laddie, who will deliver a lecture entitled "Copyright Law: Perspective from a Neighbouring Island" to the Copyright Association of Ireland on 24th October 1997.

34. [1983] FSR

35. Section 22(3) Copyright Act 1963

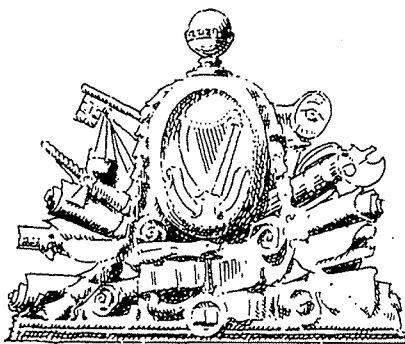
36. See *op. cit.*

37. Phonographic Performance Ireland v. Cody and Princes Hotel [1994] 2 ILRM 241

38. Section 27 Copyright Act 1963 as amended by Section 2 of the Copyright Amendment Act 1987

39. Regulation 5 SI 26/1993

40. See Copyright and the Internet by Don McAleese in forthcoming July



issue of Irish Intellectual Property Review 2 1997

41. Rental and Lending Rights Directive 92/100

Database Directive 69/9/Eec 11/3/96
Satellite and Broadcasting and Cable Directive Dire. 93/83

42. Copyright and the Challenge of Technology Document COM (88) 172 Final

43. There have also been significant developments worldwide with the negotiation of the TRIPS neighbour-

ing rights in December 1996, which have established an extraordinary degree of international consensus on basic copyright issues. These matters are outside the ambit of this paper but it is worth noting that many WIPO and European Commission representatives attribute that consensus to the hard work and tenacity of the Irish civil servants who were responsible for the work during Ireland's Presidency of the European Union in late 1996.

44. See Scales L. Copyright protection for Databases, Commercial Law Practitioner May 1995

45. See Walley P. The Rental and Lending Rights Directive Commercial Law Practitioner June 1995

46. Tate v. Minister for Social Welfare and Other Carroll J. Unrep. February 1995.



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New Superior Court Rules in Personal Injury Litigation



S.l. 348 of 1997: Disclosure and Admission of Reports and Statements The Rules of the Superior Courts (No. 7) 1997 (S.l. 348 of 1997) entitled "Disclosure and Admission of Reports and Statements" were signed on the 7th August 1997. These new rules will cause major changes in the Practices and Procedures of Personal Injuries litigation. It is strongly recommended by the Bar Council that all members of the Bar familiarise themselves with the provisions of the new Rules and with the relevant provisions of the Courts and Court Officers Act of 1995. The Bar Council intends to organise a Seminar, later this term, dealing with these Rules and the 1995 Act and with their far reaching implications for personal injuries litigation.

Some of the more significant changes in practice and procedure (and changes in the substantive law of evidential and legal privilege) are set out hereunder *as a guide only* for members of the Bar and are no substitute for ones personal familiarisation and knowledge thereof.

In addition, please note that the President of the High Court, Mr. Justice Costello has issued a Practise Direction dated the 15th September 1997 in respect of these Rules. The effect of this Direction is that, firstly, the obligation mentioned in paragraph 2 hereunder does not apply to actions in which *Notice of*

Trial was served prior to the 1st June 1997, secondly, the obligation mentioned in paragraph 3 hereunder does not apply to actions which were first listed for hearing prior to the 1st July 1997 and thirdly, non compliance with these obligations can be remedied by the delivery of the required reports/information without the necessity of an application to the Court to extend the time for so doing .

Principal Features

1. "Definitions":

(a) "Personal injury actions:" - includes all claims for damages for personal injuries other than claims in respect of which trial by jury may be available, see Section I (3) of the Courts Act, 1988.

(b) "Report:" - includes reports in letter form, statements, copies of such reports, letters or statements howsoever made and in addition includes any report, statement, note or letter made by any person who is not an expert but which reports, records, notes or conveys any relevant opinion from an expert intended to be called to give evidence .

(c) "Report:" - excludes any report, statement or letter from Private Investigators.

(d) "Experts - includes, Accountants, Actuaries, Architects, Dentists,

Doctors, Engineers, Occupational Therapists Psychologists, Physiotherapists, Scientists and/or any other expert".

2. A Plaintiff must, within three months of the Service of the Notice of Trial, deliver to the Defendant: (i) Any report from any expert intended to be called to give evidence of medical or paramedical opinion.

(ii) Any report from any other expert of the evidence intended to be given at the trial by that expert.

3. A Plaintiff must, within two months after the case is First Listed for Hearing, deliver to the Defendant the names and addresses of all witnesses intended to be called, a statement of all items of Special Damages together with vouched documentation and any statement from the Department of Social Welfare indicating payments to the Plaintiff .

4. A Plaintiff, who outside the periods mentioned above, receives additional "Experts Reports" or the names and addresses of "further witnesses" must deliver such Reports and convey such Information to the Defendant within 28 days of the receipt thereof.

5. A Defendant must, within three months from receiving the reports mentioned at paragraph 2 above, deliver to the Plaintiff every like

- report which he the Defendant has.
6. A Defendant must, within two months of receiving the information mentioned at paragraph 3 above, deliver to the Plaintiff all like information (if appropriate) which he the Defendant has.
 7. A Defendant, who outside the periods mentioned above, receives any additional Experts Reports or the names and addresses of further witnesses must deliver such Reports and convey such Information to the Plaintiff within 28 days from the receipt thereof.
 8. A Party who has delivered such reports or furnished such information may withdraw reliance thereon by indicating that he does not intend to call to give evidence the author of such report or such witness.
 9. A Party who has delivered such reports or furnished such information can serve a Notice to Admit such reports/information without the requirement of calling the author thereof. A failure to respond within 28 days is deemed a refusal to so admit.
 10. A Party in receipt of such report or such information can serve "A Notice of Admission" indicating his consent to the reception into evidence of such report or information without the authors thereof giving evidence.
 11. Similar provisions apply to proving the Special Damages as claimed and to proving payments received from the Department of Social Welfare.
 - 12 (i) Where an allegation of non-compliance is made a Motion for Directions may issue. On the hearing of such Motion, the Court may make such Order as the Justice of the case requires including an Order directing compliance with such requirements, an Order prohibiting "such evidence" being adduced at the trial of the action or indeed even an Order Striking out the Claim or the Defence, as the case may be.
- (ii) The Court may, in addition, if satisfied that the Solicitor in question has acted unreasonably or with undue delay order that Solicitor to personal-

ly bear the costs incurred as a result of his failure or delay.

- (iii) Furthermore, in respect of non compliance, the Court at any stage of the hearing has powers similar to those mentioned in paragraphs (i) (ii) above.
13. If any such report contains hearsay matters then the party objecting to the admission into evidence of such matters must make application to the Court, either prior to or at the trial of the action, seeking an Order excluding such matters from such reports and therefore from being received into evidence.
14. A party may in respect of any such report, make an Ex Parte Application to the Court seeking an Order that such report should not be disclosed as required by these rules. The Court may make such Order as appears just including an Order putting the other party to the proceedings on Notice of such application.
15. A Party, who has not complied with these rules, may on Motion seek the leave of the Court to adduce such evidence as has not been disclosed and the Court may respond by doing what is just in the circumstances.

It should be further noted that Section 45 of the Court and Court Officers' Act 1995 authorises the Rules Making Committee to make rules concerning certain disclosure on litigants to personal injury actions notwithstanding that the effect of such rules would be to remove or abrogate legal professional privilege from documents or information in the possession of a party to such litigation.

In the light of the wide ranging changes effected by the 1995 Act and these rules, members of the Bar are advised to carefully read and consider the same and to advise their client in the light of the new regime applicable to personal injuries cases. Copies of the Rules and the Act are available at the Issue Desk in the Law Library.

Practice Direction in relation to new Superior Court Rules for Personal Injury Actions

1. Rules of Court made under section 45 of the Courts and Courts Officers Act, 1995 (S.I., No. 348 of 1997) came into force on 1st September, 1997. They added Rules 45 to 52 to Order 39 of the Rules of the Superior Courts
2. These Rules place new obligations on plaintiffs in personal injury actions. New Rule 46(1) imposes an obligation to deliver to the defendants solicitors reports and statements obtained from medical and other experts within a stated period after service of notice of trial. The rule, however does not apply to pending actions in which Notice of Trial was served prior to the 1st June, 1997 because in such cases, compliance with the rule would not be legally possible. Secondly, new Rule 46 (2) places an obligation to deliver to the defendant's solicitor, inter alia, the names and addresses of witnesses intended to be called at the hearing and a full statement of special damages claimed with appropriate vouchers within a stated period after the case was first listed for hearing. This rule does not apply to actions which were first listed for hearing prior to the 1st of July, 1997 because compliance with the Rule would not be legally possible.
3. Where there has been non-compliance with the Rule in respect of actions in which Notice of Trial has been served after the 1st June, 1997, delivery of the statements or reports can be effected without the need to apply to the Court to extend the time for doing so. Where there is objection to disclosure of a statement or a report or any portion of a statement or report Rule 52 permits an ex-parte application for an order exempting compliance with the Rule.
4. In actions where the new Rules do not apply, the existing Practice Direction relating to the admission of medical reports without the necessity to adduce oral testimony continue to apply.

The Annual Report of the Health and Safety Authority, reviewed

James Nugent, SC

The 1996 Annual Report of the Health and Safety Authority published last July shows that there has been an minimal improvement in the number of workplace accidents which have been reported to the Authority. Fatal accidents have fallen from 78 in 1995 to 59 in 1996. The figures for non-fatal accidents are less impressive, 4,988 in 1995 and 4,805 in 1996.

These statistics are compiled from the accidents which are reported to the Authority. It is questionable whether these figures give an accurate picture of the actual number of workplace accidents. One's suspicions are roused when one reads the result of the labour force survey which reported that in 1996 the number of persons who had more than three days absence from work as a result of accidents at work was 18,800. The Labour Force Survey does not state that all of those 18,800 people who were absent from work in 1996 had their accidents in the same calendar year. Indeed, it is almost certain that many of them would have had their accidents in previous years.

Nonetheless, the figure given in the Labour Force Survey seems to make it highly likely that the actual number of workplace accidents are considerably in excess of the number of accidents reported to the Health and Safety Authority.

Whichever figure one takes, it is clear that there are literally thousands

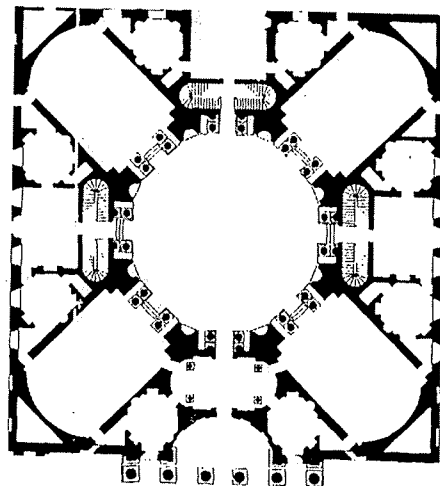
of people in this country, each year, who undergo quite unnecessary human suffering and deprivation and, in many cases, tragedy. Accidents at work are always unnecessary and need not happen. In an age when we have more knowledge, improved equipment, better education and more effective means of communication, workplace accidents numbered in thousands is totally unacceptable in a civilised society.

From the perspective of the practising barrister, two points arise. First, we have been repeatedly told that Employer Liability Insurance Prmia are an excessive burden on industry. We are also told that the way to lower the cost of this burden is to reduce the cost of litigation. Litigation is merely a symptom of a problem and is not the problem itself. The problem, itself, is workplace accidents. The elimination of such accidents (all of which are unnecessary and due to carelessness and ignorance) would eliminate litigation and, that in turn, will have a much more dramatic effect on Employer Liability Insurance Prmia than any tinkering around with the system for administering justice in our Courts.

The second point which must be made arising out of the report relates to the role of the Courts in prosecutions brought by the Health and Safety Authority. The Authority brought 35 prosecutions in 1996. The largest fine imposed by any Court was £2,600 and the next largest was £1,250. The average fine imposed was £726. When one considers that these prosecutions were brought in cases which involved seven deaths and a number of serious injuries (including limb amputation) one must ask whether the present prosecution system is adequate. One cannot comment on the circumstances of any particular case without knowing all the circumstances surrounding it. It seems, however, that the penalties imposed are not in proportion to the tragic results of the breaches of the legislation passed to protect the lives and wellbeing of the work force.

The one inescapable conclusion to which one is forced is, that all sectors of society, including the legal profession, must continue to be made aware of the size and gravity of the problem of people being killed and injured in the course of doing their days work.

The Report is available in the Law Library for interested members' reference.



A directory of legislation, articles and written judgments received from 19th July to 23rd September 1997.
 Judgment information compiled by the researchers in the Judges Library, Four Courts
 Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7

Administrative

Rizk v. Royal College of Physicians of Ireland

High Court: **Laffoy J.**
 27/08/1997

Judicial review; application for leave to apply; availability of remedy; education institution established by Royal Charter; whether decisions of institution amenable to judicial review; whether relationship between parties contractual; whether public law element to claim
Held: Judicial review refused; no jurisdiction to grant leave

Maigueside Communications Ltd. v. I.R.T.C.

High Court: **McGuinness J.**
 18/07/1997

Judicial review; fair procedures; legitimate expectation; radio licence competition; unsuccessful applicants seeking review of decision; whether legitimate expectation to have applications heard orally; selection procedure; whether fair procedures employed in selection process; whether I.R.T.C. had a duty to give reasons for decision; function of judicial review process; Radio and Television Act, 1988
Held: No requirement to give reasons for decision

Galvin v. Chief Appeals Officer

High Court: **Costello P.**
 27/06/1997

Oral hearing; estoppel; legitimate expectations; pensions; entitlement to Old Age Contributory Pension; conflict of fact as to whether requisite payments made; whether respondent obliged to hold oral hearing; whether respondent estopped from refusing to grant pension by virtue of letter representing he was entitled;

whether legitimate expectation
Held: Respondent obliged to hold oral hearing; no estoppel or legitimate expectation as no detriment and applicant not entitled by statute to benefit claimed

Bane v. Garda Representative

Association
 High Court: **Kelly J.**
 27/06/1997

Scope of judicial review; bias; judicial discretion; certiorari; challenge to expulsion of applicants from respondent association; whether respondent amenable to judicial review; whether bias; whether court should exercise discretion to quash expulsion
Held: Certiorari granted; expulsion quashed

Statutory Instruments

Ethics in public office (prescribed public body, designated directorships and designated positions in public bodies) (amendment) regulations, 1997
 S.I.310/1997
 Commencement date: 15.1.97

Explosives act, 1875 (transfer of departmental administration and ministerial functions) order, 1997
 S.I.272/1997
 Commencement date: 19.6.97

Public service management act, 1997 (commencement) order, 1997
 S.I.339/1997
 Commencement date: 1.9.97

Seanad (university members) general election (special difficulty) order, 1997
 S.I.312/1997
 Commencement date: 15.7.97

Statistics (delegation of ministerial functions) order, 1997

S.I.327/1997
 Commencement date: 22.7.97

Agriculture

Statutory Instruments

European Communities (introduction of organisms harmful to plants or plant products) (prohibition) (amendment) (no 2) regulations, 1997
 S.I.289/1997
 Commencement date: 3.7.97

European Communities (seed of fodder plants) (amendment) (no 2) regulations, 1997
 S.I.356/1997
 Commencement date: 25.8.97

Waste management (farm plastics) regulations, 1997
 S.I.315/1997
 Commencement date: 1.8.97

Company

Southern Mineral Oil Ltd. v. Cooney
 Supreme Court: **Keane J., Lynch J., Barron J.**
 22/07/1997

Fraudulent trading claim; limitation period; application to strike out claim; whether claim should be struck out on grounds of delay; whether delay on part of liquidator inordinate and inexcusable; whether delay an abuse of process; whether application brought within limitation period; discretion of court; possibility of fair trial; whether liquidator and revenue commissioners entitled to bring action in name of company;
 ss.297 & 298 Companies Act, 1963
Held: Relief refused; no delay on part of liquidator

Edenfell Holdings Limited, In re High Court: **Laffoy J.**
30/07/1997

Receiver; duty of care; sale of property; two interested parties; agreement by receiver to sell property to one party for sum including discharge of appeal by third party; whether receiver exercised all reasonable care to obtain best price available for property at time of sale; s.316A, Companies Act, 1963

Held: Failure to exercise all reasonable care; sale set aside

Greendale Developments Ltd., In re High Court: **Laffoy J.**
28/07/1997

Compulsory winding up; in camera hearing; administration of justice; application for directions by liquidator; leave sought to continue legal proceedings; s.231 Companies Act, 1963; whether application for directions can be heard in camera; whether giving of directions by Court constitute administration of justice; whether directions an administrative function; characteristics of administration of justice; justice to be administered in public; test of administration of justice applied

Held: Application to be heard in public

McQuaid v. Malone
High Court: **Laffoy J.**
02/07/1997

Winding up; leave to counter-claim; injunction restraining reduction of assets in liquidation; plaintiff seeking recovery of money from defendants on behalf of company; defendants seeking to set off monies allegedly due by company to them; whether defendants entitled to leave to counter-claim under s.222, Companies Act, 1963; whether defendants entitled to injunction restraining plaintiff from reducing surplus assets
Held: Second defendant not entitled to leave to counter-claim as position same as unsecured creditor in winding-up; injunction refused as defendants represented on Committee of Inspection

New-Ad Advertising Co. Ltd., In re High Court: **Costello P.**
01/07/1997
Petition; oppression; minority shareholder;

relief available; oppressive conduct established; director disregarded interests of minority shareholder; definition of oppression; appropriate relief; whether director should buy petitioner's shares; whether winding up should be ordered; value of shares; s.205 Companies Act, 1963

Held: Director to purchase petitioner's shares

Competition

Channelle Veterinary Ltd. v. Pfizer (Ireland) Ltd.
High Court:
30/07/1997 **O'Sullivan J.**

Distribution system; agreement; concerted practice; dominance; inter-state effect; termination of distribution arrangement; whether breach of ss. 4 and 5 Competition Act, 1991; whether decision to de-list plaintiff company constituted an agreement or concerted practice; whether decision was a unilateral act; whether agreement/ concerted practice anti-competitive; whether selective distribution; abuse of dominance; relevant market; interpretation of s.4 of 1991 Act; abuse of confidential information

Held: Claims dismissed; no breach of ss. 4 and 5 Competition Act, 1991

Conflict of Laws

O'Keeffe v. Top Car Ltd.
High Court: **Flood J.**
02/07/1997

Jurisdiction; multiple defendants; claim for breach of contract and tort; first defendant domiciled within the State; second defendant domiciled in Scotland; proceedings instituted pursuant to Art. 6(1) Brussels Convention; whether connection between two actions; whether Irish courts have jurisdiction to determine claim against second defendant; whether expedient to determine two actions together; necessity of an Art. 177 reference under the Treaty of Rome

Held: No jurisdiction to determine action against second defendant; claim struck out

Constitutional

McDonnell v. Ireland
Supreme Court: **Hamilton C.J., O'Flaherty J., Barrington J., Keane J., Barron J.**
23/07/1997

Breach of constitutional rights; limitation period; post office worker convicted of paramilitary offences; automatic forfeiture; dismissed pursuant to legislation subsequently found to be invalid; whether plaintiff entitled to damages for breach of constitutional rights; whether claim statute barred; whether tortious action; misfeasance of public office; policy considerations; whether plaintiff an established civil servant

Held: Claim statute barred

D.G. v. Eastern Health Board
Supreme Court: **Hamilton C.J., O'Flaherty J., Denham J.*, Keane J., Murphy J.**
(* dissenting)
16/07/1997

Juvenile; interlocutory detention order; validity; minor sent to penal institution; whether High Court has an inherent jurisdiction to order detention of child in a penal institution; constitutional rights of child; welfare of child; needs and character of child; duration of detention; Child Care Act, 1991

Held: Appeal dismissed; detention order upheld

Considine v. Shannon Regional Fisheries Board
Supreme Court: **Hamilton C.J., O'Flaherty J., Barrington J., Keane J., Murphy J.**
* Decision of the Court delivered by **Hamilton C.J.**
05/06/1997

Legislation; constitutional validity; right to trial in due course of law; whether s.310 Fisheries (Consolidation) Act, 1959 repugnant to Constitution; whether appeal can lie from dismissal of a criminal charge; double jeopardy; whether legislature can provide for such an appeal; Art. 34.3.4 of the Constitution

Held: Legislation not repugnant to Constitution

Cully v. Governor of Portlaoise Prison
High Court: **Kelly J.**
18/06/1997

Habeas corpus inquiry; release and re-arrest; whether arrest on prison property valid; whether failure to prove direction by D.P.P. that applicant be charged before Special Criminal Court; whether Special Criminal Court entitled to substitute new charge for charges extant before the Court

Held: Detention valid; application for release dismissed

Duncan v. Governor of Portlaoise Prison

High Court: **Kelly J.**
09/06/1997

Habeas corpus inquiry; release and re-arrest; whether arrest of person already in custody lawful; whether conspiracy to keep applicants in unlawful custody; whether sub poena directed to Attorney General could be set aside on basis that evidence would be protected by legal professional privilege

Held: Arrest lawful; no conspiracy; sub poena set aside

Contract

Sullivan v. Southern Health Board
Supreme Court: **Murphy J., Lynch J., Barron J.**
30/07/1997

Breach of employment contract; express and implied terms; damages; whether breach of express terms of contract; plaintiff employed as medical consultant by hospital board; whether board in breach of duties under contract; failure to provide proper resources for plaintiff; failure to appoint second consultant; whether implied term to appoint a second consultant permanently; assessment of damages; special and general; tax liability

Held: Appeal allowed; defendant in breach of contract; re-trial ordered on issue of damages

Forshall v. Walsh
High Court: **Shanley J.**
18/06/1997

Misrepresentation; fraudulent misrepresentation; negligent misrepresentation;

plaintiffs allegedly advanced money to defendants for purchase of motor cars; plaintiffs never received cars or money back; whether defendants fraudulently or negligently represented to plaintiffs concerning ownership of companies, existence of dealerships and/or financial standing of companies; whether bank vicariously liable for representations of employee

Held: Negligent misrepresentation by certain defendants; bank vicariously liable for misrepresentation by employee; fraudulent misrepresentation by certain defendants; damages awarded

Criminal

Killeen v. D.P.P.
Supreme Court: **Denham J., Keane J., Lynch J.**
24/07/1997

Warrant; defect; certiorari sought; indictable offence; fraud; incorrect section in warrant cited; whether warrant valid; whether defect entitled applicants to be discharged; jurisdiction of District Judge; whether error of law committed within jurisdiction; procedure for examination of indictable offences in District Court; whether sufficient evidence to send the accused forward for trial; Larceny Act, 1916; Criminal Procedure Act, 1967

Held: Certiorari granted; error of law committed outside jurisdiction

D.P.P. v. J.D.
Central Criminal Court: **Flood J.**
29/07/1997

Sentencing; paedophilic acts; accused found guilty of sexual assault and rape; child victims; whether accused should receive a custodial sentence; factors to be taken into consideration; admission of guilt

Held: Custodial sentence imposed; accused to receive sexual therapy

P.C. v. D.P.P.
High Court: **McGuinness J.**
24/07/1997

Child sexual abuse; order of prohibition sought; delay in instituting proceedings; lack of specificity in charges; whether

right to speedy trial; whether delay interferes with accused's constitutional right to a fair trial; balancing of constitutional rights; whether delay can be negated by dominion; factors to be taken into consideration

Held: Order of prohibition granted

Minister for Agriculture, Food and Forestry v. Judge Brennan
High Court: **Carroll J.**
11/07/1997

Procedure; District Court; jurisdiction; European Communities (Control Veterinary Medicinal Products and their Residues) Regulations, 1988 and 1990; mandamus sought to direct respondent to hear and determine charges against notice party; respondent had struck out charges on basis that he lacked jurisdiction as regulations in question were null and void in entirety; whether regulations had been found null and void in entirety by previous High Court decision

Held: Respondent required to hear and determine charges; regulations not found null and void in entirety by previous decision

P.D. v. D.P.P.
High Court: **McCracken J.**
19/03/1997

Indecent assault charges; child sexual abuse; delay; whether delay in bringing claim reasonable; constitutional right to trial with reasonable expedition; whether defendant would obtain a fair trial; onus of proof; test to be applied; special circumstances of case; principle of dominion; Arts. 38.1 and 40.3 of Constitution

Held: Delay reasonable in circumstances of case

J. v. D.P.P.
High Court: **Barron J.**
21/02/1997

Sexual offences; delay; prohibition; applicant engaged in counselling following allegations of sexual assault by daughter; long delay between end of counselling and initiation of prosecution following making of formal complaint; whether prosecution of applicant unfair

Held: Prohibition refused; counselling and prosecution distinct and not mutually exclusive; no unfairness

D.P.P. v. Dempsey

High Court: **Kinlen J.**
02/02/1997

Dismissal of charges; defendant charged with road traffic offences; failure by Gardai to make custody records available; breach by Gardai of Art.24(2), Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987; non-observance of the requirements of natural justice; whether trial judge entitled to dismiss the charges

Held: Trial judge entitled to exercise his discretion and dismiss the charges

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Damages

Golden v. Cahill

High Court: **Flood J.**
29/07/1997

Negligence; personal injury; motor car collision; extent of injuries; assessment of damages; general and special damages; distress and pain; interference with enjoyment of life; loss of earnings

Held: General and special damages awarded

Education

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Community law
London Athlone Press
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Employment

Frizelle v. New Ross Credit Ltd.

High Court: **Flood J.**
30/07/1997

Unfair dismissal; alleged misconduct; grounds for dismissal; manager of credit union; mortgage re-payments on own house; whether engaged in dishonest transactions; whether substantial ground to justify dismissal; appropriate remedy; Unfair Dismissals Act, 1977

Held: No substantial ground to justify dismissal; compensation awarded

Courtenay v. Radio 2000 Ltd.

High Court: **Laffoy J.**
22/07/1997

Interlocutory injunction; radio presenter; dismissed from employment; injunction sought to prevent employer terminating contract of employment; whether fair issue to be tried; whether dismissal lawful; conduct of plaintiff; fair procedures; natural and constitutional justice; whether substantial ground justifying dismissal; adequacy of damages; balance of convenience

Held: Injunction refused; entitled to pay until trial of action

Brides v. Minister for Agriculture, Food and Forestry

High Court: **Budd J.**
21/07/1997

Equality; equal pay; comparator; female applicants employed by respondents paid less than males engaged in like work by statutory body; whether applicants and comparators employed by same employer; whether employed by associated employer under same terms and conditions; s.2, Anti-Discrimination (Pay) Act, 1974; whether reference under Art. 177, Treaty of Rome appropriate

Held: Applicants not employed by same or associated employer as comparators; Art. 177 reference not necessary

Harte v. Kelly

High Court: **Laffoy J.**
16/07/1997

Termination; injunction; directors; interlocutory injunction restraining dismissal; plaintiff contesting dismissal; fair issues to be tried; whether damages an adequate remedy; whether plaintiff should be restored to directorship pending trial; s.182, Companies Act, 1963

Held: Injunction granted restraining dismissal; order restoring plaintiff to directorship refused.

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Employment regulation order (hairdressing joint labour committee), 1997
S.I.354/1997

Commencement date: 1.9.97

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S.I.273/1997

Commencement date: 1.7.97

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S.I.274/1997

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European Communities (training for drivers of vehicles carrying dangerous goods by road) regulations, 1997
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Commencement date: 10.7.97

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S.I.260/1997

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S.I.271/1997

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Barrett, Gavin

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European Communities

McBride v. Galway Corporation

High Court: **Quirke J.**
31/07/1997

Judicial review; planning; exempted development; European directives; Special Protection Area; Environmental Impact Statement; judicial review of sewage system development on foreshore; whether lease/licence granted for development lawful; whether respondent complied with EC Council directives on Conservation of Wild Birds, Environmental Impact Assessment and Habitats; whether directives had direct effect; whether directives applied to pipeline projects
Held: Reliefs refused

Statutory Instrument

European Communities (introduction of organisms harmful to plants or plant products) (prohibition) (amendment) (no 2) regulations, 1997
S.I.289/1997
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Evidence

O'Loire v. The Medical Council
Supreme Court: **Hamilton C.J., O'Flaherty J., Denham J., Barrington J., Murphy J.**
25/07/1997

Evidential burden; standard of proof; allegations of professional misconduct; neurosurgeon failed to treat patients; suspended from practice; allegations of professional incompetence by applicant against other medical professionals; appropriate standard of proof to be applied; criminal standard of proof; beyond all reasonable doubt; whether onus on applicant to establish truth of allegations made by him; whether trial judge correct in law in holding that the evidential burden on respondent was modified; s.45 Medical Practitioners Act, 1978
Held: Appeal dismissed

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Extradition

O'Sullivan v. Conroy
High Court: **Barr J.**

31/07/1997

Fair procedures; application under s.50, Extradition Act, 1965; extradition to stand trial in England for offence of conspiracy to defraud; whether conditional admissibility of evidence contrary to Irish fair procedures; whether excessive lapse of time
Held: No unfair procedures; no excessive lapse of time

Family

D.C. v. N.M.

High Court: **Geoghegan J.**
26/06/1997

Nullity; petition; validity of marriage; grounds for nullity; whether undue influence exerted by parents on parties to get married; whether husband under undue pressure by respondent as a result of pregnancy; whether parental consent given; petitioner unaware of absence of consent; s.19 Marriages (Ireland) Act, 1844; whether marriage invalid if consent forged
Held: Nullity refused

C.D. v. W.D. & Barclays Bank Plc.

High Court: **McGuinness J.**
05/02/1997

Matrimonial property; beneficial interest; direct/ indirect contributions of wife; farm land held in husband's sole name; bank charge on lands; land not part of family home; whether wife entitled to beneficial interest in farm lands due to indirect contributions to family home; whether wife acquired interest in farm land; s.12 Married Women's Status Act, 1957; whether such interest takes priority over bank charge on lands; whether trust can be inferred as a result of direct/indirect contributions; distinction between interest and property adjustment order
Held: Claim dismissed; no beneficial interest in farm lands

Statutory Instrument

Amalgamation of marriage registrars' districts order, 1997
S.I.296/1997
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Adoption, consent and the constitution
Noctor, Cathleen
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Fisheries

Guiry v. Minister for the Marine
High Court: **Laffoy J.**
24/07/1997

Bye-law; validity; appeal; whether bye-law should be confirmed or annulled; regulation of salmon fisheries; quota system; restraints on duration of fishing season; whether restraints excessive; whether bye-law expedient for the more effectual government, management, protection and improvement of fisheries; whether Minister acted ultra vires; whether Minister failed to take account of Report of Task Force; proportionality of measure; infringement of constitutional rights; right to earn a livelihood; property rights; Art. 40.3 of the Constitution; s.9 Fisheries (Consolidation)
Act, 1959; Bye-law No. 729, 1997
Held: Bye-law confirmed; no infringement of constitutional rights

Statutory Instrument

Merchant shipping (registry, lettering and numbering of fishing boats) regulations, 1997
S.I.294/1997
Commencement date: 1.8.94

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Injunctions

Lough Neagh Exploration Ltd. v. Morrice
High Court: Laffoy J.
08/08/1997

Interlocutory and mandatory injunctions sought; mandatory injunction sought relating to discovery of documents and tapes; whether tapes confidential; whether exceptional circumstances to justify granting mandatory injunction; order sought to restrain Minister from granting petroleum prospecting licence; whether fair issue to be tried between parties; whether balance of convenience arises where breach of restrictive covenant exists; whether plaintiff guilty of delay; whether damages an adequate remedy
Held: Reliefs refused

Insurance*Article*

Business protection - benefits and taxation position
9(1997) ITR 371

Intellectual Property

Gormley v. EMI Records (Ireland) Ltd.
High Court: **Costello P.**
30/07/1997

Copyright; plaintiff's recital of biblical story recorded by school teacher; recording used by defendant; whether oral recitation of a biblical story a literary work; whether plaintiff could be regarded as the author of an original literary work
Held: Claim dismissed; recital of story not a literary work; plaintiff not the author of an original literary work

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Legal Profession*Statutory Instrument*

Solicitors acts, 1954 to 1994 (apprenticeship and education) regulations, 1997
S.I.287/1997
Commencement date: 1.7.97

Local Government

Smeltzer v. Fingal County Council
High Court: **Costello P.**
13/08/1997

Injunction; extinguishment of public rights of way; plaintiff seeking to restrain construction of a county hall in town park; whether defendant held site on trust for the public's benefit; whether public right of way existed over paths in the park; whether defendant had notified and consulted public as required by s.73 Roads Act, 1993
Held: Defendant prohibited from effecting proposed development pending compliance with s.73

Negligence

Lopes v. Walker
Supreme Court: **Murphy J., Lynch J., Barron J.**
28/07/1997

Professional misconduct; negligence; road traffic accident; damages awarded to plaintiff; claim against defendant solicitor; whether defendant negligent in the pleading, preparation and presentation of plaintiff's case; assessment of damages prior to medical report; appropriate court; whether case should have been remitted to High Court; loss of earnings not raised; whether medical

evidence supported the claim for not pleading loss of earnings; bias; perjury
Held: Appeal allowed; case remitted to High Court on issue of damages

O'Connor v. Cafferkey Developments Limited

High Court: **Flood J.**
 29/07/1997

Personal injury; workplace accident; plaintiff fell from mast of forklift truck; whether plaintiff authorised to carry out task involved; whether plaintiff failed to utilise plant and equipment readily available; whether plaintiff used inappropriate mode or method

Held: Defendant negligent; 15% contributory negligence of plaintiff

Reid v. Beaumont Hospital Board

High Court: **Johnson J.**
 18/07/1997

Medical negligence; personal injuries; damages; brain operation; interview with neuro-surgeon concerning dangers of operation; whether plaintiff gave informed consent to operation; whether neuro-surgeon failed to indicate risks involved; whether sufficient information given to plaintiff; whether breach of duty in failing to hold second interview with plaintiff; failure to follow invariable practice; balance of probabilities
Held: Claim dismissed; no negligence found

Duffy v. Rooney

High Court: **Laffoy J.**
 23/06/1997

Personal injury; liability; fire accident; infant visiting grandparents; clothes of child caught fire; whether first defendant in breach of duty of care; failure to notice open fire unguarded; whether first defendant vicariously liable for plaintiffs injuries; whether second defendant in breach of standard of care in failing to affix warning label to garment; material of coat highly flammable; standard of care required; causal link between absence of warning label and injuries sustained; assessment of damages
Held: First defendant found wholly liable; second defendant in breach of duty in failing to affix warning label to coat; damages awarded

Collins v. Mid-Western Health Board

High Court: **Johnson J.**
 14/05/1996

Medical negligence; medical procedures; deceased not referred by doctor for further investigation following initial complaint; deceased not initially admitted to hospital as emergency despite letter from doctor; deceased died following lumbar puncture; whether negligence in non-referral, in non-admission and/or in administration of lumbar puncture

Held: Claim dismissed; no negligence

Pensions

Article

Small self-administered pension schemes
 Keaveney, Maura
 9(1997) ITR 376

Planning

Article

Vulnerable landscapes and the inadequacy of the Irish planning acts
 Dillon, Sara
 1996 DULJ 102

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 McGrath, Declan
 1996 DULJ 1

Practice and Procedure

Murray v. Times Newspapers Ltd.

Supreme Court: **Hamilton C.J., Barrington J., Murphy J.**
 29/07/1997

Application to strike out; contest to jurisdiction; delay in moving to strike out; libel action; proceedings instituted pursuant to Art. 5(3) Brussels Convention; place where harmful event occurred; libel published outside state; whether qualified appearance should be entered to contest jurisdiction; whether defendants mistakenly submitted to jurisdiction by entering an unqualified appearance; whether right to strike out claims outside ambit of Art. 5(3) forfeited due

to delay; whether claim for damages should be struck out; whether shareholder can claim for damages suffered by company

Held: Order granted to strike out claims based on libel published outside jurisdiction; damages claim not struck out

Conlon v. Times Newspaper Ltd.

Supreme Court: **Murphy J., Lynch J., Barron J.**
 28/07/1997

Interrogatories; leave sought to deliver interrogatories; libel action; whether interrogatories relevant to issues in case; O. 31, r.1 Rules of the Superior Courts
Held: Leave granted to deliver all interrogatories save one

Doe v. Armour Pharmaceutical Inc.

High Court: **Morris J.**
 31/07/1997

Application to strike out claim; jurisdiction of court; negligence action; contaminated blood products; whether court has inherent jurisdiction to discontinue proceedings; whether injustice would result in refusal; whether plaintiff could succeed; O.19, r.28 Rules of the Superior Courts

Held: Relief refused

O'Connell v. Ireland

High Court: **Geoghegan J.**
 31/07/1997

Locus standi; challenge to constitutionality of stamp duty in court proceedings; proceedings disposed of; whether applicant entitled to challenge constitutionality

Held: No locus standi as proceedings already disposed of

Blascaod Mor Teoranta v. Commissioners of Public Works

High Court: **Budd J.**
 01/07/1997

Statutory interpretation; s.4(4), An Blascaod Mor National Historic Park Act, 1989; whether plaintiff entitled to use Bill as introduced to assist interpretation of Act as enacted

Held: Court entitled to consider Bill

Dawson v. Irish Brokers Association

High Court: **Moriarty J.**
 23/06/1997

Discovery; lodgement; defamation proceedings; retrial on question of damages ordered by Supreme Court; whether defendant entitled to discovery and/or particulars of damage suffered in absence of claim for special damages; whether defendant entitled to make lodgement with amended defence following Supreme Court decision; O. 22, Rules of the Superior Courts
Held: Defendant entitled to discovery and particulars; defendant entitled to make lodgement

M.(M) v. D.(D)

High Court: **Moriarty J.**
10/12/1996

Discovery; order sought; details of property and sources of income covering ten year period; relief sought pursuant to s.9 Proceeds of Crime Act, 1996; whether relief sought offends against hearsay rule; standard of proof required; requirements of natural justice; whether offends against privilege against self-incrimination; constitutionality of s.9; retrospectivity of act

Held: Discovery order granted; maximum ten years not applied

Article

The treatment of jurisdictional errors in international litigation before the Irish courts

Newman, Jonathan
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Statutory Instrument

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Commencement date: 10.7.97

Succession

Library Acquisition

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Belfast SLS
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Taxation

Revenue Commissioners v. Young
Supreme Court: **Barrington J., Murphy J., Lynch J.**
31/07/1997

Capital acquisitions tax; valuation; inheritance tax assessment; discretionary trust; company shares included in trust; tax avoidance scheme; method of assessing market value of shares; whether iopen market value applicable or market value of sum payable in a voluntary liquidation; ss. 16 & 17 Capital Acquisitions Tax Act, 1976
Held: Appeal dismissed; valuation of shares correct

McCabe v. South City and County Investment Company Ltd.
Supreme Court: **Murphy J., Lynch J., Barron J.**
30/07/1997

Corporation tax; annuity sums; whether periodic payments chargeable to corporation tax; whether annuity income or capital receipt; nature of transaction; interpretation of tax statutes; s.53 Income Tax Act, 1967
Held: Annuity payments chargeable to tax

P.W.A. International Ltd. v. Commissioner of Valuation
Supreme Court: **Hamilton C.J., O'Flaherty J., Murphy J.**
22/07/1997

Valuation; plant and machinery; rateable plant; whether furnace and box oven constitute plant; whether items ifixed machinery; whether court can interfere with decision of valuation tribunal; s.7 Valuation Act, 1986
Held: Items not rateable plant

Statutory Instruments

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Commencement date: 1.9.97

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S.I.316/1997
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Telecommunications

Statutory Instruments

Telecommunications (amendment) (no
5) scheme, 1997
S.I.318/1997
Commencement date: 17.7.97 and
28.7.97

Tort

Royal Dublin Society v. Yates
High Court: **Shanley J.**
31/07/1997

Trespass to land; intimidation; nuisance;
defamation; defendant member of plain-
tiff society; numerous incidents involv-
ing defendant and employees of the
plaintiff on plaintiff's grounds; defen-
dant purportedly expelled from plaintiff

society; whether trespass by defendant to
plaintiff's lands; whether intimidation of
plaintiff by defendant; whether nuisance
of plaintiff by defendant; whether defen-
dant defamed by members and officers of
plaintiff; whether intimidation of defen-
dant by employees of plaintiff; whether
expulsion of defendant invalid due to
flawed procedures

Held: No trespass to land while defen-
dant a member of plaintiff society; plain-
tiff unable to bring proceedings in
respect of alleged intimidation commit-
ted on its servants or agents; nuisance by
defendant; no defamation or intimidation
of defendant; expulsion invalid

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At a Glance

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plants) (amendment) (no 2)
regulations, 1997
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Commencement date: 25.8.97

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vers of vehicles carrying dangerous
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Government Bills in Progress

Europol bill, 1997 - 1st stage - Dail

15 New Senior Counsel Appointed

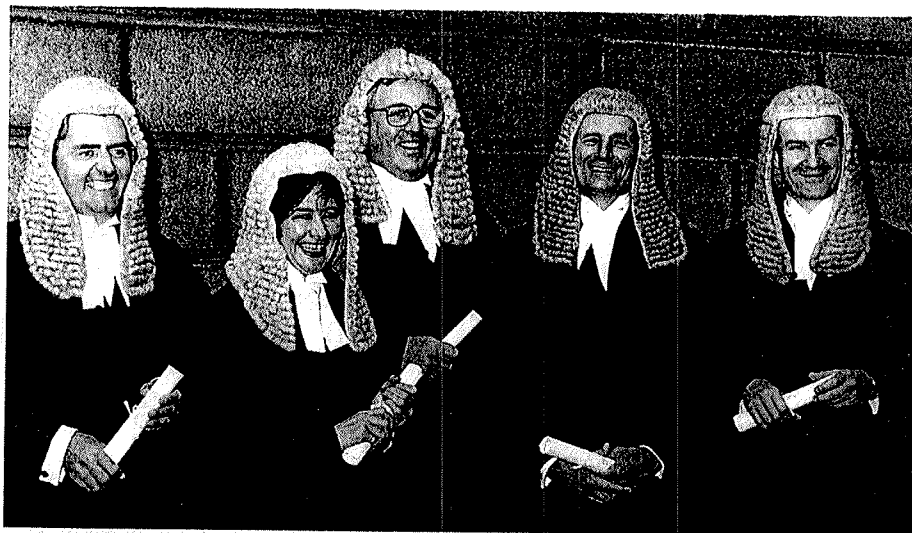
Congratulations to the following who were appointed Senior Counsel on Friday, 3rd October, 1997



Brian Lenihan, SC, Gerard Hogan, SC, Gerardine Connolly, SC, Margaret Nerney, SC and John McBratney, SC.



Tony Aston, SC, John Phelan, SC, Michael O'Donoghue, SC, Kevin Cross, SC and Gerry Danaher, SC.



Edward Walsh, SC, Bernadette Cronin, SC, Eamon Leahy, SC, Bruce Antoniotti, SC and Michael Counihan, SC.

King's Inns News

A special dinner has been arranged for Friday, 17th October in the Kings Inns to allow members and their guests sample the new fare which is now on offer following substantial changes to the kitchen facilities and dining services.

Mrs. Frances Redmond of the Campbell Bewley group has overseen the changes which have been greatly helped by the investment in new kitchens. With improved facilities for dining now available it is hoped that the Inns will be frequented by members on a more regular basis, by those working late in the Law Library or by those wishing to entertain



family and friends. The special dinner on the 17th October is an invitation to members to try out the new service for themselves. Booking for the dinner, which costs £27.00 per person, can be made through Peter Brien.

Dining Terms

Michaelmas, 1997 - 28th October to 24th November

Hilary, 1998 - 12th January to 6th February

Easter, 1998 - 20th April to 1st May

Trinity, 1998-10th June to 23rd June
Michaelmas, 1998 - 27th October to 23rd November

Benchings during Michaelmas, 1997

In Michaelmas, 3 people will dine as benchers for the first time, as follows:

Mr. Justice Quirke - Friday, 31st October, 1997

Mr. Justice O'Higgins, - Friday, 7th November, 1997

Mr. Justice O'Sullivan - Friday, 14th November, 1997

Guest nights take place on Wednesdays and Fridays during dining term, except for those Fridays on which benchings are being held, when only barristers are invited to attend.

Dinner at The Honorable Society of King's Inns

A Special Dinner for Benchers and
Barristers (3 guests per barrister)
has been arranged for
Friday 17th October 1997
at 7.30pm for 8.00pm

Price: IR£27.00 (four courses pre-dinner, drink and wine)

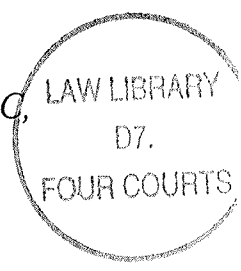
Barristers' bookings: Peter Brien

Tel: 872 0622

Hearing Loss in The Army

Mr. Vivion Kelly, ENT Consultant

*responds to an article on hearing loss cases by Mr. Alan Mahon, SC,
published in the Bar Review, June 1997*



In response to the article by Mr. Alan Mahon S.C. in *The Bar Review* June 1997. I would like to clarify several points as it pertains to Audiology. For the past two years I have been asked to see and assess soldiers claiming compensation from the State. I feel it is appropriate to explain the scientific basis of my evidence given in these cases.

No research on noise induced hearing loss (NIHL) has ever been carried out in this country. Opinion then, must be based on scientific data from research carried out in other countries. This is so especially as to how hearing loss affects the ability to hear speech, in a background of noise.

It has been pointed out in the English medical literature that "an expert when giving evidence must state the reasons for his opinions and how they were reached and by what criteria their conclusions can be tested". To give an opinion for instance at a medical meeting without being able to support it with the relevant literature would not be acceptable. Audiology is no different.

Hearing loss and Hearing Handicap

Generally we refer to someone as being deaf when they have difficulty in understanding speech. One definition of deafness, or more correctly hearing impairment, is 'hearing outside the range of normal'. The frequency range of hearing is vast. It extends from 20 Hertz (Hz) to some 20,000 Hz. However, the range for the understanding of speech is much more limited and within this range some frequencies are far more important than

others. One can have normal hearing for speech and yet have a hearing impairment outside the speech range.

In order to overcome this dilemma the term 'hearing handicap' was introduced. It is the disadvantage which occurs as a result of a hearing loss. One can therefore have a hearing impairment without necessarily having a hearing handicap. In most jurisdictions compensation is based not on hearing loss but on hearing handicap and hearing disability. Ireland is the exception.

What is a formula for?

If we look at countries such as Canada, US, UK, Australia, Denmark Germany and Austria for example, we see that they use a formula for the assessment of hearing handicap. It is salutary to ask why other countries use a formula. Formulae are used to measure in percentage terms the hearing handicap based on the hearing loss. This is based on the principle as to what difficulty, if any, a person will have in everyday conversation in the normal daily background of noise. The two formulae most commonly used are those of the American Medical Association (AMA) and the UK. I would like to discuss both formulae. First, the AMA as it is the one favoured by the majority of ENT surgeons in Ireland and is also used in Canada, Denmark, Iran, Brazil Japan, Italy and Israel. Then the UK as it was recommended to the Irish Army by their then ENT consultant.

The AMA formula was first produced in 1929. The present formula was described in 1960¹. It used the frequencies of 500, 1,000 (1k), and 2,000 (2k), as

these correspond to the speech in a quiet background. It was criticised, as it did not allow for any loss for the higher frequencies. (Most noise-induced loss is for higher frequencies). As a result 22 experts including 16 ear specialists, and four Professors of Audiology looked again at the formula. They are among the top specialists in their field and are internationally recognised for their research. They decided to leave the formula alone, *but in order to allow for any difficulty in hearing in a background of noise* that the frequency of 3k be included in the formula². This has remained unchanged since 1979. I mention this because as Mr. Mahon knows³, it has been stated in Court that the AMA formula keeps changing and that it does not go above 2,000. As noted it does go to 3k and as we will see the present British formula also stops at 3,000.

The aim of the American study was to produce a formula "to understand everyday speech adequately... the concept is everyday speech and this implies the value of contextual clues and the careless way that people speak. There is a great deal of redundancy if we are talking about everyday speech and not about the unexpected message, the unfamiliar proper name or the important telephone number"⁴.

Most of the original research of the understanding of speech was done by the Bell telephone engineers interested in knowing what frequencies were required to be transmitted in order to understand speech on the telephone. They found that in order to understand sentences it was not necessary to hear above 1,700 Hz. The telephone does not carry any frequency to 4,000 Hz The telephone does not carry any frequency to 4,000 Hz.⁵

There are a number of British systems as shown

System	Frequencies	Onset of disability
British Standards Institute (1976)	1,2, and 3k Hz	30 dB.
Department of health and Social Security (for pension disability) 1978	1,2,and 3k Hz.	30Db.
British Army	1,2,and 3k Hz	40Db.
BAOL/BSA(1983) recommended was overruled and	Recommended 1, 2, and 3kHz 1,2, and 4 k Hz	20dB
BAOL/BSA (1993)	1,2 and 3kHz	
World Health Organization (WHO)	0.5,1,and2k	25dB
British Association of Otolaryngology (1973)	1,2, and 3k Hz	40dB
Table of UK systems		

The British specialists decided in their recommendations that it be based on scientific data. The aim was "The effect of auditory impairment on everyday hearing ability, as indicated by the ability to comprehend *speech in everyday conditions, noting that these frequently include low level or unclear speech and a background of noise.*⁶ They concluded that the frequencies of 1,2 and 3K were the frequencies that corresponded best (from a number of combinations) to self assessed disability. In other words, they looked at the different combinations of frequencies such as 0.5, 1,2 3, and 4 k or 0.5,1,2,3,4,6 k before selecting the above three frequencies for their 1993 report.

It will be seen then that neither the British nor the American systems go to 4k. It has been suggested that the frequency 4k be included in the frequency range. If we were to substitute 4k instead of 3k it would not alter the formula to any significant degree as hearing loss seldom takes a precipitous drop at 4k. Loss involves 3k, 4k and 6k we would in addition not be using any internationally accepted formula.

Faced with the fact that all audiological systems stopped at the 3k frequency and because of the differing systems in the UK the majority of the Irish ENT consultants agreed that the AMA system be used.

Tinnitus and Background of Noise.

The two most common complaints of soldiers seeking compensation are Tinnitus and difficulty in hearing in a background of noise.

The incidence of tinnitus claimed by the soldiers is 95%. By comparison the incidence in soldiers with a hearing loss in Sweden is 35%.⁷ There was a clear correlation between the intensity of the tinnitus and the level of hearing loss. The Irish figure is by far the highest reported anywhere in the world. Tinnitus from noise exposure does not occur without some hearing loss⁸ and then, if it occurs tends to increase pro rata with the loss.

Difficulty in a background noise:

- We normally hear speech in a background of noise. This will vary depending on several factors including both the level of noise and the reverberation time. Most soldiers complain that although they hear fine on a one to one basis they have difficulty in a background of noise.
- As I noted above, the telephone does not go to 4K. Yet anyone can verify that even for sibilants, which are at the highest frequency range for speech,

you will find that they are quite audible. In effect we all have a "loss" above 3k when we are on the telephone.

- I have compared 25 soldiers with 25 non-claimant males, referred for assessment of hearing loss. They were matched for the same age and the same hearing loss. All the soldiers complained of tinnitus and difficulty in hearing in noise. By comparison only one of the non claimants had any tinnitus or any difficulty with background noise. (Two non claimants gave a history of shooting as a hobby)
 - I wrote to several centres noted for their audiological excellence enquiring "what difficulty would one expect in hearing in a background of noise if there is a loss at 4k usually between 25 and 55 dB with a lesser loss at 3k and 6k"? It was the unanimous opinion that such a loss for 4k would have little if any effect on the hearing for speech in noise.
 - As regards difficulty in hearing in a background of noise as noted above, both the British and the American systems were chosen specifically to allow for the understanding of speech in a background of noise. Both the Americans and the British scientists (the latter twice, 1983 and 1993) recommended 3k as the upper limit in their systems.
- If the best Audiological authorities in Britain, Canada and the States agree that 3k should be the upper limit for the assessment of hearing handicap I believe this is sufficient especially as no study has ever been carried out in Ireland.
- 5% of patients seen in ENT clinics in the UK report difficulty in hearing in a background of noise and yet have normal hearing. They have been referred to as having an auditory inferiority. Over 10% of soldiers claiming difficulty in hearing in a background of noise have normal hearing
 - Professor W. Ward Dixon, one of the most eminent in the field of Audiology stated that a loss at the 4K frequency cannot be noticed unless it

is in one ear in which case it may be noticed that the tick of the watch is not heard in one ear.

As regards the level of background noise, people with normal hearing will have some difficulty as the background noise is raised. Of course we do not talk at hearing threshold, normal conversation takes place at approximately 60 dB. In addition in a background of noise we raise our voice to overcome the ambient noise. This is referred to as the Lombard reflex.

In applying the AMA formula to several hundred soldiers, over 20% have a hearing handicap. This hearing handicap extends to over 70% in some cases. Just fewer than 80% would not be deemed to have any hearing handicap.

Other Armies

The formula as used by the British Ministry of Defence as we noted above use the frequencies 1,2, and 3k. However, no disability is considered until the hearing level exceeds 40 dB. The German army is even more restricting. Loss of wages must be shown before being compensated. Canada uses the AMA formula but with a higher threshold of 35 decibels for the 4 frequencies as compared to the 25 decibel average in the American formula. Thus in these countries the vast majority of soldiers would not be considered for compensation.

The AMA formula is more favourable to Irish soldiers who are being assessed for hearing handicap than the formula used by the British or the German armies.

As has been stated in Mr. Mahon's article, the majority of cases heard in Irish courts would not be considered to have a hearing handicap using the AMA system. It should be clear that this also applies to the other systems.

Mr. Mahon states that it is Irish law to include the frequencies up to 8k. This was introduced in 1990 as an EU Regulation into Irish law. This law is for the protection of workers. It is not and never was suggested in the law that it be used for the assessment of hearing handi-

cap or disability. The purpose of including up to 8,000 Hz is to give an early warning of any change in hearing. Even if we were to include all the frequencies it would offer no advantage, as it would include the lower frequencies that are not involved in hearing loss from noise exposure.⁹

Ear protection

Mr. Mahon states "it is generally agreed by ENT specialists that if the Army had complied with its own comprehensive rules for the protection of the hearing of its personnel, there would now be no claims for deafness". This is not so. Of course no one would argue that ear protectors should not be worn during firing. However, it is much too simplistic to state that no hearing loss would occur if they had been worn. Acoustic attenuation of hearing protectors is usually expressed in decibels mean attenuation at various test frequencies. Details on hearing protection are well outside the scope of this article. However, where protectors are worn as in the Swedish,¹⁰ British and American armies, hearing loss does occur. Reports of the American army for instance, where ear protection is compulsory, show that 20 to 30% of all personnel with ten or more years of service in a combat arm have a clinically significant hearing loss. In the British army there is a prevalence of 28% of acoustic trauma in serving infantry personnel. This has shown virtually no improvement over the original 1965 survey which prompted the hearing conservation program. Ear protectors on average offer some 25 decibels reduction in noise. The upper limit of permitted noise is 140 dB. Noise attenuation with earmuffs is dependent on the weapon fired. It offers the best protection with pistol shots about 30dB, rifle fire 20dB and only 10 dB with cannon. As some weapons produce noise levels of 170 to 180 it can be seen that in many cases protection falls far short of the 140 level. Double ear protection adds some 6 dB, as the decibel is a logarithmic and not an arithmetical unit.

Mr. Mahon states on column 2 paragraph 3, referring to the audiogram in noise induced hearing loss "*which will indicate speech range hearing within normal limits (not exceeding 20 to 25*

decibels"). He then suggests as a rough guide that compensation should be sought for each decibel up to about 25 or 30 decibels.

In reality most soldiers are over 45 years of age. To compare the hearing of a 45-year-old with that of an 18 year old is fallacious. Hearing deterioration starts as early as 25 years so that by the age of 40 years the hearing level at the frequency of 4k is 17 decibels and can be as high as 50dB. These figures are published by the International Standard Organization (ISO).

In summary, I would like to quote from Professor Sataloff Professor of Otolaryngology at Thomas Jefferson University in Philadelphia and one of the authorities on Occupational hearing loss. His reply to my letter seeking confirmation as to the veracity of my reports stated, "The AMA and the British systems for the determining of hearing impairment and disability represent our best attempt to achieve this goal. At the present time they represent the best approach to permit compensation that is fair to injured workers and employers"

1. Guides to the evaluation of permanent impairment American Medical Association, Aug. 19, 1961.
2. Guide to the Evaluation of Hearing Handicap Otolaryngologic Clinics of North America. Vol. 12 No. 3 Aug. 1979.
3. Bastic v. Minister of Defence, June 1996.
4. Davies Dr. page 82. In Discussion on papers on Occupational Hearing Loss, Ed. D.W. Robinson, British Acoustical Society Special, Vol. No. 1 Academic press 1971.
5. Discussion with Telecom Ireland June 1997.
6. BAOL/BSA Method of Assessment of Hearing Disability British Journal of Audiology 1983. 17. 203 212.
7. Alexsson A British Journal of Audiology 1985 19: 271-276
8. Ward W.D. General Auditory Effect of Noise in Noise its effect and control. Otolaryngologic Clinics of North America 1979 VOL.12 Page 490.
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10. Christiansson Bengt. An audiological Survey of Officers at an infantry Regiment Scan. *Audiol.* 1993. 147-152

Response by Alan Mahon, SC, to the foregoing

I welcome the opportunity to reply to the response by Mr. Vivian Kelly, ENT Consultant, to the article I wrote in *The Bar Review* in June 1997.

While I have no doubt that much of what is stated by Mr. Kelly is accurate from a medical viewpoint, the essential purpose of my article was to assist Practitioners in dealing with this relatively new type of claim and in understanding the sort of evidence that has been given in cases to date in this jurisdiction and, in general terms, outline the attitude of the Courts of this jurisdiction to this evidence.

The following matters which are raised by Mr. Kelly deserve particular mention.

1. The AMA system of assessing the degree of noise induced hearing loss is not universally followed, although it may, as Mr. Kelly suggests, be followed in the countries he mentions. It is my understanding that even within the United States, the system is not followed in some of the States. In any event, the suggestion (if such a suggestion is being made) that compensation should only be paid to an individual who has a noise induced hearing loss capable of measurement using the AMA system is quite ludicrous. The AMA system only measures up to 3,000 Hz. As far as I am aware all ENT Consultants agree that the frequency most severely affected by excessive noise is 4,000 Hz. How can it be fair to measure damage to hearing at 4,000 Hz (or indeed 6,000 Hz) if the system of measurement ignores these frequencies. The AMA system has been criticised by many of Mr. Kelly's colleagues. Many of them have stated in evidence that even

where the AMA system determines a nil percentage loss there is in fact a hearing defect or abnormality where the audiogram shows a dip at 4,000 Hz. In plain language, in many cases there is damage to the hearing of an individual caused by noise even though the AMA system of measurement fails to record it.

2. Whatever the position may be in the USA or in some other countries, the legal position in this jurisdiction is quite clear. The Health & Safety Authority in this country has issued a booklet entitled "Guidelines on Hearing Checks and Audiometry as required by the EU (Protection of Workers) (Exposure to Noise) Regulations 1990". Annex 11 of that document is entitled "Classification of Audiograms". It is quite clear from reading this and indeed from reading the entire document that in assessing the hearing of an individual, frequencies up to and including 8,000 Hz must be tested. Furthermore it is clear from the document that certain computations of the frequencies of 5,000 Hz, 1,000 Hz, 2,000 Hz, 3,000 Hz, 4,000 Hz and 6,000 Hz must be made in order to determine the extent of a person's hearing difficulty where noise induced loss is concerned. In another part of this document, the subject of "noise induced hearing loss" is discussed, and it is stated therein "a reasonable summary is that noise induced hearing loss is a perceptive or neural form of deafness which comes on gradually, depending on the level of noise exposure, affects the higher frequencies at first and can lead to severe social deafness".

There is no mention in the said Regulations or in the Guidelines relating thereto of the AMA system.

3. Mr. Kelly seems to suggest that compensation should not be paid to an individual unless he has a noise induced hearing loss capable of measurement using the AMA system. This is in effect the evidence he frequently gives in court in his capacity as an ENT consultant and expert retained by the State. However, the Army Medical Doctors have been applying a different "system" of

determining or measuring the level of noise induced hearing loss. The Army medical personnel do not apply the AMA system, but instead apply a system which measures the average hearing loss over the frequencies 1,000 Hz, 2,000 Hz and 4,000 Hz in each ear. Based on the results from this system of measurement, an individual soldier is medically graded. In many cases and as a direct consequence of his grading, his future in the army is determined. His grading may render him ineligible for certain duties, serving overseas with the UN, and for promotion, leading to substantial loss of allowances and income, and eventually loss of gratuity and pension. In the more serious cases, the individual may be medically discharged from the army and may find it very difficult to obtain worthwhile work as a civilian. In many of the cases which have come before the courts to date, individuals who have been medically downgraded by their superiors in the army have heard evidence in court from ENT Consultants engaged by the state to the effect that under the AMA system they have normal hearing. In effect, the army are applying different standards of measuring hearing loss, one in its capacity as employer and the other in its capacity as a defendant facing a claim for damages.

In determining whether or not compensation should be paid to a plaintiff, a court must have regard to the facts which present themselves in the particular case. It must surely be unreasonable to suggest that an individual whose career in the army is likely to be adversely affected because of noise induced hearing loss, should not be compensated because his system of measurement which measures only up to 3,000 Hz does not recognise that loss.

4. In determining the level of compensation to be paid to a Plaintiff, and indeed whether or not compensation should be paid, a Court must be satisfied that the Plaintiff has suffered an "injury". In the *Bastic* case to which Mr. Kelly referred, the learned Judge stated in his Judgment "The question so far as I am concerned is not so

much whether there is a hearing handicap or not, the question is, is the condition of the hearing such that it affects the quality of life?"

5. In an article written by Mr. Vivian Kelly in the Irish Medical Journal in January 1984 the AMA system was discussed in detail. In that article Mr. Kelly felt that the limitations of the system tended to be balanced out by the advantages of the system, but he did highlight some of the limiting factors of the AMA system. He said "in this system no allowance is made for any loss in hearing greater than 3,000 Hz. In acoustic trauma and noise induced hearing loss it is primarily the frequencies higher than this that are involved especially 4,000 Hz. A further factor is that no allowance is made in this system for tinnitus. . .".
6. Mr. Kelly is clearly of the view that the complaint of tinnitus by many of the Army Plaintiffs is made dishonestly. It is my understanding that ENT

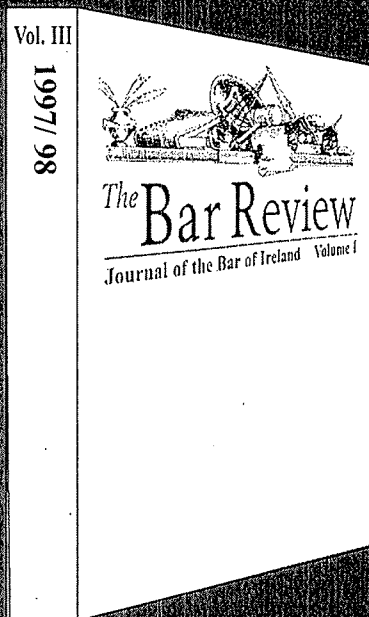
experts generally agree that the most common cause of tinnitus is noise induced hearing loss, that it is found in the majority of cases where there is noise induced hearing loss and that it is a condition which can vary in intensity and frequency from one case to another without any obvious medical explanation for this phenomenon.

7. Mr. Kelly refers to statistics for the Swedish, British and American Armies. He suggests that in the American Army, where ear protection is compulsory, 20% to 30% of all personnel with ten or more years of service in a combat Army have a clinically significant hearing loss. He states that in the British Army there is a prevalence of 28% of acoustic trauma in serving military personnel.

Is the AMA system used to identify these levels of hearing loss and produce these statistics?

In relation to the Irish Army, the overwhelming evidence is that the Army

failed to comply with its own internal Regulations relating to the protection of hearing. It is my understanding that ENT Consultants generally agree that the firing of weapons without appropriate hearing protection is almost certain to damage the hearing of Army personnel. If the wearing of appropriate protection, as Mr. Kelly suggests, in the various foreign Armies produce approximately one quarter of personnel with clinically significant hearing loss, surely this clearly explains why it is estimated that approximately 75%/80% of Army personnel in this country have suffered noise induced hearing loss. The point I intended to make in the article in relation to the provision of hearing protection was that if the Irish Army had complied with its own Regulations and provided the appropriate hearing protection and ensured its use, no real case in negligence could be made in many of these cases. In other words, if the Irish Army had done all it could reasonably have been expected to do to protect the hearing of personnel no case in negligence could be made out against it. ●



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High Court Divorce Procedures

Nuala E. Jackson, Barrister

With The Family Law (Divorce) Act 1996 having been operative since February of this year, the introduction of High court procedures for making application for divorce in that forum is obviously to be welcomed. In the interim period, the provisions of Order 3 rule (21) applied indicating that the special summons procedure, grounded upon affidavit, was appropriate. This, of course, is the procedure which was already being utilised in respect of many categories of matrimonial litigation, including proceedings for judicial separation, pursuant to Order 70A of The Rules of the Superior Courts.

The new Rules, which are operational from the 1st September 1997 are in substitution for the old Order 70A referred to above. These new Rules make provision for the procedures which are to apply to many categories of matrimonial proceedings but it is only intended in this paper to look at the procedures relating to divorce. It is noteworthy that while rendering uniform the applicable procedures in relation to many types of matrimonial litigation, the procedures for nullity applications in the High Court remain distinct, being governed by the complex petition procedures contained in Order 70 of the Rules of the Superior Court. It is regrettable that this opportunity was not availed of to reform elements of Order 70 also.

The Rules of the Superior Courts (No. 3) of 1997 retain the special summons procedure for the categories of matrimonial litigation listed at Rule 1(1) thereof and introduce this procedure for divorce applications pursuant to Rule 1(1)(a) of Order 70A. The special summons when used in this context is to be referred to as a family law summons. The matters to be set out in the verifying affidavit are listed in Rule 4(a) (it should be noted that

the new Rules detail the different matters which should be contained in such verifying affidavit depending upon the relief being sought). The matters required to be deposed to are identical for judicial separation and divorce - they are:

- (i) the date and place of marriage;
- (ii) length of living apart;
- (iii) the addresses of both parties during such time of living apart;
- (iv) details of children, including dependent children and the provisions which have been made for them;
- (v) whether or not there are any prospects of reconciliation;
- (vi) previous matrimonial relief and/or separation agreements (the relevant orders/agreements to be exhibited);
- (vii) basis of jurisdiction being dominant within the State at the date of commencement of proceedings or ordinary residence within the State for a period exceeding one year ending upon the date of such commencement (the requirements of jurisdiction are satisfied if only one of the parties was so dominated or ordinarily resident at that date (s.39(I) of the Family Law (Divorce) Act, 1996);
- (viii) details of family homes including whether the realty concerned consists of registered or unregistered land (the latter information would appear to be needed to allow the registrar of the court to carry out his/her obligations under s.14(4) of the 1996 Act);
- (ix) details of former family homes.

None of the information required to be included in the verifying affidavit is exceptional and advisers to applicants for relief will already be used to assembling such information for the preparation of

the Indorsement of Claim on the Family Law Civil Bill utilised in Circuit Court proceedings. The major difference, however, is that under the Special Summons procedure the information will have to be deposed to. Although it is not intended to primarily discuss judicial separation applications here but rather divorce applications it is noteworthy that the requirements of the new Rules indicate that the same details should be given in verifying affidavits for judicial separation and divorce applications and no specific provision is made for circumstances in which judicial separation might be sought on grounds other than separation. Rule 3 indicates that the "Special Endorsement of Claim" in the special "family law" summons shall state specifically the relief being sought and the grounds for same.

Therefore it is arguable that where one of the behavioural grounds for judicial separation is being invoked (i.e. s.2(1)(a); s.2(1)(b) or s.2(1)(c) of the Judicial Separation and Family Law Reform Act, 1989) or it is being alleged, as is most common, that no normal marital relationship has existed between the parties for a period exceeding one year prior to the institution of proceedings (s.2(1)(f) of the 1989 Act) the grounds in support of claiming such relief need only be specified in the Summons and not deposed to on affidavit. As there is effectively only one ground for divorce set out in s.5 of the Family Law (Divorce) Act 1996 and this is a no fault basis, this consideration does not apply to such relief as the requirements of s.5 of the 1996 Act must be disclosed on affidavit as well as, presumably, in the family law summons itself.

The new Rules continue to provide for the advice certificates of solicitors for the parties being exhibited in the verify-

ing affidavits and forms are provided for such certificates. In keeping with the requirements of section 5(1)(c) and s.5(2) of the Family Law (Divorce) Act, 1996, the new Rules provide for filing and service of affidavits of means and welfare. Once again, precedents are provided but the pre-requisite for filing/serving these additional documents are:

(a) Affidavit Of Means

- that financial relief is being sought
- it is to be filed with the verifying affidavit and, unless otherwise ordered by the Master or the Court, with the replying affidavit.

(b) Affidavit of Welfare

- that there are dependent children
- the timing of service of the Affidavits of Welfare is not specified
- the form provided seems uncertain as to whether it is to be sworn or declared.

Perhaps one of the most difficult aspect of utilising the special summons procedure arises where the respondent wishes to counterclaim in the proceedings. Such counterclaim is to continue to be made in the replying affidavit (Rule 17). While undoubtedly the use of sworn documents for this purpose is unsatisfactory particularly in view of the distinction between the information required to be contained in the special endorsement of claim under Rule 3 and the details to be included under Rule 4 in the verifying affidavit as referred to above. It would appear that the respondent is left with no choice but to include all of this information in the replying affidavit. A procedure for the filing of a defence and counterclaim (if required) would have been welcome.

There are other noteworthy features in the new Rules which are deserving of mention:

1. The provisions for interim and interlocutory reliefs being sought by way of motion require 14 clear days notice before the return date (Rule 9(1)). Ex parte applications are provided for in situations of urgency.
2. The Motion for Directions procedure in Rule 11 are particularly useful particularly in addressing the interest of

dependent children who are *sui juris*. The scope of these motions is, perhaps, unduly restricted by the bringing of the motion in question being limited to the application or respondent. The rules would not appear to envisage such motion being brought by the dependent child himself or herself. A further issue arises as to the protection of the rights of minor dependent children where their parents fail to do so.

3. As in the Circuit Court, provision is made for affidavits of representations (Rule 11(3)) and also for evidence as to the actuarial value of benefits under a pension scheme to be given by way of affidavit. Clearly this aims to reduce the costs which would be incurred by the appearance and intervention of notice parties and by the requirements of expert testimony. In case of dispute, the right to serve notice of cross-examination upon such affidavits remains.
4. The rules in relation to remission of actions are retained. These must be considered in the light of the concurrent jurisdiction of the Circuit Court in divorce applications (s.38(1) of the Family Law (Divorce) Act, 1996) and also in the light of the shortened waiting time for hearings, most notably in the Dublin Circuit Court area. However, the remission provisions should be considered in the light of the statutory dictates at s.38(2) of the 1996 Act.
5. Rule 22 states that subsequent ancillary reliefs should be sought by notice of motion grounded upon affidavit.

Conclusion:

The introduction of High Court divorce rules is welcome and the present rules seek to clarify the procedural position as well as adopting a uniform approach to many different kinds of matrimonial proceedings. The inclusion of nullity in such a uniformity of approach would have been welcome as would a more even-handed procedure for counterclaiming. Nevertheless, certain of the procedures and particularly the Motion for Directions referred to at Rule 11 would appear useful and efficient. ●

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Renewal of a Summons under Order 8 of the Rules of the Superior Courts

*Baulk v. Irish National Insurance Co. Ltd. and
McCooey v. The Minister for Defence - revisited*

David McGrath, SC

It has long been a practice of solicitors to issue a summons to prevent the Statute of Limitations running against the Plaintiff in personal injuries Actions. In many such cases the Summons is not served in time and is allowed to lapse, in the belief that the Courts will, by virtue of the provisions of Order 8 Rule 1 of the Rules of the Superior Courts renew the Summons without quibble.

Following the recent decision of the Supreme Court in *O'Brien v. Fahy Trading as Greenhills Hiding School*, (Unreported 21st March 1997) solicitors will, however, have to be more vigilant in their approach to handling such a Summons.

Order 8, Rule 1 of the Superior Court Rules 1986 provides as follows: "No original Summons shall be enforced for more than 12 months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the Plaintiff may apply before the expiration of 12 months to the Master for leave to renew the Summons. After the expiration of 12 months, an application to extend time for leave to renew the Summons shall be made to the Court. The Court or the Master, as the case may be, if satisfied that reasonable efforts have been made to serve such Defendant, or for other good reason, may order that the original or concurrent Summons be renewed for 6 months from the date of such renewal inclusive, and so from time to time during the currency of the renewed Summons. The Summons shall in such case be renewed by being stamped with the date of the day, month and year of such renewal; such stamp to be provided and kept for that purpose in

the Central Office and to be impressed upon the Summons by the proper Officer, upon delivery to him by the Plaintiff or his Solicitor of a memorandum in the Form No. 4 Appendix A, Part 1; and a Summons so renewed shall remain in force and be available to prevent the operation of any Statute whereby a time for the commencement of the Action may be limited and for all other purposes from the date of the issuing of the original Summons".

Order 8, Rule 2, of the Rules of the Superior Courts 1986 goes on to provide:

"In any case where a Summons has been renewed on a ex parte Application, any Defendant shall be at liberty before entering an Appearance to serve Notice of Motion to set aside such Order".

It is clear that Order 8, Rule 1, provides that the High Court may renew the Summons if satisfied that either "reasonable efforts have been made to serve the Defendant", or "for other good reason".

In many cases no efforts are made to serve the Defendant and the Plaintiff must rely on "other good reason" to have the Summons renewed.

There are several decisions in which the Courts have been asked to decide what constitutes "other good reason". In *Baulk v Irish National Insurance Company Limited* (1969) I.R.66, the Plaintiff suffered personal injuries in a road traffic accident on the 9th August 1962. The driver of the vehicle died from the injuries he received in the accident. Solicitors acting for the Plaintiff wrote to the father of the driver stating

that the Plaintiff intended to sue the personal representative of the driver for damages for negligence. The deceased's insurance company then wrote to the Plaintiff's Solicitors by letter dated the 10th October 1962 stating that they had received notification of the claim and requesting an opportunity to have the Plaintiff medically examined by their doctor. As no representation had been raised to the driver's estate on the 6th June 1964 the Plaintiff obtained an Order pursuant to Section 76 of the Road Traffic Act 1961 on consent of the parties granting the Plaintiff leave to institute Proceedings against the Defendants. On the 6th June 1964 a Plenary Summons was issued. However, it was not served within the following 12 months. The Plaintiff then sought to renew the Summons. The High Court dismissed the Application. However, on Appeal, the Supreme Court held that in the circumstances in view of the fact that the Defendants had been aware from the beginning of the Plaintiff's intention to sue, there was "other good reason" for granting leave to renew the Summons, per Walsh J. at Page 72 of the Judgment;

"In the present case it does not appear to me that any injustice would be done, in the wide sense of the term, to the Defendants by the granting of the renewal in this case. They have been aware from the beginning of the Plaintiff's intention to sue them, as they were the parties to the Motion which resulted in leave being given to name them as Defendants".

The decision in *Baulk* was followed by the Supreme Court in *McCooey v. The Minister for Finance* (1971) I.R. 159. In that case the Plaintiff suffered personal injuries in a road traffic acci-

dent on the 13th July 1965. At an early date the Plaintiff's Solicitors in writing informed the First Defendant and the Insurers of the Second Defendant of the accident and of the Plaintiff's claim and their intention to institute Proceedings. On the 4th July 1968, the Plaintiff issued a Plenary Summons claiming damages for negligence. The Plaintiff made no attempt to serve the Summons within the following 12 months, nor was it renewed until Application was made in October 1970 to renew the Summons. Murnahan J. refused to renew the Summons. On appeal the Supreme Court, in allowing the appeal, held that the fact that the Plaintiff's claim, if made by a fresh summons, would be statute barred together with the fact that at an early date the Defendants had been aware of the claim constituted "other good reason". It should be noted, however, that Fitzgerald J. (later C.J.) in his dissenting decision in *McGooley*, stated as follows at Page 167 of the report;

"the policy of successive Statute of Limitations is founded on the principle that persons with good causes of action should pursue them with reasonable diligence and the Defendants should not be put in a position in which, through the expiration of time, they have lost the evidence to resist a stale claim by reason of death or defect of recollection of witnesses or by the destruction of relevant documents. In my opinion, the law in this matter is correctly stated in the judgment of Lord Goddard who delivered the opinion at the Court of Appeal consisting of Lord Greene M.R., Lord Goddard and Duparc L.J. in the Court of Appeal in England in *Battersby v. Anglo American Oil Company Limited*. I fully appreciate that the opinion of Lord Goddard as to the failure to serve a Writ making it a "nullity" was subsequently disapproved, but nevertheless it appears to me that his judgment at Page 32 of the Report correctly states the position on the main issue as follows:

"it is the duty of a Plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on a applica-

tion which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the Court is satisfied that good reason appeared to excuse the delay in service, as indeed, is laid down in the Order".

Until such times as the words "or for other good reason" have been considered by this Court sitting with 5 Judges, I am not disposed to accept that these words necessarily relate to anything else other than service. Even if they are to be construed in a wider sense, it appears to me that to do justice between the parties requires a careful consideration as to whether the Plaintiff's default in complying with the Rules, entitles him to the assistance of the Court in depriving a Defendant of what has become an established defence to the Action".

It is to be noted in passing that McLoughlin J. (also a future Chief Justice), dissented in *Baulk v Irish National Insurance Co. Ltd.*

More recently, the renewal of a Summons came before the High Court in *Prior v. Independent Television Ltd.* (1993) ILRM 638, *Walsh v. CIE* (1995) I.L.R.M. 180 and *Kerrigan & Others v. Massey Bros.* (Funerals and Anor, (Unreported 15th March 1994) and before the Supreme Court in *O'Brien v. Fahy T/A Greenhills Riding School* Unreported 21st March 1997.

In *Prior v. Independent Television News Ltd.* the Defendant contested the renewal of the Summons on the grounds that it was no longer in a position to adequately defend - the claim and it would be prejudiced in its defence because of the delay. Barron J. in his judgment said "It seems to me that the essential principle is that where proceedings have not been heard on the merits it may be unjust that they should be barred by procedural difficulties. The facts here are similar to those in *McCooley v. The Minister for Finance* but the time span is longer, nor were the Defendants aware of the Plaintiff's intention to sue until this application was brought. The question of prej-

udice to the defendant is equally as important as prejudice to the Plaintiff. I must balance the hardship which the Plaintiff will suffer by reason of being deprived of a hearing of his cause of action against that which the defendant may suffer by reason of being required to defend the proceedings after a lapse of time, which is at present nine years, and which will be even longer". He went on to conclude

"In the present case, in my view, the ability of the defendant to defend this claim adequately has been seriously impaired. There is not in my view anything in the circumstances of the case as they affect the Plaintiff to justify the Court in requiring the Defendant to meet the claim notwithstanding such impairment. In these circumstances, Justice requires that leave to renew a Summons should be refused".

In the case of *Walsh v. C.I.E.* (1995) I.L.R.M. 180, the Plaintiff issued a Plenary Summons on the 22nd July 1982 claiming damages for personal injuries which occurred on the 20th August 1979. An originating letter was sent by the Plaintiff's Solicitors in February 1980, to which the Defendant responded in April 1981 denying liability. The Summons was not served within twelve months and an Application to renew was made which was allowed by the High Court. O'Hanlon J. held that as the Plaintiff had at an early stage made known to the Defendant his intention to bring Proceedings, stating at page 181 of the Report: "*Baulk v. The Irish National Insurance Company* 1969 I.R. 66, and again in *McCooley v. The Minister for Finance and Another* (1971) I.R. 159, The Supreme Court held that as the Plaintiff in each case had made known to the Defendant at an early stage, his intention to pursue his claim, and as a refusal to extend the time and renew the summons would result in the claim being statute barred these circumstances could amount to 'other good reason' within the meaning of Order 8, Rule 1, of the Rules of the Superior Courts". He went on to say, however

"As the circumstances of the present case are so closely analogous to those obtaining in the two decisions of the Supreme Court already

referred to, I consider myself bound to apply them and grant the relief sought by the Plaintiff. If I did not consider myself so bound I would not regard the Plaintiff as having any claim on the merits of the case for obtaining a renewal of the Summons at this stage as it appears that no effort was made to serve the Summons within the prescribed period and no reason has been put forward for the excessive delay which occurred in prosecuting the claim".

More recently Mr. Justice Geoghegan in the case of *Kerrigan and Others v. Massey Bros. (Funerals) & Another*, in an Unreported decision of the High Court 15th March, 1994, set aside an Order renewing the Plenary Summons. In that case the accident occurred on the 5th February, 1986, and a Plenary Summons was issued on the 3rd February, 1989. The Defendants and their insurers first knew of the issue of the Plenary Summons on receipt of a letter from the Plaintiff's Solicitors on the 19th November, 1992. In the meantime there had been various correspondence and telephone conversations between the Plaintiff's Solicitors and the Defendants. An Order renewing the Plenary Summons was made by Miss Justice Carroll on the 3rd February, 1993, ex parte and unknown to the Defendant. Mr. Justice Geoghegan distinguishing the cases of *Baulk* and *McCooley* stated as follows:

"The Plaintiff's are relying on *Baulk v. The Irish National Insurance Company Limited* (1969) I.R. 66, and *McCooley v. The Minister for Finance* 1971 I.R. 150. Those cases are not authority, in my view, for any general proposition and a summons should always be renewed if the action would be statute barred without such renewal. Statute barred is a factor among others which can be taken into account. In *Baulk's* Case the Defendants had been aware from the beginning of the Plaintiff's intention to sue them. That was also the position in *McCooley's* Case. It is implicit in the Court's reasoning in both cases that the respective Defendants could not have reasonably believed that the

intention to sue had been abandoned. But in this case the Defendants were entitled to make that presumption and close their file having regard to the conduct of the Plaintiffs. In my view, the Defendants in this case went out of their way to facilitate the Plaintiffs' processing of their claims and behaved impeccably. Accordingly, a renewal of the Plenary Summons is an injustice to the Defendants and I believe that had all the facts being before Carroll J. she would not have made the Order which she made. The question of prejudice does not arise. Independently of whether the Defendants would be prejudiced or not, there is no 'good reason' within the meaning of the rule for renewing the Summons. The matters put forward in the recent Affidavit relating to the breakup of the firm of Solicitors do not, when analysed, afford any good reason".

In the most recent case heard in the *Supreme Court O'Brien v. Fahy Trading as Greenhills Riding School*, Unreported 21st March 1997, these cases were opened before the Supreme Court. In that case the Plaintiff attended the Defendant's Riding School on the 24th July 1988 and during the course of a riding lesson she alleged that she fell from one of the Defendant's horses whilst jumping a fence. By Plenary Summons issued on the 23rd day July 1991, the Plaintiff instituted Proceedings seeking damages for personal injuries, loss and damage sustained as a result of the negligence, breach of duty, including breach of Statutory duty and breach of the contract of the Defendant, its servant or agent. The Summons was not served on the Solicitors for the Defendant until the 24th November 1992, after it had been renewed by Order of Mr. Justice Carney made on the 9th November 1992.

By a Notice of Motion dated the 23rd December 1992 the Defendants sought to have the said Order made by Mr. Justice Carney set aside pursuant to Order 8, Rule 2, of the Rules of the Superior Courts 1986. A Statement of Claim was delivered on the 11th May 1993 and an Appearance was entered by the Defendants solely for the purpose of contesting the issue and without prejudice as directed by Mr. Justice Johnson by Order

dated the 26th day of July 1993. When the Motion came before Mr. Justice Barr on the 15th February 1993 he dismissed the Defendant's Application with no Order as to Costs. By a Notice of Appeal dated the 5th March 1993 the Defendant appealed the decision of Mr. Justice Barr on the grounds that the learned Trial Judge was wrong in law and in fact in refusing the Application made by the Defendant to vacate the Order of Mr. Justice Carney dated the 9th day of November 1992.

The first notification received by the Defendants intimating a claim in respect of the accident which had occurred in July 1988 was a letter dated the 14th June 1992 wherein the Plaintiff stated that the accident had in fact occurred on the 24th July 1990. Before the letter dated 14th June 1992 the Plaintiff stated that the accident had in fact occurred on the 24th July 1988 and that the date of the accident stated in the letter dated the 5th June 1992 was a typographical error. The Defendants were therefore not put on formal notice of any claim until the 14th June 1992, almost four years after the accident. By letter dated the 24th June 1992 the Defendant's insurers replied to the Plaintiff's Solicitor's initial letters. The Plaintiff's Solicitors sought nomination of a firm of Solicitors to accept service of the Proceedings on behalf of the Defendants by letter dated the 14th July 1992. Solicitors were nominated to act on behalf of the Defendants on the 27th July 1992. On the 29th July 1992 the Summons was served on the Defendant's Solicitors and by letter dated 11th August 1992 the Defendant's Solicitors declined to accept service of the Summons as the same was out of date. Application to renew was made on the 9th November 1992 and the Summons was duly served following such renewal. Barrington J. delivering the judgment of the Court (Lynch J. and Barron J. concurring), said as follows:-

"There has been much debate in relation to the issues and the legal background but the central issue in the case would appear to be comparatively simple. The Plaintiff, in order to be entitled to have the Summons renewed, must be able to show either that she had some difficulty in service, which doesn't

apply in the circumstances of this case, or alternatively, she had some other good reason and the question really turns upon what was the other good reason. The good reason which the Plaintiff advances is that the Statute has now run and if the Summons is not renewed the Plaintiff will have lost her right of action and that would be an injustice to her and that is a matter to which it appears the Court must give a very great weight. However, applying the principle of *McCooley v. The Minister for Finance* (1971) I.R. page 159, it is not the only matter to which the Court must pay attention because it is quite clear that in this case the Defendant was not told until some four years afterwards that a claim would be brought against her and one of the factors in the *McCooley* case was that the Defendants had known right from the beginning that a claim would be made against them."

Mr. Gilhooly tries to counter this by saying

"while the Defendant was present at the time of the accident she actually reported the accident to the hospital and she was there when this unfortunate young girl was removed to hospital so she knew all about the Plaintiff's injuries".

And of course that is true.

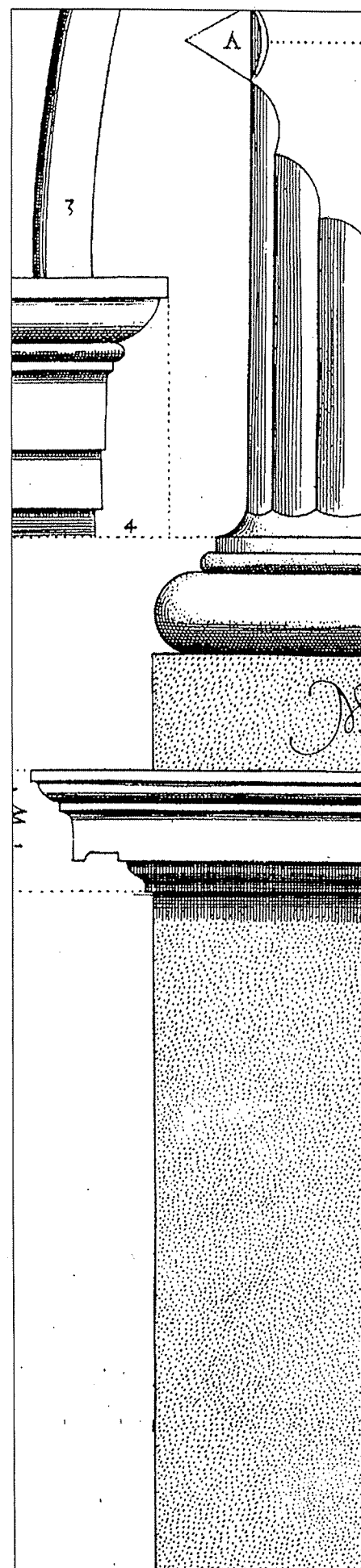
On the other hand, the Defendant did not know nor was she given any warning that a claim would be made against her and her Solicitor has sworn an Affidavit saying that as a result were a claim to be now made the Defendant would be greatly prejudiced in defence of the case as it is now nearly four and half years since the alleged accident and he says at this stage it is extremely difficult, if not impossible, to investigate all the circumstances surrounding the accident. It appears to me that the lapse of such time without knowing a claim was going to be made is something which in itself implies prejudice and, when the Defendant and her Solicitors are prepared to swear Affidavits, in fact is not a theoretical prejudice but an actual prejudice which the Defendant would suffer; one must set

that against the loss to the Plaintiff, if as a result of a refusal to renew the Summons which is out of time, her claim becomes statute barred. Unfortunately for the Plaintiff, it appears to me that the balance of justice in the circumstances of the present case lies in favour of refusing to extend the time for service of the summons and therefore of reversing the Order of Mr. Justice Barr .

Conclusion

It would seem therefore that the Supreme Court in *O'Brien v. Fahy t/a Greenhills Riding School* is making it clear that where a Defendant has not been given any warning, or any intimation that a claim is being made against them, that should be a factor to be taken into account when assessing as to whether or not the fact Statute will run against the Plaintiff is "other good reason" to renew the Summons. In the *O'Brien* case it should, however, not be forgotten that the Defendant and the Defendant's Solicitor had sworn affidavits to the effect that the lack of knowledge of proceedings being taken prejudiced the Defendant in defending the action. In that respect it was also very similar to *Prior v. Independent Television News Ltd.* case.


Taking an overview of all these cases, it would appear that the Supreme Court in the *O'Brien* case accepted that in the *Baulk* and *McCooley* cases, the fact that the defendants in those cases had at an early stage been given an intimation of a claim and had been given the opportunity to carry out investigations and to prepare for the defence of the matter was a significant part of the *ratio decidendi* of those cases. It was not, therefore, that the fact that the Statute of Limitations would bar the action of itself which was the determining factor in those cases. The fact that the Statute of Limitations will bar the action is a significant matter to be considered by the Court but is always subject to balancing justice between the parties. Taking the decisions of Barron J. in *Prior's* case and Geoghegan J. in *Kerrigan & Others* into account, it should be said that it would be a foolish assumption on the part of a Solicitor to believe that even an early warning letter will suffice. The stark warning in these cases for the Plaintiff's Solicitor is, delay in serving the Summons at your peril. ●



State Liability for Non-Implementation of Directives - Further and Better Particulars

Niamh Hyland, Barrister

Introduction

 The judgment of the Court of Justice in 1991 in *Joined Cases C-6/90 and C-9/90 Francovich and Ors.* ("*Francovich*") laid down a new and important rule - that a Member State could be liable in damages to a private individual where its failure to implement a directive had caused loss. Since then there have been a number of judgments of the Court of Justice exploring the full implications of that rule. The judgments in *Case C-373/95, Maso & Ors. v. INPS*, *Case C-261/95 Palmisani v. INPS* and *Joined Cases C-94/95 and C-95/95 Bonifaci & Ors. v. INPS* (judgments of 10 July 1997, not yet reported) constitute a further step by the Court in that direction. In particular, they explore *inter alia* the permissibility of national time limits and of national rules limiting the amount of compensation payable where these rules derive from the original directive.

Background

In all three cases, the employees had been employed by companies which had become insolvent, leaving arrears of salary owing to their employees. Because Italy had failed to implement Directive 80/987/EEC on the protection of employees following the insolvency of their employer, no guarantee fund which would have paid outstanding remuneration existed. The Court held in *Francovich* that Italy was therefore required to make good loss or damage caused to individuals by failure to trans-

pose the Directive. Italy subsequently adopted a legislative provision which was intended to make reparation for this loss. Under this provision, actions for reparation were subject to many of the limitations imposed by the Directive. The legislative provision also implemented the Directive.

Admissibility of Questions Referred

In all three cases, the defendants submitted that the questions referred by the national court were inadmissible. Recalling its previous case law which confirms the autonomy of national courts in Article 177 references, the Court held that it is solely for national courts before which actions are brought to determine in the light of the particular facts of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. It is only where it is quite obvious that the interpretation of Community law sought by a national court bears no relation to the actual facts of the main action or its purpose that a reference for a preliminary ruling may be held to be inadmissible.

The Court further confirmed the autonomy of national courts in *Palmisani* where it rejected a particular claim by the plaintiff on the ground that the national court had expressly rejected her allegations. It noted that Article 177 of the Treaty instituted a system of direct cooperation between the Court of

Justice and the national courts by way of a non-contentious procedure which was completely independent of any initiative by the parties who are merely invited to state their case within the legal limits laid down by the national court.

Limitation of damages

Under Article 4(2) of the Directive, it was provided that payment could be limited to outstanding claims relating to pay for certain periods. Italy had availed of this possibility in its legislative provision, providing that the guarantee covered wage claims relating to the last three months of the employment relationship falling within the twelve months preceding. In all three cases the national courts raised the question of whether or not the original provisions of the Directive, including those which limited liability, could be retroactively applied by the Member State and questioned the extent of the reparation payable by the Member State where a Directive is transposed belatedly.

The Court held that retroactive application of the measures implementing the Directive to employees who suffered due to the non-implementation is normally acceptable. Such an application had the effect of guaranteeing the rights which the employees would have enjoyed had the Directive been implemented on time. Retroactive application in these cases implied that a limitation of the guarantee institution's liabil-

ity could be applied provided that the Member State had in fact exercised that option under the Directive when it finally implemented the Directive.

In relation to the amount of reparation, the Court noted that retroactive application in full of the measures implementing the Directive will ensure adequate reparation unless the beneficiaries establish the existence of complementary loss sustained on account of the fact that they were unable to benefit at the appropriate time from the financial advantages guaranteed by the Directive. In those circumstances that loss may also be made good. It is for the national court to determine that reparation in any given case is adequate.

Time Limits

The Italian legislative provision provided that actions for reparation were to be brought within one year from the date of entry into force of the provision. This limitation period was challenged in *Palmisani*. Recalling its previous case-law, the Court held that national time limits governing reparation must comply (a) with the principle of equivalence i.e. they must not be less favourable than those relating to similar domestic claims; and (b) with the principle of effectiveness i.e. they must not make it virtually impossible or excessively difficult to obtain reparation.

In relation to the principle of effectiveness, the Court noted that the setting of reasonable time limits satisfied that principle since it constituted an application of the principle of legal certainty. In the instant circumstances, the time limit which ran from the date of entry into force of the measure transposing the Directive into national law could not be regarded as making it excessively difficult or impossible to seek reparation.

In relation to the principle of equivalence, the Court gave some useful guidelines as to what similar domestic claims could be relied on for the purposes of comparison. The national court had, in its reference, cited time limits in other similar types of cases. The Court held that in principle it was for national courts to ascertain whether the principle of equivalence had been complied with. However it held that equivalence can

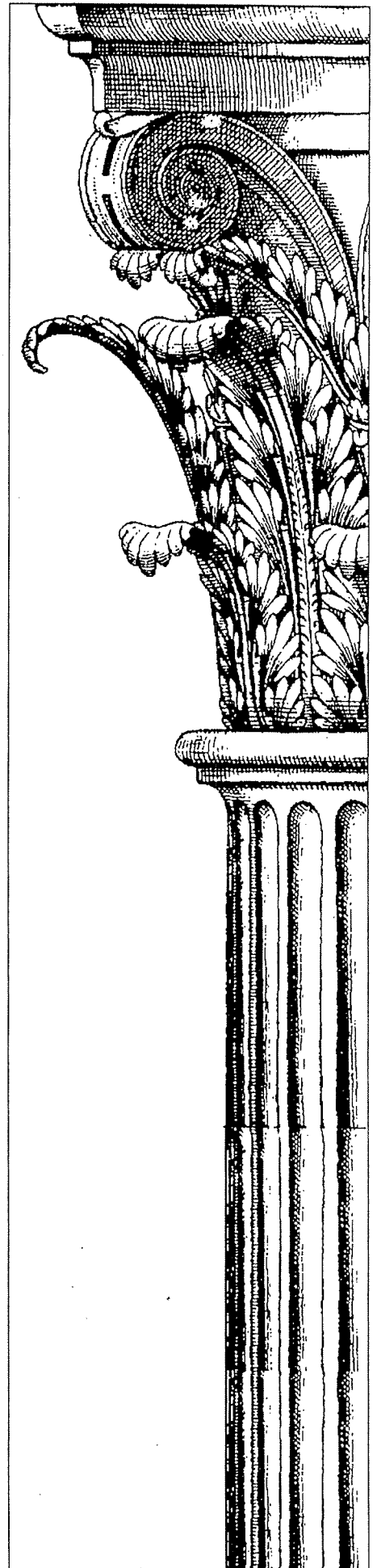
only be measured where the allegedly equivalent domestic claim has the same objective as the claim based on Community law. In the instant case, the Court held that it could not ascertain whether there was an equivalent domestic claim which was comparable due to the lack of information available to it. In these circumstances, it held that the limitation period was acceptable.

Comment

These cases are useful for a number of reasons. First, they clarify the obligations of a Member State which has failed to implement a directive and is obliged to compensate individuals for that failure. In particular, they make it clear that it is acceptable for the Member State to rely on the provisions of the original directive, for example in relation to time limits and limitation of claims. In other words, where claims under the directive, had it been correctly implemented, would have been subject to certain limitations, a Member State is entitled to apply those same limitations to actions which are intended to compensate individuals for failure to implement the directive.

Second, the judgment is useful as it confirms that the principles of effectiveness and equivalence apply in relation to time-limits and makes no reference to the judgment of the Court of Justice in Case C-208/90 *Emmot* which indicated that national time limits would not begin to run where there was incorrect or non-implementation of a directive. This was not the case here as the Italian legislative provision, as well as providing for reparation, implemented the directive, but nonetheless it supports a widely held view that the Court is distancing itself from the approach in *Emmot*.

Third, and perhaps most importantly, the Court has held adequate compensation must include complementary loss sustained on account of the fact that individuals were unable to benefit at the appropriate time from the financial advantages guaranteed by a directive. This is good news for plaintiffs and bad news for Member States. It is a further step by the Court to ensure that individuals who have suffered due to non-application of Community law are fully compensated. ●



ANNUAL REVIEW OF IRISH LAW, 1993 AND 1994, published by Roundhall, Sweet & Maxwell, £85.00 reviewed by Jacinta Heslin, Barrister.

When the first Annual Review of Irish Law was published in 1987, Mr Justice Brian Walsh in a foreword wrote that "what every busy lawyer and law teacher needs (as does the informed layman) is an accurate account of the year's legal work".

The Annual Review of Irish Law has in the past fulfilled this purpose in presenting a wide-ranging review of legal developments, both judicial and statutory, of the year under scrutiny. The recent increase in judicial appointments, together with an increase in legislative activity, means that the role of the Annual Review is perhaps now even more valuable than in the past.

The Annual Review provides the practising lawyer with an invaluable means of keeping abreast of legal developments. Every library and every legal office should be an annual subscriber. It is a publication that not alone provides the user with a legal update of statutes and statutory instruments; it also updates the developments in each specialised field of law. It does not simply record judgements, it analyses the underlying judicial reasoning and provides incisive critical commentary.

The authors of the Annual Review remain as in previous years; Raymond Byrne from the Dublin City University Law school and Dr William Binchy from the Law school at Trinity College. However the 1993 Annual Review marks a departure from previous years with the introduction of specialist contributions from other members of the author's respective law schools. While in the preface, the authors remark that they continue to take final responsibility for the overall text, there is evident a marked disparity of style in the contributions made. While it is an inevitable reality that time constraints and editorial deadlines make it necessary to invite specialist contributions; a tighter editorial stamp would in future ensure a universally stylised approach to all topics.



The list of contents and the index reflect the vast areas of law covered by the Annual Review. In the 1993 Review there are thirty five sections covered in all, ranging from the area of agriculture to the field of transport. In both the 1993 and 1994 Annual Review the section devoted to company law appears in the index so headed. Although the section is clearly sub-divided in the text no sub-headings appear in the index. This is perhaps an oversight on the part of the editorial team. However, it is one that should be addressed and rectified, for ease of reference, in future editions.

The aforementioned section on Company Law is prepared by David Tomkin and Adam McAuley of the Dublin City University Business School. It is both informative and analytical. At pages 79 to 83 the authors examine the case of *In re Frederick Inns* [1994] 1 ILRM 387, a case which relates to a series of payments made by inter-related companies to the Revenue Commissioners. The payments were made in the six months preceding the commencement of a winding-up and their validity was challenged by the liquidator. The payments made by three of the group companies exceeded their individual tax liabilities and the surplus offset liabilities of other companies within the group. On page 82 Messrs Tomkin and McAuley set out hypothetical examples which are very helpful in illustrating the practical effect of the High Court and Supreme Court decisions. The authors also put forward a formula of their own to resolve the issues which arose which I found persuasive.

The analytical emphasis of the Review is further evidenced in the section on Family Law. The editors, at page 320, review the decision of Mr Justice Murphy in *LC v. AC*, High Court, 30 March 1993. This case focused, in the context of judicial separation proceedings, on the interest in the family home. In the Circuit Court the judge ordered that the family home should remain in the spouses joint names. He further ordered that the wife should have a right to occupy the home to the exclusion of the respondent for her life or until further order. The respondent was directed to continue to pay the mortgage on the house. The case was appealed as the husband wished to purchase a similar house and was seeking a capital contribution from his wife to achieve this end.

The Review teases out the reasoning of Mr Justice Murphy in his attempts to achieve a solution that was practical, equitable and final. From page 321 onwards the book provides a discursive examination of the development of the law in this area over the past thirty years. While accepting that the law has not adapted adequately to reflect the enormous social change in this area, the authors do not provide any solutions. They do, however, provide plenty of food for thought by way of reference to international books and articles on the subject.

As regards cross-referencing, both editions provide wide-ranging and helpful references to articles and books by other authors on the subject-matter under review. Both Reviews also have internal references and also references to previous editions of the Annual Review which address the topic under discussion.

In summary, the Annual Review, in its wide-ranging coverage of the legal year has something to offer every legal practitioner. The 1995 Review should be on library shelves shortly as it is hoped that the new practice of delegating the workload should ensure that the Annual Reviews will in future be published in the year immediately following the year under review. ●

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