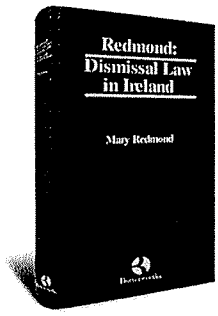
The Bar Review

Journal of the Bar of Ireland. Volume 4. Issue 1. October 1998

The comprehensive guid to the rights and legal obligations of employers and employees in dismissal law



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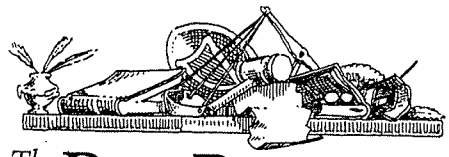

The Bar Review

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Cover: Ceremony at St. Michan's Church Street, to mark the opening of the new legal year.

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New Senior Counsel Appointed

Congratulations and best wishes are extended to the 13 members of the Bar who took Silk recently. They were Bernard Barton, Frank Callanan, Michael Cush, John A. Edwards, James Gilhooly, Felix McEnroy, Joseph McGettigan, Declan McGovern, Noel McMahon, James F. O'Leary, Desmond O'Neill, Stephen J. Roche and John Whelan. This brings the total number of Senior Counsel to 186 members.

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New Contact for Advertising and Subscription Rates for The Bar Review

The Bar Council has entered into a publishing partnership with CPG Publications Ltd. In future, CPG will take charge of the printing, advertising and subscription sales for *The Bar Review*, while editorial remains under the care of the Editorial Board. All advertising and subscription queries should be made to Tom Whelan at CPG Publications, Glenageary Office Park, Dun Laoghaire, Co. Dublin. Telephone: (01) 284.7777, fax: (01) 284.7584 or e-mail, twhelan@cpg.ie

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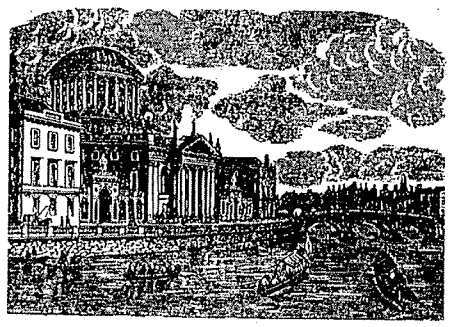
Ideas Welcomed

Submissions are invited from readers for ideas and articles for forthcoming issues of the Bar Review.

As a leading legal journal which monitors legislative and judicial developments across the full range of procedural and substantive legal matters, the Bar Review in particular would welcome contributions which seek to critically analyse such developments in their wider legal context.

Articles which are expository of the law are also welcome in some instances where a concise statement of such matters is absent from other published sources.

Social news concerning the Library and news from the Circuits are also welcomed by the Editor at 8045014.



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New Entrants

83 new entrants are welcomed into the Law Library from the start of this legal term.

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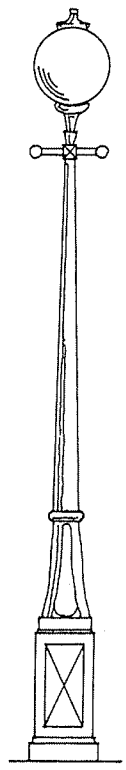
New Arrangements for Dealing with Delays in Returning Papers

A protocol, effective from 1 September 199, has been agreed between the Bar Council and the Law Society for dealing with delays in returning papers. Details of the arrangements are being sent to each member.



Services Directory

The new services directory is now available, and offers a summary of all services offered by the Bar Council to members of the Law Library, along with photos and job descriptions for all staff. This will be updated on an annual basis, as part of the yearbook and diary. Comments and suggestions are welcome for next year's edition. Please contact the Bar Council office, ext. 5000.

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New Arrangements for Dealing with Delays in Paying Barrister's Fees

A protocol, effective from 1 September, 1998, has been agreed between the Bar Council and the Law Society of Ireland for dealing with delays in paying barrister's fees. Details of the arrangements are being sent to each member.

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New Fee Structure under the Civil Legal Aid Scheme

Revised arrangements relating to the fees payable for Civil Legal Aid work have been agreed the Bar Council and the Legal Aid Board. The new arrangements come into effect from 5th October 1998. Copies of the new fee structure are available at the reception desks in the Law Library, Four Courts, Church Street and the distillery Building.

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The Late Mr. Justice Peter Shanley

The summer vacation was marked by the sudden death of Mr. Justice Peter Shanley, who served with distinction on the Bar Council during his time at the Bar. The Bar Council would take this opportunity to convey condolences to Mr. Justice Shanley's wife and family and his former colleagues at the Bar and on the Bench. Mr. Justice Ronan Keane has kindly contributed an appreciation to Mr. Justice Shanley, published on p. 52 of this journal.

Offences Against the State (Amendment) Act, 1998 – Two Views

THOUGHTS IN FAVOUR OF THE OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1998

Viewed from the detached and rarefied atmosphere of academia, the Offences Against the State (Amendment) Act, 1998 is most probably a piece of legislation which is undesirable. It pushes the frontier of criminal law and evidence towards areas where some detached and disinterested observers might wish it to avoid. This, however, is an Act which should not be judged by the question 'Is it desirable?' It should be judged by the question 'Is it necessary?'

When a democratic State takes swift and decisive action to protect its citizens and institutions there is always a danger that the frontier of fairness will be crossed and injustice may follow. Our system of jurisprudence recognises that this is so and requires that all legislation be in a position to withstand constitutional scrutiny. This Act is no exception. Its provisions, which now enjoy the presumption of constitutionality, must be operated in a manner which is fair and which meets the properly exacting requirements of the 1937 Constitution. As with all legislation, time alone will tell whether this will happen.

The five new offences created by Sections 6 to 9 and 12 of the Act are largely unexceptional. Few would contend that a person who directs an unlawful organisation, trains persons in the use of firearms or explosives or possesses articles for purposes connected with subversive activity, should be immune from the sanction of the criminal law. The provisions relating to the collection and withholding of information are undoubtedly more adventurous - but they are by no means without precedent. Both the Road Traffic Acts and the Finance Acts require citizens to provide information to State authorities on pain of criminal sanction. Is there any legal or constitutional reason why a citizen should be allowed the callous luxury of unreasonable silence in circumstances where the lives of fellow citizens are at risk? None springs readily to mind.

The evidential provisions of the act, which chiefly permit a court to draw inferences from certain conduct, have been much commented upon. Lacking in much of the comment was an understanding of the manner in which these provisions will operate. The court 'may' - not must - draw such inferences 'as appear proper'. This is not a provision which in any fashion foists on a court an obligation to draw an inference which is unreasonable or unjust. It retains judicial discretion in its strongest form and in reality the provision does little more than permit a court to draw an inference from conduct which an ordinary citizen might regard as decidedly suspicious. The inference alone cannot give rise to a conviction, it may only be used to corroborate such other evidence as may exist. Far from being undesirable, it could strongly be argued that this provision does little more than merge law and reality whilst providing an abundance of safeguards. The extension of the period of permissible detention for a person arrested under Section 30 of the 1939 Act which is provided for in Section 10 is, similarly, subject to an abundance of stated and implied safeguards. The constitutional right of access to a solicitor remains intact as does the right of access to the High Court by way of an Article 40 application. The provisions of the Regulations made under the Criminal Justice Act, 1984 apply to such detention. The decision to detain a person beyond 48 hours is to be taken, not by a police officer, but by a judge. The detained person must be produced before that judge at the time the decision is to be taken, thus allowing the person or their solicitor ample opportunity to address any irregularity which they have not chosen to address by an Article 40 application.

The Oireachtas, in the aftermath of the calculated slaughter at Omagh were faced with a choice between hand-wringing inactivity and resolute action. They chose the latter – even amongst lawyers, few would criticise their choice.

PROBLEMS WITH THE OFFENCES AGAINST THE STATE (AMENDMENT) ACT, 1998

As might be imagined in the context of a rapid legislative response to the Omagh atrocity, the Offences Against the State (Amendment) Act is a hastily cobbled together set of responses to the emergence of the RIRA. It should be noted that the RIRA had been active for a number of months, had detonated several huge bombs, and had been foiled in a number of "spectaculars". If the Gardaí knew or suspected who was involved, the existing law did not seem sufficient to put the RIRA out of business.

The issue with the 1998 Act is whether it would be ineffectual if the RIRA were determined to resume their terror campaign.

Section 2 of the Act, which allows an inference to be drawn from failure to give satisfactory answers to questions relating to the investigation of a membership offence, is unsatisfactory in the absence of any objective method of working out whether there was such a failure. In particular,

the absence of tape recording of police interviews means that any interview depends on the police recollection of the interview. If the silence of an accused person or his failure to make an adequate response to a question is made corroborative of guilt (and in this case capable of corroborating the belief of a Chief Superintendent) then surely the State should, where practicable, establish a system of electronic recording of interviews. It will be impossible for an accused person to show that he was co-operative or that he attempted to answer questions other than by his own uncorroborated testimony.

Again, the provisions of Section 3 of the Act requiring prior notification to the prosecution of witnesses in membership cases is unlikely to have much practical effect. How any witness could establish that one was not a member of the IRA is difficult to understand.

Section 4 of the Act which makes "movements, actions, activities or associations on the part of the accused person" capable of constituting "conduct" indicative of membership of an illegal organisation seems sensible.

Section 5, which allows for inferences to be drawn from the failure of the accused, when formally confronted with an accusation of a terrorist type offence, to mention particular facts relevant to his subsequent defence as made in Court, is again suspect by reason of the failure of the State to provide any system for objectively demonstrating what was and what was not mentioned by the accused and the circumstances in which the alleged failure arose.

An alarming part of Section 5 is that the inference is expressly made one for "the jury" to make. This suggests that the draughtsman had in mind the use of the new provision in cases which were not being held before the Special Criminal Court – i.e. non-terrorist offences.

The offence of directing the activities of an unlawful organisation is made punishable by life imprisonment under Section 6 of the Act. This Section seems to be unnecessarily vague and wide. It applies to anyone who "directs, at any level of the organisation structure the activities of" an unlawful organisation. It does not, for instance, confine itself to activities involving the commission or proposed commission of serious offences, but applies to all activities and to direction at any level of the organisation "structure". How the structure would be proved is another question.

While Section 8, which deals with unlawful collection of information, is restricted to information "likely to be useful in the commission by members of any unlawful organisation of serious offences," it is to be noted that Section 9, which deals with disclosing information, is not so restricted. Section 9, therefore, is now part of the ordinary criminal law of the country. A person is guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in preventing the commission of a serious offence or in securing the apprehension, prosecution or conviction of any person for a serious offence and who fails without reasonable excuse to disclose that information as soon as is practicable to a member of An Garda Síochána.

The phrase "serious offence" in this context means a serious offence under the definition in the Criminal Justice Act, 1984 where that offence involves "loss of human life, serious personal injury (other than injury that constitutes an offence of a sexual nature), false imprisonment or serious loss of or damage to property or a serious risk of any such loss, injury, imprisonment or damage."

As you read this, therefore, the ordinary criminal law of Ireland now makes it an offence punishable by five years imprisonment not to act as a "whistle-blower" in respect of any such offence, whether or not it has any terrorist or State security dimension.

Worse still, Section 14(1) purports to provide "that the ordinary Courts are inadequate to secure the effective administration of justice and preservation of public peace and order in relation to withholding information offences among others" (and therefore liable to arrest without warrant and detention under the 1984 Act).

The obvious unconstitutionality of Section 14 as originally drafted has been the subject of a face-saving amendment offered at the report stage of the Dáil debate which is set out in Section 14(3). How the provisions of Section 14(1) and (3) are supposed to sit together is anyone's guess. Section 14 should never have been enacted.

Another anomaly in the Act is the attempt to make land the subject matter of forfeiture where it is used to house firearms or explosives. The rushed drafting of Section 16 of the Act does not suggest any approach by a Court to the issue of how much land would be forfeited in such a circumstance. If a portion of a field is used, is the entire farm capable of being forfeited? Or is the extent of the property to be determined by completely arbitrary notions such as whether the land is all comprised in one folio? Presumably a Court would be obliged, in the absence of any contrary provision in the legislation, to minimise the extent of the forfeiture involved, as a canon of construction of a penal enactment.

All in all, the 1998 Act is badly drafted, and constitutes a P.R. exercise rather than a serious attempt to deal with the RIRA should it determine to continue with its terror campaign. It is difficult to believe that most of the measures in the Act (which have been tried on one side of the border or the other in the past) would succeed against the RIRA where they failed against the Provos. And if the Act is not successful, it begs the question as to whether internment might not have been a more honest and a more effective response to Omagh. These issues will remain in the realm of speculation if pressure from the Provos and the force of public opinion deter the RIRA from re-starting their terror campaign. But as legislation goes, the 1998 Act is a poor specimen in conception, execution, and likely effect.

Army Deafness Claims in the Wake of the Hanley Judgement

FRANK CALLANAN, SC

Be not afeard: the isle is full of noises,
Sounds and sweet airs, that give delight, and hurt not

The Tempest

The judgement of Mr. Justice Johnson in the case of *Hanley v. Minister for Defence* (unreported, 21 July 1998) represents a significant attempt at a judicial codification of the assessment of damages in army deafness claims. It is a venture into uncharted and choppy waters. It has to be set in the context of the recent course of army deafness claims, and the political disquiet which surrounds it, culminating in the publication of the Green Book.

The difficulties in the subject are in large measure inherent, and of a medical rather than a legal character. The assessment of hearing disability has been a subject of some degree of controversy, sometimes approaching the condition of acrimony, between medical specialists.

The chief area of dispute has been the identification of the frequencies which are most relevant to the hearing of speech. Hearing has two components, pitch and loudness. The pitch in hearing is determined by the frequency or number of cycles per second. A 500 Hertz (Hz.) tuning fork for example vibrates at 500 cycles per second (a Hertz being the unit of measurement of cycles per second). The level of 2000 Hz. is for example widely regarded as particularly important for the hearing of ordinary conversation. Loudness is measured in decibels, which are logarithmic units.

Hearing losses in army deafness cases are high-frequency losses. They are typically most manifest at 4,000 Hz., giving rise to the characteristic dip in the audiogram at that frequency. The system of the American Medical Association seems to be the most commonly used single system, but does not command universal acceptance, and is regarded by some experts as seriously understating hearing loss. It involves calculating hearing thresholds for each ear at 500, 1000, 2000 and 3000 Hz. For each ear, measuring the amounts by which average hearing thresholds exceed 25 decibels, and then applying a figure to give the binaural hearing loss, i.e. the combined loss for both ears. The main United Kingdom system uses the frequencies of 1,000, 2,000 and 4,000 Hz.

In the first wave of army deafness cases, much of the expert evidence turned on the issue of the fairness of the AMA system. Against this background of uncertainty and inconsistency, and of concern at the burden which army deafness claims were placing on the public finances. The Minister for Health and Children set up in November 1997 an Expert Group whose remit was to examine and make recommendations on an appropriate system and criteria for the assessment of hearing disability arising from hearing loss, with particular reference to noise-induced hearing loss. The report of the Expert Group, the so-called Green Book, was published on 9th April 1998.

The Civil Liability (Assessment of Hearing Injury) Act 1988 was signed by the President on 11 May 1988. Section 3 thereof provides that judicial notice is to be taken of the report of the Expert Group in all proceedings before a court claiming damages for personal injury arising from a hearing injury, whether instituted before or after the enactment of the legislation.

The Irish hearing disability system established by the Expert Group is summarised at para 7.1 and is set forth in Schedule 1. It is based on taking air conduction hearing threshold levels at the frequencies of 500 Hz., 1,000 Hz., and 4,000 Hz., and applying a formula to generate a binaural percentage hearing disability.

The Green Book seeks also to address the vexed question of the assessment of tinnitus, neither the existence nor extent of which is capable of objective verification. It provides that slight/mild tinnitus should attract a zero disability percentage; that the hearing disability attendant on moderate tinnitus should be measured at 2%; and that severe tinnitus should rate as a disability of 6%. These percentages fall to be added to the computed disability in respect of hearing loss proper.

Schedule 1:

The Green Book: Irish Hearing Disability Assessment System

To Assess Hearing Disability

- Take the Air Conduction hearing threshold levels at 500Hz, 1,000Hz, 2,000Hz and 4,000Hz, add and divide by 4.
- Do this separately for the right and left ears.
- Subtract 20dB from the average obtained for each ear.

This is an average hearing loss.

- Multiply the average hearing loss of each ear by 1.25%.
- Weight the better ear's figure by multiplying by 4, add it to the worse ear's figure and divide the sum by 5.
- Correct the ARHL by table deductions, over the age of 69 years in males and 77 years in females (Table 4).

This figure is the Binaural Percentage Hearing Disability.

An additional disability allowance for moderate or severe tinnitus may be added.

This percentage computed is the proportion of hearing disability that the individual experiences, it is not the proportion of total body disablement.

The Case Law before the Green Book

In *Bastick v. Minister for Defence* (unreported, 24 November 1988), Barron J. observed of the conflicting medical testimony before him as to the level at which a hearing loss should be taken to exist:

> 'The question so far as I am concerned is not so much whether there is a hearing handicap or not; the question is the condition of the hearing such that it affects the quality of life. That said it also seems to me important that there is no absolute standards because the Plaintiff would be entitled to damages even if he were at the upper range of normal hearing if that hearing was in fact less good than the hearing that he previously had. So when we were discussing whether his present hearing causes a handicap or not we are using the wrong base.'

In *Gardiner v. Minister for Defence* (unreported, 13 March 1998), Johnson J. the state's evidence was that the Plaintiff did not suffer from noise-induced hearing loss in that his hearing was in the normal range for his age. Declining to follow the AMA system, Johnson J. made an award in favour of the £20,000.00.

After the Green Book: *Greene*

The first extended consideration of the Green Book came in *Greene v. Minister for Defence* (unreported, 3 June 1998). The Plaintiff was a 59 year old man who had served in the defence forces, commencing with the FCA, from 1972 until his retirement in 1996. He had what is conventionally termed a hearing 'loss' of 40 decibels at 4,000 Hz: that is to say that he was unable to hear a sound of 4,000 Hz. pitch if it was below 40 decibels in loudness. Up to the date of an army medical examination in March 1993, the Plaintiff had had no problem with deafness, and Lavan J. found his evidence unconvincing as to his problems with noise-induced hearing loss and tinnitus following the medical examination. In the course of his judgement, Lavan J. cited the evidence given before him by Prof. Peter W. Alberti, Professor of Otolaryngology at the University of Toronto, General Secretary of the International Federation of Otorhinolarygological Societies, and an international authority who had been consulted by the Expert Group, as to the Irish system.

> 'My sense is that it favours the people who are claiming. I say this for two reasons: many schemes stop at 3,000 Hz; they do not include 4,000 Hz in the equation. The use one or the other. They do not use both. They use one or the other but 4,000 is more likely to b e worse hearing than 3,000. The second reason is that the age correction is little and comes in late where others [schemes] put in age corrections much earlier. The third is that the point at which compensation begins at 20 decibels is lower than several that are out in the field. So when you put those three together I think it is leaning in favour of the claimant.'

Lavan J. held that on the evidence the Green Book system, under which the Plaintiff had a 2% disability, was fair, and awarded damages of £3,000.00.

In *Dunne v. Minister for Defence* (unreported, 10 July 1988), the Plaintiff had some loss at 4,000 Hz which on the state's evidence was within acceptable limits and did not constitute a significant disability. This was, as Barr J. held, 'also borne out by the method of assessment of hearing loss contained in the Green Book. The latter does not take age into account and is intended as a broad guide for the assistance of the court'. Barr J. assessed damages in respect of hearing loss of £8,000.00, and disallowed the claim in respect of tinnitus.

Hanley

The Plaintiff in *Hanley* was a thirty five year old Army private. Using the Green Book formula, he had a 9% disability.

Of the decision of Lavan J. in *Greene*, Johnson J, the trial judge observed: 'Mr. Justice Lavan accepted the Green Book as a fair and adequate means of measuring disability and insofar as it goes, I completely accept Mr. Justice Lavan's judgement. I support the Green Book as a measure of disability at any given point in time". However he considered that the Green Book had a major lacuna in that it 'gives merely a still photograph of the impairment measured in disability terms of an injured party at any given moment, but in the formula there is no provision made for future deterioration caused by the combination of noise induced hearing loss and age related hearing loss'

It is important to appreciate that this is not of course an assertion that the noise-induced hearing loss sustained by the Plaintiff would itself deteriorate in time. It is rather an argument that the prospect of the P{laintiff sustaining an additional hearing loss in the future through the ageing process should entitle him to a further (and substantial) measure of compensation arising from the projected hearing loss at 62.

To rectify what he took to be this deficiency in the Green Book system, Johnson J. awarded damages under two heads:

(1) the existing disability as per the Green Book
(2) a sum in respect of future disability, pain and suffering having regard to the further diminution in the Plaintiff's overall hearing which would arise from the ageing process.

To compute the latter component, Johnson J. availed in addition to the Green Book method of assessment, the following:

(1) An empirical formula for the calculation of hearing threshold levels associated with age and noise [H'] which is set forth in paragraph 5.1 of ISO 1999:1990(E) which is entitled "Acoustics – Determination of occupational noise exposure and estimation of noise-induced hear-ing impairment". This paragraph is reproduced as Schedule 2 to this article.
(2) Empirical date in relation to hearing threshold levels associated with age of a typical unscreened population. Johnson J. declined to rely on the data set forth in Appendix I of the Green book on the basis that it related to the screened population. In the absence of a data base spanning the years from 20 to 80, he relied on the data contained in Annex B of ISO 1999:1990 (E), which covered the hearing thresholds in the decadal groups of 30, 40, 50 and 60.

A more comprehensive data base com-

piled by ME Lutman & AC Davis has since been identified, which was published in *Audiology*, 33, 1994 at pp.327-50. *Schedule 3* to this article extracts the relevant fogures from Lutman & Davis. The table contained in the schedule are the median percentile figures for the Green Book frequencies.

Schedule 2 From ISO 1999: 1990 (E)

Hearing Threshold Level of a Noise-Exposed Population

The hearing threshold level, in decibels, associated with age and noise (HTLAN), *H'*, of a noise-exposed population is calculated, for the purposes of this International Standard, by using the following empirical formula:

$$H' = H + N - \frac{HN}{120}$$

where

H is the hearing threshold level, in decibels, associated with age (HTLA);

N is the actual or potential noise-induced permanent threshold shift (NIPTS), in decibels;

The equation is applicable only to corresponding fractile values of *H'*, *H* and *N*.

NOTE - The additive relationship is an approximation to the biological events and is considered accurate enough for the purposes of this International Standard. Frequently,
the sum *(N -HN)* is called the actual NIPTS.
(120)

The term *HN* starts to modify the result significantly only when $H \div N$ is more than
120 approximately 40 Db.fs24

Johnson J. held the age at which the 20 decibel barrier was breached in the case of unscreened population was 62 years, and that this was the age by reference to which the further damages should be assessed. As the only data available was that relating to the year 60, this was the year in fact used in *Hanley*.

Schedule 3

Hearing Threshold levels

Sex	Age	Percentile	500Hz	1,000Hz	2,000Hz	4,000 Hz
M	20	50	5	2	3.5	6.1
M	25	50	5.2	2.2	3.8	6.8
M	30	50	5.5	2.6	4.5	8.3
M	35	50	6	3.2	5.5	10.6
M	40	50	6.7	3.9	6.9	13.7
M	45	50	7.6	4.9	8.6	17.7
M	50	50	8.6	6.1	10.7	22.4
M	55	50	9.8	7.5	13.1	27.9
M	60	50	11.2	9.1	15.8	34.2
M	65	50	12.7	10.8	19	41.3
M	70	50	14.5	12.8	22.4	49.3
M	75	50	16.4	15	26.2	58
M	80	50	18.5	17.4	30.4	67.5
F	20	50	5	2	3.5	6
F	25	50	5.2	2.2	3.8	6.4
F	30	50	5.5	2.6	4.4	7.3

As the case was in the nature of a test case, Johnson J. in addition to fixing the damages to which the Plaintiff was entitled, formulated a table of damages appended to his judgement, which is reproduced as Schedule 4.

Schedule 4

The table of damages in Hanley

Age	1% - 10%	1 0% - 25%
30	£3,000	£6,000
35	£2.750	£5,500
40	£2,500	£5,000
45	£2,250	£4,500
50	£2,000	£4,000
55	£1,750	£3,500
60	£1,500	£3,000

This table is based on two assumptions. The first is that a given hearing loss for a younger Plaintiff is more serious for a younger than an older Plaintiff. The second is that the greater the disability, the more damages additional percentages of disability should attract.
If one looks at the scale on will see at the bottom left hand corner the figure of £1,500 for a 1% hearing disability in the 1-10% disability bracket at age 60. This is based on the amount of £3,000 awarded by Lavan J. in *Greene* in respect of a 2% disability. It will be seen however that this is the lowest figure which anywhere appears, and is a jumping-off point for significantly higher levels of damages for each percentage of disability in the case of younger Plaintiffs and Plaintiffs with higher levels of disability.

The *Hanley* Procedure

The following is an attempt to summarise the procedure followed in assessing the disability and computing the damages in *Hanley*

1 Current Hearing Loss

(i) Using the relevant audiogram results compute the percentage disability in accordance with the Green Book formula.
(ii) add any additional percentage attributable to tinnitus. This is a one-off exercise and is not duplicated under 2 below.
(iii) The total gives the current binaural percentage disability under the Green Book.
(iv) Apply the table of damages appended to the *Hanley* judgement to determine the appropriate level of damages under this head.

2. Projected Aggravation of Hearing Loss into the Future

(i) Applying the figures in the Plaintiff's

audiogram, and the Lutman & Davis figures for a person of the Plaintiff's age to the ISO formula set forth in Schedule 2 hereto, to compute a value for N (the noise induced component of the Plaintiff' s hearing loss).
(ii) Then apply the Lutman & Davis hearing threshold figures for age 60 at each of the relevant frequencies, using the value of N as already determined, to compute for each of the relevant frequencies the value of H' [being at age 60 the projected hearing threshold levels at age 60 associated with age and noise]. This exercise generates a notional audiograph for the Plaintiff at age 60.
(iii) Use the Green Book formula to calculate the projected percentage disability at age 60.
(iv) Deduct from the projected percentage disability at age 60, the current binaural handicap
(v) Determine the appropriate level of damages by using the table in the *Hanley* judgement.
(vi) Determine the net present value of the amount so determined. This is the amount of further damages into the future to which a Plaintiff may be entitled under the *Hanley* judgement.

3 Total Award
This is the sum of the figure determined at 1(iii) in respect of damages for current hearing loss, and the figure determined at 2(vi) in respect of further damages into the future.

In the *Hanley* case itself Johnson J. made an award of £24,750.00 in respect of the Plaintiff's current 9% disability. In respect of further compensation in the future, he held that the Plaintiff would have a further disability of 13% at 60. Applying the table of damages appended to the judgement this gave a figure of £37,500, which accurately reduced to £15,825.00. He awarded a further £10,000.00 for anticipated reduction in service in the Lebanon, additional duties etc.
The award was thus.
£24,750.00
£15,825.00
£10,000.00+
£50,575.00
The *Hanley* procedure is more laborious than intricate, and not altogether as daunting as it may seem. For the mathematically resolute, Schedule 5 sets forth the computation of damages in the case of a 35 year-old Plaintiff with audiogram results as set forth in the top right and left hand corners. The computation

Schedule 5

Example of calculation to determine award on the basis of the Hanley judgment

Plaintiff's Age: 35

Audiogram Results		*From Lutman & Davis table*		
Right Ear from audiogram		**Median Current**	**Median @ 60years**	**Left Ear from audiogram**
500Hz	15	6	11.2	5
1000Hz	15	3.2	9.1	5
2000Hz	15	5.5	15.8	10
4000Hz	95	10.6	34.2	85

	Right	**Left**
Use Green Book Formula to determine current handicap	18.75%	7.81%
Current handicap	10.00% overall	

Compute N for relevant frequencies	**500Hz**	**1000Hz**	**2000Hz**	**4000Hz**
N noise Right Ear	9.47	12.12	9.96	92.58
N noise for Left Ear	-1.05	1.85	4.72	81.61
Compute values for H' at 60 years at relevant frequencies				
H age + N noise - (HN/120) Right	19.79	20.30	24.45	100.39
H age + N noise - (HN/120) Left	10.25	10.81	19.90	92.55

	Right	**Left**
Use the Green Book formula to determine Projected Handicap @ 60 years:	26.54%	16.72%
Handicap age 60:	18.68% overall	

Apply *Hanley* table to determine award in relation to current hearing loss -
Current Award **Total:£27,500**

Apply *Hanley* table to determine award in relation to projected hearing loss at 60 years, and actuarially discount -
Projected Award Total: £26,040 **NPV*: £11,544}**
£39,044
**The discount rate here applied is 3.5%*

conforms to, but does not follow the exact sequence of, the procedure narratively described above.

After *Hanley*

The *Hanley* judgement has been appealed by the state to the Supreme Court, as have a number of other army deafness claims. None of these appeals have as yet been heard.

In *Farrelly v. The Minister for Justice* (unreported 23 July 1998), Donovan J. referred to the *Greene* and *Hanley* cases, and was 'persuaded that the formula for assessing hearing disability in the Green Book is not complete in that it does not allow for further deterioration of hearing caused by the combination of noise induced hearing loss and age related hearing loss'. Neither party took issue with the approach of Johnson J. in the *Hanley* case to the measurement of compensation per degree of established disability, and O'Donovan J. considered the approach 'fair and reasonable if somewhat arbitrary', and followed it, 'influenced in this regard by the fact that I believe that there should be judicial consistency in the assessment of damages in these type of cases'.

Comment

The question remains whether the mode of assessment of hearing disability, and the tabulation of damages fixed in *Hanley* are satisfactory. The effect of the judgement is to significantly inflate the level of damages in army deafness cases overall, and to create a situation in which those with no current hearing disability may be able to recover reasonably significant damages arising from the knock-on effects of the ageing process, to be determined notionally at the age of 62 (or in practise 60).

One does not have to be the Minister for Defence to wonder whether the *Hanley* judgement does not create an excessively indulgent system for the compensation of army deafness cases where the level of hearing loss is slight or imperceptable.

A number of the steps taken under the *Hanley* procedure serve to escalate significantly the level of damages recoverable. While deferring in theory to the Green Book, and to the level of damages of the order adumbrated by Lavan J. In *Greene*, the *Hanley* judgement in fact goes far beyond both. What is particularly problematic is the adoption of an à la carte approach to the Green Book: following it for some purposes, but tacking on to it an entirely new and additive formula to allow for the notional aggravation into the future of the hearing loss consequent on the onset of age-related hearing loss.

In seeking to rectify the perceived deficiency in the Green Book system, the Hanley approach creates anomalies of its own. If the ISO formula (schedule 2) is to be applied at age 62, why in the case, say, of a 58-year old Plaintiff, is there no provision to allow for any age-induced element in the Plaintiff's current hearing loss?

The distinction between current loss and its aggravation in the future, together with the award of further damages under the latter head could be considered overly conjectural. It is hard enough to draw a distinction between audiographically registered dip in hearing and a felt disability, without trying to project that exercise into the future.

It is difficult not to feel that the separate calculation of damages in respect of current loss, and the anticipated aggravation of that loss at age 62, involves a significant element of double-counting. At the very least, it is difficult to see how in assessing damages on that basis it is possible in practise to avoid an element of double-counting creeping into the assessment of the damages.

If one thinks of a non-deafness personal injury award, it is certainly not the norm to award a further potentially substantial sum in damages further to the primary award, on the grounds that the injury would become materially more irksome, or the disability greater, as a result of the onset of the general debilitating effects of ageing.

While the level of damages in the United Kingdom are objectionably frugal, in the assessment of hearing loss the gap between the jurisdictions widens with *Hanley* into a yawning chasm: for the level of damages in the United Kingdom, see Kemp & Kemp, *The Quantum of Damages*, vol. 2 d 3-001 - 118

In one respect at least, its endeavour to introduce a greater degree of consistency and transparency in the computation of damages, *Hanley* is commendably innovative. That is not to say that it is either likely or desirable that rigid scales of damages on the British model should banish more intuitive approaches to the assessment of damages in individual cases. •

I am grateful for the comments of Mr. David O'Shea and Ms. Jane McCarthy in preparing this article. The responsibility for errors, or untoward bias, rests solely with myself.

DATES FOR YOUR DIARY

Law Terms for the Year

Michaelmas '98: 5th Oct 1998 - 21 Dec 1998
Hilary'99: 11th Jan 1999 - 26th March 1999
Easter '99:12th April 1999 - 20th May 1999
Trinity '99: 2nd June 1999 - 30th July 1999

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Conference

Open and Shut – Freedom of Information in Ireland

on 16 and 17 October (commences @6.45pm on 16 October), UCC. Contact: Eleanor Lehane at 021 902 220

Ageing and Older People

The Council for Ageing and Older People are hosting a conference entitled 'The Law and Older People: Implications for Service Providers' on Thursday, 5th November, in the Royal Marine hotel, Dun Laoghaire, Co. Dublin. Speakers include Former Chief Justice, Mr Justice Thomas A. Finlay, author and District Judge, Gordon Ashton and Dr Denis Cusack, BL. For reservations, please contact Dr. Terry Connors at 676 6484.

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Equality and Discrimination

A conference on Equality and Discrimination has been organised by the Irish Society for Labour Law. This will take place on October 9th and 10th in Trinity College, Dublin. A dinner will be held on October 9th at King's Inns to mark the opening of the conference. On the Saturday, Ms Justice Mary Laffoy will chair the morning session and Ms Carmel Foley, Chief Executive of the Employment Equality Agency, will chair the afternoon. Fee for the dinner and conference is £150, while fee for the Saturday sessions only, is £120. For further information, contact Sile O'Kelly, at 872 0622

Child Protection and Welfare while in Care: the Role of the Courts

TERESA BLAKE, Barrister

In an unprecedented step, the High Court has directed a Government Minister to implement in a particular manner the stated policy of his Department. The Minister involved is the Minister for Health[1] and the policy the Minister is ordered to live up to, *inter alia* is:

- To make available to the Eastern Health Board sufficient funding to allow it build, open and maintain a secure 24 bed high support unit for young people who require secure accommodation with treatment;
- To take all steps necessary and to do all things necessary to facilitate the building opening and maintenance of the unit, the unit to be open not later than 1st October 2001.

This article examines the issues that have arisen for the courts when dealing specifically with applications brought on behalf of children who need secure accommodation with treatment for their own welfare.[2] It includes examination of the judgment and case referred to above, *D.B.(A Minor suing by his mother and Next Friend), S.B v. The Minister for Justice, The Minister for Health, The Minister for Education, Ireland and the Attorney General and the Eastern Health Board).*[3]

The State's Obligation to Provide Secure Accommodation

(i) Constitutional Obligation

The obligation on the State to provide secure accommodation with treatment for children has been recognised by the Courts in a line of cases concerning very vulnerable children and young people since the mid 1990's.[4] In March 1995, judgment was delivered in *FN v. Minister for Education, Minister for Health Ireland and the Attorney General and Eastern Health Board.*[5]

The case concerned a twelve year old boy who had been diagnosed as suffering from a hyperkinetic conduct disorder. A consultant psychiatrist recommended containment for treatment. Geoghegan J having restated the constitutional rights of children stated as follows:

> 'I would take the view that where there is a child with very special needs which cannot be provided by the parents or guardian there is a constitutional obligation on the State under Article 42, s.5 of the Constitution to cater for those needs in order to vindicate the constitutional rights of the child'[6]

The manner in which those rights were to be realised by the State was stated in the following terms:

> 'I take the view that the State is under a Constitutional obligation towards the applicant to establish, as soon as reasonably practicable, suitable arrangements of containment with treatment for the applicant.'[7]

(ii) Reliance on the Original Constitutional Jurisdiction of the High Court.

Confronted with a situation where expert evidence is given to the effect that, in the interest of a child's own welfare, a child requires secure accommodation with treatment, the High Court necessarily had to have regard to the statutory basis for the detention/containment of minors. In doing so it noted in *FN*'s case and others that raised the same issues[8] that

- The Child Care Act 1991 provides a statutory scheme for the care and protection of children. It does not, however, provide for the civil containment of children.
- The detention of children is provided for in Section 58(4) of the Children Act, 1908. It provides that the District Court has power to order a child to be detained in an industrial school.
- However, practical realities relating to its operation and the fact that it is a statute from another era has meant that it is unsuitable as a legal mechanism for effecting containment of a child for treatment.

The High Court, referring to the Constitution, (particularly Articles 40 s.3 and 42.5),[9] and the principles enunciated in cases concerning children, has relied on its own original constitutional jurisdiction to make orders providing for the detention/confinement of a child where necessary in his/her own interest.

The *DB* Case

(i) The Applicant's Position

DB[10] was a minor who, for his own protection and welfare, required accommodation in a secure unit. In 1995 an application was brought on his behalf by his mother seeking *inter alia* a mandatory injunction to make available secure accommodation with treatment for him. In the absence of such a place, various other alternatives were tried without success to meet his needs. The matter was re-entered before the court in March 1996. On the application to it by the Eastern Health Board, the High Court exercised its original constitutional jurisdiction and gave directions as to his custody care and control. No place was available for him in a secure unit in the Eastern Health Board area or elsewhere in the State.

In July this year, an application was brought seeking the Court's involvement in the enforcement of DB's and other such young people's rights in a

more direct way by the Court than heretofore. It was contended on his behalf that:

- the Minister had failed to take timely and effective steps to deal with the shortage of facilities despite being aware of such needs for over three years since the *FN* case was decided.
- the experience of others in a similar position to DB was sworn to on affidavit by his solicitor and accepted by the Court as summarising the impossible situation facing the Courts as a result of the lack of such facilities.
- There had been frequent policy changes and there was no guarantee that the Department of Health policy would not be changed again.

On the applicant's behalf, the Court was urged to intervene in a manner to ensure the position was addressed as the actions of the Department of Health in the period since 1995 had been unsatisfactory.[11]

(ii) The Response of the Minister for Health

On the Minister's behalf, it was accepted that one could be critical of what had occurred in the past; there were elements in the situation which were inexcusable and that fell far short of the ideal. It was argued on the Minister's behalf that:

- There was no deliberate attempt to set at naught the rights of the applicant
- The Court should have regard to the additional funding made available by the Minister to Health Boards as a result of the implementation of the Child Care Act, 1991.
- The Court should not make the order sought as to do so would involve the Court in matters of policy.[12]

(iii) Courts Review of the Actions taken by State Agencies.

Reviewing the actions of the State agencies the Court found, *inter alia* that:

- Proposals concerning the provision of residential places outlined to the Court after its judgment in *FN* in March 1995 had been substantially departed from without that fact having been made known to the Court
- In April 1997 evidence of unseemly and wasteful wrangles as to which department of government should have responsibility for the care of children such as the applicant emerged
- There was chopping and changing of policy as to the provision of two units, at Ballydowd and Portrane
- Evidence given to the Court on oath regarding the timescale for the completion of units was wholly inaccurate
- By March 1998, little legislative progress had been made. The Childrens Bill, 1996, provided for measures to deal with children such as the applicant was awaiting Committee stage in the Dail
- A Ministerial decision made in July 1998 meant that the proposals rejected in September, 1996 would now be accepted
- An expert report commissioned by the Minister with a view to finding out the number of places required was commented upon critically[13]
- The Court accepted the uncontroverted evidence of the Eastern Health Board that 60 places would be required to accommodate young people with needs like DB.

The Jurisdiction of the Court to Grant the Orders Sought

The Court rejected the submission that it did not have jurisdiction to make the Orders sought on the following grounds:

- Article 40.3.1 places an obligation on the State to respect, and as far as practicable by its laws to defend and vindicate the rights of the citizen. The Courts are charged with the defence of rights guaranteed under the Constitution.[14]
- It inevitably follows that the courts have the jurisdiction to do all things necessary to defend and vindicate such rights.[15]
- The rights protected are rights of substance and cannot with impunity be set at naught or circumvented[16]

Kelly J, relied on the judgment of the Supreme Court in *DG v. Eastern Health Board* as authority for the proposition –

> '... that in carrying out its constitutional function of defending and vindicating personal rights, the Court must have available to it any power necessary to do so in an effective way. If that were not the case, this Court could not carry out the obligation imposed upon it to vindicate and defend such rights. This power exists regardless of the status of a respondent. The fact that in the present case the principal respondent is the Minister for Health is no reason for believing that he is in some way immune from Orders of this Court in excess of mere declarations if such orders are required to vindicate the personal rights of a citizen.'[17]

(i) Normal Relations Between the Different Branches of Government

The Court rejected the submission that it did not have jurisdiction to interfere with the administrative branch of government by relying on *Crotty v. An Taoiseach*[18] In that case the Supreme Court recognised the jurisdiction of the Court to interfere with the activities of the executive where constitutional rights were being threatened or invaded by such activities. Kelly J stated that 'Whilst I am satisfied that the Court does have jurisdiction to make orders of the type sought against the administrative branch of Government, they are not made lightly.'[19]

Referring to the mutual respect which normally exists between the legislative, executive and judicial branches of government, the Court noted the response by the government in *McMenamin v. Ireland and Ors*[20] where the Supreme Court considered it unnecessary to make any further Order on the expectation that the government would rectify the injustice. The Supreme Court had expressed the view that the government on being made aware of a 'constitutional injustice it will take the necessary steps to have the matter remedied in accordance with law and in accordance with its constitutional obligations.'[21]

The Court distinguished DB's case on the following grounds:

- The obligations of the State towards minors like DB were declared well over three years ago
- They were to be honoured as soon as practicable
- The year 2001 is the earliest they would now be met.

As regards the argument that the Court was not entitled to become involved in issues of policy, Kelly J held he did not have to decide that question as the Order he was about to make would not involve the Court in questions of policy. However he expressed the view that if such an intervention were necessary to vindicate and enforce constitutional rights, then it would be open to a Court to make it.

(ii) Factors to be Considered before exercising the Power to Grant Injunctive Relief Against a Minister[22]

When exercising the power to grant injunctive relief against a Minister, the Court held the following factors should be taken into account:

- The nature of the relief already obtained
- The need to act expeditiously
- The effect of the failure to provide facilities
- The efforts made by the Minister to respond and their proportionality given the rights that required protection.

The Court expressed the view that by the granting of declaratory relief concerning the State's obligations, it observed the constitutional respect owed to the administrative arm of government. It also provided the Minister with an opportunity to take the necessary steps to put matters right, the expectation being that those steps would be taken as soon as practicable. This had not happened.

(iii) The Injunction

Before proceeding to grant the Order sought by the applicant the Court was very critical of the State's response to young people in his position. In his conclusion, Kelly J noted the full complement of secure accommodation places required would not now be available until 2001, some six years after the judgment in *FN*. He stated 'that time scale alone would certainly suggest that the response on the part of the Minister has been neither proportionate, efficient, timeous or effective.'[23]

The Court noted that its invitation to the Minister to furnish an undertaking to it that the facilities proposed for Ballydowd and Portrane would be completed and put into operation within the specified timeframe was not forthcoming. That being so the Court stated:

> 'I have come to the conclusion that in the absence of such an undertaking on the part of the Minister, the time has now come for this Court to take the next step required of it under the Constitution so as to ensure the rights of troubled minors who require placement of the type envisaged are met'.[25]

The effect of the grant of the injunction according to the court would be that:

- The Minister was no longer free concerning the approach to be adopted to solving this problem
- The proposed development would have to be completed within the time specified
- Future changes of policy or failure to keep to the time scale would require the Minister to apply to the Court for a variation of the injunction
- Objectively justifiable reasons would have to be given to the Court for the injunction to be varied
- The Court reserved the right to intervene to ensure the provision of a short term solution in any case that might require it.[26]

An application to the Court on behalf of the Minister to stay the injunction was refused.

Commentary

The following are some of the significant features of the decision:

- The decision is rooted in the vindication of the personal rights of the minor involved. As such it is an important contribution to child protection and welfare law in this jurisdiction.
- The decision recognises and clearly states the reasons why the capacity of the Court to vindicate the personal rights of the citizen is comprehensive.
- The respect the Constitution requires to exist between the differing arms of government and the expectation of compliance with the constitutional properties of each is well stated.
- The factors to be considered when granting injunctive relief against a Minister are considered in a fair and reasonable way, acknowledging that such a power should not be used lightly.
- It acknowledges the significant fact relating to the rights of minors that the vindication of their rights is time limited. •

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1 Current title Minister for Health and Children.

2 See generally *Secure Accommodation in Child Care* Papers from a seminar organised by the Children's Legal Centre in 1997.

3 Unreported Judgment of Kelly J, 29th July 1998.

4 See *FN (A Minor suing by his mother and next Friend MH) v. Minister for Education, Minister for Health, Ireland and the Attorney General* [1995] 1 IR 409; *DT (A minor Suing by her mother and Next Friend MT) v Eastern Health Board, Ireland and the Attorney General*, Geoghegan J Unreported 24th March 1995; *GL (A minor suing by his next friend and Mother HL) v. Minister for Justice, Minister for Education, Minister for Health, Ireland and the Attorney General* Geoghegan J. Unreported 24th March 1995; *DD (A minor suing by his Mother and Next Friend AD) v. Minister for Health, Minister for Education, Ireland and the Attorney General*, Costello J. Unreported 3rd May 1995; *DG v. Eastern Health Board, Ireland and The Attorney General*,1998 1 ILRM 241.

5 [1995] 1 IR 409

6 at 416.

7 Ibid.

8 See endnote 3 above.

9 Article 40 s3.1 of the Constitution states:'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen'. Article 42 s.5 of the Constitution states 'In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of parents, but always with due regard for the natural and imprescriptible rights of the child'.

10 See endnote 2 and 3 above.

11 See pages 3-4 and 10-11 of the unreported judgment.

12 See page 11 of the unreported judgment.

13 See pages 4-10 of the unreported judgment.

14 See endnote 8 above.

15 *See DG v. Eastern Health Board, Ireland and The Attorney General* 1998 1 ILRM 241.

16 See *State (Quinn) v. Ryan* 1965 IR 70 at page 122.

17 See page 13 of the unreported judgment.

18 [1987] IR 713.

19 Page 14

20 Unreported Supreme Court 19th December 1996.

21 See page 42 of the unreported judgment.

22 See page 16 of the unreported judgment.

23 See page 17 of the unreported judgment.

24 Ibid.

25 See page 18 of the unreported judgment.

26 See page 19 of the unreported judgment.

The Criminal Justice System and Drug Related Offending: Some Thoughts on Procedural Reforms

UNA NÍ RAIFEARTAIGH, Barrister

For some years public attention has been focused on the question of drug-related offending, whether on persons who engage in misuse of drugs offences, or drug addicts who engage in offences such as larceny, robbery and burglary. This has resulted in a considerable volume of new legislation and a number of proposed measures which may shortly become law. Without taking on board broader issues such as the decriminalisation of certain classes of drugs, the relative merits of treatment programmes for addicts or broader sentencing issues, this article seeks to highlight a number of points in this area relating primarily to procedural issues which have remained, in the main, obscured by matters of greater topicality. The areas touched on include problems relating to search warrants in drugs cases; seven day detention; delays at the pre-trial stage; proof of possession in drug dealing cases; and some aspects of sentencing, including the proposals to introduce a mandatory minimum sentence for drug dealing and to establish a new Drugs Court. The intention is not to offer definitive conclusions but rather to flag areas which might merit further discussion in both the judicial and political arenas.[1]

Search Warrants

A number of issues relating to the use of search warrants have arisen in practice in recent times which, arguably, require either superior court clarification or legislative intervention in order to make the law and practice in this area clear and settled. Although these issues are not solely relevant to drugs cases as search warrants play a role in many other criminal prosecutions, it is frequently the case that drugs seized on foot of a search warrant relating to an accused person's dwelling will constitute the cornerstone of the prosecution, and therefore these issues can become highly relevant in prosecutions in respect of drugs offences.

(a) Confidentiality of Source

It has been clear at least since the decision in *Byrne v. Grey*[2] that a Peace Commissioner or District Judge who has been requested to issue a search warrant must have before him sufficient evidence to be satisfied that there are reasonable grounds to suspect that the person is in possession of drugs before the warrant is granted. This objective test appears to require that some factual substratum must be laid before the issuing authority to enable him to exercise his judgment and precludes him from acting merely as a rubber-stamping authority.

In many cases, the Garda applying for the warrant claims that the basis for his suspicion is information from a previously reliable but confidential source. The Garda will claim privilege both at the time of the application for the warrant and at the subsequent trial in respect of both the identity of the informant and the actual information received from the informant. The usual practice at present appears to be for the issuing authority merely to question the Garda as to whether he believes the informant, and whether the informant has proved reliable in the past, without probing further matters such as the nature of the information supplied or the nature or extent of the risk to the informant if his identity were revealed. In practical terms, therefore, it becomes impossible for the defence to ascertain whether the objective test laid down in *Byrne v. Grey* has been honoured.

There are, of course, at least two reasons why the confidentiality of informants should be protected. First, from a public policy point of view, there is a general need to encourage co-operation with the police, which might be significantly hampered were the identity of informants revealed on a regular basis. Secondly, in particular cases, there may well be a risk to the safety of the informant if his identity were to be revealed. On the other hand, the constitutional guarantees of the protection of the dwelling house and of the right to fair procedures suggest that the balance should not be tilted in one direction only. Without offering conclusions here, what is suggested is that achieving an appropriate balance between these conflicting considerations might be given further consideration by the courts, particularly in light of certain analogous authorities.

Of particular interest is the Irish case law in the area of executive privilege in discovery applications on the civil side including *Murphy v. Dublin Corporation*,[3] *Geraghty v. Minister for Local Government*,[4] and *Ambiorix v. Minister for the Environment (No. 1)*.[5] These cases suggest that a claim for executive privilege should be tested by the judicial authority before being granted. Moreover, they might suggest that the

burden would lie on the prosecution in a criminal case to justify why the privilege should be upheld, rather than on the defence to show why it should be lifted.

In a similar vein, but on the criminal side, is the recent decision of Carney J. in *DPP v. The Special Criminal Court and Ward*[6] in judicial review proceedings in respect of an order of the Special Criminal Court. It will be recalled that the prosecution in this case had in its possession a number of documents generated in the course of the investigation into the murder of Veronica Guerin, which it did not wish to disclose to the defence on the basis that to do so would jeopardise the safety of certain persons interviewed by the Gardaí. The defence objected that it was necessary for them to view these documents in order to assess whether they contained any information relevant to the defence. The Special Criminal Court ruled that some of the documents should be shown to the defence lawyers but not to the accused himself. In the High Court, Carney J. quashed this ruling and held that the appropriate procedure was for the trial judge (or judges as in this case) to view the documents and decide whether disclosure was appropriate. This seems to be a suitable way to deal with claims of privilege in that the ultimate decision is in the hands of a judicial authority rather than the prosecution. Carney J relied, inter alia, on the English Court of Appeal decision in *Davis*[7] concerning issues of disclosure and police informants. By analogy, it is arguable that in applications for search warrants in drugs cases, the District Judge or Peace Commissioner should be told in full the reasons for not wishing to disclose the source, should be informed of the source's identity and the facts grounding the suspicion as given by the source, and should make his assessment on the basis of that information.

Also of relevance in the area are superior court pronouncements regarding the hierarchy of constitutional rights and the respective roles of different rights within that hierarchy. It has been stated, for example, that the right of the accused to fair procedures is higher in the hierarchy of rights than that of the public interest in the prosecution of crime, although it would also appear that the right to life (and therefore, perhaps, the protection of the safety of an informant) takes priority over other rights.[8] Such cases may also be of relevance in considering a claim of confidentiality in a search warrant case.

(b) Use of Peace Commissioners

Another area which might require some further scrutiny is the widespread use of Peace Commissioners to obtain drugs and other search warrants. Peace Commissioners are of course not judicial authorities in any sense, nor have they necessarily any legal training of any kind. This alone might raise concerns as to the appropriateness of using such arbiters of whether a person's dwelling house should be entered without consent, but there are also other problems which have arisen in practice.

At time of writing, the prosecution practice is not to call the Peace Commissioner as a witness in the subsequent trial unless there is some obvious defect on the warrant relating to the Peace Commissioner's jurisdiction. The information grounding the search warrant and the search warrant itself are exhibits in the case, but the defence are usually, therefore, precluded from cross-examining the Peace Commissioner as to how he exercised his power to issue a warrant. A number of questions have arisen:

(i) Is the evidence of the Peace Commissioner required in order to show what his state of mind was when issuing the warrant?

(ii) Is the evidence of the Peace Commissioner required in order to prove his own signature on the warrant in order to render the document admissible? Also, frequently, the form of warrant used by Peace Commissioners for the search warrant merely records the fact that he is a Peace Commissioner but fails to record for what area he acts as Peace Commissioner. This leads to the related questions;

(iii) Is a warrant valid where it fails to show the jurisdiction of the Peace Commissioner on its face?

(iv) If invalid, can this invalidity be cured by evidence at the trial by the Peace Commissioner to the effect that he does in fact have jurisdiction in the area in which the warrant was issued? There have been various rulings in relation to some of these issues by the trial courts, but definitive judgments by the superior courts will be required before the position is clarified.

(c) Use of Printed Forms and Inadvertent Errors

In passing, it is also worth mentioning the difficulties that arise when printed forms relating to search warrants are filled out carelessly. In this respect, the judgments in the High Court *Dunne*[9] case and the Court of Criminal Appeal decision in *Balfe*[10] are not easy to reconcile. In *Dunne*, the importance of the dwelling was stressed as a reason for requiring total accuracy on the face of warrants, whereas in *Balfe* it was held that a warrant which did not fully correspond with the grounding information and did not specify the stolen goods to be seized was valid. Also, notwithstanding the decision in *Kenny*[11] which clarifies the concept of deliberate and conscious breaches of constitutional rights, there are still some lingering doubts about how to reconcile *Kenny* with *O'Brien*[12] when errors on the face of a search warrant are the result of inadvertence or a slip.

(d) District Court Applications for Warrants

A final issue relating to search warrants is the fact that the proceedings in which the warrant is obtained, even in the District Court, are not recorded by a stenographer. Accordingly, if, as frequently happens, a Garda states in evidence at the trial that he, in addition to his sworn written information, gave additional oral evidence to the District Court (or Peace Commissioner), there is no way in which the defence can test the veracity of this allegation with reference to a written record. As in the *Yamanoha*[13] case, the issue may have to be resolved by comparing the oral evidence of the Peace Commissioner with that of the Garda. It seems unsatisfactory that such an important stage of the proceedings should go unrecorded.

Seven Day Detention

The Criminal Justice (Drug Trafficking) Act, 1996 confers on the Gardaí the third major power of detention for investigation under Irish law, the other two being detention under Section 30 of the Offences Against the State Act,1939 and Section 4 of the Criminal Justice Act, 1984. The power relates to persons suspected of involvement in drug-trafficking offences, which is defined in Section 3(1) of the Criminal Justice Act, 1994. As is well known, the powers exercised in full permit an appropriate suspect to be

detained for investigation for a full seven days.

Section 7 of the Drug Trafficking Act, 1996 also significantly affects the right to silence of a suspect in this situation. It makes provision for the drawing of inferences from the failure of an accused charged with a drug trafficking offence to mention a particular fact when questioned. This particular fact is one which the accused subsequently relies on in his defence and which he could reasonably have been expected to mention when being questioned by the Gardaí. The Gardaí must of course tell the accused in ordinary language what the effect of failure to mention such a fact might be. The effect of the section is that the trial court may draw such inferences from the accused's failure to mention the fact as appear proper in the proceedings. The failure may be treated as corroborative of any evidence in relation to which the failure is material, although a person cannot be convicted of an offence solely on the basis of an inference drawn from the failure.

Although restrictions on the right to silence are not unprecedented in Irish law, and the above provision is somewhat similar to the 'inference' provisions in the Criminal Justice Act, 1984, which were upheld in *Rock v. Ireland,*[14] Section 7 of the Drug Trafficking Act, 1996 goes much further. Sections 18 and 19 of the 1984 Act are confined to inferences which can be drawn from the failure to answer specific questions put in specific circumstances. However, Section 7 of the 1996 Act deals with a much more open-ended situation. The accused will have to anticipate what facts he is going to rely on in the event of being charged and then decide whether it is in his best interest to volunteer those facts at that stage to the Gardaí. This provision is modelled on English legislation, but it is worth bearing in mind that the legal framework in that jurisdiction is quite different given the absence of a written constitution, and it is questionable whether this 'inference' provision is necessarily constitutionally valid. Moreover, questions might be raised about the compatibility of these provisions with the European Convention on Human Rights.

Perhaps most importantly, the restriction of the right to silence combined with seven day detention must also be seen in the context of our system in which tape-recording or audio-visual recording of interviews with suspects is not mandated. Although the legal provisions are in place to support such recordings,[15] in fact such recording of interviews is only available in a very limited number of Garda stations. Of course it would be naive to think that recording of interviews will solve all disputes arising out of interviews with suspects, as incidents taking place outside the recorded interview will remain potential areas of dispute. However, it is an important safeguard which would address at least one area of potential dispute, namely the interview itself. Given the far-reaching nature of the provisions of the 1996 Act, it is alarming that the immediate introduction of the relevant technology on a widespread basis was not thought necessary. Here, significant inroads into an accused's rights have not been matched by safeguards to prevent miscarriages of justice.

Delays in the pre-trial period

From a public interest point of view, one of the concerns in the area of drugs is that accused persons may continue to offend even after they have been charged during the period awaiting return for trial and trial itself. These concerns relate to (a) drug dealers (whether addicts or not) continuing to deal, and (b) addicts continuing to steal and rob in order to maintain their habit. Until the new bail legislation comes into force, the apprehension that an accused person may continue to commit serious offences is not a valid basis on which to refuse bail. Unless there is an apprehension of flight or interference with witnesses or evidence, which is relatively rare, the person will be on bail in the pre-trial period. This in turn raises the question of delay in the pre-trial stage of proceedings. Quite simply, the longer the time between charge and trial, the greater the opportunity to continue to offend. The question of delay also has importance from the point of view of the accused's rights in that he has a constitutional right to a speedy trial. Thus it is in everybody's interest to subject the question of pre-trial delay to some scrutiny.

In recent times, delays in the Dublin Circuit Criminal Court, i.e. between the first arraignment date and the trial date, have been reduced, and at present an accused who seeks a trial date at the arraignment stage can expect a trial date usually within three working months. However, it is perhaps worth noting that although there have been numerous judicial appointments in the last three years, at most one extra Circuit Court judge has been diverted to deal with criminal cases in the Dublin area. There are usually two trial judges available to take trials on any given day. This in turn may not, however, be a problem relating to lack of available judges, but rather due to the lack of available courtrooms. Criminal courts of course require special facilities and there are sometimes more judges than courts available.

In any event, the substantial delays appear to be not in the Circuit Court but at the earlier stage between charging and returning for trial. In this context, the proposed bill to abolish the preliminary examination procedure is relevant in that its intended effect is to reduce delays at the District Court stage.[16] In practical terms however, one can only wonder whether this will simply transfer a bottleneck from the District Court to the Circuit Court, or indeed transfer the delay backwards to the pre-charging stage, with the effect that persons will not be charged until the Book of Evidence is complete. The answer to this depends on the underlying reason for the delays in the District Court.

It is sometimes said that depositions are the reason for delays in the District Court, but in reality depositions are called for in relatively few cases, and almost never in drug related cases. In any event, the Bill proposes to maintain the deposition procedure in the District Court. Moreover, it seems more likely that the numerous adjournments in the District Court are merely to facilitate the preparation of the Book of Evidence, the delays being caused by overwork and understaffing in the Chief State Solicitor's office. Another factor in drugs cases which may also contribute to delay in preparing Books of Evidence, is delay in obtaining the relevant report from the forensic science laboratory. Again, this is due to inadequate resources, this time in the forensic laboratory. It is difficult to resist the conclusion that the proposed tampering with the preliminary examination procedure will be inadequate to tackle the root causes of pre-trial delay, and that either increased resources or more radical proposals relating to the preparation of Books of Evidence would be required.

Meanwhile there is another dimension to the resource problem, namely the relative scarcity of treatment programmes for drug addicts, both in the community and within the prisons. One

would have thought that a better way to prevent addicts from re-offending after charge would be to encourage them to tackle their addiction. Ironically, many offenders who ultimately plead guilty and then become eligible for and engage in treatment are deprived of the opportunity to do so at the pre-trial stage. In sum, delays in the pre-trial period have built up over the years and stem from a number of sources. A commitment to sensible proposals and a serious injection of resources on a number of fronts is necessary if substantial changes in the system are to be made.

The Burden of Proof in the Criminal Trial

Turning momentarily from questions of resources and procedure to the substantive law relating to drugs offences, a recent decision on the burden of proof for the offence of possession for supply (commonly known as 'drug dealing') is worthy of note. For the offence under Section 15 of the Misuse of Drugs Act, 1977 to be proved, the prosecution must prove that the person was in possession of a controlled drug and that he was so for the purpose of supply. The prosecution are assisted in the latter matter by the presumption in Section 15(2). The possession element is particularly problematic, particularly in the so-called 'container' or 'package' cases. Must the prosecution prove that the person knew that what was in the container was a controlled drug of some kind? Or must they merely prove that he knew he was in possession of a container which in fact contained a controlled drug, with the onus shifting to the accused to establish that although he knew he had the container, he did not know that what was in it was a controlled drug?

The question is in the first instance posed by reasons of the terms of the Misuse of Drugs legislation. Section 15 (1) provides that a person 'who has in his possession...a controlled drug for the purpose of selling or otherwise supplying it to another...shall be guilty of an offence'. It is clear that no *mens rea* is expressly set out, such as, for example, 'knowingly in his possession'. However, case law and in particular the *Murray* case,[17] supports the view that, at least in respect of a serious criminal offence, a guilty mind or *mens rea* is to be implied into the offence in relation to any material element of the offence. The position is then slightly complicated by the provisions of Section 29(2) which provide that if it is proved 'that the defendant had in his possession...a controlled drug...it shall be a defence to prove that (a) he did not know and had no reasonable grounds for suspecting (i) that what he had in his possession was a controlled drug.. or (ii) that he was in possession of a controlled drug'. What is of concern here are two matters. First, it appears to be for the defence to prove these matters because of the reference to 'it shall be a defence'; presumably, the burden of proof is on the balance of probabilities. This is of course more onerous than merely raising a doubt which is the normal onus on an accused. Secondly, he must prove not only that he did not know the relevant matters but that 'he had no reasonable grounds for suspecting' i.e. a negligence standard. The net effect is apparently to place on an accused a burden of proving that he was not negligent about matters which are crucial to the case. Until a recent judgment, there was some doubt about the interaction between the terms of Section 15 and Section 29; given the matters that the defence has to prove under Section 29, what did the prosecution have to prove in the first instance to transfer the onus to him to prove that he was not negligent? In other words, construing the two provisions together, what was the mens rea that had to be proved by the prosecution?

The recent decision in *DPP v. Byrne, Healy and Kelleher*[18] sheds light on the matter. The facts concerned the retrieval by the accused of a number of packages on a beach at Ballyconneely, Connemara which were subsequently found by the Gardaí to contain cannabis resin. The circumstances of retrieving the bulky packages were highly suspicious in that it appeared to be a co-ordinated operation under cover of darkness, but it was also the case that the bales were wrapped in opaque material. The trial judge directed the jury that they had to be satisfied beyond a reasonable doubt that the accused were 'knowingly in possession' in the sense that the accused knew that the bales contained a controlled drug of some kind. On appeal, it was argued on behalf of the accused that the trial should have acceded to an application for a directed acquittal in that there was insufficient evidence adduced by the prosecution to prove that the accused knew that what was in the packages was a controlled drug, as distinct from some other illegal material such as firearms or contraband. The prosecution argued that as a result of Section 29(2), the only burden of proof on the prosecution was to show that the accused had reasonable grounds for suspecting that he was in possession of controlled drugs, but that they did not have to show actual knowledge. Indeed, they argued that the trial judge's direction was unduly favourable to the accused.

The Court of Criminal Appeal followed a decision of the English Court of Appeal in *McNamara*[19] and held as follows. The prosecution have an initial burden of proving three matters:

(a) that the accused had the box/container/package in his control,

(b) that the accused knew that he had the box/container/package in his control and

(c) that he knew that the box/container/package contained something.

It is worth noting that this statement of the prosecution burden is in fact less stringent than even that for which the prosecution counsel had argued in the case. It does not require the prosecution to show that the accused had reasonable grounds for suspecting that he was in possession of controlled drugs. The Court held that no injustice would be caused by this statement of the prosecution's burden of proof, because of the existence of the provisions of Section 29(2). The Court went on to hold that since there was evidence on which the jury could be satisfied beyond a reasonable doubt that each of the accused had, and knew he had, the bales in his control, and the bales did in fact contain a controlled drug, the trial judge was correct in not acceding to a direction.

The Court of Criminal Appeal has in this judgment provided us with a definitive interpretation of the interaction between Section 15 and Section 29(2), and moreover the interpretation makes sense of those provisions and is undoubtedly what was intended by the framers of the legislation, who modelled it on English legislation. However, it may be that the legislation does not take into account constitutional imperatives in this jurisdiction concerning the burden of proof and is therefore constitutionally suspect. The net effect of the legislation, as interpreted in this judgment, is to transfer to the accused the burden of proof in relation to a significant matter (perhaps the most significant matter), namely whether the accused knew he was in possession of a controlled drug. It seems to involve a clear transfer of the legal burden of proof and not merely the evidential bur-

den of proof.

It has been held, in *Heaney v. Ireland* [20] and *O'Leary v. The Attorney General* [21] that the presumption of innocence is of constitutional pedigree, being encompassed within the guarantee of trial in due course of law under Article 38 of the Constitution. The presumption of innocence entails the corollary of proof beyond a reasonable doubt, which therefore must also be seen as having constitutional status. Accordingly, legislative provisions which shift the burden of proof to the accused must be carefully scrutinised to see whether they pass constitutional muster. In this respect, the Irish courts are in a similar position to the Canadian courts, where the presumption of innocence is explicitly recognised in the Canadian Charter, and, most importantly, in quite a different position to English law, where the presumption of innocence, although clearly a fundamental principle, may be altered by statute without reference to constitutional norms. It is worth noting that there is considerable Canadian case law on the question of when a legislative interference with the presumption of innocence is permissible, which might be of assistance to the Irish courts in this area. In particular, the foundation stone for this area of law was the decision in *Oakes*,[22] where the Supreme Court of Canada struck down a reverse onus provision in drugs legislation, on the basis that it infringed the presumption of innocence in a manner which could not be said to be necessary in a democratic society. If it were to fall to an Irish court to rule on the constitutionality of the drugs legislation, the appropriate question might be whether the casting of a legal burden of proof on an accused to establish that he was not negligent, is the least restrictive way of meeting the problems of proof of knowledge that undoubtedly beset the prosecution in these types of cases.

Anticipating a possible constitutional challenge to the drugs legislation, there is limited Irish authority on burden-shifting provisions. In *O'Leary*, both the High Court and Supreme Court upheld provisions in the Offences Against the State legislation but it is important to note that they did so on the basis of applying the presumption of constitutionality and that in so doing, they interpreted the statute to shift the evidential burden of proof only. This option may not be available in respect of the drugs legislation, because Section 29(2) is very explicit in its terms. However, in *Hardy v. Ireland* [23] the Supreme Court upheld what was interpreted to be a shift of the legal burden of proof as in accordance with the Constitution, which would tend to favour the current drugs provisions. It is to be hoped that a full consideration of the ramifications of the drugs legislation will eventually be undertaken in this jurisdiction in light of the constitutional position of the presumption of innocence. For once, it is not a question of resources but rather a judicial commitment to taking the accused's rights and our constitution, seriously.

Sentencing

The area of sentencing offenders and sentencing drug-related offenders in particular is vast. Out of this larger picture certain features have been selected here by reason of their having been the subject of some public discussion in recent times.

(a) Mandatory Minimum Sentence for Drug Dealing

In relation to sentences for drug dealing, it is worth noting at the outset that the Irish courts do not operate an explicit tariff system of sentencing. Thus there is no starting point or bench mark for any offence, let alone the offence of possession or importation for supply. It is also worth noting that the Supreme Court has made it clear that constitutional guarantees of trial in due course of law apply to sentencing, and these require not only that the sentencing court have regard to the public interest and questions of deterrence, but also to the personal circumstances of each individual offender and his prospects for rehabilitation.[24] It is in this context that the proposed mandatory minimum sentence of ten years imprisonment falls to be considered.

The only serious criminal offence for which there is a mandatory sentence is murder, and indeed the Law Reform Commission have recommended the abolition of mandatory sentences for indictable offences and have urged that no further mandatory sentences for serious offences be introduced.[25] Calls in other areas, notably sexual offences, for mandatory minimum sentences have been greeted with resistance on the ground of possible unconstitutionality. The net objection is that a mandatory minimum sentence precludes the Court from doing what it is constitutionally required to do, namely to consider whether the personal circumstances of the offender warrant a reduction in sentence below the prescribed period of ten years. If the proposed mandatory sentence is, on the other hand, marked by a caveat which allows the court to go below the mandatory minimum for reasons personal to the accused, it is difficult to see what the provision achieves other than an endorsement of present judicial sentencing practice.[26] It appears that the proposed Bill deals with the sentence in its latter form and it may well, therefore, be of little or no practical effect. Of additional concern is the proposed linking of the mandatory sentence to the street value of the drugs. The Irish Court of Criminal Appeal recently, in the *Gannon* case,[27] refused again to countenance tariffs and particularly ones based on street value. One of the problems with street value is that it varies from time to time and location to location, depending on supply and demand. Is the value to be judged at the time of possession, charge, trial or sentence? Is it acceptable that the sentence might vary according to whether heroin is more or less expensive in Dublin than in Galway? And most importantly, how is the defence expected to test Garda evidence on the question of value? Value is also complicated by the fact that the purity of the drug is highly relevant in determining to what extent the drug can be cut with some other product and subdivided into deals, and again estimates vary, as do dealers in terms of what purity drug they tend to sell. In view of all these problems, it is suggested that evidence of the quantity, and to a lesser extent the purity, of the drug is much more reliable and constant than street value, and should be more influential than street value in the sentencing process, whether minimum sentences are to be introduced or not. Another concern in relation to mandatory minimum sentences, particularly when related to street value, is that they may tend to encourage covert pre-trial bargains which are unknown to the Court and therefore unreviewable for propriety and fairness.

(b) A New Drugs Court

For some years the vast majority of offenders before the Dublin Circuit Criminal Court have been drug addicts

and that Court has substantial experience in dealing with them. The Court currently sentences in accordance with the Supreme Court's view that the personal circumstances of the offender must be fully taken into account, and has developed an extremely humane and constructive approach to addicts, giving great encouragement to addicts who genuinely attempt to rehabilitate themselves. It does so in the face of a frustrating and chronic lack of resources at many levels. Some of these have been mentioned above, but it is also worth highlighting at this point the resource problems facing the probation service. At present, a probation report can only be obtained four working months after a Court orders its preparation and many sentences are delayed for this period following a guilty plea. Moreover, because of the absence of any kind of parole board system in this jurisdiction, together with a chaotic temporary and early release system, that Court has taken it upon itself to structure sentences in such a way that offenders are encouraged to beat their addiction under the supervision of the Court. A flexible approach is used, incorporating sentence reviews and suspended sentences with conditions relating to attendance at treatment programmes.

In this context, one wonders what improvement would be represented by the establishment of a new Drugs Court. If the intention is to set up a Court with a special rehabilitative philosophy, it would appear that such a Court already exists, but that its attempts are being hampered by a lack of resources. If the intention is rather to introduce some kind of fast-track system for drugs cases to reduce delays, questions might be raised why drugs cases would necessarily be first in line for this special treatment. Other non-drugs cases subject to the 'ordinary' delays can create enormous stress for the victims of crime, such as sexual offence cases (particularly those involving children), dangerous driving causing death, and, of course, murder. (Indeed it is ironic that child sexual abuse cases encounter the greatest delays simply because there is only one video-link court serving the whole country). Moreover, cases where an accused is in custody have always been given as early a trial date as possible. Is a person accused of a drugs offence who is on bail entitled to a speedier trial than a person in custody awaiting trial for murder or rape? Furthermore, the channelling of offenders into a Drugs Court as an alternative to the ordinary courts is surely bound to lead to problems of classification, for example as between addicts and non-addicts, with resultant problems of proof. It may indeed prove unworkable given that many dealers are also addicts and the reality is that these categories are not distinct. This writer is hampered by a lack of detailed knowledge of the proposals in respect of the new Drugs Court, and by a lack of knowledge as to whether such a Court might be a viable alternative to the District Court, but would urge that the above matters be considered when deciding whether such a new entity is warranted, at least if significant inroads are to be made into the Circuit Court sentencing jurisdiction.

Conclusion

Public outrage and anger at the drugs problem in our society has indirectly led to a number of legal developments in recent times. These have included increased Garda powers to investigate drug-related crime and measures to deal more severely with those accused of or convicted of such offences. Few structural changes have been introduced to deal with the sheer increase in volume of drug-related crime and its effect on the criminal justice system as a whole, and problems stemming from resource issues are being neglected. Moreover, in the current climate of opinion there is a real risk that long established protections for persons accused of crime will fall by the wayside. Neither the interests of efficiency nor justice are being served by this one-sided, reactionary approach to the drugs problem. •

1 This article is based on a paper given to a Conference of the Institute of Judicial Studies held at Dublin Castle on the 30th April, 1998. The views expressed are those of the author only and do not purport to represent the views of the Conference itself.
2 [1988] IR 31
3 [1972] IR 215
4 [1975] IR 300
5 [1992] 1 IR 277
6 High Court, Unreported, 13th March 1998
7 [1993] 1 WLR 613
8 *DPP v. D* [1994] 1 ILRM 435, *Z v. DPP* [1994] 2 ILRM 487, *Larkin v. O'Dea* [1995] 2 IR 485, *O'R v. DPP*, Keane J, 21 December 1995, *DPP v. Shaw* [1982] IR 1, *Burke v. Central Independent Television Plc* [1994] 2 IR 75 and *DPP v. Delaney* [1998] 1 ILRM 507
9 Carney J, 14th October 1994
10 Court of Criminal Appeal, 15th May 1997
11 [1990] 2 IR 110
12 [1965] IR 142
13 [1994] 1 IR 565
14 Unreported, Murphy J., 10th November 1995
15 See Section 27 Criminal Justice Act, 1984, Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997
16 The Criminal Justice (No. 2) Bill, 1997 provides that where an accused is before the District Court charged with an indictable offence, the court 'shall send the accused forward for trial to the court before which he is to stand trial', with certain exceptions. If the DPP refuses to consent to sending forward, the District Court 'shall' strike out the proceedings, although the DPP may bring proceedings against the accused at a future date. The Book of Evidence is to be served within 42 days of the accused being sent forward, although there is a provision for extensions of this period of time.
17 [1977] IR 360
18 Court of Criminal Appeal, Unreported, 17th December 1997
19 [1998] 87 Cr. App. R. 246
20 [1994]3 IR 593, [1996] 1 IR 580
21 [1993] 1 IR 102 (High Court); [1995] 1 IR 254 (Supreme Court)
22 [1986] 26 DLR (4th) 200
23 Unreported, 18th March 1993
24 *DPP v. M* [1994] 2 ILRM 541
25 See LRC Consultation Paper on Sentencing, March 1993, Chapter 10
26 See the Criminal Justice (no. 2) Bill, 1997, of which Section 4 inserts a new Section 15A into the Misuse of Drugs Act, 1977. Section 5 deals with the penalty for this new offence, providing that the minimum penalty is ten years imprisonment, although the minimum is not to apply if the Court is satisfied that 'there are exceptional and specific circumstances relating to the offence or the person convicted of the offence which would make a sentence of not less than ten years imprisonment unjust in all the circumstances.' Matters which the Court is entitled to take into account in this respect are listed, and if the person is an addict, the sentence may be listed for review at least five years later.
27 Unreported, Court of Criminal Appeal, Ex tempore, 15th December 1997.

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 4. Issue 1. October 1998

A directory of legislation, articles and written judgments from 26th June 1998 to 16th September 1998.
Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative

Glencar Exploration Plc. v. Mayo County Council
High Court: **Kelly J.**
20/08/1998

Judicial review; damages; misfeasance; breach of statutory duty; legitimate expectation; property rights; decision of respondents imposing a mining ban found to be ultra vires; whether applicants have a cause of action in damages as a result of a finding of invalidity; grounds for granting damages in respect of wrongdoing by the respondents considered; whether decision of respondents constituted the tort of misfeasance in public office; whether there was a breach of statutory duty on the part of the respondents; whether respondents guilty of negligence; whether legitimate expectation of applicants was frustrated by respondents; whether unconstitutional interference with property rights of applicants
Held: Damages claim dismissed

DeGortari v. Judge Smithwick
High Court: **Geoghegan J.**
31/07/1998

In camera application; due process; judicial review proceedings concerning drug trafficking offence; respondent required applicant to answer questions pursuant to a request from French prosecuting authorities; such proceedings normally heard in camera in France; whether judicial review proceedings in this jurisdiction should also be heard in camera; whether applicant would be prejudiced if proceedings heard in public
Held: Judicial review proceedings to be heard in public

Colgan v. I.R.T.C
High Court: **OíSullivan J.**
20/07/1998

Judicial review; certiorari; broadcasting; constitutionality of legislation; proportionality; decision of respondent prohibiting licensed broadcasters from broadcasting an advertisement relating to abortion on the grounds that it pursued a "political end"; such advertisements prohibited by legislation; whether decision reviewable; whether respondent biased towards applicant; whether respondent acted ultra vires; whether decision of respondent irrational; interpretation of "political end" within the meaning of the legislation; whether constitutional right to broadcast; whether legislation interferes with constitutional right to freedom of expression; whether interference with this constitutional right is proportionate; s.10(3) Radio and Television Act, 1988; Art. 40 of the Constitution
Held: Claims dismissed; legislation valid

Smith v. Minister for the Marine
High Court: **Geoghegan J.**
18/06/1998

Judicial review; prohibition; mandamus; applications for fish culture licence pursuant to s. 15 Fisheries (Consolidation) Act, 1959; whether applications could be made under s. 15 if areas in question form part of the sea; effect of s. 74 Fisheries (Amendment) Act, 1997 to permit applications to be made where areas in question form part of the sea; s. 74 not yet in force; whether Minister entitled to defer decisions until s. 74 comes into force
Held: Applications could not be made under s. 15 where areas in question form part of the sea; Minister not entitled to defer decisions until s. 74 comes into force; prohibition granted to prevent Minister from granting fish culture licence; mandamus granted directing Minister to refuse fish culture licence

National Association of Regional Game Council v. Minister for Justice
High Court: **Quirke J.**
12/06/1998

Judicial Review; firearm certificate; hunting licenses; whether the procedure adopted by the respondents are effective in making reasonable enquiry in respect of non-residents; whether the statutory conservation requirements concerning certain species of wild birds and mammals were complied with; whether the suitability of non-resident applicants for firearm certificates and hunting licenses was adequately tested; obligation on member states of the European Union to give ëdue weightí to similar or equivalent qualifications, permissions or authorities granted in other member states of the European Union; Firearm Acts 1925; Wildlife Act 1976; European Council Directive 91/477
Held: Ineffective and insufficient procedure to enable respondents to adequately discharge the obligations imposed; Applicant entitled to certain declaratory and other forms of relief.

Bailey v. Flood
High Court: **Geoghegan J.**
15/05/1998

Judicial review; tribunal of inquiry; decision of tribunal to order discovery and production of applicantsí bank records; whether decision could be made other than in a public sitting of the tribunal; whether decision could be made without giving applicants an opportunity to be heard; whether decision irrational; whether adequate reasons given for decision; whether tribunal should have made use of Bankers' Books Evidence Acts; whether discovery and production orders an infringement of applicantsí constitutional rights to privacy and fair procedures; whether High Court procedures in relation to non-party discovery should apply to discovery orders made by tribunal; O. 31 Rules of the Superior Courts, Tribunals of Inquiry (Evidence) Act, 1921; Tribunals of Inquiry (Evidence)(Amendment) Act, 1979; Article 40.3 of the Constitution
Held: Decision to order discovery could be made in private; discovery could be ordered without prior notice to applicants once applicants given opportunity to apply to have orders varied; applicants not entitled to challenge merits of decision without first doing so

before tribunal; tribunal entitled not to use Bankers' Books Evidence Acts procedures; any interference with right to privacy justified

Deegan v. Minister for Finance
High Court: **O'Higgins J.**
12/05/1998

Judicial review; decision to suspend civil servants accused of fraud; whether decision justiciable; whether hearing should have been granted before decision to suspend taken; whether applicants given sufficient detail of allegations against them; s. 13 Civil Servant Regulations Act, 1956
Held: Certiorari granted

Coughlan v. Broadcasting Complaints Board
High Court: **Carney J.**
24/04/1998

Judicial review; certiorari; referenda; complaint made to the Broadcasting Complaints Commission in relation to allocation of broadcasting time; whether R.T.E gave primacy to political parties in relation to uncontested partisan broadcasts; whether the Commission had misdirected itself in law and misinterpreted the provisions of the Broadcasting Acts
Held: Certiorari granted; declaration granted that R.T.E approach to the Divorce referendum in relation to the allocation of broadcasting time was significantly unequal; no further relief granted

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SI 224/1998

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SI 167/1998
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Arbitration

Lynch Roofing Systems Ltd. v. Bennett and Son (Construction) Ltd.
High Court: **Morris P.**
26/06/1998

Arbitration; stay; construction contract; incorporation of terms of standard form contract; standard form contract included arbitration clause; application for stay of proceedings pending arbitration; whether terms of standard form contract incorporated into contract between parties; whether stay should be granted; s.5 Arbitration Act, 1980
Held: Arbitration clause from standard form contract incorporated into contract between parties; stay granted

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Gilhooly, James
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Breslin, John
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Commercial

Duggan v. Bank of Ireland
High Court: **McCracken J.**
29/07/1998

Shareholders meeting; voting procedures; validity of poll taken; cap on voting rights of large stockholders of Bank laid down in a bye-law; meeting held to amend this bye-law by a poll; whether vote valid; whether chairman of bank exercised votes he was authorised to exercise by the proxies he held; whether votes ought to have been in writing
Held: Voting procedure valid

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Hughes, Colm
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The Investment Intermediaries Act, 1995
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Company

Springline Ltd., In re
Supreme Court: **Keane J.,** Murphy J., Barron J.
22/07/1998

Examinership; compulsory liquidation; statutory interpretation; whether remuneration, costs and expenses of examiner take priority over costs of the official liquidator; legislation providing that remuneration, costs and expenses of

examiner take priority over any other claim on a winding up; whether costs of liquidator constitute a 'claim' under the legislation; interpretation of word 'claim'; s.29(3) Companies Act, 1990
Held: Examiner's remuneration, costs and expenses take priority over costs, expenses and remuneration of official liquidator

Forest Mills Investments Ltd., In re
Supreme Court: O'Flaherty J., Lynch J., **Barron J.**
14/07/1998

Company; oppression; liquidation; petition alleging oppression towards shareholder; company subsequently entered liquidation; whether shareholder entitled to maintain petition; whether damages available against alleged oppressors in personal capacity; whether claim for damages can be made in petition alleging oppression; whether claim for damages can be brought by shareholder rather than by company; s. 205 Companies Act, 1963
Held: Claim for diminution in value of shareholding cannot be brought by shareholder; petition dismissed

Valley Ice Cream (Irl) Ltd., In re
High Court: **McCracken J.**
22/07/1998

Debenture; fixed and floating charges; liquidation; whether debenture creates an equitable fixed charge over leased assets; interpretation of debenture; whether agreement to grant a fixed charge of itself creates an equitable fixed charge; requirements of registration of charge; s.99 Companies Act, 1963
Held: Equitable fixed charge created over assets

National Irish Bank, In re
High Court: **Shanley J.**
13/07/1998

Inspectors; investigation; privilege against self-incrimination; right to silence; investigation into affairs of NIB; claim by employees and former employees that, during these investigations, they were entitled to legal representation, to refuse to answer questions, to cross-examine witnesses, to advance notice of the questions, and certain other rights; whether the employees were entitled to refuse to answer the questions or provide documents required by the inspectors on the grounds of self-incrimination; whether the procedures which the inspectors intended to adopt were consistent with the requirements of natural and constitutional justice; privilege against self-incrimination and right to silence considered; whether the Companies Act 1990 preserves the privilege against self-incrimination; whether restrictions on the right to silence are necessary to enable the State to fulfil its constitutional obligations; whether there is a constitutional right not to have compelled testimony used against an accused; whether the initial stage of the procedure is investigative or accusatory; Companies Act, 1990
Held: No right to refuse to answer questions on the grounds of self-incrimination; restriction placed on the right to silence not invalid under the Constitution; procedures to be adopted by the inspectors are consistent with the requirements of natural and constitutional justice

Steamline Ltd., In re
High Court: **Shanley J.**
24/06/1998

Winding up; directors; restriction; application to restrict director; whether directors behaved honestly and responsibly in relation to the conduct of the affairs of the company; whether it is just and equitable to restrict directors; s.150 Companies Act, 1990
Held: Order refused; directors acted honestly and responsibly

National Irish Bank, In re
High Court: **Kelly J.**
11/06/1998

Directions; investigation into company affairs; application by inspectors for directions; refusal by interviewees to answer questions put by inspectors; whether interviewees entitled to refuse to answer on grounds of self-incrimination; extent of procedural protection available to interviewees; ss. 8, 10 and 11 Companies Act, 1990
Held: Directions given

Articles
The European company statute a case of 'all kinds of everything'
Gaffney, John P
1998 CLP 119

Planning for the next generation
Hughes, Colm
1998(June) GILSI 30

Section 10 of the Companies Act 1990 and the investigation of companies
O'Floinn, Benedict
3(8) 1998 BR 411

Competition

Clane Hospital Ltd. v. Voluntary Health Insurance Board
High Court: **Quirke J.**
22/05/1998

Dominant position; abuse; ancillary market; unfair prices; oppressive trading conditions; application for interlocutory injunction restraining the defendant from replacing the existing scheme of payment for private medical services; whether plaintiff has raised a fair bona fide question; whether damages would be an adequate remedy; whether there is a risk of financial collapse of the plaintiffs; s.5 Competition Act, 1991; Art. 86 EC Treaty
Held: Application refused

Article
The competition authority and the effect of the Freedom of Information Act, 1997
Breen, Oonagh
1998 CLP 144

Constitutional

Haughey v. Moriarty
Supreme Court: **Hamilton C.J.***, Denham J., Barrington J., Keane J., Murphy J.
28/07/1998
(*Judgment of the Court delivered by Hamilton C.J.)

Judicial review; certiorari; declaratory relief; separation of powers; breach of constitutional rights; privilege; challenge to parliamentary resolution establishing Tribunal; challenge to discovery orders made without notice to plaintiffs; whether Taoiseach acted ultra vires in establishing a Tribunal to inquire into payments made to first plaintiff; whether parliamentary resolution establishing Tribunal valid and constitutional; whether terms of reference of the Tribunal clear and unambiguous; whether plaintiffs entitled to interpretation of terms of reference; whether parliamentary resolution infringed constitutional rights of plaintiffs; whether infringement of plaintiffs rights to privacy; equality and property; whether breach of first named plaintiff's right to privilege; whether appointment of High Court Judge as Sole Member of

Tribunal an infringement of separation of powers; whether Tribunals of Inquiry legislation consistent with Constitution; whether Tribunal conducted in accordance with fair procedures; whether discovery orders relating to bank accounts ought to have been made on notice to the plaintiffs; whether interference with right to privacy reasonable having regard to public interest; Tribunals of Inquiry (Evidence) Act, 1921; Tribunals of Inquiry (Evidence) (Amendment) Act, 1997; Ethics in Public Office Act, 1995; Arts. 15, 34, 40 and 43 of the Constitution
Held: Tribunals of Inquiry (Evidence) Act, 1921 (as amended) valid; Houses of Oireachtas enjoy inherent jurisdiction to establish Tribunal to enquire into definite matters of urgent public importance; establishment of such a Tribunal does not constitute the administration of justice; terms of resolution establishing Tribunal did not infringe constitutional rights of plaintiffs; interpretation of terms of reference a matter for Tribunal; appointment of High Court Judge as Sole Member of Tribunal not an infringement of separation of powers; preliminary investigation of Tribunal may be conducted in private; Tribunal failed to follow fair procedures in making discovery orders; discovery orders quashed; plaintiffs entitled to interpretation of terms of reference of Tribunal; declaration to that effect granted

Lowth v. Minister for Social Welfare
Supreme Court: **Hamilton C.J.***, O'Flaherty J., Barrington J., Keane J., Murphy J.
14/07/1998
(*Judgment of the Court delivered by Hamilton C.J.)

Legislation; validity; breach of constitutional rights; equality; husband deserted by wife not entitled to same social welfare allowance as a deserted wife; whether legislation in breach of plaintiffs constitutional rights of equal treatment; whether difference in treatment constitutes invidious and unconstitutional discrimination; whether there were reasonable grounds for the difference in treatment; presumption of constitutionality discussed; Art. 40.1 of the Constitution; Social Welfare (Consolidation) Act, 1981
Held: Legislation valid

Murphy v. I.R.T.C.
Supreme Court: Hamilton C.J., O'Flaherty J., Denham J., **Barrington J.***, Keane J.
28/05/1998
(*Judgment of the Court delivered by Barrington J.)

Legislation; validity; constitutional rights; freedom of religion; right to communicate; proportionality; respondent banned radio advertisement on religious grounds pursuant to legislation; whether legislation constituted an attack on freedom to practice religion; whether legislation constitutes discrimination on grounds of religious belief or status; whether the ban infringed the right to communicate information; discussion of constitutional basis of right to communicate information; whether there was an interference with freedom of expression; whether ban constituted a disproportionate interference with constitutional rights; whether ban justified; Arts. 40.3 and 40.6.1 of the Constitution; s.10(3) Radio and Television Act, 1988
Held: Legislation valid

C v. D.P.P
Supreme Court: Hamilton C.J, **Denham J.**, Barrington J., **Keane J.**, **Lynch J.**,
28/ 05/1998

Delay; constitutional right to fair trial; alleged child sexual abuse; prohibition of criminal prosecution; lack of specificity of charges; evidence of psychiatrists and psychologists; whether the delay in the institution of proceedings resulted in a real risk that the respondent would not obtain a fair trial; whether the lack of specificity of charges prejudiced the respondent; whether the learned trial judge erred in assessing evidence of the psychiatrist and the psychologist
Held: Delay considerable; but reasonable on the part of the appellant; no actual prejudice shown; charges of habitual child sexual abuse over a period of time, will often of necessity be lacking in specificity; the learned trial judge erred, in finding that that the evidence of the psychiatrist and the psychologist did not establish that the delay was explicable.

D.P.P. v. Best
High Court: **Geoghegan J.**
31/07/1998

Constitutional rights; family; right to provide education at home; duty of the State; whether parents guilty of a criminal offence in failing to allow children to attend national school; whether parents entitled to provide education at home; limitations on right to educate at home; whether children receiving a "certain minimum education" as provided for by the Constitution; interpretation of "minimum education" in the absence of a legislative standard; whether the teaching of the Irish language is a consideration in determining the minimum standard of education provided; Art. 42 of the Constitution's.17 School Attendance Act, 1926
Held: Parents not guilty of an offence

D.B. v. Minister for Justice
High Court: **Kelly J.**
29/07/1998

Judicial review; separation of powers; child care; breach of constitutional rights; vindication of personal rights; lack of secure accommodation for minors; duty of the State to provide such accommodation for minors; delay on part of respondents in implementing policy to provide such accommodation resulting in breach of constitutional rights of minors; orders sought directing respondents to build and maintain such accommodation; whether High Court has jurisdiction to order respondents to implement policy; whether High Court interfering in the policy of the administrative branch of government
Held: Order directing respondents to implement policy; High Court has jurisdiction to make such orders to vindicate constitutional rights

Riordan v. An Taoiseach
High Court: **Kelly J.** (ex tempore)
20/5/1998

Judicial review; delay; referendum; Nineteenth Amendment to the Constitution Bill, 1998; judicial power to review on grounds of consitutionality confined to enacted laws; amendment taking form that before any amendment Articles 2 and 3 can occur, two conditions precedent must be met; whether Art. 46 violated in the procedure adopted by the Respondents; Order 84 Rule 21 of Rules of the Superior Courts; Art. 29 of the Constitution; Article 46 of the Constitution
Held: Reliefs sought refused; grounds of delay and grounds of merit; no procedural departure from Art. 46 of the Constitution; delay making application unacceptable as no excuse offered and such proceedings necessitate time for Courts to consider issues

Articles
National Irish Bank v. RTE the defence of public interest in Irish law
Lavery, Paul
1998 CLP 111

The scope of article 30
Kennedy, Brian
3(6) 1998 BR 301

Contract

Beshoff Bros. Ltd. v. Select Service Partner Ireland Ltd.
High Court: **O'Sullivan J.**
28/07/1998

Specific performance; breach of contract; informal agreement; conflicting contractual obligations of defendant; whether an order compelling defendant to specifically perform its contract with the plaintiff would cause it to breach its agreement with a third party; whether order should not be made on the grounds that the agreement is incomplete; whether damages an adequate remedy
Held: Specific performance of contract ordered

Treston v. Mayo County Council
High Court: **Moriarty J.**
10/07/1998

Contract; negligence; misrepresentation; duty of care; ejectment; agent of the defendant's made a representation to the plaintiffs that houses in a particular housing estate would be upgraded and sold to the existing tenants; decision of the plaintiffs to buy a house from a third party was influenced appreciably by this representation; whether the settlement of a disruptive family of travelling persons in one of the houses for over 10 years, despite numerous complaints, was in breach of this representation; whether the circumstances caused a decrease in the value of the plaintiff's house; whether the defendants owed a duty of care; concept of negligent misrepresentation considered; duties of local housing authorities to provide for the disadvantaged and the homeless considered
Held: Plaintiff was entitled to recover some measure of damages for negligent misrepresentation

Article
A look at utmost good faith
O'Rourke, Fergus
1998 CLP 140

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Criminal

P.W. v. D.P.P
Supreme Court: O'Flaherty J., Denham J., Barrington J., Keane J., **Lynch J.**
24/06/1998

Delay; alleged offences of indecent assault against child; alleged offences took place between 1977 and 1983; plaintiff charged with offences in 1996; death of potential witness before trial; whether plaintiff suffered prejudice as a result of death of potential witness; whether excessive delay on the part of prosecution or courts; whether proceedings could be restrained where no excessive delay took place
Held: No excessive delay on the part of prosecution or courts; proceedings could not be restrained where no excessive delay took place

McMahon v. Judges of the Special Criminal Court
High Court: **McGuinness J.**
30/07/1998

Judicial review; prohibition; warrant; voluntary questioning; jurisdiction of Special Criminal Court to issue warrant; constitutional right to fair trial; order sought preventing the trial of the applicant and further prosecution by the DPP; applicant voluntarily questioned by gardaí outside courthouse in respect of a non-scheduled offence by playing a tape recording to applicant; whether such procedure irregular and illegal; whether warrant for arrest based on incorrect evidence; whether applicant lawfully brought before the Special Criminal Court; whether warrant for arrest properly issued by the Court; ss. 43 & 47 Offences Against the State Act, 1939; Art. 38 of the Constitution
Held: Relief refused; warrant properly issued

Hyland v. Judge McCartan
High Court: **Laffoy J.**
26/06/1998

Judicial review; road traffic offences; plea of guilty; sentence; applicant pleaded guilty to road traffic offences; whether discount in sentence must be given for plea of guilty; whether sentence gave adequate weight to plea of guilty; whether judicial review available to review weight given to plea of guilty
Held: Judicial review did not lie to review weight given to plea of guilty in determining sentence; relief refused

D.P.P. v. Judge O'Leary
High Court; **Budd J.**
17/06/1998

Judicial review; certiorari; delay bringing application; drugs charges dismissed; evidence of detentionís legality; whether the proof of the making of the extension order of detention was a necessary ingredient of the prosecution case, when the prosecution was not relying on anything said or obtained during the period of detention; whether the accused had suffered any particular prejudice by reason of the delay; Art. 40.3 of the Constitution; s. 4 Criminal Justice Act 1984
Held: Certiorari granted; no challenge made to the legality of the detention; D.P.P did therefore not have to adduce evidence with regard to the extension of the period of detention

Articles
The establishment of an international criminal court Part 1
Colbert, Maria J
1998 (3) P & P 4

Criminal Law Act, 1997
Byrne, Raymond
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Drugs: the judicial response
Charleton, Peter, McDermott, Paul Anthony
3(7) 1998 BR 347, 370

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Gearty, Mary Rose
3(6) 1998 BR 275

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Hunt, Patrick
3(8) 1998 BR 375

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3(7) 1998 BR 318

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3(7) 1998 BR 322

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Copyright, Patents & Designs

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Trade marks and the internet
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1998 CLP 115

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O'Hanlon, Niall
1998 (July) GILSI

Education

Statutory Instrument
Vocational Education Committees (Allowances to Members) (Amendment) Rules, 1998
SI 171/1998

Employment

Tierney v. An Post
High Court: **McCracken J.**
07/07/1998

Judicial review; natural justice; applicant engaged as postmaster; decision to terminate contract with applicant; hearing given to applicant before termination of contract; further investigation carried out after hearing; applicant not notified of further investigation; whether contract was a contract of service; termination of contract disproportionate; whether contractual appeals procedure followed; whether natural justice breached by post-hearing investigation
Held: Contract between applicant and respondent a contract of service; decision to terminate contract disproportionate; contractual appeals procedure followed; natural justice breached by taking into account results of post-hearing investigation without giving Applicant opportunity to make representations; relief granted

McCormack v. Minister for Agriculture
High Court: **O'Donovan J.**
24/06/1998

Judicial review; employment; natural justice; legitimate expectation; applicant removed from position as Training Officer; applicant not given opportunity to make representations before removal; whether applicant had legitimate expectation that position permanent; whether decision to remove applicant from position in breach of natural justice; whether decision to remove applicant from position arbitrary or capricious
Held: No legitimate expectation that position of Training Officer permanent; decision to remove applicant not arbitrary or capricious; failure to give opportunity to make representations before removal in breach of natural justice

Wilton v. Steel Company of Ireland Ltd.
High Court: **O'Sullivan J.**
28/05/1998

Employment; discrimination; salary; decision of the Equality Officer and the Labour Court that plaintiff not entitled to same rate of pay as the male comparator; whether there was evidence to support the findings of the Equality Officer's report; whether the correct comparator was used; whether there were grounds other than sex to justify payment of different rates; Anti-Discrimination (Pay) Act, 1974
Held: Labour Court decision upheld; appeal dismissed

Articles
P v. S and Cornwall County Council the European Court of Justice, the equal treatment directive, and transsexuality
Carolan, Bruce
1998 ILT 136

The Organisation of Working Time Act, 1997
Liston, Julie
3(8) 1998 BR 378

Statutory Instruments
Employment Regulation Order (Law Clerks Joint Labour Committee), 1998
SI 181/1998

Employment Regulation Order (Contract Cleaning (City And County Of Dublin) Joint Labour Committee), 1998
SI 176/1998

Employment Regulation Order (Agricultural Workers Joint Labour Committee) 1998
SI 221/1998

Employment Regulation Order (Hotels Joint Labour Committee), 1996
S.I.208/1996

Equity

O'Malley, In re
Supreme Court: **Barrington J., Lynch J.**, Barron J.
27/07/1998

Equity; judgment; equitable assignment; priorities; garnishee order; judgment obtained against defendant; judgment remained unsatisfied; subsequent recovery by defendant of damages in unrelated action; attempt by defendant to assign damages to third party; whether garnishee order should be made against damages; whether defendant had effected equitable assignment of damages to third party; whether contract to effect equitable assignment existed; whether valuable consideration for contract existed; whether third party would take priority over garnishor
Held: Defendant had not effected equitable assignment of damages to third party; no enforceable contract to effect assignment existed

Articles
Proprietary estoppel equity's aid to those left behind
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1998 ILT 133

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O'Connor, Michael
1998 ILT 153

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European

D.P.P. v. O'Connor
High Court: **Morris P.**
22/07/1998

EU Directives; interpretation; road traffic; checks on insurance of motor vehicles; powers of An Garda Síochána to demand production of certificate of insurance in relation to vehicles in a

public place; whether gardaí prohibited from carrying out insurance checks in relation to a vehicle which is registered in another Member State of the EU having regard to a European Council Directives; whether prohibition in Directives confined to border checks; whether internal checks permitted; whether the High Court or only the European Court of Justice can determine the matter; Council Directive 72/166/EEC; Art. 177 EC Treaty; s.52 Courts (Supplemental Provisions) Act, 1961
Held: Prohibition in Directive confined to border checks; Gardaí entitled to carry out internal random checks on vehicles

Articles
Access to EC information and the principle of transparency
Conlan Smyth, David
3(7) 1998 BR 328

Can you bank on the Euro?
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P v. S and Cornwall County Council the European Court of Justice, the equal treatment directive, and transsexuality
Carolan, Bruce
1998 ILT 136

The European company statute a case of "all kinds of everything"
Gaffney, John P
1998 CLP 119

Legal aspects of the transition to Euro
Curran, Peter
1998 CLP 135

Our man in Strasbourg
Hedigan SC, John
3(7) 1998 BR 344

The application of European Community law to sport
Hyland, Niamh
3(6) 1998 BR 269

Recent EU environmental developments
Maguire, Barbara
1998 IPELJ 74

Statutory Instrument
European Communities (Cosmetic Products) (Amendment) Regulations, 1998
SI 213/1998

Evidence

Ward v. Special Criminal Court
Supreme Court: Hamilton C.J., **O'Flaherty J.**, Barrington J., Keane J., Lynch J.
20/07/1998

Disclosure; informer privilege; lawyer/client relationship; whether discovery should be ordered in respect of statements made by informants; whether real risk to life and property if identity of informants disclosed; whether informer privilege should be maintained subject to exceptions; whether discovery could be made on the basis that the appellantís counsel could view documents whilst not disclosing them to the appellant; whether Special Criminal Court exceeded its jurisdiction in ordering discovery; whether the judges of the Special Criminal Court should examine the documents in question; whether judicial review is available in a criminal trial
Held: Discovery refused; informer privilege upheld

O'Regan v. D.P.P.
High Court: **McGuinness J.**
09/07/1998

Judicial review; prohibition; evidence; fair trial; at the trial for alleged road traffic offences respondent refused to call as a witness the doctor who had carried out the blood tests and signed the statutory certificate; District Judge refused to permit this doctor to be called as a witness for the defence; whether the prosecution was obliged to call this witness; whether the prosecution properly exercised its discretion in this respect; whether the District Judge was correct in refusing to require the witness to be called; whether the applicant should have been permitted to call the doctor as a witness; whether the trial was unfair or oppressive; Art. 38 and Art. 40.3 of the Constitution; ss.49(2) and 51(a), Road Traffic Act, 1961; ss. 13(1)(v), 18 and 21, Road Traffic Act, 1994
Held: Declaration that the applicant was entitled to call the doctor as a witness granted; other relief refused

D.P.P (Ivers) v. Murphy
High Court: **McCracken J.**
07/07/1998

Admissibility of certificates; arrest; statutory interpretation; whether legislation requires the District Court to be satisfied that a person has been arrested otherwise than under a warrant prior to admitting in evidence the certificate referred therein; whether oral evidence of the nature of the arrest is required by legislation prior to or at the time the certificate is given in evidence; whether the District Court has jurisdiction to make any further orders in criminal proceedings where a certificate was admitted in purported compliance with legislation in circumstances where no evidence of the nature of the arrest was given; s. 6 (1) Criminal Justice (Miscellaneous Provisions) Act, 1997
Held: It is a condition precedent to the admissibility of certificates under section 6 (1) that Prosecutors must prove that Accused was arrested otherwise than under a warrant

Extradition

Varga v. O'Toole
High Court: **Morris J.**
31/07/1998

Extradition; mental treatment; plaintiff, who was sentenced to life imprisonment for murder in England in 1966, was detained in various hospitals for mental treatment until 1996; arrested in Ireland on foot of an English warrant in 1997; whether his detention was valid; whether his return is sought for the purpose of treating his schizophrenia, rather than for punishment; whether it would be unjust, oppressive or invidious within the meaning of s.50(2)(bbb) Extradition Act to deliver the plaintiff up; whether his sentence remains in force; Art. 40.4.2 of the Constitution; s.50, Extradition Act, 1965
Held: Plaintiff remains subject to a sentence of life imprisonment; return is for punishment not treatment; not invidious to deliver the plaintiff up

Family

K. v. K
Supreme Court: **Denham J., Lynch J., Barron J.**
06/05/1998

Child abduction; wrongful removal; acquiescence; delay; children removed without knowledge or consent of the plaintiffís husband; whether there was wrongful removal of minors; whether the plaintiff consented to the removal of the minors; whether the minors would be placed in an intolerable situation if returned to place of habitual residence; whether the minors would be exposed the physical of psychological harm if made return; Child Abduction and Enforcement of Custody Orders Act, 1991; Hague Convention
Held: Appeal dismissed

McC v. C
High Court: **McCracken J.**
06/07/1998

Nullity; consent; capacity; repudiation; whether parties gave full free and informed consent to marriage; whether parties had capacity to enter into and sustain a normal marital relationship; whether repudiation of marriage is required for a nullity application; Judicial Separation and Family Law Reform Act, 1989; Family Law Act, 1995; Family Law (Divorce) Act, 1996
Held: Nullity decree granted

Articles
Judicial discretion in family law
Martin, Frank
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Advising proofs in respect of pension adjustment orders
McDonnell, Marian
3(8) 1998 BR 382

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Fisheries

Statutory Instrument
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SI 203/1998

Monkfish (Restriction on Fishing) (No 5) Order, 1998
SI 217/1998

Continental Shelf (Corrib North, 18/20-2) order, 1998
SI 226/1998

Hake (Restriction on Fishing) (No 4) Order, 1998
SI 218/1998

Monkfish (Restriction on Fishing) (No 4) Order, 1998
SI 219/1998

Garda Síochána

Cleary v. Commissioner of An Garda Síochána
Supreme Court: Hamilton C.J., **O'Flaherty J.**, Barron J.
13/07/1998

Dismissal; judicial review; fair procedures; services of probationer Garda dispensed with by respondent; applicant made an arrest but failed to attend Garda station to charge the arrested individual; assault charges brought against applicant in respect of the arrest; whether respondent should have deferred dismissal until after criminal case; whether applicant should have been given adequate notice of intention to dismiss; whether applicant denied an opportunity to make his case; Reg. 16 Garda Síochána (Admissions and Appointments) Regulations, 1988 (SI. 164 of 1988)
Held: Order of Certiorari granted quashing decision of respondent

Bracken v. Commissioner of An Garda Síochána
High Court: **O'Sullivan J.**
31/07/1998

Dismissal; judicial review; fair procedures; proportionality; probationer Garda; misconduct; decision by respondent to dispense with applicantís services; applicant involved in road traffic accident driving an uninsured and untaxed vehicle; applicant unaware at time of accident that vehicle was uninsured; whether breach of fair procedures by respondent in relying on alleged criminal background of applicantís family in reaching decision; whether lack of proportionality between decision to dispense with applicantís services and breach of conduct; whether it was unreasonable on part of respondent to expect applicant to be aware that he was driving an uninsured vehicle
Held: Certiorari granted

Duffy v. Commissioner of An Garda Síochána
High Court: **McGuinness J.**
10/07/1998

Dismissal; judicial review; certiorari; fair procedures; natural justice; applicant's services as a probationer garda dispensed with because of alleged misconduct in a nightclub; whether the respondent could abandon the proceedings for misconduct and dispense with the applicant's services on the basis of that alleged incident; whether the procedure for discharging the applicant accorded with fair procedures and natural justice; whether different standards of fair procedures are required in relation to probationers and permanent members of an Garda Síochána; Garda Síochána (Admissions and Appointments) Regulations, 1988; Garda Síochána (Discipline) Regulations, 1989; s.7, Civil Service Regulations Act, 1956
Held: Not essential for the misconduct to be established under the 1989 Regulations before a probationer can be discharged; decision dispensing with the services of the applicant was made in breach of fair procedures and contrary to natural and constitutional justice; relief granted

Hynes v. Commissioner of An Garda Síochána
High Court: **McCracken J.**
22/05/1998

Judicial review; disciplinary inquiry; dismissal; challenge to a decision of the Tribunal of Inquiry; applicant had been prosecuted in the District Court for assault and had been acquitted; applicant had been tried again on identical charges to which he had been acquitted; whether acquittal of the criminal charge precluded a disciplinary investigation into the fact arising out of the criminal charge already brought; Garda Síochána Discipline Regulations, 1971
Held: Application refused; Plaintiff had admitted that he had committed a wrongful act; reluctance to make declarations in relation to hearing that took place eight years ago

Information Technology

Article
The regulation of the internet
Kelleher, Denis
3(8) 1998 BR 408

Trade marks and the internet
Carey, Louise
1998 CLP 115

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1998 (July) GILSI 12

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Daly, Kerren
1998 (July) GILSI 28

Insurance

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International Law

Article
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Colbert, Maria J
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Judicial Review

Article
Judicial review: no sportsman need apply
Wolfe, Seamus, Leahy, Eithne
3(6) 1998 BR 272

Landlord & Tenant

Kenny Homes & Co. Ltd. v. Leonard
Supreme Court: O'Flaherty J., **Lynch** J.. Barron J.
18/06/1998

Licence; lease; new tenancy; compensation for disturbance; tenement; application for new tenancy or compensation for disturbance; whether appellants occupied premises under a licence or a contract of tenancy; whether appellants had exclusive possession of premises; whether premises constitute a tenement; whether High Court has jurisdiction to determine such an application; ss. 5 and 28 Landlord and Tenant (Amendment) Act, 1980
Held: Appellants did not occupy premises under a contract of tenancy: premises not a tenement

Dublin Corporation v. Hamilton
High Court: **Geoghegan J.**
19/06/1998

Local government; housing authority; application by housing authority for possession of dwelling; whether court obliged to grant application once demand for possession is made; whether court has discretion to consider other factors in deciding to grant application; whether fair procedures should be followed before application to recover possession is made; whether judicial review more appropriate remedy if decision to recover possession is to be challenged; s. 62(1) Housing Act, 1966; ss. 9, 10 and 11 Housing Act, 1988
Held: Court is obliged to grant application for possession once demand for possession is made; judicial review is the appropriate remedy if decision to recover possession is to be challenged

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Medical

Article
Doctors in the dock
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SI 225/1998

Negligence

Behan v. Bank of Ireland
Supreme Court: O'Flaherty J., **Keane J., Barron J.**
20/07/1998

Negligence; breach of duty; breach of contract; limitation period; whether Bank negligently advised plaintiff with regard to sale of lands and assurances in respect of a loan; whether claims statute barred; whether plaintiff entitled to damages for personal injuries caused by negligence of bank
Held: Plaintiffís claims dismissed

Brady v. Doherty
High Court: **Barr J.**

31/07/1998

Personal injury; damages; motor car accident; physical and psychiatric injuries; post-traumatic stress disorder; liability not in issue; assessment of general damages for pain and suffering; future loss of earnings; special damages
Held: General and special damages awarded

Lawlor v. Colgan
Supreme Court: **Barrington J.**, Lynch J., **Barron J.**
24/06/1998

Liability; road traffic accident; conflict of evidence; trial judge could not apportion liability as a result of conflict of evidence; whether plaintiff had prima facie established negligence on the part of the defendant
Held: New trial ordered

Walsh v. Dublin Corporation
High Court: **Smith J.**
23/07/1998

Personal injury; plaintiff present in apartment owned by defendant; plaintiff injured when door suddenly closed on hand; whether defendant negligent in failing to take precautions against sudden closure of door
Held: Defendant not negligent

Hanley v. Minister for Defence
High Court: **Johnson J.**
21/07/1998

Personal injury; army deafness; assessment of hearing disability; plaintiffís hearing damaged by exposure to gunfire during his employment in the army; whether opportunities for promotion reduced; Green Book for assessment of hearing disability considered; whether future deterioration caused by a combination of noise induced hearing loss and age related hearing loss should be taken into account; whether formulae and variations contained in the Green Book should be applied
Held: Green Book only gives a still photograph of the impairment at any given moment, with no account of future deterioration; damages awarded for a combination of age related hearing loss and noise induced hearing loss

Dunne v. Minister for Defence
High Court: **Barr J.**
10/07/1998

Personal injury; hearing loss; claim that deafness and tinnitus resulted from activities as a member of the FCA; whether negligence of the army authorities caused the alleged disability; whether the claim was barred by the Statute of Limitations; whether the disability was likely to deteriorate in the future; Green Book considered; ss.2(1) and 3, Statute of Limitations (Amendment) Act, 1991
Held: Claim not barred; plaintiff entitled to damages for hearing disability

Barclay v. An Post
High Court: **McGuinness J.**
07/07/1998

Personal injury; duty of care; foreseeability; damages; health and safety; postman whose back injuries arose from delivering mail to houses fitted with low level letter boxes; employer had received numerous complaints from the employeeís trade union and individual postmen; whether employer had neglected duty of care to employee; whether the plaintiff's injuries were reasonably foreseeable
Held: Hazard of low level post boxes known to the employer's; reasonable duty of care not discharged; damages awarded

Molloy v. Arnotts Plc
High Court: **Barr J.**
02/07/1998

Personal injury; fall by elderly woman in department store; allegation of defect in flooring; whether fall caused by defect in flooring; whether failure by plaintiff to notice defect contributory negligence
Held: Fall caused by defect in flooring; failure by plaintiff to notice defect not contributory negligence; damages awarded

Murphy v. Minister for Defence
High Court: **Lavan J.**
17/06/1998

Personal injury; allegations by plaintiff of hearing loss and tinnitus caused during army service; manner in which hearing loss and tinnitus to be assessed; Civil Liability (Assessment of Hearing Injury) Act, 1998
Held: Plaintiff did not suffer tinnitus; plaintiff suffered hearing loss; guidelines laid down in 1998 Act for assessment of hearing injury accepted; damages awarded

Firtzpatrick v. Furey
High Court: **Laffoy J.**
12/06/1998

Fatal injury; liability; quantum of loss of dependency claim; false declaration made by the deceased to the Revenue Commissioners; public policy considerations; profit projections and the reasonable expectation of pecuniary benefit from the deceased had he lived; whether the stone which had injured the Plaintiffís husband was propelled form the gap between the tyres of the twin wheels of the defendant's truck; whether the inspection of the tyres described was adequate; whether as matter of public policy the Court should have only had regard to the income level reflected in income tax returns
Held: Public policy considerations precludes the quantifying the dependency claim on the basis of the deceased's declared and undeclared income for the accounting year prior to his death

Greene v. Minister for Defence
High Court: **Lavan J.**
03/06/1998

Personal injury; allegations by plaintiff of hearing loss and tinnitus caused during army service; manner in which hearing loss is to be assessed; effect of Civil Liability (Assessment of Hearing Injury) Act, 1998; creation of statutory formula for assessing hearing loss; courts directed to take judicial notice of and to have regard to statutory formula; extent to which court obliged to take statutory formula into account; whether statutory formula fair and reasonable; whether statutory formula would produce an unfair result in the present case
Held: Plaintiff did not suffer tinnitus; plaintiff suffered hearing loss; 1998 Act does not oblige court to adopt statutory formula; court is free to adopt alternative approaches if more suitable in the individual case; if it is not established that another approach is more suitable then statutory formula should be used; statutory formula a fair and reasonable method of assessing hearing loss; statutory formula appropriate for the present case; damages awarded

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Planning

Smyth v. Colgan
Supreme Court: **O'Flaherty J., Lynch J., Barron J.**
15/07/1998

Exempted development; dwelling house; whether works carried out on house were exempted development; whether house constituted a dwelling house; interpretation of dwelling house; whether development was within the curtilage of a dwelling house; Art. 8 Local Government (Planning and Development) Regulations, 1994
Held: House not a dwelling house within the meaning of the Regulations; development not exempted development

Burke v. Westmeath County Council
Supreme Court: **O'Flaherty J.**, Murphy J., Barron J.
18/06/1998

Planning permission; default permission; judicial review; mandamus; certiorari; applicant applied for planning permission to develop a derelict site; further information sought by respondents in respect of development plan; whether respondents entitled to postpone grant of permission where further information sought; whether such information was bona fide sought; whether applicant entitled to default permission; s.26(4) Local Government (Planning and Development) Act, 1963; Art. 33 Local Government (Planning and Development) Regulations, 1994
Held: Information bona fide sought; no entitlement to default permission

Delgany Area Residents Association Ltd. v. Wicklow County Council
High Court: **Barr J.**
28/05/1998

Judicial review; application for leave to apply for judicial review; refusal of planning permission by An Bord Pleanála; subsequent grant by local authority of planning permission for substantially similar development; whether doctrine of res judicata applies to decisions of An Bord Pleanála; whether material change of circumstances since decision of An Bord Pleanála; whether appropriate remedy is appeal to An Bord Pleanála
Held: Appropriate remedy is appeal to An Bord Pleanála; leave to apply for judicial review refused

Hynes v. An Bord Pleanála
High Court: **McGuinness J.**
30/07/1998

Judicial review; application for planning permission; applicant owner of only part of land for which planning permission sought; owner of remainder consented to application being made; application did not specify that applicant owner of only part of land; whether requirement that application specify applicant's interest in land mandatory or directory; whether applicant had sufficient interest in land to make application; whether application invalid; whether An Bord Pleanála has jurisdiction to adjudicate on appeal where application invalid; whether any defect in original decision of planning authority affected validity of decision of An Bord Pleanála; Art. 18(1)(d) Local Government (Planning and Development) Regulations 1994
Held: Validity of decision of An Bord Pleanála not affected by validity of original decision of planning authority; An Bord Pleanála has no jurisdiction to adjudicate on appeal where original planning application invalid; applicant had sufficient interest in land to make application; failure to specify applicantís interest in land did not prejudice planning authority or public; exact specification of applicant's interest in land not required in all cases; application valid; judicial review refused

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Flynn, Tom
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The concept of "causing" in environmental offences
MacIntyre, Owen
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and environmental law
Oakes, Ciaran
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Select review of recent planning appeal decisions
- multi-storey car parks
Phillips, Tom R
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Fleming v. Rathdown School Trust
O'Connell, Micheal
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Kelly v. Cullen
Supreme Court: Hamilton C.J., Barrington J., **Barron J.**
27/07/1998

Delay; application by defendant to have action struck out on grounds of delay; plaintiff born in 1976; injuries sustained by plaintiff during gestation and at birth; alleged negligence on part of attending doctor; plenary summons issued in 1990; statement of claim served in 1992; notice of trial served in 1997; whether plaintiff guilty of inordinate delay; whether court should exercise discretion to refuse to strike out action; criteria to be used by court in exercising discretion
Held: Plaintiff guilty of inordinate delay; significant prejudice to defendant caused by delay; court refused to exercise discretion not to strike out action

Doyle v. Commission of An Garda Síochána
Supreme Court: O'Flaherty J., Denham J., **Barrington J.**, Keane J., Murphy J.
22/07/1998

Discovery; complaint before European Court of Human Rights in relation to United Kingdom; material held by An Garda Síochána relevant to complaint; application for discovery of material; whether court has jurisdiction to order discovery where discovery is sole relief sought; whether plaintiff had identified wrongdoing on part of United Kingdom; whether procedures under Euro-

pean Convention on Human Rights more appropriate for investigating plaintiff's complaint; Art. 34 European Convention on Human Rights
Held: Court has jurisdiction to order discovery where discovery is sole relief sought; plaintiff failed to establish prima facie case of wrongdoing on part of United Kingdom; procedures under European Convention on Human Rights more appropriate for investigating plaintiff's complaint; discovery refused

Hughes v. Money Markets International Stockbrokers Ltd.
Supreme Court: O'Flaherty J., **Lynch J., Barron J.**
15/07/1998

Extension of time; judgment in default of appearance entered against defendant in Circuit Court; application to High Court for extension of time in which to appeal; whether determination of High Court could be appealed to Supreme Court; whether extension of time should be granted; whether application to Circuit Court to have judgment set aside more appropriate procedure; s. 39 Courts of Justice Act, 1936; O. 61 Rules of the Superior Courts; O. 27 Rules of the Circuit Court
Held: Appeal dismissed

Bank of Ireland v. EBS Building Society
Supreme Court: **Keane J., Murphy J., Barron J.**
23/06/1998

Liberty to defend proceedings sought; drawing of cheques; fraud; drawing of cheques procured by fraud on part of third party; whether bank entitled to enforce payment of cheques; whether bank aware of fraud; whether bank acted in good faith; whether matter should go to a full plenary hearing
Held: Matter to go to a full plenary hearing

O'Connor v. Judge Caroll
Supreme Court: Hamilton C.J., **Murphy J., Barron J.**
26/05/1998

Claim for costs against Judge; certiorari had been granted against order of Circuit Court Judge; High Court refusal to make any order for costs against the Circuit Court Judge; whether it is proper to join a judge as a party to judicial review proceedings; whether the respondent judge acted mala fides or with impropriety
Held: Appeal dismissed; no mala fides or impropriety on the part of the Circuit Court Judge

O'Driscoll v. Dublin Corporation
High Court: **Geoghegan J.**
03/07/1998

Statue bar plea; limitation period; reasonable knowledge; personal injury claim; delay in discovering who were the actual owners of the site where the accident occurred; meaning of reasonable knowledge; ss.2(2) and 3(1) Statute of Limitations (Amendment) Act, 1991
Held: Claim not statute barred

Inter Finance Group Ltd. v. KPMG Peat Marwick
High Court: **Morris P.**
29/06/1998

Security for costs; plaintiff company unable to pay defendant's costs if defendant successful; whether defendant has prima facie defence; whether inability to pay caused by defendant; whether other special factors justified refusal of security for costs; whether security for costs should be granted; s. 390 Companies Act, 1963; Order 29 Rules of the Superior Courts
Held: Security for costs should ordinarily be granted where defendant establishes a prima facie defence and inability of plaintiff to pay defendantís costs if unsuccessful; defendant had established a prima facie defence and inability to pay; plaintiff had not established that inability to pay was caused by defendant; no other special factors justified refusal of security for costs; security for costs granted

O'Keeffe v. Kilcullen
High Court: **O'Sullivan J.**
24/06/1998

Procedure; want of prosecution; no reasonable cause of action; striking proceedings; application on behalf of the third named defendant for an order dismissing the plaintiff's action against the defendant for want of prosecution or, in the alternative, for failure to disclose a reasonable cause of action; standard of proof considered; whether any negligence or breach of duty on the part of this defendant could conceivably have caused the loss and harm alleged; Order 27, Rule 1 and Order 19, Rule 28, Rules of the Superior Court
Held: A finding of negligence or breach of duty on the part of the third defendants could not possibly result in an award of compensatory damages against that defendant; application granted

Lough Neagh Explorations Ltd. v. Morrice
High Court: **O'Sullivan J.**
12/06/1998

Security for Costs Order; non-compliance with order; application to strike out proceedings; no such order explicitly provided for in the Rules; delay in the prosecution of the proceedings; whether jurisdiction which defendants were seeking to invoke is discretionary; whether justification for non-compliance with the order for security for costs; whether order for security for costs was stifling the proceedings; whether defendants frustrated the ability of plaintiffs to comply with the order; whether personal assets of the plaintiffs maintaining the proceedings are relevant; Order 29 of the Rules of the Superior Courts
Held: Striking Out Order granted; otherwise defendants would suffer ongoing damages; jurisdiction discretionary; to be used sparingly and in clear cases; defendants not required to facilitate plaintiff in providing funds to enable to continue to sue

Connolly v. Casey
High Court: **Kelly J.**
12/06/1998

Third party joinder; claim for professional negligence; application by third party to set aside third party proceedings; whether third party notice served as soon as reasonably possible; whether onus of proof on plaintiff to show that notice served as soon as reasonably possible; whether third party must demonstrate prejudice resulting from delay; whether adequate reasons given for delay; s. 27(1) Civil Liability Act, 1961; O. 16 r. 1(3), Rules of the Superior Courts
Held: Third party notice not served as soon as reasonably possible; third party proceedings set aside

Whearty v. Agricultural Credit Corporation
High Court: **McCracken J.**
31/10/1997

Delay; proceedings struck out; prejudice; motion brought to re-enter proceedings; whether the delays were inordinate; no appearance by either party when the case was listed; whether the defendants suffered any prejudice

Held: Order that proceedings be re-entered

Real Property

Blackall v. Blackall
Supreme Court: O'Flaherty J., **Murphy J., Barron J.**
18/06/1998

Property; sale of lands; title; order for possession; High Court made order granting possession of premises to defendant; whether question of ownership can be reopened; whether a further appeal regarding ownership of lands can be made
Held: Appeal dismissed;

Malone v. McQuaid
High Court: **O'Sullivan J.**
28/05/1998

Judgment mortgage; presumption of advancement; liquidation; resulting trust; beneficial ownership; sale of property to third party called off because of registration of mortgage; whether the judgment debtor has beneficial interest in property; whether the purchase price was paid under a resulting trust; consideration of the presumption of advancement; whether the presumption of advancement was rebutted
Held: Entire beneficial interest vested in plaintiff; judgment debtor owned no beneficial interest in property; registration of judgment should be vacated

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Sweetman, Patrick
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Road Traffic

D.P.P. v. McNeill
Supreme Court: Hamilton C.J., **O'Flaherty J.**, Lynch J.
22/07/1998

Drink driving charge; delay; right to trial in due course of law; reasonable expedition; charges dismissed as a result of delay in prosecution of case; whether District Court correct in dismissing charges; whether excessive delay so as to prejudice defendant; whether prejudice to defendant is specific or to be inferred; whether defendant discharged onus of proving prejudice; s.2 Summary Jurisdiction (Ireland) Act, 1857; s.51 Courts (Supplemental Provisions) Act, 1961; Art. 38 of the Constitution
Held: Charges should not have been dismissed; defendant suffered no prejudice as a result of delay

D.P.P. v. Somers
Supreme Court: **O'Flaherty J.**, Lynch J., **Barron J.**
22/07/1998

Drink driving charge; procedure for carrying out sample; validity of form signed by doctor; whether prescribed form completed within meaning of the legislation; whether defendant prejudiced as a result of minor omission by doctor; s.16 Courts of Justice Act, 1947; s.18 Road Traffic Act, 1994
Held: Defendant suffered no prejudice; minor flaw in filling out form of no significance

D.P.P. v. MacMathuna
High Court: **Morris P.**
24/07/1998

Road traffic; accused stopped by Garda on suspicion of driving under influence of intoxicant; Garda required accused to remain at that place while alcolyser was brought; Garda indicated that accused was obliged to do so pursuant to s.12(1)(b) Road Traffic Act, 1994 permitting arrest to allow alcolyser to be administered; whether Garda should have invoked power under s. 12(1)(c) of the Act permitting arrest while alcolyser is brought; whether use of wrong section made arrest unlawful; whether evidence obtained during unlawful arrest inadmissible; ss.12(1) (b) and (c) Road Traffic Act, 1994
Held: Use of s. 12(1)(b) permissible even where alcolyser is not immediately administered so long as reasonable cause exists for delay; arrest not unlawful

D.P.P. (O'Driscoll) v. O'Connor
High Court: **Geoghegan J.**
10/07/1998

Drink driving; question of law or fact; provision of blood and urine samples; charge of driving a mechanically propelled vehicle with an excessive quantity of alcohol in the blood; dismissed by the District Judge; respondent opted to provide a urine sample but when unable to do so within a certain period of time, blood sample taken; whether the District Judge was correct in law in dismissing the charge; whether the respondent had been given a reasonable opportunity to provide a urine specimen; whether this was a question of law or of fact; s.49, Road Traffic Act, 1961
Held: Decision of the District Judge that 30 minutes should have been allowed to provide a urine sample, was a decision on the facts; no question of law to be determined

D.P.P. (Traynor) v. Lennon
High Court: **Morris J.**
26/06/1998

Drink driving; urine and blood samples; respondent opted to provide a urine sample but felt unable to do so when she saw the toilet facilities and layout; blood sample instead taken; whether she was realistically denied the option of providing a urine sample because of the lack of facilities; whether the District Judge was correct in dismissing the charges; s.2, Summary Jurisdiction Act, 1857; s.51, Courts (Supplemental Provisions) Act, 1961; s.49, Road Traffic Act, 1961; ss. 10 and 13, Road Traffic Act, 1994; Road Traffic (Amendment) Act, 1995
Held: Respondent deprived of the opportunity to exercise her option; blood sample obtained in violation of her statutory rights; charges dismissed

Shiels v. Motor Insurers Bureau of Ireland
High Court: **O'Higgins J.**
26/06/1998

Judicial review; decision of respondent refusing ex gratia award; applicant injured in road traffic accident; duty of respondent to consider whether to make ex gratia award where accident caused by untraced vehicle; dispute as to whether any other vehicle involved in accident; decision of respondent that no other vehicle involved in accident; whether decision unreasonable; whether adequate reasons for decision given; Note 8, Agreement between Motor Insurers Bureau of Ireland and Minister for Local Government, 1964
Held: Respondent did not give adequate reasons for decision; decision unreasonable; judicial review granted

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Moorhead, Sara

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hOisin, Colm
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SI 185/1998

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SI 186/1998

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SI 187/1998

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The application of European Community law to sport
Hyland, Niamh
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3(6)1998 BR 266

Succession

Bentham v. Potterton
High Court: **Barr J.**
28/05/1998

Alleged inter vivos gift; donatia mortis causa; transaction involving four bank deposit books between the deceased and plaintiff; disposition of property when deceased terminally ill; whether transaction between the deceased and the plaintiff amounted to a donatia mortis causa made by the deceased in favour of the plaintiffs; whether gift was made in comptemplation of donor's death; whether the three essential requirements of donatia mortis causa were complied with
Held: Onus on party claiming the gift to prove that the essential requirements were complied with; plaintiff did not establish the validity of the alleged gift on the balance of probability

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Tax

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Hunt, Patrick
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2/1998 - Central Bank Act, 1998
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3/1998 - Finance Act, 1998

4/1998 - Electoral (Amendment) Act, 1998
signed 31/03/1998
commenced on signing

5/1998 - Oireachtas (Allowances to Members) and Ministerial, Parliamentary, Judicial and Court Offices (Amendment) Act, 1998
signed 01/04/98
s 24-28 commenced 19/06/1996
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6/1998 - Social Welfare Act, 1998
signed 01/04/1998
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7/1998 - Minister for Arts, Heritage, Gaeltacht and the Islands (Powers and Functions) Act, 1997

8/1998 - Court Services (no.2) Act, 1998

9/1998 - Local Government (Planning & Development) Act, 1998

10/1998 - Adoption (No.2) Act, 1998

11/1998 - Tribunals of Inquiry (Evidence)(Amendment) Act, 1998

12/1998 - Civil liability (Assessment of Hearing Injury) Act, 1998

13/1998 - Oil pollution of the Sea (Civil Liability and Compensation) (Amendment) Act, 1998

14/1998 - Arbitration (International Commercial) Act, 1998

15/1998 - Finance (No.2) Act, 1998

16/1998 - Local Government Act, 1998

17/1998 - Gas (Amendment) Act, 1998

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20/1998 Merchant Shipping (Miscellaneous Provisions) Act, 1998

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26/1998 - Turf Development Act, 1997
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37/1998 - Investment Compensation Act, 1998
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Government Bills in Progress

Information compiled by Sharon Byrne, Law Library, Four Courts.

Broadcasting and Other Media (Public, Right of Access and Diversity of Ownership) Bill, 1998
2nd stage - Dail **[p.m.b.]**
Carriage of Dangerous Goods by Road Bill, 1998
1st stage - Dail

Censorship of Publications (Amendment) Bill, 1998
2nd stage - Dail

Children Bill, 1996
Committee - Dail [re-introduced at this stage]

Criminal Justice (No.2) Bill, 1997
Report - Dail

Education (No.2) Bill, 1997
Committee - Dail

Eighteenth Amendment ff The Constitution Bill, 1997
2nd stage - Dail **[p.m.b.]**

Electoral (Amendment)(No.2) Bill, 1998
2nd stage - Dail

Employment Rights Protection Bill, 1997
2ND stage - Seanad **[PMB]**

Energy Conservation Bill, 1998
2nd stage - Dail **[PMB]**

Enforcement of Court Orders Bill, 1998
2nd stage - Dail **[P.M.B]**

Family Law Bill, 1998
2nd stage - Seanad

Home Purchasers (Anti-Gazumping) Bill, 1998
2nd stage - Dail

International War Crimes Tribunals Bills, 1997
committee- Dail

Jurisdiction of Courts and Enforcement of Judgments Bill, 1998
Passed in Seanad

Plant Varieties (Proprietary Rights)(Amendment) Bill, 1997
Committee - Dail

Prohibition of Ticket Touts Bill, 1998
2nd stage - Dail **[P.M.B]**

Protections for Persons Reporting Child Abuse Bill, 1998
[changed from - Children (Reporting of Alleged Abuse) Bill, 1998]
Report - Dail **[P.M.B]**

Protection of Workers (Shops)(No.2) Bill, 1997
2nd stage - Seanad

Road Traffic Reduction Bill, 1998
2nd Stage - Dail **[PMB]**

Seanad Electoral (Higher Education) Bill, 1997
1st Stage - Dail

Shannon River Council Bill, 1998
2nd stage - Seanad

Solicitors (Amendment) Bill, 1998
1st stage - Seanad **[P.M.B.]**

State Property Bill, 1998
1st stage - Dail

Statute of Limitations (Amendment) Bill, 1998
1st stage - Dail

Tourist Traffic Bill, 1998
1st stage - Dail

Tribunals of Inquiry (Evidence)(Amendment)(No.2) Bill, 1998
1st stage - Dail

Tribunals of Inquiry (Evidence) (Amendment)(No.3) Bill, 1998
Passed in Dail

Abbreviations

BR = Bar Review
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GILSI = Gazette Incorporated Law Society of Ireland
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
IFLR = Irish Family Law Reports
IIPR = Irish Intellectual Property Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

The references at the foot of entries for Library acquisitions are to the shelf mark for the book.

Res Judicata in Family Law

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Introduction

The role of res judicata in family law is a difficult and controversial topic and some judges have gone so far as to deny that it has any role at all to play. For example, Barron J has spoken of :

> 'the general principle that res judicata does not operate in relation to family law and that any order made in family law proceedings is subject to the proviso that it remains in force only until further order.'[1]

Contrast this with the following passage of Denham J:

> 'the fact that some issues in family law courts are not capable of finality, does not deprive this area of the law of the important concepts of certainty and finality. Whereas care for dependants requires that there be no finality in some areas the general law regarding certainty should apply unless excluded by law or justice.'[2]

The problem arises from a conflict between the desirability of finality in litigation on the one hand, and on the other, the need for the discretionary power of the court to be exercised with full knowledge of all the relevant facts, rather than on a basis, partly of fact and partly of assumptions arising from such rules as estoppel.[3] It is particularly difficult to do justice in so personal a field as family law if the realities of the situation are allowed to be obscured by the application of rules or principles which in other situations assist the cause of justice. The purpose of this article is to analyse the manner in which Irish courts have attempted to resolve this conflict.

The 'Clean Break' Principle

In England the policy of the legislature and the courts has been to favour the concept of a 'clean break' and to promote finality in respect of financial and property matters on the breakdown of a marriage.[4] The opposite view prevails in this jurisdictuion. In *JD v. DD*[5] McGuinness J examined the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 and concluded :

> 'The statutory policy is...totally opposed to the concept of the "clean break". This policy is not only clear on the face of the statutes but was most widely discussed, referred to and advocated in the considerable debate that surrounded the enactment of divorce legislation. Such an approach unfortunately not only renders the court's task in making financial and property orders more difficult; it also I fear will create considerable difficulties for parties and their legal advisers when endeavouring to reach a settlement and avoid costly court proceedings.'

Protection Against Domestic Misconduct

The leading case is *D v. C*,[6] where the prior granting of a barring order was pleaded as a bar to the wife subsequently seeking a decree of nullity, on the basis that at the relevant time one had to be a spouse in order to obtain a barring order. Costello J rejected the plea as, although in granting the barring order the previous court had acted on the assumption that the parties were spouses, the issue had not been directly put in issue or determined therein. The issue in *D v. C* is now moot in so far as one no longer has to be a spouse to obtain a barring order,[7] but the case is interesting for a number of reasons. Firstly, Costello J appears to accept as a matter of principle that both cause of action and issue estoppel can operate in family law. Secondly, it is perhaps surprising that he chose not to rest his decision on overt policy grounds. In particular it is unlikely that the courts would wish to discourage spouses from seeking barring orders out of fear that they could later find themselves estopped from denying the validity of their marriage. Finally it should be noted that, aside from res judicata, an application for nullity could be barred on the ground of approbation if a party fails to question the validity of the marriage in barring order proceedings which proceed on the basis that the marriage is valid.[8]

The refusal or setting aside of a barring order will not prevent a subsequent application from being made provided there are new facts or circumstances.[9] Given the important nature of such orders it is submitted that this would not be a particularly hard threshold to satisfy.

Parentage

Res judicata appears to have little or no role to play in questions of parentage. In *MD v. GD*[10] a father obtained an access order in respect of his child. Two days later his wife sought to have the order discharged and alleged for the first time that her husband was not the father of the child. A plea of res judicata was rejected by Carroll J who held that the court should be concerned in ensuring that the truth should prevail and, if the husband was not the father of his wife's child, that was a truth which should be established. Interestingly Carroll J also held that the wife was not estopped from raising the issue of paternity by virtue of a prior separation agreement or because she had issued maintenance proceedings.

It should be noted that under the Legitimacy Declaration (Ireland) Act, 1868, as amended, disputed questions of legitimacy can be conclusively determined by way of declaration.11

Maintenance

In *F v. F*[12] Denham J cited maintenance as an example of an issue in family law which is incapable of being the subject of a final order. Thus neither the payment of a lump sum in a settlement of divorce a mensa proceedings nor a full and final settlement of all matters in a deed of separation will prevent a spouse from later seeking maintenance.[13] In *JD v. DD*[14] the applicant sought a lump sum maintenance order to enable her make a clean break from her husband. McGuinness J refused to make such an order and stated that '[t]he court, in making virtually any order in regard to finance and property on the breakdown of a marriage, is faced with the situation where finality is not and never can be achieved.' Interestingly she commented that 'I make this decision with some regret, since the concepts of certainty and finality of litigation are indeed important.'

Custody and Access

It has been suggested in England that res judicata has a limited and diminishing role to play in custody cases.[15] Nonetheless the court retains an inherent jurisdiction, even in the absence of estoppel, to restrain the re-litigation of issues. Support for this proposition is to be found in the case of *SW v. FW*[16] where, after three years of virtually continuous litigation, the parties had entered into a comprehensive settlement agreement which dealt in a detailed manner with the issues of access and custody of the three children of the marriage. When the husband brought a new application for access, McGuinness J made an Issac Wunder Order preventing the husband from bringing any further such application without first seeking the leave of the court. This was because the continuing litigation and frequent applications to court were having an unsettling and destabilising effect on both the wife and the children.

Care Proceedings

Section 22 of the Child Care Act, 1991 permits the court to vary or discharge a care or supervision order on the application of any party. A number of recent English cases have established that res judicata has a very limited role to play in care proceedings, and the most that can be stated with confidence is that the court will have a wide discretion whether or not to permit the re-litigation of issues already decided.[17] There are two competing interests in such cases. On the one hand, when dealing with children, there is a need to preserve for the court at all times a range of options from which the one most favourable to the current best interests of the child can be selected.[18] This means that the court should reserve at every stage the power to review findings reached at earlier stages in the family history. On the other hand, to have no estoppel at all would be a recipe for chaos and could open the floodgates to claims to reopen past disputes – a process which if permitted, could disrupt the lives of the children concerned. In addition, any delay in reaching a final determination of questions involving the upbringing of a child is likely to prejudice the child's welfare. An awareness of these factors means that the court will not be overhasty to review antecedent findings of fact and on occasion may decline to hear certain matters even if the strict rules of estoppel would not cover them.

In *Re B*[19] Hale J established a general discretionary test to be used in such cases which balances all of the underlying policy considerations outlined above. The judge recognised that such a test could make it more difficult for practitioners to give firm advice to their clients than would be the case if the strict doctrine of issue estoppel were to be applied to care proceedings. However he concluded that such a balancing test is necessary to encompass both the flexibility which is essential in children's cases, and the increased control exercised by the court rather than the parties, which is a feature of modern family law. For these reasons it is submitted that the approach of Hale J should also be followed in this jurisdiction.

Consent to Marry

In Manitoba, the case of *Re Al Samadi*[20] held that the public interest in considering whether a fifteen year old girl should be permitted to marry the father of her child overrode the public interest in preventing the girl from making repeated applications for consent to marry.

Nullity

In a dictum in *D v. C*[21] Costello J stated that in the case of a void marriage, 'the inquisitorial nature of the Court's jurisdiction in nullity would prevent it from accepting as true facts which on grounds of estoppel would otherwise be found false.' He left open the question of whether the same rule applies to a voidable marriage. However *D v. C* must now be read in the light of *R McG v. NK (orse N McG).*[22] When the husband sought a decree of nullity Morris J held that he had approbated the marriage because on two prior occasions he had sought the protection and benefit of family law legislation which would not have been available to someone who was not married. In prior maintenance proceedings the husband had claimed that because of his wife's desertion she was not entitled to maintenance and he had also sought to vary the amount of the maintenance payments. In none of the maintenance proceedings did he make the claim that there was not a full and valid marriage in existence. Whilst the case is based on approbation and not res judicata, the end result is the same in that a failure to question the validity of a marriage in prior family law proceedings may lead to a subsequent application for a decree of nullity being barred. So even if res judicata does not apply to nullity, the doctrine of approbation can lead to the very same result. It is therefore absolutely crucial that when a client is seeking family law relief, no matter how urgently, practitioners should take the time to properly warn them about the dangers should they ever subsequently wish to apply for a decree of nullity. Giving advice in this area is not an exact science, but a mistake can prove fatal, as in *R McG v. NK*.

Divorce a Mensa, Separation Agreements and Judicial Separation

It is clear that a divorce a mensa will bar a subsequent application for a judicial separation. The leading case is *F v. F*[23], where the applicant sought a divorce a mensa and a barring order and

the proceedings were stayed on the basis that the respondent would stay away from the family home. When the applicant subsequently sought a judicial separation under the Judicial Separation and Family Law Reform Act, 1989 she was met by a successful plea of cause of action estoppel in the Supreme Court. In the opinion of Blayney J applications for divorce a mensa and judicial separation amounted to claims for the same relief, since the effect of both decrees was merely to relieve the spouses from the duty of cohabiting with each other. The mere fact that each action was brought under a different name could not alter this fact and so the application for judicial separation was equivalent to bringing a second claim for divorce a mensa. In addition, Blayney J held that it was impermissible for a party to institute judicial separation proceedings for the sole purpose of obtaining the ancillary relief available under the 1989 Act.

With respect to the Supreme Court it is difficult to see how the large package of provisions available under the 1989 Act can be described as the same relief as a bare order of divorce a mensa. A thirty room mansion and a two roomed bungalow can both be described as 'houses' but most people would prefer the mansion. There must come a point when the sheer extent of relief available is sufficient to distinguish in substantive terms one cause of action from what appears to be a similar, but less extensive, cause of action.

Irish cases also make it clear that a separation agreement is a bar to subsequent proceedings for divorce a mensa.[24] Such decisions have been justified on two grounds.[25] Firstly, the parties to such a contract will not be permitted to go behind it and secondly, by agreeing to live separate and apart, the parties have rendered superfluous the granting of a divorce a mensa.

If, as the above cases suggest, a divorce a mensa is the same cause of action as a judicial separation and a separation agreement is the same cause of action as a divorce a mensa, logic would seem to suggest that a separation agreement is the same as a judicial separation. However this was not the conclusion reached by McGuinness J who held in two Circuit Court cases that a separation agreement did not bar a subsequent application for a judicial separation.[26] When one of these, *P O'D v. A O'D*,[27] was appealed by way of case stated to the Supreme Court, Keane J took the opportunity to exhaustively review this area of the law and came down in favour of the older cases and against the strategy adopted by McGuinness J. He held that where a separation agreement provides, as it invariably does, that the parties are to live separate and apart, the granting of a judicial separation would be superfluous. Moreover, where parties have entered into a binding contract to dispose of differences that have arisen between them as husband and wife, it would be unjust to allow one party unilaterally to repudiate the agreement, irrespective of whether it took the form of a compromise of proceedings actually instituted.

Keane J accepted that it might seem harsh to deprive a party to a separation agreement from the right to avail of the more flexible reliefs introduced by the 1989 Act but concluded that it was for the Oireachtas 'to balance the possible injustice that might arise in some cases against the desirability of ensuring finality and certainty in settlements of family law disputes and discouraging parties from re-litigating matters with the consequent trauma for all involved, particularly the children of the marriage.'[28]

The 'harshness' that Keane J referred to has now been ameliorated to some extent by the Family Law (Divorce) Act, 1996, as the conclusion of a separation agreement is not a bar to applying for a decree of divorce, and the ancillary reliefs to a divorce decree are substantially the same as those available following the grant of a decree of judicial separation. Although Keane J held that one cannot obtain an order purely to seek attendant ancillary relief, this reasoning 'would not apply to an action one consequence of which was a change in the status of the parties'.[29] Divorce is clearly a change in status to a separation because after divorce the parties are free to remarry.

Matrimonial Property

An application for an interest in the family home under s.12 of the Married Woman's Status Act, 1957, will operate so as to estop a subsequent application being made under the same Act.[30] But there will be nothing to prevent an application for a property adjustment order pursuant to the Judicial Separation and Family Law Reform Act, 1989 being made after a 1957 Act application.[31] This is because orders under the 1989 Act are based on wider considerations than under the 1957 Act.[32] These include financial contributions, the care and nurture of children, the effect of duties on a spouse's career and general conduct. In *JD v. DD*[33] McGuinness J held that under the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996, 'there appears to be no limit on the number of occasions on which a property adjustment order may be sought and granted.' She concluded that finality could never be achieved in respect of a property order and in a dictum suggested that '[t]his also appears to mean that no agreement on property between the parties can be completely final, since such finality would be contrary to the policy and provisions of the legislation.'

Finally, in the context of family property, it is of interest to note that in New Zealand it has been held that the basis of resulting and implied trusts on the one hand and constructive trusts on the other are sufficiently different to permit a claim for the former after a suit for the latter has been defeated.[34]

Divorce

The Family Law (Divorce) Act, 1996 makes it clear that a spouse may apply for a decree of divorce and the relevant ancillary orders despite the fact that he or she may have previously obtained a decree of judicial separation.[35] Presumably this also applies to parties who have previously obtained a decree of divorce a mensa.

As interpreted by McGuinness J in *JD v. DD*[36], Irish divorce legislation prefers a principle of variation over that of a single 'clean break'. Even where spouses in a separation deed seek to effect a full and final settlement of all financial and property issues the court may, by way of ancillary relief in divorce proceedings, 'make a broad range of orders which can completely re-arrange the parties capital assets and finances.'[37] In addition, where orders for ancillary relief have been made in judicial separation proceedings, additional orders may be sought in those proceedings at a later stage and entirely new orders may be sought in subsequent divorce proceedings.[38] Similarly, after orders for ancillary relief have been made in divorce proceedings, either spouse, if they have not re-married, can later re-apply for original or

further orders for ancillary relief.[39] This aspect of the legislation has not gone uncriticised and Shatter has argued that the current legislation is 'an invitation to an embittered and vengeful spouse to turn their estranged and divorced spouse's life into a nightmare by the making of repeated claims for ancillary relief.'[40] Whilst it may be possible for the courts to rely on their inherent jurisdiction to restrain vexatious or abusive proceedings, the only real answer lies in legislative reform and a recognition that, in the words of Denham J, family law should not be deprived 'of the important concepts of certainty and finality.'[41]

Conclusion

The application of res judicata to family law operates in a piecemeal and inconsistent fashion and it is difficult to detect any coherent approach in either the case-law or the legislation. This article commenced with quotes from Barron J and Denham J respectively, one stating that res judicata has no role to play in family law, the other stating that it has an important role to play. Ideally one would conclude an article such as this by identifying which quote is correct. Unfortunately the answer from the case-law seems to be that they both are.

In such circumstances one must return to the reason why our legal system has a rule of res judicata at all. Two main theories form the basis of the doctrine in this jurisdiction. First, a litigant has the right to be protected from the vexatious re-litigation of issues by an opponent. Second, the general interest of the community is in the termination of disputes and the finality and conclusiveness of judicial decisions. Both of these important interests are harmed when a court departs from the rules of res judicata. It is therefore submitted that family law proceedings should only be excluded from the ordinary operation of res judicata in specific circumstances where there is a compelling and adverse public interest at stake. This might be the case in some child care proceedings. By contrast, there seems to be no good reason why spouses should not be permitted to conclude a full and final settlement of their property and financial affairs. •

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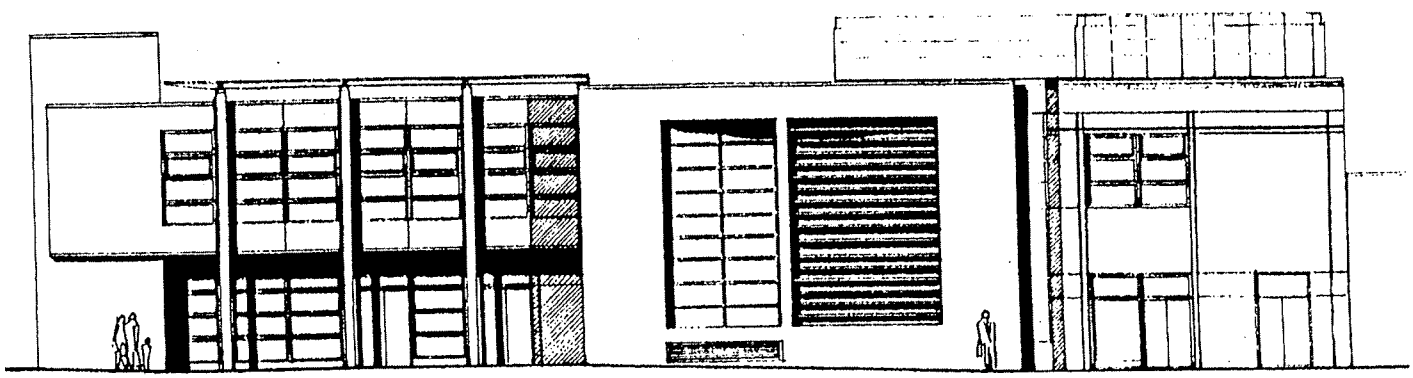
1 *D v. D* [1990] 2 IR 361 at 363 (HC).
2 *F v. F* [1995] 2 IR 354 at 369 (SC).
3 *Porter v. Porter* [1971] P 282 at 284.
4 See e.g. *Minton v. Minton* [1979] AC 593
5 1997] 3 IR 64 (HC)
6 [1984] ILRM 173 (HC)
7 See the Domestic Violence Act 1996
8 See *R McG v. NK* (orse N McG), High Court, 23rd May, 1995; discussed below.
9 *O'B v. O'B* [1984] IR 182 (SC)
10 [1993] 1 Fam. LJ 34 (HC)
11 This procedure is not available to children whose parents have never been married to each other and declarations made under the Status of Children Act, 1987 do not prevent a query as to parentage arising in other proceedings. See generally Shatter, *Family Law* (4th ed., 1997), para 11.17
12 [1995] 2 IR 354 at 369-370 (SC).
13 See respectively *HD v. PD*, unreported, Sup. Ct., 8th May 1978 and *JH v. RH* [1996] 1 IFLR 23 (HC).
14 [1997] 3 IR 64 (HC)
15 *Rowe v. Rowe* [1979] 3 WLR 101 at 105-106. See also *Frost v. Frost* [1968] 1 WLR 1221 at 1229 and *Groat v. Ibbotson* (1957) 12 DLR (2d) 361 (CA; B.C.).
16 [1995] 1 Fam LJ 24 (Cir. Ct.).
17 *Re B* [1997] 2 ALL ER 29 (Fam Div), *Re S* [1995] 2 FLR 244 (Fam Div), *K v. P* [1995] 1 FLR 248 (Fam Div), *Re S* [1995] 2 FLR 639 (CA), *Re G* [1994] 2 FLR 69 (Fam Div), *B v. Derbyshire CC* [1992] 1 FLR 538 (Fam Div).
18 *Re S* [1995] 2 FLR 639 at 645.
19 [1997] 2 All ER 29
20 110 DLR (4th) 750 (1994) (Man.; QB).
21 [1984] ILRm 173 at 195 (HC)
22 23rd May, 1995 (HC)
23 [1995] 2 IR 354 (SC).
24 K v K [1988] IR 161 (HC), *Courtney v. Courtney* [1923] 2 IR 31 (CA).
25 *P O'D v. A O'D* [1998] 1 ILRM 543 at 555.
26 *CN v. RN* [1995] 1 FLJ 14 (Cir. Ct.), *O'D v. O'D* [1996] 3 FLJ 96 (Cir. Ct.).
27 [1998] 1 ILRM 543.
28 Id at p 558
29 *F v. F* [1995] 2 IR 354 at 370, per Denham J.
30 *O'D v. O'D* [1996] 3 FLJ 96 (Cir. Ct.); *EM v. WM* [1994] 3 FLJ 93 (Cir. Ct.). In *P O'D v. A O'D*, supra note 27, the Supreme Court decided that it did not have to determine this issue on the facts of the case before it.
31 *O'D v. O'D*, id.; *EM v. WM* id.
32 *O'D v. O'D*, id. at pp 99-100; *EM v. WM*, id. at p 96.
33 [1997] 3 IR 64 (HC)
34 *Williams v. Tedcastle* [1994] 1 NZLR 85 (HC).
35 S.26.
36 [1997] 3 IR 64 (HC)
37 Shatter, *Family Law* (4th ed., 1997) para 17. 199
38 Id.
39 Id.
40 Id.
41 *F v. F* [1995] 2 IR 354 at 369 (SC). •



Banquo's Ghost at the Commercial Banquet? – Some Old and New Alternatives to the 'Live' Witness

BENEDICT O'FLOINN, Barrister

Leaving to one side those categories of action which may be commenced by way of special or summary summons and which are subsequently heard on affidavit, proceedings before the High Court have traditionally involved the exchange of pleadings which are then amplified by means of oral evidence. Indeed, the assessment of a witness' demeanour or the parties' evidence is often cited by judges as a crucial element in reaching their decisions. However, in both commercial litigation and claims in respect of medical negligence, the costs involved in directing the attendance of expert witnesses (frequently from outside the jurisdiction), added to the embarrassment of finding that their services are ultimately not required if the case is adjourned, is a recurring problem.

In these circumstances, the alternatives to the physical presence of witnesses in court and recent advances in technology should not be overlooked. That these have sometimes been underutilised by the Bar is illustrated by the check-list appended to the Practice Direction of the 21st June 1996 for use in personal injury cases. This article revisits some of the existing alternatives to oral testimony and indicates the scope for harnessing modern technology to streamline the course of hearings.

Admissions

The basic means by which one may dispense with witnesses is by securing an admission from the adverse party in relation to the evidence that a particular witness would otherwise give. This arises particularly in the context of documents. Although some persist in the misconception that documents prove themselves and are evidence of the facts which they relate, this is a contention which has been long since rejected: *Mercer v. Mercer* [1924] 2 IR 50. That it exists at all may stem from the formality attending the discovery of documents in modern litigation and the presence on the record of these affidavits. Nevertheless, the fact remains that if counsel wishes to use a document as part of his case, the author must be called as a witness to prove it. Further witnesses may be required to give evidence in relation to the veracity of its contents. This requirement may be avoided by the service of a notice calling upon the party served to admit the documents specified therein (Order 32 rule 2). Equally, a notice may be served which calls upon the party served to admit certain facts: Order 32. While the court has generally refrained from compelling parties to make admissions, whether in response to such notices or otherwise, practice directions have encouraged them, particularly in respect of the reports of medical experts and the like, while the power to penalise a party who unreasonably refuses to admit documents is explicitly recognised in Order 32. Furthermore, the attitude which a party, served with a notice, has adopted in relation to the making of admissions may have a crucial bearing on the determination of further applications to prove facts by affidavit, deliver interrogatories or to take evidence before an examiner or on commission.

Interrogatories

While admissions are, in essence, a voluntary accommodation reached by the parties themselves in the interests of an orderly and cost-effective trial, the delivery of interrogatories is by leave of the court unless they relate to proceedings in respect of fraud or breach of trust: Order 31 rule 1. Interrogatories are questions framed so as to be capable of a 'yes' or 'no' answer (*Long v. Conway*, High Court, 25th July 1977) which are answered on affidavit. These answers naturally bind the party making them and properly drafted, interrogatories can curtail the scope of inquiry at the trial, as well as relieve the party delivering them of the burden of proving the matters contained therein.

The interrogatories must relate to matters which are contested by the parties as both rule 1 and rules 6-7 of Order 31 make clear. The 'matters' referred to are those facts which are raised on the pleading or facts which relate to those pleaded: *Mercantile Credit v. Heelan* [1994] 2 IR 105. It is impermissible to interrogate merely as to the evidence to be adduced by your opponent, although the fact that the answers to the interrogatories may disclose evidence is not, of itself, a reason for leave to deliver them being refused.

Furthermore, in deciding upon any application for leave to interrogate, the Court will take into account any offer which has been made by the party whom it has sought to interrogate, to deliver further particulars, make admissions or produce documents: Order 31 rule 2. This has led the Court to refuse interrogatories where large quantities of documents had been discovered and extensive admissions had already been made in relation thereto: *Bula Ltd v. Tara Mines Ltd* [1995] ILRM 401.

Leave to deliver interrogatories will be granted only where they are 'necessary either for disposing fairly of the cause or matter or for saving costs': rule 2. The inclusion of the word 'necessary' underscores the point made in *Bula*, namely that leave to deliver interrogatories will not be granted where the information sought may be obtained by some other court process. In any consideration of what is required for the fair disposal of the proceedings, the word 'necessary' appears to have coloured the subsequent words. In *Quilligan v. Sugrue*, High Court, 13th February 1984, interrogatories were deemed not to be necessary for the fair disposal of a 'running-down' action where witnesses were available to give evidence of the incident complained of. This is a precursor of the test formulated by Mr Justice Costello in *Mercantile Credit v. Heelan* [1994] 2 IR 105. That learned judge (later President) stated that, where reliance was placed upon the 'fair disposal' justification for the delivery of interrogatories, the Court would have regard to the fact that, in proceedings commenced by way of plenary summons, the fair disposal of the action was generally by way of oral evidence. He went on to opine that any departure from this course must be justified by some 'special exigency' in the case.

This assessment was reinforced by Laffoy J. in *McCole v. Blood Transfusion Service Board*, High Court, 11th July 1996, although her judgment also emphasised the distinction between an application which placed reliance upon the 'fair disposal' of an action as justifying the delivery of interrogatories and those circumstances where interrogation was necessary in order to save costs. Clearly, in any conflict between the saving of costs and fairness of the proceedings, the latter must take precedence: *ibid.* However, where the party which it is sought to interrogate will suffer no substantial prejudice thereby, interrogatories may be used to circumscribe the factual field which the trial judge will have to cover, thus radically curtailing the costs. This was considered sufficient by Mr Justice Shanley to permit the delivery of nearly one thousand interrogatories in *Woodfab Ltd v. Coillte Teoranta*, High Court, 19th December 1997 – a number which will surely become the norm as commercial litigation continues to increase in scale and complexity.

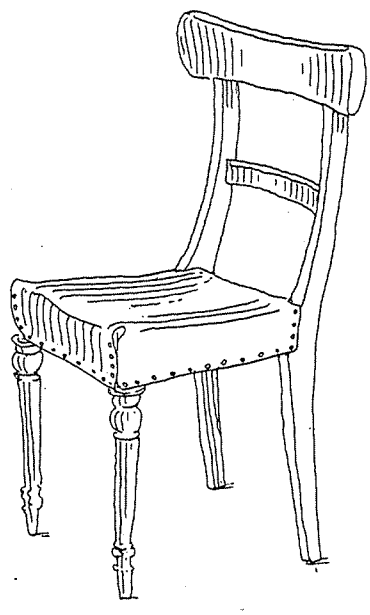
Other Affidavit Evidence

Order 39 rule 1 of the Rules states that in the absence of agreement in writing between all parties,

> '...the Court may, at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit... on such conditions as the Court may think reasonable... Provided that, where it appears to the Court that the other party, bona fide, desires the production of a witness for cross examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.'

In examining this provision, the Court has drawn a distinction between evidence which is technical or formal (which evidence may be proved on an affidavit) and evidence which goes to the gist of the action or facts which were directly in issue: *Phonographic Performance (Ireland) Ltd v. Cody and Ors*, Supreme Court, 16th February 1998. Where evidence is deemed to be central to the matters in issue, the Court will refuse to allow evidence to be given by affidavit, even if convinced, as Muphy J. was that,

> 'Proving the existence of a copyright in each and every of the sound recordings referred to in the proceedings herein and the devolution of the title or a licence to the plaintiffs would be an awesome task. It would be extremely difficult and costly. Perhaps impossible. If it can be achieved it will involve an enormous expenditure on the part of the plaintiffs and, in the event of their succeeding in the action, a corresponding burden on the defendants. I would have no hesitation in concluding that the problems of assembling so many foreign witnesses in this jurisdiction to deal with the issue constitute "sufficient reason" for seeking an alternative course.'



The distinction between technical evidence and evidence which goes to the gist of proceedings is difficult to justify, save insofar as it allows the Court to determine an application without assessing whether or not the desire of one party to cross-examine the witness is *bona fide*. In failing to give greater weight to this latter aspect, one fears that the Bench have added to the already considerable stock-pile of ammunition which may be discharged by an unscrupulous party as part of an increasingly routine interlocutory barrage. Should the emphasis shift towards the motives of the party opposing the application, one will be obliged to revisit the portion of the judgment of Mr Justice Murphy (at 11-12) in *Phonographic Performance*, where he accepted that, while the onus would fall on the party resisting the application to establish a *bona fide* desire for the witness' production, it did not necessarily follow that they would have to adduce evidence which cast doubt upon that to be given by the proposed deponent.

Evidence taken on Commission or by an Examiner

Order 39 rule 1 also refers to those circumstances in which a

> '...witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner...'

Applications for such examinations are relatively infrequent. Furthermore, they can hardly be categorised as a means of curtailing costs, in view of the fact that they are generally attended by counsel

for all concerned parties, together with the examiner or commissioner (occasionally the trial judge himself) and the necessary administrative and logistical support.

The reference in rule 1 to the desire *bona fide* of an adverse party to cross-examine extends to these applications – a point which is copper-fastened by rule 17 which states:

> '...no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the court is satisfied that the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial...'

In order to justify the taking of evidence on commission, it must, in all the circumstances, be unreasonable to expect the witness to attend personally in court: *Keane v. Hanly* [1938] Ir Jur Rep 16 and *Esmonde v. Esmonde* [1947] Ir Jur Rep 58, although membership of an enclosed order or other personal predilection is insufficient justification for such a concession: *Butler v. Faller* [1962] In Jur Rep 50.

Where the expense of bringing a witness before the Court is out of all proportion to the importance of the evidence which it is proposed that he will give, an order that evidence be taken on commision may be granted: *Independent Newspapers Ltd v. Irish Press Ltd* 72 ILTR 11.

Significantly, as with applications for the admission of affidavit evidence, the Court will have regard to the use which has been made of the procedures for eliciting admissions: *McSweeney v. Kavanagh*, High Court, 5th March 1984.

Where the proposed witness is outside the jurisdiction and is unwilling to accommodate the investigations of the Court, it may be necessary to issue a *lettre rogatoire* by means of which the relevant foreign court is asked to require the attendance of the witness before it or its appointee for examination. The form of these requests are prescribed in Order 39 rule 5(1). Ireland has yet to ratify the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, with the result that the alternative mechanisms provided for under the agreement are unavailable. However, thus far, foreign courts have been ready to accommodate requests which they have received. The rebuff delivered to the McCracken Tribunal by the courts of the Caymen Islands may be the first indication that requests may be more rigorously scrutinised in future.

The Advent of Video-Technology

Where a foreign witness is willing to be examined, but it is inconvenient or impractical for him to travel to Ireland, the development of video-link technology provides a ready alternative to commissions travelling overseas to take evidence. This technology allows witnesses to give evidence in their country or residence in front of a camera and for this testimony then to be transferred simultaneously to a court in Ireland.

There are clear advantages to this, both in terms of cost and convenience. In fact, the principal obstacle to the extensive use of the link is a cultural one, with counsel, judges and the witnesses themselves still needing to acclimatise to the new medium. This is notwithstanding the fact that those practising on the criminal side have been exposed to its use for some time, as a result of the operation of section 12 of the Criminal Evidence Act, 1992. This section provides that persons under 17 years of age (or with the leave of the Court, any person) may give evidence by way of video-link in respect of violent or sexual offences. The experience in other jurisdictions is that even within the sphere of criminal practice, the use of video-link technology can profitably be extended beyond these narrow confines, with links being used for consultations, particularly with those detained in high security facilities, and in the context of remand hearings.

In the commercial context, the attractiveness of being able to consult and evaluate expert witnesses from around the world rather than confining one's choice to those whom it is practical to fly to Ireland, is self-evident and had already been appreciated by counsel engaged in international arbitrations. Those who have used the facility have found that conversation is marginally more 'stilted' than would be the case with evidence given in facie. This is due to the fact that only those portions of the video image which are moving are re-configured in each frame. However, this idiosyncracy is easily overcome by adjusting the demeanour of witness and counsel. Clearly, the Kings' Inns is the best place for the Bar to learn about the new technology. However, for those already in practice, one means of 'painlessly' gaining experience of the medium is to suggest that consultations involving persons overseas (particularly those involving prospective expert witnesses where one wishes to assess the style as well as the content of the evidence which they propose to give) are conducted by video-link.

Within a short time, the Irish bench should be able to say, as did Sir Thomas Bingham M.R. in *Mungo D.P. Henderson v. SBS Realisations Ltd*, unreported, April 30th 1992, that:

> 'A video-link is, for all practical purposes, very much the same as hearing the evidence in court. I agree that there are technical problems about it and it may be that it is marginally preferable that the evidence should be heard in court.'

Of the technical problems identified by Bingham M.R., these principally relate to the compatibility of equipment and the quality of line which connects the systems involved. Although systems world-wide are generally compatible, optimum performance will be obtained where the foreign system is comparable to the Law Library's Concorde ZX system and the information is transferred by way of ISDN. The Library has made available to the system 6 ISDN lines (capable of transferring 384 kpbs/approximately 15 frames per second) – a vital investment in view of the fact that the cost of transmission by way of analogue line can be up to ten times the cost of transmission by way of ISDN line.

Other considerations are largely logistical such as where the time differential between Ireland and the foreign jurisdiction is wide and the foreign jurisdiction is reliant upon commercial facilities, costs may be increased where these are being used outside the ordinary hours of business. In the context of using the video-link in litigation, counsel should be alive to the sensitivities of the local jurisdictions to oaths being administered by persons other than the locally authorised officers. Indeed in time, the procedures, whether initiated by way of lettre rogatoire or otherwise, by which persons who are unwilling to give evidence to the Irish Courts are

examined, may have to be modified to accommodate the opportunities opened up by the new technology.

Thus far, only live-link evidence has been considered. Once the Bench and Bar become acclimatised to its use in commercial contexts, the recording of testimony for its rehearing at a later date will be bruited. In some respects, this is the modern counterpart of the affidavit evidence considered in *Phonographic Performance*, with the added advantage that a witness can be cross-examined and his demeanour captured on film. Once again, the regulatory framework on the criminal side is in advance of that available to those engaged in commercial work. Under section 16 of the Criminal Evidence Act referred to previously, a recording of any evidence given by a person under 17 at the preliminary examination, and any statement made by a person under 14 (during an interview with a person whom the Court considers to be 'appropriately qualified') shall be admissible at the trial of the offence to the like extent that direct oral evidence would have been admissible – although such a person is available for cross-examination. Substantially similar provisions are contained in section 32(1)(a) of the Criminal Justice Act, 1988, which governs criminal trials in England and Wales. However, in that jurisdiction, the existence of sections 2 and 10 of the Civil Evidence Act, 1968 (which admits statements into evidence which would otherwise be hearsay) has facilitated the courts in construing the rules of court in such a manner as to allow recorded as well as live video evidence into civil proceedings: *Garcin v. Amerindo Investment Advisors* [1991] 1 WLR 1140.

Conclusion

Video technology is already used in the context of arbitrations and consultations. As things stand, there would appear to be no obstacle to its development as a litigation tool where there is the written consent of the parties to evidence being taken in this way (Order 39 rule 1). Meanwhile, although the day may still be far distant on which the Court will order the use of video-link notwithstanding the objections of one of the parties, the Bar should actively consider what legislative and other changes may be required to both facilitate and manage its use. In doing so, the Bar should also use the opportunity to consider whether the existing alternatives to oral testimony are appropriate to modern litigation or whether they in fact represent obstacles to effective dispute resolution. •

The Stock Market Roller-Coaster and Your Pension

In the midst of the current stock market turmoil members of the Bar of Ireland Retirement Annuity Scheme may well be asking what is happening to their pension fund. The bulk of the funds, valued at more than £40m in July, were in the Managed Fund.

The assets were distributed as follows:

Portfolio analysis at 30 June 1998	Investment Return by Sector since 1 Jan 1998	Asset Distribution by Sector
Equity	22.1%	61.5%
Fixed Interest	5.8%	23.0%
Cash	4.4%	8.4%
Indexed Linked	4.8%	1.8%
Property	15.3%	5.3%
Total	15.5%	100%

The funds in the Bar's Scheme are managed by Bank of Ireland Asset Management (BIAM). They had been market leaders for pooled pension funds for some years until recently when their performance seemed to slide compared with other fund managers. This was due to a deliberate policy on their part, arising from a view they took of the equity markets, especially the U.S. BIAM reduced the proportion of the Bar's funds from 72% in 1995 to 61% in August.

BIAM took profit where it felt individual stocks were overvalued, especially in the U.S. and moved into other investments.

The recent volatility and corrections to the equity markets will have had less impact on BIAM managed funds than if they had retained the extent of their equity exposure at earlier levels.

The effect on the unit price of the Bar Scheme's funds has yet to be determined. Whatever the extent of the dip, members should remember that the unit price of the Managed Fund increased by 61.4% over the two years since August 1996. In other words there is a substantial "cushion" before any real loss of capital invested occurs. BIAM is also in the position to acquire good quality stock at the right price and this should be reflected in performance indices in the future.

Where to go from here? Over the longer term there is no doubt that equity investment produces the best returns. Certainly the tax advantages and the long term growth in the fund are coersive reasons to maintain contributions.

(The value of a unit in the Barristers fund at commencement in May 1984 has increased 9-fold). Those considering taking benefit over the next few years should seek the advice of the trustees and BIAM.

All subscribers should note that regardless of the performance of their fund the provisions of the scheme and current legislation allow subscribers to take one quarter of their fund as a tax free lump sum, the remainder must be used to purchase an annuity.

Annuity rates are linked to long-term interest rates and these are now at a very low level. A fund of £1m may look like a huge sum but if you take out the 25% lump sum remaining £759,000 will buy a pension of £37,500 per annum with an annuity rate of 5%. This may be far short of income expected.

– John Dowling,
Consultant, Bar Council

Entry to the Degree Course of Barrister-at-Law at King's Inns

Preliminary notice of Entrance Examination

The Council of King's Inns wishes to notify students of the Society, intending students of the Society, university law students and persons preparing to enter university to study law, with a view to seeking entry to the degree course of Barrister-in-Law in King's Inns that, as and from the year 2002, entry to the degree course of Barrister-in-Law will be on foot of an entrance examination on the results of which the available places in the Society's degree course will be allocated in order of merit.

The entrance examination will be taken by all students seeking admission to the degree course. In each year, the number of places available in the degree course commencing that year will be allocated to candidates who have passed the entrance examination *in that year* in accordance with the results of the examination. The number of places in the Society's degree course will be increased to 120 with effect from the year 2002.

In order to sit the Society's Entrance Examination, candidates will be required to hold either:

1. a degree in Irish law (including five core subjects) from an approved university,
   or
2. a Diploma in Law from King's Inns.

The five core subjects referred to above are:

- Land Law
- Law of Contracts
- Law of Torts
- European Law
- Law of Equity and Trusts

A degree in Irish Law (including five core subjects) from an approved university will mean a full-time degree in the law of Ireland or in the law of Northern Ireland of a university approved by the Society, or such other degree conferred by any such university, in which law is a principle or dominant element, approved for the purpose by the Society, and conferred on a student who has been examined and passed in the five core subjects to university degree course standards by the university. The core subjects can be conducted in the law of Ireland or of Northern Ireland.

The Entrance examination will be in five subjects set out below:

- Jurisprudence
- Criminal Law
- Company Law
- Law of Evidence
- Constitutional Law

It is envisaged that the entrance examination will occur in late July or early August each year, from 2002 onwards. The pass standard will be 50% and candidates will be allowed to compensate in only one subject between 40% and 50%. Candidates will not be allowed to carry results from one year into a subsequent year.

Candidates who have sat and failed the entrance examination will be permitted to sit the entire examination in one subsequent year only. Candidates who have passed the entrance examination but who have failed to get a place on the degree course will be afforded two opportunities to re-sit the entire examination.

The Council of King's Inns will shortly consider, approve and publish formal rules to give effect to these changes.

This notice is intended as a preliminary notification for the guidance of current and intending students. Any inquiries in relation thereto should be made, in writing only, to: The Director of Education, King's Inns, Henrietta Street, Dublin 7.

KING'S INNS NEWS

Car Parking

By now most of the barristers who have been allocated a space in the King's Inns car park will have received their 1998/1999 permit.

As a result of the reallocation of car spaces in the Four Courts, three of last year's renters in King's Inns will be vacating their spaces. If you are interested in one of the vacated spaces, please contact David Curran at telephone 874.4840. The annual rent for barristers is £390.

Graduates of 1998

73 students from King's Inns were successful in the final year examinations held in May and were called to the Bar in July. Of this number approximately 13 have taken a year out; at least another ten intend to continue in the careers that they were already engaged in. We would like to congratulate all of this year's graduates and particularly our prizewinners:

The John Brooke Scholarship: A sum of IR£500 is awarded each year for three years for the highest aggregate marks in the first year degree course and final year degree course annual examinations.
Faye Breen was this year's winner of this prestigious prize.

The Society's Exhibition of IR£200 per year for three years for the second highest aggregate marks. In 1998 the prize was awarded to Grainne Mullan.

The James Murnaghan Memorial Prize of IR£150 is awarded on conditions that are described by the Education Committee from time to time. This year's winner was Siobhan Gallagher.

The Diploma in Legal Studies Prize of IR£100 is usually awarded for the highest aggregate marks in part 1 and part 2 of the diploma examinations. This year the prize was awarded to Audrey Doyle

Callaghan Memorial Prize of IR£75 is awarded for the highest mark in Irish Constitutional Law and was won by Aileen Hickie in 1998.

11 barristers from the Inn of Court of Northern Ireland were also called to the Irish Bar as were seven barristers from England and Wales. Most of them joined the King's Inns students for the graduation ceremony which was followed by a lively reception on Constitution Hill on a lovely afternoon.

Michaelmas Dining

The four week dining term begins on Tuesday 27th October and ends on Monday 23rd November. The following dates may be worth noting:

Friday 30th October – benching for Denis McCullough SC
Friday 6th November – benching for Michael O'Kennedy, SC
Friday 13th November – dinner for Northern Ireland benchers at King's Inns
Friday 20th November – Spouses' guest night

Barristers (practising and non-practising) should note that they are welcome to dine at King's Inns on any night of the week during dining term. Up to seven guests may be invited on a Wednesday night or on Friday 13th or 20th November. Menus will be posted on the noticeboards in the Law Library in advance.

Recent Decisions on the Brussels Convention on Jurisdiction and the Enforcement of Judgements

JONATHAN BUTTIMORE, Barrister

Introduction

The Brussels Convention on the Recognition and Enforcement of Judgments as implemented by the Recognition and Enforcement of Judgments (European Communities) Acts, 1988 and 1993 has become an increasingly important and common issue for Irish practitioners to have to deal with on an everyday basis, due to the increased cross border trade within the European Union. Where a dispute arises between individuals or companies of different nationalities, jurisdiction is the first issue to be considered. This article will give an outline of the more important and recent decisions in this area both in this jurisdiction and in the European Court of Justice.

Contract – Article 5(1)

In *Rutten v. Cross Medical Ltd*[1] the court considered the difficult issue of jurisdiction for a worker's contract of employment where he works in several different states. These proceedings were between Mr Rutten, a Dutch national residing in the Netherlands, and Cross Medical Ltd, a company incorporated under English law whose registered office is in London, following termination of his contract of employment by his employer. Mr Rutten carried out his duties on behalf of his two successive employers not only in the Netherlands, but also – for approximately one third of his working hours – in the United Kingdom, Belgium, Germany and the United States of America. He carried out his work from an office established in his home in the Netherlands to which he returned after each business trip. His salary was paid to him in pounds sterling. Following his dismissal, Mr Rutten brought an action against that company before the Cantonal Court, Amsterdam claiming payment of arrears of salary and interest. Since there was uncertainty as to the interpretation of Article 5(1), a preliminary ruling was submitted to the Court of Justice.

The European Court held that Article 5(1) must be interpreted as meaning that where, in the performance of a contract of employment, an employee carries out his work in several Contracting States, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities. When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States in which he has an office where he organises his activities for his employer and to which he returns after each business trip abroad.

The European Court reaffirmed the important principle of interpretation of the Brussels Convention, applying the case of *Mulox IBC v. Hendrick*[2] that, in principle, the Court of Justice will interpret the terms of the Brussels Convention autonomously so as to ensure that it is fully effective, having regard to the objectives of Article 220 of the EEC Treaty, for the implementation of which it was adopted. That autonomous interpretation alone is capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship, and to reinforce the legal protection available to persons established in the Community while, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the Court before which he may be sued.

In *Mulox IBC*, the Court held that Article 5(1) had to be interpreted as meaning that in relation to contracts of employment, the place of performance of the relevant obligation for the purposes of that provision, refers to the place where the employee actually performs the work covered by the contract with his employer and that where the employee performs his work in more than one Contracting State, that place refers to the place where, or from which, the employee principally discharges his obligations towards his employer.[3] As justification for that interpretation, the Court stated first, that the rule on special jurisdiction in Article 5(1) was justified by the existence of a particularly close relationship between a dispute and the court which could most conveniently be called on to take cognisance of the matter[4] and, that the courts for the place in which the employee is to carry out the agreed work were best suited to resolving the disputes to which the contract of employment could give rise.[5] This was further justified on the basis that such protection was best assured if disputes relating to a contract of employment fell within the jurisdiction of the courts of the place where the employee discharged his obligations towards his employer, since that was the place where it was least expensive for the employee to commence, or defend himself in, court proceedings. The Court stated thirdly, that where the work was performed in more than one Contracting

State, it was important to avoid any multiplication of courts having jurisdiction, in order to preclude the risk of irreconcilable decisions and to facilitate the recognition and enforcement of judgments in States other than those in which they were delivered.

Consequently, Article 5(1) could not be interpreted as conferring concurrent jurisdiction on the courts of each Contracting State in whose territory the employee performed part of his work.[6] Having regard to the requirements set out in the previous paragraph, where a contract of employment is performed in several Contracting States, Article 5(1) must be understood to refer to the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties *vis-à-vis* his employer. That is the place where it is least expensive for the employee to commence proceedings against his employer or to defend himself in such proceedings. The courts for that place are also best placed and therefore the most appropriate, to resolve the dispute relating to the contract of employment. When identifying that place in the particular case, which is a matter for the national court in the light of the facts before it, the fact that the employee carried out almost two-thirds of his work in one Contracting State, (the remainder of his work being performed in several other States) and that he had an office in that Contracting State where he organised his work for his employer and to which he returned after each business trip abroad, as was the case in the main proceedings, is relevant. In a situation such as that at issue in the main proceedings, that is the place where the employee established the effective centre of his activities under the contract of employment concluded with his employer. That place must, therefore, be deemed, for the purposes of the application of Article 5(1) to be the place where the employee habitually carries out his work.

In *Francesco Benincasa v. Dentalkit Srl*[7] a dispute arose relating to the validity of a franchising contract concluded between Dentalkit Srl which had its seat in Florence, and Mr Benincasa, an Italian national. The parties specifically approved a clause of the contract reading: 'The courts at Florence shall have jurisdiction to entertain any dispute relating to the interpretation, performance or other aspects of the present contract' by separately signing it. Mr Benincasa set up his shop, paid the initial sum of LIT 8 million and made several purchases, for which, however, he never paid. In the meantime, he ceased trading altogether. Mr Benincasa brought proceedings in the Regional Court, Munich, where he sought to have the franchising contract declared void on the ground that the contract as a whole was void under German law. Mr Benincasa argued that the German Court had jurisdiction as the court for the place of performance of the obligation in question within the meaning of Article 5(1). He argued that the clause of the franchising contract conferring jurisdiction on the courts at Florence did not have the effect of derogating from Article 5(1) as regards his action to avoid the contract, because that action sought to have the whole franchising agreement declared void and, therefore, also the jurisdiction clause.

The Court again reiterated the principle laid down by the case-law[8] that the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This must apply in particular to the concept of 'consumer' within the meaning of Article 13 et seq. of the Convention,[9] in so far as it determines the rules governing jurisdiction.

Further, it was also emphasised, as the Court has consistently held, that under the system of the Convention the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and that it is only by way of derogation from that principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention. The Court went further to say that as the basic approach of the Convention has always implied that, apart from the cases expressly provided for, the Convention appears hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile.[10]

Regarding the definition of the very important term of 'consumer', which is often the only ground an individual needs to rely upon regardless of Article 5 in ordinary consumer transactions, since Article 13 (1) defines a 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession', it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities. It followed from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. Therefore, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.

Accordingly it was held that:

> 'Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character. Accordingly, it is consistent with the wording, the spirit and the aim of the provisions concerned to consider that the specific protective rules enshrined in them apply only to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future.'[11]

Article 17 – Exclusive Jurisdiction Clauses

The *Benincasa* case is also important for its interpretation of Article 17 regarding exclusive jurisdiction clauses. The Court reiterated its approach to such clauses in the context of the other terms of the Convention, since a jurisdiction clause, which serves a procedural purpose, is governed by the

provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the *lex causae* determined by the private international law of the State of the court having jurisdiction. The Court has consistently held that the objectives of the Convention include unification of the rules on jurisdiction of the Contracting States' courts, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community while, at the same time, allowing the plaintiff to easily identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be brought.[12] It is also consonant with that aim of legal certainty that the court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case. The aim of securing legal certainty by making it possible to reliably foresee which court will have jurisdiction has been interpreted in connection with Article 17, which accords with the intentions of the parties to the contract and provides for exclusive jurisdiction by dispensing with any objective connection between the relationship in dispute and the court designated, by fixing strict conditions as to form.[13]

Therefore, it was held that it is for the national court to interpret the clause-conferring jurisdiction invoked before it in order to determine which disputes fall within its scope.[14] Consequently, in the instant case it is for the national court to determine whether the clause invoked before it, which refers to 'any dispute' relating to the interpretation, performance or 'other aspects' of the contract, also covers any dispute relating to the validity of the contract.

It is important to note the *Benincasa* case was approved by Laffoy J. as to the interpretation of Article 17 in the *Minister for Agriculture v. Alte Leipzeiger*[15] albeit *obiter*, and also applied the *M.S.G.* case[16] which allows an oral agreement on jurisdiction to be binding within Article 17(3) where the clause complies with a form used in international trade or practice and both parties are aware of same. Therefore, in an insurance context, the cover note and general conditions of insurance policies were sufficient evidence of an oral agreement to come within Article 17.

Tort – Article 5(3)

The problem caused by a defamatory statement published in a number of contracting states including that of the plaintiff's domicile causes particular problems as to jurisdiction under Article 5(3) as was shown in the case of *Ewins v. Carlton Television Ltd.*[17] where Barr J. considered for the purpose of jurisdiction under Article 5(3), that the onus lay on the Plaintiffs to establish that the harm occurred within this jurisdiction. The plaintiffs were Irish residents suing the English based defendant broadcaster, part of the I.T.N. group, for alleged libel in the course of a broadcast concerning alleged activities of the I.R.A. It was broadcast in the U.K. and it was accepted that the programme was watched in this jurisdiction by various means foreseen by the defendant. Barr J. held that since there was no distinction in a television broadcast between transmission and distribution which happen simultaneously, then the normal rule in libel applies, that there is a liability for each act of republication where it is the natural and probable consequence of the original republication,[18] so the harm to the plaintiffs' reputations occurred here.[19] He further held that the damages that may be recovered were limited to the harm done to the plaintiffs' reputations that occurred in this jurisdiction, and only when the Plaintiff elects to sue in the defendant's domicile, can he recover damages on a world wide basis for all damage done in all contracting states.

Barr J. accepted that once a plaintiff has established jurisdiction under the Convention, then there is no power to stay the action or refuse jurisdiction on the grounds of *forum non-conveniens*. However, he did leave open the possibility that the Court could stay an action where jurisdiction had been established under the Convention, on the basis of the Court's inherent discretion to prevent injustice, so if it could be established that the plaintiff is improperly using the proceedings to oppress the defendant or is guilty of unconscionable conduct. This development has been averted to by the Supreme Court in *Intermetal Group Ltd. v. Worslade Trading Ltd.*[20] where the issue as to whether the doctrine of *forum non conveniens* had been abolished for both contracting and non-contracting states by the Convention, indicating the highly contentious nature of the argument and the likelihood of the need for a preliminary reference to resolve the issue. This possible use of discretion to ameliorate the effects of the rules as to jurisdiction could be a significant development in the future, but considering the general judicial attitude to the uniform and strict application of the Convention, would only be likely to be used in a very extreme case.

Maintenance Creditor – Article 5(2)

In *Jackie Farrell v. James Long*[21] there was a reference for a preliminary ruling from the Dublin Circuit Court. The proceedings were between Ms Farrell, who resided in Dalkey, and Mr Long, who was habitually resident in Bruges, Belgium. Ms Farrell was the mother of a child whose father, she claims, is Mr Long. She brought an action against Mr Long before the District Court, applying for a maintenance order in favour of that child. Mr Long denied that he was the father of the child and contested the jurisdiction of the Irish courts.

It was held that in the light of the division of responsibilities in the preliminary ruling procedure laid down by the Protocol on Interpretation of the Convention of 3 June 1971, that it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.

The Court emphasised that the terms of the Convention must, in principle, be interpreted autonomously. Such autonomous interpretation is alone capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible multiplication of the bases of jurisdiction in relation to one and the same legal relationship, and reinforcement of the legal protection

available to persons established in the Community by allowing both the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued. Those considerations also apply to the term 'maintenance creditor' in the first limb of Article 5(2), which must be interpreted as covering any person applying for maintenance, including a person bringing a maintenance action for the first time, without any distinction being drawn between those already recognised and those not yet recognised as entitled to maintenance.

The Court reaffirmed the principle in both *Mulox IBC v. Geels* and *Rutten v. Cross Medical* that the Court will, in principle, interpret the terms of the Convention autonomously so as to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty, for the implementation of which it was adopted. It further reiterated the purpose behind Article 5 and the derogation's provided for therein in that;

> 'Article 5 introduces a series of derogation's from the rule laid down in the first paragraph of Article 2, which confers jurisdiction on the courts of the Contracting State where the defendant is domiciled. Each of the derogations from that rule provided for by Article 5 pursues a specific objective. In particular, the derogations provided for in Article 5(2) is intended to offer the maintenance applicant, who is regarded as the weaker party in such proceedings, an alternative basis of jurisdiction. In adopting that approach, the drafters of the Convention considered that that specific objective had to prevail over the objective of the rule contained in the first paragraph of Article 2, which is to protect the defendant as the party who, being the person sued, is generally in a weaker position.'[22]

It was accepted that it was the intention of the authors of the Convention in cases where the entitlement to maintenance of a plaintiff in an action brought on the basis of Article 5(2) has already been recognised by a previous judicial decision, and the new action seeks an order fixing the amount of the maintenance if it has not been fixed by the previous decision or, varying the amount already fixed or, requiring the maintenance to be paid where the defendant is in arrears or refuses to pay. Therefore, having regard to these objectives and the views of the Jenard Report[23] it was held that Article 5(2) is framed in such a way as to apply to all actions brought in maintenance matters, including the initial action brought by a person applying for maintenance and, that consideration of the question of paternity as a preliminary issue in such proceedings did not prompt the authors of the Convention to adopt any different solution.

Division of property

In light of the above case and the recent introduction of divorce in this jurisdiction the enforcement of decisions in relation to maintenance and division of family property will become an increasingly important issue. It is important to note that the Brussels Convention does not define 'rights in property arising out of a matrimonial relationship' which is excluded from the Convention under Article 1(1) or 'maintenance' which is included under Article 5(2). These two terms must be distinguished, however, since only maintenance is covered by the Brussels Convention. This distinction was dealt with by the European Court in *Antonius van den Boogaard v. Paula Laumen*[24] where it was held that if the reasoning of a decision rendered in divorce proceedings shows that the provision which it awards is designed to enable one spouse to provide for himself or herself or, if the needs and resources of each of the spouses are taken into consideration in the determination of the amount, that decision will be concerned with maintenance and will therefore fall within the scope of the Convention. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond. It follows that a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse, must be regarded as relating to maintenance and therefore as falling within the scope of the Convention if its purpose is to ensure the former spouse's maintenance. This decision shows the importance of defining exactly the type of maintenance and financial arrangement in force between the parties in order to determine whether it is enforceable in whole, or in part, or not at all, and should particularly be considered where an order or agreement is being made which may need to be enforced outside this jurisdiction, and so the above distinction should always be borne in mind.

Enforcement

The importance of complying strictly with the requirements of service to effect valid enforcement of a foreign judgment was emphasised by the Supreme Court in *Barnaby (London) Ltd. v. Mullen*[25] where Murphy J. reflected the unanimous view that the regulations for service in Order 42A Rule 13 of the Rules of the Superior Courts, 1986, as amended,[26] providing for proof of service to the Master of the High Court for the issue of execution on the judgment. In this case an order of the U.K. High Court was purported to be served on the defendant's previous family home in Dublin where he no longer resided, by handing the documents to his estranged wife, with no affidavit being sworn by the summons server. Murphy J. considered that the purpose of proof of service on a defendant debtor was to inform him of the fact of the *ex parte* order granting leave to enforce, but also to fix the date for which the time to appeal will run. Therefore, the Court cannot infer that the debtor was aware of the order at a later date or deem the service good if the procedure in Order 42A is not complied with, as then the one month time limit to appeal the Master's order would have expired.

Conclusion

It can be seen from the above decisions, especially those of the European Court, that there is an increasing trend to ensure that the national courts adopt a uniform, autonomous and harmonious interpretation of the provisions of the convention, as this principle is at the heart of the effective continued use of the Convention in guiding the courts in all the contracting states to accept jurisdiction only when in accordance with the terms of the Convention. The other theme that can be seen from the recent European Court decisions is

that the national courts are expected to accept more of the workload of decision making on the Convention, where the application of the Convention to any particular case depends not on a pure issue of law, but on the interpretation of a particular clause as being within the Convention or not, in the light of all of the facts of the case, which only the national court is best placed to analyse. Therefore, as the jurisprudence of the Convention continues to grow and mature, the national courts should refrain from unnecessary preliminary references when the case simply requires an application of the existing law to the facts of the case, thereby preserving the uniform interpretation of the Convention, while affirming the role of the national courts in implementing the Convention. However, the Irish Courts continue to be pro-active and purposive in accordance with the tenets of the European Court, although the open issue of a discretion to refuse jurisdiction on grounds of *forum non conveniens* or unconscionable conduct may test the otherwise European enthusiasm of the Irish Courts. •

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1 C-383/95 1997 European Court Reports page I-0057.

2 Case C-125/92 *Mulox IBC v. Hendrick Geels* [1993] ECR I-4075, paragraph 10 - 11.

3 Paragraphs 20 and 26.

4 See Cases 133/81 *Ivenel v. Schwab* [1982] ECR 1891 and C-266/85 *Shenavai v. Kreischer* [1987] ECR 239.

5 See *Shenavai* supra. and Case 32/88 *Six Constructions v. Humbert* [1989] ECR 341.

6 Case C-288/92 *Custom Made Commercial v. Stava Metallbau* [1994] ECR I-2913 applied.

7 Case C-269/95 Judgment of the Court (Sixth Chamber) of 3 July 1997.

8 See, in particular, Case 150/77 *Bertrand* [1978] ECR 1431, paragraphs 14, 15, 16 and 19, and Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139, paragraph 13.

9 The consumer provisions provide that under Article 13 that;
'In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of point 5 of Articles 4 and 5, if it is: 1. a contract for the sale of goods on instalment credit terms, ...'
Under Article 14: 'A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.'

10 See Cases C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraphs 16 and 19, and *Shearson Lehman Hutton*, supra. paragraph 17.

11 At par. 17 and 18 of the judgment.

12 See Cases 38/81 *Effer v. Kantner* [1982] ECR 825, paragraph 6, and Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 11.

13 See, in this regard, Case C-106/95 *MSG* [1997] ECR I- 911, paragraph 34.

14 See Case C-214/89 *Powell Duffryn* [1992] ECR I- 1754, paragraph 37.

15 Unrep. Laffoy J. 6th March 1998, where the primary issue concerned whether an insurance policy was within Article 17 and the jurisdiction clause in the policy related only to the permissible risks covered by the Convention in Article 12(5), which it was held did not come within the exceptions, to prevent the insured suing in his jurisdiction of domicile under Article 8, as opposed to France under the jurisdiction clause.

16 Case C-106/95 *MSG* [1997] ECR I- 911.

17 1997 2 I.LR.M. 223

18 See *Speight v. Gospay* 1891 60 L.J.Q.B. 231.

19 C- 68/93 *Sheville v. Presse Alliance* [1995] ECR I-415 and *Turkington v. Baron St. Oswald* Unrep. 6th May 1996, Northern Ireland Court of Appeal, per Carswell L.J. applied

20 Unrep. Supreme Court, 6th March 1998 Murphy J. (Nem Diss.) at p. 25 - 26 of the judgment.

21 Case C-295/95 1997 European Court Reports page I-1683

22 At par. 18 of the judgment.

23 OJ 1979 C 59, p. 1, in particular p. 25.

24 Case C-220/95 European Court Reports 1997 page I-1147

25 Unrep. Supreme Court 25th April 1997.

26 Inserted by S.I. No. 14 of 1989.

The Electronic Commerce Communiqué

DENIS KELLEHER, Barrister

The 'Communiqué issued by the United States of America and Ireland on Electronic Commerce'[1] signed (digitally) by An Taoiseach Mr Ahern and President Bill Clinton on the 4th of September, during the Presidents visit to the Gateway 2000 plant in Dublin, must rank as one of the most hyped government documents of recent years. It was anticipated that this document would place Ireland at the 'hub' of a world wide growth industry with dizzy growth prospects. However, no agreement between Ireland and the USA could ever deliver this. Electronic commerce is an area which the European Commission has already carved out as an area in which it has a particular interest[2] an interest acknowledged by the communiqué itself.[3] The whole idea of electronic commerce is that distance and geographic location cease to matter; once a business attaches itself to the Internet it can sell to anyone, anywhere in the world, provided that they have a similar connection. To anticipate that Ireland can in some way gain control over this market is to miss the point of electronic commerce in its entirety.

If consumers are going to shop on the Internet then they will expect the sort of protections that they receive in their local supermarket. Systems will have to be set up to ensure that payments can be made securely over the Internet and to protect both consumers and vendors from potential frauds, so regulations for 'electronic signatures' and encryption will have to be devised. Laws will have to be passed to ensure that contracts signed electronically will be given the same weight in the Irish courts as contracts signed on paper. In reality Ireland is far behind in the race to create a 'framework' for electronic commerce; Germany for example is already in the process of updating its existing law on electronic commerce.

The Oireachtas may have to work faster than at present, as if Ireland signs any international treaty or agreement on electronic commerce, then it will have to be implemented very rapidly. The communiqué states: 'Growth of electronic commerce depends on the adequate protection of intellectual property rights, which will be assisted by ratification and implementation, as soon as possible, of the W.I.P.O. Copyright Treaty and the W.I.P.O. Performances and Phonograms Treaty'. Of course Ireland's record in implementing these two treaties is unusual in a country which vaunts the importance of its software industry to say nothing of its literary authors and performers. Although Ireland signed the above two treaties it failed to implement them and as a result the USA threatened to take Ireland to the court of the World Trade Organisation (WTO) earlier this year. To avoid this the Irish Government apparently promised that one Act, the Intellectual Property Act, 1998 would be passed by the Dail by the end of this summer[4] and that a new copyright bill would be published by the end of July 1998.[5]

The Oireachtas may need to become more innovative. Since Ireland will be competing with the UK for the business of electronic commerce, the Oireachtas may no longer feel that it is advisable to wait to see how the UK legislates for a problem and then copy the best parts of that legislation. Getting the balance right when legislating for any aspect of the Internet is not easy; if laws are too strict then the nascent Irish electronic commerce industry may be legislated out of existence. If laws are too loose or non-existent then anarchy may reign and the industry and consumers may feel that a secure environment in which they can do business does not exist. The Americans favour a very loose approach to Internet legislation but whether this approach will ultimately be acceptable in Europe remains to be seen.

The Oireachtas may need to become more flexible with regard to law reform which at present proceeds at a glacial pace, for example the primary Irish law on fraud (The Larceny Act, 1916) predates the foundation of the state with some legislation dating from the last century. This is in stark contrast to the frenetic pace of change exhibited by Internet and information technologies, where some products have a life of only six months. If a law essential for electronic commerce is found to be obsolete and in need of reform, then if Ireland wants to develop or maintain a lead in electronic commerce that reform will have to be implemented sooner rather than later. For example, the Irish legislation on computer misuse, contained in the Criminal Damage Act 1991 is now in need of reform. When drafting electronic commerce legislation, it will have to be accepted that in only a few years it may become out-dated. At present there is a noticeable tendency to wait until the European Union legislates on an issue before creating Irish Legislation. The European Commission did publish a draft directive on electronic commerce in May, but if Ireland waits until the final form of this directive before creating its own laws then competitor countries such as Germany will have gained a legislative lead of two years or more. It should also be noted that while the communiqué contains a commitment to privacy. Ireland has yet to implement the Data Protection Directive[6] which it was supposed to do by the end of October 1998.

Providing an appropriate legal environment for electronic commerce may be difficult, but Ireland's recent economic history has proven that the benefits from this type of high technology industry are far greater than those which can be derived from other more traditional industries. •

1 Electronic commerce is the term used to refer to the buying and selling of goods and services over the Internet.

2 See Kelleher, *'Electronic Commerce'*, *The Bar Review*, Issue 8, Vol. IV, June, 1998.

3 'building on the principles and guidelines agreed in the US-EU Joint Statement on Electronic Commerce'

4 The question of whether the executive can give a promise that the Oireachtas will pass particular legislation is another matter.

5 This later promise could not be kept, instead a 'working draft subject to review and further amendment' was published in early August.

6 95/46/EC

International Conference on Arbitration and Maritime Law Barcelona

COLM O hOISIN, Barrister

The conference, held June 24th - 28th, 1998, brought together representatives from 29 different countries to engage in a comparative study of arbitration systems and procedures currently used in the world of maritime arbitration. 50 papers were delivered over the Thursday, Friday and Saturday morning of the conference. These papers are available at the issue desk in the Law Library. Other useful material including information and promotional documents relating to some of the leading maritime arbitration organisations, which may be of interest to those involved in the arbitrations in general, is also available.

There were particularly good contributions from Lord Mustill, the recently retired Law Lord (who is now devoting himself to arbitrations), and also from Sir Anthony Evans, Lord Justice of Appeal who is also the President of the Chartered Institute of Arbitrators. Other speakers of note were Patrick Griggs who is President of the Comite Maritime International (CMI), Professor Francescon Berlingieri who is Honorary President of the CMI, Professor William Tetley, QC from McGill University, Patrick O'Donovan, President of the London Maritime Arbitrators (which is based in New York) and Alexander Von Siegler, Secretary General of the CMI.

Apart from the informative nature of many of the papers, the Conference was also very useful in terms of meeting many of the people involved in the maritime arbitration sector throughout the world. It provided an opportunity to mention the International Arbitration Centre in the Distillery Buildings and to indicate that Ireland has the capability to be a forum for maritime arbitration.

One of the most striking points to emerge from the conference was the extent to which maritime arbitration is concentrated in London. Patrick O'Donovan pointed out that approximately 3,500 appointments were made on an annual basis to full London Maritime Arbitration Association members. At present there are close to 1,000 awards being published per annum and this shows more than a twofold increase from a number of years ago. By contrast, the number of maritime arbitrations conducted under the ICC is relatively small. Alexander Von Ziegler pointed out that there have been only something in the order of 56 arbitrations conducted under ICC supervision since 1989. Interestingly, the ICC and the CMI devised special rules for maritime arbitrations a number of years ago and at the same time formed a body called the International Maritime Arbitration Organisation. This has not, however, been a success and apparently in the 20 years since its establishment, there have been only nine arbitrations under these rules and only two awards have actually been made.

Apart from London, New York is the other main base for maritime arbitrations. No statistics were provided for the number of arbitrations being handled by the New York Society of Maritime Arbitrators but one certainly got the impression that it was substantial. It was notable, however, that there was a pronounced bias against the involvement of the legal profession from the representatives present from the Society of Maritime Arbitrators. They were particularly keen to point out that all of their arbitrators were commercial people with an expertise in the shipping industry as opposed to lawyers. This sparked some controversy among the delegates as to whether lawyers or non-lawyers make better arbitrators.

At present little or no maritime arbitration work is being done in Dublin. Even in cases involving Irish parties, or having a substantial Irish connection, the tendency is to have disputes arbitrated in London. This is despite the fact that there is an increasing volume of maritime work going through the Irish courts and that there is clearly sufficient expertise in the legal profession to represent the interest of parties on either side of an arbitration. There may be some question over whether or not there are persons in Ireland with sufficient expertise to act as maritime arbitrators. However, that problem could be overcome by bringing over qualified arbitrators to Dublin. This would not prevent the parties from being represented by Irish solicitors and counsel.

In the longer term it would obviously be desirable if Dublin could compete with London and other locations in attempting to attract disputes which have no connection with Ireland. Given the lack of track record on arbitrations in this area, this is not something which is going to happen very easily. Nonetheless, Dublin does have some advantages. In the first place, it is 'not London', and there is clearly some animosity from third countries to the domination in arbitration matters by London. Secondly the primary language of English is in its favour and thirdly it should be able to compete on costs. This is certainly an area which is open to development and encouragement by members and the Council in the future. •

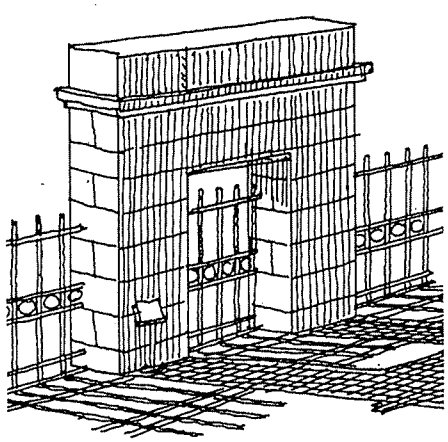
CONTEMPORARY ISSUES IN IRISH LAW AND POLITICS, ISSUE 1.
Edited by Professor Robert Clark, UCD and Dr. Joe McMahon, QUB,
Roundhall, Sweet & Maxwell, £45.00

This serial journal is 'dedicated to the interaction between law and politics in Ireland and the relation of both Irish jurisdictions to the European Union.'

The editors indicated that 'in addition to the usual articles and notes, current developments in this area will be catered for through the periodic publication of special issues dealing with the common themes or matters of particular concern and interest.' The Belfast Agreement, the devolutionary changes within the United Kingdom in relation to Scotland and Wales, and the implementation of the Treaty of Amsterdam all point in their own way, towards a period of constitutional and institutional development affecting this island. Perhaps the summer of 1998 is unequalled as an auspicious period in which to commence the publication of this series. Rarely has the 'interaction' of law and politics on this island been more to the forefront of the public's mind and imagination. The editorial board for the journal is, with the exception of Dr. Alpha Connolly of the Dept. of Foreign Affairs, entirely drawn from the law faculties of Irish universities. Undoubtedly, it is the intention of the editorial board that the publication will be a 'refereed journal' for academic purposes. From the practising lawyer's perspective, the subject, then, will be treated in a slightly more academic, more abstract and more intellectual way than might be done in a practitioner's legal periodical. Nonetheless,, barristers with an interest in constitutional law, administrative law, North-South relations and European law, will find this new publication a rich source of learning and jurisprudence.

The first issue of the journal is a broad pallet. The matters dealt with are: Trends in Employment Equality Law: A Comparative Review. Government Policy for the Environment in Northern Ireland. Reconciliation in Northern Ireland: the Law's Role. From the Downing Street Declaration 1969 to the Downing Street Declaration 1994. EC Law and the Regulation of British Anti-Terrorism legislation. Ireland and the Rockall Dispute: An analysis of recent Developments.

The latter paper, on the Rockall dispute, might appear abstruse to many practitioners. But those of us who have simply noted that a dispute was in progress without ever addressing our minds to its detail or the international law dimensions of the dispute will find the article by Clive Symmons very enlightening. Michael O'Neill's article on EC law and British anti-terrorism legislation poses the question as to whether the case of John Gallagher opens the door to further EC challenges. The European court of Justice in Gallagher broke new ground by declaring illegal the enforcement of exclusion orders by the British Government, requiring that the 'competent authority' in cases involving the exclusion of EC nationals from the territory of member states must be able to exercise its responsibilities in absolute independence and follow a procedure that enables the person concerned to put forward arguments in his defence. The Court's judgment was 'in stark contrast' with the opinion of Advocate General Elmer. O'Neill argues that the greatest significance of the judgment lies in the fact that it may perhaps pave the way for further legal challenge to PTA under European law now that the operation of PTA has been held within the jurisdiction of the European Court of Justice.



Brigid Hadfield, the Professor of Public Law at QUB, contributes a valuable insight and perspective of the development of constitutional thinking on this issue, *inter alia*, her piece 'From the Downing Street Declaration 1969, to the Downing Street Declaration 1994.' The interplay of political change with constitutional theory is mapped out in Prof. Hadfield's valuable article. Many of us have, I dare say, thought it obvious that while the status of Northern Ireland, whether as a continuing part of the United Kingdom or as part of a united Ireland, should be determined by reference to the wishes of a majority of its people, that does not mean that its internal constitutional arrangements may be decided by the same majority without regard to the interest of the minority or, indeed, the Republic of Ireland. To many people, the union between Great Britain and Northern Ireland being a bilateral matter, it follows that it is the entitlement of the Westminster parliament to determine North-South arrangements and internal governance of Northern Ireland by reference not merely to the wishes of the people of Northern Ireland, or of either community there, but also by reference to the interests of Britain and the interests of the Republic of Ireland.

Bruce Dixon contributes an admirable evaluation of the law's role in promoting reconciliation in Northern Ireland. Government policy for the environment in Northern Ireland is considered by Neil Faris. His survey of environmental issues in Northern Ireland law mirrors many issues in the Republic - not least of which is 'bungalow blight.'

Positive direct discrimination in employment equality law is among other issues considered in a study authored by Barry Fitzpatrick, Angela Hegarty and Patricia Maxwell of the University of Ulster. Barristers in the Republic interest in employment equality law and how it is likely to develop will find this comparative study of great interest.

Robert Clark and Joseph McMahon, as general editors, deserve accommodation and praise for their initiative and for the high standards established in the first issue of this journal.

— Michael McDowell, SC

Appreciation:

The Hon. Mr. Justice Peter Shanley

The old UCD physics theatre in Earlsfort Terrace was crowded to overflowing at an inaugural meeting of the Law Society one night in the 1960s. The auditor had landed a big fish as a visiting speaker in the person of Lord Longford, then a senior member of Harold Wilson's cabinet. The subject of the auditor's paper, penal reform, was close to the distinguished guest's heart, but deference, never mind sycophancy, was not to be the key note of the evening. The slight, curly headed figure at the podium subjected Lord Longford's published views on the subject to detailed and relentless criticism.

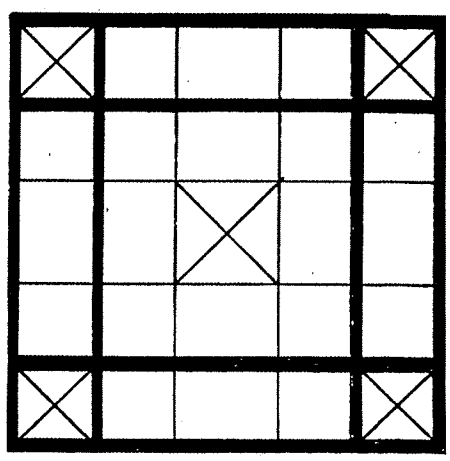
That was my introduction to Peter Shanley whose sudden death at the annual meeting of the International Association of Judges in Portugal some weeks ago cut short a judicial career of immense promise with tragic abruptness. Many features of his personality, with which the legal profession were to become familiar over the years, were evident that evening: his total dedication to any task he embarked on, his immense capacity for hard work and his unswerving independence of mind. These were qualities which ensured his success at the bar and they were already evident in the many fine judgments he produced during his sadly brief career as a judge.

That far off evening in Earlsfort Terrace was significant from another point of view: it demonstrated that the career of this gifted and versatile man could have taken different forms. He had taken a postgraduate degree in criminology at Cambridge and might well have seemed destined for a brilliant academic career. But he also succumbed at an early stage, like many young lawyers, to the charm of politics and the energy and commitment which he brought to this as to every other department of life led to his early election as Cathaoirleach of Dun Laoghaire Borough Corporation, the youngest ever person to hold such a position in Ireland.

However, in the end, it was as a practising lawyer and later as a judge that he found his true vocation. His career as a busy junior counsel took a decisive turn with his nomination to appear on behalf of the Tribunal in the Inquiry into the Stardust Fire in 1981. His leader was taken ill during the course of the public hearings and it fell to Peter to grapple single handedly with counsel of the calibre of Niall McCarthy. The latter characteristically was the first of his colleagues to urge him to take silk when the Inquiry concluded.

He became a Senior Counsel at a time when commercial cases were becoming immensely more complex and protracted. In addition, new areas, such as competition and European Union law, were opening up to practitioners. His finally honed skills as an advocate and his colossal capacity for work ensured that Peter was in the front rank of the new wave of chancery silks in the 1980s and 1990s.

But he was not the sort of person who, in his professional life, was content simply to reap the material awards of his considerable talents. He was a generous and helpful colleague and his firm conviction that the independence and professional standards of the bar were essential components in our system of justice was reflected in his years of service to the Bar Council. Both as an ordinary member and as chairman, he took a leading part in the expansion of the old Law Library into the new buildings at Church Street and the Distillery. With other far-seeing colleagues, he appreciated that, unless the Council took the lead in providing such facilities, there was a real danger that the bar in its present form would cease to exist and would be replaced by a chamber system devoid of the collegiate traditions historically associated with the Irish bar.



His appointment to the High Court two years ago was universally welcomed, not least because of the significant contribution he seemed likely to make in the Chancery and commercial law areas where he had excelled as a practitioner. His untimely death at the age of 53 has robbed us of nearly two decades of what I have no doubt would have been an immensely productive judicial career.

But the greatest loss of all, of course, is that of his dear wife Marian and their five children to whom he was devoted. He had found time during his busy career to keep up his interest in golf and cricket and in recent times had taken a special pride in the achievements on the rugby field of his elder son, Peter. It is some consolation also that he lived to see two of his children, Peter and Caren, follow him and Marian, herself a lawyer, into the law.

Indeed, when I think of Peter, while I shall never forget his marvellously lucid and carefully organised legal submissions and his unobtrusive but devastating mastery of scientific evidence, my enduring recollection will be of the intensely human person which was sometimes of necessity hidden by the mask of professional detachment. At dinner the night before he was taken so suddenly from us, he was deep in cricketing lore with an Australian judge, his bright, quizzical features lit up with that relish for life which never left him. That is how many of us will always remember him.

Ronan Keane

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