The Bar Review

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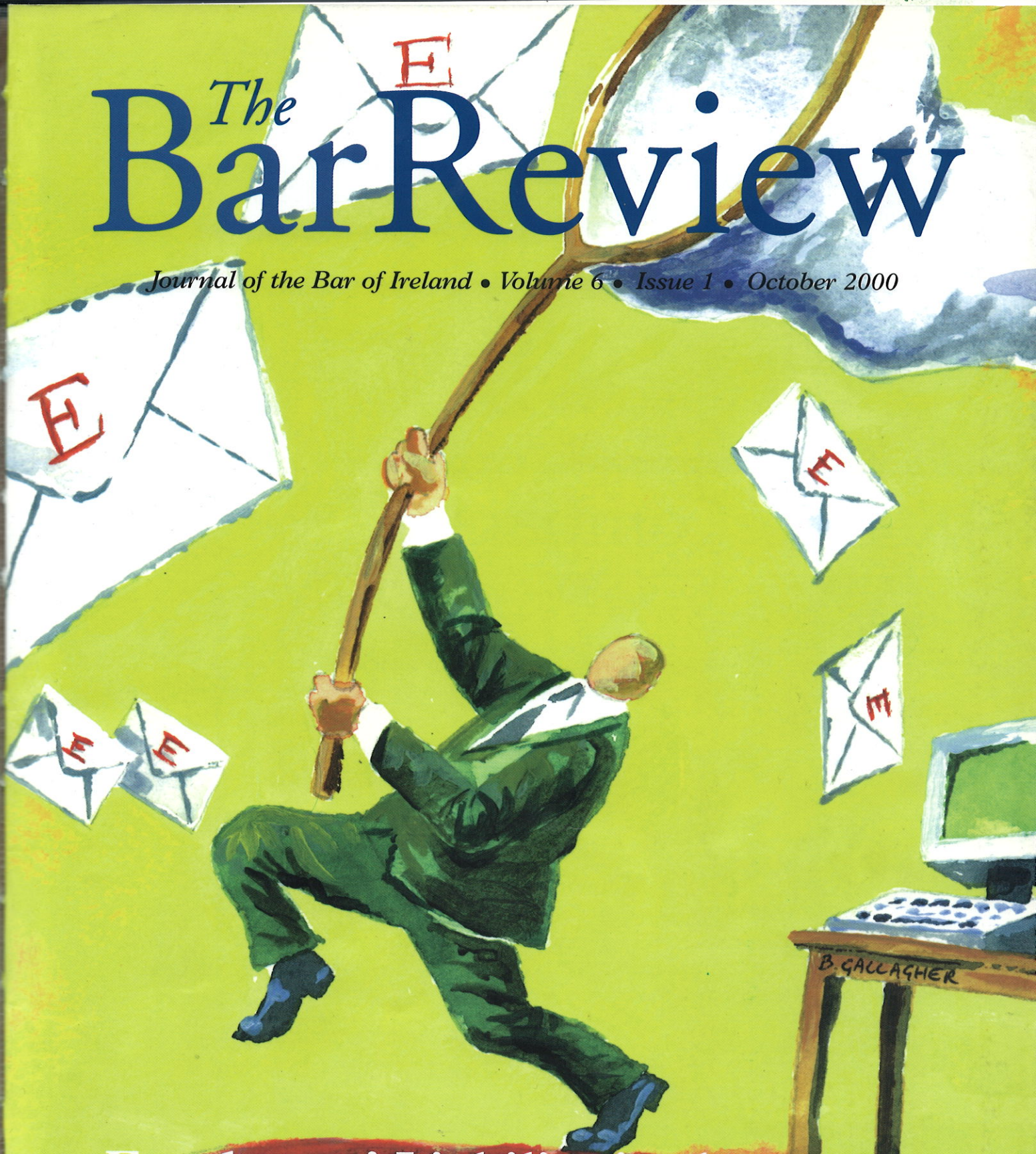

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Women and Law Conference

Ms Justice Mella Carroll will open the inaugural Women and Law Conference at 10.15am on Saturday 11 November 2000 in the Dublin Castle Conference Centre.

The conference is being held under the joint auspices of the Bar Council and the Law Society and is supported by the Attorney General, The Minister for Justice, Equality and Law Reform, the Courts Service and the British Council.

The conference commemorates the passing of the Sex Disqualification (Removal) Act 1919. It was this Act which enabled women in Ireland, England, Scotland and Wales to enter into the legal professions, the civil service and to hold public office.

The conference programme and speakers reflect the impact which women have made to our laws and society to date and will address the challenges to be met in the global information society.

* Georgina Frost was the first woman to hold public office from central government. The Chief Justice Ronan Keane is preparing an article on her contribution to mark the conference
* President Mary McAleese will be addressing the conference
* Speakers include Cherie Booth QC who will discuss the future of 'Women in the Law', Helena Kennedy QC, author of *Eve was framed*, Dr Lynda Clark, QC, MP, the Advocate General for Scotland, and Catherine Dixon, the Senior Vice President of the Northern Ireland Law Society
* Joining the panel of speakers on 'European Network - Advancement of Women' will be Mary Banotti MEP, Jan O'Sullivan TD, Dr Mary Redmond, Mary Flaherty BL, President of the European Association of Labour Court Judges and Helen Priestly, Information Officer for the Courts Service.
* Mary Robinson, UN High Commissioner for Human Rights, will be closing the conference.

The price of the conference is £60.00 including lunch and refreshments. The conference programme website is located at **www.womenandlaw1919-2000.com** and is kindly hosted by Indigo.

Asylum Conference Information

Amnesty International have just published a newsletter entitled 'Refugees in Ireland' to accompany their recent conference on *Human Rights and Asylum Seekers in Ireland.* Copies of the newsletter may be obtained from Amnesty International, Sean MacBride House, 48 Fleet Street, Dublin 2. Information on the conference can be found at **www.amnesty.ie/act/refug/cr1/shtml.**

Lecture on Legal Bibliography

The third lecture in the *Hugh M. Fitzpatrick lectures in legal bibliography* series will be held in Trinity College Dublin on Wednesday 22 November. Professor Paul O'Higgins, LL.D., MRIA, Life Fellow, Christ's College, Cambridge, will discuss 'An *essai* on puzzles in Irish legal bibliography'. The lecture evening is by invitation but there are a number of places available for anyone interested. Contact Hugh M. Fitzpatrick, Library and Information Consultant, 1 - 4 Adelaide Road, Glasthule, Co. Dublin.
Tel: 01 269 2202. Fax: 01 284 3186.

Country Air Association - Thank You

The collection in the Law Library this year made just short of £2,500 - a sizeable part of the funding for this small charity to which barristers have been contributing for over a hundred years.

In previous years the secretary of the association, Barbara Plant, used to write letters to every recorded contributor thanking them individually. She has now retired after running the charity for many years, and the chairman, Archdeacon Gordon Linney, wants you all to know that he is very grateful indeed for all the contributions which are not only a great help but also a great encouragement, year by year.

For those who have never heard of the association, it organises holidays for very modest cost for families who cannot otherwise afford them. This year, holidays were organised for about 100 people, half of whom were children.

Further contributions can be made through
Tony Aston (ext. 5022)

THE ADVOCATE'S IMMUNITY FROM SUIT - PROTECTING THE DIFFICULT ART

On 20 July this year, the House of Lords decided to abolish the common law immunity from suit of barristers and of solicitors in respect of their work as advocates in court and in respect of their pre-trial work intimately connected with the conduct of cases in court. In three joined appeals which had come before it as effective test cases for the purposes of English law, the Court unanimously concluded that the immunity no longer survived in civil cases, and by a 4-3 majority held that the core immunity should be abolished in criminal cases also. The decision, in *Arthur J.S. Hall & Co v Simons; Barratt v Ansell & Others; and Harris v Scholfield Roberts and Hill,* represents a significant milestone in the common law position of the advocate, and indeed follows similar developments in other common law jurisdictions including Canada. Here, the Courts have not yet ruled on the continuing scope of the immunity under Irish law, but the decision of the House of Lords contains much to signal that the advocate's complete immunity from suit is no longer justified and, in all likelihood, that it would be unlikely to be upheld on the civil side as a matter of modern Irish law.

The decision will be the subject of future detailed consideration in the pages of this Review, and indeed the judgments of their Lordships merit careful study by all members of the legal profession in this jurisdiction. In particular the judgments contain a comprehensive consideration of the historical origins and policy considerations underlying the advocate's immunity from suit, and serve to remind that no case has ever been made - nor can it be made - that lawyers as a profession should be given any special protection. The immunity, if any, must exist for the benefit of the public, not the lawyers. Although advocacy is more an art than a science, and although the advocate, in the words of Lord Hoffmann, practices a difficult art, the protection exists only to protect against the wider risk of prejudice to the administration of justice arising from the exposure of advocates to the risk of harassment from unmeritorious claims which, in turn, would damage and distort professional practices and professional judgments.

It has been clear at least since *Rondel v Worsley* [1969] 1 AC 191 that the dignity of the Bar is no longer regarded as a reason for conferring immunity on barristers whilst withholding it from all other professions. Yet it was then considered that other considerations of public policy - although not immutable - continued to apply. Chief among these is the barrister's overriding duty to the Court which should be freely and willingly observed without undue concern for the duty to one's client. Other supporting reasons have been the undesirability of relitigating issues which have already been decided; the assumption that barristers cannot sue for their fees; the analogy with protecting the freedom of witness statements in Court; and the public interest in the cab rank rule whereby barristers cannot pick and choose their clients, but are obliged to accept instructions from any person who wishes to engage their services in an area of law in which they practice. Following the decision in *Hall & Co v Simons*, in England these policy considerations have yielded to the greater public interest in allowing disappointed litigants to claim redress for the provision of negligent services, to the principle of equal treatment and, in addition, to the preservation of public confidence in the legal system which might be eroded if advocates, alone among professional men and women, were to continue to be immune from liability in negligence.

As the House of Lords reasoned, the public interest in legal certainty may be satisfactorily protected by the independent principles of res judicata, issue estoppel and abuse of process (including the rule against collateral civil challenges to a criminal conviction). Furthermore, and crucially, if a barrister's conduct is bona fide dictated by his perception of his duty to the Court, there could be no possiblity of a finding of negligence. In practice too, the Courts will take account in this context as in others of the difficult decisions faced daily by professionals working in demanding situations to tight timetables, and a plaintiff in any case will have to face the very considerable obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome.

For all these reasons, there are good grounds for doubting whether the core immunity of the advocate against claims by his or her client for negligence continues to apply in this jurisdiction. If anything, constitutional considerations of equality and access to Court, as well as the demonstrated approach of the Irish Courts to other types of immunities, support the case for abolition of the immunity on the civil side. It may also be that a blanket immunity, unknown in continental Europe, is incompatible with Article 6 of the European Convention on Human Rights. As the divisions in the House of Lords demonstrate, the retention of the core immunity in criminal cases is a more difficult question which raises a number of policy considerations peculiar to the administration of criminal justice. At all events, irrespective of the precise scope of the continuing immunity, the Irish Bar must be ready, in the interests of upholding professional standards of ethics and advocacy in Ireland as well as in the wider interests of ensuring legal certainty and access to justice, to contribute to the better definition of the law. ●

THE "VISIBLE HAND" IN THE MOBILE TELEPHONY MARKET

***Conleth Bradley BL** examines the significance of the Supreme Court decision in Orange Communications v the Director of Telecommunications Regulation for the law relating to reasonableness, bias and the duty to give reasons in public law cases. The decision's impact on the relationship between challenges by way of judicial review and statutory appeal mechanisms is also considered.*

Introduction

Adam Smith's "invisible hand" is often referred to as being synonymous with the notion of market economics, a philosophy which in more modern times is associated with the theories of Professor Milton Friedman, the philosophical influence behind "Reagonomics" and "Thatchersim" in the 1980s. While the more traditional advocates of socialism, or of the "social market" or of "democratic socialism" might wish it were otherwise, no one could deny the pervasive influence of market economics in the State at the beginning of the twenty-first century. The current economic prosperity in Ireland has in many ways been characterised by the emergence of new industries such as the mobile telephone industry. This growth has seen a simultaneous move away from State monopolies to a liberalisation of markets formerly dominated by the public sector. A consequence of this development has been the requirement to regulate competition between the players in newly emerging lucrative markets, such as mobile telephony. The genesis and subsequent *modus operandi* for this control is often to be found in the form of European Directives and related implementing measures.[1]

Consequently, at the end of 1997, as part of the continuing liberalisation of the telecommunications industry in Ireland, a competition was announced by the Director of Telecommunications Regulation for the award of the third licence[2] to operate a mobile telephone service in Ireland. By virtue of the provisions of the Telecommunications (Miscellaneous Provisions) Act 1996, the statutory post of Director of Telecommunications[3] had been established and *inter alia* assumed the functions once held by the Minister for Transport, Energy and Communications. As the Director announced in her press release in December 1997, the introduction of competition to the mobile telephone market had by the end of 1997 already resulted in lower rental charges, lower call tariffs and a significant increase in the number of people using mobile telephones. The economic stakes were therefore enormous and it was not altogether surprising that the companies which emerged as the two candidates[4] satisfying the minimum requirements of the tender for one lucrative licence would end up in protracted commercial litigation. This is exactly what transpired.

Arguably, the decisions in *Orange Communications v. The Director of Telecommunications Regulation and Meteor Mobile Communications Limited* [5] illustrate the very visible hand of the Director of Telecommunications Regulation in the award of a licence to operate a third mobile telephony service in Ireland. Essentially, Orange claimed that the decision of the Director to refuse it a licence was unreasonable or reached as a result of unreasonableness in the evaluation process; that her decision or the evaluation process which preceded it was tainted by bias and that she failed to give reasons for her decision which was in breach of her statutory duty. The case lasted for 51 days in the High Court and 17 days in the Supreme Court.[6] The unreported High Court judgment[7] amounted to 243 pages of text and the cumulative unreported Supreme Court judgments amount to 277 pages of text.[8] The High Court judgment on all three questions of (1) reasonableness in the context of a statutory appeal (2) bias and (3) the obligation to give reasons was overturned by the Supreme Court. The difficult nature of the issues to be addressed by both the High Court and the Supreme Court were recognised by the Supreme Court in the concluding remarks of Murphy J. who commented after finding there was no evidence of bias by the evaluators of the tender:

> "Whilst I disagree reluctantly with the conclusions reached by the learned trial Judge having regard to the immensity of the task which was imposed upon her and the diligence with which she performed it, I find myself forced to do so."[9]

Consequently, an article of this length could not do justice to the complexity of the matters and extensive legal argument which the High and Supreme Courts had to address.[10]

However, for the administrative lawyer or student of public law, the Supreme Court judgment represents *the* seminal decision on the three issues of (1) reasonableness (2) bias, and (3) the duty to give reasons. It is an overview of these issues which are addressed in a necessarily adumbrated fashion in this article.

Background[11]

The third mobile licence was to be awarded by competitive tender. The type of competition envisaged was known as a "beauty contest"[12] which meant that the competition was not necessarily won by the highest financial bidder. Rather, other criteria are taken into account, marked and weighted in order to assess the most overall suitable candidate. The tender documents stated that the Director was not bound to award the licence to the winner of the competition. It was envisaged that there would be discussions between the Director and the winner before any final decision was made as to the award of the licence.[13] The tender document *inter alia* provided that all purchasers of the tender could submit written questions concerning the invitation to tender. Applications were to be subjected to a two-stage evaluation process and only those

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applicants fulfilling the minimum requirements would be further evaluated. The tendering parties were given advance notice of the general group headings on foot of which the applications would be considered and of the individual group weighting.[14] The tenderers were informed of the dimensions to be considered within each group in descending order of importance.[15] The weightings given to the dimensions and sub-dimensions were not notified to the tenderers. After the tenders were opened and read, different aspects of each dimension or sub-dimension were isolated and described as indicators. These were given a marking on scale from A to E. After the marking was completed each indicator was given a weighting, and after the marks were added up and after the appropriate weightings had been applied Meteor Mobile Communications Limited were deemed to have won the competition and were ranked first. Orange Communications Limited were ranked second.

Orange were informed by the Director that Meteor had been ranked first as a result of the evaluation procedure and that subject to her being satisfied as to the outcome of discussions with Meteor, she proposed to award the licence to them. In accordance with the 1996 Regulations, Orange then made written representations to the Director in the hope of persuading her to come to a different decision, which was to no avail. Orange then invoked the statutory appeal mechanisms and appealed to the High Court.[16] In her preliminary judgment, Macken J. *inter alia* ruled that the nature of the appeal before her was a "review type appeal" under which the reasonableness of the Director's decision was to be ascertained by reference only to the materials which she had before her. Thus evidence could be admitted on the question of bias, but on the question of reasonableness the parties were restricted to the evidence before the Director when she made her decision. The High Court therefore had before it the bids made by each bidder and the manner in which those bids had been evaluated. The High Court found that the Director had not complied with the statutory duty to give reasons,[17] that there was objective, but not subjective bias and that her decision was unreasonable. Both the Director and Meteor appealed this decision to the Supreme Court. Orange cross-appealed against the finding that there was no subjective bias and against the ruling that limited the evidence on the issue of reasonableness.

Reasonableness

In the High Court, it was *inter alia* alleged on behalf of Orange that the following matters constituted evidence of unreasonableness on the part of the persons conducting the tender procedure[18] and on the part of the Director in accepting their recommendations: the tariffs structure proposed by Meteor; their failure to give any, or at least any adequate, weight to the withdrawal, shortly before the closing tender date, of one of the companies in the Meteor consortium, AT & T; the credit given to Meteor for what they described as their "strategic alliance" with An Post and what was said on behalf of Orange to be the illusory nature of that alliance; their failure to have any regard to what was described as a "huge hole" in Meteor's marketing strategy, namely the fact that the Meteor bid did not deal with the issue of subsidising handsets, i.e., the provision of handsets at a significantly reduced price, representing a cost to the bidder which it was said was essential for a new entrant in the market seeking to compete with what was described as an established duopoly.

The context within which the Supreme Court ruled that these matters should be addressed forms an extremely important part of the Supreme Court decision. The machinery was an appellate procedure to the High Court by virtue of Section 111(2)(b)(i) of the Postal and Telecommunications Services act 1983 as amended by Regulation 4 of the European Communities (Mobile and Personal Communications) Regulations, 1996.[19] Thus the appeal amounted to "a form of judicial review." It is interesting, however, to note Keane C.J.'s comments as to what standard should be applied in the context of assessing the reasonableness grounds:

> "In this case, however, the parties were agreed that it was not necessary for Orange to establish that the decision to refuse to grant the licence to Orange was manifestly unreasonable as to be contrary to common sense and that, to that extent at least, the principles laid down in cases such as *The State (Keegan) v. Stardust Compensation Tribunal*[20] and *O'Keeffe v. An Bord Pleanala*[21] were necessarily applicable. Accordingly, while I would approach the case on that basis, it is also clear that the High Court in hearing the appeal must bear in mind that the Oireachtas has entrusted to the Director a decision of a nature which requires the deployment of knowledge and expertise available to her, her staff and consultants retained by her, but not available to the Court."[22]

Keane C.J. adopted the approach of the Canadian Supreme Court decision in *Southan v. Director of Investigation and Research*[23] and of Kearns J. in *M. & J. Gleeson & Co. v. Competition Authority*[24] and held that courts should have regard to the degree of expertise and specialised knowledge available to the Director:

> "In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the Director. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the Director was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In arriving at a conclusion on that issue, the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the Director."[25]

The suggestion therefore was that since there existed a special form of appeal which the parties apparently accepted, it enabled the High Court (and Supreme Court on appeal) to review the impugned decision on a more generous criterion of reasonableness from the Applicant's perspective than would be available in an ordinary judicial review. Thus, if the refusal to award the licence to Orange was to be treated as unreasonable because of alleged errors then *pro tanto* it must be set aside.

Bias

The Supreme Court judgment analyses in great detail the jurisprudence to date on the thorny issue of subjective and objective bias.[26] Essentially Orange were alleging that the evaluators made so many erroneous decisions against them that there must have been bias on the evaluators part and in this regard Geoghegan J. concisely referred to Orange's allegation as being that "in a vicarious sense" there was bias on the part of the Director. While entering the caveat that bias and unreasonableness as issues were treated largely on the basis that "either neither or both" were present in the decision of the Director, Barron J. outlined the fundamental difference between bias and unreasonableness by stating that bias as an issue always exits before the hearing or other process whereas unreasonableness was something to be ascertained by comparison of the process and the decision. An allegation of bias must be made on foot of circumstances outside the actual decisions made in the case.

Geoghegan J., after analysing the case law on bias synopsised the law on bias in the following three propositions:

1. The rare case of proved actual bias. For such bias to be established it would be necessary actually to prove that the judge or the tribunal or adjudicator or whoever the person might be was deliberately setting out to mark or hold against a particular party irrespective of the evidence.
2. A situation of apparent bias where the adjudicator has a proprietary or some other definite personal interest in the outcome of the proceeding, competition or other matter on which he is adjudicating. In that case there is a presumption of bias without further proof.
3. Even in cases where there is no evidence of actual bias and no evidence of the adjudicator having any proprietary or other interest in the outcome of the matter, there will still be held to be apparent bias if a reasonable person might have apprehended that there might be bias because of some particular proven circumstance external to the matters to be decided in the case such as for instance a family relationship in circumstances where an objection may be taken[27] or the judge having been involved in a different capacity in the matters which were contentious in the case[28] or where there was evidence of pre-judgment by a person adjudicating.[29]

Murphy J., after *inter alia* finding that a comprehensive analysis of the exercise in which the evaluators were engaged did not support the view that any anti-Orange force was at work, added:

> ".....there is too an inherent conflict in the evidence adduced in support of the contention of bias. In allocating marks and weighting to the crucial indicator of 'commitments and price development' the evaluators in fact drew maximum attention to what they were doing and the higher - probably decisively higher - marks that they were awarding to Meteor over Orange when an alternative and equally acceptable course would have concealed that fact. On the other hand it is suggested that additional marks were allocated to Orange and that reports were 'sanitised' with the conscious intention of concealing the existence of bias which had been identified by other evaluators. Whilst the evaluators like any other judges, umpires or examiners may have fallen into error - and I am by no means convinced that they did - I am quite satisfied that the evidence does not establish that any of the evaluators were biased less still that such bias operated effectively or at all. If bias neither existed or operated then any perception of it is necessarily misconceived....."

Duty to give reasons

The duty to give reasons is emerging as a potent ground of review in public law cases and, as Barron J. recognised in *Orange,* "the right to be given reasons for a decision springs from the guarantee of fair procedures and the obligation upon those vested with statutory powers to exercise them fairly." In *Orange* the statutory scheme[30] required the Director, when proposing to refuse a licence, to so inform the applicant and to give reasons. The Director was then required to consider any representations made and if she decided to refuse the licence, she was required to notify the applicant and to again give reasons. The requirement to give reasons at both stages therefore had both a domestic and European basis.

The principles which govern the duty to give reasons in Irish law are set out in the decision of the Supreme Court in *Ni Eili v. The EPA.*[31] Applying this decision in the High Court in *Orange,* Macken J. identified five principles[32] which govern the application of the duty to give reasons in Irish law. Unlike the

High Court, however, the Supreme Court, considering the decision of the Court of First instance of the Court of Justice of the European Communities in *Adia Interim SA v. European Commission,*[33] which concerned an employment agency that had responded to an open invitation for the supply of Agency staff issued by the Commission, held that comparative reasons in a situation of comparative tenders are not required to be given. Therefore the correspondence from the Director combined with the written non-comparative summary was held to constitute sufficient reasons. Barron J. expressed his view as follows:

> "The right to be given reasons even when not specifically set out in the relevant legislation springs from the requirement of the guarantee of fair procedures that powers must be so exercised. Clearly, a power cannot be seen to have been so exercised until the reasons for its exercise have been given. Nor can it be so seen where such failure prevents the applicant from exercising a right of appeal. But there is nothing unfair in refusing to allow the applicant sight of the internal procedures of the decision maker. This is the case with the Director of Public Prosecutions and also with An Bord Pleanala. Even though this was a comparative bidding process, there is nothing in the regulations which involves the other bidder nor obliges the Director to disclose such bid or the manner in which it was treated. If the details of any such bid were to be furnished to any other bidder the Regulations would have been expected to give such right."[34]

Conclusion

It would appear from the Supreme Court's judgments that one of the complicating factors in the case was the considerable overlap between the issues of (1) bias and (2) unreasonableness, and the understandable difficulty the High Court may have had in excluding from its mind, when dealing with the issue of reasonableness, the oral evidence that might have been heard in relation to bias. The Supreme Court also accepted that the function of the High Court on this statutory appeal was somewhat wider than the function of the High Court on a judicial review. This is referred to by the Supreme Court in the context of ascertaining the appropriate threshold for the application of the test of reasonableness.

Geoghegan J. describes the approach adopted by Iacobucci J. in the *Southan Inc* case as the "patently unreasonable" test and distinguishes the reasonableness test in *Stardust* and *O'Keeffe* as examples of "jurisdictional error" by the deciding body acting wholly unreasonably and therefore in effect *ultra vires.* He refers to the Canadian Supreme Court decision in the *Southan Inc* case, taking the view that a jurisdictional test of that kind (i.e., *Stardust* and *O'Keeffe*) would not be appropriate where there was a statutory appeal. On this very point Geoghegan J. states that whether that view was right or wrong would not seem to be relevant for purposes of the case before him.

Geoghegan J. had "no problem" with the notion of curial deference (in the context of judicial reluctance to allow "a court of amateurs" to reverse "a court of experts" in matters pertaining to their expertise) but added that the limits of a particular statutory appeal would probably depend on the nature of the subject matter and the context in which the appeal was brought.

While the Supreme Court judgments are forensic and indeed robust, the issue of the proper test and standard of reasonableness (and indeed of review) to be applied in the context of a statutory appeal requires further judicial analysis. Barron J.[35] referred to the decision of Hamilton C.J. in *Henry Denny & Sons (Ireland) Ltd v. The Minister for Social Welfare*[36] where the Chief Justice emphatically expressed the view that the courts should be slow to interfere with the decisions of expert tribunals and to Kearns J. in *M.& J. Gleeson & Co.* where Kearns J. recognised that the greater the level of expertise and specialised knowledge the particular tribunal has, the greater reluctance there should be on the part of the Court to substitute its own view for that of the tribunal.

In this regard the judgment of Kelly J. in a recent asylum case, *Sekou Camara v. The Minister for Justice, Equality and Law Reform & The Refugee Appeals Authority,*[37] represents an interesting development. Kelly J. *inter alia* had regard to the decisions in *O'Keeffe v. An Bord Pleanala, Henry Denny & Sons (Ireland) Ltd v. The Minister for Social Welfare* and *Ryanair Limited v. Flynn*[38] (in *Ryan* Kearns J. also referred to the earlier decision in *M.& J. Gleeson*) and referred to these decisions as representing an attitude of "curial deference" for decisions of specialist administrative bodies in the context of judicial review proceedings. Importantly, however, Kelly J. added:

> "The Appeals Authority in this case is a body with particular experience and expertise. It deals on a daily basis with the assessment of claims of refugee status. This is something which I bear in mind in approaching the application for *certiorari* of the recommendation in suit."

While it is arguable whether or not the Appeals Authority could be equated with a decision-making body such as the Competition Authority or the Director of Telecommunications, it is undoubtedly a statutory body with a level of experience and expertise. While the level of experience and expertise of this body is perhaps somewhat inchoate, Kelly J., (it is submitted correctly) referred to its "particular experience and expertise" and the fact that it dealt with the assessment of claims for refugee status on a daily basis in the context of the exercise of his judicial discretion in assessing the application for *certiorari.*

Grafting established judicial review principles (and jurisprudence) onto a "statutory appeal" mechanism which does not expressly incorporate a judicial review procedure seems almost oxymoronic, even considering the parameters and limitations contained in the application of "curial deference." That said, the principle that judicial review is concerned with the decision-making process and not the decision itself, while theoretically applicable, is equally questionable (if not redundant) when one examines the application of the concept of reasonableness.

Notwithstanding the above, it is also arguable that this problem has become exacerbated in situations where the Oireachtas *has* provided for judicial review in a statutory format and which often contains an express right to challenge the validity of "a decision" (rather than the decision-making process). The cross-fertilisation of traditional judicial review (State-side/prerogative) principles in a modern judicial review/statutory appeal context has therefore led to some confusion. If the Oireachtas intends to legislate in this area, by amending the Postal and Telecommunications Services Act 1983, it is hoped that some caution will be shown in any future legislative initiative. ●

1. In relation to the market for mobile phones Ireland adopted Commission Directive No.90/388/EEC (28/6/90) and Commission Directive 96/2/EEC, 16/1/96 by means of the European Communities (Mobile and Personal Communications) Regulations 1996 by which an amendment was made to Section 111 of the Postal and Telecommunications Services Act 1983.
2. Two licenses were already in existence. Eircell were the successors to the monopoly previously held by Telecom Eireann and the Minister for Posts and Telegraphs; Esat had previously secured a licence from the Minsiter for Transport, Energy and Communication.
3. Etain Doyle is the first Director.
4. Orange Communications Limited and Meteor Mobile Communications Limited.
5. Unreported, Supreme Court, May 18, 2000; Keane C.J., Murphy J., Barron J., Murray J. and Geoghegan J.; Unreported, High Court, Macken J., October 4, 1999; Preliminary judgment of the High Court [1999] 2 ILRM 81.
6. At the conclusion of his 148 page judgment Keane C.J comments on the length of the trial and the appeal. He refers to the fact that at the time of the High Court hearing there was an absence of appropriate case management structures (which is now within the remit of the Courts Service). Keane C.J. refers to the desirability in future cases of a preliminary conference between the judge, counsel and solicitors and of the judge being provided well in advance of the hearing with the relevant documents so as to avoid the time consuming process of documents being read in Court during the opening and throughout the giving of evidence.
7. Excluding the preliminary judgment. See *Orange Communications v. The Director of Telecommunications Regulation and Meteor Mobile Communications Limited* [1999] 2 ILRM 81.
8. Excluding annexes.
9. Page 12 of the unreported judgment.
10. For a detailed comparison of the High and Supreme Court judgments, see the forthcoming publication, Bradley, *Judicial Review in Context.*
11. The judgment of Keane C.J. is required reading for a most detailed analysis of the facts in Orange.
12. This is in contrast to the auction type method.
13. While initially there were a number of consortia which showed an interest in applying for the licence, ultimately when the matter was put out to tender the only applicants were Orange Communications Limited and Meteor Mobile Communications Limited.
14. There were five groups on foot of which the applications would be considered: marketing - 38% weighting; technical - 27% weighting; financial and management - 20% weighting; charges - 10% weighting; guarantees - 5% weighting.
15. In the marketing group the dimensions were tariffs, marketing strategy and services; in the technical group, the dimensions were network quality, acquisition of sites etc., environmental issues and coverage; in the financial and management group the dimensions were solidity, sensitivity and experience/expertise. No separate dimension existed for the charges group and the guarantees group.
16. As no Rules of Court were in existence to prescribe the procedure to be adopted in the appeal, Orange had commenced proceedings by way of plenary summons in the High Court appealing the Director's decision.
17. Section 111(2B)(f)(i) and Section 111(2B)(b) of the Postal and Telecommunications Services Act 1983 as amended.
18. An expert firm of consultants from Denmark, Andersen, had been engaged by the Director to process the competition alongside members of her own staff. Different working groups were formed to evaluate the rival tenders in respect of particular topics. While the composition of these various working groups differed they consisted of members of the staff of the Director and Andersen. The reports and preliminary evaluations of these working bodies were considered by an overall body and further cross checking exercises were carried out before, ultimately, a final evaluation report was prepared for the Director.
19. S.I. No.123 of 1996.
20. [1986] I.R. 642.
21. [1993] 1 I.R. 39.
22. Page 117 of the unreported judgment.
23. [1997] 1 SCR 748.
24. [1999] 1 ILRM 401.
25. Pages 118 and 119 of the unreported judgment.
26. See especially the decisions of Murphy J., Barron J. and Geoghegan J. See also the decision of the English Court of Appeal in *Locabail Limited v. Bayfield Properties* [2000] 1 All ER 65.
27. *O'Reilly v. Cassidy* [1995] 1 ILRM 306.
28. *Dublin Well Woman Centre Limited v. Ireland* [1995] 1 ILRM 408.
29. *O'Neill v. Beaumont Hospital Board* [1990] ILRM 419.
30. Section 111 2B) (f) of the Postal and Telecommunications Services Act 1983 as amended.
31. Unreported, Supreme Court, Murphy J., July 30, 1999.
32. In summary these were:

(i) where there is a statutory duty to give reasons, these should be proper, intelligible and adequate;

(ii) it should be possible for the party given the reasons, when they are particularly relevant, to ascertain the reasons without undue difficulty or detailed research;

(iii) the reasons do not have to be set out in significant detail but should be sufficiently clear to permit the party affected by them to make appropriate use of them;

(iv) the court should be able by reference to the reasons to come to a view when exercising its supervisory role as to whether the stated reasons are sufficient or justifiable; and

(v) the degree of particularity which is to be given will depend always on the particular circumstances of the case.

33. [1996] ECR II -321.
34. Page 27 of the unreported judgment.
35. Barron J. did not find it necessary to approve or disapprove of the decision in *Re Southan* and took the view that the test for competition cases could not be a guide for other codes.
36. [1998] 1 IR 34.
37. Unreported, High Court, Kelly J., July 26, 2000.
38. Unreported, High Court, March 24, 2000.

HE UNITED STATES SUPREME COURT: THE OCTOBER 1999 TERM IN REVIEW

Liz Heffernan BL *provides an overview and analysis of recent important constitutional decisions of the United States Supreme Court, including decisions bearing on abortion, confession evidence, searches, discrimination, access to children, free speech and church-state relations.*

Introduction

June saw the close of a particularly colourful and controversial term at the United States Supreme Court. Over the course of the preceding nine months, the justices[1] handed down seventy-four decisions, roughly in keeping with recent practice. The Court sits primarily in an appellate capacity, deciding cases that wind their way to Washington, D.C., from lower federal courts and state supreme courts across the nation. The jurisdiction is almost entirely discretionary: the appellants in these cases represent less than five percent of the annual tally of litigants who seek Supreme Court review. Thus, the justices enjoy considerable leeway (and a weighty responsibility) in selecting from across the legal landscape those federal issues deemed worthy of review. This term's cases run the full gamut of American law and include decisions on federalism, the separation of powers and civil rights, judgments on bankruptcy, taxation and international trade, and pronouncements on federal court procedure and evidence. The following discussion focuses on the constitutional realm which produced a staggering array of potentially groundbreaking issues, many touching the everyday lives of Americans.

Abortion

It is not surprising that the socially explosive issue of abortion produced the Court's most publicly controversial and internally divisive step of the term. In *Stenberg v. Carhart*,[2] a bitterly divided court struck down Nebraska's ban on partial birth abortion, a medical procedure commonly used for second trimester abortions.[3] Stenberg presented an opportunity to revisit the terrain mapped out in the Supreme Court's landmark 1973 decision in *Roe v. Wade*.[4] In balancing a woman's right to choose to terminate her pregnancy against the state's interest in fetal life, Justice Blackmun's majority opinion in *Roe* focused on viability: a law which imposes an undue burden on a woman's right to choose pre-viability is unconstitutional; however, subsequent to viability, a state may regulate and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the woman. *Roe* was modified somewhat but its essential tenets reaffirmed in 1992 by a divided Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[5]

Justice Breyer's majority opinion delves into considerable technical detail in describing the abortion procedures potentially falling within the ambit of the Nebraska statute. Of the roughly ten percent of abortions in the United States that are performed after the first trimester, most involve a procedure known as dilation and evacuation ("D & E"). Typically, during D & E, the fetus is dismembered within the uterus and the fetal parts removed through the use of surgical instruments and suction. A variant, dilation and extraction ("D & X"), involves the removal of the fetus intact and the subsequent collapse of the fetal skull. D & X is the method most closely associated with the term "partial birth abortion" and the one at which the Nebraska statute was aimed.

Justice Breyer explained that Nebraska's ban on partial birth abortion was unconstitutional, in the first place, because it lacked an exception for the health of the woman. *Casey* and its progeny make plain that a state may not regulate or proscribe abortion "where it is necessary, in appropriate medical judgment, for the preservation of . . . the health of the mother."[6] Justice Breyer observed that while this does not mean that a state must grant physicians unfettered discretion in their selection of abortion methods, a statute must include a health exception where substantial medical authority recognises such a need. Notwithstanding conflicting medical evidence, the record in Stenberg supported the trial court's finding that D & X carries less health risks than D & E, principally because it reduces bleeding and avoids injury to the uterus. In a vociferous dissent, Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia) chided the majority for twisting *Roe* and *Casey* by ignoring a crucial distinction between health concerns that require a woman to have an abortion and those that merely cause a woman who desires an abortion to choose one abortion method over another. Since the present case involved only the latter scenario, the Nebraska law did not require a health exception.

The Nebraska statute was also struck down on the independent rationale of overbreadth (to use American legal parlance): insofar as the statute embraced D & E, it exceeded its basic aim of banning D & X. Justice Breyer noted that a physician who performs D & E abortions may be subjected to prosecution and, ultimately, imprisonment, a fine and the automatic revocation of her licence to practice. The chilling effect of this

regime, Justice Breyer reasoned, constituted an undue burden on a woman's right to make an abortion decision. While the Nebraska legislature could have cured this statutory defect through the simple expedient of an exception for D & E procedures, evidently it had chosen not to do so. The dissenting justices took the view that the Nebraska statute, construed in accordance with its plain and ordinary meaning, did not ban D & E and, accordingly, was not overbroad.

The implications of *Stenberg* reach well beyond the Nebraska measure (twenty-nine other states have similar anti-abortion legislation on the books) or, indeed, these particular abortion procedures. Like *Casey,* the significance of *Stenberg* lies as much in the majority's decision not to tamper with *Roe* as in its pronouncement on the merits of the case at bar. At the same time, *Stenberg* underscores the fragile judicial edifice on which *Roe* rests; in a classic example of the prominence of individualism in Supreme Court decision-making, no less than eight individual opinions including four acrimonious dissents reveal a bench rent by seemingly irreconcilable differences on abortion.

Joining Justice Breyer in voting to strike down the Nebraska law, Justices Stevens and Ginsburg characterised as irrational the state's attempt to distinguish between two "equally gruesome" abortion procedures.[7] D & X was singled out not because it is more complicated, risky, painful or cruel; rather the law was simply an attempt to chip away at the private choice shielded by *Roe* and *Casey.* While Justice O'Connor's position had been the source of much speculation, Justice Kennedy's dissent provided an interesting twist, principally because he had voted to uphold the basic right to abortion in *Casey.* It was a central premise of that position, Justice Kennedy now explained, that the states, acting as conduits for the citizenry, retain a critical role in legislating on abortion. Here, the majority had failed to accord any weight to Nebraska's interests in promoting respect for life, including its right to declare critical *moral* differences between the two abortion procedures at issue. Juctice Thomas's dissent castigated *Roe* as "grievously wrong"[8] and *Casey* "without historical or doctrinal pedigree." [9] The issue of abortion, he declared, is a matter for the people of each state and while the Federal Constitution may permit a state to legislate for abortion, it does not oblige it to do so.

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Post *Stenberg,* the choice of one *method* of abortion over another remains a matter for the woman and her physician. But the decision by no means heralds the demise of the campaign to outlaw partial birth abortion. The narrow result essentially turns on the majority's handling of two debatable issues: the construction of the Nebraska statute and the sufficiency of the medical evidence contained in the trial court record. In response to the former, legislators in Nebraska and other states will doubtless return to the drawing board to enact tighter prohibitions on partial birth abortion. Justice O'Connor's concurring opinion points the way; she expressly signaled her willingness to uphold a ban that was limited to D & X[10] and that included an exception to preserve the life and health of the woman. In short, *Stenberg*, it seems, hangs by a single, fine thread.

Criminal Law

The 1966 Supreme Court decision in *Miranda v. Arizona*[11] immortalised the words familiar to viewers of television crime drama: "You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to the presence of an attorney. If you cannot afford an attorney one will be appointed for you prior to any questioning should you so desire". In *Miranda,* the Court ruled that a failure on the part of the police to administer these cautionary words prior to custodial interrogation renders a suspect's statements inadmissible at trial. This judicial boost to the defence was a provocative step and, just two years later, Congress passed a statute which purported to trounce *Miranda* and restore the pre-existing status quo, namely a totality-of-the-circumstances approach to determining the voluntariness of confessions.[12] Doubts over the constitutionality of the statute have rendered it a virtual dead letter over the years; federal prosecutors have rarely invoked it and courts have seldom addressed it. At the same time, *Miranda* has itself proved controversial in practice. Legal debate has centered on whether the Miranda Court announced a constitutional rule or merely exercised its authority to prescribe rules of evidence and procedure for use in federal courts. Whereas Congress may legislatively supersede the latter (it was Congress, after all, that established the lower federal courts), the power to interpret the Constitution rests with the Supreme Court. Lamenting decreases in the rate of criminal convictions, critics have increasingly turned to the 1968 statute to bolster the claim that a failure on the part of the police to administer Miranda warnings is not an absolute bar to the admission of custodial confessions.

In *Dickerson v. United States,*[13] the Court has laid the debate to rest, declaring the 1968 statute unconstitutional and reaffirming that a suspect's entitlement to be informed of her rights prior to questioning is protected by the Fifth Amendment's privilege against self incrimination. Ironically, it was Chief Justice Rehnquist, a long-standing *Miranda* critic, who spoke for the seven-justice majority. In affirming *Miranda's* constitutional pedigree, Justice Rehnquist observed that the Miranda Court had intended to announce a constitutional rule; the decision had been born of a concern that the traditional test for voluntariness raised an unacceptable risk of convictions based solely on coerced custodial confessions. He also pointed to a long line of Supreme Court cases applying *Miranda* to state court prosecutions. Since it lacks the authority to prescribe evidentiary rules for state courts, the Supreme Court could only have been enforcing the Federal Constitution in such

cases.
In a strident dissent, Justice Scalia (joined by Justice Thomas) dismissed as preposterous the notion that *Miranda* warnings are constitutionally required, a conclusion reinforced by past Supreme Court decisions creating exceptions to *Miranda's* exclusionary rule. Taking aim as much with the Miranda Court as the present majority, Justice Scalia argued that neither history nor precedent supported *Miranda's* central premise that a statement obtained pursuant to custodial interrogation is necessarily the product of compulsion. The Constitution abhors compelled confession, he noted, and not confession per se. For Justice Scalia, *Miranda* was a milestone of judicial overreaching, and its endorsement by the majority in *Dickerson* a compounding act of "judicial arrogance."[14]

In a riposte to the dissent, Chief Justice Rehnquist defended the decision to uphold *Miranda* on practical as well as doctrinal grounds. Not only did the principles of *stare decisis* weigh in its favour, "*Miranda* has become embedded in routine police practice to the point that it has become part of our national culture."[15] Nevertheless, one suspects that, ultimately, Chief Justice Rehnquist had an eye to the Court's relationship with Congress. Above all, *Dickerson* represents an affirmation of the supremacy of the Court as the final arbiter on the meaning of the Constitution.

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In another notable development in the criminal field, the Court invalidated a sentencing enhancement scheme for hate crimes on the ground that the defendant had a constitutional right to a jury determination on the issue of racial motivation.[16] The term also included several decisions on the Fourth Amendment's protection against unreasonable searches. The Court propounded a commonsense approach to determining the "reasonable suspicion" that entitles a police officer to stop and frisk an individual. There was no consensus among the justices, however, as to what constitutes common sense: a bare majority found reasonable suspicion in a defendant's presence in a high-crime area coupled with his flight on seeing police officers.[17] The Court also ruled that there is no general "crime scene" exception to the warrant requirement[18] and that police officers may not stop and frisk a pedestrian for guns based solely on an anonymous tip.[19] Finally, the Court held that a federal law enforcement official violated the Fourth Amendment when he squeezed a passenger's luggage located in an overhead bin on a Greyhound bus.[20]

Discrimination

An eclectic array of cases in the field of discrimination is virtually a given, and this term was no exception. The current Court's stance against racial preference or affirmative action in the exercise of the franchise was strengthened: a provision of the Hawaiian Constitution that restricted to native Hawaiians the right to vote in statewide elections for trustees of the Office of Hawaiian Affairs was held unconstitutional.[21] In another landmark decision, a sharply divided Court struck down the Violence Against Women Act, a federal statute that created a private right of action for gender-motivated crimes of violence (as beyond Congress's power under the Commerce Clause and the Fourteenth Amendment's Equal Protection Clause).[22]

Perhaps the most publicised of the Court's recent pronouncements, *Boy Scouts of America and Monmouth Council et al. v. Dale,*[23] concerned discrimination on grounds of sexual orientation, a subject that has generated legislative activity but relatively limited litigation to date. James Dale joined the Boy Scouts at the age of eight and, on entering college, became an adult member and assistant scoutmaster. Following publication of a newspaper report on Dale's role as a gay rights college activist, the Boy Scouts removed him from their ranks, citing the organisation's statutory ban on homosexuals. Dale filed suit in the New Jersey courts, alleging that the Boy Scouts had violated state law by discriminating on grounds of sexual orientation in a place of public accommodation. On appeal to the U.S. Supreme Court, the Boy Scouts argued that, by forcing them to accept a member they did not desire, New Jersey had intruded into their private affairs and violated their First Amendment right to associate for the purpose of engaging in protected speech.

By just five votes to four, the Court sided with the Boy Scouts. Writing for the majority, Chief Justice Rehnquist noted that the Boy Scouts is a private, non-profit organisation engaged in the expressive activity of instilling values in youth, in part through the instruction and example of its adult leaders. The forced inclusion of Dale as a scoutmaster, Chief Justice Rehnquist reasoned, infringed the Boy Scouts' ability to advocate their position that homosexual conduct is immoral. The fact that the Boy Scouts did not associate *for the purpose* of disseminating that belief did not deprive them of protection; nor did the existence of some dissension in the ranks. It was sufficient for First Amendment purposes that the Boy Scouts took an official position on homosexuality and that they engaged in expressive activity that could be impaired by the presence of a homosexual scoutmaster.
Notably absent from Chief Justice Rehnquist's opinion is any discussion of gay rights *per se.* Justice Stevens, dissenting (joined by Justices Souter, Ginsburg and Breyer), viewed the case through a very different lens. Justice Stevens took issue with the majority's reading of the facts, rejecting the premise that the Boy Scouts had a singular stance on homosexuality much less that its alleged policy was linked to its expressive activities. At a more fundamental level, Justice Steven's opinion reveals a forthright commitment to equating prejudice based on sexual orientation with racial and gender discrimination. In the past, the Court has recognised that states have a compelling interest in eliminating gender discrimination in public accommodations. Noting that the right to associate for expressive purposes is not absolute, Justice Stevens argued that *Dale* came squarely within the Court's precedents upholding state anti-discrimination laws as against challenges based on

"Justice Steven's opinion reveals a forthright commitment to equating prejudice based on sexual orientation with racial and gender discrimination."

exclusionary membership policies. It was not enough, Justice Stevens opined, for the Boy Scouts simply to engage in some expressive behaviour, adopt an openly avowed exclusionary policy, and articulate some connection between its expressive activities and its exclusionary policy. While the Boy Scouts could not be compelled to *include* a message about homosexuality among the values it actually chooses to teach its scouts, there was no evidence that Dale had presented himself as a gay role model or that he intended to use his position to that end.

The legal debate aside, *Dale* has led to some surprising results on the ground. Notwithstanding the result, it appears that the publicity surrounding the decision has proved a boon for the gay rights cause. On the other hand, the Boy Scouts have reportedly suffered a significant decline in corporate and governmental support in the months since the ruling.

Family Law

Although family law in the United States is regulated first and foremost by the states, on a number of occasions the U.S. Supreme Court has intervened, for example, to assert the fundamental due process rights of parents to decide what is best for their children. The Court has now continued that trend with a decision vindicating the rights of parents to resist visitation by grandparents or other non-parental parties. In *Troxel v. Granville*,[24] it struck down a Washington state judge's order which required a mother to hand over her two young daughters to their paternal grandparents for one weekend each month, one week each summer and visits on the grandparents' birthdays. The children's father, who had not married the mother, was deceased. The mother, who had since married and whose husband had adopted the children, sought to limit the grandparents' visitation rights to one day per month (with no overnight stay) and special holidays.

All fifty states recognise in some shape or form the right of non-parental parties to seek child visitation. The Washington law at issue in *Troxel* was exceptionally broad, however, providing that "[a]ny person may petition the court for visitation rights at any time" and that the court may grant such rights whenever "visitation may serve the best interest of the child." Writing for four members of the Court,[25] Justice O'Connor noted that the statutory language effectively permitted any third party to subject a parent's decision over visitation to a state-court review in which the best-interest determination lay exclusively in the hands of the judge. In granting visitation in this case, the state court had failed to accord any material weight to the determination of the mother, a fit custodial parent.

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Justice O'Connor saw no need to consider a thorny issue raised in the state courts below, namely, whether all non-parental visitation statutes must include a showing of harm or potential harm to the child as a condition precedent to granting visitation. The dissenting justices, however, saw in such a requirement a rigid constitutional shield that would protect every parental decision, however arbitrary. Justice Stevens pointed to several scenarios in which visitation under the Washington statute would be constitutional; for example, where the "person" among "any" seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent.[26] Recognising the multi-faceted family ties that comprise American society and emphasising the independent rights of children, Justice Stevens argued that the states (rather than the federal courts) are best placed to resolve the conflicting interests that arise in disputes such as this.

Religion

Over the years, the First Amendment has spawned some of the Court's most publicised decisions. This term continued that tradition, albeit in a relatively modest sense. In the area of free speech, the Court upheld federal limits on the funding of political campaigns,[27] recognized the right of a public university to impose a student activity fee related to extra-curricular student speech,[28] validated a city ordinance banning nude dancing,[29] and struck down a Congressional law requiring cable television operators to curb indecent programming through the use of watertight scrambling technology or limited viewing hours.[30] As we have seen, the decision in *Dale* permitting the Boy Scouts to exclude a gay scoutmaster turned in large part on the First Amendment right to expressive association. It was the contentious realm of church-state relations (regulated by the First Amendment's less well known Establishment Clause), however, that took centre stage this term, with two decisions touching on religion and education.

In *Santa Fe Independent School District v. Doe*,[31] the Court revisited the issue of school prayer, on this occasion declaring unconstitutional the practice of student-led prayer at high school football games. In 1992, the Court ruled that clerics could not deliver prayers at school graduation ceremonies; insofar as the practice involved state-sponsored religious speech, it violated the Establishment Clause's prohibition on government-coerced participation in religion.[32] In *Santa Fe*, the School District purported to divorce itself from its historically pro-Christian policy by convening a limited form of student election on the issue which it then cited as proof that pre-football game prayers constituted private student speech. To the Court, however, the School District's majoritarian election was merely a guise for official control over the religious message. The delivery of the prayers over the school's public address system at regularly scheduled official functions on school property amounted to state-sponsorship of religion, both actual and perceived. Writing for six members of the Court, Justice Stevens lamented the ancillary message of exclusion the prayers sent to non-adherents and the divisiveness it fostered in the school setting.

In a stinging dissent, Chief Justice Rehnquist (joined by Justices Scalia and Thomas) criticised the majority for an opinion that "bristles with hostility to all things religious in public life."[33] Having argued that student pre-game prayer constitutes private speech, Chief Justice Rehnquist defended the School District's policy as articulating plausible secular purposes. The Court, he suggested, had acted precipitously in striking down the policy on its face rather than waiting to see whether it could be applied in practice in a constitutionally permissible manner.

Overall, the impact of *Santa Fe* is somewhat unclear. Although the actual ruling is limited to pre-football game prayer, the majority opinion is cast in fairly broad terms and is likely to spawn further challenges in related educational contexts. Meanwhile, in an attempt to get around the decision, Christian ministries have reportedly encouraged high school students to spontaneously stand up and recite prayers at the start of football games.

The second Establishment Clause case concerned aid to parochial schools, terrain the justices have traversed several times in recent years, albeit with a regrettable lack of direction. In *Mitchell v. Helms,*[34] a six-to-three majority held that federal funds can be used to buy computers and other instructional equipment for use in private parochial schools (in addition to public schools). The judicial debate centered on the appropriate standard for determining whether an educational aid programme subsidises religion. In a sweeping plurality opinion, Justice Thomas trumpeted a neutrality or even-handedness principle whereby aid is permissible if offered to a broad range of groups or persons ("religious, irreligious and areligious" alike).[35] For Justice O'Connor (concurring) and Justice Souter (dissenting), however, neutrality is an insufficient yardstick, standing alone. Applying a multi-faceted inquiry to the facts at hand, Justice Souter concluded that taxpayers' dollars had been put to unconstitutional uses (including the purchase of religious books, the screening of religious audiovisual programmes and the development of religious computer software).

While *Mitchell* has done little to clear up the jurisprudential confusion, it has perhaps laid the groundwork for the next round; the justices will almost certainly resume the debate in the near future, possibly in the contentious guise of school vouchers (programmes whereby public school students can avail of government-funded vouchers to attend private schools).

Concluding Remarks

Even a summary as brief as this serves as a reminder of the breadth and the depth of judicial discourse at the Supreme Court and of certain characteristics unique to its decision-making. One such defining feature is the persona of the individual justice. Knowing where an individual justice stands on a specific issue, it seems, can be vital to an appreciation of the Court itself. On the basis of voting records and of the frequent practice of appending lengthy concurring and dissenting opinions, the justices develop certain positions on the issues of the day. From this potpourri, a general image emerges. According to conventional wisdom, Justices Rehnquist, Scalia and Thomas are conservatives and, indeed, anchor a court that is generally more conservative than its recent predecessors; Justices Stevens, Ginsburg, Souter and Breyer comprise the liberal wing; while Justices O'Connor and Kennedy occupy more moderate, centrist terrain. Of course, these labels are simplistic barometers at best and, as we have seen, the justices occasionally cross over from their supposed ideological strongholds. Indeed, this term produced a virtual pandora's box, chock-full of opinions to please and displease the conservative and liberal public alike.

The very high number of cases decided by five-to-four majorities is testament to the deep divisions that run through the current Court. Crucial outcomes on issues such as abortion, privacy and school prayer hang on the thread of a single vote (more often than not, one supplied by Justice O'Connor or Justice Kennedy). These divisions explain one interesting eventuality, namely, the paucity of new law that has emerged from an exceptionally colourful docket. Splintered opinions and fact-specific results provide regrettably little in the way of concrete standards to guide state and lower federal courts in the application of federal law.

Whatever the internal ideological differences, there is a conspicuous confidence to the current Supreme Court. *Dickerson,* for example, is just one of a record number of cases in which the Court stridently struck down a Congressional statute, asserting the vibrancy of its own place in the constitutional scheme. Nor was the Executive Branch spared the occasional reprimand.[36] Similarly, while the Court continued a trend of advancing states' rights,[37] it was not shy about curbing state forays into the federal domain.[38]

As the Supreme Court prepares for a new term, it is difficult to predict where it will stand on the issues discussed or, indeed, on others scheduled for consideration. In the meantime, with a presidential election pending, all eyes have turned to the political realm. Amid predictions that the next president may have the opportunity to appoint two or more justices, the composition and character of the Court remains firmly in the national spotlight.●

1. The members of the Court are Chief Justice William H. Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas, Ruth Bader Ginsburg and Stephen G. Breyer.
2. 120 S.Ct. 2597 (2000).
3. In a second decision relating to abortion, *Hill v. Colorado*, 120 S.Ct. 2480 (2000), the Court upheld a state law regulating protests conducted outside abortion clinics.
4. 410 U.S. 113, 93 S.Ct. 705 (1973).
5. 505 U.S. 833, 112 S.Ct. 2791 (1992).
6. *Casey*, 505 U.S. at 879 (quoting *Roe*)
7. 120 S.Ct. at 2617.
8. 120 S.Ct. at 2635.
9. 120 S.Ct. at 2636.
10. Justice O'Connor noted with approval the efforts of some states, notably Kansas, Utah and Montana, to enact statutes more narrowly tailored to proscribing D & X.
11. 384 U.S. 436, 86 S.Ct. 1602 (1966).
12. 18 U.S.C. "3501.
13. 120 S.Ct. 2326 (2000).
14. 120 S.Ct. at 2348.
15. 120 S.Ct. at 2336.
16. *Apprendi v. New Jersey*, 120 S.Ct. 631 (2000)
17. *Illinois v. Wardlow*, 120 S.Ct. 673 (2000)
18. *Flippo v. West Virginia*, 120 S.Ct. 7 (1999).
19. *Florida v. J.L.*, 120 S.Ct. 1375 (2000).
20. *Bond v. United States*, 120 S.Ct. 1462 (2000).
21. *Rice v. Cayetano*, 120 S.Ct. 1044 (2000).
22. *United States v. Morrison*, 120 S.Ct. 1740 (2000).
23. 120 S.Ct. 2446 (2000).
24. 120 S.Ct. 2054 (2000).
25. Justice O'Connor was joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer. Justices Souter and Thomas wrote separate opinions, concurring in the judgment.
26. 120 S.Ct. at 2070.
27. *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897 (2000).
28. *Board of Regents of University of Wisconsin System v. Southworth*, 120 S.Ct. 1346 (2000).
29. *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382 (2000).
30. *United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878 (2000).
31. 120 S.Ct. 2266 (2000).
32. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649 (1992).
33. 120 S.Ct. at 2283.
34. 120 S.Ct. 2530 (2000).
35. 120 S.Ct. at 2541.
36. For a particularly controversial example, see *Food and Drug Administration v. Brown and Wilkinson Corp*, 120 S.Ct. 1291 (2000) in which the Court held that the FDA lacks authority to regulate tobacco products.
37. For example, see *Kimel v. Florida Board of Regents*, 120 S.Ct. 2348 (2000).
38. iFor two interesting examples, see *Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288 (2000), in which the Court unanimously struck down a Massachusetts human rights law boycotting companies that do business with Myanmar and *Reno v. Condon*, 120 S.Ct. 666 (2000) in which the Court held that the federal government could prohibit the states from selling automobile drivers' personal information.

EMPLOYERS' LIABILITY IN THE ELECTRONIC WORKPLACE

In the first of a two-part article on the potential legal liability of employers in respect of the use by employees of the Internet and e-mail, ***Ann Power BL*** *considers the law on publication of defamatory materials via these mediums.*

Introduction

Staggering advances in Internet and e-mail technology have transformed the world of business and commerce in recent years. Digital data can flow in seconds to anywhere in the world. Contracts can be concluded, staff recruited and deals delivered with stunning rapidity. While e-mail can be used to transact business and increase efficiency, it can also be used to broadcast discriminatory and defamatory remarks about other employees. The Internet, which opens doors to the vast resources of the information super-highway, may also open an employer's doors to employees using the Internet to access sexually explicit materials or download copyrighted software. By understanding the characteristics of these new technologies, employers will be able to enjoy the benefits of the electronic workplace, while also minimising the risk of litigation.[1]

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Business is conducted on the Internet in many ways. The net provides advertisement and recruitment facilities; it facilitates the sale and purchase of goods by means of electronic ordering using a credit card or other digital cash method; and it provides for the transmission of e-mail messages almost instantaneously. Additionally, the net has resulted in the creation of new industries such as Internet service providers (hereafter 'ISPs'), system operators and domain name keepers. Each activity has created its own specific legal issues with problems arising in issues ranging from copyright to contract, discovery to defamation, privacy to piracy.

This article addresses some questions of employers' liability in the context of the Internet and e-mail usage of their employees. It considers, in particular, an employer's liability for the publication of defamatory materials via the Internet, liability for infringement of the privacy rights of employees, and liability for discovery of virtual documentation in litigation suits. The article will conclude with some factors which employers may wish to include in devising an IT Policy Statement.

Defamation by Cyber-Libel

Ireland's first Internet case was an upsetting affair in which a young man was sentenced by the Dublin Circuit Criminal Court to two and half years in jail for sending messages to Internet bulletin sites and by e-mail, falsely accusing a teacher in his former school of paedophile activities and of sexually abusing pupils. The malicious and false claims, which caused

untold damage to the defamed teacher, were transmitted from a cyber café in South Great George's Street.[2]

In an employment context, an employee who abuses his or her employer's IT facilities may defame a fellow employee, or an innocent third party outside the organisation or, indeed, the employer itself. As the use of e-mail grows, so too does the potential for incurring legal liability for the use thereof. E-mail appears to have an informal character and a perceived impermanence. Because of this, people may use e-mail to send a message that may be inappropriate or too blunt to "put in writing." Most e-mail systems create a complete record of the communication. The systems capture the exact text that users send and receive. Additionally, e-mail records usually store information regarding their transmission and receipt, including the names of the parties communicating, the dates and time that the messages were sent and received, and an acknowledgement that the e-mail was retrieved. This information may be of great value in demonstrating what personnel were involved in making particular policy decisions, and what officials knew, and when they knew it.

Employers should be cognisant of their potential liability for defamatory and harassing material published by employees. If a company permits its employees to have access to the Internet and e-mail in the course of their employment and these employees publish defamatory or offensive material, then there is a significant risk that an employer may be held liable. The defamatory material may be communicated either directly to a third party via an e-mail message or to the world at large via postings on "bulletin boards" or in "chat rooms" provided by ISPs. Whilst there is no reported case law in this jurisdiction to give rise to immediate concerns in this regard, there are sufficient indicators from other jurisdictions to alert employers to the need to take precautions against such foreseeable risks. The basis for the imposition of liability in other jurisdictions has been that the employees were acting with "ostensible authority." In such a case, if a defamatory message went to thousands of bulletin boards around the world, an employer could face substantial claims for damages.

Vicarious and Direct Liability

Where an employee publishes defamatory material via e-mail or the Internet during the course of his or her employment, an employer may be sued as a defendant in proceedings that ensue. Before the law will impose vicarious liability upon an employer, the Plaintiff in such an action must, of course, prove that the employee is liable for the damage or injury caused. If an employee who allegedly defames a third party escapes liability by establishing an acceptable defence to the action in defamation, such as justification, fair comment or privilege, then, clearly, liability will not be imposed upon an employer. That said, however, even where the court is satisfied that the injury was caused by the act of the employee, liability will only be imposed, vicariously, upon the employer where the act complained of was within the scope of the employee's employment.[3]

A difficulty arises in applying this test to the facts of particular cases. As a general rule, a person employed as a clerical officer will be acting outside the scope of his employment if, instead of attending to his clerical duties, he spends his time in "chat rooms" on the net or sending personal e-mails to his friends. Thus, if such an officer defames a third party in those circumstances, the employer has the possibility of raising the defence that the employee in question was acting outside the scope of his employment. In *Irving v Post Office*[4] a postman-sorter wrote an offensive remark on a letter addressed to a couple of Jamaican origin. The court held that since the substance and purpose of what was written was unconnected with the performance of his duties, the Post Office was not vicariously liable. McMahon & Binchy question whether an Irish court would come to the same conclusion. While realising that each case must turn on its own facts, one can say that, as a general rule, if the employee is doing something that he is not employed to do then the master will not be liable.

Under the scope of employment defence, therefore, the employer will essentially argue that the employee was engaged in a frolic of his own making. Even if the Court accepts such an argument, however, liability could still be imposed directly on the employer if the evidence establishes that the employer was negligent and/or reckless in the supervision of its employees and/or failed to take reasonable action to prevent such frolics from taking place.

Some US cases are worthy of mention.[5] In *Owens v. Morgan Stanley & Co*[6] two African-American employees of a large investment banking firm brought proceedings demanding twenty-five million dollars each in damages due to a racist e-mail that was circulated among the white employees. While the federal court judge in New York dismissed the suit on the grounds that one racist e-mail could not form the basis for a hostile work environment, the judge did allow the employees the opportunity to amend their complaint. The case settled prior to hearing. Similarly, in *Pamper Barber v. Calsonic Int'l Inc*[7] the Plaintiff instituted a $2.5 million sexual harassment suit alleging that a male supervisor made frequent lewd remarks to a female employee via company e-mail. That case also settled for an undisclosed amount. In a third US case, the Chevron Corporation settled an action brought by four female employees who alleged they were sexually harassed through e-mail. The case settled for $2.2 million plus legal fees and court costs.[8]

Essentially, these cases go to the issue of failure on the part of an employer to provide a safe system of work - an environment in which an employee may work without fear of intimidation, harassment and/or exposure to the risk of being defamed by fellow-employees.

Liability in this area may be reduced by the deployment of some common sense techniques. An employer might begin with an e-mail and voicemail policy that carefully sets out the types of messages that may be transmitted over the system. Clearly, the policy should forbid any offensive or defamatory

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messages. An employer may also want to implement a monitoring system to periodically check the content of its employees' e-mail and/or voicemail messages. Such a system must be carefully designed and would have to include advance notice to employees.[9] Some companies issue their employees with a company and a personal email address so that there can be no doubt whether a communication sent by an employee is personal or on behalf of a company.

Defamation of an Employee by an Employer

Potential liability for defamation in the electronic workplace can arise from a number of sources. For example, e-mail, voicemail, and integrated computer networks have been designed to facilitate and encourage the rapid exchange and storage of information. Consider the situation where an employee in a large corporate organisation has gained unauthorised or accidental access to information stored or transmitted on an e-mail, voicemail, or computer system or where an employee accesses the personnel department's e-mail, voicemail, or computer network. In less than a second, the employee will likely acquire a great deal of potentially inaccurate private information, including performance evaluations and medical information, which has been stored or is being transmitted on these systems. Moreover, the information can be transmitted in seconds to other employees' machines or terminals. Has the information been published to the unauthorised employee for defamation purposes? Could the employer be held liable for defamation as a result of the unauthorised entry?

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Absent case law on this point, one must return to first principles in order to establish some guidance as to how a court may respond in such an instance. In particular, the rule which requires that a statement must be made to a third party also means, in normal circumstances, that no action will lie if a statement is communicated by private letter to the plaintiff only. McMahon & Binchy point out that if the method of communication would normally involve communication to a person other than the addressee (and IT systems are renowned for the speed with which publications can be made to numerous persons simultaneously) then this must be considered sufficient to amount to a publication. In this connection it must be noted that the courts take cognisance of man's natural curiosity in assuming that messages written on post cards will be read by third parties, and, therefore, are published.[10] If it is no defence to say that the person reading the postcard had no right so to do, then, arguably, an employer will be on weak territory if he or she claims that the employee who read the defamatory publication on an accessible e-mails had no right so to do. *Paul v Holt*[11] is good authority for the proposition that if there is accidental publication in the communication process, the defendant will not be liable, but if the communication to a third party is due to the negligence or want of care of the defendant, then the defendant is liable for the publication. *White v Stone Ltd*[12] also supports this view.

One option for the reduction of litigation risks would include the use of encryption technology. Encryption technology exists to protect stored, confidential information from access by unauthorised employees. This technology can be a major barrier to the release of potentially defamatory information. An employer may also consider the possible benefits of including confidentiality provisions in an e-mail or voicemail policy to protect the confidentiality of such transmission. A statement that all such messages are confidential and should be read only by the addressee, those authorised by the addressee, or the employer in his or her normal monitoring procedures, might arguably go some way towards reducing the release of potentially defamatory information. However, such a confidentiality statement is unlikely to be of assistance as a defence where negligence and want of care in the publication of defamatory material has been established by a plaintiff.

In the United States, defamation claims brought by dismissed employees have been common in the employment arena. What is new, however, is that the damages awarded in defamation cases against employers would appear to have increased rather dramatically. For example, a jury in North Dakota awarded $1.2 million in general damages and $700,000 in punitive damages to a man the jury found had been defamed when his former employer sent a series of letters falsely stating that he had been terminated for good cause.[13]

Written communications are fertile ground for litigation. Any intra-company communication may constitute publication, even though the publication may be defended on the grounds of privilege. For example, although employers usually enjoy the privilege of communicating disciplinary and performance information, employees in the United States have sued for disparaging remarks made about them in disciplinary notices

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and written evaluations. Similarly, memoranda prepared during internal investigations of misconduct, such as alleged sexual harassment, have also generated litigation. Although employers engaged in an investigation of an allegation of sexual harassment will generally be protected by the statutory obligations in respect of prevention of harassment at work, this is not a guaranteed protection as the facts of each case will determine what constitutes "reasonableness" in all the circumstances.

Employee Defamation of Employer

Employers are becoming increasingly alert to the possibility that they are being defamed and their businesses damaged by disgruntled employees. Disgruntled employees can also vent their anger by logging onto a Web site called "www.disgruntled.com." Here disgruntled employees can post their stories about employers and can read thousands of similar stories from other dissatisfied employees. When an angry employee visits the Web site, he or she is promptly instructed: "Tell us your stories about why your job sucks, how miserable your boss is and what you do to vent your frustrations or get even."

Posting libellous statements over the Internet has also come to be known as "cyber smearing." As Internet usage is increasing, so too is this kind of cyber sabotage against employers. According to American researchers, disgruntled employees with Internet access are increasingly venting their anger by making false and harmful statements about their employers and broadcasting these statements throughout cyberspace. The Internet has given angry employees a much larger forum in which to air their grievances. No longer does an angry employee have to settle for simply scrawling an insult about a supervisor on the canteen wall. He now can head straight for the Internet, ensuring that thousands of people will hear what he has to say about his employer. In the United States an increasing number of companies are fighting back and suing the anonymous posters of libellous statements.

Whilst the US protects ISPs from liability in defamation proceedings, federal courts have made orders directing ISPs to disclose the identities of anonymous posters who defame their employers and other third parties. Recently, libellous messages about a maker of medical equipment were posted on the Internet. The messages described the company's future as "uncertain and unstable" and were anonymously posted on a Yahoo investment message board. The company subpoenaed Yahoo for information about the anonymous user and discovered that the messages were posted by a former chief operating officer.

In a ruling made on the 25 May 2000 a Florida judge ordered America Online (AOL) and Yahoo to reveal the writers of allegedly defamatory messages. Lawyers for J. Erik Hvide brought an application before Dade County Circuit Court to have the two ISPs disclose the identities of the alleged wrongdoers.[14] They subpoenaed AOL and Yahoo seeking the identities of eight anonymous posters of messages, and the Court ordered the service providers to deliver the names within twenty days. In arriving at its decision the Court held that it had to strike a balance between the right to make anonymous accusations online and the right of someone to face his accusers.

US Case Law on Cyber-Libel

Until recently, the more litigious U.S. has been the only real source of Internet libel court cases and may provide some indication of the principles that may be applied in this jurisdiction. In *Cubby v CompuServe*[15] the complaint was that the ISP, CompuServe, provided an independently monitored bulletin board service dealing with journalism on which an unchecked and allegedly defamatory posting appeared. CompuServe maintained it was an innocent distributor of this material and not a publisher and argued that it could not be held responsible for matters appearing on the bulletin board about which it had neither knowledge nor suspicion. The court acknowledged the instantaneous nature of Internet postings and accepted that it was not feasible for CompuServe to examine every posting. The court exonerated the company from liability.

The courts later took a different view in a 1995 case against the ISP, Prodigy. In *Stratton Oakmont v Prodigy*[16] the defendant ISP was held liable for defamatory allegations of fraud made against the plaintiff company on a Prodigy-maintained bulletin board. Unlike the CompuServe case, the court held that Prodigy had specifically claimed to regulate the content of its bulletin boards (so that it could market itself as a family oriented system) and hence was a publisher and not an innocent distributor of the defamatory material.

The decision in *Stratton v Prodigy* generated debate on the regulation of the Internet. Advocates of self-regulation saw the decision as a step towards censorship and argued that it would have an adverse effect upon freedom of speech. Those in favour of Internet regulation saw the irony in the decision in that many US based service providers were being legally advised not to attempt to monitor postings to their bulletin boards in order to escape liability for defamatory publication.[17] The US Congress moved swiftly and enacted the Communications Decency Act 1996. Section 230 of the Act declares that a provider and user of an interactive computer service is not to be deemed as a publisher or speaker of any information provided by another information content provider. The effectiveness of the section as a means of exonerating ISPs from liability in defamation has been demonstrated in subsequent cases, such as *Zeran v AOL*[18] and *Bluementhal v Drudge and Others.*[19]

ISPs in the United States have also welcomed a recent

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Supreme Court ruling that gave them full protection against any libellous or abusive messages that may be sent over the Web.[20] Free speech advocates back the US ruling in *Lunney v Prodigy Services* which puts ISPs on the same footing as telephone companies, as message carriers. In that case, some infantile practical joker with access to a computer sent an offensive e-mail to a boy scout leader, infusing the text of the message with threats more likely to perplex than actually to intimidate an adult recipient. The intended victim of this prank appeared to be less the boy scout leader than the plaintiff, Alex G. Lunney, who was then a 15 year-old prospective Eagle Scout, and whose name appeared as the signatory and author of the e-mail message in question. The charade was crude but effective, in that the plaintiff was initially suspected of having sent the threatening piece of electronic correspondence. The Supreme Court upheld the New York Court of Appeals decision supporting Prodigy's defence that it was not liable for messages sent over its system. There, Bracken J.P. had stated:-

> "We conclude that Prodigy cannot be held legally responsible for it, nor for the allegedly defamatory bulletin board postings, because (1) Prodigy did not publish the statement, and (2) even if Prodigy could be considered a publisher of the statement, a qualified privilege protects it from any liability given the absence of proof that Prodigy knew such a statement would be false."[21]

Cyber-Libel in British Legislation and Case Law

To date, there has been little significant litigation in the UK concerned with libellous statements made on the Internet. Some have argued that the paucity of court cases in this area is due to the absence of legal aid in the UK for defamation actions. Others suggest that it reflects the *laissez faire* attitude that prevails on the Internet. It could, perhaps, be due to the fact that most companies have made e-mail libel (like other e-mail abuse) a disciplinary offence. Additionally, the fact that the Internet permits the victim of defamation to respond immediately may reduce the desire to sue.

Because of the unsettled state of the law in this area, in the 1990s a number of English cases settled.[22] However, in *Western Provident Association v Norwich Union Healthcare and Norwich Union Life Insurance*, the Courts have sent a strong signal that false rumours about a competitor on an internal e-mail system are actionable and possibly very expensive. The case centred on rumours about Western Provident, one of Norwich Union's major competitors in the field of private medical insurance. In 1995 it was rumoured that Western Provident was either insolvent or being investigated by the DTI, or both, and was in financial difficulty. Staff at Norwich Union disseminated these rumours via their internal e-mail system. The libel action was launched after Western Provident got wind of what was happening and managed to trace the rumours to Norwich Union.

Although Western Provident knew what had taken place on Norwich Union's e-mail system, it did not have the messages in its possession. However, in an early interlocutory move before the writ was served, the matter was taken before Mr Justice Mance who ordered that the offending e-mails be preserved. Western Provident obtained an *ex parte* injunction requiring Norwich Union to deliver a copy of this e-mail, along with an order directing the company secretary of Norwich Union to interrogate its sales force to see whether they had repeated the defamation to potential customers and to produce an Affidavit setting out the findings. In the event, Norwich Union agreed, in an out of court settlement, to pay £450,000 in costs and damages to settle Western Provident's claim for libel and slander arising out of electronic messages on Norwich Union's internal e-mail system.

The Norwich Union case makes clear to all who use e-mail in whatever form, internal or over the Internet, that if you or your employee defame a person or competitor in an e-mail then it can be classified as a published libel and is actionable. Employees who use e-mail may regard it more akin to a chat in the office corridor than the publication of a statement in a permanent form. The Norwich Union case serves as a warning to all who use the medium of the need for restraint in what they say on it. Any e-mail message, a personal note sent from a clerk to a secretary on an internal company e-mail system, has the potential to be defamatory. Thus, it is important that employers, who could ultimately be sued over material put on their own e-mail systems or the Internet by their employees, should be aware of this risk and should alert their employees to the danger that their messages could give rise to legal action.

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The UK's Defamation Act 1996 attempts to clarify the issue of ISP liability for Internet libels by proposing that system operators or service providers should be viewed as secondarily responsible for an Internet libel if they are only the transmitters and not the actual authors or editors. Under the Act, a person with only secondary responsibility can avoid liability for an Internet defamation if he or she can show that, having taken all reasonable care, he or she did not know and did not suspect that the system was being abused. This section 1 defence has been described as "a modern equivalent of the common law defence of innocent dissemination".[23] It provides:-

"1(1) In defamation proceedings a person has a defence if he shows that-

(a) he was not the author, editor or publisher of the statement complained of,
(b) he took reasonable care in relation to its

publication, and
(c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement."

Sub-section (2) defines a "publisher" to mean a commercial publisher, that is, "a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business." Subsection (3) provides that:-

"A person shall not be considered the author, editor or publisher of a statement if he is only involved-

(a) in printing, producing, distributing or selling printed material containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement."

Subsection (5) provides:-

"In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to-

(a) the extent of his responsibility for the content of the statement or the decision to publish it,
(b) the nature or circumstances of the publication, and
(c) the previous conduct or character of the author, editor or publisher."

The Defamation Act 1996 can be contrasted with the "hands-off" approach adopted in the U.S. By imposing the standard of reasonable care on an ISP the Act attempts to strike a middle ground between total irresponsibility for material transmitted and full liability as *de facto* publisher. In the UK most ISPs reserve the right to edit material (thereby demonstrating reasonable care) while emphasising the impracticality of checking every posting and not assuming any obligation so to do.[24]

It seemed that the Defamation Act 1996 provided an effective degree of protection to ISPs in the U.K. However, this was thrown into doubt by a decision of the High Court in March 1999, the first definitive ruling by the English High Court on an issue of Internet libel. The case involved the much-maligned Dr Laurence Godfrey, who had already been compensated for an earlier 1994 Internet libel.[25] In *Laurence Godfrey v Demon Internet Limited*,[26] an unknown person made a posting in a newsgroup which followed a path from its originating American ISP to the defendant's news server in England. This posting was squalid, obscene and defamatory of the plaintiff. It purported to come from the plaintiff and it invited replies by giving the plaintiff's e-mail address and it was, clearly, a forgery. On the 17th January 1997, three days after its first posting, the plaintiff sent a letter by fax to the defendant's managing director, informing him that the posting was a forgery, and that he was not responsible for it and requesting that the defendants remove the posting from its news server. There was no dispute that the defendants could have obliterated the posting from their news-server after receiving the plaintiff's request but failed to do so. It remained on-line until its expiry on or about[27] January 1997.

At the trial of the application to strike out the defence the defendants' contention was that they were not at common-law the publishers of the Internet posting which was, allegedly, defamatory of the plaintiff. They further submitted that even if they were, there was material upon which they could avail themselves of the defence provided by Section 1 of the Defamation Act 1996. The Court was satisfied that the defendants were not the publishers of the posting within the meaning of Section 1(2) and 1(3) and that they could avail themselves of Section 1(1)(a). However, it held that the difficulties facing the defendants were contained in Section 1(1)(b) and 1(1)(c). After 17 January 1997, i.e., after receipt of the plaintiff's fax, the defendants knew of the defamatory posting but chose not to remove it from their Usenet news servers. In the view of Morland J, this placed the defendants in an insuperable difficulty such that they could not avail themselves of the defence provided by Section 1. In support of this reasoning, Morland J cited Lord Mackay L.C. during debate on the Defamation Bill[27] and also referred to the Consultation Document issued by the Lord Chancellor's Department in July 1995. In the Consultation Document it is said at paragraph 2.4:-

"The section 1 defence under the UK Defamation Act 1996 does not protect those who knew that the material they were handling was defamatory, or who ought to have known of its nature. The safeguard of the common law defence of innocent dissemination are preserved, so that the defence is not available to a defendant who knew that his act involved or contributed to publication defamatory of the plaintiff. It is available only if, having taken all reasonable care, the defendant had no reason to suspect that his act had that effect."

The defence of innocent dissemination has never provided an absolute immunity for distributors, however mechanical their contribution. It does not protect those who knew that the

material they were handling was defamatory, or who ought to have known of its nature. Those safeguards are preserved, so that the defence is not available to a defendant who knew that his act involved or contributed to publication defamatory of the plaintiff. It is available only if, having taken all reasonable care, the defendant had no reason to suspect that his act had that effect.

Having reviewed and distinguished the American authorities from the facts before the Court, Morland J. concluded that the defamatory posting was, in fact, published by the defendants. He held that as from 17 January 1997 they knew of the defamatory content of the posting and that they could not avail themselves of the protection provided by Section 1 of the Defamation Act 1996. Holding that "their defence under Section 1 is in law hopeless," he allowed the plaintiff's application to strike out the defence but indicated that, in his view, any award of damages to the plaintiff was likely to be very small. Demon Internet Ltd. threatened to appeal the decision but the matter was finally settled with ISP Demon paying the plaintiff £15,000 plus substantial costs. This judgment is the latest statement of British law on the question of cyber-libel and it confirms that ISPs in that jurisdiction cannot claim that they bear no responsibility for material held on their servers. The Demon case alarmed British ISPs and Web publishers. Within days of the settlement, British ISPs closed two websites.[28]

"Thus, Irish employers sued for defamation committed by employees may wish to consider the tactical merits of joining the ISP as a third party in such proceedings."

The Approach of the Irish Courts?

In Ireland there is no comparable provision to the section 1 defence available in Britain and, accordingly, the principles of the common law apply. These principles establish that a distributor of material with defamatory content may escape liability by showing that (a) it had no knowledge of the libel contained in the material disseminated; (b) there was nothing in the material or the context in which it was posted which led it to suppose that it contained any libel; and (c) that there was no negligence on its part in failing to obtain the requisite knowledge. It is arguable that an Irish court would adopt a similar approach to that of Morland J. in *Godfrey v Demon*. Thus, Irish employers sued for defamation committed by employees may wish to consider the tactical merits of joining the ISP as a third party in such proceedings.●

To be Continued

1. Mathiason, G. and Barrett, M. *The Electronic Workplace: Employment Law Implications and Solutions* (San Francisco, 1999).
2. Donal Musgrave, *Out of Line On-Line,* in The Examiner, 10 May 2000.
3. For an analysis of the courts' interpretation of this phrase, see McMahon & Binchy, *Irish Law of Torts* (2nd ed) at 755-761.
4. [1987] IRLR 289 (C.A.).
5. Apart from case law uncovered by on-line research, I am indebted to the work of Mathiason and Barrett on *The Electronic Workplace* (1999) for many of the United States case references.
6. 74 Fair Empl. Prac. Cas. (BNA) 876 (S.D.N.Y. 1997).
7. Tenn. 1995).
8. Chi. Daily L. Bull., Vol. 143, No. 230 (Nov. 24, 1997).
9. The privacy implications of such a monitoring system are considered in the second part of this article.
10. *Robinson v Jones* 4 LR Ir 39 (1979).
11. 69 ILTR 157.
12. [1939] 2 KB 827.
13. *Vanover v. Kansas City Life Ins.,* 1995 WL 442653 (N.D. 1995).
14. Reported at http://news.findlaw.com/crime/s/20000526/onlineanonymity.html.
15. 776 F. Supp. 135, 1991.
16. 23 Med. L.R. 1794 (SC, Nassau County, 1995).
17. Angus Hamilton, *Libel On-Line,* in PC Pro July 1999, 258.
18. *Zeran .v. America Online* [1997] 129 F3d 327
19. Reported in *The Washington Post,* 30 August 1997.
20. *Lunney v Prodigy,* United States Supreme Court, 1 May 2000.
21. [1998] WL 999836 (NYAD 2 Dept).
22. In 1994 Dr Laurence Godfrey, a former physicist at the German Electron Synchrotron Laboratory who was allegedly defamed by a notice in a Usenet group, achieved an out of court settlement. In April 1995, PC David Eggleton was similarly compensated by supermarket chain Asda over a description of him that was circulated between stores after he made a complaint about some meat. Asda staff had apparently suggested over the internal email system that the officer's complaint was fraudulent.
23. Per Lord Mackay L.C. Hansard. 2nd April 1996. Col 214 Defamation Bill (HL).
24. Angus Hamilton, *Libel On-Line,* in PC Pro July 1999, 259.
25. See note 21 above.
26. High Court, 26 March 1999. Morland J.
27. 2 April 1996 Hansard Col. 214.
28. Reported in *The Guardian* 4 May 2000 and *Sydney Morning Herald,* 4 May 2000.

WARNING

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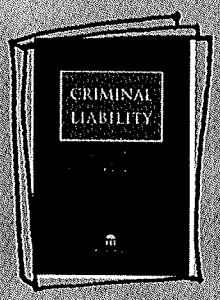

Criminal Liability

Finbarr McAuley and J Paul McCutcheon

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Judicial Review

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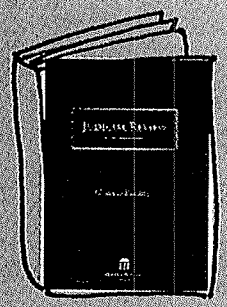

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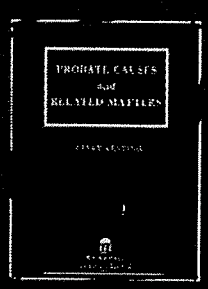

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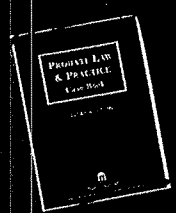

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Legal The BarReview Update

Journal of the Bar of Ireland. Volume 6, Issue 1

A directory of legislation, articles and written judgments received in the Law Library from 15 June 2000 to 18 August 2000.

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Administrative Law

Duffy v. Waterford Corporation
High Court:: **McGuinness J.**
21/07/99

Administrative; judicial review; *certiorari;* applicant sought order quashing decision of respondent to proceed with a scheme of 70 houses; housing development by corporation- planning authority- exempt from normal planning permission process under section 4 of the Act; however, corporation bound to follow procedure set out in Part X of the 1994 Regulations; corporation published a notice in a local newspaper and invited submissions; at a meeting oral presentations were accepted; in accordance with Regulations the City Engineer provided a report recommending amendments; corporation decided to proceed with scheme as presented in City Engineer's report; whether corporation ought to have re-advertised the scheme as amended and again allow for objections from members of public; whether corporation correctly carried out the statutory procedure laid down by the Regulations; whether proposed scheme in material contravention of the development plan; Local Government (Planning and Development) Act, 1963; Part X of the Local Government (Planning and Development) Regulations 1994 (S.I. No. 86 of 1994).
Held: Relief refused; corporation followed the proper statutory procedures in reaching its decision; proposed development not in material contravention of the development plan.

Orange Communications Ltd v. Director of Telecommunications Regulation
Supreme Court: **Keane C.J., Murphy J., Barron J.,** Murray J., **Geoghegan J.**
18/05/2000

Administrative; bias; unreasonableness; duty to give reasons; admission of evidence; appeal by plaintiff under s.111, Postal and Telecommunications Services Act, 1983 as amended by Reg. 4, European Communities (Mobile and Personal Communications) Regulations, 1996 (S.I. No. 123 of 1996) from decision of first defendant to refuse it a licence to operate a mobile telephone service; plaintiff and second defendant had bid for the licence; first defendant reached decision on basis of evalution report; evaluation report ranked second defendant ahead of plaintiff; first defendant decided to refuse to grant a licence to plaintiff; High Court set aside decision of first defendant on grounds of bias, unreasonableness and failure to supply adequate reasons, and remitted matter to first defendant; appeal by defendants and cross-appeal by plaintiff; scope of appeal under s.111; form of appeal; standard of review; bias; nature of objective bias; test for objective bias; whether manner in which procedure conducted can give rise to an inference of objective bias, even though there is no known factor consistent with the existence of bias motivating the decision-maker; distinction between breach of principles of natural justice and bias; duty to give reasons; scope of duty; source of duty; whether first defendant obliged to provide comparative reasons; whether applicant in a competitive tender process entitled to reasons unrelated to its own application; whether such an applicant entitled to sight of internal procedures of decision-maker; whether reasons given to plaintiff for first defendants decision adequate; admission of evidence in High Court; extent to which High Court entitled to admit evidence on the hearing of an appeal from a decision of first defendant; whether High Court incorrect in refusing to hear evidence relating to the unreasonableness argument; reasonableness; whether first defendant under obligation to adopt procedure used; whether procedure adopted fell short of requirements that it be open, non-discriminatory and transparent; onus of proof; whether tender documents unfair in that they failed to disclose in advance the weight that the first defendant would attribute to different elements of the bids; whether decision of first defendant unreasonable in any respect; Telecommunications (Miscellaneous Provisions) Act, 1996; European Communities (Telecommunications Licences) Regulations, 1998 (S.I. No. 96 of 1998); Commission Directive 90/388/EEC of the 28th June, 1990; Commission Directive 96/2/EEC of the 16th January, 1996; Commission Directive 97/13/EC of the 10th April, 1997
Held: Requirements of Directive as to appeal from decision of first defendant can be met by a form of judicial review, subject to qualification that leave need not be sought; plaintiff must show on balance of probabilities that, taking the adjudicative process as a whole, decision of first defendant vitiated by serious and significant error or series of such errors; bias is the existence of some factor that constitutes a set of circumstances from which a reasonable observer might conclude that there was a real possibility that such factor would cause the decision-maker to seek a particular decision or which might inhibit it from making its decision impartially and independently without regard to such factor; nature of objective bias is that courts set aside decision where there is a reasonable apprehension of bias, although there is no indication that decision-maker was in fact actuated by any bias; test is whether there is a reasonable apprehension or suspicion

that decision-maker may have been biased; court not entitled to infer from establishment of a number of errors in an impugned decision, or the process leading to the decision, that the decision itself was vitiated by bias; plaintiff failed to show that decision of first defendant was in any way tainted by bias; reasons given by first defendant were sufficient; onus on plaintiff to show decision unreasonable; tender documents could not be described as unfair because, if unfair to plaintiff they were equally unfair to second defendant; plaintiff failed to show that decision of first defendant was unreasonable in any respect; appeal allowed; cross-appeal dismissed.

Spin Communications Ltd t/a Storm FM v. Independent Radio and Television Commission
High Court: **Ó Caoimh J.**
08/06/2000

Judicial review; *certiorari;* bias; pre-judgment; fair procedures; application for youth oriented radio licence; applicant an unsuccessful applicant for licence; member of respondent had met with members of Garda National Drugs Unit concerning issue of drugs and dance music, and had raised concerns reported in the press regarding chairman of applicant; member of respondent had raised same concerns with chairman of respondent; whether reasonable apprehension of pre-judgment existed.
Held: Application refused.

Article

The separation of powers and grant of mandatory orders to enforce constitutional rights
Ruane, Blathna
5(8) 2000 BR 416

Library Acquisitions

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Administrative law
4th ed
London Sweet & Maxwell 1999
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M231.C5

Adoption

Article

Adoption law: the case for reform
Law Society's Law Reform Committee
2000 (June) GLSI 16

Agriculture

Statutory Instrument

National beef assurance scheme act, 2000 (commencement) order, 2000
SI 130/2000

Banking

Bank of Ireland v. D.H.
High Court: **Laffoy J.**
20/03/2000

Bankruptcy petition; substituted service; judgment had been given in favour of the petitioning creditor for a substantial sum; a bankruptcy summons had been issued and served; two orders for substituted service had been made and had not resulted in effective service; applicant seeking an order for the substitution for service of the notice of the bankruptcy petition by public advertisement; whether the court has jurisdiction to order the notice of the petition be given by public advertisement where the act of bankruptcy relied on is the failure to comply with a bankruptcy summons; whether notice by public advertisement should only be resorted to if the other modes outlined in the Rules of the Superior Courts have not proved feasible; whether in the circumstances, balancing the respective interests of the petitioning creditor and the debtor, it is just to permit notice of petition by public advertisement; ss. 7(1), 8(1), 11(1), 14(1), 14(2), 16, 17, Bankruptcy Act, 1988; O.76, r.11, r.14(1), r.25, r.38, Rules of the Superior Courts.
Held: Order granted.

Money Markets International Stockbrokers Limited (in liquidation), In re
High Court: **Laffoy J.**
23/05/00

Company; liquidation; winding-up order in existence in respect of the company; Official Liquidator sought directions of the court pursuant to s.280, Companies Act, 1963 on a number of difficulties encountered by him in the course of the winding-up; order of Laffoy J. made on 19th July, 1999 ordered that five issues be tried in accordance with the procedure specified in the order; first issue specified therein ('operation of offset') arising for consideration in present case; distribution of monies to the credit of the client bank account of MMI; evolution of final credit balance on the client money bank account involved lodgment of monies provided by clients and lodgment and retention of funds provided by MMI; Official Liquidator claiming entitlement pursuant to MMI's terms and conditions of trading or otherwise to recoup out of client funds sums due to MMI; whether effect of s.52(5)(a), Stock Exchange Act, 1995 was to ring-fence funds in client money bank account and preserve them for the client creditors who had provided them; whether third party/liquidator only had recourse or right to the sums in the client money bank account if there was a surplus after the 'proper claims' of the client creditors had been satisfied in full; whether that part of the clients' funds that was required to satisfy in full the clients' proper claims constituted trust funds and was held by MMI in a fiduciary capacity; whether notwithstanding that the evolution of the final credit balance on the client money bank account involved the lodgment of monies provided by clients and the lodgment and retention of monies provided by MMI the credit balance on the client money bank account was 'client's money' within the meaning of paragraph (a) of s.52(5), Stock Exchange Act, 1995, as amended; whether 'proper'in the context of 'proper claims' meant no more than that the client creditor's claim should be commensurate with the client creditor's beneficial interest in the funds in the account; whether sums due by MMI to client creditors should be the subject of a set-off where on the one hand the clients had given their authorisation to utilise their credit balances for the benefit of other clients for the purposes of such a set-off and on the other where a set-off had been utilised by the clients in respect of their own debits and credits; s.52, Stock Exchange Act, 1995; s. 78, Investor Compensation Act, 1998; s.17(1), Bankruptcy Act, 1988
Held: Order granted.

Article

The future regulation of the Irish banking and financial services industry
Breslin, John
2000 CLP 116

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Norton, Joseph J
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Charities

Article

Charity law in Ireland and Northern Ireland - registration and regulation
O'Halloran & Breen
2000 ILTR 6

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O'Halloran, Kerry
Charities law
Dublin Round Hall Ltd 2000
N215.C5

Children

D.H. (a minor) v. Ireland
High Court: **Kelly J.**
23/05/2000

Children; child care; duties of health board; detention; child receiving inadequate care and protection; applicant 16 years old; plaintiff a profoundly disturbed person, suffering from borderline personality disorder and conduct disorder together with dysthymia; plaintiff not suffering from mental illness as such; plaintiff in need of a high level of physical security and other supports; plaintiff being detained in St. Brigid's Hospital, Ardee; plaintiff seeking mandatory injunction compelling defendants to provide plaintiff with appropriate accommodation; whether order should be made that plaintiff be detained in Central Mental Hospital; whether Court should assume responsibility for a clinical decision concerning the admission, discharge or deferral of sick people; whether doctor may be required by the Court to adopt a particular course of treatment in relation to a child where the treatment is contrary to the doctor's clinical judgment; whether order should be made that plaintiff be detained in St. Brigid's Hospital; whether no order should be made; whether order should be made compelling Minister for Health and Children to provide appropriate facilities within 48 hours; obligation on health board under s.3, Child Care Act, 1991; Art. 40.3.1 of the Constitution.
Held: Permissive order made allowing health board to detain applicant for her own welfare at any facility that can be found, provided it meets with the approval of its consultant child psychiatrist; permissive order made allowing such medication to be administered to applicant as psychiatrists having clinical responsibility for her may deem appropriate; mandatory order made compelling health board to carry out, within three months, refurbishment to premises in St. Brigid's Hospital in order to make them suitable as a place for detention of the applicant; mandatory order made directing Minister to provide all necessary funding and supports to ensure this refurbishment is carried out.

Articles

Child protection and the European convention on human rights
Kilkelly, Dr Ursula
2000 (2) IFLJ 12

The domicile of children: towards a new basis
Power, Conor
2000 (2) IFLJ 21

The marginalised child
Levy, Allan
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The evidence of children
2nd ed
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M600.Q11

Statutory Instrument

Commission to inquire into child abuse act, 2000 (establishment day) order, 2000
SI 149/2000

Company Law

Framus Limited v. CRH plc
High Court: **O'Neill J.**
21/12/99

Company law; petition; restoration to the register; interpretation of s. 12(6), Companies (Amendment) Act, 1992; petitioner praying that Amantiss Enterprises Limited (the 'company') be restored to the register pursuant to s.12(6); the company had been incorporated in the State under the Companies Act, 1963; it ceased trading and was placed into voluntary liquidation; subsequent thereto it commenced proceedings with two other companies and claimed various reliefs against seven defendants; by a notice of motion the seventh named defendant sought inter alia an order striking out the company from the proceedings; Companies Office search carried out by seventh-named defendant subsequent to the commencement of the proceedings against the defendants revealed that second-named plaintiff had been dissolved for failure to make normal statutory returns to the Companies Office prior to it being placed in voluntary liquidation; petitioner sought restoration of the company to the register on the grounds that it had a valuable asset in the form of the proceedings against the defendants; petitioner explaining circumstances in which the company was struck off; whether the words of s. 12(6) 'the company shall be deemed to have continued in existence as if its name had not been struck off' had the effect of validating retrospectively all acts done in the name or on behalf of the company during the period between its dissolution and the restoration of its name to the register; whether the words 'and the court may by order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off' were expository qualifying the scope of the preceding general words; whether it would not be just that the company be restored to the register.
Held: relief claimed in petition granted.

Article

Section 60 of the companies act 1963
Cotter, Barbara
2000 CLP 111

Library Acquisition

Hawke, Neil
Corporate liability
London Sweet & Maxwell 2000
N261.Z45

Constitutional Law

Breathnach v. Ireland
High Court: **Quirke J.**
23/06/00

Constitutional; judicial review; right to vote; applicant convicted by Special Criminal Court of criminal offences and sentenced to various terms of imprisonment; applicant sought to exercise his right to vote; acknowledged by respondents that he had been unable to exercise his right to vote at local and national elections and referenda; State had given effect to certain provisions of the Electoral Act, 1992 enabling certain citizens prescribed by law to vote in local and national elections and in referenda by

way of postal ballot; applicant sought declaration against respondents that failure on the part of the State to provide for him, as a citizen of the State amongst the prison population, the necessary machinery to enable him to exercise his franchise to vote comprised a failure which unfairly discriminated against him and failed to vindicate the right conferred upon him by Article 40.1, Constitution of Ireland 1937 to be held equal before the law and failed to vindicate the right conferred upon him by article 14 of the European Convention on Human Rights to vote without discrimination by reason of his status; applicant sought further an order of mandamus directing respondents to provide appropriate legislative machinery to enable himself and others in lawful detention within the State and capable of voting to exercise their right to vote at both national and local elections and in national referenda; whether citizens who are lawfully detained within the prison population enjoy a constitutional right to vote at Dáil elections and whether any legislation enacted by the Legislature is currently in force which purports to remove or limit that right; whether legislative provision has been expressly made by the Oireachtas for the registration as 'electors' of citizens who are in lawful detention within the prison population of the State; whether the State is acting lawfully in preventing the applicant from exercising his constitutional right to vote in elections or referenda; whether the constitutionally protected right claimed by the applicant depends on the continuance of his personal liberty and imposes unreasonable demands on the place where the applicant is imprisoned; whether the failure by the respondents to provide for the applicant a means of voting by post or by some other convenient means comprises a failure which unfairly discriminates against the applicant having regard to the provisions of Article 40.1 of the Constitution; Article 16.1, Article 40.1 Constitution of Ireland 1937; ss. 8, 11, 14, 17, Part XIII, Electoral Act, 1992.
Held: Declaration sought by applicant made.

M. v. M.
High Court: **O'Higgins J.**
04/06/1999

Proceeds of Crime Act, 1996; constitutionality; whether appointment of receiver prevented the making of a freezing order; whether Act had extra-territorial effect; whether circumstances in which Act was passed have consequence that presumption of constitutionality attached to Act is less strong; whether proceedings under the Act are civil or criminal in nature; whether forfeiture of property infringes right to private property; whether respondents prejudiced by delay between making of interim order and hearing of interlocutory action; whether principle of res judicata prevents the respondents from reapplying to have the interlocutory order varied or discharged; whether hearsay evidence should be admissible in the interlocutory hearing given that it is not an ordinary interlocutory hearing in that there is no requirement for undertaking in damages and the substantive case would not be heard for seven years; whether the standard of proof required under the Act is balance of probabilities; whether shifting of onus of proof from applicant to respondent is unconstitutional; whether respondent entitled to statement of claim and discovery to inform him of case being made against him and case he has to answer; whether Act is overbroad; whether Act is excessively vague; whether Act is unconstitutional in that it requires the court to carry out executive functions.
Held: Constitutionality of Proceeds of Crime, Act 1996 upheld; respondents in possession of money which constituted directly or indirectly the proceeds of crime.

Article

The separation of powers and grant of mandatory orders to enforce constitutional rights
Ruane, Blathna
5(8) 2000 BR 416

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Whelan, Noel
Politics, elections and the law
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Statutory Instrument

Equal status act, 2000 (section 47) (commencement) order, 2000
SI 168/2000

Consumer Law

Library Acquisition

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Consumer law and practice
5th ed
London Sweet & Maxwell 1999
N284

Contract

Colthurst v. Colthurst
High Court: **McCracken J.**
07/01/2000

Contract; misrepresentation; settlement of proceedings; plaintiff seeks recision of settlement and an Order setting aside the court Order made on foot of it; plaintiff claims inducement to enter into settlement due to misrepresentation made by defendant's counsel to plaintiff's counsel in course of negotiations; whether there was a representation of fact; whether that representation was untrue; whether plaintiff was induced to enter into the settlement by reason of the representation.
Held: A representation of an existing fact was made to the plaintiff; plaintiff failed to discharge onus of showing that the representation was untrue and that he was induced to enter into the settlement by reason of the representation.

Jodifern Limited v. Fitzgerald
Supreme Court: Hamilton C.J., **Keane J.**, Murphy J., **Barron J., Murray J.**
21/12/99

Contract; specific performance; plaintiff's appeal from Order of High Court that proceedings be struck out in the exercise of the inherent jurisdiction of the court; proposed sale of farm; two contracts of sale headed "subject to contract/contract denied" furnished by defendants' solicitor to plaintiff's agent's solicitor accompanied by letter which stated that agreements were not to come into effect until both solicitors had agreed that that should happen; both agreements executed by the respective solicitors; further correspondence ensued between solicitors; all of the letters forming part of this correspondence emanating from defendants' solicitor headed 'subject to contract/contract denied'; defendants' solicitor indicated that his clients were not prepared to proceed with the transaction and returned plaintiff's deposit; plaintiff sought specific performance; whether letter and subsequent correspondence between the solicitors could be construed as negating the existence of a concluded contract; whether the case could not possibly succeed or involved a frivolous or vexatious claim and was an abuse of the process of the court.
Held: Appeal allowed.

Sunreed Investment Ltd v. Gill
High Court: **Finnegan J.**
03/06/2000

Contract; land; practice and procedure; application to strike out; specific performance; time of the essence; time for completion; contract for the purchase and sale of land; contract to be completed 'not later than 12.00' on a particular date; defendant purported to terminate contract at 12.11 p.m.; plaintiff's representatives attended at offices of defendant's solicitors at 12.25 p.m. with a view to completing; whether time for completion must be construed against plaintiff; whether plaintiff could not have been entitled to some indulgence in relation to time; whether defendant was in position to give vacant possession; whether plaintiff's claim for specific performance should be struck out.
Held: Application refused.

Zuphen v. Kelly Technical Services (Ireland) Ltd
High Court: **Murphy J.**
24/05/2000

Contract; termination; frustration; employment; defendants employed plaintiffs in order to provide workers to a third party, pursuant to a contract with the third party; third party terminated its arrangement with defendants, with the result that defendants were unable to provide work for plaintiffs; whether contracts of employment between plaintiffs and defendants frustrated; nature of frustration; whether appropriate to apply strict contract law approach to employment disputes.
Held: Contracts not frustrated.

Articles

Agreement on a deposit as an essential term in a contract for the sale of land: a note on Shirley Engineering Limited v. Irish Telecommunications plc
Stack, Siobhan
2000 CPLJI 6

Litigating for the Pepsi generation
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15th ed / by Simon Thorley et al
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Coroners

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Coroners: practice and procedure
Dublin Round Hall Sweet & Maxwell 2000
L254.C5

Criminal Law

Director of Public Prosecutions v. Arthurs
High Court: **O'Neill J.**
21/12/99

Criminal; case stated; accused allegedly committed assault on 27th October, 1995; accused arrested on that day; pursuant to warrant issued by judge of the District Court accused was rearrested in August 1996 and charged; accused brought before District Court in October, 1996 and elected to be tried summarily; case listed for hearing in April 1997; numerous adjournments followed; case came on in January 1998; accused objected to it being heard on grounds of excessive delay and applied for dismissal; whether District judge was correct in law in finding: that in the summary proceedings a period of some two years and three months from the date of the alleged offence to the date of the hearing was not a delay that of itself amounted to injustice and therefore prejudice, that accused would get a fair trial and would not be prejudiced notwithstanding the fact that the entire evidence was based on recollection of events some two years and three months previously, that there was no delay by the Gardai in the prosecution of the case from the date of the offence to the date of the warrant in June 1996, that the explanation given by the State for the failure to get a hearing date amounted to an explanation to the District judge's satisfaction for any delay and did not prejudice the accused; whether having regard to the fact that the offence was one which could have been tried on indictment that the appropriate time scale against which to judge delay was the time normally taken for trials on indictment in the Circuit Court to come on for hearing; whether accused had suffered or was likely to suffer either actual prejudice or whether the delay itself was of such an excessive degree as to give rise to a necessary inference that there was a real risk of the accused being prejudiced in his defence; whether there was an unwarranted invasion of the accused's constitutional right to an expeditious trial; whether test to determine whether such invasion had occurred was the risk of prejudice to the accused in the conduct of his defence or the unconscionable nature of the delay or the causes of that delay having regard to an appropriate time scale in relation to the trial of summary proceedings
Held: Delay from time of offence to trial was inordinate and excessive, but was not such that it gave rise to a necessary inference that the trial would be unfair by reason of frailty of recollection of the witnesses. Failure by State to make adequate provision for the expeditious conduct of cases in the District Court and thus causing the delay was an unwarranted invasion of the accused's constitutional right to an expeditious trial. District judge was not correct in law in finding that the application for a dismissal of the case on the grounds of delay ought to be refused.

Director of Public Prosecutions v. Rice
High Court: **Kelly J.**
22/11/99

Criminal; delay; first-named respondent applied to dismiss an appeal by way of case stated brought before the High Court by the Director of Public Prosecutions (the 'appellant') on the grounds that there hadn been excessive delay in its prosecution; first-named respondent had been involved in an altercation with a police officer in January, 1995; summary proceedings were

commenced against him; case was subsequently dismissed by a judge on the merits in November, 1995; subsequently the appellant served a notice requiring a case to be stated; judge concerned signed the case stated in April 1999 and forwarded it to Chief State Solicitor's Office in that same month; case stated was filed in the Central Office of the High Court and listed for mention in May, 1999; whether there had been undue delay in the proceedings; whether the respondent's constitutional right to a trial in due course of law would possibly be jeopardised if the case stated were entertained.
Held: Case stated stayed.

Director of Public Prosecutions v. Smith
The Court of Criminal Appeal: **Barron J.**
22/11/99

Criminal; appellant sought liberty to appeal against convictions upon one count of sexual assault and two counts of rape and against sentences imposed therefor; appellant had been arrested following complaint to Gardai and had made an incriminating statement whilst in custody; appellant alleged assault by Gardai in order to compel him to make statement and breaches of the provisions of the Treatment of Persons in Custody in Garda Siochana Stations Regulations 1987; whether statement should be admitted into evidence; whether adequate evidence to support trial judge's finding that statement was voluntary and that appellant was in a fit state to be interviewed; whether material that statement did not recall the time at which interview commenced and the time at which it finished; whether fact that appellant had been questioned by more than two Gardai in the course of the interview was sufficient to exclude statement; whether trial judge gave adequate consideration to the mental disorder of the appellant induced by alcohol abuse.
Held: Leave to appeal against convictions refused. Last six years of term of twelve years' imprisonment suspended pursuant to certain conditions.

Manson v. District Judge O'Donnell
High Court: **Kinlen J.**
27/01/00

Judicial review; road traffic offences; natural and constitutional justice; prohibition; discovery; applicant had been charged with drunken driving and dangerous driving contrary to the law; applicant had made submissions in relation to the alcolyser, breathalyser and other equipment used in relation to the charge against him; applicant had sought full details of the use of calibration, approval, certification and testing history and origin of the apparatus used for the purposes of the defence of the charge; first named respondent had not directed the second named respondent to have present before him witnesses from the third named respondent to deal with the issues raised by the applicant; applicant seeking an order of prohibition preventing the first named respondent from dealing with the charges against him without allowing the applicant to obtain information on discovery from the third named respondent; applicant seeking an order of discovery against the third named respondent directing it to provide the information sought for the defence of the applicant of the charge against him; whether the applicants had delayed in bringing the proceedings; whether there is a presumption in favour of the legality of the apparatus; whether the High Court should interfere with the jurisdiction of the first named respondent to consider all the evidence before him; ss.49(1), 49(3) and 53, Road Traffic Act, 1961; s.12(1), Road Traffic Act, 1994.
Held: Reliefs denied.

P.P. v. Director of Public Prosecutions
High Court: **Geoghegan J.**
05/10/99

Criminal; judicial review; application brought pursuant to leave granted for judicial review in form of an order of prohibition prohibiting respondent from proceeding with prosecution of the applicant on charges of gross indecency and indecent assault alleged to have occurred in 1977; complainant reported alleged offences to Gardai in 1995; applicant arrested in 1998; whether order of prohibition or injunction appropriate remedy; whether trial could be prevented on basis that too long a time had elapsed since date of the alleged offences; whether applicant inhibited from reporting to Gardai; whether there was real and actual prejudice of a kind which would prevent the applicant having a fair trial; whether there was unjustifiable delay on the part of the prosecuting authorities.
Held: Injunction granted against DPP.

Article

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SI 166/2000

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Statutory Instrument

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SI 129/2000

Employment

Howard v. University College Cork
High Court: **O'Donovan J**
25/7/00

Employment; termination; restraint of dismissal; interlocutory injunction; allegation of impropriety made against plaintiff; plaintiff issued proceedings seeking injunctive relief against possible dismissal from her position as head of department; plaintiff seeking interlocutory injunction; whether fair issue to be tried that plaintiff in employment of defendant; whether fair issue to be tried that principles of natural and constitutional justice applied to any dismissal of plaintiff from her position; whether fair issue to be tried with regard to investigation of complaints by defendant; whether plaintiff would be adequately compensated by an award of damages; potential for damage to plaintiff's reputation; balance of convenience; whether if injunction were granted defendant would suffer irreparable harm.
Held: Interlocutory injunction granted.

Tobin v. Chairman of the Board of Management of Mayfield Community School
High Court: **Kearns J.**
21/03/2000

Employment; judicial review; termination of employment; *certiorari; mandamus*; applicant had been employed by the respondent as a teacher; applicant's employment had been terminated by the respondent; applicant seeking *inter alia* an order of *certiorari* quashing the decision purporting to dismiss him and an order of *mandamus* compelling the respondent to reinstate him; whether relief should be refused on grounds of the delay of the applicant; whether the applicant was employed by the first named respondent; whether the respondents in dismissing the applicant had breached the principles of natural and constitutional justice; whether the applicant has established the threshold of unreasonableness and irrationality of the decision to dismiss.
Held: Order of *certiorari* granted; order of mandamus refused.

Philpott v. Ó Gilvy & Mather Ltd
High Court: **Murphy J.**
21/03/2000

Employment; termination of employment; injunction; plaintiff had been employed by the defendant as Creative Director; plaintiff had been dismissed from his employment; plaintiff seeking *inter alia* an injunction restraining the defendant from giving effect to the purported dismissal of the plaintiff and a mandatory injunction requiring the defendant to pay his salary as it falls due; whether the plaintiff had been denied a contractual right to notice; whether injunctive relief is the appropriate remedy for such denial; whether the plaintiff had been denied natural justice in the manner in which he was dismissed; whether the plaintiff is entitled to injunctive relief although he had not claimed damages for wrongful dismissal; whether the defendants had made allegations of misconduct against the plaintiff.
Held: Relief denied.

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SI 146/2000

Environmental Law

De Búrca v. Wicklow County Council
High Court: **Ó Caoimh J.**
24/05/2000

Environmental; waste disposal; judicial review; mandamus; respondent ceased collection of household refuse within its functional area; applicant seeking interlocutory order to compel respondent to resume collection; whether applicant raised fair issue to be tried that respondent in breach of its obligations under s.33, Waste Management Act, 1996; whether balance of convenience in favour of applicant.
Held: As applicant failed to demonstrate that she personally has been deprived of a waste collection service, balance of convenience favours respondent; interlocutory relief refused.

Ní Éilí v. Environmental Protection Agency
Supreme Court: Hamilton C.J., Denham J., Barrington J., Keane J., **Murphy J.**
30/07/1999

Environmental; waste management; integrated pollution control (IPC) licence; judicial review; defendant had granted IPC licence to notice party; notice party subsequently applied for licence permitting use of a hazardous waste incinerator; defendant gave notice of its proposed determination of a review of the IPC licence; defendant convened oral hearing under hearing officer to deal with objections to proposed determination; defendant decided to grant revised licence to notice party; applicant seeking judicial review of decision; whether decision to grant licence unreasonable; whether applicant entitled to make case that is not one of the express grounds of appeal; whether defendant acted ultra vires in granting licence before precise details of incinerator to be used in altered process had been submitted; whether defendant in breach of duty to provide reasons for proposed determination or decision; extent of reasons required; whether adoption of report of hearing officer sufficient compliance with duty to provide reasons; whether High Court entitled to refuse to permit cross-examination of deponents; whether High Court correct to refuse to permit introduction in evidence of report not referred to in proceedings before hearing officer; ss.3, 5, and 83, and Pt. IV, Environmental Protection Agency Act, 1992; Arts. 10 and 28, Environmental Protection Agency (Licensing) Regulations, 1994 (S.I. No. 85 of 1994).
Held: Appeal dismissed; judgment for defendant.

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Family Law

K. v. K.
High Court: **Murphy J.**
13/03/00

Family; judicial separation; periodical payment order; property adjustment order; Judicial Separation and Family Law Reform, Act 1989; Family Law, Act 1995.
Held: Decree of Judicial Separation granted; further orders granted.

P.O'D v. J.O'D.
High Court, **Budd J.**
31/03/00

Family; judicial separation; applicant wife sought decree of judicial separation and orders in respect of maintenance, ancillary financial orders and property adjustment orders; contest in respect of assets of husband; husband's assets held in his own name and under various aliases which he allegedly used to conceal the extent of his property assets; conflict as to the contribution which the wife made to the accumulation of the property portfolio; whether husband deliberately concealing extent of his property portfolio; whether applicant played a real part in in the building-up of the property portfolio; whether applicant entitled to an order for costs on a solicitor and client basis against the respondent; whether respondent was in breach of mareva injunction made against him in respect of bank accounts; whether respondent involved in property transactions abroad; whether order should be made in respect of taking of evidence abroad in order to allow applicant's advisors to pursue inquiry abroad with regard to respondent's assets; whether there should be a property adjustment order leaving applicant with half share of the property portfolio.
Held: Order of judicial separation granted.

Articles

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2000 (2) IFLJ 21

"To live apart or not to live apart": that is the divorce question
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SI 156/2000

Horse mackerel (restriction on fishing) order, 2000
SI 140/2000

Monkfish (restriction on fishing) (no.5) order, 2000
SI 157/2000

Monkfish (restriction on fishing)(no.6) order, 2000
SI 158/2000

Garda Siochana

O'Connell v. Minister for Finance
High Court: **Murphy J.**
08/06/2000

Garda compensation; damages; assessment of damages; plaintiff sustained injuries in course of duty; plaintiff no longer capable of performing former duties; plaintiff had psychological antipathy to light, non-confrontational duties; plaintiff retired from force by Commissioner.
Held: Special damages of £39,700 and general damages of £35,000 awarded.

Statutory Instruments

Garda Siochana (admissions and appointments) (amendment) regulations, 2000
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SI 139/2000

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SI 162/2000

Human Rights

Article

Child protection and the European convention on human rights
Kilkelly, Ursula
2000 (2) IFLJ 12

Irish libel law and the European Convention on Human Rights
Leonard, Patrick
5(8) 2000 BR 410

Information Technology

Article

Developments in electronic Irish legal information
Aston, Jennefer
5(8) BR 453

Injunctions

Wright v. The Board of Management of Gorey Community School
High Court: **O'Sullivan J.**
28/03/2000

Interlocutory injunction; plaintiffs suspended from school pending investigation into allegations of misconduct; plaintiffs have commenced proceedings claiming, inter alia, a declaration that unfair proceedings were adopted against them by the defendant which involved a breach of their constitutional right to education; plaintiffs seek an interlocutory injunction providing for their immediate reinstatement in school until the trial of their action; whether criteria for the granting of an

interlocutory injunction have been satisfied.
Held: Interlocutory injunction refused.

Insurance

Article

The MIBI agreement and the directive on motor insurance
Moorhead, Sara
5(8) 2000 BR 450

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Smith, John
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Joyce, Barbara
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Leonard, Patrick
5(8) 2000 BR 410

Licensing

Article

Intoxicating liquor bill, 2000: a commentary
Cassidy, Constance
5(8) 2000 BR 423

Local Government

Statutory Instrument

Fingal county council (Howth) special amenity area order (confirmation) order, 2000
SI 133/2000

Pensions

Statutory Instrument

Superannuation (designation of approved organisations) regulations, 2000
SI 119/2000

Planning

Carty Construction v. Fingal County Council
Supreme Court: **Keane J.**, Murphy J., Lynch J.
05/02/99

Planning; planning permission; outline permission; application for outline permission refused because of inadequate water and sewage facilities; on appeal, Minister for Local Government, in whom the appellate functions under the legislation then vested, granted outline permission subject *inter alia* to condition that applicants make financial contribution towards the council's expenditure on the provision of public water supply and sewage facilities; application for full permission refused; on appeal to An Bord Pleanala permission granted with condition identical to that contained in earlier grant of outline permission by minister; clear that Board felt constrained by Minister's earlier decision to grant permission sought; application to council for building bye law approval refused; further application two years later for bye law approval made and granted by Council; whether Council acted wrongly and in abuse of statutory powers in refusing the original application for building bye law approval; whether letter constituted consent of Corporation to circumstances which removed obstacle to grant of bye law approval; whether decision to refuse bye law approval could be impugned because it prohibited a development which had been the subject of a grant of permission; whether council in dealing with application for bye law approval were acting under a different, distinct statutory code.
Held: Appeal dismissed; grant of permission by Board did not of itself authorise the appellants to proceed with the development; obligation to obtain building bye law approval remained; application had to be determined by council under a distinct statutory scheme.

De Faoite v An Bord Pleanala
High Court:**Laffoy J.**
2/5/00

Planning; leave to apply for judicial review; substantial grounds; planning permission had been granted on appeal by respondent to developer; applicant had made submissions before respondent and now applies for leave to apply for judicial review seeking to quash decision of respondent; whether applicant had substantial grounds for claiming that there should be amenity space for sporting activities in the interest of orderly development; whether applicant had substantial grounds for contending decision should be quashed on ground that developer had resiled from an agreement to donate a site and £20,000 to applicant in return for the latter withdrawing its objections; whether applicant had substantial grounds for contending that the proposed development was out of character with existing development; whether there was sufficient evidence before respondent to support its decision.
S. 82 (3A) Local Government (Planning and Development) Act, 1963, as amended.
Held: Leave refused; evidence went to show that site was private property; private contractual arrangement not appropriate for judicial review; evidence did not go to show that respondent had no evidence before it to support its decision.

O'Connor v. Dublin Corporation
High Court: **Kelly J.**
26/05/2000

Planning; judicial review; leave to apply for judicial review; practice and procedure; time limits; planning permission granted by An Bord Pleanala to notice party subject to conditions; certain conditions required proposals to be made to and agreed to by respondent; respondent made two orders agreeing to the proposals; following an ex parte

hearing, High Court granted applicant leave to apply for judicial review of the orders; respondent seeking to have order granting leave set aside; whether the orders of the respondent were 'decisions' within meaning of s.82, Local Government (Planning and Development) Act, 1963, as amended by s.19(3), Local Government (Planning and Development) Act, 1992; whether application for leave should have been made on notice and within two months of the making of the orders.
Held: Application dismissed.

Springview Management Company Limited v. Cavan Developments Limited
High Court: **O'Higgins J.** *(ex tempore)*
29/09/99

Planning; judicial review; locus standi; application for leave to seek judicial review by way of certiorari in relation to planning decision; applicant complained of defects in site notice, positioning of same, other matters concerning site notice itself and non-compliance with planning permission; whether planning permission the proper subject of the judicial review proceedings; whether prejudice accrued to applicant or any members of the applicant company by virtue of any defects in the notice; whether plans available for public inspection during requisite period; whether requirement that date be in site notice; whether site notice would have alerted any vigilant or interested party as to what was being contemplated; whether the notice was fixed in a conspicuous position on or near the main entrance to the land from the public road as required by Article 16, Local Government (Planning and Development) Regulations, 1994; whether applicant had shown there to be a substantial and arguable case to be tried; whether applicant had locus standi; whether fact that company was formed after event complained of could be taken into consideration in deciding whether or not it has locus standi; whether the company had a property right or public interest right in the matter.
Held: Application dismissed. Applicant did not have locus standi. Applicant failed to show substantial grounds for judicial review on the merits of the case.

Practice & Procedure

Gannon v. Flynn
High Court: **Laffoy J.**
11/05/2000

Costs; taxation; costs of objections; judicial review; *certiorari;* applicant was defendant in plenary proceedings in High Court; High Court awarded costs against applicant; plaintiff in plenary action presented bill of costs for taxation; respondent made certain allowances in favour of plaintiff to which applicant objected under O.99 r.38(1), Rules of the Superior Courts; respondent disallowed all the objections; respondent awarded costs in respect of the objections against applicant; applicant instituted review under O.99 r.38(3); applicant seeking judicial review of decision of respondent; whether respondent had jurisdiction under s.27(6), Courts and Court Officers Act, 1995, to award costs of the objections; whether applicant precluded from seeking judicial review pending review under O.99 r.38(3); nature of taxation process.
Held: Judicial review not precluded by review under O.99 r.38(3); respondent acted without jurisdiction; order of *certiorari* granted.

Ni Eili v. The Environmental Protection Agency
Supreme Court: **Hamilton C.J.**, Denham J., Barrington J., Keane J., Murphy J.
21/1/00

Costs; costs awarded by trial judge against plaintiff; whether award by High Court should be set aside; whether there should be costs awarded in respect of the appeal hearing; whether appellant should be awarded costs under the Attorney General's scheme.
Held: No order made as to costs in Supreme Court; High Court order awarding costs to the respondent and notice party set aside; no order as to costs of High Court; application under the Attorney General's scheme refused.

Dunne v. E.S.B.
High Court: **Laffoy J.**
19/10/1999

Practice and procedure; dismissal for want of prosecution; inherent jurisdiction of the court; abuse of process; inordinate and inexcusable delay; plenary summons issued, appearance entered, statement of claim delivered, defence delivered, notice for particulars served and replied to, affidavits of discovery sworn; however, then neither side took action for $4\frac{1}{2}$ years until a new firm of solicitors sent notice of change of solicitor on behalf of the plaintiff to the defendant's solicitor; whether defendant prejudiced by delay; whether there is a substantial risk that it is not possible to have a fair trial because of the delay; whether there was anything in the conduct of the defendant which militates against granting the relief sought; whether plaintiff's claim statute barred.
Held: Defendant's application refused; on the facts the balance of justice lay in favour of proceeding with the case; proceedings concern dispute in relation to property rights which has hung over parties for almost a quarter of a century and which must be resolved sooner or later.

Fields v. Woodland Products Ltd.
Supreme Court: **Keane J.**, Murphy J., Barron J.
16/07/1999

Practice and procedure; discovery; personal injury; plaintiff seeks damages from defendant for continuing loss of earnings; plaintiff furnished defendant with accounts purporting to show the plaintiff's earnings for the relevant years; plaintiff asserted that an accountant had submitted them to the Revenue and that they had been agreed by an inspector on behalf of the Revenue as correctly representing the plaintiff's earnings for the years in question; whether defendant can have discovery of plaintiff's tax returns for each of the years in question.
Held: Order granted.

Hughes v. Moy Contractors Ltd
High Court: **Carroll J.** *(ex tempore)*
29/07/1999

Practice and procedure; application to dismiss plaintiff's claim for want of prosecution; delay of nine years between cause of action and delivery of statement of claim; whether defendants have discharged onus of establishing inordinate and inexcusable delay; whether the case should proceed having regard to the balance of justice.
Held: Order granted.

Ryan v. Connolly
High Court: **Kelly J.**
29/02/2000

Practice and procedure; Statute of Limitations; estoppel; plaintiff had been injured in a road traffic accident on 24/04/95 and arising out of that accident he commenced proceedings against the defendants on 11/12/98; defendants had included a plea to the effect that the proceedings were statute barred; plaintiffs had claimed that the defendants were estopped from raising the plea; trial of a preliminary issue had been directed as to whether the plaintiff's claim was statute barred; whether the correspondence exchanged between the parties solicitors is protected by privilege; whether it would be inequitable to allow the defendants to plead the statute of limitations as against

the plaintiff; whether the plaintiff's legal advisors had inferred from the correspondence that the statute would not be pleaded against them; whether it was reasonable for the plaintiff's legal advisors to so infer from the correspondence; s.11(2)(b), Statute of Limitations Act, 1957.
Held: It was not now open to the defendants to rely upon the Statute of Limitations as a defence

Silverstone Designs Ltd v. Ryan
High Court: **Smyth J.**
28/02/2000

Practice and procedure; review of judgment; case stated; at the hearing of the Circuit Appeal judgment had been pronounced against the defendants; at no stage of the proceedings was a request made for a case stated; defendant seeking *inter alia* an order reviewing the judgment and an order stating a case to the Supreme Court; whether the order made correctly and accurately recorded the decision as pronounced in court; whether it is correct to rehear or consider new matters visited during the course of the trial; whether the court had an inherent jurisdiction to hear the motion; whether a case should be stated after judgment.
Held: Application to appeal dismissed.

Village Residents Association Limited v. An Bord Pleanala
High Court: **Laffoy J.**
23/03/00

Practice and procedure; jurisdiction; security for costs; second-named respondent seeking order pursuant to s.390, Companies Act, 1963 that applicant should provide security for second-named respondent's costs in opposing the proceedings; applicant seeking *inter alia* both pre-emptive costs order against any other party to the proceedings as may arise or for the reserved costs of any such party as had arisen to date and order directing that it shall not have to furnish security for costs of any other party to the proceedings; whether court has jurisdiction to make a pre-emptive costs order; whether possibility of making such orders should be confined to cases involving public interest challenges; whether applicant should be required to give second-named respondent security for costs; whether applicant has established special circumstances such that court should decline to make an order for security for costs in favour of second-named respondent; whether an order should be made in relation to the reserved costs of the previous stage of the proceedings; section 14, Courts (Supplemental Provisions) Act, 1961; O. 99 r. 1(1) and (3)-(4), r. 5, Rules of the Superior Courts 1986.
Held: Order for security on application of the second-named respondent. Applicant's application dismissed.

Article

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Property

Moran v. Orchanda Ltd
High Court: **McCracken J.**
25/05/2000

Land; contract; recission; conditions of sale; plaintiff agreed to purchase and defendant agreed to sell certain licensed premises; defendant recklessly overstated turnover of business; defendant seeking to rescind contract, in reliance on special condition that permitted recission where vendor could not satisfy purchaser with regard to any matter relating to planning permission, licensing, or title (or any other matter); plaintiff seeking specific performance with abatement of purchase price, in reliance on a general condition that provided for purchaser to be compensated by the vendor for any mis-statements made by the vendor; whether defendant entitled to rely on the special condition when in default; whether plaintiff entitled to rely on the general condition; calculation of abatement.
Held: Specific performance ordered with abatement of £110,000.

Shirley Engineering Ltd. v. Irish Telecommunications Investment PLC
High Court: **Geoghegan J.**
02/12/1999

Land; contract; action for damages for breach of alleged contract for sale of land; whether there was a concluded agreement between the parties; whether the use of the words "subject to contract" in oral conversation must be construed as meaning that there is no binding agreement until a written contract is signed.
Held: Action dismissed; in considering whether the agreement arrived at between the parties is conditional on a written contract being entered into, the court must assess all the evidence and look at all the surrounding circumstances and the entire context in which an expression such as "subject to contract" is used.

Article

Agreement on a deposit as an essential term in a contract for the sale of land: a note on Shirley Engineering Limited v. Irish Telecommunications plc
Stack, Siobhan
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Social Welfare

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SI 101/2000

Social welfare (consolidated supplementary welfare allowance) (amendment) regulations, 2000
SI 102/2000

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SI 103/2000

Social welfare (consolidated payments provisions) (amendment) 9no.3) (carers) regulations, 2000
SI 106/2000

Social welfare (occupational injuries) (amendment) regulations, 2000
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SI 122/2000

Sports

Article

Seville 2000 sport and the law
O'Boyle, Conal
2000 (June) GLSI 26

Succession

Bank of Ireland v. Gaynor
High Court: **Macken J.**
29/06/99

Succession; interpretation; case arose out of two settlements: viz., deed of settlement executed by the settlor in 1919 and settlement created by the settlor's will made in 1926; probate of the will was granted in 1927; plaintiffs were successors to original trustees appointed pursuant to 1919 settlement and to the trustees originally appointed pursuant to the will of the deceased settlor; plaintiffs seeking court's directions as to the appropriate interpretation of certain provisions arising in respect of both settlements and the answers to a series of questions posed in the special summons issued and served in the matter; by 1919 deed of settlement settlor irrevocably settled certain property subject to a trust or trusts declared in the settlement with various limitations; will provided for certain funds and property to be held by trustees for certain individuals; whether primary trusts created by 1919 deed of settlement failed wholly or partly upon the death of the settlor's son without issue; whether the primary trusts created by the deed of settlement failed upon the death of the settlor's son's wife; if the previous question was answered in the affirmative where the beneficial entitlement lay to the property the subject matter of the trust created by the deed settlement; whether upon the death of the settlor's son's wife the trust property fell to be distributed in accordance with the terms of the respective marriage settlements of some or of all four daughters of the deceased settlor; if the previous question was decided in the affirmative, which of the marriage settlements applied; whether the trusts were void in the events which had happened or by reason of the terms thereof by reason of uncertainty of objects; whether the trusts were void in the events which had happened or otherwise for offending against the rule against perpetuities; whether if the trusts were void for uncertainty of objects or as offending against the rule against perpetuities or otherwise the trust fund was to be held by the trustees upon a resulting trust for the estate of the settlor; whether if the answer to the previous question was in the affirmative the trust fund formed part of the residuary estate of the deceased settlor; whether the proceeds of the fund, referred to in the will as the 'son's fund'fell into the residuary estate of the testator; whether the funds, the subject matter of the fund referred to in the will as 'the widow's fund' fell into the residuary estate of the testator; whether the proceeds of sale of the property at Ballybrado fell into the residuary estate of the testator; who became entitled to residuary estate of the testator; whether the estate of one of testator's daughters had any interest in the residuary estate of the testator; whether the residuary estate of the testator fell to be distributed between the estates of two of the daughters of the testator; whether the residuary estate fell to be distributed to the remoter issue of one of the testator's daughters; whether the trusts created in respect of the residuary estate of the testator failed by reason of uncertainty of objects or offending against the rule against perpetuities or otherwise; whether if the trusts in relation to the residuary estate failed the testator died partially intestate; whether if the testator died partially intestate his real property passed to his only son as his heir-at-law.
Held: Application successful. If any matter arose requiring further consideration, court would hear submissions.

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Taxation

Criminal Assets Bureau v. Kelly
High Court: **O'Sullivan J.**
13/04/2000

Revenue; illegal earnings; charge to tax; assessment; appeals; Criminal Assets Bureau; constitutional; *locus standi*; defendant's assets subject to freezing order under s.2, Proceeds of Crime Act, 1996; plaintiff issued assessments to tax; defendant made return but failed to make payment of tax admitted to be due; plaintiff informed defendant that time for appeal against assessment had accordingly expired; plaintiff seeking judgment for tax and interest; whether illegal earnings are chargeable to tax under s.58, Taxes Consolidation Act, 1997; whether assessment to tax made in accordance with s.58 or s.922, Act of 1997; whether defendant was required to pay tax admittedly due before appeal to Appeal Commissioners will lie; whether defendant has *locus standi* to challenge constitutionality of provisions of Criminal Assets Bureau Act, 1996, Proceeds of Crime Act, 1996, and the Act of 1997; whether defendant was prevented by freezing order from paying tax admittedly due and therefore from appealing against assessment; whether defendant could have applied to discharge freezing order; whether distinction could be drawn for purposes of such an application between income from unlicensed street trading and income from drug-dealing; whether defendant could have made application under s.6, Proceeds of Crime Act, 1996, to High Court to discharge freezing order to extent necessary to allow him to pay "necessary expenses"; whether payment of tax admittedly due a "necessary expense"; ss.933(1)(b) and 957(2)(a) Act of 1997.
Held: Illegal earnings chargeable to tax under s.58(2); assessment to tax made in accordance with s.922, Act of 1997; defendant lacked locus standi to bring constitutional challenge, having failed to avail himself of procedures that would have allowed him to appeal against the

assessment.
O'Shea (Inspector of Taxes) v. Colle Parkview Sevice Station Ltd
High Court: **McCracken J.**
25/05/2000

Revenue; VAT; repayment; input credit; transfer of a business; respondent sold garage premises together with plant used to carry on business of filling station; Appeal Commissioner held respondent entitled to be repaid VAT in respect of sale; whether sale amounted to transfer of ownership of goods in connection with transfer of a business; whether agreement for sale of a business necessary for there to be a transfer of a business; whether Appeal Commissioner wrong in finding no transfer of a business; s.3(5)(b)(iii) and 12(1)(a)(i) Value Added Tax Act, 1972
Held: Decision of Appeal Commissioner upheld.

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AT A GLANCE

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Information compiled by Damien Grenham, Law Library, Four Courts.

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[DEC 1999/355, 1999/516][DIR 2000/23]

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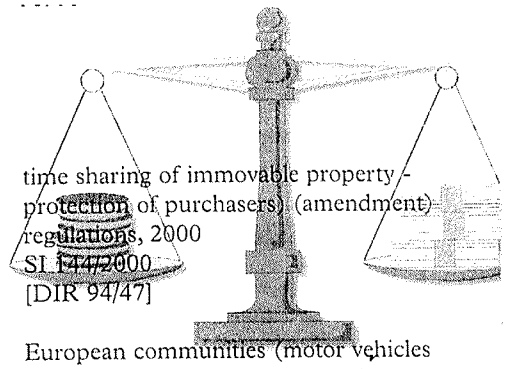
[DIR 94/47]



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[DIR 96/29][DIR 90/641]

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C-388/95 Kingdom of Belgium & Ors V Kingdom of Spain & Ors
Court of Justice of the European Communities
Judgement delivered 16/5/2000
(Article 34 of the EEC Treaty (now, after amendment, Article 29 EC)-Regulation(EEC)No 823/87-Quality wines produced in a specified region-Designations of origin-Obligation to bottle in the region of production-Justification-Consequences of an earlier judgement giving a preliminary ruling-Article 5 of EC Treaty (now Article 10 EC))

C-384/97 Commission of the European Communities V Hellenic Republic
Court of Justice of the European Communities
Judgement delivered 25/5/2000
(Failure of a Member State to fulfil its obligations-Water pollution-Obligation to adopt programmes in order to reduce pollution caused by certain dangerous substances-failure to transpose Directive 76/464/EEC)

C-38/98 Regie Nationale des Usines Renault SA v Maxicar Spa & Orazio Formento
Court of Justice of the European Communities
Judgement delivered 11/5/2000
(Brussels Convention-Enforcement of judgements-Intellectual property rights relating to vehicle body parts-Public policy)

C-301/98 KVS International BV V Minister van Landbouw, Natuurbeheer en Visserij,
Court of Justice of the European Communities
Judgement delivered 18/5/2000
(Agriculture-Animal health in the veterinary sector in intra-Community trade in and imports of deep-frozen semen of domestic animals of the bovine species-Certification of bovine semen intended for export to a Member State-Directives 88/407/EEC AND 93/60/EEC-Scope ratione temporis)

C-45/99 Commission of the European Communities V French Republic
Court of Justice of the European Communities
Judgement delivered 18/5/2000
(Failure to fulfil obligations-Failure to transpose Directive 94/33/EC)

C-50/99 Podesta V Caisse de Retraite par repartition des Ingenieurs Cadres & Assimiles (CRICA) & Ors
Court of Justice of the European Communities
Judgement delivered 25/5/2000
(Social policy-Equal pay for men and women-Private, inter-occupational, supplementary retirement pension scheme based on defined contributions and run on a 'pay-as-you-go' basis-Survivors' pensions for which the age conditions for grant vary according to sex)

Acts of the Oireachtas 2000

Information compiled by Damien Grenham, Law Library, Four Courts.

1/2000 Comhairle Act, 2000
Signed 02/03/2000

2/2000 National Beef Assurance Scheme Act, 2000
Signed 15/03/2000
SI 130/2000 = (Commencement)

3/2000 Finance Act, 2000
Signed 23/03/2000

4/2000 Social Welfare Act, 2000
Signed 29/03/2000

5/2000 National Minimum Wage *Act,2000*
Signed 31/03/2000
SI 95/2000 / SI 201/2000 = (Rate Of Pay)
SI96/2000 = (Commencement)SI 99/2000 = (Courses/Training)

6/2000 Local Government (Financial Provisions) Act, 2000
Signed 20/04/2000

7/2000 Commission To Inquire Into Child Abuse Act, 2000
Signed 26/04/2000
SI 149/2000 = *(Establishment Day)*

8/2000 Equal Status Act, 2000
Signed 26/04/2000
SI 168/2000 (Section 47 Commencement)

9/2000 Human Rights Commission Act, 2000
Signed 31/05/2000

10/2000 Mulilateral Investment Guarantee Agency (Amendment) Act, 2000
Signed 07/06/2000

11/2000 Criminal Justice (UnitedNations Convention Against Torture) Act, 2000
Signed 14/06/2000

12/2000 International Development Association (Amendment) Act, 2000
Signed 20/06/2000

13/2000 Statute Of Limitations (Amendment) Act 2000
Signed 21/06/2000

14/2000 Merchant Shipping (Investigation Of Marine Casualities) Act, 2000
Signed 27/06/2000

15/2000 Courts (Supplemental Provisions) (Amendment) Act, 2000
Signed 28/06/2000

16/2000 Criminal Justice (Safety Of United Nations Workers) Act, 2000
Signed 28/06/2000

17/2000 Intoxicating Liquor Act, 2000
Signed 30/06/2000
SI 207/2000
(Commencement Other Than S's 15, 17 & 27 (S27 = 02/10/00))

18/2000 Town Renewal Act, 2000
Signed 04/07/2000
SI 226/2000 (Commencement)

19/2000 Finance (No.2) Act, 2000
Signed 05/07/2000

20/2000 Firearms (Firearm Certificates For Non-Residents) Act, 2000
Signed 05/07/2000

21/2000 Harbours(Amendment) Act, 2000
Signed 05/07/2000

22/2000 Education (Welfare) Act, 2000
Signed 05/07/2000

23/2000 Hospitals' Trust (1940) Limited (Payements To Former Employees) Act, 2000
Signed 08/07/2000

24/2000 Medical Practitioners (Amendment) Act, 2000
Signed 08/07/2000

25/2000 Local Government Act, 2000
Signed 08/07/2000

26/2000 Gas (Amendment) Act, 2000
Signed 10/07/2000

27/2000 Electronic Commerce Act, 2000
Signed 10/07/2000

28/2000 Copyright And Related Rights Act, 2000
Signed 10/07/2000

Bills in progress

Information compiled by Damien Grenham, Law Library, Four Courts.

Activity centres (young persons' water safety) bill, 1998
2nd stage - Dail **[p.m.b.]**

Aer Lingus bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Aviation regulation bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Broadcasting bill, 1999
Committee - Dail

Cement (repeal of enactments) bill, 1999
Committee - Dail *(Initiated in Seanad)* (resumed)

Censorship of publications (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Children bill, 1999
Committee - Dail

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

Companies (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**
Companies (amendment) (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Company law enforcement bill, 2000
1st stage - Dail

Containment of nuclear weapons bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Control of wildlife hunting & shooting (non-residents firearm certificates) bill, 1998
2nd stage - Dail **[p.m.b]**

Courts bill, 2000
1st stage -Dail

Criminal justice (illicit traffic by sea) bill, 2000
1st stage - Dail

Criminal justice (theft and fraud offences) bill, 2000
1st stage -Dail

Criminal law (rape)(sexual experience of complainant) bill, 1998
2nd stage - Dail **[p.m.b.]**

Customs & excise (mutual assistance) bill, 2000
1st stage - Dail

Eighteenth amendment of the Constitution bill, 1997
2nd stage - Dail **[p.m.b.]**

Electoral (amendment) (donations to parties and candidates) bill, 2000
2nd stage - Dail **[p.m.b.]** (resumed)

Employment rights protection bill, 1997
2nd stage - Dail **[p.m.b.]**

Energy conservation bill, 1998
2nd stage ñ Dail **[p.m.b.]**

Equal status bill, 1998
2nd stage - Dail **[p.m.b]**

Family law bill, 1998
2nd stage - Seanad

Fisheries (amendment) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Health (miscellaneous provisions) bill, 2000
1st stage - Dail

Health (miscellaneous provisions) (no.2) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Health insurance (amendment) bill, 2000
1st stage - Dail

Harbours (amendment) bill, 2000
Committee - Seanad

Home purchasers (anti-gazumping) bill, 1999
1st stage - Seanad

Human rights bill, 1998
2nd stage - Dail **[p.m.b.]**

Illegal immigrants (trafficking) bill, 1999
Committee - Seanad *(Initiated in Dail)*

Industrial designs bill, 2000
1st stage - Dail

Industrial relations (amendment) bill,2000
2nd stage - Dail *(Initiated in Seanad)*

Insurance bill, 1999
Committee - Dail

Irish nationality and citizenship bill, 1999
Committee - Dail *(Initiated in Seanad)*

Landlord and tenant (ground rent abolition) bill, 2000
2nd stage - Dail **[p.m.b.]**

Licensed premises (opening hours) bill, 1999
2nd stage - Dail **[p.m.b.]**

Local government bill, Local government (no.2) bill, 2000
2nd stage - Seanad *(Initiated in Dail)*

Local Government (planning and development) (amendment) bill, 1999
Committee - Dail

Local Government (planning and development) (amendment) (No.2) bill, 1999
2nd stage - Seanad

Local government (Sligo) bill, 2000
1st stage -Dail

Mental health bill, 1999
Committee - Dail

National pensions reserve fund bill, 2000
1st stage - Dail

National treasury management agency (amendment) bill, 2000
1st stage - Dail

Nitrigin eireann teoranta bill, 2000
1st stage - Dail
Official secrets reform bill, 2000
2nd stage - Dail **[p.m.b.]**

Organic food and farming targets bill, 2000
2nd stage - Dail **[p.m.b]**

Partnership for peace (consultative plebiscite) bill, 1999
2nd stage - Dail **[p.m.b.]**

Patents (amendment) bill, 1999
2nd stage - Dail

Planning and Development bill, 1999
Report - Dail *(Initiated in Seanad)*

Prevention of corruption (amendment) bill, 1999
1st stage - Dail

Prevention of corruption (amendment) bill, 2000
2nd stage - Dail

Prevention of corruption bill, 2000
2nd stage - Dail **[p.m.b.]**

Private security services bill, 1999
2nd stage- Dail **[p.m.b.]**

Proceeds of crime (amendment) bill, 1999
2nd stage - Dail

Prohibition of ticket touts bill, 1998
Committee - Dail **[p.m.b.]**

Protection of children (hague convention) bill, 1998
2nd stage - Seanad *(Initiated in Dail)*

Protection of patients and doctors in training bill, 1999
2nd stage - Dail **[p.m.b.]**

Protection of workers (shops)(no.2) bill, 1997
2nd stage - Seanad

Public representatives (provision of tax clearance certificates) bill, 2000
2nd stage - Dail **[p.m.b.]**

Radiological protection (amendment) bill, 1998
Committee- Dail *(Initiated in Seanad)*

Refugee (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Registration of lobbyists bill, 1999
1st stage - Seanad

Registration of lobbyists (no.2) bill 1999
2nd stage - Dail **[p.m.b.]**

Regulation of assisted human reproduction bill, 1999
1st stage - Seanad **[p.m.b.]**

Road traffic (Joyriding) bill, 2000
2nd stage - Dail **[p.m.b.]**

Road traffic reduction bill, 1998
2nd stage - Dail **[p.m.b.]**

Safety health and welfare at work (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Safety of united nations personnel & punishment of offenders bill, 1999
2nd stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1997
1st stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1998
1st stage - Seanad **[p.m.b.]**

Sea pollution (amendment) bill, 1998
Committee - Dail

Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000
1st stage - Dail

Sex offenders bill, 2000
Committee - Dail

Shannon river council bill, 1998
Committee - Seanad

Solicitors (amendment) bill, 1998
Committee - Dail **[p.m.b.]**
(Initiated in Seanad)

Standards in public office bill, 2000
1st stage - Dail

Statute law (restatement) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

Statute of limitations (amendment) bill, 1999
2nd stage - Dail [p.m.b.]

Succession bill, 2000
2nd stage - Dail **[p.m.b.]**

Teaching council bill, 2000
1st stage - Dail
Telecommunications (infrastructure) bill, 1999
1st stage - Seanad

Tobacco (health promotion and protection) (amendment) bill, 1999
Committee -Dail **[p.m.b.]**
Trade union recognition bill, 1999
1st stage - Seanad

Tribunals of inquiry (evidence)(amendment)(no.2) bill, 1998
2nd stage - Dail **[p.m.b.]**

Trinity college, Dublin and the University of Dublin (charters and letters patent amendment) bill, 1997
Report - Seanad **[p.m.b.]**

Twentieth amendment of the Constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty-first amendment of the constitution (no.2) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.3) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.5) bill, 1999
2nd stage - Dail **[p.m.b]**

Udaras na gaeltachta (amendment)(no.3) bill, 1999
Report - Dail

UNESCO national commission bill, 1999
2nd stage - Dail **[p.m.b.]**

Valuation bill, 2000
1st stage - Dail

Whistleblowers protection bill, 1999
Committee - Dail

Wildlife (amendment) bill, 1999
Committee - Dail (Resumed)

Youth work bill, 2000
1st stage - Dail

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(NB) Must have 'adobe'software which can be downloaded free of charge from internet

ABBREVIATIONS

BR =	Bar Review
CIILP =	Contemporary Issues in Irish Politics
CLP =	Commercial Law Practitioner
DULJ =	Dublin University Law Journal
GLSI =	Gazette law Society of Ireland
IBL =	Irish Business Law
ICLJ =	Irish Criminal Law Journal
ICLR =	Irish Competition Law Reports
ICPLJ =	Irish Conveyancing & Property Law Journal
IFLR =	Irish Family Law Reports
IILR =	Irish Insurance Law Review
IIPR =	Irish Intellectual Property Review
IJ =	Irish Jurist
IJEL =	Irish Journal of European Law
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

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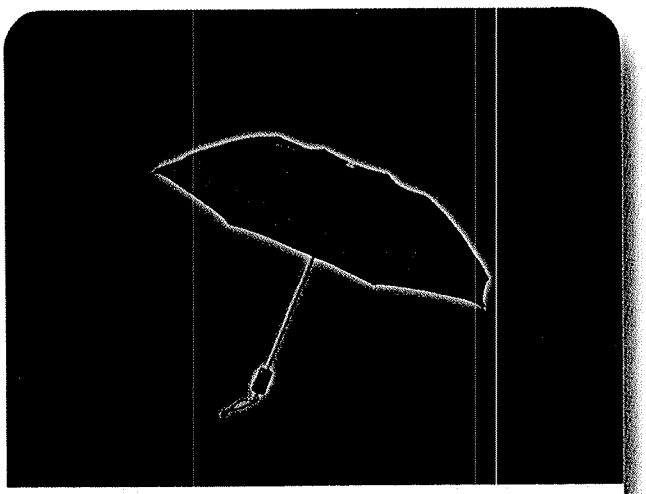

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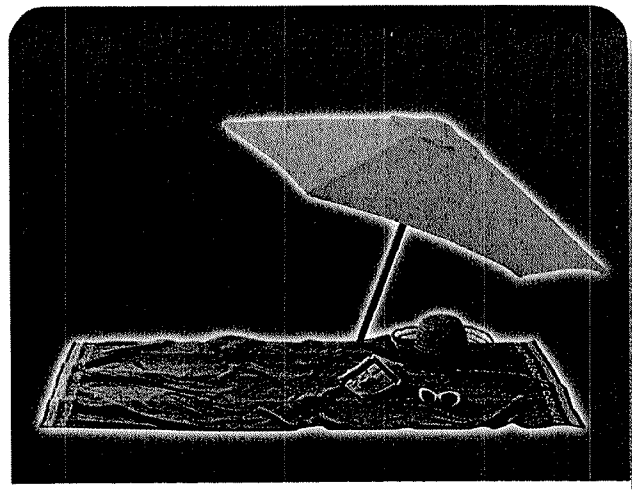

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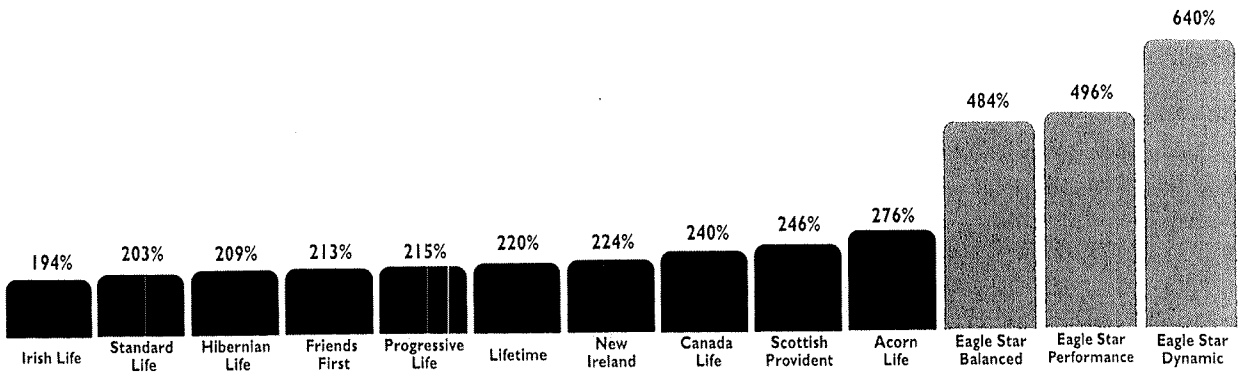

INDIVIDUAL MANAGED PENSION FUNDS TEN YEAR PERFORMANCE %

Source: MoneyMate and individual companies. All figures and copy relate to individual pension managed growth and aggressively managed sectors. Returns based on offer/offer performance from 1/11/89 - 1/11/99 and do not relate to premiums paid into a policy. Unit values may be expected to fall as well as rise. Past performance is not always an indication of future returns which are dependent on future investment conditions.

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OCIAL AND AFFORDABLE ?

***James Macken SC** considers the implications of the Supreme Court decision on Part V of the Planning and Development Act 2000*

Introduction

On 28 August 2000, the Supreme Court decided that "none of the provisions of Part V of the Planning and Development Bill 1999 are repugnant to the Constitution." In doing so, the Court cleared the way for the implementation of the most radical initiative in planning and development law since the enactment of the Local Government (Planning & Development) Act 1963. Planning authorities now have power to require that up to 20% of land comprised in applications for residential development can be set aside for social and affordable housing and transferred to the Planning Authority itself or its nominees. The justification for allowing local authorities to exact such a large measure of planning gain from developments involves a combination of two radical arguments, namely :

1. When making a decision to grant planning permission to a landowner or a developer the planning authority is exercising its regulatory function in such a manner as to enhance the value of the land for which permission is granted and should therefore be entitled to reclaim for the benefit of the public a proportion of that enhanced value; and
2. That, in any event, when acquiring land for the public good the State and its emanations are not obliged to pay full market value as compensation for such acquisition and may elect to pay considerably less where circumstances justify it.

As the judgment of the Supreme Court acknowledges "it is accepted on behalf of the State that the use of planning legislation, which has traditionally been concerned with the orderly and beneficial planning and development of the physical environment, for a purely social objective of this nature is novel and even radical."

While the Supreme Court does make an effort to limit the scope of this latter argument or justification by pointing out that "there can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property," it goes on to hold that special considerations may apply which limit this entitlement. Such special considerations apply to the present housing crisis and the efforts of the government to resolve it through the mechanism proposed in the Planning and Development Act 2000.

In this article, I propose to give a brief outline of the controversial measures included in Part V of the Planning Act, to deal with the arguments advanced in the Supreme Court and to consider the judgment itself before making some comments by way of conclusion. My focus will be on the broad policy issues involved rather than the specifics of the operation of the legislation.

Housing Supply

Part V of the Planning and Development Act 2000, which was referred to the Supreme Court by the President on 30 June 2000, bears the heading "Housing Supply" and comprises sections 93 to 101 of the Act. These sections set out a series of detailed provisions requiring a planning authority to formulate and adopt a housing strategy and to take steps through the performance of its functions as a planning authority to implement that housing strategy. As the judgment of the Supreme Court acknowledges "it is accepted on behalf of the State that the use of planning legislation, which has traditionally been concerned with the orderly and beneficial planning and development of the physical environment, for a purely social objective of this nature is novel and even radical."

Under sections 94 and 95 of the Act, the housing strategy of each local authority must be

prepared within a period of nine months from the commencement of Part V of the Act and must be included in the Development Plan by way of variation of existing plans or adoption of new plans shortly thereafter. Under section 94, the purpose of the housing strategy is to provide "for the housing of the existing and future population of the area taking into account the existing and likely future need for housing" and to provide for three social objectives, as follows :

1. The need to ensure that housing is available for persons who have different levels of income;
2. The need to ensure that a mixture of house types and sizes is developed to match the requirements of the different categories of households including in particular the elderly and persons with disabilities; and
3. The need to counteract undue segregation in housing between persons of different social backgrounds.

The scope of these broad social objectives is increased further by reason of the fact that the planning authority has to take account in preparing its housing strategy not only of those persons entitled to social housing or accommodation under the Housing Acts 1966 to 1992 but also those in need of affordable housing.

A housing strategy "shall provide that as a general policy a specified percentage, not being more than 20%, of the lands zoned for residential use, or for a mixture of residential and other uses, shall be reserved under this part for the provision of" social and affordable housing. The percentage may vary from area to area and from county to county. For example, where an area has already a great deal of social housing, there may be no specified percentage; where the demand for housing is low, the percentage may be low.

Once the housing strategy is in place and incorporated in the development plan, the provisions of Section 96 apply to any application for planning permission for the development of houses or "where an application relates to a mixture of developments, to that part of the application which relates to the development of houses." Thus, in addition to its powers to impose conditions requiring the provision of open spaces, landscaping, roads, services or restrictions on the development or use of adjoining land, the planning authority (or, on appeal, An Bord Pleanala) will have the power to impose as a condition on the granting of planning permission that an applicant for permission or any other person having an interest in the land must enter into an agreement providing for the development for social and affordable housing of a percentage of the lands concerned.[1] Such a required agreement may be for any of the following types of transfer :

(a) for the transfer of the land required by the Agreement to be reserved for the provision of social and affordable housing to the Planning Authority ;

(b) the transfer of completed houses either through the Authority itself or to persons nominated by it ; or

(c) the transfer of serviced sites.

The Arguments in the Supreme Court

The core of the objection to the constitutionality of the Bill put forward by Counsel assigned by the Court centred on the fact that the basic price of land to be transferred to the local authority whether on its own or in conjunction with a completed house or a serviced site is, under section 96 (6) (b), "the value of the land calculated by reference to its existing use on the date of the transfer of ownership of the land to the planning authority concerned on the basis that on that date it would have been, and would thereafter have continued to be, unlawful to carry out any development in relation to that land other than exempted development."

There are saving provisions built into the Act to mitigate its effect on persons who bought land at high prices prior to 25 August 1999 (the date of the publication of the Planning and Development Bill 1999), who inherited land and were obliged to pay inheritance tax on the land on the basis of a value higher than that set out above, or on mortgagees in possession who had advanced monies on the lands on the basis of a higher value. The purchaser or mortgagee in possession will be entitled to the price paid for the land plus interest, and the market value at the valuation date for CAT purposes will be paid to the person receiving a gift or inheritance.

"A housing strategy 'shall provide that as a general policy a specified percentage, not being more than 20%, of the lands zoned for residential use, or for a mixture of residential and other uses, shall be reserved under this part for the provision of' social and affordable housing."

However, this provision clearly means that land which is residentially zoned whether before or after the passing of the Act or the adoption of the housing strategy as part of the development plan is, for the purposes of its acquisition under Section 96 of the Planning and Development Act 2000, to be treated as if it has no development value. It may have a use as a car park or as agricultural land or as waste land and the planning authority will have to pay that value, but it will have no *"hope value"* as referred to in *Re Deansrath Investments Ltd.*[2] Clearly this is a substantial discount on the market value that the land would have if sold with the benefit of residential zoning. For this reason, those who argued against the constitutionality of the Bill characterised the effects of this aspect of the scheme as a measure of expropriation with virtually no compensation and therefore an unjust attack on property rights. They also pointed

to various inequities and inequalities in the provisions of Part V as constituting invidious discrimination.

The defenders of the Bill accepted that there would be a substantial difference in the compensation payable in respect of lands subject to the Bill. However, together with the written submissions and authorities in favour of the constitutionality of the Bill, they lodged a book of reports comprising an extract from the third Bacon Report and various other documents and statistics in relation to housing and the price of housing collected, collated and published by the Government over a number of years. In their submission, the argument on the constitutionality of the Bill required that regard be had to the seriousness of the present housing crisis and the government's assertion that radical action was required in order to tackle it.

"One of the most interesting aspects of this case is that it illustrates the distance which we have travelled since the first introduction of a generalised system of planning control in the State in 1963."

Not only was there a serious deficit in the amount of public and social housing available for those in need of it, but the spiralling cost of houses was in danger of putting home ownership beyond the reach of a large number of people who historically could have expected to be able to buy their own home.

The defenders of the Bill went on to point out that not only was action to tackle this problem necessary and urgently required, but that the primary objectives of the policy were matters of social justice and the common good. They emphasised the importance of the objective of social intergration and asserted that the scheme proposed by the Bill would be the best and most effective way of achieving that aim. In their submission, the Court should be slow to interfere with the discretion or "margin of appreciation" allowed to Government in the achievement of such social objectives through economic means.

In addition it was argued that, since the presumption of constitutionality applied to Bills as well as to Acts of the Oireachtas, the onus was on the opponents of the Bill to demonstrate clearly that the provisions of the Bill were repugnant to the Constitution. The provisions of the *"double construction"* rule, namely that it is only where no constitutional construction of a Statute can be placed on its terms that a Statute is to be interpreted as operating or likely to operate unconstitutionally, also applied. As the Supreme Court put it in *Tormey -v- Ireland* [3]:-

> "This means that where two constructions of a provision are open in the light of the Constitution as a whole, despite apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth and harmonious operation of the Constitution. A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution."

Ultimately, both sides accepted that in order to be held to be unconstitutional the Bill would have to be shown to fail the test of proportionality adopted by Costello P. in *Daly -v- The Revenue Commissioners* [4] and *Heaney -v- Ireland* [5] as approved by *Keane J. in Iarnrod Eireann -v- Ireland*, expressed as follows:-

> "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; and (c) be such that their effects on rights are proportional to the objective." [6]

The enhanced value of land

One of the most interesting aspects of this case is that it illustrates the distance which we have travelled since the first introduction of a generalised system of planning control in the State in 1963. At the time, planning control was seen as a restriction on the rights of property owners to develop their land in the interests of the common good. The making of a plan which provided objectives for the development of land in certain ways in different areas was seen as negatively affecting other areas which were excluded from such objectives. As Mr. Justice Kenny said in *The Central Dublin Development Association -v- The Attorney General*:-

> "A plan of development for each city and town is necessary for the common good, someone must prepare it, and a Planning Authority who have staff trained in this work seem to me to be the best persons to do it.....The making of a plan will necessarily decrease the value of some property but I do not think that the Constitution requires that compensation should be paid for this as it is not an unjust attack on property rights." [7]

On the other hand, the provisions providing for compensation for the refusal of planning permission for development were an integral part of the Planning Act of 1963. However, planning authorities, never having been provided with the necessary funds to pay compensation, and limited since the abolition of domestic rates in their ability to incur expediture not directly sanctioned and funded by central government, would often go to extraordinary lengths to avoid paying compensation. Subsequently, in the Local Government (Planning & Development) Act 1990, the circumstances under which compensation need not be paid for the refusal of planning permission for development of land were greatly extended. Some 10 years later the State argues in the course of the Planning Bill reference to the Supreme Court that by zoning property for development it is enhancing the value of the property and is entitled therefore to reclaim a certain part of that enhanced value in the form of the transfer of a percentage of the land for which planning permission is granted. Reliance in this regard was placed on *Dreher-v-The Irish Land Commission*,[8] a case where the owner of agricultural land acquired by the Land Commission was paid in land bonds

whose value fluctuated sometimes above and sometimes below the market value of the lands, and on *O'Callaghan -v- The Commissioner of Public Works,*[9] a case involving an injunction to restrain interference with a national monument, namely the stone age fort at Loughshinney in County Dublin.
The argument of the State was summarised at page 41 of the Judgment of the Chief Justice:-

> "It was submitted that.....it was essential to bear in mind that the Bill, in providing for the payment of compensation at a level which would be admittedly lower than the market value of the relevant portion of the land as would normally be determined on a compulsory acquisition, was doing no more than requiring the landowner, if he wished to develop the land, to surrender some part of the enhanced value of his property which had resulted from the operation of a planning regime intended for the benefit of the community as a whole. Thus the impugned provisions operated only where a person applied for permission to develop the land and related at most to 20% of the land. Even in relation to that portion, there was no question of the applicant not being compensated: instead he was compensated at a level which left out of account some of the enhanced value of the land resulting from its being zoned for residential use."

This far-reaching proposition reflects the popular perception of the planning process and in particular of decisions to "rezone" land. It also reflects how far we have come in our acceptance of the planning process that we should regard, as counsel in support of the Bill put it, "the essential value of the land" to be the unzoned value of land without any potential for development. This proposition can hardly have a sound foundation in economic principle, since it ignores the fact that areas of land may be zoned for development but will never be developed in the absence of demand, as for example was the case of large areas of western County Dublin for many years in the 1980s and early 1990s. It may seem, in this period of high demand, to be a pragmatic approach to the realities of the market place, but it offends against the principle that the planning process should, so far as the authorities involved are concerned, be the disinterested performance of a function concerned with the proper planning and development of the area and not the effect of that function on the value of land. Part V gives the planning authority a share of that "enhanced value."

The Decision

The judgment of the Supreme Court appears to accept this proposition in the circumstances of the crisis outlined and the social objectives sought to be achieved. The Court begins by reaffirming the importance of the general principle of compensation at market value for the compulsory acquisition of property:

> "In considering the application of these principles (the principle of proportionality) to Part V of the Bill, it is important to bear in mind that, where the property of the citizen is compulsorily acquired by the State or one of its agencies for what are deemed by the legislature to be important social objectives, it has in general been recognised that he or she is entitled to at least the market value of the property so taken as constituting a fair compensation for the invasion of its property rights. However, that this generally recognised right, although unquestionably of importance, is not absolute was made clear in two decisions of this Court."

The Court then goes on to discuss *Dreher-v-The Irish Land Commission* and *O'Callaghan-v-The Commissioners of Public Works.* Having discussed those two cases, the Court then restates the general principle of compensation at market value in the following passage:-

> "There can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property. As Walsh J. in *Dreher* pointed out, even that may not be a sufficient measure of compensation in some cases: hence the additional elements of compensation payable in compulsory acquisition of land effected under the Land Clauses Consolidation Act as determined under the Assessment of Lands (Acquisition of Compensation) Act 1919 as subsequently amended, by virtue of which the landowner is to be compensated, not merely for the market value of his land, but also for such additional elements of damage to him as disturbance, injurious affection and severence."

"The ramifications of the court's acceptance that (a) the State is entitled to the benefit of a substantial discount on the market value of property it acquires if it has, through a licencing authority, had a role in enhancing the value of the property, and (b) that the planning system has the effect of enhancing the "essential value" of land and thus conferring a benefit on the owner, cannot be confined to the particular scheme enshrined in Part V of the Planning and Development Act 2000 - it clearly has implications for all regulatory or licencing systems."

However, the Court goes on to say that "there are special considerations applicable in the case of restrictions on the use of land imposed under planning legislation." Every person who acquires or inherits land takes it subject to any restrictions which the general law of planning imposes on the use of property in the public interest. The open market value of land, as the Supreme Court stated in *Pine Valley Developments-v-Minister for the Environment,*[10] may be depreciated or enchanced by planning decisions :

"In the present case, as a condition of obtaining a planning permission for the development of lands for residential purposes, the owner may be required to cede some part of the enhanced value of the land deriving both from its zoning for residential purposes and the grant of permission, in order to meet what is considered by the Oireachtas to be a desirable social objective, namely the provision of affordable housing and housing for persons in the special categories and of integrated housing. Applying the test proposed by Costello J. in *Heaney v Ireland* and subsequently endorsed by this Court, the Court in the case of the present Bill is satisfied that this scheme passes those tests. They are rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right and, given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which, in a free and democratic society, should be regarded as pressing and substantial. At the same time, the Court is satisfied that they impair those rights as little as possible and that their effects on those rights are proportionate to the objectives sought to be attained."

Commentary

There is no doubt that Part V of the Planning and Development Act 2000 and the judgment of the Supreme Court represent a significant development in the law. It has implications not only for planning law but for the whole area of compensation for the compulsory acquisition of land and the regulation of economic activity and property rights. The ramifications of the Court's acceptance that (a) the State is entitled to the benefit of a substantial discount on the market value of property it acquires if it has, through a licencing authority, had a role in enhancing the value of the property, and (b) that the planning system has the effect of enhancing the "essential value" of land and thus conferring a benefit on the owner, cannot be confined to the particular scheme enshrined in Part V of the Planning and Development Act 2000 - it clearly has implications for all regulatory or licencing systems.

On the development front alone, the implications are significant. There are, as we all know, many aspects of the national infrastructure that need to be renewed and developed as a matter or urgency: roads, waste and wastewater treatment, schools, hospitals, etcetera. It can surely be argued that they all represent legitimate economic and social objectives for the government to pursue. The cost of funding projects to meet such needs and particularly the cost of land acquisition is likely to be significant. Indeed, the mounting cost of land acquisition for roads development, such as the completion of the C ring motorway around Dublin, is said to be a subject of great concern to the government. Will the next move be to find some way of amending the general law of compensation for compulsory purchase so as to provide for a discount on market value in the interests of the common good?

Given that it was not within the remit of the Supreme Court to ask the government to justify why it wishes to fund social and affordable housing by means of a levy on landowners, at a time when State funds would not appear to be under any discernable stress, and the Supreme Court has held that the government must be given a margin of appreciation in the choice of measures it adopts in the furtherance of social and economic policies, is it not difficult to see such an initiative being held to be unconstitutional as being an unjust attack on property rights ? ●

1. Section 96 does not specifically limit the amount of the land to be the subject of an agreement to the percentage set out in the development plan objective for the area. However, the judgment of the Supreme Court seems to assume that the maximum amount of land that could be required to be subject to a section 96 agreement is 20% and repeats this so often that the only constitutional interpretation of the section could well be that 20% of the land is the maximum that can be the subject of an agreement.

2. *In re Deansrath Investments Ltd* [1974] IR 228

3. *Tormey -v- Ireland* [1985] IR 289

4. *Daly -v- The Revenue Commissioners* [1995] 3 IR 1

5. *Heaney -v- Ireland* [1994] 3 IR 593

6. *Iarnrod Eireann -v- Ireland* [1996] 3 IR 321,361 (approving Costello J in *Heaney's case*).

7. *The Central Dublin Development Association -v-The Attorney General* 109 ILTR 69at 90

8. *Dreher v Irish Land Commission* [1984] ILRM 904

9. *O'Callaghan -v- The Commissioner of Public Works* [1985] ILRM 364

10. *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 231 Ironically, Pine Valley Developments Ltd and its parent company Healy Holdings Ltd successfully brought a case to the European Court of Human Rights on the basis that they has been the subject of discrimination and were awarded substantial damages, *Pine Valley v Ireland* (1991)14 EHRR 319.

BIOTECHNOLOGY AND THE ETHICAL MORAL CONCERNS OF EUROPEAN PATENT LAW

Oliver Mills, *Lecturer in Law, UCG, considers the implications of the Directive on the Legal Protection of Biotechnological Inventions 1998, in particular as it may impact on the interpretation of the older European Patent Convention 1973 in the field of genetic engineering.*

Introduction

Both the European Patent Convention 1973 (henceforth EPC) and the Directive on the Legal Protection of Biotechnological Inventions 1998 (henceforth the Directive) contain provisions linking patentability with commercial exploitation. Basically, these provisions exclude from patentability those inventions whose publication or exploitation is contrary to 'ordre public' or morality. Member States of the European Union are of course subject to the Directive, and most have also contracted under the EPC (which is not an instrument of Community law but a wider European Treaty emanating from the Council of Europe). However, the texts of these instruments are not identical on these points, with the result that there is some potential for confusion as to the precise obligations of these States in respect of moral questions arising from the patenting of the processes and products of biotechnology in Europe.

If this confusion is borne out in practice, already difficult ethical and moral decisions could become additionally problematic for patent-granting authorities subject to both sets of international obligations. In the long term, these doubts could prompt biotechnology companies to relocate to countries where their commercial interests, arguably, may receive greater protection.[1]

The relevant provision of the EPC is set out in Article 53 and reads as follows:

> "European patents shall not be granted in respect of:
>
> (a) inventions the publication or exploitation of which would be contrary to *ordre public* or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States."

The provision in the Directive equivalent to Article 53(a) is outlined in Article 6, which reads partly as follows:

> "Inventions shall be considered unpatentable where their commercial exploitation would be contrary to ordre public or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation."

Under Article 53(a) EPC there is no special requirement that exploitation must be prohibited by law in all, or even some, of the Contracting States. The test is not prohibition by law, but whether or not publication or exploitation of the invention would be contrary to either *ordre public* or morality. The word "contrary" is significant. It suggests that the invention must not merely be slightly on the wrong side of morality before patentability can be refused; rather, the invention must be completely, one hundred percent, against morality for refusal to occur. The test also works in a reverse manner, namely, the mere fact that publication or exploitation of the invention is permitted by law or regulation in some or all of the Contracting States does not guarantee patentability. Patentability can (and indeed should) be refused where publication or exploitation of the invention might offend against morality. In the context of the EPC, therefore, the European Patent Office (henceforth EPO) is arbiter as to what constitutes offending morality. Accordingly, in keeping with EPO jurisprudence that exceptions to patentability are construed narrowly, it may be expected that it will rarely be necessary to deny a patent on grounds of morality. However, EPO jurisprudence is not consistent on this point.

By contrast, the Directive makes no reference to exploitation in some or all of the Contracting States. This suggests that the EPO is also arbiter as to what offends against the morality provision of the Directive. However, the EPO is not an EU body, and is not legally bound to follow the EU Directive. Therefore, in order to avoid the possibility of having two different patent laws coexisting in European states that are EU members, the EPC will have to be adapted to the provisions of the Directive. However, even if such an event occurs the Directive may not result in harmonisation of patent law in the field of biotechnology across

the states involved. There are two reasons for this. First, in the context of national and European patent law the concepts of *ordre public* and morality are likely to be interpreted in different ways, resulting in divergence of practice among Member States. Second, permitting the EPO to regulate biotechnology on the basis of morality is likely to result in decisions which will map out a "moral frontier" in the context of what will be regarded as morally acceptable technological development. Such a situation is unlikely to be welcomed by all states.

The morality provision, Article 6 of the Directive, makes no reference to "publication" of the invention either. This suggests removal of discretion for looking to morality of the methods used to create inventions from the EPO. Therefore, morality of creating inventions is the task of some other regulatory authority. On this basis, there is no need for the EPO to retain discretion to look to the use or exploitation of an invention on the basis of morality.

Different textual approaches

While the text of the EPC is silent as to what constitutes *ordre public* and morality, that of the Directive offers guidance in relation thereto. However, the Directive adopts a negative approach and lists what is not patentable by virtue of *ordre public* or morality. Article 6(2) reads:

> "On the basis of paragraph 1,[8] the following, in particular,[9] shall be considered unpatentable:
>
> (a) processes for cloning human beings;
>
> (b) processes for modifying the germ line genetic identity of human beings;
>
> (c) uses of human embryos for industrial and commercial purposes;
>
> (d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial benefit to man or animal, and also animals resulting from such processes.

In three respects the language of the Directive is limited in such a manner that biotechnological inventions are unlikely to receive the protection they deserve.

First, EPO jurisprudence suggests that exclusions from patentability be construed narrowly. However, by adopting the phrase 'in particular' the Directive suggests that the list of unpatentable subject-matter is illustrative rather than exhaustive. The Directive therefore permits the EPO to exclude from patentability a very wide range of inventions on the basis of morality; in this sense the Directive expands the jurisdiction of the EPO beyond that envisaged by the European Patent Convention. The addition of Article 6(2) in the Directive is a fresh provision intended to provide guidance on the meaning of "*ordre public* or morality." However, instead of providing guidance, Article 6(2) may create uncertainty additional to that already experienced in interpreting Article 53(a) EPC. Any changes in wording between texts are bound to cause uncertainty as the existing precedents established by the EPO may be substantially thrown away. In comparison to EPO jurisprudence established by virtue of Article 53(a) EPC, Article 6(2) of the Directive adds new doubt in relation to what is patentable. The Directive purports to expand patent legislation to regulate ethical concerns.

Second, the Directive makes no direct reference to plant-related inventions constituting non-patentable subject-matter. However, under the Directive plant-related inventions may be excluded from patentability on the basis that arguments against patenting animal-related and plant-related inventions run in parallel. Given the difficulty the EPO has experienced in interpreting Article 53(b) EPC in relation to plant-related inventions, an opportunity was missed in the Directive to clarify the law in this area.

Third, the Directive makes no direct reference to the environment.[10] Environmental biotechnology will, therefore, continue to be regulated by judicial[11] interpretation of the morality provision under Article 53(a) EPC. Given public concern over environmental issues, it is regrettable that the Directive did not include environment as a criterion by which *ordre public* or morality could be evaluated.

Policy underlying the Directive

The Directive was drafted with the underlying idea that patentability requirements should be kept in conformity with the EPC. This suggests that exclusions from patentability under the EPC be continued in the Directive. For example, Article 4 of the Directive permits subject-matter exclusion on a basis similar to that outlined in Article 53(b) EPC (relating to plant and animal varieties); while Article 6 permits exclusion on a basis similar to that outlined in Article 53(a) (relating to *ordre public* and morality). Hence, uncertainty, in the interpretation of Article 53 EPC is likely to continue under the Directive.

Conformity of patentability criteria between the EPC and the Directive necessitates not only consistency in respect of novelty, inventive step and industrial application, but also as regards the extent to which patentability can be excluded on the basis of morality. Accordingly, it is likely that the morality provision of the Directive will be interpreted in keeping with EPO jurisprudence. However, unlike the Strasbourg Convention concerned with substantive provisions of patent law, a close examination of the Directive reveals that it is concerned more with ethical and moral

"It is likely that the morality provision of the Directive will be interpreted in keeping with EPO jurisprudence. However, unlike the Strasbourg Convention concerned with substantive provisions of patent law, a close examination of the Directive reveals that it is concerned more with ethical and moral principles. Because the scope of the Directive is expanded in this manner, the EPO may be forced to abandon existing jurisprudence in favour of a 'heavier' moral regulatory regime."

principles. Because the scope of the Directive is expanded in this manner, the EPO may be forced to abandon existing jurisprudence in favour of a "heavier" moral regulatory regime.

The Directive offers national courts and patent offices a general guide to interpreting *ordre public* and morality.[12] Unless these concepts are interpreted in a uniform manner across all Member States, and in accordance with EPO jurisprudence, the result will be a divergence of patent law and practice. As far as national law is concerned, both doctrine and courts suggest that *ordre public* is a body of positive law. The question is what kind of legal provisions qualify under this body of law? Positive law in this context suggests criminal law, constitutional law or other special laws protecting human life and dignity, as well as other basic values in society. In the context of national patent law morality is understood as relating to a body of ethical principles which are generally accepted by those concerned with such principles: for example, ethical principles which are generally recognised in the different branches of scientific research, or codes of practice observed in business.

As far as European patent law is concerned, there is no concept of either *ordre public* or morality. However, the Directive attributes the joint concepts of '*ordre public* and morality' with a wider ethical dimension than EPC states originally intended. Consequently the Directive, designed to harmonise, may result in greater uncertainty for breeders and inventors in this area.

Article 6 of the Directive

Article 6[13] of the Directive recites, in effect, Article 53(a) EPC and prohibits patenting of inventions whose commercial exploitation would be contrary to *ordre public* or morality. Recital 38 recognises that these concepts concern 'ethical or moral' principles. However, difficulty lies in determining what such principles embrace. Accordingly, it is suggested that setting ethical boundaries of acceptable technology is the job of governments. The patent system should operate within this.

The Directive is an attempt to mix Community-made law with legal obligations under an international treaty wider than the Community.[14] Support for this is found in both Recital 43, which recognises the European Convention on Human Rights (hereafter ECHR) as forming part of the general principles of Community law; and Recital 16, which recognises that patent law must be applied so as to safeguard the dignity and integrity of the person. Does this mean that in assessing patent applications moral criteria should be based on the ECHR?[15] Can the ECHR be distinguished from other types of conventions[16] in that is was drafted to accord protected human interests a special status? A positive answer suggests respect for human rights in interpreting all subsequent conventions. On this basis, even if there were no morality provision in the EPC or the Directive, resolution of morally problematic or ethical concerns would be based on the provisions of the ECHR. Therefore, Contracting States could not agree to anything contrary to their obligations under ECHR.

Examiners at the EPO are not sufficiently trained in either moral philosophy or jurisprudence to tackle ethical issues surrounding patent law. Support for this is found in the view of the House of Lords Select Committee on the European Community, where it said:[17]

> "We recognise, however, that patent Examiners should not be faced with complex ethical issues requiring the balancing of conflicting rights or interests where the general public is itself divided."

If the Directive is interpreted in accordance with moral criteria based on the ECHR, the result may be a conflict of interest within the EPO. EPO jurisprudence suggests that the morality provision be interpreted in a restrictive manner. However, if the ECHR is binding on patent-granting authorities, a more vigorous moral assessment may be required. On this analysis, application of the ECHR standard may be inappropriate for the following reasons: First, in respect of patentability, existing EPO jurisprudence might be abandoned. Second, it may be unwarranted to apply human rights standards to what are, essentially, commercial patent provisions.[18] Third, since the ECHR is based on respect for human rights only, failure to consider other ethical concerns relevant in a commercial environment, such as the economic and social impact of biotechnology, may itself be unethical.

"Under the Directive cloning processes are in general excluded from patentability. Specifically excluded under Article 6(2)(a) are processes for cloning human beings. The reason why such processes are excluded from patentability under the Directive is because the social and ethical ramifications of cloning remain unexplored in the EU....Arguably, the Directive should have adopted a more flexible approach to the issue of cloning."

Article 6 of the Directive is reinforced by Recital 38. This states that Article 6 contains a list of inventions excluded from patentability so as to provide national courts and patent offices with a general guide to interpreting the reference to *ordre public* and morality. However, Recital 38 proceeds to state that processes the use of which offend against human dignity, such as processes to produce chimeras from germ cells or totipotent cells of humans and animals, are obviously also excluded from patentability. Accordingly, under the Directive cloning processes are in general excluded from patentability. Specifically excluded under Article 6(2)(a) are processes for cloning human beings. The reason why such processes are excluded from patentability under the Directive is because the social and ethical ramifications of cloning remain unexplored in the EU.[19]

Unresolved issues include:[20]

*** Definition of humanity and self**

The concern here is whether or not the individual occupies a unique place in relation to humanity. The individual is characterised by many different attributes. He can exercise "free will" and freedom of conscience. The issue here is whether or not we as individuals are willing to relinquish to a population of clones that which is properly attributed to us by virtue of being individual?

***Control of reproductive fate**

A unique characteristic of the individual is the ability to reproduce. Reproductive control lies within the individual. The issue here is whether or not we as individuals are willing to sacrifice this control to third parties? Reproductive control determines the fate of future generations.

***Human experimentation**

The issue here is whether or not human experimentation is intrinsically wrong. People who argue that it is believe the human body is sacred and should not be interfered with. Others argue that experimentation is acceptable on the basis that the 'end' justifies the "means".

***Universal acceptability**

Must cloning be universally acceptable in order to be ethically and morally justified? Will cloning become ethically acceptable once the rich and developed countries of the world accept it? Who will benefit most from the results of human experimentation? If the technology is available to the developing world, will it gain acceptance there?

***Utilisation of animals**

The issue here is whether or not it is ethically permissible to use animals for the purposes of experimentation? For those who equate "animal" with "human", animal experimentation is intrinsically wrong. For others, the use of animals is permissible as long as the end justifies the means. Most people adopt an intermediate approach whereby animal experimentation is acceptable as long as it enhances animal welfare or is therapeutic for humans.

Arguably, the Directive should have adopted a more flexible approach to the issue of cloning. The attitude of the public to cloning is likely to change as elucidation of the ethical and moral problems involved occurs. The EPO attitude to morality should conform to the outcome of debate, not pre-empt it.

Article 6(2)(d) lists what in particular is unpatentable on the basis of *ordre public* or morality, namely:

> "processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes".

The provision raises three issues. First, there is no reference to plants in the provision. Therefore,[21] genetic modification of plants is acceptable and will, presumably, be determined on normal patentability criteria. The implication here is that there exists a higher standard of morality in relation to animal-related inventions than for plant-related inventions. Is the Directive drawing a distinction between animal and plant life? If yes, on what principle? EPO jurisprudence suggests that plant and animal varieties should be equated so that the principle of equal treatment applies.[22] The imposition of a higher standard of morality for animal-related inventions will result in conflicting EPO decisions. In this sense, therefore, the Directive creates uncertainty for breeders as to the state of the law. Second, embedded in Article 6(2)(d) is the principle of proportionality. However, the provision offers no guidance in relation to interpretation. How are the various elements incorporated in a proportionality test to be evaluated? How is the suffering of animals to be assessed? There are no principles common to the Member States on which to base "risk assessment." Presumably therefore, in the absence of common evaluation criteria, the balancing test outlined by the EPO in *Onco-Mouse* will continue to apply. However, since the *Onco-Mouse* decision the EPO has ruled that the balancing test is not appropriate in all types of situation. In *Plant Genetic Sytems* for example, the test was deemed inappropriate since the threats to the environment were not sufficiently substantiated at the time the EPO was asked to revoke the patent. This suggests that where the proportionality test is deemed inappropriate, the balance of grant will lie in favour of the patentee.[25] In terms of assessment of animal suffering, the absence of common principles among Member States may render genetic modification of animals patentable; on the basis that it is unjust to deny a patent in a situation where the onus of proof cannot be sufficiently discharged. Under Article 6(2)(d), only processes likely to cause animal suffering are prohibited from patentability. Therefore, in the absence of sufficient proof of suffering, such processes will be patentable. Third, the provision also raises the issue of what constitutes a "substantial" benefit? The answer to this is found in Recital 45, which merely lists benefits to either man or animal in terms of research, prevention, diagnosis or therapy as constituting substantial. Giving effect to Article 6 suggests that the Recitals be invoked. The Recitals are drafted in broad terms and the meaning attributed to *ordre public* and morality is extended accordingly. On this basis, patent legislation is expanded to regulate ethical issues.

Article 5 of the Directive

Article 5, essentially, prohibits the patenting of the human body. Therefore, it too encompasses ethical and moral considerations.

Article 5(1) reads as follows:

> "The human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions."

The provision affirms that the *simple* discovery of an element of the human body is not patentable. The provision is intended to preclude the grant of patents for speculative patent applications presenting experimental data based entirely on DNA sequencing. DNA sequences[26] encoding proteins of unknown function are, therefore, unpatentable.

Article 5(1) accords with Recital 23, namely, a mere DNA sequence without an indication of function does not contain

any technical information and, on this basis, is not a patentable invention. However, it is submitted that Recital 23 is likely to be problematic for patent-granting authorities; can it be said (with certainty) that DNA sequences *per se* do not contain technical information? Recital 24 is also likely to be problematic for patent-granting authorities. Article 5(1) accords with the requirement set out in Article 5(3), namely, that industrial application of a gene sequence or partial sequence must be disclosed in the patent application. Industrial applicability has long been accepted as a criterion of patentability. However, under Recital 24 in order to comply with the industrial application criterion it is necessary in cases where a gene sequence or partial sequence is used to produce a protein or part of a protein, to specify which protein or part protein is produced or what function it performs. The test of industrial applicability is, therefore, of a higher standard in cases involving gene sequences than for other inventions.

Article 5 states that a *simple*[27] discovery does not constitute a patentable invention.

Article 5(1) is silent on the reason why the simple discovery of elements of the human body is unpatentable. *Prima facie* it might be considered that the exclusion is justified on moral grounds. However, exclusion on moral grounds is not justified, for the following reason. Article 5(2) tells us that elements isolated from the human body may constitute a patentable invention. However, it can be argued that a gene is no less a gene merely because it is isolated from the human body. On this basis, therefore, precluding the simple discovery of genes from patentability under Article 5(1) is justified on traditional patent law criteria only, namely, that discoveries are not patentable or that genes *per se* do not have industrial character.

"The Opposition Division rejected the objection on all grounds. The Opposition Division found the allegation that human life was patented to be unfounded. The Division pointed out that DNA was not "life". Rather, it was a chemical substance carrying genetic information."

Article 5(2) tells us that elements isolated from the human body, or otherwise produced by means of a technical process, may constitute a patentable invention. The provision has two limbs. Under the first limb, the mere process of "isolation" is sufficient to transform a non-patentable discovery into a patentable invention. The process of isolating and transferring a gene into a host cell provides a means for industrial application. This is where the invention lies. Identification of a gene sequence and the protein for which it encodes is merely a discovery as long as the gene remains in the human body since at this stage man cannot make the protein. But isolating the gene and transferring it to a new environment where the protein can be produced in a factory-like manner is inventive.[29] This portion of Article 5(2) makes sense. However, reference in the provision to elements produced by means of a technical process is unnecessary because in genetic engineering, what is actually produced is cDNA rather than naturally occurring DNA. cDNA[30] is always produced as a result of a technical process and in this sense it is no different from any other manufactured product as regards patentability. Under the second limb, Article 5(2) proceeds to tell us that isolated elements, or elements produced from a technical process, do not fall foul of the novelty requirement merely because the structure of the element is identical to that of a natural element. The novelty requirement in respect of elements isolated from the human body is not 'absolute' in the strict sense; the test is not whether the substance exists, but whether it was known to exist in terms of structure. However, this test is wholly inappropriate for elements produced as a result of a technical process. In such a situation the product, namely cDNA, does not occur naturally. Article 5(2) of the Directive, by equating naturally occurring elements with elements produced as a result of a technical process, shows a profound misunderstanding of the nature of biotechnological inventions. In this respect the Directive is misleading and may result in confusion in respect of genetic engineering inventions.

The likely impact of the Directive on EPO jurisprudence

In the field of human genetics, the EPO granted one patent only in respect of an invention involving the isolation of human genes for medical purposes. There, objections were raised *inter alia* under Article 53(a) EPC. The Opposition Division dismissed the objections. An appeal is pending before the Technical Board of Appeal. The case concerned is *Howard Florey/Relaxin* [1995] EPOR 541. Relaxin is a hormone capable of influencing smooth muscle contraction in the body. It is used in many medical procedures and also during childbirth. Human sources for obtaining medicines by genetic engineering are preferred to animal sources because of their greater immunological tolerance in the human body. The invention related to a DNA fragment able to encode a specific human relaxin. The DNA sequence encoding for human relaxin was taken from a pregnant woman by surgery. The DNA was integrated into a bacterial host and later used for industrial production of the relaxin. The patent was granted in April 1991 and was later opposed. The opponents argued that the claimed DNA sequence offended against Article 53(a) EPC.

The opponents' specific allegations in respect of Article 53(a) EPC were that the invention:

* involved the patenting of human life;
* was an abuse of pregnant women;
* was a return to slavery and the piecemeal sale of women.

The Opposition Division rejected the objection on all grounds. The Opposition Division found the allegation that human life was patented to be unfounded. The Division pointed out that DNA was not "life". Rather, it was a chemical substance

carrying genetic information. Patenting a single human gene had nothing to do with patenting life.[31] Since the patenting, and exploitation, of other human substances was not objected to by the opponents, there could be no moral distinction in principle between patenting genes and these other substances. The Division said:

> "Even if every gene in the human genome were cloned (and possibly patented), it would be impossible to reconstitute a human being from the sum of its genes".

The statement by the Division runs contrary to Article 6(2) of the Directive prohibiting patenting of processes for cloning human beings.

In response to the allegation that patenting Relaxin was an abuse of pregnant women the Division justified its decision on two grounds.[34] First, women who donated tissue consented to do so within the framework of necessary gynaecological operations. Human material had been a source of useful products to man for many years and there was no evidence to suggest that such practices were unacceptable. Second, removal of human tissue was acceptable as long as appropriate information and consent procedures, within the framework of the Draft Bioethics Convention of the Council of Europe, were complied with.[35]

In response to the opponents' assertions concerning slavery and the dismemberment of women, the Division said these arguments were based on a misunderstanding of the patent system in general and of the particular patent in issue. A patent merely confers on the patentee the right to exclude others from using the invention without consent. There is no right to individual human beings under a patent. The donor was as free to live her life as she wished, and enjoyed the same right to self-determination after the grant of the patent as she was, or did, before grant. The invention in issue related to a cloned gene capable of producing proteins in a technical manner. The only stage at which a woman was involved, therefore, was at the beginning as a voluntary source of relaxin.

As indicated above, Recital 43 of the Directive states that ECHR forms part of the general principles of Community law. Recital 16 states that patent law must be applied so as to protect the dignity and integrity of the person. On these bases, the *Relaxin* case may have been decided differently by the EPO under the Directive, and more generally it is likely that existing EPO jurisprudence will be modified or abandoned under the Directive.

Conclusion

The conclusion is that the Directive is an attempt to expand patent law to regulate ethical issues. As patent legislation regulates competition issues, ethical issues should be addressed in the phase of research and development which precedes the filing of patent applications. ●

1. For example the United States.
2. My emphasis. It need not be shown that publication or exploitation is contrary to morality.
3. See *Ciba-Geigy* [1979-85] EPOR Vol.C, 758 and *Onco Mouse* [1991] EPOR 525.
4. Plant Genetic Systems case [1995] EPOR 357.
5. EPC law and Directive law.
6. The EPO fully intends to do this in all instances where it is necessary, *per* Dr. Siobhan Yeats (EPO), speaking at the 'Conference of Law and Genetics', 22 Jan. 1999, Signet Library, Edinburgh.
7. See Article 6(2).
8. That is, *ordre public* or morality.
9. My emphasis.
10. While the operative part of the Directive makes no direct reference to the environment, Recital 10 does.
11. Notably the EPO.
12. Recital 38.
13. Article 6(1).
14. The EPC.
15. Ford, *The Morality of Biotech. Patents: Differing Legal Obligations in Europe* [1997] 6 EIPR 315.
16. Specifically commercial type Conventions.
17. See paragraph 46.
18. Article 53(a) EPC.
19. Cloning of human beings is not illegal world-wide. It is permitted in the United States (although research cannot be federally funded) and is also legal in Korea.
20. Dr. Paul De Sousa, Associated with the Roslin Institute, Edinburgh, lecture entitled '*Cloning: Ethics in Medicine and Biology*', presented to the Philosophical Society of Edinburgh University, 4 February 1999.
21. Semble.
22. See PGS case [1995] EPOR 357.
23. [1991] EPOR 525.
24. [1995] EPOR 357
25. As the onus of proof adducing evidence lies with the defendant.
26. Dr. Siobhan Yeats, '*The Impact of the Biotechnology Directive on Patent Law and Practice in the Field of Genetics*', Conference on Law and Genetics, 22/01/1999, Edinburgh.
27. My emphasis.
28. Among other things.
29. Sterckx (Ed.), *Biotechnology, Patents and Morality* (1997), Ch. 14.
30. cDNA does not contain 'introns', which are sequences which do not code. cDNA is, therefore, more pure than DNA naturally occurring.
31. Paragraph 6.3.4 of the Decision.
32. For example the interferons' and erythropoeitin.
33. Paragraph 6.3.4
34. Paragraph 6.3.1
35. See Article 13 of The Convention on Human Rights and Biomedicine, 1997.

ONSTITUTIONAL IMPLICATIONS OF PLEA BARGAINING

In the second of two articles, ***Peter Charleton SC*** *and* ***Paul Anthony McDermott BL*** *examine comparative aspects of prosecutorial plea bargaining and consider whether the practice of plea bargaining, generally, has any place in Irish law.*

PROSECUTORIAL PLEA BARGAINING

Irish Law

There is no formal system of prosecutorial plea bargaining in this jurisdiction. The Prosecution of Offences Act 1974 is silent on the issue. Section 6 of the Act prohibits certain communications in relation to criminal proceedings, as follows:

> "6.(1)(a) Subject to the provisions of this section it shall not be lawful to communicate with the Attorney General or an officer of the Attorney General, the Director or an officer of the Director, the Acting Director, a member of the Garda Síochána or a solicitor who acts on behalf of the Attorney General in his official capacity for the Director in his official capacity, for the purpose of influencing the making of a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings.
>
> (b) If a person referred to in paragraph (a) of this subsection becomes of opinion that a communication is in breach of that paragraph, it shall be the duty of the person not to entertain the communication further.
>
> (2)(a) This section does not apply to-
>
> (i) communications made by a person who is a defendant or a complainant in criminal proceedings or believes that he is likely to be a defendant in criminal proceedings, or
>
> ii)communications made by a person involved in the matter either personally or as legal or medical adviser to a person involved in the matter or as a social worker or a member of the family of a person involved in the matter.
>
> (b) In this subsection "member of the family" means wife, husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister, or a person who is the subject of, or in whose favour there is made, an adoption order under the Adoption Act 1952 and 1964".

Section 2(4) of the Criminal Justice Act 1993 extends this prohibition to cover matters relating to appeals against leniency of sentence as follows:

> "Section 6 of the Prosecution of Offences Act, 1974 (which prohibits certain communications in relation to criminal proceedings), shall apply, with any necessary modifications, to communications made to the persons mentioned in that section for the purpose of influencing the making of a decision in relation to an application under this section as it applies to such communications made for the purpose of making a decision to withdraw or not to initiate criminal proceedings or any particular charge in criminal proceedings".

"A second aspect of prosecutorial plea bargaining is the power of the prosecution to seek no more than an agreed maximum sentence. In some states of the USA, for example, the trial judge cannot by law exceed the maximum which the prosecution indicate would be a satisfactory sentence. Obviously, this aspect of prosecutorial plea bargaining does not exist in Ireland. It fundamentally contradicts the long standing tradition that the prosecution should never seek to influence sentence by stating a minimum tariff or otherwise."

This legislation therefore allows only for an *ad misericordiam* plea that a prosecution should not take place or for the communication of an alibi or other defence that would dissuade the DPP from launching a case against a particular person whom it is proposed to prosecute. On the other hand, prosecutorial plea bargaining involves, firstly, the power of the prosecution to accept pleas to lesser counts on an indictment. This power does, of course, exist in Ireland, but is tightly controlled in the sense that the official of the DPP's office dealing with the file will have the final decision as to whether a lesser plea is to be accepted and will invariably require a good reason in fact or in law for altering the initial decision of the prosecution to charge on a particular basis. A second aspect of prosecutorial plea bargaining is the power of the prosecution to seek no more than an agreed maximum sentence. In some states of the USA, for example, the trial judge cannot by law exceed the maximum which the prosecution indicate would be a satisfactory sentence. Obviously, this aspect of prosecutorial plea bargaining does not exist in Ireland. It fundamentally contradicts the long standing tradition that the prosecution should never seek to influence sentence by stating a minimum tariff or otherwise.

The advantages of prosecutorial plea bargaining

Over the years a number of arguments have been advanced in favour of prosecutorial plea bargaining.

(i) It reduces the number of high cost trials. An adversarial trial before a jury consumes valuable police, prosecutorial and judicial resources.

(ii) It reduces inaccurate guilt determination. While both the heavy presumption of innocence and the exclusionary system of evidence promote important constitutional rights they do so at the cost of acquitting some persons who are guilty of the crimes with which they are charged.

(iii) It reduces unpredictability. In the absence of a developed system of sentencing tariffs, neither the prosecution nor the defence can predict with any great accuracy what sentence an accused is likely to face if convicted by a jury. Plea bargaining gives the accused more control over his fate by giving him an accurate indication of what sentence he faces.

However many of these advantages can be challenged:

(i) The experience of the United States is that plea bargaining does not remove all unnecessary delays from the criminal justice system. The imminence of the trial is often needed to spur negotiations and in many cases plea bargains are not struck until shortly before the commencement of the trial.[2] Plea bargaining may also be used as a tactical weapon and prosecutors may postpone bargaining in order to wear down those defendants who are in jail pending trial.

(ii) Plea bargaining may result in many defendants being convicted who, although guilty in fact, would have been acquitted at a trial. This may have the effect of replacing the beyond a reasonable doubt standard with a more intermediate standard based on the defense's assessment of both the likelihood of conviction and the value of the concessions offered by the prosecution."[3] It may also diminish the impact of our constitutionally mandated exclusionary system of evidence and thus remove a deterrent to police misconduct.

(iii) Plea bargaining may tempt innocent defendants to plead guilty.

(iv) There is a risk that defence counsel might prefer to settle cases expeditiously through guilty pleas and thus fail to secure the best possible outcome for their client. Because prosecutorial plea bargaining takes place in private, neither the judge nor the accused is present to ensure defence counsel's undivided loyalty to his client.

(v) Plea bargaining creates sentencing inequalities between those defendants who plead guilty and those convicted after trial. It has been suggested that:

> "The informality and low visibility of plea bargaining exacerbates the problem of inequitable sentencing. Subjective factors such as the prosecutor's desire to enhance his status within his department and his instinctive like or dislike for a particular defendant may enter into the calculation of plea concessions. These irrational considerations often produce unnecessarily lenient or unnecessarily severe sentences in individual cases."[4]

The United States

The jurisdiction most frequently cited as an example of prosecutorial plea bargaining is the United States. The U.S. system of plea bargaining has been described in the following terms:

> "...the American criminal justice system in 1996 is no longer a trial system; it is a plea-bargaining system. Trials are expensive and stressful events and the system struggles mightily to avoid trials if it is at all possible. In a system of negotiation and compromise, ... it is sometimes necessary to "split the baby" and permit a bargain to a greatly reduced charge or to a specific sentence that does not reflect the punishment that is deserved for the underlying crime..." [5]

The U.S. plea-bargaining system can throw up some strange pleas. Strangest of all must surely be the so-called "Alford plea" whereby a defendant is permitted to enter a guilty plea even though he not only publicly refuses to acknowledge his responsibility for the crime but maintains in court that he is not guilty of the crime.[6] The name of the plea comes from the US Supreme Court decision which upheld the constitutionality of such pleas, *North Carolina v Alford*[7]. In that case the defendant had been charged with first-degree murder which could have resulted in the death penalty if he had been convicted. Instead the defendant told the trial judge that he wanted to plead guilty to second-degree murder (for which he received a sentence of imprisonment). At the same time he insisted that he had not committed the murder in question. The trial judge accepted the plea bargain after considering a summary of the State's evidence which showed that Alford had taken a gun from his house with the stated intention of killing the victim and had

later returned saying that he had carried out the killing. On appeal Alford attempted to overturn his plea bargain and argued that as he had steadfastly maintained his innocence at the time of his guilty plea it was invalid. The Supreme Court rejected this argument on the basis that 'an individual may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.' Because there was a strong factual basis for the plea, the conviction was not unconstitutional. The Court held that defendants do not have the right to have such a plea accepted, rather it is a matter of discretion for the trial judge.

Canada

One of the major problems that prosecutorial plea bargaining can cause is where the prosecution or trial judge deviate from the course which the defendant feels has been promised will be followed. A couple of Canadian cases will illustrate this problem.

In *Agozzino*[8] counsel for the Crown agreed not to seek a jail term if the accused would plead guilty to a charge of possession of counterfeit money. The accused pleaded guilty and the trial judge followed the Crown's recommendation and imposed a fine. In doing so, the judge indicated that had it not been for the Crown's representation as to sentence a jail term would have been imposed. The Crown subsequently decided to appeal the sentence as being too lenient. The Ontario Court of Appeal held that the Crown could not repudiate its bargain on appeal. In *MacDonald*[9] the Crown agreed that the accused would only face a charge of being an accessory after the fact to murder, provided that he gave a complete and truthful statement to police regarding the murder committed by his co-accused. However during further investigation the police found a witness who testified at the preliminary inquiry that the accused had planned the murder. At the end of the preliminary inquiry the accused was sent forward to stand trial for murder. He subsequently sought to appeal his conviction for murder. The Ontario Court of Appeal held that as the accused had not provided the police with the complete and truthful statement they had bargained for, he could not demand that they keep their part of the bargain. In addition the accused had suffered no prejudice as the statement he had made to the police was not used at his trial. The only detriment that he suffered was that he had failed to successfully manipulate the system.

Summary

When it comes to prosecutorial plea bargaining, the reasonableness of the elements which enable the prosecution to accept pleas to lower counts during the period after the charge and before conviction must be assessed in the context of the difficulty of proving a case to the required standard of beyond reasonable doubt. In considering whether prosecutorial plea bargaining in relation to sentence should ever be permitted in this jurisdiction, one must look to the necessary division of constitutional responsibilities. The judge alone, in our jurisdiction, has been traditionally empowered to impose a sentence. It would be wrong, in our view, to move from a system where the judge after an open hearing has that responsibility, and from a system where it is the job of lawyers to estimate what the sentence will be, to a situation where the prosecution and defence can sit down together and knock out a bargain whereby the maximum sentence will be limited to a particular number of years, or to a particular tariff on a basis which is again private and which lacks the fundamental safeguard of transparency. The notion of prosecutorial plea bargaining carries with it the same fundamentally repellent features of integrity dependent upon secrecy, of lack of knowledge and of inducement to the possibility of false pleas in aid of a pragmatic disposal of a case. It also carries with it the desperate temptation that prosecutors may begin to think of themselves as the persons who dispense justice, thus overturning Articles 34 and 38 of the Constitution. The system as operated in the United States of America carries with it that very strong temptation, and it is no accident that in that jurisdiction prosecutors often gain public fame and often seek public office on the basis of their activities.

"The judge alone, in our jurisdiction, has been traditionally empowered to impose a sentence. It would be wrong, in our view, to move from a system where the judge after an open hearing has that responsibility, and from a system where it is the job of lawyers to estimate what the sentence will be, to a situation where the prosecution and defence can sit down together and knock out a bargain whereby the maximum sentence will be limited to a particular number of years, or to a particular tariff on a basis which is again private and which lacks the fundamental safeguard of transparency."

The job of a professional lawyer is to act in a professional way. His or her job is to go to court and to do the case on behalf of his or her client to the best of his or her ability. Plea bargaining has no constitutionally permissible place in our system of law.●

1. See generally: Note, *Plea Bargaining and the Transformation of the Criminal Process* (1977) 90 Harv L Rev 564; Note, Guilty *Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas* (1964) 112 U Pa L Rev 865; Conrad, *Profile of a Guilty Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas* (1971) 17 Wayne L Rev 1195; Hobbs, *Judicial Supervision Over California Plea Bargaining : Regulating the Trade* (1971) 59 Cal L Rev 962.
2. Note, *Plea Bargaining and the Transformation of the Criminal Process* (1977) 90 Harv L Rev 564 at 572.
3. Note, *Plea Bargaining and the Transformation of the Criminal Process* (1977) 90 Harv L Rev 564 at 573.
4. Note, *Plea Bargaining and the Transformation of the Criminal Process* (1977) 90 Harv L Rev 564 at 581.
5. Pizzi, *Accepting Guilty Pleas From Innocent Defendants* (1996) 146 NLJ 997.
6. See generally Note, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant* (1987) 72 Iowa L Rev 1063.
7. 400 US 25 (1970)
8. [1970] 1 O.R. 480, [1970] 1 CCC 380. See also *Brown* (1972) 8 CCC 227.
9. (1990) 54 CCC (3d) 97

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ONSENT TO TREATMENT BY PATIENTS - DISCLOSURE REVISITED

The recent decision of Kearns J in Geoghegan-v-Harris respesents an important development in clarifying the law relating to consent to treatment in medical negligence cases. In the first af a two-part article ***Ciaran Craven BL*** *critically appraises the decision.*

Introduction

Consent by patients to surgical and other interventions rightly concerns medical and nursing practitioners - and it causes them some vexation. Patients, for their part, not infrequently complain of bad treatment outcomes of which they allege they had not been informed beforehand. Some legal and medical commentators write of the requirement to obtain 'informed consent' prior to carrying out any treatment. However, the very expression immediately begs the question: informed of what? And, therein lies the central problem that has never been definitively addressed by our courts. What is at issue are the legal principles that determine what operative risks or risks of intervention must be disclosed to a patient prior to his undergoing that procedure. The imposition of a legal duty of disclosure - as the matter might more properly be characterised - is clear, and has been for decades.[1] Determination of the standard of disclosure has presented more difficulties. Over the past decade, the issue of consent prior to treatment has twice been considered by the Supreme Court. The division of that Court in respect of the applicable legal principles in the first of those cases, *Walsh v Family Planning Services Ltd & anor*,[2] was not addressed by the later unanimous decision of the same court in *Bolton v Blackrock Clinic Ltd & ors.*[3] That said, however, *Walsh* did decide that the remedy for non-disclosure should, generally, ground an action in negligence, and not trespass, a distinction not without procedural significance.

It might be noted that the plaintiff-patients failed in all of the Superior Court cases that have resulted in written judgments in this area to date - usually upon a finding of fact by the trial judge that disclosure of the risk alleged not to have been disclosed had, in fact, been made. Accordingly, the courts did not have to give particular consideration to proof of damage - in particular with regard to remoteness of damage - or causation in non-disclosure cases. However, for the first time in this jurisdiction, all of these issues have now been subjected to considered judicial analysis in the recent part-decision of Kearns J in *Geoghegan v Harris*[4] which will be considered below.

Duty of Disclosure

The judicial *locus classicus* in respect of the imposition of a duty of disclosure is the decision of the former Supreme Court in *Daniels v Heskin*,[5] the facts of which are well known. Like the more recent decision of *Mordaunt v Gallagher*[6], it involved non-disclosure of a mishap during previous treatment. Lavery J articulated the difficulties arising in the therapeutic setting as follows:

> "It is clear that there are some matters which a doctor must disclose in order to afford his patient an opportunity of deciding whether [he or] she accepts his view or wishes to consult another doctor and an opportunity to make a choice between alternative courses. An example would be where a dangerous operation was contemplated.
>
> On the other hand, there are matters which the doctor must decide for himself having accepted the responsibility of treating his patient and having regard to his professional skill and knowledge upon which the patient relies. A clear example would be where in the course of an operation an unexpected complication appears."[7]

This may seem a relatively unexceptional statement of the applicable principles. However, insofar as any such general propositions might be concerned, Kingsmill-Moore J, in a classic exposition of social and judicial paternalism, stated, in the same case:

> "I cannot admit any abstract duty to tell patients what is the matter with them, or, in particular, to say that a needle has been left in their tissue. All depends on the circumstances - the character of the patient, her health, her social position, her intelligence, the nature of the tissue in which the needle is embedded, the possibility of subsequent infection, the arrangements made for future observation and care and innumerable other considerations."[8]

The next occasion on which the Supreme Court was required to address the issue was *Walsh v Family Planing Services & ors.*[9] There, the court determined that the duty of disclosure regarding the risks of a procedure or intervention, in the therapeutic setting, is an antecedent duty of care, similar to the duty of care in diagnosis and treatment. Thus, as to whether or not treatment without adequate disclosure amounted to a trespass or negligence, it was held that claims of trespass should be confined to cases where there was no consent to the particular procedure and where it was feasible to seek such consent. Thus,

> "If there had been such a failure to give a warning as to possible future risks that would not involve the artificial concept of an assault, but, rather, a possible breach of duty of care giving rise to a claim in negligence."[10]

As the Chief Justice of Canada had held:

> "I can appreciate the temptation to say that the genuineness of consent to medical treatment depends on proper disclosure of the risks which it entails, but in my view, unless there has been misrepresentation or fraud to secure consent to the treatment, a failure to disclose the attendant risks, however serious, should go to negligence rather than to battery. Although such a failure relates to an informed choice of submitting to or refusing recommended and appropriate treatment, it arises as the breach of an anterior duty of care, comparable in legal obligation to the duty of due care in carrying out the particular treatment to which the patient has consented. It is not a test of the validity of the validity of the consent."[11]

Standard of Disclosure

The imposition of a duty of disclosure - of some description - must be considered to be settled and, as a matter of practicality, can really present no particular difficulties. The issue of the how the standard of care in disclosure is to be determined, however, is a matter of some uncertainty, although the result may still be the same irrespective of the approach actually adopted. In *Walsh*, Finlay CJ (with whom McCarthy J agreed) applied the principles set out in the decision of the Supreme Court in *Dunne v National Maternity Hospital & Another*[12] to the issue of disclosure prior to treatment. Accordingly, the disclosure of the risks of treatment was considered to be a matter of professional judgment (effectively the Bolam test[13]) except where the disclosure of a particular risk was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical man would fail to make it (modified by *Donovan v Cork County Council*).[14] The Chief Justice stated that he was:

> " ... satisfied that there is, of course, where it is possible to do so, a clear obligation on a medical practitioner carrying out or arranging for the carrying out of an operation, to inform the patient of any possible harmful consequence arising from the operation, so as to permit the patient to give an informed consent to subjecting himself to the operation concerned. I am also satisfied that the extent of this obligation must, as a matter of common sense, vary with what might be described as the elective nature of the surgery concerned."[15]

"In cases of professional negligence the determination of the standard of care is conveniently considered to be effectively delegated to the relevant profession. But this delegation, certainly since *O'Dovovan*, must also be considered to be subject to the right of the court to have the last word on the issue... In the circumstance, it can hardly be considered surprising that the same conclusion is reached irrespective of the approach that might be adopted, although it is rarely commented upon."

However, other members of the Court were of the view that the Court should determine not alone the existence of the duty of care, but also the standard of care. Thus O'Flaherty J (with whom Hederman J agreed) held that:

> "[Disclosure is] a matter for the trial judge, in the first instance, to find whether there has been a breach of duty of care owed by the defendants to a person such as the plaintiff. This has to be resolved on the established principles of negligence. This was the approach of the Supreme Court of Canada in *Reibl v Hughes.*[16] ... [in the case of elective surgery] if there is a risk - however exceptional or remote - of grave consequences involving severe pain stretching for an appreciable time into the future and involving the possibility of further operative procedures, the exercise of the duty of care owed by the defendants requires that such possible consequences should be explained in the clearest language to the plaintiff."[17]

In England, determination of the appropriate standard of care in disclosure has been equally problematic. In the leading decision of the House of Lords on the issue, *Sidaway v Governors of Bethlem Royal Hospital,*[18] the Law Lords were also divided on the correct approach. Lord Diplock favoured the application of the *Bolam* test, i.e. what to tell a patient is a matter of clinical decision making, the standard of disclosure to be determined by the profession itself as in matters of diagnosis and treatment. Lord Scarman favoured full disclosure of all material risks incident to the proposed treatment so that the patient, rather than the medical practitioner, could make the real decision as to whether or not to undergo treatment.[19] This approach has obvious practical difficulties. Lord Bridge and Lord Keith, on the other hand, while favouring the application of the *Bolam* test considered whether disclosure of a particular risk "was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical man would fail to make it."[20] This latter approach is effectively a preview of *Bolitho v City and Hackney Health Authority.*[21] Lord Templeman, for his part, took the view that the duty of the doctor - who must have regard to the best interests of the patient - is to "provide the patient with information which will enable the patient to make a balanced judgment if the patient chooses to make a balanced judgment."[22]

Having said that, however, in the later case of *Farrell v Varian*[23] O'Hanlon J relied on Sidaway and, in particular, the judgments of Lord Bridge and Lord Keith - essentially a *Dunne/Bolitho* approach. As a matter of practicality, his approach is worth noting. He stated:

> "With regard to the nature and extent of the warning which should be given to a patient contemplating an operation, I am of the opinion that the doctor's obligation does not extend to

enumerating all the possible risks, however remote, which are involved. Such a procedure could only subject many patients to unnecessary fears and worries, and possibly have the effect of deterring many patients from submitting to treatment which it was obviously in their best interests to undergo."

In *Bolton v Blackrock Clinic & ors*[24] the plaintiff alleged that a sleeve resection of her left main bronchus was unnecessary and unwarranted, that she had not been informed of the risks inherent in the procedure and, in particular, of the risks of restenosis and a subsequent pneumonectomy (or removal of her left lung). She further alleged that she had not been properly advised of the effects of the second operation in advance. In the High Court, Geoghegan J found that the defendants had not been negligent in their approach to the diagnosis and treatment of the plaintiff's condition and a unanimous Supreme Court on appeal affirmed this finding. In relation to whether or not the risks of the first surgery had been adequately disclosed to the plaintiff, Geoghegan J appeared to accept that the standard of care in disclosure was to be determined on ordinary negligence principles. On the evidence, he found that the risks had been properly disclosed. The Supreme Court upheld this finding of fact on appeal, and found that it was based on credible evidence. Insofar as the legal test was concerned, however, Hamilton CJ (Barrington and Murphy JJ concurring) quoted with approval from the judgments of Finlay CJ and McCarthy J in *Walsh*. Without reference to the basis of the decision in the High Court, the Supreme Court decided that the matter ought to be determined on the *Dunne* principles.[25]

Although *Bolton* presented the first opportunity at Supreme Court level since *Walsh* to resolve the issue of how the standard care in disclosure in the obtaining of consent prior to diagnostic or therapeutic interventions should be assessed, the central problem left by *Walsh* remained unaddressed. In summary, therefore, the definitive determination of the standard of care in disclosure had to await another day.

However, in *Reid v Beaumont Hospital Board & anor*[26] the *Dunne* approach was also favoured. Here, the plaintiff alleged *inter alia* that had she known the risks of treatment of an arterio-venous malformation, she would not have consented to the procedure. She further alleged that there should have been a second interview closer to the date of the operation than the date upon which she met the surgeon in the outpatients department. In respect of the second allegation, Johnson J was satisfied on the evidence that it was not :

" ... sufficient to establish that it was a breach of duty or negligence on the part of the defendants or either of them in failing to have a second interview explaining the details of the condition from which the plaintiff was suffering [and] the dangers which were involved in the operation, close to the operation...."

In arriving at this conclusion, Johnson J was clearly reliant on the expert evidence adduced - in effect, this appears to have been decided on *Dunne* principles. In relation to the duty of disclosure, the neurosurgeon had no specific recollection of the plaintiff, or what he had told her. However, he relied on his "invariable practice ... corroborated to a certain extent by certain letters and notes which were written at the time." In this regard, the approach is similar to that adopted in *Farrell*. Faced with a straight conflict of evidence, Johnson J preferred that of the neurosurgeon and dismissed the plaintiff's claim. Although not expressly relying on the dicta of Finlay CJ and McCarthy J in *Walsh* the clear thrust of the decision in *Reid* is in that direction.

Although clear guidance as to the correct approach to the standard of disclosure is awaited, in Britain it might be argued that notwithstanding that *Bolitho* (just as *Dunne*) was expressed not to involve consideration of disclosure, to the extent that Bolam is now modified by Bolitho, so *Sidaway* - and the duty of disclosure - must now be taken to also to be decided on *Bolitho* principles. If so, the decision of the Court of Appeal in *Gold v Haringey Health Authority*[27] - in which leave to appeal to the House of Lords was refused - as to the interpretation of *Sidaway* must also be regarded as suspect.[28] In Ireland, in contrast to *Gold v Haringey* - which involved an elective procedure - there is an apparently greater readiness on the part of the court to interfere in such cases. As Finlay CJ noted in Walsh the obligation or duty to disclose risks:

" ... must, as a matter of common sense, vary with what might be described as the elective nature of the surgery concerned ... the obligation to give a warning of the possible harmful consequences of a surgical procedure which could be said to be ... elective ... may be more stringent and onerous."[29]

Given *Bolitho* - and the inevitable effect it must have on the interpretation of the majority opinions in *Sidaway* - and considering the approach taken by our courts on the issue, the final say as to the determination of the standard of care in disclosure prior to interventions must be regarded as being in the hands of the courts, and not the medical profession.

This issue was most recently revisited by the High Court in *Geoghegan v Harris*.[30] Here, the plaintiff alleged negligence in the carrying out of a dental implant procedure by the defendant dentist, during the course of which a bone graft was taken from the plaintiff's chin. This taking of the bone graft was alleged to have damaged the incisive nerve at the front of his chin and left him with severe mid-line chin pain - a chronic neuropathic pain. The plaintiff also alleged that the defendant dentist failed to disclose to him in advance of the operation the risk that such pain might be a consequence of the procedure. The court, having heard evidence and submissions over some 20 days, gave the first part of its judgment on the disclosure of risks element of the case.

Prior to his carrying out of the procedure, the defendant had two consultations with the plaintiff and gave him a video (which the plaintiff did not initially look at) and an information sheet in relation to the implant procedure. Indeed, the defendant had insisted that the plaintiff attend for the second consultation, quite close to the actual date of the operation, before he agreed to proceed. This was the standard protocol that he adopted, in order to discuss any questions that a patient might have as a result of looking at the video or information sheet and to allow the whole procedure to be discussed in detail again. The overall purpose of this protocol was to ensure that the patient was fully prepared and informed prior to his undergoing the procedure. Conceptually, this must be considered a reasonable and prudent approach to adopt - and certainly exceeds that which Johnson J considered was necessary in *Reid*. But, in this particular case, neither the information sheet nor the video made any reference to the possibility of chronic neuropathic pain. In addition, neither addressed the question of bone grafts, but concentrated principally on the implant procedure itself. Bone grafting was necessary in only a small percentage of implant procedures, in those cases where the bone at the proposed implant site was unsuitable and required to be supplemented.

In evidence, the defendant dentist accepted that he did not discuss or disclose any possibility or risk of chronic neuropathic pain associated with damage to any nerves which lay in the area where an implant to the lower jaw and the bone graft were to take place. He maintained that he referred to possible numbness or altered sensation both in the teeth and in the lip and chin area as a result of nerves being cut. Insofar as the standard of disclosure was concerned, he was of the view that he had a duty to give information about rare complications where the risk exceeded 1%, although chronic neuropathic pain did not occur to him as being a

risk associated with this procedure. In relation to causation, the plaintiff emphatically denied that he would have undergone the procedure even if the risk was only 0.1%.

Kearns J reviewed the authorities in the area, beginning with *Walsh*,[31] and observed that, irrespective of the approach to determining the standard of care in disclosure, the same conclusion was reached in relation to two critical questions in the instant case, namely:

(a) The requirement of disclosure is to give a warning of any material risk which is a 'known complication' of a procedure properly carried out, and
(b) The test of materiality in elective surgery is to enquire only if there is any risk, however exceptional or remote, of grave consequences involving pain stretching for an appreciable time into the future; statistical frequency is irrelevant.

In this regard, the court's focus was sharply directed at a specific result of what must be considered a more generic proposition. Although the duty of care is always imposed as a matter of law, and is subject to the control devices of foreseeability and proximity, and although the court determines the standard of care in ordinary negligence on the basis of the test of reasonableness, in cases of professional negligence the determination of the standard of care is conveniently considered to be effectively delegated to the relevant profession. But this delegation, certainly since *O'Dovovan*, must also be considered to be subject to the right of the court to have the last word on the issue. In practical terms, therefore, assessement of the standard of care in professional negligence is also a legal, as distinct from a professional matter.[32] In the circumstance, it can hardly be considered surprising that the same conclusion is reached irrespective of the approach that might be adopted, although it is rarely commented upon.[33]●

To be continued.

1. See *Daniels v Heskin* [1954] IR 73.
2. [1992] IR 496.
3. Supreme Court, unreported, 23 January 1997, affirming the High Court (Geoghegan J), unreported, 20 December 1994
4. *Geoghegan v Harris,* High Court (Kearns J), 21 June 2000. The second part of the judgment was handed down on 14 September 2000, see *The Irish Times,* 15 September 2000, page 4.
5. *Daniels v Heskin* [1954] IR 73.
6. Unreported, High Court (Laffoy J), 11 July 1997.
7. [1954] IR 73 at 81 *per* Lavery J (Murnaghan and O'Byrne JJ conc. Maguire CJ diss.)
8. [1954] IR 73 at 87.
9. [1992] IR 496.
10. [1992] IR 496at 531, per O'Flaherty J.
11. *Reibl v Hughes* (1980) 114 DLR (3d) 1 at 10 (Sup Ct Canada) *per* Laskin CJ cited with approval by O'Flaherty J in Walsh.
12. [1989] IR 91.
13. *Bolam v Friern Hospital* [1957] 2 All ER 118.
14. [1967] IR 173 (SC).
15. [1992] IR 496 at 510, *per* Finlay CJ. Although Egan J agreed with Finlay CJ and McCarthy J in terms of allowing the appeal, his judgment is not clear as to which approach he favoured in addressing the issue of the standard of care in disclosure.
16. 1980 114 DLR (3d) 1 (Sup Ct Canada).
17. [1992] IR 496 at 535, per O'Flaherty J.
18. [1985] AC 871.
19. O'Flaherty's view in *Walsh v Family Planning Services & ors* [1992] IR 496 effectively reflects this view.
20. [1985] AC 871 at 900 *per* Lord Bridge. This was the approach favoured by Finlay CJ and McCarthy J in *Walsh v Family Planning Services & ors* [1992] IR 496. See, also, Heuston RFV, Buckley RA:

    Salmond & Heuston on the Law of Torts (Sweet & Maxwell, 20th Edition, 1992), pages 236-237; and McMahon B, Binchy W: *Irish Law of Torts* (Butterworths, 2nd Edition 1990), page 269.
21. [1997] 4 All ER 771 (November 13, 1997).
22. [1985] AC 871 at
23. High Court (O'Hanlon J), unreported, 19 September 1994
24 Supreme Court, unreported, 23 January 1997, affirming the High Court (Geoghegan J), unreported 20 December 1994.
25. See also W. Binchy and C. Craven, *Doctors in the Dock* (1998) GILS Vol. 92, No 5, pp 18 - 21.
26. High Court (Johnson J), unreported, 18 July 1997
27. [1987] 2 All ER 888, [1988] QB 481.
28. See also the views expressed in Kennedy I and Grubb A: *Medical Law* (Butterworths, 2nd Edition 1994) page 187.
29. *Walsh v Family Planing Services & ors* [1992] IR 496 at 510, *per* Finlay CJ (with whom McCarthy J agreed).
30 High Court (Kearns J), unreported, 21 June 2000
31. Including *Canterbury v Spence* (1972) 464 F 2d 772 (DC) and *Bolton v Blackrock Clinic & ors,* Supreme Court, unreported, January 23, 1997 affirming the High Court Geoghegan J, unreported, 20 December 1994.
32. See the incisive analysis in J. Healy: *Medical Negligence: Common Law Perspectives* (Sweet & Maxwell, 1999) chapter 3, which Kearns J cited in *Geoghegan.*
33. Cases involving allegations of negligence in nursing practice perhaps would be more illustrative. Compare, for example, the contrasting approaches in *Kelly v St. Laurence's Hospital* [1988] IR 402 and (although not a professional negligence case) *Allen v. Suilleabháin & Mid Western Health Board,* unreported, High Court (Kinlen J), 28 July 1995 affirmed by the Supreme Court, 11 March 1997 (Hamilton CJ, Blayney, Murphy JJ).
33. Although logically appealing, clinically such a conclusion could be considered strained and echoes the approach of the Supreme Court in Reeves v Carthy & O'Kelly [1984] 348 to determining whether the damage suffered was of a kind that was reasonably foreseeable.
34. However, Kearns J was also of the view that the elective nature of the surgery was more relevant to the issue of causation than to assessment of the standard of disclosure.
35. [1992] 496 at 511.
36. [1986] ILRM 189.
37. [1967] IR 173.
38. [1992] IR 496 at 510 per Finlay CJ and *Bolton v Blackrock Clinic & ors,* op. cit., *per* Hamilton CJ: an obligation to 'inform [the patient] of any possible harmful consequence.'
39. *Canterbury v Spence* (1972) 464 F 2d 772 (DC) and *Reibl v Hughes* (1980) 114 DLR (3d) 1.
40. *Ellis v Wallsend District Hospital* [1989] 17 NSWLR 553, *Bustos v Hair Transplant Pty Limited & anor* (Unreported Judgment, Court of Appeal, New South Wales, April 15, 1997), *O'Brien v Wheeler* (Unreported Judgment, New South Wales, May 23, 1997), *Chatterton v Gerson* [1981] 1 QB 432, *Hills v Potter* [1984] 1 WLR 4, *Smith v Barking* HA [1995] 5 Med LR 285.
41. In this, Kearns J cited with approval from J White (1996) *Medical Negligence Actions* (Oak Tree Press, Dublin) page 190.
42. Other than in a passing quotation in the context of the 'inquisitive patient'.
43. See, for example, the passages from *Sidaway v Bethlem Royal Hospital Governors & ors* [1985] 1 All ER 643 cited by Kearns J.
44. Kearns J considered that the doctrine 'if such it can be called' arose out of the limited duties imposed by *Bolam.*
45. (1999) Sweet & Maxwell, London, page 104.
46. In this regard, *Ewing v North Western Health Board & anor,* High Court (O'Donovan J), unreported, 2 December 1998 seems unusual.

"CORONERS: PRACTICE & PROCEDURE"

by Brian Farrell
(Round Hall Sweet & Maxwell, 2000)

REVIEWED BY PAUL CARROLL BL

Until now the Irish lawyer, when confronted with an inquest before the Coroners' Court, had little assistance by way of textbooks on the law and practice of coroners, with the exception of Patrick O'Connor's *Handbook for Coroners in the Republic of Ireland* which, whilst helpful is, as its title suggests, somewhat limited in content. If O'Connor's Handbook did not yield fruit, then one would more than likely turn to the English textbook *Jervis on Coroners* (now in its 11th edition), and continue one's research there. However, whilst in our neighbouring jurisdiction the legislature has been active in up-dating the legislative code within which the coroner's court operates, our own parliament has been somewhat remiss in this area. Accordingly, the significant divergence between coronial law in England and in this jurisdiction is such that the recently published *Coroners: Practice and Procedure* by Brian Farrell is a welcome and useful publication, and, moreover, it is a book which does not suffer from the malady of so many Irish legal texts, that is, being no more than an Irish version of an English book. That is not to say that the author has not referred to the numerous English and Northern Ireland authorities on the subject. Indeed, this is necessitated by the dearth of case law in this jurisdiction on coronial matters, there being no more than ten written judgments since the enactment of the consolidating Coroners Act of 1962. However, interestingly, two recent cases have ended up in the Supreme Court, namely, *Morris v. The Dublin City Coroner* (on the powers of the coroner to grant anonymity and screening to witnesses) and *Attorney General v. Lee* (on the powers of the coroner to compel witnesses to attend an inquest), but unfortunately judgment in neither case had been handed down at the time of publication of this book.

The work of the coroner in modern times, as defined by the author, is that of a "medico-legal death investigator", and as such straddles areas of medical knowledge and legal knowledge. In this regard the author is eminently qualified to write this book, being not only a medical practitioner (with specialised qualifications in pathology) but also a Barrister-at-law, and he has from 1991 to the present sat as the Dublin City Coroner.

As stated in the opening line of *Jervis on Coroners*, "no-one is quite sure what were the origins of the ancient office of coroner." The author tackles the origins and history of the coroner in Ireland in the opening chapter of his work, and the enormous effort put into his research in this area results in some 45 pages of fascinating material ranging from the Norman Invasion of Ireland to the present day legislative basis for the office of the coroner, namely the Coroners Act 1962.

The book then goes on in some further 16 chapters to deal with all aspects of the practice and law of coroners in Ireland. Chapters 2, 3 and 4 deal with the office, jurisdiction, powers and duties of the coroner. Chapter 5 addresses the relationship between the office of the coroner and the Registrar of Births and Deaths. Chapter 6 sets out the law and practice in regard to the reporting of deaths to the coroner. Chapter 7 details the procedures following the reporting of the death.

A coroner is under a statutory obligation to hold an inquest where "death may have occurred in a violent or unnatural manner." The question of whether a death is due to natural or unnatural causes is the topic of Chapter 8 of the book. In this chapter the author displays his medical expertise by giving the reader a concise rundown on the principal causes of natural death ranging from coronary atherosclerosis to cerebral infarction, and he then goes on to examine what amounts to unnatural death. Chapter 9 deals with the post-mortem examination.

The next six chapters, under the headings "Preparation for Inquest", "The Jury", "Procedure at Inquest", "Witnesses at Inquest", "Rules of Evidence and Examination of Witnesses" and "Record of Verdict", deal with all aspects of inquests and as such are of particular importance to the lawyer attending at an inquest or advising on the matter.

The penultimate chapter of the work deals with the area of judicial review, and the final chapter deals with matters arising after the inquest. The appendices in this work helpfully contain all the relevant legislation and statutory instruments, forms and protocols.

The author's style of writing is clear and avoids the use of excessive legalese. In many sections of the text the author has pulled together the various sources of law on the matter under discussion and quoted them in a full manner. For example, in a section on "Verdicts" in the Chapter entitled "Record of Verdicts" the first paragraph opens by listing all references in the Coroners Act 1962 to the word "verdict". Then the author sets out in full the Oath to be taken by jurors, then he quotes a textbook, followed by quotations from three different cases, and ends the section by inserting in full the content of a coroner's certificate under section 50(1) of the Act of 1962 (the latter of which appears in full in Appendix C). Clearly, the downside of this over-reliance on the insertion of full quotations is, first, that the book at times reads in a disjointed way and more like a sourcebook than a textbook and, second, that the book is often repetitious. But clearly very few law books are read cover to cover (except by overzealous reviewers) and this small criticism will not be noticed by the reader who dips in here and there in search of a specific reference. Indeed in all likelihood this work is aimed at such a reader.

Throughout the author does not shy away from suggesting legislative reform. For example, the coroner has the somewhat curious power to inquire into the finding of treasure trove. In relation to this the author states that the jurisdiction to hold inquests on treasure trove is a remnant of the archaic fiscal jurisdiction of the coroner and should be abolished. Further, the author presses for the legislature to enact Coroners Rules to aid consistency of coroners practice and procedure throughout the country. In this regard it should be noted that a Working Group on the Coroners Service was established to carry out a review of all aspects of the coroner service in Ireland, but as yet no report has been concluded.

I recommend this work as a worthwhile purchase to any lawyer, member of the medical profession or lay person who may find themselves involved in a coronial matter. ●