The Bar Review

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- Self Defence and International Law
- Calculating Commercial Damages
- Abuse of a Dominant Position
- The Abolition of Preliminary Examinations

A Butterworths Ireland Company Law Seminar

Structuring Company Lending after the Company Law Enforcement Act 2001

On 11 October 2001 at The Alexander Hotel Merrion Square, Dublin 2, from 2.15pm

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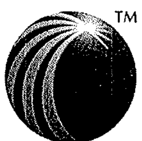

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Editorial Correspondence to:

The Editor,
Bar Review,
Law Library Building,
158 Church Street,
Dublin 7

Telephone: 353-1-817 5198
Fax: 353-1-817 5150
e-mail: pdm@lawlibrary.ie

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Design: the Design Room tel: 6617080 Cover Illustration: Brian Gallagher: tel: 4973389

WORK IN THE COURTS

In a recent lecture delivered to UCC Law Society, subsequently published in the pages of the Bar Review, the Chief Justice pointed out that it was difficult to obtain accurate and up-to-date information on court delays in this jurisdiction. In the course of a thoughtful comparative appraisal of the Irish Court system and of possible reforms to the structure and scope of the original and appellate jurisdiction of all courts, the Chief Justice was nonetheless able to identify a number of causes of delays and deficiencies which could be tackled by administrative as well as structural reforms. Whereas certain such reforms could and were being introduced without any alteration to the present court system, others called for a complete reappraisal of the present jurisdiction of the courts. In particular, it was pointed out that the Irish Court system was anomalous in having a three tier system of courts of first instance, whereas only two might be required, and in addition in having only a one tier appeal system in civil cases, where two might be preferable. The suggested answer was to abolish the Circuit Court, to significantly expand the jurisdiction of the District Court, and to rationalise appeals on both the civil and criminal sides by the establishment of a permanent Court of Appeal which, on the civil side at least, would not ordinarily hear appeals by way of a full rehearing. The Supreme Court would act as a final court of appeal in cases involving important points of law and constitutional cases.

Although far reaching and important in Irish constitutional terms, these proposals would not require a constitutional referendum. It is therefore all the more important that members of the Bar and of the legal profession in Ireland begin to reflect also on the need for and the desirability of structural reforms affecting the jurisdiction and operation of the Irish court system. A good starting point for this process may be found in the recent statistical analysis carried out by the Courts Service of the number and type of cases which came before the Irish Courts during the year 2000. This analysis, appended to the Annual Report of the Courts Service, provides an interesting snapshot of the present volume and complexity of litigation in Ireland. As appears from the following statistics relating to the calendar year 2000, the statistics confirm that the Courts in Ireland are busier than ever:

* The District Court dealt with 446,705 criminal matters, 23,329 family matters, 79,240 civil matters and 93,867 licensing matters
* Indictable Offences dealt with summarily by the District Court totalled 53,171 and resulted in 11,792 determinations of prison sentence, 4,320 fines, 2,089 community service orders and 34,970 other orders (probation, peace bond, dismissal, etc)
* The Circuit Court dealt with 8,999 criminal matters, 39,742 civil matters, 5,226 family matters and 448 licensing matters
* The High Court granted 16,999 orders and issued 227 written judgments during 2000. The offices of the High Court received 25,033 affidavits as part of pre-hearing activities comprising 70,701 separate matters
* The Central Criminal Court received 42 murder cases and 113 rape cases, and
* The Special Criminal Court heard 26 cases and received 21 new cases

The figures for the Supreme Court and the Court of Criminal Appeal relate to the period August 1999 to September 2000, as follows:

* The Supreme Court heard 449 cases, and
* The Court of Criminal Appeal heard 233 appeals during this period.

These statistics confirm that Irish courts are tackling and processing a considerable workload, but the statistics alone are only one element in the overall picture. For example, while there is undoubted merit in the observation of the Chief Justice that the inferior Courts may be presently burdened with a significant number of alcohol licensing matters which may be wasteful of judicial resources, many such licensing matters are very speedily processed and may not trouble the time of the courts to any considerable degree. Furthermore, the clients and users of the District Court, and in particular solicitors, might justifiably oppose any proposal to abolish the Circuit Court on the grounds that District Court matters should continue to be speedy affairs uncluttered by longer matters in the list requiring representation by Counsel. The Irish Circuit tradition is also a long one. If the High Court were to sit regularly as a regional Court, for example with High Court judges sitting in rotation in the different regions, this tradition could possibly be preserved. Another solution, which could preserve the Circuit Court, might be to look to the changes introduced to the Crown Court system in the United Kingdom. At all events, before considering these or other steps, the impressive ability of our present Circuit Court system to dispense justice in a manner which respects the local character and meets the demands and expectations of its clients and users, should be balanced against the possible future efficiencies of any modernised system.

ELF-DEFENCE - A LEGAL BASIS FOR THE ATTACKS ON AFGHANISTAN?

Conor Keogh BL considers whether the present use of armed force against Afghanistan is lawful as a matter of self-defence or otherwise under public international law

Introduction

At the time of writing military strikes by American and British forces against Afghanistan have commenced. These attacks have been precipitated by the horrific events of September 11th in Washington and New York and the belief that Osama bin Laden of the al-Qaeda terrorist network was responsible. In an address to the UN General Assembly on the 2nd of October, the Minister for Foreign Affairs Brian Cowen asked; "Who can reasonably argue that the US does not have the right to defend itself, in a targeted and proportionate manner, by bringing to justice those who planned, perpetrated and assisted in these outrages and who continue to threaten international peace and security?"[1] Ostensibly, these attacks are being conducted because the Taliban regime is suspected of giving aid and support to bin Laden and have refused demands to deliver him up to the American authorities. Historically, these events have a strong resonance with the U.S. bombing of Libya in April 1986. Those attacks were conducted in response to the killing of a U.S. serviceman and the injury of over 200 other people in the bombing of a West Berlin nightclub - an act attributed by the U.S. to Libyan agents. A statement issued by the White House immediately after the Berlin attack asserted that:

> "In the light of this reprehensible act of violence and clear evidence that Libya is planning future attacks, the United States has chosen to exercise its right to self-defense. It is our hope that this action will preempt and discourage Libyan attacks against innocent civilians in the future."[2]

The purpose of this article is to outline the provisions of international law under which nation states may legitimately use force as a means of self-defence and to question whether the military action being undertaken does in fact conform to these principles.

Customary International Law: The Caroline Case[3]

The customary right of self-defence was definitively expressed in diplomatic correspondence between U.S. Secretary of State Webster and British officials over what became known as 'The Caroline incident'. The case arose out of the Canadian Rebellion in 1837. A force of rebels, including a large number of American nationals, had established itself on an island in Canadian waters from which it undertook raids and attacks on passing British ships. The rebels were supplied from the United States by an American ship called The Caroline. In December 1837, British military forces seized The Caroline while it was berthed in an American port and sent her over the Niagara Falls. Two U.S. nationals were killed. In the communications with the British authorities that followed the incident, the American Secretary of State articulated the requisite conditions for an attack in self-defence. There had to exist "A necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation." Not only are such conditions necessary before self-defence becomes legitimate, but the action taken in pursuance of it must not be unreasonable or excessive, "Since the act justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it." It is therefore the case that:

> "The use of force in self-defence is lawful under customary law if it is made in response to an immediate and pressing threat, which could not be avoided by alternative measures and if the force used to remove that threat was proportional to the danger posed. So, if the crisis could be avoided by diplomatic representations, or if the 'danger' was so remote as to be nothing more than a feeling of suspicion, self-defence is not justified."[4]

The International Court of Justice has subsequently held that the right of self-defence exists as an inherent right under customary international law as well as under the U.N. Charter:

> "Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter... It cannot, therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law."[5]

If the requisite conditions are fulfilled, the right of self-defence overrides any competing rights of the offending party under international customary law.

The United Nations Charter

The U.N. Charter requires member states to settle disputes amongst themselves by peaceful means and to refrain in their international relations from either the threat or use of force. Chapter 1, Article 2(3) of the Charter requires all Member States " To settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered," while Article 2(4) demands that all Member States:

"Refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any State, or in any manner inconsistent with the purpose of the United Nations."

Chapter VII, Article 39 states;

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

By virtue of Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, the prohibition articulated in Article 2(4) of the Charter is part of *jus cogens*. In other words, it is a norm of general international law that is of a peremptory force and from which no derogation may be made, except by another norm of equal weight. Further, the Charter's prohibition on the threat or use of force is binding on states both individually and as members of international organisations such as NATO, as well as on those organisations themselves. One exception to this general prohibition on the use of force is embodied in Article 51 of the Charter and is available to states which find themselves the victim of violent aggression. Under Article 51:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Accordingly, individual or collective self-defence through the use of armed force is only permissible in the case of an "armed attack" and where the Security Council itself has not taken measures to maintain international peace and security. In Resolution 1368 passed on 12 September 2001, the Security Council has explicitly recognised the right of the United States to defend itself while expressing its readiness "To take all necessary steps to respond to the terrorist attacks of September 11th, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations." Some commentators have suggested that this resolution is the requisite mandate required under the Charter authorising military strikes against Afghanistan. It is submitted that this view is incorrect. Resolution 1368 is merely an expression of political solidarity and its only effect is to afford a measure of moral authority to the U.S. in its response to the attacks on the World Trade Centre and the Pentagon. Indeed, diplomatic sources have been quoted as saying:

"Whether the U.S. would seek a further resolution depended on whether a draft would meet with favour in the Security Council .... the U.S. did not appear to want to return to the Security Council because that might "complicate" the international consensus being built up."[6]

Nicaragua v. United States Of America[7]

In 1979, the right-wing Somoza regime in Nicaragua was overthrown in a popular revolution and the left-wing Sandinista movement was installed in power. In 1981, President Reagan terminated economic aid to Nicaragua on the ground that it aided guerillas fighting against the El Salvador government. Nicaragua allowed Soviet supplied arms to pass through its ports and territory en route to insurgents fighting the Washington backed Salvadoran Government. In this case, Nicaragua claimed *inter alia* that the United States had, contrary to customary international law, (1) used direct armed force against it by laying mines in Nicaraguan territorial waters, causing damage to Nicaraguan and foreign merchant ships, and had attacked Nicaraguan ports, oil installations and a naval base and (2) given assistance to the Contras, guerrillas fighting to overthrow the Sandinista Government. In the course of its deliberations the Court reaffirmed the existence of the right to self-defence as an inherent right under customary international law as well as under the UN Charter:

"The general rule prohibiting force established in customary law allows for certain exceptions. The exception of the right of individual or collective self-defence is also, in the view of States, established in customary law, as is apparent for example from the terms of Article 51 of the United Nations Charter, which refers to an "inherent right"............. whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence."[8]

The Court went on to consider the issue of what constitutes an 'armed attack':

"There appears now to be general agreement on the nature of the acts that can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of an armed force against another State of such gravity as to amount to" an actual armed attack conducted by regular forces,.................but the Court does not believe that the concept of "armed attack" includes assistance to rebels in the form of the provision of weapons or logistical or other support...........such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of a lesser gravity than an armed attack."[9]

The United States had sought to justify its actions against

"It is submitted that whatever approach is utilised, doubts arise as to the lawfulness of the military campaign against Afghanistan. Customary international law dictates that any action taken in self-defence must be immediate, not prepared over a long period of time...Further, the question arises as to whether the response taken is proportionate to the danger posed and whether any alternative measures were available to the U.S.?"

Nicaragua on the ground of collective self-defence. It pleaded that its actions were lawful as the activities perpetrated by Nicaragua against El Salvador constituted an 'armed attack' against a friendly third country. The Court was satisfied that an intermittent flow of arms was routed via Nicaragua to the opposition in El Salvador. However, it held that this did not amount to an 'armed attack'. The Court went on to state that the measures taken by the U.S. also fell outside the bounds of necessity and proportionality. Thus, the U.S. by its training and arming of the Contras and its mining of Nicaraguan territorial waters, had breached its obligations under customary international law not to interfere in the affairs of another State or use force against another State.

Collective Self-Defence

The right of collective self-defence is explicitly referred to in Article 51 of the Charter and indeed the entitlement was acknowledged and affirmed in *Nicaragua v U.S.A.* However its exercise is contingent on a declaration by the alleged victim that it has been attacked and a formal request by that state for assistance. It appears that states that have not been the subject of an attack may come to the assistance of the victim. Thus, collective self-defence is not the joint exercise of individual rights; rather it is collective action in response to an actual armed attack against one state. This is the basis for such military alliances as NATO. Article 5 of the North Atlantic Treaty states:

> "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such actions as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."

If the conditions are met for the application of Article 5, each NATO ally is obliged to assist the victim state by taking such action, as it deems necessary. This is an individual obligation on each ally and each ally is responsible for determining what it deems necessary in the particular circumstances. It should be noted that, pursuant to Article 7, the NATO Treaty "Does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security." On 2 October 2001, NATO formally invoked Article 5 for the first time in its history.

Conclusion.

There is considerable doubt as the extent and ambit of self-defence under current international law. Under the more flexible pre-Charter definition as articulated in The Caroline Case, proponents of a permissive approach argue that force may be lawful in self-defence in circumstances falling short of an armed attack. Thus in June 1981, Israel attacked nuclear installations in Iraq, justifying the action as legitimate self-defence against the imminent threat to Israel's security posed by the possibility of Iraq developing a nuclear weapons capability. The more restrictive view argues that self-defence may only be invoked pursuant to the UN Charter and in the sole context of an 'armed attack.' It is submitted that whatever approach is utilised, doubts arise as to the lawfulness of the military campaign against Afghanistan. Customary international law dictates that any action taken in self-defence must be immediate, not prepared over a long period of time. A period of nearly four weeks had elapsed before the U.S. and Britain commenced bombing targets. Further, the question arises as to whether the response taken is proportionate to the danger posed and whether any alternative measures were available to the U.S.? Given the success of the Lockerbie trials in responding to international terrorism, some commentators have argued a comparable process could have been initiated in respect of Osama bin Laden.

"In adopting a Charter analysis, one other major difficulty arises...As barbarous as the events of September 11th were, it is submitted that the Taliban's role therein does not come within the legal definition of armed attack as articulated by the ICJ in *Nicaragua v USA*."

In adopting a Charter analysis, one other major difficulty arises. The military action being undertaken in Afghanistan is directed against the Taliban and the al-Qaeda terrorist network. The Taliban are being targeted because of their support for and harbouring of Osama bin Laden. As barbarous as the events of September 11th were, it is submitted that the Taliban's role therein does not come within the legal definition of armed attack as articulated by the ICJ in *Nicaragua v USA*. To this writer's knowledge, no allegation has been made that the Taliban sent the suicide bombers to carry out the atrocity, but rather they are complicit because of their role in sheltering terrorist camps in Afghanistan. However, as noted earlier, the ICJ "does not believe that the concept of "armed attack" includes assistance to rebels in the form of the provision of weapons or logistical or other support."

The choice between the permissive or restrictive approach is broadly a function of any given state's role within the political economy of international relations. As Dixon has observed, "Policy arguments which favour a wider right represent nothing more than powerful states' desire to preserve their freedom of action in an incomplete system of law."[10] In the heated atmosphere since September 11th much of the focus has been on the character and modalities of the American military response. Such reactions are understandable. However, proceeding on a doubtful legal basis poses its own inherent dangers. Reprisal is not self-defence.●

1. *The Irish Times*, 3rd October 2001
2. Lambert, *Terrorism and Hostages in International Law* (Grotius 1990), 321.
3. 29 B.F.S.P 1137-1138; 30 B.F.S.P. 195-196.
4. Dixon, *Textbook on International Law* (Blackstone Press 1990) 186
5. ICJ Reports, 1986, Paragraph 176.
6. MacAskill, "U.S. will not seek mandate from the U.N. on strikes." *The Guardian*, 22nd September 2001.
7. *Case Concerning The Military And Paramilitary Activities In And Against Nicaragua*, ICJ Reports, 1986.
8. *Ibid*, Paragraphs 193-194.
9. *Ibid*, Paragraphs 195-196, 247.
10. Dixon, *Textbook on International Law* (Blackstone Press 1990), 188.

FORENSIC ACCOUNTING THE CALCULATION OF COMMERCIAL DAMAGES

In the second of two articles dealing with forensic accounting calculations, ***Prof Niamh Brennan*** *of UCD and* ***John Hennessy BL*** *examine the approach to calculating damages in commercial cases.*

Commercial damage is a business loss of profits or loss of asset value resulting from the actions of another party.* The economic damage to be calculated in a commercial suit will follow from either a lost profit or lost asset value model. The former is frequently associated with business interruption cases and the latter with business valuation and share fraud cases. Either model might be appropriate in breach of contract, commercial tort, or competition cases depending on the situation. In such commercial loss claims, forensic accountants can assist in evaluation of damages, reconstruction of records, quantification of damages, dispute resolution and provision of expert testimony. This article concentrates on the calculation of lost profits.

Computation of lost profits

Commercial damages calculations tend to vary considerably as the circumstances underlying them vary widely from case to case. In addition, the industries involved may be very different and may present unique issues. As a result of this variability, commercial damages cases present a greater degree of complexity for the damages expert.

The computation of lost profits arising from an alleged wrongful act can be expressed as follows:

- Lost profits = Loss of sales revenue - Savings in variable costs due to reduced output + extra costs incurred due to the wrongful act

These equations may need to be modified depending on particular circumstances. For example, in some cases there may be no loss of revenues, only additional costs incurred. In other situations, there may be a loss in sales revenue without a corresponding saving in variable costs.

Overview

The law does not clearly define lost profit damages - rather they vary by type of action and jurisdiction. The general principles guiding the calculation of lost profits are on the face of it simple. Net profits defined as revenues that the plaintiff would have received but for the defendant's wrongful actions, less the costs saved as a result of not having to earn those revenues, must be computed. The computation can be broken down into a number of steps as follows:

- Define the damage period
- Estimate lost revenues from sales for that period
- Subtract costs associated with lost revenues
- Subtract net profits from efforts made to mitigate losses
- Express lost profits in present value terms
- Estimate and add any other loss of worth arising from the defendant's wrongful acts.

Damage period

Determining the damage period can be relatively straightforward or may be difficult. The choice of length of a damage period depends on the length of time necessary for the damaged firm to complete its adjustment to the loss of business so that the remaining effects of the wrong suffered are negligible. In a business interruption case, losses may be measured until such time as the sales or profits of the plaintiff's business have recovered. The length of time must also take account of the fact that other causal influences on the firm's profits may overwhelm the influence of the wrongful act. If the incremental profit margin shrinks with each successive period, and/or if the discount rates fully incorporate risk factors, then usually the present value of each future year's lost profit will fall off quickly. As the present value in each period decreases towards zero, it will normally be clear where the damage period can be cut off with negligible effect on the total present value of the losses suffered.

The further into the future one forecasts, the greater is the uncertainty surrounding the forecast. Courts are reluctant to award damages where calculations are based on assumptions incorporating a high degree of uncertainty. As a result, losses will generally only be recoverable in respect of the time period within which they can be estimated with reasonable certainty.

In a US case[1] the court ruled that "as a general principle" lost future profits are deemed too speculative to allow a recovery for their loss unless the plaintiff presents sufficient proof to bring the issue outside the realm of conjecture, speculation or opinion unfounded on definite facts. In the US, the legal basis for establishing damages to the satisfaction of the courts requires that damages[2]:

- must be proven with a reasonable degree of economic certainty and
- may be estimated and do not have to be exactly measured, but
- cannot be speculative.

Where the wrongful act has caused the plaintiff to go out of business, the loss period is infinite. Although the loss period may have no definite termination date, this does not imply that the losses themselves are infinite. The practice of discounting projected lost profits to present value means that losses in the far-off future are discounted to increasingly lower values. In effect, this discounting process represents a calculation of the value of the business based on the amount and timing of the cash flows it would have generated had it not gone out of business.

The Irish courts will tend to look at the specific circumstances of each individual case and to rely, where appropriate, on the evidence of experts when deciding on the appropriate period to use for the calculation of damages for business interruption. An example of this arose in *Herlihy v. Texaco (Ireland) Ltd*[3] where Pringle J. arrived at a loss period of two years, in a case involving the termination of a tenancy, partly on the basis of evidence given by a chartered surveyor.

Estimate of lost revenues

Sales are usually a function of volume sold and unit price. Estimation of lost revenues will therefore involve looking at historic patterns and future expectations of volumes and prices. In a typical business interruption case, the projection of revenues that the plaintiff firm has lost as a result of the alleged wrongdoing is based on the plaintiff firm's historical rate of revenue growth, as well as other relevant factors. An expanding business will have to support claims made by reference to budgets, forecasts, investment appraisals and market surveys. Market conditions in the industry generally will also need to be considered. Losses are measured by projecting revenues and then converting these amounts to profits through the application of a relevant profit margin.

Deduction of costs saved

In general, defendants are only required to compensate plaintiffs for net profits, not gross profits or gross selling price.[4] In England, the Court of Appeal has held that damages for loss of gross profit or gross contribution can only be claimed if the overheads could not reasonably be avoided and/or where there was no substitute business available.[5]

It should be noted that the basis of calculation for compensation for loss of profits is often set out in a relevant insurance policy and, if so, this will determine the components of the compensable loss and the manner in which it is calculated *(e.g. see Superwood Holdings Ltd v. Sun Alliance & London Assurance plc*[6]*)*. In particular, if only losses in excess of a pre-determined amount are recoverable, this will be factored into the calculation. Also, any conditions or limitations imposed on margins recoverable under the policy must also be considered.

Concepts of profit

The profit calculation in annual financial statements consists of sales revenues for the period, less all expenses incurred in that period. The concept of profit in calculating damages or lost profits in litigation is quite different. Lost profit is incremental revenue lost less incremental (variable) expenses saved in not earning those revenues.

It can be difficult, and sometimes ill-advised, to attempt to measure lost net profit streams directly. An understanding of why the gross or net profit margin is not suitable for measuring the change in profits is an important concept in lost profits analysis. Firms usually account separately for sales and keep accurate and detailed sales data. Trends and seasonal patterns in sales are usually easy to observe. Profits, however, are residual. Inaccuracies can arise in the recording of costs resulting from mis-allocations between periods, the use of estimates and subsequent corrections, and from a mixture of cash and accrual accounting. This can lead to material fluctuations in margins, making it unwise to use recorded margins to project profitability. In addition, historic margins may conceal a mixture of variable, semi-variable and fixed costs and may not therefore approximate the margin on the incremental sales actually lost as a result of the defendant's alleged wrongful act.

Instead of measuring and projecting profits as recorded, it is preferable to measure and project sales and costs separately. Using this approach, the before and after gross revenue streams are measured or estimated, and the related costs are then separately deducted to arrive at incremental profits lost. The incremental profit margin measures the change in net profits as a result of a specific change in revenue.

A common technique to calculate the incremental profit margin is to identify each expense category (using profit and loss accounts or more detailed underlying financial data such as adjusted trial balance amounts) as being fixed or variable. The distinction lies in the importance of distinguishing between which categories of cost are fixed (do not vary with the level of revenue) and which are variable (do vary with the level of revenue). Another way of expressing this is that variable costs are those costs that can be cut back or avoided when revenues are lost. Fixed costs are those that would be incurred with or without the revenue loss.

Methods of calculating lost profits

When a company has been damaged or forced out of business, the most reasonable measure of damages is generally lost profits. Lost profit claims typically rest on a comparison between the injured firm's 'but for' situation and its actual situation. The 'but for' situation is a hypothetical construction of the facts as they would exist but for the wrongful conduct, a scenario based on the premise that the wrongful conduct never occurred. The difference between the 'but for' and actual is a measure of the firm's loss - the extent to which the firm is worse off because the wrongful conduct occurred.

The nature of the 'but for' versus actual comparison to be made depends on the ramifications of the wrongful act. Given the complexity of business enterprises, wrongful conduct

frequently has fundamental and long-lasting consequences for the injured firm. Wrongful conduct may disrupt the stream of transactions by upsetting the firm's market relationships or internal workings. Many lost profits cases involve continued transactional losses from continuing wrongful conduct. When a firm's operations are disrupted, the changes forced on the firm can be expected to impair profitability for some time, or may be so drastic that the firm is unable to recover and must liquidate. To assess the extent of the loss caused by such disruption entails a longer view of the divergence between 'but for' and actual. The focus is on the firm's capacity to make profits, not solely on the profit lost on a particular transaction or series of transactions.

Determining the revenue that would have been received had the damage not occurred can be difficult. There are several methods the plaintiff can employ to establish lost profits. Three distinct economic loss models can be used in varying types of commercial litigation cases. Lost profits are generally calculated using one or more of the following methods:

- *"Before and after"* approach - Business profits before, during and after the defendant's alleged acts are examined to show specific losses suffered by the plaintiff;
- *"Yardstick"* approach - Financial information about companies similar to the plaintiff is obtained and used as a benchmark to estimate the profits the plaintiff would have earned but for the wrong perpetrated by the defendant;
- *"Market model"* approach - A model to project lost profits is developed using assumptions arising from a study of the industry and of the plaintiff's operating results in the context of the industry.

"Before and after" approach

This method is also called the "with and without" method or "differential analysis". The before and after method compares the plaintiff's profits prior to the alleged wrong with profits thereafter using historical data (e.g the injured plaintiff's past volume).

Applying this method generally involves estimating lost revenue and then multiplying it by the incremental profit margin. The concept is to isolate factors that changed as a result of the wrongful acts or events. The "before and after" method computes the differences between actual results and assumed results that would have been achieved in the absence of the wrongful acts or events.

The logic of the assumed results rests on a series of hypothetical assumptions that can be subject to dispute. Basing those assumptions on verifiable third party data such as industry, professional or economic trends is always preferable. Study and comparison can be made of factors such as changes in the economic environment, changed industry conditions, the customer base, business facilities (where the interruption entailed a move of premises), etc. The defendant may try to undermine the damages calculation by proving that the 'after period' is different to the 'before period', and by arguing that this difference and not the injury led to the reduction in profits. For example, the defendant may allege that the plaintiff's own mismanagement or an economic downturn was responsible for poorer performance in the after period.

Yardstick approach

Another means of proving lost profits called the "yardstick" approach involves the plaintiff introducing evidence of the profits made by a business operating in similar market conditions that were not subject to the defendant's alleged wrong. In situations where it is difficult to estimate the actual lost revenues of the plaintiff firm, one approach is to compare the sales growth or level of sales of the injured firm with another firm (unaffected by the injury) in the same line of business. This method, for example, is useful where there is an insufficient track record to apply the before and after method. Alternatively the method can be used to support the findings of the before and after method.

This approach is obviously less persuasive in that it is based not on the actual performance of the business in question but on a notional performance determined by comparison. This means that inaccuracies arise in the resulting calculation, as a result not only of approximations inherent in assumptions generally, but also because of the many inevitable differences between the business in question and the business with which it is being compared.

The yardstick approach has been used in start up situations, where businesses with no past history of profits have been permitted to introduce evidence of the profits of similar businesses. Its use has the obvious problem of locating a proper proxy firm. Acceptable proxy firm candidates should be similar in size, product line, markets and other relevant factors. Caution should be used before applying the yardstick approach, given the difficulty in identifying appropriate proxy firms.

Market model / market share approach

In the market model / market share approach, revenues in the pre- or post-loss period are used to establish the firm's relationship to the total market. The total market data are then used to determine the lost revenues. The following information is required to use the market approach:

- Definition of the relevant product market;
- Historic sales for the relevant market;
- Past sales of the plaintiff firm for the same historic period;
- Demonstration that the plaintiff could have continued to compete in the market and maintain market share.

The first step in developing a market model is to study and evaluate the plaintiff company's business plan, marketing strategy and forecasts in order to identify relevant information and assumptions. The use of information prepared prior to the alleged injury helps to overcome the assertion that damages are too speculative. Then some research of the industry should be conducted, to determine typical growth rates, expenses/cost ratios, cash flow ratios, capital expenditures, etc. for similar businesses.

Once the research is complete, a model is developed to estimate the plaintiff's lost profits over the time period during which the effect of the defendant's alleged wrong is likely to continue. By using knowledge of total market sales during the injury period, sales for the injured firm can be estimated by applying the firm's market share to total market sales. Variable or direct costs can then be subtracted to arrive at lost profits. When few sales data are available from periods not affected by commercial

injury, it may be necessary to assume the enterprise would have maintained a constant share of some relevant product market if the injury had not occurred. An advantage of this approach is that highs and lows in local, regional or national economic cycles are automatically accounted for.

Variations in lost profits calculations

Start up businesses [7]

For businesses not well established (or entirely unestablished), the concept of business interruption is difficult to prove and may be speculative unless the economics or past experience or both indicate a likely successful venture. In the US, courts generally do not award lost profits damages to new companies because such damages are speculative.[8] Nonetheless, it is possible in exceptional circumstances for a new business to recover lost prospective profits.[9]

Computing lost profits in a start up business presents unique challenges for a damages expert due to the complete absence of historical data (unestablished business) or to the availability of only limited data (newly established business). The expert is generally limited to using the market model approach, although proxy firms may be used, i.e. those which are similar in every respect (size, product line, capitalisation) if they exist. This is most likely to be possible in certain very specific types of businesses such as franchises. The before and after approach is typically ruled out because the company has little or no historical operating result to show a pattern of growth or profitability.

When a new venture or start up business fails, the uncertainty surrounding lost profits and value lost will be controversial. Three principal views of what is lost have been identified.[10] The measure of damages varies depending on the view taken of what is lost. The three views of what has been lost are:

- Investment - the amount invested in the start up business. This is the least uncertain of the three methods and can be calculated based on actual records of expenditure. However, this method ignores the value arising from the prospect of the start up business being successful.
- Opportunity - the expected value of the lost profits. This approach attempts to take into account the lost opportunity to earn profits in the future. This measure of loss is based on expectations at time of injury. No consideration is given to actual experience or new information after the wrongful act and this is the main deficiency with this method.
- Outcome - the actual value of the profits lost. This method seeks to overcome the deficiency of the opportunity method by taking into account all information available after the injury about what would have happened but for the wrongful act. It seeks to restore the plaintiff to the position it would have been in 'but for' for wrongful event. The outcome is calculated based on experience to date. However, this method has practical difficulties in that a large amount of evidence and information about post-wrongful act events is required.

Defendants will attempt to show that the business was subject to very high levels of risk which caused the failure. The burden of proof is placed on the plaintiff and it can be very difficult to provide acceptable evidence especially where the defendant provides data on the other risk factors that might have caused the business to collapse.

Losses causing business failure

In severe cases, losses suffered by a business consequent on injury are so great that they cause the business to fail.[11] The dilemma for the lost profits expert is to quantify and separate out the influence of the wrongful act from other causal forces that may have also contributed to failure. One technique is break even point analysis of price and sales volume. This is a method of examining relationships between changes in volume, sales, expenses and net profit based on a knowledge of how costs behave, i.e. whether costs are fixed or variable with production. The objective is to establish the impact on financial results of specified fluctuations in level of activity/volume. The contribution of each product (i.e sales revenue less variable costs) must be known.

The court will distinguish between the failure of a young, unestablished business and of an established business. If a business is young, small and undercapitalised, then it is considered to be vulnerable to a myriad of different causes of failure and consequently it may be difficult to prove that the wrongful act was the fatal blow. Experts for the defence will frequently point to the high failure rate of small businesses in their first years of operation. Plaintiff experts will point out that the risk of failure goes down dramatically if the firm survives a certain period.

For larger firms that are clearly established businesses, it is possible to measure the impact of a particular loss of revenue on the financial ratios of the firm. Then, it is possible to draw inferences from the change in those key financial ratios as to the risk of failure of the firm. There is considerable literature on predicting the failure rate of larger firms based on changes in key financial ratios.

The quantum of damages to be claimed when a business fails completely is the value of the business immediately prior to the wrongful act that caused the failure. Fair market value is generally accepted as the most appropriate valuation method to use. Fair market value is the price the business would be exchanged at, given a willing buyer and willing seller, and assuming neither are under compulsion to buy/sell and both are reasonably informed as to the relevant facts. The position of the firm being valued, updated for events after the wrongful act that would have affected it in the absence of the wrongful act, and the economics of the industry as a whole, must be factored into the calculations.

The costs element of lost profits

The calculation of lost profits should take account of all costs (including direct costs, variable costs and semi-variable costs) that vary with output or sales. All such costs should be considered in the calculation irrespective of where the various costs are included or charged in the company's accounts.

Avoidable costs

Avoidable costs are those costs that are avoided when sales are reduced. It will be important to determine how different costs vary with levels of service provision or production. Costs that vary with production should be included in the lost profit

calculation, while those that are fixed should be excluded. The cost of producing the sales may include sales commissions, material, direct labour and distribution costs. These costs will not be incurred where related sales revenues are lost and therefore lost revenues should be reduced by these avoidable costs in the lost profits calculation. For this reason it is necessary to analyse all costs and categorise them as fixed or avoidable in order to arrive at an accurate estimate of lost profits.

Variable costs in other accounting periods are the best evidence of the avoided marginal cost to the firm of not earning lost revenue. Examples of variable costs include direct materials, direct labour, sales commission, etc. Most variable costs are included in cost of sales. However, certain variable costs not included in cost of sales, such as sales commission, delivery expenses and some administration costs, may also vary with output.

Fixed costs, such as rent, do not vary with different levels of sales or production, at least in the short to medium term. In most models fixed costs are assumed to remain constant, except for possible temporary overhead expenditures directly related to the interruption. Where long run interruption occurs this assumption may not remain valid. Costs that are fixed over the short term may increase in a step, ramp or steady, gradual manner over the longer term.

It cannot be assumed that all costs are either perfectly fixed or perfectly variable; in between behaviour is also found. Some costs can be classified as all fixed or all variable for a specified period of time. Some costs exhibit both variable and fixed elements - sometimes called semi-fixed (step) or semi-variable (mixed) costs. Step costs increase or decrease abruptly at intervals of activity because their acquisition comes in indivisible chunks (e.g rental costs of additional space acquired to increase production capacity). Mixed costs contain both mixed and variable elements (*e.g.* a telephone bill, which contains a fixed line rental charge and variable call charges).

The fixed and variable behaviour pattern of historical costs may also change after the injury. Additionally, the lost incremental profit as a result of the injury may alter as the period from the date of the wrongful act gets longer. This shrinkage of incremental profit margin over time is related to the obligation of the plaintiff to mitigate damages.

Extra costs incurred due to the injury

Generally, in computing lost profit, fixed costs are ignored. This is because fixed costs generally would have been incurred with or without business interference. However, there are occasions where some fixed costs would be included in lost profits computations. Extra costs (sometimes called incidental costs) incurred by the plaintiff as a result of the injury or interruption must be added to the other losses. For example, the injured party may have to incur fixed costs in an attempt to mitigate the damage caused by the other party.

Cost estimation

Like lost revenues, costs may not be susceptible to precise calculation, in which case they must be estimated. Unfortunately, most financial statements do not distinguish between fixed and variable costs. Given this difficulty in using aggregate amounts as disclosed in financial statements, individual cost categories must be examined to decide which vary with the level of revenue.

The appropriate estimation technique depends on the purposes of the analysis and, in some cases, the information available. The proper sorting of accounting costs into variable and fixed overhead categories requires considerable experience and judgment. The method of estimation itself can become an issue during litigation. Costs can be estimated by analysing historic information and applying professional judgment and/or analytical techniques. In some cases, reports already available within the company may contain cost information; in other cases, data accumulated by the company's accounting systems may be analysed to estimate costs. If this data is unavailable, the analyst may be required to rely on outside information from statistical or industry sources. In the absence of adequate information on variable costs, gross profit percentages from a similar industry can be substituted.

Ex ante and ex post approaches to damage calculations

Controversy surrounds whether projections of losses should be based on expectations at the time of the injury or at the time of compensation. There are two choices for measuring lost profits, based on fundamentally different temporal perspectives, which can significantly affect the amount of damages calculated:

- The *ex ante* approach (also called the lost going concern value) treats a harm to profitability as a loss in the firm's value suffered at the time of impact which, by definition, ignores the effect of post-impact events on the firm's expected 'but for' and actual experience. The extent of loss is measured *ex ante, i.e.* at the point of impact when the injured firm's 'but for' and actual prospects begin to diverge. Such an assessment compares the expectations, at the time of impact, of the firm's subsequent experience 'but for' the wrongful conduct and expectations, at the time of impact, of the firm's subsequent experience taking into account the wrongful conduct's effects. A time of impact perspective ignores events between the date of the wrongful act and the resolution of the resulting dispute. It avoids hindsight and is therefore useful in judging the propriety of the conduct at issue and matters of causation. It has obvious limitations, however, when used for the calculation of lost profits, which may be best judged in the light of events occurring after the time of impact of the wrongful act.

- The *ex post* approach (also called the lost future profits approach) treats the harm as a stream of profit losses suffered after impact, and allows post-impact events to influence the measurement of the losses. The extent of loss may be measured *ex post, i.e.* at the time the damages are being litigated. The critical difference is that a time of trial assessment permits reliance on post-impact events in constructing the firm's 'but for' and actual experience.

The two methodologies can yield radically different estimates of the plaintiff's losses.

Opportunity cost

In addition to the best estimate of actual lost profits, an aggrieved plaintiff may also advance a claim based on the opportunity cost resulting from the wrongful act. In doing so,

the concepts of loss of profits and loss of opportunity must be distinguished. The concept of lost opportunity caused by a wrongful act is the loss of the chance to earn profits in the future, rather than the loss of profits themselves. The courts normally regard loss of profits as a form of pure economic loss. A number of cases have argued that damages for loss of opportunity should be recoverable but to date there have been no conclusive authorities on the point. However, in *Dunne v. Fox,*[12] where the matter at issue was the basis on which recoverable costs should be calculated on behalf of a firm of accountants engaged in providing non-party discovery, Laffoy J. recognised the concept of opportunity costs and held that they were an appropriate basis for the calculation of costs incurred by the firm.

If the plaintiff is to recover damages in respect of such losses, he must satisfy the courts that he had a reasonable expectation of obtaining the benefits of the opportunity he claims to have lost. A person who is wrongfully deprived of an opportunity to obtain a benefit may recover damages for the loss of an opportunity even though it cannot be proved with certainty that the opportunity would have been taken or any benefit obtained.[13] Courts may discount the opportunity costs for some element of uncertainty therein.[14] In addition, a careful analysis is necessary to ensure that there is no double count between projected lost profits and opportunity costs.

Role of assumptions

Assumptions play a crucial role in damages calculations. Assumptions may be made by the expert accountant or may derive from instructions to the expert from the client, the instructing solicitor or other experts (e.g. actuaries or economists). The expert may have to make assumptions to compensate for missing information. Assumptions are often outside the expert's own area of expertise and he will have to rely on the evidence of another expert. The assumptions relied upon should be clearly stated in the expert's report.

Concluding comment

The calculation of lost profits arising from a wrongful act to ground a claim in damages is an area of litigation in which a forensic accountant can add significant value. A combination of accounting knowledge, analytical skill and commercial experience enables him or her to provide sound, defensible expert assistance and evidence.

However, as in many areas, much of the benefit of this detailed knowledge and expertise will be lost unless the expert can present his opinion, and the information underlying it, in clear and simple language. It is essential that the accountant is in a position to break down his detailed and complex calculations into a clear statement of key assumptions made and the methodology used to convert those assumptions into figures.

In this regard, it is very important that the expert accountant sets out all of the material assumptions on which he has based his expert opinion clearly in his report. He must also be in a position to explain in oral evidence the nature of the assumptions themselves, their source, their role in his calculations and the sensitivity of the results of his calculations and his conclusions to changes in the assumptions made.

The forensic accountant who can do this will be an invaluable member of the team in any commercial dispute.●

* Many aspects of commercial damages calculations cannot be covered in this short article, including forecasting techniques, application of statistical methods in estimation, loss of asset values, taxation of commercial damages, valuing businesses and shares, etc. Further information on these topics is to be found in Brennan, and Hennessy, *Forensic Accounting* (Round Hall Sweet & Maxwell, Dublin, 2001).

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3. [1971] I.R. 311.
4. West Coast Winery, Inc v. Golden West Wineries [1945] 69 CA 2d 166.
5. *Western Web Offset Printers Ltd v. Independent Media Ltd* (1995) 139 Sol. J. 212 LB.
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8. *Evergreen Amusement Corp v. Milstead* [1955] 206 Md at 618, 112 A 2d at 904 - 905.
9. *Fera v. Village Plaza, Inc* [1976] 396 Mich 639 242 NW 2d 372: Plaintiffs leased space in a new shopping centre but the landlord gave their space to another tenant. The plaintiff successfully sued for loss of profits. The judgment held that courts should not interpret the new business rule to exclude all claims for lost profits.
10. Bodington, *the profits lost by a failed new venture* Journal of Forensic Economics, Vol. 4, No. 1, 1990, pp. 7-14.
11. *Bader v. Cerri* [1980] 96 Nev 352, 609 P. 2d 314.
12. [1999] 1 I.R. 283.
13. *Allied Maples Group Ltd v. Simmons and Simmons* [1995] 4 All E.R. 907 C.A.
14. *First Interstate Bank of California v. Cohen Arnold & Co* [1996] P.N.L.R. 17 C.A.

BUSE OF DOMINANCE IN *MERIDIAN V EIRCELL*

Stephen Dodd BL *critically appraises the most recent High Court decision to address the often complex economic and competition law points raised by cases of alleged abuse of a dominant position by allegedly dominant undertakings.*

Introduction

Following liberalisation, competition in the telecommunications industry in Ireland has given rise to considerable and sometimes protracted litigation in Irish Courts. Although several proceedings have been instituted in the field of competition law,[1] none have been as prolonged as *Meridian v Eircell.*[2] The judgment in *Meridian v Eircell* also represents something of a milestone in that it is the first comprehensive analysis of abuse of dominance by an Irish Court to follow the recent setting aside of the most significant Irish competition law decision to date, in *Mars v HB*,[3] in favour of a conflicting European decision.[4] It therefore provided a renewed test for the ability of Irish Courts to grapple with the often complex economic issues at the heart of disputes concerning alleged abusive conduct by dominant undertakings.

Background Facts

In 1993, Telecom Eireann as Eircell launched a global system for mobile communication (GSM). In 1996, Meridian entered into an agency agreement with Eircell and subsequently, in mid-1997, Eircell agreed to provide Meridian with a Volume Discount Agreement or VDA. A VDA is an agreement between Eircell and certain customers whereby Eircell provides discount to such customers based on the volume of Eirtime used. This could be up to 40% off the standard price. Meridian was a subscriber to Eircell for a number of mobile phone lines at a fixed cost. It would rent these lines to its customers for a price in excess of that which it paid to Eircell. In early 1999, when Eircell saw that Meridian intended to expand in the market place, Eircell ordered that transfers to Meridian be stopped, maintaining that Meridian was in breach of the spirit of the VDA.

Meridian was initially refused an interlocutory injunction by Carroll J.[5] On appeal the Supreme Court declined to adjudicate but directed that the case should have an early trial. The matter then came before O'Higgins J. Before delivering his final judgment, O'Higgins J also delivered two preliminary judgments. These were:-

* On 4 April 2000, O'Higgins J held that Eircell was entitled to terminate the VDA. He found that:
  - the plaintiffs did not need a licence to engage in the business they were carrying on;
  - the plaintiffs had no entitlement to renew the VDA under the terms of the contract itself; and
  - the defendants were not estopped by their conduct from reviewing the VDA.
* On 4 October 2000, O'Higgins J held that Eircell and Esat were not in a position of joint dominance. He however found that there was *prima facie* evidence that Eircell was dominant in the relevant market.

The remaining matters for O'Higgins J, dealt with in his final judgment, were whether Eircell was in fact in a dominant position and if so whether it had abused such a dominant position.

The Concept of Dominance

Market Definition

In order to decide whether or not an undertaking is dominant in the market it is necessary to define the relevant market. While there was minor disagreement in this case as to whether analogue and digital (GSM) mobile telephony fell within the same market, O'Higgins J considered that this would make little difference and concluded that there was no real dispute that the relevant market product was for the service of mobile telephony within the geographic market of the Republic of Ireland. As such Irish competition law alone, and not European competition law, applied.

Future developments in the telecommunications sphere will mean an extension of the geographic market beyond Ireland, importing the application of European competition law. Article 154 of the EC treaty speaks of the "establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructure" which "shall aim at promoting the interconnection and inter-operability of national networks as well as access to such networks." Network connections are to be made between Member States, a matter within the purview of the Office of Director of Telecommunications Regulators (ODTR). The aim is to bring about a Single European market in telecommunications services.

Test of Dominance

In his judgment O'Higgins J cited the classic definition of dominance adopted by the European Court of Justice in *United*

Brands v Commission,[6] as follows:

> "... a position of dominance relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

O'Higgins J noted that this definition was followed in *Hoffman LaRoche v Commission*[7] and in several cases in Ireland such as *Mars v HB*.[8] He cited a passage from *Hoffman LaRoche*[9] where it was observed that:

> "the Court has already held inter alia in its judgment of 14th of February 1978 in the *United Brands Company and United Brands Continental BV v Commission* (1978) ECR 207 that even the existence of lively competition on a particular market does not rule out the possibility that there is a dominant position on this market since the predominant feature of such a position is the ability of the undertaking concerned to act without having to take account of this competition in its market strategy and without for that reason suffering any detrimental effects from such behaviour."

Also "..the fact that an undertaking is compelled by the pressure of its competitors' price reductions to lower its own prices is in general incompatible with that independent conduct which is the hallmark of a dominant position."[10]

In the present case an economist for the plaintiff had criticised the United Brands definition on the grounds that no firm, including monopolists, can ever price independently of its consumers, as price is set on the basis of consumer demand. Instead, he argued for a definition based on the exercise of market power, which enables a firm to restrict output and so increases price. The concept of independence, at least from a Chicago School perspective, is not necessarily anti-competitive. It is also arguably superfluous. In United States antitrust law monopoly power is defined as the power to control prices or exclude competition.[11] In *AKZO*,[12] the European Commission adopted a broader definition of dominance, as follows:

> " The power to exclude effective competition is not, however, in all cases coterminous with independence from competitive factors but may also involve the ability to eliminate or seriously weaken existing competitors or to prevent competitors from entering the market."[13]

It would appear to have been open to O'Higgins J to adopt a different concept of dominance to that prevailing in Europe. There was no parallel application of national and European law and no question of concurrent proceedings in Ireland and Europe as arose in *Masterfoods v HB Ice Cream*.[14] Furthermore, the general principle, enunciated in *Wilhelm v Bundeskartellamt*,[15] that national competition law should be administered in accordance with Community law, means that national law should not prejudice the uniform application of Community law or effect measures to implement it. However, there is no section in the Irish Competition Acts corresponding to section 60 of the English Competition Act 1998 which seeks to ensure as far as possible that competition questions in Britain are dealt with in a manner consistent with corresponding questions in Community competition law.[16]

There is a suggestion that O'Higgins J considered that it was open to him to adopt a different test. He declared

> "From the perspective of the Court, the United Brands definition is satisfactory; it has been repeatedly followed both in the European Court of Justice and in this jurisdiction and is clear and comprehensible, at least in legal terms. The essence of dominance is the ability to profitably act independently to an appreciable extent of rivals and ultimately of consumers. Thus it was pointed in the Hoffman LaRoche case that independent conduct is the "hallmark" of a dominant position. In the Faull and Nikpay definition that characteristic if independence is expressed through the "ability of firms to restrict output and thus raise prices above the level that would prevail in the competitive market without existing rivals and new entrants in due time taking away its customers".

The freedom of Irish courts to adopt a different approach to European competition law in national law is also supported by *Donovan v Electricity Supply Board*,[17] where Costello P opined that though the European competition decisions are not binding on Irish courts, they "..have very strong persuasive force"[18].

Assessment of dominance

O'Higgins J considered that an assessment of dominance involved an analysis of both structural and behavioural aspects of a market.

Market Share

O'Higgins J cited the following dictum in the *AKZO* case:

> "Save in exceptional circumstances, very large market shares are in themselves evidence of the existence of a dominant position. This is the case where there is a market share of 50 per cent."[19]

O'Higgins J noted that the weight to be attached to such evidence varies greatly from case to case and market to market. He then cited Hoffman LaRoche,[20] where it was said:

> "...A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned ... Furthermore although the importance of the market may vary from one market to another the view may legitimately be taken that very large shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position."

O Higgins J considered that the structure of the market for production, supply and demand was important in assessing the weight to be attached to a large market share. He considered in this context the low barriers to expansion as being of great importance, noting that

> "..a given market share will have different significance depending on how it came about. For example, a market share of 60% in the context of a steady increase in share over a period of years is more likely to indicate dominance than the same share in the context of a decline over a period"[21]

In the present case, Esat Digifone, Eircell's only competitor, had secured 41.8% of all digital subscribers and 39.1% of all mobile subscribers by October 1999, despite only having been launched in March 1997. However, this "dramatic decline" arose from the liberalisation of the telecommunications sector and not as a result of normal market conditions. O'Higgins J placed no weight on the fact the Eircell was the incumbent operator. Although Eircell may have lost approximately 40% of the market "share", this was somewhat misleading as the market itself had expanded at an extraordinary rate and it was thus unlikely that Eircell had a lesser volume of customers at 60 % compared to 100% of the market in 1997. No data was cited as to the annual growth in the market.

O'Higgins J rejected that the market had now stabilised at 60/40 in favour of Eircell in the light of the fact that a third operator, Meteor, had been granted a licence and had commenced operations in the market. Furthermore, the Office of the Director of Telecommunications Regulation (ODTR) was planning the grant of third generation mobile phones in the near future. Although the case concerned Eircell's alleged dominance prior to Meteor's entry to the market, he considered it "almost inconceivable that the arrival of Meteor had no strategic or costs implications for the defendants, despite the fact that it was not yet competing in the market at the conclusion of the hearing." He noted that Eircell's first price reduction occurred before Esat was actually competing. Also, the imminent award of third generation licences could mean the advent of four more entrants to the market.

Potential competition is of course a relevant factor in assessing dominance. However, the mere fact of Eircell's price reduction before Esat's entry does not necessarily indicate a lack of dominance. *In Hoffman-La Roche & Co v EC Commission,*[22] the Court of justice said that in dropping its "inflexible price policy" when it anticipated the entry of another competitor, an undertaking showed that it is "not subjected to any competitive pressure but by means of its position is able to adopt a price policy designed to forestall such pressure."[23] Whether third generation mobile phones, being a hybrid phone with audio visual components, form the same market as mobile phones or would at least bring about a shift in the market definition, remains to be resolved. One may also note that the ODTR has conceded that Ireland will not be meeting the deadline for the grant of such licences set for the end of 2001.[24]

Number of Competitors

O'Higgins J noted that the number of competitors is relevant in assessing dominance, although its significance can vary from case to case. He said that if a large number of competitors in the market had shrunk over time leaving only a few players, that fact would be strongly indicative of dominance. He concluded however that where the market has only been recently deregulated and the number of licences fixed by the regulator, the number of competitors was not of great assistance in determining dominance.

However it was arguably irrelevant that the limited number of competitors had arisen due to legal barriers to entry such as licensing, because the effective result was that there were only two operators on the mobile phone market, making Eircell in some instances an almost unavoidable trading partner.

Later on in the judgment O'Higgins J mentions the size of the market share of Esat as being a factor militating against Eircell's dominance. However this is proportionately less than in Hoffman La Roche, where in the Vitamin A market a market share of 47% was contrasted with its competitors at 27%, 18%, 7% and 1%. The Court found dominance, considering the fact that 47% equalled the aggregate of the two nearest competitors.

Significant Market Power

O'Higgins J noted that the ODTR had designated Eircell and Esat as having significant market power (SMP). He considered that this was not relevant to determining dominance as it exists only in the regulatory context (which was accepted by the plaintiffs). The European Commission has issued several recent documents proposing a conflation of the concepts of SMP and dominance.[25] These envisage the use of the concept of dominance by regulatory authorities to trigger some of the heavier obligations now prompted by the current SMP threshold.

Barriers to Entry and Barriers to Expansion

O'Higgins J considered that barriers to entry and barriers to expansion concerned the same issue, namely the "ability of other suppliers to replace output that by assumption has been lost in the market."[26] Both impinge on the ability of a competitor or potential competitor to take advantage of anti-competitive price increases or restrictions on output by another undertaking. O'Higgins J considered that "the ability of the competitor in the market place to expand easily and thus take advantage of price raising or restriction of output by a rival is of central importance in the present case." It was accepted by the parties that barriers to entry into the mobile phone market were high, with only three licences in existence and the third generation licences to be available. He considered the high barriers to entry would be of very great importance if there were also high barriers to expansion. The ability of Esat with a large market share and low barriers to expansion impinged greatly on the ability of Eircell to raise its prices or reduce output.

Although O'Higgins J did not enumerate them, the barriers to entry in the market are very considerable - the most obvious being legal regulation in the form of the necessity of obtaining a licence to operate. Other barriers to entry include sunk costs or economies of scale, the large capital investment required, the need for large scale advertising and, perhaps, the superior Eircell network coverage.

Availability of Competing Products/ Ease of Switching

O'Higgins J noted that capacity to expand is associated with ease of switching from one operator to another. In this respect there was no convincing evidence of brand loyalty between the largely homogenous services of Eircell and Esat. Although both firms charged lower prices for calls to its own network and there were some technological differences, there was no dispute but that in general terms switching in the market was relatively easy. He noted that there is partial number portability at present,[27] and while this may be of concern to business users, it was not likely to be of great significance to prepaid users who were the majority of subscribers. There was also no need to change handsets, except in the case of analogue services. He considered that prepaid customers, in particular, could easily change from one operator to another at any time, with limited costs. He thus concluded that "in the light of the matters stated above, the costs of switching from one operator to another cannot be regarded as other than a minor factor inhibiting competition."[28]

Arguably however even for non-business pre-paid users the nature and use of mobile phones means that there is an inherent inertia against frequent or regular switching in response to better offers which may arise.

"It would appear to have been open to O'Higgins J to adopt a different concept of dominance to that prevailing in Europe. There was no parallel applicatio of national and European law and no question of concurrent proceedings in Ireland and Europe as arose in *Masterfoods v HB Ice Cream*... Futhermore, there is no section in the Irish Competition Acts corresponding to section 60 of the English Competition Act 1998 which seeks to ensure as far as possible that competition questions in Britain are dealt with in a manner consistent with correspondin questions in Community competition law."

Vertical Integration/Route to Market

O'Higgins J noted that Eircell is to a large extent a vertically integrated company, in that it not only operated a network providing the infrastructure for mobile phones but also marketed and supplied mobile telephony services at retail level and sold handsets through its agents. Approximately one hundred agents operating through five hundred outlets, wholly or in part owned by Eircell, were responsible for 40% of Eircell's subscribers. O'Higgins J noted that Esat was also vertically integrated and had a similar agency structure to that of Eircell. The plaintiffs argued that the structural arrangement of the route to the market meant there was no meaningful market power save in Eircell and Esat. Although O'Higgins J considered these were matters to take into account in the assessment of the market, he concluded that:

> "....not only is vertical integration unobjectionable in itself, but it can lead to increased efficiencies and be of benefit to the consumer. It is pertinent to observe too that, at least in general terms, commercial enterprises are free to adopt such structures and marketing strategies for marketing their products as they see fit. The agency arrangements made by Eircell concerning the route to market may have been commercially advantageous but do not indicate dominance. Eircell was entitled to have the agency structure of its choice. Digiphone have a similar structure. In so far as it is claimed that in some way Eircell exercised an illegitimate stranglehold on the route to market, that contention also fails."

This passage however appears entirely misconceived. As many commentators have pointed out, dominance itself is entirely unobjectionable - it is the abuse of dominance that is outlawed.[29] Indeed advocates of the Chicago School argue that dominance can be pro-competitive in reflecting efficiency and good performance. The degree of vertical integration has been recognised in Europe as an indicator of dominance at European level. In *United Brands*,[30] the Court of Justice took into account the advantage derived from the undertaking's integrated system for the production and distribution of bananas in concluding that dominance existed. The relevance of vertical integration not only reflects the depth of resources which may assist the firm in the market for ultimate consumers, but also its power over different levels of the market, namely retailers and the degree of competition between them.

Market Structure

Summing up his conclusion on the structural aspects of the market, O' Higgins J declared:

> "The significance of the high market share is greatly diminished having regard to the rapid decline in market share in a relatively short period. The importance to be attached to the small number of competitors is significantly reduced by (a) consideration of the regulatory regime which is the background to the market, (b) by the size and strength of the competitor and (c) in light of the knowledge that new licences are to be awarded. The high barriers to entry as a factor pointing towards dominance must be looked at in the context of the low barriers to expansion, which are characteristic of the market with which we are concerned herein."[31]

A factor which O'Higgins J did not take into account is Eircell's economic strength in other telecommunications markets. The convergent nature of telecommunications technology (exemplified in the case of third generation mobile phones) and the tendency of firms to be active in several telecommunications markets provides some basis for this. The potential ability of Eircell under the concept of leverage to extend its dominance from one telecommunications market into another was not explored. The importance of the concept of leverage (the main case being *Tetra Pak*[32]) in the telecommunications sector was raised in the Commission Access Notice.[33] In this respect Eircell's control of the local loop while of no direct connection to the mobile phone market is reflective of its economic power in the telecommunications sector.

Behavioural Aspects of the Market

O'Higgins J classified behavioural aspects of the market as a second separate mode of analysis to market structure. It should be said while the European Commission and Court of Justice sometimes make reference to empirical market conditions, the focus is primarily on market structure.

International Price Comparisons and Costs

The plaintiffs argued that prices of mobile telephony in Ireland were high in comparison with other countries and so indicated dominance. Several reports were adduced in support of this. A European Commission report purported to show that Irish residential mobile charges are the highest in Europe, that Irish business mobile charges are the second highest in the EU, that Irish residential mobile charges are more than double those in the UK and that charges to Irish business users are 20 per cent higher. O'Higgins J however considered that the methodology used in the report was unclear and that there was an absence of pertinent information. Such information included the tariff plan used, the basis on which the operator in each country was

chosen, whether calls were on/off peak, the duration of the calls, etc. In addition, the report was based on post paid phones and no account was taken of handset subsidies. O'Higgins J also accepted doubts as to whether, in the comparison, the appropriate Eirtime option was chosen. In view of this, O'Higgins J considered that "...it would be unsafe to rely to any extent on the report of the Commission."[34] O'Higgins J also rejected several other reports suggesting comparatively high Irish prices including an OECD Report[35] and a Philips Tarifica Report, on similar grounds.[36] O'Higgins J also refused to place any reliance on another report[37] because of "serious flaws" in relation to the tariffs and lack of information.

While O'Higgins J's criticisms of these reports were undoubtedly well founded, this arguably only went to the weight to be attached rather than their outright rejection. A further related argument raised by the plaintiffs was that Eircell's prices were set at such a level above costs as to be indicative of dominance. However, although the defendants had failed to provide information on costs and in particular as to the cost of carrying a call, O'Higgins J refused to draw any adverse inference from the failure to do so. The defendants' evidence was that telecommunications companies do not have such information at their disposal (although Eircell was trying to compile it for the ODTR) and that the national regulatory authorities in the EU have been unable to obtain such information. O'Higgins J accepted the explanation and stated that that there was no obligation to provide such information.

Nonetheless, it may be noted more generally that charging unfair or excessive pricing is a specific abusive practice condemned under the dominant position provision. A frequently cited direct measurement of market power is excess profits or the Lerner Index, being excess of profit maximising price over short run marginal costs.[38] For example, in *Michelin*[39] the firm's pricing practice was considered to be an indicator of dominance.

A Flash report, comprising a newsletter for agents introduced by the plaintiffs during closing arguments, attempted to show that for Eirtime 50, the minimum profit for Eircell would amount to 28.33p per minute. O'Higgins J considered it inappropriate for the court to consider the submission due to the late stage it was introduced. O'Higgins J also refused to draw any inferences that prices were high from the evidence in respect of (a) Eircell's commitment to the ODTR to reduce prices by 5% each year for a period of 5 years, or (b) the fact that Eircell was able to supply Meridian with a 40% discount. Alternative explanations were open, such as expectations of economies of scale.

In conclusion O'Higgins J held that "[the] totality of the evidence does not prove on the balance of probabilities that mobile telephony prices are comparatively high although it suggests that such may be the case."[40] The invoking of the balance of probabilities as a standard is questionable. While such a standard may govern the determination of dominance, it does not mean that every indicator of dominance must reach such a threshold or otherwise be rejected. O'Higgins J considered that even if Irish mobile charges were high, possible reasons for such prices included that handsets are subsidised in Ireland, the variable take-up due to differences in income and fixed line penetration, differences in cost conditions due to population distribution, spectrum endowment, and interconnection tariffs. Furthermore, service quality could differ considerably across countries.

Empirical Evidence of Competition

The defendants adduced a table showing that between March 1997 and October 1999 the monthly bill for twelve categories of customers had changed. O'Higgins J noted that both Eircell and Digifone had reduced the total cost of airtime for all categories of users in the range of 15 to 25 per cent. Special offers on promotions were a significant part of the competitive dynamic. O'Higgins J considered it inherently unlikely that a dominant firm would lose up to 40 per cent of its market share in such a short time.

The defendants argued that growth in the market was a significant consideration in that firms will seek more market share at a time of considerable growth in the expectation that growth will level out with saturation. Thus, there was a continuing incentive to acquire new customers. O'Higgins J noted the freedom of choice of new subscribers in going to Eircell or Esat and that churning i.e., subscribers who left either Eircell or Digifone, amounted to 25 per cent of the average number of subscribers during 1998/99. Sixty per cent of these changes were on a voluntary basis. O'Higgins J concluded:

"This exercise of independence by customers is a very strong reason that operators seeking these customers cannot act independently of their wishes. In order to acquire the customers Eircell must compete with Digifone to gain these customers. This is a very strong indicator against dominance."[41]

Also O'Higgins J considered the various innovations and changes in the tariffs of Eircell and Digifone over the years "..to be a pointer towards competition in the market albeit not one of any great significance"[42] as well as a degree of response to customer demand. In addition, O'Higgins J observed that the evidence that Eircell had been forced to lower its own prices in response to pressure from Digifone's price reductions was incompatible with dominance.

However, as noted in *United Brands*, evidence of a "lively competitive struggle"[43] is not necessarily incompatible with dominance. O' Higgins J indeed later noted that a dominant company may need to "take competitive factors into account."[44] However the complete lack of transparency on costs of the market products arguably made it unsafe to rely heavily on the evidence of price competition. If profit margins are significant even after reductions, this puts a different light on the price reductions, which arguably would not represent real competition. This, combined with the even limited evidence of comparative high Irish prices, should arguably have detracted from the weight to be attached to the evidence of price competition.

'The invoking of the balance of probabilities as a standard is questionable. While such a standard may govern the determination of dominance, it does not mean that every indicator of dominance must reach such a threshold or otherwise be rejected."

Conduct: Abuse as Evidence of Dominance

O'Higgins J also rejected the plaintiffs' argument (relying on *United Brands*) that the facts alleged to amount to abuses assisted in establishing dominance. He said that it had "not been shown that the acts complained of are particularly indicative of dominance." He noted that he had already upheld the right of Eircell not to renew the VDA in its unrestricted form. While regrettably O'Higgins J's ruling on the right of Eircell not to renew this agreement is unavailable, the fact that Eircell was entitled to do so on non-competition law grounds such as under contract, does not necessarily mean the conduct cannot amount to abuse. Although the specific abusive grounds bear some analogy with inequality of bargaining power in contract law, they are independent of any justification under contract law. The refusal to renew could possibly come within several headings of abuses, such as refusal to supply, imposing unfair terms, imposing discriminatory terms and possibly refusal to allow fair access to essential facilities. In this last connection the case would seem to fall outside the *Oscar Bonner*[45] criteria for abuse in respect of essential facilities, there could have been a case for foreclosure of a small competitor. In *Commercial Solvents*,[46] a firm was held to have abused its dominance in refusing to continue to supply raw material to a customer in a derivative market, as the dominant firm was about to enter the market in question. O'Higgins J undertook no analysis of the downstream segment of the market for the sale of airtime (though perhaps very small), in which the plaintiffs operated. There was also no consideration of the level of dependency of Meridian on Eircell and whether investments presented difficulties for Meridian in switching to Esat.

Summary of Conclusions

Drawing together the various elements, O'Higgins J declared that "...the structural aspects of the market which might in the abstract provide very strong evidence of dominance by Eircell, do not justify such a conclusion when applied to the particular facts with which we are concerned in this case."[47] In addition, he considered that "even if I were to accept that prices were comparatively high, that is not proof that they are excessively high because of the difficulties inherent in international price comparisons for mobile telephony which were pointed out by Professor Cave."[48]

O'Higgins J continued:

> "Evidence concerning prices must be taken in the context of Professor Cave's observations that "what we are trying to establish and the issue which I am debating is not whether there is competitive pricing but whether there is dominance. And there is a big area in the middle in which pricing is neither perfectly competitive nor is dominance being exhibited." In this case however there is considerable behavioural evidence which suggests that Eircell is not dominant. The fall in prices, the dramatic decline in market share, the evidence of "leapfrogging" in tariff reduction, the general tendency towards price convergence, the incentives to compete, the fact that so many subscribers are new and therefore independent, and the number and scale of innovations are the most important matters relied upon by the plaintiffs as indicating competition. Collectively they form an impressive store of evidence to support the contention in Professor Cave's report that "the market data suggests that its behaviour in pricing decisions have been and are strongly constrained by competition from Digifone."[49]

Joint Dominance

In an earlier preliminary ruling, O'Higgins J ruled that Eircell and Esat were not jointly dominant on the market. The Commission, in its Access Notice[50] on the competition rules in the telecommunications sector, has suggested that joint dominance could be found in telecommunications markets. It stated there may exist interdependence or co-operation agreements, although any such structural links are unnecessary - "It is a sufficient economic link if there is a kind of interdependence which often comes about in oligopolistic markets."[51] More recent European cases of joint dominance have broadened the concept to embrace oligopolistic interdependence. In *Gencor*,[52] where a merged concern and a third producer comprised 70 per cent of the market, the Court of First instance held that, particularly in the case of a duopoly, a large market share is, in the absence of contrary evidence, "a strong indication of the existence of a collective dominant position."[53] Of course the facts of the present case, and in particular the evidence that reductions by Esat were followed by Eircell, the larger undertaking, would militate against any notion of the two firms presenting themselves as a single entity on the market. This is of course subject to the qualifications already expressed.

Conclusion

The determination as to whether Eircell was in a dominant position was perhaps a borderline case. While O'Higgins J's conclusion that Eircell was not dominant was reasonablely open to him, doubt can be cast on some aspects of his assessment. In support of his decision, Esat's swift acquisition of a 40% market share and the evidence of price reduction suggest a relatively elastic demand curve. However, the heavy reliance he placed on behavioural evidence of competition is questionable, in particular in the light of the opaque nature of the market. At the least, these considerations were arguably insufficient to trump structural factors such as Eircell's high market share on a duopolistic market that was subject to high barriers to entry. The implications of the decision are that the only means of controlling Eircell's unilateral behaviour is through regulation by the ODTR. This unfortunately runs counter to the proposed scaling down of regulation in favour of greater control via competition law. However, whatever qualms may be raised, O'Higgins J's judgment evinced a significantly more sophisticated level of economic analysis than is typically displayed by the European Commission and Court of Justice. Indeed some of the criticism could be said to spring from the fact that O'Higgins J adopted an economics driven view of competition, in contrast to the European bodies which frequently seek to protect competitors, as opposed to competition, under an amorphous concept of fairness.[54] ●

"The determination as to whether Eircell was in a dominant position was perhaps a borderline case...However, whatever qualms may be raised, O'Higgins J's judgment evinced a significantly more sophisticated level of economic analysis than is typically displayed by the European Commission and Court of Justice. Indeed some of the criticism could be said to spring from the fact that O'Higgins J adopted an economics driven view of competition, in contrast to the European bodies which frequently seek to protect competitors, as opposed to competition, under an amorphous concept of fairness."

1 *The Zockoll Group Limited v Telecom Eireann* (1998) 3 IR 287

2 Unreported, 5th April 2001

3 (1993) ILRM 145

4 *Masterfoods Ltd. (t/a Mars Ireland) v HB Ice Cream Ltd* (2001) 4 CMLR 14

5 Unreported, 20th July 1999

6 (Case 27/76) (1978) ECR 207 at 27

7 (Case 85/76) (1979) ECR 461

8 (1993) ILRM 145; also *Cooney v Murphy Brewery Sales Limited,* Unreported, High Court (Costello J), 30th July 1997; and *Blemings v Patten Limited,* Unreported, High Court (Shanley J), 15th January 1997

9 page 532 paragraph 70

10 page 532 paragraph 71

11 See *United States v Grinnell Corp.* 384 US 563 (1966); *United States v EI du Pont de Nemours & Co.* 351 US 377

12 OJ 1985 L374/1

13 *Ibid.* para 67

14 *Ibid.*

15 (1969) ECR 1; See also *Procureur de la Republique v Giry and Guerlain* (1980) ECR 2327

16 Section 60(2) also states that the court is obliged to "have regard to" any Commission decision or statement.

17 (1994) 2 IR 305

18 *Ibid.* at 322; also cited by O'Sullivan J in *Chanelle Veterinary Ltd. v Pfizer* (Ireland) Ltd (1999) IR 365 at 391

19 AKZO Chemie BV v Commission (C-62/86) (1991) ECR I -3359 at paragraph 5

20 *Ibid.* at paragraph 39, 40 and 41

21 pg. 14

22 (1979) ECR 461

23 *Ibid.* paras 75 and 76

24 See www.odtr.ie

25 See "Towards a New Framework for Electronic Communications infrastructure and associated services", Com (1999) 539, Communication from the Commission, at pgs. 48 -50

26 pg.17

27 It is necessary to change one letter of the prefix, if switching from one operator to another, though the rest of the number remains the same.

28 pg. 21

29 See Hawk, *The United States, The Common Market and International Antitrust: A Comparative Guide,* 2nd ed (1990) at 800

30 *Ibid*; See also BPB Industries OJ (1989) L 10/50

31 pg. 24

32 *Tetra Pak International v Commission* (1996) I ECR 5951

33 Ibid.

34 pg. 29

35 OECD study entitled " Cellular mobile pricing structure and trends" for August 1999

36 pg. 31

37 Report of Salmon, Smith and Barney

38 See Hawk , *The United States, Common Market and International Antitrust : A Comparative Guide,* 2nd ed (1990) at 790

39 *Michelin v EC Commission* (1983) ECR 3416

40 pg. 59

41 pg. 60

42 pg. 64

43 *Ibid.* para 114

44 pg. 65

45 (1998) ECR I-7791; See also Stothers, *Refusal to Supply as Abuse of a Dominant Position: Essential Facilities in the European Union* (2001) ECLR 256

46 [1974] ECR 223

47 pg. 64

48 pg. 65

49 pg. 65

50 Notice on the Application of the EEC Competition Rules in the Telecommunications Sector, 1998 OJ C 265/2

51 para 78-80; See also Tarrant, *Significant Market Power and Dominance in the Regulation of Telecommunications Market,* (2000) ECLR 320

52 *Gencor v Commission* (199) ECR II-879

53 para 206

54 See Temple Lang, *Abuse of a Dominant Position in European Community Law: Present and Future: Some Aspects* (1978) Fordham Corp. Law Journal 25; Also Collins, *Efficiency and Equity in Vertical Competition Law: Balancing the tensions in the EEC and the United States* (1983) Fordham Corporate Law Journal 501

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Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 7, Issue 1

A directory of legislation, articles and written judgments received in the Law Library from the 17th July 2001 to 15th October 2001.
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Administrative Law

Bula Ltd. v. Tara Mines Ltd.
Supreme Court: **Denham J., McGuinness J.,** Morris P.
03/07/2000

Administrative; perception of bias; finality; fair procedures; applicants seek an order setting aside judgment and order of Supreme Court and directing rehearing of appeal the subject of that order and judgment; whether two of the judges who heard and determined appeal had links with respondents which were of such a character as to give rise to a perception of bias; whether time lapse since work done on behalf of one or other of the parties to an action is a relevant factor in distancing judges from a link with that party such as may give rise to a perception of bias; whether fact that application was not brought to seek recusal of judge but rather after a full hearing was a relevant factor in determining alleged perception of bias; whether fact that advice and advocacy given had not been in relation to issues on appeal a relevant factor in distancing judge from party; whether failure of judge to disclose matter or association that may possibly give rise to an apprehension of bias a ground in and of itself for setting aside a judgment; whether a cogent and rational link, in addition to relationship of client/counsel, had been established in instant case so as to give rise to a reasonable apprehension of bias in the mind of a reasonable person.
Held: Application dismissed.

De Roiste v. The Minister for Defence
Supreme Court: **Keane C.J., Denham J., Fennelly J.**
19/01/2001

Administrative; delay; appellant had been compulsorily retired from Armed Forces in June 1969; appellant had not been given any reasons for his retirement or given opportunity to make representations with regard thereto; appellant had not instituted any proceedings at time; in 1997, applicant's sister had been nominated as candidate in presidential election and applicant's dismissal from Armed Forces had been alluded to in media; applicant seeks *certiorari* of relevant decisions; respondents claim that applicant has been guilty of inordinate delay as a result of which respondents have been grossly prejudiced in their defence; whether there had been gross and inordinate delay in instituting proceedings; whether respondents had been prejudiced in their defence due to delay; whether delay had been excusable.
Held: Appeal dismissed.

Anachebe v. The Medical Council
High Court: **Morris J.**
12/07/2000

Administrative; regulation of medical practitioners; preliminary issue of plaintiff's entitlement to seek relief; plaintiff, temporarily registered medical practitioner in jurisdiction present for purpose of training, seeks review of decision by defendant that plaintiff guilty of professional misconduct and that plaintiff's name in General Register of Medical Practitioners should have no effect for certain period; whether defendant had exercised power from its obligation to regulate temporary medical practitioners; whether plaintiff has right to seek review of decision if defendant exercised its power under its obligation to regulate temporary medical practitioners.
Held: Plaintiff not so entitled.

Dignam v Judge Groarke
High Court: **McCracken J.**
17/11/2000

Administrative; judicial review; *certiorari*; applicant had been sentenced to four years detention; applicant had been released into custody of probation and welfare services on condition that he keep the peace and be of good behaviour for period of two years; DPP had applied to have matter re-entered on grounds that applicant had failed to comply with conditions of his release; respondent had ordered that applicant should serve balance of sentence; only evidence before respondent had been belief of Detective Sergeant that applicant had been involved in two incidents; respondent had made no enquiry into grounds for such belief; applicant had been given no notification as to nature of evidence to be produced; whether issue was a matter which could be determined by judicial review; whether phrase "keep the peace and be of good behaviour" had been correctly interpreted; whethe nature of proceedings before respondent had been correct
Held: Order granted; matter for sentencing judge to decide whether specific behaviour while person on remand amounts to breach of good behaviour undertaking;

Dunnes Stores Ireland Company v Ryan
High Court: **Butler J.**
29/07/2000

Administrative; judicial review; appointment by second named respondent of authorised officer to examine books and documents of applicants; applicants had sought judicial review of this decision; proceedings remitted to High Court for a determination of the issues in respect of which leave to apply for judicial review had been granted; whether reasons furnished by second named respondent sustain decision to appoint first named respondent as authorised officer to applicant's company; whether concern for corporate governance sufficient reason for appointment of authorised officer; whether the Revenue was a creditor and intention to defraud it sufficient reason for appointment of authorised officer; whether concern for members of company sufficient reason for appointment of authorised officer; whether past illegality sufficient reason for appointment of authorised officer; whether, where issues between parties can be determined and finally disposed of by resolution of issue of law, the Court should refrain from expressing any view on any constitutional issue that may have been raised; s, 19, Companies Act, 1990.
Held: Relief granted; appointment had been *ultra vires* power of respondent.

Article

The "political" role of the Attorney General?
Bradley, Conleth
6(8) 2001 BR 486

Statutory Instruments

Houses of the oireachtas (members) pensions (amendment) scheme, 2001
SI 384/2001

Houses of the oireachtas (members) pensions (amendment) (no. 2) scheme, 2001
SI 385/2001

Oireachtas (allowances to members) and ministerial, parliamentary, judicial and court offices (amendment) act, 1998 (allowances and allocations) order, 2001
SI 377/2001

Petroleum and offshore exploration (transfer of departmental administration and ministerial functions) order, 2001
SI 389/2001

The members of the Oireachtas and ministerial and parliamentary offices (allowances and salaries) (no. 2) order, 2001
SI 333/2001

Agriculture

Statutory Instrument

Diseases of animals act, 1966 (national sheep identification system) order, 2001
SI 281/2001

Diseases of animals act, 1966 (restriction on movement of certain animals) (no.2) order, 2001
SI 308/2001

Diseases of animals act, 1966 (restriction on movement of certain animals) regulations, 2001
SI 315/2001

The diseases of animals act, 1966 (foot and mouth disease) restriction on imports from the netherlands) (revocation) order, 2001
SI 316/2001

Diseases of animals acts, 1966 to 2001 (approval and registration of dealers) (amendment) order, 2001
SI 319/2001

Diseases of animals act, 1966 (foot-and-mouth disease) (restriction on artificial insemination) (amendment) (no. 2) order, 2001
SI 324/2001

Diseases of animals act, 1966 (section 29a(4) (no. 4) order, 2001
SI 330/2001

Diseases of animals act, 1966 (restriction on movement of certain animals) (no. 2) (second amendment) order, 2001
SI 338/2001

Animals

Statutory Instrument

Diseases of animals act, 1966 (national sheep identification system) order, 2001
SI 281/2001

Diseases of animals act, 1966 (restriction on movement of certain animals) (no.2) order, 2001
SI 308/2001

Diseases of animals act, 1966 (restriction on movement of certain animals) regulations, 2001
SI 315/2001

The diseases of animals act, 1966 (foot and mouth disease) restriction on imports from the netherlands) (revocation) order, 2001
SI 316/2001

Diseases of animals acts, 1966 to 2001 (approval and registration of dealers) (amendment) order, 2001
SI 319/2001

Diseases of animals act, 1966 (foot-and-mouth disease) (restriction on artificial insemination) (amendment) (no. 2) order, 2001
SI 324/2001

Diseases of animals act, 1966 (section 29a(4) (no. 4) order, 2001
SI 330/2001

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Children

North Western Health Board v. W
High Court: **McCracken J.**
27/04/2000

Parental rights; best interests of the child; powers and duties of State to act for the benefit of children; plaintiff seeks declarations and injunctions; P.K.U. test normally carried out on new-born infants to screen for presence of metabolic conditions; test not provided for by legislation; defendant-parents refused to allow test to be carried out on their child; whether objective medical benefit to child overrides rights of parents to decide; s. 9 Courts (Supplemental Provisions) Act, 1961; s. 3 Child Care Act, 1991; Articles 40.3, 41.1, 42 of the Constitution.
Held: Relief refused.

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Constitutional Law

Breathnach v. Ireland
Supreme Court: **Keane C.J., Denham J.,** Murphy J., Murray J., Hardiman J.
11/07/2001

Constitutional; right to vote; appeal from order of High Court granting a declaration that failure on part of State to provide for necessary machinery to enable applicant prisoner to exercise his right to vote unduly discriminated against him and failed to vindicate his right to be held equal before the law; whether the right of citizens to vote was temporarily suspended or in abeyance as a consequence of lawful imprisonment; whether the provision of such machinery would impose unreasonable demands on the administration; Art. 16 and Art. 40.1 of the Constitution;
Held: Appeal allowed; applicant's claim dismissed.

Breathnach v. Manager Wheatfield Place of Detention
Supreme Court: **McGuinness J.,** Hardiman J., Geoghegan J.
20/10/00

Constitutional; habeas corpus; appeal against order of High Court refusing an application for an inquiry into lawfulness of the applicant's current detention in Wheatfield; whether procedure adopted by High Court to deal with his application on paper and in his absence constituted an infringement of applicant's constitutional right of access to the courts; whether this right of access implies that in all circumstances the applicant has a right to be physically present in court for the hearing of an application; Art. 40.4.2 of the Constitution;
Held: Appeal dismissed; order of the High Court affirmed.

O'Beolain v. Judge Fahy
Supreme Court: McGuinness J., Hardiman J., Geoghegan J .
04/04/2001

Constitutional; judicial review; applicant charged with drunk driving; applicant seeks declaration that Minister for Justice and Attorney General, the third and fourth named respondents, have obligation to supply official translation of District Court Rules 1997 into Irish; Applicant also seeks declaration that third and fourth named respondent have constitutional duty to make available official translation of Acts of Oireachtas in Irish and order of prohibition preventing prosecution proceeding until such translation made available; High Court had held that State obliged to make official translation available within a reasonable time; High Court had held that no violation of constitutional rights had occurred as a reasonable period had not yet elapsed; whether natural justice required that rules of court be available in Irish; whether due administration of justice takes precedence over an alleged constitutional right to procure an Irish translation of a statutory instrument where person seeking it is proficient in English; whether constitutional obligation to provide an official translation of Acts/Bills of the Oireachtas gives rise to corresponding constitutional right vested in individual; Article 8 of the Constitution.
Held: Order of prohibition refused; right to fair trial not affected by lack of Irish version of District Court rules; declaration granted that third and fourth named respondents had constitutional duty to make available official translation of Acts of Oireachtas; declaration granted that third and fourth named respondents had constitutional duty to provide official translation of District Court Rules, 1997.

Redmond v. Minister for the Environment
High Court: **Herbert J.**
31/01/2001

Constitutional; eligibility to stand for election; requirement of a deposit in national and European elections before candidate's name can be entered on ballot paper; eligible applicant of limited means; whether requirement of deposit repugnant to Constitution; whether such requirement constituted an impediment to participation in an election or exercise of Oireachtas' constitutional power to regulate elections; whether such requirement infringed the applicant's fundamental right as a human being to be held equal before law; whether statutory requirements discriminate between eligible citizens without means and those with sufficient means; whether requirement necessary to prevent abuse of electoral system; s. 47, Electoral Act, 1992; European Parliament Elections Act, 1997; Art. 40.1 of the Constitution
Held: The provisions of s. 47, Electoral Act, 1992 *ultra vires* powers of Oireachtas and unconstitutional; s. 47 and 48 of the Electoral Act, 1992, s. 13 and rules 8 and 9 in Second Schedule of European Parliament Elections Act, 1997, repugnant to Constitution and severable from remainder of these Acts.

Ríordan v. An Taoiseach
Supreme Court: **Murray J.** *(ex tempore)*, McGuinness J., Geoghegan J.
29/06/2000

Constitutional; right of access to the courts; abuse of process; applicant brought motions for relief and discovery notwithstanding an order preventing him from issuing fresh proceedings against respondents; respondents seek to have these motions struck out as constituting an abuse of process; whether judgments and orders of Supreme Court had been fundamentally flawed by major errors in application of the law and interpretation of Constitution and constituted a repudiation of the Constitution; whether in the present proceedings the judges had been corrupt in rendering corrupt judgments and acting *mala fides;* whether applicant had raised all these issues before and had exhausted all his legal remedies; whether there is any legal basis for reopening proceedings which are now terminated and revisiting those issues by way of motion in the same proceedings; Article 34.4.6 of the Constitution;
Held: Relief refused; proceedings stayed as constituting an abuse of process of the court; motion for discovery struck out as void; order that no further motion or proceedings should be taken in or concerning these proceedings without leave of the court; costs awarded to respondents.

Ríordan v. An Taoiseach
Supreme Court: **Keane CJ.,** Murphy J., McGuinness J., Geoghegan J., McCracken J.
21/07/2000

Constitutional; separation of powers; equality; third named respondent, Minister for Finance, had purported to nominate fourth named respondent to position of Vice-president of European Investment Bank; applicant seeks a declaration that method of selection of nominee had been repugnant to constitutional equality provisions and had breached his alleged right as a citizen to apply for a position that is paid out of public funds; whether it had been clearly established that

respondents, the Executive, had been acting in breach of provisions of Constitution; whether actions of respondents in forwarding name of fourth named respondent for appointment, making a public announcement that they had done so and describing same as a "nomination" without first advertising existence of a vacancy and inviting public to apply for same had violated constitutional equality provisions; whether Court should make an Art.234 reference to European Court of Justice; Art.40.1 of the Constitution.
Held: Appeal dismissed.

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SI 346/2001

Coroner

Morris v. Dublin City Coroner
Supreme Court: **Keane CJ.,** Murphy J., Geoghegan J.
17/07/2000.

Coroner; public inquests; members of Garda Siochána involved in fatal shooting of respondents' son; threat by subversive organisation to safety of Gardaí involved in incident had subsequently been made; appellant had acceded to application to have anonymity of individual Gardaí preserved at inquest; specifically, appellant had ruled that he would permit Gardaí to give evidence without their names being read out, that identification of weapon that fired fatal shot could be deleted from report at inquest and that Gardaí while giving evidence could be screened from public gallery; respondents had sought and obtained order of *certiorari* quashing appellant's rulings on basis that he had no jurisdiction to make same; whether appellant entitled to make rulings which he did because of threats to the personal security of Gardaí concerned; whether appellant entitled to conduct inquest in manner which he thinks best adapted to serve public interest, provided he complies with statutory requirements and requirements of natural justice and fair procedures; ss. 28, 29, Coroners Act, 1962.
Held: Appeal allowed; order-dismissing application for judicial review granted.

Criminal Law

Eviston v. D.P.P.
High Court: **Kearns J.**
26/01/2001

Criminal; reviewability of DPP's decisions; applicant had been involved in fatal road accident; original decision of respondent not to prosecute applicant had been reversed following internal review; internal review had resulted from letter by deceased's father to respondent outlining family's distress at decision not to prosecute; whether respondent had power to review and reverse decision not to prosecute in absence of good and sufficient reasons; whether, in light of representation made to applicant that prosecution would not be brought against her and absence of any new evidence of probative value, decision of respondent to reverse decision arbitrary and perverse; whether respondent complied with his own internal review guidelines; whether respondent complied with his espoused policy principles; whether respondent precluded from considering a representation made by person involved or member of his/her family designed to influence decision to bring a prosecution; s.6, Prosecution of Offences Act, 1974;
Held: Relief granted; respondent not precluded from considering representation made by person involved or member of his/her family designed to influence decision to bring prosecution.

Molloy v. D.P.P.
High Court: **O'Caoimh J.**
01/12/2000

Criminal; fair procedures; applicant had been charged with having certain items in his possession with intention to commit larceny; applicant seeks to prohibit respondent from further prosecution of him in suit pending before Circuit Court; whether trial judge did not permit solicitor for applicant to communicate with student garda who had been subpoenaed by him; whether trial judge refused to direct State to provide applicant's solicitor with all statements made by investigating gardaí prior to taking of depositions at preliminary examination whether first respondent had failed to provide solicitor for applicant with all statements prepared by investigating gardai; whether trial judge refused to allow applicant to cross examine subpoenaed student garda in the cours of taking depositions at preliminary examination stage.
Held: Relief refused.

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Damages

Curran v. Finn
High Court: **O'Neill J.**
29/01/2001

Damages; assessment of damages; personal injuries; plaintiff had fallen o respondent's premises; plaintiff suffering from primary progressive Multiple Sclerosis; whether plaintiff's MS had been aggravated by the prolapsed thoracic disc suffered in fall whether surgery carried out to relieve cord compression caused by the thoracic disc further aggravated plaintiff's MS; expert evidence that trauma to and surgery on central

nervous system in a patient with active MS both carry a substantial risk of aggravating MS;
Held: The fall probably did aggravate MS; decision to carry out surgery was a reasonable and prudent one, its consequences inexorably linked to the fall; duration of exacerbation from thorasic disk and surgery considered to be approx. 10 years from April 1992; total damages awarded £349, 158: £200, 000 general damages, £129, 158 special damages.

Hogan v Steele
Keane C.J., Hardiman J., Geoghegan J.
01/11/2000

Damages; personal injury; plaintiff injured while delivering materials to defendant's premises; plaintiff employed by notice party; proceedings settled; settlement included sum representing loss of earnings of plaintiff; while out of work plaintiff paid wages he would have been paid if working; plaintiff had signed an undertaking after accident requiring him to refund notice party wages paid to him during absence in event of their recovery by way of damages; defendant contended that since plaintiff not at any loss in respect of wages they could not form part of damages; High Court had held that plaintiff was entitled to recover sums in respect of loss of wages from defendant; High Court had also held that social welfare contributions were not recoverable from defendant; notice party had appealed from latter finding; whether defendant had been entitled to benefit from fact that plaintiff would have been paid his net wages out of social security deductions; whether liability of defendant in damages confined to actual loss sustained by plaintiff.
Held: Appeal dismissed; order of High Court affirmed.

Education

Statutory Instruments

Education act, 1998 (national council for curriculum and assessment) (appointment of members) regulations, 2001
SI 245/2001

Education act, 1998 (national council for curriculum and assessment) (establishment day) order, 2001
SI 246/2001

Education act, 1998 (composition of national council for curriculum and assessment) order, 2001
SI 247/2001

National council for educational awards act, 1979 (designation of institutions) (amendment) order, 2001
SI 238/2001

Employment

Iarnród Éireann v. Holbrooke
High Court: **O'Neill J.**
14/04/2000

Employment; industrial dispute; recognition of representative unions; plaintiff seek damages from defendants for losses suffered due to two stoppages of the rail services; plaintiffs claim defendants are liable for damages for procuring breaches of plaintiffs commercial contracts or for actionable conspiracy; plaintiff also seeks declaration that twelfth named defendants, the Irish Locomotive Drivers' Association (I..L.D.A.), are not entitled to negotiate and conclude agreements about employees of plaintiffs as they are not an authorised trade union possessing a negotiation licence; I.L.D.A. issued a counterclaim on this issue; both plaintiffs and defendants claim injunctions in aid of declaratory relief claimed by each of them; whether defendants did definitely and unequivocally persuade, induce or procure a breach of contract; whether I.L.D.A is a representative union; whether plaintiffs under statutory duty to negotiate with I.L.D.A if they are a representative union; whether I.L.D.A are an excepted body; Trade Union Acts, 1924 and 1941
Held: I.L.D.A are not an excepted body or a representative union as they do not posses a negotiation licence; plaintiffs entitled to declaratory relief, defendants counterclaim dismissed; defendants had not induced a breach of contract.

Iarnród Éireann v. Holbrooke
Supreme Court: **Fennelly J.,** Denham J., Murphy J., Murray J., McGuinness J.
25/01/2001

Employment law; industrial relations; statutory interpretation; defendant employees of plaintiff constituting the National Executive of the Irish Locomotive Drivers' Association (I.L.D.A.); appeal from order of High Court declaring that defendants, not having a negotiation licence and not being an excepted body, are not a representative union and can not lawfully conduct negotiations for the fixing of pay hours of duty and other conditions of service of plaintiff's drivers; whether plaintiffs had been bound to negotiate and to reach agreement with trade unions including I.L.D.A.; whether I.L.D.A. constituted an excepted body as defined by statute; whether such a body can be said to carry on negotiations where it does not and can not do so because employer refuses to negotiate; Trade Union Act, 1941; Railways Act, 1924; Industrial Relations Act, 1990;
Held: Appeal dismissed; declaration of High Court varied to state that "defendants are not an excepted body for the purposes of section 6 of the Trade Union Act, 1941 as amended by section 2 of the Trade Union Act, 1942".

Article

Employment law issues in the context of a re-organisation or closure of a business
Connolly, Maura
2001 CLP 167

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SI 257/2001

Employment regulation order (women's clothing and millinery joint labour committee), 2001
SI 258/2001

Employment regulation order (handkerchief and household piece goods joint labour committee), 2001
SI 259/2001

Employment regulation order (shirtmaking joint labour committee), 2001
SI 260/2001

Employment regulation order (provender milling joint labour committee), 2001
SI 299/2001

Employment regulation order (catering joint labour committee), 2001 (for areas other than the areas known, until the 1st of January, 1994, as the County Borough
SI 303/2001

National council for educational awards act, 1979 (designation of institutions) (amendment) order, 2001
SI 238/2001

Occupational pension schemes (schemes with external members) (united kingdom) (amendment) regulations, 2001
SI 329/2001

Protection of young persons (employment) act, 1996 (employment in licensed premises) regulations, 2001
SI 350/2001

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Extradition

M.B. v. Conroy
Supreme Court: **Keane C.J.,** Murray J., Geoghegan J.
01/03/2001

Extradition; lapse of time; exceptional circumstances; plaintiff had been convicted of sexual assault on his stepdaughter in Manchester Crown Court on 9 November, 1992, to which he pleaded guilty; plaintiff had been remanded for preparation of a probation report but had failed to appear in court; plaintiff had come to Ireland and had stayed initially with his parents and had claimed disabled person's maintenance allowance; Manchester Crown Court had issued a warrant for arrest of plaintiff on 4 December, 1995, and that warrant had been endorsed in this jurisdiction on 3 January, 1996; same had been executed by District Court on 8 January, 1996, and on 18 April, 1996, District Court had made an order for delivery of plaintiff into custody of Manchester Police; plaintiff had instituted proceedings seeking an order for his release on 19 April, 1996, but case was not heard until 9 February, 1999; part of delay attributable to illness of plaintiff; plaintiff claims that at no time since he returned to Ireland did he attempt to hide his whereabouts and that information as to his address had been easily obtainable; High Court had directed that plaintiff entitled to an order directing his release due to exceptional circumstances; defendant appeals this judgment; whether lapse of time sufficient to trigger exempting provisions; whether lapse of time and other exceptional circumstances made lapse of time unjust, oppressive or invidious in all the circumstances to deliver up plaintiff; whether plaintiff's health in conjunction with the inaction of the prosecuting authorities constitute an exceptional circumstance.
Held: Appeal dismissed.

Stanton v O'Toole
Supreme Court: **Keane C.J., Denham J.,** Murray J.
09/11/2000

Extradition; correspondence of offences; lapse of time; rape; plaintiff had failed to attend for trial at Glasgow High Court in 1994; plaintiff had been brought before Dublin District Court on foot of warrant executed in 1998; District Judge had ordered delivery of plaintiff into custody of Glasgow police; plaintiff had appealed to High Court; proceedings had been dismissed; extradition had been allowed to proceed; whether documents grounding warrant were valid; whether offence as set out on warrant corresponds with indictable offence known to law of this State; whether corresponding offence is that of rape; whether delay had been unjust; whether length of time taken to process case entirely inappropriate; s.2 of Criminal Law (Rape) Act, 1981.
Held: Appeal dismissed; corresponding offence is that of rape; delay had arisen because of plaintiff's actions;

Family Law

M.S.H. v. L.H.
Supreme Court: **McGuinness J.,** Hardiman J., Geoghegan J.
31/07/2000

Family; child abduction; Hague Convention; appeal against decision of High Court directing return of minors to England; appellant and respondent are a married couple; respondent had been imprisoned in England in September 1997 and had not been due for release until January 2001; appellant had entered into a new relationship and had a child out of this relationship; respondent through his solicitor made an application to the courts in England to prevent children being removed out of jurisdiction; District Judge had made an order prohibiting their removal; appellant had indicated that she proposed to make an application seeking leave of the court to remove children; appellant had failed to attend meeting with Court Welfare Officer and had brought children to Ireland; respondent had made an application to English Central Authority for return of children under Hague Convention; stay had been placed on High Court order pending appeal; whether removal of children had been in breach of respondent's rights of custody; whether respondent had been actually exercising his custody rights due to his

imprisonment; whether children would be exposed to a grave risk if returned to England.
Held: Appeal dismissed

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Fisheries

O'Sullivan v. Aquaculture Licences Appeal Board
High Court: **Finnegan J.**
01/02/2001

Fisheries; aquaculture licences; aquaculture licence had been granted to notice party; applicant had appealed decision to respondent on basis that grant of licence was in breach of relevant statutory provisions; applicant had alleged licence had been granted in respect of area within limits of a "several fishery" of which applicant had been owner without his consent; respondent had upheld grant of licence to notice party; whether respondent erred in law in holding that site in respect of which licence granted was not within limits of "several fishery"; s. 40 of Fisheries (Amendment) Act 1997.
Held: Relief refused; site for proposed licence below low water mark and accordingly outside limits of "several fishery" claimed by applicant.

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Cod (fisheries management and conservation) (no.3) order, 2001
SI 296/2001

Common sole (fisheries management and conservation in the Irish sea) order, 2001
SI 295/2001

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SI 355/2001

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SI 356/2001

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SI 353/2001

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SI 321/2001

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SI 294/2001

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SI 357/2001

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SI 372/2001

Garda Siochana

Statutory Instrument

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SI 392/2001

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SI 305/2001

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SI 344/2001

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SI 255/2001

Housing

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SI 320/2001

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Insurance

France Iardt v. Minister for Agriculture and Food
Supreme Court: **Keane C.J.,** Barron J., Hardiman J.
23/05/2000

Insurance; preliminary issue; whether first named fourth party at any material

time acted as placing brokers in respect of the placing, handling, management or renewal of defendants specified marine assurance policy.
Held: Appeal allowed; order substituted holding that first named fourth party did not at any material time act as placing brokers in respect of the placing, handling, management or renewal of defendant's specified marine assurance policy.

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Mental Health

Blehein v. Murphy
Suprême Court: **Keane CJ., Murphy J.**, Murray J.
13/07/2000

Mental health; involuntary committal; appellant had been refused leave to institute proceedings against respondents in respect of his being taken against his will to undergo treatment at mental hospital; proceedings had in any event been held to be statute barred; whether High Court judge was correct in holding that plaintiff had failed to establish "substantial grounds" for contention that acts purportedly done by respondents pursuant to statutory scheme in place had been vitiated by bad faith or want of reasonable care; whether there is any evidence to justify assertion that actions of respondents had been motivated by bad faith and had constituted a conspiracy against him on their part; whether failure of first named respondent, a certified medical practitioner, to comply with statutory requirement to undertake examination of plaintiff within period of seven days prior to application for temporary private patient reception order constitutes substantial ground for granting leave; whether any statutory provisions enabling proceedings to be brought outside limitation period applied; ss. 185 (4), 260, Mental Treatment Act, 1945
Held: Appeal dismissed.

Negligence

Geoghegan v. Harris
High Court: **Kearns J.**
14/09/00

Medical negligence; plaintiff suffering chronic neuropathic pain as a result of nerve damage occasioned during bone graft procedure; whether, in performing operation on plaintiff's chin, defendant had transgressed specified barrier zone between apices of plaintiff's lower frontal incisor teeth and upper margin of bone graft;
Held: Defendant did transgress specified zone.

McDonnell v. Walsh
High Court: **Barr J.**
01/03/2001

Negligence; personal injuries; road traffic accident; liability not at issue; plaintiff had always suffered from mild mental disorder; due to accident plaintiff had suffered from severe post traumatic stress disorder; substantial medical conflict on plaintiffs future hospitalisation due to mental illness; trial adjourned for three months for further medical evidence of plaintiff's continuing progress; whether litigation aggravating effect on plaintiff's situation; whether plaintiff has suffered significant permanent psychiatric damage;
Held: Plaintiff has on balance of probabilities suffered significant psychiatric damage; plaintiff's enjoyment of life has been curtailed and to a lesser extent will continue to be affected in future; due to plaintiff's mental condition she would have difficulties managing amount of damages; judgment to be sent to President of High Court to consider taking plaintiff into wardship.

Murphy v. Proctor
High Court: **Kelly J.**
11/10/2000

Negligence; conveyancing; plaintiffs had alleged that defendant solicitor failed to advise them that purchase of shop did not entitle them to immediate possession of its forecourt; defendant had contended that he identified extent of lands being purchased by plaintiff; contract had been unconditional one not being subject to loan approval; notwithstanding defendant's advice plaintiffs had decided to proceed; planning search had demonstrated that planning authority had required discontinuance of use of forecourt as fuel storage area within two months; defendant had again become involved with premises when consulted by plaintiffs regarding redevelopment of property; defendant had advised plaintiffs not to commence demolition until refinancing developments had been finalised; plaintiffs had not heeded advice; forecourt had been included by

plaintiffs in redevelopment; defendant advised plaintiffs that work should be stopped immediately; notwithstanding advice contractors continued to work; ultimately it had become necessary to buy out Dublin Corporation's interest; whether defendant had correctly apprised plaintiffs of property they were buying; whether defendant had ever attended with plaintiffs on site prior to signing of contract as alleged by plaintiff; whether defendant ought to have carried out planning search not merely prior to closing of sale but also prior to signing of contracts; whether defendant had been on site at time of demolition.
Held: Action dismissed; defendant had discharged his obligations to the plaintiffs to acquaint them with what they were buying; there had been no loss to plaintiffs even if it had been appropriate to carry out planning search.

Weldon v. Mooney
High Court: Ó **Caoimh J.**
25/01/2001

Negligence; practice and procedure; application by defendants for an order striking out plaintiff's proceeding as showing no reasonable cause of action or as being frivolous or vexatious; whether defendant negligent with regard to accident in which plaintiff suffered serious injuries when he fell from luggage compartment of defendant's bus; whether plaintiff had disclosed sustainable cause of action in asserting that his actions, in climbing into luggage compartment to hitch a free ride, had been commonly adopted by a number of youths and had been well known to each of the defendants, their servants and agents; whether allegation that defendants knowingly permitted persons to use luggage compartment to be carried on bus and drove bus in knowledge of this fact gave rise to reasonable cause of action; whether defendants owed plaintiff a duty of care as a trespasser; whether plaintiff voluntarily assumed particular risk; whether plaintiff had agreed to waive his legal right with regard to the defendant's negligence; s. 4, Occupier's Liability Act, 1995; s. 34(1), Civil Liability Act, 1961;
Held: Application refused.

Planning

O'Connor v. Dublin Corporation
High Court: **O'Neill J.**
03/10/2000

Planning; planning permission had been granted; conditions had been attached to granting of permission whereby notice party had to agree to a variety of matters with respondent before final scope of permission settled; notice party had made two submissions to respondent, both of which had been agreed to be in compliance with the planning permission by respondent; applicant seeks to challenge this agreement; whether agreements attached had been ultra vires decision of An Bórd Pleanála; whether correct approach to interpretation and conditions attached to planning permission is to determine whether or not respondent correctly construed meaning of conditions or whether correct to apply test of irrationality and unreasonableness on part of respondent in reaching its decision; whether environmental impact statement required; whether applicant entitled to consultation on agreement; whether ultra vires conditions can be severed from planning permission
Held: *Ultra vires* conditions can be severed from planning permission; declaration granted to applicant that certain conditions *ultra vires* powers of respondent.

Statutory Instrument

Planning and development act, 2000 (designation of strategic development zone - Adamstown, Lucan) order, 2001
SI 272/2001

Planning and development act, 2000 (designation of strategic development zone - Hansfield, Blanchardstown) order, 2001
SI 273/2001

Planning and Development Act, 2000 (Designation of Strategic Development Zone - Clonmagadden Valley, Navan) Order, 2001
SI 274/2001

Planning and development act, 2000 (commencement) (no. 2) order, 2001
SI 335/2001

Planning and development (appointment of chairperson and ordinary members of an bord pleanala) regulations, 2001
SI 336/2001

Waste management (use of sewage sludge in agriculture) (amendment) regulations, 2001
SI 267/2001

Waste management (farm plastics) regulations, 2001
SI 341/2001

Waste management act, 1996 (prescribed date) order, 2001
SI 345/2001

Waste management (prescribed date) regulations, 2001
SI 390/2001

Practice and Procedure

A.L. v. Neary
High Court: **Smith J.**
18/07/2000

Practice and procedure; discovery; personal injuries; negligence; plaintiff had been allegedly sexually assaulted by a priest while attending confession; plaintiff seeks order of discovery of list of priests hearing confession on day of alleged incident in furtherance of negligence action against defendants, the priests of the diocese, for allegedly permitting priest who is a paedophile to hear confessions; whether plaintiff had established *prima facie* case against defendants; whether there is a possibility that plaintiff's mother may be able to identify alleged wrongdoer if and when she gained access to said list.
Held: Order granted.

R.M. v. D.M.
High Court: **Murphy J.**
26/07/2000

Practice and procedure; in camera rule; appeal from Circuit Court refusal to grant leave to adduce certain documents from previous family law proceedings; applicant seeking to adduce documents in evidence before Barristers Tribunal in relation to complaint against his barrister; whether public interest in maintaining trust in professional services in barristers enough to lift in camera rule.
Held: Application refused

Conlon v. Judge Kelly
Supreme Court: **Fennelly J.,** Denham J., Geoghegan J.
21/02/2001

Practice and procedure; fraudulent conversion; consolidation of indictments; applicant seeks to challenge order of Circuit Court permitting prosecution to consolidate two indictments and order of High Court refusing judicial review of this

order of consolidation; whether Circuit Court has any such power to consolidate and, if so, whether, in the circumstances, it had been fairly exercised; whether respondent's orders constituted a joinder of additional counts in a bill of indictment; whether Circuit Court has the power to consolidate two independent indictments containing counts based on separate returns for trial; Criminal Justice (Administration) Act, 1924; Criminal Procedure Act, 1967; O. 49, r. 6, O. 59, r. 14 and O.125, r. 1, Rules of the Superior Courts;
Held: Appeal allowed; order of *certiorari* granted against orders of respondent.

Greene & Co. v. Instruelec Services Ltd.
High Court: **McKechnie J.** (*ex tempore)*
19/02/2001

Practice and procedure; discovery; plaintiff had sought discovery of certain documents as against defendant; Master had declined jurisdiction to hear Motion on basis that letter seeking voluntary discovery insufficiently precise, notwithstanding fact that there had been consent between parties; whether consent of parties sufficient to entitle Master to exercise discretion to make order of discovery; whether Court satisfied on evidence before it in instant case that discovery as sought is necessary to dispose fairly of cause or matter or to save costs; O. 31, r. 12(4)(1), Rules of the Superior Courts (as amended by S.I. 233 of 1999).
Held: Order granted.

O'Shea v. Judge Martin
High Court: **Murphy J.**
30/11/2000

Judicial review; service of summonses; applicant had been convicted in *absentia* in District Court of certain road traffic offences; summonses had not been served on applicant but on his business address; applicant claims that he had no opportunity to be present at District Court hearing; applicant seeking *inter alia certiorari* quashing decision of respondent upholding orders of District Court convicting applicant; whether time for judicial review application should be extended; whether applicant estopped from raising issue of service.
Held: Matter remitted to Circuit Court for rehearing

Supermac's Ireland Ltd. v. Kateson (Naas) Ltd.
Supreme Court: **Hardiman J., Geoghegan J.,** Denham J.
07/06/00

Practice and procedure; appeal from order of High Court dismissing defendant's motion to strike out plaintiff's claim as unsustainable and constituting an abuse of process of the court; plaintiff seeks specific performance of agreement with defendant to sell to plaintiff premises and business of certain fast food outlets; correspondence had been marked "subject to contract"; whether there had been a concluded oral agreement; whether such agreement enforceable pursuant to Statute of Frauds; whether agreement as to completion dates and deposit had been essential to full agreement; whether absence of agreement with regard to sitting tenant had been fatal to presence of a concluded agreement.
Held: Appeal dismissed; order of trial judge affirmed.

Article

Estoppel and the right to plead a defence under the statute of limitations
Barr, Anthony
6(8) 2001 BR 445

Prisons

Doherty v. Governor of Portlaoise Prison
High Court: **McKechnie J.**
24/11/2000

Prisons; early release of prisoners; applicant seeks certain reliefs including a declaration that he is a "qualifying prisoner" within the terms of either Multi-Party Agreement concluded on 10th April, 2000, or provisions of Criminal Justice (Release of Prisoners) Act, 1998; applicant had sought early release under terms of both instruments; State had refused him same; whether requirement that applicant be a member of a subversive organisation to which arrangements in Agreement applied unlawful and *ultra vires* powers of Minister; whether relevant offences of which applicant had been convicted are similar offences to scheduled offences in Northern Ireland; whether in accordance with proper construction and interpretation of 1998 Act, Minister had been acting intra vires in insisting on a connection between offence and Northern Ireland terrorist campaign.
Held: Relief refused.

Kinahan v. Minister for Justice
Supreme Court: **Hardiman J.,** Geoghegan J., Fennelly.
21/02/2001

Prisons; application for temporary release; separation of powers; applicant seeks order quashing refusal to grant temporary release; whether notification of decision to refuse temporary release contained adequate reasons for such refusal; whether it had been established that powers of executive in this matter had been exercised in a capricious, arbitrary or unjust way; whether criteria for granting temporary relief indicated by respondent deficient and, in particular, incompatible with Council of Europe recommendation on such matters; whether criteria had been applied in a discriminatory fashion; whether there is a presumption in favour of an applicant for temporary release being released; r. 3, Prisoners (Temporary Release) Rules, 1960; R(87)3, Committee of Ministers, Council of Europe.
Held: Appeal dismissed; order of High Court affirmed; no presumption in favour of applicant for temporary release being released.

Lynch v. Minister for Justice
High Court: **Herbert J.**
26/03/2001

Prisons; temporary release; applicant seeks order of mandamus directing respondent to grant application for temporary release; applicant claims that failure to grant him such temporary release is a denial of his fundamental rights under the Constitution and the European Court of Human Rights; whether there is a constitutional or inherent right to early or temporary release from prison; whether granting of temporary release is matter for the courts
Held: Application refused.

Statutory Instrument

Prisons act, 1970 (section 70) order, 2001
SI 297/2001

Property

Wise Finance Co. Ltd. v. Lanagan
High Court: **McCracken J.**
06/11/2000

Land law; deed of charge over land; plaintiff claims to be holder of land under registered charge; plaintiff claim

money secured by charge has now become due and seeks possession of land; loan agreement also entered into between plaintiff and defendant in form of commitment letter; contradictions between terms of deed of charge and commitment letter; whether monies secured by deed of charge or under commitment letter have become due
Held: Relief denied; plaintiff can only recover possession if monies are due under deed of charge; monies claimed to be due by plaintiff do not fall into this category.

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Road Traffic

Callaghan v Dublin Bus
High Court: **Murphy J**
01/12/2000

Road traffic; personal injuries; contributory negligence; bus driver had attempted to execute right hand turn which was counter indicated by traffic arrows; plaintiff had panicked and tried to pass bus on inside lane; plaintiff had been travelling in excess of speed limit; plaintiff's car had crashed into back of defendant's bus; plaintiff had claimed that bus had swung across carriageway into path of his vehicle; whether there was some degree of fault on part of defendants.
Held: Plaintiff 90% at fault; defendants 10% at fault.

Statutory Instrument

Road traffic (national car test) (no 2) regulations, 2001
SI 298/2001

Shipping

Statutory Instrument

Merchant shipping (investigation of marine casualties) act, 2000 (prescribed classes of vessels)
SI 285/2001

Merchant shipping (mechanically propelled pleasure craft) (safety) regulations, 2001
SI 284/2001

Social Welfare

Statutory Instruments

Social welfare (consolidated payments provisions) regulations 1994 to 2001
SI 132/2001

Social welfare (consolidated contributions and insurability) (amendment)(no. 3) (refunds) regulations, 2001
SI 133/2001

Social welfare (consolidated contributions and insurability) (amendment)
(no.2) (contribution rates) regulations, 2001
SI 134/2001

Social welfare act, 2001 (part 5) (commencement) order, 2001
SI 243/2001

Social welfare (consolidated payments provisions) (amendment) (no.3) (sharing of information) regulations, 2001
SI 242/2001

Social welfare act, 2001 (section 38) (commencement) order, 2001
SI 244/2001

Social Welfare (Consolidated Contributions and Insurability) (Amendment)
(Credited Contributions) Regulations, 2000
SI 263/2000

Social welfare (consolidated payments provisions) (amendment) (no.11) (child benefit) regulations, 2000
SI 265/2000

Social welfare act, 2000 (section 32) (commencement) order, 2000
SI 264/2000

Social welfare act, 2001 (section 22) (commencement) order, 2001
SI 300/2001

Social welfare act, 2001 (section 26) (commencement) order, 2001
SI 301/2001

Social welfare (miscellaneous control provisions) (amendment) regulations, 2001
SI 327/2001

Solicitors

Glynn, In re
High Court: **Morris P.**
13/02/2001

Solicitors; application for restoration to role of solicitors; applicant applying to court to have remaining conditions removed from his practising certificate; obligation on Law Society to make full disclosure in any circumstance where it is required to provide a certificate or reference for a solicitor; whether applicant had demonstrated that he is a fit and proper person to practice as a solicitor; whether applicant must prove this by showing that he practised as a solicitor in accordance with limited certificate; whether a solicitor's practising certificate should only be sought in circumstances to enable applicant to engage in practice as a solicitor; whether Law Society both entitled and bound to disclose applicant's history if and enquiry is made of it at any future date; Solicitor's Act 1960.
Held: Application allowed.

Statutory Instrument

The solicitors acts, 1954 to 1994 (apprentices' fees) regulations, 2001
SI 331/2001

Succession

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2nd edition
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Taxation

Criminal Assets Bureau v. Craft
High Court: **O'Sullivan J.**
12/07/2000

Revenue; proceeds of crime; first named defendant had been suspected of being drugs trafficker and had been arrested by Gardaí; while in custody first named defendant's assets had been frozen under mareva injunction and proceedings initiated; plaintiff claims arrears of income and value added tax plus interest, a declaration that first named defendant is beneficial owner of monies lodged to two identified bank accounts and a dwelling house, and a further declaration that first named defendant had been obliged to discharge income tax and value added tax for appropriate years and had failed to do so; first named defendant had allegedly transferred various interests to second named defendant in order to defraud creditors; whether arrest of defendant on drugs offences had been purely to facilitate his interrogation in relation to arrears of tax; whether a prior demand for payment of income tax is required before the commencement of any proceedings; **Held**: Defendant arrested lawfully; commencement of proceedings for income tax had been premature; declarations that first named defendant is beneficial owner of monies lodged to the two accounts identified granted; decree for value added tax and arrears thereof granted.

O'Connell v. Fyffes Banana Processing Ltd.
Supreme Court: **Keane CJ.**, Murray J., Hardiman J.
24/07/2000

Revenue; tax relief; appellant seeks to overturn determination by Appeal Commissioners, subsequently affirmed by High Court, allowing respondent's claim to manufacturing relief in respect of an assessment to corporation tax; whether process of artificially ripening bananas is a manufacturing process entitling respondent to tax relief; whether relief from taxation had been afforded expressly and in clear and unambiguous terms under statutory provisions upon which respondents had relied for purpose of claiming tax relief; s. 39 (5), Finance Act, 1980 (as inserted by s. 41 (1)(c), Finance Act, 1990); s. 41 (2), Finance Act, 1980.
Held: Appeal allowed

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Deposit interest whether a trading receipt?
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Telecommunications

Statutory Instrument

Telecommunications (miscellaneous provisions) act, 1996 (section 6) postal levy order, 2001
SI 282/2001

AT A GLANCE

Court Rules

Circuit court (fees) order, 2001
SI 252/2001

District court (fees) order, 2001
SI 253/2001

District court areas (amendment) (christmas, easter and august sittings) order, 2001
SI 366/2001

District court districts and areas (amendment) and variation of days (ask eaton and rathkeale) order, 2001
SI 367/2001

Rules of the superior courts (no.1) (amendment to order 77), 2001
SI 268/2001

Rules of the superior courts (no.2) (amendment to order 3), 2001
SI 269/2001

Rules of the superior court (no.3) (investor compensation act 1998), 20(
SI 270/2001

Supreme court and high court (fees) order, 2001
SI 251/2001

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Information compiled by
Eve Moloney and Venessa Curley,
Law Library, Four Courts

Diseases of animals act, 1966 (classical swine fever) (restriction on imports from spain) order, 2001
SI 323/2001
DIR 2001/491

European communities (pesticide residues) (foodstuffs of animal origin) (amendment) (no. 2) regulations, 2001
SI 249/2001
Directives 86/363, 93/57, 94/29, 95/39, 96/33, 97/41, 97/71, 98/82, 99/71, 2000/24, 2000/58, 2000/42, 2000/82

European communities (pesticide residues) (cereals) (amendment) (no. 2) regulations, 2001
SI 250/2001
Directives 86/362, 88/298, 93/57, 94/29, 95/39, 96/33, 97/41, 97/71, 98/82, 99/65, 99/71, 2000/24, 2000/48, 2000/58, 2000/42, 2000/81, 2000/82

European communities (pesticide residues) (products of plant origin, including fruit and vegetables) (amendment) (no.2) regulations, 2001
SI 256/2001
Directives 90/642, 93/58, 94/30, 95/38, 95/61, 96/32, 97/41, 97/71, 98/82, 99/65,99/71, 2000/24, 2000/48, 2000/57, 2000/58, 2000/42, 2000/81, 2000/82, 2001/35

European communities (units of measurement) amendment) regulations, 2001
SI 283/2001
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SI 304/2001
Dir 98/79

European communities (award of public service contracts) (amendment) regulations, 2001
SI 334/2001
Directives 92/50, 97/52

European communities (burden of proof in gender discrimination cases) regulations, 2001
SI 337/2001
Dir 97/80

European communities (consumer information on fuel economy and CO2 emissions of new passenger cars) regulations, 2001
SI 339/2001
Dir 99/94

European communities (additives, colours and sweeteners in foodstuffs) (amendment) regulations, 2001
SI 342/2001
Directives 2000/51, 95/31

European communities (purity criteria on food additives other than colours and sweeteners) (amendment) regulations, 2001
SI 343/2001
Directives 96/77, 98/86, 2000/63

European communities (authorisation, placing on the market, use and control of plant protection products) (amendment) (no. 3) regulations, 2001
SI 359/2001
Directives 91/414, 2001/28, 2001/49

European communities (passenger car entry into service) regulations, 2001
SI 373/2001
Directives 98/14, 98/69, 98/77, 99/101, 99/102, 2001/1

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SI 374/2001
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2/2001 CUSTOMS AND EXCISE (MUTUAL ASSISTANCE) ACT, 2001
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3/2001 DISEASES OF ANIMALS (AMENDMENT) ACT, 2001
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6/2001 TRUSTEE SAVINGS BANKS (AMENDMENT) ACT, 2001
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7/2001 FINANCE ACT, 2001
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8/2001 TEACHING COUNCIL ACT, 2001
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SIGNED 17/04/2001

10/2001 HOUSING (GAELTACHT) (AMENDMENT) ACT, 2001
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11/2001 INDUSTRIAL RELATIONS (AMENDMENT) ACT, 2001
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12/2001 ACC BANK ACT, 2001
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S.I. 278/2001 = COMMENCEMENT

13/2001 VALUATION ACT, 2001
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14/2001 HEALTH (MISCELLANEOUS PROVISIONS) ACT, 2001
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15/2001 IRISH NATIONALITY AND CITIZENSHIP ACT, 2001
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16/2001 EURO CHANGEOVER (AMOUNTS) ACT 2001
SIGNED 25/06/2001

17/2001 HEALTH INSURANCE (AMENDMENT) ACT, 2001
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18/2001 SEX OFFENDERS ACT 2001
SIGNED 30/06/2001
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19/2001 CARER'S LEAVE ACT, 2001
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20/2001 HORSE AND GREYHOUND RACING ACT, 2001
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21/2001 NITRIGIN EIREANN TEORANTA ACT, 2001
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22/2001 MOTOR VEHICLE (DUTIES AND LICENCES) ACT,2001
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23/2001 VOCATIONAL EDUCATION (AMENDMENT) ACT, 2001
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24/2001 CHILDREN ACT, 2001-07-31
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29/2001 AGRICULTURE APPEALS ACT, 2001
SIGNED 09/07/2001

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31/2001 STANDARDS IN PUBLIC OFFICE ACT, 2001-08-20
SIGNED 14/07/2001

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SIGNED 16/07/2001

34/2001 ADVENTURE ACTIVITIES STANDARDS AUTHORITY ACT, 2001-08-20
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35/2001 HUMAN RIGHTS COMMISSION (AMENDMENT) ACT, 2001
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36/2001 WASTE MANAGEMENT (AMENDMENT) ACT, 2001
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37/2001 LOCAL GOVERNMENT ACT, 2001

(P.S) Copies of the acts/bills can be obtained free from the internet & up to date information can be downloaded from website : www.irlgov.ie

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

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2nd stage - Dail [p.m.b.]

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2nd stage - Dail *(Initiated in Seanad)*

Asset covered securities bill, 2001
1st stage - Dail

Care of persons board bill, 2001
2nd stage - Dail

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

Central bank (amendment) bill, 2000
2nd stage - Seanad *(Initiated in Seanad)*

Children bill, 1996
Committee - Dail

Companies (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

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

Containment of nuclear weapons bill, 2000
Committee - Dail *(Initiated in Seanad)*

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

Corporate manslaughter bill, 2001
2nd stage - Dail **[p.m.b.]**

Courts bill, 2000
2nd stage - Dail

Courts and court officers bill, 2001
1st stage - Dail

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

Criminal justice (temporary release of prisoners) bill, 2001
1st stage -Dail

Criminal justice (theft and fraud offences) bill, 2000
Committee -Dail

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

Disability commissioner bill, 2001
1st stage - Seanad

Disability commissioner (no.2) bill, 2001
2nd stage - Dail **[p.m.b.]**

Dumping at sea (amendment) bill, 2000
2nd stage - Dail *(Initiated in Seanad)*

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

Electoral (amendment) bill, 2000
Report- Seanad *(initiated in Seanad)*

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Committee - Dail **[p.m.b.]**

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European convention on human rights bill, 2001
Committee - Dail

European union bill, 2001
Committee - Dail

Family law bill, 1998
2nd stage - Seanad

Family support agency bill, 2001
1st stage - Dail

Fisheries (amendment) bill, 2000
Committee - Dail *(Initiated in Seanad)*

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

Freedom of information (amendment) bill, 2000
2nd stage - Dail **[p.m.b.]**

Gas (interim) (regulation) bill, 2001
1st stage -Seanad

Harbours (amendment) bill, 2000
Committee - Seanad

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

Health insurance (amendment) bill, 2000
Committee - Dail

Health Ombudsman bill, 2001
2nd stage - Dail

Heritage fund bill, 2001
1st stage - Dail

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

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

Industrial designs bill, 2000
Committee - Dail

Interpretation bill, 2000
1st stage - Dail

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

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

Law of the sea (repression of piracy) bill, 2001
1st stage- Seanad

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

Licensing of indoor events bill, 2001
1st stage - Dail

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
2nd stage -Dail **[p.m.b.]**

Ministerial, parliamentary and judicial offices an oireachtas members (miscellaneous provisions) bill, 2001

National stud (amendment) bill, 2000
Committee - Dail

Official secrets reform bill, 2000
2nd stage - Dail **[p.m.b.]**

Ordnance survey Ireland bill, 2001
2nd stage - Dail *(Initiated in Seanad)*

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
Committee - Dail

Pensions (amendment) bill, 2001
1st stage - Seanad

Postal (miscellaneous provisions) bill, 2001
1st stage -Dail

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

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

Private security services bill, 2001
1st stage - Dail

Proceeds of crime (amendment) bill, 1999
Committee - Dail

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

Prohibition of female genital mutilation bill, 20
2nd stage - Dail **[p.m.b.]**

Protection of employees (part-time work) bill, 2000
Committee - 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 health (tobacco) bill, 2001
1st stage - Dail

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 births bill, 2000
2nd stage - Dail

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.]**

Residential institutions redress bill, 2001
1st stage - Dail

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

Road traffic bill, 2001
1st stage -Dail

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
2nd stage - Dail

Sex offenders bill, 2000
Report - Dail

Shannon river council bill, 1998
Committee - Seanad

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

State authorities (public private partnership arrangements) bill, 2001
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.]**

Surgeon General bill, 2001
2nd stage - Dail

Sustainable energy bill, 2001
2nd stage -Dail *(Initiated in Seanad)*

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

Transport (railway infrastructure) bill, 2001
2nd stage - Dail *(Initiated in Seanad)*

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

Tribunals of inquiry (amendment) bill, 2001
2nd stage - **[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]**

Twenty-first amendment of the constitution bill, 2001
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.2) bill, 2001
2nd stage - Seanad

Twenty-second amendment of the constitution bill, 2001
Committee - Dail

Twenty-third amendment of the constitution bill, 2001
Committee - Seanad

Twenty- fourth amendment of the constitution bill, 2001
2nd stage -Dail

Twenty- fifth amendment of the constitution bill, 2001
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.]

Waste management (amendment) bill, 2001
1st stage - Dail

Waste management (amendment) (no.2) bill, 2001
Report *(Initiated in Seanad)*

Whistleblowers protection bill, 1999
Committee - Dail

Youth work bill, 2000
Committee - Dail

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(NB) Must have "adobe" software which can be downloaded free of charge from interne

Abbreviations

BR =	Bar Review
CIILP =	Contemporary Issues in Irish Law & 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
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
T & ELJ =	Technology and Entertainment Law Journal

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

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

CHIEF PROSECUTION SOLICITOR

Practitioners should note that from Monday the 3rd of December 2001 the newly appointed Chief Prosecution Solicitor will act as Solicitor to the Director of Public Prosecutions. Ms. Claire Loftus will take over all functions currently carried out by the Chief State Solicitor on behalf of the Director.

Pending re-location to new premises in January 2002 the Office of the Chief Prosecution Solicitor will be located in:

Osmond House,
Little Ship Street,
Dublin 8.
Telephone : 4176100
Fax: 4757160

The relevant rules of court have been amended to reflect this development . All references in the rules to the Chief State Solicitor in relation to criminal matters involving the Director should be read as referring to the Chief Prosecution Solicitor

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The All England Law Reports from 1936; reported cases from 35 other leading law reports; Tax cases from 1875; UNREPORTED CASES from 1980.

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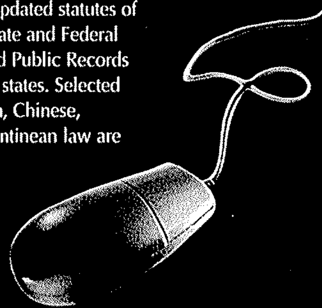

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HE PERSONAL INJURIES ASSESSMENT BOARD

The following is the text of a speech delivered by **Rory Brady SC**, *Chairman of the Bar Council, to the Dublin Insurance Institute at a meeting held at the College of Surgeons, Dublin, on 17 October 2001.*

Introduction

The Personal Injuries Assessment Board ("PIAB") will lead to a reduction over time in the level of general damages awards in smaller claims relative to special damages. These are not the words of lawyers concerned about the threat posed by PIAB to their financial well being. Nowhere in the second McAuley report will you find a conclusion of this nature. These are the words of an internal departmental document. As a result of a search carried out under the Freedom of Information Act (FOIA) we are enlightened as to one of the suggested results of the scheme represented by PIAB as envisaged. In a memorandum of the 12th July 1999 entitled "Discussion Draft 2" for the Special Working Group, an unidentified author clearly nailed his or her colours to the mast. Thus he or she observed, *inter alia*, as follows:

"The system as suggested should

- lead to a reduction over time in the level of general damages awards in smaller claims relative to special damages"

But PIAB is not intended to deal with the larger claims. The second McAuley report postulates the tentative view that larger claims should, as a matter of discretion, be declined by PIAB. If that is what is to happen to larger claims then the observation by the author of this document reveals what was at one time seen as an effect of PIAB. It is to reduce awards and ultimately to reduce insurance premia.

Again one of the fruits of the FOIA search is most instructive. In a memorandum of the 22nd March 2001 within the Department of Enterprise, Trade and Employment the Tanaiste is advised to make the point that compensation awards in Ireland were considered "reasonable". That advice was given in the context of media commentary on PIAB and remarks by the legal profession on its likely effect on the level of damages. But if compensation is reasonable in this jurisdiction, then why at one stage was one of the suggested effects of PIAB a reduction pro rata of general damages to special damages. Why if general damages are reasonable should it be the effect of any system to reduce the level of those damages - albeit in smaller cases.

The genie is out of the bottle! The constitutional right to bodily integrity and its violation does not justify discrimination between those with grievous bodily injury and minor injury.

Proper Research

No decision should be taken on the establishment of a PIAB without an in-depth examination of the present (legal) system and its perceived deficiencies. These may appear like the words of a member of the Law Society or the Bar Council playing for time. But this is not so. These words are part of the Supplementary Observations of Tom O'Malley, a member of the Special Working Group. Mr O'Malley urged further research and indeed an overhaul of the civil procedures of our courts. What was the response to Mr O'Malley's comments? They included the following wonderful passage in a departmental memorandum:

> "General Comments
>
> In my view T O'Malley's lengthy observations appended to the report will provide the legal lobby with **fairly lethal ammunition to attack the Groups proposals** for the establishment of a Personal Injuries Assessment Board and will make it extremely difficult for the Department and Minister to progress the recommendations. (emphasis added)
>
> Mr O'Malley is in support of a Personal Injuries Assessment Board being established. But he offers his support in the context of such a concept being further explored and tested. He urges a thorough examination of the present legal system. And he concludes as follows:
>
> "It is only when such an examination has taken place that we will be in a position to make **an informed judgment** about its capacity to respond to present social and economic needs" (emphasis added)

Thus we have one of the co-authors of the second McAuley report giving only conditional support to establishing a PIAB.

A Flawed Analysis?

I have already referred to the observations of Tom O'Malley with regard to the PIAB. What I now to propose to look at is a number of flaws in the recommendations of the McAuley Report.

- PIAB cannot deal with claims where liability is "totally rejected by the Defendants". But, on the other hand, PIAB would not be precluded from taking into account (in assessing the level of compensation) contributory negligence. This is an absurdity. Contributory negligence involves issues of responsibility and causation which cannot be divorced from the circumstances of the accident. How one could decide upon the level of contributory fault without engaging in an analysis of all of the facts of the case is unclear.

- The award made by PIAB is to be communicated to the Courts. This is a meaningless exercise. The prospect of further aggravation of personal injuries and of the

development of psychological and psychiatric sequelae that are an integral part of personal injuries litigation will conspire to ensure that the facts before the trial judge are different to the facts before PIAB. Different awards are therefore likely. The time element built into PIAB ensures that this is so.

- The possibility is that a substantial number of awards made by PIAB will be appealed. In particular, the perception of a risk of unfairness by virtue of an intense representation of the insurance industry in this process will create suspicion. A determination made in private is no substitute for the open administration of justice, and appeals in many if not most cases are inevitable.
- An injured party has no right to an oral hearing. When he is accorded such a right the costs of representation before PIAB are to be met from the compensation awarded to the injured party. This contrasts adversely to the decree in Court for an injured employee who has succeeded on the issue of liability.
- An award will be less than a Court decree as certain costs will be deducted from the award.
- The theoretical risk that an insurer will deliberately undervalue and underinsure for reasons of regulatory compliance. The insurer's file is the lynchpin to this process. It is subject to potentially very serious problems.

In short I believe that PIAB could have a number of different consequences. Firstly, it could introduce a further layer of bureaucracy into our compensation system. Secondly, it will have the effect of reducing the award of compensatory damages to an injured person should he or she decide to accept that award. Thirdly, it will cause utter and complete confusion as it represents a parallel system to our existing tort system. It is one of the remarkable features of the second McAuley report that it seeks to hive off certain limited claims into PIAB but leaves a concurrent stream of claims before the Courts. The perceived evils of that system will continue to apply to the greater number of claims.

It is instructive to have regard to a number of matters of fact. The second McAuley report is replete with comparisons of the Irish compensation system with Quebec, New Zealand, Sweden and other jurisdictions. But let us look at what has happened in some of those jurisdictions.

Quebec

Professor M Gaudrey found in a 1992 survey that after the introduction of a no fault system there was a 6.8% increase in fatalities, a 26.3% increase in injuries and an 11% increase in property damage.

A further survey by Professor R A Devlin found a similar order of magnitude in increases in accidents.

New Zealand

Professor I R McEwin, in examining automobile injuries in New Zealand and Australia's Northern Territory, following the introduction of a no fault insurance scheme, found that there were more road traffic deaths after the introduction of the system. This resulted in an increase of 16% on the position that obtained prior to the introduction of no fault liability.

If assessment only cases are to go to PIAB it in effect bears a resemblance to a "no fault" tribunal. Indeed insurers may concede liability if awards are less before PIAB in the hope that this procedure will be the end of the case. An injured workman may accept the PIAB judgment because of financial pressures and the delay in getting to Court because of PIAB.

It is important to bear in mind the value of public exposure of wrongdoing by motorists and employers. While the criminal law provides its own sanctions the burden of proof that it imposes can be a difficult one. On the other hand our tortious system, with its balance of probability standard and its greater array of procedural remedies, provides a forum for public justice. The impact of the moral opprobrium attaching to findings of negligence, in a court of law, cannot be overestimated. Unfortunately PIAB, as it is structured, will preclude a public exposure of negligence. While it is not easy to quantify the impact of this process on the conduct of potential wrongdoers, the evidence from Quebec, New Zealand and parts of Australia is instructive. It certainly supports the argument that importance attaches to public exposure of culpability.

Some of the factual matters relied upon by the second McAuley report are simply wrong. Part of the assessment carried out by the second McAuley report of social welfare payments, in the United Kingdom, is based on legislation that has since been effectively repealed. The 1948 Law Reform (Personal Injuries) Act was effectively repealed by the Social Security Act 1989. This later Act brought into force the system of recoupment and was modified by the Social Security Administration Act 1992. The current regime in the UK is governed by the Social Security (Recovery of Benefits) Act 1997 and the regulations made under that Act. Moreover, when a comparison is made between general damages in Ireland and the United Kingdom (and indeed other jurisdictions) it is important to bear in mind that the U.K. Law Commission in its report "Structured Settlements and Interim and Provisional Damages" suggested that U.K. damages are too low. I agree. So does the Department, albeit belatedly.

Is there a Need for Reform?

The simple answer to this is Yes. But it must be intelligent and sensible reform. There is already in being the mechanism of the Rules of the Superior Courts Committee that can address changes in procedures in the Courts that facilitate reducing the duration of cases and consequently the costs associated with them.

But it is wrong to view this issue of high premiums through one focus. The costs of premia, the size of awards and the costs of delivery of such awards is a multifaceted problem. It demands a multi-dimensational approach to its resolution. There are many issues that need to be canvassed and considered in detail if there is to be an effective process of reform. Among the issues that need to be addressed are the following:

- The deductibility of all social welfare payments in personal injuries litigation.
- The introduction of mandatory employers liability insurance.
- The introduction of Rules of Procedure requiring insurers to make offers within a stipulated period of time, after service of Notice of Trial, and the imposition of a financial inducement for them to so do and with a view to reducing legal costs.
- Consideration of the introduction of structured settlements and, indeed, provisional awards.
- Vesting full rights of subrogation in the State to recover all payments made by the State to injured parties. The tax payer should not carry this burden through increased taxation.
- Prohibition on advertising for personal injury litigants.
- Regular safety audits by the Health and Safety Authority and insurers.

Conclusion

It is my firm belief that PIAB is a fatally flawed project. It will not result in reduced premia. While it carries a real and substantial risk of a reduction in the level of awards to injured parties, a corollary of that will be appeals to the Courts. Thus, in the end of the day, PIAB as it is presently structured will only add a new layer of bureaucracy and more costs and expense.●

HE EUROPEAN CONVENTION ON HUMAN RIGHTS AND IRISH INCORPORATION - ADOPTING A MINIMALIST APPROACH

***Ray Murphy** and **Siobhán Wills**, Irish Centre for Human Rights, Faculty of Law, NUI Galway, conclude their examination of the European Convention on Human Rights Bill 2001.*

The Belfast Agreement

Human rights formed a key part of the Belfast Agreement and this was a feature that distinguished it from earlier settlement proposals for Northern Ireland.[1] The articulation of rights protection as flowing from international law commitments rather than just the history of the conflict opened up arguments for Irish government reciprocity, which were difficult to resist.[2] While the Agreement contained a number of express commitments by the Irish Government with regard to human rights, the actual commitment to examine the question of incorporation of the ECHR was couched in language falling short of creating a clear legal obligation to do anything more than examine the issue.[3] After the passing of the Human Rights Act 1998 in the United Kingdom,[4] Ireland found itself in the embarrassing position of being the only state in the Council of Europe not to have incorporated the ECHR into its domestic law.

The delay in incorporation can be partly attributed to the dispute as to exactly what is "the highest possible standard" of human rights protection attainable in Ireland.[5] Several competing and deeply held beliefs have contributed to the lack of action on the part of the government during the past two years. The first is the belief that the Constitution already embodies a much higher standard of human rights protection than that available under the ECHR; also by implication that human rights protection in Ireland, by virtue of the Constitution, is of a much higher standard than that pertaining in Northern Ireland both prior and subsequent to the passing of Human Rights Act 1998. Others argue that whilst the Constitution is strong in some areas of human rights protection, it is much weaker in others; they point to weaknesses in the criminal law procedure, inadequate access to legal aid[6] and the long struggle it took to decriminalise consensual homosexual acts of intimacy as areas in which human rights are better protected under the ECHR than the Constitution. Correlative to this point of view is the belief that the Constitution reflects particular cultural convictions that are not shared by the majority of Northern Ireland's inhabitants - and that failure to incorporate the text of the ECHR into Irish domestic law will suggest that in Ireland Convention rights are likely to be given an Irish "gloss". There is little in Irish jurisprudence to date to suggest that such fears are groundless.

The Constitution asserts unequivocally the independence of an Irish polity premised on popular sovereignty.[7] It was drawn up in the context of establishing independence, was adopted by popular referendum and can only be amended by referendum. Underlying reservations remain that to cede the pre-eminence of ECHR law and jurisprudence within the domestic law of the State would result in a diminution of sovereignty similar to that consequent to the European Court of Justice rulings in *Internationale Handesgesellschaft GmbH*[8], *Van Gend en Loos*[9] and *Costa v Enel*.[10] Any form of incorporation that did not confirm the pre-eminence of the Constitution would have required a referendum. Governments are nervous of referendums on politically sensitive issues - the history of referendums on divorce, abortion and the Nice Treaty would make any government hesitate.

Status of the Convention in Irish Law Prior to Incorporation

The problem with the incorporation of a constitutional legal regime into domestic law is how to deal with inconsistencies between the international constitutional order and the national constitutional order. The ECHR provides a European wide template for fundamental rights protection but there is room for differences in how it is applied or understood within each state. The method of incorporation, inter-action with national constitutional law and the interpretations made by local judges, affect the nature of the rights as applied in domestic courts. National diversity is recognised and respected by the European Court of Human Rights under the doctrine by which states are given *a margin of appreciation* with regard to the manner in which ECHR provisions are interpreted. This margin of appreciation is much greater with respect to rights in which there is little consensus of opinion among the many states within the Council of Europe, much less with respect to rights over which there is consensus. Consensus may change over time: the Court has stated that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that it could not but be influenced by the developments and standards commonly accepted by the majority of contracting states.[11] Commitment to the ECHR is not a one-off decision to uphold a set of defined and limited legal rights: it is commitment to a community and evolving set of principles. One of the arguments put forward against direct

"The ECHR provides a European wide template for fundamental rights protection but there is room for differences in how it is applied or understood within each state. The method of incorporation, inter-action with national constitutional law, and the interpretations made by local judges all affect the nature of the rights as applied in domestic courts. National diversity is recognised and respected by the European Court of Human Rights under the doctrine by which states are given a margin of appreciation with regard to the manner in which ECHR provisions are interpreted."

legislative incorporation is that the margin of appreciation would move from the legislature to the judiciary because it would be judges who would decide, in any given case, whether any law or state action fell within or without the terms of the ECHR.[12]

It is the generally accepted view that, because of the dualistic nature of the Irish legal system, prior to incorporation the Convention did not form part of domestic law. The extent to which an individual could rely on Convention rights in domestic courts depended on whether the rights had been upheld under European Community law and on whether the case had a Community dimension. With the exception of this Community law aspect, the Convention applied *to* Ireland but not *within* Ireland. Irish courts have been emphatic that human rights protection in Ireland must be grounded in Irish law.[13] It is noteworthy that a great bulk of the cases where Ireland has been found in breach of the ECHR relate to sexual and family matters where the freedom of action of legislators and the courts were heavily constrained by constitutional considerations or by public controversy.[14]

Irish courts have refused to give effect to decisions of the Strasbourg court - even when the decision was made against Ireland.[15] They have also refused to apply a decision of the Strasbourg court when it concerned exactly the law that was before them.[16] When Irish judges do cite the ECHR it is normally only to provide additional back up support for a decision that the Court would have reached anyway, based on Irish law.[17] They appear anxious to stress the primacy of Irish jurisprudence even when the right in question clearly derives from European jurisprudence.[18] More recently, the Supreme Court, when examining the constitutionality of the Illegal Immigrants (Trafficking) Bill 1999, did consider arguments regarding the Bill's compatibility with the ECHR. However, it concluded that it had not been demonstrated to the Court that the proposed extended grounds for detention under the Bill would contravene Article 5 of the ECHR.[19]

Options for Incorporation

A number of possible options for incorporation were available to the government.[20] They could be placed in two general broad categories, constitutional and legislative. At no stage in the debate did it seem likely that a constitutional option would be given serious consideration.[21] There is a general view that the Constitution offers excellent protection in most areas of personal liberty, and that any interference with the current bill of rights provisions might prove counter productive. Three options were put before the government; the first being a constitutional amendment to incorporate the ECHR into the Irish Constitution; secondly, incorporation by legislation giving the ECHR the same force as Irish law and leaving it to the Irish courts to sort out conflicts. This option would have had the advantage of raising the profile of the ECHR to an every day issue argued in courts throughout the land, even those of the lowest level. But there was a likelihood that if the Convention were to be given the status of ordinary legislation, problems would arise where there are conflicts with other laws. Finally, the third option was referred to as "an interpretive incorporation" by legislation. The government were reported to have been concerned to ensure legislators would make the law, not judges.[22] Unfortunately, it appears that insufficient consideration was given to finding a method to retain the current rights enshrined in the Constitution while incorporating the ECHR in a manner that would give some or all of the Convention provisions similar constitutional status.

European Convention on Human Rights Bill 2001

Ireland has decided to follow the example set by the United Kingdom. The Human Rights Act 1998 requires that existing legislation must be applied in a way that is consistent with the ECHR.[23] If this is impossible the Courts are empowered to make a declaration of incompatibility. The relevant Minister may then "fast track" an amendment through Parliament. Parliament may reject the amendment but it is considered unlikely that the government would wish to be seen refusing to amend laws that have been declared incompatible with obligations under the Convention.

The Irish legalisation is similarly framed. This is both unfortunate and unnecessary; unlike the United Kingdom, parliamentary sovereignty is not applicable in Ireland. The crucial provisions of the proposed legislation are Sections 2, 3 and 4. Section 2 establishes the framework thorough which further effect is to be given to the provisions of the Convention. It provides that any statutory provision (defined in Section 1) and any rule of law shall be interpreted, in so far as possible, in a manner compatible with the State's obligations under the Convention.[24] The section will apply retrospectively and prospectively.

Section 3 provides that every organ of the State shall perform its functions in a manner compatible with the State's

obligations under the Convention. It is noteworthy that the courts are expressly excluded from this provision, thus avoiding the embarrassing situation where a litigant wanted to pursue a remedy for delay by the courts. Section 4 allows the courts to examine and take judicial notice of the interpretation of the Convention's provisions by the European Court of Human Rights, the European Commission on Human Rights and the Committee of Ministers of the Council of Europe, but this does not actually oblige the Irish courts to follow such authorities. It can be predicted that the European Court of Human Rights itself may be reluctant to act as a court of appeal in such cases. Section 5 provides for the declaration of incompatibility, and a similar "fast track" procedure to that of the United Kingdom model. What if the applicant is detained under a provision declared to be incompatible with the ECHR, and yet consistent with the Constitution? This may not actually affect the detention or conviction, and such an applicant will find himself or herself in a kind of legal "no mans land" pending a resolution of the issue.

Ironically, the issue of compensation for an injured party following a declaration of incompatibility by the courts proved to be problematic. Section 5 (4) provides for an *ex-gratia* payment of compensation by the government to an injured party. The reason why such payment would be made by the government and not by the courts, is that the courts could not award damages where there is compliance with a statutory provision or rule of law which, while incompatible with the Convention, remains constitutionally valid in Ireland. If no compensation scheme was put in place, an injured party would have no option but to take a case to Strasbourg, thereby defeating a primary objective of the proposed legislation, i.e. to give further effect to the Convention in national law by enabling cases to be taken and remedies obtained before national courts in respect of violations of the Convention. Nevertheless, this is a far from perfect solution to the dilemma presented, and it may in fact be unconstitutional for the government to determine the compensation payable when in fact the courts have made a determination that a violation has occurred.[25]

Likely Impact of Incorporation

The communitarian social teaching of the Roman Catholic Church was particularly influential in the 1930's when the Irish Constitution was being drafted.[26] The Constitution reflects the ideologies of both liberal-democracy and theocracy, and "there appears no principled way of prioritising one over the other in Irish constitutional jurisprudence. They both have a presumptively equal claim to prominence under Irish constitutional law because both are posited by the text of the Constitution."[27] Part of Ireland's problem has been to find a method of incorporation that would secure, to the best extent possible, national cultural values against incursion by a consensus of homogenising international opinions, whilst at the same time playing its part in trying to create a human rights environment that is neutral with respect to religious and cultural divisions.

It is problematic for Ireland, with a strong and relatively homogenous moral and cultural identity, to embrace a commitment to a growing community of fundamental beliefs in which the majority of the other member states derive their beliefs from a different tradition. Unfortunately, the linkage of the incorporation of the ECHR with the Belfast Agreement has meant that the wider debate regarding incorporation of other international treaties has largely been ignored. It is three years since the commitment was made in the Belfast Agreement, and yet the government has now deferred the Bill to allow for "further consultation".[28] The introduction of the Bill was eclipsed by a separate controversy regarding the composition and establishment of a Human Rights Commission.[29] As already indicated, the delay, while inexcusable, can be partly attributed to a lack of agreement upon the best method of incorporation, and a belief that the Constitution already contains a much higher level of human rights protection than that under the ECHR. But given the belief in the strength of the fundamental rights provisions contained in the Constitution, it is remarkable that the Irish government was so reluctant to complement these with the provisions in the ECHR. In any event, the ECHR should be viewed as a minimum yardstick by which to measure human rights protection, and there is nothing to prevent Ireland guaranteeing a higher level of protection.[30] It should never be disingenuously employed to disguise encroachments on personal liberty similar to that attempted during the 1996 referendum to reform the bail laws in Ireland.[31]

Given the constitutional issues and the unresolved tensions between the domestic and international legal order, it is perhaps no surprise that the proposed European Convention on Human Rights Bill 2001 provides for a minimalist form of incorporation. The Minister himself commented that the Bill did not create any new rights, as the state was bound by the Convention provisions for fifty years, and the Constitution had provided extensive protection for individual rights.[32] The stated purpose of the Bill is to facilitate actions being taken in Irish courts rather than in the European Court of Human Rights.[33] This is all very well, but the method of incorporation chosen from the range of options available is the least facilitative of such a process. This model does very little to supplement pre-existing rights guaranteed by the Constitution.

In particular, section 2 of the Bill merely requires a court to interpret and apply any statutory provision or rule of law, in so far as possible, and subject to the rules of law relating to such interpretation and application, in a manner compatible with the obligations under the ECHR. Section 4 requires that judicial notice be taken of the Convention provisions and decisions there under. Where it is not possible to interpret other legislation in a manner compatible with rights enshrined in the ECHR, the Bill confers no power to strike down the offending legislation. The real test of the relevance and potential impact of this legislation is to examine what effect incorporation would have made in the recent cases against Ireland brought before the Court. The reality is that *Keegan*[34], *Norris*[35] and *Heaney & McGuiness v. Ireland*[36] might not have been decided any differently in the Irish courts had the Bill been enacted. The provisions in the proposed legislation still allow a wide margin of discretion to an Irish court in taking cognisance of the jurisprudence of the European Court of Human Rights, and Irish courts are neither bound to follow or apply a precedent of the Court or related bodies.

What then will be the impact of the method of incorporation adopted by the government? A survey of the role of the ECHR in Irish law to date provokes the question why it has failed to achieve a more prominent place in the domestic legal order. There is little in the Irish response of the insular hostility to any bill of rights found among elements of the British body politic.[37] The *Finucane v. McMahon*[38] decision, which came soon after the European Court of Human Rights decision in *Soering v. The United Kingdom*,[39] provides worrying indication

of Irish judicial attitudes to the jurisprudence of the European Court. The Irish Supreme Court unanimously found that a request for extradition could be refused where there was a probable risk that a suspect's fundamental rights would be breached or inadequately protected by the authorities in the requesting state. None of the judges adverted to the European Court's decision in *Soering,* although the principle involved in both cases was remarkably similar. Such was the conservatism and complacency of the Supreme Court, it did not deem it appropriate to confirm its reasoning by reference to a precedent as authoritative as that of the European Court of Human Rights. This is indicative of a pattern of regular omission which has consistently served to undermine the status of the ECHR as an important factor in the determination of Irish judges. What will happen post-incorporation should the European Court hold that the ECHR guarantees a broader right to termination of pregnancy or euthanasia than is constitutionally permitted in Ireland. Admittedly, these sensitive issues have been deliberately avoided to date, but in such an event it is unlikely that the Irish people would vote to amend the Constitution in order to comply with the State's international obligations.[40]

It is arguable that, apart from District Judges being required to give reasoned decisions, it is unlikely that incorporation will have a profound impact on the daily routine and decisions of the Irish courts. The situation regarding the status of the ECHR in domestic law has been untenable for some time, but the method of incorporation chosen may ultimately add to this unsatisfactory situation. The optimistic view of one commentator was that incorporation might provide an essential antidote to judicial short- sightedness and lead to the Irish courts discovering a lot of new rights in the Constitution that apparently were always there but had not been noticed in the past.[41] A more realistic assessment requires that consideration be given to the threat posed to the effectiveness of the model of incorporation chosen by the application of the presumption of constitutionality in favour of post-Constitution legislation, and the "double construction" test applied in *East Donegal Co-operative Ltd. v. Attorney General.*[42] The presumption of constitutionality extends to both the substance and operation of a statute.[43] An analysis of later cases demonstrates that the "double construction" rule has meant that by attributing to statutes an artificial or restrictive meaning, they can be saved from a finding of invalidity.[44] The dominant consideration being to avoid such a finding, this rule of construction takes precedence over others. If, post incorporation, the courts adopt a similar interpretive approach to determining ECHR compatibility, then many pieces of legislation can pass the test by being given an artificial or restricted meaning under the "double construction" test.

One of the benefits of the model for incorporation adopted is that the courts can identify the sometimes exaggerated conflicts between the Constitution and the ECHR. This in turn could facilitate a process of constitutional reform or moderation, though political realities render this an unlikely development in the short term. Section 3 of the proposed Act (performance of functions compatible with Convention provisions) is especially welcome. People will now enjoy a right of due process (Article 6 of the ECHR) in the determination of their entitlements by local authorities, welfare officers, health boards and others; this will include a right to a fair hearing and a reasoned decision that will be open to challenge in the courts. In fact, Article 6 has the most potential for influencing procedural issues in the conduct of criminal and civil cases in Ireland.[45] Article 10 guaranteeing a right to freedom of expression is also recognised as having wider scope than the present provisions of the Constitution, and its incorporation will have important implications for Ireland's restrictive defamation laws.[46] As yet there is no indication that the government intends to commit substantial resources to inform the public of their rights under the Convention. What programme of action does the Minister intend to introduce to make public officials, and indeed the judiciary, aware of the provisions of the ECHR? Will the judiciary be dependent on the applicant's counsel to appraise themselves of the relevant principles?

At present, applicants are required to exhaust all effective domestic remedies before the ECHR will consider a complaint.[47] This is consistent with the subsidiary nature of the European Court of Human Right's role, i.e. not to provide applicants with rights but rather to ensure contracting states do.[48] A declaratory action before the High Court, with the possibility of an appeal to the Supreme Court, constitutes the most effective method under Irish law of seeking to assert and vindicate fundamental rights. Incorporation has not changed the requirement to exhaust domestic constitutional remedies, and may in fact have complicated the matter further. It remains incumbent on an applicant to test the extent of domestic protection, and to allow a domestic court to develop fundamental rights by way of interpretation.[49] Applicants will have to plead issues of ECHR principles at first instance to ensure they do not fall at this initial hurdle for failure to exhaust domestic remedies. However, the Irish courts have yet to pronounce upon the role of ECHR principles in their own jurisprudence in the post incorporation era. Will the courts adopt a broad purposive approach to the interpretation of ECHR principles, or eschew the teleological approach for the traditional restrictive approach of the Supreme Court. Irish judges may still prefer to base their human rights rulings on the more familiar jurisprudence of Irish constitutional law, and pay lip service to that of the ECHR and elsewhere. From this perspective, the proposed legislation is a lost opportunity to enhance the protection of human rights and fundamental freedoms in Ireland by reference to the ideals and values of a European democratic society.●

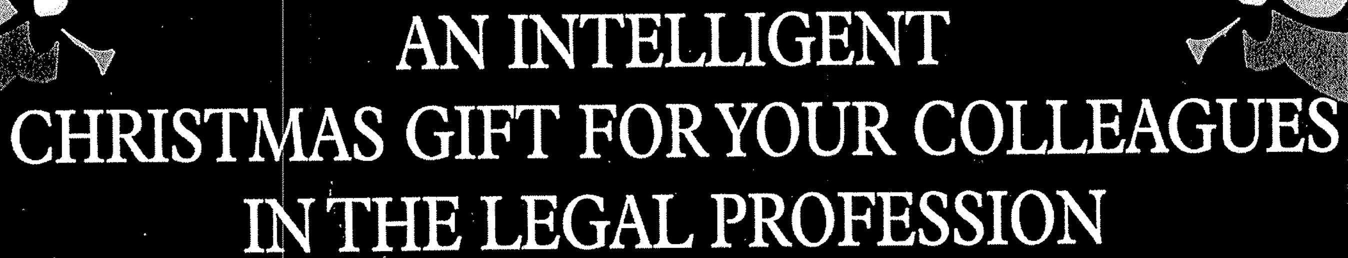
"A declaratory action before the High Court, with the possibility of an appeal to the Supreme Court, constitutes the most effective method under Irish law of seeking to assert and vindicate fundamental rights. Incorporation has not changed the requirement to exhaust domestic constitutional remedies, and may in fact have complicated the matter further."

1. C. Bell, *Peace Agreements and Human Rights,* (Oxford, 2001), p. 213.
2. *Ibid.*, p. 175
3. See Openi ng Address McDowell, *supra.*, n. 8.
4. See Lord Lester of Herne Hill and D. Pannick (eds.), *The Human Rights Act 1998;An Introduction,* (Butterworths, 1999); and Lester, *Challenges and Enigmas: The Human Rights Act 1998,* [1999] JR 170-176.
5. See *Constitutional Considerations,* Address by the Attorney General, Michael McDowell to the Law Society Conference on *Effective Remedies under the ECHR* , 10 February 2001, p. 1.
6. Robinson, *Improved remedies in Irish Law under the ECHR,* paper delivered at the Law Society Conference, Dublin, 10 February 2001.
7. Articles 1, 5, 6, 27, 29, 46 of the Constitution.
8. Case 11/70, *Internationale handesgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* [1970] ECR 1125
9. Case 26/62, *N.V.Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR1; [1963] CMLR 105
10. Case 6/64, *Flaminio Costa v. Enel* [1964] ECR 585, [1964] CMLR 425, 593
11. *Tyrer v.UK,* Eur. Court HR, ser. A, no. 26, judgment of 25 Apr. 1978
12. McDowell, *op.cit.,* at p.4.
13. See *Re O Laighleis* [1960] I.R. 93 and *O'Domhnaill v. Merrick* [1984] IR 151.
14. Mr. Justice Hardiman, *supra.*, n. 15. See also *Norris v Attorney General* [1984] IR 36
15. See *E v. E* [1982] ILRM 497 and *Airey v. Ireland* [1979] Series A, No 32.
16. *Norris v Attorney General* [1984] IR 36
17. See, for example, the dicta of Barrington, J. in *Irish Times Ltd v Murphy* [1998] 2 ILRM 161 at p. 193.
18. See *W.O'R. v. E.H.*[1996] 2 IR 248 and *Croke v Smith and Others* Unreported High Court decision of 27th and 31st July, 1995. The latter case was appealed to the Supreme Court and then to Strasbourg, and it was settled just days before its scheduled oral hearing date in October 2000 (a delay of five years).
19. The Court referred to *Amuur v. France* [1996] 22 E.H.R.R. 533 and *Chahal v. United Kingdom* [1996] 23 E.H.R.R. 413; see In the Matter of Article 26 of the Constitution and in the matter of ss. 5 and 10 of the Illegal Immigrants Bill, 1999 [2000] I.R. 360. The court found none of the provisions of s. 5 or s.10 repugnant to the Constitution.
20. See *Irish Centre for Human Rights Bulletin, Incorporation of the European Convention on Human Rights in Irish Law,* June 2000.
21. The constitutional options were as follows:

    1) An amendment to the Constitution stating that the ECHR is part of the fundamental law of Ireland. Any subordinate legislation, (even legislation already adopted), which was incompatible with Convention rights would be unconstitutional and invalid. An incompatible constitutional provision would not automatically be rendered invalid (except where it is also incompatible with Community law) and any conflicts would have to be resolved by the courts. A more certain approach, adopted by many Contracting States would have been an amendment that provides that the ECHR takes precedence over other constitutional provisions. This resolves the problem of conflict and it would have been the most comprehensive means of ensuring Ireland's compliance with Convention obligations.

    2) Replacement of the fundamental rights provisions of the Constitution with the provisions of the European Convention on Human Rights. But many people believe that in some areas the human rights protections afforded by the Constitution are superior to those of the Convention.

    3) An amendment providing that no legislation shall be enacted which is contrary to the European Convention. But this on its own would not have covered the behaviour of public officials.
22. *See The Irish Times,* 22 September 2000.
23. See Smith, *The Human Rights Act and the Criminal Lawyer: The Constitutional Context, Criminal Law Review* [1999], pp. 251-260 and Feldman, *The Human Rights Act 1998 and constitutional principles,* 19 Legal Studies, [1999], 165-206.
24. Section 2 (1) of the European Convention on Human Rights Bill, 2001.
25. See comments by the President designate of the Human Rights Commission, Justice Barrington, reported in *The Irish Times,* 21 May 2001.
26. Whelan, *Constitutional Democracy, Community and Corporatism in Ireland,* in Quinn, (ed.) *Irish Human Rights Yearbook* 1995, p. 100
27. G. Quinn, "The Nature and Significance of Critical Legal Studies", 7 ILT, (1989), p. 282.
28. See Coulter, *The Irish Times,* 20 June 2001, p. 6.
29. See Coulter, *The Irish Times,* 12 April 2001, p. 4.
30. It is generally accepted that the level of protection guaranteed to refugees is higher in Irish domestic law, than under the ECHR, see G. Hogan, *The Incorporation of the ECHR into Irish Domestic Law, supra.*, p. 3. See also Austin, *From Ireland to Strasbourg: Form & Substance of the Convention System,* 6 (5) The Bar Review, (2001), pp. 303-309 at 307-308; and N. Blackwell, *Don't look back, Law Society Gazette,* (April 2001), pp. 20-23.
31. O'Connell, *op. cit..*, p.108. One of the arguments put forward in support of amending the then liberal bail laws was that the proposed restrictions conformed with the ECHR.
32. See Coulter, *The Irish Times,* 12 April 2001, p. 4.
33. See Explanatory Memorandum, European Convention on Human Rights Bill, 2001, p. 2.
34. *Keegan v. Ireland* (1994) 18 EHRR 342.
35. *Norris v. Attorney General* [1984] IR 36; and *Norris v. Ireland, judgment* of 26 October 1998, Series A, No. 142.
36. *Heaney & McGuiness v. Ireland* , App 34720/97.
37. See Flynn, *Ireland, op. cit..*, at p. 213.
38. [1990] IR 165.
39. (1989) 11 EHRR 439.
40. Connelly, in Dickson (ed.), op. cit . p. 209.
41. M. Farrell, "Semi-detached or Joined-up Rights? Making the European Convention a Reality for Irish Lawyers -and their Clients", paper delivered to Law Society Conference on Effective Remedies under the European Convention in Human Rights, Dublin, 10 February 2001.
42. [1970] IR 317.
43. Henchy, J. in *McMahon v. Leahy* [1984] IR 548.
44. See *Loftus v. Attorney General* [1979] IR 211; *Doyle v. An Taoiseach* [1986] ILRM 693; *Hegarty v. o'Loughran* [1990] 1 IR 148; *Re National Irish Bank Ltd.*, [1999] ILRM 321; and Kelly, The Irish Constitution, *op. cit.*, pp. 458-459.
45. See generally P. A. McDermott, "The Impact of the ECHR on Irish Criminal Law, 9 IJEL (2000), pp. 23-37.
46. Article 40.6.1 of the 1937 Constitution governs freedom of expression. See Robinson, *Improved Remedies in Irish Law under ECHR,* Law Society Conference, Dublin, 10 February 2001.
47. Article 35 (1) of the ECHR.
48. See Austin, op. cit., p. 303.
49. No. 18679/91, E.N. v. Ireland, Decision 1 December 1993.



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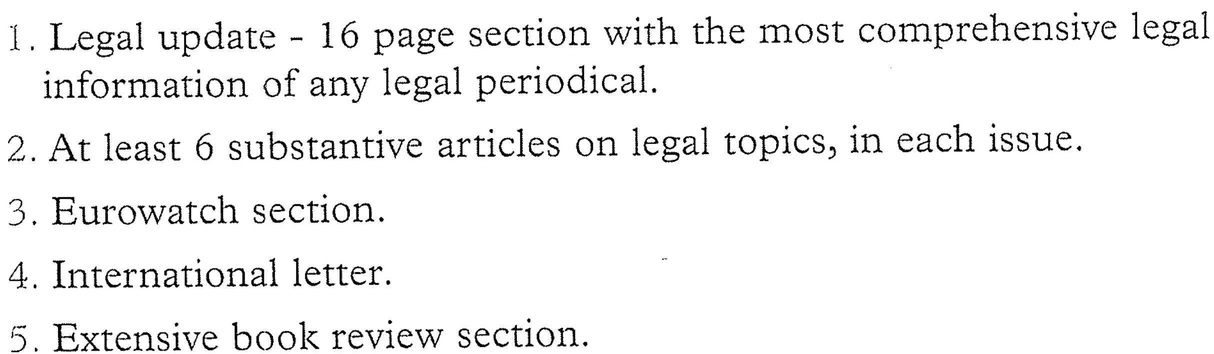

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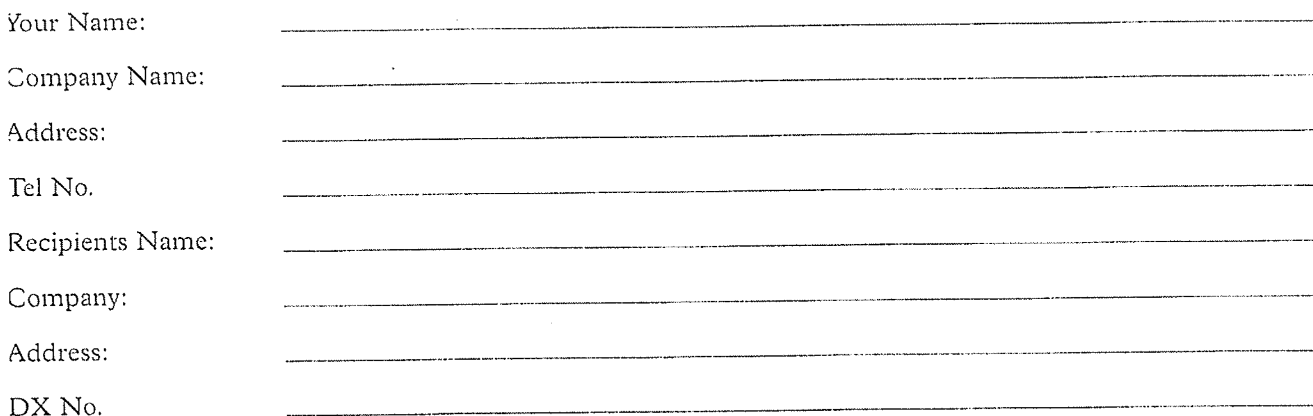

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LAIN LANGUAGE: THE END OF THE ROAD FOR RECONDITE LEGISLATION?

Brian Hunt, of the Office of the Parliamentary Counsel to the Government, examines the Law Reform Commission's recommendations on plain language in legislative drafting and finds that plain language alone will not solve the inaccessibility of our legislation.*

Introduction

The inaccessible nature of our legislation has long been criticised by both practitioners and academics. Invariably, the critics of the so-called "Victorian" and "turgid" style of drafting in Ireland and other jurisdictions enthusiastically advocate the adoption of plain language drafting as representing the great panacea to the long standing issue of the inaccessibility of legislation.

In its Report entitled "Statutory Drafting and Interpretation: Plain Language and the Law",[1] the Law Reform Commission has highlighted the "ongoing use of archaic words"[2] in our legislation. The Commission has also commented on the desirability of shorter sentences and has proposed a range of other initiatives[3] to improve the readability of legislation. On the question of plain language, the Report is measured in its tone and proposes moderate reforms. The twelfth recommendation in the LRC Report proposes that "a comprehensive programme of reform of Irish law, with a view to replacing existing statutory provisions with alternatives expressed in plain language, be undertaken" and the Commission expresses its support for initiatives in this regard which have been taken by the Office of the Parliamentary Counsel.[4]

Accuracy or Simplicity? - The Drafter's Dilemma

> "Legislation by its very nature, and because of the demands it has to meet, does not lend itself to simplicity. But that is not to say it cannot be made simpler in some degree, or that we should not try."[5]

Drafters of legislation are faced with two competing interests - on the one hand it is the determination to express the law in a simple and clear manner - as against the inherent desire to achieve certainty of meaning and accuracy on the other. In a speech delivered as Attorney General of Britain, Sir Patrick Mayhew[6] spoke of attempts to reconcile these competing interests, and was of the view[7] that it was a "moral certainty" that Parliament will not accept a simplification if it means potential injustice in any class of case, however small. This point had also been expressed by the Renton Committee, who in their report[8] stated:

> "... the draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an Act was obscure which could, by the use of a few extra words, have been made plain."

Judicial pronouncements on the plain language issue have been relatively rare and modest in tone. Of some considerable surprise therefore are the views of Lord Donaldson MR[9] who effectively suggested that if a government finds that its policy is not capable of being expressed in basic English, then the policy should be modified so as to facilitate ease of expression.[10] Clearly, this is a less than ideal solution.

Many plain language proponents would be quite critical of the drafting style in use in Ireland and a number of other common law jurisdictions. In fact some would go so far as to suggest that the language is turgid and something more fitting to the 19th century, and not the 21st. The traditional style of drafting has been criticised on the grounds that it is loaded with "long, convoluted sentences, archaic legal expressions, Latin words, and pompous language", but, despite this, it is widely recognised that the effect of the traditional style is "usually very precise".[11] However, some proponents of plain language would argue that the traditional style of drafting is far too concerned or even obsessed with precision - to the detriment of the intelligibility of legislation.

The difficulties encountered in the interpretation of legislation framed in turgid terms have been expressed many times, however, none so evocative as the words of Harman L.J.:

> "To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side ..."[12]

"In circumstances where an experienced drafter encounters difficulty in seeking to express complex policy by using precise English and legal terms, how can anyone riously suggest that this task could be made easier if expressed in plain language? Realistic proponents of plain language will dmit that plain language drafting is not the complete solution and accept that plain language may not be suitable in situations where the policy is complex."

Though all documents, regardless of their audience, should strive to be both clear and accurate, these requirements become ever more important in the realm of legislative drafting because of the gravity of the subject matter, such as sanctions, rights etc. which a piece of legislation may impose, confer or restrict. Consequently, there are those of the view that these key requirements - clarity and accuracy - should not be sacrificed in the interests of plain language or ease of understanding.

While recognising that the plain language approach does indeed carry some benefits, those who are sceptical often argue that a shift to plain language will inevitably detract from the level of clarity that the present form of drafting allows. Consequently, such persons are more inclined to favour a simplification of language rather than fully adopting the plain language school and all that it entails.

One argument commonly used in the defence of the traditional style of drafting is that parliamentary counsel have become quite fearful of wilful misinterpretation and its ensuing litigation. This fear has deepened their determination to make their drafts as water-tight as possible, and this in turn has had the effect of rendering some legislation unintelligible to many. The drafter's fear[13] in this regard is quite legitimate in that it may be said to stem from, first, the increasing litigious tendency of citizens and, secondly, the possibility of judicial misinterpretation of a legislative provision. The contention that the latter consideration is one that exercises the mind of drafters was supported by a parliamentary counsel in his submission to the Renton Committee[14], where he said:

> "The object is to secure that in the ultimate resort the judge is driven to adopt the meaning which the draftsman wants him to adopt. If in doing so he can use plain language, so much the better. But it is often easier said than done."

In *Fothergill v Monarch Airlines*, Lord Diplock[15] appeared to accept that at least some of the blame for the level of complexity found in legislation lay at the door of the judiciary, alluding to the fact that this complexity has to some extent arisen from the narrow and restrictive interpretation of legislation. However, plain language drafting may not necessarily be the most appropriate means of addressing this issue. In *R v Ottwell*,[16] Lord Reid aptly pointed out that the imprecise nature of the English language renders it very difficult to draft any provision in such a way that it is not capable of having two different meanings ascribed to it. However, the English language is not unique in this regard.

The reason why the widespread use of plain language is unsuitable in legislative drafting was succinctly expressed by Stephen J in *Re Castioni*[17] where he emphasised that the need for precision exists because people continually try to misunderstand Acts:

> "therefore it is not enough to attain a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it."[18]

In its report, the Renton Committee also alluded to the fact that invariably the use of plain language in legislative drafting will not suffice:

> "If any room is left for argument as to the meaning of an enactment which affects the liberty, the purse, or the comfort of individuals, that argument will be pursued by all available means. In this situation, Parliament seeks to leave as little as possible to inference, and to use words which are capable of one meaning only."[19]

Some opponents of plain language would go so far as to say that there is already evidence to illustrate that acceptance of the viewpoints of those advocating plain language has had a negative effect.[20] One of the great downfalls of plain language drafting is its inherent ambiguity. For example, in the Australian Broadcasting Act 1942, the phrase "commercially viable" was inserted in the 1980's without any accompanying definition. Following demands, this phrase was defined in 1991 in a provision 13 lines long, and was later again defined in a provision 17 lines long.[21]

Attempts by proponents of plain language to illustrate in a practical way its benefits have not been entirely successful. The common practice has been to take a piece of legislation and translate it from its enacted form into plain language, while emphasising the great ease with which it has been carried out. Inevitably, along with the benefits of plain language, this exercise also exposes weaknesses in the use of plain language. One such illustrative exercise was carried out by Martin Cutts,[22] a plain language proponent who claimed to have translated the UK Timeshare Act 1992 into plain language. A response to this translation came in the form of considerable criticism by the Parliamentary Counsel who drafted the Act, Euan Sutherland.[23] In his opinion, the translation had resulted in considerably altering the meaning of many of the provisions of the Act. It had omitted some provisions and had rendered the Act misleading is some respects. In a newspaper article, Francis Bennion[24] also levelled some criticism at Mr Cutts, by advising that "reformers like Mr Cutts need to start by understanding that law is an expertise."

Although the sole and legitimate aim of plain language drafting may be to render the text more comprehensible without changing its meaning, that aim is not always realisable. The conversion of legislative passages into plain language often has the unintended effect of changing the meaning of legislation. However, plain language proponents would dismiss any suggestion that this is a fatal flaw which renders plain language unsuitable for legislative drafting. Rather, they contend that these changes in meaning only occur because non-drafters, whose minds are set on simplicity rather than accuracy, nearly always carry out these re-drafts or conversions.[25] However this defence does not necessarily hold true, as Mr Cutts[26] has

admitted that his re-write was carried out with the help of two lawyers at Linklaters & Paines,[27] a highly regarded international law firm.

In response to the inevitable criticism of legislation which has been translated into plain English, the Law Reform Commission of Victoria[28] had this to say:

"Any errors in the plain English version are the result of difficulties in translation, particularly difficulties in understanding the original version. They are not inherent in plain English itself. Ideally, of course, plain English should not involve translation. It should be written from the beginning."[29]

One of the great difficulties with the appropriateness of plain language in a legislative drafting context is that the legislative intent can only be achieved by using special language. The adoption of plain language, is not (as its proponents would have us believe) a mere exercise in replacing some turgid words with simple and understandable ones. It is all too easy to become facetious and deride the apparent "inability" of some drafters to accept in full, the contentions of the plain language school.[30] Even those who accept that some change in the traditional style of drafting is needed, offer words of caution that those who are "berating drafters, ... should bear in mind that a convincing case has yet to be made out".[31]

Rather, if the adoption of plain language is a process to be taken seriously, it places an onerous task on the drafter in that it requires an analytical process to be carried out so as to ensure first, that the choice of plain word has a clear and widely concurrent meaning and secondly, that the use of that plain word would achieve the very same legislative intent as the use of the alternative term of art.

In a newspaper article, in which he expresses reservations about the adoption of plain language, Francis Bennion[32] acknowledges that terms of art, references to legal rules and doctrines cannot be fully understood by non-experts in law, but likewise, he says, medical language cannot be fully understood by non-experts in medicine. One U.S. proponent of plain language, Joseph Kimble[33], cites in favour of his argument the results of a study in the U.S. which show that technical terms and terms of art make up less than 3 percent of the average legal document.[34] Opponents of the plain language school might also like to refer to this study and say that this low incidence of the use of terms of art further strengthens their argument to the effect that there is no need for such a drastic change of approach as proposed by the plain language school.

One of the problems with plain language is that it often requires compressing what might be a complex policy into a small number of words. Consequently, this can lead to difficulties with interpretation and give rise to uncertainty. However, one suggested means of surmounting this difficulty is by shortening the length of the provisions while increasing the actual number of provisions used to express a policy.[35] However, on this very point Sir John Fiennes[36] had this to say to the Renton Committee:

"Shorter sentences are easier in themselves, and it would probably help overall to have them shorter, but of course you are then faced with having to find the relationship between that sentence and another sentence two sentences away, which, if you have it all in one sentence, is really done for you by the draftsman."[37]

In their paper, Legacé and Tremblay[38] are highly critical of what they call the "over-valuation" of short sentences. They are of the view that the tendency to limit a sentence to the expression of one thought "may result in an extremely fragmented text ..."[39] They conclude by saying that the fragmentation of ideas flies in the face of a basic thought process to the extent that "[i]t decomposes ideas to the point of disintegrating them and altering their content."[40]

In circumstances where an experienced drafter encounters difficulty in seeking to express complex policy by using precise English and legal terms, how can anyone seriously suggest that this task could be made easier if expressed in plain language? Realistic proponents of plain language will admit that plain language drafting is not the complete solution and accept that plain language may not be suitable in situations where the policy is complex. One of the more moderate proponents of plain language, I. Turnbull, acknowledges that plain language drafting is not a complete alternative to traditional style drafting. In one article,[41] he points out that in situations where complex concepts are at issue, plain language might well give rise to ambiguity and might render the legislation disjointed or absurdly long. In situations such as this, he proposes that precision must prevail over simplicity, as was the approach favoured by the Renton Committee. He sees the drafter as having a constant duty to consider alternative forms of expression and to choose the simplest by balancing different degrees of precision against different degrees of simplicity.

Plain Language: Is It Really the Answer?

The language of our legislation cannot be reduced to baby-talk for consumption by the masses. Professor Bates[42] has suggested that drafting in plain language is subject to at least two fundamental constraints - the first being that language is not plain, as a word may well have a number of meanings. So for example, "attend" cannot be replaced by "turn up", "notify" cannot become "tell" etc. The second constraint which he identifies is the actual nature of legislation itself, saying that "Statutes impose rights and obligations and the public is entitled to expect those rights and obligations to be stated precisely."[43] This point was succinctly expressed by the then UK First Parliamentary Counsel[44] in a memorandum submitted to the Select Committee on the Modernisation of the House of Commons:[45]

"A Bill's sole reason for existence is to change the law. The resulting Act is the law. ... A consequence of this unique function is that a Bill cannot set about communicating with the reader in the same way in which other forms of writing do. It cannot use the same range of tools. In particular, it cannot repeat the important points simply to emphasise their importance or safely explain itself by restating a proposition in different words. To do so would risk creating doubts and ambiguities that would fuel litigation. As a result, legislation speaks in a monotone and its language is compressed. It is less easy for readers to get their bearings and to assimilate quickly what they are being told than it would be if conventional methods of helping the reader were freely available to the drafter."

Attaining precision and accuracy is made even more difficult in legislative drafting because legislation is often drafted so as to regulate future events, the precise nature and effect of which may not be apparent at the time of drafting. The attainment of precision and accuracy occasionally gives rise to the need for the use of difficult language. Plain language, simplification, and all the other novel suggestions are not the panaceas that som

of the more enthusiastic proponents would have us believe. Some considered thoughts offered by The Hon Mr Justice Nazareth should be borne in mind:

> "Too much should not be expected in the way of simplification. Many of the improvements mentioned have long been effected in some jurisdictions. They have neither stilled the complaints nor simplified the statute book significantly." [46]

Bennion has expressed the view that the dissemination of the content of our laws is a function as distinct from that of drafting. This view is also shared by Peter Blume[47] who proposes that the content of our law should be disseminated by a variety of means. For example, he suggests that special channels of communication should be used in order to disseminate the content of our laws. In preparation for this, he suggests that the laws should undergo a process of reformulation so as to avoid too much detail. While recognising that there should be a distinction between drafting and dissemination of laws, Blume also suggests that:

> "The two aspects should be seen as a whole and Parliament has not performed its work satisfactorily if the dissemination function is neglected. When proposing a Bill it should be made clear what dissemination arrangements are planned and what they cost."[48]

There is a need to recognise that the principal function of a drafter is to enshrine policy in an accurate and precise manner. Secondly, there is a need to recognise that the communication of the law is an entirely different task. Neither the drafter, nor the legislation itself should be regarded as a vehicle of communication to the public - rather it should form the basis from which the explanatory materials should take root. These explanatory materials, specifically directed at members of the public, should seek to illustrate in plain and simple language the nature and effect of the law in question.

Communicating the Content of Legislation: The Role of Explanatory Materials

Regrettably, the Law Reform Commission appears to see plain language as a means of resolving the problems caused by the inaccessible nature of legislation, and consequently its Report does not focus in any great detail on the reform of explanatory materials. However, it is imperative that we do not become distracted in our efforts to resolve the difficulty of inaccessible legislation. The focus should turn to establishing some kind of formalised structure to effect the dissemination of the content of legislation in ways which take cognisance of the needs and abilities of citizens. From a legislative drafting perspective, dissemination of the content of legislation is the real way in which the needs of the citizens can best be served, not through distracting stratagems.

In Ireland there is a requirement that the fact of a Bill having been signed into law by the President appear in *Iris Oifigiúil.* This requirement arises from Article 25.4.2 of the Constitution. The Constitution does not in any way direct the dissemination of the legislation which has been passed. Each Bill is accompanied by an Explanatory Memorandum which is prepared by the Government Department sponsoring the Bill. It sets out in non-legal terms a summary of the object of the legislation and the general effect of each provision as it stood on the initiation of the Bill. However, the explanatory memoranda are not revised to reflect changes made to the Bill during its passage through parliament. The explanatory memoranda are available on the Government web site[49] and are also available for purchase. However, they are not directed solely at members of the public. The diffusion of the law in Ireland is not as formal as it might be and consequently there is no centralised body with responsibility for communicating the content of legislation to members of the public.

In Denmark, information leaflets on the content of particular pieces of legislation are distributed through the public libraries. This method of distribution is believed to enhance public understanding of the content of legislation. In contrast to this, in jurisdictions where the law or the content of the law is not available, or has not been disseminated, the vast majority of its ordinary citizens will, in reality, be plainly unaware of the great body of law produced by its legislature on an on-going basis. One means of avoiding such consequences is to provide the public with documents explaining the effect of complex legislation in simple and straightforward terms.

A number of specific aspects of the explanatory memoranda should be examined. For example, the Law Reform Commission's[50] recommendation to the effect that explanatory memoranda should be revised and republished on the enactment of a Bill is highly meritorious. From initiation to passing, a Bill can evolve into an entirely different creature. Consequently, where substantial changes have been made to a Bill, these will not at present be reflected in a reading of the explanatory memoranda. In a recent exchange in the Dáil[51] which focused on this recommendation, the Government Chief Whip appeared to favour this idea and undertook to pursue it further.

At present, Explanatory Memoranda are invariably drafted with parliamentarians in mind. Those who prepare explanatory materials should be directed to shift the audience focus from parliamentarians to the members of the public. This is fundamental if the effective communication of the content of legislation to members of the public is to be achieved. This change should also be accompanied by a review of the informative value and structure of the explanatory materials. Explanatory materials should be made available separately from the legislation, but more importantly they should be made more widely available than is presently the case.

Concluding Remarks

We as a democratic society need to recognise the present difficulties faced by members of the public trying to ascertain the meaning of legislation. Plain language alone will not resolve this issue. In this regard, it is important to reiterate the distinction between the enshrining of policy as law (the function of the parliamentary counsel), as compared to the communication of the content of legislation (the function of the explanatory materials).

The attention surely needs to turn towards communicating the content of the legislation itself through the existing medium of explanatory memoranda. In order to effectively communicate the meaning and effect of legislation to members of the public, the content, structure and presentation of explanatory memoranda must under-go something of a radical reform. ●

"The Law Reform Commission's recommendation to the effect that explanatory memoranda should be revised and republished on the enactment of a Bill is highly meritorious. From initiation to passing, a Bill can evolve into an entirely different creature also those who prepare explanatory materials should be directed to shift the audience focus from parliamentarians to the members of the public."

(Dip. L.S., B.A., M.Litt., Dip. L.S., Dip. Int. Arb., A.C.I. Arb. Research Officer, Office of the Parliamentary Counsel to the Government, Ireland. I am grateful to Kieran Mooney, Edward Donelan, Jack Hazlett and Fiona Carroll for their helpful comments on a draft of this article. The views expressed are personal and do not necessarily reflect the views of the Office of the Parliamentary Counsel to the Government.

2. The Report has been the subject of some comment: K. Wood, "Why Plain English Could Spell the End for Latin Lovers" (August/September 1999) *Law Society Gazette* 5; M. Bourke, "Nice and Easy Does It" (October 1999) *Law Society Gazette* 18; K. Wood "Sesquipedalian Solicitors Censured for Verbosity" Sunday Business Post 16th April, 2000; M. Bourke "Report's Backing for Wider Use of Plain English in Law is in Interest of Justice" Irish Times 28th May, 2001; M. King, "Statutes and Limitations" (August/September 2001) *Law Society Gazette* 26.
2. Law Reform Commission, "Statutory Drafting and Interpretation: Plain Language and the Law" (LRC 61-2000) at para. 6.07.
3. Id., at p. 87.
4. Formerly known as the Office of the Parliamentary Draftsman.
5. Hon. Mr Justice Nazareth, "Legislative Drafting: Could Our Statutes be Simpler?" (1987) Stat. LR 81 at 92.
6. Sir Patrick Mayhew, "Can Legislation Ever be Clear, and Certain?" (1990) 11 Stat. LR 1.
7. With reference to the First Parliamentary Counsel's evidence to the Renton Committee at para. 10.6.
8. *The Preparation of Legislation*, (London, 1975) Cmnd. 6053 at para. 11.5.
9. *Merkur Island Shipping Corp v Laughton* [1983] AC 570 at 595.
10. "... when formulating policy, ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: Is this concept too refined to be capable of expression in basic English? If so is there some way in which we can modify the policy so that it can be so expressed".
11. I. Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. LR 21 at 22.
12. *Davy v Leeds Corporation [*1964] 1 WLR 1218, 1224.
13. Described as "drafting by fear" by Jim Kennan, former Attorney-General of the State of Victoria, Australia in a statement made to the Victorian Legislative Council in May 1985.
14. *The Preparation of Legislation*, (London, 1975) Cmnd. 6053 at para. 6.5.
15. [1981] AC 251 at 280.
16. [1970] AC 642.
17. (1891) 1 QB 149.
18. *Id.*, at 167 - 168.
19. *The Preparation of Legislation*, (London, 1975) Cmnd. 6053 at para 7.5.
20. One such opponent being J. Stark, "Should the Main Goal of Statutory Drafting be Accuracy or Clarity", (1994) 15 Stat. LR 205.
21. As highlighted in I. Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. LR 21 at 27.
22. M. Cutts, "Unspeakable Acts? Clarifying the Language and Typography of an Act of Parliament", a discussion paper published under the auspices of Words at Work in (January, 1993).
23. E. Sutherland, "Clearer Drafting and the timeshare Act 1992: A Response from Parliamentary Counsel to Mr Cutts", (1993) 14 Stat. LR 163.
24. F. Bennion, "Don't Put the Law into Public Hands" The Times, 24 December, 1995.
25. I. Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. LR 21 at 25.
26. M. Cutts "Plain English in the Law" (1996) 17 Stat. LR 50.
27. Now called Linklaters & Alliance.
28. Law Reform Commission of Victoria, "Plain English and the Law" (1987).
29. *Id.*, at 49.
30. An example of this impertinence may be found in P. Rodney, "Legislative Drafting Style" paper delivered at "Legislative Drafting - Emerging Trends" conference 6th October, 2000 Dublin, Ireland. Also, Professor David Mellinkoff in his book Language of the Law Aspen Publishers, 1963) famously said that "The most effective way of shortening law language is for judges and lawyesr to stop writing". A more extreme example of facetiousness can be found in an article by Richard Thomas, a legal officer with the National Consumer Council in the U.K., entitled "Plain English and the Law" Stat. LR Autumn (1985) 139 - where he suggests that ridicule is a useful means of promoting the use of plain language. This ridicule manifests itself in the annual Plain English Awards and the Golden Bull Awards which are awarded to the "six worst examples of gobbledegook".
31. Hon. Mr Justice Nazareth, "Legislative Drafting: Could Our Statutes be Simpler?" (1987) Stat. LR 81 at 92.
32. F. Bennion, "Don't Put the Law into Public Hands", The Times, 24 December, 1995.
33. J. Kimble, "Answering the Critics of Plain Language" (1994-1995) 6 Scribes J. Legal Writing. Also appears at www.plainlanguage.gov/library/kimble.htm
34. See further, Benson Barr et al., "Legalese and the Myth of Case Precedent" (1985) 64 Mich. BJ 1136; S.M. Johanson, "In Defense of Plain Language" (1992) 3 Scribes J. Legal Writing 37.
35. As suggested by D. Berry "Legislative Drafting: Could Our Statutes be Simpler?" (1987) Stat. LR 92 at 96.
36. Former UK First Parliamentary Counsel.
37. *The Preparation of Legislation*, (London, 1975) Cmnd. 6053 at para. 11.9.
38. Legacé & Tremblay, "The Fragmentation of Ideas: A Current Form of Legislative Deconstruction" published in R.C. Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa: 1999) 129.
39. *Id.*, at 132.
40. *Id.*, at 144.
41. I. Turnbull, "Legislative Drafting in Plain Language and Statements of General Principle" (1997) 18 Stat. LR 21 at 25.
42. T St J N Bates, "Drafting for the User of Legislation" published in R.C. Bergeron (ed.), *Essays on Legislative Drafting* (Ottawa: 1999) 77.
43. *Id.*, at 78.
44. Sir Christopher Jenkins.
45. First Report "The Legislative Process" House of Commons Session 1997-98 (Cmnd. 190).
46. Hon Mr Justice Nazareth, "Legislative Drafting: Could Our Statutes be Simpler?" (1987) Stat. LR 81 at 92.
47. P. Blume, "The Communication of Legal Rules" (1990) 11 Stat. LR 189.
48. Id., at 209.
49. See www.gov.ie/oireachtas
50. Law Reform Commission, "Statutory Drafting and Interpretation: Plain Language and the Law" (LRC 61-2000) at para. 6.40.
51. Dáil Debates, 26 June, 2001. Available at www.gov.ie/oireachtas "Mr Quinn: There is a practice recommended in the LRC report to the effect that the explanatory memorandum, which is available at Second Stage, should be revised when the Bill is amended because many people... will use the explanatory memorandum as the guide to what is contained in the Bill. ... Can the Minister of State indicate from the information available to him in his briefing whether the proposed amendments to the Interpretation Act will recommend such procedures? Mr S. Brennan: I do not see any reference on my file to any such proposal but it is a top class idea because if we publish an explanatory memorandum with the Bill, by the time it has gone through all Stages in both Houses, it is often an entirely different Bill. Publishing an explanatory memorandum with the Act, therefore, might be useful. ... This is a point I have not considered but it is a top class idea and I will pursue it."

HE ABOLITION OF THE PRELIMINARY EXAMINATION

***Stephen O'Sullivan BL** outlines the changes introduced by Part III of the Criminal Justice Act (No. 10) 1999 and considers the practical implications of the abolition of the preliminary examination in Irish criminal law and procedure.*

Introduction[1]

Part III of the Criminal Justice Act (No. 10) 1999 effectively abolishes the preliminary examination in the District Court and confers jurisdiction on the trial court to conduct a similar examination where an application is made to dismiss the charges. This note analyses briefly the change and makes some comments on the practical implications and the differences that now exist with the new procedure.

The old provisions

Part II of the Criminal Procedure Act (No. 12) 1967 dealt with preliminary examination of indictable offences in the District Court. Section 8 provided *inter alia* as follows:-

> (1) If the justice is of opinion that there is a sufficient case to put the accused on trial for the offence with which he has been charged, he shall send him forward for trial.
> (2) If the justice is of opinion that there is a sufficient case to put the accused on trial for some indictable offence other than that charged, he shall cause him to be charged with that offence, proceed in accordance with section 7 (4), which shall have effect with the omission of the words "if he is sent forward for trial" in paragraph (a), and, unless section 13 applies, send him forward for trial.

The new provisions

Part III of the Criminal Justice Act (No. 10) 1999 is headed 'Amendments to abolish preliminary examination', and came into operation on 1st October 2001.[2] The entirety of Part II of the 1967 Act is repealed with the exception of section 13 which is amended and deals with 'Guilty pleas and other matters'. Section 9 then inserts new sections 4A to 4Q, which provide a new procedure for indictable offences appearing before the District Court.

Section 4A provides *inter alia* as follows:-

> (1) Where an accused person is before the District Court charged with an indictable offence, the Court shall send the accused forward for trial to the court before which he is to stand trial (the trial court) unless-
> (a) the case is being tried summarily,
> (b) the case is being dealt with under section 13, or
> (c) the accused is unfit to plead.
> (2) The accused shall not be sent forward for trial under subsection (1) without the consent of the prosecutor.
> (5) The accused shall not be sent forward for trial under subsection (1) until the documents mentioned in section 4B(1) have been served on the accused.

Therefore the consent of the D.P.P. and the serving of a book of evidence within 42 days of the accused's first appearance in court are now the only preconditions to being sent forward. The preliminary examination procedure in the District Court is abolished.[3] It remains with the District Court Judge to give the alibi warning when the accused is being sent forward.[4]

Section 4B(3) allows for the extension of time for service of the book of evidence where the District Judge is satisfied that:-

> (a) there is good reason for doing so, and
> (b) it would be in the interests of justice to do so.

Section 4E then provides inter alia as follows:-

> (1) At any time after the accused is sent forward for trial, the accused may apply to the trial court to dismiss one or more of the charges against the accused.
> (2) Notice of an application under subsection (1) shall be given to the prosecutor not less than 14 days before the date on which the application is due to be heard.
> (3) The trial court may, in the interests of justice, determine that less than 14 days notice of an application under subsection (1) may be given to the prosecutor.
> (4) If it appears to the trial court that there is not a sufficient case to put the accused on trial for any charge to which the application relates, the court shall dismiss the charge[5].
> (5) (a) Oral evidence may be given on an application under subsection (1) only if it appears to the trial court that such evidence is required in the interests of justice.

The decision of the court of trial may be appealed within 21

days to the Court of Criminal Appeal.

The remaining sections of Part II of the 1999 Act essentially amend other statutes to reflect the fact that preliminary examination has been replaced with the new procedure.

Section 23 of the 1999 Act provides a transitional provision as follows:-

> If, before the commencement of this Part, any steps have been taken under Part II of the Act of 1967 in relation to the prosecution of an accused person, the applicable provisions of the enactments amended or repealed by this Part shall continue to apply to all matters connected with or arising out of the prosecution of the accused, as if those enactments had not been so amended or repealed.

Comment

The recent Committee on Court Practice and Procedure[6] considered that the preliminary examination system did not significantly delay the criminal process, and was too significant to be abolished. The First Committee in 1963 came to a similar conclusion, with Walsh J. saying, 'it is a fundamental and inherent feature of our concept of justice that an accused person should not be put on his trial for a serious offence merely upon accusation.'

The refusal to follow this in the 1999 Act might be excused by the facility to bring the application to dismiss but this would depend on the adequacy of the new procedure.[7]

It is now for the accused to make an application to dismiss the charges against him rather than it being a precondition to the District Court sending the matter forward. The effect may be however to render this pre-trial procedure of even greater significance. Submissions on the book of evidence in the District Court were, it is submitted, very rarely made in the past, but it will now be for counsel fully assigned in the case to make this pre-trial application. Counsel so assigned may be in a better position to do so, having had more time and material to consider it.[8] It may also be that trial court judges will be more willing to dismiss charges under section 4E given that they might feel they have greater seisin of the case than a District Judge might feel, and they may also simply have more time to consider the application.

The same dilemma exists with applications under section 4E that existed with the old procedure. If a point of defence is so strong that it may warrant a successful application to dismiss the charge, then it might be worth keeping that point a secret until the trial comes on, given that the standard of proof in the former procedure will be more difficult to reach than in the actual trial itself. But the differences in the new procedure may provide another reason why it would be worth waiting for the actual trial. The fact that 14 days notice must be given to the prosecutor may mean that the prosecutor will not be taken by surprise with submissions on the book, which they may have been under the old procedure. Also, they may decide to analyse the book more closely when such an application is made, knowing that there may be gaps in the evidence which they may then seek to fill with additional evidence before the application is heard.

In relation to the extension time for service of the book of evidence under section 4B(3), it is arguable that a District Judge should not adopt a practice of extending the time for service of the book on the first appearance in court. The 1997 District Court Rules, now abolished in this respect, had required the book to be served within 30 days of the first appearance in court, save for scheduled offences: the time limit could be extended by 'leave of the court' but the former legislation provided no criteria for deciding when leave of the court should be granted. This can be contrasted with section 4B(3) which does not allow the District Judge a blanket discretion in the matter.[9]

Section 7(2) of the 1967 Act had allowed 'the prosecutor and the accused ... each ... to give evidence on sworn deposition and also to require the attendance before the justice of any person, whether included in the supplied list of witnesses or not, and to examine him by way of sworn deposition'. Section 4E(5) now provides that 'oral evidence may be given on an application [to dismiss] *only if it appears to the trial court that such evidence is required in the interests of justice*'[emphasis added].[10] Therefore the right to call a witness is qualified by the italicised words. This may be less significant than it seems since, under the 1967 Act, it had been held that the District Judge had a discretion to refuse to allow a witness to be called for the purpose of the examination where it was not 'well founded'.[11] Although the wording is different, it is likely that a court would follow the reasoning in *State (Sherry) v. Wine*[12] to conclude that the person calling a particular witness for the purpose of the application would only be entitled to examine that witness in chief but not to cross-examine them.

There is no provision equivalent to section 8(2) of the 1967 Act in the 1999 Act and although section 4M allows for the amendment of charges on the indictment a similar provision existed in section 18 of the 1967. This may call into question the jurisdiction of the trial judge hearing the application to dismiss the charge to exercise the jurisdiction which had been conferred by section 8(2), which it is submitted was a very important jurisdiction and one used quite often.

It seems from section 4M that further counts can be added to the indictment if they are founded on documents served on the accused including those additional documents served after the book of evidence is served. This is in contrast to section 18 of the 1967 Act which allowed for further counts to be added if

"It seems from section 4M of the 1999 Act that further counts can be added to the indictment if they are founded on documents served on the accused including those additional documents served after the book of evidence is served. This is in contrast to section 18 of the 1967 Act which allowed for further counts to be added if they were founded on any of the documents and exhibits 'considered by the justice at the preliminary examination."

> "An important safeguard is provided in the possibility of appeal. In contrast to the old procedure where the only real avenue of appeal was judicial review of the District Court Judge's decision,14 under the new procedures where an accused is unhappy with a decision of the trial judge it can be appealed within 21 days to the Court of Criminal Appeal."

they were founded on any of the documents and exhibits 'considered by the justice at the preliminary examination'. This might allow the prosecution to serve additional evidence documents at any stage before the trial and then to include a fresh charge based on those additional documents, even at a stage after the application to dismiss was heard. It is not clear whether in such a case the defence could make a fresh application to dismiss under section 4E in relation to the new charge. Interestingly, it was held in *O'Shea v. D.P.P.*[13] that section 18 of the 1967 Act was not unconstitutional, but in that case Finlay J. relied to some extent on the fact that the new charges in the indictment were based on evidence that had appeared before the District Judge. A close consideration of this case, in the light of the changes introduced, might call into question the constitutionality of the new section.

The transitional provisions in the 1999 Act are not very clear. One question may arise as to the meaning of the term 'any steps have been taken' in section 23 outlined above. It might be argued for example, in relation to an accused who first appeared before the court before 1 October 2001, that from the moment such an accused is remanded from his first appearance in the District Court the purpose of this is effectively the preparation of a book of evidence with a view to preliminary examination, thereby amounting to a step under Part II of the 1967 Act. This might make the 1999 Act inoperative in respect of such cases.

An important safeguard is provided in the possibility of appeal. In contrast to the old procedure where the only real avenue of appeal was judicial review of the District Court Judge's decision,[14] under the new procedures where an accused is unhappy with a decision of the trial judge it can be appealed within 21 days to the Court of Criminal Appeal.

Conclusion

Part III Criminal Justice Act (No. 10) 1999 introduces many significant changes in the pre-trial procedure for indictable offences which are sent forward. Some of these are based on very subtle changes in wording. The extent to which there will be significant practical implications for practitioners will depend to a large extent on how this Act is interpreted by the courts.●

1. For a detailed analysis of the 1967 Act procedure see Osborne, *The preliminary examination of indictable offences* (1995) 5 I.C.L.J. 1.
2. S.I. 193 of 2001
3. As pointed out in Byrne, *The Criminal Justice Act 1999* (1999) ILT 190, the original proposal was that the accused be sent forward for trial before service of the book of evidence but that the Act provide that the District Court would continue to deal with remand hearings until the book was ready.
4. Section 20 Criminal Justice Act (No. 22) 1984 remains unchanged in this respect.
5. In England section 6(1) of the Magistrates Courts Act 1980 provides the magistrate commits the accused if there is 'sufficient evidence to put the accused on trial by jury' which is a similarly worded test to section 8(2) of the 1967 Act and the new section.
6. 24th interim report in February 1997.
7. The importance of the preliminary examination procedure might be seen in *Costello v. D.P.P.* [1984] I.R. 436; [1984] ILRM 413 which held that section 62 of the Courts of Justice Act 1936 which gave the D.P.P. power to send an accused forward for trial, notwithstanding the refusal of a District Judge to do so, was unconstitutional as contrary to the separation of powers. See also *Glavin v. Governor* of *Mountjoy Trading Unit* [1991] 1 I.R. 421 which suggested that the requirement for preliminary examination might be a constitutional as opposed to a mere legal right thereby warranting a sufficient replacement if it were abolished.
8. See supra note 1 at p. 25 for an empirical review of these applications which show a steady decline in the number of cases where the application is successful from 1975 to negligible levels in the 1990's, although this does not indicate the number of cases in which submissions of no case to answer from the defence were made at preliminary examination stage.
9. O.24 r.10 (1) of the District Court Rules 1997 which were similar to those in the District Court (Criminal Procedure Act, 1967) Rules, 1967, r. 5.
10. This is similar to, but not as extensive as, the procedural limitations brought about in England by the Criminal Procedure and Investigations Act 1996 in respect of committal proceedings. This Act limited the evidence which could be considered to documentary evidence tendered by the prosecution plus exhibits and abolished the right of the defence to call evidence of its own or to require prosecution witnesses to attend to give evidence orally. In England however the procedure is still conducted in the Magistrates Court.
11. O'Hanlon J. in *State (Daly) v. Ruane* [1998] I.L.R.M. 117 at p.122. See a recent case in which a request for depositions was refused and the Supreme Court refused judicial review in upholding the decision of the District Judge to such effect - O'Shea v. D.P.P. Supreme Court, 24th May, 2001, Irish Times, 9th July 2001
12. [1985] I.L.R.M. 196.
13. [1988] I.R. 655; 1989 ILRM 309.
14. *State (Bachelor & Co. Ireland Ltd.) v. O'Leannain* [1957] 1 I.R. 1.

CIVIL LIABILITY FOR INDUSTRIAL ACCIDENTS, VOLUME 3

By John P.M. White (Volume 3, 2000)
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REVIEWED BY DAVID MCGRATH SC

When I came to the Bar in 1979 one of the first pieces of advice I got was from Richard Parnell Fitzgibbon Johnson SC (as he then was). He advised that if I ever needed a case in support of any proposition I wished to advance in Court I was bound to find one in the British & Empire Digest. Fortunately, I have not had to resort in desperation to the aforesaid Digest too often, but I have once or twice. The Digest has now of course been replaced by the Internet, and it would appear that most written submissions to court contain extensive references to Australian and Canadian decisions, previously only to be found in the Digest.

The need to consult the British and Empire Digest was of course because of the lack of Irish legal texts at that time, Professor Wiley's book on Land Law having been the only one published in the 1970's. Fortunately, since that time there has been an explosion in the number of Irish texts. In the area of Torts and Personal Injuries Law the author of the present volume under review has been a significant contributor with his books on the Irish Law of Damages (for Personal Injuries and Death), Medical Negligence Actions and the first two Volumes of Civil Liability for Industrial Accidents, which were published in 1993. With the increase in the number of judges in the High Court and the increase in litigation and written decisions of the High Court, legal texts need to be constantly updated. In respect of many Irish texts, ten years seems to be the approximate life span before a further edition appears, and in this respect Dr White is to be commended for speedily producing a supplement pending what I imagine and hope will be the preparation of an entirely new edition in due course.

In respect of the Supplement itself, I have to say that the format of the book makes it much more readable and much more useful than many supplements which barely give you a paragraph referring to a paragraph of the previous publication and often only provide the reader with the continuation of a sentence or a footnote. The lay-out of the Supplement, which correlates exactly with the chapters in the previous two tomes, means that it is like reading an additional couple of pages to the chapter in the previous Volume and serves to clearly elucidate how the author believes the law to have developed both here and in England since the publication of the first two Volumes. As ever, in Dr White's books, the content is very readable and informative. Another marvellous aspect of this book and the previous two Volumes is that, besides developments in the judicial arena, the Supplement also contains all the updated Industrial Regulations and also the Repeal of the Applications Order of 1995, so that between all the Volumes it is possible to find all the necessary Regulations one may wish to plead in respect of breaches of statutory duty in any industrial accident pleadings.

Are there any criticisms of the book? Like Dr White's previous tomes, the Supplement contains very definite views on the part of the author in relation to decisions that, in the author's view, the Courts have got wrong and in relation to matters, which he feels, should be addressed by the Oireachtas and have not been addressed to his satisfaction. Whilst I would not criticise the author's entitlement to his views, which are refreshingly expressed, I do think that when using the text and preparing a matter for Court, a practitioner referring himself to the text needs to weigh up these criticisms and also, of course, to check the original judgment, with a view to fully appraising Dr White's interpretation of the decision or his criticisms of it.

All in all it would seem to me that anyone who had the first two Volumes of Civil Liability for Industrial Accidents must acquire Volume 3, and anybody who is regularly practising in the area of negligence claims, and particularly negligence claims involving work-place accidents, should have the full set of this text in their libraries.

NEWS
& King's Inns News

Fifth Hugh M. Fitzpatrick Lecture in Legal Bibliography

Professor Desmond Greer, Professor of Common Law, Queen's University, Belfast, will deliver the fifth lecture in this series at Trinity College Dublin on Wednesday 28th November 2001 at 6.00pm. His paper - Crime, Justice and Legal Literature in 19th Century Ireland - will be followed by a wine and canapés reception. Anyone who is interested in attending should contact
Hugh M. Fitzpatrick, Library and Information Consultant, 1-4 Adelaide Road, Glasthule, Co. Dublin.
Tel: 01-2692202; Fax: 01-2843186.

Irish Lawyers Remembered in Gallipoli

During a recent visit to the Gallipoli peninsula, Turkey, Anthony P Quinn continued his research on the Irish barristers who died during World War One. He laid a wreath to remember the many Irishmen who have no known graves but are named on the Helles memorial at the tip of the Gallipoli peninsula and especially six Irish barristers, killed during Summer 1915:

Capt. Poole Hickman and Lieut. Ernest L. Julian, (Reid Professor of law at Trinity College, Dublin), both of D company, Pals, 7th battalion, Royal Dublin Fusiliers.

Capt. Robert H. Cullinan, 7th battalion and Lieut. Joseph B. Lee, 6th battalion, both of the Royal Munster Fusiliers.

Lieut. John H.F. Leland, Royal Welsh Fusiliers and Sub-Lieut. Gerald Plunkett, Collingwood battalion, Royal Naval Division.

Also remembered on the wreath placed at Helles were:

Lieut. Robert Stanton, a solicitor from cork who served in 6th battalion, Royal Dublin Fusiliers and two solicitors' apprentices who served with the Dublin Pals, Capt. Michael J. Fitzgibbon, (son of John Fitzgibbon, nationalist MP) and Sergeant Arthur C. Crookshank, (son of barrister Charles H. Crookshank).

Anthony P.Quinn places wreath at Helen's Memorial Gallipoli, Turkey, in memory of Irish lawyers killed there during World War One.

Re: Coolock Community Law Centre

Every Thursday between 6.00 o'clock and 7.30 there is a clinic at Coolock Community Law Centre. Members of the Bar have, for many years, advised and assisted people attending there.

A number of members of the Bar continue to do this but we are seeking more volunteers to share the workload. Apart from the Thursday clinic help is needed for work before the Social Welfare Appeals Tribunal and also before the Employment Appeals Tribunal. Please contact Turlough O'Donnell.

JOHN CUSHINAN QC

AN APPRECIATION

John Cushinan, the Chairman of the General Council of the Bar of Northern Ireland, died on the 28th of August 2001 at the tragically young age of 47.

At his funeral his predecessor, Brian Fee QC, paid elegant tribute to John's many wonderful characteristics - his skill as a barrister, the care and dedication he showed as Chairman, his devotion to his wife and family.

John had only discovered that he was suffering from malignant melanoma in February of this year. He fought against the disease in private. He carried on his practice until the end of the last law term without complaint. He fulfilled his many obligations to the Northern Ireland Bar. But most of all the huge crowd who attended the funeral remembered John's love of fun, his outgoing nature and involvement in the social side of life while remaining very much a serious and dedicated advocate.

His friends learned too about the way he fought his disease. It was only in the last month of his life, after he had received treatment at a number of different centres, that he acknowledged the full extent of the challenge facing him and which he had fought so hard.

Meeting John Cushinan at any international conference or inter-Bar meeting meant you were going to enjoy friendship, support and camaraderie. He was a supporter of the Library, very much aware that he represented each individual practitioner, both the eminent and those less so. He was proud of the way his Bar had managed to maintain its cohesion at a time of division and polarisation, an attribute reflected in his own practice. As Chairman, he was forthright in relations with the government, the judiciary and the community of Northern Ireland.

Yet despite his many responsibilities, John always had a glint in his eye, a real perception of the absurd and a clear realisation that there was life to be lived beyond work.

Friends who had practiced with John commented on the sheer dedication with which he pursued his client's interests and the effort which he put into ensuring that each client received individual attention. The same dedication marked his tragically shortened term of office as Chairman.

None of this could have been achieved without the extraordinary contribution of his wife, Maura, and their children. Their strength at John's funeral reflected the support he had received throughout his illness and particularly in the last two months. She and their young family, his friends and colleagues, and the Northern Ireland Bar as a whole have suffered an incalculable loss.

John McMenamin SC