The Bar Review

Journal of the Bar of Ireland. Volume 3. Issue 3. December 1997

NEW FROM BUTTERWORTHS

Redmond: Dismissal Law in Ireland

By Dr Mary Redmond BCL, LL.M (N.U.I.), PhD (Cantab), Solicitor

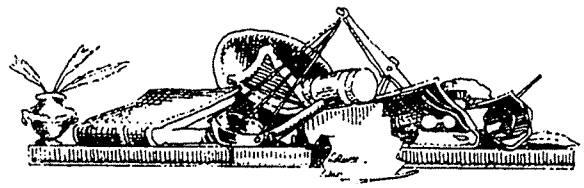
This important new book from Butterworths examines in detail the legal minefield that is this particular area of employment law.

- **Includes Decisions of the Circuit Court, High Court, Supreme Court and the Employment Appeals Tribunal.**
- **Legislation covered includes: the Unfair Dismissals (Amendment) Act 1993, and jurisdictions which have developed recently, eg. under the European Communities (Safeguarding of Employees Rights on Transfer of Undertakings) Regulations 1980.**

Publication Date: February 1998 Hard cover 1854751573 Product code: RUDL **£60.00 (approx)**

Butterworths

26 Upper Ormond Quay, Dublin 7 Tel (01) 873 1555 Fax (01) 873 1876



The Bar Review

Volume 3, Issue 3. December 1997. ISSN 1339-3426

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

The Bar Review, Bar Council Office, Law Library Building, Church Street, Dublin 7
Telephone + 01 804 5014 Fax+01 8045150
e-mail: edel@lawlibrary.ie

Superior Court Rules in Personal Injuries Actions

Proposed Amendment to S.I. 348 of 1997

The Superior Court Rules Committee has adopted a new draft Statutory Instrument, which, when signed by the Minister for Justice, Equality and Law Reform, will in effect say that S.I. 348 of 1997 does not apply to any proceedings instituted before the 1st September, 1997 or to any report coming into existence before that date.

The other matters covered by S.I. 348 of 1997 will be the subject of further consideration by the Superior Court Rules Committee and the Committee has invited the Bar Council and the Law Society to meet on these matters.

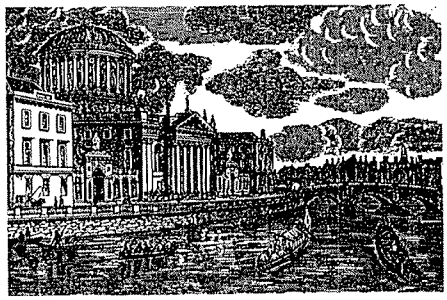
The Bar Council sub-committee dealing with this matter is chaired by Liam McKechnie, SC and includes Rory Brady, SC and Donal O'Donnell, SC. Members views are welcomed by the sub-committee.

●

Kevin Waldron, Director of Education in the King's Inns, retires.

Kevin Waldron's retirement as Director of Education in the Kings Inns brings to an end a remarkable career in the administration of justice and in legal education.

Kevin entered the Court's service as a Junior Clerk in the Central Office in 1942. He had taken first place in the special examination set up to recruit new staff to underpin the position which arose from the retirement of so many Court officers who had been serving since the pre-1921 period. Having received permission the following year to study for the Bar (while still working, full time in the courts), Kevin emerged from the King's Inns four years later with first place in the Bar final, first



class honours and the first Victoria Prize.

Despite this outstanding academic achievement, Kevin resisted the great temptation to go to the Bar and law students and practitioners, alike, would come to be grateful for this decision. It was at a time when there were very few Irish legal text books available and with English text books becoming more irrelevant with the changes in the law in that jurisdiction, there was a great need for some written Irish authority. There were none, or few, forthcoming. It was then that the famous Waldron's Notes appeared. Their impact was fairly dramatic. Almost fifty years later, Mr. Justice Kinlen could recall his student days when he included in the foreword to Michael Forde's book "Arbitration Law and Procedure" the following: "however, the main sources of legal inspiration were in the late Brendan McCormack's notes and still invaluable notes of Kevin Waldron, now Director of Education at the King's Inns, Dublin".

As far as Kevin's court career was concerned, it varied between the Central Office of the High Court and the Supreme Court. In the latter, he had the great pleasure and good fortune to serve under the late Registrar, C.P. Curran, who must have regaled him, in those relatively easy times, with his well-known Joycean tales.

As the workload increased in the courts in the seventies and eighties, there was a staff re-organisation in which a new post of Chief Registrar of the High Court was created. Kevin was the first one to be appointed. During this period he also acted as Secretary to the Committee on Court Practice and Procedure under Mr. Justice Walsh. When he was later promoted to be Registrar of the Supreme Court, he then acted as Secretary to the Superior Courts Rules Committee, where he was involved in the early planning and drafting of the 1986 Rules.

In 1984, he was enticed away to take up the post as Director of Education at the King's Inns, where he, again, was involved in the innovative and radical changes which took place there in recent years.

But it was not all work for Kevin. When attending at Trinity College, while studying for the Bar, he interested himself in athletics and took sufficient time off to win his colours. He became mile champion and cross-country champion of Trinity. He also competed successfully in many other athletic events at other venues.

During his long association with the law, in both the practical and academic spheres, Kevin proved himself to be a perceptive planner and an effective implementer. To both spheres he brought his keen legal brain and total commitment to the task in hand.

But, for all his achievements, Kevin remained a truly modest man and a man of enormous integrity. He now leaves the legal scene behind him to pasture on the green, green grass of home. To him and to his devoted wife, Helen (who is a daughter of the late John Devlin, a former distinguished member of the Bar), we wish many happy years of contented retirement together.

Eamon Mongey, Barrister

●

Chief Justice and Presidents of the Courts to Serve for Shorter Term in Future

The Courts (No. 2) Bill, published on 4th December, 1997, provides for the appointment of 2 additional High Court judges and for the reduction in the term of service by the Chief Justice and the Presidents of the other Courts. In future those appointed as Chief Justice or President of the High, Circuit or District Courts will serve for 7 years only rather than until retirement age as is the case at present. Those appointed will continue to serve as a judge of the relevant court once their term as President comes to an end.

Addressing the needs of Victims of Crime

The needs of victims of crime and the possibilities for a broad co-operation among the various state and non governmental bodies who act as service providers in this area received a welcome and thorough consideration at a recently held conference on the Victims of Crime organised by the Department of Justice, Equality and Law Reform.

The theme of the 2 day working conference attended by all policy makers and service providers dealing with victims was that of "Working Together - An integrated approach to Victims of Crime". The Bar Council, as sponsor and active participant in the Court User's Group established last year, was happy to have the opportunity to participate in the broad ranging discussions involved. The discussion embraced topics such as legal issues, law enforcement perspectives, domestic violence, sexual violence, services through Victim Support and the challenges in considering or formulating a policy of integration of all of these issues.

Although the barrister's profession is but one of the professions which victims must come into contact with on their road to recovery, the court appearance is often seen as one of the most significant, public and possibly traumatic of those recovery stages and much attention has rightly focused on the victims needs in this particular area. However, an understanding by the barrister's profession of the victim's needs in court can only benefit from an understanding of the full range of issues confronted by victims at all stages of their recovery. In this regard, valuable insights were gained by those participating in the conference, the papers and discussions from which will shortly be published by the Department.

From the conference there emerged a consensus that there is a need for a broad, consultative approach in identifying issues and developing appropriate policies. Developing well resourced complementary services in a comprehensive overall framework is the key to meeting victims needs.

As regards law enforcement and legal issues, the discussion explored the need to research and document the extent to which victims may feel let down by the criminal justice system. In this context the need to respect the victim's right to information on all aspects of the progress of the court case against their accused, a suitably sympathetic environment and modes of treatment of those victims when appearing as witnesses in court and also the issue of compensation to victims, including compensation for purely economic loss suffered by victims as a result of a crime were raised.

The need to identify and address potential tensions between respect for the rights of the accused and the needs of victims is central to any debate on victims and the criminal justice system. Victim Support have expressed their agreement with the concern of the Bar Council that all initiatives introduced for the support of the victims would not impinge on the right of an accused to a fair trial.

In this context, the question of separate legal representation for rape victims in particular received attention. The Dublin Rape Crisis Centre is working with the Law School, Trinity College Dublin on international research in this area with a view to formulating a proposal for change in this jurisdiction. The Bar Council has been happy to encourage debate on this and other related legal issues concerning victims and in this regard sponsored a successful essay competition on the topic of separate legal representation for rape victims last year, the winning entrant in which was published in the Bar Review. Properly resourced research with appropriate international comparisons is vital to inform future legal direction in this area.

The individual and societal cost of violent crimes received valuable analysis. The need for research and education to arrive at a code of best practice for all service providers working with victims was highlighted. The requirement that all services, information and supports be accessible to all victims, including those suffering a disability, was discussed in the context of creating a space where every individual has their needs met in this area. The need to discuss crime, particularly sexual and domestic crime, as an abuse of power received valuable comment. The language we adopt in speaking of victims and the potential perceptions and biases inherent in that vocabulary was also considered in the very wide ranging and valuable discussions which took place over the 2 day conference.

The Bar Council would congratulate the Minister for Justice, Equality and Law Reform for the timing and content of this conference on such an important issue of relevance to our criminal justice system and re-iterates its pleasure in having the opportunity to participate and learn from the deliberations involved.

Milk Quotas and the Law - The Milk Quota regime in Ireland

(Copy of paper delivered at Bar Council Milk Quota Conference)

PAUD EVANS,
Head of Milk Quota Division, Department of Agriculture and Food

General Comments

Any analysis of the operation of the milk quota regime at EU and at national level is deficient in my view unless it takes account of the following:

(i) the milk quota regime introduced by the EU in 1984 is essentially a market support mechanism and forms an integral part of the common organisation of the Market in milk and milk products (COM). In order to deal with overproduction of milk in the EU in the early 1980's, the Council of Ministers introduced a Regulation (i.e. Council Regulation (EEC) No. 857/84) which provided that milk delivered in excess of each Member State's national quota would be subject to a super levy. This levy is currently fixed at 115% of the target price for milk. Because of the market support nature of the regime the implementing measures should, in my view, be capable of responding quickly to trends in the market place;

(ii) the fact that the milk quota regime involves the payment of super levy on all production in excess of the national quota the regime should, in my view, be referred to as the "Milk Quota/Super Levy Regime".

The European Court of Justice has consistently held that the milk quota/super levy regime forms an integral part of the common organisation of the market in milk and milk products. The Court of First Instance pointed out in its ruling in Cases T-466/93, T469/93, T-473/93, T-474/93 and T-477/93 – *Thomas O'Dwyer and Others against Council of the European Union* that

"The Court of Justice has consistently held that both the right to property and the freedom to pursue a trade or profession form part of the general principles of Community law. However, those principles are not absolute, but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organisation of a market, provided that any restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, in the light of the aim pursued, a disproportionate and intolerable interference, impairing the very substances of the rights guaranteed (Schrader paragraph 15; Wachauf paragraph 18; Case C-177/90 *Kuhn v Landwirtschaftskammer WeserEms* 11992] ECR 1-35, paragraphs 16 and 17; and *Germany v Council*, paragraph 78).

Furthermore, the right to property safeguarded within the Community legal order does not include the right to dispose for profit of an advantage such as the reference quantities allocated in the context of a common organisation of the market, which does not derive either from the assets or from the occupational activity of the person concerned (don Deetzen 11, paragraph 27; Case C-2/92 and *The Queen v Ministry of Agriculture, Fisheries and Food ex parte Bostock* 11994] ECR 1-955, paragraph 19).

These clarifications are important in my view in that they justify the need for many of the provisions contained in the detailed rules implementing the system in Ireland.

General Comments on the Implementation of the Regime in Ireland

The objective of this paper is to provide an overview of the operation of the milk quota/super levy regime in Ireland with particular reference to the procedures adopted to administer the regime in Ireland. Many of you will be aware that the procedures adopted by the Department of Agriculture and Food to implement the regime in this country have been the subject of much criticism. My personal view is that while some of the criticism may be valid, it failed to take into account the unstable circumstances and the uncertainty that existed at EU level during the earlier years of the regime. It also fails to take account of the current detailed and comprehensive rules now provided for in the national implementing regulations in Ireland.

Milk Quota/Super Levy Regime 1984-1993

It is generally accepted that the introduction of a regime to curb milk production was a revolutionary one not only for the dairy industry in Ireland but in the EU as a whole.

I do not intend to dwell in this article on the early years of the regime apart from making the following general comments:

(i) one of the main benefits arising from the use of a quota regime to maintain milk prices at producer level is the degree of certainty that it brings to the market place. However, the early years of the super levy regime in the UK, in my view, were characterised by uncertainty.

In the first instance there was a generally held view that the regime was a short term measure to deal with over-production in the sector.

This uncertainty is evident from the duration of the periods provided for in the application of the regime.

Under the initial Council Regulation the system was due to operate from April 1984 to March 1989. However, in 1988 the super levy regime was extended for a further

April, 1987	**- 1% National Quota Reduction (permanent)**
April, 1987	**- 4% National Quota Reduction (temporary)**
April, 1988	**- 2% National Quota Reduction (permanent)**
April, 1988	**- 5.5% National Quota Reduction (temporary)**
April, 1989	**- 4.5% National Quota Reduction (temporary)**
	- 1% National Quota Reduction (permanent)
	- 1% increase in Quota available to Member States utilising the Community Reserve
April, 1990	**- 4.5% National Quota Reduction (temporary)**
April, 1991	**- 4.5% National Quota Reduction (temporary)**
	- 2% National Quota Reduction (permanent)
April, 1993	**- 4.5% temporary quota reduction converted into a permanent reduction**

three years to 31st March, 1992. In March, 1992 the existing regime was again further extended to the 31st March, 1993.

(ii) The many adjustments in the level of national quota contributed to the uncertainty, particularly at producer level. These adjustments to the level of the national quotas can be summarised as follows:

(iii) the initial years of the regime were also characterised by many amendments to both the Council and Commission Regulations.

COUNCIL REGULATION (EEC) NO. 856/84

This was the Regulation which inserted the relevant provisions (Article 5c) in the Commission Organisation of the Market Regulation i.e. Council Regulation (EEC) No. 804/68 (as amended).

COUNCIL REGULATION (EEC) NO. 857/84

In this Regulation, the Council of Ministers provided for the general rules for the operation of the milk quota regime. This Regulation was amended 69 times before it was repealed in 1992.

COMMISSION REGULATION (EEC) NO.1371/84 AND 1546/88

These Regulations incorporated the detailed rules for the implementation of the system. The initial Commission Regulation (i.e. Regulation No.1371/84) was amended 68 times before a consolidated Regulation (i.e. Regulation No.1548/88) was adopted in 1988. This Regulation was also amended 42 times before it was repealed in 1993.

Current EU Regulations Governing the Operation of the Milk Quota Regime

The current Regulations provide for the operation of the milk quota regime from 1st April, 1993 to 31st March, 2000. The relevant Regulations are

(i) Council Regulation (EEC) No. 3950/92, and

(ii) Commission Regulation (EEC) No. 536/93.

In complete contrast to the earlier Regulations, the Council Regulation has been amended only eight times since its introduction in 1993 and the Commission Regulation has been amended four times. In general, these amendments were introduced merely to cover changes in the levels of the national direct sales and deliveries quotas to take into account transfers from direct sales quota to the delivery quota or vice versa. Furthermore, the Council Regulation contains only 13 Articles most of which are extremely brief. The Commission Regulation contains only 10 Articles. It is, therefore, clear that much greater flexibility was given to Member States to implement the regime in a way which suited their own particular needs. Hence the need for comprehensive national implementing measures which are reflected in the detailed Statutory Instrument providing for the implementation of the system in Ireland.

Another factor which provides greater certainty under the current legislative framework is that there have been no reductions in national quotas since 1993 (in fact, the Council provided for an increase of 0.6% in national quotas in 1993).

IMPLEMENTATION OF THE REGIME IN IRELAND – 1993 TO DATE

Policy Objectives

My view is that the following three objectives have been the prime factors in framing the policies adopted to implement the milk quota regime in Ireland since 1993.

(i) To retain the maximum number of dairy producers in the sector operating a viable dairy enterprise. This is a vital objective as milk production continues to be one of the most profitable of farming enterprises in Ireland.

(ii) To improve the competitive position of dairy producers in Ireland in view of the challenges which will have to be faced by producers following developments at international level.

(iii) To maintain milk production activity in as wide a geographical area as is possible nationally, in particular to protect the production of milk in sensitive areas.

It should be recalled that from a national perspective the policies adopted in Ireland have attempted to strike a reasonable balance between the national policy objectives for the development of the dairy industry together with the need to take into account the socio-economic aspect of the structure of milk production in Ireland and the economic importance of milk production in rural areas, particularly in less favoured areas.

Other Considerations

Any analysis of the procedures adopted in Ireland to implement the regime should recognise that, under the provisions of the now repealed EU Regulations, Ireland decided to adopt Formula B i.e. to establish liability to super levy at the level of the milk purchaser (co-operative/dairy). A further option which was available to Member States was Formula A (which provided that the levy was established at the level of the producer). This option was adopted by Germany and the Netherlands (who subsequently changed to using Formula B). A similar type mechanism exists under the provisions of Council Regulation (EEC) No. 3950/92 (Article 2.1). It was again decided in Ireland that the levy be established at the level of the milk purchaser as is provided for in Regulation 10 of Statutory Instrument No. 266 of 1995.

The adoption of Formula B had and continues to have an important impact on the administration of the milk quota regime in Ireland. The decision to use Formula B had a direct impact on the system of quota allocation undertaken by the Minister for Agriculture and Food in 1984. In the High Court ruling in *Lawlor -v- Minister for Agriculture* [1988] 1 LRM 400, Murphy J points out that:

"It was no part of the duty of the Minister, as the competent authority or otherwise, to allocate a milk quota as such either to the Plaintiff or to the purchasers/defendants. He did, however, have the duty to allocate quotas to the purchaser/co-operatives and for the purposes of that task it was necessary for him in the circumstances which had occurred to ascertain the appropriate fraction of the milk quota to be transferred from the Bailieborough Co-operative Society to the TirLaighean Cooperative Society".

At the level of the producer, therefore, the provisions of the relevant Regulations provide that a milk quota is automatically transferred by process of the law when the lands to which it is attached is transferred. The Minister has no function in approving the transfer apart from determining the detailed rules applying to transfers of land and quota. This has been done and the detailed rules are contained in Regulations 4, 5 and 6 of Statutory Instrument No. 266 of 1995. However, the Minister does have other functions in relation to transfer of lands and quota. These include the following:

(i) verifying that individual producer's levy liability is based on any deliveries in excess of his/her validly held available quota following the allocation of unused quantities ("flexi-milk") - in other words if a producer is not entitled to all or part of a quota transferred by way of a land transaction because the transaction is not a *bona fide* one he/she may be liable to pay levy on the milk credited against the transferred quota;

(ii) establishing as to whether an offence has been committed in relation to transfer of quota without the transfer of the lands to which the quota is attached under the provisions of Regulation 4 of S.I. No. 266 of 1995.

European Communities (Milk Quota) Regulations, 1995 Statutory Instrument No. 266 of 1995

S.I. No. 266 of 1995 is a Statutory Instrument called the European Communities (Milk Quota) Regulations, 1995 which provides for the detailed implementing rules for the operation of the regime in Ireland. It is a comprehensive document in my view and covers all aspects of the operation of the regime in Ireland. I have already referred to certain considerations which were borne in mind in drafting this legislation. There are many other factors which were also taken into account when the Regulations were being drafted viz:

(i) the fact that the provisions contained in the Council and Commission Regulations are directly applicable in each Member State;

(ii) it is not possible to go beyond the scope of these Regulations when framing the detailed implementing rules in a Member State;

(iii) the nature of the regime which is, as I have already stated, a market support mechanism with the resultant need to provide some flexibility for the Minister in relation to the determination of criteria for the operation of various schemes which are operated as part of the regime;

(iv) the need for adherence to strict time limits in relation to the establishment and collection of levy at the end of each milk quota year.

Brief Outline of the Provisions of Statutory Instrument No. 266 of 1995

With the considerations already referred to in mind, Regulations were drafted which cover all aspects of the operation of the regime in Ireland. The initial rules were contained in Statutory Instrument No. 70 of 1994. As a result of a need to amend the existing Regulations to provide for what is known as ring fencing of quotas in less favoured areas and to incorporate other suggestions made by representative bodies and the legal profession, a new consolidated Regulation was introduced i.e. S.I. No. 266 of 1995 which incorporates all of the national implementing provisions in one text. I have set out the index to Regulations at Appendix A.

Regulations 4 to 9 deal with the detailed rules governing the transfer of land and quota. These Regulations provide for a strong link between land and quota. In the event of a transfer of land and quota, the quota attaches to the lands used for milk production in the last milk quota year that the transferor produced 90% of his/her quota (Regulation 4(3) of S.I. No. 266 of 1995). However, certain flexible provisions have been introduced to enable milk producers who are disposing of their lands for non-agricultural proposes or who are consolidating their holding to transfer the lands while retaining the quota attached to those lands. Restrictions are incorporated in the Regulations in order to ensure that producers cannot purchase land and quota and subsequently sell the purchased land without quota thereby rendering the link between land and quota almost redundant.

Regulations 9 to 14 and 28 and 29 deal mainly with the establishment and collection of levy.

Regulations 17 to 23 cover the registration of milk purchasers.

The remaining Regulations deal with

record keeping (24, 25, 26, 27, 28), offences (42 and 43), dormant quotas (32), fat content of milk deliveries (31) and transfers from direct sales to delivery quota or vice-versa.

Use of Public Notices

In the past, the Department has been criticised for introducing certain provisions by circular letter. This type of procedure was necessary during the earlier years of the regime because of the uncertainty prevailing at the time and the numerous amendments occuring at EU level. Indeed the validity of implementing provisions in such a fashion was endorsed by the High Court in *Condon -v- Minister for Agriculture and Food* [1993] - IJEL 151. Bearing in mind the nature of the regime as a market support mechanism and the need to be in a position to react quickly to changes in the market place, the Statutory Instrument does provide for the introduction of certain measures by inserting a notice in national newspapers. These provisions mainly cover the schemes provided for under the regime viz:

(i) reallocation of unused quota (or "flexi-milk") to a pool operated at the level of the milk purchaser - Regulation 15;

(ii) Temporary Leasing - i.e. leasing of quota on a temporary basis without land - Regulation 16 [The Temporary Leasing Scheme is normally operated in three stages - May, September and December during the milk quota year];

(iii) Milk Quota Restructuring Scheme - i.e. scheme whereby producers surrender their milk quota at the end of the milk quota year in return for a premium and the resultant reallocation of the surrendered quota within the milk purchaser- Regulation 35;

(iv) Imposition of clawback on specified land and quota transfers- Regulation 4;

(v) Imposition of a quota cut and allocation of quota from the National Reserve - Regulation 11.

In order to ensure that interested parties can comply with a complete set of these notices the Department introduced a reference system for all notices published since S.I. No. 266 of 1995. A listing of the notices in question is attached at Appendix B for your convenience.

Policy Considerations

I have already outlined the objectives which govern the implementation of the regime in Ireland. In general, all of the schemes introduced under the regime are biased in favour of smaller scale producers.

It is the general view that the operation of the regime in Ireland has struck a reasonable balance between national policy objectives together with the need to take into account the socio-economic aspects of the structure of production at producer level and of the economic importance of milk production in rural areas. The introduction of schemes such as temporary leasing and restructuring of milk quotas for example, originated from suggestions made in the Review Group.

72% of producers in Ireland hold quota of less than 35,000 gallons as is illustrated in the table at Appendix C.

This means that the number of smaller scale producers still involved in milk production means that the impact of any scheme covering the reallocation of quota is considerably diluted.

Milk Quota Appeals Tribunal

The Minister established a Milk Quota Appeals Tribunal in 1990. This is a non-statutory body whose sole function is to examine applications made by producers, or their successors, whose basic quota entitlement (based on deliveries in 1983) was adversely affected to a significant extent by either human illness, animal disease or the accidental destruction of either a producer's fodder or dairy herd and who have not benefited significantly from any previous Reserve. The Tribunal also considers cases where it is clear that the lack of a reasonable level of quota has caused extreme hardship.

The *modus operandi* of the Tribunal is to examine each individual application, and make a recommendation to the Minister on the merits of the case.

Because of the number of applications it receives and the restricted quantity of quota available for re-allocation the Tribunal gives priority to "smaller scale producers". The average allocation recommended by the Tribunal is approximately 1,000 to 2,000 gallons.

In addition to the requirements relating to the original level of a producer's quota which have already been outlined, the Tribunal also takes into consideration such factors as the applicants'

(i) Size of holding

(ii) Current quota size

(iii) Off-farm income

(iv) Family circumstances, including succession

(v) Commitment to dairying

(vi) Financial problems

(vii) Other enterprises

Disputes

In our experience most of the disputes that have arisen at individual level refer solely to transfers of land and quota. Indeed most of these disputes arose in the early years of the regime when the provisions of the relevant regulations were open to different interpretations. I have already stated that when land to which quota is attached is transferred the quota is automatically transferred by process of the law, without the involvement of the Minister or his officials.

In the past it has been suggested that a statutory body should be established to deal with the resolution of disputes. I do not agree that such a body is necessary.

When the Statutory Instrument was being drafted consideration was given to providing for an arbitration procedure for the resolution of disputes that might arise between producers involved in the transfer of land and quota. However, it was decided not to insert such a provision as it would limit the options open to parties involved in the dispute.

The Future

It seems to me that if a politically astute body such as the Bar Council organises a conference on milk quotas, there is a strong possibility that the regime will be extended beyond March, 2000.

The EU Commission have already indicated that it is their intention to introduce proposals in early 1998 which will provide for the extension of the milk quota regime to 2006 at least. They have also indicated that their proposals may provide for flexibility and simplification in the application of the regime.

However, in my view, the features of any new regime may be affected over time by the progress made in the next round of negotiations on the WTO agreement.

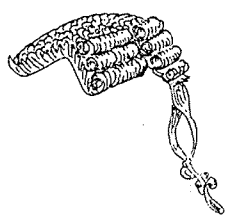
As we plan for the future, we should heed the lessons of the past. If the new regime, for example, is to be a transitionary one whereby the EU policy in the milk sector will gradually change from one where there are severe limits on milk production to one which is much more flexible, every effort should be made to avoid uncertainty in rules governing the operation of the regime.

The likelihood that there will be greater liberalisation of international trade means that policy makers in Ireland are facing a great challenge in trying to ensure that the operation of the milk quota regime in the future does not hinder, but rather improves, the competitive position of the diary industry in Ireland.

Various options are being and will be looked at in this context. In my view, there are likely to be calls for 'a use-it or lose it" provision. At present in Ireland almost 100 million gallons of quota is owned by 10,400 producers who are not involved in milk production - see Appendices C, C-1, C-2, C-3 and C-4.

Conclusion

I would like to thank the Bar Council for giving me this opportunity to make this presentation this morning. I also congratulate them for arranging this conference on milk quotas. We are always looking at ways to improve the transparency, efficiency and effectiveness of the milk quota implementing measures in Ireland. This conference gives us the opportunity to listen to the views of legal experts and others with practical experience on the operation of the regime in Ireland. ●



APPENDIX A
S.I. NO. 266 OF 1995

EUROPEAN COMMUNITIES (MILK QUOTA) REGULATIONS, 1995

SECTION	TITLE
1.	Short Title and Commencement
2.	Interpretation
3.	Competent Authority
4.	Transfers of Land and Milk Quota
5.	Restricted Quota in Less Favoured Areas
6.	Recording of Milk Quota Transfers
7.	Relocation of Milk Quota upon transfer of Lands to a Public Authority or for use in the public interest or for Non-agrictural purposes
8.	Relocation of Milk Quota upon Consolidation of a Holding
9.	Milk Quota Established on Lands held by Lease, Licence or other Limited Interest
10.	Calculation of Levy
11.	National Reserve
12.	Transfer of Milk Quota between Purchasers
13.	Collection of Levy
14.	Milk Purchaser's Annual Declaration
15.	Allocation of Unused Quantities
16.	Temporary Leasing
17.	Register of Milk Purchasers
18.	Sole Purchaser
19.	Group of Purchasers
20.	Joint Purchaser
21.	Notification of Registration
22.	Removal or Alteration of Registration
23.	Access to Register
24.	Milk Deliveries to a Purchaser
25.	Maintenance of Records - Milk Purchasers
26.	Maintenance of Records - Direct Sales Producers
27.	Recording of Milk Deliveries
28.	Recording of Milk Intake
29.	Deduction of Levy by Milk Purchasers
30.	Recovery of Levy
31.	Fat Content of Milk Deliveries
32.	Dormant Milk Quotas
33.	Definitive Discontinuation of Milk Production
34.	Permanent Transfers of Direct Sales and Delivery Quotas
35.	Restructuring of Milk Quotas
36.	Appointment of Authorised Officers
37.	Authorised Officers
38.	Functions performed by Authorised Officers
39.	Certification of Outstanding Levy
40.	Submission of False Information - Direct Sellers
41.	Submission of Information
42.	Obligations, Liabilities and Penalties for Purchasers
43.	Offences by Corporate Bodies
44.	Offences
45.	Transitional Measures
46.	Revocation of the European Communities (Milk Quota) Regulations, 1994

APPENDIX B

NOTICES PUBLISHED UNDER S.I. NO. 266 OF 1995

NOTICE NO.	DATE	CONTENT
266/1	October, 1995	Expiry of leases - Apportionment of Quota
266/2	October, 1995	Quota Clawback Measure
266/3	November, 1995	Scheme for the Temporary Leasing of Quotas in 1995/96 - Third phase
266/4	February, 1996	Milk Quota Restructuring Scheme, 1996
266/5	April, 1996	Scheme for Temporary Leasing of Milk Quota in 1996/97 - First Phase
266/6	May, 1996	Transfer land and Milk Quota between producers - Notice of Documentation required
266/7	June, 1996	Milk Quota Restructuring Scheme, 1996
266/8	August, 1996	Scheme for Temporary Leasing of Milk Quota in 1996/97 - Second Phase
266/9	October, 1996	Quota Clawback Arrangements
266/10	October, 1996	Temporary Leasing of Milk Quota in 1996/97 - Third Phase
266/11	January, 1997	Rules for the redistribution of unused quota for 1996/97
266/12	January, 1997	Milk Quota Restructuring Scheme, 1997
266/13	April, 1997	Scheme for Temporary Leasing of Milk Quota in 1997/98 - First Phase
266/14	August, 1997	Scheme providing for the Temporary Leasing of Milk Quota in 1997/98 - Second Phase.

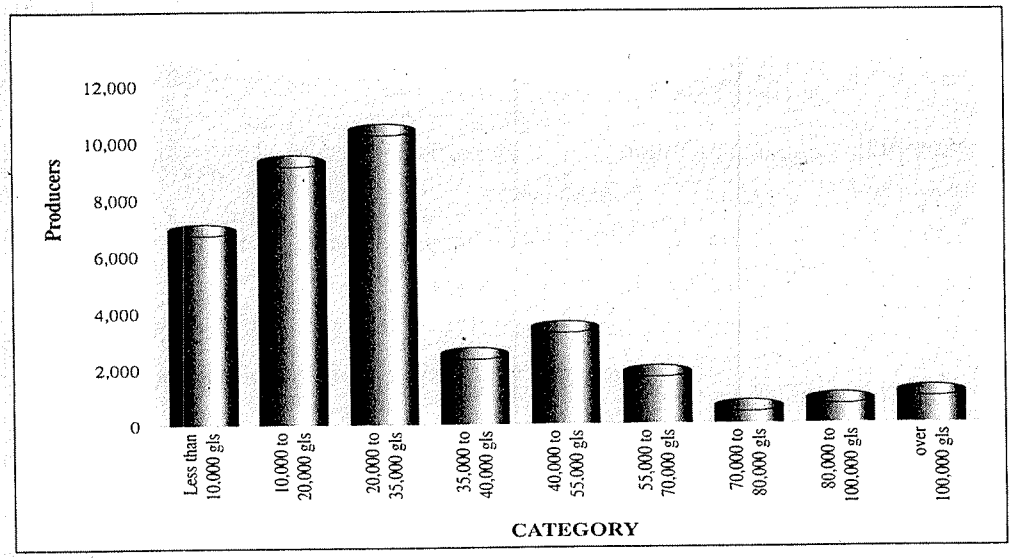
APPENDIX C

MILK QUOTA STRUCTURE 01/04/1996

	1	2	3	4
CATEGORY	**Total No. of Producers Currently in Milk Production**	**Total Quota Producers in Milk Production in Column 1**	**Total No. of Producers who hold a Milk Quota but are not involved in Milk Production**	**Total quota of Producers in Column 3**
Less than 10,000 gls	6,862	46,299,915	5,078	20,632,375
10,000 to 20,000 gls	9,218	136,232,053	978	12,854,115
20,000 to 35,000 gls	10,308	271,627,107	389	9,724,793
35,000 to 40,000 gls	2,461	89,342,021	49	1,754,671
40,000 to 55,000 gls	3,602	167,062,686	46	2,076,893
55,000 to 70,000 gls	1,854	112,005,832	21	971,100
70,000 to 80,000 gls	673	49,466,989	9	514,828
80,000 to 100,000 gls	757	66,276,850	7	526,882
over 100,000 gls	850	117,482,897	9	932,607
TOTALS	**36,585**	**1,055,796,350**	**6,586**	**49,988,264**

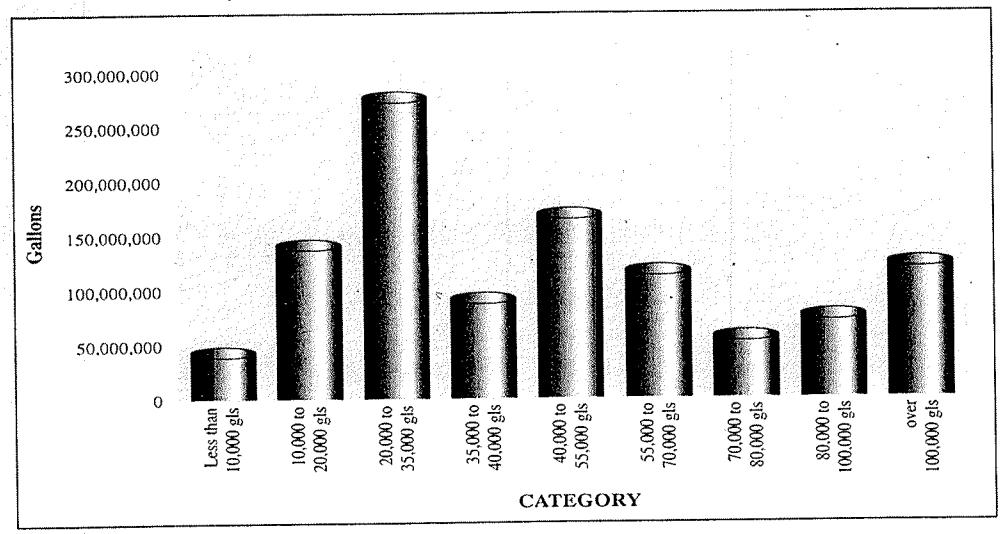
APPENDIX C–1

TOTAL NO. OF PRODUCERS CURRENTLY IN MILK PRODUCTION



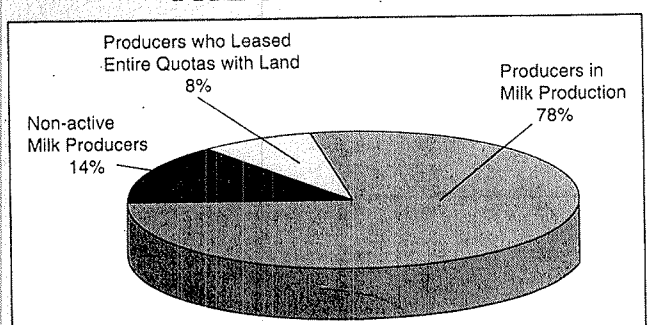
APPENDIX C–2

TOTAL QUOTA OF PRODUCERS IN MILK PRODUCTION



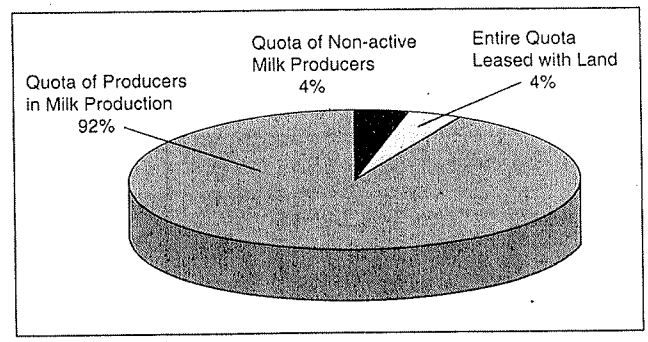
APPENDIX C–3

TYPE OF PRODUCERS



APPENDIX C–4

UTILIZATION OF QUOTA



Injuncting the Contract of Employment

TOM MALLON, Barrister and MARGUERITE BOLGER, Barrister

Introduction

The last three years have seen an increase in cases where interlocutory injunctive relief is sought to restrain a purported dismissal of an employee. The parameters within which the courts are prepared to grant these injunctions have broadened, but each case still turns on its own facts and the relief should still be seen as an exception to the general rule that to injunct an employment contract is tantamount to slavery.

The History of the Injunction

The traditional objections to the specific performance of an employment contract were, first, that it would be wrong to enforce a contract requiring personal services and, secondly, that damages could provide an adequate remedy to an employee seeking to enforce their contract.

The first indication that the courts would be prepared to force people to remain in an employment relationship arose in restraint of trade cases. As early as 1853 an opera singer was restricted to singing in one theatre only[1]. Lord Denning M.R. used this authority in the historic decision of the UK Court of Appeal in *Hill v Parsons*[2] in arguing that the common law rule against the specific performance of an employment contract was not inflexible and permitted of exceptions:

> "It may be said that, by granting an injunction in such a case, the court is indirectly enforcing specifically a contract for personal services. So be it. Lord St. Leonards did something like it in *Lumley v Wagner*. And I see no reason why we should not do it here."[3]

In granting the injunction, Lord Denning M.R. accepted that to award such a remedy the court would have to be satisfied that trust and confidence still existed between the parties and that damages would not be an adequate remedy.

These principles laid down the initial parameters for the granting of an injunction to restrain a dismissal. A good example of their narrow application can be seen in *Irani v Southampton and South West Hampshire Health Authority*[4] where the plaintiff was dismissed due to irreconcilable differences with his more senior colleague. No criticism was ever made of his conduct or professional competence. The court, in granting an interlocutory injunction restraining his dismissal, accepted that there was still complete trust and confidence between the employer and employee and that, if dismissed, the plaintiff would become unemployable in the National Health Service and would lose any right he had to use NHS facilities to treat his private patients. It is difficult to conceive of a more obvious situation that satisfied the criteria of a preservation of trust and confidence and evidence that damages would not be an adequate remedy.

The Approach of the Irish Courts

The first time an injunction restraining a dismissal was granted in this jurisdiction was in as exceptional a case as *Irani*, above. In *Fennelly v Assicurazioni Generali SPA*[5] the plaintiff had an unusual relationship with his employer in that his contract was for a fixed period of twelve years. The employer attempted to terminate the contract due to a serious downturn in business. Costello J., (as he then was), held that there was a fair question to be tried that the contract had been invalidly terminated. In considering the breach of contract, he laid down the test to determine whether or not damages could adequately compensate an employee for a wrongful dismissal pointing out that in spite of efforts to have the matter heard speedily, it would be some time before it would come on for hearing:

> "In the meantime the plaintiff will be left without a salary and nothing to live on. The situation in which he finds himself would be little short of disastrous. It seems to me in that situation that the balance of convenience is in the plaintiff's favour. He should not be left in the situation between now and the action in which he would be virtually destitute with a prospect of damages at the action. That seems an unjust situation."

An almost identical order was made by Keane J. in *Shortt v Data Packaging Ltd*[6]. In that case the plaintiff, who was the managing director of the company, had a contract which provided for a six month notice clause. He was dismissed summarily for an alleged redundancy which he argued was a sham and was unlawful and in breach of natural justice. In a brief judgement Keane J. held:

> "I am satisfied that damages are not an adequate remedy where the plaintiff will have to await the trial of the action in circumstances where he is totally without remuneration and where a trial will inevitably be some time away. Any loss sustained by the defendant will be adequately met by the plaintiff's undertakings. The balance of convenience is also in favour of the granting of an injunction pending the hearing in order to preserve the status quo."[7]

Shortt established reasonably clear parameters for the granting of these exceptional injunctions, namely a fair issue as to the legality of the dismissal which included the issue of compliance with natural justice *and* that damages could not be an adequate remedy given the financial destitution in which a dismissal would leave the employee.

In the last six months an unprecedented number of applications for interlocutory injunctive relief to restrain a dismissal have come before the courts

and the very volume of the cases and their varied facts have seen considerable expansion of the traditional parameters in this area.

The Preservation of Trust and Confidence

The earlier UK caseload clearly viewed the preservation of trust and confidence between employer and employee as essential before granting specific performance of the employment contract. That trust and confidence was present in *Fennelly* and influenced Costello J. in coming to his decision to grant an order almost identical to that granted by the Court of Appeal in *Hill v Parsons*. However in some of the more recent Irish cases, there has been a distinct absence of any trust or confidence whatsoever between the parties, but this does not seem to have greatly concerned the courts in granting interlocutory injunctive relief.

In *Shortt* the plaintiff was informed without any warning that he was being made redundant. He was told to remove his personal belongings and to vacate his office with immediate effect. The facts of the case showed that, at least in the opinion of the employer, there had been a breakdown of trust and confidence. Nevertheless, Keane J. was satisfied that there was a fair issue to be tried that the plaintiff's dismissal was ineffective for being in breach of natural justice and contrary to the constitution of the company. Although he described the order granting the injunction as largely in the form of that made by Costello J. in *Fennelly*, no mention was made of the issue of trust and confidence between the employer and employee, even though that issue distinguished *Shortt* from *Fennelly* on the facts.

It would appear that this requirement of the preservation of trust and confidence between the parties was not essential where a fair issue that the dismissal was unlawful or ineffective or that damages would not be an adequate remedy was established. This was a particularly interesting development given the implicit understanding underpinning the development of the law in the area of specific performance of employment contracts, i.e. that specific performance would only be granted in exceptional circumstances. It would seem that in Irish law exceptional circumstances can be provided by a breach of natural justice rather than the preservation of trust and confidence. This line of reasoning has been followed in subsequent cases, most clearly in *Harte v Kelly and others*[8] where Laffoy J. expressly found that there had been a "total breakdown of trust and confidence" between the parties[9]. This did not prevent her from granting an injunction restraining the dismissal of the plaintiff, although she refused to extend this to re-involving him in the management of the company. Thus, the relief granted fell short of what had been awarded in *Fennelly* and *Shortt* where the plaintiff was directed to do whatever work was required of him by the employer, which could have included no work at all.

Just what sort of circumstances establish a breach of natural justice can be seen from the decision in *Maher v Irish Permanent plc*[10] where Laffoy J. referred to the caselaw confirming the principle that an employee is entitled to natural justice in how their employee takes any decision which may affect rights or impose liabilities[11]. She decided that the plaintiff had not been granted natural justice in the manner in which allegations of sexual harassment against him had been investigated. The employer had got it wrong in failing to furnish the plaintiff with copies of the statements made by his accusers in advance of an oral hearing, in failing to inform the plaintiff in reasonable time that he was entitled to be legally represented at the hearing and in going ahead with the hearing in the absence of the plaintiff who had declined to attend. In those circumstances, Laffoy J. held that the hearing could not be considered fair and that the decision taken at the meeting to terminate the plaintiff's employment could have no effect. Therefore his employment never actually terminated and still subsisted. Interestingly, this seemed to be a different way of achieving the same result of an injunction restraining a dismissal, i.e. that the decision to terminate was invalid as being in breach of the plaintiff's right to natural justice and never actually took effect. Again, as in *Harte*, Laffoy J. refused to reinstate the plaintiff to his previous position of branch manager in view of the serious allegations of misconduct against him.

One recent case shows some divergence from the trend of granting relief in the absence of any remaining trust and confidence. In *O'Malley v Aravon School Ltd*[12] Costello P. refused to grant interlocutory relief to restrain the dismissal of a school principal. The plaintiff had originally been appointed joint principal with her husband and in 1996 she was appointed sole principal. Subsequently the employer became concerned at the manner in which the terms of that agreement were being implemented and put their concerns to the plaintiff. The plaintiff was invited to a meeting at which Costello P. found that "careful consideration" was given to her answers. Following the meeting her position was terminated.

Costello P. discussed the background to the cases where injunctive relief was granted to restrain a dismissal and referred to Lord Denning M.R.'s discussion in *Hill v Parsons* of the exceptions to the general rule that a servant cannot claim specific performance of their contract. Costello P. went on to mention his own judgement in *Fennelly* as one of those exceptions to the general rule. Applying that law to the facts of Ms O'Malley's case he stated:

> "This is a case of a school where the Board of Governors have lost confidence in the principal. Loss of confidence must be judged on an objective basis. In my view this is a wholly exceptional case where the whole essence is that confidence and trust has broken down and it would be wrong for the court to continue the employment of the plaintiff. In these circumstances I must hold that the plaintiff has failed to bring herself within the exceptions to the general principles."

It is arguable that *O'Malley* can be distinguished from the line of cases in which trust and confidence had been shattered by the fact that the plaintiff had been dismissed with at least some regard to principles of natural justice. The grounds for her employer's dissatisfaction were put to her, she was given an opportunity to respond and careful consideration was given to her response. The existence of at least some recognition of an employee's rights to fair procedures is in stark contrast to the summary manner in which the successful plaintiffs in *Shortt, Harte, Courtney*[13] and *Phelan*[14] were dismissed. On the other hand, the procedures applied were minimum and the Court could have taken the same approach as had been taken in cases where virtually

no procedures were applied without any great inconsistency in the developing line of caselaw. Costello P. also seemed to be very influenced by his belief that the trial judge would not be prepared to grant a permanent injunction. In those circumstances he felt it inappropriate to grant interim injunctive relief.

The Adequacy of Damages

In *Fennelly* Costello J. was of the view that a plaintiff would have to show potential financial destitution in order to succeed. Interestingly, there was no attempt made in either *Shortt* or *Fennelly* to suggest that the plaintiff might have avoided destitution by seeking employment elsewhere. The reality of such circumstances was recognised by Barron J. in *Boland v Phoinix Shannon plc*[15] where, in holding that damages would not be an adequate remedy, he stated:

> "The plaintiff has his profession and to that extent should be in a position to earn, but in practical terms his dismissal will leave him in the same situation as the plaintiff in Fennelly's case."

The necessity to show a level of destitution was further rolled back in *Harte*. Whilst the plaintiff would be at the loss of his salary pending the trial of the action, his income from the company would only have been reduced by half as he received some £3,000 per month net of tax in respect of royalty payments. However Laffoy J. held that a *Fennelly* type order was not limited to a situation where the plaintiff can establish that he would face pecuniary loss if the order was not made. In this case, whilst implicitly accepting that the plaintiff would not face pecuniary loss in losing half a salary of £67,000, Laffoy J. held that it would be:

> "an unjust situation to leave him without approximately half his net income pending the trial and the action and only with the prospect of an award of damages at the trial".[16]

Accordingly she held that damages would not be an adequate remedy.

The requirement of destitution as seemingly laid down in *Fennelly* and *Shortt* was further cut down in *Phelan*. Costello J. accepted that the plaintiff would not be destitute as he was to receive a pension and held shareholding valued at some £300,000 but was clearly influenced by the particular manner in which this managing director was summarily dismissed. He suggested that it would be open to a judge at the hearing of the action to grant exemplary damages, including damages for loss of reputation or even to reinstate the plaintiff as managing director. In those circumstances he held that damages were not adequate to compensate the plaintiff. The decision on the appropriate interim relief seemed to be influenced by the anticipated attitude of the trial judge, an attitude subsequently taken by Costello P. in *O'Malley*, above.

If one looks back to the earlier caselaw in the area, issues wider than financial destitution were accepted as evidence of the inadequacy of damages. In *Parsons v Hill* Sachs L.J. suggested that granting an injunction might have the effect of enabling the employee to persuade the employer to change his mind[17]. In *Robb v Hamersmith and Fulham London Borough Council* the court held that damages could not compensate the plaintiff for the loss of an opportunity to defend himself. These cases represent a more realistic approach in that whether or not the employer would change their mind upon listening to the employee, the employee is at least entitled to try.

A different type of adequacy of damages argument was put forward in *Courtney*. The plaintiff had been a radio presenter who was dismissed for alleged misconduct in relation to the presentation of his radio programme. The argument that damages would not be an adequate remedy was premised on the fact that the broadcasting community in Dublin was so small that any publicity that he had been suspended or dismissed would seriously damage his reputation and possibly render him unemployable. Laffoy J. granted an injunction preventing the dismissal and obliging the employer to pay the plaintiff's salary until the trial of the action but refused to restrain the employer from appointing any other person to his radio slot on the basis that "the show must go on"[18]. The peculiar status of a radio presenter in terms of an intellectual property type right to their reputation as an employment right did not seem to find favour with the Court. On the other hand this argument may be more relevant at the full hearing of the matter in establishing the appropriate level of damages.

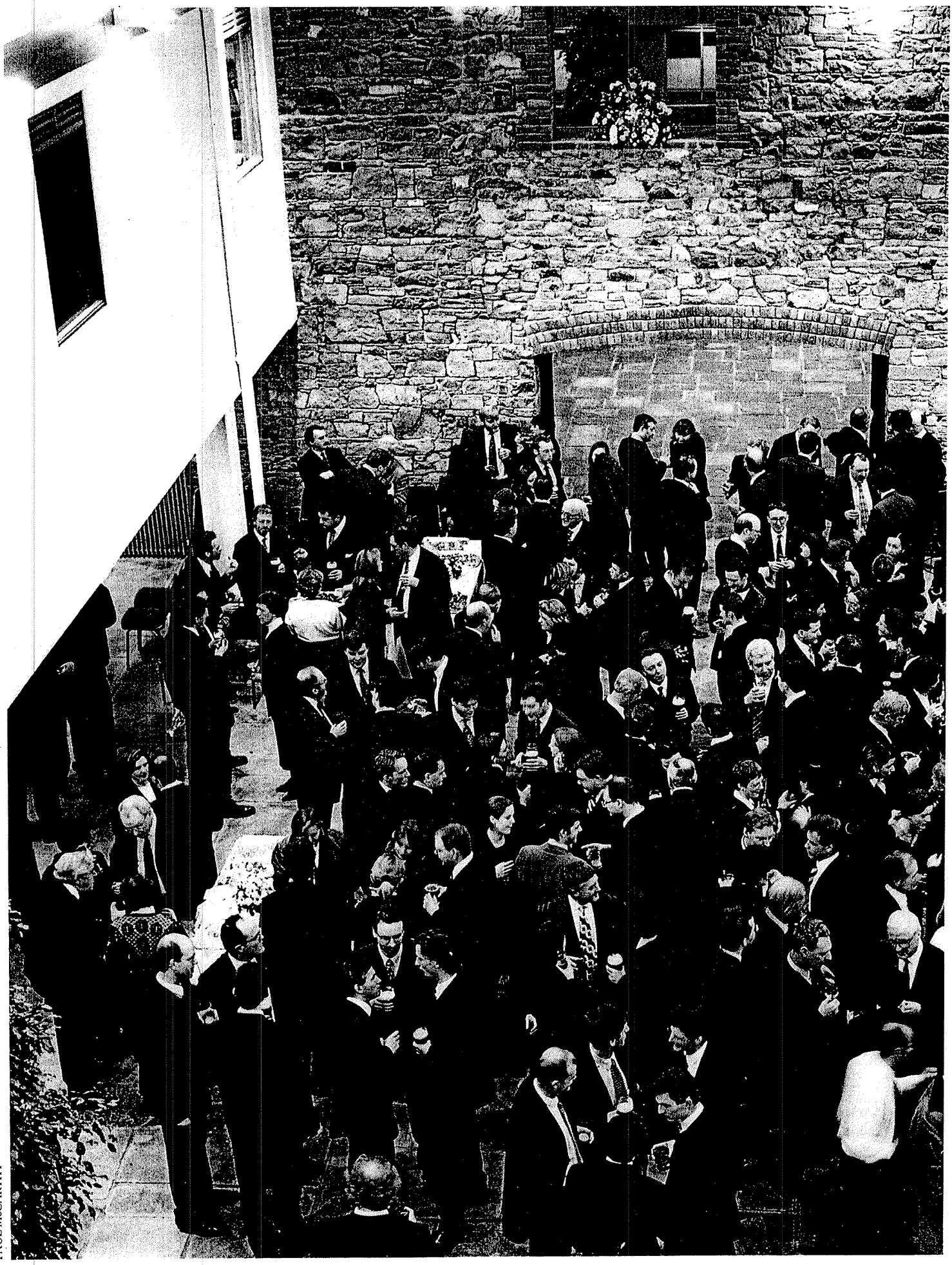
Conclusions

Specific performance of an employment contract always was and still is an exceptional remedy. However what circumstances may be considered exceptional have broadened in recent times. At one time only a plaintiff who could demonstrate the continued existence of trust and confidence between them and their employer as well as financial destitution if they were dismissed, could hope to succeed. Now, it is arguable that the most important requirement is a fair issue whether natural justice and the employer's own procedures have been satisfied. Each case will turn on its own facts, but it is clear that in terminating an employee's employment, an employer ignores fair procedures at their peril.

The development of specific performance of the employment contract is an important recognition of an employee's property rights in their job. In this age of increasing deregulation of the workplace, as more and more workers enter the twilight zone of temporary, contract and part-time work, the concept of property in employment may have even more far reaching effects in the future for the rights of employees and the obligations of employers. ●

NOTE: Several of the cases discussed above are due to go to trial in the near future. The authors intend to provide an update on these developments in a future edition of the Bar Review, at which point it is hoped it will be possible to provide some clarification on the increasingly uncertain parameters of this expanding area of law.

1. *Lumley v Gye* (1853) El & Bl 216.
2. [1972] Ch 305.
3. at 315.
4. [1985] IRLR 203.
5. Ex tempore judgement of Costello J., 12 March 1985, later approved. See generally (1985) 3 ILT 73.
6. [1994] 5 ELR 251.
7. at 255-256.
8. Unreported judgement of 16 July 1997.
9. at 5 of the unreported judgement.
10. Unreported judgement of 29 August 1997.
11. Glover v BLN Ltd [1973] IR 388; *Gunn v Bord an Cholaiste Naisiunta Ealaine is Deartha* [1990] 22 IR 168; *Mooney v An Post* unreported judgement of the Supreme Court, 20 March 1997.
12. Ex tempore judgement of Costello P., 13 August 1997.
13. *Courtney v Radio 2000* Unreported judgement of Laffoy J. 22 July 1997.
14. *Phelan v BIC Ireland Ltd and others* Ex tempore judgement of Costello J. 10 February 1997.
15. Unreported judgement of Barron J. of 18 April 1997.
16. at 7 of the unreported judgement.
17. at 318.
18. at 5 of the unreported judgement.



PAUL McCARTHY

Distillery Reception

The Law Library Development on the Distillery Site was celebrated informally on Friday, 28th November with a reception for barristers and members of the judiciary. Speaking at the reception, the Chairman of the Bar Council, Mr. John MacMenamin, SC praised the vision and dedication of the Premises Committee of the Bar Council and all members of staff involved, for seeing the project through to a very successful conclusion.

The barristers rooms are almost all now rented with just 5 rooms remaining - four "A" rooms and one "B" room. Enquiries for those rooms to be made to John Hore at 087 456934. A waiting list for the "C" and "D" rooms is currently being compiled. Members wishing to be included on this list, please contact Claire Byrne in the Bar Council office.

The next phase of the development, to include the Legal Research Centre and the Arbitration Centre will open in January, 1998.

Brian Murray, Mr. Justice Peter Shanley, Conor Maguire, SC, Michael Gleeson, SC.

James Nugent, SC, Mr. Justice Hugh Geoghegan, Denis McCullough, SC.

John Donaghy, Resident Engineer for the Distillery, Michael Durack, SC, Chairman, Premises Committee, Bar Council.

John Gallagher, SC, Henry Murphy, SC, James Connolly, SC.

Company Receiverships: Recent Developments

JOHN BRESLIN, Barrister

Introduction

Two important cases relating to the duties on a receiver appointed under a company debenture have recently been handed down. One is the decision of Laffoy J in *Re Edenfell Holdings Ltd.*[1] The other is the decision of the High Court of Australia in *Sheahan v Carrier Air Conditioning Pty Ltd.*[2] The purpose of this article is to consider the implications of each of the decisions on the law relating to the duties of a receiver when dealing with the assets of the company which has granted the debenture ('the Company'). The lender to whom the Company has granted the debenture pursuant to which the receiver has been appointed will be referred to as 'the Bank'.

Overview

The appointment of a receiver[3] is, of course, a mode of enforcing security. The primary purpose of the receiver is to realise the assets covered by the debenture, or receive the income therefrom, so that the debt secured by the debenture can be repaid.[4] The Bank will appoint the receiver to avoid the strict liability attaching to the status of mortgagee in possession.[5] As such, the receiver acts solely with the interests of the Bank in mind. However, section 24 (2) of the Conveyancing Act, 1881,[6] and most modern corporate debentures, provide that the receiver acts not as agent for the Bank, but as agent for the Company. Accordingly, the receiver has been described as 'perhaps, the only genuinely non-fiduciary agency'.[7] This contradiction in terms gives a flavour of the inherent conflict of interests in the job. Until or unless the Company goes into liquidation, the receiver is ostensibly agent for the Company, yet at the same time owes duties to the Bank to maximise the cash realisation from the Company's assets for the benefit of the Bank. Receivership is a special type of agency, the nature of which, and the fiduciary duties (if any) flowing from which, are strictly limited, and depend upon the function undertaken by him. For the receiver may be given, pursuant to the debenture, wider powers than merely the passive receipt of income, or a power to sell the Company's assets subject to the security. Where security is created over the whole of the assets and undertaking of the Company[8], the receiver may be given the power effectively to manage the business and undertaking of the Company.

Common Law Duties of Receiver Selling Company's Assets

Until relatively recently, the Common Law duties of a receiver when selling assets of the Company were quite light: he merely had a duty to act with good faith and honesty.[9] However, recent judicial trends display a greater readiness to review specific decisions of the receiver, and to intervene to set aside sales which the court views as inappropriate. So, the receiver has been fixed with liability to the Company (and to guarantors of the Company) where a grossly mismanaged sale has resulted in assets being realised for significantly less than their true value.[10] The duty of a selling receiver has been equated with the duty upon a mortgagee selling mortgaged assets. In recent years, the duties on mortgagees have become stricter. So in *Holohan v Friends Provident and Century Life Office*[11] the Supreme Court set aside a sale by a mortgagee of premises with sitting tenants because the mortgagee did not investigate the possibility of selling with vacant possession, which would have realised a higher price than was actually obtained. The receiver's duty is also analogous with the duty of a liquidator when realising a company's assets for distribution to its creditors.[12]

Section 316A Companies Act, 1963

Section 316A of the Companies Act, 1963 provides that a receiver, 'in selling property of a company, shall exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of the sale.' The section applies only in the context of a sale of assets by the receiver; it does not modify the Common Law duties of the receiver *qua* receiver and manager. The judgment of Laffoy J in *Re Edenfell Holdings Ltd* is the first decision dealing with the section.

Laffoy J said that the section is 'merely a statutory restatement of the common law duty of care' owed by the receiver. But to whom is the duty of care owed? Although the section is silent on this question, it is clear that the duty is owed at least to the Company. On the basis that the section re-states the Common Law, it is also reasonable to suggest that the duty is owed to a guarantor of the debts of the Company.[13] It is also conceivable that the duty is owed to incumbrancers of the Company junior to the Bank, and indeed to the Company's liquidator and unsecured creditors.[14]

In *Edenfell Holdings* the receiver agreed to sell land belonging to the Company for a money consideration, part of which was paid directly by the purchaser to a person who was in the course of litigating against the Company. £100,000 was to be paid to the litigant, and the remainder of the sale price, £1,500,000 was to be paid to the Company. Laffoy J found that the receiver had not considered whether the payment to the litigant was a reasonable or prudent course of action, bearing in mind that the effect of the payment was to divert away from the Company a significant part of the price that the purchaser was prepared to pay. Although such consideration necessarily involved a number of 'imponderables',[15] the

receiver had, apparently, not entertained any consideration of them.

The time at which the receiver's duty of care is to be evaluated is, under section 316A, 'as at the time of sale.' Laffoy J held this to be the time when the receiver entered into the unconditional contract with the proposed purchaser to sell the land.

It is understood that the case is under appeal.

Duties of Receiver When Managing the Company's Assets

It was noted at paragraph 2 above that a receiver, if appointed over the business and undertaking of a company, may have the power actively to manage the day to day affairs and business of the company. Such a receiver is frequently referred to as a 'receiver and manager'. When a receiver and manager is appointed, the directors cease to have any part to play in the running of the business, as the directors' powers may only be carried on insofar as they are not inconsistent with the duties of the receiver.[16] A receiver and manager is no ordinary agent of the Company: he is under no duty to keep the company appraised as to how it is faring,[17] and need not continue the Company's business at the expense of the Bank.[18]

Sheahan v Carrier Air Conditioning Pty Ltd: Implications for Receivers and Managers

The recent decision of the High Court of Australia in *Sheahan v Carrier Air Conditioning Pty Ltd* [19] has important implications for a receiver and manager. The facts (so far as relevant to this article) may be summarised as follows. The Company was a contractor employed to perform building work on an entertainment centre. The Company employed various sub-contractors. The Company experienced severe financial difficulties, and defaulted on payments due by it to its sub-contractors, who thereupon refused to complete their works. The receiver took the view that it was in the Bank's interests that those works be completed. The receiver procured the co-operation of the sub-contractors by personally undertaking that they would be paid in full. Days before the Company was formally put into liquidation, the receiver paid the sub-contractors the amounts they were due. These payments were made from the proceeds of the realisation of the Company's assets pursuant to the debenture.

The question was whether the payments amounted to a preference *by the Company* in favour of the sub-contractors. Was the money was paid, on the one hand by the Company, or on the other hand, by the receiver (in which case there could, under the relevant legislation, be no question of the payments amounting to a preference)? This entailed an analysis of the receiver's relationship with the Company and the Bank.

The Majority Opinion

The majority opinion jointly delivered by Dawson, Gaudron and Gummow JJ stated that it was 'absurd'[20] to regard the payments made by the receiver to the sub-contractors as having been made as agent for the Company. The commercial reality was that the receiver had determined, in the exercise of his own discretion, to make the payments, and personally to undertake that the sub-contractors would be paid. Accordingly, the payments were not made *by the Company,* notwithstanding that they fulfilled pre-existing contractual obligations of the Company, and that they were made (in effect) from the realisation of the Company's assets. Not even the standard agency clause in the debenture pursuant to which the receiver was appointed (stating the receiver to be the Company's agent) could override the fact that, insofar as this payment was concerned, the receiver was not acting as agent for the Company.

The Minority Opinions

Each of the two other judges on the bench, Brennan CJ and Kirby J, took fundamentally different approaches to the question. Brennan CJ considered that the receiver was acting at all times as agent for the Company, notwithstanding that he had undertaken personal liability. The payments were made on behalf of the Company in discharge of its liability to the sub-contractors. However, Brennan CJ ultimately held that there was no preference because there were insufficient funds, after paying the Bank's secured debt, to distribute among the unsecured creditors. On this basis, reasoned the Chief Justice, the sub-contractors enjoyed a preference over the Bank (which had consented to the payments) and not over the other unsecured creditors of the Company. As it were, the payment came out of the pool of funds available to the Bank, not the pool of funds available for the unsecured creditors. Such a payment did not offend the policy of the statutory prohibition against preferences.

Kirby J gave a dissenting opinion. He shared the Chief Justice's view that the payments were made by the Company, but differed by holding that the payments had the effect of preferring the sub-contractors to the other unsecured creditors of the Company. Kirby J said that the decision of the majority would have the effect of encouraging creditors to use their 'commercial muscle to secure payment of pre-receivership debts of the company in return for a promise of continued trading cooperation.' [21]

The repercussions of the majority opinion are fundamental. First, the judges did not regard themselves as hidebound by the traditional analyses of the Bank-Company-receiver relationship, fraught as it is with inconsistencies and inherent conflicts. The judges looked instead to the commercial dynamics of the course of action undertaken by the receiver. Secondly, the commercial scenario was such that it rendered nugatory the standard agency clause purporting to make the receiver agent of the Company. Accordingly, the majority opinion strongly suggests that contractual declarations as to the agency status of the receiver may be of doubtful effect if they do not accurately reflect the true commercial relationship between the parties.

Conclusions

The significance of the *Edenfell Holdings Ltd* decision is that the receiver has a *positive onus* to show that he considered whether the transaction (taking into account all its significant commercial elements) resulted in the Company obtaining the best price

reasonably obtainable as at the time of sale. Failure to show that such consideration was given could well result in the transaction being set aside by the court. The significance of the majority judgment in the *Sheahan* case is that a receiver may incur liability as principal in certain situations; this risk is most acute in the case of a receiver and manager. Furthermore, the court may well hold the receiver so liable in spite of the express terms to the contrary in the debenture pursuant to which he is appointed. •

1. (unrep) High Court, 30 July, 1997
2. (unrep) 12 August, 1997: Brennan, CJ., Dawson, Gaudron, Gummow and Kirby JJ.
3. There are restrictions in the Companies (Amendment) Act, 1990 on the ability of a secured lender to appoint a receiver, or alternatively on the ability of a receiver to continue to act, if a petition has been presented to seek the protection of the court under the act. See generally, O'Donnell, Examinership (Dublin: Oak Press Ltd, 1994)
4. See, generally, Courtney, *The Law of Private Companies*, (Dublin: Butterworths, 1994) chapter 16; Lynch, Marshall and O'Ferrall *Corporate Insolvency and Rescue* (Dublin: Butterworths, 1996) chapters 5 and 6.
5. *Irish Oil and Cake Mills Ltd., v. Donnelly* (unrep) High Court, 27 March, 1984, Costello J, at p. 6 of transcipt.
6. 44 & 45 Vict. C. 41
7. Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (Sydney: Butterworths, 1992) (third edition) p. 709
8. Which, by definition, must be by way of floating charge: see Breslin 'Fixed Charges over Book Debts after Holidair and New Bullas Trading' (1995) 2 *Commercial Law Practitioner* 32
9. *Re B Johnson & Co (Builders) Ltd* [1995] Ch 634, at 662, per Jenkins LJ
10. *Standard Chartered Bank v. Walker* [1982] 3 All ER 938: *McGowan v. Gannon* [1983] ILRM 516
11. [1996] IR 1
12. See, for example, *Re Downsview Nominees Ltd v. First City Corporation Ltd* [1993] 2 WLR 86
13. *Standard Chartered Bank v. Walker* [1982] 3 All ER 938: *McGowan v. Gannon* [1983] ILRM 516
14. *Downsview Nominees Ltd v. First City Corporation Ltd* [1993] 2 WLR 86
15. At page 18 of the transcript
16. Keane, *Company Law in the Republic of Ireland* (Dublin: Butterworths (Ireland) Ltd, 1991) (2nd Ed) para 24.02; *Lascomme Ltd v. United Dominions Trust (Ireland) Ltd* [1994] ILRM 227
17. *Irish Oil and Cake Mills Ltd., v. Donnelly* (unrep) High Court, 27 March, 1984, Costello J
18. *Kernohan Estates Ltd v. Boyd* [1967] NI 27
19. (unrep) 12 August, 1997
20. At page 15 of transcript
21. At page 33 of transcript

DIARY

Dates for end of term

Michaelmas Term ends on Friday, 19th December, Hilary Term commences on Monday, 12th January and ends on Friday, 3rd April

•

Twenty Five Years of Free Movement of Workers in Ireland
16 January 1998
Incorporated Law Society, Blackhall Place, Dublin 7

The Irish Centre for European Law, in conjunction with the European Commission, are holding a one-day conference on "Twenty five years of free movement of workers in Ireland". The European Commission is funding conferences on the free movement of workers in each Member State of the European Union. Following the national conferences, a symposium will be held by the European Commission in Brussels which will sum up the findings of those conferences.

The Irish conference will address all the issues that EC workers exercising their right to work in Ireland face, such as their rights of entry and residence, the conditions under which they may be expelled, the principle of non-discrimination, the recognition of their qualifications, and the treatment of their family members.

Attendance at this conference is by invitation only. All members of the Irish Centre for European Law will be invited, as well as representatives of the judiciary, politicians, non-governmental organisations etc. However, there are also a number of places for non-members who would be interested in attending the conference.

If you would like to attend, please contact Pauline Curtin at the Irish Centre for European Law at: 6081081 as soon as possible.

Conference on Litigation in the European Court of Justice

organised by the Academy of European Law, Trier to be held on 12 and 13 January, 1998 in Europlaza Hotel, Luxembourg

Topics include:

the various types and course of proceedings in the Courts of the European Communities;

procedural aspects of preliminary rulings, and

discussion of specific issues with expert speakers

Contact: 00 49 651 147100 (and ask for details of event No. A6)

•

Seminar on Liquor Licensing Reform

Friday, 24th April, DIT, Cathal Brugha Street

A national and international panel of speakers will address issues relevant to liquor licensing reform, particularly the Competition Authority report, the role of the courts in licensing, changes to opening and closing times, late night bars, underage drinking, clubs, supermarkets etc. Comparisons with other jurisdictions, including Northern Ireland, the Edinburgh experiment and the licensing experience in Australia will also be covered.

This timely and important seminar is designed to be of interest to publicans, lawyers, hoteliers, public servants and politicians.

Further information: Marc McDonald at 01 402 4462 or mmcdonald@dit.ie

Reflections on Tribunals of Inquiry

RORY BRADY, S.C.

There is nothing new about rich businessmen making contributions to politicians or political parties. One of the greatest of Irish parliamentarians, Charles Stewart Parnell, is reputed to have received the sum of £10,000 from Cecil Rhodes for the Irish Parliamentary Party. At least £5,000 of this sum was allegedly paid in cash to Mr Parnell. Antony Thomas in his biography of Cecil Rhodes "Rhodes" (The Race for Africa) has observed, at page 210, as follows:

> *"That still left Parnell's Irish Party, with 85 votes and a record of implacable opposition to chartered companies; but Rhodes had already prepared the ground. The previous year he had made a gift of £5,000 to party funds and pledged a further £5,000 once he had received his royal charter.*
>
> *Rhodes' early biographers were admirers who took pains to justify this curious alliance between Rhodes, the great British patriot, and the party of Irish Home Rule. They are supported by a high minded correspondence between Rhodes and Parnell, in which the two men appeared to agree that the Irish Party should always maintain a representation at Westminster to preserve "the Imperial tie". The letters became public soon after they were written - a curious fact, as party contributions were rarely divulged. Furthermore, a close examination of this correspondence reveals that Parnell had made no real commitments. It is hard to disagree with an eminent contemporary biographer, who dismissed the Rhodes-Parnell letters as "mere verbiage", designed to obscure the fact that Rhodes had bought Irish party support for £10,000."*

If Mr Parnell was currently a member of the Dail, and preferably someone with ministerial experience, there would now be a demand for a tribunal of inquiry into these payments. Such demands have become part of a new culture where tribunals have taken the place of State agencies and statutory bodies in investigating alleged wrong doing by politicians. An aspect of rule by government is now being replaced by rule by tribunal. Statutory agencies such as the Revenue Commissioners and An Garda Siochana are being relegated, by this cultural change, to a secondary role.

Tribunals have, in reality, become a new political art form. It is interesting to note that in 1997 alone there were four tribunals either sitting or established and there is a further tribunal promised. Thus we had the tribunal of inquiry into the BTSB, the Dunnes Payments Tribunal, the enquiry into Mr. Michael Lowry and Mr. Charles J Haughey, the planning inquiry and a promised inquiry in relation to blood given to haemophiliacs. In contrast during the entire decade of the 1980s there were only two full judicial tribunals sitting, i.e. the Kerry Babies and the Whiddy Disaster tribunals. Thus it is the very frequency with which tribunals have been established during 1997, that requires us to look carefully at this process and its impact on our system of government.

Are public persons more corrupt or venal in the 1990's than they were in the 1980's or are there other reasons to account for this proliferation of tribunals? It is the writer's contention that to some extent the tribunal is a victim of its own recent success. But caution must be exercised. Too much of a good thing can be bad and furthermore the more tribunals there are the more devalued they become. A limit needs to be placed on the use of tribunals. They should only be established to investigate matters of urgent public concern when the existing mechanisms of statutory investigation have been exhausted unsuccessfully. Tribunals should not become a substitute for the ordinary investigation of public matters in a democratic society. It is plain that an overuse of tribunals carries with it a risk of abuse of such tribunals for political gain. Indeed, there are interesting historical precedents of political abuse of parliamentary committees of investigation that now justifies a caution about the use of tribunals.

Up and until the enactment of the Tribunals of Inquiry (Evidence) Act 1921 ("the Act") as amended by the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979 ("the Amending Act") the manner in which matters of public controversy were investigated was through a Select Parliamentary Committee or a Commission of Inquiry. The experience of these committees was unsatisfactory. In 1679 a Select Committee of the House of Commons enquired in to allegations that the British Navy was riddled with popery and that the then Duke of York had wantonly wasted public funds. A damming report was prepared by the Select Committee based on very tenuous evidence. When the matter was then referred to the Attorney General for the purposes of a prosecution it was decided that there was in fact such a paucity of evidence that no prosecution could be maintained. In reality the Select Committee acted with political bias and was engaged on a political witch hunt. A risk of abuse of inquiries is ever present. It was not until the enactment of the Act that a superior system of investigation was introduced. The effect of the Act, as adapted in Ireland, was to require that both Houses of the Oireachtas pass a resolution establishing such a tribunal. Traditionally major tribunals have involved the appointment of a member or members of the High Court to preside over the inquiry. A system of checks and balances

has thereby been put in place to avoid abuse. The appointment of members of the judiciary, protected as they are by constitutional independence, is the greatest safeguard of a citizen likely to be exposed to the investigating zeal of a Tribunal of Inquiry. But the Act does not require that the member of the Tribunal be a judge. In fact there are no qualifications required for appointment as a member of a Tribunal. This is a potential weakness in the existing legislation and is a risk of exposure to abuse.

In any assessment of the risks of political manipulation of the powers to establish tribunals it is necessary to look at the legal function of a tribunal. In essence a tribunal is an inquirer. It is an investigator. It is an interrogator. It is pre-eminently a finder of fact. It does not determine rights, duties or obligations. It has no power to impose a criminal conviction or to adjust legal rights. This is in stark contrast to the role performed by the Courts. Thus Finlay C J in *Goodman International v Mr Justice Hamilton (1992) 2 I.R. 542 (at page 590),* in dealing with a contention that the tribunal of inquiry into the Beef Industry was engaged in a unconstitutional administration of justice, stated as follows:

> *"It is no part, and never has been any part of the function of the judiciary in our system of law, to make a finding of fact, in effect, in vacua and to report it to the Legislature. The Courts do not even exercise a function of making, in cases between litigants, a finding of a fact which does not have an effect on the determination of a right.*
>
> *With regard to the suggestion that the findings of the Tribunal, if not an impermissible administration of justice by a body other than the court, is a usurpation of the activities of courts in cases where either civil cases are pending or maybe instituted, it seems to me that again this submission arises from a total misunderstanding of the function of the Tribunal. A finding by this Tribunal, either of the truth or the falsity of any particular allegation which may be the subject matter of existing or potential litigation, forms no part of the material which a court which has to decide that litigation could rely upon. It cannot either be used as a weapon of attack or defence by a litigant who in relation to the same matter is disputing with another party rights arising from some allegation of breach of contract or illegal contract or malpractice. I am, therefore, satisfied that the Submission under Article 34 must fail."*

But if the tribunal's role is to find fact why should there be a tribunal? The State has available to it a variety of bodies that can conduct investigations. The courts are available in which to ventilate issues of fact that have legal implications and they have very wide powers to compel disclosure of documents and evidence under the sanction of contempt of court. The Dail and the Seanad can debate and discuss matters of public controversy. The Gardai and the Revenue Commissioners have very wide powers of investigation including powers of search and seizure. A vigilant media can pursue and investigate a rogue politician.

However, to date such bodies appear not to have satisfied the requirements of certain situations. Notwithstanding all of these mechanisms of investigation the plain fact is that it was only through a tribunal that facts of cardinal importance relating to the BTSB Inquiry and the Dunnes Payments Inquiry were revealed to the public. There is a price to be paid for this. The full panoply of a judicial tribunal carries with it very large costs. While there is a public interest in public investigation there is also a public interest in containing costs. Reconciling these two interests and minimising the risk of political abuse requires some adjustment to the current law and practice of tribunals. The following proposals are advanced with the objective of improving the workings of tribunals and limiting legal costs.

(a) The Terms of Reference should always include an obligation on the tribunal to report to the Houses of the Oireachtas, at the expiry of a limited period of time, on the status of its investigation. This is an important safeguard on costs. In addition the Houses of the Oireachtas must reserve the power to require a tribunal to cease its investigation if the costs become disproportionate to the issue involved. An express statutory power of suspension should be vested in the Houses of the Oireachtas. At present the Act and the amending Act are silent as to power of suspension.

(b) There is, in the writer's view, a compelling case for initially having a preliminary governmental inquiry into a matter of public controversy which inquiry should be conducted by a suitably appointed person. The report of the inquiry can be made public when completed. Powers of investigation under the Companies Act 1963-1990 (where the inquiry is carried out in private but where a report is subsequently published) have been used very successfully in the recent past and with devastating effect. Should a preliminary inquiry turn out to be unsatisfactory or not resolve an issue of fact then in those circumstances a tribunal should be established. A benefit of the recent success of tribunals is the value of the threat of a tribunal of inquiry. Having established itself as a potent instrument of investigation it would only be a fool who would now fail to co-operate with a preliminary investigation carried out on behalf of a Government. To avoid the undoubted stress and personal pressures of a tribunal it is, my belief, that in future those being investigated will be more co-operative. This can only enure to the benefit of the State in terms of minimising costs. If, however, a person is recalcitrant and will not co-operate with the preliminary inquiry then he or she should be subjected to a full judicial tribunal of inquiry with all of its associated rigours and with possible cost consequences for him or her.

(c) It is submitted that if there is a combination of misconduct in public affairs or in matters of public interest, as found by a tribunal, combined with a failure to co-operate with a Government appointed investigator's preliminary investigation then in those circumstances a tribunal should be empowered to direct that wrongdoer pay all, or an appropriate amount, of the costs of the tribunal and those appearing before it. The Act and the amending Act need to be altered so as to confer such a jurisdiction.

(d) The Tribunal should be given a right or a power to refer matters back to the Houses of the Oireachtas for guidance in relation to its terms of reference. Any ambiguity or uncertainty in the terms of reference should be resolved by the Houses of the Oireachtas and not through legal stratagems or judicial review. Fur-

thermore, a tribunal should be given a power to request the Houses of the Oireachtas to extend its terms of reference where information revealed through its investigatory processes exposes other matters of public interest that are not then known to the Dail or Seanad. Express statutory provisions dealing with the above are urgently required.

(e) The terms of reference should be precise. Our legislators should eschew the temptation to have a roving inquiry into all matters of public interest. The Act only empowers the Houses of the Oireachtas to establish a tribunal into a matter of urgent public importance. It is not any matter of public importance that can or should be referred to a tribunal. The limits on the power to be exercised by the Houses of the Oireachtas is an important safeguard in our democratic society and the use of the word "urgent" clearly indicates that it is a power that should only be used sparingly .

(f) Tribunals legislation should expressly provide that membership of a tribunal be confined to members of the judiciary. This will underscore the independence of a tribunal.

(g) The government should enact legislation that enables it to have a preliminary investigation carried out by a suitably qualified person who should be vested with powers similar to those granted to an inspector appointed under the Companies Acts. In addition statutory bodies or emanations of the State should be placed under a statutory duty of cooperation and be subject to a requirement, on demand, to make discovery to the preliminary investigator. Banks and other financial institutions should be placed under a similar statutory obligation. This will considerably reduce the costs attendant on investigating any matter of urgent public importance.

The Tribunals of Inquiry Act 1997 is an improvement on the situation. But we may need to go further. It may now be timely to refer the issue of Tribunals of Inquiry to the Law Reform Commission for its consideration. ●

NEWS

Focus Ireland Fundraising

Focus Ireland have launched a fundraising drive to increase awareness of their services and their need for funds on an ongoing basis.

Part of this drive concentrates on the desirability of including Focus Ireland as a beneficiary under your will. Focus Ireland points out that £250 feeds a homeless family in the Focus Ireland Coffee shop for one month, £5,000 would run the coffee shop for a month while £12,000 provides supportive housing for young women who would otherwise find it difficult to be housed, for one year.

A legacy to Focus Ireland is exempt from inheritance tax, so your entire bequest is used where it is needed most.

Legal The Bar Review Update

Volume 3, Issue 3. December 1997. ISSN 1339-3426

A directory of legislation, articles and written judgments received from the 6th November, 1997 to 3rd December 1997.
Judgment information compiled by the researchers in the Judges Library, Law Library, Four Courts, Dublin 7.
Edited by Desmond Mulhere, Law Library, Four Courts, Dublin 7.

Administrative

Farrell v. Attorney General
Supreme Court: Hamilton C.J., Barrington J., **Keane J.**
20/11/1997

Judicial review; certiorari; inquest; coroner; statutory interpretation; powers of Attorney General; whether Attorney General has power to direct coroner to hold fresh inquest after final verdict from a lawfully conducted inquest returned; whether decision ultra vires and unreasonable; whether irrelevant considerations taken into account; fair procedures; nature of inquest procedure; jurisdiction of High Court to review proceedings in coroner's court; s.24(1) Coroners Act, 1962
Held: Appeal dismissed; certiorari granted; decision of Attorney General ultra vires and unreasonable

Devanney v. Shields
Supreme Court: **Hamilton C.J.,** O'Flaherty J., **Denham J.,** Barrington J., **Keane J.**
28/11/1997

Appointment of District Court Clerk; validity; summons; challenge; whether District Court Clerk who issued summons validly appointed; applicability of "Carltona" principle to appointment of District Court Clerks; whether certain ministerial duties can be devolved to departmental officials; whether principle applicable in statutory context; method of appointment of civil servants; ss.46 (2) & 48 (1) Court Officers Act, 1926
Held: District Court Clerk validly appointed; summons valid; "Carltona" principle applicable

Devanney v. Shields
High Court: **McCracken J.**
31/10/1997

Judicial review; summons; validity; traffic offences; whether District Court Clerk who issued summons properly appointed; whether statutory power of Minister to appoint District Court Clerks delegable; whether officers who appointed District Court Clerk on behalf of Minister only authorised to authenticate Minister's decision; whether summons lawfully issued; s.46(2) Court Officers Act, 1926
Held: District Court Clerk not validly appointed; summons invalid

Articles

Lancefort and Locus Standi
Dignam, Conor
1997 3(2) BR 65

Law and practice relating to the interim refugee appeals authority
Farrell, Sarah
1997 3(2) BR 50

Agriculture

Statutory Instrument

Genetically modified organisms (amendment) regulations, 1997
S.I 332/1997
Commencement Date: 30.07.97

Aliens

Anisimova v. Minister for Justice
Supreme Court: Hamilton C.J., **Murphy J.,** Lynch J.
28/11/1997

Judicial review; asylum application; refugee status inquiry; natural and constitutional justice; applicant arrived in the State via the United Kingdom; deportation order made by Minister; principle that refugee claim be determined in "first safe country"; whether refugee inquiry conducted in accordance with international procedures; whether inquiry conducted in accordance with rules of natural and constitutional justice; whether proper inquiry carried out as to whether United Kingdom was "first safe country"; whether applicant given opportunity to be heard; Refugee Act, 1996; UN Convention on the Status of Refugees and Stateless Persons 1951; Protocol on the Status of Refugees, 1967
Held: Proper inquiry conducted into refugee status; application dismissed

Statutory Instruments

Refugee act, 1996 (section 22(6)(a)) (designated countries) order, 1997
S.I 376/1997
Commencement Date:13.09.97

Refugee act, 1996 (sections 1, 2, 5, 22 and 25)
(commencement) order, 1997
S.I 359/1997
Commencement Date:29.08.97

Article

Law and practice relating to the interim refugee appeals authority
Farrell, Sarah
1997 3(2) BR 50

Arbitration

Article

International commercial arbitration and the international arbitration bill, 1997
Murphy, Roderick H
1997 3(2) BR 92

Children

D.P.P. v. Thornton
High Court: **McGuinness J.**
24/09/1997

Juvenile; theft; fitness to plead; Eastern Health Board as guardian; District Court order challenged; power of District Judge to investigate fitness to plead; whether District Judge entitled to make order inquiring into general condition and future care of accused; whether order made in course of criminal proceedings should be limited to inquiry into accused's fitness to plead; whether requirements of order risked right to reasonable expedition by delaying proceedings; whether constitutional right to due process prevails over court's general constitutional duty to promote welfare of child; whether Board obliged to comply with order; s.98(3) Children Act, 1908
Held: District Judge only entitled to make, and Board only obliged to comply with, order relating to accused's fitness to plead

Statutory Instruments

Health and children (delegation of ministerial functions) order, 1997
S.I 401/1997
Commencement Date: 16.09.97

Health and children (delegation of ministerial functions) (no 2) order, 1997
S.I 402/1997
Commencement Date: 16.09.97

Company

Springline Ltd., In re
High Court: **Shanley J.**
28/10/1997

Petition; Examiner; insolvency; Liquidator; costs and remuneration of the Examiner; whether Examiners costs and remuneration have priority over those of the Official Liquidator; whether a Liquidator's costs, expenses and remuneration constitute a "claim" for the purposes of s. 29(3) Companies (Amendment) Act, 1990; s. 75 Bankruptcy Act, 1988; O. 74 of the Rules of the Superior Courts
Held : The costs, expenses and remuneration of an Official Liquidator do not amount to a "claim" within the meaning of s. 29(3) of the Companies (Amendment) Act, 1990; the costs, expenses and remuneration of an Examiner do not have priority over those of a Liquidator

Statutory Instruments

Business names regulations, 1997
S.I 357/1997

Companies (fees) order, 1997
S.I 358/1997
Commencement Date: 15.09.97

Competition

Cronin v. The Competition Authority
Supreme Court: Hamilton C.J., O'Flaherty J., **Barrington J.,** Murphy J., Barron J.
27/11/1997

Judicial review; certiorari; exclusive purchasing agreement; anti-competitive effect; notification of such agreements; category licence granted by the Competition Authority providing that agreement was not anti-competitive; positive and negative conditions for grant of licence; whether procedures concerning granting of licences fair; whether principles of natural justice complied with; whether notification procedure applies to draft agreements; whether unconstitutional delegation of legislative functions to the Competition Authority; failure of Minister to draw up regulations; s.4 Competition Act, 1991; Art. 85 Treaty of Rome
Held: Relief refused; decision of Competition Authority upheld

Hinde Livestock Exports Ltd. v. Pandoro Ltd.
High Court: **Costello P.**
01/08/1997
Interlocutory injunction; transport of livestock service; dominance; abuse; quantitative restrictions on exports; injunction sought to restrain defendant from discontinuing transport of live herds; whether fair question to be tried; whether plaintiff has a legitimate expectation that service would be continued; promissory estoppel; whether abuse of dominant position by defendant; whether objective justification for action taken by defendant; whether discontinuation of service is a quantitative restriction on exports or a measure having equivalent effect; Arts. 86 & 34 Treaty of Rome
Held: Relief refused; fair question not made out on any of the issues raised

Constitutional

Quinlivan v. Governor of Portlaoise Prison
Supreme Court: Hamilton C.J., O'Flaherty J., Barrington J., Keane J., **Barron J.**
07/11/1997

Habeas corpus application; re-arrest; detention; legality; administrative error; invalid court sitting resulting in unlawful remand of applicant; release and re-arrest of applicant; whether applicant properly released; whether re-arrest lawful; whether a valid arrest can follow upon a release from unlawful custody; whether ensuing custody lawful; jurisdiction of Special Criminal Court; constitutional rights; s.47(2) Offences Against the State Act, 1939
Held: Applicant lawfully arrested and held in lawful custody

Riordan v. Tanaiste
Supreme Court: Hamilton C.J., **O'Flaherty J.**, Denham J., Barrington J., **Keane J.**
25/11/1997

Judicial review; Taoiseach; Tanaiste; locus standi; whether constitutionally permissible for Taoiseach and Tanaiste to be absent from the State at the same time; duties of both Taoiseach and Tanaiste; whether applicant has locus standi to bring proceedings; Art. 28.6 of the Constitution
Held: Appeal dismissed; no obligation on the Taoiseach and Tanaiste to be present in the State at the same time

D.P.P. v. O'Neill
High Court: **Smyth J.**
24/09/1997
Pre-1937 legislation; constitutional validity; jurisdiction of District Judge; fair procedures; equality; whether District Judge can adjudicate constitutionality of pre-1937 law; young person's character taken into consideration by court considering summary trial of indictable offence; whether evidence of character tendered pre-trial prejudicial; whether young persons treated unequally or in

accordance with constitutional regard to differences of capacity; s.5(1) Summary Jurisdiction Over Children (Ireland) Act, 1884
Held: Legislation constitutional; District Judge has jurisdiction; judge's oath bulwark against prejudice; evidence of character simply for assessing quality of assent to summary trial

Meagher v. O'Leary
High Court: **Moriarty J.**
08/10/1997

Constitutionality of legislation; consecutive sentencing; trial of minor offences; limit of District Court's sentencing jurisdiction; sentence significant determinant of minor offence; settled two year sentence for single offence exceeds sphere of minor offences; whether statutory maximum of two years aggregate terms for different offences similarly excessive; whether balance struck by legislation so unreasonable as to constitute unjust attack on individual's rights; s.5, Criminal Justice Act, 1951
Held: Legislation reasonable and constitutional

Articles

Lancefort and Locus Standi
Dignam, Conor
1997 3(2) BR 65

Law and practice relating to the interim refugee appeals authority
Farrell, Sarah
1997 3(2) BR 50

Criminal

DPP v. Gray
Supreme Court: **Keane J.**, Murphy J., Lynch J. (ex-tempore)
10/11/1997

Renewal of application for bail; change of circumstances; fixed address provided by the applicant ; jurisdiction of the High Court; whether the matter was res judicata
Held: Application allowed

The People v. Kavanagh
Special Criminal Court : **Barr J.,** Smyth J., Reilly J.
29/07/1997

Indictment; false imprisonment; kidnap; coercion; volunteer; contradictory evidence; common law offence of false imprisonment prior to s.15 of the Non-Fatal Offences Against the Person Act, 1997; common law offence of false imprisonment abolished by statute; whether offences prosecuted before the Non-Fatal Offences Against the Person Act can be saved; whether s.11 of the Criminal Law Act,1976 creates a statutory offence of false imprisonment; whether the accused was guilty of voluntary collaboration; whether accused coerced into robbery
Held: S.11 of the Criminal Law Act, 1976 does not create a statutory offence of false imprisonment; accused guilty of voluntary collaboration; no coercion

Dutton v. D.P.P.
High Court: **Flood J.**
09/07/1997

Judicial review; indictment; disposal of evidence; injunction sought to restrain respondent from proceeding with prosecution of charges; whether failure to comply with principles of natural justice and fair procedure; whether there had been a breach of the Criminal Procedure Act, 1967 by the disposal of evidence; whether applicant was deprived or denied basic fairness of procedure in that he had no reasonable opportunity to rebut evidence referred against him
Held: Application dismissed

Keely v. Moriarty
High Court: **Quirke J.**
07/10/1997

Prohibition; conspiracy to defraud; delay in prosecution; right to reasonable expedition; whether duration of delay alone sufficient for relief; whether delay unreasonable in circumstances which necessitated both thorough investigation and resolution of applicant's discovery application; whether delay caused prejudice to the applicant's defence; whether prejudice caused by unavailability of witness due to delay
Held: Delay not unreasonable; witness testimony at trial not essential to fair procedures; relief refused

Flynn v. D.P.P.
High Court: **Quirke J.**
07/10/1997

Prohibition; conspiracy to defraud; delay in prosecution; right to reasonable expedition; whether delay; whether delay unreasonable or unconscionable having regard to circumstances of case involving complex fraud investigation and lengthy resolution of discovery application; whether applicant's defence prejudiced by delay; whether unavailability of witness due to delay prejudicial
Held: Delay not unreasonable; defence not prejudiced; relief refused

D.P.P. v. Connell
High Court: **Geoghegan J.**
16/10/1997

Arrest; drunk driving; incorrect provision of legislation cited; evidence given that arrest made under s.49(8), Road Traffic Act, 1994; no power of arrest under provision cited; whether arrest valid; whether judge could infer correct citation (s.49(8), Road Traffic Act, 1961); whether reason for arrest sufficiently obvious to defendant to render arrest valid
Held: Arrest lawful; circumstances made reason for arrest obvious

Employment

Maher v. Irish Permanent Plc.
High Court: **Laffoy J.**
29/08/1997

Employee misconduct; investigation by employer; decision to dismiss; order sought restraining implementation of dismissal save in accordance with employer's disciplinary code and fair procedures; order sought reinstating employee; whether investigation carried out in accordance with fair procedures; whether fair procedures breached when employee denied statements prior to hearing and permission to be legally represented until morning of hearing; whether decision to dismiss valid based on hearing conducted in absence of employee
Held: Restraining order granted; reinstatement refused

Maher v. Irish Permanent Plc.
High Court: **Costello P.**
07/10/1997

Employee misconduct; investigation by employer; interim injunction sought restraining inquiry proceeding otherwise than in accordance with natural justice;

whether inquiry procedures adopted by employer in accordance with natural justice; whether risk inquiry might investigate allegations based on hearsay; whether admission of hearsay evidence at inquiry contrary to natural justice in all circumstances; whether natural justice prohibits investigation into subject matter of employee's final warning
Held: Injunction refused; presumption defendant will conduct investigation in accordance with natural justice

An Post v. McNeill
High Court: **O' Sullivan J.**
21/10/1997

Employment Appeals Tribunal; statutory redundancy payment; compensation in lieu of notice; whether the plaintiff was dismissed; whether tribunal had erred in law in its determination; whether erroneous calculation of minimum notice; criteria for assessment; computation of continuous service; computable service; whether necessary to have joined the Minister for Labour to the proceedings; Minimum Notice and Terms of Employment Acts, 1973-1991; Redundancy Payments Acts, 1967-1991
Held: Claim dismissed; no error in tribunal's determination; no necessity to join the Minister for Labour to proceedings

Statutory Instrument

European Communities (occupational benefit schemes) regulations, 1997
S.I 286/1997
Commencement Date:1.07.97

Article

Punch the clock
Walsh, Padraig
1997 GILSI (Oct) 24

Environmental Law

Statutory Instrument

Environmental protection agency act, 1992 (control of volatile organic compound emmissions resulting from petrol storage and distribution) regulations, 1997
S.I 374/1997
Commencement Date: 1.10.97

Environment (alteration of name of department and title of minister) order, 1997
S.I 322/1997
Commencement Date: 22.07.97

European Communities

Campbell v. Minister for Agriculture, Food and Forestry
High Court: **Barron J.**
08/10/1997

Milk quotas; E.U. regulation; legitimate expectation; excusable error; entitlement to quotas and damages claimed; applicants who undertook not to produce milk later wrongly denied quotas; when regulation amended applications wrongly refused again; when regulation amended again applicants unaware of changes until time limit for applications passed; whether mode of notification of amendments by defendant adequate; whether breach of natural justice; whether breach of legitimate expectation; whether defendant had duty to ensure those affected were aware of changes; whether failure to impress that original applications wrongly refused breached doctrine of excusable error; whether time limit for applications should be extended; Regulation 857/84, Article 3(a)
Held: Reliefs refused except possible damages for applicant misled by notice; practice of notification by defendant led to legitimate expectation notification would not mislead; notice unclear but no breach of duty; no administrative error or power to extend national time limit; no applications made within time limit

Statutory Instruments

European Communities (application of open network provision to voice telephony) regulations, 1997
S.I 445/1997
Commencement Date: 31.10.97

European Communities (occupational benefit schemes) regulations, 1997
S.I 286/1997
Commencement Date:1.07.97

Extradition

Langan v. O'Dea
High Court: **Kelly J.** (ex tempore)
10/10/1997

Extradition; delay; escape to Ireland after robbery conviction in UK; release sought pursuant to s.50(2)(bbb), Extradition Act, 1965; whether extradition unjust having regard to lapse of time since conviction and other exceptional circumstances; whether delay attributable to applicant's further offending and absconding; whether other circumstances warranted release
Held: Application dismissed; applicant can't rely on own delay; both authorities acted with reasonable expedition; no evidence of other circumstances warranting release

Family Law

Article

The conveyancing aspects of divorce and separation
Walls, Muriel
1997 (2) CPLJ 3

Garda Siochana

Flood v. Garda Siochana Complaints Board
High Court: **Kelly J.**
08/10/1997

Judicial review; natural and constitutional justice; fair procedures; complaint by applicant against Garda member; conduct of garda towards applicant; investigation of complaint; decision of respondent that no breach of discipline had occurred; whether respondent failed to provide applicant with opportunity to consider material; whether respondent acted ultra vires; failure to give reasons for decision; whether decision unreasonable and irrational; s.7 Garda Siochana Complaints Act, 1986
Held: Application dismissed; decision not unreasonable; compliance with fair procedures

Keogh v. Commissioner of An Garda Siochana
High Court: **Morris J.**
06/11/1997

Discrimination; freedom of association; resignation by trainee garda applicant; prohibition on trainees joining Garda Representative Association (GRA) meant applicant denied support;

declaration sought that prohibition unconstitutional; order sought directing Minister for Justice to amend regulations governing membership; whether prohibition breached constitutional right of freedom of association; whether Minister empowered to extend membership of GRA; s.13, Garda Siochana Act, 1924
Held: Relief refused; under s.13, GRA only for Gardaí and Minister not permitted to extend membership

Information Technology

Articles

Domain names on the internet
Kelleher, Denis
1997 3(2) BR 61

Solicitors on the web
Rothery, Grainne
1997 GILSI (Oct) 21

International Law

Article

Procedural errors in international litigation the United Meat Packers case
Newman, Jonathan
1997 3(2) BR 87

Land Law

Articles

Payment of deposits on time
Butler, Fedelma
CPLJ 1997 (2) 12

The conveyancing aspects of divorce and separation
Walls, Muriel
1997 (2) CPLJ 3

Legal Profession

Hickey v. Carolyn
Supreme Court: **O' Flaherty J.**, Murphy J., Barron J. (ex-tempore)
24/10/1997

Solicitor and client; costs; respondent agreed to sum of costs by signing letter; agreement not honoured ; whether the original action had been undertaken on a "no foal no fee" basis ; whether the respondent was under such stress when signing the agreement as not to appreciate what he was doing; whether the costs claimed were fair and reasonable
Held: Appeal dismissed

Statutory Instruments

Solicitors (adjudicator) regulations, 1997
S.I 406/1997
Commencement Date:1.10.97

Local Government

Statutory Instruments

National cultural institutions act, 1997 (commencement) (no 2) order, 1997
S.I 328/1997
Commencement Date:25.07.97

Urban renewal act, 1986 (designated areas) (Dublin) order, 1994 (rectification of area) order, 1997
S.I 336/1997
Commencement Date:30.07.97

Urban renewal act, 1986 (designated areas) (Dungarvan) order, 1994 (rectification) order, 1997
S.I 337/1997
Commencement Date:30.07.97

Medical Law

Statutory Instruments

Hepatitis C Compensation Tribunal act, 1997 (establishment day) order, 1997
S.I 443/1997
Commencement Date:1.11.97

Hepatitis C Compensation Tribunal act, 1997 (reparation fund) (appointed day) order, 1997
S.I 444/1997
Commencement Date:1.11.97

Health and children (delegation of ministerial functions) order, 1997
S.I 401/1997
Commencement Date: 16.09.97

Health and children (delegation of ministerial functions) (no 2) order, 1997
S.I 402/1997
Commencement Date: 16.09.97

Article

Blood lines
Doran, Kieran
1997 GILSI (Oct) 12

Negligence

Forde v. Iarnrod Eireann
Supreme Court: **O'Flaherty J.,** Barrington J., Lynch J. (ex-tempore)
04/11/1997

Personal injury; liability; damages; leg of plaintiff caught in train door; suffered severe personal injury; duty of care on part of defendants; whether plaintiff contributory negligent; assessment of damages; pain and suffering; loss of earnings; loss of vocational opportunity
Held: Defendants 70% liable; plaintiff 30% liable

McKenna v. Best Travel Ltd.
Supreme Court: Hamilton C.J., Keane J., **Barron J.**
18/11/1997

Personal injury; damages; duty of care; breach of contract; mini-cruise; tour operator; plaintiff suffered serious injury while on coach tour in Israel; whether warning should have been given to plaintiff of the state of unrest in Israel; whether duty to give warning rested with the tour operator; principle of duty of care arising from proximity of contractual relationship; extent of duty of care; standard of knowledge to be attributed to tour operator; test of reasonableness
Held: Appeal allowed; no breach of duty of care

Felloni v. Dublin Corporation
High Court: **Morris J.** (ex tempore)
19/11/1996

Personal injury; defective door; duty of Corporation to provide tenant with house reasonably fit for human habitation; duty to keep premises in reasonable state of repair; whether duty breached by failure to replace door handle; whether Corporation had notice of defect; whether plaintiff and tenant negligent in allowing hazardous situation to continue
Held: No evidence Corporation negligent; negligence of plaintiff and tenant overwhelming.

Article

Disclosure in personal injuries actions
O'Neill, David
1997 3(2) BR 77

Pension Law

Article

Why it pays to plan ahead
Finucane, Kevin
1997 GILSI (Oct) 16

Planning

Article

The local government (planning and development) (amendment) bill 1997
O'Connor, Michael
1997 3(2) BR 67

Practice and Procedure

Murphy v. Times Newspapers Ltd.
Supreme Court: **O'Flaherty J.**, Keane J., Murphy J. (ex-tempore)
21/10/1997

Consolidation of actions; libel; damages; libel arising out of publication of a newspaper article; whether article defamatory to plaintiffs; whether article directed to plaintiff or to plaintiff's brother; whether actions should be consolidated; principles applicable for a joint trial; whether actions involving common questions of law or fact of sufficient importance; whether substantial saving of expense or inconvenience likely; whether confusion or miscarriage of justice likely; O.49 r.6 Rules of the Superior Courts
Held: Separate trials ordered

Sullivan v. Church of Ireland
High Court: **Laffoy J.**
07/05/1996

Plenary summons; application to renew; negligence action; delay; possibility of prejudice; defendant not joined in original proceedings; defendant not aware summons issued for over six years; whether plaintiff would suffer injustice if application refused as new claim statute barred; whether defendant would suffer injustice if summons renewed as delay seriously impaired ability to defend claim
Held: Plaintiff caused excessive delay; justice only served by refusing application

Statutory Instrument

District Court (fees) order, 1997
S.I 369/1997
Commencement Date:1.10.97

Rules of the Superior Courts (no 3), 1997
S.I 343/1997
Commencement Date: 1.09.97

Rules of the Superior Courts (no 4), 1997
S.I 344/1997
Commencement Date: 1.09.97

Records & Statistics

Statutory Instruments

Registration of births and deaths (Ireland) act, 1863
(section 17 and section 18) (mid-Western) order, 1997
S.I 414/1997
Commencement Date: 30.09.97

Registration of births and deaths (Ireland) act, 1863 (section 17) (Western) order, 1997
S.I 416/1997
Commencement Date: 9.10.97

Registration of births and deaths (Ireland) act, 1863
(section 17 and section 18) (North Eastern) order, 1997
S.I 417/1997
Commencement Date:30.09.97

Registration of births and deaths (Ireland) act, 1863
(section 17 and section 18) (South Eastern) order, 1997
S.I 418/1997
Commencement Date:9.10.97

Registration of births and deaths (Ireland) act, 1863
(section 17 and section 18) (Eastern) order, 1997
S.I 419/1997
Commencement Date:9.10.97

Registration of births and deaths (Ireland) act, 1863
(section 17 and section 18) (Midland) order, 1997
S.I 420/1997
Commencement Date: 9.10.97

Registration of births and deaths (Ireland) act, 1863
(section 17 and section 18) (Southern) order, 1997
S.I 421/1997
Commencement Date: 9.10.97

Revenue

Brosnan v. Leeside Nurseries Ltd.
Supreme Court: O'Flaherty J., **Barrington J., Keane J.**, Lynch J., Barron J.
30/10/1997

Corporation tax; manufacturing; relief for goods manufactured within the state; processing of dwarfed potted chrysanthemums; whether dwarfed potted chrysanthemums are manufactured goods; meaning of manufacture; whether dwarfing process constitutes manufacture or cultivation; whether natural products can be turned into manufactured goods; nature of process applied to chrysanthemums; s.39(1) Finance Act, 1980; s.54 Corporation Tax Act, 1976
Held: Appeal dismissed; not manufactured goods; plants cultivated and not manufactured

Article

Stamp duty and the finance act 1997 new rates for residential property
McGrath, Nicola
1997 (2) CPLJ 7

Road Traffic

D.P.P. v. Elliot
High Court: **McCracken J.**
06/02/1997

Driver intoxicated; fair procedures; self-incrimination; accused not under arrest when specimen requested by Garda pursuant to s.15(1), Road Traffic Act, 1994; whether privilege against self-incrimination required Garda to inform accused of this prior to requesting specimen; whether privilege against self-incrimination requires opportunity to be given to avoid giving specimen; whether Garda's right to require specimen overrides accused's right to

avoid self-incrimination
Held: No requirement to inform accused he was not under arrest.

Statutory Instruments

Road traffic (construction, equipment and use of vehicles) (amendment) regulations, 1997
S.I 404/1997
Commencement Date: 30.09.97

Road vehicles (registration and licensing) (amendent) regulations, 1997
S.I 405/1997
Commencement Date:1.11.97

Sea & Seashore

Statutory Instruments
Harbours act, 1996 (commencement) (no 3) order, 1997
S.I 324/1997
Commencement Date: 26.07.97

Harbours act, 1996 (initial organisation of pilotage services) regulations, 1997
S.I 325/1997
Commencement Date:26.07.97

Social Welfare

Statutory Instruments

Social welfare (consolidated contributions and insurability) (amendment) (Defence Forces) regulations, 1997
S.I 154/1997
Commencement Date:6.04.97

Social welfare (consolidated payments provisions) (amendment) (household budgeting) regulations, 1997
S.I 156/1997
Commencement Date: 27.03.97

Social welfare (consolidated contributions and insurability) (amendment) (no 2) (refunds) regulations, 1997
S.I 291/1997
Commencement Date: 18.06.97

Social welfare (miscellaneous control provisions) regulations, 1997
S.I 155/1997
Commencement Date: 1.04.97

Social welfare (no 2) act, 1995 (sections 2, 3, 4, 5, 6, 7, 8, 9, 10(1) and 10(2)) (commencement) order, 1997
S.I 194/1997
Commencement Date: 21.04.97

Social welfare act, 1997 (section 32) (commencement) order, 1997
S.I 161/1997
Commencement Date: 8.04.97

Social welfare act, 1997 (section 24) (commencement) order, 1997
S.I 162/1997
Commencement Date:10.04.97

Social welfare act, 1996 (sections 20 and 28) (commencement) order, 1997
S.I 195/1997
Commencement Date: 21.04.97

Succession

Dunne v. Heffernan
Supreme Court: Hamilton C.J., O'Flaherty J., Denham J., Barrington J., **Lynch J.**
26/11/1997

Will; grant of probate; removal of executrix; administration of estate; whether appellant should be removed as executrix of estate; grounds for removal; conduct of executrix; conflict of interest; ss. 26(2) and 27(4) Succession Act, 1965
Held: No grounds to justify removal of appellant as executrix.

Article

Recent developments in probate and succession law
Pilkington, Teresa
1997 3(2) BR 58

At a Glance

Court Rules

Rules of the Superior Courts (no 3), 1997
S.I 343/1997
Commencement Date: 1.09.97

Rules of the Superior Courts (no 4), 1997
S.I 344/1997
Commencement Date: 1.09.97

Acts of the Oireachtas 1997

Information compiled by Sharon Byrne, Law Library, Four Courts, Dublin 7.

1/1997 - Fisheries (commission) Act, 1997
signed 12/02/1997
commencement on signing

2/1997 - European Parliament Elections Act, 1997
signed 24/02/1997
commenced 21/04/1997 by S.I. 163/1997

3/1997 - Decommissioning Act, 1997
signed 26/02/1997

4/1997 - Criminal Justice (miscellaneous provisions) Act, 1997
commenced in part on 04/04/1997

5/1997 - Irish Takeover Panel Act, 1997
commences in part 14/04/1997 by S.I. 158/1997
remainder commences 01/07/1997 by S.I. 255/1997

6/1997 - Courts Act, 1997
commenced on signing 20/03/1997

7/1997 - Dublin Docklands Development Authority Act, 1997
commences in part 27/03/1997
remainder commences 01/05/1997 by S.I 135/1997.

8/1997 - Central Bank act, 1997
commences 09/04/1997 by S.I.150/1997

9/1997 - Health (provision of information) Act, 1997
commenced 01/04/1997

10/1997 - Social Welfare Act 1997
commenced in part in act
commenced in part by S.I. 161/1997 (08/04/1997)
commenced in part by S.I. 250/1997 (04/06/1997)
commenced in part by S.I. 248/1997 (09/06/1997)

11/1997 - National Cultural Institutions Act, 1997
commenced in part by S.I. 222/1997 (02/06/1997 & 01/01/1998)

12/1997 - Litter Pollution Act, 1997
commenced 01/07/1997 by S.I. 213/1997

13/1997 - Freedom of Information Act
signed 21/04/97

14/1997 - Criminal Law Act, 1997
commences 22/08/1997

15/1997 - Credit Union Act
commenced in part by S.I. 403/1997

16/1997 - Bail Act
to be commenced by.S.I.

17/1997 - Committees of the Houses of the Oireachtas (compellability, privileges and immunities of witnesses) Act
signed 5.05.97

18/1997 - Family Law (miscellaneous provisions) Act,
signed 05.05.97

19/1997 - International Development Association (amendment) Act, 1997
signed 07.05.97

20/1997 - Organisation of Working Time Act
sub-section 3 to be commenced by S.I.
remainder to commence 21/04/1998

21/1997 - Housing (miscellaneous provisions) Act
commenced 01/07/1997 by S.I. 247/1997

22/1997 - Finance Act
commenced in part by S.I. 313/1997

23/1997 - Fisheries (amendment) Act
to be commenced by S.I.

24/1997 - Universities Act
commenced by S.I. 254/1997

25/1997 - Electoral Act
commenced by S.I.245/1997 & 233/1997

26/1997 - Non - Fatal Offences Against the Person Act
signed 19.05.97

27/1997 - Public Service Management (no.2) Act
signed 19.05.97

28/1997 - Chemical Weapons Act
commenced 01/07/1997 by S.I. 269/1997

29/1997 - Local Government (financial provisions) Act
commenced by S.I. 263/1997 (apart from s7)

30/1997 - Youth Work Act
commenced 19/06/1997 by S.I. 260/1997

31/1997 - Prompt Payment of Accounts Act
commences 02/01/1998 by S.I. 239/1997

32/1997 - ICC Bank Act
commenced 21/05/97

33/1997 - Licensing (combating of drug abuse) Act
commenced 21/06/1997

34/1997 - Hepatitis C Compensation Tribunal Act
to be commenced by S.I.

35/1997 - Registration of title (amendment) act, 1997
signed 16/07/1997

36/1997 - Interperation (amendment) act, 1997
signed 04/11/1997

37/1997 - Merchant shipping (commissioners of Irish lights) act, 1997

Seventeenth amendment of the Constitution act, 1997
signed 18/11/1997

Government Bills in Progress

Information compiled by Sharon Byrne, Law Library, Four Courts, Dublin 7.

Air navigation and transport (amendment) bill, 1997
Committee - Dail

Arbitration (international committee) bill, 1997
Committee - Dail
Children bill 1997
Passed in Dail

Courts Service bill, 1997
1st stage - Dail

Court services (no2) bill, 1997
1st Stage - Seanad

Criminal justice bill, 1997
1st Stage - Dail

Europol bill, 1997 -
Passed in Dail

Electoral (amendment) bill, 1997
1st stage - Dail

Irish film board (amendment) bill, 1997
Committee - Dail

Local government (planning and development)(amendment)(no.2) bill, 1997
1st stage - Seanad

Minister for arts, heritage, gaeltacht & the islands (powers & functions) bill, 1997
Committee - Dail

Protection of workers (shops) bill, 1997
2nd Stage - Dail

Scientific & technological education (investment) fund bill, 1997
1st Stage - Seanad

Taxes consolidation bill, 1997
committee - Dail

Tribunal of inquiry (evidence)(amendment) bill, 1997
1st Stage - Dail

Turf development bill, 1997
2nd Stage - Dail

Private Members Bills in Progress

Eighteenth amendment of the constitution bill, 1997
Committee - Dail

Court officers (amendment) bill, 1997
2nd stage - Dail

Abbreviations

BR = Bar Review
CLP =Commercial Law pratitioner
CPLJ = Conveyancer & Property Law Journal
DULJ =Dublin University Law Journal
GILSI =Gazette of the Incorporated Law Society of Ireland
ICLR = Irish Competition Law Reports
IFLR = Irish Family Law Reports
ILT =Irish Law Times
IPELJ =Irish Planning and Environmental Law Journal
ITR =Irish Tax Review
JISLL = Journal of Irish Society of Labour Law
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

Nervous Shock and the Secondary Victim

KEN BREDIN, Barrister

After a lengthy period of little or no judicial consideration of the principles of recovery in respect of "nervous shock", the decision of the Supreme Court in *Kelly v Hennessy*[1] has brought the matter to the fore once more. The purpose of this article is to examine the principles upon which a person who is *outside the zone of physical danger* created by the defendant's negligence, 'the secondary victim', may recover damages for nervous shock arising from that negligence. At the outset, however, it is important to emphasise that the term "nervous shock" is an unfortunate misnomer. Its use wrongly suggests that damages may be recovered for the immediate and transient response to an unpleasant stimulus that is, in colloquial terms, "shock". On the contrary, any cursory examination of the case-law in this area quickly reveals that "recognisable psychiatric illness" rather than "shock" is the gist of the action.

> "*Shock by itself is not the subject of compensation, any more than fear, or grief, or any other human emotion occasioned by the defendant's negligent conduct. It is only when shock is followed by recognisable psychiatric illness that the defendant may be held liable*".[2]

It seems clear therefore that grief, distress, sadness and worry that flow from injury or misfortune befalling another are outside the scope of damages in an action for nervous shock. Similarly feelings of deprivation or loss or the difficulty, stress and strain involved in adjusting to a 'new' life are not cognisable in damages.[3] Whilst it is accepted that the inability of a third party to recover in these respects is well established, it nevertheless serves to emphasise the rather anomalous fact that recovery in respect of psychiatric injury may be allowed.

A further anomaly is that it would seem that the psychiatric illness of which the plaintiff complains *must be induced by shock*. In a passage which was quoted with approval in *Kelly v Hennessy* it was noted that:

> "*A plaintiff may recover only if the psychiatric illness is the result of physical injury inflicted on him by the defendant or is induced by 'shock'. Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant's carelessness*".[4]

Accordingly, psychiatric injury which cannot be said to be "shock-induced" cannot be the subject of compensation. For example, a spouse who is worn down caring for a tortiously injured husband or wife and who suffers psychiatric injury as a result goes without compensation. Similarly, a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric injury as a result has no claim against the tortfeasor liable to the child. Crucially it would seem that grief so extreme as to cause psychiatric illness cannot give rise to liability in damages.[5] Again, it is not suggested that the requirement that shock be the central element in the chain of causation is anything other than well established. However, it does emphasise once more the unusual and somewhat anomalous nature of the law of nervous shock.

There is also some suggestion that damages in respect of nervous shock can only arise where the trauma or shock is sustained as a result of the death, injury or peril of someone other than the tortfeasor himself. In *Kelly v Hennessy* Hamilton CJ noted that "*the nervous shock sustained by a plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff*".[6] Two brief points in this regard should perhaps be made. First, it has been suggested that where a third party suffers nervous shock by reason of an accident where the endangered or injured person is the negligent tortfeasor himself, damages will not be recoverable.[7] If, indeed, any such limitation exists in Irish law, it must surely be based on policy considerations, given that it cannot be said that the plaintiff's injury would never in fact be foreseeable or proximate. One should also note that this limitation is not without its practical difficulties, particularly if extended (as logically it must be) to cases of mere contributory negligence on the part of the primary victim. Secondly, it has also been suggested that nervous shock which is caused by the destruction of one's home or business, or the infliction of purely economic loss, cannot, as a matter of law, be a basis for a claim in respect of nervous shock. It was on this basis that Barron J concluded in *Phelan Holdings v Poe Kiely Hogan* that the plaintiff was not entitled to recover damages for anxiety and depression he sustained by reason of the defendant solicitor's breach of duty and conflict of interest.[8] Again, if in fact any such limitation exists, it would have to be rooted in policy considerations, although foreseeability would in any event present a considerable barrier to a plaintiff in such circumstances.

Finally, it seems clear that the plaintiff must establish, at the very least, that injury in the form of nervous shock was reasonably foreseeable.[9] In other words, a shock inducing recognisable psychiatric illness must be foreseen. A useful rule-of-thumb in this respect is to ask whether shock, which was so severe as might induce psychiatric illness, was foreseeable. Of course, provided any recognisable psychiatric illness is foreseeable, the particular pathological condition from which the plaintiff suffers need not be foreseen. In assessing whether or not injury was foreseeable, the court will act on the premise that the plaintiff was a person of normal fortitude and "ordinary phlegm".[10] Furthermore, in order to apply the test of reasonable foreseeability in this in-

stance, it is necessary to consider the matter with the benefit of hindsight and take account of what happened subsequent to the accident.[11]

A Duty of Care?

It is clear that in the context of a claim for damages in respect of nervous shock by a secondary victim the critical issue is whether or not any duty of care is owed by the defendant to the plaintiff. Under the general law of negligence the normal criteria on which this issue is determined are "*the proximity of the parties, the foreseeability of the damage, and the absence of any compelling exemption based on public policy*".[12] The Irish courts have consistently accepted that something more than reasonable foreseeability of damage is necessary in order to impose a duty of care. As such, the court must determine whether a sufficient relationship of proximity exists as between the parties. Inevitably, one suspects that the reasonableness or otherwise of imposing a duty of care impacts on this determination. The "absence of any compelling exemption based on public policy", on the other hand, involves powerful policy considerations which arise in exceptional circumstances so as to deny the plaintiff the right to recover damages. The immunity from suit of an advocate in respect of court or court-related work is one such example. Nevertheless it is clear that:

> "*Only in exceptional cases will the court deny a right of action to a person who has suffered loss on the ground that it would not be in the public interest to allow it*".[13]

In many cases, of course, the existence of proximity and foreseeability, and the absence of negativing policy considerations need not be separately considered by the court, as the existence of a duty of care will be patently obvious. For instance, a doctor clearly owes a duty of care to his patient. In other cases, however, the existence of a duty of care is very much at issue. As I have stated earlier, one such instance is where a person who is outside the zone of physical danger created by the defendant's negligence claims damages in respect of nervous shock. It cannot be that such a person can benefit vicariously from a breach of duty to another (ie. the primary victim).[14] Accordingly, he or she must establish an independent duty to take reasonable care to avoid causing him or her injury by shock.

The British Approach

In *McLoughlin v O'Brien*[15] two broad approaches to the question of whether such a duty of care arose emerged. Lord Wilberforce was of the view that because 'shock' by its nature was capable of affecting so wide a range of people, there existed "*a real need for the law to place some limitation on the extent of admissible claims*".[16] At the margin, the boundaries of a man's responsibility for acts of negligence had to be fixed as a matter of policy. Therefore in deciding such claims the court was obliged to consider the class of persons whose claims should be recognised, the proximity in time and space to the incident in question, and the means by which the shock was communicated. Whilst no precise definition of these elements was advanced, a restrictive interpretation was clearly envisaged. Furthermore, each element was seen to constitute an individual and independent barrier which a plaintiff was obliged to satisfy. By contrast Lord Bridge was unable to accept that any policy to restrict recovery in these instances was justified by cogent and readily intelligible considerations, or was capable of defining the appropriate limits of liability by reference to factors which were not purely arbitrary. He saw a defendant's duty as resting solely on "reasonable foreseeability", which was to be adjudicated on a case-by case basis. Whilst the factors referred to in Lord Wilberforce's judgment were clearly relevant to such a determination, "*to draw a line by reference to any of these criteria must impose a largely arbitrary limit of liability*"[emphasis added][17]. In the circumstances Lord Bridge could not support such a policy driven approach.

Subsequently, in *Alcock v Chief Constable of South Yorkshire Police*[18] the House of Lords unanimously accepted the criteria suggested by Lord Wilberforce for determining claims in respect of nervous shock by a secondary victim. First, it was noted that, in general, a plaintiff had to establish a close relationship with the primary victim. In this respect the court would examine whether "close ties of love and affection" existed. These were a matter for proof in each individual case, although a rebuttable presumption of their existence for certain relationships would arise (ie. husband and wife, parent and child). In *Alcock* itself a number of relationships, including those between siblings, were found not to involve such close ties of love and affection, and were therefore not within the reasonable contemplation of the tortfeasor. Secondly, proximity to the accident or its immediate aftermath in both time and space was necessary. In this context the identification of a body in a temporary mortuary some nine hours after the Hillsborough tragedy was insufficiently proximate. Thirdly, it was suggested that in general 'shock' had to be communicated by seeing or hearing the event or its immediate aftermath. In this respect it was doubted whether mere communication of news of the disaster by a third party could be a sufficient basis on which to ground a claim. It was held, moreover, that a simultaneous television broadcast of the disaster which failed to show "*suffering of recognisable individuals*" did not provide the necessary element of direct visual perception, although their Lordships were not prepared to rule out the possibility of circumstances arising where such broadcasts might suffice.

Of particular interest is the manner in which the House of Lords saw itself as applying these criteria. Whereas Lord Wilberforce in *McLoughlin v O'Brien* appeared to consider them as overt policy limitations which applied over and above any question of foreseeability and proximity, a majority of the Law Lords in *Alcock* seemed to view themselves as merely applying the essential concept of proximity to the matter. With respect, this analysis must be doubted, given that the determination of 'proximity' ordinarily involves a value judgment based on a consideration of all relevant factors. Whilst a natural hierarchy may inevitably arise in respect of those factors, they are not seen to have any *pre-determined* weight, and may need to be balanced against each other. In this context the imposition of three individual and somewhat rigid criteria which a plaintiff must satisfy seems inconsistent with the traditional understanding of the concept of 'proximity' and the manner in which it is determined. One must conclude, therefore, that *Alcock* represents a decision

which, for policy reasons, imposes explicit limitations on the right to recover damages for nervous shock, albeit in the guise of merely requiring proximity. Indeed as Lord Oliver frankly admitted:

> "*'Policy', if that is the right word, or perhaps more properly, the impracticability or unreasonableness of entertaining claims to the ultimate limits of the consequences of human activity, necessarily plays a part in the court's perception of what is sufficiently proximate*".[19]

The Irish Approach

It is clear that the Irish courts have rejected the policy driven approach favoured by their British counterparts. In *Mullally v Bus Eireann* Denham J noted that if her determination on liability in favour of the plaintiff caused commercial concern then "*that is a matter for another place, where a policy can be established in the law*".[20] She concluded that there was no bar in law or under the Constitution to the plaintiff's claim. Similarly in *Kelly v Hennessy* Hamilton C.J., speaking for the majority, stated that there was no public policy that the plaintiff's claim, if substantiated, should be excluded. He cited with approval the dicta of Lord Russell in *McLoughlin v O'Brien* who stated:

> "*But in this case what policy should inhibit a decision in favour of liability to the plaintiff? Negligent driving on the highway is only one form of negligence which may cause wounding or death and thus induce a relevant mental trauma in a person such as the plaintiff. There seems to be no policy requirement that the damage should be on or adjacent to the highway. In the last analysis any policy consideration seems to be rooted in a fear of the floodgates opening, the tacit question: what next? I am not impressed by that fear - certainly not sufficiently to deprive this plaintiff of just compensation for the reasonably foreseeable damage done to her. I do not consider that such deprivation is justified by trying to answer in advance the question posed 'what next?' by a consideration of relationships of the plaintiff to the sufferers or deceased, or other circumstances; to attempt in advance solutions, or even guidelines, in hypothetical cases may well, it seems to me, in this field, do more harm than good*".[21]

It would appear, therefore, that the Irish courts will not attempt, as a matter of public policy, to limit in advance claims for nervous shock. The disenchantment with public policy in this instance seems to be rooted in a healthy scepticism for the 'floodgates argument' coupled with an awareness of the arbitrary and capricious effect that such an approach might have. Accordingly relevant factors, such as the relationship between the plaintiff and the primary victim, will not be elevated to the status of inflexible criteria which a plaintiff must individually satisfy in order to recover damages. This does not mean of course that these factors are of no relevance or import. On the contrary a balanced consideration of them will be of singular importance in determining whether or not a duty of care exists. The essential difference is that these factors are considered on balance, not separately, and do not have any predetermined weight.

On the other hand, whether the court will approach the matter on the basis of reasonable foreseeability *simpliciter*, or on the alternative basis of foreseeability and proximity is not entirely clear. In *Mullally v Bus Eireann* the plaintiff's husband and children were seriously injured in an accident caused by the defendant's negligence. The plaintiff, who was not at the scene of the accident, received news of it from a third party. She journeyed to various hospitals in Limerick, where she saw her husband and her children in an appalling condition. As a result of her trauma the plaintiff developed post-traumatic stress disorder. Denham J concluded:

> "*The shock of the plaintiff was foreseeable. The duty of care of the defendants extends as to injuries which are reasonably foreseeable. Thus the defendants had a duty of care to the plaintiff*".[22]

The suggestion, therefore, is that Her Lordship applied a criterion of reasonable foreseeability *simpliciter* to the matter. Although the close relationship between the plaintiff and the primary victims and her witnessing of appalling scenes in a hospital that resembled a war zone were clearly important factors in the decision of Denham J, this does not necessarily mean that some notion of proximity was being applied. As Lord Bridge recognised in *McLoughlin v O'Brien*, these are also factors which will impact on the question of reasonable foreseeability.[23]

It is arguable that in *Kelly v Hennessy* a majority of the Supreme Court adopted a similar approach. Again the plaintiff's husband and daughters were involved in a serious accident caused by the defendant's negligence. On receiving news of the accident the plaintiff immediately suffered shock and commenced vomiting. Her trauma was "*gravely aggravated*" by the scenes of appalling injury she immediately witnessed thereafter in Jervis Street Hospital. As a result the plaintiff developed psychiatric illness. Speaking for the majority Hamilton CJ stated:

> "*If a plaintiff wishes to recover damages for negligently inflicted nervous shock he must show that the defendant owed him or her a duty of care not to cause him reasonably foreseeable injury in the form of nervous shock*".[24]

The question of reasonable foreseeability was then examined in some detail. Having noted that the plaintiff had come upon the immediate aftermath of the accident and that her ties with her family "*could not have been closer*", the Chief Justice concluded that she was entitled to recover damages, and that the appeal must be dismissed.

The difficulty with adopting a criterion of reasonable foreseeability *simpliciter* is that "*the general conception of relations giving rise to a duty of care*" as postulated by Lord Atkin in *Donoghue v Stevenson*[25] has traditionally been understood to require something more than reasonable foreseeability. Indeed, the essential concept of 'proximity' is well established in other areas of negligence, as *Purtill v Athlone UDC*[26] and *McNamara v ESB*[27] demonstrate. Furthermore, *Ward v McMaster*[28] appears to suggest that the test of foreseeability and proximity which, in the absence of a compelling exemption based on public policy, determines the existence of a duty of care, is one of general application to the tort of negligence. Whilst it is not

suggested that the actual result will in many cases differ simply because the matter is approached on the basis of foreseeability alone, it is conceptually a distinct and different test to require, in addition, proximity. It could also be said that the relationship between the plaintiff and the primary victim, the proximity to the accident or its aftermath in time and space, and the means by which the shock was communicated are more appropriately classified as factors of proximity.

It is arguable in any event that *Kelly v Hennessy* does in fact apply the concept of proximity to the matter. Having quoted extensively from the central passage in *Donoghue v Stevenson*, Hamilton CJ stated:

> "*There is no doubt but that nervous shock and a psychiatric injury induced by it are reasonably foreseeable consequences of the appellants negligence in this case. Nor is there any doubt but that the respondent came within the appellants' duty of care*" [emphasis added].[29]

It might therefore be suggested that the majority judgment accepted that the existence of a duty of care is not determined simply on the basis of reasonable foreseeability, but also involved the concept of proximity. It is also worth noting that Denham J clearly considered proximity to be of central importance to her decision in this case. Having noted that no issue of foreseeability arose, she stated that the case turned on the issue of proximity. Her Lordship then proceeded to examine the proximity of relationship between the plaintiff and the primary victims, the proximity in time and space to the scene of the accident, and the question of when and how the psychiatric illness was induced (which was referred to as "temporal proximity"). Ultimately she concluded that there was credible evidence on which the Trial Judge was entitled to find for the plaintiff.

Future Developments

Given the divergence in approach between the Irish and British courts to the recovery of damages for nervous shock, judicial decisions of the latter cannot be regarded as convincing precedents in this jurisdiction. Nevertheless, an examination of those authorities do indicate some of the difficult questions which may arise when the Irish courts are faced with actions of less compelling circumstances. Take for example the situation of an "ordinary bystander" who witnesses the accident but has no relationship with the primary victim or victims. Can it be said that a duty of care is never owed to such a person ?[30] It would seem that the Irish courts will not automatically exclude claims of this nature, but will instead consider whether "shock" to a person of normal fortitude in the position of the plaintiff was reasonably foreseeable. Of course the absence of a relationship with a victim and the requirement that foreseeability be determined on the basis of "ordinary phlegm" will, in many cases, mean that the defendant has no liability. If, however, the circumstances of the accident were particularly horrific, one might suggest that such a claim would have reasonable prospects of success. The matter becomes more complicated where the bystander has some connection with the victim. Suppose, for example, the plaintiff is an acquaintance or work colleague who periodically socialised with the victim. Could that fact, coupled with the proximity to the accident, be sufficient to enable him or her to recover ? In Scotland it was held in *Robertson v Forth Road Bridge Joint Board* that employees were assumed to be of sufficient fortitude to enable them to endure the shock caused by witnessing accidents to their fellow employees.[31] Of course, given the divergence in approach, the Irish courts are less likely to adopt such a presumption.

Difficult questions also arise in respect of the means by which the shock was communicated, and the proximity of the plaintiff to the accident. What will be the law's response if, for example, the plaintiff is not privy to scenes of appalling injury in the aftermath of the accident, but merely identifies the body in the mortuary some hours later ?[32] It is worth noting that it is now well established that it is not necessary that the plaintiff should witness the aftermath at the scene of the accident as "*liability cannot rationally be made to depend upon a race between a spouse and an ambulance*".[33] Can it therefore rationally depend on the fact that there is no aftermath to witness, because the victim is already dead by the time the plaintiff reaches the hospital? Is that not a race between a spouse or parent and the forces of nature? It is difficult to see how an examination of the difference in time between communication of news of the disaster and confirmation of death or injury can greatly assist in the matter. After all, *Mullally v Bus Eireann* itself involved a somewhat protracted process of traumatisation. Surely the impact of the trauma is foreseeably no less simply because the plaintiff must face the sickening confirmation of death rather than scenes of appalling injury. In any event, one might well conclude that the identification of a body in a mortuary is part of the aftermath of accident. Moreover, if the law accepts that a parent or spouse is entitled to recover in this instance it is difficult to see how it can respond any differently to one who, on being informed of the accident, is so devastated that he or she cannot (or is not allowed to) attend at the aftermath. After all, it must be accepted that such an occurrence is as foreseeable as any other. Of course, in both instances it might be argued that the failure to actually perceive the aftermath means that there is less proximity between the parties. On the other hand, this might be outweighed by the fact that the plaintiff was "*a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene*"[34] although circumstance conspired against him or her doing so.

It is equally unclear how the courts will respond to the issue of simultaneous television broadcasts. In *Alcock v Chief Constable of South Yorkshire Police* the House of Lords rejected any suggestion that the television pictures of the Hillsborough disaster which were later followed by confirmation of death were a sufficient basis for claims in respect of nervous shock by relatives of the victims. It is difficult to see how the Irish courts could adopt this approach if it was accepted that mere communication of news of the accident followed by identification of the body in the mortuary is a sufficient basis for a claim. If anything the impact of television pictures of the disaster followed by confirmation of death or injury is greater. Furthermore, it should be noted that the reasoning of the House of Lords in *Alcock* is deeply unconvincing. To deny recovery on the basis that the broadcasts did not show "*suffering of recognisable individuals*" can scarcely be accepted, given that it

was patently obvious that terrible suffering was being endured. The fact that the plaintiff could not, at that time, know for definite that his or her loved one endured this suffering seems immaterial. This, after all, was subsequently confirmed in each case. In any event, it is suggested that it would not be prudent to advance a rigid or dogmatic approach to the issue of television broadcasts. One cannot but suspect that in this instance in particular the courts need a certain flexibility to deal with the matter as the circumstances of the case necessitate.

Conclusion

The rejection by the Irish courts of an approach that is defined by policy considerations is to be welcomed. It is suggested that in the final analysis there is no compelling policy considerations justifying such an approach, furthermore, the imposition of rigid criteria governing the recovery of damages in this instance would be both arbitrary and unfair. Even still, the factual parameters to recovery are in no sense fully explored. It is anticipated that our courts will have some difficult choices to make when cases of less compelling circumstance arise for decision. This is particularly so where the plaintiff cannot be said to have perceived the event or its aftermath, or does so through the medium of a television broadcast.

1 [1996] 1 ILRM 321

2 *Page v Smith* [1995] 2 All ER 736 at 760 per Lord Lloyd. These sentiments were affirmed by the Supreme Court in *Kelly v Hennessy*, supra. at 325 and 335.

3 *Kelly* it was argued that the plaintiff's anxiety and depression was merely an ordinary human reaction to the tragedy that had befallen her family and did not constitute psychiatric illness. On the facts the Supreme Court rejected this contention.

4 *Jaensch v Coffey* (1984) 155 CLR 549 at 565 per Brennan J. In *Kelly* the defendant argued that the plaintiff's condition arose not from any immediate trauma, but stemmed from grief, stress and worry arising from her family's condition. On the facts this contention was rejected.

5 See *State(Keegan) v Stardust Compensation Tribunal* [1987] ILRM 202 at 212 per Finlay CJ.

6 Supra, at 326.

7 *Jaensch v Coffey*, supra, per Deane J. This dictum was cited with approval by the Chief Justice in *Kelly v Hennessy*, supra.

8 H.C. 1992 No.5377P (Barron J) 15 October 1996. See, however, *Owens v Liverpool Corporation* [1939] 1 KB 395 and *Attia v British Gas* [1988] 1 QB 304.

9 *Kelly v Hennessy*, supra, at 326/327 per Hamilton CJ.

10 *Page v Smith* [1995] 2 All ER 736 at 760 per Lord Lloyd.

11 *Kelly v Hennessy*, supra, at 340 per Denham J.

12 *Ward v McMaster* [1988] IR 337 at 349 per McCarthy J. See also *Madden v Irish Turf Club* [1997] 2 ILRM 148.

13 *Walker v Ireland*, H.C. 1995 No.4114P (Costello J) 11 April 1997

14 *Palsgraf v Long Island Railroad Co.* 284 NY 339.

15 [1982] 2 All ER 298.

16 Supra, at 304.

17 Supra, at 319.

18 [1991] 4 All ER 907

19 Supra., at 925.

20 [1992] ILRM 722 at 731. It is interesting to note that in *Kelly v Hennessy* Denham J declined to choose between the general and more restricted approach in the common law, noting that it was not necessary for decision in that case. Instead, she was content to isolate factors which were relevant in law and apply them to the facts of the case. Nevertheless, the tenor and effect of her judgment appears to be that liability is to be determined as a matter of principle, based on reasonable foreseeability and proximity.

21 [1982] 2 All ER 298 at 310.

22 Supra, at 731.

23 Supra, at 319.

24 [1996] 1 ILRM 321 at 326. Egan J concurred in this judgment.

25 [1932] AC 562 at 580.

26 [1968] IR 205.

27 [1975] IR 1.

28 [1988] IR 337.

29 Supra, at 328.

30 In *Alcock* a majority of the House of Lords refused to completely exclude the possibility of such a claim being successful. However, in *McFarlane v EE Caledonia* [1994] 2 All ER 1 the Court of Appeal concluded that as a matter of principle and policy such claims should not be entertained.

31 [1996] SLT 263. Liability would be imposed, however, where the defendant's negligence placed the employee involuntarily in the position of considering that he or she was responsible for the accident - *Dooley v Cammell Laird* [1951] 1 LL.L.Reps 271.

32 *Hevican v Ruane* [1991] 3 All ER 65. See also *Ravenscroft v Rederiaktiebolaget Transatlantic* [1991] 3 All ER 73. In both cases the plaintiffs succeeded in their claims. However, in *Alcock*, supra at 915, 917 and 932 it was seriously doubted whether these decisions were correct.

33 *Jaensch v Coffey* (1984) 155 CLR 549 at 578 per Brennan J.

34 *McLoughlin v O'Brien* [1982] 2 All ER 298 at 305 per Lord Wilberforce.

Recent Developments In Criminal Law

IVANA BACIK, Barrister
Reid Professor of Criminal Law and Criminology, Trinity College, Dublin

Criminal practitioners and others will be well aware that an unprecedented amount of new criminal legislation has been enacted over the past year or so. Some of the changes thus made are certainly to be welcomed, since so much of our criminal law is long overdue for reform. However, if a more thoughtful and considered approach to reform had been taken by the legislature, it would undoubtedly have improved the quality of the new legislation. Such an approach would also have provided those obliged to implement the law with greater opportunity to become familiar with the new changes. Further, in the rush to introduce new laws, the opportunity to consolidate and perhaps codify existing principles of criminal law and procedure has been overlooked. Indeed, much of the new legislation lacks consistency and has already given rise to problems of interpretation in practice.

Alongside this new legislation, and in some measure due to it, several judicial decisions in criminal cases have recently been handed down which have made a substantial impact on criminal practice. It is proposed, therefore, in dealing with recent changes in the criminal law, to examine both legislative and judicial developments over the past year. In a limited space it is of course impossible to give a comprehensive overview of such developments, but it is intended to provide an overview of those issues which appear to be most significant.

Among the criminal law reform statutes passed within the last year or so, the *Non-Fatal Offences Against the Person Act, 1997,* stands out, as it has introduced far-reaching changes to the substantive criminal law; while the *Bail Act, 1997,* the *Criminal Law Act, 1997,* and the *Criminal Justice (Miscellaneous Provisions) Act, 1997,* all make important changes in criminal procedure. The present Minister for Justice's recently announced *Criminal Justice Bill* will also introduce further substantial change in procedural terms, if it is passed.

Changes in Bail Law

The *Bail Act, 1997* was introduced following the Constitutional Amendment of November 1996[1]. When the Ministerial Order necessary to bring it into force is passed, the Act will allow a court, in considering whether to grant bail to a person accused of a "serious offence", to take account of the likelihood that the accused might commit a serious offence if allowed bail. Greater consideration of this Act is given elsewhere[2], but suffice it to say that, although the Bail Referendum was held in an atmosphere of great urgency, the political will to give it practical effect appears somewhat lacking.

General Procedural Change

The *Criminal Justice (Miscellaneous Provisions) Act, 1997,* by contrast, has attracted very little public or political attention. However, while it might best be described as a tidying-up exercise, it has made some noteworthy changes to District Court practice. For example, section 4 of the Act extends the periods of time for which it is possible to remand accused persons in custody; where both the accused person and the prosecutor consent, it is now possible for the Court to remand that person in custody for between fifteen and thirty days between court appearances. Section 6 provides that a certificate of arrest, charge and caution signed by the relevant garda will suffice as evidence of such arrest, charge and caution, and section 10 sets out a procedure whereby District Judges may grant search warrants in respect of serious offences of violence.

The *Criminal Law Act, 1997* makes more far-reaching procedural changes. Its primary purpose was to abolish the distinction between felony and misdemeanour, and, in relation to sentencing, to abolish the concepts of penal servitude, hard labour and corporal punishment. These reforms are particularly welcome, as the continued retention of penal servitude as a possible sentencing option was no longer justifiable. Similarly, the old felony/misdemeanour distinction has long since ceased to have any practical significance, and often seemed designed purely to confuse the student, and make the job of the criminal law lecturer more difficult.

However, as with much of the recent statutory reform, these changes lack consistency with the broader scheme of the criminal law. Instead of felonies and misdemeanours, the Act introduces a new distinction, between "arrestable offences" and others (not defined). An "arrestable offence" is defined in section 1 as being an offence punishable by imprisonment for a term of five years or more, and sections 4 and 6, for example, provide that the powers to arrest without warrant, and to enter premises to effect an arrest, only apply in relation to such offences. However, this new category of offence appears to have been introduced without regard to the provisions of other criminal statutes and of the Constitution.

First, no guidance is given as to when an arrestable offence may be treated as a "minor offence" under Article 38.2 of the Constitution[3]. Indeed, section 8 of the *Criminal Justice (Miscellaneous Provisions) Act, 1997,* which sets out the procedure whereby the District Court may try certain offences summarily, makes no reference to the notion of "arrestable offences", using only the constitutional definition of "minor offence" as a measure for the court to use.

Secondly, the Bail Amendment and the *Bail Act, 1997,* by contrast, use the term "serious offence", defined as meaning an offence punishable by five years or more imprisonment - a definition also used in relation to "arrestable offences" in the *Criminal Law Act, 1997.*

The new Act itself betrays some sign of confusion, by referring in section 7 both to "indictable offences" and "arrestable offences", neither explaining why such a distinction is made, nor what the difference between indictable and arrestable offences may be.

The lack of a coherent overall plan to the classification of offences causes unneccesary confusion in practice. Although in England the position used to be similar, following recommendations for reform in 1975[4], there are now only three classes of offences in existence there; offences triable summarily only, offences triable only on indictment, and offences triable either way[5]. It is argued that the present position in Irish law is most unsatisfactory, and that similar reform is required here.

The way in which offences may be classified must be clarified, in order to give the criminal law some logic as an overall scheme. It is just a pity that the opportunity to establish clear definitions was not taken up in 1997. Instead, we are left with yet another way in which to categorise different types of offence. This lack of consistency and logic is apparent throughout our criminal law system. The argument for codification of the criminal law more generally has already been made elsewhere[6], but if anything, is strengthened by the opportunity for further confusion presented by these recent changes.

The Non-Fatal Offences Against the Person Act, 1997 (the NOAPA)

The effect of this Act has, similarly, been to generate great confusion in practice. While it introduced some important and long-overdue reforms to the substantive criminal law, the Act received most public attention because of the new "syringe offences" which it created. Its reforming provisions, sections 2 to 5, drastically alter the law on assault, largely replacing the old 1861 definitions of assault with those recommended by the Law Reform Commission[7]. Sections 6 to 8 introduce the new offences involving the use of syringes, while other sections introduce new offences of coercion, harassment, and endangering traffic. Other notable provisions include section 23, which enables a minor aged 16 years or older to give valid consent to any surgical, medical or dental treatment; and section 24, which abolishes the common law rule under which teachers were immune from criminal liability in respect of physical chastisement of their pupils.

Under the new *NOAPA*, the offence of common assault and the concept of battery are both abolished. Instead, section 2 of the Act creates a new offence of assault, defining assault to mean either the direct or indirect application of force or impact to the body of another; or threatening another with such force or impact. Sections 3 and 4 of the Act replace the old definitions used for more serious assaults, with the more straightforward concepts of "assault causing harm" or "serious harm". These provisions follow the recommendations made by the Law Reform Commission, and seem eminently sensible.

However, it is not the new definitions, but the procedural implications of the abolition of the old offences, which have caused greatest trouble. Section 28(1) of the *NOAPA* provides that: "the following common law offences are hereby abolished - (a) assault and battery, (b) assault occasioning actual bodily harm, (c) kidnapping, and (d) false imprisonment."[8] The problem is that this unequivocal abolition allows any persons charged with one of these common law offences which occurred before the Act came into force, and whose cases are still pending before the courts, to argue that the offence with which they are charged is no longer known to the law, and thus that the courts may not try them for an offence which has ceased to exist.

Normally, the abolition of offences only takes effect prospectively; that is, persons are prosecuted under the law as it stood on the date the offence was committed, even if it has subsequently changed. Section 21(1)(d) of the *Interpretation Act, 1937* makes express provision for this, but this 'saving' provision applies only to statutory offences. Thus, the abolition of the common law offences would appear to require some express 'saving' language, and the absence of such language may be seen as a grave procedural defect in the Act.

The issue of abolition of common law offences was considered by the courts in the context of sexual offences, in relation to section 2(1) of the *Criminal Law (Rape) (Amendment) Act, 1990,* which provides that "the offence of indecent assault... shall be known as sexual assault".

However, both the High Court and the Supreme Court have held that this section did not in fact effect an abolition of the common law offence of indecent assault. In *Doolan v. DPP*[9], O'Hanlon J described the 1990 Act as merely effecting a change to the penalty prescribed for indecent assault, without abolishing the offence itself.

The Supreme Court considered this issue in the later case of *DPP v. E.F.*[10], but reached the same conclusion, holding that the 1990 Act had caused the offence of indecent assault to become known as sexual assault, but that it had remained a common law offence subject to a statutory punishment.

Despite these authorities, it is arguable that the *NOAPA* abolition of common assault may be viewed differently by the courts. In *Doolan, O'Hanlon* J relied upon the continued existence of the common law offence of assault to justify his decision; while the Supreme Court's judgment was based upon the wording of section 2(1) of the 1990 Act, in particular the phrase "shall be known as...". The very language used in the 1990 Act implies that only the name of the offence was altered, and not the substance; in other words, that the legislature had not intended to abolish the offence itself.

In contrast, the wording used in section 28(1) of the *NOAPA* is unequivocally the language of abolition. There is no indication that the legislature merely intended to alter the name of the offence;

indeed, it may be inferred from the wording of the provision that the legislature wished to create an entirely new set of offences to replace the old common law ones. Unfortunately, the debates around the passage of the *NOAPA* offer no clarification on the issue, as the legislators focused almost entirely on the more newsworthy syringe offence provisions.

It will, therefore, be left to the courts to resolve the matter of how to deal with the many people who have been charged with one of the abolished common law offences which allegedly occurred prior to the enactment of the *NOAPA*. Since those persons may now argue that the offences with which they have been charged are no longer known to the law, proceedings in respect of all the alleged offences may have to be discontinued.

It is most regrettable that this flaw in the drafting has dominated the application of the *NOAPA*, because the principles behind the reform provisions may not have generated much publicity, but they will have far-reaching practical implications. No longer will generations of law students and practitioners have to wade through the provisions of the 1861 Act. Instead, the use of the clear and straightforward language recommended by the Law Reform Commission does represent a genuine attempt at thoughtful law reform. However, it should be said that the provisions of the Act which create new offences to deal with syringe attacks are far from straightforward.

The political motivation behind these provisions is clear, and they are both convoluted and cumbersome, creating a large number of different offences, such as intentionally injuring another by piercing their skin with a contaminated syringe, and placing or abandoning a syringe in any place so that it is likely to injure another. Extensive new powers are also given to the gardai to enforce these provisions, and to stop and search those whom they believe to be carrying syringes.

There is no doubt that the widespread use of syringes in robberies and burglaries is a particularly vicious recent phenomenon; but more time and thought should have been put into the drafting of the provisions intended to be used against such crimes. In short, the *NOAPA* could have represented a real blow for law reform, and provided a model for other modernising criminal legislation; but the political imperative dictated otherwise, and so the new syringe offences were included, and the Act displays signs of hasty drafting, while its procedural implications were overlooked at the drafting stage and thereafter, giving rise to confusion over the status of hundreds of assault cases currently before the courts.

Similar confusion has also been evident recently over the practical application of the *Criminal Justice (Drug Trafficking) Act, 1996,* in a recent case involving the incorrect detention under this Act of the suspects in a major cannabis haul[11]. Great confusion has also been generated by the *Devanney case,* in which the Supreme Court overturned an earlier High Court ruling which had led to thousands of summonses being thrown out on the grounds that the District Court clerks who had issued them had been invalidly appointed[12].

Future Proposed Changes

While these cases have been making headlines, so too have recent proposals for further change in the criminal justice system. First, the Minister for Justice has proposed a new *Criminal Justice Bill, 1997,* which provides, *inter alia,* for mandatory ten-year sentences for certain drugs offences. The introduction of the concept of mandatory minimum sentences is particularly alarming. While the Bill will allow for exceptions, for example where the accused pleads guilty, its operation would still hamper the exercise of judicial discretion and could foreseeably lead to severe injustice in individual cases. Moreover, the Bill makes no distinction between heroin and other drugs; so it is clearly foreseeable that ten year sentences may be routinely handed down for the supply of cannabis. At a time when there is growing international pressure for the decriminalisation of cannabis, and when an increasingly lenient view is taken in cases involving the possession of small amounts of cannabis, this would seem manifestly unjust.

Secondly, the recently launched Report of the Strategic Management Initiative on the Garda has also recommended substantial change in the criminal law, including a significant extension of the Garda's powers of detention and arrest, and some modification of the right to silence. Commenting on the Report, the Minister for Justice has promised that he will consider introducing some of these changes in another *Criminal Justice Bill,* to be published next year[13]. However, it is submitted that any such changes should be approached with extreme caution; recent events suggest that gardai are still not quite familiar with the new powers and procedures contained in existing legislation. Thus, it must be doubtful whether the provision of extra powers of this nature would be advisable.

Conclusion

At a time, therefore, when the operation of the criminal justice system appears to be in some crisis, and is the subject of mounting public criticism, it may be questioned whether it is wise for the Minister for Justice to be seeking to introduce yet more legislation, giving still greater powers to the gardai, and eroding further the rights of the defendant. Surely now, more than ever, is the time to attempt a consolidation and ultimately a codification, of the criminal law. ●

---

1. This added the following subsection to section 4 of Article 40 of the Constitution:
'Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person'.
2. Bacik, The Bail Act, 1997, Practice and Procedure' Issue 3, June1997, p.7.
3. Article 38.2 of the constitution provides: Minor offences may be tried by courts of summary jurisdiction
4. The Distribution of Criminal Business between the Crown Court and Magistrates' Courts (1975), Cmnd.6323, para 9.
5. These offences are regulated by the Magistrates' Courts Act, 1980.
6. Charleton, Criminal Law, Cases and Materials (1992), p.2.
7. Law Reform Commission, Report on Non-Fatal Offences Against the Person, Government Publications, Dublin, 1994.
8. This section, like most of the Act's provisions, came into effect on 19th August, 1997.
9. [1992] 2 IR 399.
10. Unreported, 24th February 1994.
11. See The Irish Times, inter alia, November 26 and 28,1997
12. Devanney. District Judge Shields, High Court, October 31. 1997; Supreme Court, November 28, 1997.
13. The Irish Times, November 27, 1997.

The Social Welfare and Taxation implications of A Personal Injuries Award

JACK HICKEY, Barrister

Introduction:

Once a trial Judge has assessed liability in a personal injuries action and has found in favour of the Plaintiff (even if only partially) there are a number of considerations that he or she must take into account in the assessment of damages. These considerations include:

I. Social Welfare Benefits.
II. Taxation (particularly in the assessment of loss of earnings).

SOCIAL WELFARE BENEFITS:

Section 2 of the Civil Liability (Amendment) Act, 1964 ("the 1964 Act") provides that in personal injuries actions (non-fatal) the following shall not be deducted.

(a) "Any sum payable in respect of the injury under any contract of insurance".

(b) "Any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the injury".

Notwithstanding this legislation, the Social Welfare (Consolidation) Act, 1993 ("the 1993 Act") provides that in assessing damages in personal injuries actions the trial Judge is obliged to deduct from the award the value of any rights which have accrued or probably will accrue to the Plaintiff in respect of certain benefits for a period of **five years** after the date of accrual of the cause of action. These benefits include:

1. In Road Traffic Accident cases - (non-fatal).
   - Disability Benefit (soon to be renamed Sickness Benefit).
   - Invalidity Pension (soon to be renamed Disability Pension).[1]
2. In Personal Injuries Actions (non-fatal) arising in the course of employment:
   - Injury Benefit.
   - Disablement Benefit.[2]
3. In fatal accidents
   - Death Grant for Funeral Expenses.[3]

In relation to the benefits which are still to accrue at the time of the hearing of the action, the trial Judge will deduct the present value of such future benefits.[4]

The legislation requires that if the amount of damages is to be reduced in any way, the amount of benefit received is to be deducted from the total damages which would have been recoverable.[5]

Example:

A Plaintiff was involved in an accident at work on the 1st December, 1995 and sustained serious injuries which prevented her from returning to work on a permanent basis. She applied to the Department of Social Welfare for Occupational Injury Benefit and received £62.50 per week for the statutory 26 week period.[6]

She was then assessed by the Department for Disablement Benefit and on the basis of her age (55) at the time of the accident, and her medical condition, was awarded the maximum per week of £88.20.[7]

At the hearing of the action on the 1st December, 1997 the trial Judge found the Plaintiff to have been 50% responsible for the accident. He awarded General Damages in the sum of £120,000 for pain and suffering past and future. The Plaintiff's nett loss of earnings past and future were assessed at £64,500.00. Her medical and travelling expenses came to £1,000.00 and the trial Judge assessed the figure of £22,500.00 for Injury Benefit and Disablement Benefit for a period of five years after the accident. The figures were worked out as follows:-

General Damages	£120,000.00
Special Damages	£ 65,500.00
Gross Award	£185,500.00
Deduction of Injury and Disablement Benefit	£ 22,500.00
TOTAL	£163,000.00
Deduction of 50% for contributory negligence	£ 81,500. 00
Therefore, Judgement in the sum of	£ 81,500. 00

In *O'Loughlin v. Teeling*, the Plaintiff was injured in a Road Traffic Accident in September 1985 and as a result of his injuries had not returned to work at the time of hearing of his case in April, 1988.[8]

He received Disability Benefit from the time of the accident and the trial Judge, McKenzie J. deducted that amount from his loss of earnings. McKenzie J. went on to consider the words "or probably will accrue" in assessing the amount of Disability Benefit that ought to be deducted from the future loss of earnings award for the period April 1988 to September 1990. He refused to make such deductions because all the medical evidence indicated that the Plaintiff was fit for light work.

He held;

> "In those circumstances it appears to me that the Social Welfare Department could, if confronted with the evidence, cut off Disability Benefit; therefore, I cannot say with any probability..... that beyond a couple of weeks from now he will be in receipt of such a Benefit".[9]

In *O'Sullivan v. Iarnrod Eireann* the Plaintiff was injured in an accident at work in September, 1989.[10]

Iarnrod Eireann were engaged in renewing the Waterford to Cork Railway line and the Plaintiff was employed as a part-time Plate Layer at the Mallow Depot. On the day of the accident, the Plaintiff and a fellow employee were carrying a 16ft. sleeper when the fellow employee slipped and accidentally thrust the sleeper in the direction of the Plaintiff causing him to sustain a serious back injury. He continued to work for a couple of weeks after the accident but could not continue thereafter and received Injury Benefit and then Disablement Benefit from the Department.

Morris J. held that the Defendant was 100% liable for the accident and awarded the Plaintiff £140,000.00 for pain and suffering (past and future). He went on to hold that because of the serious nature of the Plaintiff's back injury coupled with the fact that the Plaintiff left school aged 14, that he was unemployable and therefore entitled to damages for loss of earnings for the rest of his working life. He awarded the Plaintiff £115,000.00 damages for loss of earnings past and future. Counsel for the Defendant asked Morris J. to apply Section 75(1) of the 1993 Act so as to deduct Injury/Disablement Benefit from the loss of earnings award for the usual five year period. Counsel for the Plaintiff argued that there was no evidence that the Plaintiff would continue to receive Disablement Benefit and requested a deduction only be made from the date of the accident to the date of trial (four and a half years) and not the remaining six month period.

Morris J. rejected this argument holding:

> "At present the Plaintiff is in receipt of Disablement Benefit and has been so since his Occupational Injury Benefit ran out on the 24th March, 1990. There is no indication, so far as I am aware, of any intention on the part of the Department of Social Welfare to alter this status.... in my view the onus....lies on the Plaintiff to show that there is in the Department's contemplation an intention to alter status quo".[11]

Therefore, Morris J. deducted approximately £16,000.00 for Injury/Disablement Benefit and gave judgement in the sum of approximately £240,000.00.

Fatal Accidents:

Section 50 of the Civil Liability, 1961 ("the 1961 Act") provides that in assessing damages in fatal accidents account should not be taken of:-

(a) Any sum payable on the death of a deceased under any contract of insurance.

(b) Any pension, gratuity or other like benefit payable under statute or otherwise in consequence of the death of the deceased.

The Oireachtas sought to confirm this principle in Section 236 of the 1993 Act. This Section provides that in fatal accidents the following benefits are not deductible:-

- Survivors Pension.
- Widows (Non-contributory) Pension.
- Lone Parent Allowance.
- Orphan (Non-contributory) Pension.
- Child Benefit.

However, Section 75 sub-section 3 of the 1993 Act provides that in assessing damages in fatal injuries cases, the trial Judge "may" deduct from the award a Department of Social Welfare Grant in respect of funeral expenses.

In *Murphy v. Cronin* the Plaintiff's husband was killed in a Road Traffic Accident.[12]

He had not reached pensionable age and the rules of the pension to which he had been a contributor provided that in such an event a sum equal to his accumulated contributions, together with interest, was payable to his personal representative and that a sum equal to 25% of such contributions was payable to his widow. The Supreme Court held that the former payment was a "like benefit" and the latter was "a gratuity", hence, neither payment was deductible under Section 50 of the Civil Liability Act 1961. ("the 1961 Act").

Section 2 of the Civil Liability (Amendment) Act, 1964 and The Employers right to deduct.

In *Dennehy v. Nordic Cold Storage* the Plaintiff was injured in an accident at work and during his recuperation received a regular payment from his employer pursuant to a non-contributory income protection plan.[13]

He subsequently sued his employer for damages for personal injuries and also sought damages for loss of earnings. The employer was indemnified pursuant to a contract of insurance for income continuance payments.

Hamilton P. held that such a contract of insurance did not fall within the ambit of Section 2 of the 1964 Act and therefore deducted the money received from the assessment of damages for loss of earnings.[14]

In *Green v. Hughes Haulage Limited* the Plaintiff was seriously injured in a road traffic accident on the 10th June, 1991.[15]

She was employed as a Clinical Research Associate by Elan Corporation in Athlone. After a brief return to work in December, 1991 she informed her employers that she no longer felt fit to do the job and was made redundant. However, her employer had a Policy of Insurance with Irish Life called "An Employee Benefit Plan". This Plan contained a provision dealing with disability and provided where an employee was totally disabled for a continuous period of six months an income was to be paid equal to 75% of his salary at the date of disablement inclusive of Social Welfare Benefits. For partial disablement proportionate payment would be made.

Geoghegan J. had to decide whether such payments, which the Plaintiff was continuing to receive at the date of trial, ought to be deducted from her loss of earnings award. He examined the words "account shall not be taken of" and "any sum payable in respect of the injury from any contract of insurance" in Section 2(a). Geoghegan J. then examined Mr. Kerr's book "The Civil Liability Acts 1961-1964" which contained the only record of the decision of Hamilton P. in *Dennehy -v- Nordic Cold Storage"*. Mr. Kerr stated that Hamilton P. was prepared to apply the words "to the Plaintiff" into Section 2(a) after the words "payable".

Geoghegan J. observed that this was the author's own analysis of the Ruling of Hamilton P. and, doubting it, held;

> "It would seem to me more likely that as the contract in that case appears to have been simply a contract indemnifying the employer against a liability which the employer himself took on...(it) was not within the category of contracts

of insurance covered by Section 2."[16]

Geoghegan J. then pointed out that in the *Dennehy* case the contract was an Indemnity Contract and the employer was also the tortfeasor, whereas in the instant case, the contract was taken out by the employer for the benefit of persons such as the Plaintiff and that a different party was the tortfeasor. He then examined the provisions of the 1964 Act and stated that Section 2 was introduced to provide a corresponding statutory provision for personal injuries actions to Section 50 of the 1961 Act (dealing with fatal accident). He held that he could assume that the Oireachtas intended that Section 2 be interpreted in the same manner as Section 50 and held therefore that the Oireachtas would not have intended that the injured party had to be a party to the contract of insurance or that the injured party had to be the person paying the premium. He looked at English Case Law on legislation akin to Section 50 which had long since established that the statutory provision relating to non-deductibility of insurance monies applied whether or not the deceased was himself a party to the insurance contract.[17]

Geoghegan J. went on to hold that the words "under any contract of insurance" in Section 2 and in Section 50 had the same effect and therefore determined that the Oireachtas intended to apply to personal injuries actions the same Rules as already applied to fatal injuries actions.

In response to any criticism that it would be inequitable for the Plaintiff to receive full compensation for loss of earnings having already received significant monies under the Policy, his Lordship held that to be a beneficiary of such a Policy of Insurance was a prerequisite of the job. In support of this finding he cited McGregor on damages:-

> "The argument in favour of non-deduction is that, even if in the result the Plaintiff may be compensated beyond his loss, he has paid for the accident insurance with his own monies, and the fruits of this thrift and foresight should in fairness enure to his, and not the Defendant's, benefit".[18]

Geoghegan J. held therefore that the monies received by the Plaintiff under the Policy were protected by Section 2(a) of the 1964 Act and that therefore only the monies paid out to her by the Department of Social Welfare (between June 1991 and June 1996 in the form of Disability Benefit) were deductible from the Loss of Earnings award.

The following observations can be drawn from the decision of Geoghegan J.

(1) His Lordship's ratio is to the effect that where an employer takes out a Policy of Insurance as part of the consideration paid by him to his employee for the employee's services (as in this case), the monies paid to the employee thereunder are not deductible from his loss of earnings award in a Personal Injuries action against a third party tortfeasor.

(2) His Lordship's findings (obiter) are as follows:-

(I) Where an employer takes out a Policy of Insurance as outlined above, the monies paid thereunder to the employee are not deductible from his award of damages for Loss of earnings even if the employer is also the Defendant.

(II) That were an employer takes out a simple Policy of Insurance indemnifying him against some contractual undertaking to continue paying salary payments to an injured employee, such payments are deductible from the employee's Loss of Earnings award where he sues the employer for personal injuries.

Section 2(a) of the 1964 Act was also considered by Budd J. in a European Law context in *Van Keep v. Surface Dressing Limited* which I have analysed elsewhere.[19]

The Employees Contractual Duty to Re-imburse his Employer

Where an employer chooses to pay an employee during a period of absence from work due to an accident caused by a third party, he may, by agreement, require the employee to sue the third party for loss of earnings for the purposes of re-imbursing him.

In *McGuinness v. Reilly* the Plaintiff was injured in a road traffic accident in September 1987.[20]

She sustained a whiplash type injury to the facet joints and ligaments of her back. As a result of these injuries, she did not return to work until June, 1989. During that period she received payments (called Sick Pay) from her employer, the ESB, equivalent to her salary for most of that period. Morris J. held that the Defendant was entirely responsible for the accident and awarded the Plaintiff £35,000.00 in general damages.

Pursuant to the terms of her employment with the ESB she was entitled to the payments she received. However, shortly after her accident in September 1987 her employer required her to sign a document agreeing to refund the ESB for the advance payments. Morris J. held that notwithstanding this "purported agreement" the ESB was obliged to make the payments made to the Plaintiff and that she was under no obligation to refund the sum advanced. He held, therefore, that she was not entitled to claim special damages and proceeded to award her £3,000.00 for loss of earnings because of a shortfall when her entitlement to Sick Pay under the terms of her employment expired.

In *Boyce v. Cawley* the Plaintiff was injured in a road traffic accident in January, 1988 and was out of work for a considerable period.[21]

He was an ESB linesman. Evidence was given at the trial that in 1975 the ESB and Trade Unions came to an agreement which entitled employees to receive advance payments during a period of absence from work due to sickness or injury. In consequence the Plaintiff received payments from the ESB and therefore included a claim for Special Damages in his Statement of Claim with the intention of re-imbursing his employer.

Costello J. whose Judgment preceeded that of his colleague Morris J., was of a different view:

> "Quite clearly the employee has a contractual obligation to repay these sums out of the damages, if he recovers damages, as he has in this case. This being the case it seems to me that once such an obligation exists the Plaintiff has shown that he has a recoverable loss and has established, in my judgment, his entitlement to the claim for Special Damages". [22]

There is a clear conflict between these two Authorities and I understand that the

matter is to be argued before the High Court this month.[23]

Section 2(b) of the Civil Liability (Amendment) Act, 1964

In *Ryan v. The Compensation Tribunal* the Plaintiff sought judicial review of an award which she received from the Hepatitis C. Tribunal. She claimed, inter alia, that her Loss of Earnings award was improperly calculated.[24]

She claimed that her earnings, from a FAS operated Community Employment Scheme, constituted £126.00 nett even though £72.00 of same was made up of two Social Welfare payments, namely Deserted Wives Allowance and Single Parent Allowance. Her Counsel submitted that these Benefits were protected by Section 2(b) of the 1964 Act and ought not to be deducted for the purposes of calculating the Loss of Earnings award. Costello P. rejected this submission holding:

> "The sums which are to be taken into account in assessing damages for personal injuries are pensions, gratuities, or other like benefits, payable under statute in consequence of the injury which gave rise to the claim for damages. The allowance amounting to £72.00 which the Applicant received were not benefits payable in consequence of the injury, they were payable under statute because the Applicant was treated as a single parent and a deserted wife within the meaning of the statute".[25]

TAXATION

In *Allen v. O'Suilleabhain* Mr. Justice Murphy recently commented that there always has been some reluctance to introduce the issue of Income Tax into Personal Injury claims in this Country.[26]

He based his comments, inter alia, on the reluctance of the Irish Courts to apply the Gourley principal to the assessment of loss of earnings.[27]

The Gourley Principal and Loss of Earnings

In 1955 in the case of *British Transport Commission v. Gourley* the House of Lords held that when damages to which a Plaintiff is entitled for personal injuries include a sum for future loss of earnings and when that sum is not chargeable to Income Tax, a deduction must be made for the Tax which the Plaintiff would have had to pay had he not been injured and continued to work. It was another 13 years however before this decision was considered in the Irish Courts. In *Glover v. B.L.N. (No. 2) Kenny J.* held that the Gourley Principal applied not only in personal injury actions but also in actions based in breach of contract (as in this case). Here the Plaintiff was a company director and the Court found that he had been wrongfully dismissed. In awarding the Plaintiff damages for future loss of earnings Kenny J. deducted an amount equivalent to the tax which he would have had to pay on the earnings had he not been dismissed.[28]

Notwithstanding Glover's case, there followed a period during which the Tax-deduction Rule was apparently ignored in personal injuries litigation.[29]

Since the 1970's however, it has been the practice for Actuaries to give their evidence on the basis that the Plaintiff would or would not be liable to Tax on the income from the notional fund derived from the award. The reasoning for doing this was succinctly explained by Murphy J. in *Allan v. O'Suilleabhain.*

> "It seems to me that the principle must apply in every case where failure to make an appropriate adjustment in assessing the damages awarded would result in a windfall to the Plaintiff". [30]

How does the Deduction Operate?

1. Past Loss of Earnings:

   With regard to past loss of earnings the Court will make a deduction from the gross loss of earnings award on the basis of the income tax rates and levies and allowances that the Plaintiff would have had to pay had he not been injured.

2. Future Loss of Earnings:
   With regard to future loss of earnings the Court appears to accept actuarial figures based on current tax rates. The difficulty with this approach is explained by Dr. White on the basis that:

   > ".... Government policy may in future switch from direct taxation to indirect taxation...(which could)....result in serious injustice to a Plaintiff whose award for future loss of earnings was reduced on the basis that he would have been taxed in future on what he earned rather than what he spent.[31]"

Loss of Pension Rights

The Gourley principal is equally applicable to lost income from a pension which in the normal course would have been subject to Income Tax and other levies.

Tax on the Investment Fund from a Personal Injuries Award

An award of damages must be increased to take into account the impact of taxation on interest accruing from the award or part of it which has been placed in an investment fund. This is especially the case where the Plaintiff is to receive a large award to compensate for future loss of earnings, or to provide for lifelong care. In *Dunne v. The National Maternity Hospital* an infant was born with severe brain damage rendering him a spastic quadriplegic with a major mental handicap. The award received on his behalf had to be invested so as to provide for his care for the rest of his life.[32]

In the aftermath of the case, it came to the attention of the public that this investment fund established for the infant Plaintiff's benefit was subject to taxation. Public outcry compelled the Oireachtas to resolve the matter and they acted by passing Section 5 of the Finance Act, 1990.

Section 5 of The Finance Act, 1990 ("the 1990 Act")

This Section provides that where a person is "..... permanently and totally incapacitated by reason of mental or physical infirmity from maintaining himself" and his award of damages is invested, no tax is payable on the dividend as long as it is his sole or main source of income. In consequence, the investment fund in the *Dunne* Case was no longer subject to taxation. The difficulty with the drafting of Section 5 was explained however by Murphy J. in *Allen v. O'Suilleabhain.*[33]

Here the Plaintiff was injured in an accident at work in October, 1989. She

was a student in midwifery and was directed by a senior obstretician to hold one of the legs of a patient during a difficult birth. In the process she sustained a very serious back injury. At the trial of the action in 1995, Kinlen J. accepted medical evidence that she could never work again as a Nurse and determined, therefore, that she was entitled to loss of earnings for the rest of her life. The actuarial evidence presented to the Court contained three actuarial multipliers namely:

I. Multiplier 953 on the basis that the award, when invested, was not subject to taxation;

II. Multiplier 1096 on the basis that the full tax rates were applicable to the investment fund, and;

III. Multiplier 1020 on the basis that a tax rate of 27% (allowing for Tax free allowances) was applicable.

Mr. Justice Kinlen chose to adopt the third multiplier and therefore awarded the Plaintiff £189,520. 00 for future loss of earnings. (The past loss of earnings had been agreed by the parties). On Appeal the parties accepted that there was an error in the calculation of the Loss of Earnings award and adopting the third multiplier, it should have come to £179,520. 00. Murphy J. then held that the trial Judge had chosen the wrong multiplier. He held that the Plaintiff had been found to be "permanently and totally incapacitated" and that therefore, as Section 5 of the 1990 Act came into operation, the lower multiplier (953) was adopted. He therefore reduced the award for future loss of earnings to £167,728. 00. In the course of his Judgment, Murphy J. made the following comments on the effect and consequences of Section 5:-

1. That it was understandable that in a case like the instant one there would be a particular reluctance by a Defendant to seek to rely on Section 5 as to do so would be to recognise the possibility, and perhaps even the probability that the Court might find that the Plaintiff was permanently and totally incapacitated and accordingly award a higher sum for general and special damages.
2. That since the Revenue Commissioners were not a party to the proceedings they were not bound by the findings that the Plaintiff was permanently and totally incapacitated. Further, that a judicial determination

BENEFIT	QUALIFICATION	WEEKLY RATE	DEDUCTIBLE FROM AWARD	FOR WHAT PERIOD
Disability Benefit (Sickness Benefit)	**39 PRSI contributions in financial year**	**£67.50 (not payable for first three years of incapacity**	**Yes (R.T.A.only)**	**5 Years**
Invalidity Pension (Disability Pension)	**Same as above together with a medical certificate that the beneficiary is permanently incapable of work**	**£69.20 (again not payable for first three days)**	**Yes (R.T.A.only)**	**5 Years**
Injury Benefit	**Available to persons injured at work or in an interupted journey to or from work**	**£67.50 (not payable for the first three days)**	**Yes (look left)**	**5 Years**
Disablement Benefit	**Same as above except that the amount varies depending on degree of incapacity and it is possible to work and be in receipt**	**£91.20 maximum Same conditions apply as above**	**Yes (same as above)**	**5 Years**
Death Grant for funeral expenses	**Granted at discretion of Minister for Social Welfare**	**£320 gratuity the direction of the Trial Judge**	**Yes but at**	**N/A**
Survivors Pension	**156 contributions before death of spouse**	**£71.10**	**No**	**N/A**
Orphan's contributory allowance	**26 contributions made prior to his/her/their death**	**£45.60**	**No**	**N/A**
Lone Parent's allowance	**Means tested widow or deserted wife who is widowed(one child or more)**	**£67.50**	**No**	**N/A**
Child Benefit	**All children under 16 or under 19 and in full-time educaton or physically and/or mentally infirm**	**£30.00 per month per child up to £39.00 where there are three or more children**	**No**	**N/A**
Widow's (non contributory) Pension	**Means tested**	**£67.50**	**No**	**N/A**
Orphan's (non contributory) Pension	**Means tested**	**£45.60**	**No**	**N/A**
N.B. NO OTHER SOCIAL WELFARE PAYMENT IS DEDUCTIBLE.				

as to the extent of the Plaintiff's disability or his prospects of recovery may be proved wrong by subsequent events and could therefore result in an injustice to one party or the other.

3. That Section 5 really only benefited Plaintiffs who were permanently and totally incapacitated and received awards of damages prior to the passing of the 1990 Act. This is because Plaintiff's such as the Dunne infant received awards taking into account the fact that tax would have had to have been paid on a dividend from the investment fund. On the other hand, any award or compensation negotiated after the Section came into operation, would have to take into account the fact that the income to be derived from the award would be exempt from Tax. Accordingly, the payment of a lesser sum, as in this case, would be sufficient to compensate the Plaintiff for the loss which he suffered.

Two hundred thousand pounds cap on damages for pain and suffering.

In the *Allen v. O'Suilleabhain* case the Supreme Court increased the cap on damages for pain and suffering imposed by the *Sinnott & Quinnsworth* case (of £150,000) to £200.000.00. Kinlen J. had awarded Ms. Allen £205,000.00 for pain and suffering past and future. Blayney J. dealt with the general damages aspect of the decision and held that since the Plaintiff's injuries were not of such a catastrophic nature as to justify the new maximum award, he reduced her award to £140,000.00. [34]

The Reddy & Bates Factor/Deduction

While it is not strictly a tax matter, the Courts are obliged to make a percentage reduction in the award made for future loss of earnings on the grounds that in the normal working environment an employee or a self-employed person's career could be cut short by the following:-

1. Unemployment.
2. Redundancy.
3. Illness.
4. Marriage prospects.
5. Accident.

The Reddy & Bates factors have since been increased to 8 to take into account business risk, maternity absences and the circumstances of the Plaintiff (personal and social) relevant for the purposes of reaching a fair figure for compensation

Once account has been taken for the tax that would have been payable on the future income had the Plaintiff not been injured, the Reddy & Bates discount or reduction is then applied. This percentage deduction or discount can be as high as 30%. [35]

Conclusion:

It is clear from the matters set out that in a personal injuries action involving a significant claim for loss of earnings, that there are a number of factors that practitioners must take into account for the purposes of calculating a final figure for loss of earnings.[36] ●

---

1. Section 237(1) of the Social Welfare (Consolidation) Act, 1993 renders these Benefits deductible. They are to be renamed as a Sickness Benefit and Disability Pension by virtue of Section 17 of the Social Welfare Act, 1997.
2. Section 75(1) of the 1993 Act.
3. Section 75(3) of the 1993 Act. The Grant is £320.00 from June, 1997.
4. See: White (Irish Law of Damages) 1989 Page 220. The legislation applies to all road traffic accident claims, commenced on or after the 30th March, 1984 unless the Defendant did not require to be covered by an approved Policy of Insurance, in which circumstance the legislation applies to all accidents commenced on or after the 4th April, 1990.
5. Section 75(2) and Section 237(2) of the 1993 Act.
6. The Benefit is now £67. 50 (post June 1997).
7. Now £91. 20 per week.
8. 1988 I.L.R.M. Page 617. McKenzie J. was considering the precursor of Section 237(1) - Section 12 of the Social Welfare Act, 1984. The words "or probably will accrue" have been replaced by the words "are likely to accrue".
9. 1988 I.L.R.M. 617 at Page 619.
10. Morris J. (High Court) (Unreported) (14 March 1994).
11. Op. Cit. Page 13-14.
12. 1965 I.R. Page 69.
13. Hamilton P. (High Court) (Ex Tempore) (8 May 1991)
14. The transcript of this decision is not available and the only record of it is contained in care: (Civil Liability Act, 1961-1964 Page 134).
15. Geoghegan J. (Unreported) (10 June, 1997)
16. Op. Cit. Page 9.
17. Bowskill v. Dawson (2) 1955 I.P.B. Page 13.
18. McGregor on Damages - Pages 929 Geoghegan J. also cited *Bradbury v. The Great Western Railway* 1874 L.R. 10 EX Page 1 and *Parry v. Cleaver* 1970 A.C. 1
19. Budd J. (High Court) (Unreported) (11 June 1993) See: Hickey, Jack: Deductions for Awards in Personal Injury cases:- Gazette: October 1996 Page 289.
20. Morris J. (High Court) (Unreported) (30 November 1992).
21. Costello J. (Sligo High Court) (Ex Tempore) (13 November 1991).
22. Op. Cit. Page 3.
23. I am informed by my colleague on the South Eastern Circuit, Mr. Paul Kavanagh, that in a case called Hogan v. Steele, the ESB have been joined as a notice party for the purposes of legal argument on this point and a Judgment in the matter will hopefully be available in the New Year.
24. 1997 1 I.L.R.M. 194
25. Op. Cit. Page 206.
26. Supreme Court (Unreported) (11 March 1997).
27. 1956 A.C. Page 185.
28. Kenny J. Delivered Judgement in November, 1968 but it is contained in the 1973 Irish Reports at Page 432.
29. White Op Cit. Page 176.
30. Op Cit. Page 13
31. Op Cit. Page 177. Dr. White also discussed the decision of Griffin J. in *Griffiths v. Raaj* 1985 I.L.R.M. Page 582. Here the Plaintiff received an award of damages on the basis of requiring care for the rest of her life. Section 5 of the Finance Act, 1990 had not been enacted so account had to be taken of the taxes that would have had to been paid on the dividend from the investment fund. The trial Judge adopted a figure based on present tax rates. On Appeal, Griffin J. (Hederman J. concurring) held that some deductions would have to be made on the basis that the tax rates could come down in future. McCarthy J. dissenting held that to attempt such a deduction, on the basis that tax rates might come down in the future, would be to engage in speculation and that therefore the preferred option was to adopt present tax rates. This decision was not referred to by Murphy J. in *Allen v. O'Sullieabhain* and I get the impression that practitioners prefer not to open it.
32. 1989 I.R. 91.
33. Op. Cit.
34. *Synnott v. Quinnsworth* 1984 I.L.R.M. Page 253. In *Allen v. O'Sullieabhain* Blayney J. dealt with the general damages aspect of the award.
35. Reddy v. Bates 1983 I.R. Page 131. See: Pierse, Robert (Recent Developments Special Damages) (1997) I.L.T. Page 159.
36. See Pierse Op. Cit.
37. Special thanks to Henry Hickey, S.C. for his kind assistance.

Fee recovery at the touch of a button...?

CIAN FERRITER, Special Projects Manager, Bar Council

The advent of powerful desk-top and lap-top computers with sophisticated software has enabled barristers to benefit from legal databases, word processing and e-mail. Arguably the most important administrative aspect of any professional practice is fee issue and fee recovery. Recent economic surveys at the Bar point to an extraordinarily high level of bad debts, perhaps stemming in part from the somewhat lax approach to fee recovery traditionally taken by members. Customised software now exists which enables barristers to automate the time-consuming task of preparing and issuing fee notes, reminders and re-issues. This feature involves an evaluation of the principal fee management product on the Irish market for barristers.

Raven Computing's "Breeze" System

Breeze is described as a "Case and Fee management system". It has been devised specifically for Irish barristers by Raven Computing, a young software house based in Fitzwilliam Square. Raven have been expanding in size and are pushing for a greater share of the market in barrister software. They claim to have over 200 members using the Breeze system.

Breeze is principally a fee recording system which also enables the compilation of information on the progress in a given case and the particulars required for completion of VAT returns. It is not, and does not purport to be, an accounts system with the result that while the system, may contain all the details relevant to the preparation of barristers accounts, the accounts still need to be prepared on a separate system. An accounts system "add-on" is a service which Raven might usefully look at for future releases.

Breeze is a DOS-based software, meaning that it was written for a pre-Windows computer environment (although it can be run on machines with Windows or Windows 95). Its principal drawbacks stem from the fact that it is a DOS-based system: the menus are operated using the keyboard rather than the mouse; it does not integrate with Windows products (a capacity to integrate with a modern word processing package would greatly improve the flexibility for customising fee notes and reminders); and it is not terribly easy on the eye. The biggest complaint made by users has been about the limited letter printing facility on the system, a well-grounded complaint based on this reviewers experience of the system. Raven intends to overcome these difficulties by releasing a Windows version of the software next Summer.

However, the system is a very useful addition to any busy barristers practice. It enables the input of data relating to all briefs, including the parties, the insurance company (if relevant), the briefing solicitor, the work done to date and the appropriate scale of fees. It enables monthly fee issues as well as fee reminder letters and production of useful analytical information on fees outstanding, reticent fee payers, bad debts etc. Details of fees received and expenses laid out enables the print-out of information for monthly VAT returns. The system is fairly easy to use once up and running.

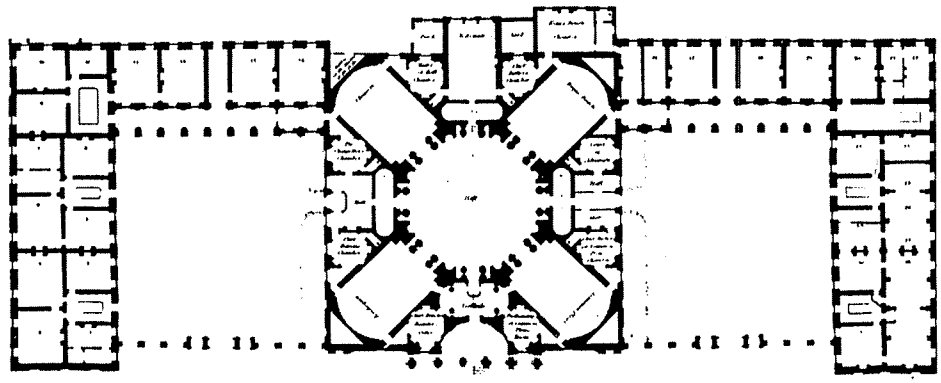
As anyone who has had trouble with hardware or software will confirm, it is vital that a product such as this has adequate back-up support. A straw poll amongst secretaries using the system found that the Breeze support is regarded as efficient and useful. The maintenance including call-out and telephone support is provided on a continuing basis as part of the initial purchase fee.

The system retails at a once-off of £695 plus VAT, although it has been available at cheaper prices during promotions.

There are of course "off-the-shelf" accounts packages at much cheaper prices which can be adapted for barristers practices. For example with time and some spreadsheet expertise, the Microsoft Excel spreadsheet package could be adapted to collate most of the information that Raven does. Another such package used by some members is the "QuickIn" invoicing package from UK software house Intuit.

However customising these systems involves quite a bit of time and an expertise "playing around" with software packages.

Raven have produced their product precisely because barristers and their secretaries don't have that expertise and would happily pay to avoid spending the time acquiring it. If you find yourself in that club, the extra cost for the convenience of the Raven system will likely represent a good long-term investment. ●



PAUL McCARTHY

The Bar Council, 1997/98

Members of the Bar Council for 1997/98, pictured at the Bar Council meeting of 15th November, 1997. (Left to right) John Dowling, Director, David Sutton, Liam McKechnie, SC, Mary Rose Gearty, Nehru Morgan Pillay, Denis McCullough SC, John Mac Menamin, SC (Chairman), Fergal Foley, Tony Hunt, Michael Gleeson, SC, Oonah McCrann, Patrick Hanrattty, SC, Rory Brady, SC, Conor Maguire, SC, Emily Egan, Michael Durack, SC, Sara Moorhead, Gerard Durcan, SC. (Missing from the photo: Miriam Reynolds, Peter Somers, Donal O'Donnell, SC, The Attorney General, Mr. David Byrne, SC.)

Chanelle Veterinary Limited v. Pfizer (Ireland) Limited t/a Pfizer Animal Health and Pfizer Animal Health SA

SHEENA HICKEY, Barrister

This High Court decision deals with the important practical question of whether the "de-listing" of an established distributor by a supplier is a breach of the Competition Act 1991 ('the 1991 Act,') and/or Articles 85 and 86 of the EC Treaty. It is an Irish case but warrants inclusion in "Eurowatch" both because of the Articles 85 and 86 arguments and because of the heavy emphasis placed upon case law of the Court of Justice by Mr. Justice O'Sullivan in his judgment.

The Plaintiff ("Chanelle"), a wholesale distribution company in veterinary products, decided to institute proceedings against the Defendants ("Pfizer"), a supplier of animal health products under sections 4(1) and 5(1) of the Competition Act, 1991 and Articles 85 and 86 of the EC Treaty of Rome. The reason for instituting proceedings was Pfizer's decision to de-list Chanelle as one of its five wholesale distributors in Ireland.

Chanelle was established in 1980 for the purpose of distributing veterinary products. Pfizer is the Irish subsidiary of the US Corporation Pfizer International Inc., and is the second largest supplier of animal health products in the Irish market.

In 1995, Pfizer appointed five wholesale distributors, including Chanelle, for the Irish market. Under the terms of the distributorship, the wholesalers discount was 12.5%. Pfizer also operated a rebate scheme for the benefit of those who purchased their goods from the five appointed wholesalers. The maximum rebate was 10% and was paid to end purchasers.

There were some difficulties between the parties before the de-listing of Chanelle occurred. In particular, in May 1996, Chanelle notified Pfizer that Chanelle's sister company was developing a generic pharmaceutical product which would compete with a very successful product of Pfizer which had recently come off patent. Following this information, Pfizer informed Chanelle in June 1996 that it had decided to implement new distribution arrangements which excluded Chanelle as a wholesale distributor for Pfizer.

Having failed to obtain a satisfactory reason for their "de-listing", Chanelle instituted proceedings, alleging:

- the existence of an agreement or concerted practice between the first and second named defendants to de-list Chanelle contrary to section 4(1) of the 1991 Act;
- the existence of an agreement or concerted practice between the first named defendant and the four remaining wholesale distributors to de-list Chanelle or to continue without Chanelle as appointed distributor contrary to section 4(1) of the 1991 Act;
- abuse by Pfizer of its dominant position in respect of a number of markets for certain products contrary to section 5(1) of the 1991 Act;
- breach of Articles 85 and 86 of the EC Treaty.

Preliminary Application to dismiss plaintiff's claims

Pfizer applied to have all Chanelle's claims dismissed on the grounds that there was no case. In order to succeed, Pfizer had to establish that Chanelle had failed to establish a *prima facie* case.

In ruling on Pfizer's application on 5th June 1997, Mr. Justice O'Sullivan distinguished between a *prima facie* case and a case that will probably succeed. He found that a *prima facie* case had been made out in respect of the allegations concerning the alleged anti-competitive agreements or concerted practices both under the 1991 Act and Article 85.

In respect of the claim in relation to a breach of a dominant position, Chanelle had alleged that Pfizer enjoyed a dominant position in five separate markets. Mr. Justice O'Sullivan noted that before a court can examine whether a product is dominant in any market it is necessary to have evidence not only of the percentage share of the product in question but also of its rivals and to have satisfactory evidence of the market share of the relevant product over a period of time to enable the court to conclude there is no prospect of the dominant position being eroded. Since Chanelle had not adduced such evidence in relation to four of the five markets, he acceded to Pfizer's request to dismiss Chanelle's claim insofar as it related to those markets.

However, in respect of the alleged fifth market Mr. Justice O'Sullivan accepted that it could be narrowly defined. Relying on the veterinary evidence, he found that that there was a *prima facie* case to warrant a reply from Pfizer to the proposition that a market existed for the product in question, a drug known as synulox, and that Pfizer had a dominant position in this market.

Judgment of July 30th 1997

At the plenary hearing the following issues arose:

- Whether an agreement or concerted practice existed;
- Whether the agreement or concerted practice had an anti-competitive object or effect;

- Whether there was a selective distribution agreement;
- Whether Pfizer was in a dominant position in respect of the product synulox and whether Pfizer had abused that dominant position.

Existence of agreement or concerted practice

There was evidence that an employee of the second named defendant was involved in the fringes of the decision to de-list Chanelle. On the facts as presented, Mr. Justice O'Sullivan held that although the employee was consulted in advance on a point of information by Chanelle, he was not informed of the new distribution system until after the event nor was he asked to endorse or approve the decision of Pfizer. Therefore no agreement or concerted practice existed as between the first and second named defendants.

In respect of the alleged agreement between Pfizer and the four remaining distributors, Mr. Justice O'Sullivan found in light of the evidence before him that there was no such agreement since they had no part in reaching the decision to de-list Chanelle and were only informed after the event.

Chanelle had also alleged that Pfizer's distribution arrangements amounted to a concerted practice and that the decision of Pfizer to de-list Chanelle should be regarded as a concerted practice. Pfizer submitted that their decision was a unilateral one. They argued that there must be some form of positive co-operation in reaching a decision for that decision to constitute a concerted practice. A wide ranging review of relevant judgments of the Court of Justice was carried out by Mr. Justice O'Sullivan. He held that the decision to de-list Chanelle was a unilateral one on the following grounds:

- There was nothing like positive co-operation between Pfizer and the four distributors before the de-listing of Chanelle;
- They were informed after the event and their only involvement was to accept the fait accompli and react to the market as they found it;[1]
- There was no question of the remaining distributors being put under any kind of pressure to assist Pfizer in continuing the de-listing of Chanelle.
- There was no question of the remaining distributors being asked to co-operate with Pfizer in continuing the de-listing of Chanelle[2]
- Here there was one act and one act alone, that of de-listing Chanelle. Parallel behaviour did not arise.[3]
- Pfizer's decision to de-list Chanelle was a voluntary act.

In those circumstances, he concluded that no concerted practice had existed between the defendants and the distributors.

Mr. Justice O'Sullivan went on to consider the other issues raised by the parties for the sake of completeness although it was not strictly necessary to do so since he had held that no agreements or concerted practices existed.

Anti-competitive object or effect of the agreements

The economists differed in their conclusions as to whether, in ascertaining whether an agreement has an anti-competitive *object*, one should establish whether harm to the competitor or harm to competition exists. These differing views in the evidence presented by the economists led Mr. Justice O'Sullivan to conclude that "the fact that there could be responsible debate at all, demonstrated that the object of the agreement could not be restrictive of competition of its nature".

In dealing with the question of anti-competitive *effect*, Mr. Justice O'Sullivan had particular regard to the differing views of the economic experts. He found that the crucial difference between the evidence of both economic experts was that the economist giving evidence on behalf of Chanelle regarded the placing of Chanelle at a competitive disadvantage as the heart of the matter, whereas the economist giving evidence on behalf of Pfizer made a distinction between harm to a competitor and harm to competition. Pfizer's expert submitted that there had to be harm to competition for an agreement to come within the scope of the 1991 Act.

In an important statement of the law, Mr. Justice O'Sullivan accepted that the Court must look at competition rather than the competitor when testing any allegedly anti-competitive agreement or concerted practice. Therefore the evidence that Chanelle was placed at a disadvantage did not establish that its de-listing was in breach of Section 4(1) of the 1991 Act. To establish such a breach, it would be necessary to show that on the balance of probabilities the agreement or concerted practice would have the effect of preventing, restricting or distorting competition.

Existence of a selective distribution system

Mr. Justice O'Sullivan considered that these systems were a "special category" and because they were "to some extent regarded as *sui generis*", he set out his views on the submission in relation to this matter. He found that selective distribution systems impose upon distributors a requirement to resell only to end users or other appointed wholesale distributors.[4] The essence of the system was the imposition of a restriction on the members of the system in relation to onward sales. There is, therefore, a restriction on the numbers of potential competitors at the wholesale level which can be seen as anti-competitive in the absence of justification.

In the instant case however, he held that there was no restriction on the number of competitors at wholesale level as a result of the system created by Pfizer. Distributors who were not appointed, such as Chanelle, could continue to purchase from appointed distributors and would be entitled to a rebate. A selective distribution system would operate only where Pfizer prohibited its nominated wholesale distributors from supplying Pfizer goods to Chanelle. This was not in fact the situation prevailing in the market.

Alleged breach of dominance in an identified market

Both economic experts accepted that the definition of the relevant market in the present case was crucially dependant upon the veterinary evidence. Mr. Justice O'Sullivan found that there were substitutes for synulox in each of its applications, and that accordingly the market for synulox could not be considered to be a distinct one. Chanelle

had therefore not discharged the onus of establishing that a distinct market existed.

Conclusion

Mr. Justice O'Sullivan's judgment of 30th July 1997 is under appeal to the Supreme Court in respect of Article 85 of the EC Treaty and section 4 of the 1991 Act. Certain aspects of the judgment are worth highlighting.

In ascertaining whether an agreement or concerted practice exists contrary to section 4(1) of the 1991 Act, regard must be had to the facts of the particular case. Something more than mere tacit acquiescence (behaviour amounting to a form of positive co-operation between them) on the part of the other distributors in response to the supplier's decision is required to establish a concerted practice.

Where the evidence of economic experts differ resulting in a "responsible debate" then this could be sufficient to demonstrate that the object of an agreement could not be restrictive of competition of its nature.

In assessing whether an agreement is contrary to section 4(1) of the 1991 Act, it is not sufficient to show that a competitor was placed at a competitive disadvantage in the absence of an economic analysis of the market and the competition.

Selective distribution systems are a special category and are "to some extent to be regarded as *sui generis*".

The essence of a selective distribution scheme is the imposition of a restriction on the members of the system in relation to onward sales.

1. Hercules v. Commission [1991] ECR II-1711.
2. Konica [1988] 4 CMLR 848.
3. ICI v. Commission [1972] ECR 619.
4. See Bellamy & Child, Para. 7-073.

ABORTION AND THE LAW, by James Kingston and Anthony Whelan with Ivana Bacik,

Published By Round Hall Sweet & Maxwell, £39.50

At the end of the first chapter of this book, published in the summer of 1997, the authors state that: "*It can be said with confidence that this issue of abortion is likely to remain a matter for discussion and controversy for the foreseeable future*". This confidence has been amply borne out by the emergence of the C case at the time of writing this review, and the ensuing discussion and controversy which have accompanied that case, as with many of the other cases in the area since 1983.

There has been a complex array of legal developments concerning abortion since 1983, by way of Irish judicial and legislative developments, European Community judicial and legislative developments, and developments under the European Convention on Human Rights with implications for the Irish law on abortion. The authors have provided a comprehensive account of all of these developments, and have also pieced together the interaction between the many developments in an intelligible manner, by no means an easy task.

The book is divided into three parts. Part I deals with the law applicable in or to Ireland regarding the provision of abortion. Chapter 1, dealing with the position in Irish constitutional law regarding abortion in Ireland both before and after the 8th Amendment in 1983, was of most interest to this reviewer. The authors recall how the Government of the day opposed the wording of the 8th Amendment and proposed an alternative wording which was as follows:-

> "*Nothing in this Constitution shall be invoked to invalidate or deprive of force or effect any provision of a law on the grounds that it prohibits abortion*".

If that wording had been passed by the Oireachtas and by the People then, in this reviewer's opinion, none or almost none of the many legal developments described would have occurred and this book would have been unnecessary. There would have been no injunctions against information or travel and no X case.

Chapter 1 contains a detailed and careful analysis of all of the judgments in the X case. It examines several very interesting issues such as whether the 8th Amendment in fact added anything to the protection of the unborn which was not there before, whether medical practice accords with the law after X, and whether Irish law is sufficiently clear and foreseeable to comply with the European Convention on Human Rights. The chapter does not look at the possibility of amending the Constitution but it does look at the issue of possible legislative reform. Under this heading the question of time-limits is discussed. When does the right to life afforded to the "unborn" by the 8th Amendment come into existence? Does it apply from the moment of fertilisation, the moment of implantation or from some later date?

Chapter 2 deals with European Community law and abortion. The discussion in this short chapter is probably academic, as acknowledged by the authors, in the light of Protocol No. 17 to the Treaty on European Union which appears to rule out any possible application of Community law to Irish law on abortion in Ireland. Chapter 3 deals with abortion and the criminal law in Ireland. It highlights and details Section 58 of the Offences Against the Person Act, 1861 and the crucial issue of whether Section 58 admits of any exceptions, in particular due to the presence of the word "unlawfully" in the provision. The authors conclude that almost all the evidence indicates that the 1861 legislation and its equivalents in comparable jurisdictions do not contain an absolute prohibition on abortion. It may well be that even in the absence of the 8th Amendment, a situation such as the X case would have arisen calling for judicial interpretation of Section 58 in this jurisdiction. However, it seems more likely that any such factual situation would have involved travel to England for an abortion and would not have given rise to litigation in this jurisdiction. Chapter 4 deals with abortion and international human rights law, with the discussion on the European Convention on Human Rights being of most interest.

Part II of this book deals with the law on travel and information in the context of abortion. Chapter 5 deals with information and travel before the 1992 amendments. As regards information, the seminal case of *Attorney General v. Open Door Counselling and Dublin Well Woman Centre* and the marathon saga of *SPUC v. Grogan* are examined in detail. The Grogan case appeared to land the controversial issue of abortion information into the lap of the European Court of Justice in 1991. The Court appeared to be faced with the difficult issue of whether a Member State could validly obstruct the provision of medical services in another Member State. Whatever about the instant case, there was a real difficulty for the Court in accepting any such general principle as a matter of Community law. The Court managed to sidestep the issue by relying on the lack of an economic link between the students' unions providing the information and the clinics in another Member State carrying out the abortions, and finding that the link was too tenuous for the prohibition on the distribution of information to be regarded as a "restriction" within the meaning of Article 59 of the Treaty. The Court suggested that the situation could be distinguished from the situation in an earlier case known as *GB - INNO - BM*. It is stated in chapter 5 that: "*the Court of Justice has been widely and, in the authors' view, correctly criticised for the way in which it interpreted its own earlier decision in GB - INNO - BM*"

Chapter 6 deals with Protocol No. 17 to the Treaty on European Union and the subsequent Solemn Declaration. The events surrounding the Protocol and the Declaration were in themselves quite remarkable. The Protocol was inserted into the Treaty on European Union at the last minute at the behest of the then Government following lobbying by anti-abortion campaigners. It was inserted at the last minute without any public debate or media discussion of any kind. This reviewer recalls seeing a short column in the Irish Times the day later the Treaty was signed in December 1991 referring to the Protocol as a fait accompli. On its face the Protocol sought to ring-fence Article 40.3.3 from Community law. Several months later, following the X case such a ring-fencing had become deeply unpopular as regards information and travel, and the Government had to go back to the other Member States and ask them to agree to amendment the Protocol to water it down. This was politically impossible as it would have lead to other requests for other Treaty amendments by other Member States and instead we had the peculiar device known as the Solemn Declaration, which sought to give a politically popular meaning to the Protocol. The Protocol

and the Solemn Declaration together represented a fine old mess, as there was great disagreement among eminent lawyers as to the overall status and meaning of the two provisions, and this disagreement was played out in the media to a very confused public. The authors make a valiant and successful effort to explain the whole mess in an intelligible way.

Chapter 7 deals with the law on travel and information after the two constitutional amendments in 1992. At the time of writing this review it is clear that problems will continue to arise in this area, given the language employed regarding "freedom" to travel and to obtain or make available information rather than a right to do so. The issues raised in the judgment of Mr Justice Geoghegan in the C case suggests that the study of jurisprudence in law school may not have been totally in vain, as regards the differences between a right and a freedom and the practical consequences which may ensue.

Part III of this book deals with comparative law on abortion, and discusses abortion law in Northern Ireland, the USA, Canada and Germany. There is a wealth of valuable material contained in Part 3, a good deal of which may become useful in future litigation in this jurisdiction. This reviewer will simply mention two matters which were of particular interest. First, Northern Ireland had a case known as the Re: K case in 1993 which was quite similar to the X case in this jurisdiction. As Mrs Justice McGuinness points out in her foreword to this book, it is instructive to compare the judgment of Sheil J in this Re: K case with the judgments in the X case, and note the very similar result arrived at. Secondly, tying in with an issue mentioned above, one learns in chapter 11 that the German Constitution and Criminal Code protect the unborn only from the date of implantation, which occurs some days or weeks after fertilisation. There are many other points of great comparative interest dealt with in part 3 of the book.

All in all this book is a scholarly production and a valuable addition to any lawyer's library. The authors are to be congratulated for their dedicated efforts.

— Seamus Woulfe, Barrister

●

INTELLECTUAL PROPERTY LAW IN IRELAND

Clark & Smyth, Butterworths, £60.00

As the authors note in their preface, intellectual property law in Ireland has been largely undocumented in the form of text books. Martin Tierney's work *"Irish Trade Marks: Law and Practice"* was heretofore the only published work dealing with existing statutory provisions relating to intellectual property. The law of patents and the law relating to registered designs and the law relating to copyright have not been visited by any major Irish text book writer until the advent of Clark and Smyth.

The authors also express misgivings about the timing of their text book. A new Copyright Bill is now in the hands of the parliamentary craftsmen. The authors had wondered whether they should wait for its enactment. But to judge by the inordinate delay that attended the enactment of the Trade Marks Act, 1996, it is as well that Clark and Smyth have published their work now. In the case of the Trade Marks Act, Ireland was already in default of its obligation under European law in 1993 when I published a Private Member's Bill (with great assistance from Shane Smyth) to modernise our trade marks law. It took three years, and the adoption of that Private Members Bill as the basis for the Government's Bill, for the Trade Marks Act, 1996 to appear on the statute book.

The authors made the right decision to press ahead now with the publication of this text book which will, doubtless, go to a second edition as soon as the new Copyright Bill becomes law.

The great merit of Smyth and Clark's book is the combination of historical context, analysis, and exegesis of the statute and case law. The developmental aspect of the analysis is very striking. The authors look forward to predict the future development of Irish intellectual property law, as well as surveying its past development.

Regarding patents, chapters 1 - 8 set out the statutory provisions, relevant case law, and commentary on the 1992 Act. The second part of the work, which relates to copyright, occupies chapters 9–20. Chapter 21 deals with semi-conductor chip protection and the 1986 Directive. Registrable designs are dealt with in chapter 22.

The recently re-stated law relating to the duty of confidence, which has, in part, been explored in Paul Lavery's recent book "Commercial Secrets" is examined in chapter 23.

Other remedies in tort in relation to passing off, goodwill, misrepresentation, injurious or malicious falsehood, and unlawful interference with economic relations are dealt with in chapter 24 and the law relating to trade marks is thoroughly explored in chapters 25 - 35.

The work also contains a useful chapter on taxation and intellectual property rights including the artist's exemption from income tax and the developing law relating to geographical indications and "appellations of origin".

Never could there be a more stark reminder of the affect of European Union law in the form of E.U. Directives on the development of Irish law.

Intellectual property law is, of course, profoundly international in character. International conventions and agreements form the basis of much of our intellectual property law. So the Paris and Strasbourg conventions in relation to patents, the European Patent Convention, the Berne Convention in relation to copyright, the Paris Convention and the Madrid Agreement as they relate to trade mark law are, along with E.U. Directives, now the back-drop for Irish legislation.

Smyth and Clark embarked ambitiously upon a broad canvas and they have succeeded. Their work will be to intellectual property law what John Wylie's books are to land law. And Mr. Justice Brian McCracken says the following of their book:

> *"in my view there would be a prima facie case of professional negligence against any solicitor, barrister, trade mark or patent agent - and perhaps of any judge if such a cause of action could arise against a judge - who does not have this book in their library".*

"Intellectual Property Law in Ireland" is a huge achievement for Smyth and Clark. It will become, in my view, the bible and handbook for practitioners in the area. It will also revolutionise the teaching of intellectual property law in Ireland.

The authors and Butterworths are to be warmly congratulated on this publication.

— Michael McDowell, SC

●

FINIS

BAR OF IRELAND

RETIREMENT TRUST PLAN

Contribution Deadline

Reminder to Members

The deadline for making contributions to your Plan if you wish to claim tax relief for 1996/97 is the 3 1St January 1998
You may claim full tax relief on contributions of up to I 5% (20% for individuals aged 55 years or over) of your Net Relevant Earnings (i.e. Income from non-pensionable employment plus net profits from profession less business related capital allowances and personal interest payments).

A representative from Bank of Ireland Trust Services will be in attendance at The Law Library, 158/159 Church Street on the 28th and 30th January 1998 and at The Distillery on 29th January 1998 to receive your contributions.

Thinking of Joining?

This is the time of year when many young members of The Law Library should actively consider joining their Scheme. There are a number of strong reasons for doing so:

- The Scheme has been designed for and is exclusive to members of The Law Library.
- The plan directly invests 97.5% of every contribution you make towards building your Retirement Fund. This is notably higher than some Plans where a small percentage of your first year contributions may well be all that's invested.
- Flexibility to increase, decrease, miss or even temporarily cease contributions without any penalties.
- Members have a choice of four funds, a Managed Fund, a Cash Fund, an International Equity Fund and a Fixed Interest Fund.
- No medical report required.

For more information contact:
Enda Murphy or Ian Mullen
at Bank of Ireland Trust Services (01) 6043600

Bank of Ireland

To all members of the legal profession

EBS BUILDING SOCIETY
CLARE STREET, DUBLIN 2
(BESIDE GREENE'S BOOKSHOP)

OPENING HOURS
9.30 A.M. TO 5.00 P.M.
NO LUNCH CLOSURE

WE OFFER

- ***MORTGAGES AT EXCELLENT RATES***
- ***WIDE RANGE OF DEPOSITS***
- ***NO BANK CHARGES***

MANAGER PADRAIC HANNON WILL BE MORE THAN PLEASED TO DISCUSS YOUR MORTGAGE REQUIREMENTS NOW OR IN THE FUTURE

THIS BRANCH AT CLARE STREET IS PARTICULARLY STRUCTURED TO CATER FOR THE REQUIREMENTS OF BARRISTERS AND SOLICITORS

JUST TELEPHONE
01 6763663, OR 6762135
OR 087 633039
FOR AN IMMEDIATE QUOTE

PADRAIC HANNON
MANAGER

EBS
BUILDING SOCIETY