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Journal of the Bar of Ireland. Volume 4. Issue 3. December 1998

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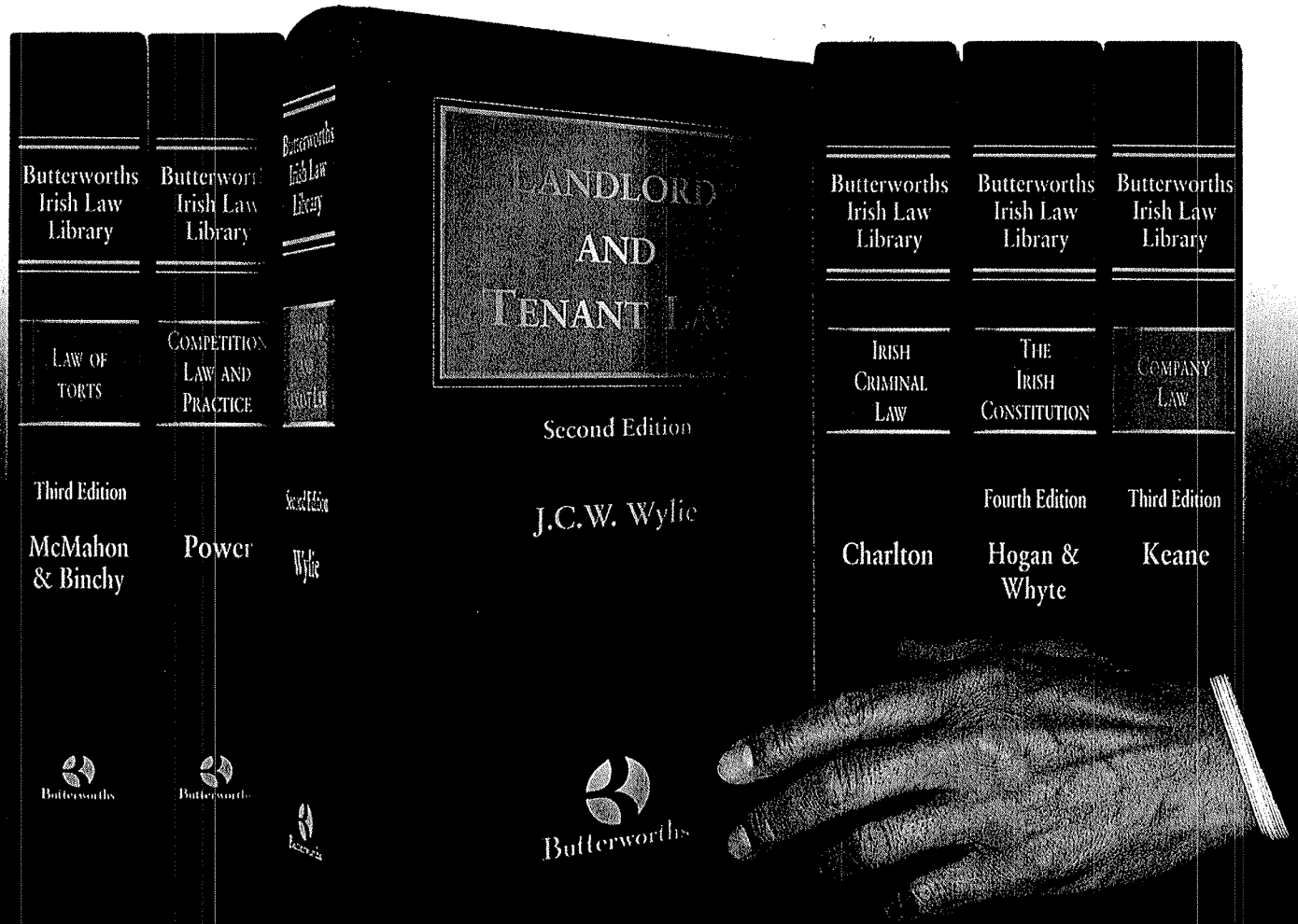

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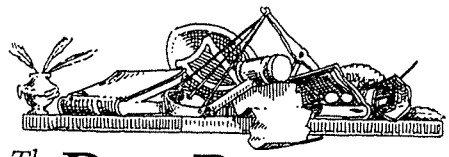

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3 new High Court judges

Congratulations to the Hon Mr. Justice Mr. Nicholas Kearns, the Hon Mr. Justice Cyril Kelly and the Hon Ms. Justice Fidelma Macken, upon their appointment as judges of the High Court.

●

Policy for borrowing books from Library

Members are reminded that the following constitutes the circulation policy for the Law Library and Legal Research Centre

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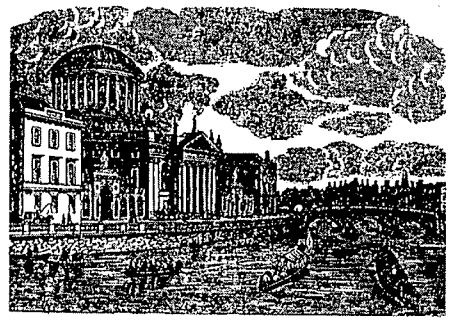

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The following have recently been appointed as directors and supervisors of the Law Library Credit Union.

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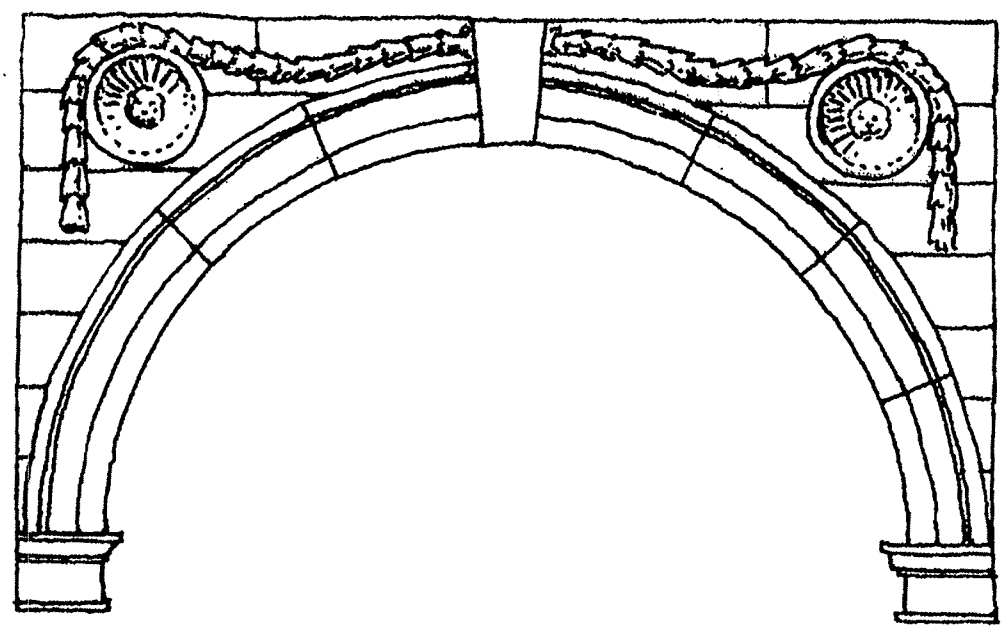
Bar Council sponsorhip of St. Audoen's School

As part of a series of initiatives aimed at strengthening the relationship between the Bar and the local communities, the Bar Council have become sponsors of St. Audoen's School in Cook Street. As part of the sponsorship, 12 sixth class pupils at the school recently visited the Four Courts and the Bridewell Garda Station before taking part in a Mock Court. The 'trial' concerned the theft of chocolates (which were later distributed among the 'jury' of schoolchildren). The script for the trial was written by Brendan Grogan, SC who also ably defended the accused in the proceedings. Michael L. O'Higgins acted as the judge and Erwan Mill-Arden was memorable in his role as prosecutor.

Other members of the Bar who kindly assisted in the event included 'Garda' Luán Ó Braonáin, Remy Farrell as the owner of Cadburys, Geraldine Small as the defendant's mother and Sheena Hickey and Caroline Cummings who corralled and coached the jury throughout the tour and mock court. Sunniva McDonagh organised the extremely successful and enjoyable evening.

The Bar Council has donated a computer and organised free Internet Access for the school. Future activities involving the school will also be planned and anyone interested in helping should contact Jeanne McDonagh at ext. 5014.



The New European Court of Human Rights

On 1 November 1998, a permanent European Court of Human Rights came into being, replacing the two-tier and semi-permanent Commission and Court of Human Rights which have served to interpret the Convention since its entry into force in 1953. In recent years, the Court has confirmed its position not just as a unique international tribunal capable of considering complaints brought directly by individuals against governments, but has established its authority in the reconciliation of complex and often novel claims to individual freedom. For example, its judgments continue to have a direct impact on Irish law and policy in matters of press freedoms, individual privacy, access to court, immigration and expulsion, and childcare. Although, in many areas, the guarantees and safeguards in the Irish Constitution exceed those required by the minimum Convention standard, for example in the protection of personal liberty, the developing jurisprudence of the Court contains much of potential interest to the Irish lawyer. The weighing of competing rights and interests by reference to the notions of necessity and proportionality, now quite marked in Irish constitutional law, has been prompted in part by the Court's decisions. In addition, although participation of the European Union in the European Convention on Human Rights is now most unlikely, it may be anticipated that the Convention will continue to act as a brake on certain EU policies which, free from the control of national constitutional safeguards, risk undermining individual rights.

Despite its successes, the delays in taking one's case to Strasbourg have hampered the Court's effectiveness. The old Court handled about 100 cases each year, all other applications having been settled or filtered out on procedural or substantive grounds by the Commission. Delays in that system, despite reforms, were such that it took an average of 5 years for a successful case to conclude before the Court (although less meritorious claims could be rejected within as little as 3 months). The new Court will be directly responsible for controlling its own docket of approximately 3,000 cases a year, and for this purpose the work will be divided among at least four Chambers of 7 judges working simultaneously. Committees of 3 judges will first consider applications, and may reject or strike out cases by unanimous vote in a special summary procedure. To avoid divergent interpretations, and in exceptional cases where the parties so request by way of appeal from Chambers, certain cases may go to a Grand Chamber consisting of 17 judges. Legal aid will be available as from the time that written observations are received by the respondent government. In addition, and crucially, Rule 39 of the new Rules of Court preserves the ability of the Court to order urgent interim measures to prevent irrevocable harm pending the hearing of the case.

The new Court will have jurisdiction over complaints brought by any person within the jurisdiction of the 40 countries of the Council of Europe. Strict procedural time limits will continue to apply for lodging applications, but it is anticipated that the Court may revisit some of the substantive issues in which the old Court and Commission have been somewhat cautious, for example, touching on the effectiveness of judicial review or the reasonableness of the length of pre-trial detention. Indeed, in certain areas it may be that Anglo-American legal traditions will continue to impact on continental practice. For this reason, as well as for the reason that Ireland should not shirk from full support for and participation in a European Court which continues to define the obligations of states in relation to torture and inhuman treatment, the use of lethal force, discrimination, expulsion, fair trial and other key concerns in other parts of Europe, Ireland should begin to take a less insular attitude to the value of the Convention and its own role in contributing to its success.

The new European Court of Human Rights is not an appeal court, and will depend as its predecessor did on the interpretation (by reference to local conditions) and implementation of the Convention at the domestic level including by domestic courts. Now that the United Kingdom has incorporated the Convention, Ireland, which was at the forefront in drafting the Convention and was among the first countries to ratify it, is one of only two Western European countries (the other being Norway), and one of only 3 or 4 countries in all, which has not incorporated the Convention in domestic law or, under a dualist system, otherwise allowed for the Convention's provisions to be pleaded and enforced before domestic courts. Therefore, despite occasional reliance by Irish courts on Convention standards, Irish lawyers continue to be inhibited from pleading the Convention directly in aid of their cases. However, it is welcome that incorporation of the Convention is likely to be raised on the political agenda in the near future in light of the references to same in the Good Friday Agreement.

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A Tribunal of Enquiry or an Investigation by Dáil Committee?

PAT RABBITTE, T.D.,

considers procedures for the investigation of matters of public importance.

A Tribunal of Enquiry or an Investigation by Dáil Committee? Usually the question is only addressed in the wake of an inevitably expensive Tribunal after the passion that bore the Tribunal has abated. Almost without exception a Tribunal of Enquiry has its origins in a climate of political tumult, fierce public discourse and high emotion and allegation.

One recalls how we teetered on the brink when the Minister for Tourism and Sport recently seemed to momentarily favour a Tribunal of Enquiry into the swimming scandal. Although unusually there was no partisan political dimension to the swimming affair, it was nonetheless highly charged. And if Dublin Castle had not already been block booked, the lure of Banking and Tax evasion as appropriate matters for a Tribunal of Enquiry may well have proved irresistible. A Tribunal of Enquiry may still beckon in the matter of army deafness although Government - politically and especially administratively - seem more preoccupied with the quantum of damages than in locating culpability.

There is a dense undergrowth of misrepresentation, prejudice and obfuscation associated with Tribunals of Enquiry in Ireland. The duration, scope and alleged cost of the Tribunal of Enquiry into the Beef Processing sector turned the man on the Tallaght Bus into an expert on Tribunals. It also allowed commentators who had never read a paragraph of the report nor attended an hour of the hearings to pose as experts. It is not possible to find a taxi driver in Dublin (no, Editor, that is not a complete sentence) who doesn't *know* that the Beef Tribunal cost somewhere between £40m and £60m. (To date the Beef Tribunal has cost £16m/17m approx - a lot of money, but well short of the regular headlines impressed on the memories of the public).

Secondly, where powerful people feel threatened if certain matters are enquired into, they will usually set about undermining the credibility of the particular Tribunal or otherwise influencing public opinion. Full-time spin doctors are retained - amazingly in the case of the Beef Tribunal at the expense of the taxpayer - to win the hearts and minds of the real jury, the public. For example, I have great difficulty in understanding why persons associated with the Flood Tribunal should be leaking information and documents as is being alleged. It seems obvious to me that a not too discreet attempt is being made by persons known or unknown to ensure that the planning Tribunal never gets off the starting blocks. As to why that should attract more coverage in one newspaper group than another is something of a mystery.

Thirdly, whenever a rational position is advanced in favour of a particular Tribunal one is likely to be met, when all else fails, with the ultimate non-sequitur: "Yes, but will anyone go to jail?".

None of this is to argue that cost is not important or that the efficacy of a particular Tribunal should not be probed or that wrong doing shouldn't be seen to be punished. It is, however, to argue that deliberate misrepresentation, prejudice and obfuscation ought not be the criteria of a new conventional wisdom. Ministers in the Rainbow Government had reason to rue the post-Beef Tribunal conventional wisdom, by definition shared on all sides of the House, viz : "We will never again have a Tribunal of Enquiry" When a hapless colleague confronted on television with the Blood scandal deferentially adverted to the new received wisdom, a mildly spoken woman in the audience enquired if he considered "Beef to be more important than women?" The new conventional wisdom melted.

A Tribunal of Enquiry can effectively inquire into matters of public interest, make findings of fact and it is a matter for Dáil Éireann - although effectively for the Government - to decide what action, if any, is warranted. Can a Committee of the Dáil achieve the same goal more expeditiously and certainly at far lesser cost? The answer, I think, is that we don't yet know. It is probable that the current investigation initiated by the Public Accounts Committee into financial institutions in respect of the D.I.R.T. controversy will determine the answer. For the first time the Public Accounts Committee, Chaired by Jim Mitchell, T.D., will be enabled if it so wishes to invoke The Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses Act,) 1997, (The Compellability Act).

Before the Compellability Act, witnesses appearing before a Dáil Committee did not enjoy absolute privilege in respect of their utterances unlike members of the Committee. The new Act confers such privilege upon witnesses giving evidence before a Dáil Committee. In this respect, Section 11(1) confers High Court privileges and immunities on persons who give oral and/or documentary evidence to a committee pursuant to a *direction*. This is the mechanism used to give the Committee power to compel witnesses to attend or to produce documents.

The experience of the Wallace Committee which enquired into the circumstances surrounding the dissolution of the Reynolds/Spring Government in 1994 is often adduced to support the argument that a Dáil Committee cannot effectively inquire into controversial matters. I don't believe that any such conclusion can be drawn for a number of reasons. First, I believe much depends on the nature of the subject matter referred to the Committee. It is difficult to see, given the nature of the subject matter of the Wallace Committee, how it

could reasonably have been expected to reach conclusions or make findings of fact. The subject matter of which the Wallace Committee was seized could scarcely have been more overtly or substantively political. Therefore the subject matter covered by the terms of reference as well as the procedures adopted will determine efficacy of performance. For example, with the single and singular exception of the enquiry into monies voted for the Relief of Distress in Northern Ireland, the Public Accounts Committee has not divided politically. The adequacy of the procedures and control exercised by the revenue Commisssioners are the normal terrain of the Public Accounts Committee and are unlikely to be the stuff of political conflict.

Secondly, the Wallace Committee had to discharge its remit without the power to compel any potential witness to give evidence or to answer any particular question. The ability of a Committee to compel witnesses and documents is central and, in any event, there is no statutory privilege available to witnesses who are not compelled.

Thirdly, there were certain procedures followed in the case of the Wallace Committee all of which might not necessarily be replicated in future hearings. For example, in terms of the finding of fact, the right to cross examine is important.

Up to the present, the Public Accounts Committee (PAC) has operated on a voluntary basis. It is the oldest and most effective Committee of the Dáil. In the normal course of business, the typical witness is a Secretary General of a Department appearing in his capacity as Accounting Officer. Given the lifelong training of these gentlemen, - and they have almost invariably been gentlemen - to avoid verbal infelicity, the absence of privilege has seldom impeded the work of the Committee. Similarly the absence of compellability rarely proved a barrier although the Great Telecom Lock-Out comes to mind.

However, it can be argued that as operated heretofore the PAC did not provide a realistic alternative to a Tribunal of Enquiry. The Compellability Act, although as yet untested, offers the prospect of many controversial matters that might otherwise cause a Tribunal to come into existence being adequately - in the public interest - investigated by a Dáil Committee.

However as operated heretofore it is unlikely that the PAC could effectively investigate the D.I.R.T. Controversy. Both Banks and Revenue would be likely to use the shield of confidentiality to decline voluntary cooperation beyond a certain threshold. The Revenue Commissioners are precluded by law from revealing information concerning the tax affairs of individual taxpayers, personal or corporate. To expect the Financial Institutions to volunteer information about their own tax affairs seems unrealistic.

Accordingly, if the PAC seeks and receives under the Compellability Act the necessary "direction" from the relevant sub-committee of the House, the powers to compel the attendance of witnesses and the production of documents may be invoked. The legal advice available to the Committee makes clear that such a direction given under Section 3 of that Act "overrules any general statutory or contractual duty of confidentiality that might exist."

This route is not without its own complications. Section 5(1)(f) exempts from the compellability provisions of the Act material "relating to information kept for the purposes of assessing liability of a person in respect of a tax." Therefore although the barrier is not absolute, it is possible to anticipate certain roadblocks.

Accordingly, the PAC is resolved on a course that is designed to have additional powers conferred on the Comptroller and Auditor General (C + AG) equivalent to those of an Inspector appointed by the High Court under the Companies Acts. Proposals to this effect have been made to government the objective of which is to invoke the powers under Section 7 of the Comptroller and Auditor General Act, 1923 to request the C.+A.G. to report to the Dáil on matters prescribed by resolution. If the additional powers sought are conferred on the C.+A.G. then neither Banks nor Revenue Commissioners could refuse to meet the reasonable requirements of his investigation. His report when laid before the Dáil would have privilege and would be referred back to the Public Accounts Committee. His report would then form the basis of more focussed hearings by the Mitchell Committee. This two stage process is itself a recognition by the Committee that there is not a simple way forward and an acknowledgement that unforeseen obstacles may arise. In deciding our approach the Committee is especially indebted to the advices furnished by Frank Clarke S.C.

I don't wish for obvious reasons to be drawn further into what might or might not be established at the end of the day. I know it will be argued that very tight terms of reference given to a Tribunal of Enquiry would be the most effective form of investigation. It can fairly in my opinion be argued that the Beef Tribunal laboured under the handicap of its terms of reference. A mandate to essentially enquire into the global beef industry offered endless prospects of becoming bogged down in legal challenge and mired in incidental detail. Given the centrality of the efficacy of our tax collection procedures for our system of democracy, the public have a right to make up their own minds as the evidence is mediated into the public domain. I believe that the course now embarked upon by the Public Accounts Committee will achieve this. This assessment I should say is predicated on the assumption that Government will, as pledged, bring forward amending legislative proposals to permit the C.+A.G. to carry out the preliminary investigation as envisaged. The C.+A.G. and his office are eminently equipped to carry out such a task. Whether the Committee will then after the hearings be able to make findings of fact and resolve conflicts of evidence, we shall wait and see. ●

The Supreme Court and the Equality Clause

GERARD HOGAN, SC

I

The sad demise earlier this year of Mr. Justice Walsh was, for many of us, an occasion for reflection on the death of a great judge whose singular contributions to the development of Irish constitutional law are unlikely ever to be surpassed. It also served to remind us that, in retrospect, Walsh J.'s lengthy tenure on the Supreme Court seems like a golden age which future legal historians will praise for that Court's steadfast protection of constitutional values and the clear articulation of a judicial vision. Since then, the pace of constitutional development has been more uncertain and uneven, a point which is also illustrated by the Supreme Court's latest pronouncement on the scope of the equality guarantee in *Lowth v. Minister for Social Welfare*[1].

II

Mr. Lowth was married in 1979 and when he was deserted by his wife in 1984 there were two young children of the marriage. Since there was no one who could assist him to rear his children, he was forced to give up his employment on a building firm. As the law stood at that time[2], a deserted wife - but not a deserted husband - would have been eligible to qualify for a deserted wife's benefit under the provisions of s.100 of the Social Welfare (Consolidation) Act 1981. Not surprisingly Mr. Lowth claimed that these arrangements constituted an unconstitutional discrimination against men, contrary to Article 40.1.

Before the High Court the defendants sought to justify the differing treatment of men and women on the basis that the Oireachtas had come to the conclusion that deserted wives were, by and large, in need of greater income support than were deserted men. Costello J. summarised the statistical evidence adduced by the defendants thus:

> "In 1979 only 16% of all married women under the age of 65 were in the labour force and although the figure has increased in 1991 to 30% the statistical evidence clearly established that in this country a significant number of women leave the labour force after marriage to look after their families and are not earning. Married women who are not earning and who are deserted are therefore, it is said, at a disadvantage compared to married men who are deserted by their wives who are more likely to be employed. Even where married women are working and are then deserted statistics for industrial earnings show that the average weekly earnings of female workers were only 58.9% of male workers in 1982 (and 59.2% in 1991) and so even in that situation a need for greater level of income support exists." [3]

Having outlined this statistical evidence, Costello J. proceeded to refer to standard judicial dicta regarding the manner in which this provision ought to be construed.[4] He then concluded that in these circumstances no unconstitutional discrimination had been established by the plaintiff:

> "It seems to me on the facts established in this case that the Oireachtas could reasonably conclude that married women fulfilled in Irish society a different social function to married men. Furthermore, the Oireachtas could reasonably conclude that married women who were deserted by their husbands require greater income support than married men who were deserted by their wives. It follows, therefore, that the distinction made in the impugned legislation is not based on any assumption that husbands deserted by their wives are to be treated in some way as inferior to wives who are deserted by their husbands, but is based on a factual assessment by the Oireachtas of the greater needs of deserted wives. [Accordingly] I must conclude that the distinction made in the legislation under review is not an arbitrary one, that it is a reasonable and a constitutionally permissible one."[5]

Finally, Costello J. added that he agreed with the comments of Barron J. in *Dennehy v. Minister for Social Welfare*[6] where the latter had concluded that, having regard to the provisions of Article 41.2 (which recognises the special position of wives and mothers in society), the Oireachtas in enacting the impugned provisions of the 1981 Act was not acting unreasonably when it sought to give special financial support to deserted wives who were also mothers.

The Supreme Court dismissed Mr. Lowth's appeal, with Hamilton C.J. delivering the judgment of the Court.[7] The Court first drew attention to the special burden which falls on a plaintiff challenging the constitutionality of a taxing or welfare statute or other legislation dealing with economic matters.[8] It then proceeded to quote with approval once again two well-known passages from the Court's equality jurisprudence. The first quotation was from the judgment of O'Dalaigh C.J. in *O'Brien v. Keogh*[9]:

> "Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances. It only forbids invidious discrimination."[10]

In passing, we may note again that the Supreme Court has once again endorsed a superficial analysis of the scope of Article 40.1 by reference to an

expression - "invidious discrimination" - which is drawn from the lexicon of the US Supreme Court's equality jurisprudence.[11] That expression was in turn fashioned by the experience of the US courts in the 1940s, 1950s and 1960s in response to legislation which not only differentiated on grounds of race, but evinced a clear hostility to the minority black population. Despite the many faults of Irish society and the rising degree of intolerance displayed towards newly-arrived immigrants, it is unlikely that the Irish courts will ever have to confront nakedly-discriminating legislation of this kind. If Article 40.1 were to be confined in its sphere of application to legislation of this kind, it would be virtually emasculated of any force or vigour.

Interestingly enough, in the next judgment cited by Hamilton C.J. - that of Kenny J. for the Supreme Court in *Murphy v. Attorney General,*[12] the Court expressly disavowed the use of the expression "invidious discrimination."[13] However, Kenny J. had proceed to state - in a passage quoted with approval in *Lowth* - that:

> "Having regard to the second paragraph of Article 40, section 1, an inequality will not be set aside as being repugnant to the Constitution if any state of facts exists which may reasonably justify it."

Yet on reflection it is clear that this analysis of the effect of the proviso to Article 40.1 is doctrinally unsound and ought not to have been further endorsed in *Lowth.* In the first place, Kenny J.'s language is apparently borrowed from American equal protection cases dealing with economic regulation, where a very low level of scrutiny is typically employed, but it ought not to be employed in an area such as gender discrimination. As Beytagh has tellingly observed:

> "This is dangerously misused language apparently borrowed from American equal protection cases involving economic regulation, where a 'hands-off' approach is typically taken. Incorporation of such a dubious standard into Irish constitutional law seems at least as unwise as the unthinking use of the 'invidious discrimination' phrase denigrated in the very same opinion."[14]

Secondly, this very low level of judicial scrutiny is not at all apposite to the facts of *Lowth,* where there was *prima facie* discrimination on the grounds of gender. On any view, this sort of discrimination calls for the most searching form of examination to examine whether it is objectively justifiable, as opposed to some form of casual inquiry to see whether the section met a basic rationality requirement. This is especially true of the Mr. Lowth's children who were co-plaintiffs in the action: all they knew at the time was that one parent had deserted them and that another was forced to give up employment to look after them. Yet because of the mere happenstance that it was their mother who had deserted them they found that their remaining parent was denied a vital State payment. Both Costello J. and Hamilton C.J. focused on the rationality of the Oireachtas attempting to compensate women in respect of their income differentials as compared with men. Yet the object of the payment was clearly as much designed to assist the children of the marriage following desertion as it was to assist the deserted wife.[15] Viewed from that perspective, it seems almost impossible to construct an objective justification for assisting the children of a marriage where a husband has deserted, but denying eligibility to this benefit where the wife has deserted, when in both instances the remaining spouse is forced to stay at home to look after young children. Indeed, a similar point was made in an adoptive widower's case, *O'G. v. An Bord Uchtála*, where in finding a gender-based discrimination to be contrary to Article 40.1, McMahon J. made the point that, judged also from the child's standpoint, it was unjust that an already sanctioned adoption should not go through simply because the one parent - the mother - had been tragically killed in an accident, and the surviving parent happened to be male.

Finally, Kenny J.'s comments do less than justice to the actual words - "have due regard" - of the proviso to Article 40.1. If ever there was a case for applying the newly developed doctrine of proportionality to any provision of the Constitution it was surely here, since the very words of the proviso envisage that any legislation enacted by the Oireachtas must be proportionate in the manner in which it takes account of relevant differences. This point had already been made by Henchy J. when delivering the judgment of the Supreme Court in *Dillane v. Ireland*[16]:

> "When the State, whether directly by statute or immediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or category of persons on the express or implied ground of a difference of social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, capricious or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of."[17]

On this approach, the Court would have been obliged to inquire, *inter alia*, whether the law in question was based on "irrational considerations" and whether the effect on rights were "proportional to the objective."[18] For reasons to be elaborated on presently, it is doubtful if s.100 of the 1981 Act could have satisfied this test.

III

At all events, having set out the statistical evidence and the governing principles, Hamilton C.J. concluded that:

> "The facts proved in evidence..... show clearly how women in employment at the material times were at a financial disadvantage compared to men. Again the statistics adduced in evidence established the relatively small proportion of married women in the work force. Moreover the provisions of the Constitution dealing with the family recognise a social and domestic order in which married women were unlikely to work outside the family home. Furthermore the Married Women's Property Acts 1881-1907 which significantly limited the rights of a married woman to deal with her own property were not repealed until the Married Women's Status Act of 1957. An even more obvious impediment to the married woman engaging in business was the Civil Service Regulation Act 1956 which required the retirement on marriage from the Civil Service of women who were civil servants. It

was not until 1973 that that prohibition was repealed by the Civil Service (Employment of Married Women) Act 1973 at about the same time as a comparable restriction on married women working in banks was lifted. These realities confirm and enliven the picture provided by the statistics given in evidence by the Defendants. It is no function of this Court to adjudicate upon the merits or otherwise of the impugned legislation. It is only necessary to conclude, as this Court has done, that there were ample grounds for the Oireachtas to conclude that deserted wives were in general more likely to have greater needs than deserted husbands so as to justify legislation providing for social welfare whether in the form of benefits or grants or a combination of both to meet such needs."[19]

This passage prompts several comments. First, the Chief Justice's observations to the effect that the provisions of the Constitution "dealing with the family recognise a social and domestic order in which married women were unlikely to work outside the family home" are wholly at variance with not only the text of the Constitution but, as a matter of historical record, with the clearly expressed views of the drafters. It is true that Article 41.2 provides that:

"1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

Article 41.2.1 is a simply a recognition of the contribution given by women in general to family life: it is general in its application and, unlike Article 41.2.2, it is not confined to mothers. It is silent on the question of whether the women referred to are working outside the home or not. Article 41.2.2, on the other hand, is confined in its application to mothers. Not only does the wording of this provision ("The State shall....endeavour to ensure....") suggest that, in the words of Barrington J. in *Hyland v. Minister for Social Welfare,*[20] it is an "imperfect obligation," but it says nothing at all that could be construed as in way of taking from the rights of mother to engage in labour outside the home. All Article 41.2.2 attempts to do is to place the State under an obligation - whether imperfect or otherwise - to ensure that mothers do not feel that they have to work outside the home for reasons of economic necessity where this would result in the neglect of their home duties. As McMahon J. put it in the widower's adoption case, *O'G v. An Bord Uchtála*[21]:

"[Article 41.2.2] recognises the social value of a mother's services in the home, but that does not involve a denial of the capacity of widowers as a class to be considered on their merits as suitable adopters."[22]

If there were any doubt about this, Article 45.2.1 requires the State to direct its policy towards securing that:

"i. that the citizens (all of whom, men and women equally have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs."

Not only does the text of the Constitution not bear out the Chief Justice's assumptions, but such views are clearly at variance with the views of the drafters. Speaking at various stages of the Dail Debates on the Constitution, Mr. de Valera was at pains to stress that neither Article 40.1 or Article 41 were intended to effectuate discrimination against women. All Article 41.2.2 was designed to do was to prevent the economic system from "driving women into avocations unsuited to their sex or strength or age." [23] He expressly stated that Article 40.1 would prevent both political and economic discrimination against women and would permit the Oireachtas to enact legislation preventing discrimination in employment directed at women.[24] Indeed, in one of his final speeches before the referendum on the Constitution, Mr. de Valera stated that, if adopted, it would prove no barrier to a woman becoming, for example, President or Chief Justice.[25] But even if Hamilton C.J.'s analysis were correct, it is hard to see how Article 41.2.2 could globally be prayed in aid to justify such discrimination in favour of married women, not all of whom were mothers.[26]

Nor is it possible to see how the litany of legislation enumerated in the judgment of the Chief Justice which discriminated against women had any bearing on this question, especially all of the items of legislation mentioned had been repealed by 1973, which was roughly the date on which the deserted wives' allowances and benefits were first introduced. Although the Chief Justice claimed that "these realities confirmed and enlivened the statistics" provided by defendants, the Court casually ignored the only statistics which, if available, might have been relevant to the discrimination question:

"...it was argued that the available evidence as to the percentage of married men and married women in employment was irrelevant. On behalf of the plaintiff it was argued that the appropriate comparison was between the percentage of deserted husbands in paid employment and the comparative figure in respect of deserted wives. It does not appear, however, that any such figures were available. Certainly they were not produced by the plaintiffs."[27]

Even assuming that gender discrimination of this kind could be objectively justified by reference to income differentials as between men and women, then this, of course, is the true and obvious comparator. (The Court laid much emphasis on the comparison between the percentages of men and women in paid employment, but given that this case concerns benefits payable to persons who, to all intents and purposes, will be forced to give up employment following desertion for the sake of their children, this is plainly a false comparison). The Chief Justice made no further reference to this comparator in his judgment, but even if such statistics were not available,[28] it seems plain that an equally low number of deserted men and women with children would be in paid employment, since almost by definition most of them would find themselves obliged to stay at home to look after such children. Against that background the justification for the discrimination would simply disappear.

Finally, the standard of review

applied by the Court to a gender-based discrimination of this kind is far too accommodating: the Court concluded that it was only necessary to demonstrate that the Oireachtas had "ample grounds" to conclude that deserted wives "in general" were "likely" to have greater needs than deserted husbands in order to justify a distinction of this kind. If such reasoning had been employed in other cases, the results of a case such as de *Burca v. Attorney General*[29] might have very been different. Could the Oireachtas have validly concluded that "in general" married women with children were likely to be less available for jury service than their male counterparts, thus exempting them from the obligation to serve on juries? Or, contrary to the result in *O'G v. An Bord Uchtála*[30], that it was reasonable for the Oireachtas to permit widows - but not widowers - to adopt a child.

Besides, where would this type of reasoning stop? Suppose, for example, the Oireachtas concluded that members of certain religious or ethnic groupings were "in general" worse off than the rest of the population at large: would it be possible, consistently with Article 40.1, to ordain that such persons should receive more generous social welfare payments? Having regard to the reasoning in *Lowth*, it is hard to see why not. Yet if this sort of result and reasoning were to prevail, there would be little of substance left of the equality guarantee.

In this respect, *Lowth* fares poorly in comparison with comparable US case-law. Two examples must suffice. In *Califano v. Goldfarb*[31] the US Supreme Court held that differential death benefits payable as between widows and widowers violated the equal protection clause in the absence of compelling objective justification. The higher benefits paid to widows stemed from a legislative intention to aid :

> "the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent.....Such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related assets." [32]

More recently, in *Virginia v. United States,*[33] the Court held that the State of Virginia could not constitutionally maintain a single-sex military academy, the Virginia Military Institute, as there was no objective justification for excluding women from military education. The test for gender-discrimination was thus set out by Ginsburg J.:

> "To summarise the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State. The State must show 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are substantially related to the achievement of these objectives. The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overboard generalizations about the different talents, capacities, or preferences of males and females."[34]

IV

What is all the more disappointing about *Lowth* is that there had been some signs that the Article 40.1 jurisprudence had been developing some coherence throughout this decade. Not only had it been used to invalidate gender-based common law rules in areas such as loss of consortium[35] and domicile[36], but there had been suggestions that Article 40.1 might be coming into its own as a free standing equality guarantee.[37] However, *Lowth* is yet a further unfortunate example of a tendency in the equality area described by the Constitution Review Group as "upholding legislation by reference to questionable stereotypes."[38]

It now seems that tinkering with the divergent strains of the equality jurisprudence will no longer do. If Article 40.1 is to have any force at all, it will really be necessary for a future Supreme Court to engage in a large-scale spring cleaning of the authorities, beginning with a disavowal of the ill-starred dicta of Ó Dálaigh C.J. in *O'Brien v. Keogh and Kenny* J. in *Murphy*. Unfortunately, there are only a few judgments which have satisfactorily got to grips with Article 40.1, including those of Walsh J. in *de Burca v. Attorney General*[39]; Henchy J. in *Dillane v. Ireland*; McMahon J. in *TO'G. v. An Bord Uchtála*[40] and Budd J. in *An Blascoid Mor Teo. v. Commissioners of Public Works.*[41]

The way forward is demonstrated not only by these decisions, but also the European and American equality jurisprudence. In essence, the courts ought henceforth to ask themselves, first, have persons in similarly situated circumstances been treated equally? If the answer is in the negative, then the court should go on to consider whether the differing treatment is objectively justifiable having regard, in particular, to proportionality principles. Finally, closer judicial scrutiny is required where the legislation differentiates on suspect grounds such as race and gender. But even if a future Supreme Court were to repent of its mistakes in this area, this would be cold comfort to Mr. Lowth or atone for the Court upholding the constitutionality of legislation that was palpably discriminatory and unfair. ●

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1 [1994] ELR 119 (HC); Supreme Court, July 14, 1998.

2 Successive Governments have introduced measures in the late 1980s to eliminate gender discrimination in the social welfare code. The payments in question were first made gender neutral in 1989, and the Social Welfare (Consolidation Act) 1993 provides for what is now described as the lone parent's allowance.

3 [1994] ELR 119, 127.

4 Including , e.g., the comments of Ó Dálaigh C.J. in *O'Brien v. Keogh* [1972] IR 144

5 [1994] ELR 119, 127-128.

6 High Court, July 25, 1984.

7 Hamilton C.J., O'Flaherty, Barrington, Keane and Murphy JJ.

8 Hamilton C.J. quoted with approval from the judgment of O'Hanlon J. in *Madigan v. Attorney General* [1986] ILRM 136, 151:
".....tax laws are in a category of their own, and that very considerable latitude must be allowed to the legislature in the enormously complex task of organising and directing the financial affairs of the State."

9 [1972] IR 144.

10 *Ibid.*, 156.

11 The phrase appears to have been first used by Douglas J. in a case dealing with the *Skinner v. Oklahoma* 316 US

535, 541 (1942). The legislation in that case was truly "invidious" in this special sense, since it arbitrarily selected a class of recidivist felons and subjected them to compulsory sterilisation.

12 [1982] IR 241.

13 Kenny J. considered ([1982] IR 241, 284) that the use of the word "invidious" was "more likely to mislead than to help."

14 Beytagh, "Equality under Irish and American Constitutions - A Comparative Analysis" (1983) 18 *Irish Jurist* 56. Although this article is now a little dated, it is a powerfully written critique of the major developments in this area.

15 By virtue of s.195 of the 1981 Act, only women over 40 years were eligible for the payment if there was no dependent child residing with them.

16 [1980] ILRM 167.

17 *Ibid.*, 169.

18 See the test propounded by Costello J. in *Heaney v. Ireland* [1994] 3 IR 593,607 and as recently approved and applied by Barrington J. in delivering the judgment of the Supreme Court in *Murphy v. Independent Radio and Television Commission* [1998] 2 ILRM 360, 373-4.

19 At pp. 17-18 of the judgment.

20 [1989] IR 624, 639.

21 [1985] ILRM 61.

22 *Ibid.*, 65.

23 67 *Dail Debates* 70.

24 *Ibid.*, 1591.

25 *The Irish Times*, June 14, 1937.

26 By virtue of s.195 of the Social Welfare (Consolidation) Act 1981, a deserted wife's benefit was payable to all such women aged 40 years irrespective of whether any qualifying child was residing with them.

27 At pp. 12-13 of the judgment.

28 One could scarcely expect that an unemployed plaintiff who had given up his job to look after his children would be in a position to produce such statistics.

29 [1976] IR 38.

30 [1985] ILRM 61.

31 430 US 199 (1977).

32 *Ibid.*, per Brennan J.

33 135 L 2nd 735 (1996)

34 *Ibid.*, 751

35 *McKinley v. Minister for Defence* [1992] 2 IR 333.

36 *W v. W.* [1993] 2 IR 476.

37 See, *e.g.*, the comments of Denham J. in *Howard v. Commissioners of Public Works* [1994] 1 IR 101 and *McKenna v. An Taoiseach* (No.2) [1995] 2 IR 10.

38 Pn. 2362, at p. 228.

39 [1976] IR 38. Walsh J.'s analysis of Article 40.1 as importing the Aristotelian version of equality is especially thoughtful.

40 [1985] ILRM 61.

41 High Court, March 13, 1998.

INVITATION TO PROPOSE

The Revenue Commissioners wish to invite proposals from suitably qualified experts to provide training to Revenue staff as part of their continuing programme of training in legal processes including court procedures. The person selected should be available to provide between 15 to 30 training days in 1999. The exact number of days will be decided by the Revenue Commissioners.

Suitable Personnel

The person selected should be a qualified barrister with expertise in cross-examination, preferably in criminal law. S/he should have good communication skills. Experience in the educational/training field would be an advantage. S/he should be available for the duration of the schedule outlined. Unavailability for a limited number of courses may be acceptable subject to the provision of cover in the form of a suitable substitute.

Full details on the Invitation to Propose are available from:-

Mr. Niall Butler,
Training Branch,
Office of the Revenue Commissioners,
D'Olier House,
D'Olier St.,
Dublin 2. Tel: 01 - 6772577 Fax: 01 - 6712774

The final date for receipt of proposals is 13th January 1999.

SERVING THE COMMUNITY 1923 - 1998 75 THE REVENUE COMMISSIONERS Na Coimisinéirí Ioncaim

Revenue

Reflections on *In Re Pinochet Ugarte*

PATRICK DILLON-MALONE, Barrister

Introduction

When Senator Augusto Pinochet, former Commander-in-Chief of the Chilean Armed Forces and former President of Chile, woke from the mists of sedation in a London hospital to learn that he had been arrested on foot of a Spanish extradition warrant for crimes including the murder and torture of Spanish citizens, it is probable that he and his bewildered entourage shared one reaction with that of the surviving torture victims of his former regime; where was the precedent for such an action? Apart from the aborted (and quite special) trial of Erik Honecker, one has to search hard for other examples of the trial or even the indictment of heads of state on charges relating to human rights abuses other than by specially constituted international criminal tribunals[1]. As the Pinochet case itself demonstrates, there are strong pragmatic reasons for avoiding such trials; following his arrest, there were cries of betrayal, not only in Chile but throughout the Southern Cone, and dark mutterings from the Senator himself about the frailty of democracy in his country. On the one hand, the United Kingdom was insulting another sovereign nation and damaging its diplomatic relations in the region. On the other, it was interfering in a process of investigation, punishment and forgiveness which, many argue, should be carried out only on home soil where the therapeutic effects of reconciliation can take root.[2]

These powerful concerns underscore the doctrine of foreign sovereign immunity, the principle of public international law which led to Pinochet's provisional order for release, some few weeks following his arrest, by Order of the English High Court. Yet, following much more extensive argument on the key point of law arising on appeal, by a 3-2 majority the House of Lords (Nicholls and Hoffmann LJJ; Steyn LJ concurring; Slynn and Lloyd LJJ dissenting) overturned a unanimous Divisional Court in holding that sovereign immunity could never extend to acts of torture and other crimes against humanity[3]. This article considers the implications of this decision in the light of international, European and Irish law, and suggests that the Irish courts would be likely to reach the same conclusion in the event that the victims were Irish and, further, that it would also be open to the Irish courts to decline generally to uphold the immunity of a former head of state in respect of torture or other crimes against humanity. This would have particular consequences for civil actions for damages against such persons. However, it is also probable that in the absence of any clear guidance in state practice, the lifting of the immunity is not compelled by any rule of international law. Furthermore, because Irish courts have no extra-territorial jurisdiction over crimes of torture and hostage-taking committed elsewhere, it appears that this question is only likely to arise, in a criminal prosecution, in relation to alleged acts of genocide. Similarly, where genocide is not included among the charges in an extradition warrant from a third country, it is far from clear that the Irish courts would be in a position to follow the lead of the House of Lords in *Pinochet* even in an extradition context.

International Criminal Responsibility

The traditional remedy of old for a country aggrieved by the murder or torture of its citizens was simply to seek reparations. While there could be no guarantee that any money paid would go to the families of the victims, the diplomatic affront was cured by the comfort and penance of transfers from one sovereign coffer to another. If the affront was great enough, as for example the massacre of one's nationals within the borders of another, war might even ensue, but there could be no question of trying the responsible sovereign before one's own criminal courts[4].

The monarch thus had immunity *rationae personae*.[5] According to the 1864 edition of Wheaton's *Elements of International Law*: 'Wherever, indeed, the absolute or unlimited monarchical form of government prevails in any State, the person of the prince is necessarily identified with the State itself: *'L'Etat, c'est moi.'* However, if the doctrine of foreign sovereign immunity may at first have been based in part on the inviolability of the person of a monarch *per se*, the rule as it developed to accommodate republics found its rationale in the perceived necessity underlining the comity of nations.[6] Now, in modern international practice, monarchical States are usually sued in the name of the State or its government rather than in the name of the monarch.[7] Furthermore, as a rule, international treaties even if concluded in the name of a monarch, and even absolute monarchs such as the Sultan of Brunei, regulate and recognise dealings between the states concerned. In contemporary international law, therefore, it appears that even a foreign state under 'absolute' personal rule is now regarded as a legal person distinct from its ruler.[8]

In these circumstances, it appears that the absolute immunity allegedly attaching to the person of the head of state cannot be justified on historical grounds and, further, that its justification cannot lie in any alleged unity of identity between a modern state and its acting head of state. So the justification must be found elsewhere. As indicated above, the primary justification for the continued recognition of a sovereign

oasis of immunity is the respect due from one sovereign to another (also described as the perfect equality of sovereigns) and the resulting promotion of good international relations.[9] Thus, the doctrine will not apply in any case where the government in question has waived the immunity of the defendant or, on United States authority, as an initial bar to proceeding where the plaintiff alleges that the activities of the defendant were carried out outside the scope of his authority. This last argument has particular practical importance in the framing of prosecutions or writs against lower level officials, as opposed to heads of state. On the other hand, the fact that a particular action was carried out contrary to the domestic laws in force is not a relevant consideration. The true question is whether the conduct is contrary to the laws, duties, rights and powers of a sovereign exercising sovereign authority.[10]

The traditional statement of the difference between acting and former heads of state is that the acting head of state is said to enjoy a concurrent immunity *rationae personae* for acts committed while in office, whereas the immunity is limited thereafter to acts done within the functions of a head of state.[11] Thus, while there have been certain precedents for prosecuting or suing former heads of state for crimes/torts committed by them in their personal or private capacity, prior to the decision in *Pinochet* it appears that there was no case in which public or official acts done under the colour of sovereign authority were nonetheless adjudged, by virtue of their repugnance, to be incapable of forming part of the exercise of sovereign authority.[12] Following *Pinochet*, it remains the case that acting heads of state continue to enjoy personal inviolability from the criminal process of third countries.

As a matter of international law, it has been clear for some time that State responsibility for certain grave breaches of human rights can be established by reason of the failure of that State to adequately investigate and punish such violations.[13] Thus, certain practices and certain domestic laws providing for or tolerating impunity of gross human rights violations will fall foul of international law standards.[14] Furthermore, the concept of crimes against humanity and the notion of the individual responsibility of perpetrators of human rights violations has been widely recognised since Nuremberg.[15] However, although the State may be condemned and ordered to pay compensation, the actual perpetrators may escape punishment and/or any civil liability in the matter. Thus, even in respect of torture, which is subject to an arguably stronger duty to prosecute in international law instruments, victims can point to no right to compel punishment of their torturers as a matter of international law.

When cases are tried, it is quite clear that public international law has not advanced to the point where domestic courts are obliged to admit the prosecution of perpetrators within their jurisdiction or to extradite persons on foot of warrants from third countries. The crucial point in this connection is that although there is some support for the view that generally applicable rules of sovereign immunity should be displaced in cases concerning infringements of *jus cogens*, e.g., cases of torture,[16] by reason of the almost complete absence of state practice supporting such a rule, it must be recognised that no such rule of customary international law exists. As stated by Slynn LJ in his dissenting judgment in *Pinochet*, there is no universality of jurisdiction for crimes against international law, and there is no universal rule that all or even some crimes are outside immunity *ratione materiae*. In consequence, the decision to lift the immunity in such cases is a matter for domestic laws, and for regional and bilateral (or in the case of genocide, drug trafficking and hijacking, universal) mechanisms of protection.[17] At the same time, however, it should be emphasised that, conversely, international law contains no prohibition on the prosecution of acting or former Heads of State in respect of such crimes. As pointed out by the International Commission of Jurists in their recent communications on the subject of the Pinochet case, the immunity is not a unilateral claim but is conceded to heads of state by countries which are free to distinguish the immunity attached to their functions from crimes against humanity allegedly committed by them.[18] Thus, while the House of Lords disagreed as to the proper construction of English law, it appears that the majority decision was neither compelled by, nor contrary to, the applicable principles of international law.

The Pinochet Decision

In its decision the English High Court found that the Applicant was entitled to immunity as a former sovereign from the criminal and civil process of the English courts. Such immunity was a conclusive objection to the provisional warrants of murder, torture, hostage-taking and conspiracy to same including conspiracy to murder in a country to which the European Convention on Extradition applied. In the leading judgment of the Divisional Court, Bingham LJ stated that while it was a matter of acute public concern that those who abused sovereign power to commit crimes against humanity should not escape trial and appropriate punishment, a former head of state was clearly entitled to immunity in relation to criminal acts performed in the exercise of public functions. One could not hold that any deviation from good democratic practice was outside the pale of immunity, and if a former sovereign was immune from process in respect of some crimes where did one draw the line?[19]

The answer proposed by the Spanish government, relying *inter alia* on Article 4 of the Genocide Convention and the Statutes of the International Military Tribunals at Nuremberg, for the Former Yugoslavia and for Rwanda, was that there were some crimes so deeply repugnant to any notion of morality as to constitute crimes against humanity. The Court rejected this argument. According to Collins LJ, history showed that it was indeed state policy during Pinochet's rule to exterminate particular groups, and the Court could not twist the law to meet the temptation of retribution in any particular case. However, the High Court relied mainly on narrower grounds. First, in this case genocide was not a charge, and the English Act giving effect to that Convention had in any case not transposed Article 4 (which specifically overrides the immunity for acting and former heads of State in respect of genocide) into domestic law.[20] Secondly, the express powers of the above international tribunals, if anything, demonstrated that these were treaty exceptions to the general principle in international law. Thirdly, and crucially, on the authority of the decision of the Court of Appeal in *Al-Adsani v Government of Kuwait and Others (1996)* TLR 192, it followed from the principle *expressio unius* that torture and other

crimes against humanity could not have been intended to be included among that exhaustive class of exceptions set out in the State Immunity Act 1978.

In *Al-Adsani*, the Plaintiff claimed that he had been kidnapped, taken to a state security prison and severely beaten in an alleged act of personal revenge by relatives of the Emir of Kuwait. The Court of Appeal recognised that under international law, torture was a violation of a fundamental human right, a crime and a tort for which the victim should be compensated. The Plaintiff had argued that international law against torture was so compelling as to constitute *jus cogens*, or compelling law, such as to override all other principles of sovereign immunity. However, the Court found that, as was the case under equivalent legislation in the United States, the statutory exceptions to the protected domain set out in the State Immunity Act 1978 marked substantial inroads into the principle that a foreign State could not be sued at all against its will in the courts of England, and it was inconceivable that the draftsman, who must have been well aware of the various international agreements about torture, intended the principle to be subject to an overriding exception.[21] In addition, the Court stated that a moment's reflection was enough to show that the practical consequences of the plaintiff's submission would be dire. The foreign State would be unlikely to submit to the jurisdiction of the English court, and in its absence the court would have no means of testing the claim or making a just determination.

In this last connection, it may be noted that objections of efficacy do not apply with the same force to the arrest and prosecution of an alleged torturer as they do to a civil suit against him – being in custody, the Court knows that the defendant is in a position to make his case. Furthermore, although it appeared that the point of statutory interpretation in English law was a strong one, it was found on appeal that Part 1 of the 1978 Act had no application to criminal proceedings. In consequence, the House of Lords was free to decide the proper scope of the immunity at common law, i.e., by reference to the applicable rules and principles of international law. As indicated above, in this task the Court was presented with a fresh canvas because, although crimes against humanity need not be characterised as sovereign acts by any rule of public international law governing immunity, by the same token international law does not demand that domestic laws should refuse to recognise such an immunity in former heads of state.

In the event, the key point of difference as between the majority and the minority approaches in the House of Lords was that the majority were prepared to cut down the immunity on first principles, to take a leap in the light, so to speak, in ruling that certain conduct was never immune from the process of the courts even if committed by a head of state. In doing so, it is noteworthy that the majority did not purport to identify the present binding rule in international law by reference to state practice, but were prepared to appeal directly to principle. Quite clearly, the rule against immunity has not crystallised in international state practice, and it is probable that the dissenting approach of Slynn LJ, in looking to existing multilateral treaty obligations of the two states in question for a binding rule in the absence of a more general binding principle of international law, represents the correct diagnostic method for identifying the present position. Be that as it may, the *Pinochet* decision itself, as a statement of English law, is now destined to have a strong bearing on developments in international law and practice governing claims to immunity in respect of grave human rights abuses. Its logic and its appeal to principle are unassailable in demonstrating that the international rules governing individual responsibility for gross human rights violations are relevant in considering the ambit of any immunity extended under domestic law. Stripped of its particular statutory context, the decision signals for the first time that because international law cannot be said to recognise torture, hostage taking and murder as functions of a head of state, it is open to domestic laws and domestic courts to deny sovereign immunity to former heads of state in respect of such crimes. In other words, former heads of state enjoying functional immunity under international law can forfeit their procedural immunity before the courts of third countries by reason of their flagrant disregard of the substantive prohibition on torture and other crimes against humanity. In time, with the development of state practice, this may even become a binding rule of international law.

The Irish position

Following the Supreme Court decisions in *Government of Canada v Employment Appeals Tribunal* [1992] 2 IR 484 and *McElhinney v Williams* [1995] 3 IR 382, it is now clear that the former doctrine of absolute sovereign immunity was never conclusively established in Irish law and that, as in England, for the purposes of deciding in any case whether the immunity should be allowed under the 'restrictive theory,' the question is whether the alleged conduct 'should be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.' According to O'Flaherty J in the *Canada* case, the immunity should still apply if the activity in question truly touches the actual business or policy of the foreign government. This test, then, is designed to differentiate between the public and private acts of a State, and appears (unless the word 'fairly' can be taken to include a moral element) to be no more than a statement of the now generally accepted test in international law governing that point.[22] However, in insisting that international law, and not domestic law, must govern the characterisation of the conduct in question (public or private), McCarthy J also signalled that this might be otherwise if it can be shown that there is a conflict with some private constitutional right.

In two subsequent cases, the Plaintiffs pleaded their constitutional rights as against a claim to State immunity, in both cases unsuccessfully. In *Schmidt v Home Secretary of the Government of the UK and Others* [1995] 1 ILRM 301, the Plaintiff claimed damages for *inter alia* trespass to the person, false imprisonment and breach of constitutional rights for alleged ill-treatment against the Home Office, the Commissioner of the Metropolitan Police and a named police officer. In upholding the claim of all three defendants to sovereign immunity, Geoghegan J found that the defendants were carrying out the general Crown policy in a public domain of preserving law and order and keeping the peace. There was nothing commercial in their activities, and so sovereign immunity applied. In this case, therefore, Geoghegan J applied what might

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be described as the primary rule, to the effect that an allegation concerning the manner in which a power in the protected domain is exercised remains nonetheless a case falling within that domain. Similarly, in the later case of *McElhinney v Williams*, the Supreme Court (Hamilton CJ) simply rejected without elaboration the Plaintiff's argument that his right to bodily integrity (and right of access to the Courts) would be infringed by any immunity of the defendant on the facts of that case. However, in considering the wider argument, the Court stated that there was no principle of public international law which required the lifting of immunity in respect of tortious acts causing personal injuries to the person affected when such act is committed *jure imperii*, i.e., an official act by a foreign sovereign acting in its public, as opposed to private, capacity.[23]

The above primary rule is quite clearly designed to accommodate the interest of individuals doing business with foreign governments.[24] It therefore omits any reference to, and is ill-equipped to deal with, arguments going to the severity of the alleged interest and the importance of the constitutional right at issue. The two last Irish cases were not concerned with allegations of serious human rights violations, and the constitutional point does not appear to have been fully argued in either case. This is understandable since in both cases the claims were relatively mundane, and the Courts were evidently concerned to avoid the explosion of the tort immunity in circumstances where almost any tort can be characterised also as a breach of a constitutional right. For example, if a personal injury claim in negligence were framed in the alternative as a deliberate breach of the Plaintiff's right to bodily integrity, what would follow would be an awkward and offensive inquiry into the seriousness of the breach, which is just the type of inquiry which the immunity is designed to avoid. By virtue of Article 29.3 of the Constitution, constitutional rights are necessarily limited by the doctrine of sovereign immunity in international law, and there is therefore no constitutional breach in the normal application of the rule. Thus, protection of one's right to bodily integrity does not imply a right to have a claim of interference by a foreign sovereign tried before an Irish court. If there is a constitutional rights exception, considerable care must therefore be taken to ensure that it is an extremely limited one and, it is suggested, the substantive prohibitions on torture and other grave human rights abuses in international law provide a ready measure of the gravity of infringement required to lift the immunity.[24A]

In this last connection, the absence of Irish legislation in this area has the particular advantage of allowing the Courts to have regard to developments in international law free from the type of statutory constraint which has prevented the argument from being developed, on the civil side, in the United Kingdom. Furthermore, although there are differences of judicial opinion on the precise place of customary international law in domestic Irish law, this appears to matter little in the present context because no conflict arises as between the substantive prohibition in international law on crimes against humanity and the emergent international procedures for prosecuting such crimes, on the one hand, and any relevant statutory or common law rule, on the other.[25] Thus, while Ireland in common with most if not all developed nations recognises that foreign sovereign immunity is restricted to certain zones of activity, it is suggested that it is an open question whether, within those zones, a sovereign can lose the benefit of immunity by reason of its flagrant violation of the fundamental rights of Irish citizens or, more generally, the fundamental human rights of any person who looks to the aid of the Irish courts in prosecuting or suing those responsible.

Certainly, the above dictum of McCarthy J in the *Canada* case offers hope to Irish citizens who may have been victims of human rights abuses. Support for such an approach may also be found in those decisions of both the Supreme Court and the High Court which have emphasised the constitutional duty of the State, in an extradition context but also more generally in its conduct of international relations under Article 29.3, to protect the constitutional rights of citizens.[26] In addition, the erosion of the absolute immunity doctrine traced by the Supreme Court in the *Canada* case unequivocally took its lead from modern developments in international commercial law and practice, and by analogy this must include, it is suggested, developments in international law concerning criminal and civil liability for gross human rights violations. On this analysis, although state practice may not compel the view that constitutional rights must trump sovereign immunity in cases of grave breaches of fundamental rights, the substantive prohibition on torture and other crimes against humanity is a relevant consideration in deciding whether the process of the Irish courts can be avoided on immunity grounds alone in cases involving such allegations.

Of course, this result still requires an answer to the question posed by Lord Bingham in *Pinochet's* case where does one draw the line? The answer, or at least the correct approach to that question from a constitutional perspective, it is suggested, is to start at the other end: there are clearly such abhorrent and cruel practices, such as repeated rape by trained dogs (one of the alleged former practices in Chile) or a pattern of disappearances/ summary execution of persons by state forces operating with evident impunity, that these cannot be said to be the official actions of a foreign sovereign. This was the approach adopted, notably, by Steyn LJ in his concurring judgment in *Pinochet*. It is also an argument which receives some support from the act of State doctrine developed in Anglo-American law going to the justiciability of certain questions of foreign affairs. Space does not permit of a full treatment of this subject here, but it may be noted in passing that in certain cases the US courts have been prepared to characterise conduct as common crimes committed by a head of state in violation of his position and not in pursuance of it.[27] In *Pinochet* the English High Court distinguished five United States cases which, in its view, were of limited assistance because they did not concern a (recognised) foreign sovereign or, in one case, because the acting government in the Phillipines agreed that the suit should proceed.[28] On appeal, Slynn LJ agreed, finding that none of these cases were examples of the prosecution or suit of former heads of state for official acts committed by them. However each of these cases, and other US precedents, are capable of a wider interpretation which the Irish courts might well find persuasive.[29] In particular, a close reading of the US precedents supports the case that, subject to an statutory conflict, because crime against humanity are often if not usual

ly committed under colour of official authority, it would be a contradiction in terms to say that such conduct, prohibited under international law as a matter of *jus cogens*, could be carried out in an official capacity for the purposes of construing the immunity attaching to the exercise of sovereign authority. That is now also the key *ratio* of the *Pinochet* case.

The European Dimension

If the immunity drops in the case of Irish citizens, what of the citizens of third States, as for example member States of the European Union? Could the above constitutional argument, taken together with the preparedness of the Irish courts to apply non-political constitutional rights equally to non-citizens, not result in the lifting of the sovereign immunity in appropriate circumstances also in the case of non-citizens? The short answer, as a matter of European Community law, is that in the absence of common action in the field, mutual assistance in criminal matters is left to bilateral arrangements. At present, the European Union has undertaken no such common endeavour.[30] Nor, beyond those pockets of equality demanded by European Union law, is there any duty to extend rights protected by the domestic constitutional order to all EU citizens within the jurisdiction.[31] Nor, finally, do either the European Convention on State Immunity 1972 or the European Convention on Extradition provide any guidance on this point.

The European Court of Human Rights has been prepared to characterise certain immunities from suit as an impairment of the essence of the right of access to courts or as a disproportionate restriction on such access, contrary to Article 6 of the Convention. For example, in its very recent decision in *Osman v United Kingdom* the Court found that the state's interest in maintaining immunity from suit in negligence of police officers acting in an investigative or preventative capacity did not justify the potential removal from the jurisdiction of the courts of certain serious claims of failure to prevent death and injury caused by armed attack. In such circumstances, the restriction was disproportionate to the aim pursued.[32] However, in the case of sovereign immunity, the Court is bound to interpret international law, and might not have the same freedom as the House of Lords in going beyond the present binding rules of international law. To impose a standard applicable to all 40 countries now party to the Convention might well require much greater reliance on existing bilateral and multilateral treaty obligations throughout Europe, in accordance with the stricter approach of Slynn LJ in Pinochet's case. Beyond that, it is probable that the Court in an Article 6 challenge would support the appeal to fundamental principle of the majority in Pinochet's case, and urge the national court to attach appropriate weight to the substantive prohibition on torture and other crimes against humanity in international law in considering whether, in any particular case, the immunity should apply.

While the outcome of any challenge in Strasbourg to the recognition of continuing immunity in respect of acts of torture and hostage-taking or other crimes against humanity must therefore remain uncertain, there is another way in which the Convention might come into play in this context. In particular, the European Court of Human Rights has insisted that there is a duty on States party to the Convention to investigate and punish torture and other crimes against humanity.[33] As stated by the Court, if there were no such duty the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity.[34] Because the guarantee extends to all persons within the jurisdiction of States party to the Convention, irrespective of their citizenship (European or otherwise), this reasoning could perhaps be relied upon by a non-citizen plaintiff in Ireland seeking to overcome the immunity on the grounds of an alleged breach of his or her fundamental human rights. Although not decisive, it could at least support the reasoning of any Irish court which was inclined to extend the proposed constitutional protection also to non-citizens.

However, the same argument does not appear capable of supporting a decision to extradite to a third country. In such a case, the victim is not within the jurisdiction of the Irish courts. Furthermore, although there is a wider duty for States party to the Convention to co-operate and comply with emergency requests for interim measures made by the Court under Rule 39 of its Rules of Court, it would appear that any such request in the context of extradition proceedings between two States party to the Convention is most unlikely because, although important, the interest of victims in the prosecution of their torturers is not a sufficiently serious and irrevocable interest to justify the application of Rule 39.

Conclusions on Irish Jurisdiction

This result would appear to mirror the position in Ireland, where the Courts have frequently taken a generous view of the ability of non-citizens to invoke the non-political rights provisions of the Irish Constitution.[35] Therefore, the Courts would be free in principle to extend any constitutional protection to non-citizens where the suit or prosecution is brought directly before the Irish courts.[36] In the event of a private suit for a foreign tort, for example against a foreign national (other than from a Brussels Convention country) who passes through Ireland and who is served in accordance with the 'fleeting residence' principle, the Courts would nonetheless be concerned to ensure that the process was effective, as stated by the English Court of Appeal in *Al-Adsani* above. In Ireland, it appears from the Supreme Court's decision in *Intermetal Group Ltd v Worslade Trading Ltd* that, in order to proceed in such circumstances, it is necessary to satisfy a double actionability test, such that the conduct must be unlawful in both Ireland and the country where the tort is alleged to have been committed. In this connection, it would appear that the existence of an amnesty in that country does not go to the lawfulness of the conduct itself, and that it may also be relevant to the *forum conveniens* question that a plaintiff is effectively shut out from litigating the claim in the country in question.[38]

As indicated above, a stateable argument can be made, in the absence of Irish legislation on the subject, that torture can never be within the sovereign function. This argument is supported by certain US judicial innovations as well as by certain decisions of the European Court of Human Rights, and has now received a further important boost in

Pinochet's case. However, it must be recognised that any such decision by the Irish courts would still be a brave one, taken in the absence of any positive rule of international law denying the immunity in such cases. In addition, other than in relation to charges of genocide it is difficult to foresee how the Irish courts could be called on to address the immunity point in a criminal or extradition context.[39] Unlike the United Kingdom, Ireland has not assumed extra-territorial jurisdiction in respect of acts of torture or hostage-taking: it has not ratified the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 and has not even signed the UN International Convention against the Taking of Hostages 1979.[40] Furthermore, the extra-territorial jurisdiction of Irish courts in respect of murder and other offences against the person set out in the Schedule to the Criminal Law (Jurisdiction) Act 1976, as amended, is plainly limited to Northern Ireland. In these circumstances, because the *locus* of the offence is probably a component of extraterritorial offences, it cannot be said that there exists in Ireland an offence whose factual ingredients, if committed in this state, would correspond to any offence included in an extradition warrant of torture or other crimes against humanity (short of genocide) committed in a third state, irrespective of the nationality of the victims.[41]

Thus, even if the Irish courts were to follow the majority House of Lords' view that crimes against humanity could never be regarded as being committed within the exercise of sovereign power, it is probable that an extradition request such as that at issue in Pinochet's case (i.e., not extending to acts of genocide) would be refused here. The exception arises in respect of genocide because Article 4 of the Genocide Convention has been fully transposed into Irish law under the Genocide Act 1973. Therefore, as a matter of Irish law the doctrine of foreign sovereign immunity has no application to charges of genocide or conspiracy to commit genocide, irrespective of the citizenship of the victims or the location of the alleged acts and irrespective also of whether the question arises on foot of an extradition warrant from a third country.

Final Observations

At the time of writing, the Home Secretary has yet to decide whether to proceed with Senator Pinochet's extradition to Spain. Even if, as may perhaps be anticipated, the Chilean government persuades the UK authorities that the 14 private prosecutions pending against the General in Chile (and others to follow) represent the most appropriate way to proceed, further appeals appear to be inevitable. Whatever the outcome, the Pinochet case is already a historic landmark in the erosion of impunity in respect of alleged crimes against humanity. In many ways, it is already a victory for those who suffered under the Pinochet regime that the Senator has been arrested and forced to answer these charges, if only indirectly on the jurisdictional point. Although perhaps not trapped, he has been snared in the autumn of his years and charged as a pariah among leaders. In addition, having dominated and attempted to control the transition to democracy in Chile, it is likely that he will now more than ever be a provocation to that process.

International law does not prohibit the arrest and prosecution of former heads of state on grounds of torture or other crimes against humanity, and the *Pinochet* case serves as a signal that state practice could well change in the coming decades in such a manner as to support, in time, a general rule of international law denying the possibility of sovereign immunity in such cases. Already, several European states have been quick to follow Spain's lead. The surprise in all of this, as the dissenting judgments in *Pinochet* make clear, is that the painstaking efforts and negotiations for the creation of war crimes tribunals and, particularly, the creation of an international criminal court, risk being overtaken on this analysis by the emergence of an international judicial order based on a near-universal application of extradition in respect of torture and crimes against humanity.[42] This path, some may argue, can only lead to trouble. The mere possibility of prosecutions and suits will open the way to abusive claims to jurisdiction, a chilling of trust and confidence among leaders, a reluctance to develop extradition arrangements, greater temerity in the employment of peacekeeping troops abroad and, finally, the undermining of the establishment of the international criminal court itself.

However, the lesson of this momentous case may be that the interests of free and uninhibited international relations must yield, in rare cases, to the concern to protect against and punish torture and other crimes against humanity. Ireland, it is suggested, should now take the opportunity to provide statutory confirmation that certain gross violations of human rights can never form part of the functions of a foreign sovereign, perhaps as part of a general State Immunity Act which has been called for in other contexts too.[43] In addition, if Ireland wishes to play a full part in the development of international law in this area and to be in a position, if needs be, to invoke extra-territorial jurisdiction in respect of alleged acts of torture and hostage-taking, the government should follow the recommendations of the Law Reform Commission in its 1994 Report on Non-Fatal Offences against the Person by ratifying the UN Torture Convention 1984 and the UN Hostage-Taking Convention 1979 as a matter of priority. ●

I am grateful to Nuala Mole, Director, The Aire Centre, London, for advice on the progress of the Pinochet appeal before the House of Lords, and to Donal O'Donnell SC and Brian Murray BL for their observations on the jurisdictional points arising under Irish law. Any errors are entirely my own.

1 Re Honecker (1984) 80 ILR 36.

2 See The Telegraph, Editorial, 28 November 1998.

3 R v Bartle and Others (Ex parte Pinochet Ugarte), The Times, 3 November and 26 November 1998.

4 In the words of Campbell LCJ in De Haber v Queen of Portugal (1851) 17 QB 196, 206-207: "To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent."

5 Wagner v USA (1867) 2 Ch App 582

6 This is clear when one considers those early cases which first recognised the capacity of republics to sue in their own name, and not necessarily in the name of their presidents, cf. Chelmsford LCJ in Wagner v USA (1867) 2 Ch App 582. The original rule did not derive from the then statutory provisions governing diplomatic immunities (the Statute of Queen Anne), any more than the modern rule, in Ireland, derives from the Diplomatic Relations and Immunities Act 1967.

7 For example each of the 22 foreign

defendants in the leading Tin Council case of J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry and Others [1990] 2 AC 418, comprising both republics and monarchies, was sued in the name of the State.

8 E.g., UAE v Abdelghafar [1995] ICR 65; and, generally, Marston, The Personality of the Foreign State in English Law (1997) 56 CLJ 374, 416.

9 According to Slynn LJ in Pinochet, "although the concepts of State immunity and Sovereign immunity have different origins, it seems to me that the latter is an attribute of the former and that both are essentially based on the principles of sovereign independence and dignity"

10 Duke of Brunswick v King of Hanover (1848) 2 HLC 1; see also Watts, Hague Academy Recueil des Cours (1994, III), 56-57.

11 Per Collins LJ in his concurring judgment in Pinochet; cf. also Slynn LJ in the House of Lords, citing Hatch v Baez (1876) 7 Hun. 596; and Lloyd LJ, citing inter alia Oppenheim's International Law, Vol.1 (9th ed) 1043-44 and Watts, op.cit., 88-89. Compare Brownlie, Principles of Public International Law (4th ed, 1990) 335 and (5th ed, 1998), 338-39.

12 See the discussion in the dissenting judgment of Lloyd LJ in Pinochet.

13 See most recently the decisions of the European Court of Human Rights in Kaya v Turkey, 19 February 1998; Yasa v Turkey, 2 September 1998; and Assenov v Bulgaria, 28 October 1998.

14 See Roht-Arriaza, Impunity and Human Rights in International Law and Practice (1995); Murray, Impunity and International Criminal Law (1997) HRLJ 1-15.

15 Nuremberg Charter, Article 7; Tokyo Tribunal Charter, Article 6; Genocide Convention, Article 4; Statute of the Yugoslav Tribunal, Article 7; Statute of the Rwanda Tribunal, Article 6; Draft Code of Crimes against the Peace and Security of Mankind, Article 7; Draft Statute of the International Criminal Court, Article 27.

16 Filartega v Pena-Irala (1980) 630 F 2d 876; Siderman de Blake, op.cit.; see also the decisions of the International Criminal Tribunal for Former Yugoslavia in Prosecutor v Tadic (1996) 35 ILM 32 and Prosecutor v Blaskic, 110 ILR 607, 710; cf. Ambos, Establishing an International Criminal Court and an International Criminal Code (1996) EJIL 519; Dugard, An International Criminal Court (1997) CLJ 329, 335-38; and the discussions of Alvarez, Greenwood and Maison in (1996) EJIL 245 et seq.

17 As a matter of customary law, piracy and, arguably, war crimes and are also subject to universal jurisdiction.

18 International Commission of Jurists, Press Releases of 19 October and 10 November 1998.

19 This reasoning was mirrored in the dissenting judgment of Slynn LJ in the House of Lords: no distinction could be drawn for this purpose between acts whose criminality and moral obloquy is more or less great, for to do so would be to deprive the immunity in respect of criminal acts of much of its content.

20 There was no similar provision in either the Taking of Hostages Act 1982 or section 134 of the Criminal Justice Act 1988 (governing torture and hostage taking). Nor is there any such exception in the European Convention on Extradition.

21 See Siderman de Blake v Republic of Argentina (1992) 965 F 2d 699.

22 Cf. also, Fusco v O'Dea [1994] 2 IR 101; Walker v Ireland [1997] 1 ILRM 363; and, generally, Heffernan, State Immunity (1992) 14 DULJ 160; Anderson, The Problem of Foreign Sovereign Immunity: An Irish Perspective (1997) ILT 200.

23 It is well established that in seeking to distinguish acta jure gestionis from acts jure imperii, one looks to the nature of the State transaction or to the resulting legal relationships, and not to the motive or purpose of the State activity, Littrell v USA [1994] 4 All ER 301†; Claim against Empire of Iran (1963) 45 ILR 57. The distinction is the civil law distinction of public and private law, cf. also, in another context, Short v Ireland [1996] 2 IR 188, 205.

24 See the discussionn in Littrell v USA [1994] 4 All ER 203.

24a See Mc Donnell V Ireland (1998)

25 See The M.V. Toledo [1995] 2 ILRM 30; and commentary by Gaffney, (1996) ILT 192; cf. also Egan, Deportation of Refugees (1998) Bar Review 172.

26 Russell v Fanning [1988] IR 505; Finucane v McMahon [1990] 1 IR 165; Clarke v McMahon [1990] 1 IR 228; Ellis v O'Dea (No2) [1991] 1 IR 251. Some of these risked direct insult to the foreign State in question, cf. Short v Ireland [1996] 2 IR 188.

27 On the statutory interpretation point, see Argentine Republic v Amerada Hess Shipping Corporation (1989) 488 US 428; Siderman de Blake v Republic of Argentina (1992) 965 F 2d 699.

28 Jimenez v Aristeguieta (1962) 311 F. 2d 574; Trajano v Marcos (1992) F 2d 493; US v Noriega (1992) 746 F Supp 1506; Hilao v Marcos (1994) 24 F 3d 1467; Filartega v Pena-Irala (1980) 30 F 2d 876.

29 See also Liu v Republic of China (1989) 25 F. 3d 1467; Letelier v Republic of Chile (1980) 488 F Supp 665.

30 Cf. O'Reilly, International Mutual Assistance in Criminal Matters (1998) Bar Review 189; Bridges, The European Communities and the Criminal Law (1976) Crim LR 88.

31 See for example O'Keeffe, Trends in the Free Movement of Persons within the EC, in O'Reilly (Ed), Human Rights and Constitutional Law (1992), 263, 267-74.

32 Osman v UK, ECHR, 28 October 1998, paragraphs 131-154. See also Dyer v UK (1989) 39 DR 246; Fayed v UK (1994) 18 EHRR 393; Ashingdane v UK (1985) 7 EHRR 528; and Tinnelly and McDuff v UK, Commission Report, 8 April 1997 (pending before the Court).

33 See note 10 above.

34 Judgment in Assenov v Bulgaria, 28 October 1998, paragraph 102.

35 E.g., Finn v AG [1983] IR 154; and, generally, Kelly, The Irish Constitution (3rd ed, 1994), 679-82.

36 As for example in a criminal prosecution for conspiracy to commit any crime against humanity in Ireland, the extraterritorial jurisdiction of the Irish courts being very limited, cf. Symmons, The Criminal Law (Jurisdiction) Act 1976 and International Law (1978) 13 Irish Jurist 36; Lew, The Extraterritorial Criminal Jurisdiction of English Courts (1978) ICLQ 168.

37 Unreported, 6 March 1998.

38 See for example Connelly v Rio Tinto plc [1996] 3 WLR 373, concerning the accountability of transnational corporations.

39 See note 36 above. On universal jurisdiction, see the decision of the Sixth Circuit of the US Court of Appeals in Demjanjuk 776 F 2d 511. For Irish jurisdiction in respect of war crimes tribunals, cf. International War Crimes Tribunals Bills 1997.

40 Ireland signed the UN Torture

Convention on 28 September 1992, and the government has recently committed itself to speedy ratification, see Irish Times, 28 November 1998. While the majority approach of the House of Lords placed considerable emphasis on the fact that the torture and hostage-taking offences were crimes under UK law (by virtue of its extraterritorial jurisdiction in matters of torture and hostage-taking), the minority found that heads of state and former heads of state were not 'public officials' within the meaning of the UN Torture Convention 1984 and, further, that nothing in the relevant Conventions to which the UK and Chile were party cut down the general immunity under international law.

41 This was indeed the finding of the Divisional High Court in Pinochet's case in relation to the first warrant, which was found to be bad on the grounds that the murder of a British citizen by a non-British citizen outside the UK was not an offence for which the UK could claim jurisdiction. In Ireland, the same is true, because section 9 of the Offences against the Person Act 1861 (which remains in force) confers extraterritorial jurisdiction for murder only where the Defendant is an Irish citizen, regardless of the nationality of the victim. See also the Child Trafficking and Pornography Act 1998. For correspondence of offences, see Wilson v Sheehan [1979] IR 423; O'Shea v Conroy [1996] 1 IR 295; Ellis v O'Dea (No2), op.cit. However, if genocide is charged, the warrant will be valid in respect of all offences, see Sey v Johnson [1989] IR 516; Molloy v Sheehan [1978] IR 438.

42 See for example Wedgwood, Fiddling in Rome, Foreign Affairs, November/December 1998, 20.

43 See for example Heffernan and Anderson, n.23 above.

Courts and Court Officers Act, 1995

THE JUDICIAL APPOINTMENTS ADVISORY BOARD

Appointment of One Judge of the Circuit Court

Notice is hereby given that one vacancy is due to arise in the Office of Ordinary Judge of the Circuit Court and that the Minister for Justice, Equality and Law Reform has requested the Board under Section 16 of the Act to exercise its powers under that section and to make recommendations pursuant to it.

Practising Barristers or Solicitors who are eligible for appointment to the Office and who wish to be considered for appointment should apply in writing to the Secretary of the Board, Office of the Chief Justice, Four Courts, Dublin 7 for a copy of the application form. Completed forms should be returned to the Board's Secretary on or before Friday, 9th January, 1999.

Application already made in respect of vacancies in the Office of Ordinary Judge of the Circuit Court will be regarded as applications for this and all subsequent vacancies in the Circuit Court unless and until the Applicant signifies in writing to the Board that the application should be withdrawn.

It should be noted that this advertisement for appointment to the Office of Ordinary Judge of the Circuit Court applies not only to the present vacancy now existing but also to future vacancies that may arise in the said Office during the six months period from the 10th December, 1998,

Applicants may at the discretion of the Board be required to attend for interview.

Canvassing is prohibited.

Dated 8th December, 1998-12-07

Secretary,
Judicial Advisory Appointments Board

Hearsay Evidence in Bail Applications

MICHAEL P. O'HIGGINS, Barrister

Cross-examination has been referred to as "the greatest legal engine ever invented for the discovery of truth." The primary objection to hearsay evidence concerns the fact that it is not capable of being tested in cross-examination and therefore constitutes an improper interference with the trial process and, potentially, with the rights of an accused. This article proposes to consider the rules relating to the admission of hearsay evidence in bail applications, particular since the decision of the Supreme Court in *The People (DPP) .v. McGinley*[1] and the policy considerations underpinning those rules.

Policy Considerations against Hearsay

The policy reasons which underpin the Rule against hearsay are many and varied. The primary objection to such evidence, as has been mentioned, concerns the fact that it is not capable of being tested in cross-examination and therefore constitutes an improper interference with the trial process and, potentially, the rights of an accused. The Rule is closely bound up with the common law process of legal investigation, an essential feature of which is the requirement that an accused have an opportunity of confronting his accusers by testing the truth of their claims. The theory runs that if the maker of a statement does not testify he is not available for cross-examination, his demeanour cannot be observed and his credibility cannot properly be challenged.

In a 1960's case in Ireland Kingsmill-Moore J. formulated the Rule thus:

> There is no general Rule of hearsay to the effect that a witness may not testify as to the word spoken by a person who was not produced as a witness. The is a general Rule, subject to many exceptions that evidence of the speaking of such words is inadmissible to prove the truth or the facts which they assert...this is the Rule known as the Rule against Hearsay. If the fact that the words were spoken rather than their truth is what it is sought to prove, a statement is admissible"[2].

This formulation of the Rule against Hearsay highlights one of the central distinctions which has to be made when considering whether a Statement is or is not hearsay. A fine example of a Court making such a distinction is to be found in the leading English case of *Subramaniam .v. The DPP,*[3] a decision of the Court of Appeal in England in 1956. In that case the Appellant was found in a wounded condition in the State of Jahore by members of the Security Forces. He was tried on a charge of being in possession of ammunition and he put forward the defence, *inter alia*, that he had been captured by terrorists and that at all material times he was acting under duress. He sought to give evidence of what the terrorists had said to him but the Trial Judge ruled that evidence of the conversation with the terrorists was not admissible unless they were called. The Trial Judge said that he could find no evidence of duress and he convicted the Appellant. On appeal it was held that the Trial Judge had erred in ruling out the evidence of a conversation between the terrorists and the Appellant. Evidence of a statement made to a witness by a person who himself is not called as a witness was not hearsay evidence and was admissible when it was proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. Statements could have been made to the Appellant by the terrorists which, whether true or not, if they had been believed by the Appellant might reasonably have induced in the Appellant an apprehension of instant death if he failed to conform to their wishes.

The primary complaint then against admitting hearsay evidence concerns the unavailability of the witness in question for cross-examination. Secondly, it is desirable that a Court have available to it the best evidence relating to a given issue so that the danger of inaccuracy through repetition can be avoided. Thirdly, there is the fear as to a jury's ability or inclination to properly evaluate hearsay. Fourthly, there is a fear that if hearsay evidence is allowed generally, a Court would be overrun with second and third hand accounts from enthusiastic witnesses. Fifthly, it is because of the increased risk of impaired perception, poor memory, ambiguity and insincerity that hearsay evidence is regarded as being so particularly vulnerable as to require a special exclusionary Rule.

Hearsay in Bail Applications

While the question of hearsay evidence has always excited considerable legal and academic debate in the context of a full criminal trial, it has recently provoked extensive debate in this jurisdiction in the context of bail applications brought by an accused person pending his trial. The issue has become particularly pertinent in recent times in Ireland as a result of the long delay currently being encountered by accused persons in getting trial dates, with the result that the stakes involved for such persons in such applications have become intolerably high. Because an adverse result in a bail application can potentially cost an Applicant a year or more in prison, the Courts are more than ever aware of the need to afford to an Applicant for bail his full constitutional entitlements to fair procedures, including the right to cross-examine on Oath those whose statements form the evidence against him in a bail application. That this is so, can be gleaned from the decision of a five person Supreme Court in People *(DPP) .v. McGinley,*[4] where a Court had to consider an appeal from a decision of the High Court refusing an Applicant bail on the basis of the likelihood of that

Applicant interfering with witnesses in the case. As Practitioners will be aware, that basis of objection to bail constitutes one of the two exceptions permitted under the People *(AG) .v. O'Callaghan* [5] case which had held that an Applicant has a prima facie right to bail.

In *McGinley* the Applicant was charged with having had unlawful carnal knowledge of a girl under the age of 15 years. Evidence was given in the High Court from a Detective Sargeant called on behalf of the prosecution in which it was stated that: "During the incident the accused's wife arrived at the scene. She banged on the door of the van. The Complainant made a run for it but the accused pursued her. He threatened her that, if she reported the crime, she would be "cut open." The Det. Sgt. had also stated in the High Court that: "The Complainant's family had been approached by members of the accused's family and told not to report the incident to the Gardai. They were threatened that, if they did report it, their legs would be broken and a serious injury would befall them." Counsel on behalf of the Appellant in the case had objected to this evidence on the grounds that it was hearsay but this submission was rejected by the Learned High Court Judge who stated that:

> "Despite the hearsay nature of the evidence, he had no hesitation whatever in holding that there was a grave likelihood that the Applicant would interfere with witnesses. He came to this conclusion mindful of the necessity to be cautious in relation to hearsay evidence. Nonetheless he believed that, realistically, there was a substantial chance that, if released on bail the accused would interfere with witnesses."

Submissions made to the Supreme Court in McGinley

From that decision of the High Court, the Accused appealed. In the Supreme Court it was submitted on behalf of the Appellant that a bail application was an entirely discrete procedure the result of which determined whether an accused person, presumed to be innocent, was deprived of his constitutional right of liberty under Article 40 pending the trial. The decision of the Supreme Court in *The People (Attorney General) v. O'Callaghan* had made it clear that, in the light of these constitutional considerations, any accused person had a *prima facie* right to bail, unless the Court was satisfied that the case fell within one of the acknowledged exceptions justifying his detention in custody. The onus, accordingly, was on the prosecution in every case to show that the case came within one of those exceptions. It was submitted that it followed that the trial of an issue of such importance must be conducted in accordance with natural justice and must respect the constitutional guarantee of fair procedure. A hearing which permitted one side to adduce hearsay evidence lacked one of the essential features of a hearing conducted in accordance with natural justice. The decision in *McKeon's*[6] case which had been relied on in the High Court in *McGinley* was clearly distinguishable. In that case, the hearsay evidence sought to be adduced was in the form of confidential information furnished to the Gardai which was *prima facie* privileged. In the present case it was submitted that no such privilege could be claimed and the Court had been given no reason as to why direct evidence of the alleged threats or inducements should not have been given.

On behalf of the Respondent, it was submitted that the fundamental question which arose in every case where there was an objection to the granting of bail was whether it had been established as a matter of probability that the Applicant was unlikely to stand trial or likely to evade justice, by either absconding,[9] or interfering with evidence or with witnesses. In determining that question, the Court was obliged to have regard, not merely to the right of liberty of the Applicant, but also the public interest in ensuring that the integrity of the trial itself was protected. It was submitted by Counsel for the DPP that the authorities demonstrated that, in a wide range of cases, Courts had permitted exceptions to the hearsay Rule, particularly interlocutory applications, such as bail, of which *McKeon's* case was an example. To enable himself decide which of these sets of submissions represented Irish law on the subject, Mr. Justice Keane thought it appropriate to consider again the passage of Mr. Justice Walsh in The *People (Attorney General) and O'Callaghan* wherein the Learned Judge had stated:

> "Naturally a Court must pay attention to the objections of the Attorney General or other prosecuting Authority or the Policy Authorities, when considering an application for bail. The fact that any of these Authorities objects is not of itself a ground for refusing bail and indeed to do so for that reason would only be, as Mr. Justice Hanna pointed out in the *State v. Purcell* [1926] IR 207, to violate the constitutional guarantees of personal liberty. Where, however, there are objections they must be related to the grounds upon which they may validly be refused. Furthermore, they cannot be simply made *in vacuo* but when made must be supported by sufficient evidence to enable the Court to arrive at a conclusion of probability and the objections made must be open to questioning on the part of the accused or his Counsel. It is not sufficient for the objecting authority or witness to have a belief, nor can the Court act simply upon the belief of someone else. It must itself be satisfied that the objection made is sufficient to enable the court to arrive at the necessary conclusion of probability."

In the opinion of the Supreme Court, the passage just outlined was not an authority for the proposition that there were no circumstances in which a Court was entitled to admit hearsay evidence on an application for bail. At the same time, however, the Court felt that it was quite clear that the Learned Judge in *O'Callaghan* was there envisaging that an Applicant for bail should, in general terms at least, be entitled to have the evidence upon which a Court was being asked to rely given *viva voce* on Oath and tested by cross-examination. Mr. Justice Keane went on to state that while numerous exceptions have been grafted on to the general exclusionary Rule, it remained an essential feature of our legal system. In support of this fundamental principal Keane J. quoted the observation made by O'Dalaigh, CJ. in *In re Haughey*[7] and by Henchy J. in *Kiely v. The Minister for Social Welfare*[8] where he said:-

> "Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written, and therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice".

In the opinion of Keane J. there was no reason why those principles should not be applied to an application for bail, such as which presented itself in *McGinley*.

DPP. V. McKeon[9]

The decision in the High Court hearing in the *McGinley* case to admit the hearsay evidence complained of was largely based on an earlier decision of the Supreme Court in *DPP v. McKeon*.

In that case the matter came before the Supreme Court by way of an appeal brought by the Appellant against an Order made by the President of the High Court, Costello P. in which he had made an Order revoking bail which had previously been granted to the Appellant. The application for the revocation of bail in the High Court was based upon additional information which had come to the knowledge of the Gardai. A Garda witness gave evidence as to confidential information that she had received to the effect that the Appellant, John McKeon, had received a false Passport and had received the assistance of a para-military organisation and so intended not to stand for his trial at Galway Circuit Court. The primary ground of appeal advanced by the Appellant was that Costello P. had formed a view that the Applicant would not stand for his trial on the basis of, and only on the basis of, hearsay evidence which was not admissible. In upholding the decision of the President, Chief Justice Hamilton, with whom O'Flaherty J. and Egan J. concurred, had this to say:

> "[Counsel for the Appellant] has submitted that hearsay evidence, in applications of this nature, is not admissible and should not be admissible having regard to the constitutional rights enjoyed by the citizens of the State. I am of the opinion that in cases of this nature that hearsay evidence is admissible. What is a different factor is the weight to be attached to such evidence. It has to be weighed and placed in the balance against what might be described as direct evidence. What is open to a Judge is to come to the conclusion that he is entitled to rely on such hearsay evidence. It is quite clear from a consideration of the transcript of the Judgment of the Learned President of the High Court and of the evidence presented before him that in this particular case he considered properly all the relevant factors. He noted that the evidence of Garda Cullen was hearsay evidence. He added that it was admissible but explicitly stated in the course of his Judgment that the weight to be attached to that evidence was a matter for a Trial Judge. He considered that evidence and he considered the evidence of the Appellant and in the light of all of this evidences [he revoked the bail]".

Chief Justice Hamilton in the *McKeon* decision placed reliance upon the following quotation from Mr. Justice Finlay (as he then was) when hearing a bail application made by James Columba Dolan on the 5th November, 1973.

> "I conclude from a consideration of both these decisions [O'Callaghan's case and *The People (A.G.) v. John Joseph Kervick*] that whereas a bald or mere belief is not something upon which the Court can act, the Court can in special circumstances and provided it has itself reached a conclusion of probability act upon a belief stated by a Police Officer to be founded on information which he accepts and believes even though the details of that information are not available to the Court."

Comment on McGinley Decision:

1. One of the central principles of law underpinning the decision of the Supreme Court in *McGinley* is the requirement that for an accused to be given a fair hearing he must have an opportunity of questioning the evidence which is being proffered by the prosecuting authority. In general terms, then, the Rule against hearsay (and the jurisprudence relating to the exceptions thereto) is applicable to bail applications just as much as it is at a full criminal trial.

2. The Supreme Court's earlier decision in the *McKeon* case was distinguishable. The Supreme Court in *McGinley* concentrated on the reasoning provided by Costello P. in the High Court rather than on the Judgments of the Learned Judges in the Supreme Court hearing the appeal in *McKeon*. Availing itself of this analysis, the Supreme Court appeared to narrow somewhat the *ratio* of the *McKeon* decision as being an authority to the effect that, where a Court takes the view that where a Court takes the view that the public interest requires that the anonymity of police informers should be preserved in a given case, a Court hearing a bail application was nonetheless entitled to hear a police officer's account of such confidential information, provided always that the Judge in question reserved the right to attribute to such evidence such weight as he might deem appropriate. The Court stressed that both the Courts in Ireland and in England have for long recognised that the public interest may require that the anonymity of police informers should be preserved in appropriate cases.

3. Keane J. was of the view that, although the hearsay nature of the evidence in the High Court hearing was specifically objected to by Counsel on behalf of the Appellant, no reason had been given as to why the relevant witnesses had not been called to give viva voce evidence. Accordingly, the view was taken that the case should be remitted to the High Court to enable the relevant witnesses to be called and/or to enable the prosecuting authority explain why such witnesses would not be called to give evidence.

4. Keane J. took the opportunity of considering the nature of a bail application and the extent to which it differs considerably with an interlocutory application in a civil case. It had been suggested in the course of the hearing in the Supreme Court that a useful analogy could perhaps be drawn with interlocutory applications in civil proceedings. Keane J. gave this submission short shrift. While a bail application could properly be described as interlocutory in its nature since it did not resolve in any way the central issue in the proceeds (that is the guilt or innocence of the accused), it differed crucially from civil interlocutory applications in that if bail is refused, the accused person is deprived of his liberty in circumstances where he must be presumed to be innocent. Moreover, if subsequently acquitted at his trail, the fact that he has spent a period in custody, however lengthy, awaiting his trial affords him no remedy. By contrast Keane J. pointed out that the granting

of an Interlocutory Injunction, generally speaking, does no more than preserve the *status quo* pending the final determination of the proceedings and is not normally granted unless the Plaintiff is in a position to give an undertaking as to damages in the event of his being unsuccessful in the Plenary proceedings.

5. The Learned Judge drew a further distinction between bail applications and an Interlocutory Injunction in civil proceedings. The constitutional rights of the Applicant for bail to liberty must, in every case where there is an objection to the granting of bail, be balanced against the public interest in ensuring that the integrity of the trial process is protected. Where there is evidence which indicates that as a matter of probability the Applicant, if granted bail, will not stand his trial or will interfere with witnesses, the right to liberty must yield to the public interest in the administration of justice. It is in that context that the hearsay evidence may become admissible, where the Court hearing the Application is satisfied that there are sufficient grounds for not requiring the witness to give *viva voce* evidence. In the opinion of Keane J., the analogy with Interlocutory Applications in civil proceedings was incomplete and misleading.

6. As matters stand, they would now appear to be two Supreme Court Judgments in existence governing the question of the admissibility of hearsay evidence in bail applications - *McGinley* which reaffirms the exclusionary rule and *McKeon* which does not. While the Supreme Court in *McGinley* thought it best to distinguish *McKeon*, the fact remains that under the Supreme Court decision in *McKeon*, hearsay evidence is admissible in "special circumstances." In the words of Chief Justice Finlay:

   "A Court can in special circumstances and provided it has itself reached a conclusion of probability act upon a belief stated by a Police Officer to be founded on information which he accepts and believes even though the details of that information are not available to the Court".

7. In the view of some commentators, it is still open to a Prosecutor in a given case to argue that where such "special circumstances" exist, hearsay evidence can be admitted. What shape and content such special circumstances may have will only be determined in future cases which come before the Court.

Potential gloss on McGinley

The *McGinley* decision was recently considered by the High Court in the case of *DPP v. Carroll.*[10] This was an application for bail heard in the context of the very large Monday bail list where decisions relating to the issue of bail are generally given *ex tempore* immediately following the conclusion of evidence. In that case, a prosecuting Garda gave evidence to the effect that a witness had told him that she was too terrified to come to Court because of a threat which was made to her by the Applicant. The Garda's evidence was objected to by Counsel on behalf of the Applicant on the basis that it amounted to hearsay evidence which should be excluded. The Learned Trial Judge took the view that he was entitled to admit the evidence in question on the basis that, while it undoubtedly constituted hearsay evidence, the Garda witness had stated that the relevant witness would not come to Court and had stated to him why she would not come to Court. The Court took the view that the Supreme Court in *McGinley* had found fault with the fact that no reason had been given as to why the relevant witnesses in that case should not give viva voce evidence. The Learned Judge felt that in the instance case, a Garda witness had complied with this requirement and had stated why the relevant witness would not be appearing in person. Accordingly, the Learned Judge felt it appropriate to admit the relevant evidence and proceeded to refuse the Applicant's application for bail.

It is submitted that this interpretation of the *McGinley* decision is somewhat at odds with the reasoning underpinning Mr. Justice Keane's decision in the Supreme Court. It may be suggested that that reasoning effectively called upon the Garda witness to explain why viva voce evidence could not be given in a particular circumstance. In the eyes of some commentators the *McGinley* decision constitutes a strong re-affirmation of the exclusionary rule preventing the admission of hearsay evidence, save where a recognised ground of public policy permits its acceptance. As against that, it is certainly possible to construct an argument to the effect that the stated basis for the witnesses non-availability in Carroll constituted the "special circumstances" envisaged in *McKeon* so as to justify a departure from the normal exclusionary rule. That two seemingly contradictory dicta exist on the point, leaves open the door for both Prosecutor and Accused to argue that the issue in future bail applications has yet to be fully decided.

Conclusion

While the decision in *McGinley* has undoubtedly moved the legal goal posts slightly in favour of an Applicant in a bail application, it would be remiss not to keep sight of the considerable difficulties which are encountered by An Garda Siochana, and by extension the Chief State Solicitors Office, in securing the attendance at a bail application of all relevant witnesses. As commented upon elsewhere, these difficulties are compounded by the fact that the number of bail applications made every week continues to grow and can, on occasion, be as high as 70 applications in one week. Considerations of sheer practicality dictate that a Court is not in a position to afford to each and every application all the time and attention which it would otherwise wish to provide. Matters can not be considerd in as much detail as they would, say, at a full criminal trial. Rather, evidence tends to get summarised and, in some cases, the Rules of evidence are occasionally, by sheer necessity, diluted in accordance with the exigencies of the weekly bail list. Such abridgement of the issues concerned is not motivated out of any desire to deprive an accused of his constitutional entitlements but, rather, is borne out of the sheer realities presented by a list of 70 or so applications, all to be heard on one day in the same Court. ●

1 Unrep. S. Ct., 20 May, 1998
2 Cullen v. Clarke, [1963] IR 368, 378
3 [1956] 1 WLR 965
4 Unrep.S.Ct., 20 May,1998
5 [1966] IR 501
6 unrep., S.Ct., 12 October, 1995
7 [1971] IR 217, 264
8 [1977] IR 267
10 unrep ex tempore decision of O' Sullivan J., 5 October, 1998

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 4. Issue 3. December 1998

A directory of legislation, articles and written judgments from 30th October 1998 to 27th November 1998.
Judgment Information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

Finnerty v. Western Health Board
High Court: **Caroll J.**
05/10/1998
Judicial review; certiorari; registered medical practitioner; eligibility for General Medical Scheme; five years continuous service at a "local" centre as a condition; rejection of application embodied in a letter from programme manager of Western Health Board; whether respondent failed to consider applicant's application properly; whether respondent took extraneous or irrelevant matters into account; whether respondent misconstrued powers under Circular 9/81; whether nine months irregular attendance at the morning practice in Athenry affected the full-time general practice in Ballinrobe; whether applicant' s practice in Athenry was at a "local" centre within the meaning of Circular 9/81; whether respondent had acted reasonably in refusing application; O.84, r.21(1), Rules of the Superior Courts
Held: Application refused; full awareness on the respondent's part of arguments forwarded by applicant; decision was reasonable; applicant did not apply to court within 6 months of final decision and offered no explanation for delay.

Robert McGregor and Sons (Ireland) Ltd. v. The Mining Board
High Court: **Carroll J.**
05/10/1998

Judicial review; delay; mining; plaintiffs seek judicial review of the defendants' decision to reject their application for registration of certain minerals as being excepted from the legislation; defendants seek to have the plaintiffs' application stayed by virtue of delay; whether minerals were being lawfully worked in the areas in question; whether there was an inordinate delay in appealing against the decision; whether delay was excusable; whether defendants' right to a fair trial would be prejudiced by reason of delay; Minerals Development Act, 1979
Held: Claim dismissed; delay inordinate and inexcusable; possibility of unfairness and prejudice to defendants arising from the delay; plaintiff's claim dismissed

Gaughan v. Haughey
High Court: **Carroll J.**
05/10/1998

Judicial review; fair procedures; applicant dismissed from prison service for chronic absenteeism; whether fair procedures were adopted in reaching the decision to dismiss applicant; whether applicant was given an adequate opportunity of making representations regarding the dismissal; whether in reaching the decision to dismiss, documents were considered which had not been disclosed to the applicant; whether there had been a failure to disclose adequate reasons for the dismissal
Held: Application dismissed

Nevin v. Judge Crowley
High Court: **O'Sullivan J.**
21/10/1998

Judicial Review; road traffic offence; sentence; variation of original sentence; appellant not heard in relation to variation; fair procedures; natural and constitutional justice; audi alteram partem; whether appellant had a satisfactory opportunity to deal with the new evidence; whether appellant had sufficient opportunity to make submissions; whether certiorari will lie regarding a matter pending before appellate court; whether justice could be done by refusing application and allowing applicant to proceed on appeal
Held: Application granted

Agriculture

Statutory Instrument
Diseases Of Animals (Carriage Of Cattle By Sea) (Amendment) Order, 1998
SI 343/1998

Control Of Bulls For Breeding (Permits)(Amendment) Regulations, 1998
SI 425/1998

Aliens

Statutory Instrument
Aliens (Amendment) Order, 1998
SI 395/1998

Animals

Statutory Instruments
Diseases Of Animals (Carriage Of Cattle By Sea) (Amendment) Order, 1998
SI 343/1998

Control Of Bulls For Breeding (Permits)(Amendment) Regulations, 1998
SI 425/1998

Arbitration

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Arbitration

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Children

L.P v. M.N.P.
High Court: **McGuinness J.**
14/10/1998

Child custody; enforcement of undertakings; defendant mother had brought child from her place of habitual residence in Italy to Ireland; Italian Court subsequently granted custody of child to the paternal grand-parents and directed that the child should not be removed from Italy; plaintiff father sought the return of the child to Italy; Italian court subsequently granted custody of the child to defendant; no final decision on the custody of the child to be given by the Italian Court for a considerable time; High Court ordered the return of the child to Italy subject to certain undertakings given by the parties; plaintiff failed to abide by the undertakings given; subsequent order of Italian Court removing child from custody of both parents and placing her in an institution; whether any useful further orders could be made by the court; Child Abduction and Enforcement of Custody Orders Act, 1991; Hague Convention
Held: No orders granted

Commercial Law

Article
The Lloyds Market Place
O'Neill, Michael
11 (1998) ITR 492

Statutory Instrument
Investor compensation act, 1998 (section 18(4)) (prescription of individuals) regulations, 1998
SI 350/1998

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Competition

Article
Prey Of The Protected: Why Some Undertakings Are Given Protection From Competition
O'Raw, Eunice
1998 CLP 199

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Competition Authority
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N266.C5

Constitutional

Mac Gairbhith v. Attorney General
Supreme Court: **O'Flaherty J.**, Murphy J., Lynch J. (ex tempore)
30/10/1998

Judicial review; Supreme Court decisions; application for judicial review of Supreme Court decisions; whether High Court judge correct in holding that judicial review does not lie in respect of Supreme Court Orders; whether judicial review could ever be entertained in respect of Supreme Court Orders; Art. 34.4.6 of the Constitution
Held: Appeal dismissed; Supreme Court decisions are final and conclusive

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O'Mahony, Dr Mary T
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Criminal

D.P.P. v. Meehan
High Court: **O'Donovan J.**
24/09/1998
Bail application; delay of applicant's trial; service of book of evidence; whether delay constituted change of circumstances such as to warrant fresh application for bail
Held: Application refused

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Damages

Malee v. Gaelthorpe Ltd
Supreme Court: **O'Flaherty J.** Barrington J., Keane J.*(ex tempore)*

02/11/1998

Damages; personal injuries; road traffic accident; assessment of damages; loss of future earnings; damages for future pain and suffering arising out of the road traffic accident; whether trial judge had assessed damages correctly; whether damages awarded were excessive; whether trial judge had considered all relevant factors
Held: Appeal dismissed; award upheld

Article
The Law Reform Commission Report On Personal Injuries: Periodic Payments and Structured Settlements - Part 1
O'Regan Cazabon, Attracta
1998 2(2) IILR 33

Education

Statutory Instrument
Vocational Education (Grants For Annual Schemes Of Committees) Regulations, 1997
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SI 329/1998

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SI 330/1998

Occupational Pension Schemes (Funding Standard) (Amendment) Regulations, 1998
SI 320/1998

Occupational Pension Schemes (Disclosure Of Information) (No 2) Regulations, 1998
SI 349/1998
Security Industry Joint Labour Committee Establishment Order, 1998
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SI 382/1998
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European Law

Maxwell v. Minister for Agriculture, Food and Forestry
High Court: **McCracken J.**
11/08/1998

Judicial review; award of levies pursuant to Council Regulation No. 1357/96; Steer cattle production; discrimination between producers who export live steers and those who sell live steers to factories; interpretation of discrimination under 40(3) of the EEC Treaty; whether producers are competing producers for the purposes of Article 40(3); whether steer cattle sold for slaughter and those sold for live shipment are the same product; whether the discrimination is objectively justifiable; whether there was a right to damages for breach of the Regulation; whether the breach was sufficiently serious to warrant damages being awarded
Held: Discrimination not objectively justifiable; damages awarded

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Family

E.D. , In re
Supreme Court; **Hamilton C.J.**, Keane J., Murphy J. (ex tempore)
04/03/1998

Wardship; bias; jurisdiction of the President of the High Court; orders made by former President of the High Court concerning a ward of the court; complaints made about the Royal Hospital by applicant; whether former President of the High Court was biased against applicant as he was Governor of the Royal Hospital; whether the former President should have disqualified himself from hearing the case
Held: No bias found; President of the High Court has discretion with all matters relating to wards; President freely and openly acknowledged that he was governor of the Royal Hospital

Fish & Fisheries

Statutory Instruments
Celtic Sea (Prohibition On Herring Fishing) (No 2) Order, 1998
SI 423/1998
Cod (Restriction On Fishing) (No 6) Order, 1998
SI 418/1998

Common Sole (Prohibition Of Fishing In ICES Divisions VIIF And VIIG Order , 1998
SI 419/1998

Herring (Prohibition On Fishing) (No 3) Order, 1998
SI 431/1998

Monkfish (Restriction On Fishing) (No 10) Order, 1998
SI 420/1998

Monkfish (Restriction On Fishing) (No 11) Order, 1998
SI 421/1998

Plaice (Control Of Fishing In Ices Divisions VIIF And VIIG) Order, 1998
SI 422/1998

Garda Síochana

Deasy v. The Commissioner of an Garda Síochana
High Court: **Geoghegan J.**
13/10/1998

Judicial review; certiorari; discipline; natural and constitutional justice; an inquiry found that there had been a breach of discipline contrary to the Garda Síochana Regulations, 1989; respondant issued an order requiring the applicant to resign or be dismissed; whether applicant knew the precise nature of the allegations of discreditable conduct which were made against him; whether charging document contained an adequate description of the factual context in which the conduct allegedly occurred; reg. 32, Garda Síochana Regulations, 1989
Held: Breach of fair procedures; order directing resignation or dismissal of the applicant to be quashed

Housing

Article
Busting The Housing Boom
Gaffney, Michael
1998 (October) GILSI 32

Statutory Instrument
Housing Act, 1966 (Acquisition Of Land) (Amendment) Regulations, 1998
SI 434/1998

Human Rights

Article
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Mullally, Siobhan
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Information Technology

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Rothery, Grainne
1998 (October) GILSI 37

Insurance

Article
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Shannon, Geoffrey
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Landlord and Tenant

Heeney v. Dublin Corporation
Supreme Court; **O' Flaherty J.**, Murphy J., Barron J. (ex tempore)
17/08/1998

Injunction; elevator services; Ballymun flats; industrial action; lift maintenance requirements contracted out by Dublin Corporation to outside contractors; countrywide strike of employees of lift maintenance contractors; strike severe on Ballymun flats complex; hardship suffered by tenants; whether Dublin Corporation has a prima facie obligation under general law as well as under tenancy agreements to provide a reasonably efficient lift service; whether Dublin Corporation should by injunction be commanded to take certain steps; whether Dublin Corporation have done all they can do to alleviate hardship
Held: Dublin Corporation has prima facie obligation under general law and tenancy agreement; corollary constitutional right to inviolability of the dwelling place is the entitlement of freedom to come and go from the dwelling place; on consent it is ordered that Dublin Corporation take all reasonable steps within their power and authority to explore every means so as to repair or have repaired and when repaired to keep maintained the lifts in the Ballymun complex

Local Government

Article
Urban Renewal Act 1998: As Eu Like It?
Mcdonnell, Jim
11 (1998) ITR 486
Statutory Instrument

County Of Mayo Local Electoral Areas Order, 1998
SI 435/1998

Medical Law

Articles
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Frenke, David A
4 (1998) MLJI 67

The Medico-Legal Impact Of Consent To Treatment Of Under-Aged Drug Users
Rooney, Dr Siobhan
4 (1998) MLJI 74

Negligence

Gill v. Egan
High Court: **O' Sullivan J.**
16/10/1998

Negligence; tort; procedure; non-suit; indemnity; forseeability; contributory negligence; accident; boundary wall; application by defendant to non-suit plaintiff; whether plaintiff had made out a prima facie case that the indemnities which he gave to the defendants did not apply; whether the chain of events leading to the accident was forseeable
Held: Application to non-suit plaintiff denied

Article
Civil Liability For Post Traumatic Stress Disorder
Mcgleenan, Tony
4 (1998) MLJI 52

The Law Reform Commission Report On Personal Injuries: Periodic Payments
And Structured Settlements - Part 1
O'Regan Cazabon, Attracta
1998 2(2) IILR 33

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Shannon, Geoffrey
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Pensions

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Planning

Lancefort Ltd. v. An Bord Plean·la
Supreme Court: Hamilton C.J., **Denham J.**(*dissenting), Barrington J., **Keane J.**, Lynch J.
21/07/1998

Locus standi; judicial review; planning permission; environmental impact statement; certiorari; requirement of locus standi to challenge the decision of a public body; whether applicant has sufficient interest in the decision; whether appellants established ' substantial grounds' for challenging decision; whether locus standi should be considered as a threshold issue or on the hearing of the substantive application; whether the court, in determining the issue of standing, should consider the merits of an application; whether the appellants acted bona fide in forming the company; whether a company can have locus standi to challenge a decision made before the company was formed; whether the alleged failure to consider the possibility of requiring an EIS could have an adverse effect on the attainment of the objectives of the Directives and Regulations; whether alleged irregularities amounted to an abuse of process or default in procedure sufficiently grave to justify awarding locus standi to the appellants; s.82 Local Government (Planning and Development) Act, 1963; s.14(8) Local Government (Planning and Development) Act, 1976; s.19(3) Local Government (Planning and Development) Act, 1992; EU Council Directive 85/337/EEC; European Communities (Environmental Impact Assessment) Regulations 1989 (SI 349 of 1989); Local Government (Planning and Development) Regulations (SI 1986 of 1994); O.84, r.4, Rules of the Superior Courts
Held: Applicant must establish substantial grounds for challenging such a decision, as well as proving it has a sufficient interest in the matter; no irregularities sufficiently grave to justify affording locus standi to the appellants; cross appeal allowed

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Horgan v. Murray
High Court: **O' Sullivan J.**
09/10/1998

Discovery; procedure; possession; third party; privilege; action for oppression contrary to s.205, Companies Act, 1963; claim that the respondants failed to refer to files of advice given to the companies in question; whether relevant documents are within the power or possession of the respondents; whether the documents were privileged; whether the advice on value of shares was obtained for the purpose of litigation or for the purpose of avoiding litigation; whether a memorandum which was created for the purpose of settlement negotiations was privileged
Held: Documents created with intention of avoiding litigation are privileged

Wildgust v. Norwich Union Sociey
High Court: **Morris P.**
28/07/1998

Application for non suit; implied terms of contract; negligent misstatement; life insurance policy; premiums paid by direct debit to defendant; policy subsequently lapsed due to breakdown in direct debit system and failure to discharge a premium; negligent misstatement not pleaded; whether plaintiff had established any case against defendant; whether case against defendant had been sufficiently pleaded; whether there was an implied condition in the contract of insurance requiring defendant to inform plaintiff of a breakdown in the direct debit system; whether there had been a negligent misstatement of fact by defendant
Held: Application for non suit refused in part; plaintiff allowed to amend statement of claim to plead appropriate case subject to defendant being allowed costs

Articles
Duties Of Disclosure And The Inquisitive Patient: A Case For Informed Consent
Healy, John
4 (1998) MLJI 69

Ward Of Court - A Review Of Utilisation In A Psychiatry Of Old Age Service
Wrigley, Dr Margo
Mccarthy, Dr Geraldine

4 (1998) MLJI 58

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Mcloughlin, Nuala
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N232.C5

Statutory Instruments
District Court Districts And Areas (Amendment) And Variation Of Days (No 9) Order, 1998
SI 390/1998

Property

Dwyer Nolan Developments Ltd. v. Kingscroft Developments Ltd.
High Court: **Kinlen J.**
30/07/1998

Conveyancing; contract; right of way; planning permission; conveyance of land; purchaser changed plans for housing development on the contract property, causing the property which the vendor had retained to become land locked; vendor claims a right of way had been reserved; whether there was an express grant of a right of way; whether there was a grant by way of necessity or a grant by implication; whether relevant was development land or agricultural land;whether fact that defendant knew of plaintiff's intention to develop land significant
Held: Plaintiff entitled to right of way through defendant' s land

Article
Busting The Housing Boom
Gaffney, Michael
1998 (October) GILSI 32

Road Traffic

D.P.P. v. McGovern
High Court: **Geoghegan J.**
28/10/1998

Case stated; road traffic offence; drink driving charge; blood specimen; labelling of container; defendant's name on specimen bottle but not on sealed cardboard box containing bottle; whether fact that accused's name was only on the specimen bottle constituted sufficient compliance with s.18, Road Traffic Act, 1994; whether the bottle was a 'container' within the meaning of s.18; whether the form prescribed by the Road Traffic Act, 1994 (Part III), Regulations,1994 was properly completed; ss.18, 19 & 21 Road Traffic Act, 1994
Held: Appeal dismissed; sufficient compliance with s. 18 Road Traffic Act, 1994

Article
Infernal Combustion A Century Of Motoring
Pierse, Robert
1998 (October) GILSI 24

Statutory Instrument
Road Traffic Act, 1994 (Section 41) (Amendment) Regulations, 1998
SI 357/1998

Shipping

Statutory Instrument
The Merchant Shipping (Ro-Ro Passenger Ship Survivability) Rules, 1998
SI 429/1998

Social Welfare

Healy v. Minister for Social Welfare
High Court: **Carroll J.**
05/10/1998

Employment; social welfare; family income supplement (FIS); delegation of legislative powers; plaintiff claims an entitlement to FIS, while being employed on a Social Employment Scheme; regulations require that a person must work 20 hours per week in order to be regarded as a full time employee for the purposes of payment of FIS; whether the refusal to grant plaintiff FIS was ultra vires; whether the regulations laying down when a person is regarded as being in remunerative full-time employment for the purposes of FIS, are valid; whether the regulations applied to the plaintiff; Social Welfare Act, 1981; s.13 Social Welfare Act, 1984; s. 47 Social Welfare Act, 1991; Social Welfare (Consolidation) Act, 1993; S.I. 278/1984; S.I .446/1986; S.I. 196/1989; S.I. 189/1990; S.I. 279/1991
Held: Regulations give effect to the principles and policies contained in the statute; no unauthorised delegation; regulations did apply to plaintiff; not entitled to FIS

Taxation

Articles
Identification Of Shares For Capital Gains Tax Purposes
Kerr, Fred
11 (1998) ITR 510

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Faughnan, Enda
11 (1998) ITR 497

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Doherty, Bernard
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Report - Dail

Censorship Of Publications (Amendment) Bill, 1998
2nd Stage - Dail

Children Bill, 1996
Committee - Dail [Re-Introduced At This Stage]

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

Control Of Wildlife Hunting & Shooting (Non-Residents
Firearm Certificates) Bill, 1998
1st Stage - Dail

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

Eighteenth Amendment Of The Constitution Bill, 1997
2nd Stage - Dail [P.M.B.]

Employment Rights Protection Bill, 1997
2nd Stage - Dail [PMB]

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

Enforcement Of Court Orders Bill, 1998
2nd Stage - Dail [P.M.B]

Family Law Bill, 1998
2nd Stage - Seanad

Health (Eastern Regional Health Authority) Bill, 1998
1st Stage - Dail

Home Purchasers (Anti-Gazumping) (No.2) Bill, 1998
1st Stage - Seanad

Irish Sports Council Bill, 1998
2nd Stage - Dail

Jurisdiction Of Courts And Enforcement Of Judgments Bill, 1998
Committee - Dail

Prohibition Of Ticket Touts Bill, 1998
2nd Stage - Dail [PMB]

Protections For Persons Reporting Child Abuse Bill, 1998
[Changed From - Children (Reporting Of Alleged Abuse) Bill, 1998]
Report - Dail [PMB]
Protection Of Children (Hague Convention) Bill, 1998
1st Stage - Dail

Protection Of Workers (Shops)(No.2) Bill, 1997
2nd Stage - Seanad

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

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

Shannon River Council Bill, 1998
2nd Stage - Seanad

Solicitors (Amendment) Bill, 1998
Committee - Seanad [PMB]

State Property Bill, 1998
Committee - Dail

Statute Of Limitations (Amendment) Bill, 1998
2nd Stage - Dail [PMB]

The Trinity College, Dublin & The University Of Dublin (Charters & Letters Patent) (Amendment)
Bill, 1997
Committee - Seanad
Tourist Traffic Bill, 1998
2nd Stage - Dail

Tribunals Of Inquiry (Evidence) (Amendment)(No.2) Bill, 1998
2nd Stage - Dail [PMB]

Voluntary Health Insurance (Amendment) Bill, 1998
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Western Development Commission Bill, 1998
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1/1998 - Referendum Act, 1998
26/02/1998

2/1998 - Central Bank Act, 1998
Signed 18/03/1998
To Be Commenced By S.I.

3/1998 - Finance Act, 1998

4/1998 - Electoral (Amendment) Act, 1998
Signed 31/03/1998
Commenced On Signing

5/1998 - Oireachtas (Allowances To Members) And Ministerial, Parliamentary, Judicial And Court Offices (Amendment) Act, 1998
Signed 01/04/98
S 24-28 Commenced 19/06/1996
Rest Commenced On Signing

6/1998 - Social Welfare Act, 1998
Signed 01/04/1998
Ss 4 &5 To Be Commenced By S.I.
Rest Commenced On Signing

7/1998 - Minister For Arts, Heritage, Gaeltacht And The Islands (Powers And Functions) Act, 1997

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

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

10/1998 - Adoption (No.2) Act, 1998
Ss 2-9 Commenced 90 Days From 29/04/1998

11/1998 - Tribunals Of Inquiry (Evidence)(Amendment) Act, 1998
Commenced 6/5/98 - Date Of Signing

12/1998 - Civil Liability (Assessment Of Hearing Injury) Act, 1998

13/1998 - Oil Pollution Of The Sea (Civil Liability And Compensation) (Amendment) Act, 1998
Commenced By S.I. 159/1998

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

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

16/1998 - Local Government Act, 1998
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17/1998 - Gas (Amendment) Act, 1998
Commenced 3rd June 1998

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19/1998 - Electoral (Amendment) Act, 1998

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

21/1998- Employment Equality Act, 1998

22/1998 - Child Trafficking And Pornography Act, 1998
Signed 29/06/1998

23/1998 - Roads (Amendment) Act, 1998
Signed 01/07/1998

24/1998 - Air Navigation & Transport (Amendment) Act, 1998
Signed 05/07/1998

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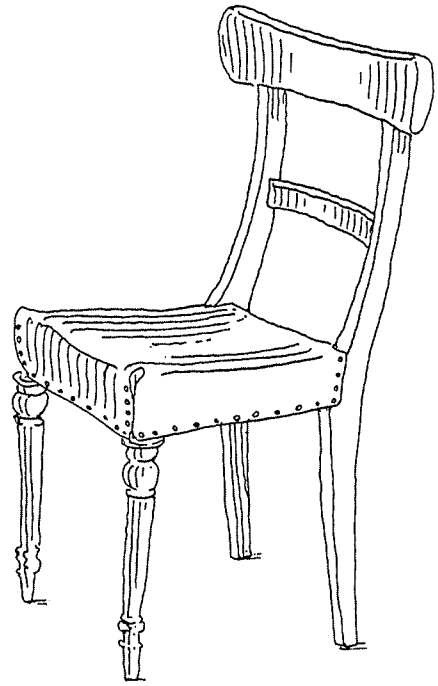

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26/1998 - Turf Development Act, 1997
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27/1998 - Urban Renewal Act, 1998
Signed 07/08/1998
Commenced By S.I. 271/1998

28/1998 - Intellectual Property (Miscellaneous Provisions) Act, 1998
Signed 07/07/1998
Changed From Copyright (Amendment) Bill, 1998

29/1998 - Food Safety Authority Of Ireland Act, 1998
Signed 08/07/1998

30/1998 - Parental Leave Act, 1998
Signed 08/07/1998
Act Will Commence 3/12/98

31/1998 - Defence (Amendment) Act, 1998
Signed 08/07/1998

32/1998 - Firearms (Temporary Provisions) Act, 1998
Signed 13/07/1998

33/1998 - Housing (Traveller Accommodation Act, 1998
Signed 13/07/1998
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34/1998 - Industrial Development (Enterprise Ireland) Act, 1998
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38/1998 - Economic And Monetary Union Act, 1998
Signed 13/07/1998
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39/1998 - Offences Against The State (Amendment) Act, 1998

40/1998 - International War Crimes Tribunals Act, 1998

41/1998 - Plant Varieties (Propritary Rights)(Amendment) Act, 1998

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19th Amendment Of The Constitution Act, 1998

Abbreviations

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

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

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KING'S INNS NEWS

Honorary Benchers

An Taoiseach, Mr Bertie Ahern TD, and The Right Honorable, Mr Tony Blair MP, were appointed Honorary Benchers on Wednesday, 25th November. The ceremony took place in the Dining Hall in the King's Inns, and was conducted by the Chief Justice, Mr Liam Hamilton.

The invitations were extended in recognition of both men's roles in forwarding the peace process in Northern Ireland. The title "Bencher' is the highest accolade that can be awarded by the Honorable Society of King's Inns.

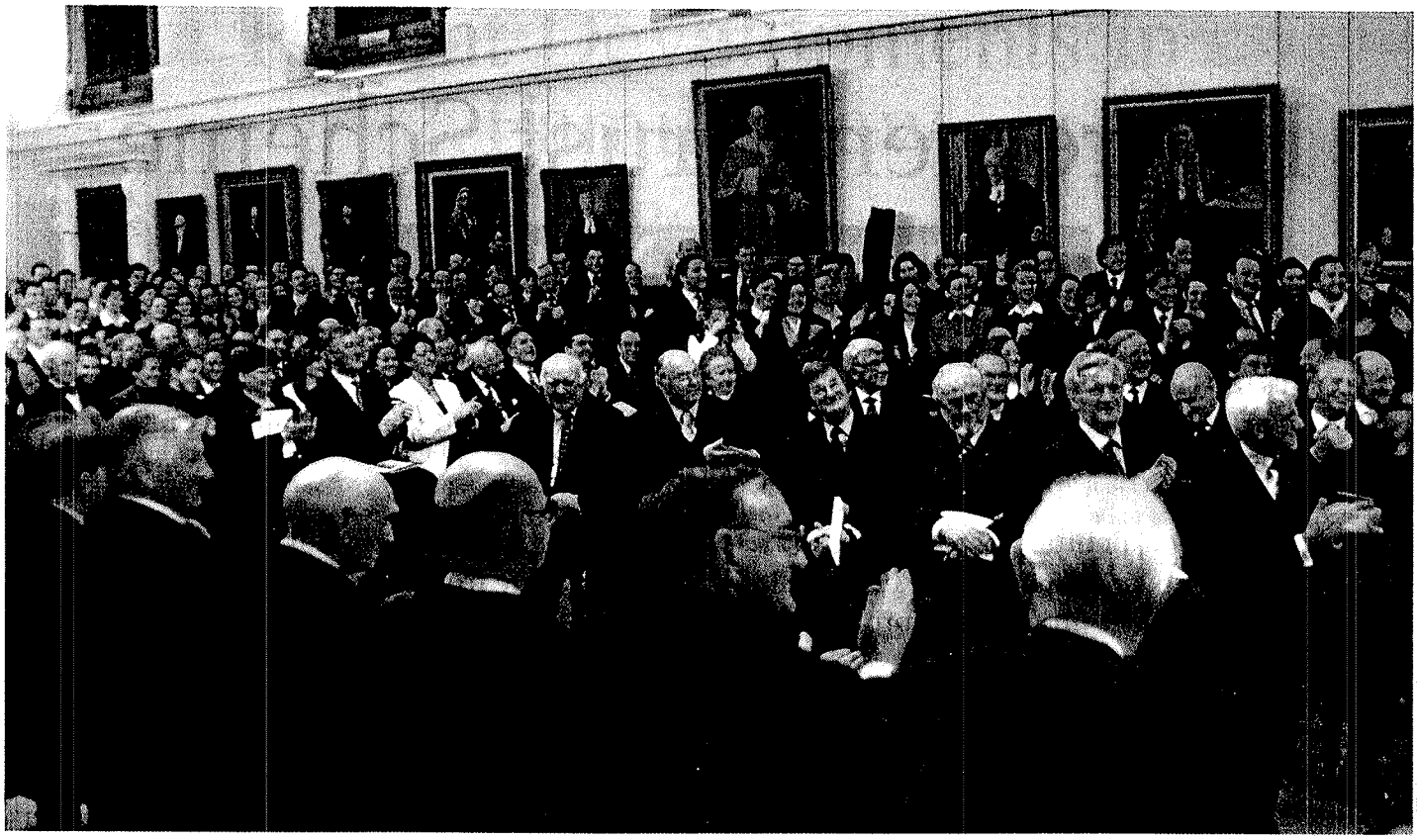
In his speech, the Chief Justice made reference to the 'non-political' nature of the Bar noting that out of the nine Taoisigh appointed since the independence of the State, five have passed through King's Inns. 'Not bad', he joked, 'for a non-political establishment.'

He recalled August 1st, 1800, when the foundation stone was laid for the King's Inns, the same day that the Act of Union was passed. But, he noted, 'while we lost our parliament, we gained the building, a home for many great lawyers.'

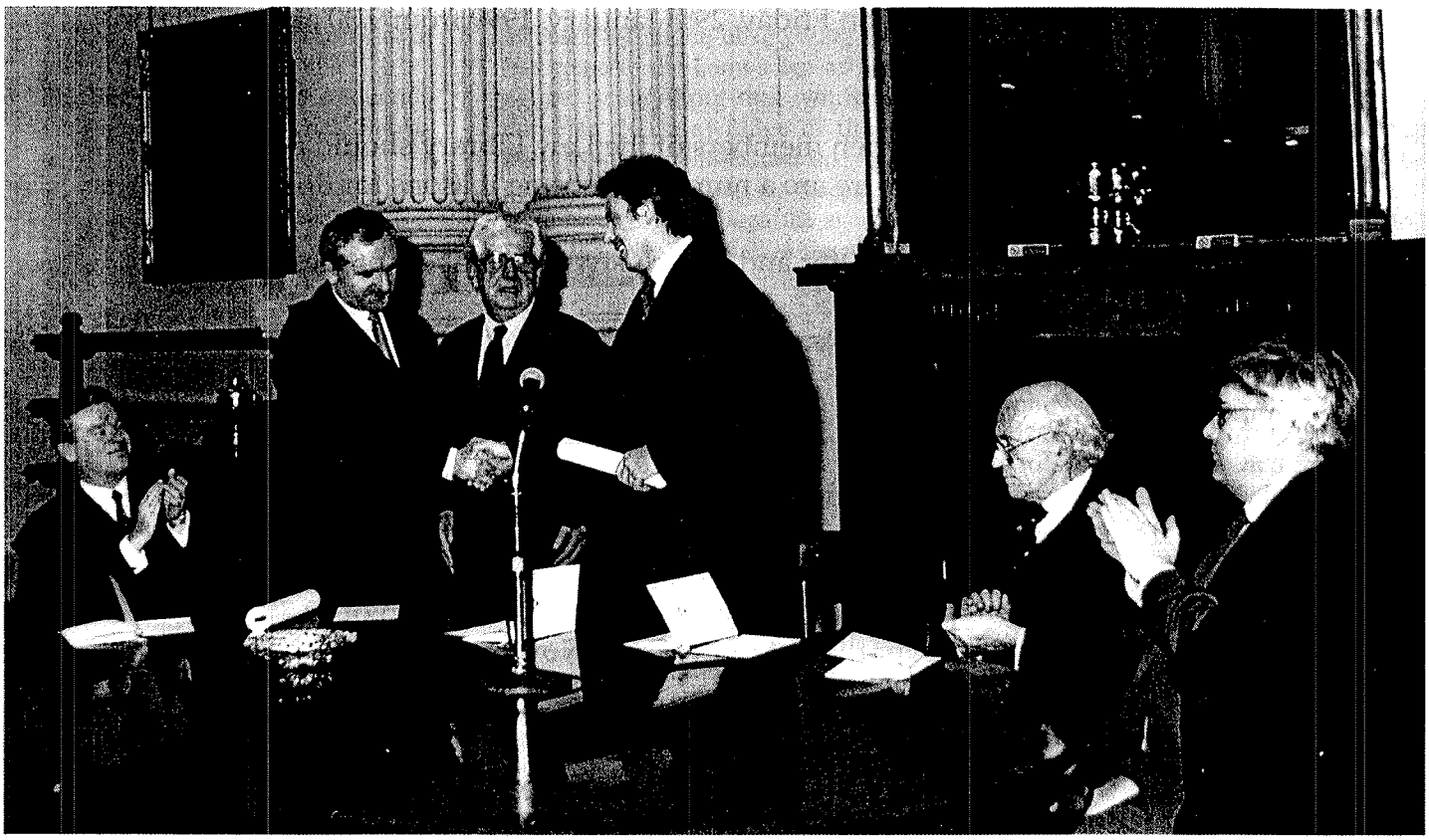
The Taoiseach, Mr Ahern addressed the audience with the reminder that, 'I am now in your jurisdiction, just as surely as your jurisdiction is in my constituency. Remember, while I would like to keep my constituents out of your jurisdiction, I welcome the presence of the various branches of the legal establishment in my constituency and the potential to be of benefit to the people who live in its vicinity.'

The ceremony was attended by the students of the King's Inns, members of the Judiciary and the Bar. Amongst the guests were the Minister for Equality, Justice and Law Reform, John O'Donoghue, TD, Nora Owens, TD, the English Ambassador to Ireland, Veronica Sutherland and other dignitaries.

Ms. Cherie Booth, Q.C., and Ms. Celia Larkin were among those who attended the recent ceremony in the King's Inns.



Members of the judiciary, senior politicians and members of the Bar who attended the conferral of Honorary Benchership to An Taoiseach, Mr. Bertie Ahern, T.D., and the Right Honorable Mr. Tony Blair, M.P., in the King's Inns.



The Attorney General, Mr. David Byrne, S.C., An Taoiseach, Mr. Bertie Ahern, T.D., The Chief Justice, The Hon. Mr. Justice Liam Hamilton, The Right Hon. Mr. Tony Blair, M.P., Mr. Ralph Sutton, S.C. and Mr. Frank Clarke, S.C., pictured at the recent conferral of Honorary Benchership to An Taoiseach, Mr. Bertie Ahern and The Right Hon. Mr. Tony Blair, M.P.

Retirement Trust Scheme

REMINDER TO MEMBERS

CONTRIBUTION DEADLINE:

- The deadline for making contributions to your Scheme if you wish to claim tax relief for 1997/98 is the 31st January, 1999.

- You may claim full tax relief on contributions of up to 15% (20% for individuals aged 55 years or over) of your Net Relevant Earnings (i.e. income from non-pensionable employ ment plus net profits from profession less business - related capital allowances and personal interest payments).

- A representative of the Trustee / Administrator, Bank of Ireland Trust Services, will be in attendance to receive your contributions as follows:

- At the Distillery building on Thursday, 28th January, 1999 from 9.30 p. am to 1.00 pm

- At the Four Courts on Thursday, 28th January, 1999 from 1.30 pm to 5.00 pm

- At the Church Street building on Friday, 29th January, 1999 from 9.30 am to 5.00 p.m.

THINKING OF JOINING?

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

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For more information contact:

Kim Lloyd or Brian King at Bank of Ireland Trust Services

01 604 3629/7

Recent Developments in Family Law

(PART 2)

SARA PHELAN, Barrister

This Article continues the summary of recent developments in family law as presented at a recent Conference, attended by the author, in the School of Law, Trinity College Dublin, entitled "Recent Developments in Family Law." Three papers were summarised in the Bar Review, Volume 4, Issue 2, November 1998 and summaries of the four other papers are discussed hereunder as follows.

- The Implications for Practitioners of the Statutory Changes Relating to the Sale and Mortgage of the Family Home by Paul Coughlan, Barrister.
- Legal Complications Affecting Non-Marital Couples by Anne Dunne, Senior Counsel.
- What Has Been Happening in Nullity Applications in the Nineties? by William Binchy, Regius Professor of Law, Trinity College Dublin
- Practical Steps in Child Abduction Litigation by Sarah Farrell, Barrister.

The Implications for Practitioners of the Statutory Changes Relating to the Sale and Mortgage of the Family Home

The purpose of this paper by Paul Coughlan, Barrister,was to examine some of the effects of the Family Law Act, 1995 (the Act of 1995) on the Family Home Protection Act, 1976 (the Act of 1976) in the light of case law and practice.

Equitable Doctrine of Notice

Section 3(1) of the Act of 1976 renders a purported conveyance[1] of an interest in a family home void if the 'conveying' spouse has not obtained the prior consent in writing of the 'non-conveying' spouse[2]. However, a conveyance will not be rendered void by virtue only of section 3(1) if it is made *inter alia* to a purchaser for full value[3] but the burden of proving the validity of a conveyance rests with the person alleging it[4]. Section 3(6) of the Act of 1976 defines 'purchaser' as a 'grantee, lessee, assignee, mortgagee, chargeant or any other person who in good faith acquires an estate or interest in property' and in *Somers v. W*[5] the Supreme Court held that 'in good faith' must be interpreted in the light of the equitable doctrine of notice[6]. Thus, a purchaser must be able to demonstrate that s/he had no actual, constructive or imputed notice that the conveyance to which they were a party came within the terms of section 3(1) of the Act of 1976. Furthermore, a purchaser is affected by notice of anything which has come to the knowledge of his/her agent, or anything that would have come to the knowledge of the said agent if such inquiries and inspections as ought reasonably to have been made were made, even though the agent was not acting 'as such' (i.e. as the agent of the purchaser) at the time in question[7].

Effect on the title to land

The failure to pursue adequate inquiries as to whether a property constituted a family home, as happened in *Somers v. W,*[8] left some titles to unregistered land open to question and thus unmarketable. In order to regularise the situation, section 54(1)(b) of the Act of 1995 inserted section 3(8) into the Act of 1976 and by virtue of same a conveyance of a family home will not be deemed to be void by reason only of section 3(1) unless a court has declared it to be void or, subject to the rights of any other person concerned, it is void by reason of section 3(1) and the parties to the conveyance or their successors in title make a written statement that it is void before the expiration of six years from the date of the conveyance. Proceedings to have a conveyance declared void by reason only of section 3(1) cannot be instituted after the expiration of six years from the date of the conveyance, save where the spouse instituting such proceedings was in actual occupation of the land concerned from immediately before the expiration of the six year period until the institution of the proceedings.[10]

In order to avoid the necessity of invoking section 3(8) of the Act of 1976 it is general and standard conveyancing practice to insist that each conveyance of an unregistered property since the 12th day of July, 1976[11] is accompanied by the *prior* written consent of the vendor's spouse or a statutory declaration stating why the property did not constitute a family home. If the property is registered such precautions are not necessary, since the register of titles is conclusive evidence of the title of the person so registered as owner[12] and a purchaser need only be concerned with compliance with section 3(1) of the Act of 1976 in relation to the intended instrument of transfer.[13]

Where parties to a conveyance or their successors in title make a written statement that it is void, a certified copy of the statement must be lodged with the Land Registry or the Registry of Deeds as appropriate, within the period of six years from the date of the conveyance.[14] In relation to registered land the statement is registerable as a burden on the folio[15] but it is doubtful whether such a statement is of any meaningful value since:

a) by virtue of the Registration of Title Act, 1964, the register of titles is conclusive evidence of the title of the person so registered as owner and once an owner[16] is registered, section 3(1) of the Act of 1976 is irrelevant,[17] and
b) the statement of voidness is expressed to be 'subject to the rights of any other person concerned'[18]

and thus a statement cannot affect the rights or title of a registered owner who is not a party to that statement.

Concept of a General Consent

Section 54(1)(b) of the Act of 1995 also inserted section 3(9) into the Act of 1976 and the said section 3(9) now provides that if 'a spouse gives a general consent in writing to any future conveyance of any interest in a dwelling that is or was the family home of that spouse and the deed for any such conveyance is executed after the date of that consent, the consent shall be deemed, for the purposes of subsection (1), to be a prior consent in writing of the spouse to that conveyance', Thus, a spouse may now give a single, once-off consent for all future conveyances of the family home, although it should be noted that nothing in the original section 3 of the Act of 1976, as enacted, provided that a consent was purely for the purpose of a single and specific conveyance. Interestingly, neither the Act of 1976 nor the Act of 1995 provide for a revocation of the general consent.

Section 3(9) of the Act of 1976 refers to a 'deed' and thus it may be argued that section 3(9) only applies to conveyances effected by deed. Is it then the case that less formal dispositions (e.g. the creation of an equitable mortgage by the deposit of title deeds) require a specific consent? It is not likely that this is the correct interpretation and certainly a spouse who had given a general consent pursuant to the provisions of section 3(9) would perhaps be estopped from asserting that a conveyance entered into on the strength of that consent was void simply because it was not a conveyance effected by deed.

Informed Consent

Should the consent for the purposes of section 3(1) of the Act of 1976 be brought about by misrepresentation, duress or undue influence it will be invalid and thus there will not have been compliance with section 3(1) and subject to the statutory exceptions[19] the conveyance will be rendered void. For instance, if the purchaser is a purchaser for full value[20] the conveyance will not be rendered void, but the Act of 1976 does not lay down the precautions which should be taken by the said purchaser before consent is given. However, it is clear that such a purchaser should ensure that the consent given is an informed consent and in *Bank of Ireland v. Smyth*[21] where the 'non-conveying' spouse was under a misapprehension that the charge in question did not concern the family home, the Supreme Court held that the misapprehension prevented her consent to the charge in favour of the plaintiffs from being a fully informed one and so it was invalid. However, the plaintiffs did not owe a specific duty to the 'non-conveying' spouse *per se* but they ought to have taken steps to ensure that her consent was an informed one so as to protect their own interests in ensuring that the consent would not be open to challenge.[22]

From a practical viewpoint one wonders how many other conveyances of family homes are open to question and, although the six year limitation period[23] is of some comfort to lending institutions, it will often be the case that the limitation period does not come into play since the 'non-conveying' spouse may have remained in actual occupation of the property[24] throughout the life of the security!

The Boundaries of the Family Home

The term 'family home' is defined[25] as a dwelling in which a married couple ordinarily reside and will also include a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided before so leaving. The definition of 'dwelling' has been expanded by the Act of 1995[26] and by virtue of same whereas a house located on an agricultural holding may constitute a family home, the land on which the business of farming is conducted would not come within the scope of the Act of 1976. The question then arises as to the status of a consent to a conveyance of land which comprises a family home together with land which does not come within the definition of 'dwelling' in section 2(2) of the Act of 1976. *Obiter* pronouncements of the Supreme Court[27] suggest that severance of the conveyance is not possible and thus the conveyance must fail in its entirety whereas the High Court has been prepared to sever a conveyance and categorise it as void insofar as it related to the family home and valid in relation to the remainder of the lands[28] and in *Allied Irish Banks plc v. O'Neill*[29] Laffoy J. held that in defining the family home and delimiting the extent of the property to which the protection conferred by the Act of 1976 should apply, the Oireachtas recognised that a family home might be part of a larger holding and theoretically severed that holding.[30]

Legal Complications affecting Non Marital couples

The purpose of this paper by Anne Dunne, Senior Counsel, was to comprehensively examine the unconstitutional family under a number of headings. The Irish legal system has thus far failed to provide a definition of cohabitation and in *Foley v. Moulton*[31] Gannon J. stated that he considered it unwise for the Court to supply a definition (of cohabitation) when the legislature had refrained from doing so. However, the Department of Social Welfare would appear to apply three criteria (social, sexual and financial), in deciding whether a couple are cohabiting and, if any one of these criteria is satisfied, the Department of Social Welfare may decide that cohabitation exists.[32]

The Constitution of Ireland, 1937

The family based on marriage[33] has been carefully guarded and protected by the courts over the years[34] and it is this family that the Constitution states to have inalienable and imprescriptible[35] rights.[36] The Constitution does not purport to protect a 'family' unit based upon cohabitation rather than marriage, and indeed the State, through the legislature, has been careful to enact statutes which protect the institution of marriage whilst, to a large extent, ignoring the concept of cohabitation.

The Status of Children Act, 1987

This Act, (the Act of 1987) was a significant step forward in eliminating many of the discriminations which operated against non-marital children, for instance, such children are now entitled to succeed to their fathers estate,[37] to be legitimated by the subsequent marriage of their parents[38] and to be supported by both parents.[39] However, the Constitution still treats children born to married parents[40] differently to those children whose parents have not

married each other[41] and in the latter case the natural father of the child has no constitutional rights whatsoever *vis a vis* his child.[42]

The natural father of such a child does have some statutory rights by virtue of the Act of 1987, but these rights are limited and the natural father simply has a right to apply to the court to be appointed guardian of his child, but he does not have the right to be appointed guardian *per se*.[43] The court retains a discretion in this regard and the only guideline available for the court is that the welfare of the child should be of first and paramount consideration.[44] There is no provision in the Act of 1987 to compel the natural father to seek to be appointed the guardian of his child and there is no provision for the child to apply to court to have his/her father appointed as his/her guardian. It should also be noted that even if the natural father has been appointed the guardian of his child, the 'family' unit of mother, father and child is still afforded no protection by the Constitution and thus cannot bring a claim that its constitutional rights have been infringed.

Financial Provisions

The Family Law (Maintenance of Spouses and Children) Act, 1976 empowers the court to award maintenance for the support of a spouse and dependent children and the Act of 1987 amended this Act to allow proceedings be issued for child support where the parents of the child are not married to each other. However, no statute yet provides for maintenance to be awarded to a person (i.e. a cohabitee) who is not a spouse, for that person's support.

Property Rights

Likewise, the legislation does not provide a framework for determining property issues between persons who are not married to each other (except in the case of engaged and formerly engaged couples[45]) and the Family Home Protection Act, 1976 does not apply to cohabitees. Similarly, an 'owning' partner may apply to court to have the 'non-owning' partner ejected from the 'family' home and the onus falls on the "non-owning" partner to prove a beneficial interest in the property, which said interest will be based on the direct and indirect contributions of the 'non-owning' partner to the purchase of the property, unless there is a specific agreement to the contrary as to the ownership of the property. In determining property disputes between cohabitees, the principles of constructing and resulting trusts will be applied by the courts.

Succession Rights

A cohabitee cannot benefit from the provisions of the Succession Act, 1965 relating to a spouses legal rights[46] and in order for a cohabitee to inherit from the estate of his/her partner there must be a clear intention of the deceased[47] that assets acquired during the period of cohabitation should vest in the surviving cohabitee.[48] Of course it is always open to cohabitees to ensure that property purchased by them is held in their joint names and thus the property will vest in the surviving cohabitee and will not become part of the deceased's estate. However, difficulties may arise when such property has been paid for fully by the deceased, in circumstances where the surviving cohabitee has made no direct or indirect contributions towards the purchase of the property, and in such cases the courts may take the view that the property is held in trust for the estate of the deceased by application of the doctrine of resulting or constructive trusts. Thus, it is of utmost importance that cohabitees set out a clear intention as to the devise of property on the death of either of them.

Protection against Violence

The Domestic Violence Act, 1996 first introduced relief for cohabitees in relation to domestic violence. However, the Act is still of no benefit to cohabitees if they have not been cohabiting for specific periods as laid down by the Act in order that a cohabitee qualify for obtaining a barring order against a partner, the cohabitees must have been living together as husband and wife for a period of at least six months in aggregate during the period of nine months immediately prior to the application for the barring order and in order[49] to obtain a safety order the cohabitees must have been living together as husband and wife for a period of at least six months in aggregate during the period of twelve months immediately prior to the application for the safety order.[50] Furthermore, a cohabitee may not obtain a barring order against a partner if the cohabitee seeking same has no proprietary interest in the property or a lesser interest than that of the partner whom s/he is seeking to bar.[51] In situations such as this, the cohabitee must resort to seeking equitable relief in the form of an injunction.

Other Legislation

The Adoption Acts 1952-1991 only apply to married couples, in that only a husband and wife (or a widow or widower) can apply to adopt a child.

The Civil Liability Act, 1961 and the Civil Liability (Amendment) Act, 1964 only apply to the constitutional family. However, the Civil Liability (Amendment) Act, 1996 amends the category of dependent to include 'a person who is not married to the deceased but who, until the date of the deceased's death, had been living with the deceased as husband or wife for a continuous period of not less than three years'[52] and thus a cohabitee may now claim damages under Part IV of the Civil Liability Act, 1961.

The Revenue Statutes ensure that married couples have benefits not available to those couples who cohabit,[53] such as income tax benefits and capital acquisitions tax benefits, there being no gift tax or inheritance tax between lawful spouses.

What has been happening in Nullity applications in the Nineties?

This paper by William Binchy, Regius Professor of Law, Trinity College Dublin, thoroughly examined recent developments in the law of nullity. It is impossible to summarise fully on the two areas which Professor Binchy examined in detail at the conference and the more recent case law in relation to same. It should be noted that since the enactment of the Family Law Act, 1995 the Circuit Court has jurisdiction to grant a decree of nullity, whereas prior to the enactment of this Act, jurisdiction to grant a decree of nullity[54] was vested solely in the High Court and, on appeal, in the Supreme Court.

Duress

In granting, or refusing to grant, a decree of nullity based upon the absence of free choice, the courts do not apply a generic formula and the

outcome of each case will purely depend on the facts of that case. The most common reason for granting a decree of nullity based on duress is that the female party became pregnant outside of wedlock and the parties entered into a ceremony of marriage as a result, but one wonders, with changing social values, whether the courts will continue to grant decrees of nullity on this reason alone in the future? Interestingly, the courts have applied the bar of approbation in relation to a decree of nullity very sparingly indeed and cases still come before the courts and decrees of nullity are still granted where the ceremony of marriage has taken place many many years previously.

During the 1980's the courts moved away from the narrow approach which they had heretofore adopted[55] and in N. *(otherwise K.) v. K.*[56] the Supreme Court placed a strong emphasis on the absence of free choice as the basis of the granting of the decree of nullity. More recently in *W.D. v. C.D.*[57] Smith J. in the High Court was prepared to grant a decree of nullity on the basis of duress even though the ceremony of marriage had taken place in or around the year 1977. The respondent had become pregnant a year previously after the parties had known each other for only a number of weeks and, the respondent having given birth, both sets of parents put pressure on the parties to get married. Relying on *N. (otherwise K.) v. K.*[58] Smith J. was 'absolutely satisfied' that neither party had given full and free consent and that the decision to get married was based upon external pressures from both families. Thus, no valid marriage had taken place.

A decree of nullity was also granted on the basis of duress in *A.C. v. P.J.*[59] The petitioner came from a home which was 'very strict, religious and pious' and the knowledge that her parents had made sacrifices so that she might have a good education inhibited the petitioner considerably. The petitioner was devastated when she discovered she was pregnant and Barron J. in the High Court was satisfied that the petitioner saw marriage as the only means of escape from the situation in which she found herself. Her fear of her parents was 'genuine and justifiable' and the circumstances surrounding the pregnancy, and the attitude which her parents would have adopted to such pregnancy, were of a character which the petitioner had been constitutionally unable to withstand and had led inexorably to her marriage.

However, the courts often refuse to grant a decree of nullity based on the grounds of duress and in *D.C. v. N.M. (falsely known as N.C),*[60] Geoghegan J. in the High Court so refused to grant a decree of nullity. Geoghegan J. noted that if the pressure (to marry) was 'excessive so as to prevent them forming an independent mature decision of their own' the court would have no hesitation in declaring the marriage invalid but that was not so in the instant case. There was no evidence of pressure from any external source and the couple had been in a loving relationship with a long term plan to marry. The respondent's pregnancy did not arise from a single night's passion and although the decision to get married at the actual time was connected with the pregnancy there was no evidence that the petitioner was under any undue or excessive pressure from the respondent or anyone else. Geoghegan J. was not of the view that the fact that the petitioner may have been 'under pressure to some extent from his own conscience' was material to the case.

Again in *B.C. v. O'F. (otherwise known as L.C.)*[61] a petition for a decree of nullity based on duress was dismissed. Morris J. in the High Court had no doubt that the parties were at all times unsuited to each other and that the marriage had probably been a mistake from the start. However that in itself was not a ground for the granting of a decree of nullity, and the petitioner had failed to discharge the onus of proof of establishing the absence of consent on the basis of duress. In adopting the test as set out by Finlay *C.J. in N. (otherwise K.) v. K,*[63] *Morris J.* examined the petitioner's evidence and found that his (the petitioner's) perception of the facts was not entirely reliable. For instance the parties had exchanged presents shortly before the marriage and this did not accord with the petitioner's view that the parties were standing apart from each other. Likewise, the petitioner put forward that he was compelled to marry against his will on the basis that he would not see his infant son again if he did not do so. Morris J. found it 'singularly unlikely' that the petitioner would not have mentioned this problem to the priest before the marriage or to his family doctor. The petitioner was genuinely concerned for the welfare of his son but this concern was not so great as to overbear his free will and force him into marriage against his will.

Incapacity to form and sustain a 'caring and considerate' or 'normal' marital relationship

This ground was first enunciated in R.S.J. v . J.S.J.[63] in an analogy with ground of impotence which of course has been recognised for many years by the courts as a valid grounds for the granting of a decree of nullity, and has been developed and extended by the courts in many cases since the early 1980's. In *U.F. (otherwise C.) v .J.C.*[64] Finlay C.J. considered that the analogy was valid not only in cases where the incapacity arose from psychiatric or mental illness but also where it arose from 'some other inherent quality or characteristic of an individual's nature or personality which could not be said to be voluntary or self-induced.' The crucial concepts underlying the grounds of relational incapacity were relatively recently analysed by *Laffoy J. in P.C. v. C.M. (otherwise C.).*[65] The respondent had had a child by another man prior to her marriage to the petitioner and following the marriage she had resumed her relationship with the father of her child. She also had had a relationship with a counsellor. However, there were periods during which her marriage to the petitioner was a happy one. The psychiatrist giving evidence for the petitioner gave evidence that the respondent suffered from an immature personality disorder which prevented her from having the capacity for a mature and empathetic relationship. However, the psychiatrist giving evidence for the respondent did not consider that she had a personality disdisorder! Laffoy J. approached the issue on the basis of the decision of the Supreme Court in U.F. *(otherwise C.) v. J.C.*[66] and whether the respondent was incapable of entering into and sustaining a proper marital relationship, that is to say, a life-long union embodying an emotional and psychological relationship between her and the petitioner, because of some inherent quality or characteristic of her nature or personality which was not voluntary or self induced. It was not necessary to decide which psychiatric evidence was more appropriate (since mental illness per se was not involved) and 'in the final analysis it was for the court to decide, on the basis of the evi-

dence adduced in court, whether the petitioner had established that the respondent was incapable of entering into and sustaining a proper marital relationship by reason of incapacity attributable to some inherent quality or characteristic, or whether a valid marriage has disintegrated by reason of wilful conduct on the part of the respondent'. On the evidence, Laffoy J. was of the opinion that the respondent was a very strong willed person and that the respondent's actions after the marriage represented 'wilful and voluntary conduct on her part' rather than revealing an incapacity to enter into and sustain a proper marital relationship. Laffoy J. came to the conclusion that the respondent, by her conduct, ruined the marriage of the parties and her nature or personality did not inherently predispose her to act in the way that she did. Thus, the marriage was a valid marriage which had broken down and was not void *ab initio*. Interestingly, in this case Laffoy J. retained control in relation to the issue of psychiatric evidence rather than allowing psychiatrists determine the crucial issues and she was of the opinion that psychiatric evidence is only crucial where incapacity on account of mental illness has been established.

The decision of McCracken J. in *D.McC. v. E.C.*[67] is of some importance since it addressed the issue of whether a party who lacks capacity may petition for a decree of nullity on the basis of his/her own incapacity. O' Hanlon J. in the High Court, in the case of *P.C. v. V.C.*,[68] had previously come to the conclusion that a petitioner could petition on the basis of his/her own incapacity and McCracken J. came to the same conclusion although previous authorities were divided on the issue. It should be noted that McCracken J. was of the opinion that *P.C. v. V.C.*[69] was a decision of the Supreme Court and thus one wonders whether he followed it because he was obliged to do so or whether he agreed with its reasoning? His comments in relation to same would suggest the latter viewpoint.

Practical steps in Child Abduction litigation

The purpose of this paper by Sarah Farrell, Barrister,was to provide an overview of the law relating to the area of child abduction litigation and to provide an outline of the necessary preliminary steps which ought to be taken by practitioners presented with a child abduction case. A brief overview of the applicable law is summarised hereunder.

Overview of the applicable law

The applicable law in this jurisdiction is the Child Abduction and Enforcement of Custody Orders Act, 1991 (the Act of 1991)[70] which brought both the Hague Convention[71] and the Luxembourg Convention[72] into force in the State. The primary purpose of both conventions is to secure the expeditious return of abducted children (or children who are being wrongfully retained in, or have been improperly removed to, a jurisdiction other than that of their habitual residence) to their country of habitual residence.[73] The Hague Convention has world-wide application[74] whereas the Luxembourg Convention applies to 24 European countries.[75] Generally speaking, before the Luxembourg Convention can be invoked, a pre-existing court order in relation to custody/access is required although it may be possible to invoke its operation with a post-dated court order if that order contains a declaration to the effect that the removal of the child/ren[76] was wrongful. Neither convention ousts the operation of the courts and indeed in some circumstances it may be necessary for the parties to apply to the courts, where for instance there are technical difficulties with an application under the conventions.[77]

The Hague Convention

The removal or retention of a child is stated to be wrongful for the purposes of the convention where 'it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention'[78] and 'at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.'[78] Rights of custody 'may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State'[79] and include 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.'[80] Recently in *H.I. v. M.G.*[81] in the High Court, Laffoy J.[82] held that inchoate rights to custody can be recognised by the Irish courts in circumstances where, although the natural father had no formal legal rights to custody, he had lived with the mother and the child for a period of five and a half years. Rights of access shall include 'the right to take a child for a limited period of time to a place other than the child's habitual residence.'[83]

Thus, where a child under the age of sixteen has been wrongfully removed from a contracting State where s/he was habitually resident, or retained in a contracting State where s/he was not habitually resident, in breach of custody/access rights, the person exercising those custody/access rights may apply to the court and the court shall order the return of the child forthwith (where a period of less than one year has elapsed from the date of the wrongful removal or retention)[84] or shall order the return of the child, unless it is demonstrated that the child is now settled in its new environment.[85]

Articles 13 and 20 provide defences to an application under the convention and Article 13 provides that 'the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that.-

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention, or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

Article 13 further provides that 'the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views' Article 20 provides that the return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

At present the Irish courts[86] interpret the convention, and the defences thereby permitted, very strictly. The defences are construed narrowly and a very heavy onus is placed on a respondent to establish same. It has been held that the convention[87] should be construed in the light of what must have been intended and the common law cannot be availed of to negate the concepts of the convention. The presumption underlying the convention is that the best interests of the child are served by the prompt return of the child to its habitual residence and any risks identified to the court will often be regarded as best dealt with by the relevant authorities in the country of habitual residence.

The Luxembourg Convention

The Luxembourg Convention is primarily concerned with the recognition and enforcement of custody decisions made in any of the contracting States. Article 1 of the convention provides that 'a decision relating to custody means a decision of an authority in so far as it relates to the care of the person of the child, including the right to decide on the place of his residence or to the right of access to him.'

The defences available under the Luxembourg Convention are more limited than those available under the Hague Convention and thus it is in the best interests of an applicant to apply for the return of a child, who has been wrongfully/improperly removed/retained, under the Luxembourg Convention wherever possible. The defences allowed by the Luxembourg Convention include the defence of procedural defects[88] and where the decision is manifestly incompatible with the fundamental principles of law relating to the family and children in the State.[89]

Undertakings

The defence of 'grave risk' under the Hague Convention[90] may be counteracted by an applicant by the giving of undertakings in relation to the welfare of the children. Thus the party seeking the return of the children may facilitate their return by giving undertakings to the court, for instance that the welfare of the children will not be affected by their return or that certain actions will be taken prior to or upon their return. It should be noted however, that undertakings are a common law concept and thus may not play the same part in the legal code of a civil law jurisdiction.[91] Thus, a court should be slow to accept undertakings from a party who will not be held in contempt of court if same are breached, and the defence of 'grave risk' will probably be more acceptable to a court in these circumstances •

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1 Section 1 of the Act of 1976 provides that a "conveyance" includes'a mortgage, lease, assent, transfer, disclaimer, release and any other disposition of property otherwise than by a will or a donatio mortis causa and also includes an enforceable agreement (whether conditional or unconditional) to make any such conveyance, and "convey" shall be construed accordingly' .
2 The operation of section 3(1) is subject to sections 3(2), 3(3), 3(8) and 4 of the Act of 1976.
3 Section 3(3)(a) of the Act of 1976.
4 Section 3(4) of the Act of 1976.
5 [1979] I.R. 94.
6 Put on a statutory basis by section 3 of the Conveyancing Act, 1882.
7 Section 3(7) of the Act of 1976 amends section 3(1)(ii) of the Conveyancing Act, 1882, for the purposes of section 3 of the Act of 1976, by deleting the words 'as such' wherever they appear in section 3(1)(ii) of the Conveyancing Act, 1882.
8 Supra.
9 Section 3(8)(b) of the Act of 1976 as inserted by section 54(1)(b) of the Act of 1995.
10 Section 3(8)(a) of the Act of 1976 as inserted by section 54(1)(b) of the Act of 1995.
11 The date on which the Act of 1976 became operative.
12 Section 31(1) of the Registration of Title Act, 1964.
13 Guckian v. Brennan [1981] I.R. 478 per Gannon J..
14 Section 3(8)(c) of the Act of 1976 as inserted by section 54(1)(b) of the Act of 1995.
15 Section 3(8)(c) supra.
16 Section 31(1) supra.
17 Guckian v. Brennan supra per Gannon J..
18 Section 3(8)(b)(ii) of the Act of 1976 as inserted by section 54(1)(b) of the Act of 1995.
19 Sections 3(2), 3(3) and 3(8) of the Act of 1976.
20 Section 3(3)(a) supra.
21 [1995] 2 I.R. 459.
22 Ibid., per Blayney J.
23 Section 3(8)(a)(i) of the Act of 1976 as inserted by section 54(1)(b) of the Act of 1995.
24 Section 3(8)(a)(ii) of the Act of 1976 as inserted by section 54(1)(b) of the Act of 1995.
25 Section 2(1) of the Act of 1976.
26 Section 2(2) of the Act of 1976 as inserted by section 54(1)(a) of the Act of 1995 now provides that a 'dwelling' means any building or part of a building occupied as a separate dwelling and includes any garden or other land usually occupied with the dwelling, being land that is subsidiary and ancillary to it, is required for amenity or convenience and is not being used or developed primarily for commercial purposes ...
27 Hamilton v. Hamilton [1982] I.R. 466, 490 per Costello J. and Bank of Ireland v. Smyth supra 471 per Blayney J..
28 Bank of Ireland v. Slevin [1995] 2 I.R. 454 per Johnson J. (authors note: this case was decided in the late 1980's but was not reported until 1995).
29 [1995] 2 I.R. 473.
30 Ibid., 481.
31 [1989] 9 I.L.R.M. 169.
32 The Irish Social Welfare System ñ Law and Social Policy, Cousins M., The Round Hall Press, 1995.
33 Article 41.3.1 of the 1937 Constitution.
34 Most recently in Ennis v. Butterly [1997] 1 I.L.R.M. 28.
35 In Ryan v. The Attorney General [1965] I.R. 294 Kenny J. defined 'inalienable' as that which cannot be transferred or given away and 'imprescriptible' as that which cannot be lost with the passage of time or abandoned by non-exercise.
36 Article 41.1.1 of the 1937 Constitution.
37 Part V of the Act of 1987.
38 Part II of the Act of 1987.
39 Part IV of the Act of 1987.
40 The family unit and all members thereof are protected by Articles 41 and 42 of the Constitution and also, individually, by Article 40 of the Constitution.
41 The mother, father and child each fall to be protected separately by Article 40 of the Constitution but the father has no constitutional rights vis a vis his child.
42 J.K. v. V.W. [1990] 2 I.R. 437.
43 Section 6A of the Guardianship of Infants Act, 1964 as inserted by section 12 of the Status of Children Act, 1987.
44 Section 3 of the Guardianship of Infants Act, 1964.
45 The Family Law Act, 1981, section 48 of the Family Law Act, 1995 and section 44 of the Family Law (Divorce)

Act, 1996.
46 Part IX of the Succession Act, 1965.
47 i.e. by testamentary disposition.
48 The doctrine of jus accrescendi.
49 Section 3(1)(b) of the Domestic Violence Act, 1996.
50 Section 2(1)(a)(ii) of the Domestic Violence Act, 1996.
51 Section 3(4) of the Domestic Violence Act, 1996.
52 Section 47 of the Civil Liability Act, 1961 as amended by section 1(1)(c) of the Civil Liability (Amendment) Act, 1996.
53 Murphy v. The Attorney General [1982] I.R. 241 and Muckley v. The Attorney General [1985] I.R. 472.
54 Section 39 of the Family Law Act, 1995.
55 Griffith v. Griffith [1944] I.R. 35.
56 [1985] I.R. 733.
57 (Unreported, High Court, 3rd April, 1998).
58 Supra.
59 [1995] 2 I.R. 253.
60 (Unreported, High Court, 26th June, 1997).
61 (Unreported, High Court, 25th November, 1994).
62 Supra.
63 [1982] I.L.R.M. 263.
64 [1991] 2 I.R. 330.
65 (Unreported, High Court, 11th January, 1996).
66 Supra.
67 (Unreported, High Court, 6th July, 1998).
68 [1990] 2 I.R. 91.
69 Supra.
70 The Act of 1991 commenced on the 1st day of October, 1991.
71 Part II of the Act of 1991.
72 Part III of the Act of 1991.
73 'Habitual residence' is to have its ordinary meaning and therefore is equated with ordinary residence per Blayney J. in K.L. v. L.C. [1993] 2 Fam L.J. 79, 80.
74 The Hague Convention applies in the following States or territories as a result of ratification, acceptance or approval (as of the 4th November, 1998); Argentina, Australia (only for the Australian States and mainland Territories), Austria, Bosnia and Herzegovina, Canada, China (Hong Kong Special Administrative Region only), Croatia, Czech Republic, Denmark (except the Faroe Islands and Greenland), Finland, The Former Yugoslav Republic of Macedonia, France (for the whole of the territory of the French Republic), Germany, Greece, Ireland, Israel, Italy, Luxembourg, Netherlands (for the Kingdom in Europe), Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland (to include the Isle of Man, the Cayman Islands and the Falkland Islands), United States of America and Venezuela. The Hague Convention applies in the following States or territories as a result of accession (as of the 4th November, 1998); Bahamas, Belarus, Belize, Burkina Faso, Chile, Colombia, Cyprus, Ecuador, Georgia, Honduras, Hungary, Iceland, Mauritius, Mexico, Moldova, Monaco, New Zealand, Panama, Paraguay, Poland, Romania, Saint Kitts and Nevis, Slovenia, South Africa, Turkmenistan and Zimbabwe.
75 Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and United Kingdom have each ratified the Convention. Malta, Moldova and Turkey have each signed the Convention but have not ratified it and thus it has not yet come into force in these jurisdictions.
76 Article 12 of the Luxembourg Convention.
77 A.S. v. E.H. and R.M.H. (Unreported, High Court, May, 1996).
78 Article 3 of the Hague Convention.
79 Ibid.
80 Article 5 of the Hague Convention.
81 (Unreported, High Court, 5th November, 1998).
82 Laffoy J. relied on the decision of Waite L.J. in Re B. (minor) (Abduction) [1994] 2 F.L.R. 249.
83 Ibid.
84 Article 12 of the Hague Convention.
85 Ibid. ñ see P. v. B. (No. 2) (Unreported, High Court, 6th November, 1998) per Laffoy J. for an interpretation of 'settled in its new environment'.
86 C.K. v C.K. [1994] 1 I.R. 250 and A.S. v. P.S. (Unreported, Supreme Court, 26th March, 1998).
87 K. v. K. (Unreported, Supreme Court, 6th May, 1998).
88 Article 9 of the Luxembourg Convention.
89 Article 10 of the Luxembourg Convention.
90 Article 13 of the Hague Convention.
91 L.P. v. M.N.P. (Unreported, High Court, 14th October, 1998) per McGuinness J.

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Ralph Sutton, SC, called to the Bar, July 1948

I was called to the Bar on the 2nd July, 1948. There were nineteen others. Only about half a dozen went into practice. None of them have survived the whole fifty years. John Blayney became a Judge and is now retired. Andy Flynn left the Bar for a considerable time but then returned to practice. People like Dermot Waldron and Paddy Power went into the Department of Foreign Affairs. They both became ambassadors in their time and are both retired now. Frank Rooney became a High Court Judge in Africa. He stood up to the President in some African Republic and was sacked and appointed in another country. He is retired now and living in South Africa. Kevin Waldron was in the Court Service and became a Registrar. After he retired, he became Director of Education in the King's Inns. There were also some very able people like Barry Deane and Vincent Delaney who never practised.

I started devilling with Tony McDowell, (Michael's father), a delightful and most helpful person who had a good general practice. He then became Special Commissioner for Income Tax, so he recommended that I should go to a Conveyancor to complete my devilling. I then went to Malcolm (Max) Ellis and I did nothing but conveyancing for the rest of my time as a devil. I did my devilling in Dublin, as no one ever devilled in Cork. It was for this reason that I never had a devil myself. I made my first appearance in Cork in the summer of 1948. I was asked to defend a Messenger Boy who was charged with careless riding of a bicycle. It was in the District Court. I think the Probation Act was applied and I got a fee of one guinea for that. Back then, anyone would have predicted that in fifty years the Barrister and the Guinea would have disappeared, but that Messenger Boys would still be around, but it is the messenger boy on a bicycle, which was a very practical thing, which has disappeared and the barrister with his fees measured in guineas who has survived. The Circuit Judge at the time was Art O'Connor. He was an nice man, but very slow. He had in his time been a very unrelenting republican, being I understand ' President' of the 'Irish Republic' sometime after 1927. No trace of such excesses remained when I knew him and his main interest was agriculture. He would interrupt any case with questions about, and observations on, agricultural matters even to the extent of giving good advice about the value of grazing goats with cattle! The most notable barristers when I started on the Circuit were Sean Fawcitt, John Gleeson, Tim Desmond, Stephen Barrett and Bertie Wellwood.

Politically my family would have been identified with Fine Gael. I had two uncles in the Free State army in the Civil War. From the time that I addressed a Fine Gael meeting in Ballsbridge on behalf of John Costello in February 1948, I was identified politically. To be politically identified then was not a hindrance to practice, but it was a complete obstacle to getting State work if you were on the wrong side. This was accepted at the Bar. No one questioned that when there was a change of Government that the State work went to different Barristers. I have done very little State work over the years. At one stage I went twenty years without getting a State Brief, because there was sixteen years of Fianna Fail government and five years of my brother-in-law, Declan Costello, as Attorney General.

I took silk in March 1968. It was a tremendous upheaval and I was very disinclined to do it. I remember people pressing me to take silk in 1966. In 1967 I got elected to Cork Corporation and I remember sending a message to Chris Micks saying that I am not taking silk, I am taking fur. To take silk then, you had to move to Dublin lock, stock and barrel and that was very traumatic.

I suppose I have been in some high profile cases during my career. I used to do some work for the Irish Times and the Irish Independent and appeared in a number of their defamation cases. Sometimes it is the very small cases that are the most memorable. I remember being in a case as a Junior, appearing for a man who was accused of stealing a red lamp off a Morris Minor. He was a charge hand in Dublin and he absolutely insisted that he had not done it and he wanted his case to be tried by a jury. His employers said that if he was found guilty that they would have to sack him, without pension. Two other charge hands said they had seen him do it and I could not think what to do to defend him successfully. Then I thought of what to do. I had one of the witnesses put out of the court room and I asked the other 'where did he go when he took the lamp?' He said 'straight to the shed.' When the other witness came back I asked him 'where did my man go after he took the lamp?' He said he went right down to the end of the main factory and around the corner to the end of the yard. The jury acquitted my client.

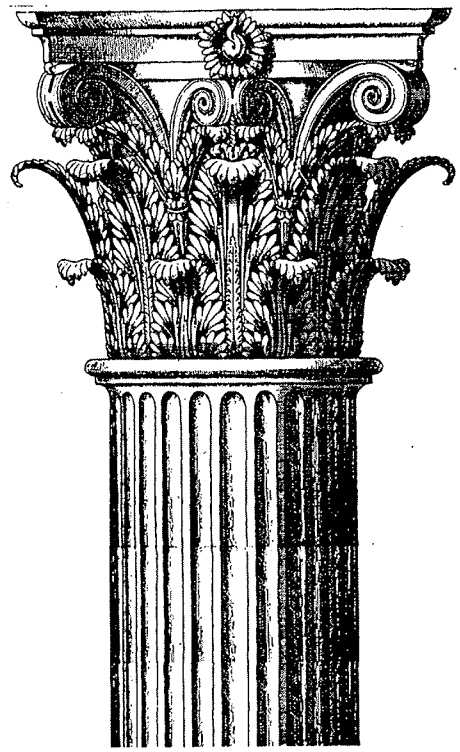
Barristers now are far better trained than they were when I was called to the Bar. They work much harder than we did then. When I was devilling and for years after that, the kind of practice we did was very different. Personal Injuries actions were always jury actions. On the non jury side, a lot of cases involved the construction of documents and construction of Wills. The sort of commercial work that exists now, did not exist then on anything like the same scale. Discovery had not been discovered, which meant that cases were much shorter. A Brief was always just what you could put under your arm. It was a Brief. Now a Brief needs a wheelbarrow to carry it round. There was no such thing as a specialised

Ralph Sutton SC, who celebrated 50 years at the Bar earlier this year.

Criminal Bar. There was no legal aid, so defending Counsel were not paid in a criminal case unless the client was rich. You did criminal work to oblige a solicitor who gave you other work. Crime did not pay. The only people who paid you were itinerants, and they always paid up in cash. Sometimes the notes were quite damp, having been dug out of some hiding place on the morning of the trial. The hole in the field was the itinerants' bank. There was no Labour Law and no Family Law. Stateside Applications took up the first two days of a term and a Court of three High Court Judges would sit to hear them.

There is a huge difference in the Law Library. The numbers are so big now, that you don't know, or even try to know, the names of all the members. If you know the people in the library sitting at your desk, you are doing well. When I started and even when I took silk, there was only something like two hundred people in the Law Library. People like Chris Micks would make sure that he knew the name of each new person that came in. He would introduce himself to them and he would know everyone. Everyone knew everyone in the Law Library then. It is more like a town now.

The Bar is the best place possible for friendships. I think it is no place for enemies. You can't afford enemies and that is the great thing about the Bar. It is not quarrelsome. You can't keep yourself to yourself. You've got to be friendly. Apart from that compulsion, you have every opportunity to be friends with people. You have such enormously wide choice and such very easy access to people. This friendship is in the interest of the public. It is because we get on so well and have such good relations with each other, that we can do people's business. I don't know if the public perceive that. You can approach anyone to discuss either the settlement of a case or the running of a case and that saves everyone time. I rarely remember any row that I had with anyone. One day when I was a Junior I was in Clonakilty and Bertie Wellwood was on the other side. I said that he was misleading the Court and Bertie Wellwood said that never, in his entire experience, had he been accused of misleading the Court. I replied that only twice yesterday I had heard people in Cork saying that he had mislead the Court. At that, he gathered up his papers and walked out of the



Court and the Court had to adjourn. It was just lunch- time. As soon as I got out, he said to me that I must go in to the Judge and apologise immediately, and then he would have lunch with me. I went into the Judge and apologised and went for lunch with him. We were late getting back.

I enjoyed the Circuit very much I had a lot of very good friends, particularly Stephen Barrett. He was a great friend of mine both politically and as a Barrister. He was a very funny person.

I think that when I started, Judges were comparatively benign and on the whole there was no frighteningly nasty Judges. There then came an age of some very rude Judges. They are now far more civilised. It is unusual now for a Judge to be unpleasant. I think the Bar would not take it anymore. They certainly would not put up with what we put up with at one stage in the sixties and seventies. Many of the more senior judges now remember that time and seem to be resolved that it will not happen again.

I made my first appearance as a Senior before Seamus Henchy. At about 11.30 he asked a question and I wondered where the voice was coming from. I was concentrating on the witness and I had forgotten that there was a judge. That is how it should be.

When I took silk there were only three telephones in what is now the Post Room. One for out going telephone calls and two for incoming calls. One of them was almost permanently occupied by Paddy Sheehan talking in Irish. When portable dictaphones came in, I remember being so appalled that we tried to stop it. With technology now practitioners can find out the law on everything, and that is a great help. In another way it is also a hindrance in that you are flooded with law. You can sometimes be inclined to not see the wood from the trees.

I think the other disadvantage of technology is the proliferation of paper. I remember a lot of very good Barristers. There were people like John Costello, Dick McGonagle and Tom Finlay. The best of all was Cecil Lavery. He was quite different to anyone else. I have never heard anyone like him. He was very tall with a civilised northern accent. The only person he would faintly remind you of was Dermot Ryan, the former Archbishop of Dublin. He was a bit like him, but taller. He had wonderful gestures. When he held out his hands he could stretch from one side of the Court to the other. He also had extraordinary little mannerisms. He would ask a witness a question and then turn on his heel. He would do a complete pivot and then look at the witness again. This was very disconcerting for the witness. In the end when he had the witness nearly beaten, he'd take off his glasses and he had queer lizard-like eyes which he would fix on the unfortunate victim. He was most dramatic. I suppose I was impressionable at that time but it was something to see him in action.

Of course, when I started at the Bar, I could not predict the future. It is very hard to see, everything is so unpredictable. When I was young everyone said that the Bar would not last, that the earnings were too low to attract the best people. I remember Gavan Duffy at a Circuit dinner in Cork when he was President of the High Court saying that it was only a matter of time before the junior Bar would be amalgamated with the solicitors' profession but that we should set our minds to saving the junior Bar. He was of course quite wrong in his prediction. I remember John Costello saying at the celebration of his fiftieth anniversay 'if you have health and you are not looking for a job, the Bar is the best life that anyone could have,' after that remark he lived and practised another fifteen years. I'd like to think that I'll do the same. •

Lodgements and Extension of Time

SHEENA HICKEY, Barrister

Introduction

The power to lodge money in Court to meet a Plaintiffs' claim is one of the most important procedural weapons at a Defendants' disposal. Similarly, the decision as to whether to accept a lodgment or not, and the timing of this decision, can be a vital decision for a Plaintiff to face. Therefore the precise rules governing the making and acceptance of lodgments and the time allowed for so doing are among the most important rules which practitioners must consider. Two important judgments in this jurisdiction are, *Brennan -v- Iarnrod Eireann* [1] and *Superwood Holdings plc & ors -v- Sun Alliance and London Insurance plc t/a Sun Alliance Insurance Group & ors.* [2]

High Court Lodgment Proceedure

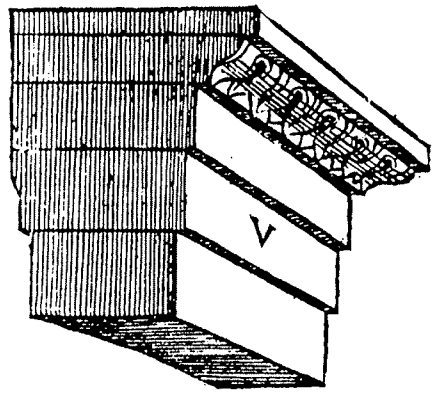
The lodgment procedure concerns the payment of a sum of money into and out of Court. The Rules on lodgments are to be found in Order 22 of the Rules of the Superior Courts ('RSC') (as amended by SI 229/1990)[3]. Also there are relevant sections in the Civil Liability Act, 1961[4] which may affect lodgments and which are namely, Part III (dealing with the liability of concurrent wrongdoers), and Part VII (more specifically section 63 dealing with costs in certain actions in which the Plaintiff is an infant).

The lodgment procedure in the High Court as laid down in Order 22 RSC distinguishes between lodgments made pursuant to actions to which section 1(1) of the Courts Act, 1988[5] applies (hereinafter referred to as "personal/fatal injuries actions") and all other claims.

In an action which is not a personal/fatal injuries action, a Defendant may make a lodgment, without the leave of the Court, at any time after an appearance has been entered and before the action has been set down for trial.[6] Such a Defendant may also on one further occasion pay an additional amount without leave within at least three months of the date on which the action has been first listed for hearing. If the Defendant wishes to lodge an amount or increase the original lodgment other than in accordance with the above prescribed rules, then leave must be sought of the Court to do so[7]. The fact of the lodgment must be disclosed in the pleadings.[8]

A Defendant may make a lodgment into Court with or without an admission of liability save where the action relates to a claim in libel or slander or where the defence raises questions of title to land or incorporeal hereditaments.[9]

In a personal/fatal injuries action, the Defendant may make a lodgment, without the leave of the Court, either at the time of the delivery of the defence or within a period of four months from the date of the Notice of Trial.[10] If the Defendant wishes to lodge an amount or increase the original lodgment other than in accordance with the above prescribed rules, then leave must be sought of the Court to do so. Neither the fact of the lodgment nor the amount of the lodgment must be disclosed in the pleadings.[11]



Where a Plaintiff serves additional particulars, the Defendant may, without leave of the Court, make a payment or increase any payment made into Court within 21 days from the date of notice[12] and where a period of more than 18 months elapses since the date of the Notice of Trial, the Defendant may, without leave of the Court, make a payment or increase any payment made into Court.[13]

Where a lodgment has been made into Court, the Plaintiff then has 14 days from receipt of notice of payment to accept the lodgment or within such further period as may be agreed between the parties.[14] Where the Plaintiff refuses to accept the lodgment but fails to obtain an award in excess of the lodgment the Rules provide, *inter alia*, that the excess 'shall be paid to the Defendant,' that the Plaintiff 'shall be entitled to the costs of the action' until such time as the payment was made, that the Defendant 'shall be entitled to the costs of the action' from the time of such payment into Court and that these 'costs shall be set off against each other.'[15]

Order 77 deals with funds in Court and more specifically Rules 20 to 30 provide for the lodgment of funds in Court but I do not intend to go into the detail of these rules for the purposes of this Article.

Extension of Time

The two situations whereby an application seeking to extend time in respect of lodgments which come before the Court are namely, the Defendant's application seeking to extend time in which to make a lodgment or indeed increase the amount of a lodgment already paid into Court[16] and the Plaintiff's application seeking to extend time in which to accept the lodgment.[17] The Court has a discretion whether to grant such an application.

Brennan -v- Iarnrod Eireann

The decision of Mr. Justice Barr in *Brennan -v- Iarnrod Eireann*[18] sets out some of the considerations which the Court considers in an application by a Defendant seeking to extend time in which to increase a lodgment.

Facts

In this case there had been settlement negotiations between the parties in which all the Plaintiff's medical reports were furnished to the Defendants. These meetings failed and the Defendant then sought to increase their lodgment.[19]

The High Court

Their application was refused on the ground that a defendant in a personal injuries case, following unsuccessful negotiations during the course of which the Plaintiffs' had made full disclosure, ought not, in the absence of special circumstances, be allowed to make a late lodgment.

The rationale for Mr. Justice Barr's decision was twofold, first, that it might lead the Plaintiffs not to fully expose their situation as to personal injuries and/or liability in early settlement negotiations and secondly, it could encourage some defendants to enter into spurious settlement negotiations. Mr. Justice Barr stated that there were certain circumstances which justified a Court in allowing a late lodgment notwithstanding a plaintiff's full disclosure in unsuccessful settlement negotiations. Such circumstances included a situation whereby it transpired as a result of the settlement negotiations that the Plaintiff's injuries were more serious than indicated in the particulars pleaded.

This matter was not appealed to the Supreme Court and remains the legal position to date.

Rules 1(9) and (10) (as inserted by S.I.229/1990) allow a defendant to make a payment or increase a payment into Court without leave of the Court where the Plaintiff has served a notice of replies to particulars or additional particulars (without a request therefor) within twenty one days from the date of notice[20] or where a period of 18 months has elapsed since the date of the notice for trial.[21] These rules have no doubt affected both the need for such applications and the corresponding difficulty experienced by Defendants who seek to rely on those factors in applications for an extension after the due date had passed. Further, the new procedural rules on the sharing of expert reports in the High Court[22] was anticipated to affect the requirements for such applications. This remains to be seen.

Superwood Holdings Plc & Ors -v- Sun Alliance and London Insurance Plc T/A Sun Alliance Insurance Group & Ors.

FACTS

The Plaintiffs in this action suffered a fire to their premises in October 1987 and brought an action against the Defendant insurance companies. As the Plaintiffs were comprised of both "insured Plaintiffs" and "uninsured Plaintiffs", a claim for damages was brought for both breach of contract of insurance and/or negligence in the wrongful repudiation of the contract of insurance. This case was initially heard in the High Court before His Honour, Mr. Justice O' Hanlon, over a period of 116 days and the Plaintiffs claim was dismissed. On appeal to the Supreme Court, the matter was remitted to the High Court to 'determine the Plaintiffs losses arising after the fire and what percentage of those losses were attributable to the fire and such matters as were relevant and in issue.'[23]

During the course of the rehearing before Mr. Justice Smyth, the Defendants made an application for leave to make a lodgment. The application was granted and in November 1996 the fourth Defendants (hereinafter referred to as "Lloyds") lodged a sum of money into Court. In May 1998, the Plaintiffs brought this application seeking to extend time in which to accept Lloyds lodgment.

This application was made in the context of a settlement between Lloyds and the Plaintiffs. However, no settlement was reached between the Plaintiffs and the other Defendants. The agreement contained a 'confidentiality clause' and accordingly this writer is unable to comment on the content of this agreement. However, it would appear from the Supreme Court judgment[24] that the agreement 'provided for the payment out to the Appellants (Plaintiffs) of the money lodged in Court by Lloyds as an integral part of the settlement."

The High Court

This application by the Plaintiffs seeking to extend time in which to accept Lloyds lodgment came firstly before the trial judge, Mr. Justice Smyth. The Plaintiffs submitted that the non-disclosure by them of the terms of the agreement to the first, second and third Defendants should not impede the Plaintiffs pursuing their settlement by the taking up of Lloyds' lodgment. Further, the Plaintiffs submitted that the Court ought to treat the application as if the two parties and their lodgments were entirely separate and independent of each other. Lloyds argued that the only liability settled was that between the Plaintiffs and themselves and that accordingly, s. 35(1) (h) of the Civil Liability Act 1961 was in point. In essence section 35(1)(h) provides that for the purposes of contributory negligence where the liability of one wrongdoer is discharged by release or accord made with him by the Plaintiff, while the liability of the other wrongdoers remains 'the Plaintiff shall be deemed to be responsible for the acts of the wrongdoer whose liability is so discharged.'

The Defendants submitted that Order 22 Rule 12 RSC was imperative in its application and accordingly the lodgment could not be paid out except where the Court dealt with the whole costs of the action. Order 22 Rule 12 provided that the monies lodged in Court by Lloyds could not be paid out to the Plaintiff unless and until the costs of the action were dealt with by the trial judge. Essentially the Defendants were arguing that until the learned trial judge was in a position to deal with the 'whole costs of the action' being the costs of all four Defendants, then the money lodged by Lloyds should not be paid out to the Plaintiff. The Defendants also submitted that section 17 of the Civil Liability Act 1961 should be applied. Section 17 provides that

where an accord (or release) is reached between a Plaintiff and one concurrent wrongdoer but the Plaintiff does not intend to release the other wrongdoers then the claim against the other wrongdoer should be reduced in the amount of the consideration paid for the release or accord. This section has the consequence that the claim against the other wrongdoers is reduced even where the release or accord stipulates that the money paid shall be regarded as consideration for the release or accord and not as satisfaction of the liability.[25] Finally the Defendants referred to the fact that the Plaintiffs application was not grounded on any affidavit.

In making his judgment, the learned trial judge relied on section 17 of the 1961 Act (referred to above), Order 122 Rule 7 RSC (dealing with the extension of time by the Court), Order 52 Rules 1 & 2 (dealing with interlocutory applications and the filing of affidavit evidence) and lastly, Order 22 Rule 12 RSC (referred to above).

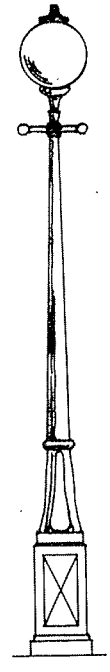
Throughout the course of his judgment, Mr. Justice Smyth made extensive reference to English Rule including the Annual Practices (more commonly known as the 'White Book") of both 1995 and 1998 and numerous English precedent. In a quote from the case of *Jameson -v- Central Electricity Generating Board*[26] the learned trial judge quoted as follows:

> "where a Plaintiff with concurrent claims against two persons has actually recovered part or all of his loss from another, that recovery goes in diminution of the damages which will be awarded against the Defendant. A plaintiff can never, as I understand the law, merely because his claim may lie against more than one person recover more than the total sum due"

Referring again to English Rule, Mr. Justice Smyth observed that the Annual Practice of 1995 provided that the payment out of monies would ordinarily be refused "if the chances [of success or failure or of greater of lesser damages] have substantially altered against the Plaintiff." The case of *Proetta -v- Times Newspapers*[27] was authority for the rule that the court should not extend the time laid down by the rules for acceptance of the payment in if in the meantime the risks of the case have changed adversely to the Plaintiff. The learned trial judge' s final reference to English Rule was that contained in the Annual Practice of 1998[28] which was to the effect that there was nothing contractual about payment into Court. It was a wholly procedural matter and had no true analogy to a settlement arranged between the parties out of Court.

Returning to the case in issue, the learned trial judge drew attention to the apprehension expressed by the first, second and third Defendants that if the funds were paid out, they would or might be used for an ulterior purpose. The learned trial judge went on to say that he understood that to mean that such funds so released would or could be used to fund or fuel the continuance of the action. Although stating that he could not be so concerned he then said, *inter alia*, in respect of the Plaintiff companies that "in the absence of full information of any form of undertaking, the oral evidence in the action at hearing as it stands in this issue at the moment raises questions and concerns as to how each of the individual companies has been or has operated within the norms of company law."

In conclusion, the learned trial judge dismissed the application finding that there was no evidence on which he could grant the relief sought and further that he was not in a position to deal with the whole costs of the action.



The Supreme Court

The Supreme Court found that the application did not fall under Order 22 Rule 12 RSC or the precise terms of any other provision of Order 22 aforesaid. The Court found that the Plaintiff and Lloyds were the only parties to the proceedings who had any possible proprietorial interest in the monies lodged in Court and the other defendants had not identified any circumstances in which they might obtain any interest whatever in the monies. Accordingly, the Court granted an extension in the manner as sought by the Plaintiff having regard to the "particular and unique circumstances" of "these long protracted proceedings".

Conclusion

In a detailed judgment, Mr. Justice Smyth relied on two grounds for his refusal of the Plaintiffs' application, namely that there was no evidence on which he could grant the relief sought, and that he was not in a position to deal with the whole costs of the action. On the issue of costs it would appear that the learned trial judge relied on the provisions of Order 22 Rule 12 RSC and was of the opinion that the costs of the "whole action" must be dealt with before the monies lodged could be paid out to the Plaintiff.

The Supreme Court, on the other hand, were clearly not of the opinion that Order 22 Rule 12 was imperative in its application to this case. They found that the application did not fall under Order 22 Rule 12 or the precise terms of any other provision of Order 22 but that the Plaintiff and the Defendant were the only parties who had 'any possible proprietorial interest' in the monies lodged in Court and regard was had to the "particular and unique circumstances" of "these long protracted proceedings". Further, it is interesting to note that the Supreme Court made no reference in its judgment to the provisions of the Civil Liability Act, 1961.

Whether "proprietorial interest" will be a sufficient ground for Plaintiffs seeking the payment of monies out of Court in the future remains to

be seen. The reference to the 'particular and unique circumstances" of this case would appear to indicate otherwise. This Supreme Court judgment illustrates, however, this courts readiness to promote the settlement of litigation even where the settlement occurs during the course of the hearing between some but not all of the parties and accordingly, does not conclude the action. ●

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1 [1993] ILRM 134
2 Decision of Mr. Justice Smyth in the High Court delivered May 15th 1998. See also Supreme Court judgment delivered July 21st 1998
3 The lodgment procedure in the Circuit Court is to be found in Order 12 (rules 8 - 15) of the Circuit Court Rules 1950 (as amended by SI 216/1995).
4 The relevant sections to this Act will not be considered in any great detail in this article save where they are referred to in the *Superwood case* (See below). For the exact wording and further commentary on the on the relevant sections, see *The Civil Liability Acts 1961 and 1964* and also see The Civil Liability Acts 1961 and 1964, by Anthony Kerr.
5 These actions would include personal injuries actions, actions pursuant to section 48 of the Civil Liability Act 1961 (fatal injuries actions) and actions pursuant to section 18 (inserted by the Air Navigation and Transport Act, 1965) of the Air Navigation and Transport Act, 1936.
6 See Order 22, Rule 1(1) RSC
7 See Order 22, Rule 1(2) RSC. See below the decision of Barr J in *Brennan -v- Iarnrod Eireann* ([1993] ILRM 134). See also Recent Developments in Civil Practice and Procedure September 1997, Sara Moorhead, BL.
8 See Order 22 Rule 7 RSC
9 See Order 22, Rule 1(3) RSC
10 Order 22 Rule 1(7) RSC
11 Order 22 Rule 1(8) RSC
12 Order 22 Rule 1(9) RSC
13 Order 22 Rule 1(10) RSC
14 See *Superwood case* cited above; See also O. 22 R. 4(1) RSC
15 Order 22 Rule 6 RSC
16 See Order 22, Rule 1(7) RSC; See also *Brennan -v- Iarnrod Eireann* ([1993] ILRM 134)
17 See Order 22,Rules 4 & 12 RSC; See below *Superwood case*
18 This was an unappealed decision of the High Court. (1993) ILRM 134
19 Similar principles and considerations would no doubt apply in an application seeking to extend time in which to make a lodgment
20 See Order 22, Rule 1(9) RSC
21 See Order 22, Rule 1(10) RSC
22 See S.I 391/98.
23 Loc. Cit.; See *Superwood case* below.
24 Judgment of the Supreme Court delivered on July 21st 1998.
25 See *The Civil Liability Acts, 1961 and 1964* by Anthony Kerr. See also *Murphy -v- J. Donohoe Ltd.* [1992] ILRM 378.
26 *Jameson -v- Central Electricity Generating Board* (Babcock Energy Limited, Third Party) [1998] QB 323
27 ([1991] 1 WLR 337)
28 Annual Practice, 1998 at page 142

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JUDGE OF THE SUPREME COURT

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Suing for Foreign Copyright Infringement in Ireland

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JONATHAN NEWMAN, Barrister

Introduction

Copyright infringement cases regularly involve the violation of copyright under several national laws. However, until last year the UK courts maintained the view that it was not possible to sue in respect of both domestic and foreign infringements of intellectual property rights in one set of UK proceedings.[1] This bar was founded on common law principles which are also part of Irish law. Its sudden reversal largely stems from a desire to keep up with the Dutch courts, which have for some time heard claims for infringement of foreign patents.[2] In a series of cases the UK courts have now determined that, under the Brussels and Lugano Jurisdiction Conventions, infringements of intellectual property rights (including copyright) taking place anywhere in the Contracting States (comprising the EU and EFTA states) may now be litigated before the UK courts in many instances. It is probable that the Irish courts will adopt a similar view. This article reviews developments in relation to copyright and summarises the current position as the author sees it.

International Copyright Infringement

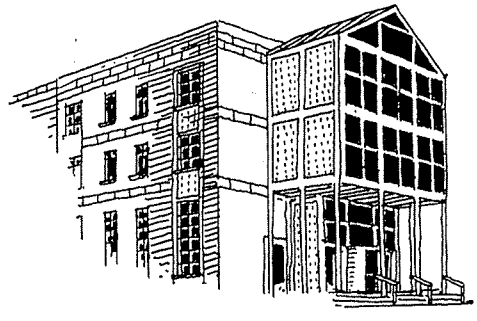
Consider the following examples of cross-border copyright infringement:-

1. Unlicensed CDs containing the work of an Irish software firm are manufactured in the Netherlands and sold to a UK company. The UK company sells, in the UK, the unlicensed copies to an Irish company, which imports them into Ireland and sells them here.

2. An Irish person is making, without a licence, a newly-released commercial sound recording available on the web. A large number of US and UK visitors to the site, in particular, have acquired the recording.

In the first scenario the activities of the Dutch and UK companies do not violate Irish copyright law. Copyright law is purely national in character: it only refers to the commission of infringement in the state in question. The Irish Copyright Act 1963 adheres to this principle. As a result, the only person potentially liable for infringement under the 1963 Act (and the Regulations implementing the Software Copyright Directive)[3] is the Irish importer and distributor. The Dutch and UK companies do however violate Dutch and UK copyright laws respectively, in particular their national provisions implementing the Software Directive.

The second scenario is a little ahead of its time. Pending the implementation of two international measures it is doubtful to what extent making a copyright work available via the internet constitutes infringement by the site provider.[4] Assuming these measures are implemented in Ireland (anticipated in the new copyright legislation) and elsewhere, in this scenario the Irish person would be violating Irish copyright law by making the copyright work available to the Irish public.[5] However, the making available of the work to the US and UK publics would probably not violate Irish copyright law, only the laws of the US and the UK respectively.



Advantages Of Hearing Foreign Copyright Claims

A very attractive possibility in these scenarios would be for the copyright owner to institute proceedings before the Irish courts in which he might:-

have separate claims for infringement of Irish and foreign copyright laws heard together in the one set of proceedings; and

obtain remedies in respect of the infringement of each national law.

Until recently this appeared to be impossible. Instead a plaintiff was required to institute separate local proceedings in respect of each infringement in the courts of the place of each infringement, seeking a remedy for the infringement carried out in that state alone. Conducting parallel foreign proceedings is costly and awkward for plaintiffs. Even if judgment is secured, there may remain the problem of enforcing against an Irish resident a foreign judgment handed down by a non-EU/EFTA court. If judgment against an Irish-resident defendant is obtained in, say, US infringement proceedings, that judgment is not enforceable in Ireland.[6] Therefore, particularly when the defendant is Irish-resident, the possibility of suing in Ireland in respect of infringements both Irish and foreign is extremely attractive.

Foreign Copyright Claims Not Admissible

The traditional view, that the courts would not entertain claims for infringement of copyright abroad, remained uncontroverted until very recently. In *Deff Lepp v. Stuart-Brown*[7] the plaintiffs (the Deff Leppard group) owned, under UK law, the copyright in a sound recording which was being illicitly copied in Luxembourg. The Luxembourg company sold the recordings to a Dutch company which sold them on to the English first defendant. That sale took place in the Netherlands. The recordings were then imported by the English first defendant. The plaintiff sought to sue the Luxembourg and Dutch companies in the English courts for, inter alia, breach of Luxembourg and Dutch copyright legislation. The English court refused to hear these claims for breach of copyright against the foreign defendants.

In *Tyburn Productions v. Conan Doyle*[8] film producers brought proceedings against the heir to the copyright of Sir Arthur Conan Doyle when she intimated that she might inform US film distributors that a film made by the plaintiffs violated her copyright. If she were to do so, the US distributors would not distribute the film. The producers brought English proceedings seeking a declaration that the film did not infringe the US copyright held by the defendant. The English court held that it could not adjudicate upon the issue of whether a foreign copyright law had been infringed or not.

Rationale For Bar

The reasons behind the bar, which was applied uniformly in respect of copyright, registered trade marks and patents, were two-fold.[9] Originating in long-standing rules of common law, it is probable that the reasoning was equally applicable in Ireland.[10]

No Jurisdiction Over Foreign Intellectual Property

The UK courts viewed themselves as having no jurisdiction to hear a case relating to the violation of a foreign intellectual property right. The long-standing rule of the common law is that, for reasons of public policy, the courts have no power to hear litigation relating to title of, or trespass upon, foreign land.[11] In *Deff Lepp* and *Tyburn* it was held to be well-established that, being the creation of national law, foreign intellectual property rights were comparable to land situated in the foreign state to whose law they owed their creation. Accordingly, actions for infringement of foreign intellectual property rights could not, just like actions for trespass to foreign land, be heard.

Foreign Intellectual Property Rights Not Justiciable

At common law where a foreign tort (*e.g.* infringement of copyright) is being sued upon in Ireland, the courts must apply in the proceedings both the law of the forum and the law of the place where the foreign tort occurred. In other words, the plaintiff has to show (a) that, if the events in question were to have occurred in Ireland, the plaintiff would have a cause of action against the defendant under Irish law; and (b) that the plaintiff has a cause of action against the defendant under the law of the place where the tortious events did in fact occur.[12] This 'double actionability' approach has recently been abolished in the UK.[13] The common law rule is still applied in Ireland[14], despite severe criticism.[15]

This doctrine took its Byzantine course in the *Deff Lepp* and *Tyburn* cases. It was held that in litigation alleging violation of foreign copyright law it was, as a matter of law, impossible for a plaintiff to demonstrate that limb (a) was satisfied. When the events constituting the infringement were fictionally moved to England, what was supposedly done in England was still just a violation of a copyright granted by a foreign state. The violation of, say, Dutch copyright in the UK was not a violation of UK copyright legislation. Only copyright granted under UK legislation could be violated in the UK. In other words, the statutory origin of the copyright the plaintiff was suing on could not be fictionally moved, only the location of its infringement.

Judicial Reluctance

Whatever their merits, these two principles represented an explicitly stated judicial unwillingness to adjudicate upon rights granted by foreign intellectual property legislation. Courts were[16] (and on occasion remain)[17] reluctant to apply an unfamiliar foreign law, enacted by a foreign government primarily for the economic well-being of its own citizens, with results that would be felt within the foreign state.

The New UK Approach

In *Pearce v. Ove Arup*[18] the plaintiff, a UK citizen, alleged that the defendants (the first of whom was English and the remainder Dutch) had copied, in constructing a town-hall in the Netherlands, an architectural plan drawn up the plaintiff for a London Docklands building. The infringing reproduction (i.e. the construction of the building according to the plaintiff's plans) took place in Holland and so only Dutch copyright law had been violated.

In the High Court in *Pearce*, Lloyd J noted that this was an attempt to claim, as against all defendants, for infringement of Dutch copyright in the English courts. Following *Deff Lepp* and *Tyburn*, that was not possible.

However, the plaintiff argued that a refusal by the English court to hear a claim for the violation of Dutch copyright would violate the Brussels Convention. This argument was upheld.

Impact Of Brussels And Lugano Conventions

The Brussels Convention of 1968 and its EFTA counterpart, the Lugano Convention of 1988, determine which national court or courts in the EU/EFTA area have jurisdiction over a given case. The basic rule is that a defendant should be sued where he is domiciled (art.2 of both Conventions), but the plaintiff is permitted to instead sue in other specified locations at his own election. In respect of a tort, under art.5(3) a plaintiff may also sue where the harmful event occurred (e.g. where the breach of copyright occurred). Furthermore, a plaintiff may sue all the co-defendants in an action in the place of domicile of any one of them (art.6(1)). The plaintiff has the choice and a court may not decline jurisdiction if it is properly identified by the

Conventions as having jurisdiction. The Conventions have effect in Ireland under the Jurisdiction of Courts and Enforcement of Judgments Acts 1988-1993.[19]

Lloyd J noted in *Pearce* that here the English court was identified by art.2 as having jurisdiction over the first, English-domiciled, defendant. Art.6(1) gave jurisdiction to the court over the Dutch co-defendants.

Lloyd J then noted that the European Court of Justice had frequently stipulated in Convention case-law that the Convention must not be interpreted in a manner which impairs its effectiveness. Furthermore, a plaintiff 'should not have to waste his time and money risking that [a particular national court] may find itself less competent than another.'[20] To accept jurisdiction under arts.2 and 6(1) - as the English court was obliged to do - but then to strike out the claim in reliance on the two common law rules above would be quixotic and deprive the plaintiff of the use of the Convention's fundamental rule of jurisdiction.

Accordingly both common law rules were necessarily overridden by the Convention. The plaintiff could sue all the defendants in the UK and the court would simply apply Dutch copyright law.[21]

This decision was subsequently discussed with apparent approval by the Court of Appeal in *Fort Dodge v. Akzo* (applying comparable thinking to patents).[22] For other examples of the adoption of the new approach see also *Coin Controls v. Suzo* (patents);[23] *Mecklermedia v. Congress* (trade marks);[24] and *Mother Bertha v. Bourne,* (copyright).[25]

The reasoning in *Pearce* appears unanswerable and so there is at present no reason to doubt that a similar approach would be adopted by the Irish courts.

Analysis: Limitations On The New Power

The rule emerging from *Pearce* is that an action in respect of breach of copyright anywhere in the EU/EFTA area may be brought in an English (or Irish) court if that court is allotted jurisdiction over the case by the Brussels or Lugano Conventions. However, that broad rule is undoubtedly subject to a number of important limitations.

Must Sue at Defendant's Domicile or Place of Central Infringement

Art.5(3) permits a plaintiff to bring a tort action in 'the place where the harmful event occurred'. This is an alternative place of jurisdiction to the defendant's domicile. The decision of the Court of Justice in *Shevill v. Presse Alliance*[26] sets limits to the art.5(3) jurisdiction. A defamatory newspaper article was published in France and distributed *inter alia* in the UK. The plaintiff, a UK resident, sued for libel in the UK relying on art.5(3) of the Brussels Convention. The Court of Justice held that:-

> (1) art.5(3) permits a plaintiff to sue at the place of the defendant's harmful act or in any place where the plaintiff suffered harm.
> (2) if the plaintiff sues in the place where the defendant committed the harmful act, the plaintiff may sue and recover for all the resulting harm suffered throughout the EU/EFTA area.
> (3) the same applies if the plaintiff sues at the place of the defendant's domicile under art.2.
> (4) if the plaintiff instead sues in a place where the plaintiff simply suffered harm, the plaintiff may only recover for the harm suffered in that place.

Therefore, Shevill could sue in France and recover for all the damage she suffered in the Contracting States as France was where the defamatory article was 'issued and put into circulation' by the defendant (ruling 2 above);[27] or as France was where the defendant was domiciled (ruling 3). If Shevill sued in the UK, where the paper was distributed, she could recover only for the damage to her reputation sustained in the UK (ruling 4).

The Court was attempting to limit the number of courts with full, international, jurisdiction. How does this impact on international copyright claims?[28] Take the example of a UK-domiciled company which manufactures unlicensed CDs in Ireland for distribution throughout the EU/EFTA area. It is submitted that, by analogy with *Shevill,* the plaintiff may:-

(1) sue the UK company in the UK under art.2 in respect of all infringements throughout the EU/EFTA area;
(2) sue the UK company in Ireland under art.5(3) for all infringements throughout the EU/EFTA area, as Ireland is where the act of making and issuing the CDs – resulting in knock-on infringements throughout Europe - was centred; or
(3) sue the UK company in any other EU/EFTA state, but only in respect of the infringement occurring in that state.

The place of the 'central' act of infringement by the defendant will tend to coincide with the place of its domicile.

Issues Must Overlap To Bring In Foreign Co-Defendants

In *Pearce* art.6(1) was used to enable the Dutch co-defendants to be sued in the UK, the UK defendant being sued in the courts of his domicile. All parties were sued for breach of Dutch copyright law alone.

Art.6(1) is advantageous for plaintiffs. It does, however, possess a significant limitation. The Court of Justice requires that, in order to justify bringing all defendants to the home-court of one of them under art.6(1), issues as between the plaintiff and the home-defendant and foreign co-defendants respectively must overlap.[29]

The question is whether "the actions brought against the various defendants are related ..., that is to say [that] it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings."[30] When laying down this test, the Court referred to art.22 which utilises these terms. Art.22 jurisprudence indicates, it is submitted, that actions are related when they involve at least one parallel legal or factual issue.[31]

Accordingly proceedings against two or more defendants should be heard together if separate proceedings against them would involve, for instance:-

(a) the same issue of fact, such as the existence of a common design between the parties to infringe;[32]

(b) the interpretation of a provision of the one national copyright law[33] or of parallel provisions of different national laws harmonised pursuant to an EU

copyright directive; or

(c) the interpretation of documents (e.g. licences) in identical terms.[34]

This analysis has, however, been thrown into doubt by *Fort Dodge v. Akzo*.[35] The English Court of Appeal held that actions against UK and Dutch defendants for infringement of identical UK and Dutch patents respectively could not be heard together as each action involved a distinct national law. The decision may well be good: the factual issues in the actions involved different events taking place in different states. The legal issues could not be said to be the same as patent infringement laws remain technically unharmonised. What is disturbing is that the Court of Appeal clearly believed that, for art.6(1) to apply, there must be the danger of separate proceedings against the defendants reaching decisions involving mutually exclusive legal consequences: i.e. two courts reaching contradictory decisions in applying one national law to one and the same set of facts. It is not enough that separate proceedings would involve parallel, similar, issues, rather the courts would have to be confronted by the one and the same issue. Such an interpretation would massively reduce the utility of art.6(1): in order for it to bite defendants would have to be accused of infringing one national law through one and the same act.

It is submitted that that conclusion clearly contradicts the Court of Justice's jurisprudence, summarised above. The Court of Appeal did feel sufficiently unsure of this view to refer this and other issues to the Court of Justice for a preliminary ruling.

Rules Summarised

It is submitted that, drawing together the above strands, the position is as follows:-

(1) an Irish court cannot hear a claim for violation of a foreign state's copyright law where the defendant is not resident in the EU/EFTA area, the Conventions being inapplicable and the common law bars on litigation applying instead.[36]

(2) an Irish court, if it has jurisdiction over an Irish-domiciled defendant under art.2 of the Conventions, may hear all claims for copyright infringement committed by that defendant anywhere in the EU/EFTA area.

(3) the same applies if an Irish court has jurisdiction over a foreign defendant under art.5(3) on the ground that the central act of infringement, creating knock-on infringements in other states, took place here.

(4) in these cases the Irish court may:-

a) award damages for infringements committed anywhere in the EU/EFTA area;

b) grant injunctive (including interlocutory) relief restraining infringement anywhere in the EU/EFTA area.[37]

(5) the Irish court should apply the law of the place of infringement to each infringement.

(6) if an Irish court has jurisdiction under art.5(3), but Ireland is not where the defendant's central act of infringement took place, the court may not hear claims for infringement elsewhere in the EU/EFTA area.

(7) foreign co-defendants may be joined in proceedings in Ireland against an Irish-domiciled defendant pursuant to art.6(1) and sued in respect of infringements occurring anywhere in the EU/EFTA area if separate proceedings against the defendants would run the risk of contradictory legal analysis or factual conclusions.

Applying these rules to the two scenarios set out above at the beginning of this paper, in the first scenario the Irish courts - it is submitted - could hear all claims against all defendants. Art.6(1) would permit the joinder of the foreign defendants in the proceedings against the Irish domiciled defendant as the case against each defendant involves the application of parallel national laws implementing the Software Directive. In the second scenario it is submitted that the Irish court could hear the UK copyright infringement claim under arts.2 or 5(3), but not the US one. ●

This paper was developed from a speech delivered to the Copyright Association of Ireland on 24 July 1998.

1 Scottish and English case-law taking similar approaches.

2 See Brinkhof [1994] EIPR 360; Laddie J, *Fort Dodge z. Akzo* [1998] FSR 222.

3 ECs (Legal Protection of Computer Programs) Regs, 1993 (SI 26/1993); Directive 91/250 OJ 1991 L122.

4 WIPO Copyright Treaty 1996; and Proposed Directive on Copyright in the Information Society OJ 1998 C108/6.

5 Falling within art.8 and art.3(1) of the above respectively.

6 See *Rainford v. Newall* [1962] IR 95.

7 [1986] RPC 273.

8 [1991] Ch 75.

9 See, for example, B*urrough v. Speymalt* [1989] SLT 561 (trade marks); *Plastus v. Minnesota* [1995] RPC 438 (patents).

10 In *LA Gear v. Whelan* [1991] FSR 670 an English court held as a fact that the Irish courts would not hear an action for infringement of copyright in the UK.

11 *British South Africa Co. v. Companhia de Mocambique* [1893] AC 602. This is also thought to be the rule in Ireland: see Binchy, Irish Conflicts of Law, 1988, p.401 et seq..

12 *Phillips v. Eyre* (1870) LR 6 QB 1; *Red Sea v. Bourguyes* [1994] 3 All ER 749.

13 See Private International Law (Miscellaneous Provisions) Act 1995. The Act post-dated the proceedings in Pearce.

14 *An Bord Trachtala v. Waterford* [1994] FSR 316; *Intermetal v. Worslade*, 6 March 1998 (SC).

15 *Grehan v. Medical Inc.* [1986] ILRM 627.

16 See Plastus, supra.

17 See Laddie J, *Coin Controls* [1997] 3 All ER 45.

18 [1997] Ch 293.

19 To be replaced by the Jurisdiction of Courts and Enforcement of Judgments Act 1998 once commenced.

20 Quoting Schlosser Report OJ 1979 C59/1, at para.78.

21 The plaintiff's claim subsequently failed on the facts.

22 [1998] FSR 222.

23 [1997] 3 All ER 45.

24 [1997] FSR 627.

25 21 March 1997, Ch.D.

26 [1995] ECR I-415; see *Murray v. Times*, 29 July 1997 (SC).

27 At para 24.

28 The relevance of *Shevill* for such cases is noted in *Mecklermedia*, supra.

29 *Kalfelis v. Schroeder* [1988] ECR 5565.

30 At para.13, *ibid.*

31 The Tatry [1994] ECR I-5439.

32 Coin Controls, supra.

33 Pearce, supra.

34 The Tatry, supra; Coin Controls, supra.

35 [1998] FSR 222

36 Art.4 of the Conventions.

37 But special considerations apply to *ex parte* relief: see art.24 and *Denilauler v. Couchet* [1980] ECR 1553.

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First come first served: Assigning Domain Names *Zockoll -v- Telecom Eireann*

KAREN MURRAY, Barrister

Although the courts of other jurisdictions have dealt with an increasing number of cases relating to the assignment of domain names, this problem has yet to come before the Irish courts. A domain name is the electronic address for a web-site. If you want to find the website of a company, for example, the Irish times, you will find it at www.irishtimes.ie. Controversy, however, has arisen where a person who is not entitled to a particular trade mark has registered that trade mark as a domain name, they then attempt to sell the domain name back to the trade mark owner.[1]

The leading case on this point, is the UK Court of Appeal decision in *British Telecommunications plc & ors v One in a Million Ltd.*[2] In this case, the appellants were "dealers in Internet domain names and as part of their business, they secure registrations of prestigious names as domain names without the consent of the enterprise owning the goodwill in those names". This case related to the registration of domain names which would also have been claimed by Marks and Spensers, Virgin, Sainsburys, British Telecom (BT), Ladbrokes and others. To give the example of BT, the respondents offered to sell them the domain name 'bt.org' for £4,700. The respondents successfully applied for a quia timet injunction. This decision was approved by the Court of Appeal, Aldous J stated:

> "In my view there can be discerned from the cases a jurisdiction to grant injunctive relief where a defendant is equipped with or is intending to equip another with an instrument of fraud. Whether any name is an instrument of fraud will depend upon all the circumstances. A name which will, by reason of its similarity to the name of another, inherently lead to passing-off is such an instrument, if it would not inherently lead to passing off, it does not follow that it is not an instrument of fraud. The court should consider the similarity of the names, the intention of the defendants, the type of trade and all the surrounding circumstances. If it be the intention of the defendant to appropriate the good will of another or enable others to do so, I can see no reason why the court should not infer that it will happen, even if there is a possibility that such an appropriation would not take place. If, taking all the circumstances into account the court should conclude that the name was produced to enable passing-off, is adapted to be used for passing-off and, if used, is likely to be fraudulently used, an injunction will be appropriate".

The Court of Appeal approved the view of the lower court that there were four possible uses which a dealer in domain names might use. First, the sale of the domain names to the trademark owner; secondly, sale to a third party for resale to the trademark owner; thirdly, sale to a third party who might make use of the domain name such as a solicitor called John Sainsbury and finally, retention by the dealer which would block the use of the name by the trademark owner. Aldous J. was satisfied that appellants registered the names with all four purposes in mind. He held that in these circumstances, domain names such as marks and spencer were "instruments of fraud. Any realistic use of them as domain names would result in passing off and there was ample evidence to grant the injunction relief granted by the judge to prevent them being used for a fraudulent purpose and to prevent them being transferred to others". The other cases were different, since there were people who might have the initials 'bt' or have the surname 'Ladbroke'. However, Aldous J. upheld the granting of an injunction in these cases also and he quoted with approval the judgement of the lower court. "The history of the defendants' activities shows a deliberate practice followed over a substantial period of time of registering domain names which are chosen to resemble the names and marks of other people and are plainly intended to deceive. The threat of passing off and trade mark infringement, and the likelihood of confusion arising from the infringement of the mark are made out beyond argument in this case, even if it is possible to imagine other cases in which the issue would be more nicely balanced."

A more difficult situation arises where several people may be entitled to the one domain name. A recent Irish case, *Zockoll Group Ltd, Dyno-Rod Plc, and Phone Names Ltd-v- Telecom Eireann*[3] endorses the approach of 'first come - first served' in relation to telephone numbers. As for legal purposes, there would appear to be little difference between the numbers allocated by Telecom Eireann and the domain names allocated by the administrators of Ireland's portion of the World Wide Web, the case is of particular relevance because the numbers concerned were appropriate for use with Alpha-numeric numbering systems. These are common in the USA although they have yet to come into use here. Eight of the numbers on a telephones key-pad have letters assigned to them, so ABC is assigned to 2, DEF is assigned to 3 and so on. The system works by allowing people to remember words instead of numbers so somebody who wants to ring a doctor will dial 1-800-DOCTOR and in the process dial, 1-800-362867 or dial 1-800-FLOWERS for a florist.

The plaintiff company would lease telephone numbers from telephone companies and then licences them to third parties through Phone Names. The example of its *modus operandi* given by Kelly J. was that it would identify a business sector such as Building Societies. It would then identify the generic

words used everyday in that business such as ' mortgage' or 'home loans'. It would then request from a service provider such as Telecom Eireann the telephone number that would correspond to the letters making up '1-800-MORTGAGE' or '1-800-HOMELOAN'. Once that is done, it would create service marks and marketing slogans (known as 'strap lines') allied to the business of building societies which would then be marketed to the industry. The Defendant, Telecom Eireann, supplied and serviced various Freephone (1-800) Numbers, these are issued as numbers and not generic phone names or alpha-numeric numbers. The Plaintiffs requested some 8 numbers initially, these included numbers which corresponded to words such as 'Florist', 'Service' and 'insure.' The plaintiffs agreed to pay connection charges and so forth in respect of these numbers and they carried out their obligations in this regard. In November of 1995, the Defendant wrote a letter to the Plaintiff which noted that under Article 51 of the Telecommunications Scheme 1994, subscribers to Telecom Eireann's services did not have any proprietary right in their numbers. Furthermore, Telecom Eireann had reserved to itself the right to alter or replace a subscribers Telephone number at any time. The plaintiffs were given notice that with effect from the end of November it would be withdrawing service on the plaintiffs numbers. The parties corresponded vigorously during the start of December 1995, during which the plaintiff requested that a further 270 choice numbers be assigned to them. These would have covered 1-800 numbers such as the equivalent of 1-800-SOLICITOR and 1-800-LEGAL AID. The Plaintiffs initiated a legal action against the defendants, this was heard over some 20 days and judgement was given by Kelly J. on the 28th of November 1997. Kelly J was satisfied that there was only one reason why the defendant decided to withdraw the telephone numbers this was that the defendant feared that the plaintiff was going to engage in 'brokering' these numbers. This was the process by which, in the words of one of the defendant's witnesses "...a number will be rented from us for onward sale or rent to another customer."[4] However, Kelly J. was satisfied that the defendants understanding of the plaintiff's activities was incorrect.

Kelly J took the view that the defendant was placed in the same position as the VHI in *Callanan -v- VHI*[5] in which case Keane J held that the defendant as "a public body established by the Oireachtas with statutorily defined objects and powers...must use the powers entrusted to it fairly and reasonably". Keane J. went on to state that while the actions of the VHI

> "....might have been unexceptional in legal terms in the case of a private commercial firm vigorously defending its own interests, they were not however, a fair and reasonable use of the powers entrusted expressly and by implication to the VHI by the Oireachtas for the common good and I am, accordingly, satisfied that the plaintiffs are entitled to appropriate relief in respect of those actions".

In Kelly J.' s opinion this judgement had equal application to the *Zockoll* case and he took the view that:

> "....in exercising such discretion as it has in relation to the withdrawal of telephone numbers which have been allocated to a customer, the defendant must use the powers entrusted to it fairly and reasonably".

He found further support for this view in the judgement of the English Court of Appeal in *Timeload Limited -v- British Telecom Plc*[6]. Here, the plaintiff had acquired the number 0800-192 192 and in the UK 192 is the number for directory enquiries. The plaintiff was using this number to supply a commercial directory enquiry service to the public. The defendants withdrew the number from the plaintiff on the basis that it had been acquired through misrepresentation and the defendant was concerned that the public would be confused by the number and would assume that there was some connection between the plaintiff and the defendant. On appeal Bingham MR stated:

> "It is therefore correct, speaking very generally, to regard BT as a privatised company, no longer a monopoly but still a very dominant supplier closely regulated to ensure that it operates in the interests of the public....I can see strong grounds for the view that in the circumstances of this contract BT should not be permitted to exercise a potentially drastic power of termination without demonstrable reason or cause for doing so".

Kelly J. held that:

> "....the ' absolute discretion' given to the defendant to alter the subscriber' s telephone number may only be exercised if it can be shown
>
> (a) that the subscriber is in breach of his contract with the defendant, or
>
> (b) circumstance exist which in the interest of some revision of the Telecommunications Service it is necessary to change the subscriber' s telephone number".

Kelly J was satisfied that there were no such reasons in this case, hence the defendant was not entitled to take the action which it did take. The plaintiffs also took issue with the procedures followed by the defendant and Kelly J. was satisfied that if the rules of natural justice applied in this situation then the defendant's procedures would not comply with the audi alteram partem rule. However, he was not satisfied that public law principles would apply to the commercial relationship which exists between the defendant and its customers. But, Kelly J. was

> "...quite satisfied that the procedure adopted by the defendant in this case could not be regarded as a fair and reasonable use of the powers entrusted to it. As I have already held that such powers must be exercised fairly and reasonably, it follows that the procedure adopted by the defendant in the instant case was fatally flawed. In my view there was no entitlement to serve the notice in question without at least affording the Plaintiffs an opportunity to explain their position in the light of the information that the defendant had in its possession."

Therefore, Kelly J. found that the plaintiff's were entitled to have the original eight numbers restored.

Kelly J. also found that the plaintiff was entitled to the remaining 270 numbers. He was satisfied that in common with practically every service provider

in the United States and the United Kingdom, the defendant operates a policy of allocating numbers on a first come, first served basis. There was no evidence that any of these numbers had been allocated to a party other than the plaintiff. Kelly J. held that:

> "In my opinion the defendant is under a statutory duty to allocate the numbers to the plaintiffs save and except where such numbers might already have been allocated to another person or where there are other good and objectively justifiable reasons present. The Defendant, in my view, is in breach of its statutory obligation by failing to allocate the numbers to the Plaintiffs and continuing to maintain that it will not do so".

Kelly J. suggested that this approach to the matter was but another aspect of the application of the obligation which had been placed upon the Defendant to exercise its powers and entitlements in a fair and reasonable way. He suggested that there might be one exception to this, the defendant could refuse to allocate a number which was of national importance, such as an emergency number.

Conclusion

The main significance of the *Zockall* case may be the approval given to the ' first come - first served' approach to the allocation of domain names. The contract between the domain name register and the user is crucial. However, once a domain name is allocated it will be difficult to remove that name from the registered party. The background to this case also illustrates the importance of registering a domain name internationally. Although some 278 numbers were the subject of this case, the dispute appears to have been driven by a desire to control one of these numbers: 1-800-FLOWERS. The use of this number in the USA has proven to be extremely profitable, when the company which uses it there attempted to register it as a trademark in the UK they found that the plaintiffs had beaten them to it. They attempted to buy the number from the plaintiffs in the UK and made representations to Telecom Eireann, promising to set up a small tele-centre in this country if this number should be assigned to them. This case can be distinguished from the British Telecom case, above, because here the terms which the plaintiff had control of were not trade marks, rather they were generic terms. Had the plaintiff tried to claim a different number such as 1-800-COCA COLA the result might have been different. ●

1 See Denis Kelleher, The Bar Review, Domain Names, November 1997.
2 1998 All ER 476.
3 Unreported 28/11/1997.
4 p 35 of his judgement.
5 Unreported Judgement of Keane J in the High Court, 22nd April 1993.
6 30th November, 1993.

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A CASEBOOK ON EQUITY & TRUSTS IN IRELAND (2ND ED.)
by J.C.W. Wylie.
Published by Butterworths, £50.00

In the preface to his newly revised casebook, Professor Wylie has acknowledged the growth of cases on equity in this country over the past decade. These have increasingly required the updating of what was, for its time, a very worthy volume. The second edition keeps the basic format of the first, but at over 1,200 pages, it is considerably longer. This length is one of text's strong points as it allows for the inclusion of all the principal equitable topics and, not least, is good value for money. Perhaps with the threat from computerised databases the content of casebooks will, in the future alter in this, and other, respects.

There is no doubt that Irish land law and equity owes a huge debt of gratitude to Professor Wylie as the first person to make them accessible to a wide audience. In some ways he can be seen as a victim of his own success. The more recent land law books by Andrew Lyall and Paul Coughlan to some extent show Wylie's work as a conservative, at times minimalist, text. He retains, however, the overriding strength of authority.

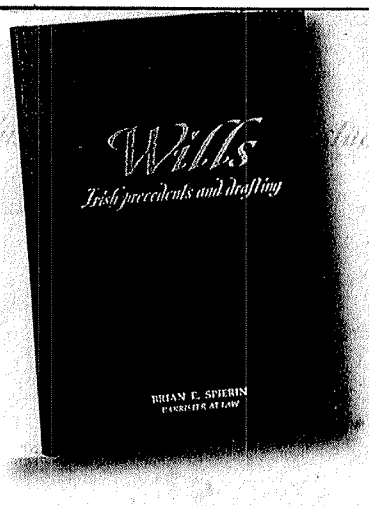
The format of the second edition remains that of relatively brief introductions to self contained chapters. The reader is then presented with the author's selection of the cases on that topic. There are some further reading references given with each topic but, disappointingly, these often refer only to the relevant chapters of Delaney or Keane or other textbook. There are also notes after most judgments which do help to tease out some of the issues raised, but more would be welcome. Neither is the reader questioned by the author at the end of a note as occurs in some other casebooks and to an extent a more demanding participation should be expected from the reader of a casebook. That is not to say that Wylie should be judged by reference to other works; he has clearly earned the right to his own format. But the result then becomes a format over-reliant on the actual judgments.

These are not edited in any substantial way and the reader's attention is often taken up sifting through long factual recitals before coming to the relevant issues of law. This is often necessary, but some more selective editing would be welcome. The effect of this, especially when long cases, such as *Shanahan's Stamp Auctions Ltd. v. Farrelly* [1962] IR 368, are included, is that a 58 page chapter on tracing contains just three cases. Another effect is that cases which deal with two or more points are not split up to their relevant areas and thus some inconsistencies enter a categorically ordered text. Of course a different reviewer might eschew over-editing as taking away from the primary purpose of a casebook which is the provision of judgments to readers in an orderly and classified manner and this book certainly achieves this aim. The approach adopted also reduces fears of excluding portions of judgments that may take a later significance, unforeseen at the time of editing.

An obvious area of personal preference is with the choice of judgments included. Professor Wylie's approach reflects the title, being equity and trusts in Ireland. Indeed the book can be roughly divided in half in dealing with these twin concerns. He includes a fair number of Northern Irish cases, though there are fewer English cases and none from other common law countries. The cases are well chosen, and include all the leading Irish cases on the topic in question, with others which trace the development of the topic. There are also an impressive amount of recent cases, which, because of the sheer generosity of cases included, does not reduce the number of traditional authorities, as much as one would easily expect. There are, however, a number of consequences of this reliance on Irish caselaw, principally the concealment of gaps in Irish law that should be demonstrated by referance to comparative authorities in other jurisdictions. One area that springs to mind is that of charitable trusts. In the past, Irish cases focused on trusts for the advancement of religion, thereby reflecting the concerns of Irish benefactors. But, times have changed and a large amount of donations go nowadays to other causes; causes not yet addressed in Irish caselaw. An inclusion of some foreign cases to demonstrate a common law approach would be apt for this kind of Irish lacunae. In this regard the inclusion of *Re Koeppler' s Will Trusts* [1986] Ch. 425 and *McGovern v. Attorney General* [1982] Ch. 321 would have been instructive, which dealt with essentially politico-charitable trusts.

Should these comments sound like complaining for the sake of it, then the worth of this book is demonstrated. If not, they ought not to be allowed to spoil what is an excellent compendium of Irish judgments.

– Conor Power, Barrister



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