The Bar Review

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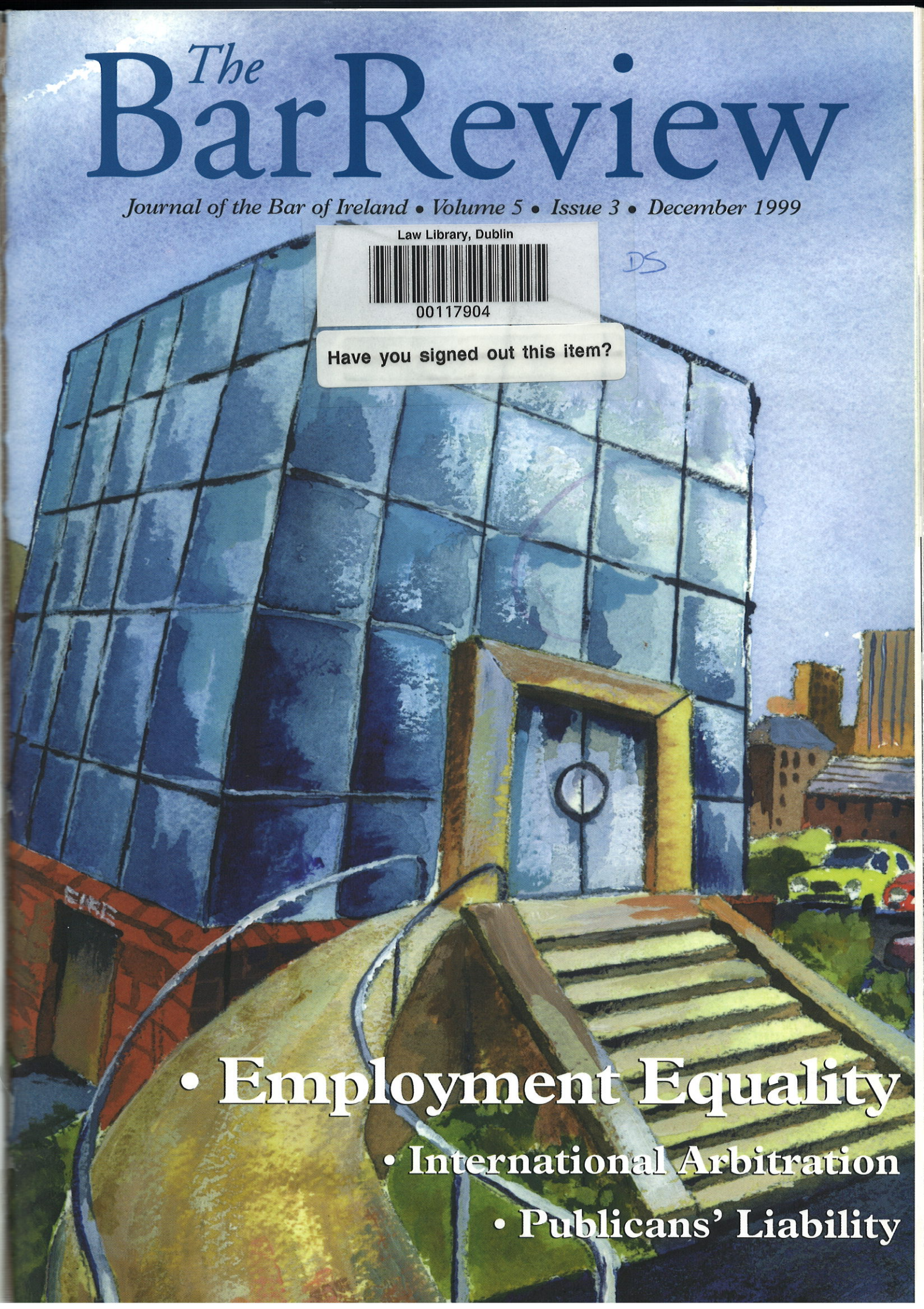

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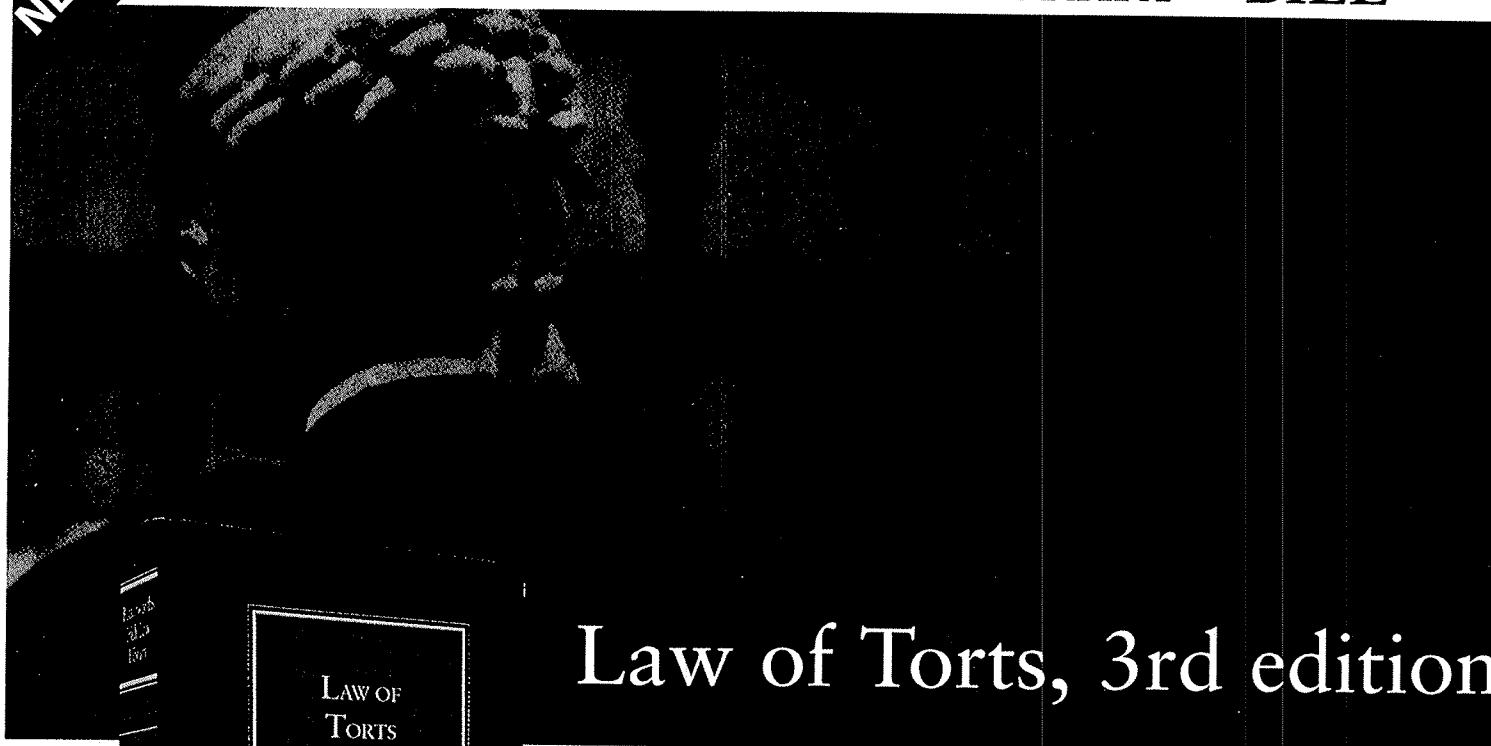

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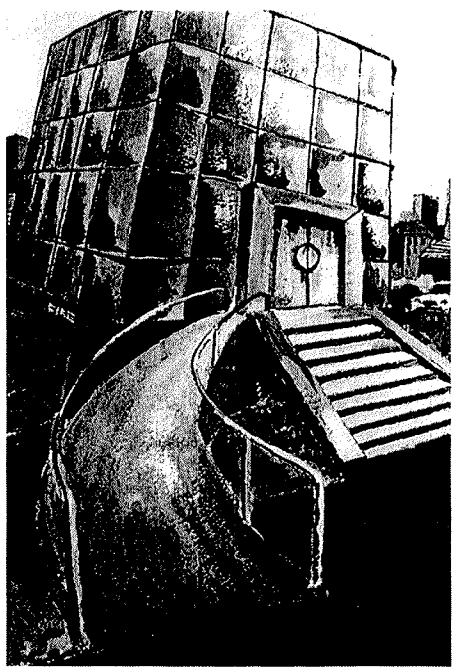

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Rex Mackey SC
An Appreciation

The following oration was delivered by the Attorney General, Michael McDowell SC at the funeral of the late Rex Mackey SC at the University Church, St. Stephens Green on Thursday, 11 November 1999

Carmel, Thora and Noemi have asked that I should say a few words before Rex's mortal remains are brought away from here to be buried in County Kildare this morning. It was an honour to be asked. And a pleasure, tinged with some sadness, to survey his life and achievements last night.

Rex was born on 7th December 1911, making him about 88 years old when he died last Sunday. As a boy in Bray, among his close companions was counted my own father, Tony. A warm friendship grew up between them that never left them. Rex often told me, in recent years, of their boyhood exploits together in terms of such obvious sentiment that a trace of a tear would form in the corner of his eye.

Their childhood paths diverged - in the case of Rex to Castleknock College where he swept all before him, academically by winning the Bodkin Prize in his last year at Castleknock, and athletically, where he excelled at cricket and rugby. On leaving school, Rex helped pay for his own education by working as a bank official from 1930 to 1933. He then went to UCD and was admitted to King's Inns as a student in 1934. He was called to the Bar in 1938, and as a young barrister he practised on the North Western Circuit. In those years just before the Second World War and at it's beginning, he met, fell in love with, and married Marie Elena, mother of Noemi.

At that time too, Rex became an actor, playing many roles in the Abbey Theatre and the Gate Theatre and, indeed, in West End theatres of London. He walked the stage with Orson Welles and Noel Coward and many other great actors with whom he rubbed shoulders. For a period after the Second World War, he wrote film scripts and plays, and performed as an actor in film and radio productions. He also wrote a very successful TV series called Justice at Large.

Returning to concentrate on his Bar career he practised as Junior Counsel on the Eastern Circuit and in Dublin, and took Silk in 1973. In the meantime, he had written his humorous legal masterpiece "Windward of the Law", and his remarkable book on contract bridge, called "The Walk of the Oysters". Those books cannot be opened too often - if only for the elegance and wit of their prose and the glimpse they gave of the wide ranging intellect and interests of their author, Rex.
By any judgement, Rex was a truly towering figure of the Irish Bar. Some of his eminent colleagues were, perhaps, more sedulous and assiduous than Rex.

Rex was brave to the point of being fearless. His courtroom rhetoric was crafted, elegant and razor sharp. His practice was not confined to the fashionable, the refined, or the cautious pastures of safer, calmer and more lucrative areas of the law. He took his "taxi rank" obligation as a professional barrister seriously. And, I think, he very much enjoyed the diversity of his practice.

He was happy to take on serious criminal cases, and to argue important constitutional cases, and to seek the vindication of the rights of the underprivileged. His formidable intellect, shown not merely in his writing and in his status as an international bridge player, was made available generously to all those who needed it, in the form of powerful advocacy. He was not a barrister who courted patronage from the rich or the powerful.

No cliche can capture his unique courtroom combination of audacity, tenacity, articulacy and wit. Suffice it to say that from the moment Rex entered a courtroom to the moment he left it, he was followed by the concentrated attention of judge, juror, advocate, and witness. He commanded attention by his presence, his speech, and by his razor sharp humour. He was the consummate advocate.

He was in many respects an intriguing contrast to his brilliant brother-in-law, Tommy Conolly who, like Rex, looms large in the pantheon of the Irish Bar.

But none of these achievements mattered more to Rex than what I believe to be his greatest attribute, that of loving husband, father and, more recently, grandfather. Rex, for all his accomplishments, had one great priority at which he only hinted in daily conversation. His love for Carmel and his daughters was palpable and grew stronger every day. There was no truer or more revealing epitaph than Carmel's beautiful subscript, which ended the death notice announcing Rex's death. She wrote "A forty year love affair has ended. Good night, Sweet Prince".

Prince, he was. A prince as a boy; a prince as an athlete; a prince as a scholar; a prince as a playwright; a prince among authors; a prince for those who sought vindication; a prince for those who came to the Bar of Justice; a prince, above all, as a husband and as a father.

With his passing, the world is a poorer place, but those of us who have known and loved Rex remain greatly enriched.

THE EMPLOYMENT EQUALITY ACT, 1998

The Employment Equality Act, 1998, which was recently commenced into operation by the Minister for Justice, Equality and Law Reform, is probably the most significant development in employment law in the last twenty years. Previously, employment-related discrimination was only prohibited where it was based on the sex or marital status of the victim. The new Act significantly increases the categories of impermissible employment-related discrimination to include discrimination based on family status, sexual orientation, religious belief, age, disability, race, colour, nationality, ethnicity or national origins and membership of the traveller community. The Act attempts to impose positive obligations on employers to ensure that treatment of employees and prospective employees, and the culture of the workplace, reflect the values of our pluralist age and as such it is to be warmly welcomed.

The Act however will operate in that often-fraught space where morality and economics meet the law and it is perhaps inevitable that certain of it's provisions will need to be litigated to provide clarity for employers and employees alike. For example, in the absence of judicial pronouncement, it will be difficult to advise employers of the circumstances (under Section 34) in which they will be able to invoke the "significantly increased costs" defence to discrimination based on disability or age. Similarly, when will indirect pay discrimination (on non-gender grounds) be "justified as reasonable in all the circumstances of the case" under Section 29? What quality and quantity of information can an employee expect from an employer under Section 76 of the Act, in relation to the employer's reasons for a particular act or in relation to the treatment of an employee with whom the claimant seeks to compare themselves?

It will clearly be some time before these and other issues are clarified in practice. However there were some aspects of our employment equality law which the legislature might have addressed in the new Act, to bring our law into line with that of other jurisdictions. For example it seems regrettable that the provisions of the Act outlawing sexual harassment do not extend to same-sex sexual harassment. Similarly, the exemption of companies with 50 employees or less from the requirement to draw up equality reviews and action plans would seem to exclude a large section of our employers from the very process designed to enable employers to identify and remedy equality deficiencies in their workplaces. It would have been useful also, if the provisions dealing with indirect pay discrimination had allowed comparison with a hypothetical comparator to aid the many female-dominated, underpaid occupations where it may be difficult or impossible to find a direct comparator in the workplace.

The Act envisages a new role for the Circuit Court in employment equality claims (on gender or equal pay grounds): this addition to its jurisdiction reflects the growing importance of the Circuit Court in our increasingly regulated society. It would be helpful if decisions of the Circuit Court in relation to claims under the Act could be reported so that the approach of the Court to the practical implementation of the obligations under the Act would be accessible to all those affected by the Act.

On the whole however, the Act is a laudable attempt to bolster the rights of sections of our society who have for too long been treated unequally in the employment field and as such the Oireachtas is to be congratulated on its enactment. ●

ENFORCING CLAIMS UNDER THE EMPLOYMENT EQUALITY ACT, 1998

Marguerite Bolger BL outlines the procedures for bringing, and enforcing, claims under the Employment Equality Act, 1998.

Introduction

The Employment Equality Act, 1998 creates a type of statutory tort of non-discrimination on nine specified grounds[1]. Under the old sex discrimination law[2] which the 1998 Act replaces, enforcement was taken out of the normal legal framework of the civil courts and placed instead in the conciliatory context of the Labour Court. The idea behind this was to provide claimants with a cheap, expeditious and informal remedy. To some extent that approach is continued under the new Act in that the role of the Labour Court is preserved and a new office of Director of Equality Investigations is created. However the Act brings equality law for the first time into the mainstream civil courts in that the Circuit Court is given a role in the first instance and claimants are now given a choice between the traditional employment law venues away from the civil courts or alternatively bringing their claim straight into the strictly legal forum of the Circuit Court.

"For the first time, the Act requires that a decision of the Director or a determination of the Labour Court must include a statement of the reasons why that decision was reached, where either party so requests. In the past the determinations of the Labour Court have been ridiculously brief, although the Equality Officers tended to give more reasoned and structured recommendations".

It is proposed in this article to examine the new methods of enforcement introduced under the Employment Equality Act, 1998 and some of the more important procedural changes. Whether or not these changes will make the law any more effective will be examined in the light of some of the difficulties that had been experienced under the old system of enforcement.

Venues for Enforcement

The Director of Equality Investigations and the Labour Court

The Act creates a new office of Director of Equality Investigations[3] who may appoint Equality Officers and Equality Mediation Officers[4]. A person making a claim under the Act may refer their case to the Director[5], unless it is a case of dismissal which claim will be made to the Labour Court[6]. All hearing before the Director shall be held in private[7]. Hearings before the Labour Court will also be held in private unless one of the parties requests otherwise in which case the Court may hold as much of the hearing as it considers not to be confidential in public.[8]

For the first time, the Act requires that a decision of the Director or a determination of the Labour Court must include a statement of the reasons why that decision was reached, where either party so requests. In the past the determinations of the Labour Court have been ridiculously brief, although the Equality Officers tended to give more reasoned and structured recommendations. Short determinations can cause difficulties in establishing the approach the Court will take to equality issues. It is to be hoped that reasoned decisions will be of some assistance in enabling people to make a more informed decision as to their chances of successfully litigating or defending a claim.

The New Circuit Court Jurisdiction

One of the most radical changes in the entire Act is the provision providing for a direct reference of a dispute to the Circuit Court[9], bypassing the Labour Court mechanism altogether and bringing a complaint straight into the purely legal forum. It is difficult to understand why the Circuit Court has been chosen over the Employment Appeals Tribunal which has a legal expertise in the form of a legally qualified chairperson and an experience of dealing in employment matters in a contentious, adversarial context.

The Circuit Court's lack of expertise in dealing with equality issues may be a problem. It was presumably with this in mind that the Act allows the Circuit Court to obtain a report by an Equality Officer on any question arising from the reference and in particular whether persons are employed to do like work[10]. This is a very useful provision and may assist the Circuit Court in developing an expertise in Equality Law. It is up to the

Circuit Court judge to request a report. It remains to be seen whether the judges will be prepared to delay an equality case in order to obtain the necessary report. On the other hand in family and criminal matters, the judges have been quite willing to adjourn cases pending relevant reports and it may be that the same attitude will be adopted in relation to Equality Officer reports.

The new jurisdiction of the Circuit Court may have implications for the level of compensation awarded, which has tended to be low. The Circuit Court is accustomed to awarding high damages, although its usual jurisdictional limits will not bind the Court when exercising their jurisdiction under the equality legislation. The approach of the Circuit Court in relation to the level of damages as compared to that of the Labour Court is illustrated by the case of *Butler v Four Star Pizza Ltd*[11] a case of sexual harassment taken to the Circuit Court on the basis of a breach of contract. The plaintiff was awarded damages of £10,000 plus her costs. It is unlikely that the Labour Court would have awarded so much.

"The new jurisdiction of the Circuit Court may have implications for the level of compensation awarded, which has tended to be low. The Circuit Court is accustomed to awarding high damages, although its usual jurisdictional limits will not bind the Court when exercising their jurisdiction under the equality legislation."

A Two-Tier Litigation System

Higher levels of awards and payment of costs may prove tempting for many claimants considering whether to go to the Director of Equality Investigations or to the Circuit Court. On the other hand there is the issue of privacy before the Director, whereas the Circuit Court will hear the case in public, which may or may not be of interest to the claimant but may be of great concern to the employer.

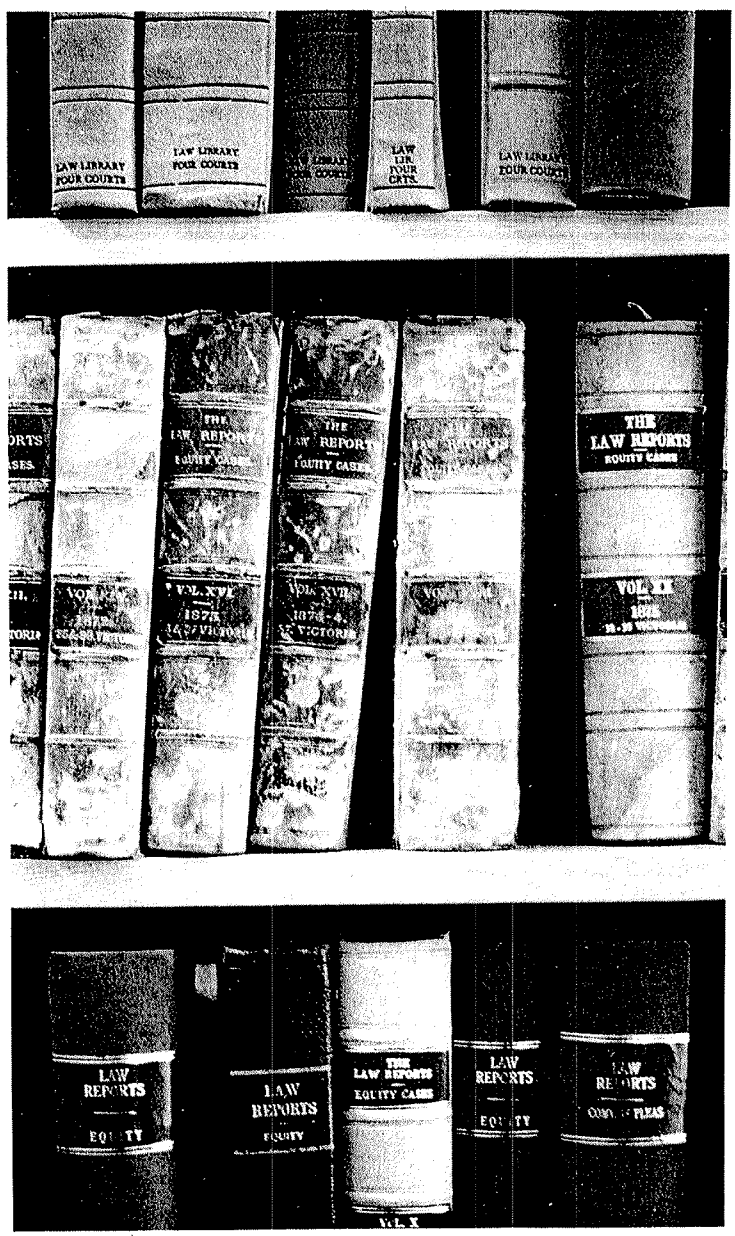
Concerns have been expressed that a choice between venues will result in a two-tier system. There will be a significant difference in the level of costs between the two venues, as a claimant may be represented by a non-lawyer before the Director. Many claimants are represented by trade union officials, or sometimes even by interested parties such as community workers. This method of representation will not be possible before the Circuit Court. It is also possible that an unsuccessful claimant before the Circuit Court may have an award of costs made against them, whereas this could never happen in the Labour Court no matter how unmeritorious the claim might be.

Mediation

Section 78 establishes an alternative method of processing a claim. Where a case has been referred to the Director or the Labour Court and it appears that it could be resolved by mediation, the case shall be referred for mediation to an equality mediation officer. Either party can object to the case going to mediation, in which case it is processed through the Director in the normal way.

Whilst mediation can be useful as an alternative method of dispute resolution in many aspects of industrial relations, it is questionable whether mediation is appropriate to determine specific issues of fact or entitlement, particularly where there is a dispute between the parties on whether or not discrimination has taken place. Again the absence of any legal expertise in this forum may present difficulties where complicated issues of law arise.

As either party can object to mediation, it would seem unlikely that many complaints will be resolved in this way. An analogy lies with the option available to a claimant under the unfair dismissals legislation of going to a Rights Commissioner rather than to the Employment Appeals Tribunal. In practice that option is rarely used and even then only in cases where there is already a significant level of consensus between the parties. It is unlikely that such consensus will exist in an equality case as, if there were room for resolving the dispute, it would probably have been resolved within the organisation without any recourse to an external forum.



Appeals

The Act provides for a complex appeal mechanism whereby parties can appeal from a decision of the Director to the Labour Court[12] or a determination of the Labour Court to the Circuit Court[13]. A decision of the Circuit Court or a determination of the Labour Court may be appealed to the High Court on a point of law[14]. The Labour Court when investigating a case, or the Circuit Court when hearing an appeal from a determination of the Labour Court may, at any point, refer a point of law arising in the course of the investigation or appeal to the High Court[15].

The Circuit Court is given jurisdiction to enforce the determinations of the Labour Court, the decisions of the Director and mediated settlements[16] although the Circuit Court may substitute an order of re-instatement or re-engagement with a compensation order where it considers it appropriate to do so in all the circumstances[17].

"Section 76 of the Act provides, for the first time, a method whereby a claimant may be able to obtain information from their employer in relation to the employer's reasons for a particular act, or information in relation to the remuneration or treatment of an employee with whom the claimant seeks to compare themselves."

Time Limits

Section 77(5) of the Act lays down a time limit for bringing a claim of six months from the date of the occurrence, or "the most recent occurrence of the act of discrimination or victimisation to which the case relates". Section 77(6) permits that time limit to be extended to twelve months in exceptional circumstances. This is an improvement as the old law did not permit a claim to be lodged later than six months from "the day of the first occurrence of the act alleged to constitute the discrimination". This time limit was criticised by the Second Commission on the Status of Women[18] which recommended that time should run from the most recent act of discrimination and that recommendation has been taken on board in the Act. However in terms of increasing the time limit in exceptional circumstances, the current law does not lay down a cut-off point once the Labour Court is satisfied that there are exceptional circumstances justifying an extension of the time limits. There have been cases in which the Labour Court has allowed a claim to be made where the act of discrimination complained of occurred more than twelve months previously. This would no longer be permitted under the Act.

The Act also lays down a time limit of 42 days in relation to lodging appeals. Where an determination of the Labour Court is being appealed to the Circuit Court, the time period may be extended by the Circuit Court[19] but this discretion is not granted to the Labour Court on hearing an appeal from a decision of the Director[20].

The Right to Information

Section 76 of the Act provides, for the first time, a method whereby a claimant may be able to obtain information from their employer in relation to the employer's reasons for a particular act, or information in relation to the remuneration or treatment of an employee with whom the claimant seeks to compare themselves. Where the employer fails to supply the requested information, or where the information supplied was false or misleading, "such inferences as seem appropriate" may be drawn[21].

As there was no procedure for discovery of documents under the old equality law, these new provisions may render the law more effective and user friendly for employees who feel they have been the victims of discrimination.

However the way in which the Act regulates the provision of information is regrettable and arguably removes much of its effectiveness. Firstly, confidential information is excluded in broad terms as any information about a person where that person does not agree with the disclosure of the information. Second the information which may be sought is limited to "material" information. Thirdly, although it is referred to as the "right" to information, the section is clearly not mandatory and an employer replies to questions only if they so wish. Similarly, the inferences to be drawn from a refusal to supply information or the supply of false or misleading information is not mandatory - inferences "may" be drawn. Even then the inference is not specified to be an inference of discrimination, simply whatever inference may seem appropriate. Lastly, considerable latitude is allowed to certain public sector employers in restricting the information that may be requested. This privileged treatment of the public sector does not appear to be justifiable.

Remedies

Section 82 provides for new provisions on redress. In an equal pay claim the Director may provide for an order of equal pay and for compensation up to a maximum of three years arrears of remuneration. In a discrimination or victimisation claim compensation can only be given for acts which occurred up to six years before the referral of the case. An order can also be made for equal treatment "in whatever respect is relevant to the case" or an order "that a person or persons specified in the order take a course of action which is so specified". Section 82(4) provides for a maximum amount of compensation payable by the Director or the Labour Court of either two years remuneration or £10,000 where the complainant was not in receipt of remuneration at the date of the reference.

In dismissal cases the Labour Court are now expressly empowered to make an order for re-engagement or re-instatement with or without compensation. This is a welcome development as there was some confusion as to whether that power was available to the Court under the 1977 Act.

The Circuit Court has different and more extensive powers to award remedies[22]. In an equal pay case the Court may make an order for compensation for arrears of remuneration up to six

years before the date of referral or an order for equal pay from the date of referral. In an equal treatment case the remedies are similar to those available to the Director or Labour Court with an express power to award re-instatement or re-engagement. The Court is not limited by its normal jurisdictional rules of £30,000 in awarding compensation.

Equality Reviews and Action Plans

Under Section 69 of the Act the Equality Authority[23] may invite a business or group of businesses which have at least 50 employees to draw up an equality review or an equality action plan. The former is an audit of the level of equality of opportunity which exists in that business whereas the latter is an examination of the practices, procedures and other relevant factors in determining whether those factors are conducive to the promotion of equality of opportunity in that business. Where a business declines the Authority's invitation, the review or plan may be drawn up by the Authority itself.

Section 70 provides for the enforcement of an equality review or an action plan, thus rendering them far stronger and more effective than the codes of practice provided for by the current equality legislation. Ultimately the business may be forced by the Circuit or High Court[24] to take action that is deemed to be reasonably required for the implementation of the review or plan.

It will be interesting to see the extent to which the Authority use their power to force compliance with a review or plan that has been drawn up by a business or by the Authority. One area of huge potential is that of sexual harassment, where the need for a comprehensive policy informing employees of their right to a workplace free from sexual harassment and the consequences of failing to respect such rights of fellow employees is well established. Unfortunately it is often smaller employers who fail to introduce such policies, and as organisations employing less than 50 employees are exempt from these provisions[25], the impact of equality reviews and action plans may be limited as a result.

The Effectiveness of the new Legislation

The Employment Equality Act is an ambitious piece of legislation that purports to stamp out discrimination in the workplace. The extent to which it will be successful in bringing about a discrimination-free workplace depends largely on the extent to which it is accessible and effective for the people it aims to protect.

The old system suffered from significant delays in the processing of claims, particularly where a point of law was appealed to the High Court and then returned to the Labour Court for application to the particular facts of the case. Some cases have dragged on for nearly ten years going back and forth from the Labour Court to the High Court. Apart from some minor procedural changes, the new Act does not deal with this difficulty and still leaves open the possibility that a person seeking to remedy a difficulty in their employment may end up in protracted litigation for many years in seeking to enforce their rights.

Even after protracted litigation, many claimants were not left with very much reward as the level of awards made under the old system tended to be low. Whilst the new Circuit Court jurisdiction may lead to higher awards, this does not necessarily do very much for claimants who, through financial necessity, are limited to bringing their claim to either the Director or the Labour Court who are likely to continue the pattern of low awards of damages.

"The Employment Equality Act is an ambitious piece of legislation that purports to stamp out discrimination in the workplace. The extent to which it will be successful in bringing about a discrimination-free workplace depends largely on the extent to which it is accessible and effective for the people it aims to protect."

The new Act is a laudable attempt to bring about equality in the workplace. However unless claimants are permitted to process their grievance in an efficient manner in an environment where the law is developed and interpreted in a manner that ensures certainty and some reasonable prediction of success, the legislation may do little to achieve its lofty aspirations. •

1. Section 6 provides that discrimination on the following grounds may be unlawful: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the traveller community.
2. The Anti Discrimination (Equal Pay) Act 1974 and the Employment Equality Act 1977.
3. Section 75(1)
4. Section 75(4)
5. Section 77(1)
6. Section 77(2)
7. Section 79(2)
8. Section 79(2), Section 83(2)
9. Section 77(3)
10. Section 80(4)
11. Judge Spain, March 1995.
12. Section 83
13. Section 90
14. Section 90(2)
15. Section 90(4)
16. Section 91
17. Section 93
18. Report to Government, January 1993.
19. Section 90(1)
20. Section 83
21. Section 81
22. Section 82(3).
23. The Equality Authority is a statutory body set up under the Act to replace the Employment Equality Agency.
24. Section 72
25. Section 69(5)

SEXUAL HARASSMENT

Adrian Twomey BL concludes his analysis of Sexual Harassment in Irish law in the light of the Employment Equality Act, 1998.

(The first part of this article appeared in the November Issue)

Express Prohibition of Sexual Harassment (continued)

Harassment Occurring Outside the Workplace

One of the criticisms to which the 1996 Bill was subjected, was the argument that it failed to protect the victims of incidents of sexual harassment which occurred outside of the workplace after working hours.[49] Such an omission from the Bill was somewhat ironic, given the fact that the *Code of Practice on Measures to Protect the Dignity of Women and Men at Work* produced by the Department of Equality and Law Reform in 1994 had noted that "sexual harassment may occur outside the workplace...."[50] Significantly, even before the Code of Practice was published, the Labour Court had already indicated that it would, in appropriate circumstances, impose liability on employers even where the harassment occurred outside of the workplace.[51]

Had the 1996 Bill been enacted as it was originally drafted, it would have significantly restricted the reach of the law on this point. It would, however, seem that Section 23 of the 1998 Act is more progressive than its predecessor in relation to incidents of harassment occurring outside of the workplace. It provides (in subsection (2)) that:

> "Without prejudice to the generality of *subsection (1)* in its application in relation to the workplace and the course of A's employment, if, in a case where one of the conditions in *paragraphs (a)* to *(c)* of that subsection is fulfilled-
>
> (a) B sexually harasses A, whether or not in the workplace or in the course of A's employment, and
>
> (b) A is treated differently in the workplace or otherwise in the course of A's employment by reason of A's rejection or acceptance of the sexual harassment or it could reasonably be anticipated that A would be so treated,
>
> then, for the purposes of this Act, the sexual harassment constitutes discrimination by A's employer, on the gender ground, in relation to A's conditions of employment."

While the provision in question is somewhat torturous in terms of its wording, it is certainly to be welcomed as a substantial improvement on the 1996 draft.

Subsection (2), paragraph (b) is particularly interesting in that it effectively absolves the employer of any potential liability arising from incidents of harassment occurring outside of the workplace where such incidents have no knock-on impact in terms of the way in which A (the victim) is treated "in the workplace or otherwise" in the course of her employment. On first reading, the paragraph in question seems somewhat harsh in that it seems to deny a remedy to victims of such harassment despite the fact that the harassment may, for example, affect a victim's attitude to her job or have a deleterious impact on her mental or physical health. On reflection, however, it seems hard to avoid the conclusion that the legislature has, via paragraph (b), deftly discharged the onerous task of appropriately balancing the rights of both employers and victims of harassment.

Despite the fact that the victim of harassment occurring outside of the workplace may suffer in the manner outlined above, it would be harsh to impose liability on her employer where the harassment has no repercussions in terms of her treatment in the workplace.[52] On the other hand, where the harasser is the employer himself, the Act would seem to leave open the possibility of imposing liability on him even where his misconduct only occurs outside of the workplace and/or the course of the victim's employment because, in such circumstances, "it could reasonably be anticipated that" the victim would be "treated differently in the workplace" "by reason of ... the sexual harassment". While paragraph (b) will undoubtedly require careful interpretation and sensible application in practice it certainly has the potential to be of benefit both in terms of clarifying the law in relation to sexual harassment occurring outside of the workplace and in terms of appropriately balancing the competing interests of employers and victims.

Vicarious Liability

In the period 1985-1994 the Labour Court and Equality Officers routinely held employers vicariously liable on foot of sexual harassment perpetrated by their employees. The degree of certainty with which the Court did so, however, was, at the very least, seriously undermined by the decision of the High Court in the case of *The Health Board v. B.C. and the Labour Court.*[53]

The claimant in the case in question had been employed by the Health Board for 15 years before she was transferred to the area in which she was ultimately sexually harassed. It would appear from the text of Costello J.'s judgment that over the following six weeks she was subjected to lewd and coarse remarks by two men who worked with her. They also "touched her without her consent, and generally harassed her."[54] Ultimately, she was violently and indecently assaulted. While the judge stated that "if an employee suddenly rapes a fellow employee" it would be "a most imprecise use of language" to describe him as having merely "harassed" her,[55] he was satisfied that the actions of her co-workers over the entire six-week period constituted both sexual harassment and "discrimination" within the meaning of the 1977 Act.

Of far greater significance, however, was the judge's decision on the second issue which faced him: namely, whether or not the Health Board was "vicariously liable" when a party under its control, acting on its behalf, committed a legal wrong. The issue of vicarious liability arises most often in the context of employment relationships where employers can be held vicariously liable for wrongful acts committed by their employees. The main question which Costello J. had to address was whether or not the claimant's employer could be held vicariously liable for the acts of her fellow employees.

The Employment Equality Act, 1977 Act provided no guidance as to how the courts should approach the issue of vicarious liability in the context of gender-based discrimination. In contrast, section 41 of the corresponding British legislation (the Sex Discrimination Act 1975) provides that "anything done by a person in the scope of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."56

The Labour Court had applied such a test in most of the sexual harassment cases which had come before it up to that point. As Costello J. explained, however, the Court had effectively been applying the test elaborated in the British legislation. The relevant Irish law was somewhat different. In the absence of clear legislation on the matter, the High Court explained that employers were only liable where the harasser was acting "within the scope of his employment" or for the employer's benefit. As the harassers in the *B.C.* case[57] were clearly not doing so, no liability could attach to the Health Board.

The implications of the decision in the *B.C.*[58] case have been extensively analysed and debated elsewhere.[59] It is undoubtedly the case, however, that the judgment of Costello J. caused some concern as to whether or not the Labour Court could legitimately continue to impose vicarious liability on employers. That concern would seem to have been addressed by the Minister in section 15 of the 1998 Act which builds the aforementioned English statutory test into Irish law. Section 15(1) provides that:

> "Anything done by a person in the course of his or her employment shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that person's employer, whether or not it was done with the employer's knowledge or approval."

In effect, section 15 reverses the effect of the decision in the *B.C.* case,[60] returning Irish Law to the position articulated by the Labour Court prior to 1994.

'Reasonably Practicable Steps' Defence

The Labour Court and Equality Officers have traditionally recognised employers as having a valid defence to an action where the employer has implemented and enforced an adequate sexual harassment policy and complaints procedure and provided the necessary training to members of his or her staff.[61] In 1991, for example, one of the Equality Officers stated that:

> "... if the employer took all reasonabl[y] practicable steps to ensure that each of its employees enjoyed working conditions ... free from sexual harassment, the discrimination carried out by its ... employees would not constitute a contravention by the employer of the [Employment Equality Act, 1977]."[62]

The existence of the defence in question is of benefit in two main respects. Firstly, it ensures that responsible employers, who are not to blame for any sexual harassment suffered by their employees, are not held liable under the legislation. Secondly, the existence of the defence acts as an incentive for employers to draft and implement sexual harassment policies and complaints procedures and to provide appropriate training.[63] Subsection (5) would seem to enshrine this defence in the 1998 Act, stating that:

> "If, as a result of any act or conduct of B, another person ("the Employer") who is A's employer would, apart from this subsection, be regarded by virtue of *subsection (1)* as discriminating against A, it shall be a defence for the Employer to prove that the Employer took such steps as are reasonably practicable-
>
> (a) in a case where *subsection (2)* applies, to prevent A being treated differently in the workplace or otherwise in the course of A's employment and, if and so far as any such treatment has occurred, to reverse the effects of it, and
> (b) in a case where *subsection (1)* applies (whether or not *subsection (2)* also applies) to prevent B from sexually harassing A (or any class of persons of whom A is one)."

While subsection (5) gives no express indication as to what are regarded as "reasonably practicable" steps on the part of the employer it would seem likely that the courts will regard such steps as including the introduction of sexual harassment policies, the provision of training and so on.

Two further points are worth noting in relation to subsection (5). Firstly, while subsection (2), as noted earlier, seeks to protect employees against harassment which occurs outside of the workplace, subsection (5), paragraph *(a)* gives employers a defence where the harassment in question does not lead to the victim "being treated differently in the workplace" or otherwise in the course of her employment.

Finally, it should be noted that subsection (5) only extends a defence to the employer where he is defending a claim arising out of harassment perpetrated by one or more of his employees. Sensibly, it would not appear to provide any defence where the harasser was the employer himself.

Employment Agencies and Educational/Training Bodies

Subsection (6) extends the application of section 23 of the 1998 Act in order to protect persons using employment agencies and those participating in vocational training courses. It states that:

> "In this section 'employed', in relation to an individual (whether A or B), includes-
>
> *(a)* seeking or using any service provided by an employment agency; and
>
> *(b)* participation in any such course or facility as is referred to in paragraphs *(a)* to *(c)* of *section 12(1);*
>
> and, accordingly, any reference to that individual's employer includes a reference to the employment agency providing the service, or as the case may be, the person offering the course of training. "[64]

Subsection (6) would seem to contain a drafting error in that the reference to paragraphs *(a)* to *(c)* of section 12(1) makes little or no sense given the content of those paragraphs.[65] It is, however, relatively clear that the Minister's intention was to counter sexual harassment perpetrated against persons using employment agencies or attending vocational training courses.

Intriguingly, professional training bodies such as the Incorporated Law Society, the Honorable Society of the King's Inns and the Royal College of Surgeons would seem to come within the scope of subsection (6). If such is the case, then subsection (6) is of major significance in

that it would appear to extend the scope of sexual harassment law beyond the realm of the workplace and into some third-level classrooms for the first time. The key question to be considered in this regard is whether or not the institutions in question can be regarded as providing "vocational training". That term is defined in section 12(2), which states that:

> "In this section 'vocational training' means any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying on of an occupational activity and which may be considered as exclusively concerned with training for such an activity."

While it would seem unlikely that a student pursuing, for example, an undergraduate Arts degree at the National University of Ireland could be regarded as pursuing a course which is "exclusively concerned with training" for "the carrying on of an occupational activity", students attending Blackhall Place, the King's Inns or the Royal College of Surgeons arguably come within the scope of the Act. One can only wonder if the Act also reaches into, for example, the University medical schools. If it does, then it would seem to enable a medical student to claim against the University she is attending if she is sexually harassed on campus. If such is in fact the case, one wonders how long it will be before the Minister for Education is asked to explain why medical students are protected and, for example, Arts students are not. On the other hand, if subsection (6) does not impact on University medical schools then one must ask why it seems to impact on bodies such as the Royal College of Surgeons.

Conclusion

Given the fact that the Labour Court and Equality Officers have had to carry the burden of dealing with sexual harassment cases without legislative guidance for some fourteen years, it is undoubtedly the case that section 23 of the Employment Equality Act, 1998 constitutes a significant development in this area of the law. The section in question at last provides statutory guidance as to what kind of conduct can constitute sexual harassment as well as explaining when that conduct becomes actionable. It reverses the potentially disastrous effect of Costello J.'s decision in the *B.C.* case[66] and clarifies situation in relation to employers' defences.

On the other hand, the section could not be said to be devoid of any flaws. It lags far behind the law in other jurisdictions on the matter of same-sex sexual harassment and its impact on third-level educational institutions is unclear.

Ultimately, however, the introduction of section 23 will be a cause for celebration on the part of those who have attempted to tackle the problem of workplace sexual harassment in Ireland over the last fourteen years. The fact that many of the legislation's provisions either reflect or build on the pioneering work of the Labour Court is indicative of the debt owed by Irish employment equality law to that body. In addition, it constitutes a belated statutory recognition of the existence of a problem which has plagued many workers down through the years. For these reasons, and others, the introduction of section 23 is to be welcomed. •

49 See Twomey, "Sexual Harassment and the Employment Equality Bill, 1996", *loc. cit.*, at 17-18.

50 Department of Equality and Law Reform, *Code of Practice: Measures to Protect the Dignity of Women and Men at Work*, (Dublin: Department of Equality and Law Reform, 1994), at 10 (paragraph 2.6).

51 See, for example, *An Office Supplies Company v. A Worker*, EE0890, Labour Court, 21 December, 1990. See also *A Company v. A Worker*, EEO492, 9 March, 1992, in which case the Labour Court were required to consider the claimant's allegation that a Christmas card containing a message with a "double-meaning" posted to her home constituted part of the harassing conduct complained of. Finally, in *A Company v. A Worker*, EEO993, 16 September 1993, the Labour Court asked itself "whether [an] [e]mployer can be held responsible for an incident which it is alleged took place in a public place on the way home from work. The only link with the [e]mployer was that it involved two of his employees. The Court [concluded] that he cannot be responsible for actions which occur outside the workplace, over which he has no control, and in a situation where he could not provide protection.... However, the Court accepts that there are occasions when the consequences of such acts could affect workers in the course of their employment, in that they could cause a deterioration in the working environment. The employer might then acquire a certain responsibility to the workers affected."

52 The creation of a statutory remedy for victims of such harassment against their harassers might be worth considering. For analyses of the American position on this issue, see Robert Lukens, *"Workplace Sexual Harassment and Individual Liability"*, (1996) 69 Temple Law Review 303; and Cheryl L. Anderson, *"'Nothing Personal': Individual Liability Under 42 U.S.C. ° 1983 for Sexual Harassment As an Equal Protection Claim"*, (1998) 19 Berkeley Journal of Employment & Labor Law 60.

53 [1994] ELR 27

54 At 29.

55 At 33.

56 The employer is, however, allowed to defend such an action on the grounds that he "took such steps as were reasonably practicable to prevent the employee from doing that act...."

57 *Op. cit.*

58 *Op. cit.*

59 See Harvey & Twomey, op. cit., at 55-72; Leo Flynn, *"The Limits of Sexual Harassment Liability"*, (1994) *Irish Law Times* 215; and Adrian F. Twomey, *"Decision exposes gap in law on sexual harassment"*, *The Cork Examiner*, 28 January, 1994.

60 *Op. cit.*

61 For a discussion of the broad range of defences used by employers in American cases, see Allan H. Weitzman, *"Employer Defenses to Sexual Harassment Claims"*, (1999) 6 Duke J. of Gender L. & Pol'y 27.

62 Per Deirdre Sweeney, Equality Officer, in *An Employer v. One Female Employee*, EE22/1991, 4 November, 1991.

63 For a discussion of these matters, see Harvey & Twomey, *op. cit.*, 79-100.

64 Section 23(7) goes on to provide that:

"Where subsection (6) applies in relation to A, subsection (1) shall have effect as if for the words 'in relation to A's conditions of employment' there were substituted 'contrary to section 11 or, as the case may be, *section 12*'"

65 Section 12(1) states that:

"Subject to subsection (7) any person, including an educational or training body, who offers a course of vocational training shall not, in respect of any such course offered to persons over the maximum age at which those persons are statutorily obliged to attend school, discriminate against a person (whether at the request of an employer, a trade union or a group of employers or trade unions or otherwise)-

(a) in the terms on which any such course or related facility is offered,

(b) by refusing or omitting to afford access to any such course or facility, or

(c) in the manner in which any such course or facility is provided."

66 *Op. cit.*

EMPLOYMENT EQUALITY ACT, 1998: EQUAL PAY PROVISIONS

Mary Honan BL analyses the equal pay provisions of the Employment Equality Act, 1998.

Introduction

This article will outline the main provisions dealing with pay discrimination in the Employment Equality Act, 1998, which became law on 18th October 1999. The Act repealed the Anti-Discrimination (Pay) Act, 1974 while repeating or amending most of its provisions. The 1974 Act in effect had implemented into Irish law the equal pay principle in Article 119 of the EC Treaty and elaborated on in Directive 75/117/EEC on Equal Pay.

Article 119 of the EC Treaty, *inter alia,* provides that:

> "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."

Article 1 of the Directive 75/117/EEC provides, *inter alia:*

> "The principle of equal pay for equal work outlined in Article 119 of the Treaty, hereinafter called 'principle of equal pay', means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration."

Whereas the 1974 Act dealt only with gender discrimination in pay, one of the most significant aspects of the 1998 Act is that it prohibits pay discrimination not only on grounds of gender but also on eight additional grounds[1]: marital status, family status, sexual orientation, religion, age, disability, race, and membership of the Traveller community.

Entitlement to equal remuneration

Remuneration is defined in Section 2(1) as any consideration, whether in cash or in kind, received directly or indirectly from the employer in respect of the employment but excluding pension rights. The definition of pay in Article 119 is essentially the same but does not exclude pension rights. Equal treatment in respect of pensions is addressed in Part VII of the Pensions Act, 1990 as amended; new legislation has been promised in this area.

Part III[2] and Part IV[3] of the 1998 Act deal with gender and non-gender discrimination respectively. Section 19(1) in Part III provides that it shall be a term of the contract under which a person is employed that he/she shall be entitled to the same rate of remuneration as a person of the opposite sex[4] who:

* is employed
* to do like work
* at that or any relevant time
* by the same or an associated employer.

Similarly, Section 29(1) in Part IV provides that it shall be a term of the contract under which a person is employed that he/she shall be entitled to the same rate of remuneration as another person who differs in relation to one of the prohibited grounds[5] and who is employed to do like work at that or any relevant time by the same or an associated employer. Section 20 implies a term in respect of an entitlement to equal pay (on the gender ground) into a contract of employment where there is no such term in the contract.

Section 9(1) provides that where a collective agreement or order contains a provision for differences in rates of remuneration based on any of the discriminatory grounds which conflicts with an equal remuneration term in a person's contract of employment, that provision shall be null and void. This subsection does not apply to provisions which are discriminatory on non-gender grounds until one year after the section came into operation[6].

Employed

One of the ways in which the new provisions diverge from those in the 1974 Act is by applying the equal pay provisions to agency workers and to contracts for services (the latter only in respect of gender pay discrimination). "Contract of employment" is defined to include agency workers.[7] An agency worker can claim like work only with the work of another agency worker; likewise a non-agency worker can compare her/his work only with that of a non-agency worker[8]. It is unfortunate that comparisons in respect of agency workers, traditionally a predominantly female group, are restricted in this way particularly given the growing number of these workers. For the purposes of the Act, a person who is liable for the pay of an agency worker is deemed to be the employer[9]. For the purposes of Section 19 (although not for Section 29), "employed" includes a contract "personally to execute any work or labour" in addition to a contract of employment[10].

Like work

Section 7(1) provides that "employed to do like work" means that both perform the same work, similar work or work of equal value; these are defined in substantially the same way as in the 1974 Act[11]. Similar work is defined[12] as work where the differences are of small importance or occur so irregularly as not to be significant. Work is of equal value[13] if equal in terms of "skill, physical or mental requirements, responsibility and working conditions". Where the work performed by the "primary worker" (the claimant) is greater in value than that performed by a comparator who is paid more, Section 7(3) provides that the work of the primary worker shall be regarded as equal in value[14] for the purposes of Section 7(1)(c), which defines work of equal value. It should be noted that the work of claimant and comparator is valued on the basis of the work as *performed,* which may differ from the relevant job descriptions or the work either was employed to do.

"It is submitted therefore that in order to establish indirect gender discrimination a term or criterion must be identified which disadvantages a group of which the claimant is a member and, further, the claimant must show that there is a higher proportion of employees of the same sex as the claimant in that disadvantaged group."

Relevant time

The employment of claimant and comparator need not be contemporaneous for the purposes of an equal pay comparison, as confirmed by the European Court of Justice in *MacCarthys Ltd. v Smith.*[15] However the legislation does not permit comparison with a hypothetical comparator: this issue was also addressed in *MacCarthys* and more recently by Budd J. in *Brides & Ors v Minister for Agriculture & Ors*[16].

The timeframe within which a comparison may be made is set out in Section 19: a "relevant time" is any time (including a time *before* the commencement of the Act) during the three years which precede or the three years which follow the particular time[17]. In respect of the non-gender provisions on pay, a "relevant time" is similarly defined but only refers to a time *on or after* the commencement of the section[18].

Associated employer

An "associated employer" means that one is a body corporate of which the other has control or both are bodies corporate of which a third has control[19]. Both Sections 19(3) and 29(3) provide that an employee will not be regarded as employed to do like work with a comparator employed by an associated employer unless "both have the same or reasonably comparable terms and conditions of employment". This is a significant change from the 1974 Act which only permitted equal pay in respect of employees of associated employers where both employees had the same terms and conditions of employment[20].

It should be noted that the restriction as to "place" is removed entirely in the 1998 Act. The 1974 Act required claimant and comparator to be employed in the same place, a restriction which arguably contravened Article 119 and Directive 75/117.

Grounds other than the prohibited ground

The entitlement to equal pay for like work is not absolute. Section 19(5) provides that different rates of remuneration may be paid on 'grounds other than the gender ground'. Similarly Section 29(5) provides that different rates of remuneration may be paid on 'grounds other than the discriminatory ground'. Valid 'grounds other than sex' in case law under the 1974 Act included for example 'red circling',[21] and grading structures.[22]

Exclusions

Section 6(3) provides that treating a person differently, who is either aged sixty five or over, or under eighteen, shall not be regarded as discrimination on the *age* ground[23]. Section 34(1) contains a number of exclusions in respect of benefits provided to employees:

* in respect of events related to members of the employee's family,
* in respect of a person as a member of an employee's family,
* on or by reference to an event occasioning a change in the marital status of the employee, or
* in respect of assistance during working hours to an employee with "family status"[24] to provide care for a person for whom the employee has responsibility.

Section 34(3) permits discrimination on the age or disability ground where warranted by "clear actuarial or other evidence that significantly increased costs would result if the discrimination were not permitted ...". Section 34(7) permits discrimination on the age ground in respect of remuneration where the difference is based on relative seniority or length of service.

Section 35(1) permits the payment of "a particular rate of remuneration" to an employee with a disability if that employee is restricted in his or her capacity to do the same amount of work or work the same hours as a comparable employee who is without that disability and doing work of the same description. Regrettably this would appear to facilitate the payment of a lower rate of pay for the same work. Section 35(3) provides, *inter alia,* that where an employee with a disability receives a particular rate of remuneration pursuant to subsection (1), an employee without that disability or with a different disability shall not be entitled to that rate.

Indirect discrimination

Sections 19(4) and 29(4) deal with indirect discrimination in pay on the gender and non-gender grounds respectively. The two provisions differ significantly. Section 19(5) provides in effect that indirect gender discrimination occurs where a term of a contract or a criterion:

* applies to all employees of a particular employer or to a particular class of such employees, including the claimant and comparator;
* is such that the remuneration of those who fulfil the term or criterion is different from that of those who do not;
* is such that the proportion of employees who are disadvantaged by the term or criterion is substantially higher in the case of those of the same sex as the claimant than in the case of those of the same sex as the comparator; and
* cannot be justified by objective factors unrelated to the claimant's sex.

It is submitted therefore that in order to establish indirect gender discrimination a term or criterion must be identified which disadvantages a group of which the claimant is a member and, further, the

claimant must show that there is a higher proportion of employees of the same sex as the claimant in that disadvantaged group. The language used in Section 19(4) is coherent with the approach to establishing disproportionate adverse impact in many judgements[25] of the European Court of Justice on indirect sex discrimination, for example *Nimz v Freie und Hansestadt Hamburg*[26], *Enderby v Frenchay Health Authority and Secretary of State for Health*[27], and *Stapleton and Hill v Revenue Commissioners and Department of Finance*[28].

Indirect discrimination is not unlawful if objective justification can be established. One of the most frequently cited judgements in this context is *Bilka-Kaufhaus v Weber von Hartz*[29], in which the European Court of Justice stated (at paragraph 37) that objective justification will be established, in respect of measures resulting in indirect sex discrimination, if the measures chosen: 'correspond to a real need on the part of the undertaking, are appropriate to achieving the objectives pursued and are necessary to that end...'

Section 29(5) provides that indirect discrimination on the non-gender grounds occurs where a term of a contract of employment or a criterion:

* applies to all employees of a particular employer or to a particular class of such employees, including the claimant and comparator,
* is such that the remuneration of those who fulfil the term or criterion is different from that of those who do not,
* is such that the proportion of employees who can fulfil the term or criterion is substantially smaller in the case of employees having the same 'relevant characteristic'[30] (for example, the same marital or family status, the same ethnic origin) as the claimant when compared with the employees having the same relevant characteristic as the comparator, and
* cannot be justified as being reasonable in all the circumstances of the case.

In applying Section 29(4) it would appear that to establish disproportionate adverse impact a comparison of proportions in two groups is required: employees having the same relevant characteristic as the claimant and employees having the same relevant characteristic as the comparator. This diverges significantly from the approach outlined in respect of Section 19(4). Another very significant difference is the lower justification standard required by the non-gender provision, which follows from the fact that non-gender discrimination is not yet forged by European law as the gender area is.

Procedure

Two of the most significant changes from the earlier legislation relate to time limits and redress. Section 77(5) provides that complaints must be referred within six months of the discrimination or of the most recent occurrence of the discrimination. This applies to equal pay claims and diverges from the position under the 1974 Act in which there was no time limit in respect of such referrals. There is no provision for extending the time limit in exceptional circumstances to twelve months as is the case where discriminatory *treatment* is alleged[31].

A person who claims discrimination in respect of pay may seek redress by referring the case to the Director of Equality Investigations;[32] the office of the Director takes on many of the functions formerly carried out by the Equality Service of the Labour Relations Commission. One of the most innovative changes in the Act provides that if the discrimination claim arises under Part III of the Act, i.e. relates to gender (or a matter to which the Equal Pay Directive is relevant), the individual has the option of seeking redress from the Circuit Court instead.[33]

The decision of the Director may be appealed to the Labour Court within 42 days of the date of the decision.[34] A determination of the Labour Court may be appealed to the Circuit Court within 42 days of the date of the determination.[35]

A determination of the Labour Court or an appeal judgement of the Circuit Court may be appealed to the High Court on a point of law.[36]

Section 82 provides that the redress which may be provided by the Director or the Labour Court (on appeal) is arrears of remuneration for a period of up to three years prior to the date of referral and an order for equal remuneration from the date of referral. The redress which may be provided by the Circuit Court is arrears of remuneration for a period of up to six years prior to the date of referral and an order for equal remuneration from the date of referral.[37]

Conclusion

The above is a short summary of the most important provisions relating to pay discrimination in the 1998 Act. It would have been useful, particularly for gender-segregated employment sectors, if a provision permitting comparison with a hypothetical comparator had been included. Nonetheless the Act is a very significant piece of legislation which confers important new rights and obligations. The changes in respect of 'place' and associated employers, and the new provisions on indirect discrimination and direct access to the Circuit Court, are especially welcome. •

1. EEA 1998 s6(2)
2. *Specific Provisions as to Equality Between Wo and Men.*
3. *Specific Provisions as to Equality Between ot Categories of Persons.*
4. EEA 1998 s18(1)
5. EEA 1998 s28(1)
6. EEA 1998 s9(4)
7. EEA 1998 s2(1)
8. EEA 1998 s7(2)
9. EEA 1998 s2(3)(c)
10. EEA 1998 s19(2)(a)
11. Anti-Discrimination (Pay) Act, 1974, s3
12. EEA 1998 s7(1)(b)
13. EEA 1998 s7(1)(c)
14. *Murphy v An Bord Telecom* [1988] 1 CMLR 87
15. Case 129/79, [1980] ECR 1275.
16. [1998] 4 IR 250
17. EEA 1998 s19(2)(b)
18. EEA 1998 s29(2)
19. EEA 1998 s2(2)
20. Anti-Discrimination (Pay) Act, 1974, s2(1)
21. 'Red circling' refers to a rate of pay whic personal to the particular employee, see example *Central Bank of Ireland v One Fe Cleaner*, EP48/80
22. *Johnson and Johnson (Ireland) Ltd v Kershaw*, 11/1987
23. This is subject to section 12(3) which operate lower the age of 18 to 16 for the purpose section 12 dealing with vocational training.
24. Defined in section 2(1) of EEA 1998
25. It should be noted however that the Co recent judgement in *R v Secretary of State Employment, ex parte Seymour-Smith & P Case* C-167/97 [1999] IRLR 253 appear affirm a somewhat different approach, compatible with the provisions in section 29(
26. Case C-184/89 [1991] IRLR 222
27. Case C-127/92 [1993] IRLR 591
28. Case C-243/95 [1998 IRLR 466
29. Case C-170/84 [1986] IRLR 317
30. EEA 1998 s28(3)
31. EEA 1998 s 71(6)
32. EEA 1998 s77(1)
33. EEA 1998 s77(3)
34. EEA 1998 s83(1)
35. EEA 1998 s90(1)
36. EEA 1998 s90(3)
37. EEA 1998 s82(3)

DISABILITY DISCRIMINATION

Marcus Dowling BL queries whether the provisions of the Employment Equality Act, 1998 which are designed to prevent discrimination on the grounds of disability, will achieve their purpose.

The decision of the Supreme Court on the Article 26 reference of the Employment Equality Bill, 1996[1] and the manner in which the legislation was subsequently revised has left a situation where there is little certainty as to what, if any, substantive effect the Disability provisions of the Employment Equality Act, 1998 will have. Niall Crowley, Chief Executive Officer of the Equality Authority, has commented that[2]:-

> "The legislation has been criticised for its definition of disability. The definition ensures a very broad range of people are covered by the legislation....while the important principle of reasonable accommodation is established in the legislation the Supreme Court ruling saw this principle bounded by nominal cost outcomes....all of these issues have to be tested out in the practice of case law. We are challenged to achieve interpretations of these parts of the legislation and to bring the learning from this into the review of the legislation."

This represents an admission that, in the view of the Authority, the legislation is dependent upon judicial intervention to give it teeth or at least to indicate how it might be amended in a manner inoffensive to the private property provisions of the Constitution. This pessimism is, I would submit, well founded. The Act as it stands is incapable of attaining any measure of real equality for disabled persons in the workplace. Whether the revisions to the legislation which created this state of affairs were in fact a necessary corollary of the decision of the Supreme Court must be the central consideration in any reading of the Act.

The Nominal Cost Exception

Section 16 of the Act provides that persons who are not (or are no longer) "fully competent and available to undertake, and fully capable of undertaking, the duties attached to [their] position"[3] do not attract the protection of the legislation. The particular provisions of the section in relation to disabled persons are set out in Section 16(3) :-

> "(a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and be fully capable of undertaking, those duties.
> (b) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates.
> (c) *A refusal or failure to provide for special treatment or facilities to which paragraph (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer.* (emphasis supplied)"

The concept of "reasonable accommodation" is at the heart of disability discrimination legislation in the US, Australia and the United Kingdom.[4] The concept extends beyond the physical alteration of premises or the provision of special facilities to persons with disabilities. For example, under the US act it includes, inter alia, job restructuring, part-time or modified work schedules, appropriate adjustment or modifications of examinations, the provision of qualified readers or interpreters, "and other similar accommodations."[5] The phrase used in the Irish legislation, "special treatment or facilities", while not elaborated upon, is clearly capable of having a similarly wide ambit.

The Act as it stands is incapable of attaining any measure of real equality for disabled persons in the workplace. Whether the revisions to the legislation which created this state of affairs were in fact a necessary corollary of the decision of the Supreme Court must be the central consideration in any reading of the Act.

Section 16(3)(c) was introduced in the wake of the Supreme Court's finding that the original Section 16 as drafted was unconstitutional. It clearly entails that an employer can discriminate against a disabled employee where there is *any* increased cost associated with the fact of disability. The impregnability of this provision is copper-fastened by the use

of the phrases "fully competent and available" and "fully capable" in Section 16(1). The relevant US provision defines a qualified person (i.e. one who is protected by the act) as one who

> "with or without reasonable accommodation, can perform the essential functions of that employment position that such individual holds or desires."[6]

The requirement that the employee be fully rather than essentially capable of performing the work is significant insofar as it suggests that even minor accommodations such as small amounts of time taken off for rehabilitation or an inability to work a "full working day" (in the sense used by an able bodied person) fall into the category of special treatment or facilities and as such are subject to the nominal cost exception.

On even the most generous reading of Section 16 it is hard to see how a Judge dealing with the section in a test case could breathe any life into the provision. A "nominal cost" must be just that - to suggest that a significant cost could become nominal in circumstances where the employer involved is of vast means is to ignore the clear meaning of the section. The ultimate consequence of Section 16 is that the Act only prohibits disability discrimination where the disabled person is fully capable of performing a job without any accommodation which has financial implications for the employer, i.e. where the discrimination is because of the fact of disability rather than any consequence of it. In practice therefore disability discrimination under the act is treated in the same manner as discrimination on, e.g., the race ground or the ground of membership of the travelling community.

Significantly Increased Costs - Section 34(3)

A further restriction on the operation of the Disability Ground can be found in Section 34(3) which provides that nothing in the act shall

> "make unlawful discrimination on the age ground or the disability ground in circumstances where it is shown that there is clear actuarial or other evidence that significantly increased costs would result if the discrimination were not permitted in those circumstances."

This section must have a relatively narrow field of application insofar as most disabled persons will already have been excluded from the protection of the act by the restrictions contained in Section 16. A possible application of the section would be where a chronic type condition is revealed which does not interfere with the employee's current fitness for work but which may lead to a future inability to fully perform the duties associated with a position. The fact the section links the disability and age grounds supports this interpretation.

It is the context of this section that the wide definition of disability introduced by the Act has real significance. "Disability" is defined in Section 2 as

> "(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
> (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
> (c) the malfunction, malformation or disfigurement of a part of a person's body,
> (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
> (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,
>
> and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person."

Read together with this definition, Section 34(3) has significant implications for employers who learn that employees suffer from a condition which may limit the time frame during which they will be able to fully perform their duties. This information may come to light at routine work medical examinations, because of a disclosure by an employee or most significantly at a pre-employment medical examination or because of information disclosed on an application form.

If an employer discovers a disability at the stage of a pre-employment medical then the Act requires that the employer make an assessment of the additional costs, if any, which will be occasioned by employing the person. This is clearly a difficult calculation which will include factors such as the value which can be put on any training invested in the person or any disability benefits to which the person will be entitled under their contract if and when they do become disabled. The value which any employer can place on permanence, in the sense of an assumption that a young non-disabled person will remain in their employ for a considerable period of time, must be another difficult element in any analysis of what would constitute "substantially increased costs." The importance of an early test case dealing with this provision is clear. Given the provisions of Section 34(3) there is now a serious issue as to whether an employer can ask questions on an application form or at an interview regarding any disability which a person may have but which does not result in a current inability to perform the relevant work.

The requirement that the employee be fully rather than essentially capable of performing the work is significant insofar as it suggests that even minor accommodations such as small amounts of time taken off for rehabilitation or an inability to work a "full working day" (in the sense used by an able bodied person) fall into the category of special treatment or facilities and as such are subject to the nominal cost exception.

The Principle of Reasonable Accommodation

Despite the provisions of Section 16, the Act retains the principle that the employer shall do all that is reasonable to accommodate the needs of disabled persons. The requirement that there be a reasonable accommodation of disabled persons in itself stems from a fundamental principle of any equality provision, i.e. that true

equality cannot be delivered by treating equally things that are unequal. This is a key underlying concept in the European Court of Justice's jurisprudence in the area of gender discrimination. The reason why it is impermissible to compare a pregnant woman with a sick man for the purpose of determining whether sex discrimination has taken place is because true equality in those circumstances can only be obtained where the pregnant worker is treated differently, i.e. *where a reasonable accommodation is made for the fact of her pregnancy.* In the case of *Dekker v VJV Centrum*[7] the ECJ made it clear that the employer must bear the brunt of any increased costs associated with the fact of the employee's pregnancy :-

> "a refusal to employ because of the financial consequences of absence connected with pregnancy must be deemed to be based principally on the fact of the pregnancy. Such discrimination cannot be justified by the financial detriment in the case of recruitment of a pregnant woman suffered by the employer during her maternity leave."[8]

In the case of *Eldridge v British Colombia (Attorney General)*[9], the Canadian Supreme Court considered what was necessary to extend to deaf persons "equal benefit of the law without discrimination" within the meaning of Section 15(1) of the Canadian Charter of Rights and Freedoms. The Medicare system of British Columbia applied equally to deaf and hearing populations but deaf persons were required to pay for the "ancillary service" of sign language interpretation. In his judgment La Forest J addressed the reasons underlying the requirement that there be a reasonable accommodation of the needs of deaf persons:-

> "Exclusion from the 'mainstream' of society results from the construction of a society based solely on mainstream attributes to which disabled person will never be able to gain access...it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."

With regard to the limits of this principle La Forest J went on to state that :-

> "It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation extends only to the point of 'undue hardship'"[10]

The Decision of the Supreme Court on The Employment Equality Bill, 1996

Section 16 of the Employment Equality Bill, 1996 contained no provision equivalent to the "nominal cost" exception in the 1998 Act. The obligation to do all that is reasonable to accommodate the needs of the disabled person was subject to Section 35(4) which provided that the employer was not required to make such accommodation where the cost of doing so "would give rise to undue hardship to the employer." Without prejudice to the generality of subsection 4, subsection 5 set out matters to be taken into account when assessing whether undue hardship arose in a particular case. These matters were the nature and cost of the accommodation, the number of persons that would benefit from it, the financial circumstances of the employer, the disruption that would be caused by the accommodation and the nature of any benefit or detriment which would accrue by reason of the provision of the treatment or facilities.

The principal difficulty which the Court had with the original Section 16 was that it attempted to

> "transfer the cost of solving one of society's problems onto a particular group. The difficulty the Court finds with the section is not that it requires an employer to employ disabled people, but that it requires him to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work"[11]

The Chief Justice made three other distinct criticisms of the Bill: that it did not exempt small firms or firms with a small number of employees, that the wide definition of disability made it impossible to estimate the likely cost of the Bill in advance and that in seeking to escape liability on the "undue hardship" ground firms would be required to reveal details of their financial difficulties to third parties.

It is not clear that these criticisms necessarily entailed the ineffectual provision which was subsequently enacted. Why was a statutory scheme of partial or total financial assistance for accommodations not furnished? This would have dealt with the Court's central objection to the Bill. As to why this did not happen is of course primarily a political and economic issue however even without such a radical solution it could have been possible to enact specific provisions to deal with what the Court perceived as the arbitrary nature of the Bill. Exclusions could have been incorporated based on number of employees or the percentage of payroll required by a particular "reasonable accommodation." A limited provision confined to larger employers would have provided the statistical and other experience required to estimate the likely cost of a future all-inclusive Act. It is difficult to accept that the Supreme Court meant to imply that the principle of reasonable accommodation was fundamentally irreconcilable with the Constitution and I would submit that that conclusion need not inevitably have been drawn from the judgment. •

1. [1997] 2 IR 321
2. In an address to a European Policy Conference entitled "*New Perspectives: Disability and Employment*" held in Waterford on 18, 19 November, 1999
3. Employment Equality Act, 1998 S16(1)(b)
4. Amercians with Disabilities Act, 42 USC s 12111, Disability Discrimination Act 1992 (Australia), Disability Discrimination Act 1995 (United Kingdom)
5. 42 USC s 12111(9)
6. 42 USC s 12111(8)
7. *Case 177/88*, [1991] IRLR 27
8. at 29-30
9. [1997] 3 SCR 624
10. at 681
11. per Hamilton CJ at 367

COMPETITION LAW REFORM

Brian J. Cregan BL reviews the draft report of the Competition and Mergers Review Group which contains proposals for the reform of Irish Competition Law.

Introduction

This article seeks to review the draft report of the Competition and Mergers Review Group with a view to commenting on the conclusions and recommendations set out therein as they affect the Courts.

I intend to consider these reforms affecting the Courts under the headings of

(a) Criminal Proceedings.
(b) Civil Proceedings.
(c) Miscellaneous Points.

Criminal Proceedings

The recommendation of the Review Group in relation to criminal proceedings is as follows:

"The Review Group considers that breaches of the Competition Acts 1991/1996 should continue to be criminal offences and that the Director of Public Prosecutions should have available to him whatever resources and expertise are necessary for the efficient prosecution of such offences."

In my view this recommendation should be re-considered and Competition Act offences should be decriminalised immediately. Indeed they should never have been made criminal offences in the first place. I say this for the following reasons:

Firstly, it is wrong in principle to make offences such as these criminal offences. The criminalisation of Competition Law in Ireland is, as the Review Group pointed out, "*almost unique in the European Community*". Given that the Competition Act, 1991 was introduced, as was stated in its preamble, as an Act to prohibit by *analogy* with Articles 85 and 86 of the Treaty of Rome, etc., it is clear that Irish Competition Law is becoming increasingly separated and isolated from European Competition Law and indeed from the Competition Law regimes of other EU Member States. This is a public policy error.

Secondly, it is wasteful of resources. The recommendation that the DPP should have available to him whatever resources and expertise as are necessary for the efficient prosecution of such offences should be reconsidered. There are other priorities within society more important than the criminal enforcement of Competition Law.

Thirdly criminalisation of Competition Law is hindering and will continue to hinder attempts at civil enforcement of Competition Law. (For the reasons set out at pages 169 to 172 of the Review Group's draft report).

Fourthly, the Competition Authority is not sufficiently "*mature*" to handle prosecution of criminal offences. The Competition Authority went from having no teeth at all under the 1991 Act to having the teeth of a great white shark - without any teething process in-between. It would be more appropriate both for the Competition Authority, and for proper implementation of a competition enforcement regime, if the Competition Authority were given more time to digest and become accustomed to the significant powers it has in respect of civil enforcement. It should therefore not be permitted to have enforcement powers in respect of criminal offences.

Fifthly, in the past three years since the Competition (Amendment) Act, 1996 was passed there has been no prosecution either of a summary or an indictable offence under the 1996 Act. Clearly therefore there was no urgent need for these offences to be criminalised. There is no public outcry in respect of Competition Law offences.

Sixthly, the wording of the criminal law offences and defences is so absurd, byzantine and complex that it is difficult to understand them, let alone achieve a conviction under them (see Competition (Amendment) Act, 1996 Section 2 Sub-section 2(c)(iii) and also Section 2 Sub-Section 2, Sub-sub-section 3).

I would conclude therefore that the most important recommendation from this Review Group should be the de-criminalisation of competition offences. This would allow the Competition Authority, the Courts, lawyers and businesses to become more familiar, over a period of time, with the civil law wrongs and enforcement machinery. The criminalisation of Competition Law offences could then be re-considered in 10 to 20 years time after two more decades of experience.

Civil Proceedings

There are a number of recommendations in the report in respect of civil proceedings. These are as follows:

1. *Recommendation 14:* This recommendation is to the effect that any appeal from a decision of the Competition Authority to the High Court under Section 9 of the Competition Act, 1991 should be on a point of law only, save that findings of fact by the Competition Authority could be reversed by the High

Court if the High Court comes to the view that the Competition Authority was very clearly wrong.

Such a recommendation is correct and should be adopted into law.

2. *Recommendation 15:* The Review Group recommends that Section 9 of the Competition Act, 1991 should be amended to permit a party who applies for a licence under Section 4(2) or a certificate under Section 4(4) of the 1991 Act to appeal from such a decision.

This also is an overdue amendment and should be implemented.

3. *Recommendation 9:* The Review Group considered that the power to bring civil proceedings for breaches of the Competition Acts and the power to bring summary proceedings for offences under the Competition Acts currently vested in the Minister or the Authority should be vested in the Minister or the Director of Competition Enforcement. It recommended that before commencing any such proceedings the Director would be obliged to consult with the other members of the Competition Authority and to obtain their consent.

In my view this recommendation should not be followed. The Competition Authority should be one body - indivisible. It has, for reasons only known to the draftsman, been decided to create a separate Director of Enforcement. Now we see the beginnings of a turf war and jurisdictional battles between the Competition Authority and Director of Competition Enforcement. In my view the statutory recognition given to the Director of Competition Enforcement should be abolished. It should be a simple question of administrative delegation from the Competition Authority to its Head of Enforcement division to bring civil proceedings or to investigate issues as they arise.

Miscellaneous

The issue of Treble Damages

At page 166 of its draft report the Review Group considers and rejects the concept of treble damages.

In the United States both the Sherman Act and the Clayton Act provided that any private person injured in his business or property by reason of anything forbidden in the anti-trust laws could recover threefold the sustained damages by him.

However I would contend that the permissibility of treble damages is the best way forward for the enforcement of Competition Law. It is a far more focused and sharper weapon than the blunt club of criminal sanctions. It is also less wasteful of human resources.

The supposed justification put forward by the Review Group that a consistent feature of our legal system is that damages could be compensatory only, is not convincing. There are certain cases where there can be exemplary or punitive damages.

It seems to be illogical and self-contradictory for the Review Group to continue to argue for the maintenance of criminal sanctions whilst at the same time not to argue for treble damages on the grounds that damages should be compensatory only.

The Issue of Injunctions

One of the omissions in the review group recommendations is a consideration of the issues brought out in the *Competition Authority v Avonmore Waterford Group Plc and Athboy Co-operative Creamery Ltd* (unreported, High Court 17 November 1998) case.

In this case the Competition Authority brought an application for an interlocutory injunction to prevent a merger between Avonmore Waterford Plc and Athboy Co-op. The High Court (O'Sullivan J.) declined to grant an injunction in this case. He stated that there was a serious issue to be tried (i.e., the question of whether the merger infringed Section 4 or Section 5 of the Competition Act 1991), that damages were not an adequate remedy for the defendants, particularly Athboy Co-op and that therefore the balance of convenience was in favour of not granting the relief sought. However one of the issues which emerged in that case was that the defendants argued strongly that the Competition Authority should give the normal undertaking in damages should they obtain the injunction and lose the plenary proceedings. The Competition Authority was unable and unwilling to give such an undertaking. The Court side-stepped this issue in view of the fact that no injunction was granted.

This clearly is a very significant issue which needs to be considered in any reform of Competition Law.

If the Competition Authority wishes to institute injunction proceedings then it must have statutory authority to give an undertaking as to damages (with all the financial consequences which might ensue if the Authority loses its case) or have a statutory exemption from the requirement to give an undertaking as to damages.

The Administration of Competition Law Actions

The Competition Review Group at page 165 considered whether Competition Act cases should be assigned to a number of specialist High Court Judges.

It stated that it was of the view that it would be preferable, where possible, that such cases be determined from a judge drawn from a small panel of High Court Judges nominated for this purpose by the President of the High Court. The recommendation is very sensible.

The Review Group should take this opportunity of also incorporating into its draft report a number of other administrative improvements which could be made in the running of competition cases. These are:

1. Case management by judges.

2. The exchange of expert economist reports.

Conclusion

What is needed in respect of a review of competition legislation is to pare back to the essentials rather than to add more carbuncles onto what is quickly becoming the unrecognisable face of an old friend. The competition law offences should be decriminalised and the position of the Director of Competition Enforcement should not be given specific statutory recognition or powers. The structure needs to be simplified, not made more complex and unwieldy. •

EQUALITY CONFERENCE

The Irish Council for Civil Liberties held a very successful conference on the new regime for equality under the Employment Equality Act, 1998 and the Equal Status Bill, 1999. There were almost forty speakers participating in the various workshops and plenary sessions of the conference which was attended by two-hundred people. Donncha O'Conaill BL provides a synopsis of the major themes addressed by various speakers and participants and a flavour of some of the issues which arose in the workshops.

Constitutional limitations

One of the recurring themes in the papers presented by various speakers at the conference was that the current judicial interpretation of Article 40.1 of the Constitution placed inherent limitations on any legislative attempt to enact meaningful equality legislation. The decision of the Supreme Court in the Article 26 referral of the original bills was viewed as a serious impediment particularly if a provision for equality impacted in any way on an employer's or service provider's private property rights.

The Employment Equality Act, 1998 and the Equal Status Bill, 1999 were viewed as unambitious in their aims and not particularly successful in achieving those aims. Having said that, there was an undoubted sense that both pieces of legislation were a considerable improvement on the pre-existing statutory code for equality in employment.

There was strong support for a constitutional amendment which would attach greater centrality to the right to equality and for further amendments in the area of social and economic rights. In the absence of such amendments it was felt that the possibility of achieving a measure of transformative or redistributive equality, as opposed to formal or juridical equality, through the law was greatly diminished.

Disability

Given that the disability provisions of the original Employment Equality Bill had been found to be unconstitutional in the Article 26 referral of the Bill, it was not surprising that the strongest demand for constitutional reform came from participants in the disability workshop. While the need for comprehensive disability discrimination legislation was undisputed there was a discernible frustration about the near futility of such a project in the absence of constitutional reform. There was also a degree of criticism about the tendency of the legislation to occasionally foster negative stereotypes of disability which, ultimately, would lead to the perpetuation of disability discrimination.

Sexual Orientation

Although the new equality code prohibits discrimination based on sexual orientation it was felt that, on the marital status ground, only indirect discrimination claims could be brought by gays and lesbians in living situations akin to marital family situations. As indirect discrimination is more difficult to establish under the new legislation it was felt that this area required further amendment. Notwithstanding these reservations it was acknowledged that the legal position of gays and lesbians was otherwise greatly enhanced by the new legislation.

Travellers

Certain provisions of the Equal Status Bill, 1999 came in for severe criticism in the workshop on the Traveller Community. In particular, Section 15 was criticised for institutionalising discrimination in the provision of important services. Notwithstanding Article 13 of the Amsterdam Treaty, there was a degree of scepticism expressed about the usefulness of EC law in dealing with problems of ethnicity.

Religion

Even though the section of the Employment Equality Act, 1998 dealing with religious discrimination was upheld by the Supreme Court in the Article 26 referral of the Bill, it was felt that there was still scope for litigation on the manner in which those provisions were implemented. The problem with such test-case would be the difficulty of finding litigants willing to embark on a repeat Eileen Flynn scenario, however heroic such involvement might be.

Age

The workshop on Age Discrimination was very well attended and a general concern was expressed about the non-explicit inclusion of state or public services in the definition of services for the purposes of the Equal Status Bill, 1999. This could have a particularly adverse impact on the elderly given their dependence on the state sector for many essential services. This debate dove-tailed with discussions in the Disability workshop on the same topic. It was felt that the exclusion of the state sector could prove to be particularly harsh for people with disabilities seeking reasonable accommodation because the nominal costs criterion could not be invoked by the state to the same extent as it could by a private employer or service provider. •

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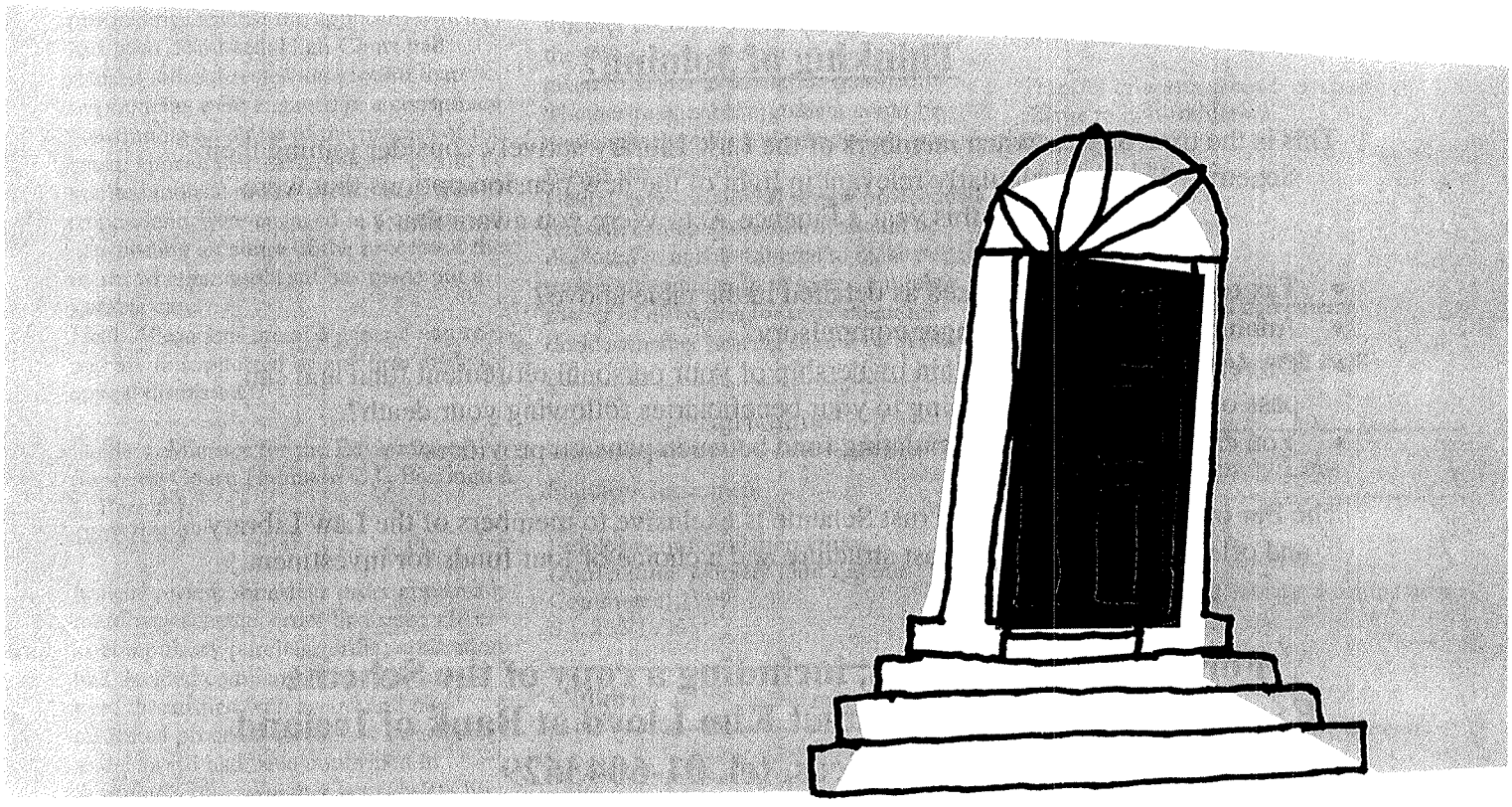

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Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 5, Issue 3

A directory of legislation, articles and written judgments from the 21st October to the 17th November 1999.
Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative

Bolger v. O'Toole
Supreme Court: Hamilton C.J., Barrington J., Keane J., Murphy J., Lynch J.
(extempore)
08/07/1999

Judicial review; extradition; High Court had granted judicial review to applicants on grounds that proceedings were res judicata and that extradition proceedings were a repetition of extradition proceedings against the applicant which had been dismissed; High Court had refused judicial review on ground that respondents were engaged in a conspiracy constituting an abuse of the process of the court; appeal; whether applicant should be granted judicial review on the basis that respondents were engaged in a conspiracy constituting an abuse of the process of the court; whether applicant has made out a statable case.
Held: Allegations are of a general nature and are unsupported by any firm evidence; appeal dismissed.

Doyle v. Minister for the Environment
Supreme Court: Hamilton C.J., Barrington J., Barron J.
18/05/1999

Judicial review; minister's order approving motorway scheme; order had same effect as compulsory purchase order; arbitration had decided compensation; applicants were dissatisfied with award and had instituted proceedings to have award set aside; award had been confirmed in Supreme Court; whether appropriate for court now to rule on validity of minister's original order; whether party having acted on basis that order was valid can now impugn it.
Held: Time to impugn order was when notice to treat was served; not having done so, applicants cannot now reopen the matter.

Murphy v. The Hon. Mr. Justice Flood, Sole Member of the Tribunal of Inquiry into Certain Planning Matters
High Court: Geoghegan J.
30/04/1999

Judicial review; certiorari; declaratory relief; leave to institute judicial review proceedings; whether decision of respondent to admit affidavit into evidence should be quashed; whether contents of affidavit relate to the terms of reference; whether decision of respondent allowing the public to be present when evidence given to Tribunal should be quashed; whether reasonable argument could be made that the ruling of respondent was wholly unreasonable.
Held: Leave for judicial review proceedings refused; contents of affidavit should be disclosed to enable tribunal to make a proper determination of issues; entirely a matter of discretion for respondent to decide whether hearing should be in public.

Agriculture

Statutory Instrument

Employment Regulation Order (Agricultural Workers Joint Labour Committee),1999
S.I. 255/1999

Children

Article

Child pornography and the internet - freedom of expression versus protecting the common good
Horgan, Rosemary
1999 (3) IJFL 7

Civil Liberties

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Clements, Luke J
European human rights: taking a case under the convention
2nd ed
London Sweet and Maxwell 1999
C200

Commercial Law

Article

Transfer of assets abroad: extension of charge to non-tranferors
Ward, Prof John
12 (1999) ITR 391

Library Acquisition

Christou, Richard
Drafting commercial agreements
2nd ed
London Sweet and Maxwell 1998
N250

Company Law

Articles

Corporate criminal liability: a comparative analysis - Part 1
Friel, Raymond J
1999 CLP 191

Irish non resident companies - the end?
Kilcullen, John
12 (1999) ITR 385

Ultra vires or directors' abuses: when can shareholders right a wrong?
Meade, John
1999 CLP 198

Variation of default rule governing equal sharing of profits
Yeo, Hwee-Ying
1999 CLP 203

Withholding tax on dividends
Gilmore-Gavin, John
12 (1999) ITR 361

Library Acquisition

Forde, Michael
Company law
3rd ed
Dublin Round Hall Sweet and Maxwell
1999
N261.C5

Maloney, Michael
The law of meetings
Dublin Round Hall Sweet and Maxwell
1999
N263.9.C5

Constitutional Law

Bolger v. Commissioner of An Garda Siochána
Supreme Court: Hamilton C.J., Barrington J., Keane J., Murphy J., Lynch J. (ex tempore)
08/07/1999

Habeas corpus; extradition; bail; appellant had been arrested on foot of extradition warrant; extradition proceedings adjourned to allow for application for order under Art. 40.4 of the Constitution; relief refused by the High Court since valid certificate for his detention existed; appellant admitted to bail pending determination of extradition proceedings; appellant appealed High Court decision that detention was valid; Supreme Court dismissed appeal and affirmed the High Court order; appellant brought motion for his release and the discharge of his bail; High Court struck out appellant's motion; appeal brought to Supreme Court; whether Art. 40 proceedings were conclusively ended on the Supreme Court's dismissal of the first appeal; whether fresh application under Art. 40 could be brought if the detention became unlawful for reasons other than those dealt with before the Supreme Court on the first appeal.
Held: Appeals are an attempt to revive proceedings which have been spent; appeal dismissed.

Article

Inquiries: the rights of individuals, privacy and confidentiality, reform and the law of tribunals
Brady, Rory
4(9) 1999 BR 443

Tribunals and the erosion of the right to privacy
Gallagher, Paul
4(9) 1999 BR 406

Contract

Bolger v. Osborne
High Court: Macken J.
06/08/1999

Contract; administrative; damages; stewards' enquiry by defendants into running of horse trained by plaintiff; fine imposed on plaintiff on basis that horse did not run on its merits; appeal to Appeal Board of fifth named defendant pursuant to the Rules of the Turf Club; appeal unsuccessful; no reasons given for decision; decision of Appeal Board appealed to High Court by plenary summons; judicial review of defendants' decision not sought; whether, in proceedings which are not judicial review proceedings, plaintiff is entitled to declaration that decision of defendants was made without evidence, was contrary to constitutional justice, was ultra vires, void and of no effect; whether there must be fault alleged by defendants on part of plaintiff; whether plaintiff is vicariously or strictly liable for failure of horse to run on its merits; whether Rules of the Turf Club are to be interpreted like a contract and any ambiguity construed against defendant and in favour of plaintiff; whether plaintiff entitled to order quashing defendants' decision imposing a fine; whether plaintiff entitled to special damages.
Held: Rule is not one of strict or vicarious liability; no evidence of fault on part of plaintiff; finding of fault on part of plaintiff was breach of contract, wholly irrational and, in the absence of facts or matters disclosed to the plaintiff as to allegation he was required to meet, was in breach of his constitutional right to fair and proper hearing; relief granted; special damages awarded.

Fitzsimons v. O'Hanlon
High Court: Budd J.
29/06/1999

Mutual mistake; settlement; plaintiffs were relatives of a deceased intestate; defendants had applied for a declaration that they were the non-marital children of the deceased; plaintiffs had opposed the application; in consideration of withdrawal of this opposition, defendants had agreed to pay a specified sum of money to the plaintiffs, being approximately half of the known value of the deceased's estate; declaration of paternity made by Circuit Court; subsequently a deposit account belonging to the deceased containing nearly £59,000 was discovered; plaintiffs seeking a share of this money; whether the settlement had been entered into on the basis of a mutual mistake going to the root of the contract; whether contract void.
Held: The settlement would not be interfered with; defendants entitled to balance of estate.

Article

Express terms in employment contracts
Chandran, Ravi
1999 CLP 215

Copyright, Patents & Designs

Article

An overview of the draft copyright and related rights bill 1998 as it applies to software owners
Carey, Louise
1999 3(1) IIPR 38

International exhaustion of copyright: lurking in the wings?
Ni Suilleabhain, Maire
1999 3(1) IIPR 31

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3rd ed
London Sweet & Maxwell 1999
N114.1

Russell-Clarke, A D
Russell-Clarke on industrial designs
6th ed
London Sweet and Maxwell
N114

Williams, Alan
Digital media: contracts, rights and licensing
2nd ed
London Sweet & Maxwell 1998
Sample clauses and precedents available on disk at Information desk
N112.10

Criminal Law

D.P.P. v. Judge Windle
High Court: Mc Cracken J.
23/07/1999

Criminal; practice and procedure; preliminary examination; first named respondent ruled search warrant invalid and refused to send second named respondent forward for trial; applicant seeking order of certiorari; whether judge has power or jurisdiction to make ruling; whether respondents prejudiced by delay in issuing proceedings.
Held: Once in existence, the question of the validity of the search warrant is one for trial not preliminary investigation; order of respondent set aside

Stewart v. Judge Patwell
High Court: Carroll J. (counsel's note)
04/06/1999

Criminal; practice and procedure; judicial review; certiorari; applicant convicted and sentenced in his absence; whether the exercise of jurisdiction by first named respondent could be affected by agreement between Garda and applicant (and/or any person acting on his behalf) to apply to have hearing adjourned; whether first named respondent failed to take into account the impact of the conviction upon applicant's livelihood; O. 23, r. 2, District Court Rules, 1997.
Held: Relief refused; applicant aware of the risk that, in the absence of any appearance by him, application for adjournment might be refused; court had all relevant facts before it; first named respondent took into account the impact of conviction and sentence upon applicant and therefore acted fairly

Articles

Child pornography and the internet - freedom of expression versus protecting the common good
Horgan, Rosemary
1999 (3) IJFL 7

The proceeds of crime act, 1996: review of the past 12 months
McDermott, Paul Anthony
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Damages

Murphy v. The Minister For Defence
Supreme Court: Hamilton C.J., Lynch J., Barron J.
19/07/1999

Damages; reaffirmation of the principles enunciated in Reddy v. Bates [1983] IR 141.
Held: Plaintiff must prove his case which includes establishing his loss; is not until these determinations have been made that the application of actuarial evidence becomes appropriate; there is no relationship between the implementation of the principles of Reddy v. Bates [1983] IR 141 and the admission of actuarial evidence.

Defence Forces

Farrell v. Minister for Defence
High Court: O'Donovan J.
16/07/1999

Army deafness; Green Book; personal injury; negligence; plaintiff claims to be suffering from noise induced hearing loss and tinnitus; whether Green Book formula for assessing hearing loss to be applied in the assessment of damages in the case of a soldier suffering from high frequency hearing loss; whether failure to attend a primary care physician for advice regarding tinnitus prior to the institution of proceedings as required by the Green Book disentitles the plaintiff from relief; whether damages fall to be assessed in accordance with the principles for the assessment of damages which existed prior to the introduction of the Green Book; Civil Liability (Assessment of Hearing Injury) Act, 1998.
Held: Damages assessed in accordance with the principles for the assessment of damages which existed prior to the introduction of the Green Book.

Employment

Carr v. Minister for Education and Science
High Court: Morris P.
25/08/1999

Judicial review; employment; secondary school principal; attempted termination of applicant's employment by respondent; applicant refused to accept respondent's correspondence in this regard; respondent informed applicant in writing that by refusing to enter into discussion she had misconducted herself; disciplinary action; suspension of salary; whether respondent is entitled to suspend payment of applicant's salary pursuant to s.7, Vocational Education (Amendment) Act, 1944 where no enquiry is being held into a breach of discipline; whether applicant's conduct in refusing to negotiate with respondent disentitles her from relief.
Held: Respondent was not entitled to suspend payment of applicant's salary; damages for loss of salary granted.

Cassidy v. Shannon Castle Banquets and Heritage Limited
High Court: Budd J.
30/07/1999

Employment; dismissal; administrative; natural justice; audi alteram partem; nemo iudex in causa sua; allegation of unwanted sexual advances by plaintiff made by fellow employee of plaintiff in defendant company; investigation; plaintiff dismissed on grounds of gross misconduct; plaintiff seeks order that purported dismissal was in breach of natural and constitutional justice and was invalid; whether plaintiff was entitled to be furnished with copy of complainant's statement and medical report; whether an adequate opportunity was given to the plaintiff to be heard; whether role of plaintiff's solicitor was nullified by denying her the complainant's statement and an opportunity to make representations and submissions; whether general manager of defendant company acted as judge in his own cause.
Held: The conduct of the investigation by defendant did not comply with the requirements of natural justice; declaration granted.

Martin v. Nationwide Building Society
High Court: Macken J.
18/05/1999

Suspension; misconduct; delay; interlocutory application; plaintiff was manager of one of defendant's branch offices; allegation that plaintiff continued to be involved in an auctioneering business; defendant caused plaintiff to be suspended with full pay; plaintiff was informed that suspension was intended to be for five days; suspension persisted for some months; whether plaintiff was entitled to be reinstated pending completion of disciplinary process.
Held: Delay was inordinate and unjust; if suspension were not set aside plaintiff would suffer irreparable loss and defendant would not; application granted.

Article

Express terms in employment contracts
Chandran, Ravi
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Environmental Law

Eastern Health Board v. Cumann Luithchleas Gaedheal Teoranta
Supreme Court: Barrington J., Keane J., Barron J.
07/07/1999

Environmental; food hygiene; whether appellant is proprietor of a food business; Art. 25, Food Hygiene Regulations, 1950 [S.I. 205/1950]; s.54, Health Act, 1947, as amended by S.I. 333/1991.
Held: Appellant is not proprietor of a food business.

Article

The new environment for offshore planning
Maxwell, Aaron
12 (1999) ITR 375

European Union

Article

Interpreting EC tax law
MacLeod, Professor James S
12 (1999) ITR 398

Evidence

D.P.P. v. Finnerty
Supreme Court: Hamilton C.J., Denham J., Barrington J., Keane J., Murphy J.
17/06/1999

Evidence; right to silence; Judges' Rules; applicant refused to answer questions while in garda custody; applicant was cross-examined about refusal to answer questions; applicant convicted on one count of rape in Central Criminal Court; leave to appeal refused by trial judge, refusal of leave to appeal appealed to Court of Criminal Appeal; appeal dismissed; appeal to Supreme Court pursuant to certificate granted by Court of Criminal Appeal under s.29, Courts of Justice Act, 1924; whether accused has right to refuse to answer questions put to him by gardaØ while detained in garda custody pursuant to s.4, Criminal Justice Act, 1984; whether, despite absence of express provision in the Act of 1984, a jury can be invited to draw adverse inferences from applicant's failure to reply to garda questions; whether right to remain silent is a constitutional right; whether cross-examination of applicant as to his refusal during the course of his detention to answer questions is permissible; whether trial judge in his charge to the jury should refrain from making reference to the fact that defendant refused to answer questions in the course of his detention; whether verdict of jury in trial of the action is safe and satisfactory.
Held: Appeal allowed; conviction reversed; retrial ordered.

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Family Law

Cronin v. Murray
High Court: Macken J.
17/12/1998

Adoption; discovery; negligence and breach of statutory duty alleged against second named defendant Health Board in failing to ensure first defendant suitable person to become foster parent; An Board Uchtala, "Adoption Board", had made assessments of first named defendant in relation to possible adoption of other children; motion for non-party discovery by Health Board against Adoption Board; whether Adoption Board documents relevant; whether s. 8 Adoption Act, 1976, prohibits discovery; meaning of "child concerned".
Held: Adoption Board documents not relevant; in any event, discovery application rejected by virtue of provisions of s. 8; documents on Adoption Board files free from discovery unless in best interest of children concerned; "child concerned" is child concerned with documents sought to be discovered.

M. v. D.
High Court: McGuinness J.
(ex tempore)
20/01/1999

Child abduction; Hague Convention; children removed from England to Ireland by their grandparents; application brought by mother; mother suffered from alcoholism; children had at various times been cared for by their grandparents and aunt; whether Court could have regard to social welfare reports; whether there had been a wrongful removal of the children; whether mother had acquiesced in the grandparents taking the children to Ireland; whether there was a grave risk that the children's return would expose them to physical or psychological harm or would place them in an intolerable situation; whether it would be wrong to rely entirely on the child's objections to being returned in absence of other defences; Child Abduction and Enforcement of Custody Orders Act, 1991; Art.13, Hague Convention.
Held: Court could have regard to social welfare report under Art.13; it would be wrong to rely entirely on the objections of the child; there had been a wrongful removal of the children from England; mother had not acquiesced; real risk of physical or psychological harm existed and return would place them in an intolerable situation; application refused.

Ó'S v. A
High Court: Mc Guinness J.
20/04/1999

Guardianship; custody; plaintiff father seeking sole custody; in her defence and counterclaim mother seeking sole custody; 'welfare' of infant; whether joint custody feasible in light of acrimonious relationship between parties; Guardianship of Infants Act, 1964.
Held: 'Welfare' of infant best served by granting joint custody; danger of sole custody adding to hostility.

Articles

Appropriation as a means of satisfying the legal right share?
McDonald, Simon
1999 CPLJI 62

Pensions and family law: practical solutions to common problems
McCarthy, John D
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S.I. 265/1999

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Housing

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The housing (traveller accommodation) act 1998: an overview
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Human Rights

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Kelleher, Denis
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Protective legal steps to combat the year 2000 problem
Murray, Karen
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Telecom children
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12 (1999) ITR 368

The millennium bug: causes of action and legal remedies
Ferriter, Cian
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International Law

Air Crash in the Florida Everglades on May 11, 1996 v. Valujet Airlines Inc.
High Court: McCracken J.
01/07/1999

Testimony; examination of witness in connection with a civil action before a foreign court; relatives of victims of air crash had commenced an action seeking damages in the United States against the owners and operators of the aircraft that crashed and others, including the applicant, an aircraft maintenance company that had removed oxygen generators from other aircraft belonging to the owners and had loaded them onto the aircraft that crashed; High Court had made an order ex parte requiring records custodian of Shannon Aerospace Ltd to give evidence on oath and to produce all documents in his power or procurement relevant to the removal, replacement and disposal by Shannon Aerospace Ltd of oxygen generators from an aircraft belonging to the owners; records custodian, having worked on the aircraft had not worked on or supervised work on the aircraft in question and had no oral evidence to give; whether request in reality a request for discovery of documents or a request that the records custodian produce documents ancillary to his oral testimony; whether order requiring him to give testimony could be set aside; s.1, Foreign Tribunals Evidence Act, 1856.
Held: Court has no power under s.1 to order discovery of documents; real basis for seeking the evidence in question was to obtain the equivalent of discovery; order set aside.

Bio-Medical Research Ltd. v. Delatex S.A.
High Court: McCracken J.
06/05/1999

Brussels Convention; jurisdiction; exclusive distribution contract; plaintiff sought declaration that agreement with defendant

terminated; defendant challenged jurisdiction of Irish courts; whether obligation the subject of the litigation was to be performed in Ireland; Art.5, Brussels Convention.
Held: Any obligation was to be performed in France; jurisdiction declined.

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Judicial Review

Article

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Medical Law

Buckley v. Governors of National Maternity Hospital Dublin
High Court: Smith J.
21/12/1998

Medical; negligence; delay; whether defendants, their servants and agents were negligent in the manner in which they carried out postnatal examination of plaintiff; whether exceptional and inexcusable delay in bringing proceedings.
Held: Claim dismissed; postnatal examination performed in a manner that conformed to the recognized contemporary standard of the medical profession; defendants cannot reasonably be expected to defend claim where records have been destroyed.

Pensions

Article

Pensions and family law: practical solutions to common problems
McCarthy, John D
1999 (August) IJFL 2

Planning

Cork County Council v. C. B. Readymix Ltd
High Court: McGuinness J.
15/06/1999

Unauthorised works; planning application; reinstatement order; contempt; sand and gravel quarry operated by various companies controlled by members of a family; lands were to be reinstated and landscaped on expiry of planning permission; quarrying continued after expiry; High Court had prohibited further works and ordered that the land be reinstated and landscaped; works still continued; attachment and committal proceedings against two members of the family resulted in their agreement to cease quarrying pending a decision on an application for planning permission and to reinstate and landscape the lands if permission should be refused; quarrying nevertheless continued; an application for planning permission was made in the name of one of the family's companies, then in liquidation; the County Council was dissatisfied with the response of the family members to its inquiries and re-entered the original proceedings; whether proper planning application had been made; whether orders could be made against family members not party to the original proceedings.
Held: No proper planning application had been made; order to reinstate land made against several family members.

Goonery v. Meath County Council
High Court: Kelly J. (ex tempore)
15/07/1999

Practice and procedure; judicial review; planning permission; planning permission granted by respondent for cement and quarry works adjacent to applicant's home; application had been brought for leave to apply for judicial review of decision of authority on grounds inter alia of failure to have adequate regard to Environmental Impact Statement and of impossibility under implementing legislation of complying with mandatory requirements of Community law; application had been brought ex parte; leave had been granted by the High Court; applicant now seeking leave to apply for judicial review by way of motion; whether it was permissible for High Court to have granted leave ex parte; whether order of the High Court should be set aside; whether validity of planning permission had been called into question by grounds relied upon before High Court; whether application should have been brought on notice; whether order of High Court severable; ss.26 and 82, Local Government (Planning and Development) Act, 1963.
Held: Validity of planning permission had been brought into question; s.26 requires application to be brought on notice; reliefs not severable; order of High Court set aside.

Kildare County Council v. Goode
Supreme Court: Hamilton C.J., Barrington J., Keane J., Lynch J., Barron J.
18/05/1999

Planning; works; intensification of use; abandonment of use; requirement to obtain planning permission; appeal from High Court decision to restrain appellant's use of lands for the purposes of a sand and gravel pit; whether operation of gravel pit constitutes development commenced before the appointed day within the meaning of s.24(1), Local Government (Planning and Development) Act, 1963; whether operation of gravel pit on appellants' land constitutes an intensification of use of the lands compared to their use prior to the appointed day; whether use of the lands had been abandoned; whether respondents' failure to bring proceedings within the five year time limit precludes them from relief; s.27, Local Government (Planning and Development) Act, 1976.
Held: The works constitute an intensification of use of the lands; planning permission required; appeal dismissed.

Ó Nualláin v. Dublin Corporation
High Court: Smyth J.
02/07/1999

Planning; applicant unsuccessful competitor in millennium monument architectural competition; applicant seeks judicial review of award of competition; whether there are illegalities associated with the architectural competition; whether the height of the proposed new monument, where it is required to relate to the buildings on the street, must be similar to the height of the said buildings; whether the question of scale is a mandatory provision in the competition rules; whether there is non-compliance with Articles 132(1)-(3) of the Local Government (Planning and Developments) Regulations, 1994 (S.I. 86/1994); whether decision to proceed under either Part IX or X of the 1994 Regulations was the subject of a considered position by a properly delegated officer of Respondent with powers to make such a decision; whether Respondent was obliged to carry out an Environmental Impact Statement in accordance with Council Directive 85/337-EEC; whether applicant acquiesced in the course being taken by Respondent; whether the application was brought in time.
Held: Non-compliance with Article 132(2) of the 1994 Regulations is not of a

peripheral or technical nature such as can be excused; no decision was taken as to which Part of the 1994 Regulations should apply; decision-makers are obliged to carry out an Environmental Impact Statement in accordance with the Directive if a particular project is likely to have significant effects on the environment by reason of its nature, size and location, notwithstanding that it falls below the threshold set out in the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. 349/1989).

Article

The new environment for offshore planning
Maxwell, Aaron
12 (1999) ITR 375

Practice & Procedure

Cooney v. Ireland
Supreme Court: Barrington J., Keane J., Murphy J. (ex tempore)
11/10/1999

Practice and procedure; res judicata; plaintiff had applied for judicial review; High Court had ruled that proceedings were out of time; plaintiff did not appeal; plaintiff raised same dispute with same parties and same issues by way of plenary summons; High Court struck out proceedings as res judicata and as an abuse of the process of the court; appeal; whether matter is res judicata by reason of the unappealed judgment of the High Court; whether the court has jurisdiction to entertain the appeal.
Held: Appeal dismissed.

Criminal Assets Bureau v. Kelly
High Court: O'Higgins J
04/06/1999

Summary judgment; whether defendant has real or bona fide defence; whether very presence of factual dispute precludes summary judgment; whether arguable defence in law; whether s. 933(6) (a) and (b) of the Taxes Consolidation Act, 1997 constitutional.
Held: Matter remitted for plenary hearing; court can deal with factual issues summarily; constitutionality of s. 9333(a) and (b) upheld; however defendant raised fair point for argument.

Jacksonway Properties Ltd v. Minister for the Environment and Local Government
High Court: Geoghegan J.
20/05/1999

Practice and procedure; amendment of pleadings; application on notice for leave to seek judicial review in respect of order modifying motorway scheme; applicant had intended to challenge scheme itself; counsel for applicant mistakenly thought that approval of scheme by Minister had been given under s.51, Roads Act, 1993, but approval of scheme was in fact given under s.49; approval under s.51 had been in respect of a proposed development in the light of an environmental impact statement; whether leave should be granted to amend pleadings to include reference to s.49; whether it was clear from the pleadings that there was an error that should have been noticed by counsel for the respondents and notice party (the relevant local authority) whether alteration of pleadings would require order extending time.
Held: Leave to amend pleadings granted; extension of time granted.

Leinster Leader Ltd v. Williams Group Tullamore Ltd
High Court: Macken J.
09/07/1999

Practice and procedure; interlocutory applications; motion to strike out proceedings; frivolous or vexatious proceedings; plaintiff seeking declaratory relief in respect of alleged oral misrepresentations; defendants seeking to have proceedings struck out on basis of either O.19 r.28, Rules of the Superior Courts or the Court's inherent jurisdiction.
Held: Relief refused.

Article

The implied undertaking on discovery
O'Neill, David
4(9) 1999 BR 431

Practice and procedure
Power, Conor
1999 (3) IJFL13

Statutory Instrument

Rules of the Superior Courts (No.2) (Discovery), 1999
S.I. 233/1999

Prisons

Statutory Instrument

Prisons Act, 1970 (Section 7) Order,1999
S.I. 219/1999

Property

Tesco Ireland Ltd v. McGrath
High Court: Morris P.
14/06/1999

Rescission; requisitions on title; reviewable disposition; vendor and purchaser summons; plaintiff purchaser and defendant vendor entered into a contract for the purchase and sale of land; defendant became aware of marital difficulties between plaintiff and his wife; plaintiff raised requisition seeking confirmation that the agreement was not a disposition for the purpose of defeating a claim for financial relief under the Family Law legislation; defendant offered a statutory declaration that no proceedings had been instituted or threatened in relation to the property under this legislation; plaintiff required a sight of the proceedings, pleadings and court order in relation to the proceedings between the defendant and his wife; defendant refused on the ground that the proceedings were in camera; defendant purported to rescind contract on five days' notice under Condition 18 of the Law Society's General Conditions of Sale; whether statutory declaration offered by defendant was adequate to ensure plaintiff would be a person acting in good faith without notice of a claim for relief under the Family Law Act, 1995; whether defendant should furnish plaintiff with copies of any claims, pleadings and orders made in proceedings between him and his wife; whether statutory declaration was adequate to satisfy plaintiff that assurance of the property not a reviewable disposition within the meaning of s.35(1) of the Family Law Act, 1995; whether defendant was entitled to rescind the contract; whether the contract had been validly rescinded; s.29, Judicial Separation and Family Reform Act, 1989; Family Law (Divorce) Act, 1996.
Held: Statutory declaration inadequate; defendant not free to furnish requested proceedings, pleadings and orders; contract validly rescinded.

Articles

Appropriation as a means of satisfying the legal right share?
McDonald, Simon
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Rateable occupation
Byrne, Deirdre
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Tolerated trespass examined: Burrows v. London Borough of Brent
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Road Traffic

D.P.P. v. Croom-Carroll
Supreme Court: Barrington J., Lynch J., Barron J.
24/06/1999

Road traffic; case stated in High Court; interpretation of s. 18(1) Road Traffic Act, 1994; specimen of blood to determine concentration of alcohol in blood; whether "container" referred to in s. 18(1) refers to the glass bottle in which specimen held; whether "container" refers to box into which the glass bottle containing specimen is placed; whether box can be "container" for one purpose and glass bottle "container" for different purpose; whether defendant prejudiced by allowing counsel to put forward different interpretation of "container" to that put forward in court below; s. 18(1) Road Traffic Act, 1994.
Held: "Container" refers to box into which the glass bottle containing specimen is placed; however requirements of Act not complied with; therefore defendant not prejudiced by allowing counsel to put forward different interpretation of "container".

D.P.P. v. Lennon
Supreme Court: O'Flaherty J., Barrington J., Keane J., Murphy J., Barron J.
09/03/1999

Road traffic; driving while intoxicated; respondent required to provide specimen; respondent could choose whether to furnish a blood or urine sample; whether circumstances in which respondent was required to provide urine sample were so deficient as to amount to no real choice at all; s.13, Road Traffic Act, 1994.
Held: Appeal allowed.

Social Welfare

Minister for Social, Community and Family Affairs v. Scanlon
High Court: Laffoy J.
11/05/1999

Social welfare; disability benefit; statutory interpretation; retrospectivity; evidence that the defendant worked while in receipt of disability benefit; original decision to allow disability benefit to the defendant reviewed; plaintiff seeks recovery of disability benefit overpaid to the defendant; whether s.300(5), Social Welfare (Consolidation) Act, 1981, as amended by s.35, Social Welfare Act, 1991, has retrospective effect; whether s.35 of the 1991 Act is self-executing; whether there was in force a statutory mechanism for the recovery of benefit disallowed on account of new evidence; whether ss.249, 264, 278 and 281, Social Welfare (Consolidation) Act, 1993, have retrospective effect.
Held: When statutory provisions are ambiguous as to retrospectivity the relevant provision is to be construed as having prospective effect only; s.300(5), Social Welfare (Consolidation) Act, 1981, as amended by s.35, Social Welfare Act, 1991, does not have retrospective effect and benefit paid to the defendant prior to the commencement of the 1991 Act is not recoverable; the statutory mechanism introduced by s.31(1), Social Welfare Act, 1993, came into operation on 2nd April, 1993, and does not have retrospective effect; while a demand for repayment of the benefit paid to the defendant after 2nd April, 1993, could have been made, there was no evidence of such; liability of the defendant under s.278, Social Welfare (Consolidation) Act, 1993, is not established; plaintiff's claim dismissed.

Taxation

Trustees of Gurteen Agricultural College v. Registrar of Friendly Societies
High Court: McGuinness J.
30/07/1999

Valuation; exemption from rates; interpretation of s.1 of Scientific Societies Act, 1843; whether agriculture is a science; whether institution, the core activity of which is dissemination of science through teaching, is within s. 1; whether level of voluntary contributions sufficient to bring the institution within s.1; s. 2 Valuation (Ireland) Act, 1954
Held: Agriculture is a science; fact that institute is a teaching institute does not take it out of s. 1; appeal allowed.

Premier Periclase Ltd v. Commissioner of Valuation
High Court: Kelly J.
24/06/1999

Case-stated; valuation; hereditaments; non-rateability; appeal from decision of Valuation Tribunal; respondent used five tanks in order to produce magnesium hydroxide precipitate; precipitate used to produce unreactive periclase; Valuation Tribunal had held tanks fell within exemption from valuation under the Schedule to the Valuation Act, 1986, in respect of constructions which are designed or used primarily to induce a process of change in a substance; whether Tribunal correct in so holding; Ref. No. 1 of Sched. to Valuation Act, 1860, as inserted by s.8, Valuation Act, 1986; s.7, Valuation Act, 1860, as substituted by s.7, Valuation Act, 1986.
Held: Determination of Tribunal was one of primary fact that was open to the Tribunal on the evidence before it; Court could not interfere with the determination.
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Corporation tax - the revenue internal guidance manuals
Cuddigan, John
12 (1999) ITR 401

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Irish non resident companies - the end?
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Kelly, Gillian . 1999 ILT 217

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Statutory Instrument

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S.I. 264/1999
Commencing 30/08/1999 Other Than Sections 4 To 8, 11, 16 And 23

Tribunals

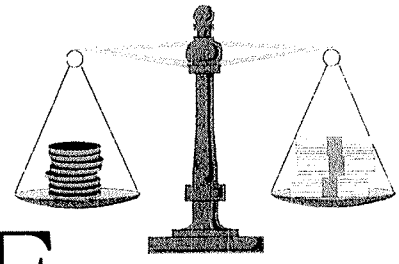
Article

Inquiries: the rights of individuals, privacy and confidentiality, representing the public interest.
Moorhead, Sara
4(9) 1999 BR 445

Reform of the law of tribunals
Brady, Rory
4(9) 1999 BR 443

Tribunals and the erosion of the right to privacy
Gallagher, Paul
4(9) 1999 BR 406

AT A GLANCE



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Wills

Lynch v. Burke
High Court: Mc Cracken J.
30/07/1999

Will; construction; contradiction; trusts; intentions of testator; whether extrinsic evidence admissible to determine nature of trust; whether ambiguity can be resolved by regarding certain words in clause as surplusage; whether entire contradictory clause void for uncertainty.
Held: Court entitled to disregard words which are surplus to proper construction of will in accordance with testator's intentions.

Moorhead v. Tilikainen
High Court: O'Sullivan J.
17/06/1999

Intestacy; entitlement to shares of estate; deceased separated from husband; under separation agreement deceased and her husband renounced any rights each would have in estate of the other; agreement stated that in the event of a reconciliation all covenants in the agreement would be void; reconciliation took place; whether renunciation or surrender constituted a covenant; Succession Act, 1965.
Held: Renunciation or surrender nullified.

Kirby v. Barden
High Court: Carroll J.
12/03/1999

Succession; trusts; conflict of interest; defendant is co-trustee and personal representative of testator's estate; defendant claims beneficial entitlement to bulk of testator's liquid assets; plaintiff seeks removal of defendant as trustee.
Held: Removal of defendant as trustee is not enough; conflict of interest between defendant's claim of beneficial entitlement to assets and the duty of a personal representative to get in such assets can only be resolved by removing the defendant as personal representative of testator's estate; such Order is conditional on undertaking from plaintiff to apply for Grant of Probate; defendant directed to furnish plaintiff with account showing all monies received and disbursed in capacity as personal representative.

Article

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Spierin, Brian E
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C-5/93 P DSM NV v Commission of the European Communities
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Appeal - Application for revision - Admissibility

C-6/97 Italian Republic v Commission of the European Communities
Judgment delivered: 19/5/1999
State aid- Definition - Tax credit - Recovery - Absolute impossibility

C-33/97 Colim NV v Bigg's Continent Noord NV
Judgment delivered 3/6/1999
Approximation of laws - Procedure for the provision of information in the field of technical standards and regulations - Directive 83/189/EEC - Labelling and presentation of products - Consumer protection - Language

C-59/97 Italian Republic v Commission of the European Communities
Judgment delivered: 18/3/1999
EAGGF - Clearance of accounts 1992 financial year

C-75/97 Kingdom of Belgium v Commission of the European Communities
Judgment delivered: 17/6/1999
State aid - Definition - Increased reductions in social security contributions in certain industrial sectors - 'Maribel bis/ter' scheme

C-126/97 Eco Swiss China Time Ltd. v Benetton International NV
Judgment delivered 1/6/1999
Competition - Application by an arbitration tribunal, of its own motion, of Article 81 EC (ex Article 85) - Power of national courts to annul arbitration awards

C-159/97 Transporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA
Judgment delivered: 16/3/1999
Brussels Convention - Article 17 - Agreement conferring jurisdiction - Form according with usage's in international trade or commerce

C206/97 Kingdom of Sweden v Council of the European Union
Judgment delivered: 29/6/1999
Accession of the Kingdom of Sweden - Fisheries - Determination of total allowable catches of certain fish - Cod

C-225/97 Commission of the European Communities v French Republic
Judgment delivered: 19/5/1999
Failure of a member State to fulfil obligations - Freedom to provide services - Public procurement procedures - Water, energy, transport and telecommunications sectors

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Judgment delivered: 8/7/1999
Failure to fulfil obligations - Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances - Failure of a Member State to adopt the programmes provided for by Article 6 of the Directive

C-185/98 Commission of the European Communities v Hellenic Republic
Judgment delivered 20/5/1999
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1st Stage - Dail

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Report - Dail

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Control Of Wildlife Hunting & Shooting (Non-Residents
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Copyright & Related Rights Bill, 1999
Committee - Dail *(Initiated In Seanad)*

Criminal Justice (United Nations Convention Against Torture) Bill, 1998
Committee - Dail

Criminal Justice (Safety of United Nations Workers) Bill, 1999
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Criminal Law (Rape)(Sexual Experience of Complainant) Bill, 1998
2nd Stage - Dail [P.M.B.]

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2nd Stage - Dail

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2nd Stage - Dail [P.M.B.]

Employment Rights Protection Bill, 1997
2nd Stage - Dail [P.M.B.]

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2nd Stage - Dail [P.M.B]

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1st Stage - Seanad

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2nd Stage - Dail (Initiated In Seanad)

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2nd Stage - Dail [P.M.B.]

Protection of Children (Hague Convention) Bill, 1998
Committee - Dail

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Radiological Protection (Amendment) Bill, 1998
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Refugee (Amendment) Bill, 1998
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Registration of Lobbyists (No.2) Bill 1999
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1st Stage - Seanad

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2nd Stage - Seanad

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2nd Stage - Dail

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Signed 02/06/1999

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Signed 23/06/1999

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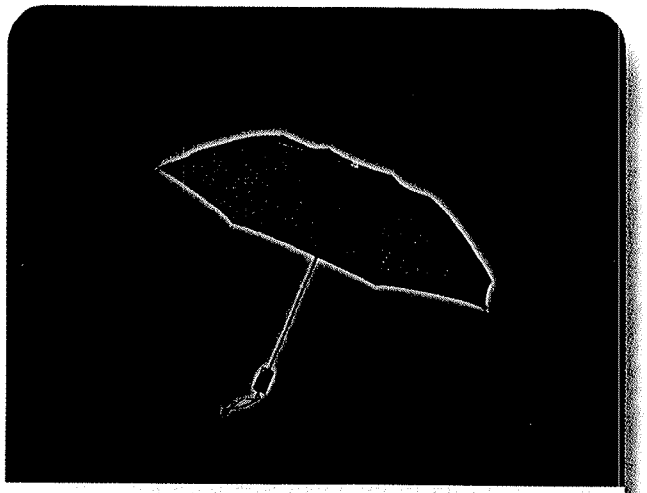
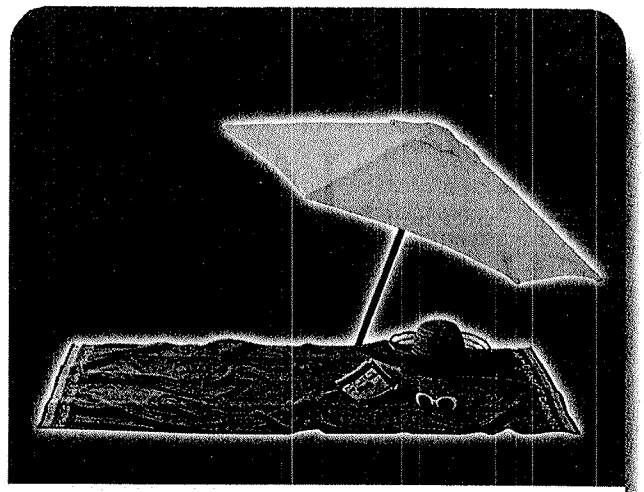
ABBREVIATIONS

BR = Bar Review
CIILP = Contemporary Issues in Irish Law & Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Law Society of Ireland
IBL = Irish Business Law
ICLJ = Irish Criminal Law Journal
ICLR = Irish Competition Law Reports
ICPLJ = Irish Conveyancing & Property Law Journal
IFLR = Irish Family Law Reports
IILR = Irish Insurance Law Review
IIPR = Irish Intellectual Property Review
IJEL = Irish Journal of European Law
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ITR = Irish Tax Review
JISLL = Journal Irish Society Labour Law
MLJI = Medico Legal Journal of Ireland
P & P = Practice & Procedure

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



Pension



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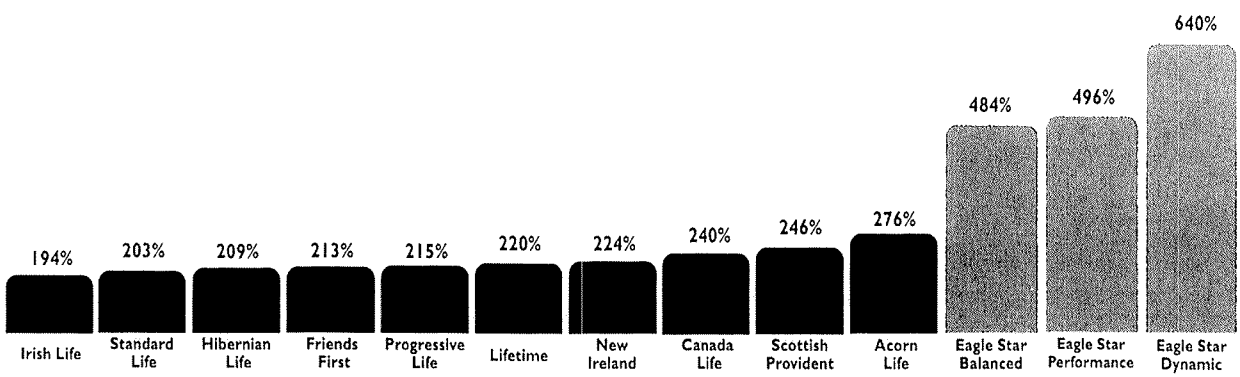

INDIVIDUAL MANAGED PENSION FUNDS TEN YEAR PERFORMANCE %

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

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COURTS SERVICE
An tSeirbhís Chúirteanna

Courts Service Board

The Courts Service has recently been established.

With effect from the 9th November 1999 the Courts Service will take over responsibility for the funding, management and administration of all court services in the state.
During the coming weeks and months the Courts Service will be developing a corporate strategy for the years ahead and its first three year business plan which will be reviewed on an annual basis thereafter.

The Courts Service wishes to invite submissions from the public on the development of it's corporate strategy and first business plan.

The strategy will cover areas including:

Policy Development
- Future development of Courts Services
- Modernisation of Courts Services
- Reducing waiting times for access to Courts
- Use of buildings
- Development of Public information and customer services generally
- Development of modern management structures and devolution of authority and responsibility to local regional managers.

Infrastructure Projects
- 5-7 year Court Building program
- 3-4 year Information Technology Programme

Further information about the Courts Service can be obtained from;

The Secretary,
The Courts Service,
Green Street Courthouse,
Dublin 7,
telephone (01) 8886432

or by visiting our Courts Service Website which can be accessed at the following address: **http//www.courts.ie**

Our website includes background information about the establishment of the Courts Service, the legislation establishing the Courts Service and information about all court venues, sittings, dates, times etc.

Submissions marked
Courts Service Strategy and Business Plan
should be sent to:

Miss Marie Ryan,
Secretary,
Courts Service Board,
Green Street Courthouse,
Dublin 7.

ph:(01) 8886432
Fax:(01) 8735242
E-mail http//www.courts.ie

DEVELOPING INTERNATIONAL ARBITRATION IN IRELAND

Leila Anglade (Lecturer at Law, UCD, M.B.A. (ECS Lyon), LL.M. (Harv.), Paris Bar)
outlines the key issues involved in developing the practice of international arbitration in Ireland.

Introduction

International Arbitration has become a much talked about practice area in the Irish legal profession. Although Ireland is relatively new to international arbitration, it has the potential to attract significant international arbitration business. To achieve this potential, however, we will undoubtedly require renewed efforts to establish Dublin as an internationally recognised centre for international arbitration.

The adoption of the Arbitration (International Commercial) Act, 1998, while it has enabled Ireland to become a suitable venue for international arbitration, will not suffice to attract international arbitration to Ireland.

International arbitration is the prime way of adjudicating international commercial contractual disputes. It is also a very interesting and lucrative specialty. As such, a large number of countries both inside and outside Europe are trying to attract this very sought after business to their capital cities. Ireland has thus to compete with the rest of the world to attract international arbitration, and this competition is tough.

At present, 25 other countries around the world have, like Ireland, adopted the UNCITRAL Model Law. Indeed some countries such as Switzerland, France and the USA, have been, for a long time, developing arbitration laws that are much more flexible and arbitration friendly than the UNCITRAL Model Law. These countries are also signatories to a greater range of international arbitration conventions than the Republic of Ireland.

On the other hand, Ireland has a number of advantages in attracting international arbitration. These are principally the following: Ireland is located in Europe, it has a history of international neutrality, it does not suffer from the stigma of being a former colonial power, it has recently adopted a suitable international arbitration law and it is English speaking.

Ireland's task is thus to demonstrate to the international arbitration community, which is a small community of highly qualified professionals, that they should choose Ireland as a venue in preference to another country.

In order to develop international arbitration in Ireland, it is important to understand that a certain number of key elements must be present to meet the expectations of the different players in the international arbitration process. These elements include:

* An understanding of the distinctive features of international arbitration
* A good network of modern arbitration laws and conventions
* A reliable local expertise
* A favourable attitude of the courts.

Developing an understanding of the distinctive features of international arbitration

Advantages of international arbitration

In international contracts disputes, the choice is not between international arbitration and international litigation. The choice is between international arbitration and litigation before a national court. There is no international court to deal with international commercial disputes, unless the disputes are between states in which case they may submit their cases to the International Court of Justice.

This is one of the keys to the success of international arbitration. Parties to an international contract want their disputes to be adjudicated by a neutral adjudicating body. In particular, they do not want to have to submit a dispute to the national courts of their contractual counterpart. Indeed, it is estimated that 80% to 85% of international commercial disputes are arbitrated rather than litigated.

There are other advantages to international arbitration:

* Arbitration is a private and consequently confidential process.
* Arbitration offers the parties the opportunity to choose their own adjudicator i.e. their arbitrator, from a pool of well-qualified professionals
* There is a continuity in an international arbitration, since the arbitral tribunal is appointed to deal with one particular case. The arbitrators follow this case from the beginning to the end, unlike judges in some jurisdictions who often only make inconsistent appearances.
* Arbitration is in principle more flexible and adaptable and as a result quicker and more efficient than litigation. Because arbitration is more flexible, it is be possible to tailor arbitration rules to fit the particular case which is being arbitrated: for example, the parties may agree to limit the extent of disclosure of the documents; may not provide for any disclosure, e.g. if one of the parties is from a civil law country, may provide for evidence to be submitted in writing.
* Arbitration is often cheaper than litigation particularly in Common Law countries.
* Because of the range of multilateral international arbitration conventions, it is easier to obtain international enforcement of an international award than it is to obtain the enforcement of a court judgement.

Complexity of international arbitration

For the neophyte, international commercial arbitration appears to be a very casual, informal and simple process. It also seems to be completely independent from any outside legal support or control[1]. The reality of international arbitration is quite different from that over-simplistic image. International arbitration is one of the most complex legal processes.

International commercial arbitration is a branch of private international law and the present system of international arbitration only works effectively because it is held in place by a complex system of laws, rules and treaties[2].

Even a relatively simple international arbitration may require reference to as many as four or five different systems or rules of law. First, there is the law which governs the capacity of the parties. Then there is the law which governs the recognition and enforcement of the agreement to arbitrate. Then there is the law which governs the actual arbitration proceedings themselves[3]. There is also the law or the set of rules[4] which will apply to the substance of the dispute. Finally, there is the law or laws which governs recognition and enforcement of the award rendered by the arbitral tribunal[5].

International commercial arbitration is a branch of private international law and the present system of international arbitration only works effectively because it is held in place by a complex system of laws, rules and treaties

These laws may be the same but not necessarily so. First, the law governing the validity of the arbitration clause is not necessarily the law governing the substance of the dispute. Second, the place of arbitration is usually selected for purposes of convenience or neutrality. As a result, it is very rare that the law applicable to the substance of the dispute would be the same as the national law of the place where the arbitration is taking place[6].

In addition, the law governing the substance of the dispute may not necessarily be the law of a given national system such as Irish law or French law. It may be international law, or a mix of international law and national law, and it can be a mix of several national laws[7]. It can also be an assembly of trade usage, rules of law and general principles of law called the lex mercatoria.

Finally the system of law which governs the recognition and enforcement of the award rendered by the tribunal is different from the law governing the proceedings themselves and depends upon where the award will be enforced[8].

Types of international arbitrations

There are two types of international commercial arbitration: ad hoc arbitration and institutional arbitration. In an ad hoc arbitration, the parties themselves devise their own arbitration rules.

Generally an ad hoc arbitration clause is much longer and more complicated than an institutional arbitration clause because it must lay down the rules for the arbitration[9].

In an institutional arbitration, the parties refer their disputes to arbitration under the supervision and administration of an arbitral institution which possesses an existing set of procedural and administrative rules such as the ICC rules. In referring to arbitration under the auspices of an arbitral institution, the parties agree to be bound by the rules of arbitration of that institution and to conduct the arbitration in accordance with those rules. The arbitral institution also administers the case. Some of the best-known arbitral institutions are the ICC[10], the AAA[11], the LCIA[12], the Stockholm Chamber of Commerce and the Euro-Arab Chamber of Commerce. Each of these institutions applies its own set of international arbitration rules.

A good system of modern international arbitration laws and conventions

The adoption of a new international arbitration law was necessary

In order to be perceived as an attractive venue for international commercial arbitration, Ireland needed to reform its international arbitration laws which had become obsolete and had a domestic, rather than an international, focus.

The Arbitration (International Commercial) Act, 1998 (the "Act"), by adopting the UNCITRAL Model Law with minor amendments, equips Ireland with a modern and flexible international arbitration tool in line with standard legal framework for international arbitration.

The Act creates a dual arbitration regime in Ireland. International arbitration is now governed solely by the Act and by the international arbitration conventions signed by Ireland, while domestic arbitration remains governed by the Arbitration Acts 1954 and 1980.

In contrast with England, which has not adopted the Model Law in its entirety, the Act adopts the Model Law with some minor amendments. It was perceived that by enacting legislation as close as possible to the Model Law, Ireland would stay in line with a well recognised international arbitration standard. It is clear from the Oireachtas debates that this was intended as an asset to market Ireland as an attractive centre of international commercial arbitration[13]. Indeed, the English Arbitration Act, 1996 has been received by international arbitration experts with great caution and has been criticised as being too complicated.

The other 25 countries which have adopted the Model Law, include such countries such as Australia, Canada, Egypt, India, New Zealand, and, more recently, Germany.

The duality of arbitration regimes is by no means an oddity and is actually quite a common feature in international arbitration law. Other countries, such as France, have used the dual regime system quite successfully. Indeed, the level of flexibility and autonomy needed in international arbitration justifies such dual regime, which is quite incompatible with the more constrained legal regime required for domestic arbitration.

Presentation of the new law

The Model Law is divided into eight Chapters. Chapter I deals with general provisions such as the scope of application of the Model Law and important definitions.

Chapter II contains provisions relating to the arbitration agreement itself. In particular, Article 7 of the Model Law, similarly to the New York Convention, requires an arbitration agreement to be in writing.

Chapter III addresses the composition of the arbitral tribunal. In particular, Article 11 provides for the rules regarding the appointment of arbitrators. Obviously, Article 11 is not as relevant for parties who have chosen institutional arbitration, since issues relating to the composition of the arbitral tribunal will normally be covered by that institution's rules. Article 12 provides for a disclosure by the arbitrator of "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence". An arbitrator may be challenged for lack of impartiality and independence under Article 12(2). Article 13 provides for the procedure to challenge an arbitrator.

Chapter IV deals with the jurisdiction of the arbitral tribunal. Article 16 embodies the well-established rule of the "Kompetenz Kompetenz"[14].

Chapter V sets out the rules governing the conduct of arbitral proceedings. In particular, Article 18 provides for the equal treatment of parties by the tribunal.

Chapter VI deals with the making of an award and the termination of proceedings. In particular, Article 31 details the form and content of the award. This Article has been significantly complemented in Ireland by sections 10 (interest) and 11 (costs) of the Act.

Chapter VII contains one Article only, Article 34, and prescribes the only possible recourse available against an international arbitral award rendered in Ireland; under Article 34 of the Model Law," recourse to a court against an arbitral award may be made only by an application for setting aside".

Finally, Chapter VIII of the Model Law deals with recognition and enforcement of awards. In particular, Article 36, which enumerates the grounds for refusing recognition or enforcement to an award is largely identical to the grounds listed in Article V of the New York Convention.

International Conventions

In addition to the Act, Ireland also possesses two further international arbitration tools: the New York[15] and ICSID Conventions[16].

1. The New York Convention

The New York Convention is so far the most important international agreement relating to international commercial arbitration. The Convention was designed to:

* encourage the recognition and enforcement of commercial arbitration agreements in international contracts;
* unify the standards by which agreements to arbitrate are observed ;
* unify the standards by which arbitral awards are enforced in the signatory nations.

Today over 90 nations have ratified the New York Convention including many Latin American, African, Asian and Eastern European states.

In broad outline, the Convention requires national courts of the signatory countries to:

* recognise and enforce awards, subject to specified exceptions (Articles III and V of the New York Convention).
* recognise the validity of arbitration agreements, subject to specified exceptions (Article II(1) of the New York Convention).
* refer parties to arbitration when they have entered into a valid agreement to arbitrate that is subject to the Convention (Article II(3) of the New York Convention).

In addition, the New York Convention does not preclude the operation of other more favourable enforcement laws or conventions. Article VII(1) of the New York Convention specifically provides that it does not affect the validity of any bilateral or other multilateral arrangements concerning the recognition and enforcement of foreign arbitral awards[17].

This has been interpreted by a number of courts in different countries as to permit enforcement of arbitration agreements and awards under either the Convention or another treaty if it is applicable.

In virtually all signatory countries, the Convention has been implemented through national legislation[18].

An important aim of the Convention drafters was to establish a single, stable set of rules for the enforcement of arbitral agreements and awards. However, the fulfilment of that aim is dependent upon the willingness of national legislatures and courts, in the various signatory states, to adopt a uniform interpretation of the Convention.

Some very arbitration-friendly countries such as France, Switzerland and the United States have often criticised the New York Convention as being too limited and not sufficiently delocalised in its approach.

2. ICSID

The International Centre for the Settlement of Investment Disputes ("ICSID") is a specialised arbitration institution, established pursuant to the so-called Washington Convention of 1965. ICSID was established at the initiative of the International Bank for Reconstruction and Development, and is based at the World Bank's Headquarters in Washington DC.

The ICSID Convention is designed to facilitate the settlement of a limited range of "investment disputes" that the parties have specifically agreed to submit to ICSID arbitration (Article 25.1 of the ICSID Convention). Investment disputes are defined as controversies that arise out of an investment and arise between a signatory state or state entity (but not a private entity) and a national of another signatory state. The ICSID Convention therefore covers only disputes between state parties and private parties and does not cover disputes between two private companies.

With respect to disputes covered by the ICSID Convention, the Convention provides both conciliation (see Article 28-35 of the ICSID Convention) and arbitration procedures.

The Convention contains a number of unusual provisions

relating to international arbitration. First the Convention provides that, absent agreement by the parties, ICSID arbitration agreements are governed by the law of the state that is a party to the dispute (including it's conflicts of law rules) and such rules of international law as may be applicable (Article 42 of ICSID Convention). This provision can generate difficulties. So parties to an ICSID arbitration would be well advised to include a governing law clause in their agreement when it is possible to do so.

Second, ICSID awards are theoretically directly enforceable in signatory states, without any method of appeal in national courts (Articles 53-54 of the ICSID Convention). Third, when a party challenges an ICSID award, the Convention empowers the Chairman of the Administrative Council of ICSID to appoint an ad hoc committee to review, and possibly annul awards. If an award is annulled, the dispute may be submitted to a new tribunal (Article 52 of the ICSID Convention).

Nearly 100 countries, from all geographical regions of the world have ratified the ICSID Convention. Unfortunately, relatively few cases have been brought under the Convention. Moreover, the practical value and future prospects for the Convention have been significantly threatened by the annulment of several ICSID awards by ad hoc panels assigned to review awards.[19]

In addition, uncertainty as to the jurisdictional scope of the Convention and the appointment mechanism have led many to question ICSID's usefulness as a means of dispute resolution.

Apart from the New York and ICSID Conventions, Ireland is not a party to any other multilateral conventions on international arbitration. In particular, Ireland is not a party to the 1961 European Convention called the Geneva Convention[20]. The Geneva Convention is regarded by many arbitration experts as the most advanced arbitration treaty. The aim of the convention was to complete and modernise the New York Convention. The Geneva Convention has been ratified by 27 countries including Austria, Germany, Italy, France, Belgium, the Russian Federation and Spain. In effect, the Geneva Convention is more in tune with the current international arbitration trends, particularly with respect to delocalization.

A real local expertise

Availability of International Arbitration lawyers

One of the crucial elements in the development of international arbitration in Ireland is the availability of local expertise.

While there is significant experience in Dublin in domestic arbitration, there clearly is a scarcity of international arbitration specialists.

It is important to emphasize that international arbitration is totally different from domestic Irish arbitration. In fact they are two distinct branches of the law which involve the application of different concepts and procedures. Consequently, expertise gained in domestic arbitration can be quite unhelpful when it comes to international arbitration.

Countries which have been particularly successful in attracting international arbitration such as Switzerland, France, Austria or the United States, have, for a long time, included the teaching of international arbitration (often as a compulsory subject) in the curriculum of their law schools (at both undergraduate and graduate levels).

The need for systematic education in international arbitration in Ireland is indeed particularly marked. International arbitration law includes numerous concepts alien to Common Law practitioners. For example, essential concepts in international arbitration include: clause compromissoire, lex arbitri, lex loci arbitrii, Kompetenz Kompetenz, lex causae, delocalization, lex mercatoria, amiable compositeur and so on.

The teaching of international arbitration in Ireland has, until quite recently, been quite limited. In 1997, The Law Faculty in UCD started offering a Diploma in International Arbitration, the purpose of which is to train international arbitration experts in Ireland.

The Diploma in International Arbitration is designed to acquaint students with the process of international arbitration and the way in which it is regulated with a view to preparing them for participation, as arbitrators or counsel for the parties, in international arbitrations in Ireland or elsewhere.

The course follows closely the different chapters of the Arbitration (International Commercial) Act, 1998 and enables the students to analyze the provisions of the Act and of the UNICITRAL Model Law in great depth. However, since there is no single, uniform law governing the international arbitration process, the course also examines the laws of various different countries which an Irish international arbitration lawyer is likely to encounter.

Because the enforcement of international arbitral awards relies heavily on international conventions, much attention is focused on the international treaties and conventions governing arbitration. The procedural rules of the main arbitration institutions: ICC, LCIA, AAA corresponding to each stage of an arbitration are discussed throughout the course.

The course also aims at training the participants to the more practical aspects of international arbitration. Students learn to draft international arbitration clauses, to select an arbitration institution, to pick arbitrators, to draft international arbitration terms of reference. This hands-on approach is rendered possible by the participation of internationally-recognised guest experts from the world of international arbitration who come from the United States, Switzerland, France and Ireland to share their expertise with the participants.

The next Diploma in International arbitration course will start in January 2000.

"The need for systematic education in international arbitration in Ireland is indeed particularly marked. International arbitration law includes numerous concepts alien to Common Law practitioners. For example, essential concepts in international arbitration include: clause compromissoire, lex arbitri, lex loci arbitrii, Kompetenz Kompetenz, lex causae, delocalization, lex mercatoria, amiable compositeur".

Access to international arbitration resources

One of the difficulties of international arbitration is also one of its main advantages: it is a totally confidential process. Consequently, few awards are published, and those that are published are not published in extenso. At the same time, international arbitration is a constantly evolving process, which follows closely the advances and the globalization of international commerce.

In order to keep up with the more recent developments in international arbitration, it is therefore necessary to have access to international arbitration materials published world-wide. Information on international arbitration in Dublin may be found at the library of the Institute of Chartered Arbitrators in Dublin, the Law Library in Dublin, and the UCD Law Library. Considerable efforts have been made by these institutions to collect international materials in the last 2 to 3 years.

Library resources, however, are not sufficient in international arbitration since a number of international arbitration materials are unpublished for confidentiality reasons. Additional information must therefore be gathered from participants in the international arbitration process. The International arbitration world consists in a number of experts from all over the world who meet at regular intervals to exchange information on arbitration trends. A series of seminars are regularly organized by the various arbitration institutions and attendance at such meetings enables arbitration practitioners to gather invaluable information. Unfortunately, until now, Irish lawyers have rarely attended these gatherings.

Access to resources also includes the availability of facilities suited to the international arbitration process (and in particular to the need for simultaneous translation). Until very recently, no such facilities existed in Dublin.

In 1998, the Dublin International Arbitration Center was officially opened in Dublin. The Center is a specially designed venue which provides facilities for the conduct of international arbitration and dispute resolution. In particular, simultaneous translation and simultaneous transcription facilities are available. The Center is located in the Distillery Building, close to the Four Courts. The Center could become an alternative venue for arbitration in London, for example, which has become quite prohibitive in terms of cost.

A favourable attitude of the courts

Finally, the development of international arbitration will also depend on the attitude of Irish courts towards the international arbitration process. Interference by local courts in this process deters to a very significant degree international arbitration practitioners from choosing that particular country as a venue.

In that respect, the philosophy of the Act with respect to court involvement in international arbitration differs quite dramatically from the approach prevailing in the Arbitration Act, 1954. The Act has significantly curtailed the powers of the courts to intervene in the arbitration process. For example, the procedure of case stated to the courts on issues of law provided by Article 35 of the 1954 Act is abolished. This fundamental change in the involvement of courts in international arbitration was clearly emphasised in the Oireachtas debates[21].

In that respect, the changes brought by the Act were clearly welcome by international arbitration experts. Indeed, these experts saw the Irish case stated procedure as an absolute bar to arbitrating in Ireland.

In fact, under the Act, the role of national courts is simply to facilitate and support arbitration, not to interfere in the arbitration process.

Article 6 of the Model Law allows each state enacting the Model Law to choose and specify the court "competent to perform certain functions of arbitration assistance and supervision". Under the Act, the High Court is the court entrusted with these functions.

Even though international arbitration tends to be as detached as possible from any state control, the intervention of a court in aid of arbitration is sometimes required.

The functions which may be performed by the High Court in aid of arbitration include the power to grant interim measures of protection under Article 9 of the Model Law, to assist a party or the arbitral tribunal in taking evidence under Article 17 of the Model Law, to set aside an award under Article 34 of the Model Law and to grant recognition and enforcement of awards under Articles 35 and 36 of the Model Law. In addition, under Article 11(3) of the Model Law, the High Court may also appoint arbitrators if the parties are unable to do so or if the arbitrators fail to agree on the third arbitrator. •

1. Redfern and Hunter, *Law and Practice of International Commercia Arbitration* (Sweet and Maxwell 1991) p.1.
2. Redfern and Hunter, *Law and Practice of International Commercia Arbitration* (Sweet and Maxwell 1991) p.1.
3. Including the rules of arbitration institutions.
4. Such as the *Lex Mercatoria,* the UNIDROIT principles for internationa commercial contracts or general principles of law.
5. See Redfern and Hunter, *Law and Practice of International Commercia Arbitration* (Sweet and Maxwell 1991) p.1.
6. For example, an international arbitration panel sitting in Dublin might hav to apply Tanzanian law as the governing law of the agreement.
7. In the *Liamco v. Libya* arbitration [1977] *Rev. Arb.* 1980.132, the governin law clause provided that the oil concession was to be governed an interpreted in accordance with the principles of law of Libya common t the principles of international law. In the absence of such commo principles, by the general principles of law as may have been applied b international tribunals.
8. The *Liamco* arbitration case enforcement was tried in Sweden, in the U and in France with different laws applying to the enforcement procedu and different results with respect to the enforcement of the award.
9. The parties can also adopt a set of ad hoc rules which already exist such a the UNCITRAL Rules (different from the UNCITRAL Model Law).
10. International Chamber of Commerce
11. American Arbitration Association
12. London Court of International Arbitration
13. 481 Dail debates Cols. 1305-1306; 155 Seanad Debates Cols. 770-771.
14. The competence of the arbitral tribunal to rule on its own jurisdiction.
15. The 1958 UN Convention on the Recognition and Enforcement of Foreig Arbitral Awards often referred to as the New York Convention
16. These two conventions came into effect in Ireland though the Arbitratic Act, 1980.
17. Except the Geneva Protocol and the Geneva Convention.
18. For Ireland, see the Arbitration Act, 1980
19. See Redfern, *"ICSID-Losing its appeal?"*, 3 Arb. Int'l 98 (1987).
20. The Geneva Convention was signed in Geneva on 21 April 1961.
21. 481 Dáil Debates Cols. 1307-1308; 155 Seanad Debates Col. 773

THE PLANNING & DEVELOPMENT BILL, 1999

James Macken S.C. concludes his analysis of the significant reforms of our planning laws proposed in the Planning and Development Bill, 1999

(The first part of this article appeared in the November Issue)

Housing Supply

Easily the most controversial provision of the Bill, and almost certain to result in a constitutional challenge, Part V deals with the question of housing supply. This has been described by Minister Dempsey as "a central concern of planning and land use". Part V, after some preliminary definitions, begins by declaring that, for the avoidance of doubt:

> "... it is hereby declared that, in respect of any planning application or appeal, compliance with the housing strategy and any related objective in the development plan shall be a consideration material to the proper planning and sustainable development of the area."

Each planning authority will have a duty to include in any development plan it makes a strategy for ensuring that the proper planning and sustainable development of the area *provides for the housing of the existing and future population of the area* . Work on such a strategy must commence within one year of the commencement of the new Act, whether by way of incorporation in a development plan in the course of preparation or by way of variation of an existing plan. In addition to having regard to the latest housing assessment made under the Housing Act, 1988 and providing for the needs of the persons referred to in that Act, the housing strategy must take into account the need

* to ensure that housing is available for persons who have different levels of income,
* that a mixture of house types and sizes are developed to reasonably match the requirements of the different categories of households, and
* the need to counteract undue segregation in housing between persons of different social backgrounds.

Each planning authority will have a duty to include in any development plan it makes a strategy for ensuring that the proper planning and sustainable development of the area provides for the housing of the existing and future population of the area .

The strategy must also include an estimate of the amount of social housing and the amount of *affordable housing* required in the area of the development plan and "shall provide that as a general policy a specified percentage, not being more than 20 per cent, of land to be used for residential development as provided for in the development plan shall be reserved for the provision of both social and affordable housing. What is affordable housing is to be determined by examining the relationship between the price of houses (either generally or of a particular class or classes) with the income of persons (either generally or of a particular class or classes).who require houses , in the area of the development plan.

The planning authority must indicate specific objectives in the development plan with a view to securing the implementation of the housing strategy in relation to areas zoned in the plan for residential use or for a mixture of residential and other uses. Different objectives may be indicated for different areas but the percentage of 20% cannot be exceeded. Some areas may be assigned a lower or indeed no percentage of social or affordable housing in order to counteract undue segregation in housing between persons of different social backgrounds; land may, however, be developed exclusively for social housing.

Once the housing strategy and the specific objectives are in place, the provisions of section 82 apply to applications for planning permission. This will take approximately 12 months from the date of commencement of the Act. Under section 82 the planning authority or the Board on appeal may require as a condition of a grant of permission that "the applicant or any other person with an interest in the land" enter into an agreement with the planning authority "concerning the development for housing" of that part of the land which is required to be reserved for social or affordable housing. Regard must be had to the proper planning and sustainable development of the area, the housing strategy and the objectives of the development plan and "the need to ensure the overall coherence of the development to which the application relates." In the event of a dispute the matter may be referred to the Board for determination.

"This does not apply to the price to be paid for the land, which is to be determined by the property arbitrator, subject to this very important proviso: the value is to be the greater of (a) the existing use value calculated on the assumption that no development other then exempted development could be carried out on the land, or (b) the actual price paid on sale or agreed to be paid under an option to purchase or enforceable agreement was entered into prior to the 25th August 1999. No doubt intense debate will be focused on these provisions, which have already been amended in the Seanad and it is to be anticipated that the wording will undergo some further refinement before the Bill is eventually passed.

It would appear that the date was chosen with a view to fixing valuations prior to the publication of the Bill, and the date, as such, is hardly the issue. It appears to me that the intention was (a) to confine property value to existing use value and (b) not to be unfair to persons who may have bought or agreed to buy property in the recent past on the strength of property valuations that took development value into account. The trouble is that the list of persons considering themselves to be unfairly treated will no doubt continue to grow: what about persons who have inherited property and paid tax on the basis of market value, for example? or financial institutions that have accepted property deeds as security for loans, on the basis of market value ? This provision would appear to fall between two stools. It might be better to fix values at a certain date and forget about trying to reduce value to below market level at that date.

As we go to press, amendments have been introduced in the Senate by the Minister to provide that builders may, instead of transferring land, opt to construct a certain number of houses and transfer them to the housing authority or its nominee or to transfer serviced sites. In that event the builder would be entitled to claim as part of the transfer price, in addition to the cost of the land as determinded above, the development cost of the sites or houses including profit cost.

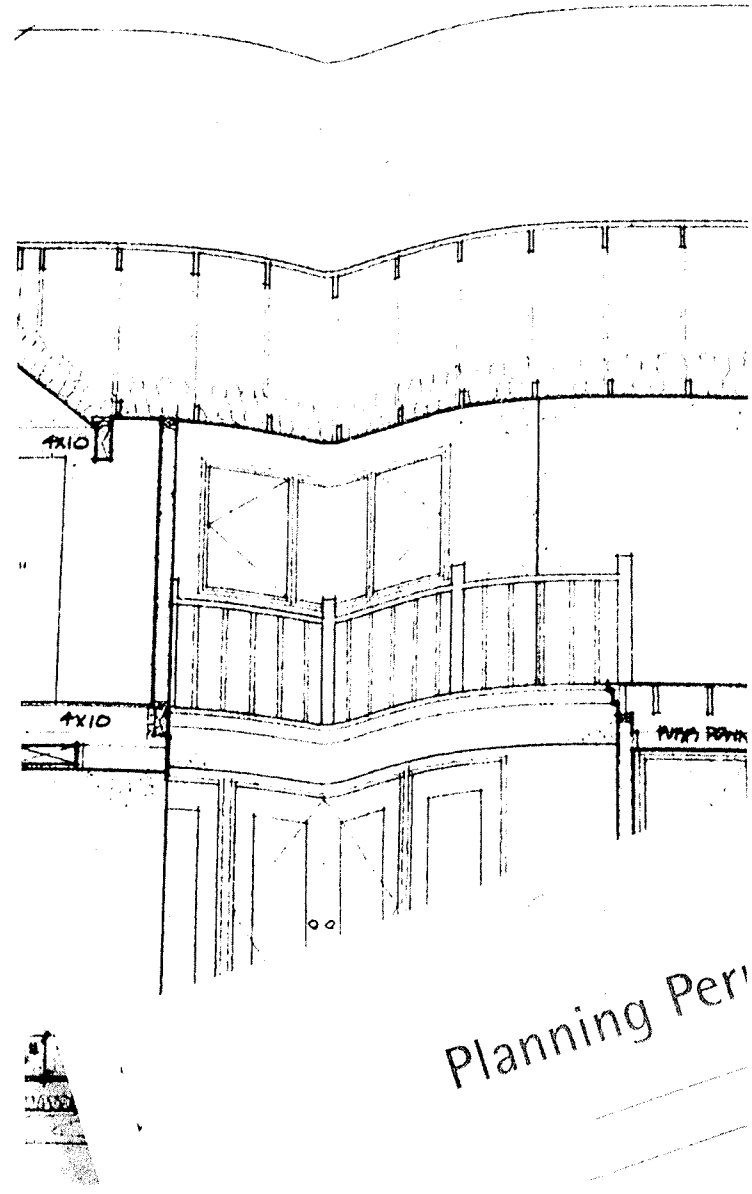
Also included in amendments is an "anti-25 August 1999 evasion" measure. A permission granted on an application made after that date which would have been captured by Section 82 if a housing strategy had been in place at the time permission was granted., will only have a limited life: 31 December 2002 or two years from the date of the grant, as regards so much of the development which has not been commenced or "for which the foundations have not been completed." In the Minister's mind, 25 August 1999 is obviously a seminal date.

Enforcement

Part VIII of the Bill deals with enforcement. and leaves the basic structure unchanged as follows:

1. A general prohibition on development without the benefit of planning permission, on pain of committing a criminal offence.
2. A formal notice can be served by the planning authority with failure to comply being a criminal offence,
3. A planning injunction in the High Court or Circuit Court, brought at the suit of any person.

Apart from the rationalisation of the various sections providing for warning notices and enforcement notices into one section, some interesting additional changes are proposed : the public will have the right to insist that the planning authority acknowledge and act on complaints; and the Section 27



procedure is to be extended to cover anticipated breaches, and renumbered Section 145.

The basic offence is set out in section 136. A person is guilty of an offence who has carried out or is carrying out development

* which is not exempt and for which no permission has been granted, or
* which did not comply with a permission or any conditions of a permission.

Such an offence may be prosecuted summarily or on indictment, the maximum penalties being £1,500 and/or 6 months imprisonment or £10 million and/or 2years, repsectively. Fines are payable to the planning authority and may be enforced as a civil debt. Proceedings for a summary offence may be commenced at any time within six months from the date on which "evidence sufficient, in the opinion of the person by whom the proceedings are initiated, to justify proceedings, comes to that person's knowledge." This appears to be an unduly open-ended period of time. The time limit for indictable offences is 7 years.

The most significant omission from the definition of an offence

under Section 136 is "development commenced before the appointed day." Given that a significant number of quarries have been operating since before the appointed day and have recently been recognised by the Supreme Court as doing so lawfully by virtue of the fact that they are carrying on or completing development commenced before the appointed day (see *Waterford County Council v John A. Wood Ltd* [1999] 1 ILRM 217and *Kildare County Council v Goode Concrete Ltd* unreported 17 May 1999), the danger here is that this new section will make all these quarries illegal because it fails to recognise development commenced *before the appointed day.* The limitation period may not be of much assistance, since the extractive industry breaks new ground every day.

Section 137 provides that where a representation in writing is made to a planning authority that unauthorised development is being, may have been or may be carried out, the planning authority, once it appears to them that the representation is not "vexatious, frivolous, or without substance or foundation," and that the matter is not of a trivial or minor nature, must issue a warning letter to the person carrying out the development, within six weeks of the receipt of the original representation. The person to whom the Warning Letter issues has four weeks to make submissions or observations to the planning authority , which must then decide as expeditiously as possible whether to issue an Enforcement Notice under Section 139.

An Enforcement Notice may be served whether or not a Warning Notice is served. Specific provision is made for the withdrawal "for stated reasons" of an Enforcement Notice, which, in any event ceases to have effect ten years from the date of service. The Enforcement Notice takes effect immediately. Failure to comply is a criminal offence.

Section 145, replacing the present Section 27, provides for the granting of an injunction, "*where an unauthorised development has been, is being or is likely to be carried out or continued.*" Such an application must be brought within seven years from the date of commencement of a development for which no permission has been granted, or within seven years from the expiry of the life of a permission. However, an application to enforce a condition of a planning permission "concerning the ongoing use of land" may be brought at any time.

Costs and expenses "measured by the court" must be awarded against anyone convicted of an offence under Part VIII or against whom a Section 145 order is made unless there are special and substantial reasons for not so doing. It will not be a defence to a prosecution to show that a permission has been granted after proceedings were initiated, or a warning letter or enforcement notice issued. No enforcement action (including proceedings under Section 145) shall be stayed or withdrawn by reason of an application for or the grant of retention permission.

Strategic Development Zones

The power to designate Strategic Development Zones is an example of the Government's desire to retain the power to intervene in the planning process in the interests of national development. The model for the Strategic Development Zone provisions appears to lie in the Custom House Docks Development legislation. Sites are designated by the Government as Strategic Development Zones. A development agency such as the IDA, Enterprise Ireland, Udaras na Gaeltachta or the Shannon Free Airport Development Company Ltd draws up a draft planning scheme, which must contain an environmental impact assessment, and which is then submitted to one or more planning authorities for public consultation and adoption in very much the same manner as development plans. However, if the elected members fail to complete consideration of the draft plan within 10 weeks of receiving the manager's report, "the functions of the authority...shall be performed by the manager."

There is an appeal to An Bord Pleanala against the decision of the planning authority, exercisable by the development agency that made the draft plan or any person who made submissions or observations to the planning authority.

Once a scheme has been adopted, it operates as a kind of outline permission for subsequent applications; the planning authority "*shall grant permission*" for developments proposed for the SDZ, where it is satisfied that the development would be consistent with the scheme. There is no appeal to An Bord Pleanala against such a grant of permission, which is deemed to be given on the date of the decision..

Land Acquisition

The functions conferred on the Minister for the Environment and Local Government in relation to the compulsory acquisition of land by a local authority are to the transferred to An Bord Pleanala, as are the Minister's functions under the Roads Act, 1993 in relation to motorways, and other road developments. Public local inquiries will become a thing of the past, instead the Board may hold an oral hearing . It may, however, decide to dispense with a hearing, where it "considers that the holding of an oral hearing would not be likely to aid its understanding of the issues involved." The Board may order the acquiring authority to pay a reasonable sum towards the costs incurred by the Board in holding the hearing or towards the costs of any person appearing at the hearing.

Events And Funfairs

The lacuna in planning control of open air concerts and events created by the decision of the Supreme Court in the IRFU case *Butler and others v Dublin Corporation* [1999] 1 ILRM 481 is dealt with in Part XV, which proposes a licensing system, to be administered by the local authorities, for events , defined as public performances

" which take place wholly or mainly in the open air or in a tent or similar temporary structure and which is comprised of music, dancing, displays of public entertainment or any activity of a like kind, "

or any other event prescribed by regulations. It will be a criminal offence to promote, organise, hold or otherwise be materially involved in the organisation of such an event or to be in control of land on which an event is held, without a licence.

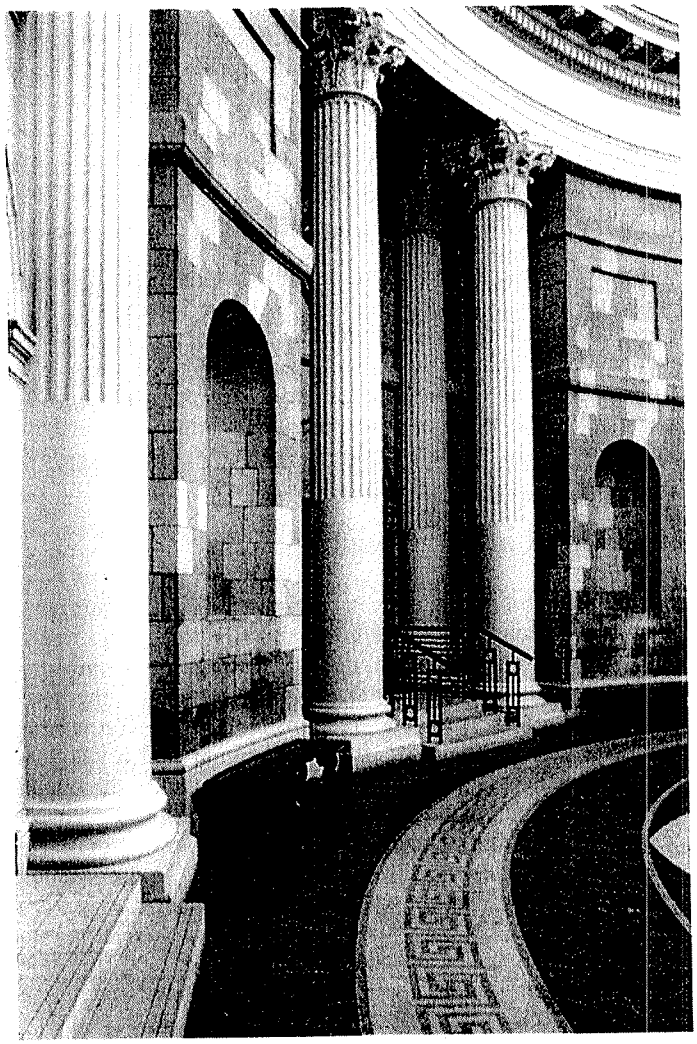
Regulations are to be made by the Minister in relation to applications for and the grant or licences, as well matters such as the applicability of codes of practice, the protection of the environment, including the control of litter, the maintenance of public order, and the provision of adequate means of transport to and from the place in which the event is to be held. It appears clear that licences can be granted for a number of events at a time, to be held within a specified period. Public

notice and consultation with appropriate bodies may be required. Section 211 would authorise a local authority to serve a notice requiring that an event not take place, and that all temporary buildings, structures, plant, machinery and the like be removed from the land. It would be a criminal offence not to comply with such a notice. Organisers of funfairs must give the local authority two weeks notice of intention to hold a funfair.

Local Authority Development

Development by local and state authorities is dealt with in Part XI of the Bill, which puts in statutory form the procedures at present set out in Part X of the 1994 Planning Regulations. Regulations are to be made to prescribe the types of development which can be carried out under this part, which involves public consultation but final approval by the local authority itself. Where an environmental impact assessment is required, the local authority must apply to the Board for approval, under Section 159 of Part X of the Bill, instead of to the Minister for Environment and Local Government, as at present. Where a waste licence is required application is made to the EPA.

One interesting provision relates to unfinished estates. Section 164 gives the right to a majority of qualified electors who are owners or occupiers of houses in an estate to require a roads authority to take roads and open spaces in charge under Section 11 of the Roads Act, 1993. This applies both to completed estates and to uncompleted estates where no enforcement proceedings have been commenced within seven years of the expiry of the permission. In addition to the roads, "the open spaces, car parks, sewers, watermains or drains within the attendant grounds of the development." are to be taken in charge. I wonder what "attendant grounds" are?



Other Matters

There are many other aspects of the Bill that would merit comment, had one but space and the time. I should not finish without pointing to the following changes:

"The lacuna in planning control of open air concerts and events created by the decision o the Supreme Court in the IRFU case Butler and others v Dublin Corporation [1999] 1 ILRM 481 is dealt with in Part XV, which proposes a licensing system, to be administered by the local authorities, for events , defined as public performances."

* Both the Environmental Protection Agency Act, 1992 and the Waste Management Act, 1996 are amended to correct a situation which has given rise to difficulties. At present where a licence is required from the EPA, a planning authority cannot refuse planning permission for the reason that the development would cause environmental pollution, accordingly, it "shall not consider any matters relating to the risk of environmental pollution from the activity.."

* The amendments allow the planning authority or the Board to refuse permission, following consultation with the EPA , where the authority or the Board, consider that the development, notwithstanding the licensing of the activity by the Agency "is unacceptable on environmental grounds, having regard to the proper planning and sustainable development of the area."

* Another interesting provision is Section 190 which authorises a planning authority to create a public right of way over land by a compulsory procedure, "where it appears to the planning authority that there is need for a public right of way", subject to an appeal to the Board and to the payment of compensation. Such a public right of way may also be created by agreement, under Section 189.

* Section 223 provides for a formalised consultation process between applicant and planning authority. This is to be welcomed. However, in view of the fact that many important decisions are now made by the Board, often against the recommendations of its inspectors, would it not be helpful if written consultation with the Board could be similarly formalised, without prejudicing the performance of its functions, as is proposed in relation to planning authorities?

Finally, Christmas is coming and is to become officially recognised in planning law: in the computation of "any appropriate period or other time limit" under the Bill the period between 24 December and 1 January , both days inclusive, "shall be disregarded." •

PUBLICANS' LIABILITY FOR INJURIES OFF THE PREMISES

Mark Dunne BL considers, in the light of the law in other jurisdictions, whether Irish publicans could be held liable for injuries sustained to intoxicated patrons after they leave the publicans' premises.

Introduction

The law in relation to public houses is very much to the fore at present because of the proposed changes to the licensing laws allowing longer opening hours. Many of the implications of such a move are being debated and analysed by publicans, unions and the public alike. One question which has been somewhat overlooked, despite the fact that it may will be of great relevance in the new era of longer opening hours, is the question of a publican's liability for a drunken patron's conduct after he/she leaves the premises.

There can be no doubt that a duty of care exists both at common law and under the Occupiers' Liability Act, 1995 in respect of activities and accidents that happen on a premises, relating to the physical condition of the premises and the acts of other customers.[1] However the law in respect of activities and accidents that happen off a premises as a result of intoxication is far less clear. In some jurisdictions (notably Canada and Australia) the courts have held that the common law duty of care that exists between a pub/hotel owner and a patron is such that the pub/hotel owner is liable for injury sustained by the patron off the premises as a result of his intoxication. However in the UK the courts have recently held that the imposition of such a duty of care would extend Lord Atkin's neighbour principle too far and that to dilute self-responsibility and blame one adult for another's lack of self-control in relation to the consumption of alcohol was neither just nor reasonable.

In this jurisdiction the courts have not yet had the opportunity to consider this issue, not because accidents involving alcohol are any less frequent here than in other countries but perhaps because publicans and their insurers are unwilling to take the risk of the Irish courts setting a precedent along the lines of their Canadian and Australian brethren. The case of *Denis Murphy v Napier t/a "The Roundabout Tavern" & Canny t/a "The Duhallow Lodge Hotel"* is illustrative of this. This case, which did not proceed to hearing but was reportedly settled for a sum in the region of £100,000, involved a 55 year old farmer who sued a publican and a hotelier for allowing him to consume a large quantity of alcohol and drive when drunk, causing him to have an accident which left him a quadriplegic. The Plaintiff who had been drinking in both the Defendants' premises crashed his van into a wall after receiving a lift from the wife of one of the proprietors to the place where he had parked his car. The matter, which was listed for hearing on Tuesday 13th October 1998 in Cork High Court, was settled and struck out, much to the relief, it is suspected of the insurance companies and other interested parties.[2]

In this article the law in relation to the duty of care owed by publicans to intoxicated patrons will be examined. The approach which the Canadian and Australian Courts have taken will be analysed as will that taken by the UK Courts. Irish jurisprudence in relation to the duty of care will then be examined in the hope of foreseeing what approach the Irish Court are likely to take if and when they are given the opportunity.[3]

The Canadian Approach

In *Jordan House Ltd. v Menow & Honsberger*[4] the Supreme Court of Canada held that a hotel and a patron stand in the relationship of invitor and invitee and that where a patron is served with beer past the point of visible intoxication, the hotel is in breach of its duty and responsible for the foreseeable personal injury to the patron. In that case the Plaintiff who was a frequent customer of the hotel and well known to the owner and his staff, had a tendency to drink to excess and then act recklessly. The staff had been instructed not to serve him unless he was accompanied by a responsible person. On the evening of the accident the Plaintiff had been drinking in the hotel from about 5.15pm until 10.15 pm, the hotel having sold beer to him past the point of visible intoxication. He was ejected from the premises for annoying other customers and the trial judge

found that this was in the knowledge that he was unable to take care of himself by reason of intoxication and that he would have to go home, probably by foot, by way of the main highway. The trial judge found that the hotel owed and was in breach of a common law duty of care to the Plaintiff.

The Canadian Supreme Court dismissed an appeal unanimously. Laskin J. (with whom the other judges concurred) dealt with the issue solely on the basis of the common law.[5] He stated that the common law assesses liability for negligence on the basis of breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. The guiding principle assumes a nexus or relationship between the injured person and the injuring person which makes it reasonable to conclude that the latter owes a duty to the former not to expose him to an unreasonable risk of harm. The learned judge went on to state that in considering whether the risk of injury to which a person may be exposed was one that he should not reasonably have to run, it was relevant to relate the probability and the gravity of injury to the burden that would be imposed upon the prospective defendant in taking avoiding measures.

In relation to the case before him he stated,

> " In the present case, it may be said from one point of view that Menow created a risk of injury to himself by excessive drinking on the night in question. If the hotel's only involvement was the supplying of the beer consumed by Menow, it would be difficult to support the imposition of common law liability upon it for injuries suffered by Menow after being shown the door of the hotel and after leaving the hotel. Other persons on the highway, seeing Menow in an intoxicated condition, would not, by reason of that fact alone, come under any legal duty to steer him to safety, ... The hotel, however, was not in the position of persons in general who see an intoxicated person who appears to be unable to control his steps. It was in an invitor-invitee relationship with Menow as one of its patrons, and it was aware, through its employees, of his intoxicated condition, a condition which, on the findings of the trial judge, it fed in violation of applicable liquor licence and liquor control legislation. There was a probable risk of personal injury to Menow if he was turned out of the hotel to proceed on foot on a much-travelled highway passing in front of the hotel."

The learned trial judge went on to hold that there was nothing unreasonable in calling upon the hotel in such circumstances to take care to see that the Plaintiff was not exposed to injury because of his intoxication. No inordinate burden would be placed upon it in obliging it to respond to the Plaintiff's need for protection. The Judge took account of the fact that the hotel had experience with the occasional need to take care of intoxicated patrons and had in the past provided rides and accommodation for such patrons.

> "Given the relationship between Menow and the hotel, the hotel operator's knowledge of Menow's propensity to drink and his instruction to his employees not to serve him unless he was accompanied by a reasonable person, the fact that Menow was served, not only in breach of this instruction, but as well in breach of statutory injunctions against serving a patron who was apparently in an intoxicated condition, and the fact that the hotel operator was aware that Menow was intoxicated, the proper conclusion is that the hotel came under a duty to Menow to see that he got home safely by taking him under its charge or putting him under the charge of a responsible person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself. There was, in this case, a breach of this duty for which the hotel must respond according to the degree of fault found against it. The harm that ensued was that which was reasonably foreseeable by reason of what the hotel did (in turning Menow out), and failed to do (in not taking preventive measures)."

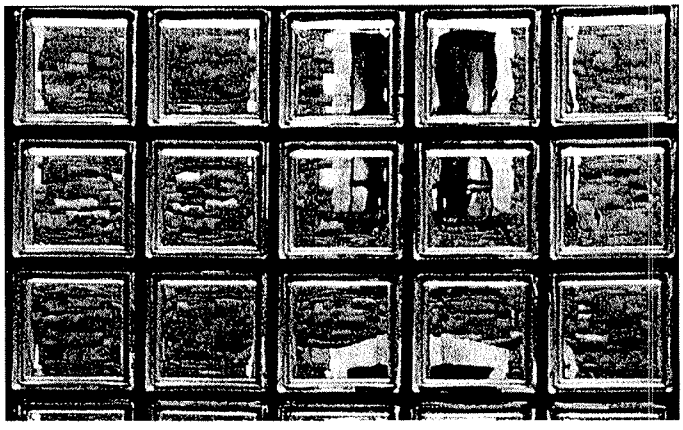
The principle as laid down in the Jordan case was considered and affirmed by the Canadian Supreme Court in *Crocker v Sundance Northwest Resorts Ltd.*[6] In that case the Defendant operated a ski resort and held "tubing" competitions in order to promote its resort. The competition involved teams of two sliding down a steep hill in oversized inner tubes. The Plaintiff and his friend entered the competition. On the morning of the race the Plaintiff and his friend drank large quantities of alcohol including some bought from the bar at the resort while wearing bibs that identified them as "tubing" competitors. During one heat they were thrown from their tube and the Plaintiff suffered a cut above his eye. Both the owner and manager of the Defendant premises noted the Plaintiff's condition and asked him whether he was in any condition to compete in another heat. At the beginning of the second heat the Plaintiff fell down and his tube slid down the hill. The plaintiff was visibly drunk but yet a new tube was obtained for him. On the way down the hill the Plaintiff and his friend were flipped out of the tube and as a result the Plaintiff was rendered a quadriplegic. The trial Judge held that the Defendant was 75% negligent and held the Plaintiff to be 25% contributorily negligent.

On appeal to the Supreme Court the decision of the trial judge was upheld. After reviewing the case-law including the *Jordan* decision Wilson J. (delivering the judgement of the court) stated that the issue in the appeal before him was whether the defendant, owed a duty of care to take all reasonable measures to prevent the plaintiff from continuing to participate in the very dangerous activity which was under its full control and supervision and promoted by it for commercial gain when it became apparent that the plaintiff was drunk and injured. He held that the relationship between the Plaintiff and the Defendant gave rise to such a duty, because the defendant had set up an inherently dangerous competition in order to promote its resort and improve its financial future, it was in charge of the way in which the event was to be conducted, it provided the alcohol to the Plaintiff during the event and knew of the Plaintiff's inebriated and injured condition. The judge was compelled by the case law which he considered made this conclusion inevitable.

Having established that a duty of care existed Wilson J went on to consider the standard of care applicable. He refered to the dicta of Laskin J. in *Jordan* that it was relevant to relate the probability and gravity of injury to the burden that would be imposed upon the prospective defendant in taking avoiding measures. He held that numerous steps had been open to the Defendant to dissuade the Plaintiff from competing, none of which imposed a serious burden on the on the resort. It could have disqualified him, refused to give him a tube or attempted to bring home to him the risk of serious injury in competing while drunk. In such circumstances the Defendant failed to meet its standard of care.

This case, while relevant from the point of view of endorsing *Jordan* was based on permitting the victim to take part in the race while intoxicated as opposed to serving alcohol. However the overall approach of the Canadian Courts is clear. Whether a duty of care exists between a publican and a patron to protect the patron in an intoxicated state depends on the publican's state of knowledge and the foreseeability of risk. If a publican who is aware of a patron's intoxication continues to serve him, then according to the Canadian Courts, the common law imposes a duty of care upon him for forseeable injury to the patron off the premises resulting from the intoxication. Whether the publican is in breach of that duty depends upon the foreseeability of the risk.

The liability of publicans for injury sustained by third parties as a result of the intoxication of a patron was recently considered in *Mayfield Investments Ltd. v Stewart.*[7] The Respondent Gillian Stewart together with her husband, brother and his wife went to the Appellant's theatre-restaurant for an evening of dinner and live theatre. The admission price included the dinner and performance, but did not include the cost of alcohol consumed. They arrived at about 6.00pm in the Respondent's brother's car. They were served by the same



"He considered that the question was whether the circumstances were such that a reasonably prudent establishment should have foreseen that the intoxicated patron would drive and therefore should have taken steps to prevent this."

waitress all evening, who kept a running total of all alcohol ordered. The Respondent's brother drank 5-7 double rum and cokes throughout the evening, although he showed no signs of intoxication. The respondent testified that she knew in general terms the amount he had drunk. On leaving the premises at 11.00pm they had a discussion amongst themselves about whether or not the Respondent's brother was fit to drive. Neither the Respondent nor his wife had any concerns and he thus drove the car. On that particular night there was a heavy frost on the road so he drove home cautiously below the speed limit. However despite his caution he momentarily lost control of the vehicle which spun out of control and hit a light pole and a wall. The Respondent, who was not wearing a seat belt, was thrown from the car and was rendered a quadriplegic.

She was unsuccessful against Mayfield Investments Ltd at the trial. However the Court of appeal allowed her appeal and held Mayfield negligent and 10% liable. Mayfield thus appealed to the Supreme Court. Major J. delivering the unanimous decision of the Supreme Court stated that in determining the existence of a duty of care the test to be applied was that laid down by the House of Lords in *Anns v Merton Borough Council.*[8] He stated that this test as applied by the Canadian Court was: Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so, are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

The learned judge concluded that there was a sufficient degree of proximity between the Appellant and the Respondent and that a duty of care existed between them. The duty of care arose because the Respondent was a member of a class of persons who could be expected to be on the highway, and it was to this class of persons the duty was owed.

Having established the existence of a duty of care Major J. went on to consider what was the standard of care and whether or not it was breached. He stated that he doubted that any liability could flow from the mere fact that the appellant may have over-served the driver as it was only if there was some foreseeable risk of harm to the patron or a third party that an hotel or others in their position would be required to take some action. After reviewing the case-law including *Jordan* and *Croker* the judge considered that there was little difficulty with the proposition that the necessary "special relationship" exists between vendors of alcohol and the motoring public. However he went on,

> "Where no risk is foreseeable as a result of the circumstances, no action will be required, despite the existence of a special relationship."

He considered that the question was whether the circumstances were such that a reasonably prudent establishment should have foreseen that the intoxicated patron would drive and therefore should have taken steps to prevent this. He took the view that the Appellant could not escape liability simply because the driver was apparently not exhibiting any visible signs of intoxication as the waitress kept a running tab, and knew that he had consumed a large quantity of alcohol over a 5 hour period. However he felt that the presence of two sober women at the table relieved the Appellant of liability. Referring to the dicta of Laskin J. in *Jordan* to the effect that an hotel's duty could have been discharged by making sure that a patron got home safely by taking him under its charge or putting him under the charge of a responsible person he took the view that

> "Had [the driver] been alone and intoxicated, Mayfield could have discharged its duty as established in *Jordan House Ltd. v Menow* by calling [the driver's] wife or sister to take charge of him. How, then can Mayfield be liable when [the driver] was already in their charge, and they knew how much he had had to drink? .... He was already in their care, and they knew how much he had to drink. It is not reasonable to suggest in these circumstances that Mayfield had to do more."

It was not reasonably foreseeable that he would be driving when a sober wife and sister were present with full knowledge of the circumstances. In these circumstances Major J. concluded that the Appellants did not breach the duty of care they owed to the victim and on that basis he allowed the appeal and dismissed the action against the Appellant.

The approach taken by the Canadian Courts is, it is submitted, a well balanced and reasonable one. It does not impose liability on all publicans for their intoxicated patrons, but rather bases liability on the knowledge of the publican as to the patron's state of intoxication at the time when he continued to serve him drink, knowledge of the surrounding circumstances and the foreseeability of risk. The obligation imposed by the duty of care seems to be an affirmative one and as such imposes liability on the publican for an omission on the basis that the publican assumed control of the intoxicated patron by serving him past the point of inebriation and as such assumed responsibility for him. However no liability will arise if the risk to the patron was not foreseeable, or if the publican takes action which reduces the risk to the point where it is not foreseeable. Thus if the patron is in the company of others or is put into the care of others who are responsible, then this in the normal course of events will be sufficient to relieve the publican of liability.

'The overall approach of the Canadian Courts is clear. Whether a duty of care exists between a publican and a patron to protect the patron in an intoxicated state depends on the publican's state of knowledge and the foreseeability of risk. If a publican who is aware of a patron's intoxication continues to serve him, then according to the Canadian Courts, the common law imposes a duty of care upon him for forseeable injury to the patron off the premises resulting from the intoxication. Whether the publican is in breach of that duty depends upon the foreseeability of the risk."

Australia

A recent decision of the Supreme Court of Queensland takes a similar approach. In *Johns v Cosgrove, Chevron Queensland Ltd. & Ors*[9] the Plaintiff, a 29 year old man had been drinking in the second-named Defendant's hotel from late in the afternoon until closing time. He had gone there to drink heavily and become intoxicated in accordance with his usual habit. His usual practice was known to at least some of the staff. While waiting for the bus he staggered out in front of the first named Defendant's car and was injured.

Derrington J. held that the Plaintiff had been served in the hotel up to the state of gross intoxication when he was a danger to himself, for it was known to the bar staff that he would then go home by a route that would take him into close proximity to a busy highway. He stated that,

"Again, the primary responsibility was the Plaintiff's, but, knowing that an intoxicated person would place himself into a position of danger on leaving the hotel, a publican cannot continue to supply him with the means of greater intoxication without regard to the danger to which he is thereby contributing. While the Plaintiff's fault is enlarged because he deliberately drank intending to become heavily intoxicated, there is some substance to the argument that at a certain stage his judgment as to how far he should go would be impaired."

The Judge cited authorities for this principle that a publican must take reasonable care in such circumstances not to contribute to the danger, including *Munro v Park Holiday Estates Ltd., Mayfield Investments Ltd. v Stewart and Jordan House Ltd. v Menow.* He held that,

"It is not negligence merely to serve a person with liquor to the point of intoxication; but it is so if because of the circumstances it is reasonably foreseeable that to do so would cause danger to the intoxicated party, such as, for example where the intoxication is so gross as to cause incapacity for reasonable self-preservation when it is or should be known that he or she may move into dangerous circumstances, and where no action is taken to avert this. This is not to impose an excessive burden on publicans if it is fully understood."

In the case before him Derrington J held that the fact that, it were known that the intoxicated Plaintiff would be negotiating dangerous traffic because the hotel was situated between two major arterial roads and his habit of going home unescorted which was also known meant that the second-named Defendant was liable. The learned Judge apportioned responsibility 45% to the Plaintiff, 30% to the first-named Defendant and 25% to the second-named Defendant hotel.

This approach, which is identical to the Canadian one is, it is submitted, a reasonable and well balanced one which imposes liability, not on the basis of serving a person to the point of intoxication, but on the basis of the foreseeable risk of injury to a patron served beyond that point, to be judged in light of the knowledge of the publican as to the patron's intoxication and the surrounding circumstances.

The United Kingdom

The law of the UK in this area is somewhat unclear. The most recent decision there seems to suggest that no liability attaches to a publican for the conduct and actions of an intoxicated patron. However in *Munro v Porthkerry Park Holiday Estates Ltd.*[10] Beldam J. in the Queens bench division of the High Court held that the mere relationship between the licensee and his visitor could not of itself impose a duty to take care beyond the common duty of care and that the selling of large quantities of intoxicating liquor could not of itself impose a duty to take care of the customer. The licensee would be entitled to assume that the customer would regulate his own consumption and would not consume liquor in such quantity as to become incapable of taking care of himself. However the Judge went on to state that the scope of the licensee's duty to his customer would extend to a duty on his part to guard his customer against dangers arising from the customer's inability to take care of himself due to intoxication from excessive consumption of alcohol, when it was proved that the licensee knew that the customer was already, or would, if additional alcohol was served, become incapable of taking reasonable care of himself. However the Judge considered it essential that the licensee had

knowledge that the customer was so intoxicated as to be incapable of taking care of himself. The absence of any immediate hazard or the presence of companions capable of looking after the customer might absolve the licensee from any failure to take steps.

In that case the Plaintiff was the administrator of the deceased's estate who along with two friends had decided to spend the weekend at the Defendant's leisure park situated on a cliff top. They were drinking on the premises until they became boisterous and were asked to leave. The deceased walked out towards a chain link fence at the cliff edge and fell over it down the sheer cliff to his death. Beldam J. held that there was no evidence that the deceased had reached such a stage of intoxication that he was incapable of taking care of his own safety, as opposed to being merely merry or boisterous. Therefore it would not have occurred to the reasonable licensee, seeing the deceased leaving the premises with his companions, that the accident was more than a remote possibility. In such circumstances the Defendant was not liable to the Plaintiff. This reasoning would seem to be in line with that enunciated by the Canadian and Australian Courts, putting the knowledge of the publican as to the state of the patron and the foreseeability of risk as the key factors.

However the most recent decision of the Court of Appeal seems to retreat from this position. The case of *Barrett v Minister of Defence.*[11] concerned a Naval Serviceman who died after becoming so drunk one night at the naval base where he was serving that he passed out into a coma and became asphyxiated on his own vomit. Alcohol had been provided at a reduced duty-free rate on the base. It was accepted that such conduct and action was prohibited by the Queens Regulations of the Royal Navy and the deceased's Commanding Officer pleaded guilty to an internal tribunal for breach of his obligations under these regulations to ensure that all officers and petty officers did not display levels of drunkenness and improper behaviour. The trial judge held the Defendant liable upon the grounds that the deceased had been a heavy drinker, that this was widely known, and that it was therefore foreseeable that in the particular environment of the Naval Base with its lax attitude to drinking, he would succumb to heavy intoxication. On appeal the Court of Appeal disagreed with the trial judge as to the Defendant's duty of care and imposed liability upon the Defendant on the basis that having assumed responsibility for the deceased when he went into a coma, they failed to do so properly in a manner that would prevent him vomiting and asphyxiating.

Beldam L.J. (with whom the other Law Lords concurred) stated that there were many judicial pronouncements of high authority that mere foreseeability of harm is not a sufficient foundation for a duty to take care in law.

> "Since *Anns v Merton London Borough Council* ... the House of Lords has preferred the approach of the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 that the imposition of additional duties to take care for the safety of others should develop incrementally and by analogy with established categories, an approach which involves consideration of whether it is fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of another. The mere existence of regulatory or other public duties does not of itself create a special relationship imposing a duty in private law."

After referring to the categories of relationship in which an obligation to use reasonable care already exists he went on to state,

> "The characteristic which distinguishes those relationships is reliance expressed or implied in the relationship which the party to whom the duty is owed is entitled to place on the other party to make provision for his safety. I can see no reason why it should not be fair, just and reasonable for the law to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink. No one is better placed to judge the amount that he can safely consume or to exercise control in his own interest as well as in the interest of others. To dilute self-responsibility and to blame one adult for another's lack of self-control is neither just nor reasonable and in the development of the law of negligence an increment too far."

The Judge referred to the decisions in *Crocker* and *Jordan* and distinguished the former on the basis that liability was not based on permitting the victim to drink but in permitting him to take part in the race. He distinguished the latter on the basis that the Plaintiff's relationship with the defendant was that of invitee/invitor and was thus sufficient to justify the imposition of a duty to take care for the safety of the customers.

This case seems at odds with the authorities already discussed, and in particular with the earlier judgment in *Munro.* While the learned judge was correct in holding that it was fair, just and reasonable for the law to leave a responsible adult to assume responsibility for his own actions in consuming alcohol, it seems, it is suggested unfair and unreasonable for the law to continue to leave this adult responsible at the stage when it is clear to the publican that he is intoxicated to the point that he is clearly no longer capable of assuming responsibility and the publican continues to serve him for his own financial gain.

"The law of the UK in this area is somewhat unclear. The most recent decision there seems to suggest that no liability attaches to a publican for the conduct and actions of an intoxicated patron."

It may be argued that this case was decided specifically on its facts and as such does not contradict the earlier decisions. The court was not dealing with the normal relationship of publican and patron nor was the alcohol supplied on that basis. Indeed Beldam L.J. distinguished the *Jordan* decision on this basis.

The approach of the Irish Courts

The approach that the Irish Courts will take remains to be seen. One point of note in considering this is the fact that in assessing the duty of care the Canadian and Australian Courts applied the principles laid down in *Anns v Merton London*

Borough, which in effect put foreseeability of risk centre stage. The UK courts on the other hand have departed from the *Anns* formulation[12]. Indeed this was evident in *Barrett* where Beldam L.J. noted that the House of Lords had long since preferred the dicta of Brennan J. in *Sutherland Shire Council v Heyman*[13] where he stated that,

> "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty."

The Irish Courts have not followed suit. In *Ward v McMaster*[14] McCarthy J. stated that he, "would not seek to dilute the words of Lord Wilberforce" in *Anns*. He held that a duty of care in a given case arose from, "the proximity of the parties, the foreseeability of the damage, and the absence of any compelling exemption based upon public policy." He was of the view that any such exemption would have to be a very powerful one so as to "deny an injured party his right to redress at the expense of the person or body that injured him." McCarthy J. rejected what he called "the verbally attractive proposition of incremental growth" as laid down by Brennan J. in *Sutherland* because it "suffers from a temporal defect - that rights should be determined by the accident of birth."

The dicta of McCarthy J has been followed by the Supreme Court in a number of subsequent decisions.[15] In *W. v Ireland & Ors.*[16] Costello P. applying the McCarthy test stated that in assessing whether a duty of care existed, consideration must be given to whether: (a) there was a relationship of proximity between the parties, (b) if so whether the relationship was such that it was in the reasonable contemplation of one party that carelessness on his part would be likely to cause damage to the Plaintiff and (c) are there any considerations which ought to negative, reduce or limit the scope of the said duty.

Applying this test it is certainly open to the Irish Courts to find that a publican who knowingly serves a patron to the point of intoxication owes him a duty of care to protect him from foreseeable injury off the premises. Such an approach would, it is suggested be in line with both the spirit and letter of the McCarthy J.'s dicta in *Ward.* Indeed in *Walsh v Ryan*[17] Lavan J. stated that the application of the principles of *Donoghue v Stephenson* established that a publican owed a duty of care to his customers in view of the sale, supply and consumption of alcohol on the premises.[18] However the courts may in assessing any considerations which "ought to negative or limit the scope of the duty" take a similar view to Beldam L.J. in *Barrett* to the effect that it is fair, just and reasonable for the law to leave the responsibility for consuming alcohol in the hands of the drinker. Such an approach while not in line with the spirit of the *Anns* decision or indeed the dicta of McCarthy J. in *Ward,* is a possibility, especially in light of the fact that while the Courts have repeatedly referred to *Anns* and *Ward* as a statement of the law, there is some evidence to suggest that there is a latent move away from these decisions in favour of the more cautious approach of the UK Courts.[19] However until such time as the insurers and others involved decide to give the Irish courts an opportunity to consider one of these cases, publicans, patrons and insurers alike must serve, drink and insure with uncertainty. •

1. In *Hall v Kennedy & Rudledge t/a "The White House"* (Unreported High Court 20/12/1993) Morris P. held that the obligation of a pub owner is to take all reasonable care for the safety of the patron while on the premises, including ensuring that a customer in the premises did not assault him. He went on to hold that the necessary steps would include, in the appropriate case, removing such a customer from the premises, refusing to serve him drink, staffing the bar with sufficient barmen or security staff so as to ensure the safety of the Plaintiff.
2. In an article in the *Irish Times* of 15th October 1998 by Catherine Cleary entitled "*Insurers put on the pressure to settle case, says publican*" one of the Defendants claimed he had been willing to fight the case in court, but the insurance company insisted on settling. An article in the same edition by Carol Coulter entitled "*Rise in claims unlikely after man wins settlement*" reported that legal and insurance sources were confident that because the case was settled out of court no legal precedent had been set.
3. It is not proposed to examine US jurisprudence in this area as it is primarily statute based, known as "Dramshop" legislation.
4. (1973) 38 D.L.R. (3d) 105
5. He referred to the fact that the trial judge had taken account of the Liquor statutes and stated that he did not read his reasoning as holding, that the mere breach of those statutes and that fact that the Plaintiff suffered personal injury, were enough to attach civil liability to the hotel. He took the view that the trial Judge had regarded them as crystallising a relevant fact situation which, because of its authoritative source, the Court was entitled to consider in determining, on common law principles, whether a duty of care should be raised in favour of the Plaintiff as against the hotel.
6. (1988) 51 D.L.R. (4th) 321
7. (1995) 121 D.L.R. (4th) 222.
8. [1978] A.C. 728
9. [1997] QSC 229. 12/12/1997
10. [1984] T.L.R 138, (1984) 81 L.S. Gaz. 1368.
11. [1995] 3 All E.R. 87
12. In *Murphy v Brentwood DC* [1991] 1 AC 398 the House of Lords overturned the *Anns* formulation in favour of a more restrictive approach.
13. (1985) 157 CLR 424.
14. [1988] IR 337
15. *Cotter v Min for Agriculture & Ors.* Unreported Supreme Ct. 01/04/1993. *Convery v Dublin County Council* [1996] 3 IR 153.
16. [1997] 2 IR 141.
17. Unreported High Court 12/2/1993
18. This would have to be viewed as *obiter dicta* in the present context as the case concerned an incident which took place on the premises.
19. In *W. v Ireland* [1997] 2 IR 141 Costello P. referring to the fact that the Irish Courts followed *Anns* stated that "Irish Law has therefore parted company with English law but I am by no means certain that the departure is a major one. The view of the Irish courts has been that *Anns* was a "confirmation" of the long established principles of the law of tort contained in *Donoghue v Stephenson* and was not (as some commentators in England seem to consider) a major innovation in the law of tort." In that case the Court held that even if there were a sufficient relationship of proximity between the Attorney General and the Plaintiff and the injury to the Plaintiff was foreseeable, it would be contrary to public policy to impose a duty of care.

ICROSOFT V. THE DEPARTMENT OF JUSTICE

Adèle Murphy BL summarises the key issues involved in the Microsoft anti-trust battle in the US.

Introduction

Microsoft has been involved in the personal computer market since its genesis. It has also recently been the subject of very bitter and protracted antitrust proceedings. Microsoft claims that the charges levied against it have come about as the result of disgruntled competitors trying to sabotage the success that it has achieved through legitimate competitive and innovative business practices. Its critics say that Microsoft has engaged in anti-competitive and pressuring behaviour to retain its market share and to maintain barriers to entry. The recent findings of fact by Judge Thomas Penfield Jackson of the U.S. Federal District Court leave no doubt that he shares the opinion of Microsoft's competitors. While a final judgment is not due until March of next year the findings of fact are so damning there is no doubt that the ultimate judgment will follow suit.

Background

In June 1990 the U.S. Federal Trade Commission secretly investigated possible collusion between Microsoft and IBM but decided, in 1993, not to take any action. In the same year the U.S. Justice Department took over the investigation and in July 1994 a consent decree was signed prohibiting Microsoft from requiring computer makers that license its Windows operating system to also license any other software product, but the decree allowed Microsoft to develop "integrated products". In 1996 the government investigated a possible breach of the decree. In 1997 the Justice Department sought to have Microsoft fined $1 million a day for bundling Internet Explorer with Windows 95. Microsoft argued that it was an integrated part of the operating system. An injunction was granted by Jackson J. and subsequently modified by the Appeals Court who ruled that the injunction should not include Windows 98 thereby allowing Microsoft to launch Window 98 complete with Internet Explorer. In May 1998 the Justice Department and others filed antitrust proceedings alleging abuse of market power. The trial began on June 24th 1998 and ended on September 21st 1999. The Judge delivered his findings of fact at the beginning of November 1999.

The judge found there were a number of barriers to entry to the market because, as Microsoft's Operating System enjoys such a large market share, the majority of applications are written to run on Windows. Thus, it is well nigh impossible to compete.

Market

Jackson J.defined the relevant market as that of Operating Systems.[1] A computer that uses an Intel chip (i.e. PCs) cannot use an Operating System designed to run on computers that do not use intel chips (e.g. Macs). Microsoft has enjoyed over 90% of the Intel-compatible Operating Systems market for over a decade, a market share that has risen to 95% in the last few years.[2]

Barriers To Entry

The judge found there were a number of barriers to entry to the market because, as Microsoft's Operating System enjoys such a large market share, the majority of applications are written to run on Windows. Thus, it is well nigh impossible to compete. Persons are unlikely to change from Windows because to do so would involve investment in new hardware and would result in fewer applications being available to the computer user and would also involve compatibility issues.

Anti-Competitive Practices

Netscape developed a web browser which was released in 1994. A web browser is a type of middleware. Middleware sits between the Operating System and the Application. Therefore Applications written for a non-Intel compatible Operating System could also be used on Intel compatible Operating Systems and vice versa, in other words; it had the potential to weaken the barriers to entry. Microsoft were also developing their own browser but it was seen as inferior to the Netscape browser. They felt threatened and sought to persuade Netscape to enter into a "special relationship"[3] which would have meant Netscape would get special treatment from Microsoft in return for not competing directly with them. Netscape refused and

rapidly rose to the top of the browser market. Microsoft was aware that the primary source of income for Netscape was browser revenue. They chose to give their browser away with every Operating System. While this sounds like a good deal for consumers (and it was possibly the only thing Judge Jackson praised about Microsoft[4]) it was held to have come about as a result of concerted practices and to the detriment of consumers:

> "It is clear, however, that Microsoft has retarded, and perhaps altogether extinguished, the process by which these two middleware technologies could have facilitated the introduction of competition into an important market."[5]

Jackson J. found no other justification for the investment of $100 million of research into a product that was subsequently given away than the prevention of competition to its Operating System. Companies such as IBM, Sun and Compaq were subjected to anti-competitive practices. Microsoft imposed licensing agreements on Original Equipment Manufacturers (OEMs)[6] and opposition to the terms of the agreements resulted in severe sanctions, such as excessively late delivery of new releases, higher costs and the withholding of necessary technical information all of which meant:

> "The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest."[7]

What Happens Now?

Commentators[8] argue that Bill Gates would be wise to settle before the final ruling, as the Judge's preliminary findings of fact are not in themselves admissible in private litigation. However it is also suggested that Gates has no intention of settling and that he believes his political supporters will save him from the over zealous regulatory antitrust department. If he does settle it would involve dividing the company up, either into numerous small companies, who would all have rights to Windows and would theoretically go their own way and compete with each other, or alternatively into two or three parts, such as Operating Systems, Software and Telecommunications.

If he does not settle then it is open to those harmed by Microsoft to take actions.[9] In fact, a number of suits are already in existence, including an action taken by Sun Microsystems. America Online would have a very strong cause of action on behalf of Netscape, which it took over last year and would be likely to recover damages.[10] Consumers could conceivably take a class action which if it was successful could run to billions of dollars in damages.

Gates may also choose to rely on delay to succeed. While it is possible that appeals may continue until 2003 or 2004 it is open to the judge to use a fast track mechanism under the Antitrust Expediting Act if he enters a final judgment. By ruling that "immediate consideration of the appeal by the Supreme Court is of general public importance" the case goes directly to the Supreme Court who can then decide whether to hear the matter.

Microsoft's fastest growing market is the European Union. A settlement would probably satisfy EU regulators and may deflect attention from Microsoft's recent $4 billion investments in European cable and telecommunications companies and would probably be the wisest course of action. •

1. An Operating System is an integral part of any PC; it allocates computer resources and also allows software to run.
2. paragraph 35 of the judgment
3. paragraph 79
4. paragraph 408
5. paragraph 411
6. OEMs would be the largest consumers of Operating Systems. Selling a computer without an Operating System is generally not of much use.
7. paragraph 412
8. Irwin Steltzer, *"Gates could do worse than settle for 'Baby Bills'"*, *The Sunday Times,* 14th November 1999
9. *The Wall Street Journal, The Sunday Business Post,* November 14th 1999, p. 21
10. In November 1998 Netscape was used by 40% of users and Microsoft IE by 60%. In November 1999 Microsoft IE is used by 64% and Netscape by 36%. *The Irish Times,* Monday, November 15th, 1999.

KING'S INNS NEWS

Cottages at King's Inns

Barristers who spent time at King's Inns may be unaware of the existence of the cottage block. Tucked away to the south of the car-park is a unique L-shaped block of five houses built to the design of Jacob Owen in the 1840s. Apart from the fact that they have a preservation order on them, it is the Society's intention to ensure that they go on and on forever. With this in mind, we have undertaken a complete conservation and restoration project. The five cottages will be fitted out to a high standard - each with a living room, two bedrooms, kitchen and bathroom. There will be electric central heating, parking and a fully fitted kitchen. It is hoped that they will be available for rental in the early spring.

Honorary Benchership for Kevin Waldron *(former Director of Education)*

At a meeting of the Benchers, held on Friday 15 October, the Chief Justice, the Hon. Liam Hamilton, proposed that Kevin Waldron be elected an honorary bencher. The President of the High Court, the Hon. Mr Justice Morris, seconded this proposal. There was unanimous agreement to the proposal.

As will be remembered, Kevin Waldron was Director of Education at King's Inns between 1984 and 1997. During his tenureship, great strides were made in developing the curriculum and in introducing practical exercises. As Eamon Mongey recently wrote "he was a perceptive planner and an effective implementer". Additionally, he acted as advisor to staff and students alike. During the recent illness of Richard Tuite, Kevin Waldron was pressed to return to active service in the Inns. He remains as keen as ever about the education of barristers. As might be expected students currently going through King's Inns are beseeching him to update the famous *Waldron's notes.*

Print Series

The third print in the King's Inns print series is now available. It features the *Rotunda of the Four Courts* viewed from the dome. Robert Ballagh is the artist. The price will be £100. Preference will be given to purchasers of previous prints.

Further enquiries to: David Curran at (01) 874 4840

Recent activities at King's Inns - Main Building

More layers of paint have been removed from columns and pilasters. This time it was the turn of the inner entrance hall in the main building.

The former offices of the Under-Treasurer and of his steward have been brought back to Gandon's original design as one room. Take a look at this room when you are next in the entrance hall of the main building. We made three agreeable discoveries; while the locked Under-Treasurer's mausoleum of a safe contained no gems it now works, the 1807 bell used for the call to dining is still in place and will be used henceforth (thereby replacing a less elegant handheld bell) and two small pieces of wallpaper from c.1810 and c.1820 were saved. These items will contribute to the social history of the Inns that is waiting to be written.

The corridor outside the Bar Room was refurbished (floor sanded, walls painted). Photographs of LSDSI committees down through the years have been sent to the conservator for badly needed treatment. The entire back stairs area has also been redecorated (painted, recarpeted, sanded) and industrially cleaned. Directional signs will be put in place shortly.

The external entrance steps were lifted, relaid and pointed. This we hope, will be a prelude to a major resurfacing job in front of the Registry of Deeds and King's Inns. •

"HOLIDAY LAW IN IRELAND"

by Jonathan Buttimore BL
(Blackhall Publishing 1999)

Reviewed by John Trainor SC

For most of us, thankfully, a foreign holiday provides an enjoyable and restful break. For those not so lucky, however, it can represent an unmitigated period of distress and suffering. Usually, these disasters have their origins in the holiday having been misdescribed by the Tour Operators Brochure or by the Travel Agent. Often it results from a botsch-up in the arrangements which the Tour Operator was to have put in place. The honeymoon couple flown to the wrong destination, or the Eastern European resort that had closed for the winter two weeks before a plane load of tourists arrive are examples from the not too far distant past of what can go wrong. On his return, the infuriated holidaymaker will head straight for his Solicitor to seek redress. But not all cases are worthy of compensation. The British Association of Travel Agents some years ago produced statistics to indicate that 1 in 20 holiday makers set off with the deliberate intention of contriving a claim for compensation to reimburse them for the cost of their holiday on their return.

Bringing or defending holiday claims is therefore part of the staple diet of the barrister for whom I have no doubt "Holiday Law in Ireland" by Jonathan Buttimore B.L. will be of particular assistance. This useful publication contains a detailed treatment of the provisions of the Package Holiday and Travel Trade Act, 1995 and the Council Directive on Package Travel, Package Holidays and Package Tours (Dir 90/314/EEC), from which the 1995 Act is derived. The Directive was enacted for the purposes of harmonising aspects of national provisions relating to package travel in the EEC with a view to providing protection for consumers and eliminating distortions of competition in the tourism market between the various member states. Both it and the 1995 Act contain detailed provisions regulating Travel Contracts and certain provisions as to the content of brochures, and for imposing liability in the case of misleading brochures. They stipulate the essential contractual terms relating to travel destinations, means of transport, accommodation features, itinerary, and visits, excursions or other services included in the price; along with other important provisions. They contain detailed provisions in relation to the transfer of booking, contact price provision, and the rights of the parties in the event that there should be a significant failure of performance on the part of the travel operator after the start of the package. All these matters are given careful consideration in Mr. Buttimore's book which also considers the consumers rights at common law in relation to damages in contract and tort. The book also contains a chapter on the impact of International conventions on the limitation of liabilities of tour organisers such as the Warsaw Convention on International Carriage by Air as well as important Conventions signed at Geneva (1949), Berne (1970), Brussels (1970) and Athens. It also contains a chapter on the consequences on insolvency of Tour Operators and Travel Agents, a matter of no small importance given the recrrent stories we often read of holidaymakers stranded abroad when their Tour Operator ceases to trade. Importantly, there is a chapter on holiday arbitration, a matter of considerable importance; because it is an invariable feature of the standard booking form adopted by most travel agents who are members of the Irish Association of Travel Agents that it contains an arbitration clause. So, often the first thing that the legal adviser will require to examine is whether or not his client is bound to arbitrate, and if so, he must thereafter appreciate the mechanics of advancing that process as speedily as possible to protect his clients rights.

While the term "Holiday Law", does not trip as readily off the tongue as, say "Contract Law", or "Tort Law", Mr. Buttimore has, I feel, correctly identified an important niche in legal publishing, in that he has succinctly collected together all the relevant law and all the applicable legal principles (including useful appendices reproducing the relevant legislation), which will enable "Holiday Law in Ireland" to be precisely the type of one stop shop that the eager solicitor or barrister will seek to avail of when the disappointed holidaymaker arrives at his door. •

BRIEF CASES

by Henry Murphy SC
(Blackhall Publishing, 1999)

Reviewed by Conor Bowman BL

Libel lawyers all around the world are about to be roused from their late autumnal snooze. Henry Murphy is back on the shelves. Swear in the jury and grab a second Silk.

Dermot McNamara B.L. returns in this volume as a seasoned junior-Junior He is married with children (what a good name for a TV series) and his heretofore sole instructing Solicitor, Arnold, is still doling out hospital-pass cases from his imperial palace at 203 Gardiner Street. In this collection Henry Murphy invites us to get on board and enter a fantasy world where Barristers often get no payment for their work and where Judges sometimes completely misread cases and find for the Defendant. There are six stories in this collection and once the brief opening chapter sets the scene we are off.

This is the sequel to Henry's first book *(An Eye on the Whiplash)* which appeared two years ago. Sequels are often beset by two problems. Firstly, they rarely match the heights of the first volume and, secondly, they usually require the reader to have read the first book before allowing them to make any sense of the follow-up. Henry Murphy, with all the skill and grace of a second centre leaving Lomu stranded before scoring under the posts, easily avoids both traps and the result is an absolute cracker of a book.

The stories are varied. They cut a slice out of legal life and let everyone have a peek. Those pessimistic lowbrow journo hacks, who peddle rubbish for a living and imagine themselves to be the successors to Flann O'Brien, will never see into the legal profession beyond tribunal fees. They will certainly never cast a critical eye on the fourth housing estate (or whatever they call themselves). H. Murphy, on the other hand, takes his own job and experiences and those of his colleagues and turns them inside-out to show us what makes ourselves tick. We follow McNamara B.L. around the system and the country and we are entertained at every juncture.

What I like most about *Brief Cases* is that we are told quite a bit about the central character, and his life beyond the law, and, as a consequence, he rings true and invites empathy. When he is confronted by that commonest of legal cocktails: one part inept Solicitor, three parts greedy client and nine parts hopeless case, we are right there with him uncomfortably balanced between his obstructing Solicitor and the useless pocket bit on the gown which the Solicitor is trying to tug. We can see Dermot on Circuit, we find him hacking up the greens on a Golf Society outing and we discover again, through him, the growing pains of the diminishing practice. At every turn the narrative is controlled and classy and the depth of insight, coupled with the sharp dialogue, made me laugh out loud on numerous occasions.

If you think you're one of the characters, you may be right, but if you believe that no part of you subsists in this book, then you are greatly mistaken. We are all there in some way. Some foible or trademark nuance belonging to each of us lurks behind the library pillar columns in Dermot McNamara's world. This is a super, super book and it positively rattles along on a level which is at once accessible to and memorable for even those with no connection whatsoever to our profession. The exchanges between Bar and Bench are so excellent that it would nearly be worth the disbarring to try out a couple of them. When you buy this book (as you will) you purchase a ticket to a legal Narnia. It is a place which is easy enough to enter, but decidedly difficult to leave behind. Caveat Emptor.

Finally, I can only say about Brief Cases that as soon as I had finished reading it I regretted having begun it and wished with all my heart that I still had it ahead of me to enjoy for the first time. Buy it, ration it and savour it. This is a wonderful, wonderful book from our own star called Henry. •

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