The Bar Review

Journal of the Bar of Ireland. Volume 4. Issue 4. Jan/Feb 1999

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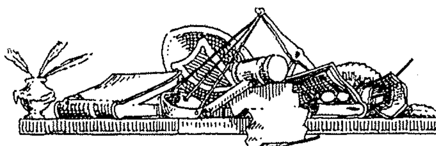

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The Editor
The Bar Review, Bar Council Office,
Law Library Building, Church Street, Dublin 7
Telephone: +01 817 5198 Fax: +01 804 5150
e-mail: edel@lawlibrary.ie

EDITOR: Edel Gormally

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Lawyers of 1798 commemorated in the Four Courts

An Taoiseach, Mr. Bertie Ahern, T.D., attended at the Four Courts last December at a ceremony to remember those lawyers who were involved in the insurrection of 1798.

A plaque listing the names of those lawyers was unveiled by Mr. Ahern. The plaque is located beside the entrance to the Supreme Court.

Descendants of the lawyers who are remembered were guests of honour at the ceremony which was also attended by The Hon. Mr. Justice Hugh O'Flaherty, The Minister for Justice, Mr. John O'Donoghue, The Attorney General, Mr. David Byrne, SC, The Chairman of the Bar Council, John MacMenamin, SC and The Vice-Chairman of the Bar Council, Rory Brady, SC and The President of the Law Society, Mr. Pat O'Connor.

●

Irish Statute Book on CD-Rom – Recall of certain CDs

It has come to notice that there is a fault on a batch of the above CDs which were issued between 17th and 31st December 1998.

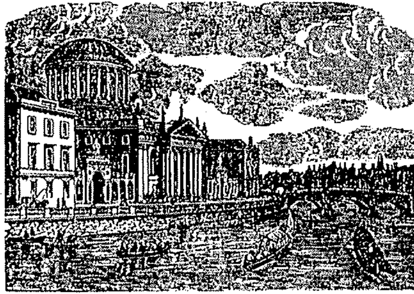
Faulty CDs can be exchanged through the Govt. Publications Office, Molesworth Street, Dublin 2. Tel: 01 661 3111 or the Office of the Attorney General, Govt. Buildings, Upper Merrion Street, Dublin 2. Tel: 01 6616944 The fault was corrected on all CDs sold after December, 1998. Such CDs do not need to be replaced.

●

Information sought on barristers who died in World War One

Anthony Quinn, Barrister, is attempting to record biographical outlines of Irish Barristers who died in World War One. The lives of Willie Redmond and Tom Kettle are already well chronicled and members with information on the lesser known barristers whose names are listed on the War Memorial in the Four Courts are invited to contact Anthony Quinn in the Law Library.

●



Law Society launches Website

The Law Society launched its website on Wednesday, 10th February, the address of which is www.lawsociety.ie. The site includes a page on the Society's library which has links to other relevant sites of interest to legal researchers.

●

An Taoiseach, Mr. Bertie Ahern, T.D., pictured with descendants of Thomas Addis Emmet and Bagenal Harvey who are among those remembered by the plaque.

The Vice-Chairman of the Bar Council, Rory Brady, SC, The President of the Law Society, Mr. Pat O'Connor, The Chairman of the Bar Council, John MacMenamin, SC and The Attorney General, Mr. David Byrne, SC attended at the ceremony to commemorate those lawyers who died in the 1798 rebellion.

The Good Friday Agreement

It is no exaggeration to say that 1998 was probably the most significant year in Irish constitutional history since 1921. Few would have imagined not so long ago that all major paramilitary organisations in Ireland would now be on cease-fire. Nor would many have imagined that an agreement providing for new and sophisticated constitutional arrangements within Northern Ireland, between North and South and between Ireland and the U.K. would be resoundingly endorsed by the people on the island by way of referenda.

However, though the political implications of the Belfast Agreement have been well aired, its legal implications have not received the same attention. The recent conference, organised by the Bar Council of Northern Ireland and the Bar Council of the Republic of Ireland, on the legal implications of the Belfast Agreement was therefore an important initiative. Certain of the papers delivered at that conference are reproduced in this issue of the Bar Review with the kind permission of the authors.

The most significant legal changes resulting from the Belfast Agreement will be felt, of course, in Northern Ireland. The Northern Ireland Act, 1998, implements many important provisions of the Agreement, in particular by establishing elaborate power-sharing institutions in Northern Ireland. It also repeals virtually all prior UK legislation on constitutional issues since partition, including the Government of Ireland Act, 1920. However, there are also very significant changes in the Republic of Ireland, not least of which is the replacement of the old Articles 2 and 3 of the Constitution with new Articles.

Perhaps the most significant legal changes brought about by the agreement are in the field of human rights and equality. To begin with, the new Northern Ireland Act allows the Northern Irish courts to review judicially all legislation of the Assembly and to examine its conformity with the European Convention on Human Rights. Unfortunately, however, the power in the UK Human Rights Act, 1998, to review legislation emanating from Westminster is more modest. This is all the more disappointing when one considers that Westminster will retain the exclusive right to legislate on crucial areas such as the control of terrorism for the foreseeable future.

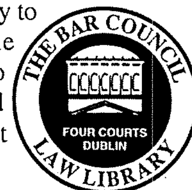
Secondly, a new Northern Ireland Human Rights Commission is currently being established to advise on human rights issues, to scrutinise legislation and to assist individuals in taking cases. The recent and enlightened appointment of Professor Brice Dickson as Chief Executive-Designate of the Commission is most welcome and augurs well for its future.

The Republic of Ireland has also committed itself to establishing a Human Rights Commission. While it remains to be seen how the Government will follow up on the commitment made in the Agreement to ensure at least an equivalent level of protection of human rights under Irish law as exists under the European Convention on Human Rights, we must be mindful of the fact that many of these rights are already afforded protection by our Constitution and by the dynamic development of our constitutional jurisprudence.

Finally, an Equality Commission is being set up to combat discrimination on grounds of religion, sex, race and disability. Curiously, however, the new Commission in ensuring equality of opportunity, is obliged to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial grouping. One would have thought that the rigorous promotion of equality of opportunity would, of itself, ultimately lead to the promotion of such good relations.

While the various Commissions are welcome, it is worth pointing out that they will only succeed if they are treated seriously by Government and are funded accordingly. Equally, while the new Article 2 of the Constitution states that it is the "entitlement and birthright of every person born in the island of Ireland to be part of the Irish nation," it is not yet clear how the Government will give appropriate expression to this expression by, for example, the limited extension of voting rights or rights of audience or representation in the Dail or Seanad.

Also, in the context of respect for Human Rights and the promotion of good relations, Friday, 12th February marked the 10th anniversary of the killing of Patrick Finucane, Solicitor. To co-incide with this anniversary, the Law Society for England and Wales, the Lawyers Committee for Human Rights, the International Commission of Jurists, Amnesty International and the Committee on the Administration of Justice have supported the call by the UN Special Rapporteur on the Independence of Judges and Lawyers for a judicial inquiry into his death. The particular significance of Mr. Finucane's killing lies in the association between his death and his work as a solicitor discharging his duty to his clients. The Bar Council took the opportunity at the recent conference to support the call for a judicial inquiry and would re-iterate its support for that inquiry here.



Constitutional Background to and Aspects of The Good Friday Agreement – A Republic of Ireland Perspective

DONAL O'DONNELL, SC

As is well known, the proposal contained in the 19th Amendment to the Constitution Bill was approved by the people on the 22nd of May 1998 by a margin of 1,442,583 votes to 85, 748. It was promulgated by the President as a Law pursuant to Article 46.5 of the Constitution on the 3rd of June 1998. Since that date, we are in a unique constitutional position where the original Articles 2 and 3 remain in the Constitution but Article 29 has been amended. That amendment contains, in subsection 7, new Articles 2 and 3 which, on the happening of a certain event, – the declaration by the Government that the State has become obliged pursuant to the Agreement to give effect to the amendment of the Constitution, – will slip into place displacing the old Articles 2 and 3. If such declaration is not made within 12 months of the 3rd of June 1998, or such longer period as may be provided for by law, the new Article 29 will itself fall out of the Constitution.

Whichever is the outcome, we find ourselves now in a constitutional position where the perspective is unique and which provides a particularly interesting vantage point to consider the constitutional changes which have occurred and are due to occur.

There are, I think, three different aspects of the amendment which I would like to address briefly under the following headings:-

(i) Mechanics;
(ii) Institutional provisions;
(iii) Substantive amendments of Articles 2 and 3.

Mechanics

The amendment is a conditional one, which by its terms provides that when the Government makes the requisite declaration then *"notwithstanding Article 46 hereof, this Constitution shall be amended as follows"*.

In other words the amendments to Articles 2 and 3, if and when they take place, will occur, not by the mechanism created by Article 46 but, rather, under a mechanism approved by the people in an amendment, which itself complied with Article 46.

This raises an interesting point. Is there any limit to the amending power of the Constitution? Are there provisions of the Constitution beyond the amending power, and if so, is Article 46 one of those provisions? Given the constitutional history, this is not an unstateable argument. The Irish Free State Constitution was originally intended to be capable of amendment by ordinary legislation for a limited time. However, that provision was used to amend the amending power itself and extend indefinitely the power to make amendments by ordinary legislation. This is widely regarded as one of the weaknesses of the 1922 Constitution. *The State (Ryan) -v- Lennon* [1935] IR 170 is a well known case concerning the drastic amendment of the 1922 Constitution by the insertion of a new Article 2A. It is also well known for the passionate dissent by Chief Justice Hugh Kennedy, one of the foremost drafters of the 1922 Constitution. In its tone and approach, the dissent is much closer to the more modern approach to constitutional interpretation and, indeed, it has been argued that in many ways, the Chief Justice's dissent is now the law. Because of the concentration of the natural law flavour of his dissent, it is often forgotten that one of the central points of his judgment was the contention that the amending power was not capable of amendment. It is noteworthy that the transitory provisions of the Constitution provide by Article 51 that power to amend the Constitution by ordinary legislation during the three years of its life does not apply to Article 46.

This argument was available but never really explored in the litigation commenced by Mr Denis Riordan and decided by the High Court on the 20th of May 1998 and substantially by the Supreme Court on the 19th of November 1998 (in the Judgment of Barrington J). It might have been argued that the correct theoretical response was that while there was nothing to prevent the 19th Amendment to the Constitution, nevertheless, there may be some limitation on the amending power, in that certain fundamental provisions or the fundamental structure of the Constitution could not be validly altered under guise of an amendment. This is an argument which has succeeded in India.[1] I must say, I do not agree, but in any event, I think the High and Supreme Courts were absolutely correct not to explore the theory and instead to give such a clear, unambiguous and peremptory response which will presumably discourage further attempts to challenge or interfere with referenda. There is something unnerving when the court proceedings themselves become an actor in the political drama, such as for example, when the *McKenna* Judgment emerged shortly before the Divorce Referendum and itself became part of the debate and its effect measured by opinion polls. It is too tempting for participants or would be participants in Referendum campaigns to seek some advantage and/or publicity by court challenge. In reality, such challenges are, I think, inconsistent with the primacy of the role of the people in a Referendum and such forays should, I think, be firmly discouraged.

Institutional provisions

There are two provisions in the amendment dealing with institutional matters. Article 29.7.2 contains the following provision:-

"Any institution established by or under the Agreement, may exercise the powers and functions thereby conferred on it in respect of all or any part of the Island of Ireland notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of state appointed under or created or established by or under this Constitution. Any power or function conferred on such an institution in relation to the settlement or resolution of disputes or controversies may be in addition to or in substitution for any like power or function conferred by this Constitution on any such person as aforesaid".

Sub-section 2 of the proposed Article 3 contains the following provision:-

"Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the Island."

There is clearly an element of duplication here. This may be attributable simply to a process of drafting by incorporating suggestions and text from different sources. However, a number of observations might be made. First, it is clear that Article 29.7.2 relates to institutions *"established by or under the Agreement"* i.e. the British/Irish Agreement to which the State may consent to be bound by virtue of Article 29.7.1. On the other hand, there is no such qualification in Article 3.2 which permits at any stage and pursuant to any agreement the establishment of *"institutions with executive powers and functions that are shared between those jurisdictions"*. The reference to *"those jurisdictions"* refers back to the provision of the new Article 3(1), which refers to the majority of people ... *"in both jurisdictions in the Island"*. This is as close as the Constitution comes to referring to Northern Ireland. There is one further thing to be noted in respect of Article 29.7.2. The cumbersome language is designed to ensure that powers and functions conferred by the Constitution on certain persons or organs may, pursuant to the Agreement, be conferred on other persons or organs. If this interpretation is correct, then it seems to permit the exercise of legislative/executive and judicial powers by institutions created *"by or under the Agreement"*. The most significant matter to be observed, however, from these provisions is, I think, somewhat different. As was observed by Mr Justice Barrington at paragraph 7 of his Judgment in the *Riordan* case:-[2]

"Cross Border Bodies contemplated by the Belfast Agreement would exercise some of the powers formerly exercised by institutions established by the Constitution and that therefore, an amendment to the Constitution to authorise the Government to become bound by and to implement the Belfast Agreement was necessary".

It was, I think, popularly assumed that the only constitutional amendment necessary was the amendments of Articles 2 and 3. However, the working of the Good Friday Agreement requires something more. While cross border bodies were widely referred to as exercising powers within Northern Ireland and criticised or welcomed, according to the perspective of the speaker, what this amendment makes clear is that any such exercise of power and consequent subtraction from the administrative independence of Northern Ireland, only occurs in the context of an equal and opposite interference with, or subtraction from, the administrative independence of the Republic. This is, I think, from a Northern Nationalist perspective, both impressive and somewhat humbling. In her book *In search of a State: Catholics in Northern Ireland*[3] Fionnuala O'Connor records the mutual disenchantment between Northern Nationalists and the South, but these provisions of the Constitution show that when it came to the decision, the administration in the Republic overwhelmingly endorsed by its people, was prepared not only to shoulder the burden of becoming involved in the affairs of Northern Ireland, but to permit participation from the North in the affairs of the Republic.

Substantive amendments of Articles 2 and 3

As I have already observed, we are now in a unique constitutional position where Articles 2 and 3 remain in the Constitution but their successors are also in the Constitution, in, as Mr Justice Barrington put it, *"the form of an escrow"*.[4] As the title of this paper suggests, to understand the constitutional changes, it is necessary, I think, also to understand the constitutional background.

Articles 2 and 3 are, I suspect, reasonably unique in that they were probably more discussed outside the jurisdiction than within it. When I came to actually read Articles 2 and 3 and then subsequently study them, they were something of a disappointment to me. They could never live up to the advance billing provided for them by their Unionist critics. If they are looked at solely as law calling for legal interpretation, then I think they make dispiriting reading for lawyers, because of the difficulty of coming to grips with them. In this respect, I don't think that I am alone. In fact, I would suggest that of all the articles of the Constitution which have been subjected to sustained judicial analysis, the cases on Articles 2 and 3, have the dubious distinction of being the least satisfactory.

It is well known that unlike the 1922 Constitution, the 1937 Constitution was not drafted by lawyers. Its principal architect was Eamon de Valera himself, and it is a work of impressive subtlety. De Valera was, I think, fully aware that this was a document which would have legal consequences and would be subjected to subsequent legal analysis and application, something he regarded as an undesirable though unavoidable consequence of the enactment of the Constitution:

Its origins show that the Constitution is a document which is political in the sense that it expresses political philosophy but is also intended to have legal effect. In my view, however, that does not mean that it is a legal document like any other and that we should apply the same principles to it as we do to the interpretations of say, contracts or leases. To properly and sensitively interpret the Constitution, I think that we must be alive to its political origins – by that I mean origins in political philosophy – and that it is something quite different from an ordinary legal document. Despite the common criticism of lawyers and legalese, I think that in most cases, lawyers want to draft documents to achieve supremely practical results: to seek to lay out as clearly as possible the intention of the parties and the practical consequences which are designed to follow a series of foreseeable events and to

do so by reference to a prediction of how a court will apply the provisions in fact. The Constitution is, I think, significantly different. It certainly seeks to express common intention which must be discerned by the techniques of the constitutional interpretation, but it is not particularly or primarily intended to predict or determine in advance, how certain events will be dealt with. In some sense, a Constitution is therefore less, and at the same time much more, than another legal document. It is an unremarkable insight to suggest that Constitutions are different but I would suggest that sometimes lawyers and judges do not always approach the Irish Constitution with a consciousness of this difference. In many cases, we readily see the law and don't always see or appreciate the political philosophy or the social science. There are, I think, a number of reasons for this. Apart from the predisposition of lawyers to apply familiar techniques to the task of interpretation, these are also historical considerations. For the early years of its life, the Constitution was virtually ignored as an instrument capable of having legal effect. It was regarded as all political philosophy and no law. That misapprehension has been comprehensively dispelled, but there is, I think, a danger, discernible in the cases of Articles 2 and 3, of overcorrection, and a implicit assumption that the Constitution is only law.

First, I would suggest that Articles 2 and 3 are not addressed primarily, or at all, to the people in the North. Instead, I suggest that they were principally directed towards a Southern audience, although undoubtedly heard and having some quite considerable effect in the North. Professor Tom Garvin's book – *1922 The Birth of Irish Democracy*,[5] studies different aspects of a momentous year when somewhat like today, there was a sense of fluidity, possibility and unpredictability. He suggests at one point [6] that the differences between the sides which ultimately became the civil war protagonists, can be described as a difference between *"republican moralism"* on the one hand and *"nationalist pragmatism"* on the other. In a very real sense, the different sides spoke mutually incomprehensible languages leading to a contemptuous dismissal of the views of the other side. Significantly, as Professor Garvin observes, *"de Valera could speak both of these political languages"*. I would tentatively suggest that Mr de Valera was doing just this when he came to draft Articles 2 and 3. Articles 2 and 3 sound like pure *republican moralism* but when one looks at the business end of the articles, the aspect which is intended to have some legal effect, they are pure *nationalist pragmatism*: the laws enacted by the Dail are to have the same area and extent of application as the laws of Saorstat Eireann. To the mathematician's mind to say thirty two minus six is to say precisely the same as twenty six, but Mr De Valera may not have cared, or more possibly quite liked, the fact that people when confronting that calculation, focused on and heard the reference to thirty two. I would also suggest that De Valera did not see the rhetorical aspects of Articles 2 and 3, the *republican moralist* parts, as intended to have future legal consequences. They were not the first word, but rather the final word. From his point of view, I think, they were happy and subtle reconciliation of his constituency of republican moralists with the demand he was facing of nationalist pragmatism.

In fact, Articles 2 and 3 were, in one sense, the last word for some considerable time and were not subjected to any significant legal analysis until the 1970s and 80s when three cases made their way to the Supreme Court arising out of the Sunningdale and Anglo Irish Agreements respectively. The first, was *Boland -v- An Taoiseach*.[7] In those proceedings, the Plaintiff sought a Declaration that the signing of any formal or informal agreement in the terms of the Sunningdale communiqué would be repugnant to the Constitution of Ireland and sought an injunction restraining the Government from implementing any part of the communiqué or entering into any agreement which would limit the exercise of sovereignty over any portion of the national territory or which would prejudice the right of the Parliament and Government of Ireland to exercise jurisdiction over the whole of the national territory. This focused attention directly on the second clause of Article 3 *"without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory"*. The answer the Supreme Court gave to this challenge was not entirely satisfactory i.e. that the Declaration was an exercise of executive power and could not be reviewed. The Chief Justice, Mr Justice Fitzgerald observed at page 362:-

> *"Consequently in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise of the Government of its executive functions unless the circumstances are such to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution".*

This of course, as the late Professor Kelly observed, really avoided the question, since the Plaintiff's claim was that the exercise by the Government of its powers was precisely a *"clear disregard by it of its powers and duties conferred upon it by the Constitution"*. However, I sympathise with the instinct of the Court in that case to avoid, if at all possible, becoming involved in a political controversy and I think that instinct is itself noteworthy.

More significant, in the current context, is the judgment of the then President of the High Court, Mr Justice O'Keeffe. Just as the Chief Justice has been critical of Counsel for the Plaintiff, Mr Justice O'Keeffe's Judgment expresses some impatience with Counsel for the State, saying:

> *"During the course of the argument, I sought to obtain from Counsel for the Defendant, some expression of view as to what it [i.e. the communiqué] meant, but Counsel gave the Court no assistance as to how the Court should construe it".*

On re-reading this Judgment, it struck me how differently one reads Judgments as a practitioner than as a law student. Counsel for the State, was the late T.K. Liston SC and the cat and mouse exercise described here would, I think, have made fascinating viewing. Mr Liston's position was not simply obtuse; it was instead, I think, a careful and intelligent tactic. This was a matter of enormous political sensitivity. Faced with an unpredictable court, anything said could have had unforeseen consequences. The only sensible course was to circle the wagons and wait for the storm to blow itself out. There is, I think, a hint of judicial frustration in the next sentence where Mr Justice O'Keeffe expresses his own view:-

> *"An acknowledgement that the Government of the State does not claim to be entitled as of right to jurisdiction over Northern Ireland would, in my opinion, be clearly not within the*

competence of the Government having regard to the terms of the Constitution."

It is not so much the content of this sentence but rather the fact that it was delivered at all, with its hint that the Government might be about to make such acknowledgments that contains, I think, an element of republican moralism revisited.

However, a significantly different view was expressed by the Supreme Court in an Article 26 reference on the terms of *The Criminal Law (Jurisdiction) Bill, 1975*[8] which was enacted in order to give effect to part of the Sunningdale Agreement. The argument of Counsel assigned by the Court (Colm Condon SC, Donal Barrington SC and Hugh O'Flaherty), was ingenious. The State could not legislate for offences occurring in Northern Ireland because, although it had asserted a general right under Article 3, it had expressly withdrawn from that right by the terms of Article 3 *"pending the reintegration of the national territory"*. Counsel for the Bill, the then Attorney General, Declan Costello SC, Rory O'Hanlon SC and John Cooke BL (as they all then were), implicitly accepted this argument, but contended that the right to legislate came, not from the second Clause of Article 3 but from the final clause, that the laws enacted by the Parliament would have the like extra-territorial effect, as the laws of Saorstát Éireann. If it was possible for Saorstát Éireann to legislate with extra-territorial effect, then it was also possible for the Dail. This argument was accepted but the Supreme Court[9] also took the opportunity of advancing a subtle interpretation of Articles 2 and 3 in a passage commencing with the words:-

"Articles 2 and 3 can only be understood if their background of law and political theory is appreciated"

The court went on:-

"One of the theories held in 1937 by a substantial number of citizens was that a nation, as distinct from a state, had rights: that the Irish people living in, what is now called the Republic of Ireland and in Northern Ireland, together form the Irish Nation; that a nation has the right to unity of territory in some form, be that as a unitary or federal state; and that the Government of Ireland Act, 1920, though legally binding, was a violation of that national unity which was superior to positive law".

Significantly, in my view, the Supreme Court went on then to state:-

"The National claim to unity exists not in the legal but in the political order and is one of the rights which are envisaged in Article 2; it is expressly saved by Article 3 which states the area to which the laws enacted by the Parliament established by the Constitution apply. The effect of Article 3 is that, until the division of the Island of Ireland has ended, the laws enacted by the Parliament established by the Constitution are to apply to the same area and have the same effect of application as the laws of Saorstát Éireann had. The area to which the laws of Saorstát Éireann applied was, having regard to the Articles of Agreement of 1921 and the Act of 1925 is unquestionably the area now known as the Republic of Ireland".

The significant sentence there, was the one which identified the national claim to unity as existing *"not in the legal but in the political order"*. This was a theme taken up by a member of that Court, speaking extra judicially, when delivering the McDermott Lecture in Queens University, Belfast on the 9th of November 1978. Mr Justice Kenny's topic was the advantages of a written Constitution incorporating a bill of rights, but he also took the opportunity of expressing his views on what he described as a controversial matter. He stated that to understand Articles 2 and 3, it was necessary to deal with the *"political (but not legal) concept of a nation and the political doctrines of Irish Nationalism"*. He described nationalism as:-

"Essentially a doctrine of the heart and not of the intellect. Those who hold it, brush aside all intellectual arguments against it. Because it is a doctrine of the heart and is therefore passionately held, adherents do not think it is important that they find considerable difficulty in answering questions as to how one becomes a member of the nation and how and when one ceases to do so".

Mr Justice Kenny set out what he described as four of the fundamental doctrines of Irish Nationalism, repeating the analysis of the *Criminal Law Jurisdiction Bill* judgment and went on:-

"I want to emphasise that these beliefs are in the political and not in the legal order. Article 3 was intended to be and is a statement of political belief and not of law: the right of the Parliament established by the Constitution to exercise jurisdiction over the whole of the island which is referred to in article 3, is not a claim to a legal right to do this. It is the expression of a right which has its sole origin in the political doctrine of Irish nationalism. When the people enacted the Constitution, they did not make a legal claim that the Parliament and Government established by the Constitution had any legal powers under international or national law to exercise any power over Northern Ireland."

This theme was taken up in a speech of great subtlety and interest, given by the (by then) Mr Justice Donal Barrington in 1988 as part of the Thomas Davis Lectures on RTE.[10] He referred to the *Criminal Law Jurisdiction Bill* case (although perhaps significantly, not to *Boland -v- An Taoiseach*) and to Mr Justice Kenny's paper. He stated:-

"the point is that while these doctrines of political nationalism are reflected in article 2 of the Constitution, the Constitution is primarily concerned with the establishment of a parliament and system of Government, and that that parliament, whatever the creeds of Irish nationalism, is expressly prohibited from attempting to legislate for Northern Ireland until such time as the partition problem has been resolved."

He also made the important point that the Constitution does not purport to be a treaty or a document of international law. He identified as particularly significant, the terms of Article 29 of the Constitution which had hitherto been ignored in the context of Articles 2 and 3. It was, as he said, of some significance that in 1936 when the Constitution was being drafted, Mr de Valera was President of the League of Nations and the language of Article 29 is clearly derived from the covenant of the League of Nations, in particular, Article 29.2

which reads:-

"Ireland affirms its adherence to the principle of the Pacific settlement of international disputes by international arbitration or judicial determination".

Under this analysis, it is entirely appropriate, therefore, that Article 29 is the vehicle chosen to hold the proposed new Articles 29.

As Mr Justice Barrington pointed out, the 1925 Boundary Agreement was a treaty registered with the League of Nations. Accordingly, if the Constitution was to be viewed as a claim to be settled by international arbitration, it would not be difficult to predict the outcome of such an international arbitration, he went on to observe:-

"It is for these reasons that I suggest that the national claim made in article 2 is, for all purposes, of domestic and international law, withdrawn in article 3 until such time as the unity of our country is restored. The formula contained in Articles 2 and 3 is, I suggest, a subtle one in which Mr De Valera has combined nationalist ideals with common sense and political caution in a manner not untypical of the man."

Mr Justice Barrington suggested that in fact, the Constitution committed the State to seek a peaceful method of reunification of the country. He concluded his lecture by suggesting that the formulation of policy in relation to any possible solution to the Northern Ireland problem, is *"under our constitution a matter for the Government"*. There is nothing in Articles 2 or 3 he suggested:-

"To inhibit the Government in its quest for an interim solution, provided that the aim of ultimate national unity is preserved. If at any time the question of setting up any form of All Ireland Body exercising executive, legislative or judicial powers should arise, a Constitutional Referendum would be necessary, but if that were to happen, we would be on the road to an ultimate solution,"

There the matter lay, until the Anglo Irish Agreement of the 15th of November 1985. The Agreement was challenged in the Irish Courts by Christopher and Michael McGimpsey. One of the arguments they made (although not the best argument) was that the Government's recognition that the status of Northern Ireland could only be changed with the consent of the majority of the population of Northern Ireland, was contrary to the provisions of the Constitution of Ireland, 1937. They contended that to recognise the present status of Northern Ireland violated Articles 2 and 3 of the Constitution. This was, I think, their political argument. Their better legal argument was that the Secretariat established restricted the Government's exercise of the external relation powers of the State and required a constitutional amendment.[11]

As luck would have it, the matter was heard in the High Court by none other than Mr Justice Barrington. As bad luck would have it, both sides contended that Articles 2 and 3 amounted to a claim as of legal right, to jurisdiction to legislate with effect for Northern Ireland. Mr Justice Barrington, however, took the opportunity of advancing the analysis developed in his lecture and that of Mr Justice Kenny and derived ultimately from the decision in the *Criminal Law Jurisdiction Bill, 1975*, and which after all, was the then authoritative view of the Supreme Court. He rejected the Plaintiff's claim and the matter was appealed to the Supreme Court. Before the Supreme Court appeal was heard, Mr Justice Costello decided *McGlinchey -v- Ireland and the A.G. (No. 2)*[12] and repeated and endorsed the construction of the Articles first advanced in the *Criminal Law Jurisdiction Bill* case observing – *"this claim to unity exists in the political and not in the legal order"*. There was thus an impressive line of authority on this point by the time the Supreme Court decided the appeal in *McGimpsey*.

The Supreme Court[13] upheld the decision of the High Court but adopted a significantly different analysis. The Judgment of Mr Justice Finlay was joined by Walsh, Griffin and Hederman JJ. In one sense, the simple answer to this aspect of the case was that given by both Mr Justice Barrington and Mr Justice Finlay in their respective Judgments, i.e. that an agreement recognising that the change in the status of Northern Ireland was something that required the consent of the majority of the people of Northern Ireland, was not only not inconsistent with the Constitution but was compatible with the obligations undertaken by the State in Article 29 Sections 1 and 2, whereby Ireland affirmed its adherence to the principles of pacific settlement of international disputes.

However, Mr Justice Finlay went on to deal with the theoretical argument as to the status of the claim to unity. He stated at page 119:-

"I am not satisfied that the statement that this national claim to unity exists not in the legal but political order and is one of the rights which are envisaged in Article 2, necessarily means that the claim to the entire national territory is not a claim of legal right."

He declined to follow the decision in the *Criminal Law Jurisdiction Bill* case and set out that the true interpretation of the Constitutional provisions was as follows:-

(i) The re-integration of the national territory is a constitutional imperative quoting Hederman J's (dissenting) Judgment in *Russell -v- Fanning*;[14]

(ii) Article 2 of the Constitution consists of a Declaration of the extent of the national territory as a claim of legal right;

(iii) Article 3 of the Constitution prohibits, pending the re-integration of the national territory, the enactment of laws of any greater extent than that of the laws of *Saorstát Éireann;*

(iv) The restriction imposed by Article 3 in no way derogates from the claim as a legal right to the entire national territory.

The arguments so carefully elaborated from the decision of the Supreme Court in the *Criminal Law Jurisdiction Bill* is here dismantled quite peremptorily. It is possible, I think, to suggest that the *McGimpsey* Judgment in this regard, is an example of the weakness that I have referred to earlier. The Constitution is treated as a purely legal document. I understand, I think, the argument that since Article 3 refers to the *"right"* of Parliament to exercise jurisdiction, that that right must be a *"legal right"* since the Constitution is a *"law"*. Equally, I think it can be said that it does not really

matter whether it is a claim of *"legal"* or *"political"* right, since it is probably as offensive to those who wish to be offended however it is characterised. Nevertheless, it is, I think, important to look closely at the question raised and apparently determined in *McGimpsey*, as to the nature of the claim made in Articles 2 and 3.

The phrases *"constitutional imperative"* and *"claim of legal right"* are impressive rhetorical soundbites, but it is not entirely clear what they mean, particularly, as a matter of law. What is a *"claim of legal right"* and to what court or tribunal is that claim directed? The Constitution is not a pleading, nor is it indeed a document of international law. There is in the phrase a sense that the claim to national unity is something that some hypothetical court might grant.

The Chief Justice's reasoning, I think, reflects the difficulty lawyers have with Articles 2 and 3 and particularly when the matter is treated as one of pure legal interpretation. The Chief Justice went on to say that the phrase in Article 3 *"without prejudice to the right of the Parliament etc ..."* was:-

> *"an express denial and disclaimer made to the community of nations of acquiescence to any claim that, pending the reintegration of the national territory, the frontier at present existing between the State of Northern Ireland, is or can be accepted as conclusive of the matter or that there can be any prescriptive title thereby created and an assertion that there be no estoppel created by the restriction in Article 3 on the application of the laws of the State in Northern Ireland."*

This reasoning and language is familiar to a lawyer, but it is the very struggle to make sense of the text which is significant. There is something unconvincing about an analysis which treats Articles 2 and 3 as pleading some sort of large scale constitutional boundary and right of way dispute. In what circumstances and in what tribunal could it be that the claim to national reunification could be defeated by a counterclaim relying on acquiescence, prescription and estoppel ?

I suggest that a close reading of the clause as a *"claim of legal right"* means nothing more substantial than a claim of *"political right"*, although of course, it sounds and was understood to be much more significant. The whole progression is, I think, a demonstration of the difficulty lawyers have with these aspects of the constitutional text, particularly when they are viewed solely as matters of law to be compared with other provisions and analysed by reference to the concepts such as estoppel or prescription.

The assertion that the Articles amount to a claim of legal right has a certain attractive robust simplicity to it. The argument is, I think, that there is a claim of a "right" which must be a legal right, since the Constitution is a law. By the same token, the contrary argument that the claim is one which lies essentially in the political realm is easily dismissed as an attempt to depart from the plain words of the text. But as I have attempted to show, in my view, the true legal interpretation of the Constitution is that it is not just a legal but also a political document in the sense that it expresses not just a matter of legal right, but also political philosophy.

That view, which holds that most of Article 2 and 3 is in essence, a matter of political philosophy, would I think, gain important support from the law in the United States which of course, was significantly influential in the development of constitutional law here. The United States Supreme Court has developed a *political question doctrine* which holds that there are certain limited provisions of the Constitution which are simply not susceptible to judicial decision making. The doctrine is associated, in part, with Judge Felix Frankfurter and to some extent suffered when his reputation temporarily declined. However, it remains part of the constitutional jurisprudence of the United States. A classic example of this doctrine is the guarantee clause in Article IV paragraph 4 which provides that:-

> *"The United States shall guarantee to every State in this Union a Republican Form of Government and shall protect each of them against Invasion ..."*

This has been held not to be a:-

> *"Repository of judicially manageable standards which a court could utilise independently in order to identify a States lawful Government."*[15]

This language could, I think, be applied with benefit to some of the more unmanageable provisions of Articles 2 and 3. Professor Alexander Bickel in his famous book, *"The Least Dangerous Branch"* 1962, advanced a rationale for the political question doctrine. He argued:-

> *"Such is the foundation, in both intellect and instinct, of the political question doctrine: the Court's sense of lack of capacity compounded in unequal parts of:-*
>
> *(a) the strangeness of the issue and its intractability to principled resolution;*
>
> *(b) the sheer momentousness of it, which tends to unbalance judicial judgment;*
>
> *(c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be;*
>
> *(d) finally, the inner vulnerability, the self doubt of an institution which is electorally irresponsible and has no earth to draw strength from".*

Not all of this is directly applicable in Ireland[16] but these are ideas that could, I think, profitably be reflected on in the light of the Irish cases on Articles 2 and 3. These Articles present to the lawyer, strange issues which are intractable to principled resolution. They are, nevertheless, momentous issues which can unbalance judicial judgment. The judicial judgment on such issues, is after all, the judgment of persons whose undoubted expertise lies in matters of law and not political philosophy, but nevertheless, produce judgments which are given much more importance in the general political world that they perhaps deserve on their own merits. One modest suggestion I would make, therefore, is that there may still be a place for a political question doctrine as a principled tool in constitutional analysis in this jurisdiction.

It is useful, given that background, I think, to look now to the proposed changes in Articles 2 and 3. Like the clauses they are intended to replace, it appears that they were not drafted principally by lawyers and are not thought of primarily as a legal text. Instead, they operate, successfully, in my view, at the level of political philosophy.

However, the Constitution is law, will be sought to be invoked in court and, therefore, these phrases, having performed their task at the level of political rhetoric, will remain to be scrutinised by the more pedestrian and pragmatic turn of mind that lawyers adopt when approaching any text which requires interpretation.

Approached in this way, then just like the original Articles 2 and 3, I suspect that they would be off-putting to any lawyer seeking a clear answer to a client's problem. The solution the Articles propose to the political problem posed by the current Article 2 and 3 is, I think, both clearly discernible and clever. The definition of nation by reference to territory is abandoned and instead, the focus is on the people. It is then possible to express the aspiration of the people to unity by peaceful means and only with the consent of the majority in Northern Ireland democratically expressed.

If we apply a more mechanical legal analysis, some interesting aspects emerge. The new Articles 2 and 3 will slot into an existing document and use terminology which is used elsewhere in the text. The new Article 2 asserts in ringing terms:-

"The entitlement and birthright of every person born in the Island of Ireland which includes its islands and seas, to be part of the Irish Nation."

Article 3 goes on to speak for, and express the firm will of, the Irish Nation. The concept of *"Nation"* and *"National"* are concepts which appear elsewhere in the Constitution. For example, Article 6 identifies the right of the people to designate the rulers of the State and *"in final appeal, to decide all questions of national policy"*. Article 7 and 8 refer to the national flag and language. Article 13.7.1 refers to the President's right to address the people on *"matters of national importance"*. Articles 16-27 refer to and identify the powers of the *"National Parliament"*. However, the most significant provision in relation to the Nation is Article 1 which reads:-

"The Irish Nation hereby affirms its inalienable, indefeasible and sovereign right to choose its own form of Government, to determine its relations with other nations and to develop its life, political, economic and cultural in accordance with its own genius and traditions."

This is the nation to which the new Article 2 asserts it is the right and birthright of every person in Ireland to belong.

In Fionnuala O'Connor's book referred to above (*In search of a State: Catholics in Northern Ireland*), two incidents are described which still have the capacity to raise the blood pressure. In 1925, as the Boundary Commission was being debated, a deputation of Northern Nationalists requested permission to address the assembled Dail. The matter was left to the Dail to decide. Both Messrs McGilligan and Cosgrave objected even to the question of procedure being debated. Mr Cosgrave said:-

"An occasion may arise in future in which some of our own citizens for whom we have a direct responsibility may have a case if a precedent has been made in respect of those for whom we only act as trustees."

The deputation was sent away unheard.

In 1951, four Northern anti-partition league MPs and two nationalist senators at Stormont sought admission to the Dail as elected representatives of part of the national territory. In the terms of the new Articles 2 and 3, here were members and representatives of the nation seeking the entitlement to participate in the national parliament. Again, they were sent away.

This issue has arisen recently again in the political sphere, but I do not think that the claim has been advanced as a constitutional entitlement. I do not know how any such claim, if made, would have been resolved under the Constitution before the recent amendment. The strong terms of the new Article 2 may make some difference. It becomes, at a minimum, difficult, I think, to explain in a satisfactory and constitutional way, why someone in Northern Ireland who has accepted their birthright as part of the Irish nation can or should be excluded from, for example, referenda where the Irish nation chooses its form of government, develops its political life and resolves in final appeal, questions of national importance. It is not inconceivable, that the Supreme Court may yet have reason to revisit the political question doctrine and find new merit in the idea that these guarantees operate at a political, rather than legal, level. Because after all, one thing the Good Friday Agreement triumphantly demonstrates, is that these matters are most satisfactorily dealt with by the People. ●

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1 (See Whelan – Constitutional Amendments in Ireland: The Competing Claims of Democracy in Justice and Legal Theory in Ireland – Edited by Quinn, Ingram and Livingstone) – And See also Kelly – The Irish Constitution – 3rd Edition, 683 and – Kesavananda's Case (1973) ASC 1461.

2 Unreported 19/11/1998.

3 Blackstaff Press 1993.

4 *Riordan -v- An Taoiseach Bertie Ahern* – unreported 18/11/1998.

5 Gill & McMillan 1996.

6 p 145

7 [1974] IR 338.

8 *In Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* – [1977] IR 129.

9 O'Higgins CJ, Finlay P, Griffin, Kenny and Parke JJ

10 Barrington, The North and the Constitution in de Valera's Constitution and Ours. Ed Brian Farrell – Gill & MacMillan

11 Relying on *Crotty -v- An Taoiseach* [1987] IR 713.

12 [1990] IR 220.

13 Finlay CJ, Walsh, Griffin, Hederman and McCarthy JJ.

14 [1988] IR 505.

15 *Baker -v- Carr* (1962) 369 US 186223.

16 The fact that judicial review is not explicitly provided for by the US Constitution and the fact that the bulk of Supreme Court cases are by way of petition for certiorari where the Court has a discretion to hear or refuse to hear the case, have contributed to an approach emphasising judicial restraint. see e.g. Hand, "The Bill of Rights": "Since this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunely the occasion demands an answer". See, however, the opposite view put by Herbert Wechsler: Towards Neutral Principles of Constitutional Law, 73 Harv.L.Rev.1:

The Disclosure and Exchange of Experts' Reports in Personal Injuries Litigation

RORY BRADY, SC

Background

Section 45 of the Courts and Court Officers' Act, 1995 is the genesis of a major change to the concept of legal privilege in personal injuries actions. The policy underlining that section of the 1995 Act was to secure the disclosure of: expert evidence, the identity of witnesses, documentation relating to certain special damages claims and social welfare payments and other similar information regardless of legal privilege. It was undoubtedly the expectation of our legislators that full and frank disclosure – in personal injuries litigation – would ensure a more speedy and cost efficient resolution of such claims for damages. The mechanism through which that policy was to be given effect was through the making of rules of court by the Superior Courts Rules Committee with the concurrence of the Minister for Justice.

The first attempt at regulating, *inter alia*, the exchange of experts' reports came in the shape of the Rules of the Superior Courts, (NO. 7) of 1997 (S.I. 348 of 1997). By a Practice Direction of the then President of the High Court those rules were deemed to apply to all actions where the notice of trial was served on or after the 1st June, 1997 and regardless of when the expert's report had been prepared or when the proceedings were commenced. The concern of both branches of the legal profession at, in particular, this complete erosion of privilege attaching to all experts' reports – including those prepared under the cloak of a then existing privilege – resulted in a review of those rules. In addition the definition of the term 'report' in those rules was of such breadth that it was capable of encompassing notes taken by a counsel or solicitor at a consultation with an expert and this, rightly, was of grave concern to all lawyers. A review of these rules resulted in the enactment of amending rules (S.I. 471 of 1997, referred to hereafter collectively with S.I. 348 as 'the 1997 rules') which had the effect of limiting the application of the 1997 rules to actions commenced on or after the 1st September, 1997. But the disquiet of the legal profession as to the ambit of the 'report' and in addition the procedures for the exchange of the same were not then addressed. A further review of the many complex legal and evidential issues involved in regulating the disclosure and exchange of experts' reports resulted in a new set of rules being introduced.

Thus the final stage in the process of implementing the policy of the 1995 Act was reached with the introduction of the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements), 1998 (S.I. No. 391 of 1998) ('the 1998 Rules').

The Scope of the 1997 and 1998 Rules

The 1997 Rules came in to operation on the 1st September 1997. The 1998 Rules were introduced on the 14th October 1998. The 1997 Rules, were, by Article 2 of the 1998 Rules, revoked as and from 14th October, 1998.

Article 3 of the 1998 Rules provides as follows:

> 'This rule shall be deemed to have come in to operation on 1st September 1997.'

The Explanatory Note attached to the 1998 Rules (although not part of the S.I.) states, *inter alia*, as follows:

> 'The rules apply to all existing proceedings which were instituted on or after the 1st September, 1997 and require that from the date these rules become law, a party to such proceedings may only rely on a statement or report during the course of the trial of an action where that statement or report has been disclosed in accordance with these rules;'.

The 1997 Rules and the 1998 Rules have to be considered in the context of the provisions of the Interpretation Act, 1937. Section 22 (1) of the 1937 Act provides that where a statutory instrument is revoked then, unless a contrary intention appears, such revocation does not:

> 22 (1) (b) affect the previous operation of the statutory instrument or portion of the statutory instrument so revoked or anything duly done or suffered thereunder or;
> (c) affect any right, privilege, obligation or liability acquired, accrued, or incurred under the statutory instrument or portion of statutory instrument so revoked, or;...
> (e) prejudge or affect any legal proceedings, civil or criminal, pending at the time of such revocation in respect of any such right, privilege, obligation, liability, offence, or contravention as aforesaid;

The 1998 Rules (at rule 51) expressly provide that they do not apply to 'proceedings instituted before the 1st Day of September 1997 or to any report coming in to existence before that date for the purposes of any proceedings'. Thus reports prepared by experts at a time when the 1997 and the 1998 Rules did not apply continue – in all circumstances – to retain the cloak of legal / litigation privilege. Such reports are, rightly, immune from the disclosure and exchange obligations of the 1998 Rules. However, because of the effect of Section 22 of the Interpretation Act, 1937 and the provisions whereby the 1997 Rules are revoked as and from the 14th

October 1998, practitioners ought to be aware that the 1997 Rules continue to have some force of law. They have a small but important envelope of application.

Accordingly, the position on the disclosure and exchange of experts' reports can, in the writers contention, be summarised as follows:

(a) Any expert's report prepared before the 1st September, 1997 is immune from disclosure and exchange regardless of when the proceedings were commenced.

(b) Where proceedings were commenced before the 1st September 1997 the 1997 Rules and the 1998 Rules do not apply

(c) Experts' reports, prepared after the 1st September, 1997 are not automatically the subject of a disclosure obligation as the obligation only arises where a lawyer makes a decision that the expert will be called to give evidence at the trial of the action.

(d) When a decision is made to call an expert in evidence then a report from that expert, containing the substance of the evidence to be given, must be disclosed and in due course exchanged.

(e) In all actions commenced after the 1st September, 1997 – where Notice of Trial has been served between that date and the 14th October, 1998 – the parties were obliged to comply with the exchange requirements of the 1997 Rules. Any liability created by those rules for non compliance therewith during the period from 1/9/97 to 14/10/98 continues to exist and survives the revocation of those rules.

(f) In respect of an action which complies with the time requirements at (e) above, the procedures as set forth in the 1998 rules apply as and from the 14th October, 1998 in respect of any procedural rights conferred or obligations imposed by those rules.

(g) All actions commenced after the 1st September, 1997 – where Notice of Trial is served after the 14th October, 1998 – are governed exclusively by the 1998 Rules and the parties must comply with the same.

The Principal Obligations

The principal obligations of parties involved in personal injuries litigation as provided for in the 1998 Rules are as follows:

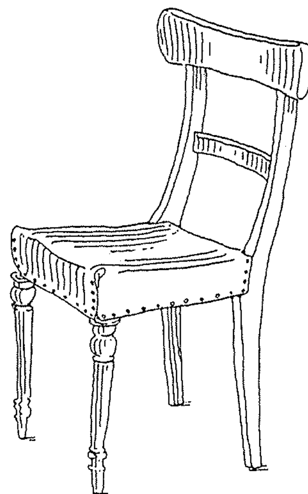
(a) A plaintiff is obliged to furnish to the Defendant (or other party or parties) a schedule listing all of his reports from expert witnesses intended to be called in evidence and to do so within one month of the service of the Notice of Trial. (Order 39 Rule 46(1)).

(b) Within seven days of receipt of the Plaintiff's schedule a Defendant (or any other party or parties) is obliged to furnish to the Plaintiff a schedule listing all of his reports from expert witnesses intended to be called in evidence by that Defendant (or other party or parties) (Order 39 Rule 46(1)).

(c) Within seven days of receipt of the Defendant's (or any other party or parties) schedule of expert witnesses all of the parties to the litigation must exchange copies of the reports listed in their schedules. (O.39 R.46(1)).

(d) Where, subsequent to delivery of the experts' reports any party to the litigation obtains any further report (required to be exchanged) he is obliged forthwith to deliver a copy of such report to the other party or parties. (O.39 R.45(4)).

(e) In any case where a party or his solicitor certifies in writing that no report exists which requires to be disclosed and exchanged under the 1998 Rules then the other party, on the expiry of the time fixed or agreed or permitted, (as the case may be) shall deliver any report to all other parties to the proceedings. O.39 R.46(3)).



(f) Where a party who has previously delivered a report of an expert witness wishes to 'withdraw reliance' on the expert's report he must confirm by letter in writing the intention not to call the author of the report. Upon the service of such a notice the privilege that hitherto applied to the report (before it was exchanged) is revived. O.39 R.46(6)).

It is to be noted that the term 'parties' is defined by O. 39 Rule 45 (1) (c) in a very broad way as follows:

> 'parties' includes a plaintiff or co-plaintiff, defendant or co-defendant or any third party, counterclaimant or notice party to the action save where the context otherwise requires.'

Supervisory Role of the Court

While the mechanics of the 1998 Rules involve an interaction between litigants, lawyers and their opponents, the Court continues to exercise a supervisory role. The primary supervisory functions of the Court are as follows:

(a) Where it appears necessary so to do, a Court may, on application to it by any party to an action, require that an affidavit or affidavits be filed by any other party in relation to proof of the disclosure and the service of reports as required by the 1998 Rules (O.39 R. 46(5)).

(b) Prior to the trial of the action, the Court – on the application on any party which must be grounded on an Affidavit – has power to direct compliance with the requirements of Rule 46 of the 1998 Rules. It may fix the time within which such compliance should occur and it may make an order providing that in default of such compliance the party in default shall '...be prohibited from adducing such evidence...' or it may provide that the claim or defence (as the case may be) be struck out and it may make an order for costs. (O.39, R.47).

(c) If, during a hearing of an action it appears to the Court that there has been non-compliance with the 1999 Rules the court may make such an order as it deems fit, including an order prohibiting the adducing of evidence in respect of which there

has been non-compliance. Alternatively, it may adjourn the action so as to allow compliance to occur, upon such terms and conditions as seem appropriate and it may make an order as to costs. (O.39, R48).

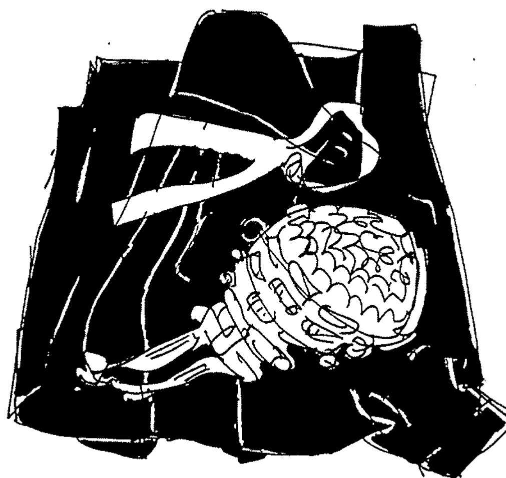
(d) An application may be made to the Court by way of a motion seeking an order to the effect that '..in the interests of justice' the provisions of Rule 46, i.e. the disclosure and exchange obligations, shall not apply in relation to a particular report. The Court may make such an order, upon such an application, as to it seem just. (o.38, R.50).

(e) Where there has been a failure to comply with the relevant obligations a party in default may apply to the court, by way of a motion on notice, for an order seeking the leave of the court permitting the adducing of such evidence as ought to have been disclosed via the exchange of an expert's report. The Court may make such order as appears just in the circumstances.

The Substance of the Evidence

Under the 1998 Rules, a lawyer continues to retain an absolute veto as to whether he will call an expert witness in evidence. It is only where a decision is made whereby it is intended to call an expert in evidence that a 'report' must be disclosed and in due course exchanged. But what is it that is to be disclosed and exchanged? The term 'report' (which includes a statement from an expert) as defined in the 1998 Rules only applies to a report from a witness – intended to be called to give evidence – and that contains the substance of the evidence to be adduced. How does a lawyer (or perhaps more prudently an expert!), determine what is to be included in a report as being the substance of the evidence to be given? At present there is no judicial determination of this issue. Hence it is necessary to look at the experience of the operation of similar (but not identical) rules of court in England and Wales.

The rules of court in England and Wales provide that, in respect of all expert evidence, a court on an application for directions '...shall direct that the substance of the evidence be disclosed in the form of a written report or reports' to be delivered to other parties in the litigation. Phipson on Evidence (14th edition) contains the following helpful observations on this rule:



> 'While the principal purpose of the disclosure of the reports is for each party to be appraised of the issues raised and the conclusions reached by the other side's expert, it seems that the report must do more then contain merely the salient points. Some guidance on the form of the report was given in *Ollett v. Bristol Aerojet* and since then the rules have been slightly redrafted in such a way as to broaden if anything the scope of the disclosure envisaged. Accordingly, it now seems clear that the report disclosed must contain substantially the whole of the evidence of the expert...'

In *Ollett v. Bristol Aerojet Ltd* (Practise note (1979) 1 WLR 1197) Mr Justice Ackner (as he was then), in dealing with a case concerning personal injuries caused by a machine in the plaintiff's workplace, stated that it was wrong to assume that the obligation to disclose the substance of the evidence:

> 'is satisfied by the experts merely setting out factual descriptions of the machine and the alleged circumstances in which the accident happened and leaving out any conclusions as to the defect in the machine, the system of work or other relevant opinion evidence, this seems to me to be a total misconception of the ordinary meaning of the word 'substance'. It is also a misconception of the function of an expert. An expert, unlike other witnesses, is allowed, because of a special qualification and/or experience to give opinion evidence. It is for opinion evidence that he is called, not for a factual description of the machine or the circumstances of the accident, although that is often necessary in order to explain and/or justify his conclusion. When the substance of the expert's report is to be provided, that means precisely what it says, both the substance of the factual description of the machine and /or the circumstances of the accident and his expert opinion in relation to that accident, which is the very justification for calling him.'

The above *dicta* should – absent an Irish authority – act as a good guide. However, it is, for the reasons referred to below, the expert's duty to ensure that his report does contain the necessary 'substance of the evidence'. Whether it does is ultimately a question of fact. But it would not be prudent for lawyers to draft or censor such reports.

The Nature of the Expert's Disclosure Obligation

Does the duty of disclosure encompass a duty to disclose facts or opinions adverse to the interests of the client? While an expert's report under the 1998 Rules is concerned with the substance of the evidence to be given one cannot ignore the legal context in which an expert gives evidence. This is succinctly described in the following passage from Hodgkinson's Expert Evidence – Law and Practice:

> 'Unlike the lawyers, the expert witness has a principal and overriding duty, not to the party by whom he is retained, but to the courts;'

This bold statement of principle may strike the practitioner as being an unrealistic assessment of the practices of litigation experts in the personal injuries field. However, as a legal principle, it is sound and it can not be ignored. Seen in this light, the decision to call an expert witness will now assume a massive significance for litigators such as barristers.

Hodgkinson in commenting upon the effect of the Kenning decision noted:

> 'It seems likely that the effect of this decision, however correct in principle and desirable in fact, will be to ensure that such adverse evidence or information is relayed orally rather than in

a document, although this would not be sufficient to exclude it from the duty of disclosure'.

In a recent paper by Mr. Justice Robert Barr of the High Court entitled 'Expert Evidence – A Few Personal Observations and the Implications of Recent Statutory Developments' (given to the Expert Witness Conference in Dublin on the 25th November, 1998 and reproduced with the kind permission of the author in this issue of the Bar Review), his Lordship noted that experts' reports 'should be factually accurate and opinions should be carefully reasoned'. In a similar vein his Lordship observed:

"They should contain all relevant information known to the expert which he/she believes is necessary for a fair objective assessment of the particular problem in question. If that necessarily includes information which is prejudicial to the Plaintiff, so be it. In such circumstances it will become a matter for the Plaintiff and his advisors to decide whether in the circumstances to pursue that particular aspect of his claim or whether an application to the Court for exclusion from the expert's report of the information in question might have some prospect of success'"

It would seem that fact or opinion that is adverse to a client's case – and that goes to the substance of the case – can not be suppressed. If it is essential to call the expert witness in evidence, then relevant prejudicial material can only be excluded from the report if the interest of justice. The duty of the expert is, at a minimum, one which precludes the suppression of damaging but relevant evidence of fact or opinion.

Conclusion

It is submitted that one of the practical effects of the 1998 Rules will be to force lawyers to concentrate on the precise nature of their clients case at an early stage in the litigation process. Thus an examination of the merits of a claim or a defence (before the Notice of Trial phase) is a *sine qua non* of the proper and efficient operation of the 1998 Rules. In order to operate the 1998 Rules successfully a more 'hands-on' approach to personal injuries litigation is now necessitated. Furthermore, to achieve a situation where a solicitor or counsel can make an informed judgement call in respect of forming an intention to call an expert in evidence it seems to the writer that many of those procedures that typically occur after the service of the Notice of Trial (and indeed after the procuring by a solicitor of an Advice on Proofs) must now ideally occur prior to service of the Notice of Trial. It would be unwise to make a decision to disclose and exchange a report (even if it can be withdrawn) without having had the benefit of discovery and/or interrogatories where necessary. ●

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Expert Evidence – A Few Personal Observations and the Implications of Recent Statutory Developments

MR. JUSTICE ROBERT BARR

My observations on expert testimony are based on a long life in the law which includes fourteen years as a trial judge in the High Court. Looking back over that experience as judge and advocate I have no doubt that the holy grail to which professional witnesses should aspire may be summarised in two words: objectivity and fairness. Any competent judge will readily recognise these virtues, or the lack of them, and where they are found the testimony of such a witness is like to be greatly enhanced in the mind of the judge. The converse is, of course, also true. Most senior judges have long experience of professional testimony, the assessment of such witnesses and the weight to be attached to their evidence.

Surprisingly, experts whose testimony is found to be unreliable or unhelpful are often persons of undoubted ability in their particular fields. They are rarely dishonest or deliberately unfair, but they seem to lack a true understanding of their function, i.e., to assist the court in arriving at the truth by providing a skilled expert assessment, which is objective and fair, of matters requiring a specialised appreciation of the particular problem at issue. There are two pitfalls into which some experts are prone to tumble. The first is a tendency to avoid presenting the whole picture and thus creating an unbalanced assessment of the situation. This flaw may be exposed on cross examination and, if so, the efficacy of the witness's evidence will be devalued.

The second pitfall is where the expert drifts into the role of advocate, a tendency which is, to some extent, the product of our adversarial system of trial. Experts who regularly give evidence in court, such as medical specialists who act for insurers, are vulnerable in that regard and it seems are more likely to stray into the arena of the advocate than a specialist on the plaintiff's side who is a "treating doctor" in the case. If the opinion of a medical specialist acting for the defence is to have real value it is imperative that the witness establishes his/her objectivity and fairness. In that regard they may well have something of an uphill struggle because many judges tend to have a preference for the opinions of those who have actually treated the plaintiff and therefore have a longer and more intimate knowledge of his injuries and post accident history.

It is important to bear in mind that the function of the advocate differs fundamentally from that of the expert witness. The objective of the former is to present his/her client's case In contrast, as already stated, the function of the expert witness is to advise the court as to his/her objective professional assessment of a given situation based upon established facts and specialist information and learning about which the expert should be aware.

I well remember a spectacular incident which underlines the point I am making about avoidance of advocacy. Many years ago in a personal injuries action I was junior counsel for the plaintiff, a young woman who had suffered substantial fractures of the tibia and fibula of one leg. The defence was led by probably the greatest advocate of his day, William FitzGerald, S.C., subsequently Chief Justice. Our principal medical witness, Mr. X., was an eminent surgeon of great experience. He very rarely gave evidence for plaintiffs but often did so for defendants. Indeed, he and William FitzGerald were well known as a formidable combination on that side. The plaintiff had made a good recovery but there was a permanent half inch shortening of her leg. Mr. X. stated in evidence that that was a potentially serious sequela because in time the shortening was likely to give rise to a tilt in her pelvis and arthritic changes in the hip joint leading to the onset of pain and disablement. All of this was music in my ears because it had not been stated by Mr. X. in his reports which in those days were never exchanged with the other side. However, it came as a great shock and surprise to William FitzGerald and he commenced his cross-examination as follows:

> "Mr. X., I have to put it to you that a number of times in these courts, in answer to me, you have positively stated that anything less than three-quarters of an inch shortening of a leg is of no practical significance."

The immortal reply was:

> "Mr. FitzGerald, if I said that I was wrong!".

How does one explain that remarkable confrontation? Mr. X. was a man of undoubted honour and probity. I believe that he did not seek to deceive the court in that case or in any other, but that his difficulty arose out of a fundamental failure to understand his role as an expert witness and in particular to appreciate that it was no part of his function to don the mantel of advocate on his client's behalf. It appears that his approach to expert testimony was that in circumstances where a divergence in established professional opinion regarding possible sequelae of particular injuries existed, he was entitled to look at the spectrum of opinion and advance the view most favourable to his side of the particular case. In short, he looked for the appropriate high watermark of established opinion on that side and put it forward as being a probability in the case. Such an approach constitutes a classical illustration of advocacy and is far removed from

the proper function of the expert witness.

It seems to me that an approach to expert testimony which may be helpful in avoiding the pitfalls which I have mentioned and also in achieving the holy grail of objectivity and fairness, is to adopt the same criteria as one would have in lecturing students on the probable consequences of a particular injury. If there is a divergence in established opinion, presumably one would inform the students of all tenable theories and then express an opinion on which of them one personally prefers, i.e., which view in one's own professional assessment was likely to be the most reliable pointer to the sequelae of injury in the given case. A professional opinion in court similarly expressed would be likely to receive great respect. Likewise, experts in other disciplines, such as engineers and architects, should adopt a similar approach when giving evidence on the adequacy or otherwise of industrial work practices and other related matters if there is a divergence in respected professional opinion in that area.

Statutory Developments and New Rules of Court

Historically there was a long established practice in personal injury actions that examination of a plaintiff by a medical specialist on behalf of the defence took place after particulars of injuries and sequelae were furnished as part of the pleadings in the action and in the presence of the plaintiff's expert, "the treating doctor", who normally brought with him the relevant hospital records, including x-ray films and reports (if any) received by him from other treating specialists in the case, e.g., radiologists. This arrangement had two major advantages. It afforded the defence specialist an opportunity to confer with the treating doctor and to obtain, if necessary, such additional information as he might require. Almost invariably this obviated the risk of misunderstanding or subsequent surprise as to the nature and/or perceived consequences of the injury. The presence of his own expert also tended to put the injured party at ease and it avoided the risk of unfair questioning and aggressive examination by the defence doctor which sometimes happens when the injured party is alone when seen by him. However, the practice of joint examination seems to have withered on the vine in the past 20 years or so and I understand that the usual procedure now is that injured plaintiffs are examined on their own by defence specialists. One reason for this change is, of course, the quite substantial cost of paying for the attendance of two experts at such examinations.

It has been a common occurrence at trials that no significant dispute on the medical evidence has emerged and it could have been provided for the judge by way of agreed reports. It is also not uncommon that it may transpire at the trial that there are complications regarding the plaintiff's condition which are not readily discernible from particulars furnished to the defence but which probably would have emerged if the respective experts had had a joint examination of the plaintiff as in the past or if medical reports had been exchanged in good time before the hearing.

Section 45 of the Courts and Court Officers Act, 1995 and rules of court made thereunder have sought to create a framework which addresses these problems and which it is hoped will create an acceptable degree of order which is fair to both sides and which will also effect substantial savings in costs. That objective is probably easily enough achieved under the new regime in the vast majority of personal injury actions provided that experts are fully advised about what is expected of them regarding the quality and content of their reports. However, there are some cases where there is a potential for real difficulty arising out of problems which are not readily amenable to rule making solutions. Difficulties which have already emerged in that regard and also in other respects, such as time limits for furnishing reports, have necessitated a reassessment of the rules of court which were made in 1997 pursuant to Section 45 and their replacement by a new set of rules which were published in October of this year (S.I. No. 391 of 1998). All in all, it seems to me that the scheme which has now emerged is reasonably practical and workable, but it does create potential problems for expert witnesses. It is imperative that they are aware of and understand the new regime. What I propose to do is to give a birdseye view of the new structure and to comment on some facets of it which seem to be of particular importance to expert witnesses. There are other aspects which are pertinent to the legal advisors of the parties that merit exploration in another forum.

It is a long established principle of the common law that documents which come into existence for the purpose of preparing for litigation are privileged and protected from discovery by the other side. Such documents include counsels' opinions, statements from potential witnesses and reports from professional advisors. As to the latter; an advantage which privilege created for experts, particularly those advising plaintiffs, is that they were free to include in appropriate circumstances relevant facts and opinions which might be unfavourable to the plaintiff's case in the knowledge that what they had written would not be disclosed to the other side. Subject to the possibility of exceptions in particular cases to which I shall refer hereunder, that privilege is now removed.

Section 45 of the 1995 Act, insofar as it is relevant to potential expert witnesses, is in the following terms:

(1) "Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings (or in connection with the obtaining or giving of legal advice) are in certain circumstances privileged from disclosure, the Superior Courts Rules Committee, or the Circuit Court Rules Committee as the case may be, may....... make rules

(a) requiring any party to a High Court or Circuit Court personal injuries action, to disclose to the other party or parties, without the necessity of any application to court by either party to allow such disclosure, by such time or date as may be specified in the rules, the following information, namely

(i) any report or statement from any expert intended to be called to give evidence of medical or paramedical opinion in relation to an issue in the case;

(ii) any report or statement from any other expert of the evidence intended to be given by that expert in relation to an issue in the case;.....

(b) Providing for the imposition by the High Court, or the Circuit Court as the case may be, of a sanction for noncompliance with a requirement under paragraph (a) of this subsection including termination of an action, prohibition on a party from adducing such evidence as has not been disclosed without leave of the court, and penalties as to award of costs.....

(4) "Notwithstanding the rule of law against the admission of hearsay evidence and the privilege attached to documents prepared for the purpose of pending or contemplated civil proceedings the Superior Courts Rules Committee or the Circuit Court Rules Committee may.... make rules allowing for the admission in evidence in personal injuries actions in the High Court or the Circuit Court of information, documentation, reports or statements disclosed pursuant to subsection (1) of this section, subject to such conditions and procedures as may be necessary to protect the interests of the parties."

The primary object of the foregoing statutory provision is to shorten the length of personal injuries trials and to reduce costs. As already stated it is envisaged that consequent upon a compulsory exchange of reports it is likely to emerge in many cases that there is no significant controversy between the experts on either side in consequence of which viva voce evidence is not required at the trial and it is sufficient to furnish the reports of experts to the court for its assessment. In other cases where there is a divergence of opinion among the experts it is envisaged that the pre-trial exchange of reports is likely to narrow the area of controversy and thus save time and expense. It will be noted that Section 45 applies only to personal injuries actions but is not confined to medical or paramedical opinions. It also includes reports or statements from other experts such as engineers, actuaries or accountants who may have furnished advice on the liability aspect of the case or on financial matters relating to the assessment of damages. There is also provision for the imposition of substantial sanctions by the court where there has been failure to comply with the new regime.

As already stated, the original rules made in 1997 under Section 45 to flesh out the new structure were found to create certain problems which could cause injustice or avoidable difficulties and they have been replaced by new rules made in October, 1998. They contain, *inter alia*, the following provisions:

The term "action" is stated to include "any claim for damages in respect of any personal injuries to a person howsoever caused (including a claim for fatal injuries brought pursuant to Section 48 of the Civil Liability Act, 1961) but does not include an action to which section 1(3) of the Courts Act, 1988 applies so as to entitle a party to trial by jury in that action". (e.g., a personal injuries action brought by a plaintiff based upon an alleged assault by the defendant). "Personal injuries" includes "any disease and any impairment of a person's physical or mental condition". "Report" is defined as meaning

> "a report or reports or statement from accountants, actuaries, architects, dentists, doctors, engineers, occupational therapists, psychologists, psychiatrists, scientists, or any other expert whatsoever intended to be called to give evidence in relation to an issue in an action and containing the substance of the evidence to be adduced and shall also include any maps, drawings, photographs, graphs, charts, calculations or other like matter referred to in any such report. Any copy report (including a copy report in the form of a letter), copy statement or copy letter however made, recorded or retained from any such expert mentioned above intended to be called to give evidence in relation to an issue or action and containing the substance of the evidence to be adduce, the original of which has been concealed, destroyed, lost, mislaid or is not otherwise readily available, shall also be deemed to be a report for the purposes of this rule".

Time limits are laid down for the furnishing of schedules of expert reports by one side to the other and for the exchange of copies of the relevant reports. All reports etc. subsequently obtained also must be exchanged. It is specifically provided that:

> "Any party who has previously delivered any report or statement..... may withdraw reliance on such by confirming by letter in writing that he does not now intend to call the author of such report or statement..... to give evidence in the action. In such event the same privilege (if any) which existed in relation to such report or statement shall be deemed to have always applied to it notwithstanding any exchange or delivery which may have taken place."

As will emerge later, this rule could have importance in circumstances where an expert report has been furnished on behalf of a plaintiff which contains information prejudicial to him and it is subsequently decided not to pursue that aspect of his claim to which the prejudicial information or opinion relates.

Rule 50 deals with "Exceptions" and provides, *inter alia*, that:

> "In any case application may be made to the Court by motion on notice by any party for an order that in the interests of justice the provisions of Rule 46 [which deals with disclosure of reports and statements] shall not apply in relation to any particular report or statement (or portion thereof), which is in the possession of such party and which he maintains should not be disclosed and served as required. The Court may, upon such application, make such order as to it seems just."

This rule recognises that in certain circumstances particular reports or parts thereof should, by leave of the court, remain privileged. What is envisaged is that in a particular case an expert report, usually on the plaintiff's side, may contain matter which is prejudicial to that party and which in the interest of justice should not be disclosed. For example, a psychiatrist who treats a plaintiff for depression sustained consequent upon substantial ongoing physical injuries may learn from his patient that, say, 20 years earlier he had suffered from depression arising out of marital conflict which ended in divorce but from which he had long ago made a full recovery. If the psychiatrist made reference to the earlier episode of depression in his report it would be open to the plaintiff on notice to the other side to make application to the court for an order excluding that part of the report from discovery to the defendant on the ground that it would be contrary to the interest of justice to

divulge that information and to open up the earlier information to detailed exploration in cross-examination of the psychiatrist. I am not aware of any application having been made to the High Court under that rule and I apprehend that they will rarely arise. In the foregoing illustration the psychiatrist ought not to have made any reference in his report to the earlier marital depression on the ground that the plaintiff, having long since made a full recovery from that episode, it was irrelevant to his post-traumatic depression or stress disorder. It is an example of how important it is for experts to take particular care to avoid the inclusion of information which is irrelevant to the assessment of the plaintiff's post-accident problems. However, circumstances may arise where, in the interests of justice, an expert cannot avoid making reference to a particular matter even though it may be highly prejudicial to the plaintiff. For example, a plaintiff who alleges that he suffers from severe post-traumatic depression relating to physical injuries sustained in the accident may disclose to his psychiatrist that he has been recently diagnosed H.I.V. positive arising out of sexual misbehaviour outside marriage, which is not generally known. The psychiatrist may conclude that the latter situation is at least in part the cause of, or a factor contributing to, his existing depression. If such a connection is perceived to exist or to be a real possibility, the expert would have a duty to disclose it in his report and to take that circumstance into account in his assessment of the plaintiff's ongoing depression even though disclosure could be grievously embarrassing to the plaintiff and his family. If the expert failed to disclose all possible causes of the plaintiff's depression of which he had become aware in course of treatment, he would thereby fail in his duty to the court to give a fair, objective assessment of the plaintiff's mental illness. Where an expert is obliged, because of relevance, to include prejudicial material in a report, an application to the court (which under the new rules now must be on notice to the defendant) for liberty to exclude the prejudicial information in the report will probably fail. The test will be, not the nature and extent of the potential prejudice to the plaintiff, but, whether the information is relevant to a full professional assessment of a particular illness or condition in respect of which he is seeking compensation.

The end result in such circumstances is that the plaintiff is left with two alternatives. Either he may decide to pursue his claim in full notwithstanding the embarrassment arising out of his psychiatrist's report and subsequent evidence if required as a witness; or he may decide to avoid embarrassment by abandoning his claim for compensation arising out of post-traumatic depression and he may limit his claim to the physical injuries only. If that course is taken then there will be no need for psychiatric evidence and the psychiatrist's report will not be discoverable under the rules.

The problem which medical experts, particularly those on the plaintiff's side, may have to face sometimes is whether or not information or opinions prejudicial to the plaintiff should be included in medical reports furnished for the purpose of litigation, bearing in mind that such reports are now usually discoverable by the other side. The answer to that question brings us back to the first point I referred to in this paper, i.e., that the holy grail of expert testimony is objectivity and fairness. If particular information is necessary for a full assessment of the claim which the plaintiff is making in his action then it should be included in the report of the relevant expert however embarrassing that may be for the claimant. However, great care should be taken in deciding whether or not the sensitive information is relevant to the assessment of the plaintiff's claim by the particular expert. If the latter has doubt in that regard it would be wise to obtain advice from his professional body and/or other senior colleagues before furnishing his report.

In conclusion, potential expert witnesses when preparing reports under the new regime must always bear carefully in mind that the reports will become evidence in the case and therefore will be subjected to detailed scrutiny by the trial judge and counsel on both sides of the case. It follows that such reports should be factually accurate and opinions should be carefully reasoned. They should contain all relevant information known to the expert which he/she believes is necessary for a fair, objective assessment of the particular problem in question. If that necessarily includes information which is prejudicial to the plaintiff so be it. In such circumstances it will become a matter for the plaintiff and his legal advisors to decide whether in the circumstances to pursue that particular aspect of his claim or whether an application to the court for exclusion from the expert's report of the information in question might have some prospect of success. ●

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Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 4. Issue 4. Jan/Feb 1999

A directory of legislation, articles and written judgments received in the Law Library from 30th November 1998 to 22nd January 1999.
Judgment Information compiled by the Legal Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

Devlin v. Minister for Arts, Culture and the Gaeltacht
Supreme Court: **O'Flaherty J., Murphy J., Barron J.**
12/11/1998

Judicial review; wildlife licences; falconry; judicial review sought of the refusal of the Minister to renew the applicant's falconry and possession licences and the refusal to grant CITES certificates; applicant had failed to co-operate with the Minister regarding DNA testing of birds of prey held by him; whether the Minister adopted a fixed and inflexible policy; whether the decision was unreasonable or irrational; whether there was a failure to consider the circumstances of the applicant; whether there were valid reasons for the refusal of the CITES certificates; whether the statement by the National Park and Wildlife Service that the applicant could appeal against the decision, even though no statutory appeal system existed, suggested a procedural impropriety; whether Minister should have considered a previous conviction of the accused in the United Kingdom for offences relating to birds; Wildlife Act, 1976; Wildlife Act 1976 (Birds of Prey) Regulations 1984; EEC Regulation Number 3626/82.
Held: Appeal dismissed.

Articles
Co-operation in justice and home affairs in the European Union – an overview and critique in the light of the treaty of Amsterdam.
Barrett, Gavin
1998 CIILP 237

From the Downing Street declaration 1969 to the Downing Street declaration 1993.
Hadfield, Brigid
1998 CIILP 76

Statutory Instruments
Oireachtas (Allowances to Members) (Telephone and Postal Facilities) (Amendment) Regulations, 1998
SI 457/1998

St. James's Hospital Board (Establishment) Order, 1971 (Amendment) Order,
1998
SI 538/1998

Animals

Statutory Instruments
Control of Dogs (Amendment) Act, 1992
SI 443/1998

Control of Dogs Regulations, 1998
SI 442/1998

Arbitration

Tobin and Twomey Services Ltd. v. Kerry Foods Ltd.
High Court: **Kelly J.**
03/12/1998

Costs; arbitration; taxation; five items of costs contested by the plaintiff; whether the first item, the costs of consultations, should be allowed; whether the consultations were necessary; whether the Taxing Master adequately assessed the reasonableness of the expenses; whether the consultations in question were a 'luxury'; whether the defendants should recover the second contested item of costs, which were not the subject of an order in their favour; whether the third item, the costs of the taking of judgment by the defendants' counsel, was excessive; whether the fourth item, the brief fee which was charged, was appropriate; whether the fifth item, the costs of the swearing of affidavits and the attendance in court of the chartered accountants on behalf of the defendants, should be allowed; s. 27(3), Courts and Courts Officers Act, 1995.
Held: First item of costs allowed; second item of costs disallowed; costs of the taking of judgment were excessive; third item reduced; fourth item allowed; fifth item reduced, as attendance in court of the accountant was in the nature of a 'luxury'.

Library Acquisition
Carrigan, Michael W
Handbook on arbitration in Ireland
Dublin Law Society of Ireland 1998
N398.C5

Children

T.D. v. The Minister for Education
High Court: **Kelly J.** *(ex tempore)*
04/12/1998

Constitution; childcare; special accommodation for children; judicial review; constitutional obligation on State to provide suitable accommodation for young people; problem of children being sent to Oberstown Remand Centre in circumstances where it was inappropriate and possibly damaging to them; no information as to the numbers of persons requiring facilities of the type in question; whether attempts are being made to rectify the situation; whether the application for judicial review should succeed.
Held: Progress being made; certain information to be placed before the court to enable the situation to be monitored, such as information regarding the steps being taken to provide adequate facilities; case to be listed for further consideration.

Articles
Hague conference on Private International Law and the Children's Conventions
Duncan, William
1998 IJFL 3

In the best interests of the child?: An evaluation of Ireland's performance before the UN committee on the Rights of the Child
Kilkelly, Ursula
1998 ILTR 293

Towards the establishment of a Children's Ombudsman: champion of children's rights or unnecessary interloper?
Martin, Frank
1998 IJFL 8 [Part 1]

Statutory Instrument
Children Act, 1997 (Commencement) Order, 1998
SI 433/1998

Commercial Law

Articles
Dealing as a consumer
Bird, Timothy
1999 CLP 10

Global crisis: the wolf at the door
Fitzgerald, Kyran
1998 IBL 206

Product liability: Part 1 – Are your products safe?
Garvey, Hugh
2 (1998) IILR 63 [Part 1]

Project finance, a new asset class for securitisation.
Downey, Conor
1998 IBL 244

The future of International Financial Services in Ireland
Tutty, Darren
11 (1998) ITR 595

Library Acquisition
Electronic commerce law and practice
London Sweet and Maxwell 1999
Chissick, Michael
L157.2

Statutory Instrument
Financial Transfers (Governments of the Federal Republic of Yugoslavia and the Republic of Serbia) Order, 1998
SI 360/1998

Company Law

McGilligan v. O'Grady
Supreme Court: Keane **J., Lynch J., Barron J.**
05/11/1998

Injunction; investment of funds by plaintiff's company in third-named defendant company; plaintiff appointed director under terms of investment agreement; subsequent share transfer agreement; second-named defendant became holding company of third-named defendant; plaintiff appointed director of second-named defendant; proposed removal of plaintiff as director; alleged oppression; failure to make available books of accounts; proposed alteration of objects of company; whether serious question to be tried; whether court can restrain removal of director pending hearing of oppression petition; whether plaintiff's right to relief under s.205 of Companies Act, 1963 affected by fact that he is not a member of company; whether interlocutory injunction can be granted where perpetual injunction not sought; s.182 & 205 Companies Act, 1963; s.202(8) Companies Act, 1990.
Held: High Court Order affirmed in so far as it restrained removal of director and ordered compliance with s.208(8) of 1990 Act; Order discharged in so far as it restrained defendants from altering the objects of the Company.

Articles
Company law enforcement in Ireland – fact or fiction?
O'Connor, Fintan J
4 (2) 1998 BR 92

Examinerships after Springline – another line in the sand
O'Donnell, John L
1998 CLP 279

Receiverships in Ireland in the wake of Demite Ltd. v. Protec Health Ltd.
Courtney, Thomas B
1998 CLP 255

Restricting directors – recent case law on section 150 of the Companies Act 1990
Garvey, Hugh
1998 CLP 289

Library Acquisition
Forde, Michael
Cases and materials on Irish company law
2nd ed
Dublin Round Hall S & M1998
N261.C5

Competition

Library Acquisition
Kenny, Patrick
McNutt, Patrick A
Competition Authority
Competition Authority Discussion Paper No. 6 Solving Dublin Taxi Problems

Urban-Sharecroppers V Rentseekers
[Dublin] Competition Authority 1998
N266.C5

Constitutional Law

Dalton v. Governor of the Training Unit
High Court: **Morris P.**
29/11/1998

Habeas corpus; detention; offences contrary to the Fisheries Acts 1959-1980; failure to pay fines imposed; subsequent execution of committal warrants; delay; petition lodged with the Minister for Justice; whether the delay in the execution of the committal warrants was inexcusable; whether delay was excusable in that the delay was to enable the Minister to adjudicate upon the petition; whether warrants should have been executed as soon as was reasonably possible; whether applicant contributed to the delay.
Held: Order granted; no reasonable explanation for the delay; applicant did not contribute to the delay.

Articles
Discerning the philosophical premises of the report of the constitution review group: an analysis of the recommendations on fundamental rights
Whyte, G F
1998 CIILP 216

Freedom of Information Act: who's using it, and why?
Meehan, David L
1998 (December) GILSI 22

From the Downing Street declaration 1969 to the Downing Street declaration 1993

Hadfield, Brigid
1998 CIILP 76

National Constitutional Law and European Integration: FIDE report
Phelan, Diarmuid Rossa
Whelan, Anthony
1997 IJEL24

Contract

Michael Byrne Motors Ltd. v Rover Ireland Ltd.
High Court: **Morris P.**
15/12/1998

Contract; sequestration; dealership agreement; interlocutory order to recommence agreement made on consent; whether court entitled to reconsider interlocutory orders made on consent; whether court should exercise its discretion to vary or alter the interlocutory order made on consent; whether defendant entitled to resile from agreement; whether plaintiff in fundamental breach of agreement; whether defendants entitled to terminate plaintiff's dealership; whether plaintiff entitled to order of sequestration for the disobedience of the interlocutory order.
Held: Relief refused.

Construction Law

Library Acquisition
Brown, Jeffrey C
Professional negligence in the construction industry
London LLP 1998
N33.72

Conveyancing

Articles
Deposit of title deeds
Hardiman, David
1999 CLP 2

Recent developments in conveyancing practice
Sweetman, Patrick
1998 IPELJ 163

Copyright, Patent & Designs

Articles
Suing for foreign copyright infringement in Ireland
Newman, Jonathan
4 (2) 1998 BR 97

The copyright and related rights bill – first impressions
Scales, Linda
1998 IBL 255

Criminal Law

O'Connor v D.P.P.
High Court: **Morris P.**
25/11/1998

Judicial review; sexual offence complaint; delay in prosecution of charges; right to trial with due expedition; delay in the making of the complaint; whether delay created defence difficulties over and above what would be normal difficulties to be expected in meeting charges such as those proffered against the applicant; whether delay will result in the applicant being deprived of a fair trial.
Held: Relief granted; trial of applicant would not constitute an observance of the constitutional right to a fair trial.

Breathnach v. Governor of Limerick Prison
Supreme Court: **O'Flaherty J., Murphy J., Lynch J.** (*ex tempore*)
03/12/1998

Habeas corpus; lawful sentence currently being served by applicant; litany of complaints; whether current complaints afford grounds for ordering an enquiry under Art. 40 of the Constitution; whether the Court has jurisdiction to enter a general commission of inquiry into the various actions of various departments of Government.
Held: Appeal dismissed.

Article
EC law and the regulation of British anti-terrorism legislation: does Gallagher open the door to further EC challenges?
O'Neill, Michael
1998 CIILP 110

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Eady Sir, David
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Damages

Miley v. Daly
Supreme Court: **O'Flaherty J., Lynch J., Barron J.** (*ex tempore*)
07/12/1998

Personal injuries; damages; cycling accident; contributory negligence; liability; head injury resulting in loss of sense of smell and temporary loss of sense of taste; whether loss of sense of smell is a permanent condition; whether award of £32,000 in damages was significantly low.
Held: Award of damages increased to £45,000.

Defamation

Reynolds v. Malocco
High Court: **Kelly J.**
11/12/1998

Defamation; libel; justification; injunction; restraint of publication, dissemination or circulation of an article which plaintiff claims is defamatory of him; whether the words in question are capable of bearing the meanings contended; whether damages would adequately compensate the plaintiff; whether a statement of the intent to plead justification is sufficient to de-bar the claim of the plaintiff to an injunction; meaning of the word "gay" considered; whether an allegation that a person is a homosexual, is capable of bearing a defamatory meaning; Article 10, European Convention for the Protection of Human Rights and Fundamental Freedoms; Judicature (Ireland) Act, 1877 ; O. 50 R. 6, Rules of the Superior Courts, 1986.
Held: Defendant cannot oust the jurisdiction of the Court by expressing the intention to plead justification; no arguable prospect of making out the defence of justification; there was a clear innuendo which a jury would say was libellous; words used were

capable of bearing a defamatory meaning; interlocutory injunction granted.

Easements

Article
Easements of elevator and/or parking: from Ballymun to the IFSC
Bland, Peter
1998 CPLJI80

Education

Statutory Instruments
National University of Ireland, Cork (Change of Name of University) Order, 1998
SI 446/1998

National University of Ireland, Dublin (Change of Name Of University) Order, 1998
SI 447/1998

Employment

Mc Call v. An Post
Supreme Court: **O'Flaherty J., Keane J., Barron J.**, (*ex tempore*)
04/12/1998

Case-stated; employment; conditions of service; dismissal of An Post employee; procedure for dealing with Grievances and Disputes formed part of the appellants condition of service; alleged unfair dismissal; decision of the Employment Appeals Tribunal confirming that appellant had not been unfairly dismissed; disciplinary record of appellant; admissibility of record into proceedings; whether art. 3.3 of the respondent's grievance and dispute procedures preclude the Court from hearing evidence of written reprimands for serious offences that are more than two years old; whether appellant was entitled to have his record purged after a specified period of satisfactory service; s. 6(1), Unfair Dismissals Act, 1977 as amended by the Unfair Dismissals (Amendment) Act. 1993; s. 16, Courts of Justice Act, 1947.
Held: In accordance with art.3.3 of the respondent's grievance and dispute procedures, the Court is not precluded from hearing evidence of written reprimands for serious offences that are more than two and four years old respectively when deciding whether the dismissal of the appellant was unfair pursuant to the provisions of s. 6(1) of the Unfair Dismissals Act, 1977, as amended by the Unfair Dismissals (Amendment) Act, 1993.

Moran v. Minister for Health
High Court: **Morris P.**
15/12/1998

Judicial review; employment; Civil Service; alleged promotion agreement; alleged breach of agreement; whether binding contract had been entered into between the plaintiff and the first named respondent; whether the applicant is the lawful incumbent of the post of Principal Officer; whether the first named respondent revoked the agreement alleged; whether the applicant was entitled to an order of mandamus requiring her appointment as Principal Officer; Civil Service Regulation Act, 1956, s. 17(1).
Held: Relief refused.

Articles
Legal implications of the economics of occupational health and safety
Jacobson, David
1998 ILTR 309

Review of the 1997 annual report of the Health & Safety Authority
Scanaill, Micheal
4 (2) 1998 BR 103

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Ferguson, Garry
1998 ILTR 277

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1989
MacNamee, Michael
2 (1998) IILR 70

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O'Mara, Ciaran A
1998 CLP 282

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B Fitzpatrick, P Maxwell, A Hegarty,
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Industrial Training Levy (Food, Drink and Tobacco Industry, 1999 Scheme)
Order, 1998
SI 470/1998

Industrial Training Levy (Clothing and Footwear Industry, 1999 Scheme) Order, 1998
SI 471/1998

Industrial Training Levy (Chemical and Allied Products Industry 1999 Scheme) Order, 1998
SI 472/1998

Industrial Training Levy (Engineering Industry, 1999 Scheme) Order 1998
SI 473/1998

Industrial Training Levy (Textiles Industry, 1999 Scheme) Order, 1998
SI 474/1998

Organisation of working time (code of practice on Sunday working in the retail trade and related matters) (declaration) order, 1998
SI 444/1998

Parental leave (Notice of Force Majeure Leave) Regulations, 1998
SI 454/1998

Environmental Law

Articles
Building conservation under the planning code
Grist, Berna
1998 IPELJ 140

Environmental democracy, oral hearings and public registers in Ireland "me thinks thou dost protest too much"
Taylor, George
1998 IPELJ 143

Government policy for the environment in Northern Ireland
Faris, Neil C
1998 CIILP 44

IPC Licences
Doyle, Alan
1998 IPELJ 152

Review of An Bord Pleanala's recent decisions – holiday homes and related facilities at Ventry, Dingle
Brassil, Declan
1998 IPELJ 156

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Environmental Protection Agency Act, 1992 (Established Activities) Order, 1998
SI 460/1998

European Union

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A reluctant step towards fortress Europe: the inevitable but regrettable in Silhouette
Travers, Noel
1999 CLP 18

Article 177 E.C. treaty – Preliminary rulings and the Court of Justice
Conlan Smyth, David
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Barrett, Gavin
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Buttimore, McEntee, Hurley,
1997 IJEL65

Europe prepares for electronic signatures
Murray, Karen
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Collins, Anthony M
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Byrne, David
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Cooke, John D
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Mapping the European regulation of asylum
Harvey, Colin
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Phelan, Diarmuid Rossa
Whelan, Anthony
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Wood, Kieron
1998 (December) GILSI 16

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Daly, Bart D
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Family

L. v. T.
Supreme Court: **O'Flaherty J., Murphy J., Lynch J.**
09/11/1998

Children; custody; father resident in United States; custody awarded to father; role of medical expert in custody proceedings; whether trial judge was correct in deciding to award custody to father; whether interviews conducted by psychiatrist were insufficient to enable him to reach conclusions re custody; whether trial judge erred in law and in fact in failing to have due regard to evidence he permitted to be given and made findings contrary to the evidence; s.11 Guardianship of Infants Act, 1964.
Held: Appeal dismissed.

Articles
Domestic violence – a case for reform?
Horgan, Rosemary
1998 IJFL 2 [Part 1]

Looking north, looking south? comparing legal responses to matrimonial breakdown in the two jurisdictions
Archbold, Claire
White, Ciaran
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Power, Conor
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Fisheries

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SI 449/1998

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SI 453/1998

Common Sole (Restriction of Fishing In The Irish Sea) (No 2) Order, 1998
SI 440/1998

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(No 2) Order, 1998
SI 458/1998

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SI 456/1998

Monkfish (Restriction on Fishing) (No 12) Order, 1998
SI 451/1998

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SI 452/1998

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Housing (Traveller Accommodation) Act, 1998 (Commencement) (No 3) Order, 1998
SI 448/1998

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Articles
Human rights considerations in extradition and expulsion cases: the European convention on human rights revisited
Egan, Suzanne
1998 CIILP 188

Mapping the European regulation of asylum
Harvey, Colin
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Murray, Karen
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Rothery, Grainne
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O'Neill, Niall
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James, Cefyn
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Scene on the web
Phillips, Barry
1998 ILTR 301

Windows 98
Bale, Norman
11 (1998) ITR 631

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Chissick, Michael
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Injunctions

Oba Enterprises Ltd. v. TMC Trading International Ltd.
High Court: **Laffoy J.**
27/11/1998

Mareva injunction; declaration that the assets of the defendants are the property of the plaintiffs or their nominees; criteria for granting mareva injunction; whether defendant likely to dissipate its assets with the intention of evading obligations, if any, to the plaintiff; whether plaintiff's claim could be classified as a proprietary claim rather than a claim for a mareva injunction; whether plaintiffs have shown reasonable grounds for claiming a proprietary interest in the defendant's assets.
Held: Relief refused.

Article
The 'Golden rule' in ex parte applications for Mareva Injunctions
Courtney, Thomas B
4 (2) 1998 BR 63

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Hetherington, Marion
Mareva injunctions
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Intellectual Property

Gormley v. EMI Records (Ireland) Ltd.
Supreme Court: **Barrington J., Murphy J., Barron J.**
17/11/1998

Intellectual property; copyright; original literary work; sound recording; copyright claimed in respect of biblical stories which the plaintiff told in a school class as a child; teacher recorded stories told by plaintiff and hundreds of other children and these were later broadcast and produced commercially on a tape; whether the words spoken by the plaintiff were an original literary work; whether the words were original; whether the work can obtain protection without being written down; definitions of 'literary work' and 'notation' considered; whether writing must be something which is visible; whether the recording must be done by the author; whether the expression 'other material form' can apply to literary work; whether the originality subsisted in the sound recording or in the literary work; whether there was the necessary skill, labour and judgment to create a new work; ss. 2(1), 3(4), 8(1) Copyright Act, 1963; Article 2(2) Berne Convention.
Held: No copyright in the words spoken; not a literary work; no originality in the way the plaintiff related the story; appeal refused.

Articles
The Intellectual Property (Miscellaneous Provisions) Act 1998 – presumptions and penalties
Murphy, Adele
1998 CLP 268

Suing for foreign copyright infringement in Ireland
Newman, Jonathan
4 (2) 1998 BR 97

The copyright and related rights bill – first impressions
Scales, Linda
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Ireland and the Rockall dispute: an analysis of recent developments
Symmons, Clive R
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Towards a universal declaration of Human Rights, responsibilities and feminism
Mullally, Siobhan
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Judicial Review

Nevin v Judge Crowley
High Court: **O' Sullivan J**
05/11/1998

Judicial review; certiorari; improper conviction; decision of first named respondent quashed; whether order quashing conviction and sentence would entitle applicant to plead *autrefois acquit* in the event that the matter was remitted to the first named respondent; whether matter should be remitted to the respondent for further consideration of the original charge; whether there can be a distinction between conviction and sentence within the respondent's order; O 84, r 26(4), Rules of the Superior Courts.
Held: Order not granted; applicant would be entitled to plead *autrefois acquit* should the case be remitted to the learned first named respondent.

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Irish Lawyers and the Great War
Hogan, Daire
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Dickson, Brice
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SI 439/1998

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Local Government Act, 1998 (commencement) order (no 4) order, 1998
SI 490/1998

National Cultural Institutions Act, 1997 (Commencement) Order, 1998
SI 438/1998

Oireachtas (Allowances to Members) (Telephone and Postal Facilities) (Amendment) Regulations, 1998
SI 457/1998

Medical

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Craven, Casey
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Statutory Instrument
St. James' Hospital Board (Establishment) Order, 1971 (Amendment) Order,
1998
SI 538/1998

Negligence

Ewing v. North-Western Health Board
High Court: **O'Donovan J.**
2/12/1998

Medical negligence; personal injury; whether an unnecessary surgical operation had been performed on the plaintiff; whether defendant negligent in that there was a failure to carry out a review ultrasound scan prior to performing operation; whether operation had been carried out without plaintiff's consent; whether an unnecessary procedure of plication of the round ligaments had been performed without the plaintiff's consent; whether operation was one which a medical practitioner, of equal standing to the defendant practitioner, acting with ordinary care would have undertaken.
Held: Negligence established; £35,505 damages awarded.

Article
Product liability: Part 1 – Are your products safe?
Garvey, Hugh
2 (1998) IILR 63 [Part 1]

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Brown, Jeffrey C
Professional negligence in the construction industry
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Pensions

Article
Are PEP's better than AVC's?
Gilhawley, Tony
11 (1998) ITR 599

Planning

Curley v. Galway Corporation
High Court: **Peter Kelly J.** (*ex tempore*)
11/12/1998

Planning application; planning conditions; landfill site; planning permission for a landfill site granted, subject to various conditions; conditions requiring rehabilitation measures and a phased programme for landscaping of the site not complied with; whether there was a deliberate and serious breach of the terms of the planning permission; whether the respondent was guilty of a criminal offence under the planning legislation; statutory duty of the respondent regarding waste management, considered; whether there exists circumstances in which the court should withhold its order; s.19, Local Government (Planning and Development) Act, 1992.
Held: Deliberate and conscious breaches of the planning law found to exist; orders restraining use of the land for dumping and restraining breaches of the planning conditions; concession granted that landfilling from Corporation refuse dumps may continue for one month.

Huntstown Air Park Ltd. v. An Bord Pleanala
High Court: **Geoghegan J.**
18/12/1998

Judicial review; disclosure; planning permission; development; outline planning permission for a new airport terminal refused; at oral hearing of appeal against the refusal the applicants sought to have two reports produced; judicial review sought of decision not to require production of these documents; whether the respondent was bound to exercise its powers under s.10, Local Government (Planning and Development) Act, 1992, to order production of the documents; whether an Bord Pleanala can exercise this power at any stage before its final decision; whether this application is premature; s. 82, Local Government (Planning and Development) Act, 1963; ss. 9, 10 and 11, Local Government (Planning and Development) Act, 1992.
Held: Application refused; application for judicial review premature.

John A. Wood Ltd. v. Kerry County Council
High Court: **Smyth J.**
31/10/1998

Planning permission; judicial review; injunction; gravel extraction; outline planning permission granted for the extraction of gravel at a site, subject to certain conditions; permission expired; seven years later, application for extension of the planning permission refused; judicial review proceedings brought challenging this refusal; applicant then claimed planning permission not necessary; planning authority issued warning notice in relation to unauthorised development of land; third parties raised objections to the unauthorised use; whether there were 'substantial works' within the meaning of s. 4, Local Government (Planning and Development) Act, 1982; whether respondent's reasons for refusing extention were valid; whether development was carried out before the date of expiration of the planning permission; whether there was an excessive gap in time between the expiry of the permission and the application for extension; whether prejudice to third parties could be a ground for refusing to extend planning permission; whether there was a time limitation upon the planning permission; s. 26, Local Government (Planning and Development) Act, 1976; s. 27, Local Government (Planning and Development) Act, 1976 (as substituted by s. 19(4)(g), Local Government (Planning and Development) Act, 1992); ss. 2 and 4, Local Government (Planning and Development) Act, 1982; Local Government (Planning and Development) Regulations, 1994 (S.I. No. 86 of 1994) Part VI, Regulation 80.
Held: Application for judical review dismissed; s. 27 order granted.

Waterford County Council v. John A Wood Limited
Supreme Court: **Hamilton CJ, O'Flaherty J., Murphy J.**
29/10/1998

Consultative case stated; quarrying works; licence to quarry granted in 1952; licence related to approximately eight acres; further land purchased in 1996; injunction sought restraining quarrying on additional land; whether quarrying works carried out on the additional lands were a development requiring planning permission; whether quarrying works on additional land were a continuation of the original quarrying operations; whether proceedings should have been instituted under s.27 Local Government (Planning and Development) Act, 1976; ss. 3 & 24 Local Government (Planning and Development) Act, 1963.
Held: Planning permission required; s.27 proceedings unsuitable where matter involves novel questions of law and complex questions of fact.

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Grist, Berna
1998 IPELJ 140

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MacEochaidh, Colm
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Taylor, George
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Review of an Bord Pleanala's recent decisions – holiday homes and related facilities at Ventry, Dingle
Brassil, Declan
1998 IPELJ 156

Practice & Procedure

Cummins v. D.P.P.
Supreme Court: **O'Flaherty J., Murphy., Lynch.** (*ex tempore*)
03/12/1998

Search warrant; challenge; case yet to be heard; request for name of informant who had lead to the search warrant being issued; request for an order compelling the Government to enact the European Convention for the Protection of Human Rights and Fundamental Freedoms into domestic law; whether challenge to the warrant would be something that would be proper to be dealt with by the judge at trial; whether release of name of informant is a matter for the trial judge; whether the Court has jurisdiction to order the Oireachtas, the Government, or the Attorney General to enact any legislation in any circumstances.
Held: Appeal dismissed.

D.P.P. v. Fennelly
Supreme Court: **O'Flaherty J., Lynch J., Barron J.**(*ex tempore*)
02/12/1998

Drink driving offence; motorcycle; blood sample provided; mishap in the course of the hearing in that the certificate, from the Medical Bureau of Road Safety in Ireland, was mistakenly quoted by the prosecuting Sergeant to certify a reading of urine and not of blood; whether Sergeant's misstatement constituted evidence; whether the certificate proves itself; whether there was a conflict between the oral evidence of the prosecuting Sergeant and the certificate; s. 21(3), Road Traffic Act, 1994.
Held: Case to be remitted to the District Court; certificate should have been received in accordance with the provisions of s. 21(3), Road Traffic Act, 1994.

Philip Smyth and Genport Ltd v Tunney
High Court: **McCracken J.**
12/06/1998

Taxation; bill of costs; review of taxa-

tion of the taxing master; whether taxing master erred in principle in saying that apportionment did not apply in relation to a Motion of considerable importance and relevance; whether taxing master erred in disallowing costs of a specific attendance fee; whether taxing master erred in disallowing brief fees for one senior counsel where the motion made was of such importance as to constitute exceptional circumstances; whether taxing master erred in disallowing costs of written submissions which had been specifically directed by the Supreme Court; whether taxing master erred in apportionment of instruction fees; whether the taxation was unjust; s. 27(3), Court and Court Officers Act, 1995 O 99 r. 38(3), Rules of the Superior Court.
Held: Taxation reviewed; error on the part of the taxing master resulting in unjust taxation; apportionment allowed and fees claimed reviewed; solicitors claim reduced to £15,000.

O'Reilly v Northern Telecom (Ireland) Ltd.
High Court: **Laffoy J**
27/11/1998

Plenary summons; renewal; time-limit; application to have order of renewal of summons set aside; application for renewal summons granted *ex parte*; personal injury action; alleged delay in prosecution of claim; delay in the first notification of a claim by the plaintiff against the defendant; whether defendant would be seriously prejudiced in defending the claim; whether plaintiff has established any good reason for failure to serve the summons within the prescribed time; whether plaintiff entitled to renew summons; whether delay by defendant in bringing application to have renewal order set aside can avail the plaintiff.
Held: Relief granted; plaintiff has not established that there was a good reason why the summons was not served within the relevant period prescribed by O 8 r.1 of the Rules of the Superior Court.

Flaherty v District Judge Crowley
High Court: **O'Donovan J**
24/07/1998

Judicial review; drink driving offence; arrest; summons issued; incorrect hearing date on the face of the summons; service and entry of the summons did not comply with the District Court Rules; the first named respondent held that appearance of applicant's solicitor on the return date as provided for on the summons cured any defect in the service of the summons; whether first named respondent acted judicially; whether first named respondent accorded the applicant a fair hearing or basic fairness of procedures when he determined that service of the said summons be deemed to be good and when he abriged the time for entry thereof; whether summons void; whether relief sought would be in the intersts of justice; Rule 47(1), District Court Rules, 1948
Held: Order of certiorari granted; order for prohibition not appropriate.

Dawson v. Irish Brokers Association
Supreme Court: **O'Flaherty J., Murphy J., Lynch J.**
06/11/1998

Damages; defamation; retrial on issue of damages; exemplary and aggravated damages; apprehension that jury might have to be discharged; preliminary rulings on admissibility of evidence; dismissal of plaintiff's action following plaintiff's refusal to proceed; appeal against dismissal; circumstances in which a jury should be discharged; whether matters can be raised at a retrial, which were not raised at original trial; whether plaintiffs were entitled to advance claim for exemplary and aggravated damages at retrial; whether plaintiff entitled to assert a general loss of profits at retrial.
Held: Retrial ordered.

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New Disclosure Rules in Personal and Fatal Injuries Actions
Marray, Eamon
1998 (6) P & P 4

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Cummings, Caroline J
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Hardiman, David
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Hardiman, David
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Sweetman, Patrick
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Brennan, Gabriel
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Hill, Christopher
London LLP 1998
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Succession

McDonald v. Norris
High Court: **McCracken J.**
18/12/1998

Will; contest; adequate provision allegedly not made for the plaintiff in the will as child of the testator; plaintiff had occupied and worked testator's lands for his own benefit against testator's wishes; plaintiff had refused to comply with court order to vacate the lands and permitted campaign of intimidation against the testator; whether a moral duty exists in general for a testator to make provision for his children; whether and to what extent the behaviour of the plaintiff towards the testator affected the testator's moral duty to make proper provision for the plaintiff in accordance with his means under s.117, Succession Act, 1965; whether s. 120(4), Succession Act, 1965.
Held: Claim dismissed; the moral duty of the testator was affected by the plaintiff's behaviour.

Article
Section 117 of the Succession Act, 1965
Pilkington, Teresa
4 (2) 1998 BR 89

Taxation

Articles
1998 Tax Changes
Moore, Alan
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Ryan, Jim
11 (1998) ITR 626

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O'Brien, Pat
11 (1998) ITR 629

Inheritance tax/gift tax – a case for change
Cashman, Jean
11 (1998) ITR 621

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Costello, Patrick
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Telecommunications

Article
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Carney, Tom
1998 ILTR 314

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Judgment delivered: 17/11/1998
Brussels convention – Arbitration clause – interim payment – meaning of 'provisional measures'

C-159/96 Portuguese Republic v Commission of the European Communities
Judgment delivered: 19/11/1998
Commercial policy – Quantitative limits on imports of textile products –
Products originating in the People's China –
Additional imports –
Commission's powers of implementation

C-185/96 Commission of the European Communities v Hellenic Republic
Judgment delivered: 29/10/1998
Failure of a Member State to fulfil its obligations – benefits for large families – discrimination

C-214/96 Commission of the European Communities v Kingdom of Spain
Judgment delivered: 25/11/1998
Failure to fulfil obligations – Failure to transpose dir. 76/464

C-228/96 Aprile Srl v Amministrazione delle Finanze dello stato
Judgment delivered: 17/11/1998
Charges having equivalent effect – Recovery of sums paid but not due – Procedural time-limits under national law.

C-242/96 Italian Republic v Commission of the European Communities
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C-252/96P European Parliament v Enrique Gutierrez de Quijano y Llorens
Judgment delivered: 19/11/1998

Appeals – Proceedings before the court of first instance – Prohibition of new pleas – Applicability to the court of first instance – Officials
– Inter-Institutional transfer

C-269/96 Sucreries et Raffineries d'Erstein SA v Finds d'Intervention et de regularisation du Marche du Sucre
Judgment delivered: 12/11/1998
Council Regulations – 1785/81 2225/96 – Aid for the marketing of sugar produced in the French overseas depts.

C-360/96 Gemeente Arnhem v BFI Holding BV
Judgment delivered: 10/11/1998
Public service contracts – Meaning of contracting authority –
Body governed by public law

C-375/96 Galileo Zaninotto v Ispettorato Centrale Repressione Frodi
Judgment delivered: 29/10/1998
Agriculture – common organisation of the agricultural markets – market in wine – compulsory distillation scheme

C-399/96 Europieces SA v Sanders, Automotive Ind.
Judgment delivered: 12/11/1998
Social policy – harmonisation of laws – transfers of undertakings
DIR 77/187

C-7/97 Oscar Bronner GmbH & Co. v Mediaprint Zeitungs
Judgment delivered: 26/11/1998
Art. 86 – Abuse of a dominant position – Refusal of a media undertaking
holding a dominant position in the territory of a Member State to include
a rival daily newspaper of another undertaking in the same Member
State in its newspaper home-delivery scheme

C-51/97 Reunion Europeenne SA v Spliethoff's Bevrachtingskantoor BV
Judgment delivered: 27/10/1998
Brussels Convention -interpretation of Articles 5(1), 3, 6

C-85/97 Societe Financiere d'investissements SPRL v Belgian State
Judgment delivered: 19/11/1998
VAT – Limitation period – Starting point – Method of calculation

C-114/97 Commission
Judgment delivered: 29/10/1998
Failure of a Member State to fulfil its obligations – Free movement of workers – Freedom of establishment

C-152/97 Abuzzi Gas SpA (Agas) v Amministrazione Tributaria di Milano
Judgment delivered: 27/10/1998
DIR 69/335 – indirect taxes on the raising of capital –
merger of companies

C-230/97 Ibiyinka Awoyemi
Judgment delivered: 29/10/1998
Driving licence – interpretation of dir. 80/1263 – failure to comply with the obligation to exchange a licence.

C-233/97 Kappahl Oy
Judgment delivered: 3/12/1998
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of the Republic of Austria, Finland and Kingdom of Spain – derogation's -Art 99

C-235/97 French Republic v Commission of the European Communities
Judgment delivered: 19/11/1998
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refunds in respect of processed cheese

C-259/97 Uwe Clees v Hauptzollant Wuppertal
Judgment delivered: 3/12/1998
Common customs tariff – collections and collector's pieces of historical orethnographic interest – old cars

C-308/97 Giuseppe Manfredi v Regione Puglia
Judgment delivered: 25/11/1998
Wine – New planting of vines – Table grapes – 822/87

C-366/97 Romanelli
Judgment delivered: 29/10/1998
Criminal proceedings

C-381/97 Belgocodex SA v Belgian State
Judgment delivered:3/12/1998
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Information compiled by Ciaran McEvoy, Law Library, Four Courts, Dublin 7.

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Architectural Heritage (National Inventory) & Historic Monuments (Miscellaneous Provisions) Bill, 1998
1st Stage – Seanad

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2nd Stage – Dail

Building Societies (Amendment) Bill, 1998
2nd Stage – Dail [PMB]

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

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

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

Criminal Justice (United Nations Convention Against Torture) Bill, 1998
1st Stage – Seanad

Criminal Law (Rape) (Sexual Experience of Complainant) Bill, 1998
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Control Of Wildlife Hunting & Shooting (Non-Residents Firearm Certificates) Bill, 1998
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Eighteenth Amendment Of The Constitution Bill, 1997
2nd Stage – Dail [P.M.B.]

Electricity Regulation Bill, 1998
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Employment Rights Protection Bill, 1997
2nd Stage – Dail [P.M.B.]

Energy Conservation Bill, 1998
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Enforcement of Court Orders Bill, 1998
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1st Stage – Dail

Family Law Bill, 1998
2nd Stage – Seanad

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

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

Human Rights Bill, 1998
2nd Stage – Dail

Irish Sports Council Bill, 1998
2nd Stage – Dail

Local Government (Planning and Development) Bill, 1998
1st Stage – Dail

National Disability Authority Bill, 1998
Committee – Seanad

Postal and Telecommunications Services (Amendment) Bill, 1998
1st Stage-Dail

Prohibition of Ticket Touts Bill, 1998
2nd Stage – Dail [P.M.B]

Protection of Children (Hague Convention) Bill, 1998
1st Stage – Dail

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2nd Stage – Seanad

Radiological Protection (Amendment) Bill, 1998
Committee- Seanad

Refugee (Amendment) Bill, 1998
1st Stage – Dail

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

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1st Stage – Dail

Safety Health and Welfare at Work Bill, 1998
1st Stage – Dail

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

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1st Stage – Dail

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2nd Stage – Seanad

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Report – Seanad [P.M.B.]

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2nd Stage – Dail [PMB]

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

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26/02/1998

2/1998 – Central Bank Act, 1998
Signed 18/03/1998
To be commenced by S.I.

3/1998 – Finance Act, 1998

4/1998 – Electoral (Amendment) Act, 1998
Signed 31/03/1998
Commenced on signing

5/1998 – Oireachtas (Allowances to Members) and Ministerial, Parliamentary, Judicial and Court Offices (Amendment) Act, 1998
Signed 01/04/98
S 24-28 Commenced 19/06/1996
Rest commenced on signing

6/1998 – Social Welfare Act, 1998
Signed 01/04/1998
Ss 4 &5 To be Commenced By S.I.
Rest commenced on signing

7/1998 – Minister for Arts, Heritage, Gaeltacht and the Islands (Powers and Functions) Act,1997

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

9/1998 – Local Government (Planning & Development) Act, 1998
10/1998 – Adoption (No.2) Act, 1998
Ss 2-9 Commenced 90 days from 29/04/1998

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

12/1998 – Civil Liability (Assessment of Hearing Injury) Act, 1998

13/1998 – Oil Pollution of the Sea (Civil Liability and Compensation) (Amendment) Act, 1998
Commenced By S.I. 159/1998

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

15/1998 – Finance (No.2) Act, 1998

16/1998 – Local Government Act, 1998
Commenced By S.I.'S 178/98 222/98 223/98

17/1998 – Gas (Amendment) Act, 1998
Commenced 3rd June 1998

18/1998 – Tribunals Of Inquiry (Evidence) (Amendment) Act, 1998

19/1998 – Electoral (Amendment) Act, 1998

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

21/1998- Employment Equality Act, 1998

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

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

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

25/1998 – European Communities (Amendment) Act, 1998
Signed 06/07/1998

26/1998 – Turf Development Act, 1997
Signed 07/07/1998

27/1998 – Urban Renewal Act, 1998
Signed 07/08/1998
Commenced By S.I. 271/1998

28/1998 – Intellectual Property (Miscellaneous Provisions) Act, 1998
Signed 07/07/1998
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29/1998 – Food Safety Authority Of Ireland Act, 1998
Signed 08/07/1998

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

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

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

33/1998 – Housing (Traveller Accommodation) Act, 1998
Signed 13/07/1998
Commenced By S.I. 328/98

34/1998 – Industrial Development (Enterprise Ireland) Act, 1998
Signed 13/07/1998

35/1998 – Geneva Conventions (Amendment) Act, 1998
Signed 13/07/1998

36/1998 – Criminal Justice (Release of Prisoners) Act, 1998
Signed 13/07/1998

37/1998 – Investment Compensation Act, 1998
Signed 13/07/1998

38/1998 – Economic and Monetary Union Act, 1998
Signed 13/07/1998
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39/1998 – Offences Against the State (Amendment) Act, 1998
40/1998 – International War Crimes Tribunals Act, 1998

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

42/1998 – Western Development Commission Act, 1998
Signed 25/11/1998`

43/1998 – Carriage of Dangerous Goods by Roads Act, 1998

44/1998 – State Property Act, 1998
Signed 08/12/1998

45/1998 – Tourist Traffic Act, 1998
Signed 12/12/1998

46/1998 – Voluntary Health Insurance (Amendment) Act, 1998
Signed 15/12/1998

47/1998 – Comptroller and Auditor General & Committees of The Houses of The Oireachtas (Special Provision) Act, 1998

48/1998 – Appropriation Act, 1998
Signed 23/12/1998

49/1998 – Protections for Persons Reporting Child Abuse Act, 1998
Signed 23/12/1998

50/1998 – George Mitchell Scholarship Fund Act, 1998
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51/1998 – Education Act, 1998
Signed23/12/1998

52/1998 – Jurisdiction of Courts and Enforcement of Judgments Act, 1998
Signed 23/12/1998

53/1998 – Scientific and Technological Education (Investment) Fund (Amendment) Act, 1998
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54/1998 – Fisheries And Foreshore (Amendment) Act, 1998
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Abbreviations

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

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

Moot Courts

A Moot Court Exchange Programme initiated by Mr Peter Maguire SC recently took place between King's Inns and the University of Georgia Law School. Speakers Conor Halpin and Nessa Cahill, team coach Gillian Reid, auditor Terry Walshe and Under-Treasurer Camilla McAleese travelled to the United States in September 1998 to moot an international law programme with our hosts.

Court No 5 at the Four Courts in Dublin was the venue for the return moot in November when King's Inns speakers Gillian Reid and Marcus Doweling and the UGA team were confronted by an Irish domestic law problem. On each occasion and in a most diplomatic fashion both the US and the Irish Bench reserved judgement. Professor Ed Spurgeon (UGA Law School) and Mr Richard Tuite (Director of Education, King's Inns) stressed the practical importance of the programme in addition to underlining the strong international relationship that has been forged between the Law Schools,

Ms. Nessa Cahill, Student at King's Inns speaking at the recent Moot Competition.

Conor Halpin Student at King's Inns speaking at the recent Moot Competition.

KING'S INNS NEWS

It is envisaged that the programme will continue to take place every two years.

Dining During Easter and Trinity Terms

The dates for the last two dining terms of the Law Year are:

Easter: Monday 12 April to Friday 23 April (excluding Tuesday 20 April)

Trinity: Wednesday 2nd June to Wednesday, 16th June

No benchings are scheduled to take place but there will be a spouses guest night on Friday 11 June. Dinner costs IR£18 per person and begins at 7.30 for 8.00 pm on both nights.

King's Inns as a film location

Many of you will have seen The American, shown on BBC1, during the Christmas holidays. The screenplay was based on the Henry James novel 'An American in Paris'. Some of the scenes were shot at King's Inns during Summer 1998. Watching cabrioles and other horse drawn carriages racing down under the archway into Henrietta Street was exciting. Brenda Fricker, as always, gave a polished performance.

Last November, the Irish film director Thaddeus O'Sullivan, of 'December Bride' fame, used King's Inns over a three day period to shoot a number of scenes from 'Ordinary Criminal'. The entire area – inside and out – was converted into a Gallery of Art. The protraits in the dining hall were temporarily replaced with copies of Caravaggio's work. Kevin Spacey has the leading role. The film is expected to be released in the Autumn.

As we go to press, 'David Copperfield' is being filmed in the Library Building. This is an American production for television. The Hungarian director is Michael Madek, well known in the US for his TV direction. The director of design is Michael Pickwoad who also designs for the TV series Kavanagh QC. Sally Field, who starred in Forrest Gump plays the part of Miss Betsey and Michael Richards plays Macawber.

So far the production crews have been meticulous in their care of the buildings and in ensuring that everything is re-instated. It is good to able to facilitate a fledgling, but already important, Irish industry. We also benefit. Indeed, courtesy of these three productions, our graffiti has been removed and the main entrance hall has been brought back to Gandon's plan for it. With this latest production we hope to tag the books in the Library.

Ms. Camilla McAleese, Under-Treasurer, King's Inns, pictured with film director, Thaddeus O'Sullivan at

Ms. Camilla McAleese, Under-Treasurer, King's Inns, pictured with film actor Kevin Spacey at the King's Inns.

Print No. 2: The Library at King's Inns by David Evans

The second print in the King's Inns series is now on sale. It features the Reading Room in the Library Building and is by David Evans who was born in Belfast and was trained as an architect in Liverpool. He lectures in the Department of Architecture in the Queen's University of Belfast. He is a former president of the Royal Ulster Academy, which body had previously awarded him its gold medal. So far the edition of 300 has sold well with 200 already sold. For order forms or enquiries for this latest print please telephone David Curran at the King's Inns. Tel: 8744840

Comments on latest print

"This lovely picture records a distinguished space, little known beyond the Inns. David Evans has paid a great tribute to the King's Inns in producing this print".

Edward McParland, FTCD,
Author of James Gandon

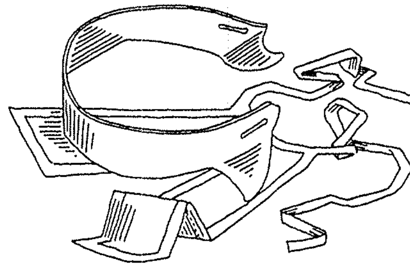
"David Evans recalls for me not merely the architectural joy of the King's Inns Library, but also a lot of the pleasure of reading there, of being with books in a lovely place".

Kevin B Nowlan,
Vice-President of the
Irish Georgian Society.

"The masterful draughtsmanship in David Evan's print has fully captured the spatial grandeur and the elegant neo-classical ornamentation of Frederick Darley's lovely library in the King's Inns".

Arthur Gibney, President,
Royal Hibernian Academy.

The first print in the series; the Ballagh print of the Dining Hall has been a great success with all copies sold. The last five were sold for IR£120 each i.e a 26% increase in one year (the initial selling price having been IR£95per print).



The Working Group on Qualifications for Appointment as Judges of the High and Supreme Courts, Reports

The report of the Working Group on the Qualification for Appointment as Judges of the High and Supreme Court, published on Tuesday, 16th February has recommended certain changes in the qualifications for appointment to such positions. As the changes recommended will require amending legislation, the Minister for Justice, Mr. John O'Donoghue, T.D., has said that he will consider the recommendations carefully and will bring any new legislative proposals that might emerge to the Government in due course.

The primary recommendation of the Working Group is that only those with significant knowledge and experience of the decisions, practices and procedures of the Superior Courts, and who have demonstrated this in practice before those courts, should be eligible for appointment.

Accordingly it recommends that eligibility only be extended to solicitors of 12 years standing who have been engaged in regular litigation in the Superior Courts for a minimum of ten years. Such solicitors will also be required to have been in private practice for two years immediately prior to the date of appointment.

With regard to barristers, it is recommended that the requirement of 12 years practice should include a continuous period of two years immediately prior to the date of appointment. (This does not apply to barristers who are Judges of the European Court of Justice, Court of First Instance Advocate General or Circuit Court Judges).

The Group has also recommended changes to the manner in which Circuit Judges can be promoted to the Higher Courts. At present there is no formal procedure whereby an individual Circuit Court Judge who may be suitable for promotion can be brought to the attention of the Government.

The Group suggests that such appointments should be made on the recommendation of the Judicial Appointments Advisory Board. It further recommends that these should be made only on the Board's own initiative, with no applications being allowed. The provision remains whereby Circuit Court Judges should become eligible for appointment to the Higher Courts after four years service on the Circuit Bench.

The Bar Council nominees to the Working Group were Mary Finlay SC, Garrett Cooney SC and Turlough O'Donnell SC and their contribution on behalf of members is very much appreciated. Copies of the report are available in the Library.

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Court Visits

In the last few weeks our students have been busy visiting the courts. Every morning for six weeks, 2nd year degree students were given an introduction to the Circuit Court by Margaret O'Neill, Chief Clerk, Dublin Circuit Court. The 1st year degree students had an opportunity to sit beside a registrar in the High Court on their allocated day. The students have expressed great enthusiasm as a result of these experiences and are grateful to the registrars, judges and tipstaff who made them feel welcome. King's Inns is very fortunate to have this kind of support for our students.

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Visits to Mountjoy

All 2nd year degree students have been given an opportunity to visit Mountjoy Prison. The Governor, Mr. Lonergan, has made it possible for these visit to take place. They are naturally an important part of the training of a legal practitioner.

Camilla McAleese
Under-Treasurer, King's Inns

The Belfast Agreement and the Future Incorporation of the European Convention of Human Rights in the Republic of Ireland

GERARD HOGAN, SC

I

Mr. Steven King, the very able adviser to John Taylor MP, has been quoted recently as claiming credit for forcing the Irish Government as part of its commitments under the Belfast Agreement to consider incorporating the European Convention of Human Rights ("ECHR") into domestic law.[1] This immediately begs the twin questions: why – if it be the case – was the Irish Government so reluctant to give such a commitment and would such incorporation in any event make any difference? Moreover, how could the Convention be incorporated into Irish domestic law? Could this be done at sub-constitutional level, or would a constitutional amendment analogous to Article 29.4.5 (dealing with the supremacy of EU law) be necessary?

At present, of course, the Convention has not been so incorporated into Irish law. Accordingly, for many years, the Irish courts steadfastly resisted attempts by litigants directly to rely on the ECHR, citing the dualist nature of the Irish legal system as provided for by Article 29.6[2] of the Constitution.[3] Over the last fifteen years or so, this approach has distinctly mellowed. The courts have recognised that there is a presumption that our law is conformity with the ECHR,[4] but increasingly decisions of the Strasbourg court are cited as persuasive authorities on constitutional matters and there is evidence that the Irish courts are now making a firm effort to ensure, where appropriate, that constitutional interpretation accords with both the ECHR and the latest Strasbourg thinking.[5] As Barrington J. said in *Doyle v. Garda Commissioner*:[6]

> "The Convention may overlap with certain provisions of Irish constitutional law and it may be helpful to an Irish court to look at the Convention when it is attempting to specify certain rights guaranteed by the Article 40.3 of the Constitution. Alternatively, the Convention may, in certain circumstances, influence Irish law through European Community law. But the Convention is not part of Irish domestic law and the Irish court has no power in its enforcement."[7]

II

If we consider first the question of whether incorporating the ECHR would make a difference, it is worth noting that although the Republic of Ireland was among the first countries to ratify the Convention and the first to allow the right of individual petition (in 1953), it has been found guilty of breaching the Convention by the European Court of Human Rights on only six occasions. Four of the cases – *Norris v. Ireland*,[8] *Johnston v. Ireland*,[9] *Dublin Well-Woman Centre Ltd. v. Ireland*[10] and *Keegan v. Ireland*[11] – concern what might broadly be described as sexual and family themes. Another case – *Airey v. Ireland*[12] – also had a family law theme, but it principally concerned the absence of legal aid in civil cases. The final case – *Pine Valley Developments Ltd. v. Ireland*[13] – is a very special case with almost unique facts, as an over-scrupulous concern for the separation of powers led the Supreme Court to an interpretation of the Local Government (Planning and Development) Act 1982 which was found to be unfairly discriminatory against the Pine Valley company. At the risk of appearing complacent, this record cannot be regarded as other than a very good one. What is especially striking is that despite the pressures placed on the Republic's legal system by the overspill from 30 years of civil conflict in Northern Ireland, not one criminal case has come before the European Court.[14]

A full audit of the provisions of the Convention by way of comparison with the relevant constitutional guarantees would require extensive analysis, although some of the groundwork for this exercise has already been conducted by the Constitution Review Group.[15] However, the following rough and ready comparative audit – which does not pretend to be comprehensive – can be attempted.

Article 2: Right to Life
This provision guarantees the right to life, with limited stated exceptions. There is a similar guarantee (but without the stated exceptions) contained in Article 40.3.2. Moreover, the Constitution guarantees the right to life of the unborn, a topic which the European Court will probably leave to each Contracting State to decide.

Article 3
This guarantees that no one shall be subjected to torture or inhuman or degrading treatment. There is no similar express guarantee in the Irish Constitution, but the express protection of the "person" in Article 40.3.2 and the implied right to bodily integrity in Article 40.3.1 means that "it is surely beyond argument" that the unenumerated personal rights protected by Article 40.3.1 include:

> "freedom from torture, and from inhuman and degrading treatment and punishment. Such a conclusion would seem inescapable even if there had never been a European Convention on Human Rights, or if Ireland had never been a party to it."[16]

Article 4
This guarantees that no one shall be held in slavery or obliged to perform forced labour. There is no express guarantee in similar terms in the Irish Constitution, but these rights are already embraced in the guarantees regarding the protection of the person (Article 40.3.2) and per-

sonal liberty (Article 40.4.1).

Article 5
Article 5 guarantees the right to personal liberty, save in certain stated cases. It also provides for speedy trial and the right to habeas corpus. Again, this traverses much of the ground covered in Article 40.4.1 (personal liberty) and Article 40.4.2 (habeas corpus). Indeed, it might be argued that prior to the 16th Amendment of the Constitution Act 1996, Article 40.4.1 by providing for a constitutional right to bail (with very limited exceptions) went further than Article 5(3) ECHR.[17] But even though the breadth of this constitutional right now has been abridged somewhat, Article 40.4.1 appears to go at least as far as Article 5.

Article 6
This is a key provision guaranteeing, inter alia, a "fair and public hearing within a reasonable time by an independent and impartial tribunal." Article 6(3) provides for certain minimum guarantees in respect of the trial of persons accused of criminal offences, including the right to legal aid and to cross-examine witnesses. Again, these provisions find an echo in Article 34.1 (administration of justice to be in public, save in such "special and limited cases as may be prescribed by law); Article 38.1 (right to trial in due course of law) and Article 40.3.1 (right to fair procedures).

Article 7
This provides that no retroactive punishment can be imposed. Article 15.5 of the Constitution provides for a similar guarantee. Article 15.5 goes further in one respect: it applies to both civil and criminal matters, whereas Article 7 ECHR is confined to criminal matters. The Oireachtas cannot, for example, retroactively create a tort,[18] although this would not appear to be prohibited by Article 7 ECHR. On the other hand, Article 7 ECHR provides that:

> "Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The Constitution Review Group recommended that Article 15.5 be amended to reflect the extra guarantee contained in Article 7 ECHR.[19]

Article 8
Article 8(1) ECHR provides that:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

There is some overlap between Article 8(1) ECHR and various provisions of the Constitution. Article 40.5 guarantees the inviolability of the dwelling. While there is no express protection of the privacy of correspondence and communication, this is embraced in the unenumerated privacy right contained in Article 40.3.1.[20] Article 41 protects the family, but it confines the protection to the family based on marriage. In *WOR v. EH*[21] a majority of the Supreme Court refused to follow *Keegan v. Ireland*[22] and held that Article 41 of the Constitution does not protect *de facto* family ties. In this respect, it has to be acknowledged that Article 8 offers superior protection to families outside the traditional marriage unit.

Article 9
Article 9 ECHR protects the right to freedom of thought, conscience and religion. Article 44.2.1 is expressed in not dissimilar terms. It is true that Article 9 ECHR expressly protects the right to manifest "religion or belief", but since the Supreme Court has recently confirmed in *Murphy v. Independent Radio and Television Commission*[23] that the right of religious freedom also includes the right to manifest one's religion in public, it would seem that such differences as there are between Article 9 on the one hand and Article 44 on the other may not be of any great consequences.

Article 10
The case-law dealing with the protection of the right of free speech has been one of the great glories of the European Court. Since their decision in *Sunday Times v. United Kingdom*,[24] nearly every decision of that Court has been favourable to the right of free speech. Thus, for example, in *Tolstoy v. United Kingdom*[25] the Court held that libel awards have to be proportionate and must balance the competing rights of free speech and reputation; in *Goodwin v. United Kingdom*[26] the Court upheld the right of journalists to protect their sources and in *Bowman v. United Kingdom*[27] the Court held that a restriction which effectively suppressed the right of non-candidates to publish electoral literature during an election was contrary to Article 10.

By contrast, the language of Article 40.6.1 seems weak, with the emphasis on the exceptions to the right rather than the right itself. Unsurprisingly, therefore, the Constitution Review Group concluded that this provision was one which might usefully be replaced by an amendment modelled on Article 10. But even here the ground has shifted somewhat since the Review Group first reported, since two subsequent ground-breaking Supreme Court decisions have clarified the ambit and scope of Article 40.6.1.

In the first of these, *Irish Times Ltd. v. Murphy*[28] the Supreme Court quashed a reporting ban imposed by a trial judge in the course of a criminal trial as inconsistent with Article 40.6.1.i. In so doing, the Court stressed that the right of free speech embraced the right to communicate facts as well as to comment on them. Barrington J. observed that while there "significant similarities" as well as "important differences" between Article 10 ECHR and Article 40.6.1, the key point was that the opening words of Article 10(1) ECHR ("...freedom to receive and impart information...") was merely "making explicit something which is already implicit in Article 40.6.1."[29]In the second case, *Murphy v. Independent Radio and Television Commission*,[30] the Supreme Court, although upholding the validity of the ban on religious advertising on either radio or television imposed by s.10(3) of the Radio and Television Act 1988, held that the validity of any such ban had to be gauged by reference to standard European proportionality principles. If, therefore, in practice, the Supreme Court's analysis of free speech issues – and the methodology it uses to test the validity of statutory abridgments of the right of free speech – conforms to the tests already employed by the European Court of Human Rights, does it now significantly matter if the actual language of Article 40.6.1 seems weaker than contained in Article 10 ECHR? If the promise held out by these two 1998 decisions is subsequently fulfilled, the answer is probably not a great deal at a legal level, but the wording of Artiucle 40.6.1. would nonetheless undoubtedly be improved if replaced by wording modelled on Article 10 ECHR lines.

Article 11
Article 11 protects two distinct but complementary rights: the right of peaceable assembly and the right of freedom of association with others, including the right to form and join trade unions. The corresponding provisions of the Constitution seem here unproblematic. Article

40.6.1.ii protects the right of peaceable assembly in terms which are very similar to Article 11 and Article 40.6.1.iii gives similar guarantees regarding the formation of "associations and unions."

Article 12
Article 12 ECHR provides that men and women of marriageable age have the right to marry and to found a family. Curiously, neither right is expressly protected as such by the Constitution, but such protections are clearly necessarily implicit in Article 41.3.1 (protecting the institution of marriage) and Article 40.3.1 (the general unenumerated personal rights clause).[31]

1st Protocol

Article 1
Article 1 of the First Protocol gives protection to property rights. Every natural or legal person "is entitled to the peaceful enjoyment of his possessions", save that a Contracting State is entitled, subject to a proportionality test,

> "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

As it happens, both Article 40.3.2 and Article 43 both protect property rights, with the former focusing on the individual's own possessions whereas Article 43 is directed towards the protection of property as an institution. While the Irish courts' attitudes towards these provisions have waxed and waned over the years, the Constitution Review Group was surely correct in concluding that:

> "Following a review of the case law on the provisions of both Article 40.3.2 and Article 43 on the one hand and Article 1 of the First Protocol on the other, the Review Group is of the view that there is a great deal of overlap as far as the substance of the respective guarantees is concerned (although a majority of the Review Group does not favour cover being extended to legal persons). While a detailed review of the respective caselaw would be an examination of the two leading cases arising respectively under the Constitution (*Blake v. Attorney General*) and the Convention (*Sporrong v. Sweden*) reveals a striking similarity in terms of judicial reasoning and the general approach to the issue of what constitutes an unjustified interference with property rights. Applying, therefore, the first two principles already mentioned, there is little of substance to choose between the Constitution and the Convention, as both protect the right to property and both envisage circumstances in which such rights can be restricted, qualified etc. in the public interest, provided any such interference in the right is proportionate and required on objective grounds."[32]

Indeed, if anything, the development of the principle of proportionality in constitutional adjudication in the last three or four years has led to an increasing convergence between the approach of the Irish courts and Strasbourg on this particular issue.

Article 2 of the First Protocol
Article 2 of the First Protocol provides that no person shall be denied the right to education and also requires that the State must respect "the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions." Article 42 clearly traverses similar ground but also goes further by obliging the State to provide free primary education and to ensure that all children receive a certain minimum education.

Article 3 of the First Protocol
Article 3 of the First Protocol requires Contracting States to hold free elections at regular intervals by means of secret ballot "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." Article 16 clearly meets these standards: voting is required to be by secret ballot and no Dail can last for a period longer than seven years. There are, moreover, in-built safeguards to ensure that the constituencies are revised at least once every twelve years and that the ratio of elector per constituency "shall, so far as is practicable, be the same throughout the country."[33]

Article 1 of the Fourth Protocol
Article 1 of the Fourth Protocol provides that no person shall be deprived of his liberty "merely on the ground of inability to fulfill a contractual obligation." There is no corresponding provision in the Constitution, but, currently, Irish law does not provide for the imprisonment of debtors merely because of the inability to pay debt. It does, of course, allow for the ultimate imprisonment of defaulting judgment debtors as a species of contempt of court, but only where, although possessed of the necessary assets, they have refused to discharge the debt. Such imprisonment, of course, is not prohibited by the Convention, since the judgment debtor in no sense is being imprisoned *merely* because of the inability to discharge the debt.

Article 2 of the Fourth Protocol
Article 2(1) of the ECHR guarantees freedom of movement and freedom to choose one's residence and Article 2(2) ECHR further provides that everyone "shall be frèe to leave any country, including his own."

Curiously, the Constitution does not expressly protect this obvious right in a free-standing fashion, although this right can clearly be inferred from a variety of provisions such as Article 40.4.1 (the guarantee of personal liberty). The right to travel abroad has been held to be an unenumerated personal right protected by Article 40.3.1 and one statutory provision has been found to be unconstitutional on the ground that it infringed this right.[34] Moreover, in the light of the remarkable decision in *Attorney General v. X*[35], Article 40.3.3 was amended in order to make it clear beyond doubt that the right to life of the unborn had to yield to the right of the mother to travel.[36] This is another example of a right which already enjoys constitutional protection in practice, but where it would be obviously preferable if the right were to enjoy express free-standing protection in the Constitution.[37]

Article 3 of the Fourth Protocol
Article 3 ECHR prohibits the expulsion of nationals. This reflects a general principle of international law which, by virtue of Article 29.3, Ireland accepts as "its rule of conduct with other States." While there is no express protection against the expulsion of nationals, this seems implicit either as a dimension of the democratic nature of the State (Article 5); citizenship (Article 9) or as a general personal right of citizens (Article 40.3.1). As a result of the Supreme Court's decision in *Fajujono v. Minister for Justice,*[38] it is clear that not only may the State not deport an Irish national, but that it requires quite exceptional circum-

stances before the State would be entitled to deport non-nationals who were themselves parents of Irish citizens.

Article 4 of the Fourth Protocol
Article 4 ECHR prohibits the collective expulsion of aliens. There is no similar corresponding prohibition contained in the Constitution.

Article 1 of the Sixth Protocol
Article 1 of the Sixth Protocol provides for the abolition of the death penalty. The last execution was carried out almost fifty years ago and the last remaining vestiges of the death penalty were abolished by the Criminal Justice Act 1990. The Constitution Review Group recommended that the incidental references to the death penalty should be deleted.[39]

Article 2 of the Sixth Protocol
Article 2 of the Sixth Protocol allows States to make provision for the death penalty in time of war or imminent threat of war.

Article 1 of the 7th Protocol
Article 1 of the 7th Protocol provides that all aliens lawfully in a Contracting State shall not be expelled except in accordance with law and shall be allowed:

a. to submit reasons against his expulsion,

b to have his case reviewed, and

c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.[40]

Although there is no express corresponding provision in the Constitution, the constitutional right to fair procedures ensures that these procedures are followed prior to the deportation of aliens.[41]

Article 2 of the 7th Protocol
Article 2(1) of the 7th Protocol provides that everyone convicted of a criminal offence shall have the right to have his conviction or sentence reviewed by a higher tribunal. Article 2(2) provides that this right may be subject to exceptions:

"in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

There is no similar express guarantee contained in the Constution although both Article 34.3.4 and Article 34.4.3 generally preserve the right of appeal from the District Court to the Circuit Court and from the High Court to the Supreme Court. There is a general right of appeal from convictions on indictment to the Court of Criminal Appeal.

Article 3 of the 7th Protocol
Article 3 provides that a person whose conviction has been reversed on appeal or pardoned "on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice" is entitled to be compensated unless "it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

There is no express constitutional provision providing for the compensation of persons who are the victims of a miscarriage of justice, although such persons could presumably sue for breach of constitutional right to liberty. At all events, the Criminal Procedure Act 1993 provides for an enforceable right to compensation in circumstances closely corresponding to those contained in Article 3 of the 7th Protocol.[42]

Article 4 of the 7th Protocol
Article 4 of the 7th Protocol provides that:

"(1) No one shall be liable to be tried again or punished again in criminal proceedings under the same jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."

The principle of double jeopardy is a feature of the right to trial in due course of law in Article 38.1, although prosecution appeals are not considered to be precluded by this constitutional provision.[43]

Article 5 of the 7th Protocol
Article 5 provides for equality of rights and responsibilities (including rights regarding children) of spouses during marriage. This principle is enshrined in a combination of two constitutional provisions – Article 40.1 (equality) and Article 41 (family provisions) – which regard marriage as a "union of equals."[44] There have been quite a number of cases in which the courts have either invalidated common law[45] or statutory rules[46] on this ground and, in one case, extended the rule as to make it gender neutral as between spouses.[47]

III

A rough evaluation of this comparative audit reveals a striking degree of overlap between the respective guarantees (as judicially interpreted) contained in the Constitution and the Convention. The Constitution contains no significant omissions compared with the ECHR, although the guarantee of the rights to family life in Article 8 and free speech in Article 10 are probably more extensive than the corrsponding constitutional guarantees, although in the latter case, judicial attitudes seem to be changing. It is also true that some of the specific and particular guarantees in the later Protocols (e.g., the abolition of the death penalty in Article 1 of the Sixth Protocol) find reflection in specific statutory provisions rather than in the Constitution itself.

What does appear to be almost beyond question, however, is that there no major deficiencies in the level of constitutional protections as compared with the ECHR. It is also true that the Constitution's guarantees in respect of matters such as the separation of powers,[48] the right to jury trial for major offences and the guarantees in respect of religious discrimination and non-endowment of religion go significantly beyond ECHR guarantees. Furthermore, the constitutional jurisprudence relating to remedies – the exclusion of evidence for breach of constitutional rights; the jurisdiction of the courts to restrain anticipated unconstitutional conduct by the executive or legislative branches and the award of damages for breach of constitutional rights – is at least the equal of that provided by Strasbourg and is, in many

significant respects, more developed.

IV

While Ireland was the first State to permit individual petitions to the European Court of Human Rights in 1953, its satisfactory record before that Court will be somewhat obscured by the fact that with the incorporation by the United Kingdom of the ECHR (as it is has done with the Human Rights Act 1998), we will be among the last states in Western Europe not to have done so.[49] Given that – as we have just seen – nearly every major right protected by the ECHR is already either expressly protected by the Constitution or by judicial decision and that in some instances the protections afforded by the Constitution are more extensive than that afforded at ECHR level, one might wonder why this step is deemed necessary?

It may be to some extent a question of perception. Although it defies conventional wisdom to say so, the Constitution was significantly ahead of its time in the manner in which it protected fundamental rights. Moreover, the extent to which it provided for a separation of Church and State cut across the prevailing political and social ethos of that time.[50] But, rightly or wrongly, this is not how the Constitution is perceived, especially among the majority community in Northern Ireland. As the Constitution is often – erroneously – supposed to have been the handiwork of just one man, Eamon de Valera, it is naturally assumed in many non-legal quarters that it entirely reflects the values of Hibernia Irredenta: the narrow, authoratitarian, Gaelic Catholic ethos which prevailed at the time. While the Constitution still does in places reflect these values, the fact that it has survived and is thriving in a modern and very different era is testament to the fact that it transcended those cultural values of the 1930s.

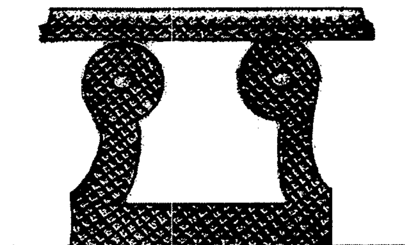
Accordingly, looked at on a strictly legal level in isolation from all other factors, there is probably no pressing need for incorporation. It is not as if, for example, incorporation would make an enormous difference to the chances of a litigant's success in any standard public law case where the validity of a legislative or executive act was under challenge. Nor would incorporation make a significant difference to the prevailing legal culture. For unlike the changes which will confront legal practitioners in the United Kingdom when the Human Rights Act 1998 comes into forces, the habit of testing the constitutionality of legislation has long since been forged in the general consciousness of the Republic's legal profession: it was not for nothing that over twenty years ago the Taoiseach of the say (Mr. J. Lynch T.D.) ruefully remarked that "it would be a brave man who would predict, these days, what was or was not contrary to the Constitution."[51]

This is not to say that incorporation – or even partial incorporation of the ECHR – should not be attempted. Even partial incorporation of the Convention might improve the level of protection by replacing those elements of the fundamental rights provisions of Articles 40-44 of the Constitution which have been found to have been flawed.

Incorporation could take various forms. The first is to adopt the British approach, by incorporating the ECHR by an ordinary Act of Parliament, such as the Human Rights Act 1998 has done. This procedure makes little sense in the context of a written Constitution such as ours. The courts cannot invalidate one ordinary law by reference to another ordinary law (as an ordinary law incorporating the ECHR would be): they can only do so by reference to the Constitution itself. Besides, there would be great uncertainty and the overlapping of guarantees in such areas as free speech, personal liberty, property rights between the ordinary law incorporating the ECHR and the Constitution itself.

The second is to replace the existing fundamental rights provisions of Articles 40-44 by the ECHR. The Constitution Review Group rejected this suggestion on the ground that it would represent:

> "too great a change in our legal system and one which would not be warranted by any existing flaws in those provisions. It would mean jettisoning almost sixty years of well established and sophisticated case law."[52]



One might add that wholescale incorporation by replacement would have many negative features: The ECHR does not, for example, guarantee the right to trial by jury[53] or prevent the endowment of religion[54] or, for that matter, guarantee the right to life of the unborn,[55] whereas the Constitution does. Likewise, the Constitution's guarantees relating to personal liberty, habeas corpus and non-discrimination on grounds of religious belief or status are more extensive than those contained in the ECHR.

The third is to follow the Swedish model of incorporation. In 1995 the Swedish Constitution was amended to provide that

> 'no law or other regulation may be enacted contrary to Sweden's obligations as follow from the ECHR'

One possible difficulty with this form of amendment is that it effectively yields ultimate judicial sovereignty to the European Court of Human Rights. The State would be under an enforceable constitutional duty to give effect to the European Convention as interpreted by the European Court – and not only in cases involving Ireland – and these rulings would absolutely bind the Irish courts in the same manner as they are presently bound by decisions of the European Court of Justice.

The final method is that of selective incorporation – the method preferred by the Constitution Review Group. It recommended that it would preferable to draw on the ECHR where:

(i) the right is not expressly protected by the Constitution;

(ii) the standard of protection of such rights is superior to those guaranteed by the Constitution;

(iii) the wording of a provision of the Constitution protecting such a right might be improved.

While this method might be the best way forward, one difficulty would be that it would require a careful analysis of each of the individual fundamental rights provisions to see whether (and, if

so, to what extent) it might be replaced by partial ECHR incorporation.

V.

At a political level, of course, some form of incorporation is now inevitable in the wake of the Belfast Agreement. Incorporation at this level is important, since, in the context of the impending cross-border bodies and the North-South Ministerial Council, it is important to have a neutral yardstick of fundamental rights protection. Irrespective of the legal virtues of the Constitution as compared with the ECHR, the latter provides a poltically neutral template for sensitive cross-border dealings which the former could never hope to attain. As Aughey has explained:

> "The source of Catholic social teaching is sufficient grounds for unionists to reject the Constitution; and the content of the Constitution does not matter...because the common good it seeks may be admirable in itself, but it is estranged from unionists."[56]

Nonetheless, however, given that the Constitution scores so well vis-a-vis the ECHR in the rough comparative legal audit which has just been attempted, we may wonder why the Irish Government was apparently so reluctant to give the guarantees which, not unreasonably, had been demanded of it? In time, history will probably provide us the answer to this rather puzzling conundrum. •

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1 *The Sunday Tribune*, December 27, 1998. The actual commitment given by the Irish Government (at paragraph 9 of the "Rights, Safeguards and Equality of Opportunity" section of the Belfast Agreement) is as follows:

"The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will, taking account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.

2 Which provides that:
"No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

3 See, e.g., *Re Ó Láighleís* [1960] IR 93; *Norris v. Attorney General* [1984] IR 36; *Doyle v. Garda Commissioner* [1998] 2 ILRM 528..

4 See, e.g., *The State (DPP) v. Walsh* [1981] IR 412; *O Domhnaill v. Merrick* [1984] IR 151; *Desmond v. Glackin (No.1)* [1993] 3 IR 1.

5 See, e.g., *Heaney v. Ireland* [1994] 3 IR 593; *Murphy v. Independent Radio and Television Commission* [1997] 2 ILRM 467 (HC), [1998] 2 ILRM 360 (SC); *Barry v. Medical Council*, unreported, Supreme Court, December 20, 1997; *Irish Times Ltd. v. Murphy* [1998] 2 ILRM 161 and *Doyle v. Garda Commissioner* [1998] 2 ILRM 523.

5 [1987] IR 713.

6 [1998] 2 ILRM 523.

7 *Ibid.*, 529.

8 (1991) 13 EHRR 186.

9 (1987) 9 EHRR 203.

10 (1993) 15 EHRR 244.

11 (1994) 18 EHRR 342.

12 (1979) 2 EHRR 305.

13 (1992) 14 EHRR 319.

14 It is true that the first Irish case – indeed the very first case to come the European Court – *Lawless v. Ireland* (1961) originated in an arrest, but the case concerned the power of internment as opposed to a criminal conviction proper.

15 Pn. 2632 (1996). The writer was a member of the Review Group.

16 *The State (C.) v. Frawley* [1976] IR 365, 374, per Finlay P.

17 Which provides, inter alia, that "release may be conditioned by guarantees to appear for trial."

18 *Dublin Heating Co. Ltd. v. Hefferon* [1992] ILRM 51.

19 The Review Group recommended (at p. 43) that Article 15.5 "should be extended on the lines of Article 7 of the European Convention of Human Rights sp as to provide that a heavier penalty shall not be imposed than was applicable at the time the offence was committed."

20 *Kennedy v. Ireland* [1987] IR 587.

21 [1996] 2 IR 248.

22 (1994) 18 EHRR 342.

23 [1998] 2 ILRM 162.

24 (1979) 3 EHRR 317.

25 (1995) 20 EHRR 442.

26 (1996) 23 EHRR 123.

27 (1998) 26 EHRR 1

28 [1998] 2 ILRM 161.

29 *Ibid.* 193.

30 [1998] 2 ILRM 360.

31 The right to marry was one of the unenumerated personal rights protected by Article 40.3.1 which Kenny J. instanced in *Ryan v. Attorney General* [1965] IR 294, 313 as flowing from the "Christian and democratic nature of the State.".

32 At 365. The Review Group concluded, however, that the Convention scored heavily in terms of clarity of language with Article 43 and went on to recommend a re-casting of Article 43 which incorporated elements of the wording of the existing Article 43 and the Article 1 of the Ist Protocol ECHR.

33 This is no paper guarantee: see *O'Donovan v. Attorney General* [1961] IR 114 and Kelly, The Irish Constitution (Dublin, 1994) at 160-166.

34 *The State (M.) v. An Bord Uchtala* [1979] IR 73.

35 [1992] 1 IR 1.

36 *A v. Eastern Health Board* [1998] 2 ILRM 460.

37 This was acknowledged by the Review Group when they observed (at 214):
"The right to travel is now protected in the context of Article 40.3.3, but it is scarcely satisfactory that such an important right does not receive general constitutional protection."

38 [1990] 2 IR 151.

39 *Op.cit.*, at 286.

40 However, Article 1(2) of the 7th Protocol provides that an alien may be expelled before the exercise of his rights under Article 1(1) a, b and c when such expulsion is necessary in the interests of public order or is grounded on reasons of national security. While Ireland has signed this Protocol, it has not yet ratified it and, according to the Minister for Foreign Affairs (Mr. D. Andrews TD) further "detailed work and consultation is necessary to establish the legal, constitutional and possible legislative implications of such a step": 489 *Dail Debates* Col. 1215 (April 21, 1998).

41 See, e.g., *Fakih v. Minister for Justice* [1993] 2 IR 406; *Anisimova v. Minister for Justice* [1998] 1 ILRM 523; *Laurentiu v. Minister for Justice*, unreported, High Court, January 22, 1999.

42 See *The People (Director of Public Prosecutions) v. Pringle (No.2)* [1997] 2

IR 225.

43 *The People v. O'Shea* [1982] IR 384; *Considine v. Shannon Regional Fisheries Board* [1997] 2 IR 404.

44 Kelly, *The Irish Constitution* (Dublin, 1994) at 998.

45 *Re Tilson* [1951] IR 1 (paternal supremacy in custody matters unconstitutional); *The State (DPP) v. Walsh* [1981] IR 412 (doctrine of marital coercion which operated in favour of a wife unconstitutional); *W v. W.* [1993] 2 IR 476 (wife's domicile of dependency unconstitutional).

46 *O'G v. An Bord Uchtala* [1985] ILRM 61 (rule discriminating against adoptive widowers unconstitutional).

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

48 For example, rather surprisingly – it might be thought – the European Court did not consider that domestic legislation which intentionally interfered with pending litigation in order to prevent the applicants winning did not amount to a breach of Article 6(1) ECHR, despite the fact that it entirely frustrated their right of access to the courts: *National & Provincial Building Society v. United Kingdom* (1998) 25 EHRR 1. The comparison with the Supreme Court's celebrated decision in *Buckley v. Attorney General* [1950] IR 67 – where comparable legislative encroachment in respect of pending litigation was resoundingly held to be unconstitutional – could not be more obvious.

49 Norway appears to be the only other country not to have done so.

50 See generally, Keogh, "The Irish Constitutional Revolution: An Analysis of the Making of the Constitution" (1988) 35 *Administration* 11.

51 Kelly, *op.cit.*, xci.

52 *Op.cit.*, 218.

53 Article 38.5.

54 Article 44.2.2.

55 Article 40.3.3.

56 "Obstacles to Reconciliation in the South" in *Building Trust in Ireland: Studies Commissioned by the Forum for Peace and Reconciliation* (Belfast, 1996) 1, 30. See also the essay in the same volume by Dickson, "A Unionist Legal Perspective on Obstacles in the South to Better Relations with the North", *op.cit.*, 53.

THE LEADING CASES OF THE TWENTIETH CENTURY

The Irish Association of Law Teachers Annual Conference on the theme of

"The Leading Cases of the Twentieth Century"

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The Northern Ireland Act Issues of Equality and Human Rights

BRUCE DICKSON,
University of Ulster and Chief Commissioner-Designate of the Nothern Ireland Human Rights Commission

In a general sense the Good Friday Agreement was entirely about human rights. It was about the right of people to sleep in their beds at night without being afraid of being fire-bombed, or the right of shoppers to walk around town centres without any risk of being blown up, or the right of people to make political progress within and between communities in Northern Ireland without being subjected to violence or the threat of violence.

But the Agreement was about human rights in four particular respects. First, it asserted that the parties to the Agreement were affirming their commitment to "the mutual respect, the civil rights and the religious liberties of everyone in the community"; amongst the rights they especially affirmed were the right to freedom and expression of religion, the right to pursue democratically national and political aspirations and the right of women to full and equal political participation. Second, the British Government promised that, pending devolution of powers to a new Northern Ireland Assembly, it would pursue "broad policies...for promoting social inclusion, including in particular community development and the advancement of women in public life". Third, it provided for the establishment of a Human Rights Commission and for a future Bill of Rights for Northern Ireland. And fourth, it guaranteed the imposition on public authorities in Northern Ireland of a statutory duty to carry out all their functions with due regard to the need to promote equality of opportunity, and the creation of an Equality Commission to advise on, validate and monitor the implementation of this statutory duty.

The Northern Ireland Act, 1998 goes a considerable distance in giving the last two human rights dimensions the force of law. The first two are left in the realm of political aspiration, though it may be that in due course laws that are passed to reflect the last two dimensions will cover the first two as well. The Act's provisions on human rights are in sections 68-72; those on equality are in sections 73 to 78.

Sections 68 to 72 (and Schedule 7) provide for a Northern Ireland Human Rights Commission, conferring on it specific duties and three kinds of powers. The duties of the Commission are as follows:

(1) To advise the Secretary of State on what should be contained in a Bill of Rights for Northern Ireland (s.69(7)). According to the Good Friday Agreement the rights in this Bill, which is to passed by Westminster, not by the Assembly, are to reflect not only "the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience" but also "the principles of mutual respect for the identity and ethos of both communities and parity of esteem".

(2) To advise the Secretary of State and the Assembly's Executive on the measures which ought to be taken to protect human rights in Northern Ireland (s.69(3)). If the Secretary of State insists on taking a narrow view of what a Bill of Rights should contain, presumably the other rights which the Commission would like to see protected can be contained in legislative measures drafted in pursuance of this second statutory duty.

(3) To advise the Assembly on whether a Bill being introduced for debate is compatible with human rights(s.69(4)). Here, be it noted, the Commission is not restricted to advising on the Bill's compatibility with the European Convention on Human Rights (which is being incorporated into the law of all parts of the United Kingdom by the Human Rights Act 1998 – not expected to be brought into force until early 2000); the Commission could also measure a Bill against, for example, the Council of Europe's Revised Social Charter or the United Nations' International Covenants, Conventions and Codes of Conduct.

(4) To keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights (s.69(1)). This requires the Commission to pay close attention to how current laws are operating in Northern Ireland with a view to deciding if they are in need of reform. It often happens that on their face laws do not conflict with human rights standards, but do so whenever they are implemented.

(5) To promote understanding and awareness of the importance of human rights in Northern Ireland (s.69(6)). This requires the Commission to undertake educational and research activities; it may mean convincing people that human rights are for all, not just for one particular community.

(6) To do all that it can to ensure the establishment of a Joint Committee with Ireland's Human Rights Commission (s.69(10)). The Good Friday Agreement obliges the Government of the Republic of Ireland to create a Commission with a mandate and remit equivalent to those of the Northern body, and heads of a Bill providing for this are apparently already in circulation. When both bodies are up and running the Agreement envisages that they will create a Joint Committee "as a forum for consideration of human rights issues in the island of Ireland" and, in particular, to consider "the possibility of establishing a charter, open to signature by all democratic parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland".

(7) To recommend to the Secretary of State within two years how the adequacy and effectiveness of the Commission could be improved (s.69(2)).When the

Northern Ireland Bill was going through Parliament, strenuous efforts were made to persuade the Government to confer more powers on the Commission. These efforts failed and the furthest the Government would go towards satisfying its critics was to allow the Commission to review its existing powers after a two-year trial.

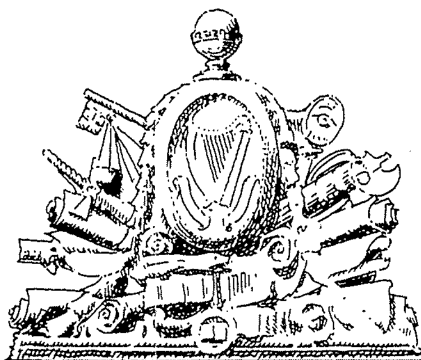
The Commission's powers are threefold:

(1) To give assistance to individuals when they are bringing court proceedings, and to bring court proceedings itself (s.69(5)). The criteria for deciding when assistance should be given are identical to those in existing anti-discrimination legislation both in Great Britain and in Northern Ireland, which means that a lot will turn on whether it would be "unreasonable" for a particular applicant to proceed with a case unaided. The Commission itself will not be able to take cases in which it wishes to rely upon the European Convention on Human Rights because that Convention has been incorporated into UK law in such a manner as to limit court access to those who qualify as "victims" within the strict sense of that term in the European Convention itself.

(2) To conduct such investigations as the Commission considers necessary or expedient for the purpose of exercising its functions (s.69(8)). At present the Commission does not have the ancillary powers necessary to make investigations really effective– it cannot oblige people to provide sworn evidence and it cannot compel the disclosure of documents – but it may be that public authorities will realise the wisdom of cooperating with investigations, thus rendering the lack of additional powers irrelevant. One or two trial investigations will soon test this position.

(3) To publish its advice and the outcome of its research and investigations (s.69(9)). No one could quarrel with this necessary corollary to the Commission's other functions. If the Commission cannot itself enforce its recommendations, it must at least be able to publicise them.

Once its nine part-time Commissioners have been appointed (later in February) the Commission as a whole will have to sit down and plan its strategy for the immediate future. Quite where the priorities will lie remains to be seen. But I would have thought the Commission would want to be carrying out all of its duties and exercising all of



its powers well within the first 12 months. It will want to maintain a high profile for its work and to develop a reputation for thoroughness, accuracy and commitment to internationally recognised standards. It will be able, if it wishes, to express its views on punishment beatings and shootings (which to most people are the most egregious types of human rights abuse currently occurring in Northern Ireland). It will have to create good links with other bodies in Northern Ireland working in the same field – statutory or voluntary. And it will need to learn, where appropriate, from the experiences of Human Rights Commissions in other parts of the world.

On the more specific topic of equality, s.75 of the Act imposes a duty on most public authorities in Northern Ireland to have regard to the need to promote equality of opportunity and to the desirability of promoting good relations. They are to do so by devising equality schemes, which will have to be submitted to the Equality Commission for approval. If not so approved the draft schemes will then be referred to the Secretary of State, who can either require a revised scheme to be submitted or make one herself. If a person complains that the provisions of an approved equality scheme are not being complied with, the Equality Commission must investigate this complaint. If the Commission then makes recommendations based on the investigation but these are not adhered to by the public authority concerned, the matter can be referred to the Secretary of State for directions to be issued to the authority.

One prominent public authority excluded from the scope of s.75 is the RUC (and the Police Authority). This is a great disappointment to those who believe that it is the police more than most who need to pay attention to equality of opportunity and to good community relations. But the upside of s.75 is the range of bases upon which equality must be founded. The standard ones of gender, race, political belief, religion, disability and marital status are of course mentioned, but so are age, sexual orientation and whether or not a person has dependents. Class, though referred to in the Good Friday Agreement, is not one of the grounds listed.

Section 76 repeats existing law, (s.19 of the Northern Ireland Constitution Act 1973), which makes discrimination on religious or political grounds a statutory tort, allowing victims to sue for compensation and/or an injunction. This time the police and the Police Authority are included within the law's ambit.

The Equality Commission will be a larger, busier and more powerful body than the Human Rights Commission. It will have between 14 and 20 Commissioners, as opposed to the HRC's ten. It will take over the functions currently exercised by the Equal Opportunities Commission, the Fair Employment Commission, the Commission for Racial Equality and the Northern Ireland Disability Council. Its powers of investigation will therefore be greater (especially in fair employment matters), as will its resources. Although the members of both Commissions are appointed by the Secretary of State, the Equality Commission is to be funded by and is to report primarily to the Assembly, whereas the Human Rights Commission is to be funded by Westminster and is to report to the Secretary of State. The Equality Commission will be subject to oversight by the Commissioner for Complaints in Northern Ireland, but the Human Rights Commission will not.

At the time of writing we await with interest developments on human rights and equality promised by the Irish Government. The Taoiseach has said that consideration will be given to incorporating the European Convention into domestic law and that he wants the Irish Human Rights Commission to be setting the pace in world terms.

The future, then, looks rosy. Let us all hope that the politicians in both parts of Ireland can ensure that the right political environment exists in the years to come to allow the human rights and equality provisions of the 1998 Agreement to be fully realised in practice in both jurisdictions. ●

An Outline of the Right of Establishment under the Europe Agreements

EILEEN BARRINGTON, Barrister

1. What are the Europe Agreements?

Following the fall of the Berlin Wall and the collapse of the Soviet sphere of influence, the European Community ("EC") reacted swiftly to bring the Central and Eastern European Countries ("CEEC") *"back to Europe"*. Negotiations began in 1990 for the conclusion of Association Agreements with the CEEC countries. These Association Agreements, now known as 'the Europe Agreements', were designed to promote co-operation with the CEEC countries, in the short-term providing for aid in technical assistance with a view, in the long-term, to the integration of these countries into the European Community. The first Agreements were entered into in 1991 with Czechoslovakia, Hungary and Poland.[1] Agreements with Romania and Bulgaria were entered into in 1993. In 1995, Agreements were entered into with the Baltic States of Latvia, Lithuania and Estonia. Lastly, an agreement was entered into with Slovenia in 1996.

In this article, it is proposed to examine briefly the right of establishment conferred by the Europe Agreements.[2]

The wording of the various Europe Agreements is broadly similar. As most attempts to assert Europe Agreement rights in Ireland are made by Romanian nationals, it is proposed to refer to the wording of the Romanian Agreement ('the Agreement'). This Agreement came into effect in February 1995.[3] Certain Romanian Nationals, whose applications for asylum in this State have been turned down, have sought to invoke the establishment provisions of the Agreement. However, the question of how the Agreement operates in practice and how Romanian Nationals can successfully invoke the freedom of establishment provisions is far from clear. This is compounded by the lack of information available in Ireland on the Europe Agreements and by the failure of the State to adopt any regulations setting out the manner in which the State proposes to comply with its obligations under the Agreement. While a number of requests for preliminary rulings are pending before the European Court of Justice ("the ECJ"), no judgment has yet been handed down by the ECJ to clarify the scope of the establishment provisions.

2. Movement of Workers

The relatively broad establishment right granted by the Agreement can be contrasted with the extremely limited nature of the right of access to the labour market. Articles 38 to 44 of the Agreement govern the movement of workers. Article 38 prohibits discrimination against a Romanian worker legally employed in the territory of a Member State. This prohibition on discrimination falls far short of the conferral of any right of free movement of workers such as is provided for by Article 48 of the EC Treaty. By virtue of Article 42 of the Agreement, the Member States undertake to preserve existing facilities for access to employment for Romanian workers and *"if possible"* to improve them. Article 38(1) does, however, provide for a right of access to the employment market for the family members of a legally employed worker for the duration of that employment.

A limited right of access to the labour market in the Member States is also granted as a corollary to the establishment rights. Beneficiaries of the establishment right are entitled to employ *"key personnel"*. The notion of "key personnel" is defined at Article 53(2). There are two main categories:-

(a) senior employees of a business who primarily direct the management of the business, receiving general supervision or direction principally from the board of directors or shareholders of the business, including:-
   (i) directing the business for a department or sub-division of the business;
   (ii) supervising or controlling the work or other supervisory, professional or managerial employees;
   (iii) having the authority personally to engage, dismiss or recommend engaging, dismissing or other personnel actions;

(b) persons employed by a business who possess higher or uncommon:-
   (i) qualifications referring to a type of work or trade requiring specific technical knowledge;
   (ii) knowledge essential to the businesses service;
   (iii) research, equipment, techniques for management.

In both categories, the key personnel must have been employed by the business for at least one year preceding the posting to the relevant Member State.

3. The Right of Establishment

Articles 45 to 58 govern the right of establishment. This covers two types of activity:

a) the right of Romanian nationals to establish themselves personally, or through a company, in self-employment in the Member States and

b) the right of companies to establish a place of business within a Member State.

In each case, the right is worded in terms of equal treatment with own nationals and own companies.

Article 45(5) confers the right of establishment on nationals and defines this as

"the right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings, in particular companies, which they effectively control."

The right is then clearly circumscribed as the Article goes on to provide that *"self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market or confer right of access to the labour market of another Party. [The self-employment provisions] to not apply to those who are not exclusively self-employed."*

Article 45(5)(ii) defines the right of establishment as regards companies as being *"the right to take up and pursue economic activities by means of the setting up and management of subsidiaries, branches and agencies."*

Article 54 provides that *"the establishment rights conferred are subject to limitations justified on grounds of public policy, public security or public health. They do not apply to activities which in the territory of each party are connected, even occasionally, with the exercise of official authorities."*

No reference is made to the admission of family members of nationals exercising their right of self-employment.

So far, the wording of the establishment provisions is comparable to Article 52 of the EC Treaty which confers the Community establishment rights. However, under the Agreement, the ambit of the right is complicated by the existence of certain other provisions. Article 59 provides that *"for the purposes of [the Provisions on workers and establishment] nothing in the Agreement shall prevent the parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement."*

Furthermore, the Parties have made a joint declaration to the Agreement to the effect that *"the sole fact of requiring a visa for natural persons of certain parties and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment."*[4]

4. Direct Effect

The right of establishment contained in Article 52 of the EC Treaty and that set out in the Agreement are virtually identical. Article 52 has been held by the ECJ to have direct effect.[5] This means that the right conferred by this provision may be invoked directly by any national of a Member State. The ECJ has held that provisions of international agreements entered into by the EU may also have direct effect. The test is two-fold.

First, the classic Community direct effect test is applied, i.e. is there a clear and precise obligation which is not subject in its implementation or effect to the adoption of any subsequent measures. Secondly, the *"purpose and nature of the Agreement"* must be examined.[6] Applying these tests, it would appear that the establishment provision in the Agreement could be considered by the ECJ to have direct effect, like Article 52 EC. However, even assuming it does have direct effect, the issue arises as to how this right may be invoked by Romanian Nationals in practice. It has been pointed out that the establishment provisions could be interpreted in a number of ways. They could mean:-

(a) that any Romanian national has the right to enter any EC Member State to take up self-employment;

(b) that any Romanian national already in a Member State has the right to enter any other Member State and take up self-employment; or

(c) that any Romanian national legally resident in a Member State is entitled to take up self-employment in that Member State.[7]

It has been argued that the Agreement should be interpreted in the manner set out at (a) above.[8] However, the UK has made it clear that it views (c) as the correct interpretation.

The practical issue that arises is how a person seeking to assert rights conferred by the Agreement can access a Member State. The rights of physical access seems, by virtue of Article 59 (and the joint declaration), to be an issue which must be determined independently of the Agreement. The Agreement does not purport to abolish any obligation incumbent upon Romanian nationals to obtain a visa and to comply with any national rules on residence permits in order to enter and to stay legally within a Member State.

As a matter of Community law, visa policy is considered to come within the competence of the Member States, unless the requirements in relation to the particular country have been harmonised pursuant to measures adopted by the Council of Ministers on the basis of Article 100(c)EC.[9] Article 100(c) provides that the Council shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member State.

Regulation 2317/95[10] was adopted pursuant to Article 100(c) and determines the third country nationals who must have a visa. Annex I includes Romania as one of the countries for which a visa is required.[11]

The difficult issue to apply in practice is therefore how to marry the claims of a person seeking to invoke rights conferred under the Agreement with the Member State's powers to impose visa and residence permit requirements. One option is to view the plausibility of a claim to assert Agreement rights when considering whether or not a Romanian national ought to be granted physical access to the State. In respect of non-visa nationals (such as Poles) the assessment of the plausibility of the claim would have to be done at a later date. If the claim made by the national was plausible, the relevant visa or residence requirement would have to issue *as of right*. Therefore, while the issue of the manner in which physical access to the State is granted to third country nationals is one which falls outside the scope of the Agreement, it is nonetheless a matter which must be determined in the light of the Agreement. Where the claim is plausible and the relevant authorisations are granted to permit the third country national to remain in the State, then the principle of non-discrimination would come into play.

The difficulty in the Irish context is knowing what criteria might be applied in assessing the plausibility of a claim made by a Romanian national. No indication has been given by the relevant Department as to what criteria would be applied. Doubtless, criteria such as those applied in the UK would be followed. The UK rules are also of interest in that the UK does not consider the approach to the question of physical access set out above to be valid.

5. UK Rules

Paragraph 211-223 of HC 395, the Statement of Changes in Immigration Rules, purport to implement the Europe Agreements in the UK.

Paragraph 212 sets out the requirements which apply on entry both to persons seeking to establish themselves in self-employment and those seeking to

establish themselves in a company which they effectively control. Further requirements are then set out for each category. The common requirements of the person asserting a Europe Agreement right are:-

(a) the money he or she is putting into the business must be under his or her control and sufficient to establish him or herself in business in the UK;

(b) until his or her business provides him with an income, he or she must have sufficient additional funds to maintain and accommodate him or herself and any dependants without recourse to employment (other than his or her work for the business) or to public funds;

(c) his or her share of the profits of the business must be sufficient to maintain and accommodate him or herself and any dependants without recourse to employment (other than his or her work for the business) or to public funds;

(d) he or she does not intend to supplement his or her business activities by taking or seeking employment in the UK, other than his or her work for the business;

(e) he or she must hold a valid UK entry clearance.[12]

The Home Office interprets the entry clearance provision as meaning that an application under the Europe Agreements cannot be considered from anyone who has not been granted leave to enter, has over-stayed his or her visa, or who has been given temporary leave to remain while an asylum claim is processed or whose removal has been suspended pending the outcome of an appeal.[13] Any individuals who do not have valid leave to enter the UK when making their application are required to return to their countries of origin and to apply for entry clearance there.

Several cases are currently challenging the Home Office's interpretation of the Europe Agreements. In *Gloszczuk*,[14] leave was granted to bring judicial review proceedings in relation to a Polish national whose leave to remain in the UK had expired before he made an application under the EC/Poland Agreement. Prior to making the application, Mr Gloszczuk had established a successful business in the UK. The High Court has referred questions to the ECJ as to whether or not Mr Gloszczuk was entitled to have his application considered under the Poland Agreement.

In *Kondova*[15] judicial review proceedings were brought by a Bulgarian National who entered the UK on a visitor's visa. She subsequently applied for asylum which was refused. She married a citizen of Mauritius who had indefinite leave to remain in the UK. She established herself as a provider of household services. However, the Home Office considered that she earned £22.00 less per month than was considered necessary for her to be self-sufficient. Her husband offered to make up the difference but the Home Office refused to recognise this. It maintained that Ms Kondova required leave to enter in order to exercise her rights under the Bulgaria/EC Agreements. Leave to bring these proceedings was only granted recently. A decision by the ECJ or by the English High Court will not be available for some time.

6. Conclusion

Unfortunately, as there is no indication that anything has, as of yet, been done in the Irish context to indicate how the State proposes to implement the Europe Agreements, it is unclear whether or not the approach adopted by the UK Home Office with regard to entry clearance will be followed. At the very least, regulations ought to be put in place setting out the criteria which will be considered in assessing whether or not a Romanian national will be considered to have made a plausible claim to exercise the right of establishment under the Europe Agreements. •

1 After the partition and the creation of Czech and Slovak Republics, new negotiations took place and separate agreements were signed with each of the States in 1993.

2 The Agreements entered into with the Baltic States and with Slovenia provide for a transitional period before the rights of establishment granted come into effect. The transitional period has not yet expired. The other Agreements with the CEEC States referred to are all in force. A transitional period was, however, provided for in respect of the right of establishment in the EU/Hungary Agreements. The transitional period expires on February 1st, 1999.

3 O.J. L357, December 31st, 1994 at p.2.

4 The validity of this declaration has been questioned by a number of commentators. See, for example, F. Elspeth Guild, "A Guide to the Right of Establishment under the Europe Agreements" (Baileys, Shaw and Gillett in association with the Immigration Law Practitioners Association) at p.7:- *"It is certainly irregular to annex to an Agreement a declaration which seeks to justify an interference with a right granted in the Agreement itself. The declaration would also appear to interpret the provision of the Agreement itself, a role normally considered appropriate for a court. Had the Member States intended to place a mandatory visa requirement on the exercise of the right of establishment for Europe Agreement nationals, the correct approach would have been so to state in the provision itself."*

5 Case 2/74 *Reyners* [1974] ECR 631

6 See Case 12/86, *Demirel* [1987] ECR 3719.

7 See Peers "Towards Equality: Actual and Potential Rights", CML Rev. 1996 at p.40.

8 See Peers and Guild, op. cit..

9 Article 100(c) was inserted in to the EC Treaty by the Treaty of Maastrict and has now been replaced by Article 73(j)(ii), as inserted by the Treaty of Amsterdam.

10 O.J. L234, October 3rd, 1995 P.1

11 Bulgarian and Slovaks are also visa nationals. Poles, Hungarians and Czechs are not.

12 The validity of this latter requirement has been questioned. See McDonald "Immigration Law and Practice", Butterworths 1995 and Guild at P.30.

13 In the Irish context a number of claims to invoke Agreements rights have been made at the end of an asylum process. The Austrian Courts have referred a question to the ECJ asking whether or not the fact that a Europe Agreement national entered a Member State while seeking asylum means that Europe Agreement rights cannot be invoked. The view adopted by the Commission (as expressedly informally by the legal adviser to DGIA, Part (f)) is that the manner in which the State was entered is a factor which can be taken into account when determining the plausibility of a claim. It is not one which can inevitably preclude the making of a claim.

14 CO/2426/96

15 CO/3245/96

The Irish Statute Book Database on CD-ROM

CIAN FERRITER, Barrister

The publication of the Irish Statute Book (containing all statutes passed from 1922 to 1997) on CD-ROM and on the Internet represents a crucial moment in Irish electronic legal publishing. The advances in research and in the provision of legal services which the database heralds will significantly shape legal practice in coming years.

Introduction

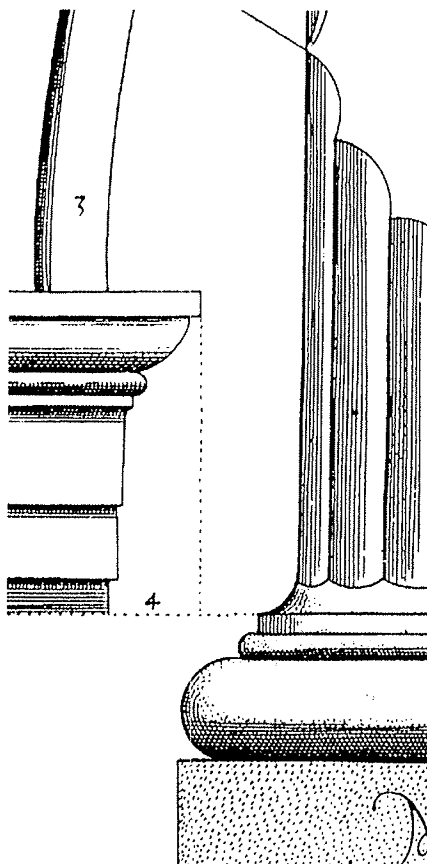
The first release of the Irish Statute Book database contains the full text (in English) of every act passed by the Oireachtas from the foundation of the State to the end of 1997. The second release (due in May) will include all statutes passed in 1998 as well as the full text of all Statutory Instruments from 1922 to 1998 and the Chronological Tables of Statutes currently found in the Index to the Statutes. The database has been developed by the Attorney General's Office in conjunction with Juta & Co., a South African electronic publisher who secured the tender in 1997.

The database is published simultaneously on the Internet (at *www.irlgov.ie/ag/*). The Internet service is at present quite slow and further investment of resources may be required to render it usable. As the future of electronic publishing lies very much in delivery via the Internet, the State is at least well placed to capitalise on developments in this field in coming years. The comments in the remainder of this article are confined to the CD-ROM version of the database.

The Search System

The usefulness of a database is largely determined by the search software used to retrieve information in the database. The publishers have very wisely chosen the Folio Views search software, a user-friendly and powerful software already in widespread use in legal databases (Folio Views is the search software in use for the Law library's New JILL database).

Folio Views operates by allowing the user to retrieve and manage information contained in an "infobase". In the case of the Statutes Database, the text of all the Acts from 1922 to 1997 constitutes one infobase, which can be searched, annotated, bookmarked, printed from, and so on. The system allows the user to perform simple word searches and searches involving multiple words, synonyms and phrases. Searches can be confined to particular titles or sections of an Act. Search



results can be printed out or "pasted" into a word processed document, thus facilitating easy management of the information in the database.

For example, browsing the table of contents, I started with Act Number 1 of 1922: CONSTITUTION OF THE IRISH FREE STATE (SAORSTÁT EIREANN) ACT, 1922. A quick copy and paste enables me to reproduce the long title here thus: AN ACT TO ENACT A CONSTITUTION FOR THE IRISH FREE STATE (SAORSTÁT EIREANN) AND FOR IMPLEMENTING THE TREATY BETWEEN GREAT BRITAIN AND IRELAND SIGNED AT LONDON ON THE 6TH DAY OF DECEMBER, 1921. A further search on acts relating to the key-word "constitution" leads to a perusal of Act Number 16 of 1937: PLEBISCITE (DRAFT CONSTITUTION) ACT, 1937 the long title of which explains that this is an act "..TO PROVIDE FOR THE TAKING OF A PLEBISCITE ON A DRAFT CONSTITUTION APPROVED OF BY DAIL EIREANN (WHETHER BEFORE OR AFTER THE PASSING OF THIS ACT) BEFORE THE DISSOLUTION OF THE OIREACHTAS WHICH SHALL OCCUR NEXT AFTER THE PASSING OF THIS ACT. [2nd June, 1937.]".

And so the trail of research continues through the acts detailing proposed constitutional amendments, all carried out (and copied across in to my word processor for reproduction here) at one sitting, in a matter of minutes.

Extensive use is made of "jumplinks" which connect the user to other statutory provisions referred to in the body of an Act.

The presentation of the information is a little muddled at times: the titles of Acts found after a search can be obscured by a recitation of their place

in the database and the system lists the multiple occurrence of the same key word in the same Act as separate hits. However, these are minor presentational issues which can be rectified in later releases.

The CD-ROM is accompanied by a clear and well-illustrated users manual which assumes very little technical knowledge on the part of the user. There is also a user's helpline.

It is understood that this release of the database represents the first phase in a longer term project. It is hoped in time to refine the database so that it contains the text of statutes as revised. The potential for linking the statutes database with other databases (such as a Courts Service Judgments database, EU legal databases etc.) will also be explored. The Attorney General's Office are open to discussing any potential applications of the database which will increase promulgation and understanding of our statute code.

Ramifications of the Database for Providers of Legal Services

There has been much debate in academic circles and in specialised media as to the impact of information technology on law and the legal system.[1] This is a debate which has largely bypassed the average practitioner. The Statutes Database contain some powerful editing and publishing functions which should make all practitioners sit bolt upright.

The Statutes Database, unlike many of the databases supplied by commercial publishers, permits the user to customise their own "Infobases" from the main database itself (through the use of "shadow infobases"). The distinction here is between merely retrieving or locating information and adding value to that information. Translated into English, this means that practitioners can develop their own customised databases which can contain all the relevant statutory, and, in time, case law and case management materials required to do their job.

Supposing 'Bob' has a specialist practice in employment law. Using the Statutes database, Bob could create his own Employment law Infobase by copying all relevant statutes (and,

with the next release, Statutory Instruments) into a separate Infobase. He could then annotate the most important provisions with details of recent case law, references to the relevant sections of text books and references to relevant precedents on his own system. The database could be further linked to an electronic case management system which could in turn be linked to a fee billing system and so on. The result is a dynamic database which can draw together all the legal, procedural and case management aspects of a lawyer's professional practice.

Similarly, the database has potential applications in teaching the law, by designing electronic tutorials and collections of legal materials, which can be annotated and added to by the student.[2] More enterprising users could explore the possibilities of customising electronic legal guidance packs for specialist users eg. an Infobase on Housing Law, Social Welfare entitlements etc. The Statutes database exemplifies the type of electronic product which could alter the very nature of the market for legal services provision. For example, it could facilitate a new type of legal service provider, who will manage electronic legal advice bureaux operating via the Internet, providing either expert system "Question and Answer"-type legal guidance or supplying legal advice (for a fee) in response to queries transmitted via e-mail or posted on the Service Providers Web site.[3] The emerging technologies will also foster the emergence of legal information professionals who specialise in adding value to legal information found in databases and on the world wide web and selling on the value-added information to legal practitioners.[4]

There is obviously a wider context to any such debate about the nature and structure of the market for legal services, but it is a debate that should take place sooner rather than later if the legal profession is not to be overtaken by technological events.

Conclusion

The ramifications of the Statute Book database and its future offspring are likely to alter the Irish legal landscape of the future. There is sufficient of immediate benefit in the first release of the Statute database result for us to warmly congratulate the project team on their magnificent job.

The CD-ROM is available now from Government Publications Office at the giveaway price of £20.

It is recommended that you invest in the CD-ROM to save the hassle (and telephone charges) of constant recourse to the Internet.

Any serious practitioner, teacher or student of Irish law should acquire the Irish Statute Book Database without delay. ●

1 See, generally, Susskind, "The Future of Law" (OUP 1997); Consultation Paper published by the Lord Chancellor's Department "civil.justice: resolving and avoiding disputes in the information age", Sept 1998; and the response of the Society for Computers and Law to that paper (both published on the Web at www.scl.org)

2 For a good example of electronic course materials for law students, see the Law Courseware Consortium's web site at the Univeristy of Warwick: www.law.warwick.ac.uk/lcc/

3 For a more detailed analysis of predicted changes in legal service, see the Society for Computers and Law response to the civil.justice paper, referred to at footnote I, supra.

4 Witness the recently launched Firstlaw service being provided to Irish practitioners by Lawlink.

Mr. P. J. Fitzpatrick, Chief Executive - Designate of the Courts Commission Takes Up New Position

The reports of the Working Group on a Courts commission painted a picture of the courts system as an overburdened, under resourced structure which required major and fundamental re-organisation and investment in order to provide an up to date and efficient service to meet modern demands. In order to deal with these problems the Group recommended the establishment of an independent, unified body which would be responsible and accountable for all aspects of the administration of the courts.

The necessary statutory changes for the introduction of such changes are set out in the Courts Service Act, 1998 which was enacted on 16th May, 1998. The Courts Service Transitional Board is currently in operation and P.J. Fitzpatrick, the Chief Executive Designate, took up his position on the 18th January, 1999. The Chief Executive Designate and the Transitional Board are currently making the necessary arrangements for the establishment of the independent Courts Service and for the transfer of functions from the Department of Justice, Equality and Law Reform to the new Board. It is planned that the necessary preparatory arrangements will be completed as quickly as possible so that the new Service can be operational later this year. The transitional period will then be terminated and the Courts Service Board with its Chief Executive will be responsible and accountable for all matters regarding the administration of our courts.

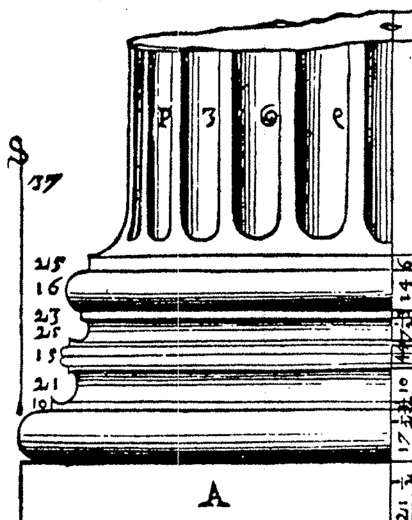
Hailing from Cavan, P. J. Fitzpatrick has spent most of his career to date in the health sector and he comes to the courts from the position of chief Executive of the Eastern Health Board.

"Are you fazed at all by the prospect of overseeing and implementing the most wide ranging reform of the courts since the foundation of the State?"

"I am under no illusion about the magnitude of the task ahead. However much of the work to be done has been very well researched and set out in reports prepared by the Working Group on a Courts commission. I have also been very encouraged by the commitment of the judges and staff that I have met so far to the re-organisation and changes that lie ahead. I have also been impressed by the dedication of the staff who, as the Working Group reported, have worked under much pressure in the past. No, I am not daunted by the task ahead. However, I am under no illusion as to the enormity of what lies ahead and I look forward to working with the judges and staff in the Service to establish a Courts Service in Ireland that will at least equal, if not surpass, the best in other countries.

"What is your vision for the new courts organisation?"

"In the months immediately ahead my vision for the Courts Service will be further developed through the development of a mission statement and the development of a corporate strategy and business plan for the new Board. I am looking forward to developing with judges, staff and the professional groups who represent users, a Courts Service that will be characterised by:



- a service where access is speedy and equitable,
- a service that is efficient, effective and provides value for money for the users of the Service and for the State,
- a service that is user friendly to the public and the professionals who represent the users and which is founded on a strong customer service ethos such as information facilities, accommodation, etc.,
- a service that is unified in all its structure,
- a service that is founded on forward planning and is proactive and far-sighted,
- a service which is flexible, robust and responsive to change,
- a service where the CEO and senior management are accessible to all, to judges, staff and users,

and most importantly,

- a service where the administration/management exists and is seen to exist to support and resource those providing services in our courts and other associated offices.

"What is on the agenda for the immediate future?"

"The agenda for the immediate future is to make arrangements for the

establishment of the new independent Courts Service Board from the earliest possible date. This involves issues such as familiarisation on my part with the Service, the design and implementation of management /administrative structures, the organisation of accommodation, the development of information technology programmes, the development of financial management and information systems and the development of a communications strategy (already the first edition of a new Courts Service newsletter has been published and a website will be established in the weeks immediately ahead).

Within six months of establishment, the new Board will be required to produce a three year busines plan which will have to address all of the issues facing the courts and identified in the working Group repors. These include staffing, accommodation, information technology, upgrading of court accommodation, the evolution of responsibility of budgets to local offices. While the preparation of a business plan is not part of the functions of the Transitional Board, nevertheless, it is something very much on my mind in my discussions with the judges and staff in the Service and with the professional groups who represent users, ie. The Bar Council and the Law Society.

As regards the changes these will make to the courts, I see that the defining characteristic of the new Board will be its strong customer service ethos. Access to the courts is a constitutional right of every citizen in the State and that access should be speedy and effective, and it should take place in suitable accommodation which respects the gravity of the proceedings and the dignity of the individuals involved. In this regard, the seven year building programme to upgrade the court accommodation countrywide is a very welcome aspect of the long term plans of the Board.

In addition, people, including the court staff, the public and the professionals involved in the courts, must be kept aware of the changes and indeed have an input into the shape of certain of those changes. It is my hope and intention that the Courts Service Board will be a user-friendly, accessible structure with open and effective communication at all levels; one the staff and the public will be proud of.

In this regard, as I've already mentioned we have just published the *'Courts Service News'*, which is the newsletter of the Board and plans are afoot for a website also. Other communication tools will include the proper resourcing of information desks in the courts and the provision of leaflets on key areas of interest to court users. Arrangements for consultation between management and the relevant trade unions and staff associations are also a key element of our communication and information structures.

As well as investment in the physical infrastructure of the courts and the creation of proper channels of communication the whole issue of information technology and how it can be used to transform the work of judges and court staff has huge potential to transform the Court Service generally.

The real challenge facing the Board is to totally transform the structure within which services are provided through our courts. While most of us would prefer to never have to go to court, disputes are a fact of life and people need to have recourse to the courts for the resolution of some of those disputes. Visits to court are invariably stressful and it is the challenge for the new Board to work with the staff, the professional bodies and the judiciary to ensure that stress is kept to a minimum in a manner which provides a value for money service to the public. Accurate and up to date information regarding what is involved in going to court, the guarantee of a speedy and efficient court system, a physical setting which respects the dignity of the individuals and the proceedings and a complaints procedure to remedy defects in the system are some of the pillars of the new service to the public. I look forward to making those pillars a reality and I look forward to working with the Bar Council in order to achieve that aim" •

Mr. Jerry Carroll, Director, Bar Council (on right), talks to Mr. P. J. Fitzpatrick, Chief Executive Designate, of the Courts' Commission who has recently taken up his new position, in the Transitional Courts Service Boards' offices in Green Street Courthouse.

THE CAPITAL MARKETS – IRISH AND INTERNATIONAL LAWS AND REGULATIONS
by Agnes Foy,
Published by Round Hall Sweet & Maxwell, 1998, £98.00

The Capital markets – Irish and International Laws and Regulations by Agnes Foy is a unique book. There is no other Irish textbook which tackles Ireland's complex array of laws and regulations that govern the operation of the financial markets and the provision of financial services. The book provides the reader with not only a comprehensive review of the law, but also a panoramic overview of the industry, its history and relevance. Ms Foy's lively (and at times anecdotal) writing style ensures that there is plenty of vigour in the text, providing constant interest for both those who are new to the subject and the old hand alike. Furthermore, the use of cartoons is innovative and amusing. To date, the most law books have achieved by way of graphic illustration is, perhaps, a bewildering illustration of the chain of liability on a bill of exchange in the rather fanciful circumstances of its having passed through five different endorsers.

The scope of the book is ambitious: an overview of the capital markets from the Irish, British and international (primarily US) perspective, followed by a detailed analysis of Ireland's financial services legislation. In this regard Ms Foy's task is gargantuan: to many (not Ms Foy) it would be Sisyphean. The text runs to some 670 pages, including appendices containing the ISDA swap agreements and some US legislation. Part I of the book is a general introduction to the capital markets and the products traded on them. Part II is a comprehensive review of Central Bank legislation, the regulation of collective investment schemes, the Netting of Financial Contracts Act 1995, and the Stock Exchange and Investment Intermediaries Acts of 1995.

One of the qualities of this book is that it does not deal solely with technical law. The book also contains a great deal of discussion and background information on *causes celebres* such as the collapse of Barings Bank and BCCI, the great stock market flops, the colourful rogues, and the occasional hysteria of the markets as evidenced by tulipmania in the 17th century (and currently

Internet stocks). The book is essential reading not only for lawyers practising in the area of financial services law, but also for anyone seeking an understanding of the ethos and economic context of the world's financial markets.

While it is tempting to glamourise 'the rogue trader', or the debonair corporate thief, Ms Foy correctly reminds us of the damage that financial scandals inflict on the economy. When financial misdeeds go unpunished the public correctly feels outraged, and the sense that a level playing field exists is undermined. Michael McDowell S.C. is leading a governmental working group to evaluate the effectiveness of our system of banking and financial services regulation. The goal is to achieve an appropriate balance between consumer protection and market integrity, on the one hand, and business development and efficiency, on the other. Ms Foy's book is a timely analysis of the law in this area.

Like any book, there are some shortcomings. But they are minor, particularly bearing in mind the enormity of the subject matter, and they certainly do not go to the substance of this admirable text. First, there are many nuggets of information (both by way of anecdotes and interesting unreported case law from other jurisdictions) which are buried in the general text in Part I of the book, and may perhaps be difficult for the busy practitioner to locate in a hurry. Secondly, a greater treatment of the economic function and the mechanics of financial futures transactions (together with their clearance and settlement) would have been a valuable addition. These minor quibbles do not, however, detract from the overall quality of the book.

–John Breslin, Barrister

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ADMINISTRATIVE LAW IN IRELAND (Third Edition),
by Gerard Hogan and David Gwynn Morgan,
Published by Round Hall Sweet & Maxwell. £58.00 (£98.00 hardback)

The three editions of *Administrative Law in Ireland* parallel the growth of jurisprudence and legislation in the general area of administrative law over a twelve year period in this country. The first edition consisted of 422 pages of text and was published in 1986. The second edition was published in 1991 and consisted of 773 pages of text. This most recent edition published in May 1998 amounts to 992 pages of text. Any book on administrative law has an almost impossible task from the outset in trying to monitor and analyse how the state operates in a legal context. The pace of change often reflects the emergence of a new political or economic ideology such as, for example, in England where Margaret Thatcher's adherence to monetarism and her reliance on the philosophy of Milton Friedman had a pervasive effect on the British administrative state. In England, Wade's 'Administrative Law' is now in its seventh edition (the seventh edition is co-written with Christopher Forsyth) and one wonders if the next edition of that work will result in a new and revised format to reflect Tony Blair's constitutional revolution.While no such ideological revolution has taken place in Ireland, we as a State remain heavily regulated with a panoply of governmental bodies imbued with various powers and controls at each tier of the pyramid of power. *Administrative Law in Ireland* successfully explains to the reader the relationships between the various decision-makers and organs of control in the State. To assist the reader in his or her journey through what can sometimes justifiably be viewed as a myriad of control mechanisms in an administrative vortex, the text is divided into a number of inter-linking areas.

Chapters 1-4 deal broadly with the instruments of government which have to work against the background of a written constitution. The authors point out that while the sources of administrative law are various and heterogeneous, five principle domestic sources are recognisable: the Constitution; common law; primary legislation;

delegated legislation and administrative circulars. Due recognition is also given to the European public law principles of proportionality and legitimate expectations which are emerging as powerful tools in a judicial review context. From a practitioner's perspective, one of the most interesting aspects of this part of the book is the analysis at pages 53 to 57 on the amenability of administrative circulars to judicial review. So many government decisions involve the use of circulars that one can expect this area to be increasingly litigated in future cases.

National and local politicians will undoubtedly find Chapters 3 and 5, dealing with central and local government respectively, of assistance in explaining the legal background to the "executive" arm of government (The impact of the Public Service Management Act 1997 is summarised at pages 63-66 and 81-92 and the authors take the opportunity of explaining the legislation in the context of the Carltona principle.) Pending reforms in local government may mean that the authors may have to revisit Chapter 5 sooner rather than later. The political and economic context of administrative law is illustrated in Chapter 3 by a fascinating analysis commencing at page 155 entitled 'contemporary governmental policy towards the state-sponsored sector' which includes a discussion of privatisation and goes on to deal with de-regulation and monopolies and the impact of competition law on our domestic administrative matrix.

Since the structure of the administrative state is predicated on governmental policies, any book which examines its legal basis, can only provide a snap-shot of the prevailing ideology. However, the pace of growth in jurisprudence is illustrated by the fact that some of the issues dealt with in the book have since been the subject matter of detailed discussions by the Courts, after the publication of the third edition. Thus, for example, the question of *locus standi* in judicial review resulted in contrasting Supreme Court judgments from Keane J.(majority) and Denham J.(dissenting) in *Lancefort v. An Bord Pleanala* (Unreported, July 21 1998). Indeed while both judges referred to the judgments in *Cahill v. Sutton* [1980] IR 269 and *State (Lynch) v. Cooney* [1982] I.R.337 one wonders how long these cases can continue to

be relied on as determinative of the issue of *locus standi* rather than being a statement of the general approach which the Court should have when an issue of *locus standi* is raised before it. (see Kelly J.'s judgment in *Shannon v. District Judge McGuinness*, Unreported, High Court, March 20, 1997).

This work is to administrative law what "Keane" is to local government in the sense that Keane's seminal work has led to the evolution of individual texts on planning, compulsory purchase, housing and environmental law. Likewise, while *Administrative Law in Ireland* deals with the general principles of licensing law (Chapter 7), the Freedom of Information Act 1997 (pages 494 to 496) and has a comprehensive summary of the salient features of judicial review (specifically Chapters 9 and 13 and more generally Chapters 10,11,12 and 16), recent texts have been devoted to these areas.

Most public law lawyers have a fascination for both the practice and science of politics and therefore Chapter 6 and its appendix may be the most thumbed through sixty or so pages of text dealing generally with tribunals and inquiries and specifically with the non-statutory Hepatitis C tribunal, the Dail Inquiry into the fall of the Fianna Fail-Labour Coalition Government and the Dunnes Stores Tribunal. The results and the procedures adopted at the most recently established tribunals may be the subject matter of a future fourth edition as could the anticipated implementation bodies arising from Strand Two of the Agreement reached in the multi-party negotiations and dealing with the North/South Ministerial Council. The fluidity and uniformity of the third edition is apparent when one contrasts the chapters on state-sponsored bodies, with those on tribunals and inquiries and Chapter 8 on the Ombudsman (the Ombudsman is often described as symbolising the pragmatic nature of the State).

Most impressively in Chapter 15 the authors categorise the complex and often inconsistent case law on the general issue of damages and administrative law into ten distinct parts ranging from the availability of damages in a judicial review context to a discussion of liability for the negligent exercise of discretionary public powers, for breach of European law and liability in contract and in restitution. A single chapter (Chapter 16) is devoted in full to the emerging principle of legitimate expectations of which McCracken J. in *Abrahamson v. Law Society* [1996] 1 I.R. 403 commented regarding earlier judgments "I find it very difficult to reconcile some of these decisions, although it is only to be expected that in an evolving concept there will be contradictory judgments." The *Abrahamson* judgment itself has helped clarify the case law on legitimate expectations and for a further analysis which compliments the chapter on legitimate expectations, Hilary Delany's excellent article "The future of the doctrine of legitimate expectations in Irish administrative law" Irish Jurist (1997, Volume XXXII, page 217) is recommended reading.

The authors are two of the leading experts in public law and this third edition therefore reflects an academic and practical theme which is to the benefit of both practitioner and student alike. In this regard there is a discernable improvement from the second edition in the sense that less time is devoted to an academic discussion of hypothetical scenarios and more pages are devoted to an incisive and concise analysis of case law. Quite phenomenally, the footnotes contain a vast amount of references to relevant articles and direct the reader to other cases of interest or which illustrate a different approach to a given subject. *Administrative Law in Ireland* is an essential and invaluable guide to the complex world of government for student lawyer and politician alike. For a legal text it makes enjoyable, easy and informative reading which is no bad thing in a State where increasingly the legal and political worlds are becoming better acquainted!

–Conleth Bradley, Barrister

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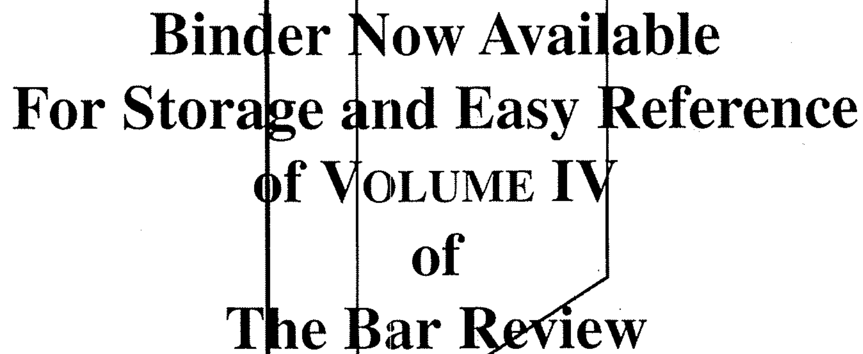

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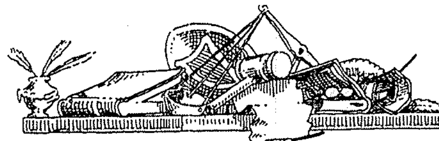

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