The Bar Review

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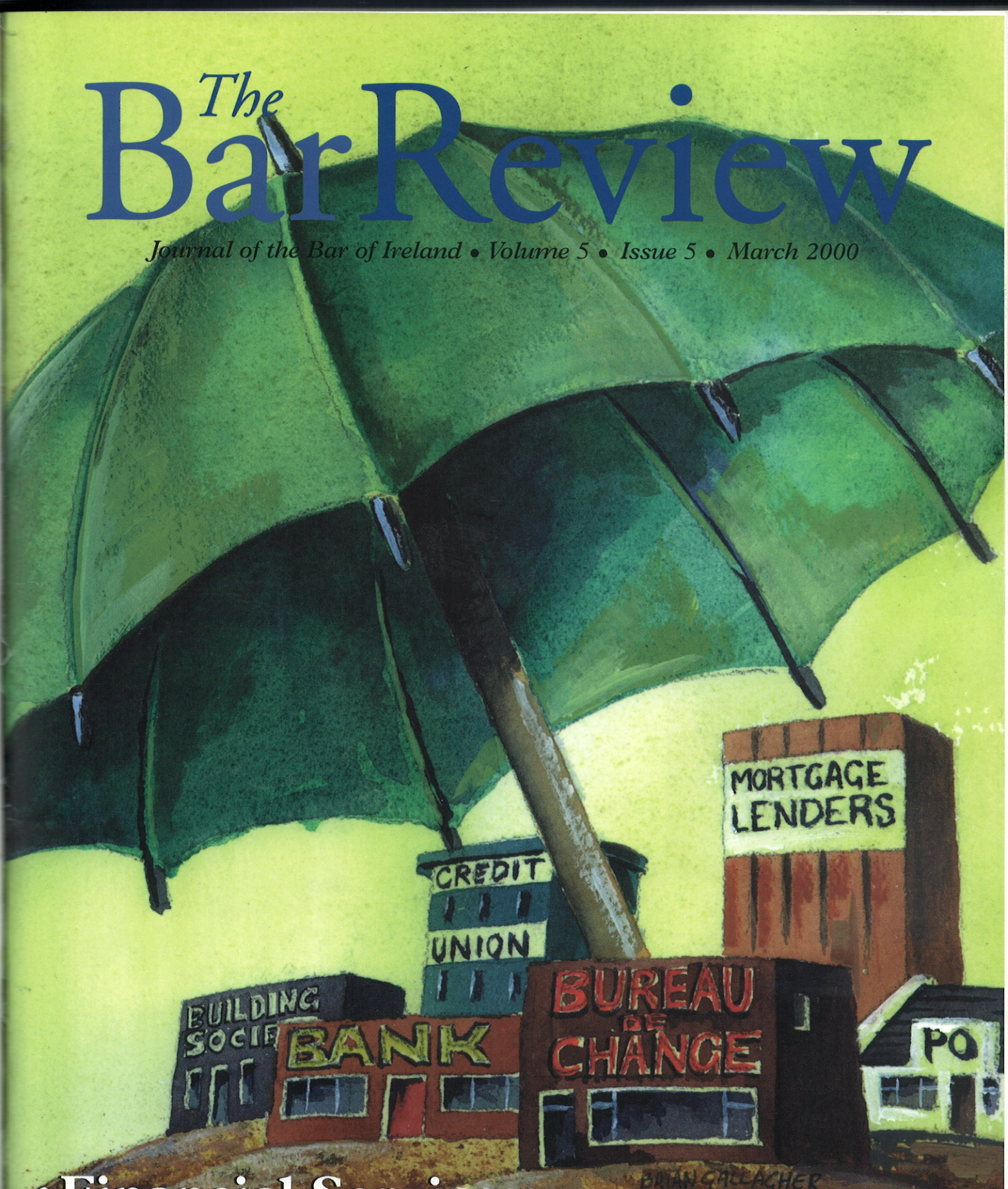

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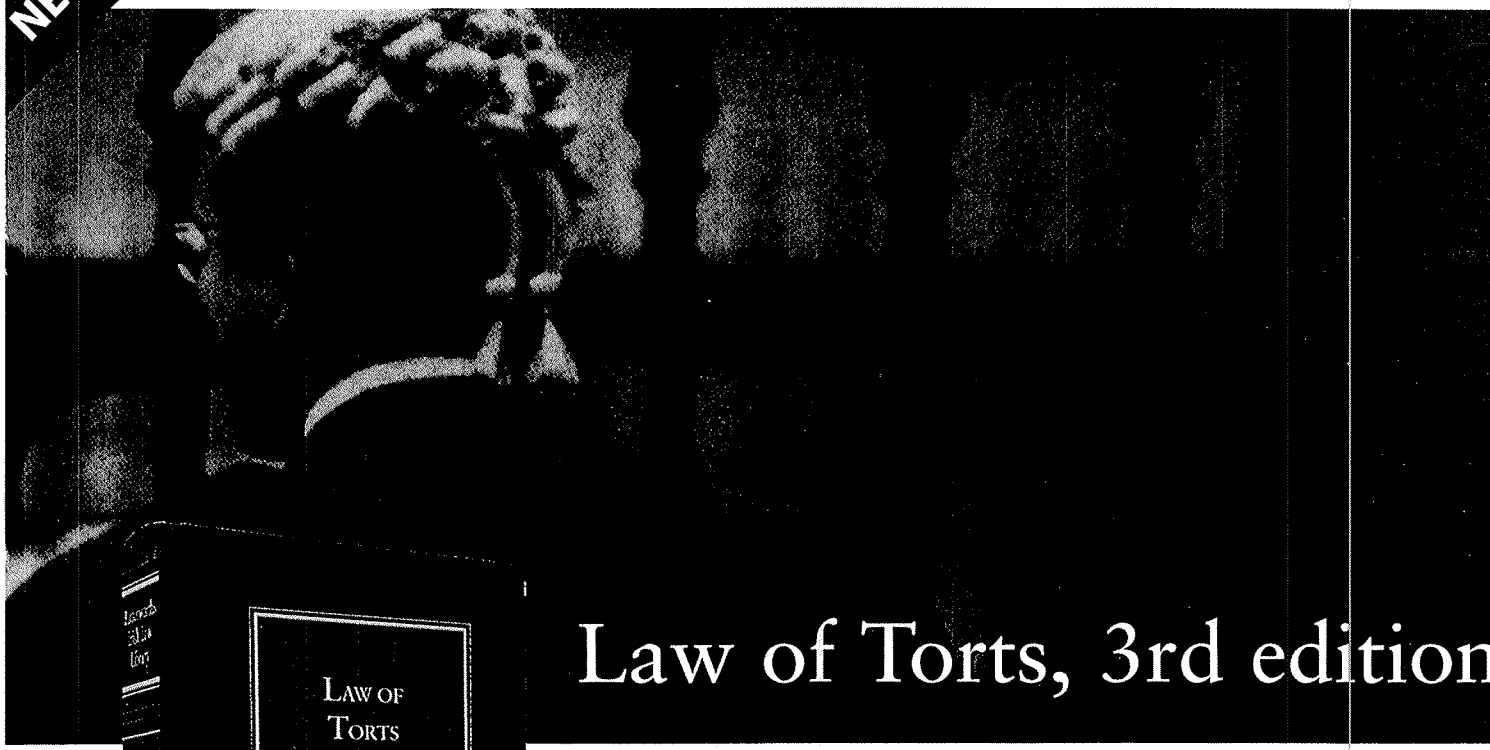

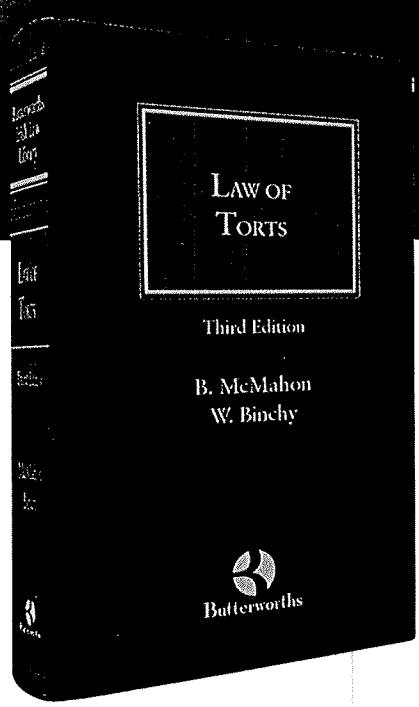

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Noted Marketing and Design Limited,
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Telephone 01 294 2929,
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Editorial Correspondence to:

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

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

MELIOSA DOOGE

Words of Celebration and Gratitude

Meliosa Dooge, Barrister and Consultant Editor to the Bar Review, passed away on Wednesday 2nd February last.

On this page, we print the tribute paid to Meliosa by the *Attorney General, Michael McDowell S.C.,* at a service at St. Joseph's Church, Terenure on Saturday 5th February

On the page opposite, we print the words of *His Honour Judge Smyth, President of the Circuit Court,* led in tribute to Meliosa in the Dublin Circuit Court on Friday 4th February.

May she rest in peace.

I have been asked to say some words in celebration of and gratitude for the life of Meliosa. It would be very understandable if the great number of people who have come here today confined themselves to thinking thoughts of grief, to expressing sentiments of warmth and sympathy to Michael and his family and to Jim and his family, to simply pondering the imponderable, and reflecting on the apparent harshness of blind fate.

But today is not the day for that. We have come together here in such numbers to celebrate and give thanks for Meliosa's wonderful life - from girlhood to womanhood to motherhood. And I think that all here will agree that Meliosa was, is, and will remain, a great cause for celebration, for gratitude, and for pride.

It is difficult to capture in a few words her personality, her qualities, her kindness, her good nature, her humour, her appetite for the company of friends and for fun, her strength and gentleness, her caring nature, her application, her calmness, her contempt for humbug, and all the other elements that made Meliosa.

Add to all of that what became apparent in recent years - her calmness and bravery in personal adversity - and you still don't have a quarter of the full picture. To all of this we must add her laughter, her gaiety and the love that she lavished on those closest to her.

All these personal qualities were embodied in Meliosa. We have known and lived with a remarkable woman whose life and personality demand celebration. Meliosa was and is a cause for joy.

As a barrister and colleague, any fair and impartial observer would acknowledge her qualities. As Judge Smyth said in Court the other day, Meliosa commenced practice when there were only a handful of women barristers. She and her generation broke new ground, overcame daunting and apparently enduring obstacles and attitudes, and quietly and effectively, through their talent and commitment, won respect and admiration for their work.

More important than all her successes as a barrister were her decency, integrity and humanity which always stayed with her - even in the sometimes fraught atmosphere of adversarial justice. She quietly stuck to the highest standards of professionalism and kindness and in doing so she was richly rewarded with well-deserved success.

Truly it can be said of her that all of her colleagues regarded her as a friend. And those colleagues who were not her close friends wished that they were.

Finally, Meliosa's death marks a terrible loss. But if we now and in times to come weigh against that loss the happiness, joy, privilege and honour that we share in having loved, lived with, worked with and disported ourselves with such a remarkable person as Meliosa, the scales most assuredly will tip from sadness and loss to celebration and gratitude.

On behalf of those who have come here today I wish to say to Michael, Grace and Andrew, and to Jim, Colm, Diarmuid, Cliona and Dara and their spouses. "Thank you for sharing Meliosa with us. We now join and always will join you in your celebration of Meliosa, her life and her accomplishments".●

This morning I would like to pay tribute on your behalf to Meliosa Dooge Barrister-at-Law, colleague and trusted and loyal friend of all of us.

Born in Dublin in 1958, she was educated at Loreto school in Dalkey and in UCD and King's Inns. She married Michael, the love of her life in 1985, and was mother of Grace and Andrew, whose young lives she enriched with her presence and with all her imaginative graces and delights. It was always a source of amazement to her friends how well she managed a warm family life with the demands of a busy practice.

The effect of her life on all those around her has been incalculably diffusive. So much so, that it cannot be adequately reflected in what I or any of us could easily say today.

Who was this lovely person? At the age of 21, in 1979, she began, what was to be a distinguished career as a barrister and circuiteer.

She made a rather slow start to her practice. Indeed, some of her new colleagues at the time who started out with her, wondered, just briefly of course, if she would ever catch up with them.

The reason for this slightly disingenuous concern was because at the beginning of Michaelmas Term, Meliosa overstayed her holiday in Greece by 11 days. She was to prove then, as she was to prove often again in her life with her confident sense of discrimination between things that matter and the things that don't, that you can sometimes balance art with life so that the scales tip ever so slightly in favour of the latter.

However lest anyone at the time might have felt they had a headstart on her, she was to disappoint them very quickly.

For that was to be the last time she ever missed an appointment and rather than her catching up with everyone else - others found it difficult, may I say almost impossible, to keep up with her.

Although she devilled with distinction with Kevin Feeney, the professional life she embarked on in 1979 was a far cry from the Round Hall or the Chancery Courts.

Many of you here today have shared part of that road with Meliosa; through the broken lives of families and the daily claims and counter claims of our separating brethren. But we should remember that at the beginning when Meliosa and a loyal band of family lawyers first ventured into this difficult and sometimes distressing branch of the law, the rewards were uncertain and the jurisdiction which they worked in was more ecclesiastical than human.

The Circuit Court was to get jurisdiction, but there was still eight years to go before the greater certainty of the 1989 Act could be evoked.

It took great professional skill, some legal imagination and a lot of patient counselling before a barrister or solicitor could achieve any sort of acceptable result for often disbelieving clients.

Meliosa was such a person and I know because of her modesty that she would not like to be singled out apart from her colleagues, for having talents that they do not share as well. But it was Meliosa's quality to reach out to everyone, during those early days of her practice, with kindness and understanding and with common sense and intelligence, which helped the other family lawyers around her build a firm foundation for Family Law in Ireland in the years that were to follow.

If the good of the world is partly dependent on unhistoric acts, as George Elliott has said, and things are not so ill with us as they might have been, then the Family Law Bar has contributed its fair share and Meliosa more than most.

I last saw Meliosa some two weeks ago, crossing the bridge quickly with a bundle of books and papers held securely in front of her, intent on the next task of her day.

Even then, the flashing spark of wit and intelligence shone through; the wit understated, ironic and quietly spoken; the intelligence still informing everything she did with common sense and a practised - perhaps intuitive - feeling for what was in her clients best interest.

It would be a mistake however, to think she was concerned only for her clients. She never forgot the interest of the other party as well. She knew that in Family Law an apparent victory is often a real defeat and that without sensitivity to the needs of others, the needs of your own can suffer as well.

How often did she remind us and indeed her devils over the years, or anyone who chose to listen, of this very simple wisdom.

If a case could be settled, she would settle it, and always take the interests of everyone, husband and wife and children into account while doing so. She never put a foot wrong.

Donie Doyle, and who would know better the Donie, pointed out to me that few, if any of her settlements were upset or set aside over the years, surely a great tribute to her supreme professionalism and foresight.

Her knowledge of the law was such, that it was not unknown for Judges on Circuit, without the relevant authority to hand, to ask of Counsel what does Meliosa Dooge in Dublin say the law is, and on being told of her opinion, they would happily attribute to it, the same authority which the learned opinions of conveyancing counsel used to carry in the old Chancery Courts.

From time to time, we often tried to persuade her to take Silk. She would reflect for a moment, and then without further hesitation tell us that her heart was in the Circuit, and that is why it is so poignant for all of you on the Dublin Circuit to have lost such a great friend and supporter.

All of us on the Circuit have enjoyed her company; she illuminated our lives without intolerance, and her passing through this world was unaccompanied by any trace of vanity or self-serving. She gently directed and guided the Family Law circuit in Dublin with patience and sympathy and so good was the depths of her concentration during long and protracted days, that no client was ever left without the benefit of a true advocate and a courageous barrister.

These are some of her characteristics but each of you will have your own special memories.

God forbid that she is looking in on this ceremony, from somewhere higher than us. Because if she is, with all her intrinsic modesty and humility she would draw back from this public tribute. She would tell us, in no uncertain terms to get back to our work and our day, and remember the things we were trained to do.

She would very quickly remind us that others have passed this way as well, and that others will follow. I have no doubt that she would ask us to remember in our prayers those other colleagues who have passed on recently as well. So let us respect her wishes. She has asked us to celebrate her happy and successful life; not to mourn it. Her last wish was for a party.

Yet again, the scales have tipped slightly over in favour of life.●

THE CRIMINAL JUSTICE BILL, 2000

*In the interests of stimulating debate on the far-reaching proposals contained in the recent Criminal Justice Bill, **The Bar Review** presents the arguments for and against the Bill's provisions.*

THE CASE FOR

One worrying aspect of recent criminal reforms has been the tendency to rush through far reaching legislation in response to a particular event. Thus the Proceeds of Crime Act 1996 was enacted in direct response to the murder of Veronica Guerin and the Offences Against the State (Amendment) Act 1998 after the Omagh bombing. The recent proposals for a new Criminal Bill represent a more considered approach to law making in the criminal field and are therefore to be welcomed.

The proposals have been in the making since 1997 when the Strategic Management Initiative published its report on the efficiency and effectiveness of the Gardaí. Therefore, by no stretch of the imagination, can the proposals be described as rushed or ill-thought out.

The aim of the proposals is to enhance the effectiveness of criminal investigations. It is submitted that they represent a proportionate and effective means of securing this necessary result with the minimum possible impact on the rights of the accused. As so often happens when reform is suggested, loud complaints about the abolition of the right to silence have been made. Of course, the proposals do no such thing. They simply permit an inference to be drawn from the failure of a suspect to mention certain facts. Experience has shown that juries are likely to draw such an inference of their own accord anyway, even in the absence of statutory provisions. It is a fact of life that most jurors expect to hear an accused person give an explanation for his or her conduct and the proposals do no more than recognise this reality.

Irish courts have consistently upheld statutory provisions that permit the guilt of the accused to be inferred from certain factors. In *Heaney v Ireland* (1986) the Supreme Court stated that "the State is entitled to encroach on the right of the citizen to remain silent in pursuit of its entitlement to maintain public peace and order." The Supreme Court noted that the prima facie right of citizens to remain
silent must yield to the right of the State to protect itself. The Court concluded that "the innocent person has nothing to fear from giving an account of his or her movements." In the more recent case of *Rock v Ireland* (1997) the constitutionality of s 18 of the Criminal Justice Act 1984 (which permits an inference to be drawn form the failure of the accused to account for any object, substance or mark found on him) was upheld. Thus, contrary to what some people would have us believe, there is nothing extraordinary or unconstitutional about the new proposals.

Critics of the new proposals would also do well to remember that they are perfectly compatible with the case law of the European Convention of Human Rights. For example, in *Murray v UK* (1996) the European Court of Human Rights held that where a prima facie case is established and the burden of proof remains on the prosecution, adverse inferences can be drawn from a failure to testify.

The new proposals will permit imprisonment for up to 48 hours for all offences punishable with 10 years imprisonment or more. Ultimately the test must be whether there is a proportionality between the infringement of a citizen's rights and the entitlement of the State to protect itself. By limiting the 48 hour period to offences which carry a minimum sentence of ten years the proposal clearly satisfies the test of proportionality.

One cannot look at the new proposals in isolation. Rather they must be viewed in the context of the wider reforms of the criminal justice system. This year funding of £3 million has been set aside for the refurbishment of interview rooms in 200 stations for electronic recording. More funds have been allocated for the training of Gardaí and the instalment of specialist video and audio recorders. These measures ensure that the rights of suspects will be fully protected under the new legislation.

Much stronger provisions than those now proposed have long been in place to deal with terrorists. With the peace process the terrorist threat has diminished and it is only right that the Government should turn its attention to the criminal gangs and drug barons who are effectively running a terrorist campaign in certain inner city areas. When such persons possess the weaponry and organisation of a terrorist group there is no reason why the gardaí should not be given appropriate powers. The Offences Against the State Acts successfully protected the State from political terrorists and the lessons learned there can and should be used against the new urban terrorists.

Given the fact that many of our criminal laws were made in the Victorian era and have remained unchanged since then, one should be slow indeed to criticise any proposed reforms as a step backwards. The Government is not only entitled to keep ahead of the criminal element in our society but is obliged to. The new proposals will ensure that those who inflict their criminal acts on others are swiftly, but fairly, brought to justice. ●

THE CASE AGAINST

Dramatic changes are to be made to the rights of suspects detained in police custody in the Government's proposed Criminal Justice Bill, 2000. These changes must be opposed by all of us concerned with upholding fair procedures in criminal law.

First, the Minister for Justice has said that he plans to extend the time for which persons suspected of committing a "serious offence" (punishable by ten years or more imprisonment) may be detained without charge, from the present maximum of twelve hours, to a total of forty-eight hours. The second change proposed by the Minister, also in relation to "serious offences", would restrict the right to silence of those accused of such offences, by allowing inferences to be drawn at trial where the accused had failed while in custody to mention any fact later sought to rely upon in defence.

Two further measures that have been proposed by the Minister should also be of great concern. He is planning to re-classify saliva as a non-intimate sample, so that "reasonable force" may be used by gardai in obtaining saliva from suspects. Finally, he has proposed to allow senior gardai to issue search warrants in "exceptional circumstances", a measure that may well be in breach of the constitutional doctrine of separation of powers.

If enacted, these proposals would amount to an excessive encroachment on the rights of persons accused of criminal offences. In particular, the extension of the detention period and the restriction on the right to silence would place great pressure on suspects to make statements while in custody. It may be predicted that the likelihood of false confessions will increase, as indeed with the potential for abuse of power by the gardai. The Special Criminal Court recently expressed grave concerns about garda questioning methods used in the *Ward* case. The potential for abuse would only be heightened by the introduction of greater garda powers over the suspect.

Detention without Charge

Prior to 1984, garda powers to detain suspects without charge were limited to the investigation of scheduled offences. Then, a general power of detention for a wider range of criminal offences was introduced through section 4 of the Criminal Justice Act, 1984, which allows detention without charge for a period of up to twelve hours for offences punishable by five years or more imprisonment. In 1996, an even more lengthy detention period, of up to seven days, was introduced for those suspected of drug trafficking offences.

The need to ensure that inculpatory admissions made by accused persons during these detention periods are properly obtained was recognised by the Martin Committee, which in 1990 recommended the introduction of routine audio-visual recording of police interviews. Regulations were introduced in 1997 that provided for such recording, but they have not been implemented in most garda stations, and a brief written memo is normally the only record of the suspect's interview.

Moreover, the Supreme Court has recently confirmed in Lavery's case that the accused person has no right to have a solicitor present during the garda interview, and that the solicitor has no right to see the memo of interview before their client is charged. Even when the memo of the interview is later provided to the defence, the Courts have held that the gardai are not obliged to reduce everything that is said during the interrogation to writing; they may limit their written record to "anything of consequence".

The lack of safeguards evident here is in marked contrast to the position in England, whereby persons detained without charge have the right not only to have their interviews recorded, but also to have their solicitors present throughout their interrogation. Such measures are essential in order to protect against potential police abuses.

Right to Silence

Just as statute law presently allows for lengthy periods of detention without charge, so too are there already various statutory restrictions on the right to silence of the accused. Most recently, sections 2 and 5 of the Offences Against the State (Amendment) Act, 1998 allow inferences to be drawn from the failure of an accused to mention during questioning facts later relied on in defence.

While the Courts have recognised the right to silence as a constitutional right, the validity of the legislative restrictions to that right has been upheld in the interests of proportionality (in *Heaney)*, and in recognition of the State interest in protecting its citizens *(in Rock)*. However, no statute has yet gone as far in restricting the right to silence as the proposed Bill. If passed in its present form, it is argued that it would encroach so significantly on the constitutional right to silence as to render it meaningless, and thus that it could not be upheld by our superior courts on the grounds of proportionality or balance of State interest.

Conclusion

It is clear that the Minister's new proposals would add considerably to existing restrictions on the rights of suspects, yet there is no evidence that the additional garda powers involved would make any real difference to the police investigation of serious crime. Particularly at a time when crime rates are falling, it is difficult to see any argument for the introduction of such serious encroachments on the rights of those detained in police custody.

In conclusion, it is submitted that these proposed changes would invade the constitutional rights of liberty and of due process beyond acceptable limits. This is especially so, given the absence of adequate safeguards to prevent abuses occurring while suspects are in garda custody. The Minister's proposals should be opposed in their entirety. ●

A NEW CHIEF JUSTICE

The appointment of Mr Justice Keane as the new Chief Justice has been universally welcomed. The Bar would like to express its delight at his appointment and to offer Mr Justice Keane every good wish in undertaking the very onerous obligations of his office for which he is so excellently suited.

Mr Justice Keane's appointment comes at a time of unprecedented change in our legal system. The proliferation of administrative and commercial regulation, both European and domestic, has greatly increased the day to day impact of law on the lives of both consumers and business people. It has further heightened the need for efficient and effective judicial scrutiny of these regulations and their application.

The explosion of new technologies presents the challenge of adapting well established legal norms to new problems. The globalisation of commerce inevitably increases the scale and importance of commercial disputes coming before the Courts and the need for efficient and effective resolution of those disputes. The deepening awareness of the importance of fundamental human rights and liberties requires further elaboration of our constitutional rights in the context of an ever changing legal environment. The ethical and moral (and inevitably legal) challenges arising from developments in medicine, science and new technologies is likely to give rise to entirely novel legal issues of great complexity.

Mr Justice Keane enjoys the very special qualities needed to meet these unprecedented challenges. He brings to the highest judicial office in the State a combination of vast judicial experience of over sixteen years as a High Court Judge, four years as an ordinary member of the Supreme Court, many years as a highly successful Junior and Senior Counsel, five years as President of the Law Reform Commission as well as outstanding achievements as an academic and author.

Mr Justice Keane's understanding and empathy for the vitality of the law and the need for the legal system to continuously adapt to social and economic change is exemplified by the output of the Law Reform Commission during his term of office as President from 1987 to 1992. There he oversaw the production of a wide range of courageous and ground-breaking reports containing proposals for law reform of subjects as diverse as child sexual abuse, defamation, confiscation of the proceeds of crime and the rule against hearsay in civil cases.

On the Bench Mr Justice Keane has constantly demonstrated his independence and integrity. The knowledge that the judicial system's role as a bulwark against corruption and unlawful use of State power will be fearlessly maintained by the new Chief Justice can but reassure a public whose confidence in some aspects of public life has been seriously eroded. In addition his breadth of expertise (crossing the spectrum of commercial law to public and constitutional law) will be a particular asset to a Court increasingly called upon to resolve matters of particular legal specialisation. There can be no better manifestation of our system of justice than that it should be headed by a person of such exceptional quality. ●

SINGLE REGULATORY AUTHORITY FOR FINANCIAL SERVICES SECTOR

Attracta O'Regan Cazabon BL outlines the far-reaching proposals contained in the Report of the Implementation Advisory Group on the establishment of a single regulatory authority for the financial services sector.

Introduction

On the 20th October, 1998 the Government agreed in principle to the establishment of a single regulatory authority for the financial services sector and to this end it agreed to the establishment of an Implementation Advisory Group to advise the Government on matters within its broad terms of reference. On the 19th May, 1999, Mr Michael Mc Dowell SC, the chairman of the Advisory group presented the group's report entitled "The Report of the Implementation Advisory Group on the establishment of a single regulatory authority for the financial services sector" to Mary Harney, Tanaiste & Minister for Enterprise, Trade & Employment and to Charlie McCreevy, Minister for Finance. The Report has far reaching implications for all financial service providers coming within its terms of reference.
This article assesses the group's recommendations with particular regard to consumer protection issues in the context of the proposed financial service providers to be overseen by the Single Regulatory Authority (SRA).

Terms of Reference.

The Group were requested to advise the Government of the following;

"a) The role and functions of the single financial regulatory authority (e.g. prudential supervision, the maintenance of orderly markets, safeguarding of clients' funds, consumer protection, the development and regulation of conduct of business rules) including consideration of the issues arising from combining the functions of monetary policy and prudential regulation.

b) The range of financial service providers to be overseen by the authority (e.g. banks, building societies, Post Office Savings Bank, insurance companies and brokers, investment intermediaries (including lawyers and accountants in as much as they handle clients' funds), exchanges, credit unions, friendly societies, finance companies, moneylenders, etc.) also taking account of the development of electronic commerce which may involve new types of service providers.

c) The extent, if any, to which existing regulators (e.g. the Director of Consumer Affairs, Registrar of Friendly Societies, Central Bank and Department of Enterprise, Trade and Employment) would continue to have functions in relation to the regulation of the financial services sector and the extent to which any alteration to the *status quo* would impinge on the non-regulatory functions of the Central Bank.

d) The organisational structure for the authority, including the manner of its public accountability.

e) The funding, researching and staffing of the authority (and issues arising in a transition to a new structure, including staffing and industrial relations, and the extent to which the authority could be self-financing).

f) The legislative changes necessary for the establishment of the authority.

g) The time schedule (including, insofar as necessary, a phased implementation) for achieving the objective of a fully operational single financial regulator at the earliest date possible."[1]

In November, 1998 the group commenced its research by placing an advertisement in the principal national daily papers inviting submissions to the group. 64 submissions were received from interested parties. The group held 22 meetings in the currency of its deliberations including meetings with a representative of the UK Treasury and with a representative of the UK Financial Services Authority. It also took account of the Report of the Joint Oireachtas Committee on Finance and the Public Service on the Regulation and Supervision of Financial Institutions (July 1998). It examined the supervisory regimes in other European Union Member States[2], the USA, Canada, Australia and Japan. The group also examined the analysis undertaken by the Working Group on Banking and Consumer Issues established by the Minister for Finance in April, 1998 the remit of which was overtaken by the establishment of the Implementation Advisory Group.
The Group's report is meticulously professional and comprehensively presented. It presents the existing regulatory regime in a clear concise and codified manner. Its recommendations are thorough and rationally reasoned on the basis of the substantive examination of the submissions received and the comparative research examined.

Financial Service providers within the remit of the SRA.

The group developed the following criterion in assessing whom should be overseen by the SRA;

"*all* financial service providers should, in principle, be dealt with by the SRA and that a compelling case would have to be made for the exclusion of any provider from its remit. The group decided that it should be guided by the twin needs of ensuring that sound prudential practices are followed throughout the financial services industry in order that the integrity of the financial system is protected and also ensuring that a proper regime is in place for the adequate and appropriate protection of consumers in relation to financial services provided to them.....the Group felt that, wherever possible, the SRA should offer a "one-stop-shop" service to both the financial service providers and to consumers in respect of their dealings with the financial sector.....In this context the Group concluded that the remit of the SRA should encompass the full range of bodies currently regulated by the Central Bank, with the exception of payments systems.....those regulated by the Department of Enterprise, Trade and Employment primarily covering financial services provided by the insurance industry."[3]

The types of providers considered by the Group are as follows:

Accountants	Moneylenders (consumer)
An Post/POSB	Moneylenders (non-consumer)
Banks/Building Societies	Mortgage Intermediaries
Bureaux de Change	Mortgage lending
Collective Investment Schemes	Mortgage Lenders - Unlicensed
Credit Intermediaries	Pawnbrokers
Credit Unions	Payments Systems
Friendly Societies	Pension Funds
IFSC entities	Reinsurance companies
Insurance Undertakings	Reinsurance intermediaries
Insurance Intermediaries	Solicitors
Investment Intermediaries	Stockbrokers
Moneybrokers	Stock Exchange/ Futures Exchanges

The Financial service providers which the group are recommending *should not* be brought within the remit of the SRA are;

"Credit Intermediaries (will continue to be supervised by the Director of Consumer Affairs).
Pawnbrokers (will continue to be supervised by the Director of Consumer Affairs)
Payments Systems Operators (to be regulated by Central Bank as part of its monetary policy function)
Pension Funds (supervision will remain with the Pensions Board)."[4]

Consumer protection issues

The Group stated that they gave considerable attention to the matter of consumer protection and how it could be dealt with in the context of the SRA.[5] In that regard it noted that at present consumer issues are spread across a number of authorities, including the Central Bank and the Director of Consumer Affairs. It noted that non-statutory codes of conduct apply in relation to the selling of life insurance products and that complaints in regard to unfair treatment by financial institutions are currently dealt with by the Director of Consumer Affairs, the Registrar of Friendly Societies, the Department of Enterprise, Trade and Employment, the Central Bank, industry representative bodies and through, inter alia, non-statutory Ombudsman schemes.

The Group examined the protection of the interests of consumers on two levels. Firstly "the protection of consumers' interests in the context of the solvency of the regulated entity is of particular relevance to prudential regulators and indeed is part of the legislative remits of the Central Bank and the Department of Enterprise, Trade and Employment. The second concentrates on the individual consumer and his/her relationship with a particular financial institution."[6] The report refers in particular to recent emphasis which has been placed on the "relationship between these two levels and, in particular, on the obligations imposed, under EU law, on the Central Bank, as a regulator, which prohibits it from disclosing to the relevant authorities, information on issues for which it has no statutory function and which it may come across in the course of its duties."[7] In deciding on the most appropriate structure for the SRA, the Group paid particular attention to this fact.

Disclosure of Confidential Information[8]

This section of the Groups report illustrates the manner in which an EU member state can circumvent EU legislation for the purposes of protecting its own consumers. The report outlines the EU Directives which establish the conditions under which information can be disclosed by a bank, investment service and insurance regulators within the European Union[9]. In this regard the Group examine in particular the BCCI Directive.[10] The report states that "Under EU law, Member States must provide that all employees, past or present, of competent authorities as well as external agents working for them, are bound by professional secrecy obligations. No confidential information, which they may receive in the course of their duties may not be divulged to any person or authority whatsoever except in summary or collective form, such that the individual institution cannot be identified"[11].

The report makes specific reference to Article 12 of the First Banking Directive[12] which outlines the confidential supervisory information which is open to disclosure and the circumstances in which same can be done. The report refers to such disclosure circumstances as 'gateways', which are detailed as follows;

"(i) cases covered by criminal law;
(ii) in certain circumstances, where a credit institution is being wound up;
(iii) disclosure in certain circumstances, to certain other EEA banking and financial supervisors and certain other EEA authorities and bodies. The information given must be subject to the same professional secrecy standards;
(iv) disclosure, in certain circumstances and through co-operation agreements, to certain non-EEA banking and financial supervisors and certain non-EEA authorities and bodies. The information given must be subject to equivalent professional secrecy constraints;
(v) disclosure, in certain circumstances, to central banks and other monetary authorities and overseers of payment systems. The information given must be subject to the same professional secrecy conditions;
(vi) disclosure, in certain circumstances, to other institutions in the State (e.g. Government Departments) which have responsibility for legislating for banks and disclosure may only be made for reasons of prudential control and must comply with certain conditions;
(vii) disclosure to an authority with statutory responsibility for the detection and investigation of breaches of company law. The information received must be

subject to the same professional secrecy conditions. Certain other conditions also apply"[13]

The group also outlines the circumstances in which competent authorities receiving information may use it in the course of their duties;

"a) to check that the conditions governing the taking up of the business of credit institutions are met and to facilitate monitoring of the conduct of such business'
b) to impose sanctions,
c) in an administrative appeal against decisions of the competent authority, or
d) in court proceedings appealing decisions taken in respect of a credit institution in pursuance of laws, regulations and administrative provisions adopted in accordance with Directives adopted in the field of credit institutions."[14]

The importance of the 'gateway' criterion cannot be over emphasised when assessing the type of organisational structure proposed for the SRA. The model chosen will have enormous implications for the degree of information that can flow between the prudential regulation and consumer protection functions. With this in mind the group examined a number of models for the SRA from the perspective of their implications for exchange of information between the two functions. The models examined are worth noting as the rationale for their appropriateness is dependent upon whether they are capable of circumventing yet complying with the EU Directives more particularly referred to above.

Four models were examined; 1) Separate authorities for prudential regulation and consumer protection, 2) Two competent authorities with one having a consumer protection function, 3) An SRA with a subsidiary responsible for consumer protection and 4) Combining the prudential regulation and consumer protection functions in one body.

1) Separate authorities for prudential regulation and consumer protection.

An example of this model in practice would be an SRA and a Director of Consumer Affairs. The problem with this model is that EU law does not allow the possibility of information transfer from a prudential regulator to an authority solely responsible for consumer affairs. The report notes that ".....in this context...even in a situation where the authority responsible for consumer issues has significant powers and resources in relation to the collection of information from financial services providers, the prudential regulator cannot pass on to the consumer protector information it comes across in carrying out its regulatory function."[15]

2) Two competent authorities with one having a consumer protection function.

This involves an adaptation of the one above. The report summarises this model as one "where by some elements of prudential regulation (e.g. Codes of Conduct rules) would be assigned to the authority responsible for consumer protection. The rest of the prudential regulation function would remain with the main prudential regulator. In this case, as both bodies would have a prudential regulation remit, it may be possible to regard both as competent authorities for the purposes of EU law and accordingly, it may be possible to transfer information to each other."[16] The most significant problem with this model is that it leads to the splitting of prudential regulation functions and therefore does not achieve the objective of establishing a single financial regulator.

3) An SRA with a subsidiary responsible for consumer protection.

This proposed model also created problems, in that where the subsidiary is solely responsible for consumer protection, EU law would not allow information transfers from the parent to the subsidiary. They noted however, that where "the subsidiary was assigned some prudential regulation function it may be possible under EU law to transfer information between the two bodies."[17] The group were critical of this model in that they felt "that this model would not command consumer confidence in that the consumer protection function could be seen to be subsidiary to the prudential regulation one."[18]

4) Combining the prudential regulation and consumer protection functions in one body.

The Report ingeniously noted that "[T]here is no express provision in EU law prohibiting the State establishing an SRA having both prudential and consumer focused functions. Although legal certainty is elusive, there being limited assistance in case law, in circumstance where no gateway for the transfer of confidential information between the two functions is expressly provided for in EU law, it is considered that, on balance, it is possible to pass information between the prudential side and the consumer side of such a body and be used by it for its statutory functions. This is on the assumption that there would be suitable enabling legislation in place giving the SRA an enforcement role in consumer legislation and a general role in all elements of banking law."[19] The group note that they are unclear "as to whether in reality, there will be any operational requirements to pass information from the prudential side to the consumer protection side without using the existing gateways set out in the Directives. In such circumstances, which are likely to be very rare, it would be necessary for the SRA to ensure that, in relation to the communication of confidential information by the prudential side to the consumer one, the provisions of EU law are complied with in its operations. The group took the view that it would be for the SRA itself to devise appropriate mechanisms to achieve this."[20]

The group noted that in taking into account EU law on the one hand and, on the other hand, the necessity of providing for disclosure of information as between the prudential and consumer sides, their choice of model was reduced to only two options. Firstly, an attempt could be made to have EU law amended to allow such transfer of information or, secondly the two functions could be amalgamated in the one organisation. The group decided against the first option as they felt that it "would be extremely time consuming and holds no guarantees of success."[21]

The group stated that

"the public interest is best served by a situation whereby, within EU Law, the maximum transmission of relevant information collected by the prudential regulator in the course of its supervisory activities is provided to whatever authority is responsible for the protection of consumers. However, as a result of EU Law, certain restrictions apply in relation to the transfer of such information. The Group concluded that, given the exigencies imposed by the relevant EU law, the best mechanism for providing for the maximum flow of information between prudential regulators and consumer regulators is to combine both functions within one authority."[22]

Accordingly, the Group recommended that the proposed model should be responsible for both the prudential regulation of the entities set out above and that in addition it should be given "statutory responsibility for consumer issues related to those entities and that all financial services consumer-protection related functions currently undertaken by existing authorities should be transferred to it."[23] Furthermore, the Group also recommended that a statutory position of Customer Protection Director, reporting directly to the CEO, should be established within the SRA. It should be noted that, in the opinion of the Group, the term 'consumer' embraces both private individuals and business interests. The type of functions for which the SRA could be responsible for should include "the supervision of advertisements, the introduction and policing of conduct of business rules and codes of conduct, as well as most of the current functions of the Director of Consumer Affairs in relation to consumer credit. In charges area prior to it being transferred to the Director for Consumers Affairs in 1996."[24]

Consumer Representation within the SRA.

The Group proposed that those entities which it proposed should be regulated by the SRA and their clients should have access to the decision making in the SRA. To facilitate this proposal it recommended that two panels should be established which would be representative of industry and consumer interests and which would be chaired by high ranking officials of the SRA. The objective of the panels would be to provide fora for discussions on the performance of the SRA in carrying out its regulatory duties and to propose initiatives which they may wish to see pursued. The Group also proposed that sub - panels could also be established to enable specific sectional interests to be addressed, e.g. in relation to the IFSC.

Consumer complaints and compensation.

The Group noted that there currently exists a number of schemes under which clients of financial service providers can seek redress or compensation. In this regard it noted that non-statutory ombudsman schemes exist for banking and insurance undertakings. It also noted that the Investor Compensation Act, 1998 provides for eligible investors to be compensated. In reference to the non-statutory Insurance and Credit Institutions Ombudsman schemes which are operated as private sector schemes by the insurance and banking industries, the Group stated that while it was satisfied that the structure of the schemes guaranteed their independence, nevertheless, it recommended the establishment of a single statutory ombudsman scheme for all financial services providers which would operate independently of the SRA.

Statutory Ombudsman Scheme.

The group proposed this recommendation on the basis that it felt that this step was necessary to achieve the objective of a 'one-stop-shop' for regulated entities and their customers and in order to fill the existing gap created by the non-existence of an ombudsman scheme for investment business. In setting out the general manner in which such a scheme would operate the group proposed a similar procedure to that which presently operates within the non statutory schemes. It proposes that complaints raised by individual and small enterprise customers of regulated entities could be referred to the relevant financial service provider in the first instance. In the event that a customer is unhappy with the institution's response they would be able to refer the matter to the SRA which, depending upon the nature of the complaint, could deal with it itself or refer it to the Ombudsman. In any event, any decision of the SRA in relation to customer complaints would be appealable to the Ombudsman. It is not clear from this recommendation which section of the SRA would deal with the complaint prior to the involvement if any of the statutory Ombudsman. The Report does not outline the broad Terms of Reference of such a scheme nor does it make any reference to the monetary jurisdiction in respect of awards. It is this writers opinion that in order for such a scheme to operate successfully, its monetary jurisdiction in respect of awards must be substantial so as to facilitate the optimum number of complaints. Further, it is imperative that the terms of reference of such a scheme should be carefully examined so as to provide the ultimate redress in the maximum of circumstances. In this regard the drafters of such a scheme should have particular regard to the annual reports of the existing non statutory Ombudsman schemes in an attempt to facilitate grievances which are presently not within their terms of reference. In this regard also an examination of the terms of reference of the Financial Services Ombudsman Scheme in the U.K. would be of enormous assistance.

Conclusion

One of the most difficult issues which the group had to address were the legal complexities of balancing internal state financial regulatory accountability with E.U. confidential disclosure restrictions. However, as is apparent herein they surmounted this task impressively. The Report of the Implementation Advisory Group is perhaps the most significant document published to date in regard to the future regulation of the financial services sector. The research methodology utilised by the group is substantive, credible, comparative and relevant. They have taken into account the views of those who represent the financial sector and they have presented their recommendations in an unbiased and objective manner. All of the members of the Advisory group are to be congratulated on their impressive professionalism. ●

1 Report of the Implementation Advisory Group on the establishment of a Single Regulatory Authority for the Financial Services Sector, Department of Finance, Government Publications, May, 1999.
2 Austria, Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, the Netherlands, the UK, Sweden, Finland, Spain and Portugal.
3 op. cit.,1n. at p.17, para 3.2
4 op. cit.,1n. at p.30, para 3.21.
5 op. cit.,1n. at pp 32 - 36
6 op. cit.,1n at p.32, para 4.8.
7 op. cit.,1n. at p.32-33, para 4.8.
8 op. cit.,1n. at pp 33-35.
9 First Banking Directive (Dir. 77/780/EEC); UCITS Directive (Dir.85/611/EEC); Second Banking Directive (Dir. 89/646/EEC); Second Consolidation Directive (Dir. 92/30/EEC); Non-Life Assurance Directive (Dir.92/49/EEC); Life Assurance Framework Directive (Dir.92/96/EEC); Investment Services Directive (Dir.93/22/EEC); BCCI Directive (Dir.95/26/EC); and Directive 98/33/EC.
10 Dir. 95/26/EC.
11 op. cit., 1n. at p.34, para. 4.11.
12 Dir 77/780/EEC.
13 op. cit.,1n. at p.34, para 4.12.
14 op. cit.,1n. at p.34, para 4.13
15 op. cit.,1n. at p.35, para 4.15.
16 op. cit.,1n. at p.35, para 4.16.
17 op. cit.,1n. at p.35, para 4.17.
18 ibid.
19 op. cit.,1n. at p.35, para 4.18.
20 ibid.
21 op. cit.,1n. at p.36, para 4.20.
22 op. cit.,1n. at p.36, para 4.21
23 op. cit.,1n. at p.36, para 4.22.
24 ibid.

BAR OF IRELAND RETIREMENT TRUST SCHEME

EXCEEDS IR£50 MILLION

The assets of the Bar of Ireland Retirement Trust Scheme are now worth over IR50 million. This milestone was passed on the 1st December last.

The Scheme, designed to cater for the retirement needs of members of the Law Library and which is endorsed by the Bar Council, has received excellent returns for members through the years. Members have a choice of four funds in which to invest - Managed Fund, International Fund, Cash Fund & Pension Protector Fund.

A contribution of IR£10,000 invested in the Managed Fund ten years ago is today worth IR£34,800. The net cost to the contributor of this IR£10,000, of course, would have been only IR£5,200 (assuming tax relief at 48%).

A contribution of IR£10,000 (net cost of IR£3,500 after tax relief at the top rate), made when the Scheme commenced in May 1984, is today worth IR£106,440.

Saving for retirement should start as early as possible in order to get the benefit of annual tax relief and investment returns. Recent legislation has improved the limits for tax relief, as well as introducing new retirement options. For your copy of the up-dated Scheme explanatory booklet, please contact the Law Library or Bank of Ireland Trust Services (Kim Lloyd - tel. 01-6043629, fax 01-6615992, e-mail kim.lloyd@boi.ie).

Past returns are no gaurantee of future performance.

Bank of Ireland

Courts and Court Officers Act, 1995

The Judicial Appointments Advisory Board

Appointment of one Ordinary Judge of the District Court

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

Practising Barristers or Solicitors who are eligible for appointment to the Office and who wish to be considered for appointment should apply in writing to the Secretary of the Board, Courts Service, Green Street Courthouse, Green Street, Dublin 7 for a copy of the application form. Completed forms should be returned to the Board's Secretary, on or before 5.00 p.m. on Friday 10th March 2000.

It should be noted that this advertisement for appointment to the Office of the Ordinary Judge of the District Court applies not only to the present vacancy but also to all future vacancies that may arise in the said Office during the period to the 31st December 2000, unless and until the Applicant signifies in writing to the Board that the application should be withdrawn.

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

Canvassing is prohibited.

Dated The 24th February 2000.

BRENDAN RYAN, B.L., SECRETARY
JUDICIAL APPOINTMENTS ADVISORY BOARD

Courts and Court Officers Act, 1995

The Judicial Appointments Advisory Board

Appointment of One Ordinary Judge of the High Court

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

Practising Barristers who are eligible for appointment to the Office and who wish to be considered for appointment should apply in writing to the Secretary of the Board, Courts Service, Green Street Courthouse, Green Street, Dublin 7 for a copy of the application form. Completed forms should be returned to the Board's Secretary, on or before 5.00 p.m. on Friday 10th March 2000.

It should be noted that this advertisement for appointment to the Office of Ordinary Judge of the High Court applies not only to the present vacancy now existing but also to all future vacancies that may arise in the said Office during the period to the 31st December 2000, unless and until the Applicant signifies in writing to the Board that the application should be withdrawn.

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BRENDAN RYAN, B.L., SECRETARY,
JUDICIAL APPOINTMENTS ADVISORY BOARD

WARDSHIP: TIME FOR REFORM?

Siobhán Ní Chúlacháin BL *examines the role of the Wardship jurisdiction in our legal order and advances some proposals for the reform of the jurisdiction.*

Introduction

At present, there are around 3,600 wards of court in Ireland, illustrating how under-used the wardship jurisdiction is. It is perceived as applying mainly to older members of society suffering from mental incapacity, whose property requires management and protection. In many situations, there is little or no alternative to wardship. Enduring powers of attorney are one such alternative, but in order to avail of it, a person must be both compos mentis and far-thinking. Who anticipates premature mental incapacity?

In fact, the original jurisdiction in wardship was wide-ranging and this was strongly re-asserted by the Supreme Court in *Re D.*[1] As a result of this decision, it is clear the wardship jurisdiction also extends to situations where the person of the ward, as opposed to the property, requires protection.

There are two practical obstacles to the full use of the jurisdiction - first, the statutory regulation of the jurisdiction is almost exclusively property-orientated and, as a result, the jurisdiction over the person of wards is comparatively unregulated and unclear. Secondly, as the extent of the jurisdiction over the person of the ward is unclear on the face of the legislation, it is often not considered by practitioners with mentally incapacitated[2] clients except in situations involving large sums of money.

This article seeks to examine the extent of the jurisdiction over the person of the ward, as well as suggesting some necessary reforms.

Historical Context

Wardship of adults is an ancient jurisdiction[3] which, at its origins, was acquisitive rather than protective. It was a royal prerogative to take a person into wardship as a means of compensating the King and feudal lords for the loss in feudal service due to the incapacity of tenants. Early regulation[4] of the jurisdiction created a distinction between the treatment of "fools" (who were born incompetent) and "lunatics" (who became incompetent later in life and were liable to recover). The Crown received a beneficial interest in the property of fools, whereas it assumed the role of trustee in relation to the property of lunatics. Many older cases involved the warding of peers of the realm.

Eventually, the Crown entrusted its jurisdiction to the Lord Chancellor by way of sign manual. The Lord Chancellor's jurisdiction was transferred first to the Chief Justice[5] and then to the President of the High Court.[6] It should be emphasized that this jurisdiction is merely regulated by, and is not restricted to, the Lunacy Regulation (Ireland) Act, 1871.[7]

Inquiries as to whether or not a person should be taken into wardship were held before juries. The first reported inquiry by jury dates from 1603 and perhaps the most celebrated was the inquiry into the state of mind of Dean Jonathan Swift, whose jury counted among its number a Robert Donovan, Thomas Hamilton, John Walsh, John Cooke, and Joshua Barrington. The role of the jury inquiry in developing the jurisdiction should not be underestimated. It was under its influence that the inequitable distinction between fools and lunatics disappeared and the jurisdiction became protective in nature. Although the option is available to prospective wards under the 1871 Act,[8] inquiries by juries are relatively rare in recent times.[9]

"Usually it is the question of soundness of mind that presents most difficulties. The term may have been appropriate in 1871 - indeed, it was a big improvement on the pre-existing terms of fool and lunatic - but it is not appropriate in modern practice."

As a result of public opinion and advances in psychiatry, the jurisdiction was considerably extended in terms of the categories of ward covered, and by the late nineteenth century,

statutory regulation of the jurisdiction was necessary. The Lunacy Regulation (Ireland) Act, 187110 was passed and continues to regulate the jurisdiction.

The Inquiry

The first step in wardship is usually by way of a petition to the High Court to hold an inquiry into the state of mind of the person whom it is proposed to make a ward of court. Two criteria are applied in deciding whether or not to take a person into wardship - unsoundness of mind and inability to govern self and property. This inquiry, if it results in a verdict of unsoundness of mind and inability to govern property and self, forms the substantive basis of the Court's jurisdiction in wardship.

Usually it is the question of soundness of mind that presents most difficulties. The term may have been appropriate in 1871 - indeed, it was a big improvement on the pre-existing terms of fool and lunatic - but it is not appropriate in modern practice. Firstly, it can be perceived as pejorative and may carry with it a stigma which is unpalatable for families of proposed wards. Secondly, it creates a difficult practical obstacle - a petition in lunacy must be supported by two medical affidavits attesting to a person's unsoundness of mind[11] and this poses a difficulty where the proposed ward is mentally ill, disabled or is in a permanent vegetative state (pvs). Many medical practitioners

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are unwilling to equate such mental states with unsoundness of mind. Moreover, some medical practitioners have a problem with the term per se, seeing it as a term of art which connotes some risk of causing harm to others.

In Re D[12]

The use of the jurisdiction to afford protection to persons with mental handicap has been hampered by the fact that the jurisdiction was traditionally property-oriented. *In Re D*[13] the proposed ward was a twenty-year old mentally-handicapped woman who had no property and no independent means but the Petitioner Health Board had identified a serious risk to her welfare in her continued residence in the family home. She had been admitted to a residential care centre but her parents obtained a habeus corpus order a few months later. The Health Board then petitioned for an inquiry. The President of the High Court held that it was a condition precedent to his exercise of the jurisdiction that proposed wards be entitled to property which required protection and management.

On appeal, the Supreme Court ruled that the exercise of the jurisdiction could not be restricted to any particular class and that the High Court had jurisdiction to take into wardship a person of unsound mind whose person requires protection and management but who has no property or no substantial property requiring such management.[14] This interpretation obtained

> "significant support from a consideration of the provisions of Article 40.3.2 where the obligation imposed by the state in its laws to protect as best it may from unjust attack and in the case of injustice done to vindicate the life and person of every citizen, is put in equal place with the obligation to protect the property rights of every citizen."[15]

In practice, the 1871 Act merely casts a procedural cloak over the inherent jurisdiction of the Court. In fact, in *Re D* the Chief Justice could not construe the provisions of the Act in such a way that it could practicably be applied to the taking into wardship of a person with no property and he ruled that if the President did take the respondent into wardship,

> "the procedures to be followed are entirely at his discretion and, having regard to the views expressed in this judgment, would clearly not include compliance with many of the provisions of the Act of 1871 or with those rules and forms contained in the Rules of the Superior Courts relevant to that Act."[16]

In *Re a Ward of Court*[17] Hamilton C.J. described the wardship jurisdiction as extending to

> "all matters relating to the person and estate of the ward and in the exercise of such jurisdiction is subject only to the provisions of the Constitution."

Property Rights

Although the regulation of the jurisdiction concentrates on the powers and duties of the Court and committee in relation to the property of the ward, the regulation is now quite outdated. For example, at least three sections of the Act1[18] deal with the powers and duties of the Court and committee in relation to mines belonging to wards. Section 63 of the 1871 Act is an example of another shortcoming - it allows for the ward's property to be sold, but only where there is an order of the Court authorising such sale, and only where the proceeds of the sale are used to discharge debts or to be provided for the maintenance of the ward. There is no provision for sale where good management of the estate requires it.

The structures in place in relation to management of property are quite inadequate. In modern wardship practice, some estates under the administration of the wards of court office involve large sums of money and require sophisticated investment techniques. The Lunacy Act is clearly in need of updating in relation to this point.

Thought should be given to the creation of a mechanism which falls short of full Court intervention and supervision in certain circumstances e.g. where an elderly person has money in a bank account which could be used for maintenance purposes, but the bank is unwilling to release such funds in the absence of a court order. This situation is common-place and wardship is often considered in this context, but it could be considered

slightly "belt and braces". Could there not be a mechanism to apply for Court approval for the next of kin to indemnify the Bank for releasing those funds? This mechanism could operate through the lower Courts, which would facilitate access, in terms of proximity and cost, to the law.

Personal Rights

In other jurisdictions, many cases have probed the questions of personal rights of wards - including the rights to die, to refuse treatment, to sterilisation, to abortion and to blood transfusions. Of these issues, only the so-called right to die has been considered here,[19] but the decisions of the High and Supreme Court on that right will have a bearing upon other cases touching the rights of wards which might foreseeably arise here in the future.

In Re a Ward of Court[20] established that a patient who is fully competent has the right to refuse any medical or surgical treatment which he or she reasonably regards as excessively burdensome when weighted against the prospective benefits.[21] It then fell to be considered whether this right could be exercised on behalf of the ward. The Supreme Court held that the diminution of the ward's capacities did not result in any diminution of her personal rights, including the right to life, to bodily integrity, to privacy, to self-determination, and the right to refuse medical care or treatment, and that the responsibility for the exercise of and vindication of those rights rested on the President of the High Court or the judge assigned by him.[22]

Best Interests of the Ward

In exercising the personal rights of a ward, the Court must first satisfy itself as to what would be in the "best interests" of the ward. In adopting this test, the High Court held the question should be approached

> "from the standpoint of a prudent, good and loving parent in deciding what course should be adopted". [23]

This view was endorsed by the Supreme Court on appeal.[24] Denham J. outlined fifteen factors which must be taken into consideration by the Court when deciding what course of action is in the best interests of a ward.[25] These include the ward's medical condition, proposed medical treatment, life history, the prognosis, previous views expressed by the ward, medical opinion, the views of the ward's family and carers, the spiritual aspect, and the ward's constitutional rights.

The alternative to the "best interests" test is the "substituted judgment" test, which requires the committee of the person to attempt to reach the decision the ward would have made if he or she had been able. The difficulty with this test is that in the absence of a clear statement by the ward prior to incapacity, it is difficult for a third party to say with confidence what the ward would have chosen. Furthermore, it assumes that at one stage, the ward had the capacity to rationally consider and weigh up the factors involved in the relevant decision.

The application of the best interests test has been examined in other jurisdictions. It is generally preferred in the USA, in England[26] and in Canada. In Canada, the issue fell to be considered in Re Eve.[27] La Forrest J. held that "a court may act not only on the ground that injury to person and property has occurred, but also on the ground that such injury is apprehended.... I have no doubt that the jurisdiction may be used to authorise the performance of a surgical operation that is necessary for the health of a person... The discretion is to be exercised for the benefit of that person, not for others."

In that case, Eve's mother sought to have Eve, a mentally-handicapped teenage girl, sterilised to protect her from the personal trauma of giving birth and difficulties relating to parenting and personal care and the consequent stress it would impose on her. The Supreme Court of Canada held that the Court had jurisdiction to permit sterilisation for non-therapeutic reasons but held that it should never authorise sterilisation for such purposes.

The elaboration by the courts of a test to establish the criteria for extending this protection, is an important development which will impact on such cases in the future. Nonetheless, the lack of statutory protection for the personal rights of wards, places wards in a vulnerable position. There is no legal requirement above and beyond the Common Law for consent to medical or surgical treatment and no clarification of the degree of intervention which is acceptable without the prior approval of the courts being required. These questions which are legally, morally and ethically challenging should not be left to the courts to decide but should be established by way of legislation after considerable research, consultation with professionals working in the area and public debate.

The application of the best interests test in *Re a Ward of Court* may not preclude the substituted judgment test being used in other cases. Problems may arise where the best interests of the ward conflict with a view clearly expressed while competent. However, the fact that the views of the ward are to be considered under the criteria laid down by Denham J will be helpful in avoiding such a conflict.

Reform of the Administration of the Jurisdiction

The administration of the jurisdiction could also be substantially reformed. The current practice is bureaucratic. Most transactions involved in the day-to-day management of

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"It is perhaps understandable that the legislature has not taken on the reform of the wardship jurisdiction - at first glance, it appears fraught with moral issues. It is quite possible to imagine such divisive issues as assisted conception, abortion, sterilisation, and euthanasia arising in the context of wardship. These are issues where the law and public policy are equally unclear, and the failure to legislate affects more than wards of Court. However, the reality is that most wardship cases do not involve such difficult issues and it is submitted that the legislature should not abdicate its responsibilities in relation to this group of vulnerable people".

the estates of wards require orders of the Court. All orders in wardship are signed by the Court, and not the Registrar as is the case with other jurisdictions. Provision for aspects of day-to-day management of property to be transacted without Court intervention save where there is controversy or a need for directions would substantially reduce costs and delays.

The authority of the committee derives from the order of the Court assigning certain powers and duties to it. Again, costs and delays would be significantly reduced if this authority issued from the Registrar, with any person who is materially affected having the right to make submissions to the Court. This would provide protection for the property rights of the ward and safeguard against abuse without eroding the judicial functions of the Courts in respect of wards.

There is also an argument for the distinction between the powers granted to a private committee and the powers granted to the General Solicitor who, as a public trustee, has expertise in a wide range of functions.

Conclusions

Reform of the jurisdiction must include a reform of the powers and duties in relation to the property and the person of the ward, as well as the administration of the jurisdiction. New legislation is required, formulating the parameters of the jurisdiction to ensure that it is readily accessible to those most in need of its protection. It is particularly necessary to clarify the powers and duties of the committee of the person and of the Court in relation to the person of the ward. For example, at present, the question of who can give consent on behalf of a ward in relation to routine medical procedures, emergency procedures (for example, appendectomies, post-coital contraception) and elective procedures is very unclear. In essence, the Lunacy Act does not regulate the jurisdiction of the Court over the person of a ward but it is not an impediment to it.

However, from a practical point of view, machinery must be put in place to ensure that the wardship office is adequately equipped to supervise such cases. Were the jurisdiction to be extensively availed of, this would have implications in terms of the level of expertise required, particularly in the areas of the physical, psychological and psychiatric well-being of the wards.

It is perhaps understandable that the legislature has not taken on the reform of the wardship jurisdiction - at first glance, it appears fraught with moral issues. It is quite possible to imagine such divisive issues as assisted conception, abortion, sterilisation, and euthanasia arising in the context of wardship. These are issues where the law and public policy are equally unclear, and the failure to legislate affects more than wards of Court. However, the reality is that most wardship cases do not involve such difficult issues and it is submitted that the legislature should not abdicate its responsibilities in relation to this group of vulnerable people.

Harris, writing in 1930, described wardship as "one of the most nearly perfect branches of judicial administration in this country"[28]. The jurisdiction may have tarnished slightly in its efficiency since Harris's time, but if it has, it is due to the failure of the legislature to keep abreast of the changes in the needs of wards. It is to no-one's benefit to have the jurisdiction undermined by out-dated legislation, designed for a different era. It would be a shame to allow one of the most fascinating and equitable areas of law to dwindle into obscurity. ●

1 [1987] IR 449
2 This term is used in relation to persons with disability and persons suffering mental illness.
3 The first mention of wardship of adults is in Bracton and dates from about 1260.
4 Statute De Prerogativa Regis 17 Ed II St 1 cc9, 10
5 Supreme Court of Judicature (Southern Ireland) Order, 1921, Article 5(2)
6 Courts of Justice Act, 1936 Section 9
7 34 & 35 Vict c22
8 Section 14
9 This author has found references to one jury inquiry per decade since 1920.
10 34 & 35 Vict c22
11 RSC Ord64 r4(3)
12 [1987] IR 449
13 [1987] IR 449
14 [1987] IR 449 at p454
15 [1987] IR 449 at p455
16 [1987] IR 449 at p456
17 [1995] 2 ILRM 401
18 Sections 79, 80, 82
19 [1996] 2 IR 79
20 [1996] 2 IR 79
21 [1996] 2 IR 79 at p94
22 [1995] 2 ILRM 401 at p 428
23 [1996] 2 IR 79 at p99
24 [1995] 2 ILRM 401 at p429
25 [1995] 2 ILRM 401 at p463
26 *Airedale NHS Trust v Bland* [1993] 1 All ER 821
27 (1986) DLR (4th)1
28 Harris *Law and Practice in Lunacy* (1930)

TRADE MARKS INTERNATIONAL EXHAUSTION

Imelda Maher, *London School of Economics, analyses important recent case law on the application of the principle of international exhaustion, and EU competition law, to the parallel importation of trademarked goods*

Introduction

The judgements of the European Court of Justice (ECJ) in the *Silhouette*[1], *Sebago*[2] and *Javico*[3] cases have generated serious cause for concern for parallel traders and reaffirmed the right of a trade mark holder to prevent parallel imports of goods placed on the market outside the EEA[4] by excluding the principle of international exhaustion from the Trademark Directive[5] The judgements shed light on the extent to which concern about market integration still dominate the development of the law on intellectual property rights and the extent to which broader commercial considerations as to the nature of parallel imports have had little influence on the Court. As well as reviewing *Silhouette, Sebago* and *Javico* the judgement of Laddie J. in the English High Court case of *Zino Davidoff*[6] will also be analysed as it provides a powerful criticism of the approach of the ECJ from the perspective of the commercial lawyer. Finally the possibilities of reform as seen in the Commission recent working paper will also be outlined.

Silhouette

The case arises in the context of an ongoing debate as to parallel imports, also known as grey imports. These are goods placed on a market by the intellectual property holder which are imported into a national market other than through the authorised distributor network, usually to take advantage of price differentials between different national markets e.g. where a supermarket imports designer jeans and can sell them at a lower price. There is a debate as to whether such importers are free riders or free traders. Under classic economic theory parallel importers are seen as pro-competitive in their effects as they reduce price discrimination and encourage intra-brand competition. There is recent theoretical work however which suggests that some barriers against parallel importers may be justified in order to enhance global consumer welfare but there is no conclusive proof either way.[7]

The aim of the Trademark Directive was not to achieve full harmonisation of national trademark laws but simply to harmonise those provisions which most affected the functioning of the internal market. This means that even when implemented, the Directive still leaves some competence to national law. The issue in *Silhouette* was the extent to which national law retained discretion as to international exhaustion whereby the placing of goods on any market in the world exhausted the right of the trade mark holder.

"Under classic economic theory parallel importers are seen as pro-competitive in their effects as they reduce price discrimination and encourage intra-brand competition. There is recent theoretical work however which suggests that some barriers against parallel importers may be justified in order to enhance global consumer welfare but there is no conclusive proof either way."

Silhouette International is the trademark holder for "silhouette" - a mark for its designer spectacle frames. It sought to rely on the trademark to secure an injunction against Hartlauer, who sold cut-price spectacles in Austria and who had secured some out-of-date Silhouette stock which Silhouette had distributed for sale in the former Soviet bloc. Silhouette argued that it could rely on its trademark. It had not consented to the goods being sold within the EEA and therefore its trademark right was not exhausted.

Prior to the introduction of the trademark directive, Austrian law had recognised the principle of international exhaustion. It was not clear from the terms of the Directive whether national law could still apply this principle. Thus the Austrian Oberster Gerichtshof asked the ECJ inter alia in a preliminary reference whether the Directive precluded the application of the principle of international exhaustion by national law.[8]

Article 5 of the Directive defines the rights conferred and Article 7 governs the exhaustion of rights. Under Article 5, a trademark confers exclusive rights on the holder. The holder can rely on these rights to prevent any third party inter alia from importing or exporting goods under the sign without the consent of the holder. Article 7(1) states that "[T]he trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent." The Court applied both a literal and purposive interpretation to this provision. On a literal reading the Directive only excluded reliance on a trademark where the owner consented to the goods being placed on the EEA market. This interpretation was consistent with the scheme and purpose of the Directive which was designed to harmonise divergent national laws to the extent that they impeded the operation of the internal market. The imperative of the internal market required that trade marks had the same level of protection in each state save where the Directive expressly gave discretion to the states e.g. to provide additional protection for trade marks with a reputation.[9] If Member States could apply the doctrine of international exhaustion this would in the opinion of the Court create artificial barriers to the free movement of goods and services. As Advocate General Jacobs pointed out, if Austria was entitled to retain the doctrine then de facto international exhaustion would become the rule for all the Member States as any goods lawfully imported into one Member State is entitled to free movement throughout the EU. Given the language of the Directive itself is expressly limited to the Community (and EEA), if international exhaustion is to be introduced it should be, as the Court suggested, through reform of the Directive.

The Swedish government had argued strongly in favour of international exhaustion on conceptual and competition grounds. It noted that the function of a trademark is to allow the consumer guarantee the origin of the good.[10] It is not its function to allow the partition of the market on territorial lines which in turn would reduce price competition leading to higher prices in the EU thus disadvantaging consumers. While the Advocate General found these arguments attractive the integrity of the internal market was paramount. He also noted the protectionist nature of the ruling but suggested that commercial policy evaluations were not for the Court and there also existed a risk that Community traders could be disadvantaged by the unilateral adoption of international exhaustion. They would be subject to the threat of cheap imports while they would not be able to access lucrative markets outside the EEA.

There were two issues left outstanding after *Silhouette:* first, because the judgement was only concerned with goods placed on the market outside the EEA it did not address the question whether the placing of goods in the EEA market gave implied consent to parallel imports of the same goods from outside the EEA; and second, what is the relationship between the exhaustion doctrine and the EC competition rules.[11] Both questions have since been answered by the Court.

Sebago

In Sebago a manufacturer and exclusive distributor of American shoes with a Belgian trademark claimed breach of trademark against a retailer who sold genuine Sebago shoes purchased through a parallel importer. Sebago claimed it had not given its consent to the sale of those particular goods in the EC (the goods having been manufactured in El Salvador). The ECJ confirmed its ruling in *Silhouette* and went onto hold that given that the Directive only recognised exhaustion in the EEA and not world-wide exhaustion, consent for the importation of goods has to be express not implied otherwise the placing of goods on any market would mean they could be imported into the EEA. The holder must consent to individual items of the product being put on the market by giving its consent to each batch. The Directive itself is silent as to the nature of consent but the Court pointed to the reference to further commercialisation in Article 7(2) as implying that exhaustion only concerns specific goods which have been put on the market with consent. The fact exhaustion is limited by the Directive to Community and now EEA exhaustion also supported this viewpoint. The Court also examined the purpose of the Directive noting that the trade mark would be devoid of substance if all that was required was implied consent. In reaching this conclusion it rejected the argument of the retailer that the essential function of a trademark is to guarantee the origin of the goods and that function does not include the right to prevent the importation of genuine goods.

"The question of whether or not the principle of Community exhaustion was consistent with the EC competitio rules was answered implicitly in the *Javico* case."

Javico

The question of whether or not the principle of Community exhaustion was consistent with the EC competition rules was answered implicitly in the *Javico* case. Javico was the authorised distributor of Yves Saint Laurent (YSL) products in Russia, the Ukraine and Slovenia. The distribution contract required Javico to sell only in those territories and YSL sued Javico for breach of contract and damages in the French courts when products sold to Javico found their way back to the Community market. Javico raised Article 81(1) as a defence arguing that the contract was void because it was a restrictive agreement. On a preliminary reference the ECJ held that the clauses in the distribution agreement limiting sales to certain territories and prohibiting sales outside them, did not per se fall within Article 81(1) i.e. by their very nature the agreements did not have as

their object the prevention, restriction or distortion of competition within the common market. Thus the court reached a different conclusion to Advocate General Tesauro who saw the agreement as having an anticompetitive purpose especially as the penalty clauses in the contract only applied to goods resold in the EC, and not to goods resold in other eastern European countries. In his view this implied that the object of the agreement was to restrict competition within the EC. The Court on the other hand held that such territorial clauses in distribution agreements outside the EC facilitated market penetration by guaranteeing sufficient quantities of the products to those markets. The agreement was not per se restrictive of competition and the question of whether or not it had as its effect the restriction of competition was for the national court to decide having regard to the legal and economic context of the agreement. Even though this question was for the national courts, the ECJ did go on to provide some guidance. The presence of an oligopolistic market with price differentials between different territories (excluding duty and transport costs), would point towards an effect on competition. Even if there is such an effect, Article 81(1) is only breached if there is an appreciable effect on inter-state trade. There would be no such impact on inter-state trade where goods resold into the EC only accounted for a very small percentage of the total EC market. The position of the supplier on this market would be an important factor in determining the impact on inter-state trade. The more important the supplier to the market, the more likely there was to be an effect. Unlike the Court, the Advocate General did not leave much discretion to the national court in deciding whether or not there was an appreciable effect on inter-state trade. He noted that a "large volume" of Javico's goods were to be found in three Member States implying that there were considerable price differentials between Member States as there was a clear advantage to parallel imports of YSL products. The implication of the judgement is that a distribution agreement that prohibits resale of goods within the Community (or EEA where relevant) is not automatically contrary to Article 81(1). Even if there is an appreciable effect on competition established by reference to market structure (in particular the number of players in the market), and price differentials there must also be an appreciable effect on inter-state trade which would require the parallel imports to constitute more than a small percentage of the overall EC market. Thus a trade mark holder will be able to rely on its trademark to preclude the importation of parallel imports which it has not expressly agreed to being placed on the EC market in many instances without infringing the EC competition rules. Fortress Europe is further re-enforced by the judgement.

"In *Zino Davidoff* Laddie J. offered a brilliant critique of the Community exhaustion rules as articulated in *Silhouette*."

Zino Davidoff

In *Zino Davidoff* Laddie J. offered a brilliant critique of the Community exhaustion rules as articulated in *Silhouette*. The case which culminated in a preliminary reference to the ECJ, arose before the *Sebago* judgement and concerned the same question of the nature of consent. Laddie J. emphasised that the function of the trade mark is to prevent consumer confusion by guaranteeing origin. Where there are parallel imports, there is no confusion as the goods are genuine thus in his view *Silhouette* should be given the narrowest of interpretations. Otherwise the case confers a parasitic right on the trade mark holder to interfere in the distribution of goods which has little or no relationship to the essential function of the trade mark and "[I]t is difficult to believe that a properly informed legislature intended such a result, even if it is the proper construction of art 7(1) of the directive."[12] Unsurprisingly, he went onto hold that consent could be implied when a trade mark holder had agreed directly or otherwise to entry to the EEA or give the goods to a third party without imposing restrictions as to onward sales, before referring the case to the ECJ.

Reform

The trio of cases - *Silhouette, Sebago* and *Javico* have generated considerable controversy.[13] The issue of international exhaustion has been discussed by the EC Internal Market Council of Ministers who requested a working paper on the issue from the Commission in June last year.[14] In this working paper which in turn follows a commissioned Report on the economic consequences of an exhaustion regime in the EEA,[15] the Commission puts forward the options of change to the existing law on exhaustion of trade mark rights. There are four main options:

1. Changing the law in relation to trademarks

The issue here is whether to introduce change at either the EC or national level or whether to change the law in relation to both systems. The Commission, echoing the *Silhouette* judgement, argues that consistency is important between EC and national law in order to avoid confusion. It also notes that as it is small businesses who predominately use national law while large companies have recourse to the supranational EC rules, it would place these companies on a more equal footing if the two sets of rules were consistent.

2. Differentiation between property rights

The issue here is whether the law on exhaustion only needs to be changed for trademarks or whether change is needed also for other intellectual property rights such as patents and copyright. Many products contain a basket of intellectual property rights e.g. in relation to a music CD the music may be subject to copyright; the technology to a patent and the label may be trademarked. This means that if only the law on trademarks is addressed then other intellectual property rights could be relied on to prevent importation. Very few products only have trademarks e.g. clothing. At the same time, the function of a trademark is to protect origin while other property rights reward innovation and creativity so there may be a stronger argument for retaining Community exhaustion for those rights in order to provide a better incentive for such innovation.

3. Differentiation of exhaustion by sector

Given that trademarks are more important in some sectors (e.g. clothing and perfume), legislation could be drawn up containing either an inclusive (international exhaustion would apply to the products listed) or exclusive (international

exhaustion would be excluded for specific products) list. The main difficulty here would be to identify and define particular sectors. The list would have to be subject to revision and there would be resource implications for the Commission which would have to monitor the list.

4. International agreement

If the EC were to unilaterally introduce international exhaustion this could place EC trademark holders at a disadvantage in relation to other countries e.g. the United States. To avoid such disadvantages, the EC could enter into bilateral agreements with countries carefully chosen in order to avoid unbalanced competition e.g. on the basis of their level of intellectual property protection, market conditions, pricing and possibly their GNP. The difficulty with such agreements is that they may fall foul of the TRIPS rules, in particular the most favoured nation clause which requires states to apply the same trade conditions to all states as that which it applies to the state which it most favours in its international trade. This implies that multilateral agreements would be the most appropriate but the whole issue of international exhaustion was not included in TRIPS as it was deemed too delicate. Thus while international agreement might be the most desirable, it is likely to take a long time to negotiate leaving a regulatory vacuum in the meantime.

The arguments in favour of the current EC regime of exhaustion in the EEA only is that return on investment by the trade mark holder is higher thus improving the range and quality of products. If ensures that EC companies are not placed at a disadvantage vis a vis those countries which do not have international exhaustion. There is some evidence of consumer confusion with parallel imports and even if there is change, trade mark holders will use other methods to protect their markets e.g. selective distribution agreements, bar coding to trace the distribution of goods so as to detect distributors who sell to parallel importers, and licensing.

On the other hand the current system has a number of disadvantages: prices are probably higher than they would be if there was international exhaustion - the only reason there are such parallel imports is that the importers are exploiting price differentials. Inter-brand competition would be increased. It is conceptually confusing that trade marks, which are designed to guarantee origin, should be used to segment markets. Countries with international exhaustion do not seem to have problems e.g. with after sales services or guarantees.

The Commission is conducting wide consultation having held meetings with Member State representatives and with interested parties in advance of publication of the working paper. It has not yet put forward any suggested reform of the Directive and in fact, the working paper is notable for the absence of a clear indication of Commission preference in relation to some of the options discussed.

Conclusion

What is clear from the discussion of reform, is that the priority given to integration of the market by the ECJ has simply shifted the focus to the political domain where that integration concern is no longer to the forefront as interested trademark holders and parallel importers seek to persuade their national governments and the Commission as to how best to change the law. This is not to suggest that the ECJ arrived at the wrong conclusion in *Silhouette* - earlier drafts of the Directive had referred to international exhaustion but these were later removed - and there is a clear reference to Community exhaustion only in the final version. The imperative of the internal market shaped the jurisprudence of the Court on intellectual property rights generally long before harmonisation measures emerged. Thus on an historical and literal basis, there was very limited room for manoeuvre for the Court. Where it did have greater discretion was in the *Sebago* case given that consent is not clarified within the directive. If Sebago had gone the other way, as Laddie J. so keenly argues in *Zino Davidoff,* then the conceptual consistency surrounding the function of trademarks could have been retained. What these cases highlight for us is the overwhelming importance of the logic of the internal market for the ECJ. ●

1 C-355/96 *Silhouette International v. Hartlauer* [1998] 2 CMLR 593
2 C-173/98 *Sebago Inc. v. Ancienne Maison Dubois et fils* unreported 1 July 1999, *Times,* March 26, 1999, 30.
3 C-306/96 *Javico International v. Yves Saint Laurent Perfums* [1998] ECR I-1983; [1998] 5 CMLR 172.
4 The Trademark Directive was incorporated into EEA law see the EEA Agreement [1994] OJ L1/3.
5 [1989] OJ L40/1.
6 *Zino Davidoff SA v. A&G Imports Ltd.* [1999] 3 All ER 711
7 A. Clark, Editorial (1999) 21 EIPR 1.
8 Article 234 EC (formerly Article 177).
9 Article 5(2) of the Directive.
10 See 102/77 *Hoffman La Roche v. Centrafarm* [1978] ECR 1139 at para. 7.
11 For an outline of the relationship between EC competition law and intellectual property rights see I. Maher, *Competition Law: Alignment and Reform* (Round Hall Sweet & Maxwell, Dublin, 1999), ch. 9.
12 [1999] 3 All ER 711 at 724.
13 See e.g. W. Cornish, *'Trade Marks: Portcullis for the EEA?'* (1998) EIPR 172; W. Alexander, *'Exhaustion of Trade Mark Rights in the EEA'* (1997) 24 ELRev 58; N. Shea, *'Parallel Importers Use of Trade marks'* (1997) EIPR 43.
14 Commission Staff Working Paper Exhaustion of Trade Mark Rights 9 December 1999 available at http://europa.eu.int/comm/dg15/en/intprop/indprop/exhaust.htm
15 NERA, The Economic Consequences of the Choice of a Regime of Exhaustion in the Area of Trademarks Final Report for DGXV 8 February 1999, London.

Legal Update

The Bar Review
Journal of the Bar of Ireland. Volume 5, Issue 5

A directory of legislation, articles and written judgments from 11th January 2000 to 9th February 2000.

Judgment information compiled by the Legal Researchers, Judges Library, Four Courts.

Edited by Desmond Mulhere, Law Library, Four Courts.

Administrative Law

Aziz v. Midland Health Board
Supreme Court: Keane J., Murphy J., Barron J.
29/10/99

Judicial review; *certiorari;* employment; dismissal; declaration; *audi alteram partem;* plaintiff failed to attend for duty; conflict between plaintiff and senior as to reason for failure to attend; defendant met with senior in absence of plaintiff before arriving at decision to dismiss plaintiff; whether plaintiff denied natural justice and fair procedures by defendant in considering alleged misconduct; whether fact that there was ample evidence to justify dismissal absolved defendants from adhering to fair procedures.
Held: Appeal allowed; judicial review is concerned with the decision-making process not the decision.

Statutory Instrument

Electoral Act, 1992 (Section 165) Regulations, 1999
S.I. 153/1999

Electoral Act, 1997 (Section 33) Order, 1999
S.I. 121/1999

Agency

Article

Agency workers
O'Brien, Pat
12 (1999) ITR 491

Agriculture

Statutory Instruments

European Communities (Pesticide Residues) (Products of Plant Origin, Including Fruit and Vegetables) Regulations, 1999
S.I. 179/1999

European Communities (Pesticide Residues) (Foodstuffs of Animal Origin) Regulations, 1999
S.I. 180/1999

European Communities (Pesticide Residues)(Cereals) Regulations, 1999
S.I. 181/1999

Aliens

Statutory Instrument

Immigration Act, 1999 (Deportation) Regulations, 1999
S.I. 319/1999

Animals

Statutory Instrument

European Communities (Conservation of Wild Birds) (Amendment) Regulations, 1999
S.I. 131/1999

European Communities (Supply of Information on the Origin, Identification and Destination of Bovine Animals) Regulations, 1999
S.I. 258/1999

Greyhound Industry Act, 1958 (Section 32(1)(B)(Ii)) (Commencement) Order, 1999
S.I. 212/1999

Arbitration

Library Acquisition

Cato, D Mark
So you really want to be an arbitrator?
London LLP 1999
N398.1

Bankruptcy

N.C., In re
High Court: **Laffoy J.**
26/11/99

Bankruptcy; court had ordered that property of the arranging debtor be protected from any action until further order, pursuant to Bankruptcy Act 1988; creditors met and accepted proposal of the arranging debtor; whether court should approve the proposal of arranging debtor; whether debt had arisen or had been contributed to by fraudulent conduct on part of arranging debtor; whether arranging debtor should be subject to restriction order under s. 150 or a disqualification order under s. 160 of the Company's Act 1990.
Held: Proposal of arranging debtor approved; disqualification order made under s. 160 for period of five years.

Civil Liberties

Article

Freedom of information act - success stories to date

Fennell, David
12 (1999) ITR 524

Statutory Instruments

Freedom of Information Act, 1997 (First Schedule) (Amendment) Regulations, 1999
SI 209/1999

Freedom of Information Act, 1997 (Prescribed Bodies) Regulations, 1999
S.I. 329/1999

Commercial Law

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Clarke, Blanaid
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Dublin Round Hall Sweet & Maxwell 1999
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2nd ed
London Sweet & Maxwell 1998
N300

Singleton, Susan
Commercial agency agreements: law and practice
London Butterworths 1998
Precedents available on disk at the Information Desk, Distillery Library
N250

Company Law

Articles

Irish non resident companies under tax treaties
Kilcullen, John
12 (1999) ITR 529

Remuneration and the private company executive
Twomey, Kieran
12(1999) ITR 138

Two recent cases on management expenses
MacLeod, James S
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Taxation of companies and company reconstructions
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Dublin Round Hall Sweet & Maxwell 1999
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Companies (Fees) Order, 1999
SI 232/1999

Competition

Article

The United Kingdom's competition act 1998
McCarthy, Niamh
1999 ILTR 246

Library Acquisition

Maher, Imelda
Competition law alignment and reform
Dublin Round Hall Sweet & Maxwell 1999
N266.C5

Statutory Instrument

Competition Authority (Witness Summons) Regulations, 1999
SI 137/1999

Contract

Article

Insurance contracts - the duty to disclose: is it of a continuing nature?
O'Regan Cazabon, Attracta
3 (1999) IILR 68

Coroner

Morris v. Dublin City Coroner
High Court: **Kinlen J.**
08/10/1999

Coroner; judicial review; statutory interpretation; members of Garda Síochána to testify at coroner's inquest; threats made to personal security of witnesses; respondent ruled that gardaí could give evidence anonymously, that they could be screened form public view and that the identity of the garda gun could be deleted from forensic report; applicant seeks orders of certiorari; whether respondent acted ultra vires his jurisdiction; ss. 28, 29, 30 and 56, Coroners Act, 1962.
Held: Orders of certiorari granted.

Criminal Law

Lynch v. D.P.P.
Supreme Court: Barrington J., Murphy J., **Lynch J.**
10/06/1999

Criminal; delay in bringing prosecution; judicial review; allegation of appellant's involvement in commission of offence made by accomplice to Gardaí 15 months after commission of offence; accomplice had been convicted and sentenced; respondent had decided not to prosecute appellant until accomplice had fulfilled the immediate requirements of his sentence; appellant declined when in prison in connection with other offences to be interviewed by Gardaí; delay of 31/2 years between date of alleged offence and appellant first being accused of it; appellant claims his memory of events is gravely diminished; appellant applied for judicial review of respondent's decision to prosecute him; High Court refused order restraining respondent from prosecuting appellant; appeal; whether delay was sufficient to prohibit prosecution; whether, in light of alleged retraction by accomplice of his statements implicating appellant, respondent was correct in taking time to weigh up reliability of accomplice.
Held: Appeal dismissed.

Corway v. Independent Newspapers (Ireland) Ltd.
Supreme Court: Hamilton C.J., **Barrington J.**, Murphy J., Lynch J., Barron J.
30/07/1999

Criminal; blasphemy; appeal against refusal of leave to institute criminal prosecution for blasphemy against respondent; respondents published in national newspaper, beside an article on divorce referendum, a cartoon depicting caricature of priest holding a chalice and offering the host to three politicians who appear to be waving goodbye; the caption read "Hello progress - bye bye Father"; High Court refused leave to institute criminal prosecution for blasphemy against respondent pursuant to s.8, Defamation Act, 1961; appeal, whether, given reference to offence of blasphemy in the Constitution, blasphemy is offence known to Irish law; whether actus reus or mens rea necessary for offence of blasphemy are clear; whether task of defining crime of blasphemy is one for the legislature; whether facts complained of amount to crime of blasphemy; whether s.13(1), Defamation Act, 1961

applies to offence of blasphemy.
Held: Appeal dismissed; blasphemy is an offence known to Irish law; in absence of legislative definition of offence of blasphemy it is impossible to state of what offence consists; no jury could reasonably conclude that insult to Blessed Sacrament existed or was intended to exist.

Statutory Instrument

Misuse of Drugs (Amendment No.1) Regulations, 1999
S.I. 273/1999

Damages

M O'N v. Minister for Health and Children
High Court: **O'Neill J.**
19/10/99

Assessment of damages; compensation for victims infected with hepatitis C through contaminated blood products; appeal from award of former non-statutory tribunal; s. 6(3)(e) Hepatitis C Compensation Tribunal Act, 1997.
Held: Significantly higher level of compensation awarded.

Troute v. Brassil
High Court: **O'Neill J.**
19/11/99

Assessment of damages; medical negligence; plaintiff permanently and totally mentally and physically incapacitated; liability conceded.
Held: Special and general damages of £1,180,311 awarded.

O'Donohue v. W. Deecan & Sons Ltd
Supreme Court: **Keane J.**, Murphy J., Lynch J. (ex tempore)
19/07/1999
Assessment of damages; plaintiff had been injured injured at work as a result of the negligence of the defendant, his employer; plaintiff developed phobia in relation to his pre-accident work; High Court awarded damages for pain and suffering in the future primarily on the basis of evidence given by the plaintiff's general practitioner and a vocational careers counsellor, rather than on the basis of the psychiatric evidence; whether High Court correct to do so.
Held: Critical question was plaintiff's capacity for work; answer depends largely on the psychiatric evidence; given the lack of clarity in the assessment of damages by the High Court, there should be a retrial on the assessment of damages; appeal allowed.

Article

Damages in a personal injury action
Waldron, Denise
3 (1999) IILR 64

Library Acquisition

Pierse, Robert
Quantum of damages for personal injuries 1999
2nd ed
Dublin Round Hall Sweet & Maxwell 1999
N37.1.C5

Employment

Aziz v. Midland Health Board
Supreme Court: Keane J., Murphy J., Barron J.
29/10/99

Employment; dismissal; judicial review; certiorari; declaration; audi alteram partem; plaintiff failed to attend for duty; conflict between plaintiff and senior as to reason for failure to attend; defendant met with senior in absence of plaintiff before arriving at decision to dismiss plaintiff; whether plaintiff denied natural justice and fair procedures by defendant in considering alleged misconduct; whether fact that there was ample evidence to justify dismissal absolved defendants from adhering to fair procedures.
Held: Appeal allowed; judicial review is concerned with the decision-making process not the decision.

Articles

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12 (1999) ITR 491

Minimum notice: Bolands v. Ward reconsidered
O'Sullivan, Donal
5(1) 1999 BR 20

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Employment Regulation Order (Aerated Waters and Wholesale Bottling Joint Labour Committee), 1999
S.I. 261/1999

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SI 152/1999

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SI 236/1999

European Union

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S.I. 215/1999

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S.I. 238/1999

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S.I. 179/1999

European Communities (Pesticide Residues) (Foodstuffs of Animal Origin) Regulations, 1999
S.I. 180/1999

European Communities (Pesticide Residues) (Cereals) Regulations, 1999
S.I. 181/1999

European Communities (Protective Measures with Regards to Contamination by Dioxins in Belgian Foodstuffs) Regulations, 1999
S.I. 172/1999

European Communities (Protection of Topographies of Semiconductor Products) (Amendment) Regulations, 1999
S.I. 113/1999

European Communities (Supply of Information on the Origin, Identification and Destination of Bovine Animals) Regulations, 1999
S.I. 258/1999

European Parliament Election (Reimbursement of Expenses) Regulations, 1999
S.I. 122/1999

Family Law

O'F. v. O'F.
High Court: **Budd J.**
06/05/1999

Extension of time to appeal; order of the Circuit Court refusing second assessment of dependent child of parties; respondent wife unhappy with certain aspects of first report; respondent had immediately formed *bona fide* intention to appeal; in error, notice of appeal not lodged; fourth factor mentioned in *_ire Continental Trading Co. Ltd v. Clonmel Foods Ltd* [1955] I.R. 170, i.e. other circumstances; whether there should be a extension of time to appeal; whether the overall equity favours an extension of time; s.47, Family Law Act, 1995.
Held: One of the purposes of s.47 is to reduce intrusion caused by one or more similar expert interviewing and reporting on the child; further report would cause unnecessary delay; Circuit Court judge can deal with the matter more fully at the hearing; application refused.

P. v. P.
High Court: **McCracken J.**
14/12/99

Judicial separation; maintenance; Judicial Separation and Family Law Reform Act, 1989; Family Law Act, 1995; whether applicant entitled to lump sum; whether applicant entitled to periodic payments.
Held: Respondent ordered to pay lump sum payment and periodic maintenance payments.

W. v. W.
Supreme Court: **Denham J.**, Barrington J., **Barron J.**
25/11/99

Family; judicial separation; appeal from order of High Court refusing to transfer case from High Court in Dublin to Circuit Court in Cork; jurisdiction of courts concurrent; whether refusal to exercise discretion was in interests of justice; whether delay may be factor for consideration by judge in exercise of his discretion in considering the interests of justice; O. 70A, Rules of the Superior Courts.
Held: Appeal dismissed.

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Bass (Restriction on Sale) Order, 1999
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Bass Fishing Conservation Bye-Law No. 758 Of 1999
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Cod (Restriction On Fishing) (No. 4) Order, 1999
SI 151/1999

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Common Sole (Restriction on Fishing in the Irish Sea) Order, 1999
SI 148/1999

Crawfish (Conservation of Stocks) Order, 1999
SI 244/1999

Horse Mackerel (Restriction on Fishing) Order, 1999
SI 147/1999

Horse Mackerel (Restriction on Fishing) (Revocation) Order, 1999
SI 242/1999

Monkfish (Restriction on Fishing) (No.5) Order, 1999
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S.I. 225/1999

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S.I. 211/1999

Irish Horseracing Industry Act, 1994 (Section 54(1)(B)(Ii)) (Commencement) Order, 1995
S.I. 268/1999

Garda Síochána

Flood v. Garda Síochána Complaints Board
Supreme Court: Hamilton C.J., Barrington J., Keane J., Murphy J., **Barron J.**
19/07/1999

Garda Síochána; complaints procedure; fair procedures; natural justice; duty to give reasons; appellant had alleged assault by member of Garda Síochána; appellant arrested; appellant released without charge; summons had issued charging appellant with use of threatening or abusing or insulting words or behaviour with intent to provoke breach of the peace; summons had been struck out; appellant made complaint to respondent pursuant to Garda Síochána (Complaints) Act, 1986; Chief Executive of respondent found complainant to be admissible and investigating officer appointed; respondent referred the matter to the Director of Public Prosecutions; Director decided not to prosecute; respondent decided not to take further action; judicial review of decision not to take further action refused; appeal; whether appellant should have been afforded opportunity to make representations before respondent formed its opinion; whether appellant should have received from respondent materials upon which it based its opinion; whether respondent should have given appellant reasons for its decision; whether respondent failed to consider matter afresh after Director made decision not to prosecute; whether respondent was merely forming opinion as to whether investigation should proceed to a further stage.
Held: Appeal dismissed; function of respondent is to ensure that there is a case to be met, not to make a decision; if there is

a case to be met respondent must refer matter to the Director; respondent having decided that there was no case to meet in relation to breach of discipline was entitled to take no further action; reason given by respondent to appellant is sufficient; decision of respondent was bona fide, sustainable and not unreasonable.

Housing

Statutory Instruments

District Court (Housing (Miscellaneous Provisions) Act, 1997) Rules, 1999
S.I. 217/1999

Housing (Sale of Houses) (Amendment) Regulations, 1999
S.I. 248/1999

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Local Government

Brady v. Cavan County Council
Supreme Court: Hamilton C.J., Denham J., Barrington J., **Keane J., Murphy J.***
(* dissenting)
17/06/1999

Local Government; non-compliance with statutory duty; respondent failed to maintain particular public road in 'good condition and repair' as required to do by s.82, Local Government (Ireland) Act, 1898; respondent did not have resources necessary to fulfil its statutory duty in relation to six hundred roads of similar condition within the county; High Court granted order of mandamus compelling respondent to undertake repair of road in issue; appeal; government or minister not party to proceedings; whether grant of order of mandamus would be futile since an order would fail to secure compliance by respondent with its statutory duty in relation to the rest of the road network in the county; whether trial judge erred in exercising her discretion to grant order of mandamus; whether court should refuse to grant order of mandamus where respondent does not have means to comply with order and where its successful implementation depends on co-operation of bodies not before the court.
Held: Appeal allowed.

Statutory Instruments

Local Government (Major Offices) Order, 1999
S.I. 190/1999
Revokes S.I. 170/1952

Local Government (Reorganisation) Act, 1985 Section 27 (Specified Bodies) Regulations, 1999
S.I. 165/1999

Local Government Act, 1994 (Commencement) Order, 1999
S.I. 128/1999

Local Government Act, 1994 (Local Authority Meetings) (Interim) Regulations, 1999
S.I. 129/1999

Medical Law

Statutory Instrument

Medicinal Products (Prescription and Control of Supply) (Amendment) Regulations, 1999
S.I. 271/1999

Negligence

McMullen v. Clancy
High Court: **McGuinness J.**
03/09/1999

Negligence; settlement; right to sue counsel; privilege; defendant retained by plaintiff's solicitors as counsel in action for nuisance; defendant consulted with plaintiff directly; nuisance action settled; significance of term "liberty to apply" used in settlement not explained to plaintiff; distinction between "liberty to apply" and "liberty to re-enter" not explained to plaintiff; defendant gave evidence for defence in plaintiff's negligence action against plaintiff's former solicitors; High Court dismissed plaintiff's claim; Supreme Court dismissed appeal; plaintiff complained to Barristers' Professional Conduct Tribunal; defendant held to be in breach of number of articles of Code of Conduct of the Bar of Ireland; Barristers' Professional Conduct Appeals Board upheld decision; whether fiduciary relationship existed between plaintiff and defendant; whether defendant by giving evidence for defence in plaintiff's negligence action against solicitors breached his duty of confidentiality to plaintiff; whether defendant gave untrue evidence at hearing of negligence action; whether defendant acted negligently in failing to advise plaintiff properly of nature of settlement and in encouraging plaintiff to bring re-entry proceedings; whether plaintiff had a realistic chance of success in nuisance action; whether claims of negligence are statute barred.
Held: Claim dismissed; defendant did not engage in a deliberate campaign of lies; a witness is immune from suit in regard to the evidence which he gives in court; defendant should have raised privilege; plaintiff did not suffer loss as a result of negligent advice since plaintiff's claim had no realistic chance of success; fiduciary relationship did not exist between plaintiff and defendant.

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Planning

Murphy v. Wicklow County Council
High Court: **Kearns J.**
19/03/1999

Judicial review; *locus standi;* environmental impact statement (EIS); consent of Ministers for Finance and Agriculture to acquisition of state land designated a nature reserve; compulsory purchase procedure; rights of way; *ius spatiendi*; charitable trust; applicant seeks to judicially review decision of respondent to widen public road running through the Glen of the Downs; whether the applicant has locus *standi*; whether the application has merit; whether there was delay in challenging the EIS; whether the applicant has *locus standi* to ground his application in relation to the EIS; whether the applicant can challenge the EIS certified by the Minister for the Environment in an application against the respondent; whether the EIS provided adequate material on which the Minister could decide to certify; whether an entirely new EIS was a reasonable requirement; whether there was consent from the Minister for Finance; whether the respondent had a licence to enter on State lands to commence development; whether amendment of S.I. 178 of 1980, designating the area as a nature reserve, is a precondition to development; whether compulsory purchase procedures are applicable to State lands; whether public rights of way exist in the area; whether the public have a *ius spatiendi;* whether a charitable trust may be presumed to have been created; Wildlife Act, 1976.
Held: Declaratory relief granted in relation to two grounds; there is a requirement of consent for the sale and transfer of State lands and development of State lands and the compulsory purchase procedures are not applicable to State lands. Relief refused on the other grounds.

Keelgrove Properties Limited v. An Bord Pleanala
High Court: **Quirke J.**
27/08/1999
Planning; judicial review; statutory interpretation; determination of preliminary issue as to when leave to apply for judicial review was sought by applicant; applicant seeks order of *certiorari* to quash decision of respondent dismissing applicant's appeal against an earlier decision of Dublin Corporation; whether application for leave to seek judicial review was "made" within period of two months commencing on date upon which decision by respondent was "given"; whether date upon which a decision is "given" is the date upon which parties affected by the decision have been notified of it; s.(3B)(a) of s.82, Local Government (Planning and Development) Act, 1963, as inserted by Local Government (Planning and Development) Act, 1976, and amended by s.19, Local Government (Planning and Development) Act, 1992.
Held: Construing the words in their "ordinary and natural sense", the date upon which a planning decision is "given" within the meaning of s.(3B)(a) of s.82, is the date stated upon the Order which gives effect to the decision unless the contrary can be proved; application for leave to apply for judicial review not served within statutory period of two months from the date when decision was "given"; applicant barred from bringing judicial review proceedings.

Practice & Procedure

McCabe v. Ireland
Supreme Court: Hamilton C.J., Lynch J., Barron J.
07/07/1999

Preliminary issue; negligence; duty of care; statutory duty; appellant assaulted by person on temporary release from prison; High Court had ordered that preliminary issue be tried as to whether respondents owed appellant a duty of care in determining whether to cause or permit a person to be released from prison on temporary release or in imposing conditions on such temporary release; whether, without prejudice to right to contest the facts if determination of preliminary issue should not dispose of matter, preliminary issue is to be tried on basis that averments in appellant's statement of claim are true including allegations of want of care on part of respondents; whether discovery of documents to be dealt with by High Court judge trying preliminary issue.
Held: Appeal dismissed.

McCarthy v. McNulty
Supreme Court: Denham J., Murphy J., Lynch J.
22/10/1999

Practice and procedure; appeal against order of High Court granting leave to amend defence to include counterclaim against appellant; whether convenience of appellant would be seriously embarrassed by counterclaim; whether counterclaim would be unjust to appellant; O. 19, r. 12 and O. 21, r. 14, Rules of the Superior Courts.
Held: Appeal dismissed.

B.V. Kennemerland Groep v. Montgomery
High Court: Geoghegan J.
10/12/1999

Practice and procedure; proceedings brought in name of wrong plaintiff due to bona fide error; application to change name of plaintiff; whether application is statute barred; O. 15, r. 12, Rules of the Superior Courts.
Held: Order granted; there may be answers to the Statute of Limitations defence; if defendants plead the Statute of Limitations the other issues can then be tried.

O'Leary v. The Minister For Transport, Energy and Communications
High Court: **Kelly J.**
26/11/1999

Practice and procedure; judicial review; applicant seeks leave to introduce new claim into statement of claim; whether amendment is necessary for the purpose of determining the real questions in controversy between the parties; O. 28, r. 1, Rules of the Superior Courts.
Held: Application refused.

Collins v. BusÁtha Cliath
Supreme Court: Denham **J., Murphy** J., Lynch J.
22/10/1999

Delay; action arose from alleged accident in May, 1985; High Court ordered that the action be dismissed for want of prosecution; whether High Court correct to dismiss action for want of prosecution; whether defendant prejudiced in defence of the proceedings; whether defendant's failure to seek to have proceedings struck out for want of prosecution earlier could be taken into account.
Held: Form of High Court order incorrect; defendant prejudiced; very little weight attached to failure to have proceedings struck out for want of prosecution; appeal dismissed but terms of High Court order rectified to dismiss action for inordinate and inexcusable delay on the part of the plaintiff to the prejudice of the defendant.

Howberry Lane Limited v. Telecom Éireann
High Court: **Morris P.**
06/05/1999

Interlocutory injunction; fair question to be determined at trial of action; balance of convenience; first and second named defendants proposed to sell a company, Cablelink Ltd, all of the shares of which they owned; first and second named defendants retained a bank to act for them in the sale; the bank instituted a tender process; final bids were invited from inter alia the plaintiff and the third named defendant; final bids were required to be in a specific monetary amount; third named defendant bid 15% more than the highest bid, which was submitted by the plaintiff; the bank then invited revised bids, informing plaintiff of the amount of the third named defendant's bid, as calculated in accordance with the formula; third named defendants bid a higher amount than plaintiff's revised bid; plaintiff seeking injunction restraining first and second named defendants from selling company to third named defendant; whether there was an implied term in the contract which would require vendor to complete transaction with the highest bidder; whether plaintiff made out a fair question to be tried that it was entitled to an order directing first and second named defendants to sell Cablelink Ltd to it; whether balance of convenience favoured restraining first and second named defendants from selling Cablelink Ltd to third named defendant.
Held: Terms of the bid documentation excluded the possibility that the first and second named defendants could be bound to sell Cablelink Ltd to any bidder; plaintiff failed to establish a fair question to be tried; although loss of acquisition of Cablelink Ltd would be a great loss to plaintiff, restraining sale to third named defendant would be no less a loss because first and second named defendants likely to seek alternative buyer during the currency of the injunction; injunction refused.

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Property

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Road Traffic

D.P.P. v. O'Connor
Supreme Court: Hamilton C.J., (O'Flaherty J.*), Denham J., **Barrington J.,** Keane J.
(Parties accepted decision of four members of the Court)
17/11/1999

Road traffic; compulsory motor vehicle insurance; appeal from High Court; garda demanded production of certificate of insurance or of exemption from accused in relation to the use by him of a U.K. registered van in a public place; no such certificate was produced; whether garda precluded from demanding such a certificate in relation to a vehicle deemed to be based in another member state of the E.U.; whether point of law involved required a reference to the European Court of Justice for a preliminary ruling; art.2, Council Directive 72/166/EEC; art.1, Commission Decision of 6th February, 1974; ss.69(1)(a) and 69A (as inserted by art.6, European Communities (Road Traffic) (Compulsory Insurance) Regulations, 1975 (S.I. no. 178 of 1975)), Road Traffic Act, 1961.
Held: Purpose of Directive 72/166/EEC was to place foreign registered cars and their drivers in the same position as domestically registered cars and their drivers; directive did not trench on the police power of the State; garda's demand was permissible provided it was made in the course of a random check or routine investigation of a suspected offence relating to the use of the motor vehicle; appeal dismissed.

O'Friel v. D.P.P.
Supreme Court: **Barrington J.**, Lynch J., Barron J.
30/07/1999

Drink driving; appeal by way of case stated; appellant found by garda in driver's seat of car on side of road with engine running; appellant drunk; garda had passed that location on side of road an hour earlier and vehicle had not been there; district judge stated case to Supreme Court as to whether appellant whilst asleep in motor car with engine running was driving the vehicle within meaning of s.49(3), Road Traffic Act, 1961 as inserted by s.10, Road Traffic Act, 1994; whether case stated to be remitted to district judge for amendment to enable district judge to set out facts and inferences from fact on basis of which he convicted the accused; s.7, Summary Jurisdiction Act, 1857.
Held: Case stated remitted.

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Social Welfare

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SI 91/1999

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SI 138/1999

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SI 139/1999

Social Welfare (Consolidated Contribution And Insurability) Regulations, 1996 To 1999
SI 140/1999

Social Welfare Act, 1997 (Section 29) (Commencement) Order, 1999
SI 141/1999

Social Welfare Act, 1998 (Section 24) (Commencement) Order, 1999
SI 142/1999

Social Welfare Act, 1999 (Section 11) (Commencement) Order, 1999
SI 160/1999

Social Welfare (Consolidated Payments Provisions) (Amendment) (No.3) (Re Spite Care Grant) Regulations, 1999
SI 161/1999

Social Welfare (Rent Allowance) Regulations , 1998
SI 162/1999

Social Welfare (Occupational Injuries) (Amendment) Regulations, 1999
S.I. 163/1999

Social Welfare (Consolidated Payments Provisions) (Amendment) (No.2) (Increase In Rates) Regulations, 1999
SI 164/1999

Social Welfare (Consolidated Contributions And Insurability) (Amendment) (No.3) (Refunds) Regulations, 1999
SI 176/1999

Sports

Statutory Instrument

Irish Sports Council Act, 1999 (Establishment Day) Order, 1999
SI 173/1999

Taxation

Transport Museum Society of Ireland Limited v. Registrar of Friendly Societies
High Court: **Geoghegan J.**
05/10/1999

Statutory interpretation; rates; respondent refused to grant applicant certificate pursuant to s.1, Scientific Societies Act, 1843 exempting applicant from obligation to pay rates on one of its premises on basis that applicant was not instituted for the purposes of science, literature or the fine arts exclusively; appeal to Circuit Court; decision of respondent reversed; appeal to High Court by respondent; whether reference to educational purposes in addition to scientific and literary purposes in Memorandum of Association of appellant removes appellant from ambit of s.1; whether statement of purposes in Memorandum of Association of appellant is conclusive; whether word 'science' to be given broad interpretation.
Held: Appellant entitled to certificate; appeal dismissed.

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S.I. 238/1999

Transport (Dublin Light Rail) Act, 1996 (Line A- Tallaght to Abbey Street Light Railway) Order, 1999
SI 59/1999

Tribunals

Lawlor v. Flood
High Court: **Kearns J.**
02/07/1999

Powers of Tribunal; statutory interpretation; statutory construction; compulsory questioning before counsel for the Tribunal; constitutional rights; discovery; compulsory affidavits; respondent had made three orders, which the applicant now seeks to quash; statutory interpretation of s.4, Tribunal of Inquiry (Evidence) (Amendment) Act, 1979; whether the respondent has power to require the attendance of a person for questioning by counsel for the Tribunal when the High Court does not have this power; whether there are disjunctive words in s.4; whether the order for discovery is excessive in scope; whether fair procedures were observed in respect of the making of an order for discovery; whether Re Haughey rights arise at preliminary stage of tribunal; whether the respondent has the power to compel the applicant to swear an affidavit; whether the High Court has the power to compel a person to swear an affidavit; O.39, r.4, Rules of the Superior Courts.
Held: Order compelling attendance of applicant for questioning before counsel for tribunal quashed; order compelling applicant to swear affidavit quashed; order for discovery was not excessive in scope and fair procedures were observed.

Lawlor v. Flood
Supreme Court: Hamilton C.J., Denham J., Barrington J., Keane J., Murphy J.
08/10/99

Tribunals; statutory interpretation; extent of powers given by legislation to the appellant; two orders made by the appellant had been quashed in the High Court: an order that the respondent attend before counsel for the tribunal and answer questions; and an order that the respondent disclose by affidavit any company of which he was a shareholder or director or in which he had a beneficial interest; statutory interpretation of s.4, Tribunals of Inquiry (Evidence) Act, 1979; whether the appellant can delegate the power to question witnesses; whether the appellant can require the swearing of an affidavit; whether s.4 gives the appellant greater powers than a High Court Judge.
Held: Appeal dismissed.

Article

Tribunals
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Wills

Article

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AT A GLANCE

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Report - Dail

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1st Stage - Dail

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Committee - Dail

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1st Stage - Dail

Prohibition of Ticket Touts Bill, 1998
Committee - Dail **[P.M.B.]**

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

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Committee - Dail

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2nd Stage - Seanad

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Committee- Dail (Initiated In Seanad)

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

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

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

Trade Union Recognition Bill, 1999
1st Stage - Seanad

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ABBREVIATIONS

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

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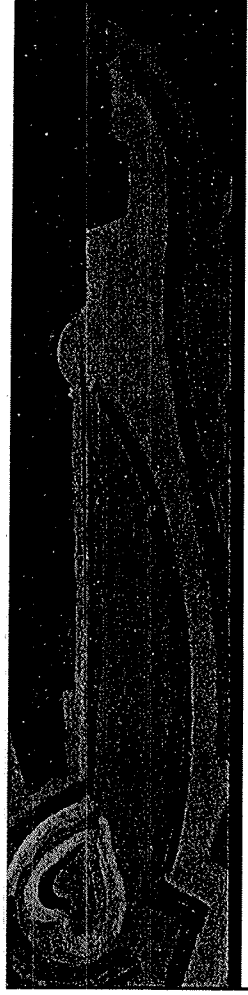

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OINT DEBTORS: SETTLING ONE, PURSUING THE OTHERS

Bernard Dunleavy BL considers the circumstances in which a compromise may be reached with one of a number of joint and several debtors, without the creditor relinquishing his right to pursue the other joint debtors.

Introduction

The law relating to the release of a joint debtor is well settled. Put at its most crude, the principle works on the basis of "one out, all out." Halsbury[1] describes it as follows:

> "A release given to one of a number of persons who is jointly, or jointly and severally, liable discharges the others." [2]

The notion underlying this principle is the practice of the Court to try and prevent what is known as circuity of action. The function of the law is to impose finality in relation to the questions which come to be heard before it. If the release of one of a number of joint debtors did not also serve to release the others then the Court might be faced with a situation where the intended effect of the compromise might be annulled by an attempt by those joint debtors who were not included in the settlement to bring the released party back into the action at a later date. The principle was described most succinctly in the case of *North -v- Wakefield:* [3]

> "The reason why a release to one debtor releases all jointly liable is, because, unless it was held to do so, the co-debtor, after paying the debt might sue him who was released for contribution, and so in effect he would not be released."

Given that the law relating to the release of co-debtors is well settled, the question to be considered in this article is whether a mechanism exists which would allow practitioners to effectively compromise actions in a manner which would not be regarded as a release. In other words to settle actions in a manner which would operate qua a release without all of the implications of a release. Such a mechanism exists in the form of a covenant not to sue. Halsbury remarks that - "If the intention of the creditor however,[in settling with one co-debtor] was to reserve his rights against the other persons liable on the contract, such release will be treated as a covenant not to sue and will not discharge the others."[4] The distinction between a release and a covenant not to sue arose since it was originally thought that a joint, or a joint and several obligation could not be denied by agreement between the parties. Accordingly, when it came to be recognised that effect should be given to a creditor's intention to release only one joint debtor, it was felt necessary to use a different name for the instrument of discharge.

Express Covenants not to Sue

The law relating to the effect of an express covenant not to sue in a document of settlement was considered in the judgments of three important cases.

In the first case, that of *Dean -v- Newhall*[5] the Court ruled in relation to a situation in which a covenant not to sue was inserted into a settlement agreement with one of a number of joint and several debtors:

> "The foundation of the defendant's argument is that the deed of assignment executed in 1796 was a release to Taylor, and therefore it was also a release to the Defendant. But the fallacy of the argument consists in treating this as a release, and in confounding this, which is only a constructive release arising out of a covenant not to sue, with a formal and absolute release. It may be admitted that if the Plaintiff had formally released Taylor, he would also thereby have released the Defendant. But this is not a release to Taylor; it only operates qua a release...[There is] a distinction between a covenant not to sue a sole obligor and one of several obligors...If A is bound to B, and B covenants never to put the bond in suit against A;

"The distinction between a release and a covenant not to sue arose since it was originally thought that a joint, or a joint and several, obligation could not be denied by agreement between the parties. Accordingly, when it came to be recognised that effect should be given to a creditor's intention to release only one joint debtor, it was felt necessary to use a different name for the instrument of discharge."

> if afterwards B will sue A on the bond, he may plead the covenant by way of release. But if A and B be jointly and severally bound to C in a sum certain, and C covenant with A not to sue him, that shall not be a release but a covenant only; because he covenants not to sue A, but does not covenant not to sue B; for the covenant is not a release in its nature, but only by construction to avoid circuity of action; for where he covenants not to sue one, he still has a remedy, and then it shall be constructed as a covenant and no more."

In other words the Court held that in circumstances where a covenant not to sue is made between a sole creditor and a sole debtor, such a covenant is in effect a release of the debt and the creditor's cause of action cannot survive the making of the covenant. In circumstances however, where the covenant is made between a creditor and one of a number of joint and several debtors, the covenant, though having the same effect as a release for the debtor it is made with, only has that effect of a release in order that circuity of action will be avoided. As far as the other co-debtors are concerned the covenant acts merely as a covenant, nothing more, and the creditor's subsisting cause of action continues against those co-debtors with whom he has not covenanted.

In the second case, that of *Hutton -v- Eyre,*[6] the Court considered the case of a covenant not to sue one of two joint debtors, and whether that operated as a release to the other. Gibbs CJ stating that:

> "The principle on which a covenant not to sue is held to operate as a release, is to avoid circuity of action; but it goes no further. Eyre says it goes much further: it is a release as between me and those to whom I and Hutton were jointly indebted, and being a release to me, it is a release to Hutton, who was jointly with me obliged for payment of that debt....The case [of *Dean -v- Newhall*] is not like the present: there the party was jointly and severally answerable to the Plaintiff, who might sue the one obligor without the other...The fact is not so here, therefore the same doctrine is not applicable, and we must consider it on principle, whether that law applies to the present case. In the case of a creditor suing a single debtor whom he has covenanted not to sue, it not only promotes the doctrine, which prevails so strongly in the law, of preventing circuity of action, but it falls in within the intent of the parties that the covenant shall act as a release; but it is impossible that it should here be in the contemplation of the parties, that in covenanting not to sue Eyre, the insufficient creditor, he meant to release Hutton, who was sufficient. It was as easy to insert in the deed a release as a covenant not to sue, and it would have been shorter; it must be inferred that the parties did not insert a release, because it would release Hutton also; but it is this day contended that a covenant not to sue has the same effect. Where the words, by being extended beyond their obvious intent, would, as it seems, go beyond the intent of the party, the Court ought not to put that construction on them...We think that the rule that a covenant not to sue operates as a release, applies only to cases where the covenantor and covenentee are single."

The importance of this judgment is not only that the principle of a covenant not to sue is extended from joint and several debtors to joint debtors, but also that the Court has laid down the manner in which it will interpret covenants not to sue, and that is that they will be construed in accordance with the intentions of the parties.

In the third case, that of *North -v- Wakefield,*[7] the Court considered the covenant not to sue in the context of an express reservation of creditor's rights against the co-debtors.

This case was an action on foot of a promissory note and the Defendant pleaded that the note was the joint and several note of himself and another debtor, and that the Plaintiff in making a deed without the Defendant's consent releasing the other debtor from his obligations under the note had released the Defendant also. It was held that as the deed of release contained an express clause that the release should not operate to discharge anyone else jointly liable to the creditors, it did not release the Defendant. The Court summarised its decision as follows:

> "Now the deed contained an express clause that the release to Goddard should not operate to discharge anyone jointly or otherwise liable to the Plaintiff for the same debts. [The reason why the release would not operate to release all debtors is because such a rule] does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor. Neither does such a clause qualifying the release operate as a fraud on other creditors; for, as it appears on the face of the deed, all who execute that deed are aware of it and agree to it."

"What becomes clear then, having regard to the case law above, is that it is the express reservation of rights coupled with the promise not to sue which allows the settlement to effectively function as a release of one debtor without discharging the remaining co-debtors."

What becomes clear then, having regard to the case law above, is that it is the express reservation of rights coupled with the promise not to sue which allows the settlement to effectively function as a release of one debtor without discharging the remaining co-debtors.

Implied Covenants not to Sue

The Courts have held that where a creditor and a co-debtor compromise the co-debtor's liability in terms of a covenant not to sue, the creditors rights against any other debtors liable for the same debt being reserved, then such a covenant will not be treated as a release and the creditor's cause of action against the remaining co-debtors will survive the compromise. What of the situation however, where the covenant and the reservation of rights is only implied in a settlement agreement? What will be the Court's attitude in those circumstances? An early indication is to be found in the case of *Hutton -v- Eyre* referred to earlier. This case along with the judgment in *Price -v- Barker,* [8] was considered by the House of Lords in the case of *Duck -v- Mayeu,* [9] their Lordships

holding that as regards agreements of this nature:

> "A rule of construction was laid down by the Court [10] where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction where this was sought to be done, was that it was a covenant not to sue and not a release."

It is clear then that when dealing with implied covenants not to sue the Courts will be chiefly concerned with the real intention of the parties, and as will be seen from the modern case law in this area, the intention of the parties will be construed very strictly indeed.

The Supreme Court of Western Australia considered this question in *Kenworthy -v- Avoth Holdings Pty Ltd* [11] in a case where the appellants B and D entered into indentical agreements for the purchase of shares from the respondents. After payment of certain sums B received a receipt expressed as accepting money "...in full payment of any and all moneys outstanding by B under the agreements." In an action brought by the respondents to recover the balance due under the contracts the trial judge held that the discharge was intended by all parties to relate to B alone. The appellants appealed

"It is clear then that when dealing with implied covenants not to sue, the Courts will be chiefly concerned with the real intention of the parties, and as will be seen from the modern case law in this area,the intention of the parties will be construed very strictly indeed."

contending that the contracts represented a joint obligation, that there was accord and satisfaction and that the discharge of one debtor discharged the others. It was held, in dismissing the appeal, that it was clear from the surrounding circumstances that the receipt was to operate as a discharge, not of the debt itself, but of the liability of B personally.

Similarly, in the cases of *Watts -v- Aldington and Tolstoy -v- Aldington,*[12] the Court of Appeal in England had to consider whether a settlement agreement reached by the winner of a defamation case with one of the two losers constituted a release or merely an agreement by the defamed party not to sue on the remainder of the judgment which did not discharge the other loser from liability. In his judgment Neill LJ held that the settlement agreement was plainly subject to an implied term that Lord Aldington's rights against Count Tolstoy would be reserved. "Any other result", held his Lordship, "would offend against common sense."

The Courts, in attempting to construe the true intention of the parties to the settlement will have regard to the circumstances surrounding the settlement. If those circumstances would tend to indicate that a settlement is in fact a release rather than a covenant not to sue, then the Courts will regard such a settlement as releasing all the other co-debtors as well. In the case of *Deanplan Ltd -v- Mahmoud & Anor.* [13] the Court held in dealing with a dispute over a lease that:

> "It is a question of construction of the contract between the creditor and the debtor or covenantor, in the light of the surrounding circumstances, whether the contract amounted to a release or merely a covenant not to sue. On the facts, since the Plaintiff had chosen to release the first Defendant from his obligations in return for the immediate surrender of the term and half the goods rather than proceeding to forfeit the lease, the arrangement between the Plaintiff and the first Defendant was a clear case of accord and satisfaction rather than a covenant not to sue and in those circumstances the second Defendant was also released from its obligations."

The Law in Ireland

The leading Irish case in this area is that of *Powell -v- Adamson and Pilkington*[14] which was a landlord and tenant matter in which two defendants were sued as being jointly liable. One of the two defendants sued for rent jointly, but defending separately, at the trial consented to judgment for a portion of the amount sued for. The first defendant maintained that as a result of the settlement the case against him had been altered and that the Plaintiff was not entitled to succeed against him for any sum greater than that for which he had settled with Pilkington. In the Court of Appeal Fitzgibbon LJ rejected this argument on the grounds that:

> "The Plaintiff dealt with Pilkington only as a Defendant, and she got what she could from him in consideration of letting him off. She gave him terms, whether easy or hard, for which she let him off; but, with all respect, I cannot see how a separate settlement with one defendant without the concurrence of the other, at a trial where both are sought to be made liable jointly, and either may be held liable separately, can operate to discharge the liability of that other to the Plaintiff...It is clear to me that £50 was paid on account, and in part discharge of the rent claimed on the writ, and that the payment enured to discharge so much of that rent for the benefit of whoever was liable to it, and therefore that Adamson was thereby benefited, in that a part of the rent to which he was liable was discharged, for the benefit of both defendants who were sued jointly."

The present law in Ireland relating to covenants not to sue will certainly be informed by the large body of case law to be found on this area in other common law jurisdictions. In addition however, the Irish Courts would also seem to be invested with a particular discretion to take into account, not only the intention of a creditor who seeks to compromise with one of a number of co-debtors, but also the resulting benefit of that compromise to those creditors who are liable for the entirety of the debt in any event.

The judgment in *Powell -v- Adamson and Pilkington* seems to find its reflection in Section 17 Civil Liability Act, 1961 dealing with the release of one of a number of concurrent wrongdoers. "If no such intention [that the release of one concurrent wrongdoer shall discharge the others] is indicated by release or

accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers...and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest." [16]

As Kerr remarks in his commentary on the Act, this section sweeps away the subtle distinctions between a release and a covenant not to sue and clarifies the law relating to accord and satisfaction. [17]

The Law relating to Covenants Not to Sue and Guarantees

One of the rights available to a surety is his right of contribution against his co-sureties, if there are any. The rationale underlying the discharge of a surety where the principal is no longer liable is that the creditor cannot do anything to put the rights of the surety in danger, for if he does, the surety is entitled to be discharged. Accordingly, where the creditor releases a co-surety who is jointly or jointly and severally liable, the surety's rights of contribution and marshalling of securities are prejudiced, and the release will discharge the surety in toto. This is a manifestation of the general rule of law as outlined above, that a release of one of a number of joint or joint and several covenantors will discharge the others.

The position in relation to co-sureties who are severally liable was considered in *Ward -v- National Bank of New Zealand Ltd,* [18] where Sir Robert Collier explained the rule thus:

> "It is no part of the contract of surety that other persons shall join in it, in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety; the surety cannot therefore claim to be released on ground of breach of contract...The claim of a several surety to be released upon the creditor releasing another surety arises not from the creditor having broken his contract, but from his having deprived the surety of his remedy of contribution in equity. The surety therefore, in order to support his claim, must show that he had a right to contribution and that that right has been injuriously affected."

Accordingly, where one of a number of jointly or jointly and severally liable co-sureties is released, the remaining co-sureties are wholly discharged. The analysis is that since they are jointly liable, release of one is release of all. Where the sureties contract only severally inter se (that it is not part of the surety's contract that his co-sureties should join in it as such), the release of one will discharge the others pro tanto to the extent that each of their rights of contribution and marshalling are prejudiced.

While a release of one co-surety will have the effect of releasing the remaining co-sureties it is possible with contracts of guarantee as with other forms of joint or joint and several agreement, to settle with one co-surety while reserving your rights against the others, thus achieving the benefits of a release without the attendant dissolution of a creditor's cause of action.

A surety will not be discharged where there is no actual release of his co-surety, but merely a forbearance, or a giving of time or, as is seen in the case of *Price -v- Barker,* a covenant not to sue.[19] Where the creditor releases the co-surety with the consent of the surety, or having reserved his rights against the surety, the surety will not be released, the release of the co-surety having the same effect as a covenant not to sue: if the release of the co-surety is genuinely a release, as opposed to a covenant not to sue, then the surety will be released. Those advising principals should therefore take care when considering a release, for if it only amounts to a covenant not to sue, the principal will be unprotected from an indemnity claim by the surety. Where there is no doubt that the creditor intends to extinguish the debt (as opposed to intending merely not to sue upon it), it is a release and the sureties are discharged. [20]

Conclusion

A number of issues warrant mention in conclusion. Firstly, in circumstances where joint and several debtors or a joint and several surety are released from their obligations, the remaining co-debtors and co-sureties will also be released. The same will also be the case, where an attempt is made to dress-up a release as a covenant not to sue, but the circumstances of the agreement between the parties indicate that it is a release rather than a covenant not to sue - then the remaining co-debtors or co-sureties will also be released. A covenant not to sue is more than merely a form of words; the covenant not to sue must also show itself in the intention of the parties making the covenant. In other words it must be the intention of the creditor to reserve his rights against the remaining co-debtors or co-sureties, and the co-debtor or co-surety making the covenant must accept that the agreement is not a release. A covenant not to sue may be express or implied, but where it is implied the Courts will closely scrutinise the circumstances surrounding the compromise which the creditor maintains is a covenant rather than a release. Finally, and in summation, where a creditor releases one of a number of persons who is jointly, or jointly and severally liable, but it is his intention in so doing to reserve his rights against the other persons liable on the contract, such a release will be treated as a covenant not to sue and will not discharge the others. ●

1. Halsbury, *Laws of England* (4th edn., reissue) Vol. 9(1)
2. Ibid at Para. 1089
3. (1849) 13 QB 538
4. Halsbury, op. cit., Para. 1089
5. (1799) 8 Term. Rep. 169
6. (1815) 6 Taunt. 289
7. Op. cit. 536
8. (1855) 4 E&B 760
9. [1892] 2 QB 511
10. The rule of construction being referred to, was that enunciated by the Court in *Price -v- Barker* in applying the judgment of the Court of Exchequer in *Kearsley -v- Cole,* 16 M&W 128
11. [1974] WAR 135
12. Both at (1993) Times December 16
13. [1992] 3 AER 945
14. [1895] 2 IR 41
15. Civil Liability Act, 1961 S.17
16. Civil Liability Act, 1961 S.17(2)
17. Kerr, *The Civil Liability Acts,* 1999, Round Hall Sweet & Maxwell.
18. (1883) 8 App Cas 755
19. Practitioners should note that a useful precedent for a Covenant not to Sue is to be found in the report on *Price -v- Barker* at 767.
20. Andrews & Millett, *Law of Guarantees,* (2nd edn.) Sweet and Maxwell

THE EQUAL STATUS BILL, 1999 - EQUAL TO THE TASK?

Conor Power BL *analyses the extent to which the Equal Status Bill 1999, once enacted, is likely to succeed as a bulwark against discrimination in Irish society.*

Introduction

A right to equality, supposedly constitutionally protected, should be a mark of our State's democratic maturity, but is instead more a testament to traditional ignorance towards diversity. Forced to introduce employment equality by the EEC in the 1970's, Ireland stumbled through to the late 20th century before a more composite notion entered public discourse. Even then, the limit of the Constitution was exposed, when the more radical provisions of the Employment Equality Bill 1996 and Equal Status Bill 1997 were found unconstitutional.[1] A revised Employment Equality Act was passed in 1998 and the Equal Status Bill 1999 is set to become law soon. Together these statutes represent the birth here of broad anti-discrimination laws.

The Equal Status Bill 1999 will bring statutory equality rights out of the workplace and into wider society for the first time. Such a change was almost destined to weed out unwarranted fears of catastrophic social breakdown[2], but, regrettably, the Bill may not have such a reforming effect. Indeed, that the introduction of such a laudable Bill should have caused adverse comment speaks volumes concerning the neglect of equality as civic ideal. This neglect is represented in the Constitution by a narrow focus on the right to equality that will restrict the impact of anti-discrimination law in practice. It is crucial to recognise that the model of equality fostered by the Constitution is only one approach and that there are other versions of equality.

Competing theories of equality

Equality, because of its abstract nature, is one of the more difficult rights to articulate. At its root it demands equal treatment for individuals and non-discrimination on the basis of irrelevant characteristics. It encompasses both direct and indirect discrimination[3]. But unlike other rights it guarantees nothing in particular. A facile view of rights might thus prefer to develop these other substantive rights and leave equality for the theorists. Arguably this has been the approach of the Supreme Court when considering the nature of fundamental rights under the Constitution. This is a rather benign view, and while it remains a discussion for another day, perhaps the stunted constitutional growth of any socio-economic rights platform is more telling. In fact, equality is a necessity in the development of all other rights for without a bedrock of equal treatment those other rights may be of little use to the disadvantaged.

There two broad methods of conceptualising the right to equal treatment. The first is to provide equality of opportunity, which can be described as formal equality, while the second focuses on equality of outcome. This latter is sometimes called substantive equality and has its most notorious manifestation in affirmative action programs, sometimes called positive action. There is a large difference between these two; a difference in outlook, effectiveness and of ideology. The former is based on sameness, that by mandating the ignorance of a specified characteristic, individuals will be treated for what they are. In this approach equality brings people to the starting line and leaves them to do the running on their abilities. The anti-discrimination measures focus on the actions of the would-be discriminator vis-a-vis the individual with the characteristic.

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The substantive equality model takes difference as its basis and not only bans the consideration of irrelevant characteristics in a negative manner, but seeks to actively promote members of a disadvantaged class. Here equality is not simply a case of treating one group the same as the other, but of taking account of the difference. In this regard, equality of outcome seeks to

compensate for historic discrimination. Bringing people to the starting line is no good if the others have some advantage because they had ease of access there for so long. Measures must then be introduced to combat the effects of historic discrimination, though such affirmative actions remain one of the more controversial aspects of equality.

In the USA there has long been debate between these two models. This has been undertaken mainly by the proponents of two groups, blacks and women. Years after the introduction of civil rights and sex discrimination legislation these groups continued to suffer unequal treatment. More radical campaigners began to feel that historic factors could not be overcome without special remedial action. Radical theorists wondered whether these movements could ever battle against the hegemony of traditional civil society, as reinforced by legal codes, on their own terms and the more militant called for revolutionary change[4]. For those whom the hegemony suited such talk was treason, and yet the fundamental claim of marginalised groups was merely for full inclusion within society, with the attendant rights of any citizen.

Features of historic discrimination can also be seen in Irish society, for in the only area of non-discrimination until recently, that based on sex and marital status in employment, the presence of legislation has failed to eradicate unequal pay and conditions.[5] Moves to equalise the position by positive action, e.g. by specifying a minimum number of women on the boards of companies, is creeping into the public sector. How far this can go, and its extension to the private sector, is questionable. The root of employment-related sex-discrimination law is in EC law, which limits the scope for positive action[6]. More importantly, the Constitution has fostered a limited form of equality, and is only applicable in respect of State actions. The Constitutional Review Group was divided as to whether an explicit mention should be given to affirmative action, though it did recognise its importance when saying:

> "Equality is, however, more than the absence of discrimination, whether direct or indirect. The attainment of equality is not solely a matter of individual effort. It involves the development of strategies which would actively promote a civil society based on principles of social, economic and political inclusion."[7]

Because of the Supreme Courts decision in the Employment Equality Bill, 1996 case, there is little scope for positive action because any duty imposed by such action could not be prevented from attack by the Constitution.

Under that 1996 Bill an employer could have been obliged to take reasonable measures to make the workplace accessible for disabled employees, something known as the reasonable accommodation principle. The Bill provided that the principle would not apply where undue hardship was caused to the employer. This provision was struck down as unconstitutional on the basis that the expense of a laudable social goal was placed on the private sector, and thus interfered with property rights, in this case the right to profit. In effect, the equality clause in the Constitution was not strong enough to trump the right to private property, and thus the scope for positive action can only be minimal. It is against this background that anti-discrimination law must operate, a background that will hamper any real moves to achieve substantive equality.

The Equal Status Bill

The Bill will develop anti-discrimination law in non-employment activities and outlaws discrimination on ten grounds, being: gender, marital status[8], family status[9], sexual orientation[10], religion, age[11], disability[12], race[13], membership of the Traveller community and victimisation[14]. These grounds are the similar to those under the Employment Equality Act, 1998. As with any equal treatment provision the basic operation of the law is comparative in that discrimination involves being treated unfavourably by comparison with another because of satisfying one of the ten attributes which the other does not have. In this regard only individuals can claim discrimination. A provision in the 1997 Bill allowing representative groups to take claims was excluded from that now about to enter force. This may deprive the Bill of some effectiveness as individuals may be reluctant to challenge discriminatory rules, whereas an organisation may have more forcefulness and resourses to do so.

Section 3 defines discrimination generally, with the basic form being where, on any of the ten grounds, which exists at present or previously existed or which may exist in the future or which is imputed to a person, a person is treated less favourably than another is, has been or would be treated. This broad definition enables historic features to be taken into account, though only acts of discrimination that occur after the legislation comes into force can form the basis of a claim. Thus, for example, if someone used to have a characteristic and is treated less favourably because of that, such discrimination is unlawful if the less favourable treatment occurs after the operation of the Bill.

A second form of discrimination arises where a person associated with another is treated less favourably because of that association, where similar treatment of the other person would amount to discrimination. Discrimination by association is an important matter for a law of this nature to cover as the nature of discrimination is to base exclusion on matters of irrelevance. The exact nature of association is a matter that should be clarified, but a standard definition may limit the concept to availing of a service together with a person with the characteristic. This would be a conservative approach and a broader meaning should be considered to ensure proper protection.

The final definition of discrimination caters for indirect discrimination, and occurs where a person is a member of a protected category and is required to comply with a condition that substantially more people outside the category can comply with, where the obligation to comply with the condition cannot be justified as reasonable in the circumstances.

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The inclusion of indirect discrimination is vital because discrimination often occurs in covert ways, as service providers are unlikely to directly discriminate, especially when they learn of the consequences of so doing. The ban on indirect discrimination means that supposedly neutral criteria cannot be used to cloak what in reality amounts to unlawful unequal treatment. Thus, for a bar to have a requirement of living in a house would amount to indirect discrimination on the Traveller community ground as substantially more non-Travellers can comply with it and it would appear difficult to justify it as a reasonable requirement for being served drink.

Activities covered

One of the central planks of the Bill, contained in Section 5, is to ban discrimination in the disposal of goods or the provision of services that are available to the public generally or a section of the public. It is irrelevant that the service or goods are given for consideration or not. The State is not specifically included in the definition of service provider, and this was a cause for criticism among interested groups, but the State will be covered by the law regardless[15]. Service is defined more particularly, but without prejudice to generality, as access to and the use of any place; facilities for banking, insurance, loans, etc., entertainment, cultural activities and transport; services provided by a club and professional or trade services.

Thus for the first time in Irish law a business cannot refuse to serve a person simply because he or she falls into one of the categories. Thus a black person cannot be refused service on the basis of being black, nor a woman because she is a woman. One would think that this self-evident consequence of human dignity need not be enshrined in legislation, but that is not necessarily the reality for many who suffer discrimination because of some innate characteristic. In this regard the nature of the law must be understood. It is not a demand that everyone in a protected class be served at all times, but just that they be treated the same as anyone else in relation to that service. To the extent that the provision of any service is discriminatory of someone else who cannot thereby avail of the service the Bill will require an equality of discrimination.

"Landlords will have to be particularly careful to ensure that only objective factors are used to decide to whom to let premises. For example, in the past many pregnant women have had difficulties securing rented accommodation. Discrimination on that basis will now be unlawful."

There are some exceptions where this principle of equal treatment is abrogated[16]. Differences on the gender ground in relation to services of an aesthetic or cosmetic nature where the services require physical contact are excluded. For example, a women's hairdresser need not serve men, and vice versa. Other permissible differences of treatment include that in relation to the provision of pensions, insurance policies and other matters related to the assessment of risk, where there is clear actuarial evidence to justify the difference; disposals of goods by will or gift and there is also an exception relating to sporting events. Age requirements in order for a person to be an adoptive or foster parent are specifically excluded as are cultural performances where persons can be treated differently on gender, age and disability for reasons of authenticity. While the list of exceptions is long, they appear necessary as otherwise some peculiar consequences would follow. Indeed this reflects the true notion of equality of treating similar things the same, but differences differently.

Section 6 deals with the provision of accommodation and provides that nobody shall discriminate in the disposal of any estate or interest in premises or in providing accommodation or any services relating thereto. This does not apply to disposals by gift or will. Neither does it apply where the provision of accommodation or disposal is in respect of a small premises[17], when the person making the disposal, a near relative[18] or other person with an interest in the property intends to reside there. Grounds of privacy in relation to accommodation of one gender is included as an exemption. Overall, this provision will be a marked improvement for many people seeking accommodation. Landlords will have to be particularly careful to ensure that only objective factors are used to decide to whom to let premises. For example, in the past many pregnant women have had difficulties securing rented accommodation. Discrimination on that basis will now be unlawful.

The admission and access to courses of education are covered by section 7, which also bans discrimination in relation to the punishment and sanction of students. This is a welcome addition to the notion of service provision and demonstrates the broad nature of the Bill in the remit of activities covered. Again, some discriminations are permitted, e.g. if a non-third level establishment admits students of one gender only then it is not unlawful to exclude members of the opposite gender, and schools which promote religious values are entitled to prefer students of that religion, so long as a refusal to admit a student is essential to maintain the ethos of the school. This latter test is very stringent, as it will be difficult to prove that the exclusion of a potential student is essential for the ethos.

One particularly notorious form of discrimination in Ireland has been the refusal of some golf and tennis clubs to admit women. This will now be unlawful under section 8 of the Bill, which draws discrimination widely in this regard as having a rule, policy or practice which discriminates against a member or applicant for membership, or where a person involved in management so discriminates. By covering not just rules and policies, but extending the provisions to practices, clubs that operate subtle forms of making certain persons unwelcome are in danger of breaching the law. Section 9 allows certain clubs to discriminate, for example if its purpose is to provide for a particular religion, age, nationality, or national origin.

The sanction against discriminating clubs is somewhat different to those generally under the Bill. When a club is accused, by an individual or the Equality Authority, of discrimination the matter goes to the District Court for determination and if found to be discriminating no certificate of registration can issue or be renewed under the Registration of Clubs Acts, 1904 to 1995, in other words the club will lose its drink licence. This is a proper sanction a such a licence is a benefit given by the State and there is no reason to allow it continue to benefit a discriminating club. It appears that other remedies under the Bill can also be pursued by persons discriminated against.

Special provisions for the disabled

One group that require more than just formal equality are the disabled. Often, because of the disability, such persons need special provision in order to ensure to them the right to full participation in society. In this regard sections 17, 18 and 19 cater for public transport and the disabled. Section 17 permits the Minister to make regulations to ensure that new road and rail passenger vehicles are equipped so as to be readily accessible to and usable by persons with a disability. Section 18 applies similar rules to bus and rail stations, while section 19 provides that local authorities shall provide dipped foothpaths near pedestrian crossings, etc., to facilitate disabled users. The Bill does not extend its provisions to taxis and hackneys, which is a serious omission that ought to be addressed.

One reason for the omission is the fears of falling foul of the Constitution. To make new taxis accessible may cost a private enterprise money, and thus be within the rationale of In re Article 26 and the Employment Equality Bill, 1999.[19] It is in the field of disability that the real loss of positive action, or reasonable accommodation, is seen. Throughout the Act there are provisions that allow some special rules for promoting special interests of certain groups. Without such an express rule, special provision might itself be discriminatory, and in effect they allow for the unequal treatment of some groups, including the disabled. However, these provisions do not demand special treatment. For disabled people, section 4 is of crucial importance in this regard by providing that failure by a service provider to do all that is reasonable to accommodate a disabled person by providing special treatment or facilities, if without such it would be impossible or unduly difficult for a disabled person to avail of the service, amounts to discrimination under the Bill. Section 4(2) says that a failure to provide special treatment will not be reasonable unless the provision would give rise to a cost, other than a nominal cost, to the service provider.

The effect of this provision, introduced in response to the Supreme Court's ruling, is to limit, indeed almost abolish, the duties of service providers to make reasonable accommodation. Almost any worthwhile accommodation, from widening an entrance or providing a ramp to installing a lift, would involve some expenditure, and thus would not have to be carried out. This is a serious flaw in our equality law. The Bill is also drafted wider than necessary to accord with the Supreme Court's decision. That decision banned the passing of the cost of social policies to the private sector, but would have allowed the imposition of affirmative duties on State services, which are subject to the Act. Not only would an obligation on the State assist disabled persons in their movements, it would also provide an important standard-setting measure. In effect the State could have led by example in service provision for the disabled, but has chosen not to.

Even within the formal equality regime, these are inadequate rules to cater for the disabled for service providers who are willing to engage in positive action. For example, if a business has a rented premises, the consent of the landlord may be needed for structural changes. There is nothing in the Bill to facilitate such measures20, which is symptomatic of the lack of thought given to disabled persons' needs.

Miscellaneous

Sexual and other harassment has been recognised as a serious problem in the workplace, but it may also happen in other environments. Section 11 of the Bill outlaws both of these. Sexual harassment occurs where one person subjects the victim to an act of physical intimacy, requests sexual favours from the victim or subjects that person to conduct with sexual connotations or displays, in circumstances where the conduct is unwelcome and could be reasonably regarded as offensive, humiliating or intimidating to him or her. This is a broad definition that mirrors that under the Employment Equality Act, 1998. For instance it covers not just direct sexual harassment, but also environmental harassment, e.g. where a club is decked with lewd pictures of naked women. Harassment is treatment akin to sexual harassment, but caters for the other discriminatory grounds. An example would by anti-ethnic posters in a shop or name-calling by a service provider of a member of the Traveller community.

Mention should also be made of section 15 which is the section introduced to cater for the fears of publicans. The section provides, for greater certainty, that nothing requires a service provider, etc., to provide service in circumstances which would lead a reasonable individual to the belief, on grounds other than the discriminatory grounds, that the provision of services would create a substantial risk of criminal or disorderly conduct or behaviour or damage to property. Subsection 2 provides that actions done in good faith by a liquor licence for the purpose of complying with the Licensing Acts, 1833 to 1997 shall not amount to discrimination. In the context of an anti-discrimination law it is surely unusual in the extreme to cater for the views of a particular group by permitting action that has nothing whatsoever to do with equal treatment. Nobody who supports the principle of equality would condone any criminal action by whoever. To specify this kind of rule allows a stereotypical view of one group, the Traveller community, to be legislated for in a statute designed to counter prejudicial stereotypes.

"In the context of an anti-discrimination law it is surely unusual in the extreme to cater for the views of a particular group by permitting action that has nothing whatsoever to do with equal treatment. Nobody who supports the principle of equality would condone any criminal action by whoever. To specify this kind of rule allows a stereotypical view of one group, the Traveller community, to be legislated for in a statute designed to counter prejudicial stereotypes."

Enforcement

The enforcement procedures under the Act are similar to those under the Employment Equality Act, and the same offices are to be used. Thus the Equality Authority and the Director of Equality Investigations will have a role in all Irish anti-discrimination cases. This is welcome as

it will lead to the creation of a specialist agency to combat discrimination wherever it occurs. A person who claims to have suffered prohibited conduct can refer the case to the director within two months of the incident. The complainant must be the person who suffered the discrimination and a provision allowing others to complain if the victim was unwilling was removed from the Bill at committee stage in the Dáil. The Equality Authority can also refer cases to the director, where the conduct is of a general nature or where the person who suffered discrimination would not reasonably be expected to take a case.

The Director is given wide powers of investigation under the Bill and if satisfied that the claim is made out can order damages up to the District Court limit, £5,000. The Director can also order that specified persons take a certain course of action designed to stop the discriminatory activity. An appeal lies from the determination of the Director to the Circuit Court, and from there to the High Court on a point of law. Decisions of the Director can be enforced by the Circuit Court where a person fails to comply.

The Equality Authority has a broader policy formation role, and does not investigate individual cases as such. The Bill specifically widens the remit of the authority to include the elimination of prohibited conduct, the promotion of equality of opportunity, and the provision of information to the public on equal status matters.

Conclusion

Despite the flaws inherent in the Bill due to its concentration on formal equality, the enactment of such equal treatment provisions truly marks a milestone in Irish law. The widening of anti-discrimination out from the workplace and away from sex and marital status is a matter of considerable importance to those within the protected categories. While much work remains to be done, the introduction of this legislation is a good start on the road to a fairer society. Interested groups should watch the development of the law and practice under the Bill as there is a provision for a review of its operation after two years. This will provide a necessary juncture to suggest changes in order to continue the move towards achieving true equality. ●

1 *Re Article 26 and The Employment Equality Bill 1996* [1997] 2 IR 321 and *Re Article 26 and The Equal Status Bill 1997* [1997] 2 IR 387.

2 In truly Irish style this principally focused on the admission of Travellers to pubs.

3 This occurs when seemingly a objective criterion is used in deciding a matter, but where its effect is more marked on e.g. one sex than on the other, or is easier satisfied by the other.

4 For a discussion of the theories involved see Crenshaw *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-discrimination Law,* 101 Harv. L.R. 1331.

5 See e.g. The Employment Equality Agency "*Women in the Labour Force*" (1995).

6 See *Kalanke v. Freie Hansestadt Bremen* [1995] IRLR 660.

7 At p.221 of its Report (1995).

8 "marital status" means single, married, separated, divorced or widowed.

9 "family status" means being pregnant or having responsibility-

(a) as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years, or

(b) as a parent or the resident primary carer in relation to a person of or over that age with a disability which is of such a nature as to give rise to the need for care or support on a continuing, regular or frequent basis,

and, for the purposes of paragraph (b), a primary carer is a resident primary carer in relation to a person with a disability if the primary carer resides with the person with the disability.

10 "sexual orientation" means heterosexual, homosexual or bisexual orientation.

11 Section 3(3) provides that treating someone under 18 less favourably than another does not amount to discrimination.

12 "disability" means-

(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,

(b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,

(c) the malfunction, malformation or disfigurement of a part of a person's body,

(d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or

(e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour.

13 This includes difference in race, colour, nationality, or ethnic or national origin.

14 This arises where a person has applied for redress under the Act or has given evidence in proceedings in connection with such a case.

15 In the Dáil debate the Minister justified this on the basis of *Howard v. Commissioners for Public Works* [1994] 1 IR 101; the Minister also said that State services were covered and exampled social welfare services 512 Dáil debates, col. 1602. Section 14 of the Bill allows legislative action under other enactments to be unaffected by this Bill. It would therefore seem that while Acts and mandatory actions thereunder can discriminate, other actions pursuant to legislation must not discriminate in operation.

16 See s.5(2).

17 This is defined as accommodation for not more than three households (in relation to accommodation for more than one such) or, as the case may be, six persons in addition to the resident person.

18 Being a spouse, lineal descendent, ancestor, brother or sister.

19 Supra note 1.

20 This is in contrast to the UK's Disability Discrimination Act 1995, s.27.

INSTITUTION OF PROCEEDINGS THE STATUTE OF LIMITATIONS

Sara Phelan BL *highlights the procedural differences between the High Court and the Circuit Court in respect of the institution of proceedings for the purpose of the Statute of Limitations.*

The Statute of Limitations, 1957 and the Statute of Limitations (Amendment) Act, 1991[1]

The Statute of Limitations, 1957 and the Statute of Limitations (Amendment) Act, 1991 provide for certainty in the area of litigation and ensure that there will not be perpetual litigation on the subjects of tort, contract, title and so on.. In other words, the Statutes of Limitations 1957 and 1991 [hereinafter referred to as "the Statutes"] impose limitations of time upon existing rights of action. Thus, it is advisable from a Plaintiff's point of view that proceedings, in respect of any cause of action for which a limitation period exists, are instituted within the period of time prescribed by the Statutes.

However, failure to institute proceedings within the relevant period may not be fatal to the Plaintiff's claim and the Statutes (and the fact that a Plaintiff's claim is statute-barred) must be specifically pleaded in the Defence. It is thus a matter of choice for the Defendant whether he wishes to raise or waive the Statutes! If the Statutes are not pleaded in the Defence then a court generally has jurisdiction to hear the Plaintiff's claim (unless, of course, if after the expiry of the limited period the Plaintiff's cause of action no longer exists) and it is on this basis that the Statutes may be classified as being 'procedural' as opposed to being 'substantive' or 'jurisdictional'.

This 'procedural' classification applies where the Statutes merely effect the Plaintiff's remedy and not the Plaintiff's right or cause of action *per se,* but in other circumstances, where a right is extinguished by the passage of time, such a limitation goes to the cause of action itself and in such a situation the Statutes may be classified as 'substantive'.

Thus, in order to ensure that a Plaintiff's claim is not statute-barred, proceedings should be instituted within the period or time limits prescribed by the Statutes and it is important to note that there are procedural differences between the High Court and the Circuit Court in respect of the institution of proceedings for the purpose of the Statutes.

Institution of Proceedings in The High Court

The Rules of the Superior Courts, 1986 (S.I. No. 15 Of 1986)

Generally speaking, civil proceedings in the High Court are instituted by originating summons[2] which must be issued out of the Central Office of the High Court[3]. The summons is deemed to be issued when it has received the High Court seal and record number[4] and, prior to being issued, the proceedings are recorded or entered in a Cause Book in the Central Office, numbered, dated, authenticated and sealed[5]. Once the summons has been issued, time has been stopped for the purpose of the Statutes.

"In order to ensure that a Plaintiff's claim is not statute-barred, proceedings should be instituted within the period or time limits prescribed by the Statutes and it is important to note that there are procedural differences between the High Court and the Circuit Court in respect of the institution of proceedings for the purpose of the Statutes."

Once issued in accordance with the Rules of the Superior Courts, 1986, a summons has a life span of twelve months and remains valid during the currency of the twelve months following the date of issue[6]. The summons may be served upon the Defendant/s at any time during that twelve month period

and if, for some good reason, the Defendant (or any of a number of Defendants) has not been served with the summons within the twelve month period then the Plaintiff may apply to the Master of the High Court (within the twelve month period) for leave to renew the summons or to the High Court (outside the twelve month period) for leave to extend time for leave to renew the summons. Once a summons has been so renewed, it remains in force and is available to prevent the operation of the Statutes from the date of the issuing of the original summons[7].

It is important to note however, that for the purpose of the Statutes, time has been stopped once the summons has been issued, and service of the summons per se or the mode of service thereof is not relevant for the purpose of the Statutes.

Institution of Proceedings in The Circuit Court

Unfortunately, the institution of proceedings in the Circuit Court for the purpose of the Statutes is neither as simple nor as straightforward as the High Court procedure. In order to fully comprehend the differences in procedure between the High Court and the Circuit Court it is helpful to examine the history behind the procedure in the Circuit Court (and the inter-relationship between issue and service) prior to examining the current procedure.

The Circuit Court Rules, 1930 (08/02/1930)

The Circuit Court Rules, 1930 (which came into operation on the 1st day of January, 1932) provided that civil proceedings in the Circuit Court should be instituted or commenced by the issue of a Civil Bill (unless otherwise provided for by Statute or by the said Rules)[8].

Issue

Order 6 of the Circuit Court Rules, 1930 (entitled "Service and Entry") laid down the procedure for the issue of a Civil Bill and by virtue of the said Order a Civil Bill was deemed to be issued when it was handed to or sent by post to a Summons Server for service on the Defendant or Defendants[9].

Service

Service of a Civil Bill was to be effected by the Summons Server upon the Defendant personally wherever he was to be found within the jurisdiction, or at the Defendant's residence and upon the Defendant personally or upon some relative or employee of the Defendant being over the age of sixteen years and apparently resident there[10].

Substituted service was permitted in suitable cases[11] and imperfect service was permitted to be deemed good, again in suitable cases[12]. It should be noted that Order 6 was silent as to when issue of such a Civil Bill was deemed to have occurred and may have pre-supposed that the Civil Bill would have been handed to (or posted to) the Summons Server prior to difficulties with respect to service arising. Thus, issue of the Civil Bill would have occurred prior to an application to Court (a) in respect of substituted service or (b) to deem service good.

In special circumstances and for good cause shown the Court was permitted to allow service of any Civil Bill or other document to be effected by a person other than a Summons Server, and in such case the service of such a Civil Bill was deemed to be the institution of the proceedings[13].

Thus, unless otherwise permitted by the Circuit Court, routine service of a Civil Bill was to be effected by a Summons Server and the issue of the Civil Bill (for the purpose of the Statutes) occurred when the Civil Bill was handed to or sent by post to a Summons Server for service on the Defendant or Defendants.

The Circuit Court Rules (Service of Originating Documents By Post) Order, 1944 (09/12/1944)

The Circuit Court Rules (Service of Originating Documents by Post) Order, 1944 altered the Circuit Court Rules, 1930 to the extent that Order of 1944 permitted service of any Civil Bill, Originating Summons (or other originating document by which proceedings in the Court are instituted) to be effected by sending a copy of the same to the Defendant or other person to be served, by registered pre-paid post addressed to such person at his last known residence or place of business. Such originating document was to be posted by the Plaintiff or other person instituting the proceedings, or by his Solicitor, or by any other person acting on his behalf. The time, date and place of posting was to be endorsed upon the original and the certificate of registration of the postal packet containing the copy was be annexed or appended to the original before the same was lodged in the Circuit Court Office or filed with the County Registrar[14].

Issue

Such document was deemed to have been issued when the copy of the same was posted[15].

Service

Unless the contrary was proved, service of such document was deemed good upon proof that the postal packet containing the copy of the same was properly addressed, registered and posted, and such document was deemed to have been served at the time when such postal packet would in the ordinary course of post have been delivered[16].

It should be noted that this Order only had effect where a Judge, by Order, declared the same to be in force in respect of a specified area comprised within the Circuit to which he was for the time being assigned and for a specified period not being longer than one year[17].

Thus, routine service of a Civil Bill could now be effected by sending a copy of the same to the Defendant or other person to be served, by registered pre-paid post addressed to such person at his last known residence or place of business and issue of the Civil Bill (for the purpose of the Statutes) was deemed to have occurred when the copy of the same was posted.

Naturally, service of a Civil Bill could also be effected by a Summons Server and in accordance with the provisions of the Circuit Court Rules, 1930.

The Circuit Court Rules, 1950 (S.I. No. 179 of 1950)

The Circuit Court Rules, 1950 (which came into operation on the 2nd day of October, 1950) repealed the Circuit Court Rules, 1930 and the Circuit Court Rules (Service of

Originating Documents by Post) Order, 1944.
Again, by virtue of the Circuit Court Rules, 1950, proceedings were to be commenced or instituted in the Circuit Court by the issue of a Civil Bill in accordance with the Rules)[18].

Issue

Order 10 of the Circuit Court Rules, 1950 (entitled "Service and Entry") laid down the procedure for the issue of a Civil Bill[19] and Order 10 rule 1 (entitled "Issue of a Civil Bill") stated that a Civil Bill was deemed to be issued when;

1. it was handed or posted to a Summons Server, or other authorised person, for service on a Defendant or Defendants, or on his or their Solicitor, who had undertaken in writing to accept service thereof and enter an appearance thereto, or
2. when the appropriate Court Orders in relation to substituted service[20] or service by person other than Summons Server[21] had been made.

Service

Again, service of a Civil Bill or other originating document was to be effected upon the Defendant personally wherever he was to be found within the jurisdiction, or at the Defendant's residence within the jurisdiction personally upon the husband or wife of the Defendant, or upon some relative or employee of the Defendant over the age of sixteen years and apparently resident there[22].

A Solicitor could undertake in writing to accept service of a Civil Bill and in such case service on such Solicitor was to be sufficient, provided that he did at the time of service indorse on the original Civil Bill his acceptance of service thereof and his undertaking to enter an appearance thereto[23].

Substituted service was permitted if the Plaintiff was from any cause unable to effect prompt personal service, or such other service as was prescribed by the Rules[24] and in any case, the Circuit Court was permitted to declare the service actually effected sufficient[25]. As previously stated at sub-paragraph 2 above, issue of a Civil Bill in such cases occurred when the appropriate Court Orders in relation to substituted service[26] or service by person other than Summons Server[27] had been made, but Order 10 rule 11 of the Circuit Court Rules, 1950 is silent as to when issue takes place when the Court declares the service actually effected sufficient. It should be noted that Order 6 of the Circuit Court Rules, 1930 was not only silent on relationship between issue and imperfect service, but also on the relationship between issue and substituted service.

Thus, unless otherwise permitted by the Circuit Court, routine service of a Civil Bill was to be effected by a Summons Server and issue of the Civil Bill (for the purpose of the Statutes) occurred when the Civil Bill was handed to or sent by post to a Summons Server for service on the Defendant or his Solicitor or when the appropriate Court Orders in relation to substituted service or service by person other than Summons Server had been made.

By repealing the Circuit Court Rules (Service of Originating Documents by Post) Order, 1944 and by not providing for the service of an originating document by registered pre-paid post, the Rules of the Circuit Court, 1950 effectively restored the position in relation to the issue and service of a Civil Bill to that of the Circuit Court Rules, 1930.

This anomaly was to remain in being for the next fourteen years until the enactment of the Courts Act, 1964.

The Courts Act, 1964

The Courts Act,1964 deals with certain procedures in the District Court and the Circuit Court. It is not applicable to the Superior Courts.

Section 7 of the Courts Act, 1964 lays down the procedure for the service of court documents by post and applies in relation to the service of Circuit Court documents and District Court documents (including originating documents) in any area whenever and so long as no Summons Server stands assigned to that area by the County Registrar for the county in which the area is situate[28].

By virtue of Section 7 of the Courts Act 1964, service of a Circuit Court document or a District Court document can now be effected by sending a copy of the document by registered pre-paid post in an envelope addressed to the person to be served at his last known residence or place of business in the State and the document may be posted by the person on whose behalf it purports to be issued or a person authorised by him in that behalf[29]. Service of a Circuit Court document or a District Court document upon a person is deemed to be good service upon the person unless it is proved that such copy was not delivered[30].

Section 7(6)(a) of the Courts Act, 1964 is particularly relevant in relation to the issue of proceedings (and the consequent effects of the Statutes) and justifies quoting in full;

> "(a)Where service of a document on a person is effected by sending a copy thereof by registered pre-paid post in an envelope addressed to the person pursuant to subsection (3) of this section-
> (i) the document shall be deemed to be served upon the person at the time at which the envelope would be delivered in the ordinary course of post,
> (ii) the document shall be deemed to be issued at the time at which the envelope is posted,
> (iii) the addressing, registering and posting, in accordance with the provisions of subsection (3) of this section, of the envelope may be proved by a statutory declaration (which shall be endorsed upon the original document and shall be made, not earlier than ten days after the day on which the envelope is posted, by the person who posted the envelope) exhibiting the certificate of posting of the envelope aforesaid and stating, if it be the case, that the original document was duly stamped at the time of posting and that the envelope has not been returned undelivered to the sender, and
> (iv)the time, date and place of posting of the envelope shall be endorsed upon the original document."

Thus, if service of an originating document is to be by registered pre-paid post, the document is not deemed to be issued (and the Statutes have not been stopped) until the envelope is posted.

The Circuit Court Rules (No. 2), 1995 (S.I. No. 216 of 1995)

The next major change in relation to issue and service of originating documents in the Circuit Court was brought about

by the Circuit Court Rules (No. 2), 1995 (which came into operation on the 1st day of October, 1995) when it was hoped to mirror the High Court procedure in respect of the institution of proceedings (i.e. that issue out of the Circuit Court Office and not the handing or posting of the document to the Summons Server or other authorised person[31] or the posting of the document by registered pre-paid post[32] would stop the Statutes).

Order 10 of the Rules of the Circuit Court, 1950 was amended and entitled "Issue of Civil Bill, Service and Entry" as opposed to "Service and Entry" (as was the case with the original Order 10 of the Rules of the Circuit Court, 1950).

Issue

Order 10 rule 2 stated that a Civil Bill or other originating document should be dated with the date of issue, sealed and marked with the record number by the proper officer of the Circuit Court Office and that it was thereupon deemed to be issued. No Civil Bill or other originating document was permitted to be served until the same had been so dated, sealed, marked and issued. However, Order 10 rule 1 of the Circuit Court Rules, 1950 (also dealing with the issue of Civil Bills and discussed above) was not repealed and therefore it is not clear whether Order 10 rule 1 or Order 10 rule 2 governed the issue of Civil Bills!

Service

Order 10 rule 3 of the Rules of the Circuit Court, 1950 was deleted and substituted by a new Order 10 rule 3 which stated that a copy of the Civil Bill or other originating document was to be served by one of the officers duly appointed as Summons Servers by the County Registrar save as provided by Rules 8[33], 9[34] and 1735 of Order 10.

Most importantly however, Order 10 rule 3 went on to state that wherever and for so long as no Summons Server in each case stood assigned to any area by the County Registrar of the County in which such area is situate, then service could be effected in the manner prescribed by Section 7 of the Courts Act, 1964.

Unfortunately, Section 7(6)(a)(ii) of the Courts Act, 1964 remained in being and thus superseded Order 10 of the Circuit Court Rules (No. 2), 1995 in respect of the issue of originating documents which were served by registered pre-paid post.

Order 10A of the Circuit Court Rules (No. 2), 1995

It should be noted that the Circuit Court Rules (No. 2), 1995 also introduced an entirely new Order (Order 10A) to the Circuit Court Rules. Order 10A again attempts to mirror the High Court procedure and permits the renewal of a Civil Bill or other originating document in much the same way as Order 8 of the Rules of the Superior Courts allows for the renewal of a summons.

However, there are procedural difficulties in respect of the renewal of a Civil Bill given that it must be validly issued before it can be renewed and if issue depends upon the posting of the Civil Bill then there must be very few cases in which it would need to be renewed (given that service is nearly always consequent upon posting).

An interesting proposition arises whereby if a Civil Bill is issued by virtue of posting same by registered pre-paid post but service is not effected for some reason (i.e. perhaps the Defendant is no longer residing at that address or is evading service), has the Civil Bill been validly issued for the purposes of the Statutes?

Of course, if service is to be personal or by ordinary pre-paid post then the renewal of a Civil Bill may be necessary, but is personal service (other than by an assigned Summons Server or other such person appointed by the Court) or service by ordinary pre-paid post, valid service in accordance with the rules? If not, then an application must be made to Court to deem the service actually effected sufficient and, as already outlined, Order 10 rule 11 of the Circuit Court Rules, 1950 is silent as to when issue takes place when the Court declares the service actually effected sufficient!

The Circuit Court Rules (No. 3), 1997 (S.I. No. 500 of 1997)

Order 10 of the Circuit Court Rules, 1950 as amended by Order 10 of the Circuit Court Rules (No. 2), 1995 was deleted and revoked and substituted by a completely new Order 10 by virtue of the Circuit Court Rules (No. 3), 1997 (which came into operation on the 22nd day of December, 1997).

Order 10 of the Rules of the Circuit Court, 1950 is now entitled "Issue of Civil Bill or Other Originating Document, Service and Entry".

Issue

Order 10 rule 3 lays down the current procedure for the issue of a Civil Bill and in accordance with Order 10 rule 3 the original Civil Bill or other originating document must be dated with the date of presentation to the Circuit Court Office, sealed, marked with the record number by the proper officer and entered in the cause book and shall thereupon be deemed to be issued, subject to the provisions of section 7(6)(a)(ii) of the Courts Act, 1964.

The new Order 10 makes express reference to Section 7(6)(a)(ii) of the Courts Act, 1964 and thus, where an originating document is to be served by registered pre-paid post it is deemed to be issued at the time of the posting of the envelope and the Statutes are stopped at this point in time.

Service

Again, service of a Civil Bill or other originating document is to be effected by a Summons Server[36] upon the Defendant personally wherever he is to be found within the jurisdiction, or at the Defendant's residence within the jurisdiction personally upon the husband or wife of the Defendant, or upon some relative or employee of the Defendant over the age of sixteen years and apparently resident there[37]

Service may also be effected by registered pre-paid post in accordance with the provisions of section 7(6) of the Courts Act, 1964 as discussed above.

Furthermore, service may also be effected upon a Solicitor[38] and the Court may make Orders for substituted service[39] and may declare the service effected sufficient[40] and may, in special circumstances and for good cause shown, permit service of a Civil Bill to be effected by a person other than a Summons Server[41]. Order 10 is silent as to when issue of the Civil Bill takes place in these circumstances and thus one must assume

that issue has taken place in accordance with Order 10 rule 3 except when the mode of service has been or is to be by registered pre-paid post!

Obviously the effect of section 7(6)(a)(ii) of the Courts Act, 1964 on the issue of an originating document (and the stopping of the Statutes) is not of any consequence;

(a) where service of an originating document is by Summons Server (but how many Summons Servers stand appointed by the County Registrars in this day and age?) or

(b) where service is to be effected by registered pre-paid post and the originating document is issued out of the Circuit Court Office and posted on the same day.

Conclusion

The author understands that representations have been made to the Department of Justice, Equality and Law Reform by the Circuit Court Rules Committee seeking an amendment to the Courts Act, 1964 (and in particular Section 7(6)(a)(ii) thereof) so that the procedure in respect of issue of an originating document in the Circuit Court may mirror that of the High Court, and that the fact of issue of an originating document (and not service of same or the mode of service thereof) will stop the Statutes.

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The author contacted the Department of Justice, Equality and Law Reform[42] and they were in a position to confirm the foregoing and stated that a Courts Bill is due to be published early in this parliamentary session. However, the Department of Justice, Equality and Law Reform were not prepared to comment any further in respect of this matter.

On a different note, a decision is awaited from O'Donovan J. in respect of an appeal from an Order of Her Honour Judge Lindsay in *Ciaran Murphy v. Robert McNamara and Recovery Services and Repairs Limited,* where Judge Lindsay in the Circuit Court held that the Plaintiff's claim for personal injuries was statute-barred due to the fact that service had been effected by registered pre-paid post and the originating document had been posted outside the three year limitation period prescribed for by the Statutes. ●

1 Brady, James C. and Kerr, Anthony, *The Limitation of Actions* (2nd edn., The Incorporated Law Society of Ireland, 1994)
2 The Rules of the Superior Courts, 1986 Order 1 rule 1
3 The Rules of the Superior Courts, 1986 Order 5 rule 1
4 The Rules of the Superior Courts, 1986 Order 5 rule 9
5 The Rules of the Superior Courts, 1986 Order 5 rules 7 & 8
6 The Rules of the Superior Courts, 1986 Order 8 rule 1
7 The Rules of the Superior Courts, 1986 Order 8 rule 1
8 The Circuit Court Rules, 1930 Order 2 rule 1
9 The Circuit Court Rules, 1930 Order 6 rule 1
10 The Circuit Court Rules, 1930 Order 6 rule 4
11 The Circuit Court Rules, 1930 Order 6 rule 8
12 The Circuit Court Rules, 1930 Order 6 rule 10
13 The Circuit Court Rules, 1930 Order 6 rule 14
14 The Circuit Court Rules (Service Of Originating Documents By Post) Order, 1944 Rule 3
15 The Circuit Court Rules (Service Of Originating Documents By Post) Order, 1944 Rule 5
16 The Circuit Court Rules (Service Of Originating Documents By Post) Order, 1944 Rule 4
17 The Circuit Court Rules (Service Of Originating Documents By Post) Order, 1944 Rule 1
18 The Rules of the Circuit Court, 1950 Order 5 rule 1
19 Subject to future modification by the Courts Act, 1964 and the Rules of the Circuit Court (No. 3), 1997
20 The Rules of the Circuit Court, 1950 Order 10 rule 9
21 The Rules of the Circuit Court, 1950 Order 10 rule 17
22 The Rules of the Circuit Court, 1950 Order 10 rule 4
23 The Rules of the Circuit Court, 1950 Order 10 rules 8 & 21
24 The Rules of the Circuit Court, 1950 Order 10 rules 9 & 10
25 The Rules of the Circuit Court, 1950 Order 10 rule 11
26 The Rules of the Circuit Court, 1950 Order 10 rule 9
27 The Rules of the Circuit Court, 1950 Order 10 rule 17
28 The Courts Act, 1964 Section 7(2)
29 The Courts Act, 1964 Section 7(3)
30 The Courts Act, 1964 Section 7(4)
31 The Rules of the Circuit Court, 1950 Order 10 rule 1
32 The Courts Act, 1964 Section 7(6)(a)(ii)
33 Relating to the acceptance of service by Solicitor
34 Relating to the substitution of service
35 Relating to service by person other than Summons Server.
36 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 5
37 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 6
38 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 10
39 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rules 11 & 12
40 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 13
41 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 17
42 On the 8th day of February, 2000

RENDS IN LEGAL INFORMATION PROVISION

John Furlong, Information Manager, William Fry Solicitors outlines the latest research into the changing ways in which legal information is provided.

The management and provision of information in law has dramatically changed over the last ten years. Electronic information has come into its own and indexes and digests are no longer the sole method of finding legal information. The implications of the information revolution in the legal profession have been felt both by end-users and by information professionals including law librarians.

As part of its bicentenary celebrations in 1999, legal publishers, Sweet & Maxwell, funded a major research project to identify the main issues arising from the changes in the way legal information is provided. The research was carried out by BIALL (The British & Irish Association of Law Librarians) and surveyed current legal information trends within the UK and Ireland. The results under the title "Law and Order? - Trends in Legal Information Provision" were published in December 1999. The research was conducted across the entire legal information community and was not just confined to law librarians. The initial questionnaire provoked a 26.1% response rate with replies received from law firms, academic institutions, professional bodies and courts and tribunals. The questionnaire sought background information on the organisation and the population served by the service. It also sought to identify future trends in the provision and management of legal information. A statistical software package was used to analyse the questionnaire and qualitative information. Interviews based on the responses from the questionnaire were then carried out across Britain and Ireland. A number of key issues emerged from the survey.

Managing Electronic Resources

The survey revealed that access to electronic formats such as CD-Roms, online and Internet is widespread across the different groups. While this has led to information being easily accessible it has had implications for those managing information and for end users. Timewise, the increased amount of available information and variety of searchable material has led to more time having to be spent in order to ensure that a search is exhaustive. From a financial point of view it was clear that while electronic information resources have increased substantially the budgets to purchase them have not. It is

"It also emerged that electronic interfaces vary widely from publisher to publisher and that the lack of a common interface has caused difficulties when training end users. Concern was expressed at the licensing and costing structures for electronic products. While hard materials have a standard price the amount charged for electronic products not only varies between publishers but also between publisher and clients. Undoubtedly this may have had its origins in publishers attempting to wean clients on to electronic resources but has resulted in an unwieldy price structure in which information professionals must haggle continuously."

therefore clear that product choices that did not have to be made ten years ago are now having to be made.

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Accessing information

As I have already mentioned the growth in electronic information has inevitably impacted on the end user and their relationship with information. Solicitors, barristers and students are now able in many cases to access information themselves. This has a number of implications for the information professional. Widespread concern was expressed about the lack of common interfaces and standardisation of search methods. To counter this, training of end-users in the use of electronic products was emphasised as a key area of development.

Key Issues in Training

The issue of training also figured very significantly in the survey and was considered in three different ways - training for information professionals, training provided by information professionals and supplier training. Training for information professionals was agreed to be an essential ingredient for the effective running of information units. No common programme existed across all sectors - the type of organisation and personalities dictated the nature of the training that was undertaken.

"A number of skills were identified as being important to the information professional. Information technology skills were seen as being of prime importance".

The development of electronic resources has inevitably led to the exponential growth in desktop access for end users and consequently individuals need to be adequately trained in how to use those products. The training of end-users in the use of electronic products was seen as becoming a key function of information professionals as increased use is made of desktop access to information. The methods of training differed from organisation to organisation. In some academic institutions training was formally integrated into the curriculum while in other sectors training consisted of demonstrations, one-to-ones and library tours. The survey noted problems with training in specific sectors - lawyers are frequently too busy to attend training sessions or that there were too few staff to train too many students.

Time Allocation

Respondents were asked to evaluate the amount of time they spent on various tasks now and to compare it with when they started in their current position. The influence of electronic information was quite apparent. Over half the respondents spend more time on electronic product evaluation than before, while over a third spend more time on the development of internet sites (In academic institutions this figure increases to 58%). Information professionals now spend more time attending inter-departmental meetings and it found that library / information units are no longer seen as insular independent departments. Amongst law firms, current awareness programmes were seen as being of importance. However other sectors did not see current awareness programmes as being applicable to them. The survey also confirmed that law firms are much more actively involved in the development of intranet sites and know-how systems than the other groups.

Skills for Information Professionals

A number of skills were identified as being important to the information professional. Information technology skills were seen as being of prime importance. Financial and effective communication skills were also highly ranked. The survey found that an information professional also required internal and external marketing skills. A third of those responding found that traditional skills (such as cataloguing and classification) although less used, were still important.

"The survey noted problems with training in specific sectors - lawyers are frequently too busy to attend training sessions"

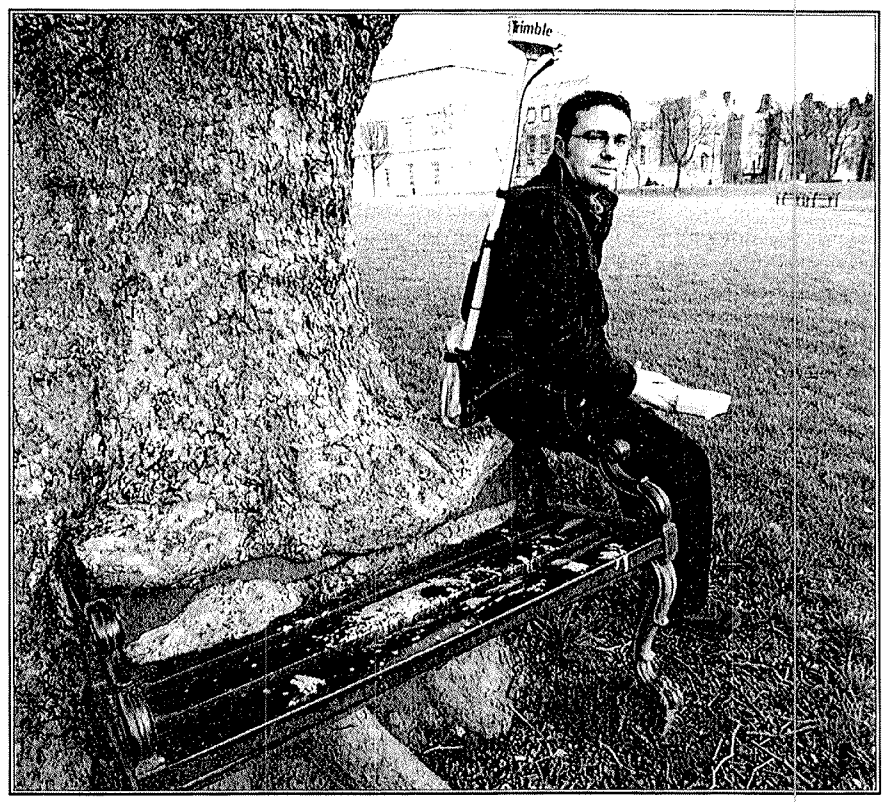
Conclusion

"Law and Order? - Trends in Legal Information Provision" provides a useful starting point for further more extensive research into the provision of legal information. In his introduction to the Report, Professor Richard Susskind pointed out that the "legal information market place needs far more user-oriented empirical and attitudinal research" of the kind found in the Report. Hopefully the main findings will be noted and will inform the thinking of lawyers, legal information professionals and legal publishers. The key point of the Report is to underline the shift towards electronic material directly accessed by end-users. This, as Susskind has regularly emphasised, is part of the shift from the old style of consultative advisory legal service to one in which legal information management will be the central core. The Report as he quite rightly states, shows that "change is endemic and systemic for legal information providers today and for the foreseeable future".

John Furlong is Vice Chairman of the British & Irish Association of Law Librarians and was a member of the Steering Committee for "Law & Order? - Trends in Legal Information Provisions".

KING'S INNS NEWS

A VERY HUNGRY TREE



Many of you will have read the article in the *Irish Times* (Saturday 29 January 2000) relating to a remarkable tree at King's Inns. For the benefit of those who missed it we reproduce the photograph here by kind permission of the *Irish Times*

Former students of the Inns will remember seeing the tree, on their way to lectures, as they came through the main gate from Constitution Hill. The London plane lies to the left opposite the gate lodge. What makes it stand out from its brethren is that for many years it has been consuming a cast-iron bench at its base.

It is believed that the garden bench was placed in this spot about 40 or 50 years ago. It gave respite to senior benchers who would have walked from the Law Library to the Inns in order to dine or to use the King's Inns Library. The tree itself is only about 70 years old. However, its appetite for Robert Mallet's cast iron bench has not abated. As Jane Powers remarked in the *Irish Times* "it is now firmly embedded in the tree's wrinkled, encrusted fabric, which pours heavily over the back-rail like a sumo wrestler's body". We are told that it is one of the most commented upon trees in the Dublin area.

The progress of the bench eating tree is being noted by Mark Twomey, project director of the Tree Register of Ireland and its vital statistics have been added to the register's database of remarkable trees.

PRINT NO. 3
(Round Hall by Robert Ballagh)

This Ballagh print has now gone on general sale with approximately 40 unassigned numbers still available in the signed edition of 300. If it goes the way of the other Ballagh print in the series, your outlay will have doubled within two years. However, we would hope that your purchase will be motivated (a) because you like the print and the Ballagh-esque view and (b) because you are supporting the activities of King's Inns. David Curran is the person to contact at (01) 874 4840. IR£108 will secure one of the remaining signed numbers.

SUMMER FUNCTION AT KING'S INNS

If any member is planning a function (such as a wedding, seminar or charity event), think "King's Inns". Remove the worries about marquees, parking and catering. Instead, use Gandon's last building during the year of the bicentenary of the laying of the foundation stone. Talk to Miriam Riordan at (01) 874 4840.

CONTACT YOUR COLLEAGUES IN AMERICA

The Irish American Bar Association of New York is a social and educational association whose membership is made up of lawyers and law students who have an interest in, or connection with, Ireland and is not a provider of any legal advice or services. If you know of any potential new members then please give them this e mail address:
Irishlawyers@yahoo.com

electronic IRISH WEEKLY LAW REPORTS

published by Firstlaw (2000)

REVIEWED BY JENNEFER ASTON, CONSULTANT LIBRARIAN

eIWLR is the first of many promised electronic publishing developments in Ireland during 2000. This year marks a definite shift for Irish legal materials to electronic format and further and more radical developments are expected in the wake of the "Free the Law" discussions. This is also the newest law reporting service available on the Irish market. It differs from other reporting services not just because it is electronic not paper but because it aims to report all judgments circulated by the Courts Service. The publicity material for this service contains the proud boast "no more unreported judgments" and this they seem set to fulfil.

The CD is published by FirstLaw (run by Bart Daly) who already have an on-line current awareness service providing the full text of judgments, legislation (bills, explanatory memos, acts and statutory instruments), journal articles, press releases and other materials.

Coverage and Content

The first disc was released in early January and contains 163 judgments. The disc to be released at the end of March will bring that total to over 300. The 163 judgments on the first disc consist of 103 High Court with the balance from the Supreme Court, Court of Criminal Appeal, Court-Martial Appeals Court (1) and Special Criminal Court (1). These figures include 'ex tempore recorded judgments' which are not usually circulated as widely as the 'reserved written judgments'.

The layout of the reports follows reporting conventions: starting with fields for: title, court, judge or judges, report reference, record number, date, counsel, and reporter; followed by caption, facts and 'held' followed by the full text of the case. This format facilitates structured searching and assists in identifying information very precisely.

In addition to the reports there is also a subject index with abstracts of the reports arranged under 30 subject headings ranging from Arbitration to Torts. It is possible to expand or collapse these headings, for more or less detail as required, by clicking on the Folio feature of + or - to alter the display. At the end of each abstract an eIWLR reference in green indicates a jump link to the full text of the case.

The Subject Index has 30 headings many with sub-divisions covering topics from Arbitration to Tort. Pleasing all the people all the time when subject indexing is a very difficult if not impossible task. Until there is a recognised Irish standard for legal headings the debate will continue. The format is clear and follows the captions in the reports. Each entry ends with a jumplink to the full text of the case.

As with many new services there are some minor inconsistencies in style and some typos, which have been brought to the attention of the developers, but generally standards are high.

Searching and Instructions

The search package is Folio views. Folio is becoming familiar to Irish lawyers since the Irish Statute book became available on CD. The default "view" of the eIWLR database is the browse view (with three panes) which seems to work fairly well for the judgments. Folio is not an intuitive package and it takes a while for users to become comfortable with the searches. The small manual supplied is extremely clear as to installation and how to do searches. The pre-loaded searches, available at the bottom of the search drop down menu are also very useful. These are 1) case by title, 2) case by judge date or court, 3) word or phrase within a caption. Searching 'case by title' will be even more useful as the number of judgments increases. Already, a search for "Murphy" in title refers you to 7 cases whereas an advanced search in the free text refers to 62 cases. 'Case and court' allow you to restrict your search to a particular judge, date or court e.g. judgments by McGuinness J. in the High Court rather than Supreme Court. (McGuinness J having just been elevated from the High to the Supreme Court).

Jumps or hyperlinks internally between judgments are not yet plentiful but will become more so as the database grows. At present when another case is cited as unreported the eIWLR follows practice and gives the Judge and date in future in addition to this information there will be an eIWLR reference with a jumplink to the full text. For an example try point 3 of 'held' in Dunnes v Maloney.

Printing

The electronic 'pages' have been maintained as in the original. What this means in practice is that because printers & typefaces may introduce variables, the pages when printed may not look exactly the same as the pages in the original paper version. However, the text and content of Page 8 from both sources will be exactly the same. This will be an advantage in quoting page references or preparing for Court where the Court or colleagues may be relying on the paper original.

Price

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UNREACHT NA hÉIREANN : A STUDY OF THE IRISH TEXT

by Micheál Cearúil, with original contributions by Professor Mairtín O Murchú (Oifig an tSoláthair, 1999)

REVIEWED BY BENEDICT O FLOINN BL

For many years, commentaries on An Bunreacht have been accustomed to quote the words of W.T. Cosgrove and to discount the Irish text, as he did, as "a mere translation of the English." Cosgrave added that it was "unheard of and contrary to common sense that an imperfect translation ... should be made the authoritative version for the courts." In this book, Micheál O Cearúil and the All-Party Oireachtas Committee on the Constitution have shown how hollow such assessments ring.

Mr. O Cearúil's work may be divided into two parts. His introduction is full and gives a detailed account of the drafting of the Irish text. It also sets both the original text and subsequent amendments in a wider socio-historic context. The picture that emerges is of the careful and deliberate working-up of an Irish "basic constitutional law" in tandem with the development of the English text. Rather than slavishly translating a finished article, there appears to have been a complementary process of refinement, with each text informing the other. In hindsight, the account given by O Cearúil is a striking vindication of the approach first commended by Mr. Justice Budd in *O'Donovan -v- Attorney-General* [1961] IR 114 when he observed that: "one should not approach the elucidation of the meaning of either text with a view to seeking a conflict, but rather with a view to seeing if they can properly be reconciled..."

By the time it had been reduced to its present form, the Irish text had been reviewed by some of the leading scholars of the day, including Professor Eoin Mac Néill. It comes as little surprise to find, therefore, that it is replete with innovation as well as learning. Given that it was not intended to be an exact concordance with the English text, O Cearúil's statement that there is hardly an article which does not contain a divergence between the two texts comes as little surprise. It is the painstaking review of these divergences and the minute parsing of the Irish text which form the second and most substantial part, of O Cearúil's work.

This is, quite simply, a triumph. Virtually every head-word of the Irish text is examined at one point or another in the book. Various ordinary dictionary meanings are given first, followed by a wealth of comparisons drawn from constitutional, legislative and other contexts. The amount of detail is such as to make it impossible to give an adequate flavour of the text, much less any meaningful criticism. True, one has to search through more than one cross-reference to discover the treatment of commonly-recurring words such as "ní foláir" and read still further before learning that it conveys a present and existing requirement to do something rather than a future or possible one. However, it is difficult to see how notes could be arranged otherwise and there is a comprehensive index. It is also regrettable that the deadline for publishing did not allow a full treatment of the new articles 2 and 3. Given their inelegant and opaque phrasing in English, any assistance in the interpretation of these articles which might be gleaned from the Irish text would have been welcome. However, the observations of any reviewer pale into insignificance when set against the breadth of learning which even the most cursory glance at this book will reveal.

O Cearúil's analysis throws up a number of matters which require attention. Firstly, the simplification of spelling and the move from An Cló Gaelach to An Cló Rómhánach has led to a number of anachronisms to which the All-Party Committee will undoubtedly turn its attention. Perhaps more importantly, there are a number of anomalies between the phrasing and vocabulary of the Irish text and the official legal terminology which was adopted, pursuant to the the Irish Legal Terms Act, 1945, in both legislation and subsequent constitutional amendment. While the Committee may well have useful recommendations to make on this topic, the remedy does not lie solely in their hands. There is an urgent need for new life to be breathed into the Irish Legal Terms Committee and for a start to be made in the revision and updating of certain legal terms. No order has been made by the Minister, pursuant to the Act, since 1956. Irish, no less than English, undergoes linguistic and/or morphological change and it is essential that official dictionaries such as Téarmaí Dlí keep pace with the spoken word.

These are future concerns. For the moment, it remains only to state that the author, together with Professor Máirtín O Murchú and the All-Party Committee deserve hearty congratulation. The Law Library can be proud that it is one of our own, Brian Lenihan T.D., who has acted as midwife to the project. If proof were needed of the contribution which a knowledge of Irish can make to the study of law, this masterly tome by Micheál O Cearúil is it. It needs no commendation. Every man or woman who has occasion to refer to An Bunreacht will buy it and every barrister worth the title will ensure that a copy rests on his shelf. ●

THE LAW OF BANKS CREDIT INSTITUTIONS

by Mary Donnelly
(Round Hall Ltd., 2000)

REVIEWED BY JOHN BRESLIN BL

The Law of Banks and Credit Institutions is a comprehensive and up-to-date work on the law relating to banks and other types of credit institution. Ms. Donnelly has therefore chosen a broad canvas, taking in not only banks, but also building societies and credit unions (and others) This approach is entirely logical: the European Union legislation upon which much of our regulatory law is based focuses upon the *credit institution*, rather than the bank. It is fair to say that the work has predominantly a customer-oriented focus - and indeed, in her preface, Ms. Donnelly argues that the legislative trend to provide full protection to 'consumers' (being individuals acting for purposes unrelated to a trade, business or profession) should be expanded so as to provide similar protection to all customers. (This raises the interesting question as to when a *customer* ceases to be such and becomes a *counterparty* to the service provider. This is an issue which is particularly acute in the wholesale financial markets, where, for example, banks often enter into sophisticated transactions with large businesses, both parties standing to lose or gain substantial sums of money depending on the vagaries of movements in financial indices.)

The book has a retail focus: and there is much useful reference to 'soft' law, in the form of codes of practice, and reports of the Ombudsman for the Credit Institutions. This reviewer did find somewhat disappointing the absence of a thorough analysis of the precise legal effect of 'soft' law. It is indeed true, as Ms. Donnelly suggests, that a breach of a code of practice and the like can be evidence of a breach of duty. However, one of the difficulties with a code of practice can be its vagueness: when this is coupled with the absence of a traditional legal foundation (such as statute or contract) then save in the clearest of cases, it can be difficult, as a practical matter, to elevate what appears to be a pious aspiration on the part of the credit institution to a legally enforceable duty. It would have been preferable to have had more analysis in this regard given the emphasis placed on 'soft' law.

Part I of the work deals with the regulation of credit institutions. Part II of the book deals with the relationship between the credit institution and the customer. Part III deals with payment mechanisms. Part IV deals with credit and security.

I found the portions of the book on payment mechanisms to be illuminating, particularly with regard to means of payment in consumer transactions. Ms. Donnelly deals effectively with the complexities of the cheque clearance system, and discusses in a careful and thorough manner the legal issues relating to the area of electronic payments. Ms. Donnelly has made a significant contribution in the latter area, the growing importance of which need hardly be stressed. Also, the chapter on the operation of the law of restitution in the context of mistaken payments is a useful summary of the new approach of the courts to this problem. (This is welcome reading for anyone who has had to agonise over whether a mistake is one of fact or of law (or both). Ms. Donnelly efficiently summarises the decisions which mean that this arbitrary exercise need not now be undertaken.)

It is inevitable that in a work of this magnitude some errors can be perceived. The name of the plaintiff in the Privy Council decision in *Yuen Kun Yeu v A.G. for Hong Kong* [1988] AC 175 is misspelt in circumstances which suggest the perils of secondary referencing. The practice of cross-referencing footnotes at times means that one has to journey to several destinations to find the source of, or authority for, a proposition. Furthermore, the publishers at times did not manage to get all the relevant footnotes on to the correct page, with some 'stragglers' being carried over to the next following page. Whilst no text is perfect, one would expect that in this day and age a publisher could eradicate whatever gremlins cause this minor mishap.

Finally, an aspect of the discussion of the Irish case law on charges over book debts is open to question. This is with particular regard to the question whether a bank which takes what purports to be a fixed charge over the book debts of a company must actually exercise the control over the account which has been provided for in the deed of charge. After referring to *Re Keenan Brothers Limited* [1985] IR 201, *Re Wogan's (Drogheda) Limited* [1993] 1 IR 157 (the parenthesis around 'Drogheda' and the apostrophe in 'Wogan's' are lost in the text) and *Re Holidair* Ltd [1994] 1 ILRM 481, Ms. Donnelly concludes as follows:

> 'As a result of the decision in *Re Holidair*, if lenders in this jurisdiction wish to create a fixed charge over book debts, they cannot rely on the contents of a clause in the charge but must maintain a high level of control over the proceeds of the book debts to be sure of acquiring a fixed charge over book debts.'

With the greatest of respect, it is submitted that there is no support for this conclusion. Finlay CJ held, in *Re Wogan's (Drogheda) Limited*, that so long as the deed of charge provides that it is a fixed charge, and so long as it has the features identified by the Supreme Court in *Re Holidair* Ltd, it does not matter that the bank does not in fact exercise control over the book debts account. To do otherwise would be to subvert the sensible (and necessary) rule that one cannot ordinarily look to the conduct of the parties to construe a contract. The reason why the charge in *Re Holidair Ltd.* was held to be a floating charge was because it did not have the necessary *Re Keenan Brothers Limited* ingredients: it did not *provide* for the bank's control of the book debts account. (The deed appeared to be based on wording approved by the English courts, subsequently disapproved of in Ireland.) The actual conduct of the bank in this regard was irrelevant to the decision that the charge was a floating charge.

Notwithstanding these points, the book is a valuable addition to the corpus of Irish literature in this area. I would heartily recommend the book to anyone advising consumers in dispute with their credit institution. The book is also essential reading for a thorough and up to date analysis of the complexities of the law relating to payment mechanisms in the banking sector.●

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